Title 23B RCW
Washington Business Corporation Act

Chapter 23B.08 RCW
DIRECTORS AND OFFICERS

Title 23B RCW
Washington Business Corporation Act

Chapter 23B.08 RCW
DIRECTORS AND OFFICERS
(continued)

RCW 23B.08.010
REQUIREMENT FOR AND DUTIES OF BOARD OF DIRECTORS

CURRENT SECTION

(1) Each corporation must have a board of directors, except that a corporation may dispense with or limit the authority of its board of directors by describing in its articles of incorporation, or in a shareholders' agreement authorized by RCW 23B.07.320, who will perform some or all of the duties of the board of directors.

(2) Subject to any limitation set forth in this title, the articles of incorporation, or a shareholders' agreement authorized by RCW 23B.07.320:

(a) All corporate powers shall be exercised by or under the authority of the corporation's board of directors; and

(b) The business and affairs of the corporation shall be managed under the direction of its board of directors, which shall have exclusive authority as to substantive decisions concerning management of the corporation's business.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §80 (eff. 7-1-90)

(1) Except as provided in subsection (3) of this section, each corporation must have a board of directors.

(2) All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors, subject to any limitation set forth in the articles of incorporation.

(3) A corporation may dispense with or limit the authority of its board of directors by describing in its articles of incorporation who will perform some or all of the duties of the board of directors.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3033-34 (1989)

Section 8.01 Requirement For and Duties Of Board of Directors.

Proposed section 8.01 requires that every corporation have a board of directors except that a corporation may dispense with or limit the authority of the board of directors by describing in the articles "who will perform some or all of the duties of a board of directors." Proposed subsection 8.01(c).

Obviously, some form of governance is necessary for every corporation. The board of directors is the traditional form of corporate governance but it need not be the exclusive form. Patterns of management may be tailored to specific needs in connection with family controlled enterprises, wholly or partially owned subsidiaries, or corporate joint ventures. The persons who perform some or all of the duties of the board of directors may be designated "trustees," "agents," or "managers," and they may be selected in ways other than the traditional election by the shareholders. It is necessary, however, that some person or group perform these duties, and the designated persons, while performing them, are subjected to the same duties as directors.

Proposed subsection 8.01(b) states that if a corporation has a board of directors "all corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of," the board of directors. The quoted language is chosen to reflect the role and functions of boards of directors in all varieties of corporations. In a small corporation and in some larger corporations where the board of directors is composed entirely of persons actively involved in the management of the corporate business, it may be reasonable to describe management as being "by" the board of directors. But a different model is appropriate for the boards of directors of publicly held corporations, which usually include individuals not actively involved in management. In these corporations the appropriate model is that the business and affairs be managed "under the direction of" the board of directors, since the role of the

board of directors consists principally of the formulation of major management policy with little or no direct involvement in day-to-day management.

As a corollary, in large and complex publicly held corporations it is generally recognized that boards of directors delegate to appropriate officers those powers not required by law to be exercised by the board of directors itself. Although delegation does not relieve the board of directors from its responsibilities of oversight, directors should not be held personally responsible for actions or omissions of officers, employees, or agents of the corporation so long as the directors have acted reasonably in delegating authority to others.

Proposed subsection 8.01(b) also recognizes that the powers of the board of directors may be limited by express provisions in the articles of incorporation.

In the event a corporation elects, pursuant to Proposed subsection 8.01(c), to dispense with the board of directors, its articles of incorporation must describe who will perform some or all of the duties of the board of directors. (E.g., "the corporation has no board of directors. Its corporate powers shall be exercised by or under the authority of, and its business and affairs shall be managed under the direction of, its shareholders.") Proposed section 16.22 requires that the annual report to be filed with the secretary of state must set forth the names and addresses of persons performing the directors' functions.

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Laws 2011, ch. 328, §2 (eff. 7-22-11)

(1) ~~Except as provided in subsection (3) of this section, e~~Each corporation must have a board of directors~~.~~

(~~2) All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors, subject to any limitation set forth in the articles of incorporation.~~

(~~3) A~~, except that a corporation may dispense with or limit the authority of its board of directors by describing in its articles of incorporation, or in a shareholders' agreement authorized by RCW 23B.07.320, who will perform some or all of the duties of the board of directors.

(2) Subject to any limitation set forth in this title, the articles of incorporation, or a shareholders' agreement authorized by RCW 23B.07.320:

(a) All corporate powers shall be exercised by or under the authority of the corporation's board of directors; and

(b) The business and affairs of the corporation shall be managed under the direction of its board of directors, which shall have exclusive authority as to substantive decisions concerning management of the corporation's business.

CARC COMMENTARY

The amendments to 23B.08.010 are intended to clarify that, absent provisions in the articles of incorporation or a shareholder agreement pursuant to RCW 23B.07.320 to the contrary, all corporate powers are exercised by or under the authority of the board of directors; the business and affairs of the corporation are managed under the direction of the board; and the board has the exclusive authority as to substantive decisions concerning management of the corporation's business. The statement that a board of directors has exclusive authority as to substantive decisions is not intended to limit the board's historical and well-settled practice of delegating to an officer or agent the authority to make a substantive decision is a particular area so long as the board retains the ultimate authority and responsibility as to such decision. The amendments reflect the analysis of the respective roles of the board and shareholders in the business and affairs of the corporation articulated by the Delaware Supreme Court in *CA Inc. v. AFSCME Employees Pension Plan*, 953 A 2d 227 (Del. 2008). The proposed amendment to RCW 23B.08.010(2) also adds a cross reference to the existing provision in RCW 23B.07.320 to make it clear that the authority of the board of directors can also be dispensed with or limited by a unanimous shareholder agreement that complies with the requirements set forth in RCW 23B.07.320. The proposed changes constitute a clarification of what the Committee believes is current law.

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RCW 23B.08.020
QUALIFICATIONS FOR DIRECTORS

CURRENT SECTION

The articles of incorporation or bylaws may prescribe qualifications for directors. A director need not be a resident of this state or a shareholder of the corporation unless the articles of incorporation or bylaws so prescribe.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §81 (eff. 7-1-90)
Same as current.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3034 (1989)
Section 8.02 Qualifications of Directors.
The elimination of statutory qualifications for directors is now nearly universal. The articles of incorporation or bylaws, however, may prescribe special qualifications, an option that is most likely to be utilized in closely held corporations where qualifications for directors may be used as a device for ensuring representation and voting power on the board of directors.

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RCW 23B.08.030
NUMBER AND ELECTION OF DIRECTORS

CURRENT SECTION

(1) A board of directors must consist of one or more individuals, with the number specified in or fixed in accordance with the articles of incorporation or bylaws.

(2) Directors are elected at the first annual shareholders' meeting and at each annual meeting thereafter unless (a) their terms are staggered under RCW 23B.08.060, or (b) their terms are otherwise governed by RCW 23B.05.050. Directors also may be elected by execution of a shareholder consent under RCW 23B.07.040.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §82 (eff. 7-1-90)

(1) A board of directors must consist of one or more individuals, with the number specified in or fixed in accordance with the articles of incorporation or bylaws.

(2) Directors are elected at the first annual shareholders' meeting and at each annual meeting thereafter unless their terms are staggered under RCW 23B.08.060.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3034 (1989)

Section 8.03 Number and Election of Directors.

Proposed section 8.03 prescribes rules for the determination of the size of the board of directors of corporations that have not dispensed with a board of directors under Proposed subsection 8.01(c). Proposed subsection 8.03(a) provides that the size of the initial board of directors may be "specified in or fixed in accordance with" the articles of incorporation or bylaws. The size of the board of directors may thus be fixed initially in the fundamental corporate documents, or the decisions as to the size of the initial board of directors may be made thereafter by those authorized in those documents.

The committee did not adopt RMA section 8.03(b) and (c), related, respectively, to limits on the power of the board of directors to fix or change the number of directors, and to article of incorporation or bylaw provisions regarding a variable range for the size of the board of directors and changes therein. The committee believes that Proposed subsection 8.03(a) is a sufficiently broad grant of authority to empower a corporation, by means of an article of incorporation or bylaw provision, to establish a variable range for the size of the board of directors. It further believes that restrictions on the power of directors to fix or change the number of directors, or on the power of directors either to change the size of a variable range board of directors, or to change from a fixed to a variable range board, can be imposed by shareholders in either the articles of incorporation or the bylaws as part of the basic planning for the control structure. It thus concluded that RMA sections 8.03(b) and (c) were unduly confining.

Proposed subsection 8.03(b) makes it clear that all directors are elected annually unless the board is staggered. See Proposed section 8.05.

AMENDMENTS TO ORIGINAL SECTION

Laws 1994, ch. 256, §29 (eff. 6-9-94) *(amends subsection (2))*

(2) Directors are elected at the first annual shareholders' meeting and at each annual meeting thereafter unless (a) their terms are staggered under RCW 23B.08.060 or (b) their terms are otherwise governed by section 31 of this act. [RCW 23B.05.050]

CARC COMMENTARY

Section 31 of chapter 256, Laws 1994 added RCW 23B.05.050 to title 23B.

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Laws 2002, ch. 297, §27 (eff. 6-13-02)*(amends subsection (2)*

(2) Directors are elected at the first annual shareholders' meeting and at each annual meeting thereafter unless (a) their terms are staggered under RCW 23B.08.060 or (b) their terms are otherwise governed by RCW 23B.05.050. Directors also may be elected by consent action under RCW 23.07.040.

CARC COMMENTARY

The addition of the second sentence to subsection (2) removed possible inference from language in the first sentence that directors can only be elected at shareholders' meetings.

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Laws 2007, ch. 467, §1 (eff. 7-22-07)*(amends only citation in subsection (2) to read "RCW 23B.07.040").*

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Laws 2009, ch. 189, §23 (eff. 7-26-09)*(amends only subsection (2))*

(2) Directors are elected at the first annual shareholders' meeting and at each annual meeting thereafter unless (a) their terms are staggered under RCW 23B.08.060, or (b) their terms are otherwise governed by RCW 23B.05.050. Directors also may be elected by execution of a shareholder consent ~~action~~ under RCW 23B.07.040.

CARC COMMENTARY

The term "corporate action" is defined and used throughout the Washington Business Corporation Act for consistency and to clarify the distinction between the matter being approved versus the action of approving.

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RCW 23B.08.040
ELECTION OF DIRECTORS BY CERTAIN CLASSES OR SERIES OF SHARES

CURRENT SECTION

If the articles of incorporation authorize dividing the shares into classes or series, the articles may also authorize the election of all or a specified number of directors by the holders of one or more authorized classes or series of shares. A class, or classes, or series of shares entitled to elect one or more directors is a separate voting group for purposes of the election of directors.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §83 (eff. 7-1-90)
Same as current.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3034-35 (1989)
Section 8.04 Election of Directors By Certain Classes or Series of Shares.
Proposed section 8.04 makes explicit that the articles of incorporation may provide that a specified number (or all) of the directors may be elected by the holders of one or more classes or series of shares. This approach is widely used in closely held corporations to effect an agreed upon allocation of control, for example, to ensure minority representation on the board of directors by issuing to that minority a class or series of shares entitled to elect one or more directors. A class (or classes) or series of shares entitled to elect separately one or more directors constitutes a separate voting group for purposes of the election of directors; within each voting group directors are elected by a plurality of votes and quorum and voting requirements must be separately met by each voting group. See Proposed sections 7.25, 7.26, and 7.28.

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RCW 23B.08.050
TERMS OF DIRECTORS – GENERALLY

CURRENT SECTION

(1) The terms of the initial directors of a corporation expire at the first shareholders' meeting at which directors are elected.

(2) The terms of all other directors expire at the next annual shareholders' meeting following their election unless (a) their terms are staggered under RCW 23B.08.060 then at the applicable second or third annual shareholders' meeting following their election; or (b) their terms are otherwise governed by RCW 23B.05.050, except to the extent (i) the terms are otherwise provided in a bylaw adopted pursuant to RCW 23B.10.220, or (ii) a shorter term is specified in the articles of incorporation in the event of a director nominee failing to receive a specified vote for election.

(3) A decrease in the number of directors does not shorten an incumbent director's term.

(4) The term of a director elected to fill a vacancy expires at the next shareholders' meeting at which directors are elected.

(5) Except to the extent otherwise provided in the articles of incorporation or pursuant to RCW 23B.10.220, if a bylaw electing to be governed by that section is in effect, despite the expiration of a director's term, the director continues to serve until the director's successor is elected and qualified or there is a decrease in the number of directors.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §84 (eff. 7-1-90)

(1) The terms of the initial directors of a corporation expire at the first shareholders' meeting at which directors are elected.

(2) The terms of all other directors expire at the next annual shareholders' meeting following their election unless their terms are staggered under RCW 23B.08.060.

(3) A decrease in the number of directors does not shorten an incumbent director's term.

(4) The term of a director elected to fill a vacancy expires at the next shareholders' meeting at which directors are elected.

(5) Despite the expiration of a director's term, the director continues to serve until the director's successor is elected and qualified or until there is a decrease in the numbers of directors.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3035 (1989)

Section 8.05 Terms of Directors Generally.

Proposed section 8.05 provides for the annual election of directors at the annual shareholders' meeting with the single exception that terms may be staggered as permitted in Proposed section 8.06.

Proposed subsection 8.05(c) provides that a decrease in the number of directors does not shorten the term of an incumbent director. Rather, the incumbent director's term expires at the annual meeting at which the director's successor would otherwise be elected.

Proposed subsection 8.05(d) provides that the terms of all directors elected to fill vacancies expire at the next meeting of shareholders at which directors are elected. Thus, if terms are staggered under Proposed section 8.06, the term of a director elected to fill a vacant term with more than a year to run is shorter than the term of that director's predecessor. The board of directors may take appropriate steps, by designation of

short terms or otherwise, to return the rotation of election of directors to the original terms established or fixed by the articles or bylaws.

Proposed subsection 8.05(e) provides for "holdover" directors so that directorships do not automatically become vacant at the expiration of their terms but the same persons continue in office until successors qualify for office. Thus the power of the board of directors to act continues uninterrupted even though an annual shareholders' meeting is not held or the shareholders are deadlocked and unable to elect directors at the meeting.

AMENDMENTS TO ORIGINAL SECTION
Laws 1994, ch. 256, §30 (eff. 6-9-94) *(amends only original subsection (2))*
(2) The terms of all other directors expire at the next annual shareholders' meeting following their election unless (a) their terms are staggered under RCW 23B.08.060, or (b) their terms are otherwise governed by section 31 of this act. [RCW 23B.05.050]

CARC COMMENTARY
Section 31 of Laws 1994, ch. 256 was codified as RCW 23B.05.050.

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Laws 2007, ch. 467, §1 (eff. 7-22-07) *(amends only subsections (2) and (5))*
(2) The terms of all other directors expire at the next annual shareholders' meeting following their election unless (a) their terms are staggered under RCW 23B.08.060~~, or~~ then at the applicable second or third annual shareholders' meeting following their election; or (b) their terms are otherwise governed by RCW 23B.05.050, except to the extent (i) the terms are otherwise provided in a bylaw adopted pursuant to RCW 23B.10.220, or (ii) a shorter term is specified in the articles of incorporation in the event of a director nominee failing to receive a specified vote for election.

(5) Except to the extent otherwise provided in the articles of incorporation or pursuant to RCW 23B.10.220, if a bylaw electing to be governed by that section is in effect, ~~D~~despite the expiration of a director's term, the director continues to serve until the director's successor is elected and qualified or ~~until~~ there is a decrease in the number of directors.

CARC COMMENTARY
Proposed Revisions to RCW 23B Regarding Voting for Directors in Public Companies From the WSBA Corporation Act Revision Committee ("CARC")

The issues of voting for directors and accountability of directors to shareholders are the subjects of substantial shareholder group activism and academic commentary. The Delaware General Corporation Laws and the Model Act provisions have recently been amended in response. This memorandum addresses the proposed CARC response.

In voting for directors of Washington corporations, the WBCA establishes a plurality vote for directors as the default standard. Section 23B.07.280(2) of the WBCA provides: "Unless otherwise provided in the articles of incorporation, in any election of directors the candidates elected are those receiving the largest number of the votes cast by the shares entitled to vote in the election, up to the number of directors to be elected by such shares."

The language in RCW 23B.07.280 is a little different from that of Section 7.28 of the Model Act but the effect is the same: directors with the most votes in favor are elected. This number can be less than a majority of all votes entitled to be cast. In the context of an election of directors, "plurality vote" is well understood to mean more affirmative votes cast for a nominee than for other nominees without regard to the number of votes against or not cast.

CARC and the ABA Committee counterpart for the Model Act reviewed the plurality voting

default standard because a change from plurality voting for the election of directors in publicly-held corporations has recently become a major focus as an element of corporate governance and a means to enhance the accountability of directors of publicly-held corporations. The expressed concern with the current standard is that directors are elected by plurality in most publicly-held corporations and thus directors may be elected even if a majority of the shareholders do not vote in favor of their election. Most elections for directors in publicly-held corporations are not contested. It is argued that shareholders in these corporations lack the means to express a meaningful objection to the directors' management policies and decisions or to individual directors. Contested elections generally are not practical in publicly-held companies given the expense and complications of a proxy fight. Critics of the plurality system as embodied in the WBCA, the Model Act (prior to the 2006 amendment), and many other corporation acts point out that the current system limits shareholders to providing a proxy holder with the authority to either vote for a nominee or to expressly withhold votes for such nominee. A withhold vote in a plurality system is only symbolic.

The ABA Committee produced a detailed discussion paper on voting by shareholders for the election of directors in June of 2005 ("Discussion Paper"). The Discussion Paper was part of the ABA Committee's review of plurality voting and study of whether to recommend a change in the Model Act provisions relating to the election of directors. The Discussion Paper reviewed the issues with the plurality system, examined the problems raised with a mandatory majority vote system and discussed possible alternatives. The final report of the ABA Committee regarding the changes to the Model Act in the election of directors was issued March 13, 2006 ("ABA Report").

CARC followed the ABA Committee precedent and reviewed a number of alternatives in consideration of changes to the default rule. These included:

1. Adoption of a majority of voting standard as the default rule for all director elections.
2. Adoption of a default plurality rule requiring a director be elected by a minimum plurality vote.
3. Retention of the current plurality vote default rule but authorize "against" votes and provide specific consequences where a director receives a plurality vote but has more votes against than for.
4. Statutory revisions to allow publicly-held corporation directors or shareholders to design a voting standard by bylaw, whether a majority, modified plurality or other with consequences in the event of receipt of less than a specified vote.

CARC 2006 examined possible solutions under the current WBCA structure. Like the Model Act pre-revision provisions, the WBCA allows a corporation to deviate from the plurality default rule by inserting another standard in the articles of incorporation. The plurality voting standard is imposed on Washington corporations only by default. RCW 23B.07.280(2) permits Washington corporations to set forth a different standard for election of directors in the articles of incorporation. A Washington corporation could amend its articles of incorporation to provide for majority voting. There are two issues with this solution: it requires action by both the directors and the shareholders as it is an amendment to the articles of incorporation and cannot be unilaterally done by either the board or the shareholders as could be done with a bylaw. The other complication with this approach is that the current WBCA RCW 23B.08.050(5) contains a "holdover rule." The holdover rule specifies that incumbent directors remain in office until their successors are elected and qualified. The potential result is a "failed election." Namely a director does not receive a majority of the shares cast and thus is not elected; however, the director continues to hold office until a successor is elected.

CARC also reviewed the policies and bylaws various major corporations have adopted for majority vote or modified plurality provisions. These have taken several forms, but generally fall into two categories. First, are policies or bylaw provisions that provide that if a director does not receive a majority of the votes cast, such director agrees to resign. The second approach involves

provisions that provide that if a director does not receive a majority of votes cast and is nevertheless elected because of receipt of a plurality vote, such director would only serve for a limited time period following that election (for example, 90 days). The concerns expressed about either approach generally focus on the lack of statutory provisions specifically authorizing the approach. A director who does not receive a majority vote could refuse to resign indicating that a corporation policy or even a bylaw cannot overrule the provisions in RCW 23B.08.050(5) regarding holdover until a successor is elected. Shareholder groups have expressed concerns that internal policies are easily changed and that board adopted bylaws can be similarly amended or repealed by the board. The advantages and disadvantages of each approach are further discussed in detail in the ABA Committee Discussion Paper and Report.

The ABA Committee decided that it was not advisable to alter the existing plurality default rule in the Model Act. Rather, the ABA Committee was persuaded that the potential negative consequences of failed elections, combined with the uncertainty of applying a non-tested voting standard as the default rule for publicly-held corporations, warranted the retention of the plurality voting rule but with modifications to allow for bylaw adoption providing consequences in the event a director receives more votes withheld or against than in favor of election ("modified plurality" voting). The ABA Committee also stated that imposing a one-size-fits-all modification to the existing Model Act voting system would be inconsistent with the enabling nature of the Model Act.

After review of the issues and review of the ABA Committee's Report and Discussion Paper, CARC proposed a number of changes to the WBCA generally consistent with the ABA amendments in Substitute House Bill 1041. CARC also was concerned about possible adverse consequences of adopting a majority voting default rule across the board. CARC concluded, as did the ABA Committee, that shareholders and directors should be afforded great flexibility in voting arrangements through private ordering to adopt a director election system suited to their corporation. CARC also agrees with the ABA Committee's conclusion that the best solution is to provide an enabling set of provisions in the WBCA which would allow the directors and shareholders of publicly-held companies to facilitate modifications to the present plurality system for their corporations. The specific enabling provisions in the CARC proposed amendments differ from the ABA Committee's modified plurality approach in the Model Act amendments. The CARC proposal initially contained the Model ACT modified plurality approach; however in connection with discussion in the legislative process of SHB 1041, CARC revised its proposal to include a wide enabling provision allowing bylaw adoption of a different voting standard which would include majority voting as well as modified plurality voting. The revised proposal was included in the Senate amendment to SHB 1041.

There are three prongs to the CARC legislative change proposals embodied in SHB 1041 as amended in the Senate to enable directors and shareholders to choose governance rules regarding election of directors that work best for their corporation.

First, the amendments facilitate the present enabling system of RCW 23B.07.280(2) permitting articles of incorporation provisions to establish a director election voting requirement different than plurality. CARC proposed a change to RCW 23B.08.050(4) that permits the articles of incorporation to eliminate or modify the holdover rule in 23B.08.050. Further amendments to 23B.08.050 also include a change to 23B.08.050(2) that permits articles of incorporation to provide for a shorter term than one year based on voting results (e.g., 90 days if a certain specified vote is not received). The effect of these amendments to the statute would permit corporations to develop a majority voting system in which a director who does not receive a majority vote would not be seated or would only be seated for a limited period of time (in which cases the remaining directors could fill the vacancy). If a limited term was provided in such an amendment no resignation would be required as there would be no holdover past such specified limited term. A corporation could also provide for a majority vote standard in its articles of incorporation and have

a resignation policy to address the holdover issue (see comments below regarding resignation policies). In this regard the CARC changes are very similar to the ABA Committee 2006 amendments to the Model Act.

Second, the amendments to the WBCA provide for the selection of a majority or modified plurality or other percentage, number or level of votes for director election by means of a bylaw provision. The use of the articles of incorporation as discussed above requires action by both the board of directors and shareholders. To enable either the shareholders or the board of directors of a publicly-held corporation to unilaterally adopt a majority voting standard by bylaw requires a new Section to be added to the WBCA. CARC proposed a new Section to be RCW 23B.10.220 which would permit corporations to replace the plurality voting and default standard with a flexible voting standard to be established in such bylaw. The bylaw could provide for majority, modified plurality or other voting standard. Under this new Section a candidate who is not an incumbent director and fails to receive the specified vote is not elected. An incumbent director candidate who fails to receive the required vote would continue in office for the period specified in the bylaw or 90 days whichever is earlier. With the specified term limit in the statute there is no need for a resignation policy as there is no holdover. The proposed new statutory provision enables either the board of directors or the shareholders to adopt a bylaw to have such effect. If such a bylaw is adopted, and there is a failed election or short term, the board of directors then would fill the vacant seat created by the failed election of a candidate or the early termination of the term of an incumbent director(s) failing to receive the required vote. The board in the exercise of its duties could fill the vacancy with the same person. If the shareholders adopt such a bylaw the board cannot repeal it. As noted, the revised CARC proposal is different in this regard than the Model Act's 2006 bylaw provision amendment which is limited to "modified plurality" voting.

Third, the CARC proposed amendments provide statutory authority for the required resignation approach currently in place in many publicly-held corporations by corporate policy or bylaw. CARC proposed that RCW 23B.08.070 be amended to expressly facilitate the adoption of a majority voting policy in which directors agree to submit their resignations to the board upon failure to receive the required vote. This removes the possible conflict between a resignation provision and the holdover rule. The amendments recognize that such a director resignation can be effective upon the failure to receive the specified vote (e.g., "majority for") and to make clear that such resignation provision may be irrevocable. The CARC resignation proposal is substantially similar to the ABA Committee 2006 amendments to the Model Act.

CARC also believes that the proposed new Section 23B.10.220(1) (discussed in the "Second" prong above) should not be applicable in case of genuine contested elections; in such elections the shareholders have a choice. Accordingly, CARC generally followed the ABA Committee's approach by proposing a new default subsection to the new section 23B.10.220 to provide that the new bylaw voting standards would not apply in contested elections and provide guidance to determine whether there is a genuine contested election.

The CARC proposal also adds a new section -- RCW 23B.07.290 which provides for an inspector of elections for Washington public corporations. The new Section is consistent with the practice of most Washington public companies. Statutory authority is also important because the inspector process sets a date for the determination of the results of an election which trigger various time periods, either under a new bylaw provision or under resignation policies.

CARC COMMENT TO PROPOSED RCW 23B.08.050 AMENDMENTS

The proposed amendment to RCW 23B.08.050(2) provides that a director term may expire before the next, or applicable second or third, annual shareholders' meeting if a bylaw invoking proposed new section RCW 23B.10.220 is in effect or the articles of incorporation provide for a shorter term in the event a director nominee fails to receive a specified vote for election. The proposed amendment to RCW 23B.08.050 with the addition of new subsection (5) would provide two

possible exceptions to the general hold over rule in RCW 23B.08.050 and the last paragraph of the Official Legislative History would be supplemented as to the intent of the section as amended to read as follows:

> RCW 23B.08.050(5) as originally adopted provided for "holdover" directors so that directorships do not automatically become vacant at the expiration of their terms but the same persons continue in office until successors qualify for office. Thus the power of the board of directors to act continues uninterrupted even though an annual shareholders' meeting is not held or the shareholders are deadlocked or otherwise unable to elect directors at the meeting. RCW 23B.08.050(5), as amended, provides for two possible exceptions to the general rule that directors hold over. First, it permits the articles of incorporation to modify or eliminate the holdover concept. Second, it recognizes that, if a bylaw is adopted invoking proposed new RCW 23B.10.220, the effect will be that incumbent directors who do not receive the vote specified in such bylaw for election would continue in office but would not hold over following the earliest of the abbreviated term specified in the bylaw or the 90-day term of the office specified in proposed new RCW 23B.10.220 or the date the board selects an individual to fill the vacancy. Whether by amendment to the articles of incorporation or by adoption of a bylaw pursuant to RCW 23B.10.220 the directors' term ends at the end of the period specified, there is no hold over beyond such period. No resignation is required at the end of such term; however, a resignation could be given prior to such date which would then shorten the limited term.

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RCW 23B.08.060
STAGGERED TERMS FOR DIRECTORS

CURRENT SECTION

(1) The articles of incorporation may provide for staggering the terms of directors by dividing the total number of directors into two or three groups, with each group containing one-half or one-third of the total, as near as may be. In that event, the terms of directors in the first group expire at the first annual shareholders' meeting after their election, the terms of the second group expire at the second annual shareholders' meeting after their election, and the terms of the third group, if any, expire at the third annual shareholders' meeting after their election. At each annual shareholders' meeting held thereafter, directors shall be chosen for a term of two years or three years, as the case may be, to succeed those whose terms expire.

(2) If cumulative voting is authorized, any provision establishing staggered terms of directors shall provide that at least three directors shall be elected at each annual shareholders' meeting.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §85 (eff. 7-1-90)
Same as current.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3035 (1989)
Section 8.06 Staggered Terms For Directors.
The Committee believes that the only justification for imposing a board-size limitation on the corporations eligible to elect staggered terms relates to the operation of cumulative voting. That belief led to the two changes made in RMA section 8.06: (1) the addition of subsection 8.06(b) requiring corporations with cumulative voting to elect at least three directors at each annual shareholders' meeting; and (2) the deletion of a size limitation (in RMA section 8.06, nine or more directors) for corporations with straight voting.

Proposed section 8.06 recognizes the practice of "classifying" the board or "staggering" the terms of directors so that only one-half or one-third of them are elected at each annual shareholders' meeting and directors are elected for two-or three-year terms rather than one-year terms.

Under Proposed subsection 8.06(b) if the corporation has cumulative voting, at least three directors must be elected at each annual meeting. These directors may be elected by one or more voting groups, as provided in the articles of incorporation.

The principal justification for staggering the board today is that it protects against sudden change in the management of the corporation despite a change in shareholdings. It also reduces the impact of cumulative voting since a greater number of votes is required to elect a director if the board is staggered than is required if the entire board were elected at each annual meeting.

The staggered board of directors is sometimes used by incumbent management to make unwanted takeover attempts more difficult to effectuate. It is unlikely to be effective alone, however, since the shareholders may in any event remove directors under Proposed section 8.08 whether or not their terms are staggered. As a result, a staggered board is likely to be used for this purpose only in conjunction with a provision that directors may be removed only for cause.

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RCW 23B.08.070
RESIGNATION OF DIRECTORS

CURRENT SECTION

(1) A director may resign at any time by delivering notice in the form of an executed resignation to the board of directors, its chairperson, the president, or the secretary of the corporation.

(2) A notice of resignation is effective when the resignation is delivered unless the resignation specifies a later effective date, or an effective date determined upon the happening of an event or events. A notice of resignation that is conditioned upon failing to receive a specified vote for election as a director may provide that it is irrevocable.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §86 (eff. 7-1-90)
(1) A director may resign at any time by delivering written notice to the board of directors, its chairperson, the president, or the secretary.
(2) A resignation is effective when the notice is delivered unless the notice specifies a later effective date.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3035-3036 (1989)
Section 8.07 Resignation of Directors.
The resignation of a director is effective when the written notice is delivered unless the notice specifies a later effective date, in which case the director continues to serve until the later date. Since the person giving the notice is still a member of the board, the director may participate in all decisions until the specified date, including the choice of the director's successor under Proposed section 8.10. The participation of the retiring director in the decision on the director's successor may be of importance in closely held corporations where control of the board may be affected by the resignation.

When vacancies are created by a resignation effective at a later date, under Proposed section 8.10 action may be taken before that date to fill the vacancy.

AMENDMENTS TO ORIGINAL SECTION
Laws 2002, ch. 297, §28 (eff. 6-13-02)*(amends subsection (1))*
(1) A director may resign at any time by delivering ~~written~~ an executed notice to the board of directors, its chairperson, the president, or the secretary.

CARC COMMENTARY
See CARC Comment to 2002 Amendment to RCW 23B.01.410.

* * * * *

Laws 2007, ch. 467, §3 (eff. 7-22-07)
(1) A director may resign at any time by delivering notice in the form of an executed ~~notice~~ resignation to the board of directors, its chairperson, the president, or the secretary of the corporation.
(2) A notice of resignation is effective when the ~~notice~~ resignation is delivered unless the ~~notice~~ resignation specifies a later effective date, or an effective date determined upon the happening of an event or events. A notice of resignation that is conditioned upon failing to receive a specified vote for election as a director may provide that it is irrevocable.

CARC COMMENTARY

See generally commentary to 2007 amendments to RCW 23B which appears under RCW 23B.08.050.

The resignation of a director is effective when an executed notice is delivered unless the notice specifies a later effective date or an effective date determined upon the happening of an event or events, in which case the director continues to serve until that later date. Under RCW 23B.08.100, a vacancy that will occur at a specific later date by reason of a resignation effective at a later date may be filled before the vacancy occurs. Since the individual giving the notice is still a member of the board, he or she may participate in all decisions until the specified date, including the choice of his or her successor under RCW 23B.08.100. The proposed amendment to RCW 23B.08.100 does not permit vacancies that occur by virtue of a resignation conditioned upon a future event or events to be filled until such events occur.

The proposed amendment to RCW 23B.08.070 provides that a director may resign by "delivering" an "executed" "notice". Each of these terms is defined in RCW 23B.01.400.

The provisions in proposed RCW 23B.08.070(2) that a resignation may be made effective upon a date determined upon the happening of a future event or events, coupled with authority granted in the same section to make irrevocable resignations conditioned at least in part upon failing to receive a specified vote for election, are intended to clarify the enforceability of director resignation policies conditioned upon an "event" such as the director failing to receive a specified vote for reelection (e.g., majority of votes cast in favor or more votes for than against), coupled with board acceptance of the resignation. These provisions thus permit corporations and individual directors to agree voluntarily and give effect, in a manner subsequently enforceable by the corporation, to voting policy standards for the election of directors that exceed the plurality default standard in RCW 23B.07.280(2). These changes also are intended to buttress the enforceability of resignation policies that are not part of a corporation's voting provisions in the articles of incorporation to or pursuant to bylaws adopted under the authority of new section RCW 23B.10.220. The proposed provisions of RCW 23B.08.070(2) also make it clear that such arrangements do not contravene public policy. The express reference to the failure to receive a specified vote is not to be construed to address or negate the possible validity of other appropriate conditions for an irrevocable resignation.

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RCW 23B.08.080
REMOVAL OF DIRECTORS BY SHAREHOLDERS

CURRENT SECTION

(1) The shareholders may remove one or more directors with or without cause unless the articles of incorporation provide that directors may be removed only for cause.

(2) If a director is elected by holders of one or more authorized classes or series of shares, only the holders of those classes or series of shares may participate in the vote to remove the director.

(3) If cumulative voting is authorized, and if less than the entire board is to be removed, no director may be removed if the number of votes sufficient to elect the director under cumulative voting is voted against the director's removal. If cumulative voting is not authorized, a director may be removed only if the number of votes cast to remove the director exceeds the number of votes cast not to remove the director.

(4) A director may be removed by the shareholders only at a special meeting called for the purpose of removing the director and the meeting notice must state that the purpose, or one of the purposes, of the meeting is removal of the director.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §87 (eff. 7-1-90)

Same as current, except that subsection (3) stated:

(3) If cumulative voting is authorized, a director may not be removed if the number of votes sufficient to elect the director under cumulative voting is voted against the director's removal. If cumulative voting is not authorized, a director may be removed only if the number of votes cast to remove the director exceeds the number of votes cast not to remove the director.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3036 (1989)

Section 8.08 Removal of Directors By Shareholders.

Proposed subsection 8.08(a) accepts the view that since the shareholders are the owners of the corporation, they should normally have the power to change the directors at will. This section reverses the common law position that directors have a statutory entitlement to their office and can be removed only for cause--fraud, criminal conduct, gross abuse of office amounting to a breach of trust, or similar conduct. The power to remove directors is subject to several restrictions set forth in Proposed section 8.08:

(1) The power to remove a director without cause may be eliminated by a provision in the articles of incorporation. Such a provision in effect guarantees the directors the same entitlement to office that directors enjoyed at common law. It is likely to be used in closely held corporations as an element of an agreed-upon allocation of power and control which ensures directors immunity from removal except for cause. It may also be used in publicly held corporations that fear changes in ownership of the majority of the shares and desire to provide security to the directors.

(2) If the articles of incorporation provide that one or more classes or series of shares constitute a separate voting group entitled to elect a director (see Proposed section 8.04), only the shareholders of that voting group may participate in the vote whether or not to remove that director. But that director may be removed by court proceeding under Proposed section 8.09 despite this section.

(3) If cumulative voting is not authorized, a director is removed only if the votes cast to remove the director exceed the votes cast to retain the director at a meeting of the voting group electing the director at which a quorum of shares entitled to vote on the director's election is present. This is a significant change from the old rule which required the vote of a majority of shares entitled to a vote at an election of directors.

(4) If cumulative voting is authorized, a different standard for removal is involved. Under cumulative voting, a director may be removed only if the votes cast in favor of retaining the director would not have been sufficient to elect the director pursuant to cumulative voting at that meeting. This provision guarantees that a minority faction with sufficient votes to guarantee the election of a director under cumulative voting will be able to protect that director from removal by the remaining shareholders. The director, however, may be removed by court proceeding under Proposed section 8.09 despite this section. In computing whether or not a director elected by cumulative voting is protected from removal from office by Proposed subsection 8.08(c), the votes should be counted as though (1) the vote to remove the director occurred in an election to elect the number of directors normally elected by the voting group along with the director whose removal is sought, (2) the number of votes cast cumulatively against removal of the director had been cast for the director's election, and (3) all votes cast for removal of the director had been cast cumulatively in an efficient pattern for the election of a sufficient number of candidates so as to deprive the director whose removal is being sought of the director's office.

Removal of directors under the Proposed subsection 8.08(d) requires the meeting notice to state that removal of specific directors will be proposed. The Committee added the requirement that removal occur only at a special meeting of shareholders, in order to maximize the shareholders' interest in the proceedings. Such requirement need not impose extra expense on the corporation as the special meeting may be held concurrently with the corporation's annual meeting.

AMENDMENTS TO ORIGINAL SECTION
Laws 1995, ch. 47, §7 (eff. 7-23-95) (amends only subsection (3))
(3) If cumulative voting is authorized, ~~a~~ and if less than the entire board is to be removed, no director may ~~not~~ be removed if the number of votes sufficient to elect the director under cumulative voting is voted against the director's removal. If cumulative voting is not authorized, a director may be removed only if the number of votes cast to remove the director exceeds the number of votes cast not to remove the director.

CARC COMMENTARY
The proposed amendment is designed to eliminate a conflict between subsection (1) and subsection (3). Subsection (1) empowers shareholders to remove an entire board of directors. The vote required for such removal is not specified. The vote is thus determined under the general requirements for shareholder action under RCW 23B.07.250(3): if a quorum exists, action on a matter, other than election of directors, is approved by a voting group if the votes cast within the voting group opposing the removal. That result was intended even if the corporation had cumulative voting. However, current RCW 23B.08.080(3) seems to say that an action to remove the entire board of directors will not be successful if shareholders with sufficient cumulated votes to elect one or more directors vote against removal. The proposed amendment avoids this conflict by confining subsection (3) to situations where less than the entire board is to be removed.

The language added to subsection (3) previously appeared in RCW 23A.08.380.

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RCW 23B.08.090
REMOVAL OF DIRECTORS BY JUDICIAL PROCEEDING

CURRENT SECTION

1) The superior court of the county where a corporation's principal office, or, if none in this state, its registered office, is located may remove a director of the corporation from office in a proceeding commenced either by the corporation or by its shareholders holding at least ten percent of the outstanding shares of any class if the court finds that (a) the director engaged in fraudulent or dishonest conduct with respect to the corporation, and (b) removal is in the best interest of the corporation.
(2) The court that removes a director may bar the director from reelection for a period prescribed by the court.
(3) If shareholders commence a proceeding under subsection (1) of this section, they shall make the corporation a party defendant.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §88 (eff. 7-1-90)
Same as current.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3037 (1989)
Section 8.09 Removal of Directors By Judicial Proceeding.
Proposed section 8.09 authorizes the removal of a director who is found in a judicial proceeding to have engaged in fraudulent or dishonest conduct with respect to the corporation. For example, a judicial proceeding (as contrasted with removal under Proposed section 8.08) may be necessary or appropriate in the following situations:

(1) In a closely held corporation, the director charged with misconduct is elected by voting group or cumulative voting, and the shareholders with power to prevent the director's removal exercise that power despite the existence of fraudulent or dishonest conduct. The classic example is where the director charged with misconduct possesses sufficient votes to prevent the director's own removal and exercises such voting power to that end.

(2) In a publicly held corporation, the director charged with misconduct declines to resign, though urged to do so, and because of the large number of widely scattered shareholders, a special shareholders' meeting can be held only after a period of delay and at considerable expense.

A shareholder who owns less than 10 percent of the outstanding shares of the corporation may bring suit derivatively in the name of the corporation under this section upon compliance with the requirements of Proposed section 7.40. A shareholder who owns at least 10 percent of the outstanding shares of the corporation may maintain suit in the shareholder's own name and own right without compliance with Proposed section 7.40. But in such a case the corporation must be made a party defendant to the proceeding. See Proposed subsection 8.09(c).

The purpose of Proposed section 8.09 is to permit the prompt and efficient removal of directors found by the court to have engaged in fraudulent or dishonest conduct with respect to the corporation. It is not intended to permit judicial resolution of internal corporate struggles for control except in those cases in which a court finds that the director has been guilty of wrongful conduct of the type described. The provision is also not intended as a basis for removing a director whose misconduct is not with respect to the

corporation (even though such conduct is possibly embarrassing to the corporation).

The Committee deleted the RMA language that would have permitted a court to remove a director found to have engaged in gross abuse of authority or discretion. The Committee believed such language was so general as to be meaningless.

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RCW 23B.08.100
VACANCY ON BOARD OF DIRECTORS

CURRENT SECTION

(1) Unless the articles of incorporation provide otherwise, if a vacancy occurs on a board of directors, including a vacancy resulting from an increase in the number of directors:

(a) The shareholders may fill the vacancy;

(b) The board of directors may fill the vacancy; or

(c) If the directors in office constitute fewer than a quorum of the board, they may fill the vacancy by the affirmative vote of a majority of all the directors in office.

(2) If the vacant office was held by a director elected by a voting group of shareholders, only the holders of shares of that voting group are entitled to vote to fill the vacancy, if it is filled by the shareholders, and only the directors elected by that voting group are entitled to fill the vacancy if it is filled by the directors.

(3) A vacancy that will occur at a specific later date, by reason of a resignation effective at a later date under RCW 23B.08.070(2) or otherwise, may be filled before the vacancy occurs but the new director may not take office until the vacancy occurs.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §89 (eff. 7-1-90)

Same as current, except subsection (2) read:

(2) If the vacant office was held by a director elected by holders of one or more authorized classes or series of shares, only the holders of those classes or series of shares are entitled to vote to fill the vacancy.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3037-38 (1989)

Section 8.10 Vacancy On Board of Directors.

Vacancies on the board of directors may be filled either by the shareholders or by the board of directors. In large corporations the cost of calling a special meeting of shareholders may be prohibitive so that in those corporations filling vacancies by the board of directors is the norm. On the other hand, in a closely held corporation the shareholders may fill vacancies as readily as the board.

Proposed subsection 8.10(a)(3) allows the directors remaining in office to fill vacancies even though they are fewer than a quorum. The test for the exercise of this power is whether the directors remaining in office are fewer than a quorum, not whether the directors seeking to act are fewer than a quorum. For example, on a board of six directors where a quorum is four, if there are two vacancies, they may not be filled under Proposed subsection 8.10(a)(3) at a "meeting" attended by only three directors. Even though the three directors are fewer than a quorum, Proposed subsection 8.10(a)(3) is not applicable because the number of directors remaining in office--four--is not fewer than a quorum.

Proposed subsection 8.10(b) provides that if holders of one or more authorized classes or series of shares is entitled to elect a director, only holders of those classes or series of shares are entitled to fill a vacant office which was held by a director elected by that voting group. This section is part of the consistent treatment of directors elected by a voting group of shareholders. See Proposed sections 1.40, 7.25, 7.26, 7.28, and 8.04 and Proposed subsection 8.08(b).

Proposed subsection 8.10(c) permits vacancies that will arise on a specific later date to be filled in advance of that date so long as the designee does not actually take office until the vacancy occurs. The director in

the office that will become vacant may participate in the selection of his successor. A vacancy arising at a later date is most likely to arise because of a resignation effective at a later date; it may also arise in connection with retirements or with prospective amendments to bylaws. In a closely held corporation with a balance of power on the board of directors that was reached by agreement, a prospective resignation followed by the appointment of a successor under this section permits the board to act on the replacement before the change in balance caused by the resignation.

AMENDMENTS TO ORIGINAL SECTION

Laws 2007, ch. 467, §4 (eff. 7-22-07) *(amends only subsection (2))*

(2) If the vacant office was held by a director elected by ~~holders of one or more authorized classes or series of shares~~ a voting group of shareholders, only the holders of ~~those classes or series of~~ shares of that voting group are entitled to vote to fill the vacancy, if it is filled by the shareholders, and only the directors elected by that voting group are entitled to fill the vacancy if it is filled by the directors.

CARC COMMENTARY

See generally commentary to 2007 amendments to RCW 23B which appears under RCW 23B.08.050.

The proposed amendment to RCW 23B.08.100(2) provided that if a voting group of shares is entitled to elect a director, only that voting group is entitled to fill a vacant office which was held by a director elected by the voting group. Alternatively, if that vacancy if filled by the directors, only those remaining directors elected by that voting group are entitled to fill the vacancy. This section is part of the consistent treatment of directors elected by a voting group of shareholders. See RCW 23B.01.400, 23B.07.250, 23B.07.280, 23B.08.280, 23B.08.040 and 23B.08.080(2).

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RCW 23B.08.110
COMPENSATION OF DIRECTORS

CURRENT SECTION

Unless the articles of incorporation or bylaws provide otherwise, the board of directors may fix the compensation of directors.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §90 (eff. 7-1-90)
Same as current.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3038 (1989)
Section 8.11 Compensation of Directors.
This section puts at rest the question whether the board of directors can fix the compensation of its members for serving as directors. The practice of compensating directors is now of long standing, and the establishment of a policy with respect to director compensation is an appropriate function of the board of directors.

In publicly held corporations, compensation is customarily provided to nonmanagement directors. As stated in The Corporate Director's Guidebook, ". . . it is expected that a nonmanagement director will devote substantial attention to the affairs of the corporation and will be compensated accordingly." 33 BUS.LAW. 1591, 1622 (1978).

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RCW 23B.08.200
MEETINGS AND ACTION OF THE BOARD

CURRENT SECTION

(1) The board of directors may hold regular or special meetings in or out of this state.

(2) Unless the articles of incorporation or bylaws provide otherwise, any or all directors may participate in a regular or special meeting by, or conduct the meeting through the use of, any means of communication by which all directors participating can hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §91 (eff. 7-1-90)
Same as current.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3038 (1989)
Section 8.20 Meetings and Action of the Board.
This section authorizes meetings of directors anywhere. No distinction is made between meetings in-state and out-of-state. It also authorizes any or all directors to participate in a meeting by the use of any means of communication by which all directors participating can hear each other. A person participating in this fashion is deemed to be present in person at the meeting for purposes of quorum and voting requirements.

With the development of modern electronic technology, it is possible that most of the advantages of the traditional meeting, at which all members are present at a single place, may be obtained even though the members are physically dispersed and no two directors are present at the same place. The advantages of the traditional meeting is the opportunity for interchange that is permitted by a meeting in a single room at which members are physically present. The opportunity for interchange is provided by conference call technology. Thus, a meeting may be conducted by electronic means although no two directors are physically present at the same place and no specific place for the meeting is designated.

The Committee rejected RMA language that gave directors the discretion to decide whether to permit a director to participate in a meeting by conference communication technology. The Committee felt that such discretion could too easily be abused, with serious consequences on the possibility of certain directors participating in director deliberations. The Committee also rejected the RMA requirement that all directors participating in the meeting be able to simultaneously hear each other during the meeting. Such requirement would eliminate communications equipment whereby the speaker cannot hear other persons speaking at the same time.

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RCW 23B.08.210
ACTION WITHOUT MEETING

CURRENT SECTION

(1) Unless the articles of incorporation or bylaws provide otherwise, corporate action required or permitted by this title to be approved at a board of directors' meeting may be approved without a meeting if the corporate action is approved by all members of the board. The approval of the corporate action must be evidenced by one or more consents describing the corporate action being approved, executed by each director either before or after the corporate action becomes effective, and delivered to the corporation for inclusion in the minutes or filing with the corporate records, each of which consents shall be set forth either (a) in an executed record or (b) if the corporation has designated an address, location, or system to which the consents may be electronically transmitted and the consent is electronically transmitted to the designated address, location, or system, in an executed electronically transmitted record.

(2) Corporate action is approved under this section when the last director executes the consent.

(3) A consent under this section has the effect of a meeting vote and may be described as such in any record.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §92 (eff. 7-1-90)

(1) Unless the articles of incorporation or bylaws provide otherwise, action required or permitted by this title to be taken at a board of directors' meeting may be taken without a meeting if the action is taken by all members of the board. The action must be evidenced by one or more written consents describing the action taken, signed by each director either before or after the action taken, and delivered to the corporation for inclusion in the minutes or filing with the corporate records. (2) Action taken under this section is effective when the last director signs the consent, unless the consent specifies a later effective date.

(3) A consent signed under this section has the effect of a meeting vote and may be described as such in any document.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3038 (1989)

Section 8.21 Action Without Meeting.

The power of the board of directors to act unanimously without a meeting is based on the pragmatic consideration that in many situations a formal meeting is a waste of time. For example, in a closely held corporation there will often be informal discussion by the manager-owners of the venture before a decision is made. And, of course, if there is only a single director (as is permitted by Proposed section 8.03), a written consent is the natural method of signifying director action. Consent may be signified on one or more documents if desirable.

In publicly held corporations, meetings of the board of directors may be appropriate for many actions. But there will always be situations where prompt action is necessary and the decision noncontroversial, so that approval without a meeting may be appropriate.

Under Proposed section 8.21 the requirement of unanimous consent precludes the possibility of stifling or ignoring opposing argument. A director opposed to an action that is proposed to be taken by unanimous consent, or uncertain about the desirability of that action, may compel the holding of a directors' meeting to discuss the matter simply by withholding the director's consent.

AMENDMENTS TO ORIGINAL SECTION
Laws 2002, ch. 297, §29 (eff. 6-13-02)
(1) Unless the articles of incorporation or bylaws provide otherwise, action required or permitted by this title to be taken at a board of directors' meeting may be taken without a meeting if the action is taken by all members of the board. The action must be evidenced by one or more ~~written~~ consents describing the action taken, ~~signed~~ executed by each director either before or after the action taken, and delivered to the corporation for inclusion in the minutes or filing with the corporate records, each of which consents shall be set forth either (a) in an executed record or (b) if the corporation has designated an address, location, or system to which the consents may be electronically transmitted and the consent is electronically transmitted to the designated address, location, or system, in an executed electronically transmitted record.
(2) Action taken under this section is effective when the last director ~~signs~~ executes the consent, unless the consent specifies a later effective date.
(3) A consent ~~signed~~ under this section has the effect of a meeting vote and may be described as such in any ~~document~~ record.

CARC COMMENTARY
See CARC Comment to 2002 Amendment to RCW 23B.01.410.

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Laws 2009, ch. 189, §24 (eff. 7-26-09)*(amends subsections (1) and (2))*
(1) Unless the articles of incorporation or bylaws provide otherwise, corporate action required or permitted by this title to be ~~taken~~ approved at a board of directors' meeting may be ~~taken~~ approved without a meeting if the corporate action is ~~taken~~ approved by all members of the board. The approval of the corporate action must be evidenced by one or more consents describing the ~~action taken~~ corporate action being approved, executed by each director either before or after the ~~action taken~~ corporate action becomes effective, and delivered to the corporation for inclusion in the minutes or filing with the corporate records, each of which consents shall be set forth either (a) in an executed record or (b) if the corporation has designated an address, location, or system to which the consents may be electronically transmitted and the consent is electronically transmitted to the designated address, location, or system, in an executed electronically transmitted record.
(2) Corporate ~~A~~action ~~taken~~ is approved under this section ~~is effective~~ when the last director executes the consent~~, unless the consent specifies a later effective date~~.

CARC COMMENTARY
The term "corporate action" is defined and used throughout the Washington Business Corporation Act for consistency and to clarify the distinction between the matter being approved versus the action of approving.

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RCW 23B.08.220
NOTICE OF MEETING

CURRENT SECTION

(1) Unless the articles of incorporation or bylaws provide otherwise, regular meetings of the board of directors may be held without notice of the date, time, place, or purpose of the meeting.

(2) Unless the articles of incorporation or bylaws provide for a longer or shorter period, special meetings of the board of directors must be preceded by at least two days' notice of the date, time, and place of the meeting. The notice need not describe the purpose of the special meeting unless required by the articles of incorporation or bylaws.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §93 (eff. 7-1-90)
Same as current.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3038-39 (1989)
Section 8.22 Notice of Meeting.
Regular meetings of the board of directors may be held without notice and special meetings require only two days' notice unless other requirements are imposed by the articles of incorporation or bylaws. The notice may be written, or oral if expressly authorized by the articles of incorporation or bylaws. See Proposed section 1.41. Also, no statement of the purpose of either a regular or special meeting is necessary unless required by the articles of incorporation or bylaws. These requirements differ from the requirements applicable to meetings of shareholders because of fundamental differences in their roles: directors are expected to be more closely involved in corporate affairs than shareholders, and meetings of directors are held more systematically and regularly than meetings of shareholders.

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RCW 23B.08.230
WAIVER OF NOTICE

CURRENT SECTION

(1) A director may waive any notice required by this title, the articles of incorporation, or bylaws before or after the date and time stated in the notice, and such waiver shall be equivalent to the giving of such notice. Except as provided by subsection (2) of this section, the waiver must be delivered by the director entitled to the notice to the corporation for inclusion in the minutes or filing with the corporate records, which waiver shall be set forth either (a) in an executed record or (b) if the corporation has designated an address, location, or system to which the waiver may be electronically transmitted and the waiver has been electronically transmitted to the designated address, location, or system, in an executed electronically transmitted record.

(2) A director's attendance at or participation in a meeting waives any required notice to the director of the meeting unless the director at the beginning of the meeting, or promptly upon the director's arrival, objects to holding the meeting or transacting business at the meeting and does not thereafter vote for or assent to any corporate action approved at the meeting.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §94 (eff.7-1-90)

(1) A director may waive any notice required by this title, the articles of incorporation, or bylaws before or after the date and time stated in the notice, and such waiver shall be equivalent to the giving of such notice. Except as provided by subsection (2) of this section, the waiver must be in writing, signed by the director entitled to the notice, and delivered to the corporation for inclusion in the minutes or filing with the corporate records.

(2) A director's attendance at or participation in a meeting waives any required notice to the director of the meeting unless the director at the beginning of the meeting, or promptly upon the director's arrival, objects to holding the meeting or transacting business at the meeting and does not thereafter vote for or assent to action taken at the meeting.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3039 (1989)

Section 8.23 Waiver of Notice.

Proposed subsection 8.23(a) continues the old law authorizing waivers of notice by directors after the date and time of the meeting. In modern practice notice is often a technical requirement and waivers should be freely permitted.

Proposed subsection 8.23(b) recognizes that the function of notice is to inform directors of a meeting. If a director actually appears at the meeting the director has probably had notice of it and generally should not be able to object to lack of notice. In cases where actual prejudice occurs because of the lack of notice, as may be indicated by the absence of one or more other directors, the director must call attention to the defect at the outset of the meeting or promptly upon the director's arrival. That director, or a director who did not receive notice and was not present at the meeting, may then attack the validity of the action taken for want of notice. If a director properly objects to the meeting being held, the director is not presumed to have assented to actions taken thereafter, but the director waives any objection if the director thereafter votes for or assents to action taken at the meeting. See Proposed subsection 8.24(d).

AMENDMENTS TO ORIGINAL SECTION

Laws 2002, ch. 297, §30 (eff. 6-13-02)*(amends subsection (1))*

(1) A director may waive any notice required by this title, the articles of incorporation, or bylaws before or after the date and time stated in the notice, and such waiver shall be equivalent to the giving of such notice. Except as provided by subsection (2) of this section, the waiver must be ~~in writing, signed~~ delivered by the director entitled to the notice~~, and delivered~~ to the corporation for inclusion in the minutes or filing with the corporate records, which waiver shall be set forth either (a) in an executed record or (b) if the corporation has designated an address, location, or system to which the waiver may be electronically transmitted and the waiver has been electronically transmitted to the designated address, location, or system, in an executed electronically transmitted record.

CARC COMMENTARY

See CARC Comment to 2002 Amendment to RCW 23B.01.410.

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Laws 2009, ch. 189, §25 (eff. 7-26-09)*(amends only subsection (2))*

(2) A director's attendance at or participation in a meeting waives any required notice to the director of the meeting unless the director at the beginning of the meeting, or promptly upon the director's arrival, objects to holding the meeting or transacting business at the meeting and does not thereafter vote for or assent to any corporate action ~~taken~~ approved at the meeting.

CARC COMMENTARY

The term "corporate action" is defined and used throughout the Washington Business Corporation Act for consistency and to clarify the distinction between the matter being approved versus the action of approving.

* * * * *

RCW 23B.08.240
QUORUM AND VOTING

CURRENT SECTION

(1) Unless the articles of incorporation or bylaws require a greater or lesser number, a quorum of a board of directors consists of a majority of the number of directors specified in or fixed in accordance with the articles of incorporation or bylaws.

(2) Notwithstanding subsection (1) of this section, a quorum of a board of directors may in no event be less than one-third of the number of directors specified in or fixed in accordance with the articles of incorporation or bylaws.

(3) If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the board of directors unless the articles of incorporation or bylaws require the vote of a greater number of directors.

(4) A director who is present at a meeting of the board of directors when corporate action is approved is deemed to have assented to the corporate action unless: (a) The director objects at the beginning of the meeting, or promptly upon the director's arrival, to holding it or transacting business at the meeting; (b) the director's dissent or abstention as to the corporate action is entered in the minutes of the meeting; or (c) the director delivers notice of the director's dissent or abstention as to the corporate action to the presiding officer of the meeting before adjournment or to the corporation within a reasonable time after adjournment of the meeting. The right of dissent or abstention is not available to a director who votes in favor of the corporate action.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §95 (eff. 7-1-90)

(1) Unless the articles of incorporation or bylaws require a greater number, a quorum of a board of directors consists of a majority of the number of directors specified in or fixed in accordance with the articles of incorporation or bylaws.

(2) The articles of incorporation or bylaws may authorize a quorum of a board of directors to consist of no fewer than one-third of the fixed or specified number of directors determined under subsection (1) of this section.

(3) If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the board of directors unless the articles of incorporation or bylaws require the vote of a greater number of directors.

(4) A director who is present at a meeting of the board of directors when action is taken is deemed to have assented to the action taken unless: (a) The director objects at the beginning of the meeting, or promptly upon the director's arrival, to holding it or transacting business at the meeting; (b) the director's dissent or abstention from the action taken is entered in the minutes of the meeting; or (c) the director delivers notice of the director's dissent or abstention to the presiding officer of the meeting before its adjournment or to the corporation within a reasonable time after adjournment of the meeting. The right of dissent or abstention is not available to a director who votes in favor of the action taken.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3039-40 (1989)
Section 8.24 Quorum and Voting.
In the absence of a provision in the articles of incorporation or bylaws, a quorum is a majority of the number of directors specified in or fixed in accordance with the articles of incorporation or bylaws.

Proposed subsection 8.24(b) provides that the articles of incorporation or bylaws may decrease the size of the quorum to not less than one-third of the number of directors determined under Proposed subsection 8.24(a).

Proposed subsection 8.24(a) allows the articles of incorporation or bylaws to increase the quorum up to and including unanimity while Proposed subsection 8.24(c) allows these documents similarly to increase the vote necessary to take action. The articles of incorporation or bylaws may also establish quorum or voting requirements with respect to directors elected by voting groups of shareholders pursuant to Proposed section 8.04. The option to increase either or both the vote and quorum requirements most commonly is exercised in closely held corporations where a greater degree of participation is thought appropriate or where a minority participant in the venture seeks to obtain a veto power over corporate action.

The phrase "when the vote is taken" in Proposed subsection 8.24(c) is designed to make clear that the board of directors may act only when a quorum is present. If directors leave during the course of a meeting, the board of directors may not act after the number of directors present is reduced to less than a quorum.

Under Proposed subsection 8.24(d) directors, if they object or abstain with respect to action taken by the board of directors, must make their position clear in one of the ways described in this subsection. If objection is made in the form of a written dissent, it may be transmitted by wire, telecopier, or other medium of data transmission. This written objection serves the important purpose of forcefully bringing the position of the dissenting member to the attention of the balance of the board of directors. The requirement of a written objection also prevents a director from later seeking to avoid responsibility because of secret doubts about the wisdom of the action taken. The right of dissent or abstention is not available to a director who voted in favor of the action taken.

Proposed subsection 8.24(d) applies only to directors who are present at the meeting. Directors who are not present are not deemed to have assented to any action taken at the meeting in their absence.

The Committee altered RMA section 8.24(d) to permit dissenting or abstaining directors to deliver written notice of dissent or abstention within a reasonable time (rather than immediately, as in RMA section 8.24(d)) after adjournment of the meeting. Such change was designed to accommodate the director who does not find out the director's dissent or abstention was not included in the minutes of the meeting until the minutes were distributed to members of the board.

The Committee also deleted the reference to a committee of a board of directors from RMA section 8.24(d) on the ground that Proposed subsection 8.25(c) extends the provisions of Proposed section 8.24 to committees and members of committees.

AMENDMENTS TO ORIGINAL SECTION
Laws 1991, ch. 72, §35 (eff. 7-28-91) *(amended only subsections (1) and (2) of original)*
(1) Unless the articles of incorporation or bylaws require a greater or lesser number, a quorum of a board of directors consists of a majority of the number of directors specified in or fixed in accordance with the articles of incorporation or bylaws.
(2) ~~The articles of incorporation or bylaws may authorize~~ Notwithstanding subsection (1) of this section, a quorum of a board of directors ~~to consist of~~ may in ~~no fewer~~ event be less than one-third of the ~~fixed or specified~~ number of directors ~~determined under subsection (1) of this section~~ specified in or fixed in accordance with the articles of incorporation or bylaws.

CARC COMMENTARY
The proposed amendment clarifies the relationship between subsections (1) and (2) of RCW 23B.08.240 as adopted in 1989 in two respects: (1) to make clear that the articles of incorporation or bylaws may authorize a quorum less than a majority of the number of directors specified in or fixed in accordance with the articles of incorporation or bylaws (such was only implied previously); and (2) to mandate that irrespective of language in the articles of incorporation or bylaws a quorum may not be less than one-third of the number of directors specified in or fixed in accordance with the articles of incorporation or bylaws.

* * * * *

Laws 2002, ch. 297, §31 (eff. 6-13-02)
Amended original subsection (4)(c) by deleting the word "written."

CARC COMMENTARY
See CARC Comment on the 2002 amendment to RCW 23B.01.410.

* * * * *

Laws 2009, ch. 189, §26 (eff. 7-26-09)*(amends only subsection (4))*
(4) A director who is present at a meeting of the board of directors when corporate action is ~~taken~~ approved is deemed to have assented to the corporate action ~~taken~~ unless: (a) The director objects at the beginning of the meeting, or promptly upon the director's arrival, to holding it or transacting business at the meeting; (b) the director's dissent or abstention ~~from~~ as to the corporate action ~~taken~~ is entered in the minutes of the meeting; or (c) the director delivers notice of the director's dissent or abstention as to the corporate action to the presiding officer of the meeting before ~~its~~ adjournment or to the corporation within a reasonable time after adjournment of the meeting. The right of dissent or abstention is not available to a director who votes in favor of the corporate action ~~taken~~.

CARC COMMENTARY
The term "corporate action" is defined and used throughout the Washington Business Corporation Act for consistency and to clarify the distinction between the matter being approved versus the action of approving.

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RCW 23B.08.245
CORPORATE ACTION – VOTE OF SHAREHOLDERS

CURRENT SECTION

A corporation may agree to submit a corporate action to a vote of its shareholders whether or not the board of directors determines at any time subsequent to approving such a corporate action that it no longer recommends the corporate action.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 2011, ch. 328, §4 (eff. 7-22-11)
Same as above.

CARC COMMENTARY

Proposed RCW section 23B.08.245 is intended to clarify that a corporation may enter into an agreement, such as merger agreement, containing a "force the vote" provision. Proposed section 23B.08.245 makes it clear that the board of directors may authorize the corporation to agree with another person to submit a corporate action to the shareholders for approval, but reserve the ability to change its recommendation with respect to the corporate action. This provision is not intended to relieve the board of directors of its duty to consider carefully the proposed corporate action and the interests of the shareholders.

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RCW 23B.08.250
COMMITTEES

CURRENT SECTION

(1) Unless the articles of incorporation or bylaws provide otherwise, a board of directors may create one or more committees of directors. Each committee must have two or more members, who serve at the pleasure of the board of directors.

(2) The creation of a 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 creation of the committee is approved or (b) the number of directors required by the articles of incorporation or bylaws to approve the creation of the committee under RCW 23B.08.240.

(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 committees and their members as well.

(4) To the extent specified by the board of directors or in the articles of incorporation or bylaws, each committee may exercise the authority of the board of directors under RCW 23B.08.010.

(5) A committee may not, however:

(a) Approve a distribution except according to a general formula or method 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 on any of its committees;

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

(e) 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.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §96 (eff. 7-1-90)

(1) Unless the articles of incorporation or bylaws provide otherwise, a board of directors may create one or more committees of directors. Each committee must have two or more members, who serve at the pleasure of the board of directors.

(2) The creation of a 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 action is taken or (b) the number of directors required by the

articles of incorporation or bylaws to take action under RCW 23B.08.240.
(3) RCW 23B.08.200 through 23B.08.240, which govern meetings, action without meetings, notice and waiver of notice, and quorum and voting requirements of the board of directors, apply to committees and their members as well.
(4) To the extent specified by the board of directors or in the articles of incorporation or bylaws, each committee may exercise the authority of the board of directors under RCW 23B.08.010.
(5) A committee may not, however:
(a) Authorize or approve a distribution except according to a general formula or method prescribed by the board of directors;
(b) Approve or propose to shareholders action that this title requires be approved by shareholders;
(c) Fill vacancies on the board of directors or on any of its committees;
(d) Amend articles of incorporation pursuant to RCW 23B.10.020;
(e) Adopt, amend, or repeal bylaws;
(f) Approve a plan of merger not requiring shareholder approval; or
(g) Authorize or 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 action by a committee does not alone constitute compliance by a director with the standards of conduct described in RCW 23B.08.300.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3040-41 (1989)
Section 8.25 Committees.
Proposed section 8.25 makes explicit the power of a board of directors to act through committees of directors and specifies the powers of the board of directors that are nondelegable, that is, powers that only the full board of directors may exercise. Proposed section 8.25 deals only with committees made up of members of the board of directors exercising the functions of the board of directors; the board of directors or management, independently of Proposed section 8.25, may establish nonboard committees composed of directors, employees, or others to deal with corporate powers not required to be exercised by the board of directors.

Proposed subsection 8.25(b) provides that a committee of the board of directors may be created only by the affirmative vote of a majority of the board of directors then in office, or, if greater, by the number of directors required to take action by the articles of incorporation or the bylaws. This supermajority requirement reflects the importance of the decision to invest board committees with power to act under Proposed section 8.25.

Committees of the board of directors are assuming increasingly important roles in the governance of publicly held corporations. See "The Corporate Director's Guidebook," 33 BUS. LAW. 1591 (1978); "The Overview Committees of the Board of Directors," 35 BUS. LAW. 1335 (1980). Executive committees have long provided guidance to management between meetings of the full board of directors. Audit committees also have a long history of performing essential review and control functions on behalf of the board of directors. In recent years nominating and compensation committees, composed primarily or entirely of nonmanagement directors, have also become more widely used by publicly held corporations.

Proposed section 8.25 establishes the desirable and appropriate role of director committees in light of competing considerations: on the one hand, it seems clear that appropriate board committee action is not only desirable but also is likely to improve the functioning of larger and more diffuse boards of directors; on the other hand, wholesale delegation of authority to a board committee, to the point of abdication of director responsibility as a board of directors, is manifestly inappropriate and undesirable. Overbroad delegation also increases the potential, where the board of directors is divided, for usurpation of basic board functions by means of delegation to a committee dominated by one faction.

The statement of nondelegable functions set out in Proposed subsection 8.25(e) is based on the principle that prohibitions against delegation should be limited generally to actions substantially affecting the rights of shareholders among themselves as shareholders and specifically to (1) those matters that have immediate and irrevocable effect, (2) those matters that may well become irrevocable without swift action, and (3) those matters that will cause changes of position by others that cannot be rectified. As a result, delegation of authority to committees under Proposed subsection 8.25(e) may be broader than mere authority to act with respect to matters arising within the ordinary course of business. The ordinary course of business standard for delegation was rejected as being too narrow and inappropriate for many modern corporations. For example, although Proposed subsection 8.25(e)(7) makes nondelegable the decision whether to issue and sell shares or create a class or series of shares with designated rights and preferences, it permits the board of directors to delegate to a committee (within limits specifically prescribed by the board of directors) the important but more limited functions of fixing the specific terms--including without limitation, the price, the dividend rate, provisions for redemption, sinking fund, conversion, voting or preferential rights, and provisions for other features of a class or series of shares. The committee may also be empowered to adopt any final resolution setting forth the terms and to authorize the appropriate filing with the secretary of state required by this title. Thus, terms of the sale of shares may be set quickly and upon the most accurate information without necessarily involving a meeting of the full board of directors. The phrase "(or senior executive officer of the corporation)" also permits these functions to be delegated to the chief financial officer or other appropriate officer of the corporation. The subsection also permits delegation to a committee of authority to determine the terms of a contract or option for the sale of shares if the board prescribes specific limits in a stock option plan or otherwise. This delegation avoids requiring involvement of the full board in the details of the administration of stock option or other compensation plans.

Proposed subsection 8.25(e)(2) prohibits delegation of authority with respect to most mergers, sales of substantially all the assets, amendments to articles of incorporation and voluntary dissolution since most of these actions require shareholder action. In addition, Proposed subsection 8.25(e) prohibits delegation to a board committee of authority to declare distributions (unless according to a general formula or method prescribed by the full board of directors), designate director candidates for purposes of proxy solicitation, fill board vacancies, approve a so-called "short-form merger" (where the interests of the minority shareholders warrant special attention), or amend the bylaws or the articles of incorporation (without shareholder approval under section 10.02). On the other hand, under Proposed subsection 8.25(e) many actions of a material nature, such as the authorization of long-term debt and capital investment or the pricing of shares, may properly be made the subject of committee delegation.

Proposed subsection 8.25(f) makes clear that although the board of directors may delegate to a committee the authority to take action, the designation of the committee, the delegation of authority to it, and action by the committee will not alone constitute compliance by a noncommittee board member with the director's responsibility under Proposed section 8.30. On the other hand, a noncommittee director also will not automatically incur liability should the action of the particular committee fail to meet the standard of care set out in Proposed section 8.30. The noncommittee member's liability in these cases will depend upon whether the director failed to comply with Proposed subsection 8.30(d). Factors to be considered in this regard will include the care used in the delegation to and supervision over the committee, and the amount of knowledge regarding the particular matter which the noncommittee director has available. Care in delegation and supervision includes appraisal of the capabilities and diligence of the committee directors in light of the subject and its relative importance and may be facilitated, in the usual case, by review of minutes and receipt of other reports concerning committee activities. The enumeration of these factors is intended to emphasize that directors may not abdicate their responsibilities and secure exoneration from liability simply by delegating authority to board committees. Rather, a director against whom liability is asserted based upon acts of a committee of which the director is not a member avoids liability if the standards contained in Proposed section 8.30 are met.

Proposed subsection 8.25(f) has no application to a member of the committee itself. The standard applicable to a committee member is set forth in Proposed subsection 8.30(a).

AMENDMENTS TO ORIGINAL SECTION
Laws 2009, ch. 189, §27 (eff. 7-26-09)

(1) Unless the articles of incorporation or bylaws provide otherwise, a board of directors may create one or more committees of directors. Each committee must have two or more members, who serve at the pleasure of the board of directors.

(2) The creation of a 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 ~~action~~ creation of the committee is ~~taken~~ approved or (b) the number of directors required by the articles of incorporation or bylaws to ~~take action~~ approve the creation of the committee under RCW 23B.08.240.

(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 committees and their members as well.

(4) To the extent specified by the board of directors or in the articles of incorporation or bylaws, each committee may exercise the authority of the board of directors under RCW 23B.08.010.

(5) A committee may not, however:

(a) ~~Authorize or a~~Approve a distribution except according to a general formula or method 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 on any of its committees;

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

(e) Adopt, amend, or repeal bylaws;

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

(g) ~~Authorize or a~~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.

CARC COMMENTARY

The term "corporate action" is defined and used throughout the Washington Business Corporation Act for consistency and to clarify the distinction between the matter being approved versus the action of approving.

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RCW 23B.08.300
GENERAL STANDARDS FOR DIRECTORS

CURRENT SECTION

(1) A director shall discharge the duties of a director, including duties as member of a committee:
(a) In good faith;
(b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
(c) In a manner the director reasonably believes to be in the best interests of the corporation.
(2) In discharging the duties of a director, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:
(a) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;
(b) Legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the person's professional or expert competence; or
(c) A committee of the board of directors of which the director is not a member if the director reasonably believes the committee merits confidence.
(3) A director is not acting in good faith if the director has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (2) of this section unwarranted.
(4) A director is not liable for any action taken as a director, or any failure to take any action, if the director performed the duties of the director's office in compliance with this section.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §97 (eff. 7-1-90)
Same as current.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3041-44 (1989)
Section 8.30 General Standards For Directors.
Proposed section 8.30 defines the general standard of conduct for directors. It sets forth the standard by focusing on the manner in which the director performs the director's duties, not the correctness of the director's decisions. Proposed subsection 8.30(a) thus requires a director to perform the director's duties in good faith, with the care of an ordinarily prudent person in a like position and in a manner the director believes to be in the best interests of the corporation. This standard is based on the old Washington law, a number of state statutes and on judicial formulations of the duty of care applicable to directors. Proposed section 8.30 also parallels, to the extent possible, the indemnification provisions of Proposed sections 8.50 through 8.60.

In determining whether to impose liability, the courts recognize that boards of directors and corporate managers continuously make decisions that involve the balancing of risks and benefits for the enterprise. Although some decisions turn out to be unwise or the result of a mistake of judgment, it is unreasonable to

reexamine these decisions with the benefit of hindsight. Therefore, a director is not liable for injury or damage caused by the director's decision, no matter how unwise or mistaken it may turn out to be, if in performing the director's duties the director met the requirements of Proposed section 8.30.

Even before statutory formulations of directors' duty of care, courts sometimes invoked the business judgment rule in determining whether to impose liability in a particular case. In doing so, courts have sometimes used language similar to the standards set forth in Proposed subsection 8.30(a). The elements of the business judgment rule and the circumstances for its application are continuing to be developed by the courts in Washington and elsewhere. Compare the requirements for the rule set forth in Nursing Home Bldg. Corp. v. De Hart, 13 Wash. App. 489 (1975), with those in Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985). See also Comment, to Proposed section 8.42. In view of that continuing judicial development, Proposed section 8.30 does not try to codify the business judgment rule or to delineate the differences, if any, between that rule and the standards of director conduct set forth in this section. That is a task left to the courts.

Proposed section 8.30 should be read in light of the basic duty of directors set forth in Proposed subsection 8.01(b) that the "business and affairs of a corporation [shall be] managed under the direction of" the board. Since the board may delegate or assign to appropriate officers of the corporation the authority or duty to exercise powers that Proposed section 8.01 does not require the board to retain, directors are not personally responsible under Proposed section 8.30 for actions or omissions of officers, employees, or agents of the corporation so long as the directors, complying with the standard of care set forth in section 8.30, have acted reasonably in delegating responsibility.

Proposed subsection 8.30(a) establishes a general standard of care for all directors. It requires a director to exercise "the care an ordinarily prudent person in a like position would exercise." Some state statutes use the words "diligence," "care," and "skill" to define this duty. E.g., N.C. GEN. STAT. ANN. §55-35 (1975). There is very little authority as to what "skill" and "diligence," as distinguished from "care," can be required or properly expected of corporate directors in the performance of their duties. "Skill," in the sense of technical competence in a particular field, should not be a qualification for the office of director. The concept of "diligence" is sufficiently subsumed within the concept of "care." Accordingly, the words "diligence" and "skill" were omitted from the standard adopted.

Likewise, Proposed section 8.30 does not use the term "fiduciary" in the standard for directors' conduct, because that term could be confused with the unique attributes and obligations of a fiduciary imposed by the law of trusts, some of which are not appropriate for directors of a corporation.

Several of the phrases chosen to define the general standard of care in Proposed subsection 8.30(a) deserve specific mention:

(1) The reference to "ordinarily prudent person" embodies long traditions of the common law, in contrast to suggested standards that might call for some undefined degree of expertise, like "ordinarily prudent businessperson." The phrase recognizes the need for innovation, essential to profit orientation, and focuses on the basic director attributes of common sense, practical wisdom, and informed judgment.

(2) The phrase "in a like position" recognizes that the "care" under consideration is that which would be used by the "ordinarily prudent person" if such person were a director of the particular corporation.

(3) The combined phrase "in a like position ... under similar circumstances" is intended to recognize that (a) the nature and extent of responsibilities will vary, depending upon such factors as the size, complexity, urgency, and location of activities carried on by the particular corporation, (b) decisions must be made on the basis of the information known to the directors without the

> benefit of hindsight, and (c) the special background, qualifications, and management responsibilities of a particular director may be relevant in evaluating the director's compliance with the standard of care. Even though the quoted phrase takes into account the special background, qualifications and management responsibilities of a particular director, it does not excuse a director lacking business experience or particular expertise from exercising the common sense, practical wisdom, and informed judgment of an "ordinarily prudent person."

The process by which a director becomes informed will vary but the duty of care requires every director to take steps to become informed about the background facts and circumstances before taking action on the matter at hand. The omission of the words "reasonable inquiry," present in the old law, is not intended to work any substantive change in the law.

In relying upon the performance by management of delegated or assigned duties pursuant to Proposed section 8.01 (including, for example, matters of law and legal compliance), the director may depend upon the presumption of regularity, absent knowledge or notice to the contrary. A director may also rely on information, opinions, reports, and statements prepared or presented by others as set forth in Proposed subsection 8.30(b).

A director complying with the standards expressed in Proposed subsection 8.30(a) is entitled to rely upon information, opinions, reports or statements, including financial statements and other financial data, prepared or presented by the persons or committees described in Proposed subsection 8.30(b). The right to rely under this section applies to the entire range of matters for which the board of directors is responsible. Under Proposed subsection 8.30(c), however, a director so relying must be without knowledge concerning the matter in question that would cause the director's reliance to be unwarranted. Also inherent in the concept of good faith is the requirement that, in order to be entitled to rely on a report, statement, opinion, or other matter, the director must have read the report or statement in question, or have been present at a meeting at which it was orally presented or summarized, or have taken other steps to become generally familiar with its contents. In short, the director must comply with the general standard of care of Proposed subsection 8.30(a) in making a judgment as to the reliability and competence of the source of information upon which the director proposes to rely.

Proposed subsection 8.30(b) permits reliance upon outside advisers, including not only those in the professional disciplines customarily supervised by state authorities, such as lawyers, accountants, and engineers, but also those in other fields involving special experience and skills, such as investment bankers, geologists, management consultants, actuaries, and real estate appraisers. The concept of "expert competence" in Proposed subsection 8.30(b)(2) embraces a wide variety of qualifications and is not limited to the more precise and narrower recognition of experts under the Securities Act of 1933. In this respect Proposed subsection 8.30(b) goes beyond many existing state business corporation acts, although several state statutes permit reliance on reports of appraisers selected with reasonable care by the board of directors and deal with the scope and nature of corporate reports and records generally.

Proposed subsection 8.30(b) permits reliance upon a committee of the board of directors when performing a supervisory or other functions. For example, there may be reliance upon an investigation undertaken by a board committee and reported to the full board of directors, which forms the basis for action by the board of directors itself. Another example is reliance upon a committee of the board of directors, such as a corporate audit committee, with respect to the ongoing role of oversight of the accounting and auditing functions of the corporation. In addition, where reliance upon information or materials prepared or presented by a board committee is not involved, a director may properly rely on dispositive action by a board committee (of which the director is not a member) empowered to act pursuant to authority delegated under Proposed section 8.25 or acting with the acquiescence of the board of directors. See Comment to Proposed section 8.25. A director may similarly rely on committees not created under Proposed section 8.25 which have nondirector members.

In conditioning reliance upon reasonable belief that the board committee merits the director's "confidence," Proposed subsection 8.30(b)(3) recognizes a difference between a board committee and an expert. In Proposed subsections 8.30(b)(1) and (2) the reference is to "competence of an expert," which recognizes the expectation of experience and in most instances technical skills on the part of those upon whom the director may rely. In Proposed subsection 8.30(b)(3), the concept of "confidence" is substituted for "competence" in order to avoid any inference that technical skills are a prerequisite.

By identifying those upon whom a director may rely in discharging the director's duties, Proposed subsection 8.30(b) does not limit the ability of directors to delegate their powers under Proposed sections 8.01(a) and 8.25 to committees of the board of directors or officers of the corporation, except where this delegation is expressly prohibited by the Proposed Act. Delegation should be carried out in accordance with the standards set forth in Proposed subsection 8.30(a).

Proposed subsection 8.30(c) expressly prevents a director from "hiding his or her head in the sand" and relying on information, opinions, reports, or statements when the director has actual knowledge which makes reliance unwarranted.

Proposed subsection 8.30(d) is self-executing, and the individual director's exoneration from liability is automatic. If compliance with the standard of conduct set forth in Proposed section 8.30 is established, there is no need to consider possible application of the business judgment rule. The possible application of the business judgment rule need only be considered if compliance with the standard of conduct set forth in Proposed section 8.30 is not established.

Proposed subsection 8.30(d) makes clear that the section will apply whether or not affirmative action was in fact taken. If the board of directors or a committee considers an issue (such as a recommendation of independent auditors concerning the corporation's internal accounting controls) and determines not to take action, the determination not to act is protected by Proposed section 8.30. Similarly, if the board of directors or committee delegates responsibility for handling a matter to subordinates, the delegation constitutes "action" under Proposed section 8.30. Proposed subsection 8.30(d) applies (assuming its requirements are satisfied) to any conscious consideration of matters involving the affairs of the corporation. It also applies to the determination by the board of directors of which matters to address and which not to address. Proposed subsection 8.30(d) does not apply only when the director has failed to consider taking action which under the circumstances the director is obliged to consider taking.

Proposed section 8.30 generally deals only with directors. Proposed section 8.42 and its Comment explain the extent to which the provisions of Proposed section 8.30 apply to officers.

* * * * *

RCW 23B.08.310
LIABILITY FOR UNLAWFUL DISTRIBUTIONS

CURRENT SECTION

(1) A director who votes for or assents to a distribution made in violation of RCW 23B.06.400 or the articles of incorporation is personally liable to the corporation for the amount of the distribution that exceeds the amount that could have been distributed without violating RCW 23B.06.400 or the articles of incorporation if it is established that the director did not perform the director's duties in compliance with RCW 23B.08.300. In any proceeding commenced under this section, a director has all of the defenses ordinarily available to a director.

(2) A director held liable under subsection (1) of this section for an unlawful distribution is entitled to contribution:

(a) From every other director who could be held liable under subsection (1) of this section for the unlawful distribution; and

(b) From each shareholder for the amount the shareholder accepted knowing the distribution was made in violation of RCW 23B.06.400 or the articles of incorporation.

(3) A shareholder who accepts a distribution made in violation of RCW 23B.06.400 or the articles of incorporation is personally liable to the corporation for the amount of any distribution received by the shareholder to the extent it exceeds the amount that could have been distributed to the shareholder without violating RCW 23B.06.400 or the articles of incorporation, if it is established that the shareholder accepted the distribution knowing that it was made in violation of RCW 23B.06.400 or the articles of incorporation.

(4) A shareholder held liable under subsection (3) of this section for an unlawful distribution is entitled to contribution from every other shareholder who could be held liable under subsection (3) of this section for the unlawful distribution.

(5) A proceeding under this section is barred unless it is commenced prior to the earlier of (a) the expiration of two years after the date on which the effect of the distribution was measured under RCW 23B.06.400(4), or (b) the expiration of the survival period specified in RCW 23B.14.340.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §98 (eff. 7-1-90)

(1) A director who votes for or assents to a distribution made in violation of RCW 23B.06.400 or the articles of incorporation is personally liable to the corporation for the amount of the distribution that exceeds what could have distributed without violating RCW 23B.06.400 or the articles of incorporation if it is established that the director did not perform the director's duties in compliance with RCW 23B.08.300. In any proceeding commenced under this section, a director has all of the defenses ordinarily available to a director.

(2) A director held liable under subsection (1) of this section for an unlawful distribution is entitled to contribution:

(a) From every other director who could be held liable under subsection (1) of this section for the unlawful distribution; and

(b) From each shareholder for the amount the shareholder accepted knowing the distribution was made in violation of RCW 23B.06.400 or the articles of incorporation.

(3) A proceeding under this section is barred unless it is commenced within two years after the date on which the effect of the distribution was measured under RCW 23B.06.400(4).

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3044-45 (1989)

Section 8.31 Liability For Unlawful Distributions.

Although the revisions to the financial provisions of both the old and Proposed Act have simplified and rationalized the rules for determining the validity of distributions (see Proposed section 6.40), the possibility remains that a distribution may be made in violation of these rules. Proposed section 8.31 provides that if it is established that a director failed to meet the standards of conduct of Proposed section 8.30 and voted for or assented to an unlawful distribution, the director is personally liable for the portion of the distribution that exceeds the maximum amount that could have been lawfully distributed. It also expressly preserves for a director all defenses which would ordinarily be available, notably the common law business judgment rule.

The explicit reference to the availability of defenses ordinarily available to a director was not contained in the old law, and may well be unnecessary. This declaration was included in the current text for two reasons. First, Proposed section 8.31 is the only provision in the Proposed Act specifying personal liability for directors in the event of failure to comply with the statute (specifically Proposed section 6.40), and the absence of the declaration might have provided the basis for an argument that the standards for Proposed section 6.40 were different than in other cases, a result not intended by the Proposed Act. Second, the declaration was inserted to make section 8.31 congruent with the intent of Proposed subsection 8.30(d), which states that the director is automatically shielded from liability if the director's compliance with Proposed section 8.30 is established and that the application of the business judgment rule need only be considered if compliance with the standard of conduct set forth in Proposed section 8.30 is not established. A director who is compelled to restore the amount of an unlawful distribution to the corporation is entitled to contribution from every other director who could have been held liable for the unlawful distribution. The director may also recover the amounts paid to any shareholder who accepted the payments knowing that they were in violation of the statute. A shareholder who receives a payment not knowing of its invalidity is entitled to retain it. Although no attempt has been made in the Proposed Act to work out in detail the relationship between this right of recoupment from shareholders and the right of contribution from assenting directors, it is expected that a court will equitably apportion the obligations and benefits arising from the application of the principles set forth in this section.

Proposed subsection 8.31(c) limits the time within which a proceeding may be commenced against a director for an unlawful distribution to two years after the date on which the effect of the distribution was measured.

AMENDMENTS TO ORIGINAL SECTION

Laws 2006, ch. 52, §3 (eff. 6-7-06)

(1) A director who votes for or assents to a distribution made in violation of RCW 23B.06.400 or the articles of incorporation is personally liable to the corporation for the amount of the distribution that exceeds ~~what~~ the amount that could have been distributed without violating RCW 23B.06.400 or the articles of incorporation if it is established that the director did not perform the director's duties in compliance with RCW 23B.08.300. In any proceeding commenced under this section, a director has all of the defenses ordinarily available to a director.

(2) A director held liable under subsection (1) of this section for an unlawful distribution is entitled to contribution:

(a) From every other director who could be held liable under subsection (1) of this section for the unlawful distribution; and

(b) From each shareholder for the amount the shareholder accepted knowing the distribution was made in violation of RCW 23B.06.400 or the articles of incorporation.

(3) A shareholder who accepts a distribution made in violation of RCW 23B.06.400 or the articles of incorporation is personally liable to the corporation for the amount of any distribution received by the shareholder to the extent it exceeds the amount that could have been distributed to the shareholder without violating RCW 23B.06.400 or the articles of incorporation, if it is established that the shareholder accepted the distribution knowing that it was made in violation of RCW 23B.06.400 or the articles of incorporation.

(4) A shareholder held liable under subsection (3) of this section for an unlawful distribution is entitled to contribution from every other shareholder who could be held liable under subsection (3) of this section for the unlawful distribution.

(5) A proceeding under this section is barred unless it is commenced ~~within~~ prior to the earlier of (a) the expiration of two years after the date on which the effect of the distribution was measured under RCW 23B.06.400(4), or (b) the expiration of the survival period specified in RCW 23B.14.340.

CARC COMMENTARY

We propose clarifying that creditors do have the ability to pursue assets distributed by a dissolved corporation to its shareholders, if the shareholders have received the assets knowing that the distribution was wrongful as to creditors. While there is some older Washington case law suggesting that an earlier statute did allow creditors to satisfy their claims out of assets distributed to shareholders (*see, e.g., Lonsdale v. Chesterfield*, 99 Wn. 2d 353, 662 P.2d 385 (1983)), the most recent ruling addressing the subject concludes that there is no statutory basis for allowing creditors to pursue assets distributed to shareholders by a corporation that has dissolved without establishing a reserve for known creditors' claims (*Woods v. Noble Manor Co.,* 123 Wn. App. 1026, 2004 WL 2095536 (Wash. App. Div. 2). See also general commentary on the 2006 amendments to RCW 23B.14 under RCW 23B.14.010.

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RCW 23B.08.320
LIMITATION ON LIABILITY OF DIRECTORS

CURRENT SECTION

The articles of incorporation may contain provisions not inconsistent with law that eliminate or limit the personal liability of a director to the corporation or its shareholders for monetary damages for conduct as a director, provided that such provisions shall not eliminate or limit the liability of a director for acts or omissions that involve intentional misconduct by a director or a knowing violation of law by a director, for conduct violating RCW 23B.08.310, or for any transaction from which the director will personally receive a benefit in money, property, or services to which the director is not legally entitled. No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §99 (eff. 7-1-90)
Same as current.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3045-46 (1989)
Section 8.32 Limitation On Liability of Directors.
Proposed section 8.32 separates, for emphasis, the Washington Business Corporation Act subsection adopted in 1987 that permitted articles of incorporation to contain provisions that eliminated or limited the personal liability of directors (with stated exceptions). The Comment to the 1987 legislation follows.

> 1. General comments:
> A number of recent events have resulted in a significant increase in the risk of liability encountered by directors of a corporation: (1) directors as a result of increased takeover and merger activity have with greater frequency been exposed to decisions in which their corporation's survival as an independent entity is involved; (2) dissatisfied shareholders have sued directors in connection with almost every hostile takeover attempt in recent years, framing complaints based on state corporation laws, securities laws, or RICO; (3) courts, as a result of decisions like Smith v. Van Gorkom, 488 A.2d 858 (Del. l985), are perceived to have imposed more stringent standards regarding directors' disclosure, care and loyalty; and (4) insurance companies, as a result of some extraordinarily large claim settlements, either withdrew from offering directors' and officers' insurance, cancelled such policies for high-risk corporations, or rewrote such policies to enlarge exclusions, reduce coverage and substantially increase premiums.
>
> The issue came to the attention of the WSBA Corporate Act Revision Committee this summer 1986 when several events confirmed the existence of a significant problem in Washington. Numerous companies reported either resignations of outside directors, or difficulty in obtaining qualified candidates for outside directorships. Statutes in a number of jurisdictions (e.g., Virginia, Maryland, Indiana, Missouri, Delaware, and New York) were enacted, or proposed (e.g., Texas, Michigan, Louisiana, Utah), to modify some of the legal rules thought to exacerbate the problem. Finally, a number of Washington corporations either reincorporated in a state with such legislation (e.g., Microsoft) or sought advice about such reincorporation.

The committee concluded that it was appropriate to recommend to the Board of Governors, and ultimately to the legislature, that legislation be adopted to ameliorate the problem. The committee reviewed a number of measures, including a statutory limitation on the amount of directors' liability, a change in the standard of culpability for directors, a provision authorizing shareholders' limitations on liability of directors, and a change in directors' indemnification provisions. It concluded that a combination of the last two approaches seemed most appropriate for Washington corporations.

2. Comment concerning proposed amendment to RCW 23A.12.020 (Contents Articles of Incorporation).

RCW 23A.12.020 would be amended to authorize a new optional provision in the articles of incorporation eliminating or limiting the personal liability of a director for monetary damages for conduct as a director. The provision is modeled on Delaware Gen. Corp.L. §102(b)(7) (added to that statute effective July 1, 1986). The central concept of the provision is that shareholders, as owners of a corporation, should have the right to decide whether such a limitation on liability of directors is an appropriate means of obtaining the services of qualified directors. Such limitation is analogous to trust law principles which authorize a settler to limit the liability of a trustee for breach of trust. See 1 Restatement of Trusts (2d) §222 (1959). The exceptions to the proposed limitation on liability are also quite analogous to those set forth in the Restatement.

The proposed amendment makes a number of changes in the specific language of the Delaware provision:

(1) Delaware permits a limitation on monetary damages "for breach of fiduciary duty as a director." The Committee concluded that "breach of fiduciary duty" is not a clearly defined term, and thus might lead to litigation over its meaning or to subterfuges (e.g., suits against directors for the tort of negligence.) It chose instead "for conduct as a director," which avoids the difficulties and is similar to language used in connection with indemnification under RCW 23A.08.025.

(2) Delaware excludes from the limitation liability "for any breach of the director's duty of loyalty to the corporation or its stockholders." The Committee concluded that the "duty of loyalty" is not a clearly defined term, and that the main content of such duty, receipt of personal benefit, was explicitly excluded under a later clause.

(3) Delaware excludes from the limitation liability "for acts or omissions not in good faith." The Committee concluded that "good faith" is not a clearly defined term.

(4) Delaware excepts liability "for any transaction from which the director derived an improper personal benefit." The Committee concluded that improper personal benefit was not clearly defined. It chose instead to refer to personal receipt of benefits to which the director was not entitled, language adapted from the New York indemnification statute. The proposed amendment does not affect the ability of shareholders to obtain injunctive or equitable relief against directors for any breach of duty.

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RCW 23B.08.400
OFFICERS

CURRENT SECTION

(1) A corporation has the officers described in its bylaws or appointed by the board of directors in accordance with the bylaws.

(2) A duly appointed officer may appoint one or more officers or assistant officers if authorized by the bylaws or the board of directors.

(3) The bylaws or the board of directors shall delegate to one of the officers responsibility for preparing minutes of the directors' and shareholders' meetings and for authenticating records of the corporation.

(4) The same individual may simultaneously hold more than one office in a corporation.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §100 (eff. 7-1-90)
Same as current.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3046-47 (1989)
Section 8.40 Officers.
Proposed section 8.40 permits every corporation to designate the officers it wants. The designation may be made in the bylaws or by the board of directors if such designation is consistent with the bylaws. This is a departure from the old law and most state corporation acts, which require certain officers, usually the president, one or more vice presidents, the secretary, and the treasurer, and generally authorize the corporation to designate additional or assistant officers. Experience has shown, however, that little purpose is served by a statutory requirement that there be certain officers, and that statutory requirements may sometimes create problems of implied or apparent authority or confusion with nonstatutory offices the corporation desires to create.

The board of directors may appoint assistant officers pursuant to its general powers under Proposed subsection 8.40(a); duly appointed officers may also appoint assistant officers if authorized by the board under Proposed subsection 8.40(b).

Throughout the Proposed Act, the act of a board designating an officer is referred to as an "appointment" rather than an "election." The Act also consistently uses the word "elect" when referring to the selection of directors, thus emphasizing the difference in the selection process.

The board of directors, as well as duly appointed corporate officers or other agents, may also appoint agents for the corporation.

The bylaws or the board of directors must also delegate to an officer the responsibility to prepare minutes and authenticate records of the corporation; the person performing this function is referred to as the "secretary" of the corporation throughout the Proposed Act. See Proposed section 1.40. Under the Proposed Act a corporation may have this and all other corporate functions performed by a single individual functioning as its only officer.

The person who is designated by the bylaws or the board as responsible for maintaining minutes of meetings and authenticating records of the corporation thereby has authority to bind the corporation by the

person's authentication under this section. This delegation of authority, traditionally vested in the corporate "secretary," allows third persons to rely on authenticated records without inquiring into their truth or accuracy.

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RCW 23B.08.410
DUTIES OF OFFICERS

CURRENT SECTION

Each officer has the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with the bylaws, the duties prescribed by the board of directors or by an officer authorized by the board of directors to prescribe the duties of other officers.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §101 (eff. 7-1-90)
Same as current.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3047 (1989)
Section 8.41 Duties of Officers.
Proposed section 8.41 recognizes that persons designated as officers have the formal authority set forth for that position (1) by its description in the bylaws, (2) by specific resolution of the board of directors, or (3) by direction of another officer authorized by the board of directors to prescribe the duties of other officers.

These methods of investing officers with formal authority do not exhaust the sources of an officer's actual or apparent authority. Many cases state that specific corporate officers, particularly the chief executive officer, may have apparent authority merely by virtue of their positions. This authority, which may overlap the express authority granted by the bylaws, generally has been viewed as extending only to ordinary business transactions, though some cases have recognized usually broad apparent authority of the chief executive officer or have created a presumption that corporate officers have broad authority, thereby placing on the corporation the burden of showing lack of authority.

In addition to express, implied, or apparent authority, a corporation is normally bound by unauthorized acts of officers if they are ratified by the board of directors. Generally, ratification extends only to acts that could have been authorized as an original matter. Ratification may itself be expressed or implied and may in some cases serve as the basis of apparent authority.

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RCW 23B.08.420
STANDARDS OF CONDUCT FOR OFFICERS

CURRENT SECTION

(1) An officer with discretionary authority shall discharge the officer's duties under that authority:
(a) In good faith;
(b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
(c) In a manner the officer reasonably believes to be in the best interests of the corporation.
(2) In discharging the officer's duties, the officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:
(a) One or more officers or employees of the corporation whom the officer reasonably believes to be reliable and competent in the matters presented; or
(b) Legal counsel, public accountants, or other persons as to matters the officer reasonably believes are within the person's professional or expert competence.
(3) An officer is not acting in good faith if the officer has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (2) of this section unwarranted.
(4) An officer is not liable for any action taken as an officer, or any failure to take any action, if the officer performed the duties of the officer's office in compliance with this section.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §102 (eff. 7-1-90)
Same as current.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3047 (1989)
Section 8.42 Standards of Conduct for Officers.
This section provides that a nondirector officer with discretionary authority must meet the same standards of conduct required of directors under Proposed section 8.30. But the officer's ability to rely on information, reports, or statements, may, depending upon the circumstances of the particular case, be more limited than in the case of a director in view of the greater obligation the officer may have to be familiar with the affairs of the corporation. See Proposed subsection 8.42(b). Nondirector officers with more limited discretionary authority may be judged by a narrower standard. The Comment to Proposed section 8.30 is generally applicable to nondirector officers as well as to directors.

The adoption of Proposed section 8.42 would change much of the reasoning that appears in Para-Medical Leasing, Inc. v. Hangen, 48 Wash. App. 389 (1987). In that case, the court held that the standards stated in old RCW 23A.08.343 did not apply to an officer of a corporation. It also held that the rules of agency related to an agent's duty of care to the principal did not apply to an officer. It said: "In considering the action of a corporate officer, however, the business judgment rule rather than the standard of ordinary care applies." 48 Wash. App. at 396. Adoption of Proposed section 8.42 would make clear that the standard of

care prescribed therein does apply to officers with discretionary authority. Indeed, Proposed subsection 8.42(d) makes clear that if compliance with the standard of conduct set forth in the section is established, there is no need to consider application of the business judgment rule. If, on the other hand, compliance with the standard of conduct set forth in the section is not shown, possible application of the business judgment rule may be considered. But given the overlap in the requirements imposed by most courts for operation of the business judgment rule (see, e.g., Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985)) and the requirements set forth in Proposed section 8.42, it would appear that there should be few cases in which a court would be able to find that an officer whose conduct failed to meet the requirements of Proposed section 8.42 nevertheless was exonerated by the business judgment rule.

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RCW 23B.08.430
RESIGNATION AND REMOVAL OF OFFICERS

CURRENT SECTION

(1) An officer may resign at any time by delivering notice to the corporation. A resignation is effective when the notice is delivered unless the notice specifies a later effective date.

(2) A board of directors may remove any officer at any time with or without cause. An officer or assistant officer, if appointed by another officer, may be removed by any officer authorized to appoint officers or assistant officers.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §103 (eff. 7-1-90)
Same as current.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3047-48 (1989)
Section 8.43 Resignation and Removal of Officers.
Proposed subsection 8.43(a) is declaratory of current law. It recognizes that corporate officers may resign, and that they may resign effective at a later date.

In part because of the unlimited power of removal, confirmed by Proposed subsection 8.43(b), a board of directors may grant an officer an employment contract that extends beyond the term of the board of directors. This type of contract is binding on the corporation even if the articles of incorporation or bylaws provide that officers are appointed for a term shorter than the period of the employment contract. If a later board of directors refuses to reappoint that person as an officer, the officer has the right to sue for damages but not for specific performance of the officer's employment contract.

Proposed subsection 8.43(b) is also declaratory of current law. The tenure of all corporate officers is subject to the will of the board of directors. If the board of directors loses confidence in a corporate officer, that officer may be removed irrespective of contract rights or the presence or absence of "cause" in a legal sense. Proposed section 8.44 provides that removal of an officer who has contract rights is without prejudice to whatever rights the former officer may assert in a suit for damages for breach of contract.

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RCW 23B.08.440
CONTRACT RIGHTS OF OFFICERS

CURRENT SECTION

(1) The appointment of an officer does not itself create contract rights.

(2) An officer's removal does not affect the officer's contract rights, if any, with the corporation. An officer's resignation does not affect the corporation's contract rights, if any, with the officer.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §104 (eff. 7-1-90)
Same as current.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3048 (1989)
Section 8.44 Contract Rights of Officers.
Proposed section 8.44 makes clear that the appointment of an officer does not itself create contract rights in the officer. The removal of an officer with contract rights is without prejudice to the officer's later enforcement of contract rights in a suit for damages for breach of contract. Similarly, an officer with an employment contract who prematurely resigns may be in breach of the officer's employment contract. The mere appointment of an officer for a term does not create a contractual obligation on the officer's part to complete the term.

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RCW 23B.08.500
INDEMNIFICATION DEFINITIONS

CURRENT SECTION

For purposes of RCW 23B.08.510 through 23B.08.600:

(1) "Corporation" includes any domestic or foreign predecessor entity of a corporation in a merger or other transaction in which the predecessor's existence ceased upon the effective date of the transaction.

(2) "Director" means an individual who is or was a director of a corporation or an individual who, while a director of a corporation, is or was serving at the corporation's request as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise. A director is considered to be serving an employee benefit plan at the corporation's request if the director's duties to the corporation also impose duties on, or otherwise involve services by, the director to the plan or to participants in or beneficiaries of the plan. "Director" includes, unless the context requires otherwise, the estate or personal representative of a director.

(3) "Expenses" include counsel fees.

(4) "Liability" means the obligation to pay a judgment, settlement, penalty, fine, including an excise tax assessed with respect to an employee benefit plan, or reasonable expenses incurred with respect to a proceeding.

(5) "Official capacity" means: (a) When used with respect to a director, the office of director in a corporation; and (b) when used with respect to an individual other than a director, as contemplated in RCW 23B.08.570, the office in a corporation held by the officer or the employment or agency relationship undertaken by the employee or agent on behalf of the corporation. "Official capacity" does not include service for any other foreign or domestic corporation or any partnership, joint venture, trust, employee benefit plan, or other enterprise.

(6) "Party" includes an individual who was, is, or is threatened to be made a named defendant or respondent in a proceeding.

(7) "Proceeding" means any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative and whether formal or informal.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §105 (eff. 7-1-90)

Same as current, except that subsection (1) stated:

(1) "Corporation" includes any domestic or foreign predecessor entity of a corporation in a merger or other transaction in which the predecessor's existence ceased upon consummation of the transaction.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3048-49 (1989)

Section 8.50 Indemnification Definitions.

The definitions set forth in Proposed section 8.50 apply only to Proposed sections 8.51-8.60 and have no application elsewhere in the Proposed Act.

A special definition of "corporation" is included in Proposed section 8.50 to make it clear that predecessor entities that have been absorbed in mergers or other transactions are included within the definition. It is probable that the same result would be reached for many transactions under Proposed section 11.06 (effect of merger or share exchange), which provides for the assumption of liabilities by operation of law upon a merger. The express responsibility of successor entities for the liabilities of their predecessors under Proposed sections 8.51-8.60 is broader than under Proposed section 11.06 and may impose liability on a successor even though Proposed section 11.06 does not. Proposed subsection 8.50(1) is thus an essential aspect of the protection provided by Proposed sections 8.51-8.60 for persons eligible for indemnification.

A special definition of "director" is included in Proposed section 8.50 to make it clear that a person who is or was a director is covered by Proposed sections 8.51-8.60 while serving at the corporation's request in another enterprise. The purpose of this definition is to give directors the benefits of the protection of the Proposed sections 8.51-8.60 while serving at the corporation's request in a responsible position in employee benefit plans, trade associations, nonprofit or charitable entities, foreign or domestic entities, and other kinds of profit or nonprofit ventures. A director serving at the corporation's request in such a venture is viewed as acting as a director of the corporation for purposes of Proposed sections 8.51-8.60 even though the director is also acting in some other capacity in the other venture.

The second sentence of Proposed subsection 8.50(2) addresses the question of liabilities arising under the Employee Retirement Income Security Act (ERISA). It makes clear that a director who is serving as a fiduciary of an employee benefit plan is nevertheless viewed as acting as a director for purposes of Proposed sections 8.51-8.60. Special treatment is felt to be necessary because of the broad definition of "fiduciary" in section 3(21) of ERISA, 29 U.S.C. section 1002(21) (1974), and the requirement of section 404 (section 1104(a)) that a "fiduciary" must discharge the fiduciary's duties "solely in the interest" of the participants and beneficiaries of the employee benefit plan. Decisions by a director serving as a fiduciary under the plan on questions regarding eligibility for benefits, investment decisions, and interpretation of plan provisions regarding qualifying service, years of service, and retroactivity are all subject to the protections of Proposed sections 8.51-8.60. See also Proposed subsections 8.50(4) and 8.51(b). Similar provisions appear in the business corporation acts of New York, N.Y. BUS. CORP. LAW ANN. section 723 (McKinney 1963), and Connecticut, CONN. GEN. STAT. ANN. section 33-320a (West Supp. 1981).

The estate or personal representative of a director is entitled to the rights of indemnification possessed by the director. See the last sentence of Proposed subsection 8.50(2). The phrase, "unless the context requires otherwise," was added to make clear that the estate or personal representative did not have the right to participate in directorial decisions whether to grant indemnification authorized in Proposed sections 8.51-8.60.

"Expenses" is defined to include counsel fees to avoid repeated references to such fees every time "expenses" appears throughout Proposed sections 8.51-8.60.

"Liability" is defined for convenience, to avoid repeated references to recoverable items throughout Proposed sections 8.51-8.60. Even though the definition of "liability" includes both expenses and amounts paid to satisfy or to settle substantive claims, indemnification against substantive claims is not allowed in several provisions in Proposed sections 8.51-8.60. For example, indemnification in suits brought by or in the name of the corporation is limited to expenses. See Proposed subsection 8.51(e).

The definition of "liability" permits the indemnification only of "reasonable expenses incurred." The intention is that any portion of expenses falling outside the perimeter of reasonableness should not be indemnified, and that, if necessary, an allocation of expenses should be made. By contrast, unlike the old law and statutes of many states, Proposed subsection 8.50(4) provides that amounts paid to settle or satisfy substantive claims are not subject to a reasonableness test. Since payment of these amounts is permissive -- mandatory indemnification is available under Proposed section 8.52 only where the defendant is "wholly successful"-- a special limitation of "reasonableness" for settlements is inappropriate. Further, it is undesirable to base the statutory test of power to indemnify on an affirmative finding that a settlement is reasonable. Indeed, the grant of authority to indemnify only those settlements that are "reasonable" would

suggest an "all or nothing" approach inconsistent with the basic philosophy of indemnification of "reasonable" expenses.

"Penalties" and "fines" are expressly included within the definition of "liability" so that in appropriate cases these items may also be indemnified. See Proposed section 8.51. The purpose of this definition is to cover every type of monetary obligation that may be imposed upon a director, including civil penalties (which have been authorized in a number of recent statutes), restitution, and obligations to give notice (which are proposed as part of the revision of the federal criminal code). This definition also expressly includes the levy of excise taxes under the Internal Revenue Code pursuant to ERISA within the definition of "fines."

The definition of "official capacity" is necessary because the term determines which of the two alternative standards of conduct set forth in Proposed section 8.51 applies: if action is taken in an "official capacity," the person to be indemnified must have reasonably believed he or she was acting in the best interests of the corporation, while if the action in question was not taken in his or her "official capacity," the director need only have reasonably believed that the conduct was not opposed to the best interests of the corporation.

The definition of "party" establishes the basic coverage of the Proposed sections 8.51-8.60. The definition includes every individual "who was, is, or is threatened to be made a named defendant or respondent in a proceeding." A person who is only called as a witness is not a "party" within this definition, and as specifically provided in Proposed subsection 8.59(b), indemnification of this person is not limited by this subchapter.

The broad definition of "proceeding" ensures that the benefits of Proposed sections 8.51-8.60 will be available to directors in new and unexpected, as well as traditional, types of proceedings whether civil, criminal, administrative, or investigative. It also includes appeals in lawsuits and petitions to review administrative actions.

AMENDMENTS TO ORIGINAL SECTION
Laws 2009, ch. 189, §28 (eff. 7-26-09)*(amends only subsection (1))*
(1) "Corporation" includes any domestic or foreign predecessor entity of a corporation in a merger or other transaction in which the predecessor's existence ceased upon ~~consummation~~ the effective date of the transaction.

CARC COMMENTARY
The term “corporate action” is defined and used throughout the Washington Business Corporation Act for consistency and to clarify the distinction between the matter being approved versus the action of approving.

* * * * *

RCW 23B.08.510
AUTHORITY TO INDEMNIFY

CURRENT SECTION

(1) Except as provided in subsection (4) of this section, a corporation may indemnify an individual made a party to a proceeding because the individual is or was a director against liability incurred in the proceeding if:

(a) The individual acted in good faith; and

(b) The individual reasonably believed:

(i) In the case of conduct in the individual's official capacity with the corporation, that the individual's conduct was in its best interests; and

(ii) In all other cases, that the individual's conduct was at least not opposed to its best interests; and

(c) In the case of any criminal proceeding, the individual had no reasonable cause to believe the individual's conduct was unlawful.

(2) A director's conduct with respect to an employee benefit plan for a purpose the director reasonably believed to be in the interests of the participants in and beneficiaries of the plan is conduct that satisfies the requirement of subsection (1)(b)(ii) of this section.

(3) The termination of a proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent is not, of itself, determinative that the director did not meet the standard of conduct described in this section.

(4) A corporation may not indemnify a director under this section:

(a) In connection with a proceeding by or in the right of the corporation in which the director was adjudged liable to the corporation; or

(b) In connection with any other proceeding charging improper personal benefit to the director, whether or not involving action in the director's official capacity, in which the director was adjudged liable on the basis that personal benefit was improperly received by the director.

(5) Indemnification permitted under this section in connection with a proceeding by or in the right of the corporation is limited to reasonable expenses incurred in connection with the proceeding.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §106 (eff. 7-1-90)
Same as current.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3049-51 (1989)
Section 8.51 Authority to Indemnify.
The standards for indemnification of directors contained in Proposed subsection 8.51(a) define the outer limits for which indemnification of directors not authorized by shareholder action is permitted under the Proposed Act. A director whose conduct does not meet these standards is eligible for court-ordered indemnification under Proposed subsection 8.54(2) and for shareholder authorized indemnification under Proposed section 8.56. Conduct that falls within these outer limits does not automatically entitle directors

to indemnification, although many corporations have adopted bylaw provisions that obligate the corporation to indemnify directors to the maximum extent permitted by statute. Absent such a bylaw provision, Proposed section 8.52 defines a much narrower area in which the directors are entitled as a matter of right to indemnification.

The old law provided separate, but similarly worded, standards for indemnification in third-party suits and indemnification in suits brought by or in the name of the corporation. The Proposed Act establishes a single uniform test to make clear that the outer limits of conduct for which indemnification of directors is permitted should not be dependent on the type of proceeding in which the claim arises. To prevent circularity in recovery, however, Proposed subsection 8.51(e) limits indemnification in connection with suits brought by or in the name of the corporation to expenses incurred and excludes amounts paid to settle or satisfy substantive claims.

The standards of conduct described in Proposed subsections 8.51(a)(1) and 8.51(a)(2)(i)--that a director's conduct in his or her official capacity was in "good faith" and in the corporation's "best interests"--is closely related to the basic standards of conduct imposed by Proposed section 8.30, but the two standards are not identical. No attempt is made to define "good faith," a term used in both Proposed section 8.30 and Proposed section 8.51. The concept of good faith involves a subjective test, which would include "a mistake of judgment," even though made unwisely by objective standards. But the affirmative requirement of Proposed section 8.30--that the "care of an ordinarily prudent person in a like position" be exercised--is not included in the standard of conduct for indemnification. On the other hand, Proposed section 8.51 requires that there be a "reasonable" belief on the part of the director in most instances, and in the case of criminal proceedings that there be no "reasonable" cause to believe the conduct was unlawful. Accordingly, it is possible that a director who has not acted "with the care an ordinarily prudent person in a like position would exercise under similar circumstances," as required by Proposed section 8.30, could nevertheless be indemnified if the standard of Proposed section 8.51 were met. As a corollary, it is clear that a director who has met the Proposed section 8.30 standards of conduct would be eligible in virtually every case to be indemnified under Proposed section 8.51.

Proposed subsection 8.51(a)(2)(ii) requires, if a director is not acting in his or her official capacity, that the director's action be "at least not opposed to" the corporation's best interests. This standard is applicable to the director when serving another entity at the request of the corporation or when sued simply because he or she is or was a director. The words "at least" were added to qualify "not opposed to" in order to make it clear that this test is an outer limit for conduct other than in an official capacity.

This section makes clear that a director who is serving as a trustee or fiduciary for an employee benefit plan under ERISA meets the standard for indemnification under Proposed subsection 8.51(a) if the director reasonably believes the director's conduct was in the best interests of the participants in and beneficiaries of the plan. This standard is a specific application of the more general test that conduct not in official corporate capacity is indemnifiable if it is "at least not opposed to" the best interests of the corporation and provides a standard for indemnification that is consistent with the statutory policies embodied in ERISA.

The purpose of Proposed subsection 8.51(c) is to reject the argument that indemnification is automatically improper whenever a proceeding has been terminated on a basis that does not exonerate the director claiming indemnification. Even though a final judgment or conviction is not automatically determinative of the issue whether the minimum standard of conduct was met, any judicial determination of substantive liability would in most instances be entitled to considerable weight. By the same token, it is clear that the termination of a proceeding by settlement or plea of nolo contendere should not of itself create a presumption either that conduct met or did not meet the standard of Proposed section 8.51. On the other hand, a final determination of nonliability or acquittal automatically entitles the director to indemnification of expenses under Proposed section 8.52.

Proposed subsection 8.51(c) applies expressly to indemnification of expenses in derivative actions as well as to indemnification in third party suits. The most likely application of this subsection to derivative

actions will be to settlements since a judgment or order would normally result in liability to the corporation and thereby preclude all indemnification under Proposed subsection 8.51(d). In the rare event that a judgment or order entered against the director did not include a determination of liability to the corporation, the entry of the judgment or order would not be determinative that the director failed to meet the requisite standard of conduct.

Proposed subsection 8.51(d) makes clear that indemnification is not permissible under Proposed section 8.51 in the face of a finding of improper conduct either because liability is imposed in favor of the corporation in a suit brought by or in its name or because there is a finding that the director improperly received a personal benefit as a result of the director's conduct. Indemnification under this subsection is prohibited if a director is adjudged liable in a derivative suit because it is believed that there should be no indemnification in this situation unless a court first finds it proper. Proposed section 8.54 permits a director found liable to the corporation to petition a court for a judicial determination of entitlement to indemnification. Proposed section 8.56 authorizes shareholders in certain circumstances to indemnify directors found liable to the corporation. Voluntary indemnification is also prohibited if there has been an adjudication that a director improperly received a personal benefit, even if, for example, the director acted in a manner not opposed to the best interests of the corporation. Improper use of inside information for personal benefit should not be an action for which the corporation may provide indemnification, even if the corporation was not thereby harmed. Although it is unlikely that a person found liable for receiving an improper personal benefit would be found to have met the statutory standard of conduct set forth in Proposed subsection 8.51(a)(2)(ii), this limitation is made explicit in Proposed subsection 8.51(d)(2). Recourse to a court under Proposed section 8.54 may also be appropriate in some improper benefit cases--for example, where it would be unfair for a small personal benefit to foreclose indemnification in an expensive and complicated matter.

Proposed subsection 8.51(e) limits indemnification in suits brought by or in the right of the corporation to expenses incurred in connection with the proceeding. Its purpose is to avoid circularity that would be involved if a corporation seeks to indemnify a director for payments made in settlement by the director to the corporation. This subsection applies only to settlements since all indemnification is prohibited by Proposed subsection 8.51(d)(1)--subject to the right to seek judicially approved indemnification under Proposed section 8.54 or to seek shareholder approved indemnification under Proposed section 8.56--in cases where a director is "adjudged" liable to the corporation.

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RCW 23B.08.520
MANDATORY INDEMNIFICATION

CURRENT SECTION

Unless limited by its articles of incorporation, a corporation shall indemnify a director who was wholly successful, on the merits or otherwise, in the defense of any proceeding to which the director was a party because of being a director of the corporation against reasonable expenses incurred by the director in connection with the proceeding.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §107 (eff. 7-1-90)
Same as current.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3051-52 (1989)
Section 8.52 Mandatory Indemnification.
Proposed section 8.51 determines whether indemnification may be made voluntarily by a corporation if its directors elect to do so. Proposed section 8.52 determines whether a corporation must indemnify a director for the director's expenses; in other words, Proposed section 8.52 creates a statutory right of indemnification in favor of the director who meets the requirements of that section. Enforcement of this right by judicial proceeding is specifically contemplated by Proposed subsection 8.54(1), which also gives the director a statutory right to recover expenses incurred by the director in enforcing his or her statutory right to indemnification under Proposed section 8.52.

The basic standard for mandatory indemnification is that the director has been "wholly successful, on the merits or otherwise," in the defense of the proceeding. The word "wholly" is added to avoid the argument accepted in Merrit-Chapman & Scott Corp. v. Wolfson, 321 A.2d 138 (Del. 1974), that a defendant may be entitled to partial mandatory indemnification if the defendant succeeded by plea bargaining or otherwise to obtain the dismissal of some but not all counts of an indictment. A defendant is "wholly successful" only if the entire proceeding is disposed of on a basis which involves a finding of nonliability. However, the language in the old law and in many other state statutes that the basis of success may be "on the merits or otherwise" is retained. While this standard may result in an occasional defendant becoming entitled to indemnification because of procedural defenses not related to the merits (e.g., the statute of limitations or disqualification of the plaintiff), it is unreasonable to require a defendant with a valid procedural defense to undergo a possibly prolonged and expensive trial on the merits in order to establish eligibility for mandatory indemnification.

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RCW 23B.08.530
ADVANCE FOR EXPENSES

CURRENT SECTION

(1) A corporation may pay for or reimburse the reasonable expenses incurred by a director who is a party to a proceeding in advance of final disposition of the proceeding if:

(a) The director furnishes the corporation a written affirmation of the director's good faith belief that the director has met the standard of conduct described in RCW 23B.08.510; and

(b) The director furnishes the corporation a written undertaking, executed personally or on the director's behalf, to repay the advance if it is ultimately determined that the director did not meet the standard of conduct.

(2) The undertaking required by subsection (1)(b) of this section must be an unlimited general obligation of the director but need not be secured and may be accepted without reference to financial ability to make repayment.

(3) Authorization of payments under this section may be made by provision in the articles of incorporation or bylaws, by resolution adopted by the shareholders or board of directors, or by contract.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §108 (eff. 7-1-90)
Same as current.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3052 (1989)
Section 8.53 Advance For Expenses.
It is often critically important to a director who is made a party to a complex proceeding that the corporation the director served have power to make advances for expenses at the beginning of and during the proceeding. Adequate legal representation and adequate preparation of a defense may require substantial payments of expenses before a final determination, and unless the corporation may make advances for expenses, a defendant may be unable to finance the defendant's own defense. This problem is complicated by the fact that during the early stages of a proceeding (when advances are often needed) the facts underlying the claim cannot be fully evaluated and the board of directors therefore cannot accurately ascertain the ultimate propriety of indemnification.

Proposed subsection 8.53(a) requires a written affirmation by the director of the director's good faith belief that the director has met the standard of conduct necessary for indemnification by the corporation and a written undertaking by or on behalf of the director to repay the advance if it is ultimately determined that the director has not met the standard of conduct. Under Proposed subsection 8.53(b), the undertaking need not be secured and financial ability to repay is not a prerequisite. The theory underlying this subsection is that, in advancing expenses, wealthy directors should not be favored over directors whose financial resources are modest.

The limitations of Proposed section 8.53 apply only to persons who are directors at the time the advance is made. Thus the corporation may advance the expenses of former directors without obtaining the affirmation and undertaking otherwise required by Proposed subsection 8.53(a)(1) and (2).

The Committee deleted the RMA requirement that directors make a determination on the basis of facts known that indemnification is not precluded under Proposed section 8.51. It concluded that that requirement frequently led the board of directors to deny advances to directors for fear that liability might be imposed on directors authorizing the advances. It also concluded that the corporation's real protection in such situations was the director's written undertaking to repay the advance if it was later shown that the director had not met the standard of conduct.

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RCW 23B.08.540
COURT-ORDERED INDEMNIFICATION

CURRENT SECTION

Unless a corporation's articles of incorporation provide otherwise, a director of a corporation who is a party to a proceeding may apply for indemnification or advance of expenses to the court conducting the proceeding or to another court of competent jurisdiction. On receipt of an application, the court after giving any notice the court considers necessary may order indemnification or advance of expenses if it determines:

(1) The director is entitled to mandatory indemnification under RCW 23B.08.520, in which case the court shall also order the corporation to pay the director's reasonable expenses incurred to obtain court-ordered indemnification;

(2) The director is fairly and reasonably entitled to indemnification in view of all the relevant circumstances, whether or not the director met the standard of conduct set forth in RCW 23B.08.510 or was adjudged liable as described in RCW 23B.08.510(4), but if the director was adjudged so liable the director's indemnification is limited to reasonable expenses incurred unless the articles of incorporation or a bylaw, contract, or resolution approved or ratified by the shareholders pursuant to RCW 23B.08.560 provides otherwise; or

(3) In the case of an advance of expenses, the director is entitled pursuant to the articles of incorporation, bylaws, or any applicable resolution or contract, to payment or reimbursement of the director's reasonable expenses incurred as a party to the proceeding in advance of final disposition of the proceeding.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §109 (eff. 7-1-90)
Same as current.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3052-53 (1989)
Section 8.54 Court-Ordered Indemnification.
Proposed section 8.54 permits court-ordered indemnification in three situations: (1) a director entitled to mandatory indemnification may enforce that entitlement by judicial proceeding (in which case the court may also order the corporation to pay the reasonable expenses incurred in connection with the proceeding); (2) indemnification at the court's discretion is permitted in all cases whether or not the director met the requisite standard of conduct in Proposed section 8.51 or is otherwise ineligible for indemnification; and (3) a director entitled to advances for or reimbursement of expenses may enforce that entitlement by judicial proceeding. But indemnification with respect to derivative suits or improper benefit is limited to expenses by the last clause of Proposed subsection 8.54(2) unless the articles of incorporation or a bylaw, contract or resolution approved or ratified by the shareholders pursuant to Proposed section 8.56 provides otherwise.

Proposed subsection 8.54(3) is new and has no counterpart in either the Revised Model Act or the old law. It permits a director to sue for expense advances pursuant to charter, bylaw, or other provision committing the corporation to advance expenses. This permits a director to enforce previously bargained for contract rights to expense advancement in the proceeding in which the expenses are being incurred.

Application for indemnification under Proposed section 8.54 may be made either to the court in which the proceeding was heard or to another court of appropriate jurisdiction. For example, a defendant in a criminal action who has been convicted but believes that indemnification would be proper could apply either to the court which heard the criminal action or bring an action against the corporation in another court. A decision by the board of directors not to oppose the request for indemnification is governed by the general standards of conduct found in Proposed section 8.30. Even if the corporation decided not to oppose the request, the court must satisfy itself that the person seeking indemnification is properly entitled to it.

A corporation may limit the right of a director under Proposed section 8.54 by a provision in its articles of incorporation. In the absence of such a provision, however, the court has general power to grant indemnification under this section.

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RCW 23B.08.550
DETERMINATION AND AUTHORIZATION OF INDEMNIFICATION

CURRENT SECTION

(1) A corporation may not indemnify a director under RCW 23B.08.510 unless approved in the specific case after a determination has been made that indemnification of the director is permissible in the circumstances because the director has met the standard of conduct set forth in RCW 23B.08.510.

(2) The determination shall be made:

(a) By the board of directors by majority vote of a quorum consisting of directors not at the time parties to the proceeding;

(b) If a quorum cannot be obtained under (a) of this subsection, by majority vote of a committee duly designated by the board of directors, in which designation directors who are parties may participate, consisting solely of two or more directors not at the time parties to the proceeding;

(c) By special legal counsel:

(i) Selected by the board of directors or its committee in the manner prescribed in (a) or (b) of this subsection; or

(ii) If a quorum of the board of directors cannot be obtained under (a) of this subsection and a committee cannot be designated under (b) of this subsection, selected by majority vote of the full board of directors, in which selection directors who are parties may participate; or

(d) By the shareholders, but shares owned by or voted under the control of directors who are at the time parties to the proceeding may not be voted on the determination.

(3) Approval of indemnification and evaluation as to reasonableness of expenses shall be made in the same manner as the determination that indemnification is permissible, except that if the determination is made by special legal counsel, approval of indemnification and evaluation as to reasonableness of expenses shall be made by those entitled under subsection (2)(c) of this section to select counsel.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §110 (eff. 7-1-90)

(1) A corporation may not indemnify a director under RCW 23B.08.510 unless authorized in the specific case after a determination has been made that indemnification of the director is permissible in the circumstances because the director has met the standard of conduct set forth in RCW 23B.08.510.

(2) The determination shall be made:

(a) By the board of directors by majority vote of a quorum consisting of directors not at the time parties to the proceeding;

(b) If a quorum cannot be obtained under (a) of this subsection, by majority vote of a committee duly designated by the board of directors, in which designation directors who are parties may participate, consisting solely of two or more directors not at the time parties to the proceeding;

(c) By special legal counsel:

(i) Selected by the board of directors or its committee in the manner prescribed in (a) or (b) of this subsection; or

(ii) If a quorum of the board of directors cannot be obtained under (a) of this subsection and a committee cannot be designated under (b) of this subsection, selected by majority vote of the full board of directors, in which selection directors who are parties may participate; or
(d) By the shareholders, but shares owned by or voted under the control of directors who are at the time parties to the proceeding may not be voted on the determination.
(3) Authorization of indemnification and evaluation as to reasonableness of expenses shall be made in the same manner as the determination that indemnification is permissible, except that if the determination is made by special legal counsel, authorization of indemnification and evaluation as to reasonableness of expenses shall be made by those entitled under subsection (2)(c) of this section to select counsel.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3053 (1989)
Section 8.55 Determination and Authorization of Indemnification.
Proposed section 8.55 provides the method for determining whether a corporation should voluntarily indemnify directors under Proposed section 8.51. In this section a distinction is made between a "determination" and an "authorization." A "determination" involves a decision whether under the circumstances the person seeking indemnification has met the requisite standard of conduct under Proposed section 8.51 and is therefore eligible for indemnification. This decision may be made by the persons or groups described in Proposed subsection 8.55(b). In addition, after a favorable "determination" is made, the corporation must "authorize" indemnification; this includes a review of the reasonableness of the expenses. Proposed subsection 8.55(c) provides that "authorization" of indemnification may be made only by the board of directors, by a committee of the board, or by the shareholders. While special legal counsel may make the "determination" of eligibility for indemnification, counsel may not "authorize" the indemnification.

Proposed subsection 8.55(b) establishes a procedure for selecting the person or persons who will make the determination of eligibility for indemnification. Even though directors who are parties to the proceeding may not participate in the decision determining eligibility for indemnification, they may, if necessary to permit valid action by the board of directors, participate in the decision establishing a committee of independent directors or selecting special legal counsel. Directors who are parties may also participate in the decision to "authorize" indemnification on the basis of a favorable "determination" if necessary to permit action by the board of directors. This limited participation of interested directors in the decision is justified by a principle of necessity.

Legal counsel authorized to make the required determination is referred to as "special legal counsel." In statutes of other states, the counsel is referred to as "independent" legal counsel. The word "special" is felt to be more descriptive of the role to be performed and is not intended to indicate that the counsel selected should not be independent in accordance with governing legal precepts. "Special legal counsel" should normally be counsel having no prior professional lawyer-client relationship with those seeking indemnification, should be retained for the specific occasion, and should not be either inside counsel or regular outside counsel. It is important that the selection process be sufficiently flexible to permit selection of counsel in light of the particular circumstances and so that unnecessary expense may be avoided. Hence the phrase "special legal counsel" is not defined in the statute.

Determinations by shareholders rather than by directors or special counsel are permitted by Proposed subsection 8.55(b)(4), but shares owned by or voted under the control of directors seeking indemnification may not be voted on the determination of eligibility for indemnification. This does not affect rules governing the determination of a quorum at the meeting.

AMENDMENTS TO ORIGINAL SECTION
Laws 2009, ch. 189, §29 (eff. 7-26-09)*(amends only subsections (1) and (3))*
(1) A corporation may not indemnify a director under RCW 23B.08.510 unless ~~authorized~~ approved in the specific case after a determination has been made that indemnification of the director is permissible in the circumstances because the director has met the standard of conduct set forth in RCW 23B.08.510.

(3) ~~Authorization~~ Approval of indemnification and evaluation as to reasonableness of expenses shall be made in the same manner as the determination that indemnification is permissible, except that if the determination is made by special legal counsel, ~~authorization~~ approval of indemnification and evaluation as to reasonableness of expenses shall be made by those entitled under subsection (2)(c) of this section to select counsel.

CARC COMMENTARY

The term "corporate action" is defined and used throughout the Washington Business Corporation Act for consistency and to clarify the distinction between the matter being approved versus the action of approving.

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RCW 23B.08.560
SHAREHOLDER AUTHORIZED INDEMNIFICATION AND ADVANCEMENT OF EXPENSES

CURRENT SECTION

(1) If authorized by the articles of incorporation, a bylaw adopted or ratified by the shareholders, or a resolution adopted or ratified, before or after the event, by the shareholders, a corporation shall have power to indemnify or agree to indemnify a director made a party to a proceeding, or obligate itself to advance or reimburse expenses incurred in a proceeding, without regard to the limitations in RCW 23B.08.510 through 23B.08.550, provided that no such indemnity shall indemnify any director from or on account of:

(a) Acts or omissions of the director finally adjudged to be intentional misconduct or a knowing violation of law;

(b) Conduct of the director finally adjudged to be in violation of RCW 23B.08.310; or

(c) Any transaction with respect to which it was finally adjudged that such director personally received a benefit in money, property, or services to which the director was not legally entitled.

(2) Unless the articles of incorporation, or a bylaw or resolution adopted or ratified by the shareholders, provide otherwise, any determination as to any indemnity or advance of expenses under subsection (1) of this section shall be made in accordance with RCW 23B.08.550.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §111 (eff. 7-1-90)
Same as current.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3053-54 (1989)
Section 8.56 Shareholder Authorized Indemnification and Advancement of Expenses.
The provision in old RCW 23A.08.025(8) was amended in 1987 to eliminate former limitations on any indemnity not consistent with the statute. At the same time, old RCW 23A.12.020 was amended to authorize limitations of directors' liability in certain circumstances if the articles of incorporation so provided. See comment to Proposed section 8.32 which contains the background of both provisions.

Proposed section 8.56 is an entirely separate grant of corporate authority to indemnify, without regard to limitations contained in other sections of the title. This authority may be only be exercised by the shareholders, and then only under the types of voting rules generally reserved for decisions such as amending the articles of incorporation and other major corporate actions.

Under Proposed section 8.56 the corporation may indemnify directors fully, including the amount of judgments and fines, as well as for expenses. This authority extends to actions by the corporation and derivative actions, as well as to actions brought by third parties or government officials. The justification for this is the parallel power of the shareholders to exculpate directors from liability to the corporation or its shareholders for negligent acts, subject to the public policy limits imposed by Proposed section 8.32. Where shareholders have not exculpated directors in advance by formally amending the corporation's

articles of incorporation, this section grants them power to indemnify directors, either by contract, bylaw or resolution approved in advance or after the fact. The reference to "ratified" is intended to cover the situation where a board of directors has authorized such indemnification, either in a bylaw, resolution or contract with the director, but the shareholders did not approve their action until a later time.

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RCW 23B.08.570
INDEMNIFICATION OF OFFICERS, EMPLOYEES AND AGENTS

CURRENT SECTION

Unless a corporation's articles of incorporation provide otherwise:

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

(2) The corporation may indemnify and advance expenses under RCW 23B.08.510 through 23B.08.560 to an officer, employee, or agent of the corporation who is not a director to the same extent as to a director; and

(3) A corporation may also indemnify and advance expenses to an officer, employee, or agent who is not a director to the extent, consistent with law, that may be provided by its articles of incorporation, bylaws, general or specific action of its board of directors, or contract.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §112 (eff. 7-1-90)
Same as current.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3054-55 (1989)
Section 8.57 Indemnification of Officers, Employees and Agents.
Proposed section 8.57 correlates the general legal principles relating to the indemnification of officers, employees, and agents of the corporation with the limitations of indemnification of directors in Proposed sections 8.51-8.56. This correlation may be summarized in general terms as follows:

(1) Proposed sections 8.51-8.56 apply only to, and limits the indemnification of, directors.

(2) An officer, agent or employee of a corporation who is not a director may be indemnified by the corporation on a discretionary basis to the same extent as though such person were a director, and, in addition, may have additional indemnification rights apart from Proposed sections 8.51-8.60. (Proposed subsections 8.57(2) and (3)).

(3) A director who is also an officer, employee, or agent of the corporation is limited to the director's indemnification rights under Proposed sections 8.51-8.56 and is therefore treated the same way as other directors. (Proposed subsection 8.57(3) by negative inference.) Such an officer-director is limited to his or her rights under Proposed sections 8.51-8.56 even though the officer-director is sued solely in his or her capacity as an officer.

(4) An officer of the corporation (but not employees or agents generally) who is not a director has the mandatory right of indemnification granted to directors under Proposed section 8.52 and the right to apply for court-ordered indemnification under Proposed section 8.54 (Proposed subsection 8.57(1)).

Proposed subsection 8.57(3) authorizes indemnification for officers, employees, and agents who are not directors, but neither requires nor prescribes standards for their indemnification and expressly states that their indemnification may be broader than the right of indemnification granted to directors by Proposed sections 8.51-8.60. The rights of employees or agents may derive from principles of agency, the doctrine of respondeat superior, or collective bargaining or other contractual agreement, rather than from the statute. Indemnification of employees or agents may appropriately protect the person indemnified from liabilities incurred while serving at the corporation's request as a director, officer, partner, trustee, or agent of another commercial, charitable, or nonprofit enterprise. See the definition of "director" in Proposed subsection 8.50(2). But indemnification under Proposed subsection 8.57(3) must ultimately be "consistent with law." In effect, this leaves public policy determinations as to what are permissible limits, in a particular case, to the courts. For example, in Koster v. Warren, 297 F.2d 418, 423 (9th Cir. 1961), the court allowed indemnification of an officer and an employee, both of whom pleaded nolo contendere to an antitrust indictment at the corporation's request, the court reasoning that they had foregone their personal right to defend for the corporation's benefit. On the other hand, the court indicated in dictum that an agreement in advance by the corporation to indemnify anyone convicted of antitrust violations would be against public policy.

The broad grant of indemnification in Proposed subsection 8.57(3) may be limited by appropriate provisions in the articles of incorporation.

Proposed section 8.57 provides that officers, employees, or agents who are also directors are subject to the same standards of indemnification as other directors. Consideration was given to whether these officer-directors, if acting in their capacity as an officer but not as a director, should have the benefit of the additional flexibility afforded by Proposed subsection 8.57(3) for officers who are not directors. It was concluded, however, that all directors should be treated alike; complications may be created if directors who are not officers have potentially less protection under the statute than directors who are officers. It would also be difficult in many instances to distinguish in what capacity an officer-director is acting. Finally, Proposed sections 8.51-8.56 offer sufficient flexibility in indemnifying directors so that, as a practical matter, foreseeable problems for officer-directors can be handled within the statutory framework.

Proposed subsection 8.57(1) grants nondirector officers the same mandatory rights to indemnification under Proposed section 8.52 (or to petition a court for indemnification under Proposed section 8.54) as are granted directors. Thus, the net effect of Proposed section 8.57 is to provide officers with no less protection than is provided directors (including protection for service to third parties at the request of the corporation) and, additionally, to permit the corporation to provide broader indemnification for officers who are not directors.

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RCW 23B.08.580
INSURANCE

CURRENT SECTION

A corporation may purchase and maintain insurance on behalf of an individual who is or was a director, officer, employee, or agent of the corporation, or who, while a director, officer, employee, or agent of the corporation, is or was serving at the request of the corporation as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise, against liability asserted against or incurred by the individual in that capacity or arising from the individual's status as a director, officer, employee, or agent, whether or not the corporation would have power to indemnify the individual against the same liability under RCW 23B.08.510 or 23B.08.520.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §113 (eff. 7-1-90)
Same as current.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3055 (1989)
Section 8.58 Insurance.
Proposed section 8.58 authorizes a corporation to purchase and maintain insurance on behalf of directors, officers, employees, or agents against liabilities imposed on them by reason of actions in their official capacity or arising from their service to the corporation or another entity at the corporation's request. Insurance is not limited to claims against which corporations are entitled to indemnify under this subchapter. This insurance, usually referred to as "D&O Liability Insurance," provides a useful supplement to the rights of indemnification created by Proposed sections 8.51 to 8.60, providing a source of reimbursement for corporations who indemnify directors and others for conduct covered by the insurance, and protecting the insured against the corporation's failure to pay indemnification required or permitted by Proposed sections 8.51 to 8.60. On the other hand, policies do not cover uninsurable events like self-dealing, bad faith, knowing violations of the securities acts, or other willful misconduct. See generally Johnston, "Corporate Indemnification and Liability Insurance," 33 BUS. LAW. 1993 (1978); Hinsey, "The New Lloyd's Policy Form for Directors and Officers Liability Insurance--An Analysis," 33 BUS. LAW. 1961 (1978).

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RCW 23B.08.590
VALIDITY OF INDEMNIFICATION OR ADVANCE FOR EXPENSES

CURRENT SECTION

(1) A provision treating a corporation's indemnification of or advance for expenses to directors that is contained in its articles of incorporation, bylaws, a resolution of its shareholders or board of directors, or in a contract or otherwise, is valid only if and to the extent the provision is consistent with RCW 23B.08.500 through 23B.08.580. If articles of incorporation limit indemnification or advance for expenses, indemnification and advance for expenses are valid only to the extent consistent with the articles of incorporation.

(2) RCW 23B.08.500 through 23B.08.580 do not limit a corporation's power to pay or reimburse expenses incurred by a director in connection with the director's appearance as a witness in a proceeding at a time when the director has not been made a named defendant or respondent to the proceeding.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §114 (eff. 7-1-90)
Same as current.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3055-56 (1989)
Section 8.59 Application of Sections 8.50-8.58.
Proposed subsection 8.59(a) provides that a provision treating the indemnification of directors by the corporation in articles of incorporation, bylaws, shareholders' or directors' resolution, or contract "is valid only if and to the extent it is consistent with" Proposed sections 8.50-8.58. The statutes of many states provide that the statutory provisions are not "exclusive" and make no attempt to limit the nonstatutory creation of rights of indemnification. Such language is subject to misconstruction, however, since nonstatutory conceptions of public policy limit the power of a corporation to indemnify or to contract to indemnify directors, officers, employees, or agents.

The language of the first sentence of Proposed subsection 8.59(a), "to the extent it is consistent with sections 8.50-8.58," is believed to be a more accurate description of the limited validity of nonstatutory indemnification provisions than the "nonexclusive" provisions in other states. It is important to recognize that "to the extent it is consistent with" is not synonymous with "exclusive." Situations may well develop from time to time in which indemnification is permissible under Proposed section 8.58 but would be precluded if all Proposed sections 8.50-8.58 were viewed as exclusive. But indemnification provisions protecting against the consequences of bad faith or willful misconduct are not consistent with law and would not be valid. Furthermore, they would violate well-understood principles of public policy and doubtless would be invalidated on that ground even under statutes purporting to make "nonexclusive" the statutory provisions for indemnification. To the extent the consistency language may preclude indemnification in circumstances where it is reasonable and violates no statutory policy, an escape valve is provided in Proposed subsection 8.55(2), which authorizes a court to grant indemnification if a director "is fairly and reasonably entitled to indemnification in view of all the relevant circumstances," even though the director may not have fully met the standards of conduct set forth in Proposed section 8.51.

Proposed section 8.59 does not preclude provisions in articles of incorporation, bylaws, resolutions, or contracts designed to provide procedural machinery different from that provided by Proposed section 8.55 or to make mandatory the permissive provisions of Proposed sections 8.50-8.54. For example, a corporation may properly obligate the board of directors to consider and act expeditiously on an application for indemnification or advances, or obligate the board of directors to cooperate in the procedural steps required to obtain a judicial determination under Proposed section 8.54.

Some corporations currently commit themselves, in one form or another, to indemnify directors to the fullest extent permitted by applicable law. These commitments are consistent with Proposed sections 8.50-8.58, subject to appropriate interpretation in light of the facts and circumstances of the particular case. Furthermore, a commitment to maintain liability insurance for a director, pursuant to Proposed section 8.58, is consistent with Proposed sections 8.50-8.58.

The first sentence of Proposed subsection 8.59(a) applies only to directors; it does not apply to officers, employees, or agents who are not directors. The inherent problems of conflict of interest and the need to encourage persons to serve as directors are not present to the same degree in the case of nondirector officers, employees, or agents. The standard for permissible indemnification of these persons in Proposed subsection 8.57(3) is "consistent with law" without regard to Proposed sections 8.50-8.58.

Proposed subsection 8.59(b) is designed to make clear that Proposed sections 8.50-8.58 deal only with directors who are actual or prospective defendants or respondents in a proceeding, and that expenses incurred in connection with appearance as a witness may be indemnified without regard to the limitations of Proposed sections 8.50-8.58. Indeed, most of the standards described in Proposed sections 8.51-8.54 by their own terms can have no meaningful application to a director whose only connection with a proceeding is that the director has been called as a witness.

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RCW 23B.08.600
REPORT TO SHAREHOLDERS

CURRENT SECTION

If a corporation indemnifies or advances expenses to a director under RCW 23B.08.510, 23B.08.520, 23B.08.530, 23B.08.540, or 23B.08.560 in connection with a proceeding by or in the right of the corporation, the corporation shall report the indemnification or advance in the form of a notice to the shareholders delivered with or before the notice of the next shareholders' meeting.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §115 (eff. 7-1-90)
If a corporation indemnifies or advances expenses to a director under RCW 23B.08.510, 23B.08.520, 23B.08.530, 23B.08.540, or 23B.08.560 in connection with a proceeding by or in the right of the corporation, the corporation shall report the indemnification or advance in writing to the shareholders with or before the notice of the next shareholders' meeting.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3056 (1989)
Section 8.60 Report to Shareholders.
Proposed section 8.60 requires reporting to shareholders of payments made to directors or officers either for indemnification under Proposed sections 8.51, 8.52, 8.54 and 8.56 or for advances for expenses under Proposed section 8.53. Some academic criticism of earlier indemnification statutes pointed out the possible evil of secret payments of indemnification which may or may not be consistent with the standards set forth in the general corporation statute. In addition, the use of corporate funds for this purpose is a legitimate matter of interest to shareholders.

Proposed section 8.60 requires the report to be made no later than the time notice is given for the next meeting of shareholders. Disclosure is required only of payments made in connection with suits by or in the name of the corporation; payments and advances arising out of third-party suits are not required to be reported, although proxy rules may require reporting and corporations, of course, may choose to report even if not legally required to do so. This subsection does not require reporting of indemnification payments or advances to any individual who is not a director. The required reporting covers payments and advances to directors in derivative suits made not only under Proposed sections 8.51, 8.52, 8.53, 8.54 or 8.56 but also pursuant to a charter, bylaw, or other provision.

AMENDMENTS TO ORIGINAL SECTION
Laws 2002, ch. 297, §32 (eff. 6-13-02)
If a corporation indemnifies or advances expenses to a director under RCW 23B.08.510, 23B.08.520, 23B.08.530, 23B.08.540, or 23B.08.560 in connection with a proceeding by or in the right of the corporation, the corporation shall report the indemnification or advance in ~~writing~~ the form of a notice to the shareholders delivered with or before the notice of the next shareholders' meeting.

CARC COMMENTARY
See CARC Comment to 2002 Amendment to RCW 23B.01.410.

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RCW 23B.08.603
INDEMNIFICATION OR ADVANCE FOR EXPENSES – LATER AMENDMENT OR REPEAL OF SUBJECT PROVISION

CURRENT SECTION

The right of a director, officer, employee, or agent to indemnification or to advancement of expenses arising under a provision in the articles of incorporation or a bylaw shall not be eliminated or impaired by an amendment to or repeal of that provision after the occurrence of the act or omission that is the subject of the proceeding for which indemnification or advancement of expenses under that provision is sought, unless the provision in effect at the time of such an act or omission explicitly authorizes the elimination or impairment of the right after such an action or omission has occurred.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 2011, ch. 328, §9 (eff. 7-22-11)
Same as current.

CARC COMMENTARY

Proposed RCW 23B.08.603 is new. Many Washington corporations include provisions in their articles of incorporation and/or bylaws that mandate indemnification of and advancement of expenses to directors and, sometimes, officers, employees and other agents (subject to any limitations that may apply under RCW 23B.08.500-.08.590). Proposed RCW 23B.08.603 addresses the question of when rights to indemnification and advancement of expenses under provisions in a Washington corporation's articles of incorporation or bylaws vest. The proposed new section is based on an amendment to Section 145(f) of the Delaware General Corporation Law that was adopted in 2009. The purpose of that amendment was to adopt a different rule relating to vesting of rights under provisions in a corporation's charter documents than the approach articulated in *Schoon v. Troy Corp.*, 948 A. 2d 1157 (Del. Ch. 2008). The court in *Schoon* held that a former director's rights under a provision in the corporation's bylaws that entitled him to advancement of expenses could be amended to eliminate that right after the occurrence of the acts and omissions that were at issue in the proceeding for which advancement of expenses was sought (but before the former director had been named as a party in the proceeding). In other words, the *Schoon* decision articulated a rule that rights of a director, officer, employee or agent to indemnification or advancement of expenses under a provision in the charter documents do not vest until the person becomes a party to a proceeding. In response to the *Schoon* case, Section 145(f) of the Delaware General Corporation Law was amended to provide that rights to indemnification or advancement of expenses under a provision in the certificate of incorporation or blaws cannot be impaired or eliminated after the fact (i.e., after the occurrence of the act or omission that is the subject of the proceeding), unless the provision specifically authorizes after-the-fact impairment or elimination of such rights. Similar to the 2009 amendment to Section 145(f), proposed RCW 23B.08.603 is intended to provide directors, officers, employees and other agents who serve Washingotn corporations greater certainty that rights to indemnification and/or advancement of expenses created under provisions in the articles of incorporation or bylaws can be counted on to protect them after the occurrence of acts or omissions that may lead to their involvement in threatened or actual judicial, administrative or investigative proceedings. Corporations can retain the flexibility to eliminate or impair such rights after the fact by expressly authorizing after-the-fact amendment or repeal of such rights in the

articles or bylaws provisions that establish indemnification or advancement of expenses rights. However, in any case, once a director, officer, employee or agent becomes a party to a proceeding, no after-the-fact amendment or repeal of a provision in the articles of incorporation or bylaws that previously afforded him or her rights to indemnification or advancement of expenses should be effective to eliminate or impair such rights.

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RCW 23B.08.700
DEFINITIONS

CURRENT SECTION

For purposes of RCW 23B.08.710 through 23B.08.730:

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

(a) Whether or not the transaction is brought before the board of directors of the corporation for action, the director knows at the time of commitment that the director or a related person is a party to the transaction or has a beneficial financial interest in or so closely linked to the transaction and of such financial significance to the director or a related person that the interest would reasonably be expected to exert an influence on the director's judgment if the director were called upon to vote on the transaction; or

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

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

(3) "Related person" of a director means (a) the spouse, or a parent or sibling thereof, of the director, or a child, grandchild, sibling, parent, or spouse of any thereof, of the director, or an individual having the same home as the director, or a trust or estate of which an individual specified herein is a substantial beneficiary; or (b) a trust, estate, incompetent, conservatee, or minor of which the director is a fiduciary.

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

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

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §116 (eff. 7-1-90)

Same as current except that subsection (5) read:

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

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3056-65 (1989)
Section 8.70 Definitions for Sections 8.71-8.73.

INTRODUCTORY COMMENT TO SECTIONS 8.70-8.73

The common law, drawing by analogy on the fiduciary principles of the law of trusts, initially took the position that any transaction between X Co. and a director of X Co. was contaminated by the director's conflicting interest, that the transaction was null and void or voidable, and, at least by implication, that the interested director who benefited from the transaction could be required to disgorge any profits and be held liable for any damages. In time, this rule was perceived to be demonstrably unworkable in the real business world and contrary to the best interests of the corporation. Accordingly, some courts modified their initial rigidity, and, in addition, corrective legislation was enacted as a part of the business corporation acts.

The new statutory provisions on directors' conflicting interest transactions allowed the courts to develop the substantive content of the duty of loyalty owed by agents to their principals, by employees to their employers, and by directors to their corporations. The statutes themselves concentrated on creating procedures by which interest-conflict transactions between corporations and their directors could be salvaged while, at the same time, corporations and their shareholders could be protected against unfair dealing by self-aggrandizing directors. Section 41 of the 1969 Model Business Corporation Act was such a procedural provision; so was its successor, section 8.31 of the Model Act.

The replacement for section 8.31, now embodied as sections 8.70-8.73 of the Proposed Act, is of the same procedural character. But the new sections have some important new features.

1. PURPOSES AND SPECIAL CHARACTERISTICS OF PROPOSED SECTIONS 8.70-8.73.

Predecessor provisions to Proposed sections 8.70-8.73 were sweeping and generalized in character. The Proposed sections are not. Their key objectives are to increase predictability and to enhance practical administrability. To that end, the Proposed sections spell out a safe harbor procedure more meticulously than their predecessors. To the same end, the Proposed sections go further. Earlier statutes left entirely to judicial interpretation -and to the guess of corporate counsel--the central question as to what does and what does not constitute a conflicting interest of a director. Great uncertainty has arisen as to the scope of that concept. The new sections take the new step of spelling out a practical working definition of "conflicting interest" and declare that definition to be exclusive. Circumstances that fall outside the statutory definition of conflicting interest cannot constitute the basis for an attack on a transaction on grounds of a director's

interest conflict, although they may, of course, afford basis for legal attack on some other ground. Finally, to a greater degree than their predecessors, the new sections specify when judicial intervention is appropriate and when it is not.

In sum, the new sections are new in that they adopt a "bright-line" statutory approach. An inevitable feature of any bright-line statute or regulation is that, no matter where the line may be set, some situations that fall outside the line will closely resemble other situations that fall inside it. Some observers find that outcome anomalous and argue that a bright-line approach is inferior to a statement of broad principles. But the legislative draftsman who chooses to suppress marginal anomalies by resorting to generalized statements of principle will pay a cost in terms of predictability. The choice between these two drafting approaches is a matter of judgment; an experienced legislative draftsman would never write a bright-line constitutional "due process" clause, nor would the draftsman provide in a business corporation act for "a reasonable period" of notice for a shareholders' meeting.

For a number of reasons, the new sections are deliberately weighted towards bright-line specificity and predictability. That there will be imaginable situations at the margin that are similar but yield different results can be anticipated and is accepted.

One consideration arguing for the bright-line approach in the new sections is that the existing case law governing interest conflicts of directors is in a state of unhealthy uncertainty, reflecting differing judicial attitudes toward and varying levels of comprehension concerning the subject. Equal uncertainty surrounds the working of the procedural machinery for dealing with transactions that involve a director's conflicting interest.

A second consideration arguing for a bright-line approach is that the fundamental perspective of the new sections is prospective. In the real business world, a decision must be made now whether or not to proceed with the transaction and legal counsel's opinion must be delivered now as to whether clearance procedures are available and have been complied with. The business executive can accept either "yes" or "no" as an answer but the executive cannot effectively function in an environment in which the law, lawyers or the courts say "Go ahead and I will tell you later--perhaps years later--whether the transaction is vulnerable to attack."

Further, the essential character of interest conflict is often, unfortunately, misunderstood by the public and the media (and sometimes misunderstood, too, by lawyers and judges). Interest conflicts can and sometimes do lead to baneful acts. The law regulates interest conflict transactions because experience shows that people often yield to the temptation to advance their self-interests and, if they do, other people may be injured. That contingent fear is sufficient reason to warrant caution and to apply special standards and procedures to interest conflict transactions.

Nonetheless, it is important to keep firmly in mind that it is a contingent risk we are dealing with--that an interest conflict is not in itself a crime or a tort or necessarily injurious to others. Contrary to much popular usage, having a "conflict of interest" is not something one is "guilty of"; it is simply a state of affairs. Indeed, in many situations, the corporation and the shareholders may secure major benefits from a transaction despite the presence of a director's conflicting interest. Further, while history is replete with selfish acts, it is also oddly counterpointed by numberless acts taken contrary to self interest.

And, as an additional consideration, while conflicting interests surely carry potential danger, other important social values, such as economic efficiency, predictability and business finality are also at stake and should be accorded heavy countering weight in the law.

One last point. Even if one were to disregard these considerations and were to draft statutory language governing directors' interest conflicts in the most generalized form in an effort to catch the last malefactor, "anomalous" results still would not be avoided. One reason is that generalized drafting invites varying judicial and practitioner interpretation, as has in fact occurred in the cases on directors' conflicts of interest.

But the ultimate unresolvable problem in seeking to regulate interest conflicts is that human beings are motivated by unimaginably varied and indeterminable mixes of ambitions, likes, dislikes, and biases. At the end of the day, who can say in respect of any matter that a particular director was in a deeper sense "disinterested" in a particular transaction and acted objectively on the merits? In regulating the conflicting interests of directors, the courts (and pertinent statutes) have limited inquiry to the financial interests of the director and the director's immediate family and associates. That is the wise course and, indeed, the only practical course. But in adopting that course, one obviously excludes a large fraction of the interests that actually drive the actions of human beings. Thus, the law may preclude a director from voting on a transaction in which the director has an economic interest even if, given the director's resources, the amount at stake will have no real impact upon the director's decision-making; yet the law does not prohibit the same director from voting on a transaction which significantly benefits a religious institution to whose creed the director is deeply devoted and that guides the director's life. Such deeper anomalies cannot be eradicated and the law should not seek to eradicate them. But it is worthwhile to be reminded that they exist, for in this field a degree of anomaly is a condition that must be accepted and lived with.

2. PROPOSED SCOPE OF SECTIONS 8.70-8.73.

The focus of Proposed sections 8.70-8.73 is sharply defined and limited.

First: the Proposed sections are targeted on legal challenges based on interest conflicts only. They do not undertake to define, regulate or provide any form of procedure regarding other possible claims. For example, the Proposed sections do not address a claim that a controlling shareholder has violated a duty owed to the corporation or minority shareholders.

Second: the Proposed sections are applicable only when there is a "transaction" by or with the corporation. Many circumstances can arise in which a director has an economic interest in a particular matter that is adverse to the corporation's best interests but that does not entail a "transaction" with the corporation. Obvious examples include a director who usurps a corporate opportunity or competes with the corporation. In some situations, too, simple inaction by a board might work to a director's personal economic advantage. Without suggesting anything about other safe harbor procedures for the director and the corporation that might be available for such nontransactional matters (see paragraph 4 below), the new sections have no application unless there is a "transaction" to which the corporation is a party.

Third: Proposed sections 8.70-8.73 deal with directors only. Conflicts of interest of non-director officers or employees of the corporation are dealt with by the law of agency prescribing loyalty of agent to principal. Moreover, most large corporations today have internal regulations governing the business conduct of all personnel, including loyalty to the employer and avoidance of conflicting personal interests. A corporate employee can also deal with a personal conflict situation by going to the employee's supervisor. Thus the conflict of interest problems of all corporate personnel except directors can be satisfactorily handled by general law, internal rules and personnel procedures. For the directors, however--those who are ultimately responsible for the corporation--special provisions in the business corporation statute are required.

Fourth: it is important to stress that the voting procedures and standards prescribed in the Proposed sections deal solely with the element of the director's conflicting interest. A transaction that receives a directors' or shareholders' vote that complies with the new sections may well fail to achieve a different vote or quorum that may be requisite for substantive approval of the transaction under other applicable statutory provisions or under the articles of incorporation; and vice versa. (Under the Proposed Act, latitude is granted for setting higher voting requirements and different quorum requirements in the articles of incorporation. See sections 7.27 and 2.02(e).)

Fifth: a few corporate transactions or arrangements in which directors inherently have a special personal interest are of a unique character and are regulated by special procedural provisions of the Act. See Proposed sections 8.51 and 8.52 dealing with indemnification arrangements and Proposed section 7.40

dealing with termination of derivative proceedings by board action. Any corporate transactions or arrangements affecting directors that are governed by such regulatory sections of the Proposed Act are not governed by the new sections.

The new sections contemplate the deletion of provisions dealing specially with loans to directors; a loan to a director is simply a subspecies of directors' conflicting interest transactions and is procedurally governed by the new sections.

3. STRUCTURE OF PROPOSED SECTIONS 8.70-8.73

Definitions are in Proposed section 8.70. Proposed section 8.71 prescribes what a court may or may not do in various situations. Proposed section 8.72 prescribes procedures for action by boards of directors regarding a director's conflicting interest transaction. Proposed section 8.73 prescribes corresponding procedures for shareholders. Thus the most important operative section of the subchapter is Proposed section 8.71.

4. OUTSIDE PROPOSED SECTIONS 8.70-8.73: NON-TRANSACTIONAL SITUATIONS

A prudent director will be sensitive to situations that may place the director in the position of divided loyalty. To resolve doubts, the director will bring to the attention of the board of directors investment opportunities or business activities the director wishes to pursue. The board's blessing can serve as a shield if the director later should be charged with usurping corporate opportunity or engaging in improper competitive activity. Quite often, too, a director's personal financial interests can often be impacted by a non-transactional policy decision of the board--as where it decides to establish a divisional headquarters in the director's small home town. Non-transactional cases of that kind most often employ a procedure quite similar to that provided for director's conflicting interest transactions under Proposed section 8.72. In addition, a flow of ongoing business relationships between the director and the corporation may, without centering upon any discrete "transaction", raise problems of alleged favoritism or unfair dealing or undue influence.

The circumstances in which such non-transactional situations should be brought to the board or shareholders for clearance, and the legal effect of such clearance, are questions for development under the common law. While non-transactional situations are unaffected one way or the other by the provisions of sections 8.70-8.73, a court may well recognize procedures in those sections as a useful analogy for dealing with such situations. Where the procedures of sections 8.70-8.73 were followed in such situations, the court may, in its discretion, accord to them the same or similar effect to that which is provided by the new sections.

For purposes of Proposed sections 8.70-8.73, "transaction" generally connotes negotiations or a consensual bilateral act between the corporation and another party or parties that concern their respective and differing economic rights or interests--not simply a unilateral action by the corporation but rather a "deal." See discussion of "transaction" under subparagraph (2) of paragraph (2) respecting section 8.70.

NOTE

In the Comments to the sections of subchapter F, the director who has a conflicting interest is for convenience referred to as "the director" or "D," the corporation of which the director is a director is referred to as "the corporation" or "X Co." and another corporation dealing with X Co. is referred to as "Y Co."

COMMENT TO PROPOSED SECTION 8.70

The definitions set forth in Proposed section 8.70 apply to sections 8.71-8.73 only and have no application elsewhere in the Proposed Act.

1. CONFLICTING INTEREST

The definition of conflicting interest requires that the director know of the transaction. More than that, it requires that the director know of the director's interest conflict at the time of the corporation's commitment to the transaction. Absent that knowledge by the director, the risk to the corporation addressed by Proposed sections 8.70-8.73 is not present. In a corporation of significant size, routine transactions in the ordinary course of business, involving decision-making at lower management levels, will usually not be known to the director and will thus be excluded by the "knowledge" criterion in the definition.

The term "conflicting interest" as defined in Proposed section 8.70 is never abstract or free-standing; its use must always be linked to a particular director, to a particular transaction and to a particular corporation.

The definition of "conflicting interest" is exclusive. An interest of a director is a conflicting interest if and only if it meets the requirements of subdivision (1).

D can have a conflicting interest in only three ways.

First: a conflicting interest of D will obviously arise if the transaction is between D and X Co.

A conflicting interest will also arise under subdivision (1)(i) if D is not a party but has a beneficial financial interest in the transaction that is separate from the director's interest as a director or shareholder and is of such significance to the director that it would reasonably be expected to exert an influence on the director's judgment if the director were called upon to vote on the matter. The personal economic stake of the director must be in or closely linked to the transaction--that is, the director's gain must hinge directly on the transaction itself. A contingent or remote gain (such as a future reduction in tax rates in the local community) is not enough to give rise to a conflicting interest under subdivision (1)(i). See the discussion of "transaction" under the Comment to subdivision (2).

If Y Co. is a party to or interested in the transaction with X Co. and Y Co. is somehow linked to D, the matter is in general governed by subdivision (1)(ii). But D's economic interest in Y Co. could be so substantial and the impact of the transaction so important to Y Co. that D could also have a conflicting interest under subdivision (1)(i).

Note that the basic standard set by subdivision (1)(i) and throughout Proposed sections 8.70-8.73--"would reasonably be expected to exert an influence"--is an objective, not a subjective, criterion.

Second: a conflicting interest of D can arise under subdivision (1)(i) from the involvement in the transaction of a "related person" of D. "Related person" is defined in subdivision (3).

Third: in limited circumstances, subsequently discussed, a conflicting interest of D can arise through the economic involvement of certain other persons specified in subdivision (1)(ii). These are any entity (other than X Co.) of which the director is a director, general partner, agent or employee; a person that controls, or an entity that is controlled by, or is under common control with one or more of the entities specified in the preceding clause; and any individual who is a general partner, principal or employer of D.

The terms "principal" and "employer" as used in subdivision (1)(ii) are not separately defined but should be interpreted sensibly in the context of the purpose of the new sections. The key question is whether D is, by force of an overt or covert tie to an employer or a principal who has a significant stake in the outcome of the transaction, beholden to act in the interest of that outside employer or principal rather than in the interest of X Co.

The "would reasonably be expected" criterion of subdivision (1)(i) applies also to subdivision (1)(ii).

Any director will, of course, have countless relationships and linkages to persons and institutions other than

those specified in subdivision (1)(ii) and those defined in subdivision (3) to be related persons. But, for the reasons outlined in the Introduction, the subcategories of persons encompassed by subdivision (1)(ii) are expressly intended to be exclusive and to cover the field for purposes of Proposed sections 8.70-8.73 and particularly Proposed subsection 8.71(a). Thus, if, in a case involving a transaction between X Co. and Y Co., a court is presented with the argument that D, a director of X Co., is also a major creditor of Y Co. and that that stake in Y Co. gives D a conflicting interest, the court should reply that D's creditor interest in Y Co. does not fit any subcategory of subdivision (1)(ii) or subdivision (3) and therefore the conflict of interest claim must be rejected by force of Proposed subsection 8.71(a). The result would be otherwise if Y Co.'s debt to D is of such economic significance to D that it would fall under subdivision (1)(i) or put D in control of Y Co. and thus come within subdivision (1)(ii).

Subdivision (1)(ii) has a differentiated threshold keyed to the significance of the transaction. See the Official Comment to subdivision (2).

It is to be noted that under subdivision (1) of Proposed section 8.70, any interest that the director has that meets the criteria set forth is considered a "conflicting interest." If a director has an interest that meets those criteria, sections 8.70-8.73 draw no further distinction between a director's interest that clashes with the interests of the corporation and a director's interest that is parallel to the interests of the corporation. If the director's "interest" is present, "conflict" is assumed.

2. DIRECTOR'S CONFLICTING INTEREST TRANSACTION

The definition of "director's conflicting interest transaction" in subdivision (2) is the key concept of Proposed sections 8.70-8.73, establishing the area that lies within--and without--the scope of the provisions. The definition operates preclusively; it not only designates the area within which the rules of Proposed sections 8.70-8.73 are to be applied but also denies the power of the court to act with respect to claims of conflict of interest of directors in circumstances that lie outside the statutory definition of "director's conflicting interest transaction." See Proposed subsection 8.71(a).

(1) Transaction

To constitute a director's conflicting interest transaction, there must first be a transaction by the corporation or its subsidiary or controlled entity in which the director has a financial interest. As discussed in the Introduction, the safe harbor provisions provided by sections 8.70-8.73 have no application to circumstances in which there is no "transaction" by the corporation, however apparent the director's conflicting interest. Other strictures of the law prohibit a director from seizing corporate opportunities for personal benefit and from competing against the corporation of which the director is a director; Proposed sections 8.70-8.73 have no application to such situations. Moreover, a director might be personally benefited if the corporation takes no action, as where the corporation decides not to make a bid. Proposed sections 8.70-8.73 have no application to such instances. The limited thrust of the sections is to establish procedures which, if followed, immunize a corporate transaction and the interested director against the common law doctrine of voidability grounded on the director's conflicting interest. See the Introductory Comment for further discussion.

However, a policy decision and a transactional decision can blur and overlap. Assume X Co. operates a steel mini-mill that is running at a loss. A real estate developer offers to buy the land on which the mill is located and the X Co. board, having no other use for the land, accepts the offer. This corporate action can readily be characterized either as a transaction--the sale of the land--or as a business policy decision--to go out of an unprofitable business. If D is a partner of the real estate developer, D has a stake in the sale transaction and subdivisions (1)(i) and (1)(ii) and all of Proposed sections 8.70-8.73 apply. But what if D, having no such interest, is in the local trucking business and a predictable consequence of closing the local mini-mill is that D will benefit from a future increase in demand for hauling services to bring in steel from more distant supply sources? An intent of the words "in or so closely linked to the transaction" in subdivisions (1)(i) and (1)(ii) is to focus Proposed sections 8.70-8.73 on the transaction itself. D's financial

stake as a trucker in this situation lies not in the transaction, which is governed by Proposed sections 8.70-8.73, but in the corporate business decision, which is not; accordingly, Proposed subsection 8.71(a) is inapplicable and imposes no bar to the court's discretion. Board action, though in compliance with Proposed section 8.72, will not, ipso facto, yield safe harbor protection for D or the transaction under Proposed subsection 8.71(b). The matter will be treated as provided in paragraph 4 of the Introduction.

As another feature of the key term "transaction," the text of subdivision (1) emphasizes that the term implies and is limited to action by the corporation itself. The language of Proposed sections 8.70-8.73 have no application one way or the other to economic actions by the director in which the corporation is not a party or in which the corporation takes no action. Thus, a purchase by the director of the corporation's shares on the open market or from a third party is not a "transaction" within the scope of Proposed sections 8.70-8.73 and the sections do not govern an attack made on the propriety of such a share purchase.

If the board of directors of X Co. decides to distribute "poison pill" rights in order to fend off a possible takeover, that occurrence does not constitute a "transaction" as contemplated by Proposed sections 8.70-8.73. See the discussion in paragraph 4 of the Introductory Comment as to the character of a "transaction." If, on the other hand, a board of directors commits the corporation to a "crown jewel" option granted to a third party, there would be a "transaction."

But as noted earlier, for the transaction to be covered by Proposed sections 8.70-8.73, the director (or other person designated by Section 8.60(i)) must have a beneficial interest respecting the transaction. Proposed sections 8.70-8.73 would obviously govern such a crown jewel contract if a director was (or had a defined relationship to) the third party. But the fact that the crown jewel contract was in part motivated by the directors' desire to keep themselves on the board would not, taken alone, constitute a sufficiently direct interest in the transaction to bring it within Proposed sections 8.70-8.73.

(2) Party to the transaction--the corporation

Transaction by what entity? In the usual case, the transaction in question would be by X Co. But assume that X Co. is the controlling corporation of S Co. (i.e., it controls the vote for directors of S Co.). D wishes to sell a building D owns to X Co. and X Co. is willing to buy it. As a business matter, it will often make no difference to X Co. whether it takes the title itself or places it with its subsidiary S or another entity that X Co. controls. The applicability of Proposed sections 8.70-8.73 cannot be allowed to depend upon that formal distinction. The Proposed sections 8.70-8.73 therefore include within their operative framework transactions by a subsidiary or controlled entity of X Co. See the Note on Parent Companies and Subsidiaries below.

(3) Party to the transaction--the director

Subdivision (1)(i) and subdivision (1)(ii) differ as to the persons covered and as to the threshold of transactional significance. Subdivision (1)(i), addressed to D and related persons of D, includes as directors' conflicting interest transactions all transactions that meet the substantive criteria prescribed. By contrast, subdivision (1)(ii), addressed to transactions involving other designated persons, excludes from its coverage transactions that are not sufficiently significant to the corporation to warrant decision at the boardroom level.

As a generalization, the linkage between a director and a "related person" is closer than that between the director and those persons and entities specified in subdivision (1)(ii). Correspondingly, the threshold of conflicting interest under subdivision (1)(i) is lower than that set for subdivision (1)(ii). Thus, all routine transactions of X Co. are excluded from the definition of director's conflicting interest transaction unless they fall within subdivision (1)(i). If Y Co., a computer company of which D is also an outside director, sells office machinery to X Co., the transaction will not normally give rise to a conflicting interest for D from the perspective of either company since the transaction is a routine matter that would not come before

either board. If, however, the transaction is of such significance to one of the two companies that it would come before the board of that company, then D has a conflicting interest in the transaction with respect to that company.

Implicit in subdivision (1)(ii) is a recognition that X Co. and Y Co., particularly if large enterprises, are likely to have routine, perhaps frequent, business dealings with each other as they buy and sell goods and services in the marketplace. The terms of these dealings are dictated by competitive market forces and the transactions are conducted at personnel levels far below the board room. The fact that D has some relationship with Y Co. is not in itself sufficient reason to open these smaller scale impersonal business transactions to challenge if not passed through the board in accordance with the procedures of Proposed section 8.72. It would be doubly impractical to do so twice where X Co. and Y Co. have a common director.

Proposed section 8.70 takes the practical position. The definition in subdivision (1)(ii) excludes most such transactions both by its "knowledge" requirement and by its higher threshold of economic significance. In almost all cases, any such transaction, if challenged, would in any case be easily defensible as being "fair." In respect of day-to-day business dealings, the main practical risk of impropriety that could arise would be that a director having a conflicting interest might seek to exert inappropriate influence upon the interior operations of the enterprise--might try to use the director's status as a director to pressure lower level employees to divert their business out of ordinary channels to the director's advantage. But a director's affirmative misconduct goes well beyond a claim that the director has a conflicting interest and judicial action against such improper behavior remains available. See also the Comment to Proposed subsection 8.72(b) regarding common directors.

The absence of the significance threshold in subdivision (1)(i) does not impose an inappropriate burden on directors and related persons. The commonplace and oftentimes recurring transaction will involve purchase of the corporation's product line, it will usually not be difficult for D to show that the transaction was on commercial terms and was fair, or indeed, that D had no knowledge of the transaction. As a result, these transactions do not invite harassing lawsuits against the director. A purchase by D of a product of X Co. at a usual "employee's discount", while technically assailable as a conflicting interest transaction, would customarily be viewed as "fair" to the corporation as a routine incident of the office of director. For other transactions between the corporation and the director or those close to the director, D can, and should, have the burden of establishing the fairness of the transaction if it is not passed upon by the arm's-length review of qualified directors or the holders of qualified shares. If there are any reasons to believe that the terms of the transaction might be questioned as unfair to X Co., D is well advised to pass the transaction through the safe harbor procedures of Proposed sections 8.70-8.73.

Note on Parent Companies and Subsidiaries

If a subsidiary is wholly owned there is no outside holder of shares of the subsidiary to be injured with respect to transactions between the two corporations.

Transactions between a parent corporation and a partially-owned subsidiary may raise the possibility of abuse of power by a majority shareholder to the disadvantage of a minority shareholder. Proposed sections 8.70-8.73 have no relevance as to how a court should in the circumstances deal with that claim.

If there are not at least two outside directors of the subsidiary, the subsidiary and the board of directors must operate on the basis that any transaction between the subsidiary and the parent that reaches the significance threshold in subdivision (1)(ii) may, as a technical matter, be challengeable by a minority shareholder of the subsidiary on grounds that it is a director's conflicting interest transaction. In that case, the directors of the subsidiary will have to establish the fairness of the transaction to the subsidiary. In practice, however, the case law has dealt with such claims under the rubric of the duties of a majority shareholder and that is, in reality, the better approach. See the Comment to Proposed subsection 8.71(b).

3. RELATED PERS0N

Two subcategories of "related person" of the director are set out in subdivision (3). These subcategories are specified, exclusive and preemptive.

The first subcategory is made up of closely related family, or near-family, individuals, trusts and estates as specified in clause (i). The clause is exclusive insofar as family relationships are concerned. The references to a "spouse" are intended to include a common-law spouse or unrelated cohabitant.

The second subcategory is made up of persons specified in clause (ii) to whom or which the director is linked in a fiduciary capacity as, for example, in the director's status as trustee or administrator. (Note that the definition of "person" in the Proposed Act includes both individuals and entities. See Proposed subsection 1.40(16).) From the perspective of X Co., D's fiduciary relationships are always a sensitive concern. A conscientious director may be able to control the director's own greed arising from a conflicting personal interest. And the director may resist the temptation to assist the director's spouse or child. But the director can never escape the legal obligation to act in the best interests of another person for whom the director is a trustee or other fiduciary.

4. REQUIRED DISCLOSURE

Two separate elements together make up the defined term "required disclosure". They are disclosure of the existence of the conflicting interest and then disclosure of the material facts known to D about the subject of the transaction.

Subdivision (4) calls for disclosure of all facts known to D about the subject of the transaction that an ordinarily prudent person would reasonably believe to be material to a judgment by the person acting for the corporation as to whether to proceed or not to proceed with the transaction. If a director knows that the land the corporation is buying from the director is sinking into an abandoned coal mine, the director must disclose not only that the director is the owner and that the director has an interest in the transaction but also that the land is subsiding; as a director of X Co. the director may not invoke caveat emptor. But in the same circumstances the director is not under an obligation to reveal the price the director paid for the property ten years ago, or that the director inherited it, since that information is not material to the corporation's business judgment as to whether or not to proceed with the transaction. Further, while material facts that pertain to the subject of the transaction must be disclosed, a director is not required to reveal personal or subjective information that bears upon the director's negotiating position (such as, for example, the director's urgent need for cash, or the lowest price the director would be willing to accept. This is true despite the fact that such information would obviously be relevant to the corporation's decision-making in the sense that, if known to the corporation, it could equip the corporation to hold out for terms more favorable to it.

Underlying the definition of the twin components of "required disclosure" is the critically important provision contained in subdivision (1) that a basic precondition for the existence of a "conflicting interest" is that the director know of the transaction and also that the director know of the existence of the director's conflicting interest.

5. TIME OF COMMITMENT

The time of the commitment by the corporation (or its subsidiary or other controlled entity) to the transaction is defined in operational terms geared to change of economic position.

AMENDMENTS TO ORIGINAL SECTION
Laws 2009, ch. 189, §30 (eff. 7-26-09)*(amends only subsection (5))*
(5) "Time of commitment" respecting a transaction means the time when the transaction ~~is consummated~~ becomes effective or, if made pursuant to contract, the time when the corporation, or its subsidiary or the entity in which it has a controlling interest, becomes contractually obligated so that its unilateral withdrawal from the transaction would entail significant loss, liability, or other damage.

CARC COMMENTARY
The term "corporate action" is defined and used throughout the Washington Business Corporation Act for consistency and to clarify the distinction between the matter being approved versus the action of approving.

* * * * *

RCW 23B.08.710
JUDICIAL ACTION

CURRENT SECTION

(1) A transaction effected or proposed to be effected by a corporation, or by a subsidiary of the corporation or any other entity in which the corporation has a controlling interest, that is not a director's conflicting interest transaction may not be enjoined, set aside, or give rise to an award of damages or other sanctions, in a proceeding by a shareholder or by or in the right of the corporation, because a director of the corporation, or any person with whom or which the director has a personal, economic, or other association, has an interest in the transaction.

(2) A director's conflicting interest transaction may not be enjoined, set aside, or give rise to an award of damages or other sanctions, in a proceeding by a shareholder or by or in the right of the corporation, because the director, or any person with whom or which the director has a personal, economic, or other association, has an interest in the transaction, if:

(a) Directors' action respecting the transaction was at any time taken in compliance with RCW 23B.08.720;

(b) Shareholders' action respecting the transaction was at any time taken in compliance with RCW 23B.08.730; or

(c) The transaction, judged according to the circumstances at the time of commitment, is established to have been fair to the corporation.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §117 (eff. 7-1-90)
Same as current.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3065-69 (1989)
Section 8.71 Judicial Action.
Section 8.71 is the operational section of Proposed sections 8.70-8.73 as it prescribes the judicial consequences of the other sections.

Speaking generally:

(i) If the procedure set forth in Proposed section 8.72 or in Proposed section 8.73 is complied with, or if the transaction is fair to the corporation, then a director's conflicting interest transaction is immune from attack on any ground of a personal interest or conflict of interest of the director. The narrow scope of Proposed sections 8.70-8.73 must again, however, be strongly emphasized; if the transaction is vulnerable to attack on some other ground, Proposed sections 8.70-8.73 do not make it less so for having been passed through the procedures of those sections. See, however, paragraph 4 of the Introductory Comment.

(ii) If a transaction is <u>not</u> a director's conflicting interest transaction as defined in Proposed section 8.70, then the transaction may <u>not</u> be enjoined, rescinded or made the basis of other sanction <u>on the ground of a conflict of interest of a director, whether or not it went through the procedures of sections 8.70-8.73</u>. In that sense, Proposed sections 8.70-8.73 are specifically intended to be both comprehensive and exclusive.

(iii) If a transaction that is a director's conflicting interest transaction was not at any time the subject of action taken in compliance with Proposed section 8.72 or Proposed section 8.73, and it is attacked on grounds of a director's conflicting interest and is not shown to be fair to the corporation, then the court may grant such remedial action as it considers appropriate under the applicable law. If the attack is on other grounds, Proposed sections 8.70-8.73 have no relevance to the issue(s) before the court.

1. PROPOSED SUBSECTION 8.71(a)

Proposed subsection 8.71(a) is a key component in the design of Proposed sections 8.70-8.73. It draws a bright-line circle, declaring that the definitions of Proposed section 8.70 wholly occupy and preempt the field of directors' conflicting interest transactions. Of course, outside this circle there is a penumbra of director interests, desires, goals, loyalties and prejudices that may, in a particular context, run at odds with the best interests of the corporation; but Proposed subsection 8.71(a) forbids a court to ground remedial action on any of them. If a plaintiff charges that a director had a conflict of interest with respect to a transaction of the corporation because the other party was the director's cousin, the answer of the court should be: "No. A cousin, as such and without more, is not included in Proposed subsection 8.70(3) as a related person--and under Proposed subsection 8.71(a), I have no authority to reach out farther." If a plaintiff contends that the director had a conflict of interest in a corporate transaction because the other party is president of the golf club the director wants desperately to join, the court should respond: "No. The only director's conflicting interest on the basis of which I can set aside a corporate transaction or impose other sanctions is a financial interest as defined in Proposed section 8.70." The reasons why Proposed sections 8.70-8.73 adopt this bright-line approach are reviewed in the Introductory Comment.

In the real world, however, matters are often not clear, and one cannot always predict with comfort a future judicial response. It must be expected that quite often a director (and the director's legal/business advisors) may be in doubt as to whether a particular person would or would not be held to fall within a subcategory in Proposed subsection 8.70(3), or whether the economic impact on the director will be considered "in or closely linked" to the transaction, or whether the director is an "agent" or "employee," or whether the scale of the director's interest is large enough to be likely to sway the director if brought to a vote. Some directors will wish, too, to make it clear that they are leaning over backwards. In such circumstances, the obvious avenue to follow is to clear the matter with qualified directors under Proposed section 8.72 or with the holders of qualified shares under Proposed section 8.73. If it is later judicially determined that a conflicting interest of the director did exist, the director will be grateful for the safe harbor protection. If it should be ultimately held that there was no conflicting interest in the transaction as defined by Proposed section 8.70, no harm (other than nuisance) has been done by passing the transaction through the procedures of Proposed section 8.72 or Proposed section 8.73. It may be expected, therefore, that the procedures of Proposed section 8.72 (and, to a lesser extent, Proposed section 8.73) will be used with regard to many transactions that lie outside the sharp definitions of Proposed section 8.70--a result that is healthy and constructive.

Once again, it is important to stress that Proposed sections 8.70-8.73 deal only with "transactions". If a non-transactional corporate decision is challenged on the ground that D has a conflicting personal stake in it, Proposed subsection 8.71(a) is irrelevant. For a discussion of corporate action that may be considered either a business decision or a transaction, see the Comment to Proposed subsection 8.70(1)(ii) and Paragraph 4 of the Introductory Comment.

2. PROPOSED SUBSECTION 8.71(b)

Proposed subsection 8.71(b) is the heart of Proposed sections 8.70-8.73--the fundamental section that provides for the safe harbor.

Clause (1) of subsection (b) provides that if a director has a conflicting interest respecting a transaction, neither the transaction nor the director is legally vulnerable if the procedures of Proposed section 8.72 have

been properly followed. Proposed subsection (b)(1) is, however, subject to a critically important predicate condition.

The condition--an obvious one--is that the board's action must comply with the care, best interests and good faith criteria for director action prescribed in Proposed subsection 8.30(a). If the directors who voted for the conflicting interest transaction were qualified directors under Proposed sections 8.70-8.73, but approved the transaction merely as an accommodation to the director with the conflicting interest, going through the motions of board action without complying with the requirements of Proposed subsection 8.30(a), the action of the board would not be given effect for purposes of Proposed subsection 8.71(b)(1).

Board action on a director's conflicting interest transaction provides a context in which the function of the "best interests of the corporation" language in Proposed section 8.30(a) is brought into clear focus. Consider, for example, a situation in which it is established that the board of a manufacturing corporation approved a cash loan to a director where the duration, security and interest terms of the loan were at prevailing commercial rates, but (i) the loan was not made in the course of the corporation's ordinary business and (ii) the loan required a commitment of limited working capital that would otherwise have been used in furtherance of the corporation's business activities. Such a loan transaction would not be afforded safe-harbor protection by Proposed section 8.72(b)(1) since the board did not comply with the requirement in section 8.30(a) that the board's action be, in its reasonable judgment, in the best interests of the corporation--that is, that the action will, as the board judges the circumstances at hand, yield favorable results (or reduce detrimental results) as judged from the perspective of furthering the corporation's business activities.

If a determination is made that the terms of a director's conflicting interest transaction, judged according to the circumstances at the time of commitment, were manifestly unfavorable to the corporation, that determination would be relevant to an allegation that the directors' action was not taken in good faith and therefore did not comply with Proposed section 8.30(a).

The Proposed Act does not undertake to prescribe litigation procedures. If board action under Proposed section 8.72(b)(1) is interposed as a bar to a challenge to a director's conflicting interest transaction and the complainant wishes to put in issue an alleged non-compliance with Proposed section 8.30(a) by the board, he would do so by proceeding under the same local pleading, presumption and burden of proof rules that would govern any other attack on an action of a board of directors.

Clause (2) of Proposed subsection (b) regarding shareholders' approval of the transaction is the matching piece to clause (1) regarding directors' approval.

Clause (3) of Proposed subsection (b) provides that a director's conflicting interest transaction will be secure against judicial intervention if the interested director (or the corporation, if it chooses) shows that although neither directors' nor shareholders' action was taken complying with Proposed sections 8.72 or 8.73, the transaction was fair to the corporation. The term "fair" accords with traditional language in the cases. But it must be understood that, as used in the context of those cases and of Proposed sections 8.70-8.73, they have a special flexibility in meaning and a wide embrace.

Note on Fair Transactions

(1) Terms of the Transaction. If the issue in a transaction is the "fairness" of a price, "fair" is not to be taken to imply that there is a single "fair" price, all others being "unfair." It has long been settled that a "fair" price is any price in that broad range which an unrelated party might have been willing to pay, or willing to accept, as the case may be, for the property, following a normal arm's-length business negotiation, in the light of the knowledge that would have been reasonably acquired in the course of such negotiations, any result within that range being "fair." The same statement applies not only to price but to any other key term of the deal.

Although the "fair" criterion applied by the courts is a range rather than a point, the width of the range is only a segment of the full spectrum of the directors' discretion associated with the exercise of business judgment under Proposed section 8.30(a). That is to say, the scope of decisional discretion that a court would have allowed to the directors if they had acted and had complied with Proposed section 8.30(a) is wider than the range of "fairness" contemplated for judicial determination where Proposed subsection 8.71(b)(3) is the governing provision.

(2) Benefit to the Corporation. In considering the "fairness" of the transaction, the court will in addition be required to consider not only the market fairness of the terms of the deal, but also, as the board would have been required to do, whether the transaction was one that was reasonably likely to yield favorable results (or reduce detrimental results) from the perspective of furthering the corporation's business activities. Thus, if a manufacturing company that is short of working capital allocates some of its scarce funds to purchase a sailing yacht owned by one of its directors, it will not be easy to persuade the court that the transaction is "fair" in the sense that it was reasonably made to further the business interests of the corporation; the fact that the price paid for the yacht was stipulated to be a "fair" market price will not be enough alone to uphold the transaction. See also the discussion above regarding Proposed section 8.30(a).

(3) Process of Decision. In some circumstances, the behavior of the director having the conflicting interest can itself affect the finding and content of "fairness." The most obvious illustration of unfair dealing arises out of the director's failure to disclose fully the director's interest or hidden defects known to the director regarding the transaction. Another illustration could be the exertion of improper pressure by the director upon the other directors. When the facts of such unfair dealing become known, the court should offer the corporation its option as to whether to rescind the transaction on grounds of "unfairness" even if it appears that the terms were "fair" by market standards and the corporation profited from it. If the corporation decides not to rescind the transaction because of business advantages accruing to the corporation from it, the court may still find in the director's misconduct a basis for judicially imposed sanction against the director personally. Thus, the course of dealing--or process--is a key component to a "fairness" determination under subsection (b)(3).

Note on Directors' Compensation

Directors' fees and similar forms of compensation, expense reimbursement practices, directors' and officer's liability insurance and routine incidents of office (such as a privilege to buy the corporation's products at a discount) in the normal course of business are typically set by the board and are specially authorized (though not regulated) by sections 8.11 and 8.58 of the Proposed Act. These practices obviously involve a conflicting interest on the part of most if not all of the directors and are capable of being abused, although, in the usual case, they fall within normative patterns and fairness can be readily established. While, as a matter of practical necessity, these practices are universally accepted in principle by the law, board action on directors' compensation and benefits would be subject to judicial sanction if not in the circumstances fair to the corporation or favorably acted upon by shareholders pursuant to Proposed section 8.73. Sustainable action by the board in this regard must, of course, meet the general criteria for board action prescribed in Proposed section 8.30(a); see the Comment to Proposed section 8.71(b).

Note On Directors' Personal Liability

At common law, articulation of the legal principles applicable to directors' conflicts of interest typically declare the transaction to be void or (sometimes) voidable. These formulations say little about the liabilities, if any, of the parties to the transaction. It is clear, however, that in some special circumstances a court would hold that the interested director must disgorge the profits the director made from the transaction or must respond in damages for injury suffered by the corporation as a result of the transaction. Such sanctions could arise in contexts where the court leaves the transaction itself in place as well as in situations where the court rescinds the transaction. Proposed sections 8.70-8.73 leave these matters of sanction entirely to the judgment of the court.

In some situations, a transaction will contain an element of conflicting interest on the part of the director but in reality the director is a surrogate in the board room and not the real beneficiary of the transaction. Thus, where P Co. is a majority or controlling shareholder in X Co., and some or all of the directors of X Co. are the employees or agents of P Co., there is always a risk that, in a transaction between P Co. and X Co., P Co. may take advantage of its position to press its agents and employees who are on the X Co. board to approve a transaction that is disadvantageous to X Co. but advantageous to P Co. Under Proposed sections 8.70-8.73, if X Co. has directors who are not affiliated with P Co., action pursuant to Proposed section 8.72 is possible. But many less-than-wholly-owned subsidiaries have no unaffiliated directors to pass on a transaction between X Co. and its controlling shareholder P Co. In such a circumstance, the minority shareholders of X Co. are entitled to fair treatment; if they are not treated fairly, the responsibility should, in most cases, be laid at the door of P Co. and not be placed upon P Co.'s agents or employees on the X Co. board.

As a matter of case law, the courts have arrived at that result by treating such cases under the rubric of the duty of fair dealing on the part of the controlling shareholder vis-à-vis the minority shareholders. In so doing, the courts have deliberately skipped over any analytically available alternative approach predicated on a theory of conflicting interest of the X Co. director who is an employee or agent of the controlling shareholder. All rights of minority shareholders against a controlling shareholder are preserved unaffected by Proposed sections 8.70-8.73. All directors of X Co., regardless of their other affiliations, have duties to perform for the benefit of all X Co.'s shareholders, not just some of them. D is not relieved of those obligations merely because D happens to be an employee of the majority shareholder. At the same time, in these circumstances D often has little real discretion in voting to approve the transaction and the beneficiary of the transaction is not D but P Co., D's employer.

If a transaction is between P Co. and X Co., if the transaction is important to X Co., if D is an agent or employee of P Co., if the transaction is not protected by the procedures of Proposed section 8.72 or Proposed section 8.73, and if the transaction is not shown to be fair to X Co., then a court may well set aside the transaction or take other remedial action with regard to P Co.--but it would not usually be equitable in such cases to hold D personally liable.

Parallels to this commonplace parent-subsidiary example can also arise under Proposed sections 8.70-8.73 out of almost any circumstance that meets the criteria of Proposed subsection 8.70(1)(ii). It is evident that a common director of X Co. and of Y Co. has a degree of conflicting interest in a transaction between the two corporations; but (assuming no valid safe harbor action under Proposed sections 8.70-8.73) the sanction that would be appropriate would in most circumstances be addressed to the transaction itself and to one or both of the companies involved, rather than to D personally. See the Comment to Proposed subsection 8.70(2) and Proposed subsection 8.72(d).

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RCW 23B.08.720
DIRECTORS' ACTION

CURRENT SECTION

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

(a) All its members are qualified directors; and

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

(2) If a director has a conflicting interest respecting a transaction, but neither the director nor a related person of the director specified in RCW 23B.08.700(3)(a) is a party to the transaction, and if the director has a duty under law or professional canon, or a duty of confidentiality to another person, respecting information relating to the transaction such that the director may not make the disclosure described in RCW 23B.08.700(4)(b), then disclosure is sufficient for purposes of subsection (1) of this section if the director (a) discloses to the directors voting on the transaction the existence and nature of the director's conflicting interest and informs them of the character and limitations imposed by that duty before their vote on the transaction, and (b) plays no part, directly or indirectly, in their deliberations or vote.

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

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

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §118 (eff. 7-1-90)
Same as current.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3069-70 (1989)
Section 8.72 Directors' Action.
Proposed section 8.72 provides the procedure for action of the board of directors under Proposed sections 8.70-8.73. In the normal course, this section, taken together with Proposed subsection 8.71(b), will be the key provision for dealing with directors' conflicting interest transactions.

All discussion of Proposed section 8.72 must be conducted in light of the overarching provisions of Proposed subsection 8.30(a) prescribing the criteria for decisions by directors. Board action that does not comply with the requirements of Proposed subsection 8.30(a) will not, of course, be given effect under Proposed section 8.72. See the Comment to Proposed subsection 8.71(b).

1. PROPOSED SUBSECTION 8.72(a)

A transaction in which a director has a conflicting interest is approved under Proposed section 8.72 if and only if it is approved by qualified directors, as defined in Proposed subsection 8.72(d). Action by the board of directors as a whole is effective if approved by the affirmative vote of a majority (but not less than two) of the qualified directors on the board. Action may also be taken by a duly authorized committee of the board but, to be effective, all members of the committee must be qualified directors and the committee must either contain all of the qualified directors on the board or must have been appointed by the affirmative vote of a majority of the qualified directors on the board. The effect of the limitation on committee action is to make it impossible to handpick as committee members a favorably inclined minority from among the qualified directors.

Except to the limited extent provided in subsection (b), approval by the board or committee must be preceded by required disclosure.

Action complying with Proposed subsection 8.72(a) may be taken by the board of directors at any time, before or after the transaction, and may deal with a single transaction or a specified category of similar transactions.

2. PROPOSED SUBSECTION 8.72(b)

Proposed subsection (b) is a new provision designed to deal, in a practical way, with situations in which a director who has a conflicting interest is not able to comply fully with the disclosure requirement of Proposed subsection (a) because of an extrinsic duty of confidentiality. The director may, for example, be prohibited from making full disclosure because of restrictions of law that happen to apply to the transaction (e.g., grand jury seal or national security statute) or professional canon (e.g., lawyers' or doctors' client privilege). The most frequent use of Proposed subsection (b), however, will undoubtedly be in connection with common directors who find themselves in a position of dual fiduciary obligations that clash. If D is also a director of Y Co., D may have acquired privileged confidential information from one or both sources relevant to a transaction between X Co. and Y Co. that the director cannot reveal to one without violating the director's fiduciary relationship to the other. In such circumstance, Proposed subsection (b) makes it possible for such a matter to be brought to the board for consideration under Proposed subsection (a) and thus enable X Co. to secure the protection afforded by Proposed sections 8.70-8.73 for the transaction despite the fact that D cannot make the full disclosure usually required.

To comply with Proposed subsection (b), D must disclose that D has a conflicting interest, inform the directors who vote on the transaction of the nature of the director's duty of confidentiality (e.g., inform them that it arises out of an attorney-client privilege or the director's duty as a director of Y Co. that prevents the director from making the disclosure called for by clause (ii) of Proposed subsection 8.70(4)) and then play no personal part in the board's deliberations. The point of Proposed subsection (b) is simply to make clear that the provisions of Proposed sections 8.70-8.73 may be employed with regard to a transaction in circumstances where an interested director cannot, because of enforced fiduciary silence, make disclosure of the facts known to the director. Of course, if D invokes Proposed subsection (b) and then remains silent before leaving the boardroom, the remaining directors may decline to act on the transaction if troubled by a concern that D knows (or may know) something they do not. On the other hand, if D is subject to an extrinsic duty of confidentiality but has no knowledge of facts that should be disclosed, D would normally so state and disregard Proposed subsection (b), and (having disclosed the existence and nature of D's conflicting interest) thereby comply with Proposed subsection 8.70(4).

A director could, of course, encounter the same problem of mandated silence with regard to any matter that comes before the board; that is, the problem of forced silence is not linked at all to the problems of transactions involving a conflicting interest of a director. It could easily happen that at the same board meeting of X Co. at which D, the interested director, invokes Proposed subsection 8.72(b) and excuses himself, another director who has absolutely no financial interest in the transaction might conclude that under local law the other director is bound to silence (because of attorney-client privilege, for example) and would under general principles of sound director conduct withdraw from participation in the board's deliberations and action.

While subchapter F explicitly contemplates the application of Proposed subsection (b) to the frequently recurrent problem of common directors and officers, it should not otherwise be read as attempting to define the scope or mandate the consequences of various silence-privileges; that is a topic for local law.

Proposed subsection (b) is not available to D if the transaction is directly between the corporation and D or the director's related person--if, that is, the director or a related person is a party to the transaction. If D or a related person is a party to the transaction, the director's only options are required disclosure on an unqualified basis, abandonment of the transaction, or acceptance of the risk of establishing fairness in a court proceeding if the transaction is challenged.

Whenever D proceeds as provided in Proposed subsection 8.72(b), the board should recognize that D may well have information that in usual circumstances D would be required to reveal to the board--information that may well indicate that the transaction is a favorable or unfavorable one for X Co.

3. PROPOSED SUBSECTION 8.72(c)

Proposed subsection (c) contains technical provisions dealing with quorum and superfluous votes by interested directors.

4. PROPOSED SUBSECTION 8.72(d)

Obviously, a director's conflicting interest transaction and D cannot be provided safe harbor protection by fellow directors who themselves have conflicting interests; only "qualified directors" can provide such safe harbor protection pursuant to Proposed subsection (a). "Qualified director" is defined in Proposed subsection (d). The definition is broad: it excludes not only any director who has a conflicting interest respecting the matter, but also--going significantly beyond the persons specified in the subcategories of Proposed subsection 8.70(1)(ii) for purposes of the "conflicting interest" definition--any director whose familial or financial relationship with D or whose employment or professional relationship with D would be likely to influence the director's vote on the transaction.

The determination of whether there is a financial, employment or professional relationship should be based on the practicalities of the situation rather than formalistic circumstances. For example, a director employed by a corporation controlled by D should be regarded as having an employment relationship with D.

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RCW 23B.08.730
SHAREHOLDERS' ACTION

CURRENT SECTION

(1) Shareholders' action respecting a transaction is effective for purposes of RCW 23B.08.710(2)(b) if a majority of the votes entitled to be cast by the holders of all qualified shares were cast in favor of the transaction after (a) notice to shareholders describing the director's conflicting interest transaction, (b) provision of the information referred to in subsection (4) of this section, and (c) required disclosure to the shareholders who voted on the transaction, to the extent the information was not known by them.

(2) For purposes of this section, "qualified shares" means any shares entitled to vote with respect to the director's conflicting interest transaction except shares that, to the knowledge, before the vote, of the secretary, or other officer or agent of the corporation authorized to tabulate votes, are beneficially owned, or the voting of which is controlled, by a director who has a conflicting interest respecting the transaction or by a related person of the director, or both.

(3) A majority of the votes entitled to be cast by the holders of all qualified shares constitutes a quorum for purposes of action that complies with this section. Subject to the provisions of subsections (4) and (5) of this section, shareholders' action that otherwise complies with this section is not affected by the presence of holders, or the voting, of shares that are not qualified shares.

(4) For purposes of compliance with subsection (1) of this section, a director who has a conflicting interest respecting the transaction shall, before the shareholders' vote, inform the secretary, or other officer or agent of the corporation authorized to tabulate votes, of the number, and the identity of persons holding or controlling the vote, of all shares that the director knows are beneficially owned, or the voting of which is controlled, by the director, or by a related person of the director, or both.

(5) If a shareholders' vote does not comply with subsection (1) of this section solely because of a failure of a director to comply with subsection (4) of this section, and if the director establishes that the director's failure did not determine and was not intended by the director to influence the outcome of the vote, the court may, with or without further proceedings respecting RCW 23B.08.710(2)(c), take such action respecting the transaction and the director, and give such effect, if any, to the shareholders' vote, as it considers appropriate in the circumstances.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §119 (eff. 7-1-90)
Same as current.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3070-73 (1989)
Section 8.73 Shareholders' Action.
Proposed section 8.73 provides the machinery for shareholder safe harbor of a director's conflicting interest transaction, as Proposed section 8.72 provides the machinery for safe harbor by action of directors.

1. PROPOSED SUBSECTION 8.73(a)

Proposed subsection (a) specifies the procedure required to establish effective safe harbor protection of a director's conflicting interest transaction through vote of shareholders. In advance of the vote, three steps must be taken. Shareholders must be given notice describing the transaction. D must provide the information called for in Proposed subsection (d), discussed below. And required disclosure must be made, as defined in Proposed subsection 8.70(4). If, then, a majority of all qualified shares that are entitled to vote on the matter vote favorably, the safe harbor provision of Proposed subsection 8.71(b)(2) becomes effective.

Action that complies with Proposed subsection 8.73(a) may be taken at any time--before or after the transaction.

Note that Proposed section 8.73 does not contain a provision comparable to Proposed subsection 8.72(b). Thus, the safe harbor protection of Proposed sections 8.70-8.73 cannot be made available through shareholder action under Proposed section 8.73 in a case where D remains silent because of an extrinsic duty of confidentiality. This is advertent. While it is believed that the Proposed subsection 8.72(b) procedure is workable in the collegial setting of the boardroom, one must have reservations whether the same is true vis-à-vis the shareholder body--especially in larger corporations where there is heavy reliance upon the proxy mechanic. In most situations no opportunity exists for shareholders to quiz D about D's duty and to discuss the implications of acting without the benefit of D's knowledge concerning the transaction. In a case involving a closely-held corporation where Proposed section 8.73 procedures are followed, but with D acting as provided in Proposed subsection 8.72(b), a court could, of course, attach significance to a favorable shareholder vote in evaluating the fairness of the transaction to the corporation. See the discussion in paragraph 4 of the Introductory Comment.

2. PROPOSED SUBSECTION 8.73(b)

Under Proposed subsection (a), only "qualified shares" may be counted in the vote for purposes of safe harbor action pursuant to Proposed subsection 8.71(b)(2). Proposed subsection (b) defines "qualified shares" to exclude all shares that prior to the vote the secretary or other tabulator of the votes knows to be owned or controlled by the director who has the conflicting interest or any related person of that director. It should be stressed that this definition is dependent upon the tabulator's actual knowledge. If the tabulator does not know that certain shares are owned by the director who has the conflicting interest, the tabulator cannot be expected to exclude those shares from the vote count. But see the Comment to Proposed subsection (e).

The category of persons whose shares are excluded from the vote count under Proposed subsection (b) is not the same as the category of persons specified in Proposed subsection 8.70(1)(ii) for purposes of defining D's "conflicting interest" and -- importantly -- not the same as the category of persons excluded for purposes of the definition of non-qualified directors under Proposed subsection 8.72(d). The distinctions among these three categories are deliberate and carefully drawn.

The definition of "qualified shares" excludes shares owned by D or a related person as defined in Proposed subsection 8.70(3). If D is an employee or director of Y Co., Y Co. is not prevented by that fact from exercising its usual voting rights as to any shares it may hold in X Co. D's linkage to a related person is close. But the net of Proposed subsection 8.70(1)(ii) specifying other persons and entities for purposes of the "conflicting interest" definition is cast so wide that D will never be able to know whether, nor have a reason to try to monitor whether, some person within those subcategories holds X Co. shares. Typically, moreover, D will have no control over those persons and how they vote their X Co. shares. There is, in reality, no reason to strip those persons of their voting rights as shareholders, for in the usual commercial situation they will vote in accordance with their own interests--which may well not coincide with the personal interest of D.

To illustrate the operation of Proposed subsection (b), consider a case in which D is also a director of Y Co., and to D's knowledge: 30% of Y Co.'s stock is owned by X Co.; D, D's spouse, a trust of which D is the trustee, and a corporation D controls, together own 10% of X Co.'s stock but no stock of Y Co.; and X Co. and Y Co. wish to enter into a transaction that is of major significance to both.

From the perspective of X Co., D has a conflicting interest since D is a director of Y Co. If X Co. submits the transaction to a vote of its shareholders under section 8.73, the shares held by D, D's spouse, the trust of which D is the trustee and the corporation D controls are not qualified shares and may not be counted in the vote.

From the perspective of Y Co., D has a conflicting interest since D is a director of X Co. If Y Co. submits the transaction to a vote of its shareholders under Proposed section 8.73, the 30% of Y Co. shares held by X Co. are qualified shares and may be counted for purposes of Proposed section 8.73. The same would be equally true if X Co. were the majority shareholder of Y Co. but as emphasized elsewhere, the vote under Proposed section 8.73 has no effect whatever by way of exonerating or protecting X Co. if X Co. fails to meet any legal obligation which, as the majority shareholder of Y Co., it may owe to the minority shareholders of Y Co.

3. PROPOSED SUBSECTION 8.73(c)

Proposed subsection (c) contains administratively useful quorum provisions and provides that superfluous voting of shares that were not qualified to vote does not vitiate the effectiveness of the vote. But see Proposed subsection (e).

The fact that certain shares are not qualified and are not countable for purposes of subsection (a) says nothing as to whether they are properly countable for other purposes such as, for example, a statutory requirement that a certain fraction of the total vote or a special majority vote be obtained.

4. PROPOSED SUBSECTION 8.73(d)

In most circumstances, the secretary of X Co. will have no way to know whether certain of X Co.'s outstanding shares should be excluded from the teller's count because of the identity of the owners or of those persons who control the voting of the shares. Proposed subsection (a) together with Proposed subsection (d) therefore impose on a director who has a conflicting interest respecting the transaction, as a prerequisite to safe harbor protection by shareholder vote, the obligation to inform the secretary, or other officer or agent authorized to tabulate votes, of the number and holders of shares known by the director to be owned by the director or by a related person of the director. Thus, a director who has a conflicting interest respecting the transaction, because the director stands to make a commission from it, is obligated to report shares owned or the vote of which is controlled by the director and by all related persons of the director; a director who has a conflicting interest respecting the transaction because the director's brother stands to make a commission from it has the same reporting obligation. The tabulator may also, of course, have other independent knowledge of shares that are owned or controlled by a related person of the director.

If the tabulator of votes knows that particular shares should be excluded but fails to exclude them from the count and their inclusion in the vote does not affect its outcome, Proposed subsection (c) governs and the shareholders' vote stands. If the improper inclusion determines the outcome, the shareholders' vote fails to comply with Proposed subsection (a). If the tabulator does not know that certain shares are owned or controlled by the director who has the conflicting interest or a related person of the director, the shares are "qualified" pursuant to the definition in Proposed subsection (b), and the vote cannot be attacked on that ground for failure to comply with Proposed subsection (a); but see Proposed subsection (e).

5. PROPOSED SUBSECTION 8.73(e)

If D did not provide the information required under Proposed subsection (d), on the face of it shareholders' action is not in compliance with Proposed subsection (a) and D has no safe harbor under Proposed subsection (a). In the absence of such safe harbor D can be put to the challenge of establishing the fairness of the transaction under Proposed subsection 8.71(b)(3).

That result is the proper one where D's failure to inform was determinative of the vote or, worse, was part of a deliberate effort on D's part to influence the outcome of the vote. But if D's omission was essentially an act of negligence, if the number of unreported shares was not determinative of the outcome of the vote, and if the omission was not motivated by an effort by D to influence the integrity of the voting process, the court should be free to fashion an appropriate response to the situation in the light of all the considerations at the time of trial and not be automatically forced by the mechanics of sections 8.70-8.73 to a lengthy and retrospective trial on "fairness". Proposed subsection (e) grants the court that discretion in those circumstances and permits it to accord such effect, if any, to the shareholders' vote, or grant such relief respecting the transaction or D, as the court may find appropriate.

Despite the presumption of regularity customarily accorded the secretary's record, a plaintiff may go behind the secretary's record for purposes of Proposed subsection (e).

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RCW 23B.08.900
CONSTRUCTION – CHAPTER APPLICABLE TO STATE REGISTERED DOMESTIC PARTNERSHIPS

CURRENT SECTION

For the purposes of this chapter, the terms spouse, marriage, marital, husband, wife, widow, widower, next of kin, and family shall be interpreted as applying equally to state registered domestic partnerships or individuals in state registered domestic partnerships as well as to marital relationships and married persons, and references to dissolution of marriage shall apply equally to state registered domestic partnerships that have been terminated, dissolved, or invalidated, to the extent that such interpretation does not conflict with federal law. Where necessary to implement chapter 521, Laws of 2009, gender-specific terms such as husband and wife used in any statute, rule, or other law shall be construed to be gender neutral, and applicable to individuals in state registered domestic partnerships.

HISTORY

ORIGINAL SECTION Laws 2009, ch. 521, §63 (eff. 12-2-09)
Same as current.

OFFICIAL LEGISLATIVE HISTORY
None.

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