Third Edition, 2010

Washington Business Corporation Act
(RCW 23B)

Sourcebook

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Prepared by
Corporate Act Revision Committee
of the
Washington State Bar Association

Richard O. Kummert, Reporter

Members
John A. Reed, Chair
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Eric DeJong
G. Scott Greenburg
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RCW 23B.01.400
DEFINITIONS

CURRENT SECTION

Unless the context clearly requires otherwise, the definitions in this section apply throughout this title.

(1) "Articles of incorporation" include amended and restated articles of incorporation and articles of merger.

(2) "Authorized shares" means the shares of all classes a domestic or foreign corporation is authorized to issue.

(3) "Conspicuous" means so prepared that a reasonable person against whom the record is to operate should have noticed it. For example, printing in italics or boldface or contrasting color, or typing in capitals or underlined, is conspicuous.

(4) "Corporate action" means any resolution, act, policy, contract, transaction, plan, adoption or amendment of articles of incorporation or bylaws, or other matter approved by or submitted for approval to a corporation's incorporators, board of directors or a committee thereof, or shareholders.

(5) "Corporation" or "domestic corporation" means a corporation for profit, which is not a foreign corporation, incorporated under or subject to the provisions of this title.

(6) "Deliver" includes (a) mailing, (b) for purposes of delivering a demand, consent, notice, or waiver to the corporation or one of its officers, directors, or shareholders, transmission by facsimile equipment, and (c) for purposes of delivering a demand, consent, notice, or waiver to the corporation or one of its officers, directors, or shareholders under RCW 23B.01.410 or chapter 23B.07, 23B.08, 23B.11, 23B.13, 23B.14, or 23B.16 RCW delivery by electronic transmission.

(7) "Distribution" means a direct or indirect transfer of money or other property, except its own shares, or incurrence of indebtedness by a corporation to or for the benefit of its shareholders in respect to any of its shares. A distribution may be in the form of a declaration or payment of a dividend; a distribution in partial or complete liquidation, or upon voluntary or involuntary dissolution; a purchase, redemption, or other acquisition of shares; a distribution of indebtedness; or otherwise.

(8) "Effective date of notice" has the meaning provided in RCW 23B.01.410.

(9) "Electronic transmission" means an electronic communication (a) not directly involving the physical transfer of a record in a tangible medium and (b) that may be retained, retrieved, and reviewed by the sender and the recipient thereof, and that may be directly reproduced in a tangible medium by such a sender and recipient.

(10) "Electronically transmitted" means the initiation of an electronic transmission.

(11) "Employee" includes an officer but not a director. A director may accept duties that make the director also an employee.

(12) "Entity" includes a corporation and foreign corporation, not-for-profit corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, two or more persons having a joint or common economic

interest, the state, United States, and a foreign governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(13) "Execute," "executes," or "executed" means (a) signed with respect to a written record or (b) electronically transmitted along with sufficient information to determine the sender's identity with respect to an electronic transmission, or (c) with respect to a record to be filed with the secretary of state, in compliance with the standards for filing with the office of the secretary of state as prescribed by the secretary of state.

(14) "Foreign corporation" means a corporation for profit incorporated under a law other than the law of this state.

(15) "Foreign limited partnership" means a partnership formed under laws other than of this state and having as partners one or more general partners and one or more limited partners.

(16) "Governmental subdivision" includes authority, county, district, and municipality.

(17) "Includes" denotes a partial definition.

(18) "Individual" includes the estate of an incompetent or deceased individual.

(19) "Limited partnership" or "domestic limited partnership" means a partnership formed by two or more persons under the laws of this state and having one or more general partners and one or more limited partners.

(20) "Means" denotes an exhaustive definition.

(21) "Notice" has the meaning provided in RCW 23B.01.410.

(22) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(23) "Principal office" means the office, in or out of this state, so designated in the annual report where the principal executive offices of a domestic or foreign corporation are located.

(24) "Proceeding" includes civil suit and criminal, administrative, and investigatory action.

(25) "Public company" means a corporation that has a class of shares registered with the federal securities and exchange commission pursuant to section 12 or 15 of the securities exchange act of 1934, or section 8 of the investment company act of 1940, or any successor statute.

(26) "Record" means information inscribed on a tangible medium or contained in an electronic transmission.

(27) "Record date" means the date established under chapter 23B.07 RCW on which a corporation determines the identity of its shareholders and their shareholdings for purposes of this title. The determinations shall be made as of the close of business on the record date unless another time for doing so is specified when the record date is fixed.

(28) "Secretary" means the corporate officer to whom the board of directors has delegated responsibility under RCW 23B.08.400(3) for custody of the minutes of the meetings of the board of directors and of the shareholders and for authenticating

records of the corporation.

(29) "Shares" means the units into which the proprietary interests in a corporation are divided.

(30) "Shareholder" means the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation.

(31) "State," when referring to a part of the United States, includes a state and commonwealth, and their agencies and governmental subdivisions, and a territory and insular possession, and their agencies and governmental subdivisions, of the United States.

(32) "Subscriber" means a person who subscribes for shares in a corporation, whether before or after incorporation.

(33) "Tangible medium" means a writing, copy of a writing, or facsimile, or a physical reproduction, each on paper or on other tangible material.

(34) "United States" includes a district, authority, bureau, commission, department, and any other agency of the United States.

(35) "Voting group" means all shares of one or more classes or series that under the articles of incorporation or this title are entitled to vote and be counted together collectively on a matter at a meeting of shareholders. All shares entitled by the articles of incorporation or this title to vote generally on the matter are for that purpose a single voting group.

(36) "Writing" does not include an electronic transmission.

(37) "Written" means embodied in a tangible medium.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §14 (eff. 7-1-90)

The following terms in the current section are the same in the original section: articles of incorporation, authorized shares, corporation, effective date of notice, employee, foreign corporation, governmental subdivision, includes, individual, means, notice, principal office, proceeding, record date, secretary, shares, shareholder, state, subscriber, United States, and voting group.

The following terms in the current section were in the original section, but with the following definition:

"Conspicuous" means so written that a reasonable person against whom the writing is to operate should have noticed it. For example, printing in italics or boldface or contrasting color, or typing in capitals or underlined, is conspicuous.

"Deliver" includes mailing.

"Distribution" means a direct or indirect transfer of money or other property, except its own shares, or incurrence of indebtedness by a corporation to or for the benefit of its shareholders in respect to any of its shares. A distribution may be in the form of a declaration or payment of a dividend; a purchase, redemption, or other acquisition of shares; a distribution of indebtedness; or otherwise.

"Entity" includes a corporation and foreign corporation, not-for-profit corporation, profit and not-for-profit unincorporated association, business trust, estate, partnership, trust, and two or more persons having a joint or common economic interest, and the state, United States, and a foreign government.

"Person" includes an individual and an entity.

“Public company” means a corporation that has a class of shares registered with the federal securities and exchange commission pursuant to section 12 of the securities exchange act of 1934, or section 8 of the investment company act of 1940, or any successor statute, and that has more than three hundred holders of record of its shares.

The remaining terms in the current section have been added since the original was effective.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 2987-88 (1989)
Section 1.40 Title Definitions.
Proposed section 1.40 collects in a single section definitions of terms used throughout the Proposed Act. Sections of the Act in a few instances contain specialized definitions applicable only to those sections.

Some of the definitions of Proposed section 1.40 are drawn directly from the old law and are reasonably self-explanatory. A number of definitions, however, are new or deserve further explanation.

"Conspicuous" is defined in Proposed subsection 1.40(3) basically as defined in section 1-201(10) of the UNIFORM COMMERCIAL CODE. Even though the definition indicates some of the methods by which a provision may be made attention-calling, the test is whether attention can reasonably be expected to be called to it.

"Corporation," "domestic corporation," and "foreign corporation" are defined in Proposed subsections 1.40(4) and (10). The word "corporation," when used alone, refers only to domestic corporations. In a few instances, the phrase "domestic corporation" has been used in order to contrast it with a foreign corporation.

The term "distribution" defined in Proposed subsection 1.40(6) is a fundamental element of the financial provisions of the old law as amended in 1984. Proposed section 6.40 sets forth a single, unitary test for the validity of any "distribution." Proposed subsection 1.40(6) in turn defines "distribution" to include all transfers of money or other property made by a corporation to any shareholder in respect of the corporation's shares, except mere changes in the unit of interest such as share dividends and share splits. Thus, a "distribution" includes the declaration or payment of a dividend, a purchase by a corporation of its own shares, a distribution of evidences of indebtedness or promissory notes of the corporation, and a distribution in voluntary or involuntary liquidation.

The term "indirect" in the definition of "distribution" is intended to include transactions like the repurchase of parent company shares by a subsidiary whose actions are controlled by the parent. It also is intended to include any other transaction in which the substance is clearly the same as a typical dividend or share repurchase, no matter how structured or labeled.

The term "entity," defined in Proposed subsection 1.40(9), appears in the definition of "person" in Proposed subsection 1.40(16) and is included to cover all types of artificial persons. See also the definitions of "governmental subdivision," in Proposed subsection 1.40(11), "state," in Proposed subsection 1.40(23), and "United States," in Proposed subsection 1.40(25).

Proposed subsection 1.40(17) defines the principal office of a corporation to be the office, within or without the state, where the principal executive office of the corporation is located. Many corporations maintain numerous offices, but there is usually one office, sometimes colloquially referred to as the home office, headquarters, or executive suite, where the principal corporate officers are located. The corporation must designate its principal office address in the annual report required by Proposed section 16.22. In case of doubt as to which corporate office is the principal office, the designation by the corporation in its annual report should be accepted as establishing the principal office of the corporation.

The definition of "shareholder" in Proposed subsection 1.40(22) includes a beneficial owner of shares named in a nominee certificate under Proposed section 7.23, but only to the extent of the rights granted the

beneficial owner in the certificate--for example, the right to receive notice of, and vote at, a shareholders' meeting. Various substantive sections of the Proposed Act also permit holders of voting trust certificates or beneficial owners of shares (not subject to a nominee certificate under Proposed section 7.23) to exercise some of the rights of a "shareholder." See, for example, Proposed section 7.40 (derivative proceedings). The term "secretary" is defined in Proposed subsection 1.40(20) since the Proposed Act does not require the corporation to maintain any specific or titled officers. See Proposed section 8.40. However, some corporate officer, however titled, must perform the functions described in this definition, and that officer is referred to as the "secretary" in various sections of the Act that impose a duty on that person.

The term "person" is defined in Proposed subsection 1.40(16) to include an individual or an entity. In the case of an individual the Proposed Act assumes that the person is competent to act in the matter under general state law independent of the corporation statute.

Proposed subsection 1.40(27) defines "voting group" for purposes of the Act as a matter of convenient reference. A "voting group" consists of all shares of one or more classes or series that under the articles of incorporation or the title are entitled to vote and be counted together collectively on a matter. Shares entitled to vote "generally" on a matter under the articles of incorporation or this title are for that purpose a single voting group. The word "generally" signifies all shares entitled to vote on the matter by the articles of incorporation or this title that do not expressly have the right to be counted or tabulated separately. "Voting groups" are thus the basic units of collective voting at a shareholders' meeting, and voting by voting groups may provide essential protection to one or more classes or series of shares against actions that are detrimental to the rights or interests of that class or series.

The determination of which shares form part of a single voting group must be made from the provisions of the articles of incorporation and of this title. In a few instances under the Proposed Act, the board of directors may establish the right to vote by voting groups. On most matters coming before shareholders' meetings, only a single voting group, consisting of a class of voting or common shares, will be involved, and action on such a matter is effective when approved by that voting group pursuant to Proposed section 7.25. See Proposed subsection 7.26(a). If a second class of shares is also entitled to vote on the matter, then a further determination must be made as to whether that class is to vote as a separate voting group or whether it is to vote along with the other voting shares as part of a single voting group.

Members of the board of directors are usually elected by the single voting group of shares entitled to vote generally; in some circumstances, however, some members of the board may be selected by one voting group and other members by one or more different voting groups. See Proposed section 8.03.

The definition of a voting group permits the establishment by statute of quorum and voting requirements for a variety of matters considered at shareholders' meetings in corporations with multiple classes of shares. See Proposed sections 7.25 and 7.26. Depending on the circumstances, two classes or series of shares may vote together collectively on a matter as a single voting group, they may be entitled to vote on the matter separately as two voting groups, or one or both of them may not be entitled to vote on the matter at all.

AMENDMENTS TO ORIGINAL SECTION
Laws 1991, ch. 72, §28 (eff. 7-28-91)
(only definitions amended or added are presented; amendments changing only subsection numbers are ignored) (amends original "deliver")
"Deliver" includes (a) mailing and (b) for purposes of delivering a demand, consent, or waiver to the corporation or one of its officers, transmission by facsimile equipment.

CARC COMMENTARY
The definition of "deliver" in subsection (5) is expanded to make it clear that demands, consents and waivers may be delivered to the corporation and its officers by facsimile transmission (as permitted for written notice under RCW 23B.01.410(2).)

* * * * *

Laws 1991, ch. 269, §35 (eff. 7-28-91) *(added two definitions)*
"Foreign limited partnership" means a partnership formed under laws other than of this state and having as partners one or more general partners and one or more limited partners.

"Limited partnership" or "domestic limited partnership" means a partnership formed by two or more persons under the laws of this state and having one or more general partners and one or more limited partners.

CARC COMMENTARY
Definitions were added as part of 1991 amendments by Chapter 269 to the Limited Partnership Act to permit mergers between corporations and limited partnerships. See CARC Comment to 1991 Amendment to RCW 23B.11.110.

* * * * *

Laws 1995, ch. 47, §1 (eff. 7-23-95) *(amends "distribution")*
"Distribution" means a direct or indirect transfer of money or other property, except its own shares, or incurrence of indebtedness by a corporation to or for the benefit of its shareholders in respect to any of its shares. A distribution may be in the form of a declaration or payment of a dividend; a distribution in partial or complete liquidation, or upon voluntary or involuntary dissolution; a purchase, redemption, or other acquisition of shares; a distribution of indebtedness; or otherwise.

CARC COMMENTARY
The term "distribution" was introduced into the Washington Business Corporation Act in 1984 as part of a general revision of the financial provisions of the Act. The prior law had imposed different tests upon a corporation's distributions to its shareholders, which varied with the precise form of the distribution. The 1984 amendment used a broad definition of the term as a critical part of a revision that subjected all forms of distributions to shareholders to a single series of tests. However, the statute was not clear as to the status of distributions made in connection with liquidation or dissolution of the corporation. On the other hand, the commentary to the 1984 amendments, and to the 1989 general revision of the Act, both state that a "distribution" includes "a distribution in voluntary and involuntary liquidation." The proposed amendment simply adds that statement to the definition in the statute and thereby removes an important ambiguity in the current statute.

* * * * *

Laws 1996, ch. 155, §4 (eff. 6-6-96) *(amends "public company")*
"Public company" means a corporation that has a class of shares registered with the federal securities and exchange commission pursuant to section 12 or 15 of the securities exchange act of 1934, or section 8 of the investment company act of 1940, or any successor statute~~, and that has more than three hundred holders of record of its shares~~.

CARC COMMENTARY
Last clause deleted as surplusage.

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Laws 2000, ch. 168, §1 (eff. 6-8-00) *(adds "electronic transmission")*
"Electronic transmission" or "electronically transmitted" means any process of electronic communication not directly involving the physical transfer of paper that is suitable for the retention, retrieval, and reproduction of the transmitted information by the recipient.

CARC COMMENTARY
See CARC Comment to 2000 Amendment to RCW 23B.07.220.

* * * * *

Laws 2002, ch. 296, §1 (eff. 6-13-02) *(amends "person")*
"Person" ~~includes an individual and an entity~~means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

CARC COMMENTARY
In reviewing RCW Chapter 23B, CARC noted that the definition of "person" used in RCW 23B.01.100(19) and the definitions of "person" in the Partnership Act, the Limited Liability Company Act and Limited Partnership Act, while very similar, are each slightly different without good reason. The recent adoption of the Revised Uniform Partnership Act (RCW Chapter 25.05) in 1998 provides a good model for the definition in each business organization statute. Accordingly, CARC is proposing that the Chapter 23B definitions of a person be revised to be consistent with the other statutes. Similar revisions to "person" are being suggested for RCW Chapter 25.10 (Limited Partnerships) and RCW Chapter 25.15 (Limited Liability Companies). The issue is somewhat more complicated in Chapter 23B because the WBCA also has a definition of "entity" which is not in the other statutes. With the proposed revisions to "entity" in the Chapter 23B definitions, the result is that a "person" under Chapter 23B.

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Laws 2002, ch. 297, §9 (eff. 6-13-02) *(amends "conspicuous", "deliver", "electronic transmission", "entity"; adds "electronically transmitted", "execute", "record", "tangible medium", "writing", and "written".)*
"Conspicuous" means so ~~written~~ prepared that a reasonable person against whom the ~~writing~~ record is to operate should have noticed it. For example, printing in italics or boldface or contrasting color, or typing in capitals or underlined, is conspicuous.

"Deliver" includes (a) mailing, ~~and~~ (b) for purposes of delivering a demand, consent, notice, or waiver to the corporation or one of its officers, directors, or shareholders, transmission by facsimile equipment, and (c) for purposes of delivering a demand, consent, notice, or waiver to the corporation or one of its officers, directors, or shareholders under RCW 23B.01.410 or chapter 23B.07, 23B.08, 23B.11, 23B.13, 23B.14, or 23B.16 RCW delivery by electronic transmission.

"Electronic transmission" ~~or "electronically transmitted"~~ means ~~any process of~~ an electronic communication (a) not directly involving the physical transfer of ~~paper~~ a record in a tangible medium and (b) that ~~is suitable for the retention, retrieval, and reproduction of the transmitted information by the recipient~~ may be retained, retrieved, and reviewed by the sender and the recipient thereof, and that may be directly reproduced in a tangible medium by such a sender and recipient.

"Electronically transmitted" means the initiation of an electronic transmission.

"Entity" includes a corporation and foreign corporation, not-for-profit corporation, ~~profit and not-for-profit unincorporated association,~~ business trust, estate, ~~partnership,~~ trust, ~~and~~ partnership, limited liability company, association, joint venture, two or more persons having a joint or common economic interest, ~~and~~ the state, United States, and a foreign ~~government~~governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

"Execute," "executes," or "executed" means (a) signed with respect to a written record or (b) electronically transmitted along with sufficient information to determine the sender's identity with respect to an electronic

transmission, or (c) with respect to a record to be filed with the secretary of state, in compliance with the standards for filing with the office of the secretary of state as prescribed by the secretary of state.

"Record" means information inscribed on a tangible medium or contained in an electronic transmission.

"Tangible medium" means a writing, copy of a writing, or facsimile, or a physical reproduction, each on paper or on other tangible material.

"Writing" does not include an electronic transmission.

"Written" means embodied in a tangible medium.

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

* * * * *

Laws 2009, ch. 189, §1 (eff. 7-26.09) *(adds "corporate action.")*
"Corporate action" means any resolution, act, policy, contract, transaction, plan, adoption or amendment of articles of incorporation or bylaws, or other matter approved by or submitted for approval to a corporation's incorporators, board of directors or a committee thereof, or shareholders.

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.01.410
NOTICE

CURRENT SECTION

(1) Notice under this title must be provided in the form of a record, except that oral notice of any meeting of the board of directors may be given if expressly authorized by the articles of incorporation or bylaws.

(2) Permissible means of transmission.

(a) Oral notice. Oral notice may be communicated in person, by telephone, wire, or wireless equipment which does not transmit a facsimile of the notice, or by any electronic means which does not create a record. If these forms of oral notice are impracticable, oral notice may be communicated by radio, television, or other form of public broadcast communication.

(b) Notice provided in a tangible medium. Notice may be provided in a tangible medium and be transmitted by mail, private carrier, or personal delivery; telegraph or teletype; or telephone, wire, or wireless equipment which transmits a facsimile of the notice. If these forms of notice in a tangible medium are impracticable, notice in a tangible medium may be transmitted by an advertisement in a newspaper of general circulation in the area where published.

(c) Notice provided in an electronic transmission.

(i) Notice may be provided in an electronic transmission and be electronically transmitted.

(ii) Notice to shareholders or directors in an electronic transmission is effective only with respect to shareholders and directors that have consented, in the form of a record, to receive electronically transmitted notices under this title and designated in the consent the address, location, or system to which these notices may be electronically transmitted and with respect to a notice that otherwise complies with any other requirements of this title and applicable federal law.

(A) Notice to shareholders or directors for this purpose includes material that this title requires to accompany the notice.

(B) A shareholder or director who has consented to receipt of electronically transmitted notices may revoke this consent by delivering a revocation to the corporation in the form of a record.

(C) The consent of any shareholder or director is revoked if (I) the corporation is unable to electronically transmit two consecutive notices given by the corporation in accordance with the consent, and (II) this inability becomes known to the secretary of the corporation, the transfer agent, or any other person responsible for giving the notice. The inadvertent failure by the corporation to treat this inability as a revocation does not invalidate any meeting or other corporate action.

(iii) Notice to shareholders or directors who have consented to receipt of electronically transmitted notices may be provided by (A) posting the notice on an electronic network and (B) delivering to the shareholder or director a separate record of the posting, together with comprehensible instructions regarding how to obtain access to the posting on the electronic network.

(iv) Notice to a domestic or foreign corporation, authorized to transact business in this state, in an electronic transmission is effective only with respect to a corporation that has designated in a record an address, location, or system to which the notices may be electronically transmitted.

(d) Materials accompanying notice to shareholders of public companies. Notwithstanding anything to the contrary in this section or any other section of this title, if this title requires that a notice to shareholders be accompanied by certain material, a public company may satisfy such a requirement, whether or not a shareholder has consented to receive electronically transmitted notice, by (i) posting the material on an electronic network (either separate from, or in combination or as part of, any other materials the public company has posted on the electronic network in compliance with applicable federal law) at or prior to the time that the notice is delivered to the public company's shareholders entitled to receive the notice, and (ii) delivering to the public company's shareholders entitled to receive the notice a separate record of the posting (which record may accompany, or be contained in, the notice), together with comprehensible instructions regarding how to obtain access to the posting on the electronic network. In such a case, the material is deemed to have been delivered to the public company's shareholders at the time the notice to the shareholders is effective under this section. A public company that elects pursuant to this section to post on an electronic network any material required by this title to accompany a notice to shareholders is required, at its expense, to provide a copy of the material in a tangible medium (alone or in combination or as part of any other materials the public company has posted on the electronic network in compliance with federal law) to any shareholder entitled to such a notice who so requests.

(3) Effective time and date of notice.

(a) Oral notice. Oral notice is effective when received.

(b) Notice provided in a tangible medium.

(i) Notice in a tangible medium, if in a comprehensible form, is effective at the earliest of the following:

(A) If expressly authorized by the articles of incorporation or bylaws, and if notice is sent to the person's address, telephone number, or other number appearing on the records of the corporation, when dispatched by telegraph, teletype, or facsimile equipment;

(B) When received;

(C) Except as provided in (b)(ii) of this subsection, five days after its deposit in the United States mail, as evidenced by the postmark, if mailed with first-class postage, prepaid and correctly addressed; or

(D) On the date shown on the return receipt, if sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee.

(ii) Notice in a tangible medium by a domestic or foreign corporation to its shareholder, if in a comprehensible form and correctly addressed to the shareholder's address shown in the corporation's current record of shareholders, is effective:

(A) When mailed, if mailed with first-class postage prepaid; and

(B) When dispatched, if prepaid, by air courier.
(iii) Notice in a tangible medium to a domestic or foreign corporation, authorized to transact business in this state, may be addressed to the corporation's registered agent at its registered office or to the corporation or its secretary at its principal office shown in its most recent annual report, or in the case of a foreign corporation that has not yet delivered its annual report in its application for a certificate of authority.
(c) Notice provided in an electronic transmission. Notice provided in an electronic transmission, if in comprehensible form, is effective when it: (i) Is electronically transmitted to an address, location, or system designated by the recipient for that purpose; or (ii) has been posted on an electronic network and a separate record of the posting has been delivered to the recipient together with comprehensible instructions regarding how to obtain access to the posting on the electronic network.
(4) If this title prescribes notice requirements for particular circumstances, those requirements govern. If articles of incorporation or bylaws prescribe notice requirements, not inconsistent with this section or other provisions of this title, those requirements govern.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §15 (eff. 7-1-90)
(1) Notice under this title must be in writing except that oral notice of any meeting of the board of directors may be given if expressly authorized by the articles of incorporation or bylaws.
(2) Written notice may be transmitted by: Mail, private carrier or personal delivery; telegraph or teletype; or telephone, wire, or wireless equipment which transmits a facsimile of the notice. If these forms of written notice are impracticable, written notice may be transmitted by an advertisement in a newspaper of general circulation in the area where published. Oral notice may be communicated in person or by telephone, wire or wireless equipment which does not transmit a facsimile of the notice. If these forms of oral notice are impracticable, oral notice may be communicated by radio, television, or other form of public broadcast communication.
(3) Written notice by a domestic or foreign corporation to its shareholder, if in a comprehensible form, is effective when mailed, if mailed with first-class postage prepaid and correctly addressed to the shareholder's address shown in the corporation's current record of shareholders.
(4) Written notice to a domestic or foreign corporation, authorized to transact business in this state, may be addressed to its registered agent at its registered office or to the corporation or its secretary at its principal office shown in its most recent annual report or, in the case of a foreign corporation that has not yet delivered an annual report, in its application for a certificate of authority.
(5) Except as provided in subsection (3) of this section, written notice, if in a comprehensible form, is effective at the earliest of the following:
(a) When received;
(i) Five days after its deposit in the United States mail, as evidenced by the postmark, if mailed with first-class postage, prepaid and correctly addressed; or
(ii) On the date shown on the return receipt, if sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee.
(b) Oral notice is effective when communicated if communicated in a comprehensible manner.
(c) If this title prescribes notice requirements for particular circumstances, those requirements govern. If articles of incorporation or bylaws prescribe notice requirements, not inconsistent with this section or other provisions of this title, those requirements govern.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 2988-89 (1989)
Section 1.41 Notice.
Proposed section 1.41 establishes rules for determining how notice may be given and when notice is effective for a variety of purposes under the Proposed Act.

Proposed subsection 1.41(a) provides that notice generally under the Act must be given in writing. Proposed subsection 1.41(a) accepts from this general requirement notice of any meeting of the board of directors, which may be oral if expressly authorized by the corporation's articles of incorporation or bylaws. The exception was designed to authorize oral notice of directors' meetings (assuming the required article of incorporation or bylaw provision is present) and to emphasize the breadth of the general requirement of written notice.

Proposed subsection 1.41(b) defines written notice for purposes of the Act essentially as notice which results in the recipient receiving a paper copy of the notice. Thus, written notice includes a notice typed or printed on paper and transmitted by mail, private carrier, or personal delivery to the recipient. Written notice includes a notice transmitted by telegraph if messenger service is specified. Written notice includes a notice transmitted by teletype (including telex and twx) if answerback is received. Written notice includes a notice transmitted by telephone, wire or wireless equipment which transmits a facsimile of the notice. If such equipment does not transmit a facsimile, e.g., electronic mail (even though that system permits hard copies to be made of incoming messages at the option of the recipient), such notice is oral.

Proposed subsection 1.41(c) provides that notice by a corporation to its shareholders is effective when mailed if correctly addressed with sufficient first-class postage. The correct address for this purpose is the address shown in the corporation's records. The effect of this section is to permit the corporation to compute the statutory time periods for notice of shareholders' meetings and other actions from the date the notice is mailed without regard to where its shareholders are located or the time it takes for the mail to reach them.

Written notice to shareholders by persons other than the corporation is effective as provided in Proposed subsection 1.41(e). Notice by the corporation to its shareholders that is not addressed to the record address of the shareholder, or is effective when received under Proposed subsection 1.41(e).

Proposed subsection 1.41(d) provides that notice to a corporation may be addressed to the registered agent of the corporation at its registered office or to the corporation or its secretary at the principal office of the corporation as shown in its most recent public filing. An officer, director, or shareholder of a corporation will normally give written notice to the corporation by delivering or mailing a copy of that notice to the corporation or to the secretary of the corporation at its principal office. Such a notice is effective when it is received. Such notice may be given for a variety of purposes under this Act, e.g., giving notice of intent to dissent (Proposed section 13.21), notice of a demand to inspect books and records (Proposed section 16.02), and notices of resignation (Proposed sections 8.07 and 8.43). This method of giving notice to the corporation, however, is not exclusive, and an officer, director, or shareholder may give notice in other ways as well.

Persons who have no prior relationship with the corporation may give notice either to the registered agent of the corporation, or if they wish, to the corporation or its secretary at its principal office.

Proposed section 1.41 also contains a variety of general provisions dealing with notice. It recognizes, for example, that notice of a board of directors' meeting may be given orally if that is specifically authorized by the articles of incorporation or bylaws. It also deals with situations where notice may be sought to be given to persons for who no current address is available, or where personal notice is impractical. Notice delivered to the person's last known address is effective as described in Proposed subsection 1.41(e) even though never actually received by the person. Proposed subsection 1.41(b) also authorizes notice by publication in some circumstances, including radio, television, or other form of public wire or wireless communication.

Proposed subsection 1.41(g) recognizes that other sections of the Act prescribe specific notice requirements for particular situations--e.g., service of process on a corporation's registered agent under Proposed section 5.04--and that these specific requirements, rather than the general requirements of Proposed section 1.41, control. Finally, the second sentence of Proposed subsection 1.41(g) permits a corporation's articles of incorporation or bylaws to prescribe the corporation's own notice requirements, if they are not inconsistent with the general requirements of this section or specific requirements of other sections of the Act.

The rules set forth in Proposed section 1.41 permit many other sections of the Proposed Act to be phrased simply in terms of giving or delivering notice without repeating details with respect to how notice should be given and when it is effective in various circumstances.

CARC COMMENTARY

The Senate Journal inexplicably omits the following paragraphs that were submitted to the Legislature regarding Proposed section 1.41:

Proposed subsection 1.41(a) provides that notice generally under the Act must be given in writing. Proposed subsection 1.41(a) excepts from this general requirement notice of any meeting of the board of directors, which may be oral if expressly authorized by the corporation's articles of incorporation or bylaws. The exception was designed to authorize oral notice of directors; meetings (assuming the required article of incorporation or bylaw provision is present) and to emphasize the breadth of the general requirement of written notice.

Proposed subsection 1.41(b) defines written notice for purposes of the Act essentially as notice which results in the recipient receiving a paper copy of the notice. Thus, written notice includes a notice typed or printed on paper and transmitted by mail, private carrier, or personal delivery to the recipient. Written notice includes a notice transmitted by telegraph if messenger service is specified. Written notice includes a notice transmitted by teletype (including teles and twx) if answerback is received. Written notice includes a notice transmitted by telephone, wire or wireless equipment which transmits a facsimile of the notice. If such equipment does not transmit a facsimile, e.g., electronic mail (even though that system permits hard copies to be made of incoming messages at the option of the recipient), such notice is oral.

* * * * *

AMENDMENTS TO ORIGINAL SECTION

Laws 1990, ch. 178, §2 (eff. 7-1-90) *(amends only original subsection 5)*

(5) Except as provided in subsection (3) of this section, written notice, if in a comprehensible form, is effective at the earliest of the following:

(a) If expressly authorized by the articles of incorporation or bylaws, and if notice is sent to the person's address, telephone number, or other number appearing on the records of the corporation, when dispatched;

(b) When received;

(c~~i~~) Five days after its deposit in the United States mail, as evidenced by the postmark, if mailed with first-class postage, prepaid and correctly addressed; or

(d~~ii~~) On the date shown on the return receipt, if sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee.

(6~~b~~) Oral notice is effective when communicated if communicated in a comprehensible manner.

(7~~c~~) If this title prescribes notice requirements for particular circumstances, those requirements govern. If articles of incorporation or bylaws prescribe notice requirements, not inconsistent with this section or other provisions of this title, those requirements govern.

CARC COMMENTARY

A new subsection (5)(a) is added, authorizing articles of incorporation or bylaws to provide that notice sent to the address, telephone number, or other number of an addresses appearing on the records of the corporation will be effective on despatch. This option significantly enlarges the methods offered by the Proposed Act to have notice effective despite never being received by the addressee.

* * * * *

Laws 1991, ch. 72, §29 (eff. 7-28-91) *(amends only subsection 5, as amended by Laws 1990)*

(5) ~~Except as provided in subsection (3) of this section,~~ W~~w~~ritten notice, if in a comprehensible form, is effective at the earliest of the following:

(a) If expressly authorized by the articles of incorporation or bylaws, and if notice is sent to the person's address, telephone number, or other number appearing on the records of the corporation, when dispatched by telegraph, teletype, or facsimile equipment;

(b) When received;

(c) Except as provided in subsection (3) of this section, f~~F~~ive days after its deposit in the United States mail, as evidenced by the postmark, if mailed with first-class postage, prepaid and correctly addressed; or

(d) On the date shown on the return receipt, if sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee.

CARC COMMENTARY

Subsection (5) is reorganized to make it clear that written notice to shareholders may be effected by means other than first-class mail under subsection (3). Subsection (5)(a) is clarified set as to limit the situations in which notice is effective upon dispatch to those contemplated at the time of the 1990 Amendments (i.e., notice by telegraph, teletype or facsimile equipment).

* * * * *

Laws 2002, ch. 297, §10 (eff. 6-13-02)

(1) Notice under this title must be ~~in writing~~ provided in the form of a record, except that oral notice of any meeting of the board of directors may be given if expressly authorized by the articles of incorporation or bylaws.

(2) ~~Written notice may be transmitted by: Mail~~Permissible means of transmission.

(a) Oral notice. Oral notice may be communicated in person, by telephone, wire, or wireless equipment which does not transmit a facsimile of the notice, or by any electronic means which does not create a record. If these forms of oral notice are impracticable, oral notice may be communicated by radio, television, or other form of public broadcast communication.

(b) Notice provided in a tangible medium. Notice may be provided in a tangible medium and be transmitted by mail, private carrier, or personal delivery; telegraph or teletype; or telephone, wire, or wireless equipment which transmit a facsimile of the notice. If these forms of ~~written~~ notice in a tangible medium are impracticable, ~~written~~ notice in a tangible medium may be transmitted by an advertisement in a newspaper of general circulation in the area where published. ~~Oral notice may be communicated in person or by telephone, wire or wireless equipment which does not transmit a facsimile of the notice. If these forms of oral notice are impracticable, oral notice may be communicated by radio, television, or other form of public broadcast communication.~~

~~(3) Written notice by a domestic or foreign corporation to its shareholder, if in a comprehensible form, is effective when mailed, if mailed with first class postage prepaid and correctly addressed to the shareholder's address shown in the corporation's current record of shareholders.~~

~~(4) Written~~ (c) ~~n~~Notice provided in an electronic transmission.

(i) Notice may be provided in an electronic transmission and be electronically transmitted.

(ii) Notice to shareholders or directors in an electronic transmission is effective only with respect to shareholders and directors that have consented, in the form of a record, to receive electronically transmitted notices under this title and designated in the consent the address, location, or system to which these notices

may be electronically transmitted and with respect to a notice that otherwise complies with any other requirements of this title and applicable federal law.
(A) Notice to shareholders or directors for this purpose includes material that this title requires or permits to accompany the notice.
(B) A shareholder or director who has consented to receipt of electronically transmitted notices may revoke this consent by delivering a revocation to the corporation in the form of a record.
(C) The consent of any shareholder or director is revoked if (I) the corporation is unable to electronically transmit two consecutive notices given by the corporation in accordance with the consent, and (II) this inability becomes known to the secretary of the corporation, the transfer agent, or any other person responsible for giving the notice. The inadvertent failure by the corporation to treat this inability as a revocation does not invalidate any meeting or other action.
(iii) Notice to shareholders or directors who have consented to receipt of electronically transmitted notices may be provided by (A) posting the notice on an electronic network and (B) delivering to the shareholder or director a separate record of the posting, together with comprehensible instructions regarding how to obtain access to the posting on the electronic network.
(iv) ~~n~~Notice to a domestic or foreign corporation, authorized to transact business in this state, ~~may be addressed to its registered agent at its registered office or to the corporation or its secretary at its principal office shown in its most recent annual report or, in the case of a foreign corporation that has not yet delivered an annual report, in its application for a certificate of authority.~~
~~(5) Written notice,~~ in an electronic transmission is effective only with respect to a corporation that has designated in a record an address, location, or system to which the notices may be electronically transmitted.
(3) Effective time and date of notice.
(a) Oral notice. Oral notice is effective when received.
(b) Notice provided in a tangible medium.
(c) Notice in a tangible medium, if in a comprehensible form, is effective at the earliest of the following:
(A~~a~~) If expressly authorized by the articles of incorporation or bylaws, and if notice is sent to the person's address, telephone number, or other number appearing on the records of the corporation, when dispatched by telegraph, teletype, or facsimile equipment;
(B~~b~~) When received;
(C~~c~~) Except as provided in (b)(ii) of this subsection ~~(3) of this section~~, five days after its deposit in the United States mail, as evidenced by the postmark, if mailed with first-class postage, prepaid and correctly addressed; or
(D~~d~~) On the date shown on the return receipt, if sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee.
~~(6) Oral notice is effective when communicated if communicated in a comprehensible manner.~~
~~(7)~~ (ii) Notice in a tangible medium by a domestic or foreign corporation to its shareholder, if in a comprehensible form and correctly addressed to the shareholder's address shown in the corporation's current record of shareholders, is effective:
(A) When mailed, if mailed with first class postage prepaid; and
(B) When dispatched, if prepaid, by air courier.
(iii) Notice in a tangible medium to a domestic or foreign corporation, authorized to transact business in this state, may be addressed to the corporation's registered agent at its registered office or to the corporation or its secretary at its principal office shown in its most recent annual report, or in the case of a foreign corporation that has not yet delivered its annual report in its application for a certificate of authority.
(C) Notice provided in an electronic transmission. Notice provided in an electronic transmission, if in comprehensible form, is effective when it: (i) Is electronically transmitted to an address, location, or system designated by the recipient for that purpose; or (ii) has been posted on an electronic network and a separate record of the posting has been delivered to the recipient together with comprehensible instructions regarding how to obtain access to the posting on the electronic network.
(4) If this title prescribes notice requirements for particular circumstances, those requirements govern. If articles of incorporation or bylaws prescribe notice requirements, not inconsistent with this section or other provisions of this title, those requirements govern.

CARC COMMENTARY

Nationally, there is a substantial trend to allow communications from corporations to their shareholders to be made by electronic means. It is efficient and can be very cost saving for larger companies. Similarly, filing electronically could be very beneficial for practitioners and the Secretary of State. Currently, the law in Washington regarding the validity of an electronic notice is not clear. The WBCA generally requires that a "notice" be in "writing."

There is recent case law that suggests e-mail may constitute a "writing" [Real Networks, Inc. Privacy Litigation 5 ILR (PNF) 3049 (US Dist. Ct. Ill. No. 00C1366, 5-8-00)]. There is also recent federal legislation in the area [the Electronic Signatures in Global and National Commerce Act (the "Federal Act") which took affect on October 1, 2000]. Basically, the Federal Act provides that notwithstanding any other law (e.g. the WBCA) with respect to any transaction in interstate commerce, a signature, contract or record relating to a transaction may not be denied validity solely because it is in electronic form [§101(a)(1)]. The Federal Act may preempt state law and permit electronic notices and other communications provided that a shareholder is not a "consumer" under such law or, if a consumer, the shareholder consents to receipt of electronic notice and provided the corporation's Articles of Incorporation or Bylaws contain no provision to the contrary. CARC determined that it is preferable to amend the WBCA to clearly provide for notice by electronic means and to draft amendments to the WBCA which are consistent with the Federal Act and remove any ambiguity that could arise under case law such as Real Networks.

It was also concluded that amendments were necessary to grant authority to the Secretary of State to allow for electronic filing, with rules and procedures to be set by the Secretary of State.

PROPOSED AMENDMENTS RE ELECTRONIC TRANSMISSION

The proposed amendments that CARC is submitting to the Legislative Committee substantially revise the approach to notices in the present RCW 23B.01.410. It is proposed that RCW 23B.01.410 and related sections be amended to provide for permissive electronic transmission of notices and that RCW 23B.01.200 regarding filing requirements be amended to allow for permissive system for electronic filing with the Secretary of State, subject to implementation by the Secretary of State. Briefly, the approach of these amendments to the electronic transmission matters can be described in the following parts:

(1) As a general rule, it is proposed that "notice" under Chapter 23B must be provided in the form of a "record" (except that oral notice of a meeting of the board of directors may be given if authorized in either the Articles or the Bylaws). The concept of a "record" is a key to the revised approach. A record is defined in the proposed amendments as "information that is inscribed on a tangible medium or contained in an electronic transmission." With the proposed revision to the definition of "electronic transmission" in the WBCA, this concept is then consistent with the "record" definition as used in the Federal Act.

(2) The second element is to set forth the permissible means of transmission of a notice. The concept of oral notice in the amended 23B.01.410 is essentially the same as that in the present statute and is limited in its use. Notice by other means is then divided into two parts. Notice can be provided in a "tangible medium" and notice can be provided in an "electronic transmission." Tangible medium refers to a writing, a copy of a writing, facsimile or a physical reproduction of such on paper. Notice in a tangible medium may be transmitted by mail, private carrier, personal delivery, telegraph, teletype, wire or wireless equipment which transmits a facsimile of the notice.

Notice provided in an electronic transmission is permissible under the amended 23B.01.410 and "electronic transmission" is slightly revised as follows: "Electronic transmission means an electronic communication (i) not directly involving the physical transfer of paper, and

(ii) that may be retained, retrieved and reviewed by the sender and the recipient thereof, and that may be directly reproduced in a tangible medium by such sender and recipient."

CARC spent considerable time looking at the approach in the Federal Act regarding consent by consumers to receipt of electronic notice and similar provisions in other proposed state corporation laws. This is the approach that is in the proposed amended 23B.01.410. First, notice may be provided in an electronic transmission, but such electronic transmission is effective only with respect to shareholders that have consented, in the form of a "record," to receive electronic transmitted notices under Chapter 23B, and have designated in the consent, the address, location or system to which such notices may be electronically transmitted. The amendments further make clear that notice to the shareholders can include other material that RCW 23B requires or permits to accompany the notice (e.g., the plan of merger in the case of the notice of a merger, etc.) The provisions also provide that a shareholder who has consented to receipt of electronically transmitted notices may revoke that consent by delivering the revocation to the corporation in the form of a "record." A provision was also added to cover the situation where a shareholder's consent is deemed to be revoked if the corporation is unable to electronically transmit two consecutive notices in accordance with such consent and the inability becomes known to the corporation, transfer agent or other person responsible for giving the notice. The proposed amendments also make it clear that notice to shareholders who have consented to receipt of electronically transmitted notices can be provided by posting the notice on an electronic network and delivering to the shareholder a separate "record" of such posting, together with instructions on how to obtain access to the posting. The amendments also address the permissible means of use of electronic transmission to a corporation. The amendments provide that notice to a domestic or foreign corporation (authorized to transact business in Washington) is effective only with respect to a corporation that has designated in a "record," an address, location or system to which such notices may be electronically transmitted.

(3) The third element in the revised notice provisions deals with the effective time and date of the notice. These provisions track the permissible means of delivery. The provisions for the effective time of oral notice is as in the present statute. The approach taken for notice provided in a tangible medium is to have a general rule that is consistent with delivery of written notice under the present statute and then to separately update and cover the situation of a notice in tangible medium by a corporation to its shareholder, providing that such notice is effective when mailed, if mailed with first class postage prepaid and when dispatched if prepaid by air courier. The major change in the amended RCW 23B.01.410 is to provide rules for the effectiveness and timing for notice by electronic means. Notice by electronic transmission is effective when (1) it is electronically transmitted to an address, location or system designed by the recipient for that purpose, or (2) has been posted on an electronic network and a separate record of such posting has been delivered to the recipient together with instructions on how to obtain access to the posting.

(4) The fourth element to the proposal to provide for electronic transmission of notices consists of the addition of the new definitions in 23B.01.400 for the new terms used in the amendments: "execute," "record," "electronically transmitted," "tangible medium," "writing," and "written" and to amend the existing definitions of "deliver" and "electronic transmission" to conform to the new provisions and definitions.

(5) The fifth element in the electronic transmission amendments provides authority for the Secretary of State to permit documents to be filed through electronic transmission. These provisions were developed with the Secretary of State's Office and reflects their desired result. RCW 23B.01.200 concerning filing requirements would be amended to provide that, if permitted, the Secretary of State may adopt rules varying from these requirements to facilitate electronic filing. Such rules would detail the circumstances under which the electronic filing of documents shall be permitted and how such documents shall be filed.

Such rules may also impose additional requirements related to implementation of electronic filing processes including but not limited to: file formats; signature technologies; delivery; and the types of entities, records or documents permitted.

(6) Because of the distinction resulting from the definitions of "record," "execute," and "tangible medium," and the addition of definitions of "writing," "written," and "delivered," it was necessary to review all of Chapter 23 to make conforming changes.

* * * * *

Laws 2008, ch. 59, §1 (eff. 6-12-2008)*(amends subsection (2)(c)(ii)(A) and adds new subsection (2)(d)*
(2)(c)(ii)(A) Notice to shareholders or directors for this purpose includes material that this title requires ~~or permits~~ to accompany the notice.

(2)(d) Materials accompanying notice to shareholders of public companies. Notwithstanding anything to the contrary in this section or any other section of this title, if this title requires that a notice to shareholders be accompanied by certain material, a public company may satisfy such a requirement, whether or not a shareholder has consented to receive electronically transmitted notice, by (i) posting the material on an electronic network (either separate from, or in combination or as part of, any other materials the public company has posted on the electronic network in compliance with applicable federal law) at or prior to the time that the notice is delivered to the public company's shareholders entitled to receive the notice, and (ii) delivering to the public company's shareholders entitled to receive the notice a separate record of the posting (which record may accompany, or be contained in, the notice), together with comprehensible instructions regarding how to obtain access to the posting on the electronic network. In such a case, the material is deemed to have been delivered to the public company's shareholders at the time the notice to the shareholders is effective under this section. A public company that elects pursuant to this section to post on an electronic network any material required by this title to accompany a notice to shareholders is required, at its expense, to provide a copy of the material in a tangible medium (alone or in combination or as part of any other materials the public company has posted on the electronic network in compliance with federal law) to any shareholder entitled to such a notice who so requests.

CARC COMMENTARY

In July 2007, the SEC adopted amendments to the federal proxy rules (referred to as the "*e-proxy rules*") which will permit a public company to satisfy requirements relating to the delivery of proxy statements, annual reports and related materials required under federal law (referred to collectively as "*proxy materials*") by:

- posting its proxy materials on a designated web site; and
- mailing a notice (referred to as a *"notice of internet availability of proxy materials*") to securityholders at least 40 days before the meeting date that, among other things, advises them how to access the proxy materials electronically and includes instructions about how to obtain physical copies of the proxy materials from the corporation (at the corporation's expense).

This method of satisfying proxy material delivery requirements under the federal proxy rules is referred to as the "*notice only option*". A public company that wants to use the notice only option is not required to obtain any sort of consent from its securityholders to post its proxy materials on a webs site instead of sending physical copies. However, a securityholder who wants a paper copy of the proxy materials may request one, and the company is required to provide the paper copy at its own expense within three business days after receiving the request.

Although the SEC's proxy rules govern a public company's obligations to provide proxy materials in connection with annual or special meetings, the Washington Business Corporation Act, Title 23B of the Revised Code of Washington (the "*Business Corporation Act*") imposes separate requirements on a Washington corporation to provide shareholders a notice of annual and special meetings and, in some cases, requires that other materials be included with the meeting notice. For example, if the shareholder meeting agenda includes a proposed amendment to (or amendment and restatement of) the corporation's articles of incorporation, the Business Corporation Act requires the meeting notice to be accompanied by a copy of the proposed amendment. Other

examples of materials required to accompany a meeting notice include a plan of merger or share exchange or description of a sale of all or substantially all of the assets, when such matters are on the meeting agenda, and a complete copy of Chapter 13 of the Business Corporation Act if a matter giving rise to dissenters' rights is on the agenda).

RCW 23B.01.410 provides that a notice to shareholders may be transmitted by mail, private carrier or personal delivery, among other methods. RCW 23B.01.410 requires a Washington corporation to have the consent of the shareholder if it wants to provide notices electronically. This is referred to as the "*opt-in requirement*" for electronic notification. The opt-in requirement currently applies not only to the notice itself, but also to materials that are required or permitted to accompany the notice under the Business Corporation Act. A public company's shareholder base is typically large and fluid and the company lacks adequate means of obtaining consent from all its shareholders to receive notices and other materials required by the Business Corporation Act electronically. Consequently, as a practical matter a Washington public company must currently provide a meeting notice, *and all other materials that the Business Corporation Act requires to accompany the notice*, by mail – even if it otherwise chooses to use the notice only option for making its proxy materials available to shareholders.

Under the e-proxy rules, the notice of internet availability of proxy materials may be accompanied by or incorporate any notice required under state corporate law. Consequently, a Washington public company can satisfy the Business Corporation Act's requirement to provide a notice of annual or special meetings by including the meeting notice with the notice of internet availability mailed to shareholders. For routine annual meetings, RCW 23B.01.410's opt-in requirement for electronic notification does not impede Washington public companies from using the notice only option under the e-proxy rules. However, if a Washington public company's shareholder meeting agenda includes an item for which the Business Corporation Act requires the meeting notice to be accompanied by other materials, then the opt-in requirement could be an impediment to use of the notice only option. If, for example, a company is required to include a paper copy of an extensive amendment to its articles of incorporation with the mailing of its notice of internet availability and meeting notice, it may be dissuaded from using the notice only option for that meeting.

It is CARC's view, the notice only option under the e-proxy rules provides important potential benefits and that the Business Corporation Act should not impede Washington public companies from using this method of making proxy materials available to their shareholders. For a public company, significant potential cost savings are associated with using the notice only option. According to an estimate by Automatic Data Processing, which handles the vast majority of proxy mailings to beneficial owners of public companies, the average cost of printing and mailing a paper copy of a set of proxy materials during the 2006 proxy season was $5.64.[1] In addition, the amount of paper that could be saved by using the notice only option could be significant. A random sampling of five Washington public companies with market capitalizations (based on recent stock trading data) ranging from approximately $70 million to $4.9 billion mailed between approximately 2,800 and 26,000 sets of proxy materials in 2007, comprised of approximately 100 to 150 total pages per set. Assuming these companies had used the notice only option and posted these materials electronically, and assuming no more than 20% of their shareholders requested physical copies of those materials, approximately 2,500,000 pages of paper could have been spared.

HB 2499 has been proposed to remove unnecessary impediments to the use of the notice only option under the e-proxy rules. The amendments to RCW 23B.01.410 contemplated by HB 2499 would:

[1] See SEC Release Nos. 34-56135; IC-27911 – Shareholder Choice Regarding Proxy Materials, at page 37.

- allow a public company[2] incorporated in Washington to satisfy the requirement under the Business Corporation Act that a notice to shareholders include a copy of other materials by posting those materials on an electronic network (whether or not shareholders have opted to receive notices electronically) and including in or with the notice of the meeting instructions on how to obtain access to the electronic posting;[3]
- require a corporation that relies on electronic posting of WBCA-required materials to provide, at its expense, a paper copy of such materials to any shareholder who requests one; and
- eliminate superfluous and potentially confusing language from RCW 23B.01.410(2)(c)(ii)(A) that could otherwise be construed to apply the opt in requirement for electronic notification to materials that a corporation provides on a completely voluntary basis or pursuant to legal requirements other than the WBCA (such as the SEC's proxy rules).

The e-proxy rules in their current form do not allow public companies to use the notice only option for proxy solicitations relating to business combination transactions (e.g., mergers, sales of all or substantially all of a corporation's assets, exchanges of stock, etc.). However, the SEC stated in its July 2007 adopting release that it may consider extending the e-proxy rules to business combination transactions at some point in the future. Consequently, CARC believed it prudent to draft HB 2499 broadly enough to allow for electronic posting of documents like plans of merger or share exchange or descriptions of asset sales in case the e-proxy rules are expanded to cover business combination transactions in the future.

* * * * *

Laws 2009, ch. 189, §2 (eff. 7-26-09)*(amends only subsection (2)(c)(ii)(c))*
(2)(c)(ii)(C) The consent of any shareholder or director is revoked if (I) the corporation is unable to electronically transmit two consecutive notices given by the corporation in accordance with the consent, and (II) this inability becomes known to the secretary of the corporation, the transfer agent, or any other person responsible for giving the notice. The inadvertent failure by the corporation to treat this inability as a revocation does not invalidate any meeting or other corporate action.

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.

* * * * *

[2] Defined in RCW 23B.01.400(24) as "a corporation that has a class of shares registered with the federal securities and exchange commission pursuant to Section 12 of the securities exchange act of 1934, or section 8 of the investment company act of 1940."

RCW 23B.02.020
ARTICLES OF INCORPORATION

CURRENT SECTION

(1) The articles of incorporation must set forth:

(a) A corporate name for the corporation that satisfies the requirements of RCW 23B.04.010;

(b) The number of shares the corporation is authorized to issue in accordance with RCW 23B.06.010 and 23B.06.020;

(c) The street address of the corporation's initial registered office and the name of its initial registered agent at that office in accordance with RCW 23B.05.010; and

(d) The name and address of each incorporator in accordance with RCW 23B.02.010.

(2) The articles of incorporation or bylaws must either specify the number of directors or specify the process by which the number of directors will be fixed, unless the articles of incorporation dispense with a board of directors pursuant to RCW 23B.08.010.

(3) Unless its articles of incorporation provide otherwise, a corporation is governed by the following provisions:

(a) The board of directors may adopt bylaws to be effective only in an emergency as provided by RCW 23B.02.070;

(b) A corporation has the purpose of engaging in any lawful business under RCW 23B.03.010;

(c) A corporation has perpetual existence and succession in its corporate name under RCW 23B.03.020;

(d) A corporation has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including itemized powers under RCW 23B.03.020;

(e) All shares are of one class and one series, have unlimited voting rights, and are entitled to receive the net assets of the corporation upon dissolution under RCW 23B.06.010 and 23B.06.020;

(f) If more than one class of shares is authorized, all shares of a class must have preferences, limitations, and relative rights identical to those of other shares of the same class under RCW 23B.06.010;

(g) If the board of directors is authorized to designate the number of shares in a series, the board may, after the issuance of shares in that series, reduce the number of authorized shares of that series under RCW 23B.06.020;

(h) The board of directors must approve any issuance of shares under RCW 23B.06.210;

(i) Shares may be issued pro rata and without consideration to shareholders under RCW 23B.06.230;

(j) Shares of one class or series may not be issued as a share dividend with respect to another class or series, unless there are no outstanding shares of the class or series to be issued, or a majority of votes entitled to be cast by such class or series approve as provided in RCW 23B.06.230;

(k) A corporation may issue rights, options, or warrants for the purchase of shares of the corporation under RCW 23B.06.240;
(l) A shareholder has, and may waive, a preemptive right to acquire the corporation's unissued shares as provided in RCW 23B.06.300;
(m) Shares of a corporation acquired by it may be reissued under RCW 23B.06.310;
(n) The board may authorize and the corporation may make distributions not prohibited by statute under RCW 23B.06.400;
(o) The preferential rights upon dissolution of certain shareholders will be considered a liability for purposes of determining the validity of a distribution under RCW 23B.06.400;
(p) Corporate action may be approved by shareholders by unanimous consent of all shareholders entitled to vote on the corporate action, unless the approval of a lesser number of shareholders is permitted as provided in RCW 23B.07.040, which shareholder consent shall be in the form of a record;
(q) Unless this title requires otherwise, the corporation is required to give notice only to shareholders entitled to vote at a meeting and the notice for an annual meeting need not include the purpose for which the meeting is called under RCW 23B.07.050;
(r) A corporation that is a public company shall hold a special meeting of shareholders if the holders of at least ten percent of the votes entitled to be cast on any issue proposed to be considered at the meeting demand a meeting under RCW 23B.07.020;
(s) Subject to statutory exceptions, each outstanding share, regardless of class, is entitled to one vote on each matter voted on at a shareholders' meeting under RCW 23B.07.210;
(t) A majority of the votes entitled to be cast on a matter by a voting group constitutes a quorum, unless the title provides otherwise under RCW 23B.07.250 and 23B.07.270;
(u) Corporate action on a matter, other than election of directors, by a voting group is approved if the votes cast within the voting group favoring the corporate action exceed the votes cast opposing the corporate action, unless this title requires a greater number of affirmative votes under RCW 23B.07.250;
(v) All shares of one or more classes or series that are entitled to vote will be counted together collectively on any matter at a meeting of shareholders under RCW 23B.07.260;
(w) Directors are elected by cumulative voting under RCW 23B.07.280;
(x) Directors are elected by a plurality of votes cast by shares entitled to vote under RCW 23B.07.280, except as otherwise provided in the articles of incorporation or a bylaw adopted pursuant to RCW 23B.10.205;
(y) A corporation must have a board of directors under RCW 23B.08.010;
(z) All corporate powers must 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 under RCW 23B.08.010;
(aa) The shareholders may remove one or more directors with or without cause under RCW 23B.08.080;

(bb) A vacancy on the board of directors may be filled by the shareholders or the board of directors under RCW 23B.08.100;
(cc) A corporation shall indemnify a director who was wholly successful in the defense of any proceeding to which the director was a party because the director is or was a director of the corporation against reasonable expenses incurred by the director in connection with the proceeding under RCW 23B.08.520;
(dd) A director of a corporation who is a party to a proceeding may apply for indemnification of reasonable expenses incurred by the director in connection with the proceeding to the court conducting the proceeding or to another court of competent jurisdiction under RCW 23B.08.540;
(ee) 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 under RCW 23B.08.570;
(ff) The corporation may indemnify and advance expenses to an officer, employee, or agent of the corporation who is not a director to the same extent as to a director under RCW 23B.08.570;
(gg) A corporation may 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 approval of its board of directors, or contract under RCW 23B.08.570;
(hh) A corporation's board of directors may adopt certain amendments to the corporation's articles of incorporation without shareholder approval under RCW 23B.10.020;
(ii) Unless this title or the board of directors requires a greater vote or a vote by voting groups, an amendment to the corporation's articles of incorporation must be approved by each voting group entitled to vote on the proposed amendment by two-thirds, or, in the case of a public company, a majority, of all the votes entitled to be cast by that voting group under RCW 23B.10.030;
(jj) A corporation's board of directors may amend or repeal the corporation's bylaws unless this title reserves this power exclusively to the shareholders in whole or in part, or unless the shareholders in amending or repealing a bylaw provide expressly that the board of directors may not amend or repeal that bylaw under RCW 23B.10.200;
(kk) Unless this title or the board of directors require a greater vote or a vote by voting groups, a plan of merger or share exchange must be approved by each voting group entitled to vote on the merger or share exchange by two-thirds of all the votes entitled to be cast by that voting group under RCW 23B.11.030;
(ll) Approval by the shareholders of the sale, lease, exchange, or other disposition of all, or substantially all, the corporation's property in the usual and regular course of business is not required under RCW 23B.12.010;
(mm) Approval by the shareholders of the mortgage, pledge, dedication to the repayment of indebtedness, or other encumbrance of any or all of the corporation's property, whether or not in the usual and regular course of business, is not required under RCW 23B.12.010;

(nn) Unless the board of directors requires a greater vote or a vote by voting groups, a sale, lease, exchange, or other disposition of all or substantially all of the corporation's property, other than in the usual and regular course of business, must be approved by each voting group entitled to vote on such transaction by two-thirds of all votes entitled to be cast by that voting group under RCW 23B.12.020; and

(oo) Unless the board of directors requires a greater vote or a vote by voting groups, a proposal to dissolve must be approved by each voting group entitled to vote on the dissolution by two-thirds of all votes entitled to be cast by that voting group under RCW 23B.14.020.

(4) Unless its articles of incorporation or its bylaws provide otherwise, a corporation is governed by the following provisions:

(a) The board of directors may approve the issuance of some or all of the shares of any or all of the corporation's classes or series without certificates under RCW 23B.06.260;

(b) A corporation that is not a public company shall hold a special meeting of shareholders if the holders of at least ten percent of the votes entitled to be cast on any issue proposed to be considered at the meeting demand a meeting under RCW 23B.07.020;

(c) A director need not be a resident of this state or a shareholder of the corporation under RCW 23B.08.020;

(d) The board of directors may fix the compensation of directors under RCW 23B.08.110;

(e) Members of the board of directors may participate in a meeting of the board by any means of similar communication by which all directors participating can hear each other during the meeting under RCW 23B.08.200;

(f) Corporate action permitted or required by this title to be taken at a board of directors' meeting may be approved without a meeting if approved by all members of the board under RCW 23B.08.210;

(g) Regular meetings of the board of directors may be held without notice of the date, time, place, or purpose of the meeting under RCW 23B.08.220;

(h) 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, and the notice need not describe the purpose of the special meeting under RCW 23B.08.220;

(i) A quorum of a board of directors consists of a majority of the number of directors under RCW 23B.08.240;

(j) 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 under RCW 23B.08.240;

(k) A board of directors may create one or more committees and appoint members of the board of directors to serve on them under RCW 23B.08.250; and

(l) Unless approved by the shareholders, a corporation may indemnify, or make advances to, a director for reasonable expenses incurred in the defense of any proceeding to which the director was a party because of being a director only to the extent such action is consistent with RCW 23B.08.500 through 23B.08.580.

(5) The articles of incorporation may contain the following provisions:

(a) The names and addresses of the individuals who are to serve as initial directors;

(b) The par value of any authorized shares or classes of shares;
(c) Provisions not inconsistent with law related to the management of the business and the regulation of the affairs of the corporation;
(d) Any provision that under this title is required or permitted to be set forth in the bylaws;
(e) Provisions not inconsistent with law defining, limiting, and regulating the powers of the corporation, its board of directors, and shareholders;
(f) Provisions authorizing corporate action to be approved by consent of less than all of the shareholders entitled to vote on the corporate action, in accordance with RCW 23B.07.040;
(g) If the articles of incorporation authorize dividing shares into classes, the election of all or a specified number of directors may be effected by the holders of one or more authorized classes of shares under RCW 23B.08.040;
(h) The terms of directors may be staggered under RCW 23B.08.060;
(i) Shares may be redeemable or convertible (i) at the option of the corporation, the shareholder, or another person, or upon the occurrence of a designated event; (ii) for cash, indebtedness, securities, or other property; or (iii) in a designated amount or in an amount determined in accordance with a designated formula or by reference to extrinsic data or events under RCW 23B.06.010; and
(j) A director's personal liability to the corporation or its shareholders for monetary damages for conduct as a director may be eliminated or limited under RCW 23B.08.320.
(6) The articles of incorporation or the bylaws may contain the following provisions:
(a) A restriction on the transfer or registration of transfer of the corporation's shares under RCW 23B.06.270;
(b) Shareholders may participate in a meeting of shareholders by any means of communication by which all persons participating in the meeting can hear each other under RCW 23B.07.080;
(c) A quorum of the board of directors may consist of as few as one-third of the number of directors under RCW 23B.08.240;
(d) If the corporation is registered as an investment company under the investment company act of 1940, a provision limiting the requirement to hold an annual meeting of shareholders as provided in RCW 23B.07.010(2); and
(e) If the corporation is registered as an investment company under the investment company act of 1940, a provision establishing terms of directors which terms may be longer than one year as provided in RCW 23B.05.050.
(7) The articles of incorporation need not set forth any of the corporate powers enumerated in this title.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §27 (eff. 7-1-90)
Current subsections (1) and (2) are the same as subsections (1) and (2) of the original section. Current subsections (3)(a) – (o) are the same as subsections (3)(a) – (o) of the original section. Current subsections (3)(q) – (oo) are the same as subsections (3)(p) – (nn) of the original section. (Current subsection (3)(p) was added in 1997, and all other subsections in subsection (3) relettered.) Subsection (3)(oo) of the

original section stated: "A corporation with fewer than three hundred holders of record of its shares does not require special approval of interested shareholder transactions under RCW 23B.17.020."

Current subsection (4) is the same as the original subsection (4). Current subsections (5)(a) – (e) are the same as original subsections (5)(a) – (e). (Current subsection (5)(f) was added in 1997 and other subsections of (5) relettered.) Current subsection (5)(g) – (j) are the same as original subsections (5)(f) – (i). Current subsections (6)(a) – (c) are the same as original subsections (6)(a) – (c). (Current subsections (6)(d) – (e) were added in 1994). Current subsection (7) is the same as original subsection (7).

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 2990 (1989)
Section 2.02 Articles of Incorporation.
Proposed subsection 2.02(a) sets forth the minimum mandatory requirements for all articles of incorporation. If the corporation is to have a board of directors (an option it need not accept, under Proposed section 8.01), either the articles of incorporation or the bylaws must state the number of directors or specify how the number is to be determined Proposed subsection 2.02(b). A corporation formed with articles of incorporation that only state these minimum requirements will have the broadest powers and least restrictions on activities permitted by the Proposed Act. The Proposed Act thus permits the creation of a "standard" corporation by a simple, one-page document.

Proposed subsections 2.02(c) and (d) list numerous situations in which the statute prescribes rules that will govern the corporation unless the articles of incorporation, or either the articles of incorporation or the bylaws, provide otherwise. The Committee felt that these provisions would provide counsel with ready check-lists for planning incorporations, and thereby would facilitate practice in the state. Such provisions derive their significance only to the extent of the rules prescribed by the statute elsewhere. They are not intended to add to or detract from the substance of the basic rules cited therein.

AMENDMENTS TO ORIGINAL SECTION
Laws 1994, ch. 256, §27 (eff. 6-9-94) *(added current subsections (6)(d) – (e).)*
d) If the corporation is registered as an investment company under the investment company act of 1940, a provision limiting the requirement to hold an annual meeting of shareholders as provided in RCW 23B.07.010(2); and
(e) If the corporation is registered as an investment company under the investment company act of 1940, a provision establishing terms of directors which terms may be longer than one year as provided in RCW 23B.05.050.

* * * * *

Laws 1996, ch. 155, §5 (eff. 6-6-96) *(made minor changes in original subsections (3)(mm) – (nn), and repealed original subsection (3)(oo).)*
(mm) Unless the board of directors requires a greater vote or a vote by voting groups, a sale, lease, exchange, or other disposition of all or substantially all of the corporation's property, other than in the usual and regular course of business, must be approved by each voting group entitled to vote on such transaction by two-thirds of all votes entitled to be cast by that voting group under RCW 23B.12.020; and
(nn) Unless the board of directors requires a greater vote or a vote by voting groups, a proposal to dissolve must be approved by each voting group entitled to vote on the dissolution by two-thirds of all votes entitled to be cast by that voting group under RCW 23B.14.020~~; and~~
~~(oo) A corporation with fewer than three hundred holders of record of its shares does not require special approval of interested shareholder transactions under RCW 23B.17.020~~.

CARC COMMENTARY
See CARC Comment to 1996 Amendment of RCW 23B.19.020.

* * * * *

Laws 1997, ch. 19, §1 (eff. 7-27-97) *(added current subsection (3)(p) and relettered remaining subparts in subsection (3); added current subsection (5)(f) and relettered remaining subparts in subsection (5).)*

(p) Action may be taken by shareholders by unanimous written consent of all shareholders entitled to vote on the action, unless the approval of a lesser number of shareholders is permitted as provided in RCW 23B.07.040;

(q) Unless this title requires otherwise, the corporation is required to give notice only to shareholders entitled to vote at a meeting and the notice for an annual meeting need not include the purpose for which the meeting is called under RCW 23B.07.050;

(r~~q~~) A corporation that is a public company shall hold a special meeting of shareholders if the holders of at least ten percent of the votes entitled to be cast on any issue proposed to be considered at the meeting demand a meeting under RCW 23B.07.020;

(s~~r~~) Subject to statutory exceptions, each outstanding share, regardless of class, is entitled to one vote on each matter voted on at a shareholders' meeting under RCW 23B.07.210;

(t~~s~~) A majority of the votes entitled to be cast on a matter by a voting group constitutes a quorum, unless the title provides otherwise under RCW 23B.07.250 and 23B.07.270;

(u~~t~~) Action on a matter, other than election of directors, by a voting group is approved if the votes cast within the voting group favoring the action exceed the votes cast opposing the action, unless this title requires a greater number of affirmative votes under RCW 23B.07.250;

(v~~u~~) All shares of one or more classes or series that are entitled to vote will be counted together collectively on any matter at a meeting of shareholders under RCW 23B.07.260;

(w~~v~~) Directors are elected by cumulative voting under RCW 23B.07.280;

(x~~w~~) Directors are elected by a plurality of votes cast by shares entitled to vote under RCW 23B.07.280;

(y~~x~~) A corporation must have a board of directors under RCW 23B.08.010;

(z~~y~~) All corporate powers must 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 under RCW 23B.08.010;

(aa~~z~~) The shareholders may remove one or more directors with or without cause under RCW 23B.08.080;

(bb~~aa~~) A vacancy on the board of directors may be filled by the shareholders or the board of directors under RCW 23B.08.100;

(cc~~bb~~) A corporation shall indemnify a director who was wholly successful in the defense of any proceeding to which the director was a party because the director is or was a director of the corporation against reasonable expenses incurred by the director in connection with the proceeding under RCW 23B.08.520;

(dd~~cc~~) A director of a corporation who is a party to a proceeding may apply for indemnification of reasonable expenses incurred by the director in connection with the proceeding to the court conducting the proceeding or to another court of competent jurisdiction under RCW 23B.08.540;

(ee~~dd~~) 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 under RCW 23B.08.570;

(ff~~ee~~) The corporation may indemnify and advance expenses to an officer, employee, or agent of the corporation who is not a director to the same extent as to a director under RCW 23B.08.570;

(gg~~ff~~) A corporation may 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 under RCW 23B.08.570;

(hh~~gg~~) A corporation's board of directors may adopt certain amendments to the corporation's articles of incorporation without shareholder action under RCW 23B.10.020;

(ii~~hh~~) Unless this title or the board of directors requires a greater vote or a vote by voting groups, an amendment to the corporation's articles of incorporation must be approved by each voting group entitled to vote on the proposed amendment by two-thirds, or, in the case of a public company, a majority, of all the votes entitled to be cast by that voting group under RCW 23B.10.030;

(jj~~ii~~) A corporation's board of directors may amend or repeal the corporation's bylaws unless this title reserves this power exclusively to the shareholders in whole or in part, or unless the shareholders in amending or repealing a bylaw provide expressly that the board of directors may not amend or repeal that bylaw under RCW 23B.10.200;

(kk~~jj~~) Unless this title or the board of directors require a greater vote or a vote by voting groups, a plan of merger or share exchange must be approved by each voting group entitled to vote on the merger or share exchange by two-thirds of all the votes entitled to be cast by that voting group under RCW 23B.11.030;
(ll~~kk~~) Approval by the shareholders of the sale, lease, exchange, or other disposition of all, or substantially all, the corporation's property in the usual and regular course of business is not required under RCW 23B.12.010;
(mm~~ll~~) Approval by the shareholders of the mortgage, pledge, dedication to the repayment of indebtedness, or other encumbrance of any or all of the corporation's property, whether or not in the usual and regular course of business, is not required under RCW 23B.12.010;
(nn~~mm~~) Unless the board of directors requires a greater vote or a vote by voting groups, a sale, lease, exchange, or other disposition of all or substantially all of the corporation's property, other than in the usual and regular course of business, must be approved by each voting group entitled to vote on such transaction by two-thirds of all votes entitled to be cast by that voting group under RCW 23B.12.020; and
(oo~~nn~~) Unless the board of directors requires a greater vote or a vote by voting groups, a proposal to dissolve must be approved by each voting group entitled to vote on the dissolution by two-thirds of all votes entitled to be cast by that voting group under RCW 23B.14.020.

* * *

(5) The articles of incorporation may contain the following provisions:
(f) Provisions authorizing shareholder action to be taken by written consent of less than all of the shareholders entitled to vote on the action, in accordance with RCW 23B.07.040;
(g) If the articles of incorporation authorize dividing shares into classes, the election of all or a specified number of directors may be effected by the holders of one or more authorized classes of shares under RCW 23B.08.040;
(h~~g~~) The terms of directors may be staggered under RCW 23B.08.060;
(i~~h~~) Shares may be redeemable or convertible (i) at the option of the corporation, the shareholder, or another person, or upon the occurrence of a designated event; (ii) for cash, indebtedness, securities, or other property; or (iii) in a designated amount or in an amount determined in accordance with a designated formula or by reference to extrinsic data or events under RCW 23B.06.010; and
(j~~i~~) A director's personal liability to the corporation or its shareholders for monetary damages for conduct as a director may be eliminated or limited under RCW 23B.08.320.

CARC COMMENTARY
See CARC Comment to 1997 Amendment of RCW 23B.07.040.

* * * * *

Laws 2002, ch. 297, §11 (eff. 6-13-02) *(amends only subsection (3)(p) and (5)(f) as both were amended by Laws 1997)*
(3)(p) Action may be taken by shareholders by unanimous ~~written~~ consent of all shareholders entitled to vote on the action, unless the approval of a lesser number of shareholders is permitted as provided in RCW 23B.07.040, which consent shall be in the form of a record;

(5)(f) Provisions authorizing shareholder action to be taken by ~~written~~ consent of less than all of the shareholders entitled to vote on the action, in accordance with RCW 23B.07.040;

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

* * * * *

Laws 2009, ch. 189, §3 (eff. 7-26-09) *(amends only subsections (3)(h), (3)(p), (3)(u), (3)(x), (3)(gg), (3)(hh), (4)(a), (4)(f) and (5)(f))*
(3)(h) The board of directors must ~~authorize~~ approve any issuance of shares under RCW 23B.06.210;

(3)(p) Corporate ~~A~~action may be ~~taken~~ approved by shareholders by unanimous consent of all shareholders entitled to vote on the corporate action, unless the approval of a lesser number of shareholders is permitted as provided in RCW 23B.07.040, which shareholder consent shall be in the form of a record;

(3)(u) Corporate ~~A~~action on a matter, other than election of directors, by a voting group is approved if the votes cast within the voting group favoring the corporate action exceed the votes cast opposing the corporate action, unless this title requires a greater number of affirmative votes under RCW 23B.07.250;

(3)(x) Directors are elected by a plurality of votes cast by shares entitled to vote under RCW 23B.07.280, except as otherwise provided in the articles of incorporation or a bylaw adopted pursuant to RCW 23B.10.205;

(3)(gg) A corporation may 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~~ approval of its board of directors, or contract under RCW 23B.08.570;

(3)(hh) A corporation's board of directors may adopt certain amendments to the corporation's articles of incorporation without shareholder ~~action~~ approval under RCW 23B.10.020;

(4)(a) The board of directors may ~~authorize~~ approve the issuance of some or all of the shares of any or all of the corporation's classes or series without certificates under RCW 23B.06.260;

(4)(f) Corporate ~~A~~action permitted or required by this title to be taken at a board of directors' meeting may be ~~taken~~ approved without a meeting if ~~action is taken~~approved by all members of the board under RCW 23B.08.210;

(5) (f) Provisions authorizing ~~shareholder~~ corporate action to be ~~taken~~ approved by consent of less than all of the shareholders entitled to vote on the corporate action, in accordance with RCW 23B.07.040;

CARC COMMENTARY

All amendments except that to subsection (3)(x) are the result of adding a definition for "corporate action" to RCW 23B.01.400. 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.

The amendment to subsection (3)(x) provides consistency with 2007 amendments to RCW 23B.10.205.

* * * * *

RCW 23B.02.050
ORGANIZATION OF CORPORATION

CURRENT SECTION

(1) After incorporation:

(a) If initial directors are named in the articles of incorporation, the initial directors shall hold an organizational meeting, at the call of a majority of the directors, to complete the organization of the corporation by appointing officers, adopting bylaws, and carrying on any other business brought before the meeting;

(b) If initial directors are not named in the articles, the incorporator or incorporators shall hold an organizational meeting at the call of a majority of the incorporators:

(i) To elect directors and complete the organization of the corporation; or

(ii) To elect a board of directors who shall complete the organization of the corporation.

(2) Corporate action required or permitted by this title to be approved by incorporators at an organizational meeting may be approved without a meeting if the approval is evidenced by the consent of each of the incorporators in the form of a record describing the corporate action so approved and executed by each incorporator.

(3) An organizational meeting may be held in or out of this state.

(4) A corporation's initial report containing the information described in RCW 23B.16.220(1) must be delivered to the secretary of state within one hundred twenty days of the date on which the corporation's articles of incorporation were filed.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §30 (eff. 7-1-90)

(1) Within ninety days after the date on which the corporation's articles of incorporation were filed:

(a) If initial directors are named in the articles of incorporation, the initial directors shall hold an organizational meeting, at the call of a majority of the directors, to complete the organization of the corporation by appointing officers, adopting bylaws, and carrying on any other business brought before the meeting;

(b) If initial directors are not named in the articles, the incorporator or incorporators shall hold an organizational meeting at the call of a majority of the incorporators:

(i) To elect directors and complete the organization of the corporation; or

(ii) To elect a board of directors who shall complete the organization of the corporation.

(2) Action required or permitted by this title to be taken by incorporators at an organizational meeting may be taken without a meeting if the action taken is evidenced by one or more written consents describing the action taken and signed by each incorporator.

(3) An organizational meeting may be held in or out of this state.

(4) Within thirty days after the date of its organizational meeting, the corporation shall file an initial report with the secretary of state containing the information described in RCW 23B.16.220(1).

ORIGINAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 2991 (1989)

Section 2.05 Organization of Corporation.

The additions to Revised Model Act section 2.05 are designed to provide the secretary of state with a date certain by which a corporation's initial annual report will be filed. Thus, under Proposed section 16.22(c),

the first annual report must be delivered to the secretary of state within 120 days of the date on which the articles of incorporation were filed.

The Revised Model Act (and the Proposed Act) does not contain notice provisions for an incorporators' meeting. The Committee believes that Proposed sections 8.22(b), and 1.41 should be applied by analogy to establish such requirements.

AMENDMENTS TO ORIGINAL SECTION
Laws 1991, ch. 72, §31 (eff. 7-28-91)
(1) ~~Within ninety days~~ A~~a~~fter ~~the date on which the corporation's articles of~~ incorporation ~~were filed~~:
(a) If initial directors are named in the articles of incorporation, the initial directors shall hold an organizational meeting, at the call of a majority of the directors, to complete the organization of the corporation by appointing officers, adopting bylaws, and carrying on any other business brought before the meeting;
(b) If initial directors are not named in the articles, the incorporator or incorporators shall hold an organizational meeting at the call of a majority of the incorporators:
(i) To elect directors and complete the organization of the corporation; or
(ii) To elect a board of directors who shall complete the organization of the corporation.
(2) Action required or permitted by this title to be taken by incorporators at an organizational meeting may be taken without a meeting if the action taken is evidenced by one or more written consents describing the action taken and signed by each incorporator.
(3) An organizational meeting may be held in or out of this state.
(4) ~~Within thirty days after the date of its organizational meeting, the corporation shall file an initial report with the secretary of state containing the information described in RCW 23B.16.220(1).~~ A corporation's initial report containing the information described in RCW 23B.16.220(1) must be delivered to the secretary of state within one hundred twenty days of the date on which the corporation's articles of incorporation were filed.

CARC COMMENTARY
Resolves ambiguity in original section regarding latest date for filing a corporation's initial report.

* * * * *

Laws 2002, ch. 297, §13 (eff. 6-13-02)*(amends only subsection (2))*
(2) Action required or permitted by this title to be taken by incorporators at an organizational meeting may be taken without a meeting if the action taken is evidenced by ~~one or more written consents~~ the consent of each of the incorporators in the form of a record describing the action taken and ~~signed~~ executed by each incorporator.

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

* * * * *

Laws 2009, ch. 189, §4 (eff. 7-26-09) *(amends only subsection (2) as amended by Laws 2002, ch. 297)*
(2) Corporate ~~A~~action required or permitted by this title to be ~~taken~~ approved by incorporators at an organizational meeting may be ~~taken~~ approved without a meeting if the ~~action taken~~approval is evidenced by the consent of each of the incorporators in the form of a record describing the corporate action ~~taken~~ so approved and executed by each incorporator.

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.06.020
TERMS OF CLASS OR SERIES

CURRENT SECTION

(1) If the articles of incorporation so provide, the board of directors may determine, in whole or part, the preferences, limitations, voting powers, and relative rights, within the limits set forth in RCW 23B.06.010(1)(b) and this section of (a) any class of shares before the issuance of any shares of that class, or (b) one or more series within a class, and designate the number of shares within that series, before the issuance of any shares of that series.

(2) Each series of a class must be given a distinguishing designation.

(3) All shares of a series must have preferences, limitations, voting powers, and relative rights identical with those of other shares of the same series, except to the extent otherwise permitted by RCW 23B.06.010(1)(b). All shares of a series must have preferences, limitations, voting powers, and relative rights identical with those of shares of other series of the same class, except to the extent otherwise provided in the description of the series.

(4) Before issuing any shares of a class or series created under this section, the corporation must deliver to the secretary of state for filing articles of amendment, which are effective without shareholder approval, that set forth:

(a) The name of the corporation;

(b) The text of the amendment determining the terms of the class or series of shares;

(c) The date it was adopted; and

(d) The statement that the amendment was duly adopted by the board of directors.

(5) Unless the articles of incorporation provide otherwise, the board of directors may, after the issuance of shares of a series whose number it is authorized to designate, amend the resolution establishing the series to decrease, but not below the number of shares of such series then outstanding, the number of authorized shares of that series, by filing articles of amendment, which are effective without shareholder approval, in the manner provided in subsection (4) of this section.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §45 (eff. 7-1-90)

(1) If the articles of incorporation so provide, the board of directors may determine, in whole or part, the preferences, limitations, and relative rights, within the limits set forth in this section of (a) any class of shares before the issuance of any shares of that class, or (b) one or more series within a class, and designate the number of shares within that series, before the issuance of any shares of that series.

(2) Each series of a class must be given a distinguishing designation.

(3) All shares of a series must have preferences, limitations, and relative rights identical with those of other shares of the same series, except to the extent otherwise provided in the description of the series, with those of other series of the same class.

(4) Before issuing any shares of a class or series created under this section, the corporation must deliver to the secretary of state for filing articles of amendment, which are effective without shareholder action, that set forth:
(a) The name of the corporation;
(b) The text of the amendment determining the terms of the class or series of shares;
(c) The date it was adopted; and
(d) The statement that the amendment was duly adopted by the board of directors.
(5) Unless the articles of incorporation provide otherwise, the board of directors may, after the issuance of shares of a series whose number it is authorized to designate, amend the resolution establishing the series to decrease, but not below the number of shares of such series then outstanding, the number of authorized shares of that series, by filing articles of amendment, which are effective without shareholder action, in the manner provided in subsection (4) of this section.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 2999-3000 (1989)
Section 6.02 Terms of Class or Series.
Proposed section 6.02 permits the board of directors, if authority to do so is contained in the articles, to fix the terms of a class of shares to meet corporate needs, including current requirements of the securities market or the exigencies of negotiations for acquisition of other corporations or properties, without the necessity of holding a shareholders' meeting to amend the articles. This section therefore permits prompt action and gives desirable flexibility. The articles of incorporation may also create "series" of shares within a class (rather than designating that "series" as a separate class) if that is deemed desirable.

The board of directors may create new series within a class or set the terms of a class or series only if there are no outstanding shares of that class or series. This section recognizes that in some contexts there is no substantive difference between a "class" and a "series within a class," and that the labels are often a matter of convenience. In appropriate circumstances, a series may be treated as a class of shares that has one or both of the fundamental characteristics described in Proposed subsection 6.01(b).

Shares of stock to be issued in different classes or series that vary in terms to be set by the board of directors are sometimes referred to as "blank stock." The granting of the power to vary the terms gives the board of director's broad power to affect the capital structure of the corporation. Exercise of this power may in some circumstances dilute the interest of existing shareholders. But on balance it is desirable to permit this flexibility.

Proposed subsection 6.02(e) gives directors (unless the articles of incorporation provide otherwise) the power to reduce the number of shares of an outstanding series, but not below the number of shares of that series then outstanding. Such power in accord with old law.

AMENDMENTS TO ORIGINAL SECTION
Laws 1998, ch. 104, §2 (eff. 6-11-98)
(1) If the articles of incorporation so provide, the board of directors may determine, in whole or part, the preferences, limitations, voting powers, and relative rights, within the limits set forth in RCW 23B.06.010(1)(b) and this section of (a) any class of shares before the issuance of any shares of that class, or (b) one or more series within a class, and designate the number of shares within that series, before the issuance of any shares of that series.
(2) Each series of a class must be given a distinguishing designation.
(3) All shares of a series must have preferences, limitations, voting powers, and relative rights identical with those of other shares of the same series ~~and~~, except to the extent otherwise ~~provided in the description of the series, with those~~ permitted by RCW 23B.06.010(1)(b). All shares of a series must have preferences, limitations, voting powers, and relative rights identical with those of shares of other series of the same class, except to the extent otherwise provided in the description of the series.

(4) Before issuing any shares of a class or series created under this section, the corporation must deliver to the secretary of state for filing articles of amendment, which are effective without shareholder action that set forth:
(a) The name of the corporation;
(b) The text of the amendment determining the terms of the class or series of shares;
(c) The date it was adopted; and
(d) The statement that the amendment was duly adopted by the board of directors.
(5) Unless the articles of incorporation provide otherwise, the board of directors may, after the issuance of shares of a series whose number it is authorized to designate, amend the resolution establishing the series to decrease, but not below the number of shares of such series then outstanding, the number of authorized shares of that series, by filing articles of amendment, which are effective without shareholder action, in the manner provided in subsection (4) of this section.

CARC COMMENTARY

The primary reasons for the proposed amendments to RCW 23B.06.020 are to clarify the relationship between RCW 23B.06.010(1)(b), which addresses external facts that may affect the terms of classes and series of shares, and RCW 23B.06.020, which addresses the powers of the board of directors with respect to the establishment of the terms of classes and series of shares, and to eliminate any uncertainty with respect to the statutory authority for the creation of various shareholder rights plans. The existing text of RCW 23B.06.010(1)(b) was incorporated in the Washington business corporation act in 1986, and such language has through the years been interpreted in other states as providing the statutory authority for corporations to adopt various shareholder rights plans, including those known as "poison pills," that assist the board of directors of a corporation in its efforts to delay or foreclose hostile takeover of cases beginning with Providence & Worcester Co. v. Baker, 378 A.2d 121 (Del. 1977) to permit stock that differ or may differ in application to certain holders of that class or series of stock upon the occurrence of certain facts that may arise subsequent to the adoption of the preferences, limitations, voting powers or relative rights of the class or series. Many Washington corporations have adopted shareholder rights plans in reliance upon the authority of RCW 23B.06.010(1)(b).

As currently structured, there is no cross reference in the Washington business corporation act that demonstrates the relationship of RCW 23B.06.010(1)(b) and RCW 23B.06.020. In the absence of a cross reference, the requirements of RCW 23B.06.020(3) might be misconstrued as prohibiting the very kind of differences contemplated by RCW 23B.06.010(1)(b) because its text indicates that all shares of the same series must have preferences, limitations, voting powers and relative rights identical with those of other shares of the same series. The proposed amendment merely adds a cross reference to RCW 23B.06.010(1)(b) to confirm the existing statutory authority to the effect that, while the requirement for identical preferences, limitations, voting powers and relative rights remains applicable at the time the board of directors determines such preferences, limitations, voting powers and relative rights for a class or series of shares under authority granted to the board by the articles of incorporation, the terms and operation of those preferences, limitations, and relative rights may require different treatment of the shares or the holders of the shares due to facts ascertainable outside the articles of incorporation as amended by action of the board of directors as required by RCW 23B.06.020(4). An example would be a change in the voting powers of certain shares within a class or series upon the obtaining by one shareholder of more than a certain percentage of the shares of the class or series. The proposed revision expressly recognizes the existing relationship between the two provisions.

RCW 23B.06.010(1)(b) affects and limits RCW 23B.06.020(3) by permitting the board of directors to establish non-identical preferences, limitations, voting powers and relative rights of the shares of a class or a series or among the holders thereof based upon facts ascertainable outside the articles of incorporation if the manner in which such facts operate on the preferences, limitations, voting powers or relative rights of such class or series or the holders thereof is set forth in the articles of incorporation, once the articles of incorporation have been amended by the action of the board of directors as required by RCW 23B.06.020(4). The new last sentence to

RCW 23B.06.010(1)(b) makes it clear that "facts ascertainable outside the articles of incorporation" include the existence of any condition or the occurrence of any event, including, without limitation, determinations made by or within the control of the corporation or a person or body affiliated with the corporation, such as decision by the corporation's board of directors, officers or agents.

The reference to facts external to the articles of incorporation negates any inference that provisions creating different treatment of the holders of shares of a particular class are necessarily invalid. See, *e.g.*, Asarco, Inc. v. M.R.H. Holmes a Court, 611 F.Supp. (D. N.J. 1985); R.D. Smith & C. v. Preway, Inc., 644 F. Supp. 868 (W.D. Wis. 1986). The cross reference proposed in RCW 23B.06.020 expressly recognizes the statutory authority for and validity of not only so called "shareholder rights" provisions in classes or series of shares, but also scaled voting rights, time-phased voting rights, and other arrangements whereby the effectiveness or operation of preferences, limitations, voting powers and relative rights are dependent upon provisions in stock purchase contracts applicable to, example, large shareholders. This provision does not alter existing statutory authority or the fiduciary responsibilities of a corporation and its board of directors, which include making determinations and taking actions in the best interests of the corporation, including all of its shareholders.

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Laws 2009, ch. 189, §6 (eff. 7-26-09)*(amends only subsections (4)(introductory paragraph) and (5)).*
(4) Before issuing any shares of a class or series created under this section, the corporation must deliver to the secretary of state for filing articles of amendment, which are effective without shareholder ~~action~~approval, that set forth:

(5) Unless the articles of incorporation provide otherwise, the board of directors may, after the issuance of shares of a series whose number it is authorized to designate, amend the resolution establishing the series to decrease, but not below the number of shares of such series then outstanding, the number of authorized shares of that series, by filing articles of amendment, which are effective without shareholder ~~action~~approval, in the manner provided in subsection (4) of this section.

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.06.040
FRACTIONAL SHARES

CURRENT SECTION

(1) A corporation may:

(a) Issue fractions of a share or pay in money the value of fractions of a share;

(b) Arrange for disposition of fractional shares by the shareholders;

(c) Issue scrip in registered or bearer form entitling the holder to receive a full share upon surrendering enough scrip to equal a full share.

(2) Each certificate representing scrip must be conspicuously labeled "scrip" and must contain the information required by RCW 23B.06.250(2).

(3) The holder of a fractional share is entitled to exercise the rights of a shareholder, including the right to vote, to receive dividends, and to participate in the assets of the corporation upon liquidation. The holder of scrip is not entitled to any of these rights unless the scrip provides for them.

(4) The board of directors may approve the issuance of scrip subject to any condition considered desirable, including:

(a) That the scrip will become void if not exchanged for full shares before a specified date; and

(b) That the shares for which the scrip is exchangeable may be sold and the proceeds paid to the scripholders.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §47 (eff. 7-1-90)

(1) A corporation may:

(a) Issue fractions of a share or pay in money the value of fractions of a share;

(b) Arrange for disposition of fractional shares by the shareholders;

(c) Issue scrip in registered or bearer form entitling the holder to receive a full share upon surrendering enough scrip to equal a full share.

(2) Each certificate representing scrip must be conspicuously labeled "scrip" and must contain the information required by RCW 23B.06.250(2).

(3) The holder of a fractional share is entitled to exercise the rights of a shareholder, including the right to vote, to receive dividends, and to participate in the assets of the corporation upon liquidation. The holder of scrip is not entitled to any of these rights unless the scrip provides for them.

(4) The board of directors may authorize the issuance of scrip subject to any condition considered desirable, including:

(a) That the scrip will become void if not exchanged for full shares before a specified date; and

(b) That the shares for which the scrip is exchangeable may be sold and the proceeds paid to the scripholders.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3000-01 (1989)

Section 6.04 Fractional Shares.

Fractional shares may arise from a share dividend that, as applied to a particular holder, does not produce an even multiple of shares; they may also result from fractional stock splits, from reverse splits, and from reclassifications and mergers. Although corporations are authorized to issue fractional shares, which are vested proportionately with the same rights as full shares, the creation of fractional shares often creates administrative difficulties, particularly for voting and dividend purposes.

Proposed section 6.04 authorizes handling fractional shares in various ways, including:

(1) The corporation may issue scrip instead of fractional shares. Scrip confers none of the substantive rights of shareholders, but only authorizes holders to combine scrip certificates in amounts aggregating a full share and then to exchange them for a full share. This aggregation must occur within the time and subject to the conditions set initially by the board of directors and stated in the scrip certificate. Scrip that is not combined and exchanged becomes void. To protect shareholders against forfeiture of their interest, however, it is usually provided that the shares represented by scrip certificates not exchanged by the expiration date are to be sold and the proceeds held, either indefinitely or for a stated period, for the benefit of the scripholders and paid to them on surrender of their scrip certificate.

Scrip has been widely used in lieu of fractional shares. The New York Stock Exchange, while not requiring the use of any particular method for the settlement of fractional share interests, has established a policy relating to the minimum rights and privileges that scrip issued by registered companies must provide. N.Y.S.E. LISTED COMPANY MANUAL Section 703.02(B).

(2) The corporation may authorize the immediate sale of all fractional share interests, thereby avoiding the expense and delay of scrip and the inconvenience of recognizing fractional shares. While this procedure denies shareholders the benefit of any subsequent rise in the market, it protects them against any subsequent decline and ensures them of recognition based on market values contemporaneous with the transaction. Since these transactions necessarily involve less than one full share for each shareholder, the amount involved in subsequent price changes is usually modest.

Under this section fractional shares may be certificated or uncertificated. There is no difference in treatment of certificated or uncertificated shares for this purpose. See Proposed sections 6.25 and 6.26.

AMENDMENTS TO ORIGINAL SECTION
Laws 2009, ch. 189, §6 (eff. 7-26-09)*(amends only subsection (4)(introductory paragraph))*
(4) The board of directors may ~~authorize~~ approve the issuance of scrip subject to any condition considered desirable, including:

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.06.210
ISSUANCE OF SHARES

CURRENT SECTION

(1) The powers granted in this section to the board of directors may be reserved to the shareholders by the articles of incorporation.

(2) Any issuance of shares must be approved by the board of directors. Shares may be issued for consideration consisting of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, contracts for services to be performed, or other securities of the corporation.

(3) A good faith determination by the board of directors that the consideration received or to be received for the shares to be issued is adequate is conclusive insofar as the adequacy of consideration relates to whether the shares are validly issued, fully paid and nonassessable. When the board of directors has made such a determination and the corporation has received the consideration, the shares issued therefor are fully paid and nonassessable.

(4) The corporation may place in escrow shares issued for a contract for future services or benefits or a promissory note, or make other arrangements to restrict the transfer of the shares, and may credit distributions in respect to the shares against their purchase price, until the services are performed, the benefits are received, or the note is paid. If the services are not performed, the benefits are not received, or the note is not paid, the shares escrowed or restricted and the distributions credited may be canceled in whole or part.

(5) Where it cannot be determined that outstanding shares are fully paid and nonassessable, there shall be a conclusive presumption that such shares are fully paid and nonassessable if the board of directors makes a good faith determination that there is no substantial evidence that the full consideration for such shares has not been paid.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §49 (eff. 7-1-90)

(1) The powers granted in this section to the board of directors may be reserved to the shareholders by the articles of incorporation.

(2) Any issuance of shares must be authorized by the board of directors. Shares may be issued for consideration consisting of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, contracts for services to be performed, or other securities of the corporation.

(3) A good faith determination by the board of directors that the consideration received or to be received for the shares to be issued is adequate is conclusive insofar as the adequacy of consideration relates to whether the shares are validly issued, fully paid and nonassessable. When the board of directors has made such a determination and the corporation has received the consideration, the shares issued therefore are fully paid and nonassessable.

(4) The corporation may place in escrow shares issued for a contract for future services or benefits or a promissory note, or make other arrangements to restrict the transfer of the shares, and may credit distributions in respect to the shares against their purchase price, until the services are performed, the benefits are received, or the note is paid. If the services are not performed, the benefits are not received, or

the note is not paid, the shares escrowed or restricted and the distributions credited may be canceled in whole or part.

(5) Where it cannot be determined that outstanding shares are fully paid and nonassessable, there shall be a conclusive presumption that such shares are fully paid and nonassessable if the board of directors makes a good faith determination that there is no substantial evidence that the full consideration for such shares has not been paid.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3001-03 (1989)

Section 6.21 Issuance of Shares.

Proposed section 6.21 continues the thrust of the 1984 and 1985 amendments: it does not recognize the concepts of par value and stated capital which were eliminated from the old law in 1984; and it endorses the 1985 elimination of the old rules declaring certain kinds of property ineligible as consideration for shares.

Since shares need not have a par value, under Proposed section 6.21 there is no minimum price at which specific shares must be issued and therefore there can be no "watered stock" liability for issuing shares below an arbitrarily fixed price. The price at which shares are issued is primarily a matter of concern to other shareholders whose interests may be diluted if shares are issued at unreasonably low prices or for overvalued property. This problem of equality of treatment essentially involves honest and fair judgments by directors and cannot be effectively addressed by an arbitrary doctrine establishing a minimum price for shares such as "par value" provided under older statutes.

Proposed subsection 6.21(b) specifically validates contracts for future services (including promoters' services), promissory notes, or "any tangible or intangible property or benefit to the corporation," as consideration for the present issue of shares. The term "benefit" should be broadly construed to include, for example, a reduction of a liability, a release of a claim, or benefits obtained by a corporation by contribution of its shares to a charitable organization or as a prize in a promotion. In the realities of commercial life, there is sometimes a need for the issuance of shares for contract rights or such intangible property or benefits. And, as a matter of business economics, contracts for future services, promissory notes, and intangible property or benefits often have value that is as real as the value of tangible property or past services, the only types of property that many older statutes permit as consideration for shares. Thus, only business judgment should determine what kind of property should be obtained for shares, and a determination by the directors (meeting the requirements of Proposed section 8.30) to accept a specific kind of valuable property for shares should be accepted and not circumscribed by artificial or arbitrary rules.

The issuance of some shares for cash and other shares for promissory notes, contracts for past or future services, or for tangible or intangible property or benefits, like the issuance of shares for an inadequate consideration, opens the possibility of dilution of the interests of other shareholders. For example, persons acquiring shares for cash may be unfairly treated if optimistic values are placed on past or future services or intangible benefits being provided by other persons. The problem is particularly acute if the persons providing services, promissory notes, or property or benefits of debatable value are themselves connected with the promoters of the corporation or with its directors. Protection of shareholders against abuse of the power granted to the board of directors to determine that shares may be issued for intangible property or benefits is provided in part by the requirement that the board must act in accordance with the requirements of Proposed section 8.30, and, if applicable, Proposed sections 8.70-8.73, in determining that the consideration received for shares is adequate.

Accounting principles are not specified in the Proposed Act, and the board of directors is not required by the statute to determine the "value" of noncash consideration received by the corporation (as was the case in old law.) In many instances, property or benefit received by the corporation will be of uncertain value; if the board of directors determines that the issuance of shares for the property or benefit is an appropriate transaction that protects the shareholders from dilution, that is sufficient under Proposed section 6.21. The board of directors does not have to make an explicit "adequacy" determination by formal resolution; that determination may be inferred from a determination to authorize the issuance of shares for a specified consideration.

Proposed section 6.21 also does not require that the board of directors determine the value of the consideration to be entered on the books of the corporation, though the board of directors may do so if it wishes. Of course, a specific value must be placed on the consideration received for the shares for bookkeeping purposes, but bookkeeping details are not the statutory responsibility of the board of directors. The statute also does not require the board of directors to determine the corresponding entry on the right-hand side of the balance sheet under owner's equity to be designated as "stated capital" or be allocated among "stated capital" and other surplus accounts. The corporation, however, may determine that its shareholders' equity accounts should be divided into these traditional categories if it wishes.

The first sentence of Proposed subsection 6.21(c) describes the effect of a good faith determination by the board of directors that consideration is adequate for the issuance of shares. That determination, without more, is conclusive to the extent that adequacy is relevant to the question whether the shares are validly issued, fully paid, and nonassessable. Proposed subsection 6.21(c) provides that shares are fully paid and nonassessable when the board of directors has made such determination, and the corporation has received the consideration. Whether shares are validly issued may depend on compliance with corporate procedural requirements, such as issuance within the amount authorized in the articles of incorporation or holding a directors' meeting upon proper notice and with a quorum present. The Proposed Act does not address the remedies that may be available for issuances that are subject to challenge.

Shares issued pursuant to preincorporation subscriptions are governed by Proposed section 6.20 and not by this section.

The Proposed Act does not address the question whether validly issued shares may thereafter be cancelled on the grounds of fraud or bad faith if the shares are in the hands of the original shareholder or other persons who were aware of the circumstances under which they were issued when they acquired the shares. It also leaves to the Uniform Commercial Code other questions relating to the rights of persons other than the person acquiring the shares from the corporation.

Proposed subsection 6.21(d) permits the board of directors to determine that shares issued for promissory notes or for contracts for future services or benefits be placed in escrow or their transfer otherwise restricted until the services are performed, the benefits received, or the notes are paid. The section also defines the rights of the corporation with respect to these shares. If the shares are issued without being restricted as provided in this subsection, they are validly issued insofar as the adequacy of consideration is concerned.

Proposed subsection 6.21(a) provides that the powers granted to the board of directors by this section may be reserved to the shareholders by the articles of incorporation. No negative inference should be drawn from Proposed subsection 6.21(a) with respect to the efficacy of similar provisions under other sections of the Proposed Act.

Proposed subsection 6.21(e) is designed to provide a mechanism for determining that shares issued in prior years are fully paid and unassessable even if those facts cannot currently be verified.

AMENDMENTS TO ORIGINAL SECTION
Laws 2009, ch. 189, §8 (eff. 7-26-09)*(amends only subsection (2))*
(2) Any issuance of shares must be ~~authorized~~ approved by the board of directors. Shares may be issued for consideration consisting of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, contracts for services to be performed, or other securities of the corporation.

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.06.220
LIABILITY OF SHAREHOLDERS

CURRENT SECTION

A purchaser from a corporation of its own shares is not liable to the corporation or its creditors with respect to the shares except to pay the consideration for which the shares were approved to be issued under RCW 23B.06.210 or specified in the subscription agreement under RCW 23B.06.200.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §50 (eff. 7-1-90)
A purchaser from a corporation of its own shares is not liable to the corporation or its creditors with respect to the shares except to pay the consideration for which the shares were authorized to be issued under RCW 23B.06.210 or specified in the subscription agreement under RCW 23B.06.200.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3003-04 (1989)
Section 6.22 Liability of Shareholders.
With the elimination of the concepts of par value and watered stock in l984, the sole obligation of a purchaser of shares from the corporation, as set forth in Proposed section 6.22, is to pay the consideration established by the board of directors (or the consideration specified in the subscription, in the case of preincorporation subscriptions). The consideration for the shares may consist of promissory notes, contracts for future services, or tangible or intangible property or benefits, and, if the board of directors so decides, the delivery of the notes, contracts, or accrual of the benefits constitute full payment for the shares. See Proposed section 6.21. Upon the transfer to the corporation of the consideration so determined or specified, the shareholder has no further responsibility to the corporation or its creditors "with respect to the shares," though the shareholder may have continuing obligations under a contract or promissory note entered into in connection with the acquisition of shares.

Proposed section 6.22 deals only with the responsibility for payment by the purchaser of shares from the corporation. The Proposed Act leaves to the Uniform Commercial Code questions with respect to the rights of subsequent purchasers of shares and the power of the corporation to cancel shares if the consideration is not paid when due. See sections 8-202 and 8-301 of the UNIFORM COMMERCIAL CODE.

The Proposed Act does not include a subsection in the RMA that states that unless the articles of incorporation provide otherwise, a shareholder is not liable for the debts of the corporation "except by reason of his own acts or conduct." The committee concluded that the RMA language might well confuse development within the state of such well-known doctrines as disregard of the corporate entity. It therefore omitted the provision.

AMENDMENTS TO ORIGINAL SECTION
Laws 2009, ch. 189, §9 (eff. 7-26-09)
A purchaser from a corporation of its own shares is not liable to the corporation or its creditors with respect to the shares except to pay the consideration for which the shares were ~~authorized~~ approved to be issued under RCW 23B.06.210 or specified in the subscription agreement under RCW 23B.06.200.

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.06.260
SHARES WITHOUT CERTIFICATES

CURRENT SECTION

(1) Unless the articles of incorporation or bylaws provide otherwise, the board of directors of a corporation may approve the issue of some or all of the shares of any or all of its classes or series without certificates. The approval does not affect shares already represented by certificates until they are surrendered to the corporation.

(2) Within a reasonable time after the issue or transfer of shares without certificates, the corporation shall send the shareholder a record containing the information required on certificates by RCW 23B.06.250 (2) and (3), and, if applicable, RCW 23B.06.270.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §54 (eff. 7-1-90)

(1) Unless the articles of incorporation or bylaws provide otherwise, the board of directors of a corporation may authorize the issue of some or all of the shares of any or all of its classes or series without certificates. The authorization does not affect shares already represented by certificates until they are surrendered to the corporation.

(2) Within a reasonable time after the issue or transfer of shares without certificates, the corporation shall send the shareholder a written statement of the information required on certificates by RCW 23B.06.250(2) and (3), and, if applicable, RCW 23B.06.270.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3005-06 (1989)

Section 6.26 Shares Without Certificates.

Proposed section 6.26(a) authorizes the creation of uncertificated shares either by original issue or in substitution for shares previously represented by certificates. This subsection gives the board of directors the widest discretion so that a particular class and series of shares might be entirely represented by certificates, entirely uncertificated, or represented partly by each. The second sentence ensures that a corporation may not treat as uncertificated, and accordingly transferable on its books without due presentation of a certificate, any shares for which a certificate is outstanding.

The statement required by Proposed subsection 6.26(b) ensures that holders of uncertificated shares will receive from the corporation the same information that the holders of certificates receive when certificates are issued. There is no requirement that this information be delivered to purchasers of uncertificated shares before purchase.

Detailed rules with respect to the issuance, transfer, and registration of both certificated and uncertificated shares appear in article 8 of the UNIFORM COMMERCIAL CODE. In general terms there are no differences between certificated and uncertificated securities except in matters such as their manner of transfer.

AMENDMENTS TO ORIGINAL SECTION

Laws 2002, ch. 297, §18 (eff. 6-13-02)

(1) Unless the articles of incorporation or bylaws provide otherwise, the board of directors of a corporation may authorize the issue of some or all of the shares of any or all of its classes or series without certificates. The authorization does not affect shares already represented by certificates until they are surrendered to the corporation.

(2) Within a reasonable time after the issue or transfer of shares without certificates, the corporation shall send the shareholder a ~~written statement of~~ recording containing the information required on certificates by RCW 23B.06.250(2) and (3), and, if applicable, RCW 23B.06.270.

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

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Laws 2009, ch. 189, §10 (eff. 7-26-09)*(amends only subsection (1))*
(1) Unless the articles of incorporation or bylaws provide otherwise, the board of directors of a corporation may ~~authorize~~ approve the issue of some or all of the shares of any or all of its classes or series without certificates. The ~~authorization~~ approval does not affect shares already represented by certificates until they are surrendered to the corporation.

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.06.310
CORPORATION'S ACQUISITION OF ITS OWN SHARES

CURRENT SECTION

(1) A corporation may acquire its own shares and shares so acquired constitute authorized but unissued shares.

(2) If the articles of incorporation prohibit the reissue of acquired shares, the number of authorized shares is reduced by the number of shares acquired, effective upon amendment of the articles of incorporation.

(3) The board of directors may adopt articles of amendment under this section without shareholder approval and deliver them to the secretary of state for filing. The articles must set forth:

(a) The name of the corporation;

(b) The reduction in the number of authorized shares, itemized by class and series; and

(c) The total number of authorized shares, itemized by class and series, remaining after reduction of the shares.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §58 (eff. 7-1-90)

(1) A corporation may acquire its own shares and shares so acquired constitute authorized but unissued shares.

(2) If the articles of incorporation prohibit the reissue of acquired shares, the number of authorized shares is reduced by the number of shares acquired, effective upon amendment of the articles of incorporation.

(3) The board of directors may adopt articles of amendment under this section without shareholder action and deliver them to the secretary of state for filing. The articles must set forth:

(a) The name of the corporation;

(b) The reduction in the number of authorized shares, itemized by class and series; and

(c) The total number of authorized shares, itemized by class and series, remaining after reduction of the shares.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3008 (1989)

Section 6.31 Corporation's Acquisition of Its Own Shares.

Proposed subsection 6.31(a) restates the fundamental power of a corporation to reacquire its own shares. Such a transaction constitutes a "distribution" by the corporation (see the definition of that term in Proposed section 1.40) and is subject to the limitations of Proposed section 6.40.

Shares that are reacquired by the corporation become authorized but unissued shares under Proposed subsection 6.31(b) unless the articles prohibit reissue, in which event they are cancelled. Proposed subsection 6.31(c) requires a simplified official filing to reflect the reduction of authorized shares. This provision is included in order that there be a public record of the number of authorized shares that a corporation may issue. The amendment may be made without shareholder action.

Until the amendment referred to in Proposed subsection 6.31(c) is effective, the corporation has power to reissue the reacquired shares despite a prohibition in the articles of incorporation. In such a case, the action of the directors in issuing the shares may be challengeable but the shares so issued would be fully paid and nonassessable if issued in conformity with Proposed section 6.21.

AMENDMENTS TO ORIGINAL SECTION
Laws 2009, ch. 189, §11 (eff. 7-26-09)*(amends only subsection (3)(introductory paragraph))*
(3) The board of directors may adopt articles of amendment under this section without shareholder ~~action~~ approval and deliver them to the secretary of state for filing. The articles must set forth:

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.06.400
DISTRIBUTIONS TO SHAREHOLDERS

CURRENT SECTION

(1) A board of directors may approve and the corporation may make distributions to its shareholders subject to restriction by the articles of incorporation and the limitation in subsection (2) of this section.

(2) No distribution may be made if, after giving it effect:

(a) The corporation would not be able to pay its liabilities as they become due in the usual course of business; or

(b) The corporation's total assets would be less than the sum of its total liabilities plus, unless the articles of incorporation permit otherwise, the amount that would be needed, if the corporation were to be dissolved at the time of the distribution, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution.

(3) For purposes of determinations under subsection (2) of this section:

(a) The board of directors may base a determination that a distribution is not prohibited under subsection (2) of this section either on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable in the circumstances; and

(b) Indebtedness of a corporation, including indebtedness issued as a distribution, is not considered a liability if its terms provide that payment of principal and interest are made only if and to the extent that payment of a distribution to shareholders could then be made under this section.

(4) The effect of a distribution under subsection (2) of this section is measured:

(a) In the case of a distribution of indebtedness, the terms of which provide that payment of principal and interest are made only if and to the extent that payment of a distribution to shareholders could then be made under this section, each payment of principal or interest is treated as a distribution, the effect of which is measured on the date the payment is actually made; or

(b) In the case of any other distribution:

(i) If the distribution is by purchase, redemption, or other acquisition of the corporation's shares, the effect of the distribution is measured as of the earlier of the date any money or other property is transferred or debt incurred by the corporation, or the date the shareholder ceases to be a shareholder with respect to the acquired shares;

(ii) If the distribution is of indebtedness other than that described in subsection (4) (a) and (b)(i) of this section, the effect of the distribution is measured as of the date the indebtedness is distributed; and

(iii) In all other cases, the effect of the distribution is measured as of the date the distribution is approved if payment occurs within one hundred twenty days after the date of approval, or the date the payment is made if it occurs more than one hundred twenty days after the date of approval.

(5) A corporation's indebtedness to a shareholder incurred by reason of a distribution made in accordance with this section is at parity with the corporation's indebtedness to its general, unsecured creditors except to the extent provided otherwise by agreement.
(6) In circumstances to which this section and related sections of this title are applicable, such provisions supersede the applicability of any other statutes of this state with respect to the legality of distributions.
(7) A transfer of the assets of a dissolved corporation to a trust or other successor entity of the type described in RCW 23B.14.030(4) constitutes a distribution subject to subsection (2) of this section only when and to the extent that the trust or successor entity distributes assets to shareholders.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §59 (eff. 7-1-90)
Same as current, except subsection (2)(a) referred to "debts" instead of "liabilities," subsection 4, opening sentence, referred to subsection (3)(b), and subsection (7) was not present.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3008-12 (1989)
Proposed section 1.40 defines "distribution" to include virtually all transfers of money, indebtedness of the corporation or other property to a shareholder in respect of the corporation's shares. It thus includes cash or property dividends, payments by a corporation to purchase its own shares, distributions of promissory notes or indebtedness, and distributions in partial or complete liquidation or voluntary or involuntary dissolution. Proposed section 1.40 excludes from the definition of "distribution" transactions by the corporation in which only its own shares are distributed to its shareholders. These transactions are called "share dividends" in the Proposed Act. See Proposed section 6.23.

The old law prohibited payments of dividends if the corporation was, or as a result of the payment would be, insolvent in the equity sense. This test is retained, appearing in Proposed subsection 6.40(b)(1).

In most cases involving a corporation operating as a going concern in the normal course, information generally available will make it quite apparent that no particular inquiry concerning the equity insolvency test is needed. While neither a balance sheet nor an income statement can be conclusive as to this test, the existence of significant shareholders' equity and normal operating conditions are of themselves a strong indication that no issue should arise under that test. Indeed, in the case of a corporation having regularly audited financial statements, the absence of any qualification in the most recent auditor's opinion as to the corporation's status as a "going concern," coupled with a lack of subsequent adverse events, would normally be decisive.

It is only when circumstances indicate that the corporation is encountering difficulties or is in an uncertain position concerning its liquidity and operations that the board of directors or, more commonly, the officers or others upon whom they may place reliance under Proposed subsection 8.30(b), may need to address the issue. Because of the overall judgment required in evaluating the equity insolvency test, no "bright line" test can be employed. However, in determining whether the equity insolvency test has been met, certain judgments or assumptions as to the future course of the corporation's business are customarily justified, absent clear evidence to the contrary. These include the likelihood that (a) based on existing and contemplated demand for the corporation's products or services, it will be able to generate funds over a period of time sufficient to satisfy its existing and reasonably anticipated obligations as they mature, and (b) indebtedness which matures in the near-term will be refinanced where, on the basis of the corporation's financial condition and future prospects and the general availability of credit to businesses similarly

situated, it is reasonable to assume that such refinancing may be accomplished. To the extent that the corporation may be subject to asserted or unasserted contingent liabilities, reasonable judgments as to the likelihood, amount, and time of any recovery against the corporation, after giving consideration to the extent to which the corporation is insured or otherwise protected against loss, may be utilized. There may be occasions when it would be useful to consider a cash flow analysis, based on a business forecast and budget, covering a sufficient period of time to permit a conclusion that known obligations of the corporation can reasonably be expected to be satisfied over the period of time that they will mature.

In exercising their judgment, the directors are entitled to rely, under Proposed subsection 8.30(b) as noted above, on information, opinions, reports, and statements prepared by others. Ordinarily, they should not be expected to become involved in the details of the various analyses or market or economic projections that may be relevant. Judgments must of necessity be made on the basis of information in the hands of the directors when a distribution is authorized. They should not, of course, be held responsible as a matter of hindsight for unforeseen developments. This is particularly true with respect to assumptions as to the ability of the corporation's business to repay long-term obligations which do not mature for several years, since the primary focus of the directors' decision to make a distribution should normally be on the corporation's prospects and obligations in the shorter term, unless special factors concerning the corporation's prospects require the taking of a longer term perspective.

The Proposed Act establishes the validity of distributions from the corporate law standpoint under Proposed section 6.40 and determines the potential liability of directors for improper distributions under Proposed sections 8.30 and 8.31. The federal Bankruptcy Act and state fraudulent conveyance statutes, on the other hand, are designed to enable the trustee or other representative to recapture for the benefit of creditors funds distributed to others in some circumstances. In light of these diverse purposes, and to minimize management difficulties in administering the statutes, Proposed subsection 6.40(f) provides that the provisions in this title supersede those of the state fraudulent conveyances act in determining the legality of a distribution.

Proposed subsection 6.40(b)(2) requires that, after giving effect to any distribution, the corporation's assets equal or exceed its liabilities plus (with some exceptions) the dissolution preferences of senior equity securities. Proposed subsection 6.40(c)(1) authorizes asset and liability determinations to be made for this purpose on the basis of either (1) financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or (2) a fair valuation or other method that is reasonable in the circumstances. The determination of a corporation's assets and liabilities and the choice of the permissible basis on which to do so are left to the judgment of its board of directors. In making a judgment under Proposed subsection 6.40(c)(1), the board may rely under Proposed subsection 8.30(b) upon opinions, reports, or statements, including financial statements and other financial data prepared or presented by public accountants or others.

Proposed section 6.40 does not utilize particular accounting terminology of a technical nature or specify particular accounting concepts. In making determinations under this section, the board of directors may make judgments about accounting matters, giving full effect to its right to rely upon professional or expert opinion.

In a corporation with subsidiaries, the board of directors may rely on unconsolidated statements prepared on the basis of the equity method of accounting (see American Institute of Certified Public Accountants, APB Opinion No. 18 (1971)) as to the corporation's investee corporations, including corporate joint ventures and subsidiaries, although other evidence would be relevant in the total determination.

The board of directors should in all circumstances be entitled to rely upon reasonably current financial statements prepared on the basis of generally accepted accounting principles in determining whether or not the balance sheet test of Proposed subsection 6.40(b)(2) has been met, unless the board is then aware that it would be unreasonable to rely on the financial statements because of newly-discovered or subsequently arising facts or circumstances. But Proposed section 6.40 does not mandate the use of generally accepted

accounting principles; it only requires the use of accounting practices and principles that are reasonable in the circumstances. While publicly-owned corporations subject to registration under the Securities Exchange Act of 1934 must, and many other corporations in fact do, utilize financial statements prepared on the basis of generally accepted accounting principles, a great number of smaller or closely-held corporations do not. Some of these corporations maintain records solely on a tax accounting basis and their financial statements are of necessity prepared on that basis. Others prepare financial statements that substantially reflect generally accepted accounting principles but may depart from them in some respects (e.g., footnote disclosure). These facts of corporate life indicate that a statutory standard of reasonableness, rather than stipulating generally accepted accounting principles as the normative standard, is appropriate in order to achieve a reasonable degree of flexibility and to accommodate the needs of the many different types of business corporations which might be subject to these provisions, including in particular closely-held corporations. Accordingly, the Proposed Act contemplates that generally acceptable accounting principles are always "reasonable in the circumstances" and that other accounting principles may be perfectly acceptable, under a general standard of reasonableness, even if they do not involve the "fair value" or "current value" concepts that are also contemplated by Proposed subsection 6.40(c)(1).

Proposed subsection 6.40(c)(1) specifically permits determinations to be made under Proposed subsection 6.40(b)(2) on the basis of a fair valuation or other method that is reasonable in the circumstances. Thus the statute authorizes departures from historical cost accounting and sanctions the use of appraisal and current value methods to determine the amount available for distribution. No particular method of valuation is prescribed in the statute, since different methods may have validity depending upon the circumstances, including the type of enterprise and the purpose for which the determination is made. For example, it is inappropriate in most cases to apply a "quick-sale liquidation" method to value an enterprise, particularly with respect to the payment of normal dividends. On the other hand, a "quick-sale liquidation" valuation method might be appropriate in certain circumstances for an enterprise in the course of reducing its asset or business base by a material degree. In most cases, a fair valuation method or a going-concern basis would be appropriate if it is believed that the enterprise will continue as a going concern.

Ordinarily a corporation should not selectively revalue assets. It should consider the value of all of its material assets, whether or not reflected in the financial statements (e.g., a valuable executory contract). Likewise, all of a corporation's material obligations should be considered and revalued to the extent appropriate and possible. In any event, Proposed subsection 6.40(c)(1) calls for the application under Proposed subsection 6.40(b)(2) of a method of determining the aggregate amount of assets and liabilities that is reasonable in the circumstances.

Proposed subsection 6.40(c)(1) also refers to some "other method that is reasonable in the circumstances." This phrase is intended to comprehend within Proposed subsection 6.40(b)(2) the wide variety of possibilities that might not be considered to fall under a "fair valuation" or "current value" method but might be reasonable in the circumstances of a particular case.

Proposed subsection 6.40(b)(2) provides that a distribution may not be made unless the total assets of the corporation exceed its liabilities plus the amount that would be needed to satisfy any shareholder's superior preferential rights upon dissolution if the corporation were to be dissolved at the time of the distribution. This requirement in effect treats preferential dissolution rights of shares for distribution purposes as if they were liabilities for the sole purpose of determining the amount available for distributions, and carries forward analogous treatment of shares having preferential dissolution rights from the old law. In making the calculation of the amount that must be added to the liabilities of the corporation to reflect the preferential dissolution rights, the assumption should be made that the preferential dissolution rights are to be established pursuant to the articles of incorporation, as of the date of the distribution or proposed distribution. The amount so determined must include arrearages in preferential dividends if the articles of incorporation require that they be paid upon the dissolution of the corporation. In the case of shares having both a preferential right upon dissolution and other nonpreferential rights, only the preferential right should be taken into account. The treatment of preferential dissolution rights of classes of shares set forth in

Proposed subsection 6.40(b)(2) is applicable only to the balance sheet test and is not applicable to the equity insolvency test of Proposed subsection 6.40(b)(1). The treatment of preferential rights mandated by this section may always be eliminated by an appropriate provision in the articles of incorporation.

Proposed subsection 6.40(d)(2)(iii) provides that the time for measuring the effect of a distribution for compliance with the equity insolvency and balance sheet tests for all distributions not involving the reacquisition of shares or the distribution of indebtedness is the date of authorization, if the payment occurs within 120 days following the authorization; if the payment occurs more than 120 days after the authorization, however, the date of payment must be used. If the corporation elects to make a distribution in the form of its own indebtedness, under Proposed subsection 6.40(d)(2)(ii) the validity of that distribution must be measured as of the time of distribution, unless the indebtedness qualifies under Proposed subsection 6.40(d)(1).

Proposed subsection 6.40(d)(2)(i) provides a different rule for the time of measurement when the distribution involves a reacquisition of shares. The application of the equity insolvency and balance sheet tests to distributions that involve the purchase, redemption, or other acquisition of the corporation's shares creates unique problems; Proposed section 6.40 provides a specific rule for the resolution of these problems as described below.

Proposed subsection 6.40(d)(2)(i) provides that the time for measuring the effect of a distribution under Proposed section 6.40(b), if shares of the corporation are reacquired, is the earlier of (i) the payment date, or (ii) the date the shareholder ceased to be a shareholder with respect to the shares, except as provided in Proposed subsection 6.40(d)(1).

In an acquisition of its shares, a corporation may transfer property or incur debt to the former holder of the shares. The case law on the status of this debt is conflicting. However, share repurchase agreements involving payment for shares over a period of time are of special importance in closely-held corporate enterprises. Proposed subsection 6.40(d)(2)(i) provides a clear rule for this situation: the legality of the distribution must be measured at the time of the issuance of incurrence of the debt, not at a later date when the debt is actually paid, except as provided in Proposed subsection 6.40(d)(1). Of course, this does not preclude later challenge of a payment on account of redemption-related debt by a bankruptcy trustee on the ground that it constitutes a preferential payment to a creditor.

Proposed subsection 6.40(e) provides that indebtedness created to acquire the corporation's shares or issued as a distribution is on a parity with the indebtedness of the corporation to its general, unsecured creditors, except to the extent otherwise provided by agreement. General creditors are better off in these situations than they would have been if cash or other property had been paid out for the shares or distributed (which is proper under the statute), and no worse off than if cash had been paid or distributed and then lent back to the corporation, making the shareholders (or former shareholders) creditors. The parity created by Proposed subsection 6.40(e) is logically consistent with the rule established by Proposed subsection 6.40(d)(2)(i) that these transactions should be judged at the time of the issuance of the debt.

Proposed subsection 6.40(c)(2) provides that indebtedness need not be taken into account as a liability in determining whether the tests of Proposed subsection 6.40(b) have been met if the terms of the indebtedness provide that payments of principal or interest can be made only if and to the extent that payment of a distribution could then be made under Proposed section 6.40. This has the effect of making the holder of the indebtedness junior to all other creditors but senior to the holders of all classes of shares, not only during the time the corporation is operating but also upon dissolution and liquidation. It should be noted that the creation of such indebtedness, and the related limitations on payments of principal and interest, may create tax problems or raise other legal questions.

Although Proposed subsection 6.40(c)(2) is applicable to all indebtedness meeting its tests, regardless of the circumstances of its issuance, it is anticipated that it will be applicable most frequently to permit the reacquisition of shares of the corporation at a time when the deferred purchase price exceeds the net worth

of the corporation. This type of reacquisition will often be necessary in the case of businesses in early stages of development or service businesses whose value derives principally from existing or prospective net income or cash flow rather than from net asset value. In such situations, it is anticipated that net worth will grow over time from operations so that when payments in respect of the indebtedness are to be made the two insolvency tests will be satisfied. In the meantime, the fact that the indebtedness is outstanding will not prevent distributions that could be made under subsection (b) if the indebtedness were not counted in making the determination.

AMENDMENTS TO ORIGINAL SECTION
Laws 1990, ch. 178, §10 (eff. 7-1-90) *(amended only subsection 4, general clause to read)*
(4) The effect of a distribution under subsection ~~(3)(b)~~ (2) of this section is measured:

Laws 2006, ch. 52, §2 (eff. 6-7-06) *(amends subsection (2)(a) to substitute "liabilities" for "debts"; adds subsection (7))*
(7) A transfer of the assets of a dissolved corporation to a trust or other successor entity of the type described in RCW 23B.14.030(4) constitutes a distribution subject to subsection (2) of this section only when and to the extent that the trust or successor entity distributes assets to shareholders.

CARC COMMENTARY
The amendment clarifies the time at which a distribution occurs in the event of a transfer of the assets by a dissolved corporation to a trust or other successor entity. See general commentary on 2006 amendments to RCW 23B.14 under RCW 23B.14.010.

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Laws 2009, ch. 189, §12 (eff. 7-26-09) *(amends only subsections (1) and (4)(b)(iii))*
(1) A board of directors may ~~authorize~~ approve and the corporation may make distributions to its shareholders subject to restriction by the articles of incorporation and the limitation in subsection (2) of this section>

(4)(b)(iii) In all other cases, the effect of the distribution is measured as of the date the distribution is ~~authorized~~ approved if payment occurs within one hundred twenty days after the date of ~~authorization~~approval, or the date the payment is made if it occurs more than one hundred twenty days after the date of ~~authorization~~approval.

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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Title 23B RCW
Washington Business Corporation Act

Chapter 23B.07 RCW
SHAREHOLDERS

RCW 23B.07.030
COURT-ORDERED MEETING

CURRENT SECTION

(1) The superior court of the county in which the corporation's registered office is located may, after notice to the corporation, summarily order a meeting to be held:

(a) On application of any shareholder of the corporation entitled to vote in the election of directors at an annual meeting, if an annual meeting was not held within the earlier of six months after the end of the corporation's fiscal year or fifteen months after its last annual meeting or approval of corporate action by shareholder consent in lieu of such a meeting; or

(b) On application of a shareholder who executed a demand for a special meeting valid under RCW 23B.07.020, if:

(i) Notice of the special meeting was not given within thirty days after the date the demand was delivered to the corporation's secretary; or

(ii) The special meeting was not held in accordance with the notice.

(2) The court may, after notice to the corporation, fix the time and place of the meeting, determine the shares and shareholders entitled to participate in the meeting, specify a record date for determining shareholders entitled to notice of and to vote at the meeting, prescribe the manner, form, and content of the meeting notice, fix the quorum required for specific matters to be considered at the meeting, or direct that the votes represented at the meeting constitute a quorum for approval of those matters, and enter other orders necessary to accomplish the purpose or purposes of the meeting.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §62 (eff. 7-1-90)

(1) The superior court of the county in which the corporation's registered office is located may, after notice to the corporation, summarily order a meeting to be held:

(a) On application of any shareholder of the corporation entitled to vote in the election of directors at an annual meeting, if an annual meeting was not held within the earlier of six months after the end of the corporation's fiscal year or fifteen months after its last annual meeting; or

(b) On application of a shareholder who signed a demand for a special meeting valid under RCW 23B.07.020, if:

(i) Notice of the special meeting was not given within thirty days after the date the demand was delivered to the corporation's secretary; or

(ii) The special meeting was not held in accordance with the notice.

(2) The court may, after notice to the corporation, fix the time and place of the meeting, determine the shares and shareholders entitled to participate in the meeting, specify a record date for determining shareholders entitled to notice of and to vote at the meeting, prescribe the manner, form, and content of the meeting notice, fix the quorum required for specific matters to be considered at the meeting, or direct that the votes represented at the meeting constitute a quorum for action on those matters, and enter other orders necessary to accomplish the purpose or purposes of the meeting.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3014-15 (1989)
Section 7.03 Court-Ordered Meeting.
Proposed section 7.03 provides the remedy for shareholders if the corporation refuses or fails to hold a shareholders' meeting as required by Proposed section 7.01 or Proposed section 7.02. A shareholder entitled to vote for directors at a meeting may apply for a summary court order to command the holding of a meeting if (1) an annual meeting is not held within 6 months after the end of the corporation's fiscal year or 15 months after its last annual meeting, or (2) a special meeting is not properly noticed within 30 days after a valid demand is delivered to the secretary of the corporation or, if properly noticed, is not held in accordance with the notice. Since a meeting must be held within 60 days of the notice date under Proposed section 7.05, the maximum delay between the demand for a special meeting and the right to petition a court for a summary order is 90 days.

The court must provide notice to the corporation before it orders a meeting or fixes the details of the meeting. The Committee added this requirement to the RMA in order to give the corporation ample opportunity to take necessary action on its own initiative.

The court has discretion under Proposed section 7.03 since the language of the statute is that the court "may summarily order" that a meeting be held. A court, for example, may refuse to order a special meeting if the specified purpose is repetitive of the purpose of a special meeting held in the recent past. Similarly, even though a demand for an annual meeting is not a formal prerequisite for an application for a summary order under this section, the court may withhold setting a time and date for the annual meeting for a reasonably short period in order to permit the corporation to do so.

In any event, a shareholder applying for a summary order to hold a meeting has the burden of showing that the shareholder is entitled to the order and, in the case of a special meeting, the shareholder has the burden of showing that the demand was executed by the holders of at least 10 percent (or, in the case of a non-public corporation, such higher percentage not in excess of 25 percent as is stated in the articles of incorporation or bylaws) of the votes entitled to be cast on the record date and that the demand was duly delivered to the corporation's secretary.

If the court orders that a meeting be held, it may fix the time and place of the meeting, determine the voting groups entitled to participate in the meeting, set the record date, order notice to be given, and enter such other orders as may be appropriate for the holding of the meeting.

The court may provide that a meeting it has ordered is to be the annual meeting. If so provided, the meeting should be viewed as compliance with Proposed section 7.01, precluding all other shareholder requests for an annual meeting for that year.

The Committee considered in connection with Proposed section 7.03 old RCW 23A.08.305 (missing shareholders). It concluded that most situations in which that provision might be invoked were covered by the Proposed section. It therefore omitted old RCW 23A.08.305 and made minor changes in RMA section 7.03(b) to authorize the court to determine the shareholders to participate in a meeting (thereby covering the main operative element in old RCW 23A.08.305) and to authorize the court to determine the manner (e.g., by publication) of providing notice.

AMENDMENTS TO ORIGINAL SECTION
Laws 2002, ch. 297, §22 (eff. 6-13-02)*(amended only subsection (1))*
(1) The superior court of the county in which the corporation's registered office is located may, after notice to the corporation, summarily order a meeting to be held:
(a) On application of any shareholder of the corporation entitled to vote in the election of directors at an annual meeting, if an annual meeting was not held within the earlier of six months after the end of the corporation's fiscal year or fifteen months after its last annual meeting or action by consent in lieu of such a meeting; or

(b) On application of a shareholder who ~~signed~~ executed a demand for a special meeting valid under RCW 23B.07.020, if:
(i) Notice of the special meeting was not given within thirty days after the date the demand was delivered to the corporation's secretary; or
(ii) The special meeting was not held in accordance with the notice.

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

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Laws 2009, ch. 189, §13 (eff. 7-26-09)*(amends only subsection (1)(a) and subsection (2))*
(1)(a) On application of any shareholder of the corporation entitled to vote in the election of directors at an annual meeting, if an annual meeting was not held within the earlier of six months after the end of the corporation's fiscal year or fifteen months after its last annual meeting or approval of corporate action by shareholder consent in lieu of such a meeting; or

(2) The court may, after notice to the corporation, fix the time and place of the meeting, determine the shares and shareholders entitled to participate in the meeting, specify a record date for determining shareholders entitled to notice of and to vote at the meeting, prescribe the manner, form, and content of the meeting notice, fix the quorum required for specific matters to be considered at the meeting, or direct that the votes represented at the meeting constitute a quorum for ~~action on~~ approval of those matters, and enter other orders necessary to accomplish the purpose or purposes of 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.

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RCW 23B.07.035
INSPECTORS TO ACT AT MEETINGS – APPOINTMENT – DUTIES – CERTAIN CORPORATIONS

CURRENT SECTION

(1) A corporation having any shares listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national or affiliated securities association shall, and any other corporation may, appoint one or more inspectors to act at a meeting of shareholders and make a written report of the inspectors' determinations. Each inspector shall take and sign an oath faithfully to execute the duties of inspector with strict impartiality and according to the best of the inspector's ability.

(2) The inspectors shall:

(a) Ascertain the number of shares outstanding and the voting power of each;

(b) Determine the shares represented at a meeting;

(c) Determine the validity of proxies and ballots;

(d) Count all votes; and

(e) Determine the result.

(3) An inspector may be an officer or employee of the corporation.

(4) If no challenge of a determination by the inspectors is timely made, such determination is conclusive. Challenge of any determination by the inspectors may be made in a court of competent jurisdiction.

HISTORY AND COMMITTEE COMMENTARY

SECTION ADDED BY LAWS 2007, Ch. 467, §6 (eff. 7-22-07)

CARC COMMENTARY

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

* * * * *

Proposed RCW23B.07.035 requires that, if a corporation has shares which are listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national or affiliated securities association, one or more inspectors of election must be appointed to act at each meeting of shareholders and make a written report of the determinations made pursuant to proposed RCW 23B.07.035(2). This proposed new section is nearly identical with the MBCA section 7.29 which was added to the Model Act in 1996. Subsection (4) in the proposed section differs from the text of the Model Act provision; however, it is consistent with the Official Comments to Model Act section 7.29. It is included in the text of proposed section RCW 23B.07.035 as subsection (4) to make clear that absent timely challenge the report of inspectors is conclusive and to recognize the authority of judicial review of the report pursuant to such a challenge if timely made.

The proposed section is intended to recognize the generally accepted practice for public corporations in connection with the conduct of shareholder meetings and to provide statutory authority for the process.

It is contemplated that the selection of inspectors would be made by responsible officers or by the directors, as authorized either generally or specifically in the corporation's bylaws. Alternate inspectors could also be designated to replace any inspector who fails to act. The requirement of a written report is to facilitate judicial review of determinations made by inspectors.

Proposed RCW 23B.07.035 (2) specifies the duties of inspectors of election. If no challenge of a determination by the inspectors within the authority given them under this section is timely made, such determination shall be conclusive. In the event of a challenge of any determination by the inspectors in a court of competent jurisdiction, the court should give such weight to determinations of fact by the inspectors as it shall deem appropriate, taking into account the relationship of the inspectors, if any, to the management of the company or to other persons interested in the outcome of the vote, the evidence available to inspectors, whether their determinations appear to be reasonable, and such other circumstances as the court shall regard as relevant. The court should review de novo all determinations of law made implicitly or explicitly by the inspectors.

Normally, in making the determinations contemplated by proposed RCW 23B.07.035(2), the only facts before the inspectors should be "records" (in written or electronic form) of appointment forms, envelopes submitted with appointment forms, ballots and the regular books and records of the corporation, including lists of holders obtained from depositories. However, inspectors may consider other reliable information for the limited purpose of reconciling appointment forms, electronic transmissions, and ballots submitted by or on behalf of banks, brokers, their nominees, and similar persons which represent more votes than the holder of a proxy is authorized by the record owner to cast or more votes than the shareholder holds of record. If the inspectors do consider such other information, it should be specifically referred to in their written report, including the person or persons from whom they obtained the information, when the information was obtained, and the basis for the inspectors' belief that such information is accurate and reliable.

Proposed RCW 23B.07.035(3) provides that an inspector may be an officer or employee of the corporation. However, in the case of publicly held corporations, good corporate practice suggests that such inspectors should be independent persons who are neither employees nor officers if there is a contested matter or a shareholder proposal to be considered. Not only will the issue of independent inspectors enhance investor perception as to the fairness of the voting process, but also the report of independent inspectors can be expected to be given greater evidentiary weight by any court reviewing a contested vote.

* * * * *

RCW 23B.07.040
ACTION WITHOUT MEETING

CURRENT SECTION

(1)(a) Corporate action required or permitted by this title to be approved by a shareholder vote at a meeting may be approved without a meeting or a vote if either:

(i) The corporate action is approved by all shareholders entitled to vote on the corporate action; or

(ii) The corporate action is approved by shareholders holding of record or otherwise entitled to vote in the aggregate not less than the minimum number of votes that would be necessary to approve such corporate action at a meeting at which all shares entitled to vote on the corporate action were present and voted, and at the time the corporate action is approved the corporation is not a public company and is authorized to approve such corporate action under this subsection (1)(a)(ii) by a general or limited authorization contained in its articles of incorporation.

(b) Corporate action may be approved by shareholders without a meeting or a vote by means of execution of a single consent or multiple counterpart consents by shareholders holding of record or otherwise entitled to vote in the aggregate not less than the minimum number of votes necessary under (a)(i) or (ii) of this subsection. Any such shareholder consent must: (i) Be in the form of an executed record; (ii) indicate the date of execution of the consent by each shareholder who executes it, which date must be on or after the applicable record date determined in accordance with subsection (2) of this section; (iii) describe the corporate action being approved; (iv) when delivered to each shareholder for execution, include or be accompanied by the same material that would have been required by this title to be delivered to shareholders in or accompanying a notice of meeting at which the proposed corporate action would have been submitted for shareholder approval; and (v) be delivered to the corporation for inclusion in the minutes or filing with the corporate records in accordance with subsection (4) of this section. A shareholder may withdraw an executed shareholder consent by delivering a notice of withdrawal in the form of an executed record to the corporation prior to the time when shareholder consents sufficient to approve the corporate action have been delivered to the corporation.

(2) The record date for determining shareholders entitled to approve a corporate action without a meeting may be fixed under RCW 23B.07.030 or 23B.07.070, but if not so fixed shall be the date of execution indicated on the earliest dated shareholder consent executed under subsection (1) of this section, even though such shareholder consent may not have been delivered to the corporation on that date.

(3)(a) Notice that shareholder consents are being sought under subsection (1)(a) of this section shall be given, by the corporation or by another person soliciting such consents, on or promptly after the record date, to all shareholders entitled to vote on the record date who have not yet executed the shareholder consent and, if this title would otherwise require that notice of a meeting of shareholders to consider the

proposed corporate action be given to nonvoting shareholders, to all nonvoting shareholders as of the record date. Notice given under this subsection (3)(a) shall include or be accompanied by the same information required to be included in or to accompany the shareholder consent under subsection (1)(b)(iii) and (iv) of this section.

(b) Notice that sufficient shareholder consents have been executed to approve the proposed corporate action under either of subsection (1)(a)(i) or (ii) of this section shall be given by the corporation, promptly after delivery to the corporation of shareholder consents sufficient to approve the corporate action in accordance with subsection (4) of this section, to all shareholders entitled to vote on the record date and, if this title would otherwise require that notice of a meeting of shareholders to consider the proposed corporate action be given to nonvoting shareholders, to all nonvoting shareholders as of the record date.

(4) Unless the consent executed by shareholders specifies a later effective date, shareholder approval obtained under this section is effective when: (a) Executed shareholder consents sufficient to approve the proposed corporate action have been delivered to the corporation, either at an address designated by the corporation for delivery of such shareholder consents or at the corporation's registered office, or to such electronic address, location, or system as the corporation may have designated for delivery of such shareholder consents; and (b) any period of advance notice required by the corporation's articles of incorporation to be given to any nonconsenting shareholders has been satisfied. Executed shareholder consents are not effective to approve a proposed corporate action unless, within sixty days after the date of the earliest dated shareholder consent delivered to the corporation, consents executed by a sufficient number of shareholders to approve the corporate action are delivered to the corporation.

(5) Approval of corporate action by execution of shareholder consents under this section has the effect of a meeting vote and may be described as such in any record, except that, if the corporate action requires the filing of a certificate under any other section of this title, the certificate so filed shall state, in lieu of any statement required by that section concerning any vote of shareholders, that shareholder approval has been obtained in accordance with this section and that notice to any nonconsenting shareholders has been given to the extent required by this section.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §63 (eff. 7-1-90)

(1) Action required or permitted by this title to be taken at a shareholders' meeting may be taken without a meeting if the action is taken by all the shareholders entitled to vote on the action. The action must be evidenced by one or more written consents describing the action taken, signed by all the shareholders entitled to vote on the action, and delivered to the corporation for inclusion in the minutes or filing with the corporate records.

(2) If not otherwise fixed under RCW 23B.07.030 or 23B.07.070, the record date for determining shareholders entitled to take action without a meeting is the date the first shareholder signs the consent under subsection (1) of this section.

(3) A shareholder may withdraw consent only by delivering a written notice of withdrawal to the corporation prior to the time that all consents are in possession of the corporation.
(4) Action taken under this section is effective when all consents are in possession of the corporation, unless the consent specifies a later effective date.
(5) A consent signed under this section has the effect of a meeting vote and may be described as such in any document.
(6) If this title requires that notice of proposed action be given to nonvoting shareholders and the action is to be taken by unanimous consent of the voting shareholders, the corporation must give its nonvoting shareholders written notice of the proposed action at least ten days before the action is taken. The notice must contain or be accompanied by the same material that, under this title, would have been required to be sent to nonvoting shareholders in a notice of meeting at which the proposed action would have been submitted to such shareholders for action.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3015 (1989)
Section 7.04 Action Without Meeting.
Proposed section 7.04 provides that all the shareholders entitled to vote on an issue may validly act by unanimous written consent without a meeting. Unanimous written consent is obtainable, as a practical matter, only on matters on which there are only a relatively few shareholders entitled to vote.

Proposed section 7.04 is based on the fundamental premise that if all the voting shareholders desire some action to be taken, no purpose is served by requiring the formality of holding a meeting of shareholders. Action by unanimous written consent has the same effect as a meeting vote and may be described as such in any document, including documents delivered to the secretary of state for filing. Proposed section 7.04 is applicable to any shareholder action, including, without limitation, election of directors, approval of mergers or sales of substantially all the corporate property not in the ordinary course of business, amendments of articles of incorporation, and dissolution.

To be effective, consents must be in writing, signed by all the shareholders entitled to vote, and delivered to the corporation for inclusion in the minutes or filing with the corporate records. The phrase "one or more written consents" is included in Proposed subsection 7.04(a) to make it clear that all shareholders do not need to sign the same piece of paper. The record date for determining who is entitled to vote, if not otherwise fixed by or in accordance with the bylaws, is the date the first shareholder signs the consent. Proposed subsection 7.04(b).

Proposed subsection 7.04(c), related to withdrawal, was designed to eliminate possible confusion and litigation as to revocability of consents. See Calumet Industries, Inc. v. MacClure, 464 F. Supp. 19 (N.D. Ill. 1978) (reaching a conclusion similar to that in Proposed subsection (c)).

Proposed section 7.04 is applicable to all shareholder actions, including the approval of fundamental corporate changes described in chapters 10, 11, 12, and 14. If these actions were taken at an annual or special meeting, shareholders who were not entitled to vote on the matter would nevertheless be entitled to receive notice of the meeting, including a description of the transaction proposed to be considered at the meeting. See, e.g., Proposed sections 10.03 (notice of proposed amendment), 11.03 (notice of proposed merger). In order to ensure that nonvoting shareholders have essentially the same right if action is taken by consent rather than at a meeting, Proposed subsection 7.04(d) provides that all nonvoting shareholders must be given at least 10 days' written notice of the fundamental corporate changes that are proposed for approval by consent.

AMENDMENTS TO ORIGINAL SECTION
Laws 1991, ch. 72, §33 (eff. 7-28-91) *(amended only subsections (3), (4))*
(3) A shareholder may withdraw consent only by delivering a written notice of withdrawal to the corporation prior to the time ~~that~~ when all consents ~~are in possession of~~have been delivered to the corporation.

(4) Action taken under this section is effective when all consents ~~are in possession of~~ have been delivered to the corporation, unless the consent specifies a later effective date.

CARC COMMENTARY
Under RCW 23B.01.410, written notice to the corporation is effective when received. The amended reference to delivery (rather than possession) better reflects that event.

* * * * *

Laws 1997, ch. 19, §2 (eff. 7-27-97)
(1)(a) Action required or permitted by this title to be taken at a shareholders' meeting may be taken without a meeting or a vote if either:
(i) the action is taken by all ~~the~~ shareholders entitled to vote on the action; or
(ii) The action is taken by shareholders holding of record or otherwise entitle to vote in the aggregate not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitle to vote on the action were present and voted, and at the time the action is taken the corporation is not a public company and is authorized to take such action under this subsection (1)(a)(ii) by a general or limited authorization contained in its articles of incorporation.
(b) The taking of action by shareholders without a meeting or vote must be evidenced by one or more written consents describing the action taken, signed by ~~all the~~ shareholders holding of record or otherwise entitled to vote ~~on the~~ in the aggregate not less than the minimum number of votes necessary in order to take such action by written consent under (a)(i) or (ii) of this subsection, and delivered to the corporation for inclusion in the minutes or filing with the corporate records.
(2) If not otherwise fixed under RCW 23B.07.030 or 23B.07.070, the record date for determining shareholders entitled to take action without a meeting is the date on which the first shareholder ~~signs the~~ consent is signed under subsection (1) of this section. Every written consent shall bear the date of signature of each shareholder who signs the consent. A written consent is not effective to take the action referred to in the consent unless, within sixty days of the earliest dated consent delivered to the corporation, written consents signed by a sufficient number of shareholders to take action are delivered to the corporation.
(3) A shareholder may withdraw consent only by delivering a written notice of withdrawal to the corporation prior to the time when ~~all~~ consents sufficient to authorize taking the action have been delivered to the corporation.
(4) Unless the written shareholder consent specifies a later effective date, a~~A~~ction taken under this section is effective when ~~all~~ : (a) C~~c~~onsents sufficient to authorize taking the action have been delivered to the corporation~~, unless the consent specifies a later effective date.~~; and (b) the period of advance notice required by the corporation's articles of incorporation to be given to any nonconsenting shareholders has been satisfied.
(5) A consent signed under this section has the effect of a meeting vote and may be described as such in any document, except that, if the action requires the filing of a certificate under any other section of this title, the certificate so filed shall state, in lieu of any statement required by that section concerning any vote of shareholders, that written consent has been obtained in accordance with this section and that written notice to any nonconsenting shareholders has been given as provided in this section..
(6) ~~If this title requires that~~ N~~n~~otice of ~~proposed~~ the taking of action by shareholders without a meeting by less than unanimous written consent of all shareholders entitled to vote on the action shall be given, before the date on which the action becomes effective, to those shareholders entitled to vote on the action who have not consented in writing and, if this title would otherwise require that notice of a meeting of shareholders to consider the action be given to nonvoting shareholders ~~and the action is to be taken by unanimous consent of the voting shareholders, the corporation must give its~~, to all nonvoting shareholders ~~written notice of the proposed action at least ten days before the action is taken~~ of the corporation. The general or limited authorization in the corporation's articles of incorporation authorizing shareholder action by less than unanimous written consent shall specify the amount and form of notice required to be given to nonconsenting shareholders before the effective date of the action. In the case of action of a type that would constitute a significant business transaction under RCW 23B.19.020(15), the notice shall be given no

fewer than twenty days before the effective date of the action. The notice ~~must~~ shall be in writing and shall contain or be accompanied by the same material that, under this title, would have been required to be sent to nonconsenting or nonvoting shareholders in a notice of meeting at which the proposed action would have been submitted ~~to such shareholders~~ for shareholder action. If the action taken is of a type that would entitle shareholders to exercise dissenters' rights under RCW 23B.13.020(1), then the notice must comply with RCW 23B.13.220(2), RCW 23B.13.210 shall not apply, and all shareholders who have not signed the consent taking the action are entitled to receive the notice, demand payment under RCW 23B.13.230, and assert other dissenters' rights as prescribed in chapter 23B.13 RCW.

CARC COMMENTARY

The revisions to RCW 23B.07.040 are designed to enable certain privately-held corporations to act quickly and efficiently in response to business opportunities or challenges, without the delays and legal and other costs associated with calling a special shareholders meeting. As revised, the written consent provisions are now more similar to the non-unanimous consent provisions that have existed for many years under Delaware law. However, in an effort to reduce the potential for abuse, the availability of the revised provisions is limited to nonpublic companies, and only those whose shareholders have affirmatively elected (by a two-thirds majority unless the articles of incorporation already allow amendment by a lesser majority) to take advantage of the non-unanimous consent provisions.

Traditional concepts of fiduciary duty as well as dissenters' rights continue to apply as deterrents to oppressive action by means of non-unanimous consent. Nonetheless, in considering whether to amend the articles of incorporation to permit action by non-unanimous consent, minority shareholders should weigh the flexibility and efficiency afforded to the corporation against the potential loss of opportunity to make input to majority shareholders or seek judicial protection in advance of the taking of corporate action.

* * * * *

Laws 2002, ch. 297, §23 (eff. 6-13-02)

(1)(a) Action required or permitted by this title to be taken at a shareholders' meeting may be taken without a meeting or a vote if either:

(i) The action is taken by all shareholders entitled to vote on the action; or

(ii) The action is taken by shareholders holding of record or otherwise entitle to vote in the aggregate not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitle to vote on the action were present and voted, and at the time the action is taken the corporation is not a public company and is authorized to take such action under this subsection (1)(a)(ii) by a general or limited authorization contained in its articles of incorporation.

(b) The taking of action by shareholders without a meeting or vote must be evidenced by one or more ~~written~~ consents, each in the form of a record describing the action taken, ~~signed~~ executed by shareholders holding of record or otherwise entitled to vote in the aggregate not less than the minimum number of votes necessary in order to take such action by ~~written~~ consent under (a)(i) or (ii) of this subsection, and delivered to the corporation for inclusion in the minutes or filing with the corporate records, which consent shall be set forth either (i) in an executed record or (ii) if the corporation has designated an address, location, or system to which the consent may be electronically transmitted and the consent is electronically transmitted to the designated address, location, or system, in an executed electronically transmitted record.

(2) If not otherwise fixed under RCW 23B.07.030 or 23B.07.070, the record date for determining shareholders entitled to take action without a meeting is the date on which the first shareholder consent is ~~signed~~ executed under subsection (1) of this section. Every ~~written~~ consent shall bear the date of ~~signature~~ execution of each shareholder who ~~signs~~ executes the consent. A ~~written~~ consent is not effective to take the action referred to in the consent unless, within sixty days of the earliest dated consent delivered to the corporation, ~~written~~ consents ~~signed~~ executed by a sufficient number of shareholders to take action are delivered to the corporation.

(3) A shareholder may withdraw consent only by delivering a written notice of withdrawal in the form of a record to the corporation prior to the time when consents sufficient to authorize taking the action have been delivered to the corporation.
(4) Unless the ~~written~~ shareholder consent specifies a later effective date, action taken under this section is effective when: (a) Consents sufficient to authorize taking the action have been delivered to the corporation; and (b) the period of advance notice required by the corporation's articles of incorporation to be given to any nonconsenting shareholders has been satisfied.
(5) A consent ~~signed~~ executed under this section has the effect of a meeting vote and may be described as such in any ~~document~~record, except that, if the action requires the filing of a certificate under any other section of this title, the certificate so filed shall state, in lieu of any statement required by that section concerning any vote of shareholders, that ~~written~~ consent has been obtained in accordance with this section and that ~~written~~ notice to any nonconsenting shareholders has been given as provided in this section..
(6) Notice of the taking of action by shareholders without a meeting by less than unanimous ~~written~~ consent of all shareholders entitled to vote on the action shall be given, before the date on which the action becomes effective, to those shareholders entitled to vote on the action who have not consented in writing and, if this title would otherwise require that notice of a meeting of shareholders to consider the action be given to nonvoting shareholders, to all nonvoting shareholders of the corporation. The general or limited authorization in the corporation's articles of incorporation authorizing shareholder action by less than unanimous ~~written~~ consent shall specify the amount and form of notice required to be given to nonconsenting shareholders before the effective date of the action. In the case of action of a type that would constitute a significant business transaction under RCW 23B.19.020(15), the notice shall be given no fewer than twenty days before the effective date of the action. The notice shall be in ~~writing~~ the form of a record and shall contain or be accompanied by the same material that, under this title, would have been required to be ~~sent~~ delivered to nonconsenting or nonvoting shareholders in a notice of meeting at which the proposed action would have been submitted for shareholder action. If the action taken is of a type that would entitle shareholders to exercise dissenters' rights under RCW 23B.13.020(1), then the notice must comply with RCW 23B.13.220(2), RCW 23B.13.210 shall not apply, and all shareholders who have not ~~signed~~ executed the consent taking the action are entitled to receive the notice, demand payment under RCW 23B.13.230, and assert other dissenters' rights as prescribed in chapter 23B.13 RCW.

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

* * * * *

Laws 2009, ch. 189, §14 (eff. 7-26-09)
(1)(a) Corporate ~~A~~action required or permitted by this title to be ~~taken~~ approved by a shareholder vote at a ~~shareholders'~~ meeting may be ~~taken~~ approved without a meeting or a vote if either:
(i) The corporate action is ~~taken~~ approved by all shareholders entitled to vote on the corporate action; or
(ii) The corporate action is ~~taken~~ approved by shareholders holding of record or otherwise entitled to vote in the aggregate not less than the minimum number of votes that would be necessary to ~~authorize or take~~approve such corporate action at a meeting at which all shares entitled to vote on the corporate action were present and voted, and at the time the corporate action is ~~taken~~ approved the corporation is not a public company and is authorized to ~~take~~ approve such corporate action under this subsection (1)(a)(ii) by a general or limited authorization contained in its articles of incorporation.
(b) ~~The taking of~~Corporate action may be approved by shareholders without a meeting or a vote ~~must be evidenced by one or more consents, each in the form of a record describing the action taken, executed~~ by means of execution of a single consent or multiple counterpart consents by shareholders holding of record or otherwise entitled to vote in the aggregate not less than the minimum number of votes necessary ~~in order to take such action by consent~~ under (a)(i) or (ii) of this subsection~~, and~~. Any such shareholder consent must: (i) Be in the form of an executed record; (ii) indicate the date of execution of the consent by each shareholder who executes it, which date must be on or after the applicable record date determined in accordance with subsection (2) of this section; (iii) describe the corporate action being approved; (iv) when delivered to each shareholder for execution, include or be accompanied by the same material that would

have been required by this title to be delivered to shareholders in or accompanying a notice of meeting at which the proposed corporate action would have been submitted for shareholder approval; and (v) be delivered to the corporation for inclusion in the minutes or filing with the corporate records~~, which consent shall be set forth either (i) in an executed record or (ii) if the corporation has designated an address, location, or system to which the consent may be electronically transmitted and the consent is electronically transmitted to the designated address, location, or system, in an executed electronically transmitted record.~~

~~(2) If not otherwise fixed under RCW 23B.07.030 or 23B.07.070, the record date for determining shareholders entitled to take action without a meeting is the date on which the first shareholder consent is executed under subsection (1) of this section. Every consent shall bear the date of execution of each shareholder who executes the consent. A consent is not effective to take the action referred to in the consent unless, within sixty days of the earliest dated consent delivered to the corporation, consents executed by a sufficient number of shareholders to take action are delivered to the corporation.~~

~~(3)~~ in accordance with subsection (4) of this section. A shareholder may withdraw an executed shareholder consent ~~only~~ by delivering a notice of withdrawal in the form of ~~a~~ an executed record to the corporation prior to the time when ~~consents sufficient to authorize taking the action have been delivered to the corporation.~~

~~(4) Unless the shareholder consent specifies a later effective date, action taken under this section is effective when: (a) Consents sufficient to authorize taking the action have been delivered to the corporation; and (b) the period of advance notice required by the corporation's articles of incorporation to be given to any nonconsenting shareholders has been satisfied.~~

~~(5) A consent executed~~ shareholder consents sufficient to approve the corporate action have been delivered to the corporation.

(2) The record date for determining shareholders entitled to approve a corporate action without a meeting may be fixed under RCW 23B.07.030 or 23B.07.070, but if not so fixed shall be the date of execution indicated on the earliest dated shareholder consent executed under subsection (1) of this section, even though such shareholder consent may not have been delivered to the corporation on that date.

(3)(a) Notice that shareholder consents are being sought under subsection (1)(a) of this section shall be given, by the corporation or by another person soliciting such consents, on or promptly after the record date, to all shareholders entitled to vote on the record date who have not yet executed the shareholder consent and, if this title would otherwise require that notice of a meeting of shareholders to consider the proposed corporate action be given to nonvoting shareholders, to all nonvoting shareholders as of the record date. Notice given under this subsection (3)(a) shall include or be accompanied by the same information required to be included in or to accompany the shareholder consent under subsection (1)(b)(iii) and (iv) of this section.

(b) Notice that sufficient shareholder consents have been executed to approve the proposed corporate action under either of subsection (1)(a)(i) or (ii) of this section shall be given by the corporation, promptly after delivery to the corporation of shareholder consents sufficient to approve the corporate action in accordance with subsection (4) of this section, to all shareholders entitled to vote on the record date and, if this title would otherwise require that notice of a meeting of shareholders to consider the proposed corporate action be given to nonvoting shareholders, to all nonvoting shareholders as of the record date.

(4) Unless the consent executed by shareholders specifies a later effective date, shareholder approval obtained under this section is effective when: (a) Executed shareholder consents sufficient to approve the proposed corporate action have been delivered to the corporation, either at an address designated by the corporation for delivery of such shareholder consents or at the corporation's registered office, or to such electronic address, location, or system as the corporation may have designated for delivery of such shareholder consents; and (b) any period of advance notice required by the corporation's articles of incorporation to be given to any nonconsenting shareholders has been satisfied. Executed shareholder consents are not effective to approve a proposed corporate action unless, within sixty days after the date of the earliest dated shareholder consent delivered to the corporation, consents executed by a sufficient number of shareholders to approve the corporate action are delivered to the corporation.

(5) Approval of corporate action by execution of shareholder consents under this section has the effect of a meeting vote and may be described as such in any record, except that, if the corporate action requires the filing of a certificate under any other section of this title, the certificate so filed shall state, in lieu of any

statement required by that section concerning any vote of shareholders, that ~~consent~~ shareholder approval has been obtained in accordance with this section and that notice to any nonconsenting shareholders has been given ~~as provided in this section.~~

~~(6) Notice of the taking of action by shareholders without a meeting by less than unanimous consent of all shareholders entitled to vote on the action shall be given, before the date on which the action becomes effective, to those shareholders entitled to vote on the action who have not consented and, if this title would otherwise require that notice of a meeting of shareholders to consider the action be given to nonvoting shareholders, to all nonvoting shareholders of the corporation. The general or limited authorization in the corporation's articles of incorporation authorizing shareholder action by less than unanimous consent shall specify the amount and form of notice required to be given to nonconsenting shareholders before the effective date of the action. In the case of action of a type that would constitute a significant business transaction under RCW 23B.19.020(15), the notice shall be given no fewer than twenty days before the effective date of the action. The notice shall be in the form of a record and shall contain or be accompanied by the same material that, under this title, would have been required to be delivered to nonconsenting or nonvoting shareholders in a notice of meeting at which the proposed action would have been submitted for shareholder action. If the action taken is of a type that would entitle shareholders to exercise dissenters' rights under RCW 23B.13.020(1), then the notice must comply with RCW 23B.13.220(2), RCW 23B.13.210 shall not apply, and all shareholders who have not executed the consent taking the action are entitled to receive the notice, demand payment under RCW 23B.13.230, and assert other dissenters' rights as prescribed in chapter 23B.13 RCW~~ to the extent required by this section.

CARC COMMENTARY

The proposed amendments to RCW 23B.07.040 are intended primarily to address a number of uncertainties arising under the existing shareholder consent provisions, by:

- Eliminating the confusing dual usage of the word “action” to refer to both the achievement of shareholder approval by consent, as well as the underlying corporate action so approved; to enable greater precision of meaning in this and various other sections of the WBCA, a new definition of “corporate action” is proposed to be added to RCW 23B.01.400, and “approval” is used as a standardized reference to the affirmative result of a board or shareholder voting or consent process.
- Eliminating uncertainties as to whether “notice of the taking of action…by…consent” could be given at the beginning of a consent solicitation; and instead specifying an expanded notice requirement that includes both an initial notification, to be given promptly after commencement of a solicitation to those shareholders who have not yet signed the consent, as well as a second notice, to be given to both signing and non-signing shareholders promptly after completion of the approval process;
- Clarifying that the required notification that a solicitation process has been commenced may be given by a person conducting the solicitation, if the sponsor is someone other than the corporation itself;
- Eliminating the requirement that a corporation’s articles specify the amount and form of advance notice to non-consenting shareholders that must be given prior to the date on which a non-unanimously approved corporate action “becomes effective”; and instead replacing that potentially minimal notice requirement with more robust notification requirements both at the beginning and the end of a solicitation process;
- Eliminating the anomaly that, in cases where proposed corporate action would require notice to non-voting shareholders if it were to be considered at a meeting, notice thereof must be given to non-voting shareholders only if the corporate action is approved by non-unanimous consent, but not if it is approved by unanimous consent of only voting shareholders; and
- Eliminating the confusing cross-reference to the “significant business transactions” sections of the WBCA (Ch. 23B.19), and the previous 20-day notice requirement for actions of that “type,” on the ground that these references gave rise to more confusion than benefit (since public companies cannot act by non-unanimous consent and only a few privately held Washington corporations are believed to have elected to be governed by the anti-takeover provisions under RCW 23B.19.020(19)(a)(ii)).

Practical Application of the Amended Shareholder Consent Section:

- Corporations that have included specific language in their articles of incorporation, concerning the amount and form of advance notice required prior to effectiveness of non-unanimously approved corporate actions, may wish to consider modifying or deleting such specifics since they will no longer be required under the amended statute.
- While the proposed amendments may seem to create duplicative notification requirements, it is important to note that the content of the two required notices is substantively different (i.e., that an approval process is "underway" versus being "completed"). In many cases, it will be possible to combine these two notices into a single record (e.g., in the situation where the signatures needed for approval are obtained and delivered within the relatively short period in which notice of the commencement of the solicitation can still be sent "promptly").
- In situations where a corporation's board of directors desires to set a specific record date for a consent solicitation (which is allowed only so long as no signatures have been obtained), it is worth noting that the initial notification will be required to be sent "promptly after the record date," as distinguished from the date on which the board specifies the record date or the date of the earliest dated shareholder consent.

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RCW 23B.07.060
WAIVER OF NOTICE

CURRENT SECTION

(1) A shareholder may waive any notice required by this title, the articles of incorporation, or bylaws before or after the date and time of the meeting that is the subject of such notice, or in the case of notice required by RCW 23B.07.040(3), before or after the corporate action to be approved by executed consent becomes effective. Except as provided by subsections (2) and (3) of this section, the waiver must be delivered by the shareholder entitled to 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 and dated record or (b) if the corporation has designated an address, location, or system to which the waiver may be electronically transmitted and the waiver is electronically transmitted to the designated address, location, or system, in an executed and dated electronically transmitted record.

(2) A shareholder's attendance at a meeting waives objection to lack of notice or defective notice of the meeting, unless the shareholder at the beginning of the meeting objects to holding the meeting or transacting business at the meeting.

(3) A shareholder waives objection to consideration of a particular matter at a meeting that is not within the purpose or purposes described in the meeting notice, unless the shareholder objects to considering the matter when it is presented.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §65 (eff. 7-1-90)

(1) A shareholder may waive any notice required by this title, the articles of incorporation, or bylaws before or after the date and time of the meeting that is the subject of such notice. Except as provided by subsections (2) and (3) of this section, the waiver must be in writing, be signed by the shareholder entitled to notice, and be delivered to the corporation for inclusion in the minutes or filing with the corporate records.

(2) A shareholder's attendance at a meeting waives objection to lack of notice or defective notice of the meeting, unless the shareholder at the beginning of the meeting objects to holding the meeting or transacting business at the meeting.

(3) A shareholder waives objection to consideration of a particular matter at a meeting that is not within the purpose or purposes described in the meeting notice, unless the shareholder objects to considering the matter when it is presented.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3016-17 (1989)

Section 7.06 Waiver of Notice.

Proposed subsection 7.06(a) permits any shareholder to waive any notice required by Proposed section 7.05 by a written waiver, signed by the shareholder and delivered to the corporation. A waiver is effective even though it is signed before or after the date and time of the meeting that is the subject of the notice.

A notice of shareholder meetings serves two principal purposes: (1) it advises shareholders of the date, time, and place of the annual or special meeting, and (2) in the case of a special meeting (or an annual meeting at which fundamental changes may be made), it advises shareholders of the purposes of the meeting. If a shareholder attends a meeting, the shareholder has probably received some form of notice of the date, time, and place of the meeting whether from the corporation or from another source. As a result,

Proposed subsection 7.06(b) provides that attendance at a meeting constitutes waiver of any failure to receive the notice or defects in the statement of the date, time, and place of any meeting. Defects waived by attendance for this purpose include a failure to send the notice altogether, delivery to the wrong address, a misstatement of the date, time, or place of the meeting, and a failure to notice the meeting within the time periods specified in Proposed subsection 7.05(a). If a shareholder believes that the defect in or failure of notice was in some way prejudicial, the shareholder may preserve that objection by stating at the beginning of the meeting that the shareholder objects to holding the meeting or transacting any business. If this objection is made, the corporation may correct the defect by sending proper notice to the shareholders for a subsequent meeting or by obtaining written waivers of notice from all shareholders who did not receive the notice required by Proposed section 7.05.

For purposes of this section, "attendance" at a meeting involves the presence of the shareholder in person or by proxy. A shareholder who attends a meeting solely for the purpose of objecting to the notice may be counted as present for purposes of determining whether a quorum is present. See Proposed subsection 7.25(b).

In the case of special meetings, or annual meetings at which fundamental corporate changes are considered, a second purpose of the notice is to tell shareholders what is to be considered at the meeting. An objection that a particular matter is not within the stated purposes of the meeting obviously cannot be raised until the matter is presented. Thus Proposed subsection 7.06(c) provides that a shareholder waives this kind of objection if the shareholder fails to object promptly after the matter is first presented. If this objection is made, the corporation may correct the defect by sending proper notice to the shareholders for a subsequent meeting or obtaining written waivers of notice from all shareholders. Of course, whether or not a specific matter is within a stated purpose of a meeting is ultimately a matter for judicial determination, typically in a suit to invalidate action taken at the meeting brought by a shareholder who was not present at the meeting or who was present at the meeting and preserved the shareholder's objection under Proposed subsection 7.06(b).

The purpose of both waiver rules in Proposed subsections 7.06(b) and (c) is to require shareholders with objections to holding the meeting or considering a specific matter to raise them at the outset and not reserve them to be raised only if they are unhappy with the outcome of the meeting. The rules set forth in this section differ in some respects from the waiver rules for directors set forth in Proposed section 8.23 where a waiver is inferred if the director acquiesces in the action taken at a meeting even if the director raised an objection to the notice of a meeting at the outset.

Other sections of the Proposed Act require that shareholders who are not entitled to vote are entitled to notice of meetings at which certain fundamental corporate changes are to be considered. See Proposed sections 10.03, 11.03, 12.02, and 14.02. In order to obtain an effective waiver of notice for these meetings under this section, waivers must be obtained from the nonvoting shareholders who are entitled to notice as well as from the voting shareholders.

AMENDMENTS TO ORIGINAL SECTION
Laws 1991, ch. 72, §34 (eff. 7-28-91) *(amended only subsection (1))*
(1) A shareholder may waive any notice required by this title, the articles of incorporation, or bylaws before or after the date and time of the meeting that is the subject of such notice, or in the case of notice required by RCW 23B.07.040(6), before or after the action to be taken by written consent is effective. Except as provided by subsections (2) and (3) of this section, the waiver must be in writing, be signed by the shareholder entitled to notice, and be delivered to the corporation for inclusion in the minutes or filing with the corporate records.

CARC COMMENTARY
Under RCW 23B.07.040(6), written notice of a proposed action by unanimous consent of voting shareholders must be provided to non-voting shareholders at least 10 day before the action is taken. The amendment redefines the period during which a non-voting shareholder can waive such notice in terms of the effective date of the action, rather than the date of the deemed shareholder meeting.

* * * * *

Laws 2002, ch. 297, §24 (eff. 6-13-02)*(amended only subsection (1))*
(1) A shareholder may waive any notice required by this title, the articles of incorporation, or bylaws before or after the date and time of the meeting that is the subject of such notice, or in the case of notice required by RCW 23B.07.040(6), before or after the action to be taken by ~~written~~ executed consent is effective. Except as provided by subsections (2) and (3) of this section, the waiver must be ~~in writing, be signed by the shareholder entitled to notice, and be~~ delivered by the shareholder entitled to 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 and dated record or (b) if the corporation has designated an address, location, or system to which the waiver may be electronically transmitted and the waiver is electronically transmitted to the designated address, location, or system, in an executed and dated electronically transmitted record.

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

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Laws 2009, ch. 189, §15 (eff. 7-26-09)*(amends only subsection (1))*
(1) A shareholder may waive any notice required by this title, the articles of incorporation, or bylaws before or after the date and time of the meeting that is the subject of such notice, or in the case of notice required by RCW 23B.07.040(~~6~~3), before or after the corporate action to be ~~taken~~ approved by executed consent ~~is~~ becomes effective. Except as provided by subsections (2) and (3) of this section, the waiver must be delivered by the shareholder entitled to 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 and dated record or (b) if the corporation has designated an address, location, or system to which the waiver may be electronically transmitted and the waiver is electronically transmitted to the designated address, location, or system, in an executed and dated electronically transmitted record.

CARC COMMENTARY
The reference to RCW 23B.07.040 is amended to reflect amendments made by Laws 2009, ch. 189, §14 to that section.

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.07.070
RECORD DATE

CURRENT SECTION

(1) The bylaws may fix or provide the manner of fixing the record date for one or more voting groups in order to determine the shareholders entitled to notice of a shareholders' meeting, to demand a special meeting, to vote, or to approve any other corporate action. If the bylaws do not fix or provide for fixing a record date, the board of directors of the corporation may fix a future date as the record date.

(2) If not otherwise fixed under subsection (1) of this section or RCW 23B.07.030, the record date for determining shareholders entitled to notice of and to vote at an annual or special shareholders' meeting is the day before the first notice is delivered to shareholders.

(3) If the board of directors does not fix the record date for determining shareholders entitled to a share dividend, it is the date the board of directors authorizes the share dividend.

(4) If the board of directors does not fix the record date for determining shareholders entitled to a distribution, other than one involving a purchase, redemption, or other acquisition of the corporation's shares, it is the date the board of directors authorizes the distribution.

(5) A record date fixed under this section may not be more than seventy days before the meeting of shareholders or more than ten days prior to the date on which the first shareholder consent is executed under RCW 23B.07.040(1)(b).

(6) A determination of shareholders entitled to notice of or to vote at a shareholders' meeting is effective for any adjournment of the meeting unless the board of directors fixes a new record date, which it must do if the meeting is adjourned to a date more than one hundred twenty days after the date fixed for the original meeting.

(7) If a court orders a meeting adjourned to a date more than one hundred twenty days after the date fixed for the original meeting, it may provide that the original record date continues in effect or it may fix a new record date.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §66 (eff. 7-1-90)

(1) The bylaws may fix or provide the manner of fixing the record date for one or more voting groups in order to determine the shareholders entitled to notice of a shareholders' meeting, to demand a special meeting, to vote, or to take any other action. If the bylaws do not fix or provide for fixing a record date, the board of directors of the corporation may fix a future date as the record date.

(2) If not otherwise fixed under subsection (1) of this section or RCW 23B.07.030, the record date for determining shareholders entitled to notice of and to vote at an annual or special shareholders' meeting is the day before the first notice is delivered to shareholders.

(3) If the board of directors does not fix the record date for determining shareholders entitled to a share dividend, it is the date the board of directors authorizes the share dividend.

(4) If the board of directors does not fix the record date for determining shareholders entitled to a distribution, other than one involving a purchase, redemption, or other acquisition of the corporation's shares, it is the date the board of directors authorizes the distribution.
(5) A record date fixed under this section may not be more than seventy days before the meeting or action requiring a determination of shareholders.
(6) A determination of shareholders entitled to notice of or to vote at a shareholders' meeting is effective for any adjournment of the meeting unless the board of directors fixes a new record date, which it must do if the meeting is adjourned to a date more than one hundred twenty days after the date fixed for the original meeting.
(7) If a court orders a meeting adjourned to a date more than one hundred twenty days after the date fixed for the original meeting, it may provide that the original record date continues in effect or it may fix a new record date.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3017-18 (1989)
Section 7.07 Record Date.
Proposed subsection 7.07(a) authorizes the board of directors to fix record dates for any action by shareholders unless the bylaws themselves fix or provide for the fixing of a record date. A separate record date may be established for each voting group entitled to vote separately on a matter at a meeting, or a single record date may be established for all voting groups entitled to vote in the meeting. If neither the bylaws nor the board of directors fix a record date for a specific action, Proposed subsections (b), (c) and (d) provide record dates. Thus, subsection (b) provides that the record date for determining who is entitled to notice of a meeting (if not fixed by the directors or the bylaws) is the day before the date the corporation first gives notice to shareholders of the meeting. Subsection (c) fixes the record date (if the board of directors does not fix it) for share dividends as the date the directors authorize the share dividend. Subsection (d) fixes the record date (if the board of directors does not otherwise fix it) for distributions other than those involving a reacquisition of shares as the date the directors authorize the distribution. No record date is necessary for a reacquisition of shares from one or more specific shareholders. The board of directors may set a record date for a reacquisition if it is to be pro rata and offered to all shareholders.

A record date may not be fixed more than 70 days before the meeting or action in question and may not be fixed retroactively. Once set, the same record date may be utilized for an adjournment of the meeting that reconvenes within 120 days after the date fixed for the original meeting or the board of directors may fix a new record date. If the adjourned meeting takes place more than 120 days after the date fixed for the original meeting, Proposed subsection 7.07(f) requires that a new record date be fixed. But if an adjournment is ordered by a court, Proposed subsection 7.07(g) allows the court to provide that the original record date continues to be applicable or to fix a different date. In any event, if a different record date is or must be fixed under this section, Proposed section 7.05 requires that new notice be given to the persons who are shareholders as of the new record date, and Proposed section 7.25 requires that a quorum be redetermined for an adjourned meeting as to which a new record date is set.

AMENDMENTS TO ORIGINAL SECTION
Laws 2009, ch. 189, §16 (eff. 7-26-09) *(amends only subsections (1) and (5))*
(1) The bylaws may fix or provide the manner of fixing the record date for one or more voting groups in order to determine the shareholders entitled to notice of a shareholders' meeting, to demand a special meeting, to vote, or to ~~take~~ approve any other corporate action. If the bylaws do not fix or provide for fixing a record date, the board of directors of the corporation may fix a future date as the record date.

(5) A record date fixed under this section may not be more than seventy days before the meeting ~~or action requiring a determination~~ of shareholders or more than ten days prior to the date on which the first shareholder consent is executed under RCW 23B.07.040(1)(b).

CARC COMMENTARY

Subsection (1) is amended as part of the addition to the term "corporate action" to RCW 23B.01.400. 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.

Subsection (5) clarifies the earliest possible record date for determining shareholders entitled to approve a corporate action without a meeting under RCW 23B.07.040(1)(b).

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RCW 23B.07.200
SHAREHOLDERS' LIST FOR MEETING

CURRENT SECTION

(1) After fixing a record date for a meeting, a corporation shall prepare an alphabetical list of the names of all its shareholders on the record date who are entitled to notice of a shareholders' meeting. The list must be arranged by voting group, and within each voting group by class or series of shares, and show the address of and number of shares held by each shareholder.

(2) The shareholders' list must be available for inspection by any shareholder, beginning ten days prior to the meeting and continuing through the meeting, at the corporation's principal office or at a place identified in the meeting notice in the city where the meeting will be held. A shareholder, the shareholder's agent, or the shareholder's attorney is entitled to inspect the list, during regular business hours and at the shareholder's expense, during the period it is available for inspection.

(3) The corporation shall make the shareholders' list available at the meeting, and any shareholder, the shareholder's agent, or the shareholder's attorney is entitled to inspect the list at any time during the meeting or any adjournment.

(4) If the corporation refuses to allow a shareholder, the shareholder's agent, or the shareholder's attorney to inspect the shareholders' list before or at the meeting, the superior court of the county where a corporation's principal office, or, if none in this state, its registered office, is located, on application of the shareholder, may summarily order the inspection at the corporation's expense and may postpone the meeting for which the list was prepared until the inspection is complete.

(5) A shareholder's right to copy the shareholders' list, and a shareholder's right to otherwise inspect and copy the record of shareholders, is governed by RCW 23B.16.020(3).

(6) Refusal or failure to prepare or make available the shareholders' list does not affect the validity of corporate action approved at the meeting.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §68 (eff. 7-1-90)

(1) After fixing a record date for a meeting, a corporation shall prepare an alphabetical list of the names of all its shareholders on the record date who are entitled to notice of a shareholders' meeting. The list must be arranged by voting group, and within each voting group by class or series of shares, and show the address of and number of shares held by each shareholder.

(2) The shareholders' list must be available for inspection by any shareholder, beginning ten days prior to the meeting and continuing through the meeting, at the corporation's principal office or at a place identified in the meeting notice in the city where the meeting will be held. A shareholder, the shareholder's agent, or the shareholder's attorney is entitled to inspect the list, during regular business hours and at the shareholder's expense, during the period it is available for inspection.

(3) The corporation shall make the shareholders' list available at the meeting, and any shareholder, the shareholder's agent, or the shareholder's attorney is entitled to inspect the list at any time during the meeting or any adjournment.

(4) If the corporation refuses to allow a shareholder, the shareholder's agent, or the shareholder's attorney to

inspect the shareholders' list before or at the meeting, the superior court of the county where a corporation's principal office, or, if none in this state, its registered office, is located, on application of the shareholder, may summarily order the inspection at the corporation's expense and may postpone the meeting for which the list was prepared until the inspection is complete.
(5) A shareholder's right to copy the shareholders' list, and a shareholder's right to otherwise inspect and copy the record of shareholders, is governed by RCW 23B.16.020(3).
(6) Refusal or failure to prepare or make available the shareholders' list does not affect the validity of action taken at the meeting.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3018-19 (1989)
Section 7.20 Shareholders' List for Meeting.
Proposed section 7.20 requires the preparation of a list of shareholders entitled to notice of a meeting and requires that this list be made available on request to shareholders beginning 10 days prior to, and continuing during, the meeting.

The list of shareholders is often referred to as the "voting list" and usually the list will include only the names of those shareholders entitled to vote at the meeting. The list, however, must also include the names, shareholdings, and addresses of shareholders of nonvoting shares if they are entitled to notice of the meeting by reason of the nature of the actions proposed to be taken at the meeting. The list must generally be available for inspection beginning 10 days prior to the meeting and continuously thereafter until the meeting occurs at the corporation's principal office or at a place identified in the meeting notice.

Proposed subsection 7.20(b) permits the list to be maintained prior to the meeting either at the corporation's principal office or at any location in the city in which the meeting is to be held, the precise location to be designated in the notice of meeting.

Proposed subsection 7.20(c) also requires a copy of the shareholders' list to be available at the meeting itself for inspection. This list may be used to determine the presence or absence of a quorum, and the right to vote.

Proposed section 7.20 does not require the list of shareholders to be in any particular form. It may be maintained, for example, in electronic form. If the list is maintained in other than written form, however, suitable equipment must be provided so that a comprehensible list may be inspected by a shareholder as permitted by this section.

Proposed section 7.20 creates a corporate obligation rather than an obligation imposed upon a corporate officer. If the corporation fails to prepare the list or refuses to permit a shareholder to inspect it, either before the meeting as required by Proposed subsection 7.20(b) or at the meeting itself as required by Proposed subsection 7.20(c), a shareholder may apply to the superior court under Proposed subsection 7.20(d) for a summary order permitting inspection of the list; the court may further order the meeting to be postponed for a reasonable time. If the court orders a copy of the list to be provided to the shareholders, the copying is at the corporation's expense.

The judicial remedy provided in Proposed subsection 7.20(d) is the only sanction for violation of Proposed section 7.20 since Proposed subsection 7.20(e) provides that the failure to prepare, maintain, or produce the list does not affect the validity of any action taken at the meeting.

Proposed subsection 7.20(b) permits shareholders to "inspect" the list without limitation during the l0 days prior to the meeting. But Proposed subsection 7.20(e) permits the shareholder to "copy" the list only if the shareholder complies with the requirements of Proposed subsection 16.02(c). The distinction between "inspection" and "copying" set forth in Proposed subsections 7.20(b) and 7.20(e) reflects an accommodation between competing considerations of permitting shareholders access to the list immediately prior to and at the meeting and possible misuse of a copied list.

As Proposed subsection 7.20(e) makes clear, Proposed section 7.20 creates a right of shareholders to inspect a list of shareholders in advance of and at a meeting that is independent of the rights of shareholders to inspect corporate records under chapter 16. A shareholder may obtain the right to inspect the list of shareholders as provided in chapter 16 without regard to the provisions relating to the pendency of a meeting in Proposed section 7.20, and similarly the limitations of chapter 16 are not applicable to the right of inspection created by section 7.20.

The right to inspect under chapter 16 is also broader in the sense that in some circumstances the shareholder may be entitled to receive copies of the documents the shareholder desires to inspect. See section 16.03.

AMENDMENTS TO ORIGINAL SECTION
Laws 2009, ch. 189, §17 (eff. 7-26-09) *(amends only subsection (6))*
(6) Refusal or failure to prepare or make available the shareholders' list does not affect the validity of 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.

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RCW 23B.07.250
QUORUM AND VOTING REQUIREMENTS

CURRENT SECTION

(1) Shares entitled to vote as a separate voting group may approve a corporate action at a meeting only if a quorum of those shares exists with respect to that corporate action. Unless the articles of incorporation or this title provide otherwise, a majority of the votes entitled to be cast on the corporate action by the voting group constitutes a quorum of that voting group for approval of that corporate action.

(2) Once a share is represented for any purpose at a meeting other than solely to object to holding the meeting or transacting business at the meeting, it is deemed present for quorum purposes for the remainder of the meeting and for any adjournment of that meeting unless a new record date is or must be set for that adjourned meeting.

(3) If a quorum exists, a corporate action, other than the election of directors, is approved by a voting group if the votes cast within the voting group favoring the corporate action exceed the votes cast within the voting group opposing the corporate action, unless the articles of incorporation or this title require a greater number of affirmative votes.

(4) An amendment of articles of incorporation adding, changing, or deleting either (i) [(a)] a quorum for a voting group greater or lesser than specified in subsection (1) of this section, or (ii) [(b)] a voting requirement for a voting group greater than specified in subsection (3) of this section, is governed by RCW 23B.07.270.

(5) The election of directors is governed by RCW 23B.07.280.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §73 (eff. 7-1-90)

(1) Shares entitled to vote as a separate voting group may take action on a matter at a meeting only if a quorum of those shares exists with respect to that matter. Unless the articles of incorporation or this title provide otherwise, a majority of the votes entitled to be cast on the matter by the voting group constitutes a quorum of that voting group for action on that matter.

(2) Once a share is represented for any purpose at a meeting other than solely to object to holding the meeting or transacting business at the meeting, it is deemed present for quorum purposes for the remainder of the meeting and for any adjournment of that meeting unless a new record date is or must be set for that adjourned meeting.

(3) If a quorum exists, action on a matter, other than the election of directors, is approved by a voting group if the votes cast within the voting group favoring the action exceed the votes cast within the voting group opposing the action, unless the articles of incorporation or this title require a greater number of affirmative votes.

(4) An amendment of articles of incorporation adding, changing, or deleting either (i) a quorum for a voting group greater or lesser than specified in subsection (1) of this section, or (ii) a voting requirement for a voting group greater than specified in subsection (3) of this section, is governed by RCW 23B.07.270.

(5) The election of directors is governed by RCW 23B.07.280.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3024-27 (1989)
Section 7.25 Quorum and Voting Requirements.
Proposed section 7.25 establishes general quorum and voting requirements for voting groups for purposes of the title. As defined in Proposed section 1.40, a "voting group" consists of all shares of one or more classes or series that under the articles of incorporation or the Proposed Act are entitled to vote and be counted together collectively on a matter. Shares entitled to vote "generally" on a matter (that is, all shares entitled to vote on the matter by the articles of incorporation or this title that do not expressly have the right to be counted or tabulated separately) are a single voting group. The determination of which shares form part of a single voting group must be made from the provisions of the articles of incorporation and of this title.

The voting group concept permits a single section of the Proposed Act to deal with quorum and voting rules applicable to a variety of single and multiple voting group situations. Proposed section 7.25 covers, for example, quorum and voting requirements for all actions by the shareholders of a corporation with a single class of voting shares; it also covers quorum and voting requirements for a matter on which only a class of shares with preferential rights is entitled to vote under the articles of incorporation because of a default in the payment of dividends (a vote which is often described as a "class vote"); and it covers quorum and voting requirements for a matter on which both common and preferred shares are entitled to vote, either together as a single voting group under the articles of incorporation or separately as two voting groups under either the articles of incorporation or this title.

Under the Proposed Act, classes or series of shares are generally not entitled to vote separately by voting group except to the extent specifically authorized by the articles of incorporation. But Proposed sections 10.04 and 11.03 of the Act grant classes or series of shares the right to vote separately when fundamental changes are proposed that may adversely affect the class or series. Under the Proposed Act even a class or series of shares that is expressly described as nonvoting under the articles of incorporation may be entitled to vote separately on a matter affecting the class or series in a designated way. See Proposed subsection 10.04(e).

In addition to the provisions of this title, separate voting by voting group may be authorized by the articles of incorporation in such instances and on such terms as may be desired (except that the statutory privilege of voting by separate voting groups cannot be diluted or reduced). Finally, on some matters the board of directors may condition their submission of matters to shareholders on their approval by specific voting groups designated by the board of directors. Proposed sections 7.25 and 7.26 establish the rules by which all voting by single or multiple voting groups is conducted.

In some situations, shares of a single class may be entitled to vote in two different voting groups.

Implicit in Proposed section 7.25 is the concept that the determination of the voting groups entitled to vote, and the quorum and voting requirements applicable thereto, must be determined separately for each "matter" coming before a meeting. As a result, different quorum and voting requirements may be applicable to different portions of a meeting, depending on the matter being considered. In this respect, Proposed sections 7.25 and 7.26 differ in structure from the old law which contemplated that a single set of quorum and voting requirements would be applicable to a "meeting." There is no difference in substance, however, since it was generally recognized that different quorum and voting requirements should be applicable in class voting situations. And, under the Proposed Act, if only a single voting group is entitled to vote on all matters coming before a meeting of shareholders, a single quorum and voting requirement will usually be applicable to the entire meeting.

Proposed subsections 7.25(a) and (b) provide standard rules for the determination of a quorum for each voting group required to act at a shareholders' meeting on a matter. In the absence of a different provision in the articles of incorporation or in the Proposed Act, Proposed subsection 7.25(a) provides that a quorum consists of a majority of the votes entitled to be cast on the matter at the meeting.

Proposed subsection 7.25(b) retains the common law view that once a share is present (assuming that shares represented at the meeting solely to object to notice or matters on the agenda are not present) at a meeting, it is deemed present for quorum purposes throughout the meeting. Thus, a voting group may continue to act despite the withdrawal of persons having the power to vote one or more shares in an effort "to break the quorum." In this respect, a meeting of shareholders is governed by a different rule than a meeting of directors, where a sufficient number of directors must be present to constitute a quorum at the time action is taken.

Once a share is present at a meeting it is also deemed to be present at any adjourned meeting unless a new record date is or must be set for that adjourned meeting. See Proposed section 7.07. If a new record date is set, new notice must be given to holders of shares of a voting group and a quorum must be established from within the holders of shares of that voting group on the new record date.

The shares owned by a shareholder who comes to the meeting to object on grounds of lack of notice may be counted toward the presence of a quorum. Similarly, the shares owned by a shareholder who attends a meeting solely for purposes of raising the objection that a quorum is not present are counted toward the presence of a quorum. Attendance at a meeting, however, does not constitute a waiver of other objections to the meeting such as the lack of notice. Such waivers are governed by Proposed subsection 7.06(b).

As used in Proposed sections 7.25 and 7.26, "represented at the meeting" means the physical presence of the shareholder or a duly appointed proxy in the meeting room after the meeting has been called to order or the presiding officer has commenced consideration of the business of the meeting, and before the final adjournment of the meeting. If a person owns shares of different classes or series that are entitled to vote in separate voting groups, the presence of the person at the meeting constitutes representation at the meeting of all the shares owned by that person.

Proposed subsection 7.25(c) provides that an action (other than the election of directors, which is governed by Proposed section 7.28) is approved by a voting group at a meeting at which a quorum is present if the votes cast in favor of the action exceed the votes cast opposing the action. This section changes the traditional rule appearing in the old law and many state statutes that an action is approved at a meeting at which a quorum is present if it receives the affirmative vote "of a majority of the shares represented at that meeting." The traditional rule in effect treated abstentions as negative votes; the Proposed Act treats them truly as abstentions. The rule set forth in Proposed subsection 7.25(c) is considered desirable in part because it permits action to be taken by the shareholders when considered appropriate by a majority of those with views on the matter in question. Potential concern about the effect of abstentions in publicly held corporations has also been increased by changes in the SEC proxy regulations that recognize the right of shareholders of publicly held companies to abstain on issues.

The treatment of abstaining votes under the traditional rule gave rise to anomalous results in some situations. For example, if a corporation has 1,000 shares of a single class outstanding, all entitled to cast one vote each, a quorum consists of 501 shares; if 600 shares are represented and the vote on a proposed action is 280 in favor, 225 opposed, and 95 abstaining, the action is not approved since fewer than a majority of the 600 shares attending voted in favor of the action. This is anomalous since if the shares abstaining had not been present at the meeting at all a quorum would have been present and the action would have been approved. Under Proposed subsection 7.25(c) the action would not be defeated by the 95 abstaining votes.

The articles of incorporation may modify the quorum and voting requirements of Proposed section 7.25 for a single voting group or for all voting groups entitled to vote on any matter. The articles of incorporation may increase the quorum and voting requirements to any extent desired up to and including unanimity upon compliance with Proposed section 7.27; they may also require that shares of different classes or series are entitled to vote separately or together on specific issues or provide that actions are approved only if they receive the favorable vote of a majority of the shares of a voting group present at a meeting at which a

quorum is present. The articles may also decrease the quorum requirement to a quorum of one-third of the votes entitled to be cast.

Proposed subsection 7.25(d) provides that Proposed section 7.27 governs the adoption or amendment of provisions in the articles of incorporation that impose greater or lesser quorum or voting requirements than provided for in this section.

The phrase "or this title" in Proposed subsections 7.25(a) and (c) makes clear that wherever the provisions of the Proposed Act provide more stringent voting or quorum requirements, they control over Proposed section 7.25. More stringent requirements are provided for the approval of certain fundamental corporate changes--for example, certain amendments to the articles of incorporation, mergers, and the sale of all or substantially all the corporate property not in the ordinary course of business. See Proposed sections 10.03, 11.03, and 12.02. See also sections 8.70-8.73, which impose a special voting requirements for shareholder approval of conflict of interest transactions entered into by members of the board of directors.

* * * * *

AMENDMENTS TO ORIGINAL SECTION
Laws 2009, ch. 189, §18 (eff. 7-26-09) *(amends only subsections (1) and (3))*
(1) Shares entitled to vote as a separate voting group may ~~take~~ approve a corporate action ~~on a matter~~ at a meeting only if a quorum of those shares exists with respect to that ~~matter~~corporate action. Unless the articles of incorporation or this title provide otherwise, a majority of the votes entitled to be cast on the ~~matter~~ corporate action by the voting group constitutes a quorum of that voting group for ~~action on that matter~~ approval of that corporate action.

(3) If a quorum exists, a corporate action ~~on a matter~~, other than the election of directors, is approved by a voting group if the votes cast within the voting group favoring the corporate action exceed the votes cast within the voting group opposing the corporate action, unless the articles of incorporation or this title require a greater number of affirmative votes.

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.07.260
ACTION BY SINGLE AND MULTIPLE VOTING GROUPS

CURRENT SECTION

(1) If the articles of incorporation or this title provide for voting on a corporate action by all shares entitled to vote thereon, voting together as a single voting group and do not provide for separate voting by any other voting group or groups with respect to that corporate action, that corporate action is approved when voted upon by that single voting group as provided in RCW 23B.07.250.

(2) If the articles of incorporation or this title provide for voting by two or more voting groups on a corporate action, that corporate action is approved only when voted upon by each of those voting groups as provided in RCW 23B.07.250.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §74 (eff. 7-1-90)

(1) If the articles of incorporation or this title provide for voting by a single voting group on a matter, action on that matter is taken when voted upon by that voting group as provided in RCW 23B.07.250.

(2) If the articles of incorporation or this title provide for voting by two or more voting groups on a matter, action on that matter is taken only when voted upon by each of those voting groups counted separately as provided in RCW 23B.07.250. Action may be taken by one voting group on a matter even though no action is taken by another voting group entitled to vote on the matter.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3027-28 (1989)

Section 7.26 Action By Single and Multiple Voting Groups.

Proposed subsection 7.26(a) provides that when a matter is to be voted upon by a single voting group, action is taken when the voting group votes upon the action as provided in Proposed section 7.25.

Proposed subsection 7.26(b) basically requires that if more than one voting group is entitled to vote on a matter, favorable action on a matter is taken only when it is voted upon favorably by each voting group, counted separately. Implicit in this section are the concepts that (1) different quorum and voting requirements may be applicable to different matters considered at a single meeting and (2) different quorum and voting requirements may be applicable to different voting groups voting on the same matter. Thus, each group entitled to vote must independently meet the quorum and voting requirements established by Proposed section 7.25. But if a quorum is present for one or more voting groups but not for all voting groups, Proposed subsection 7.26(b) provides that the voting groups for which a quorum is present may vote upon the matter.

A single meeting, furthermore, may consider matters on which action by several voting groups is required and also matters on which only a single voting group may act. Action may be taken on the matters on which the single voting group may act even though no quorum is present to take action on other matters. For example, in a corporation with one class of nonvoting shares with preferential rights ("preferred shares") and one class of general voting shares without preferential rights ("common shares"), a matter to be considered at the annual meeting may be a proposed amendment to the articles of incorporation that reduces the cumulative dividend right of the preferred shares (a matter on which the preferred shares have a statutory right to vote as a separate voting group). Other matters to be considered may include the election of directors and the appointment of an auditor, both matters on which the preferred shares have no vote. If a quorum of the voting group consisting of the common shares is present but no quorum of

the voting group consisting of the preferred shares is present, the common shares may proceed to elect directors and appoint the auditor. The common shares voting group may also vote to approve the proposed amendment to the articles of the incorporation, but that amendment will not be approved until the preferred shares voting group also votes to approve the amendment.

As described in Proposed subsection 7.26(b), if voting by multiple voting groups is required, the votes of members of each voting group must be separately tabulated. Often each class or series of shares will participate in only a single voting group. But since holders of shares entitled by the articles of incorporation to vote generally on a matter are always entitled to vote in the voting group consisting of the general voting shares, in some instances classes or series of shares may be entitled to be counted simultaneously in two voting groups. This will occur whenever a class or series of shares entitled to vote generally on a matter under the articles of incorporation is affected by the matter in a way that gives rise to the right to vote separately as well as generally, and to have its votes cast under the special voting right counted separately as an independent voting group under the Act. For example, assume that non-public corporation Y has outstanding one class of general voting shares without preferential rights ("common shares"), 600 shares issued, and one class of shares with preferential rights ("preferred shares"), 300 shares issued, that also have full voting rights under the articles of incorporation, i.e, the preferred may vote for election of directors and on all other matters on which common may vote. The preferred and the common therefore are part of the general voting group. The directors propose to amend the articles to create a new class of nonvoting shares that will have preferential rights senior to the existing preferred's preferential rights. All shares are present at the meeting and they divide as follows on the proposal to adopt the amendment:

Yes	_	Common	310
	_	Preferred	300
No	_	Common	290
	_	Preferred	0

Both the preferred and the common are entitled to vote on the amendment to the articles of incorporation since they are part of a general voting group pursuant to the articles. But the vote of the preferred is also entitled to be counted separately on the proposal by Proposed subsection 10.04(a)(7) of the Proposed Act. The result is that the proposal passes with the required 2/3rds votes: 610 to 290 in the voting group consisting of the shares entitled to vote generally; and 300 to 0 in the voting group consisting solely of the preferred shares:

(a) First voting group

Yes:	Common	310
	Preferred	300
		610
No:	Common	290
	Preferred	0
		290

(b) Second voting group (preferred)

Yes:	Preferred	300
No:	Preferred	0

AMENDMENTS TO ORIGINAL SECTION
Laws 2003, ch. 35, §2 (eff. 7-27-03)
(1) If the articles of incorporation or this title provide for voting ~~by~~ on a matter by all shares entitled to vote thereon, voting together as a single voting group ~~on a matter~~ and do not provide for separate voting by any other voting group or groups with respect to that matter, action on that matter is taken when voted upon by that single voting group as provided in RCW 23B.07.250.
(2) If the articles of incorporation or this title provide for voting by two or more voting groups on a matter, action on that matter is taken only when voted upon by each of those voting groups ~~counted separately~~ as provided in RCW 23B.07.250. ~~Action may be taken by one voting group on a matter even though no action is taken by another voting group entitled to vote on the matter.~~

CARC COMMENTARY
The proposed changes to RCW 23B.07.260 are meant to clarify that action can be taken by a single voting group only when there are no other voting groups, and that action cannot be taken by fewer than all of the voting groups entitled to vote on a matter.

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Laws 2009, ch. 189, §19 (eff. 7-26-09)
(1) If the articles of incorporation or this title provide for voting on a ~~matter~~ corporate action by all shares entitled to vote thereon, voting together as a single voting group and do not provide for separate voting by any other voting group or groups with respect to that ~~matter~~corporate action, ~~action on that matter is taken~~that corporate action is approved when voted upon by that single voting group as provided in RCW 23B.07.250.
(2) If the articles of incorporation or this title provide for voting by two or more voting groups on a ~~matter~~ corporate action, ~~action on that matter is taken~~ that corporate action is approved only when voted upon by each of those voting groups as provided in RCW 23B.07.250.

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.07.270
GREATER OR LESSER QUORUM OR VOTING REQUIREMENTS

CURRENT SECTION

(1) The articles of incorporation may provide for a greater or lesser quorum, but not less than one-third of the votes entitled to be cast, for shareholders, or voting groups of shareholders, than is provided for by this title.

(2) The articles of incorporation may provide for a greater voting requirement for shareholders, or voting groups of shareholders, than is provided for by this title.

(3) Under RCW 23B.10.030, 23B.11.030, 23B.12.020, and 23B.14.020, the articles of incorporation may provide for a lesser vote than is otherwise prescribed in those sections or for a lesser vote by separate voting groups, so long as the vote provided for each voting group entitled to vote separately on the plan or transaction is not less than a majority of all the votes entitled to be cast on the plan or transaction by that voting group.

(4) Except as provided in subsection (5) of this section, an amendment to the articles of incorporation that adds, changes, or deletes a greater or lesser quorum or voting requirement for a particular corporate action must meet the same quorum requirement and be adopted by the same vote and voting groups as are required under the quorum and voting requirements then in effect for approval of the corporate action.

(5) An amendment to the articles of incorporation that adds, changes, or deletes a greater or lesser quorum or voting requirement for a merger, share exchange, sale of substantially all assets, or dissolution must be adopted by the same vote and voting groups as are required under the quorum and voting requirements then in effect for approval of the particular corporate action, or the quorum and voting requirements then in effect for amendments to articles of incorporation, whichever is greater.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §75 (eff. 7-1-90)

(1) The articles of incorporation may provide for a greater or lesser quorum, but not less than one-third of the votes entitled to be cast, for shareholders, or voting groups of shareholders, than is provided for by this title.

(2) The articles of incorporation may provide for a greater voting requirement for shareholders, or voting groups of shareholders, than is provided for by this title.

(3) Under RCW 23B.10.030, 23B.11.030, 23B.12.020, and 23B.14.020, the articles of incorporation may provide for a lesser vote than is otherwise prescribed in those sections or for a lesser vote by separate voting groups, so long as the vote provided for each voting group entitled to vote separately on the plan or transaction is not less than a majority of all the votes entitled to be cast on the plan or transaction by that voting group.

(4) An amendment to the articles of incorporation that adds, changes, or deletes a greater or lesser quorum or voting requirement must meet the same quorum requirement and be adopted by the same vote and voting groups required to take action under the quorum and voting requirements then in effect.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3028-29 (1989)
Section 7.27 Greater or Lesser Quorum or Voting Requirements.
Proposed subsections 7.27(a) and (b) permit the articles of incorporation to increase the quorum or voting requirements for approval of an action by shareholders up to any desired amount including unanimity. These provisions may relate to ordinary or routine actions by the general voting group (which otherwise may be acted upon under Proposed section 7.25 if the number of affirmative votes exceeds the number of negative votes at a meeting at which a quorum of that voting group is present), or to one or more other voting groups, or to actions for which the Proposed Act provides a greater voting requirement--for example, changes of a fundamental nature in the corporation like certain amendments to articles of incorporation (section 10.03), mergers (section 11.03), sales of all or substantially all the property of a corporation not in the ordinary course of business (section 12.02), and dissolution (section 14.02). Unless the articles of incorporation reduce the required vote to a majority of shares entitled to vote on the matter, the Proposed Act requires these fundamental changes to receive the affirmative vote of two-thirds of the votes entitled to be cast on the proposal by each voting group entitled to vote thereon (rather than by a plurality of the shares voting affirmatively or negatively at a meeting at which a quorum is present). Proposed subsection 7.27(c) recognizes the right to reduce under Proposed sections 10.03, 11.03, 12.02 and 14.02 the required vote to a majority of shares entitled to vote on the matter.

Proposed subsection 7.27(d) requires that any amendment of the articles of incorporation that adds, modifies, or repeals a greater or lesser quorum or voting requirement must be approved by the quorum and vote requirements then in effect. Thus, a supermajority provision in the articles of incorporation that requires an 80 percent affirmative vote of all eligible votes of a voting group present at the meeting may not be removed from the articles of incorporation or reduced in any way except by an 80 percent affirmative vote. Similarly, an amendment to the articles of incorporation to reduce the required vote for a sale of substantially all assets (pursuant to section 12.02) from the statutory requirement of two-thirds of all votes entitled to be cast to a majority of all votes entitled to be cast on such action would require a vote of two-thirds of the votes entitled to be cast.

Proposed subsection 7.27(a) also permits the articles of incorporation to decrease the quorum below a majority of votes entitled to be cast, provided that the quorum may not be less than one-third of the votes entitled to be cast. The required vote and quorum for such action would be the vote and quorum requirements then in effect. The Committee rejected the RMA provision on quorum (which would have permitted decreases without any such limit) in favor of retaining the standard set in current law.

AMENDMENTS TO ORIGINAL SECTION
Laws 1990, ch. 178, §11 (eff. 7-1-90) *(amends only subsection (4) and adds (5))*
(4) Except as provided in subsection (5) of this section, a~~A~~n amendment to the articles of incorporation that adds, changes, or deletes a greater or lesser quorum or voting requirement for a particular corporate action must meet the same quorum requirement and be adopted by the same vote and voting groups required to take action under the quorum and voting requirements then in effect for the corporate action.
(5) An amendment to the articles of incorporation that adds, changes, or deletes a greater or lesser quorum or voting requirement for a merger, share exchange, sale of substantially all assets, or dissolution must be adopted by the same vote and voting groups required to take action under the quorum and voting requirements then in effect for the particular corporate action, or the quorum and voting requirements then in effect for amendments to articles of incorporation, whichever is greater.

CARC COMMENTARY
The amendments to RCW 23B.07.270(4) and (5) are intended to eliminate possible confusion as to the voting requirements to amend articles of incorporation when the purpose of the amendment is to change voting requirements for mergers, share exchanges, sales of substantially all assets other than the regular course of business, and dissolutions. The question is acute where the corporation either by statute, or by shareholder action, has a vote required for amendments to

articles of incorporation that is greater or less than the vote then required for the particular corporate action. RCW 23B.07.270, as amended, overrides any contrary implication in RCW 23B.10.030, and requires any such amendment to be approved by the greater of the vote requirements. Examples:

1. A public company with one class of shares outstanding desires to have shareholders vote to reduce the vote required for approval of a merger from two-thirds of outstanding shares to a majority of outstanding shares. Under RCW 23B.10.030, the vote required to amend the articles of incorporation of a public company is generally a majority of outstanding shares. However, under RCW 23B.07.270(5) the vote required for an amendment to the articles of incorporation to reduce the vote required for a merger will be the vote then in effect for a merger, two-thirds of outstanding shares, since that vote is greater than the vote required to amend articles of incorporation.

2. A non-public company with a single class of shares outstanding has previously amended its articles of incorporation to require the vote of 90 percent of outstanding shares to amend its articles of incorporation. A proposal to amend its articles of incorporation to change the vote required for a merger, either down to majority of outstanding shares or up to 90 percent or less, will require the vote of 90 percent of outstanding shares, the greater of the two votes. On the other hand, a proposal to amend its articles to increase the vote required for a merger to 100 percent of outstanding shares would require the vote of 100 percent.

Laws 2009, ch. 189, §20 (eff. 7-26-09) *(amends only subsections (4) and (5))*
(4) Except as provided in subsection (5) of this section, an amendment to the articles of incorporation that adds, changes, or deletes a greater or lesser quorum or voting requirement for a particular corporate action must meet the same quorum requirement and be adopted by the same vote and voting groups as are required ~~to take action~~ under the quorum and voting requirements then in effect for approval of the corporate action.
(5) An amendment to the articles of incorporation that adds, changes, or deletes a greater or lesser quorum or voting requirement for a merger, share exchange, sale of substantially all assets, or dissolution must be adopted by the same vote and voting groups as are required ~~to take action~~ under the quorum and voting requirements then in effect for approval of the particular corporate action, or the quorum and voting requirements then in effect for amendments to articles of incorporation, whichever is greater.

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.07.280
VOTING FOR DIRECTORS – CUMULATIVE VOTING

CURRENT SECTION

(1) Unless otherwise provided in the articles of incorporation, shareholders entitled to vote at any election of directors are entitled to cumulate votes by multiplying the number of votes they are entitled to cast by the number of directors for whom they are entitled to vote and to cast the product for a single candidate or distribute the product among two or more candidates.

(2) Unless otherwise provided in the articles of incorporation or in a bylaw adopted under RCW 23B.10.205, in any election of directors the candidates elected are those receiving the largest numbers of votes cast by the shares entitled to vote in the election, up to the number of directors to be elected by such shares.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §76 (eff. 7-1-90)

(1) Unless otherwise provided in the articles of incorporation, shareholders entitled to vote at any election of directors are entitled to cumulate votes by multiplying the number of votes they are entitled to cast by the number of directors for whom they are entitled to vote and to cast the product for a single candidate or distribute the product among two or more candidates.

(2) Unless otherwise provided in the articles of incorporation, in any election of directors the candidates elected are those receiving the largest numbers of votes cast by the shares entitled to vote in the election, up to the number of directors to be elected by such shares.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3029 (1989)

Section 7.28 Voting for Directors; Cumulative Voting.

Proposed subsection 7.28(a) continues the approach in old RCW 23A.08.300 regarding cumulative voting: a corporation has cumulative voting in elections of directors unless its articles of incorporation provide otherwise. The Committee's concern with the RMA approach was that many small corporations have relied on the current statutory structure in erecting control arrangements. The affairs of those corporations would have been dramatically affected if the RMA change were adopted. Moreover, corporations for which cumulative voting is not appropriate have long since eliminated it by article of incorporation provisions.

For similar reasons, Proposed section 7.28 omits RMA §7.28(d). That provision, in the name of notice to shareholders, appears to undercut substantially the right to vote cumulatively where it exists.

Proposed subsection 7.28(b) provides that directors are elected by a plurality of the votes cast in an election of directors at a meeting at which a quorum is present of the voting group entitled to participate in the election. A "plurality" means that the individuals with the largest numbers of votes are elected as directors up to the maximum number of directors to be chosen at the election. In elections in which several factions are competing within a voting group, the individuals elected may have fewer than a majority of all the votes cast in the election. The articles of incorporation or bylaws of the corporation may, however, provide different voting requirements for the election of directors.

The entire board of directors may be elected by a single voting group or the articles of incorporation may provide that different voting groups are entitled to elect a designated number or fraction of the board of directors. See Proposed section 8.04.

Under Proposed subsection 7.28(a) each corporation may determine whether or not to elect its directors by cumulative voting. If directors are elected by different voting groups, the articles of incorporation may provide that specified voting groups are entitled to vote cumulatively while others are not. Cumulative voting affects the manner in which votes may be cast by shares participating in the election but does not affect the plurality principle set forth in Proposed subsection 7.28(b).

AMENDMENTS TO ORIGINAL SECTION
Laws 2009, ch. 189, §21 (eff. 7-26-09) *(amends only subsection (2))*
(2) Unless otherwise provided in the articles of incorporation or in a bylaw adopted under RCW 23B.10.205, in any election of directors the candidates elected are those receiving the largest numbers of votes cast by the shares entitled to vote in the election, up to the number of directors to be elected by such shares.

CARC COMMENTARY
Subsection (2) is amended to provide consistency with the 2007 amendment adding RCW 23B.10.205.

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RCW 23B.07.320
AGREEMENTS AMONG SHAREHOLDERS – ACQUISITION OF SHARES AFTER AGREEMENT

CURRENT SECTION

(1) An agreement among the shareholders of a corporation that is not contrary to public policy and that complies with this section is effective among the shareholders and the corporation even though it is inconsistent with one or more other provisions of this title in that it:

(a) Eliminates the board of directors or restricts the discretion or powers of the board of directors;

(b) Governs the approval or making of distributions whether or not in proportion to ownership of shares, subject to the limitations in RCW 23B.06.400;

(c) Establishes who shall be directors or officers of the corporation, or their terms of office or manner of selection or removal;

(d) Governs, in general or in regard to specific matters, the exercise or division of voting power by or between the shareholders and directors or by or among any of them, including use of weighted voting rights or director proxies;

(e) Establishes the terms and conditions of any agreement for the transfer or use of property or the provision of services between the corporation and any shareholder, director, officer, or employee of the corporation or among any of them;

(f) Transfers to one or more shareholders or other persons all or part of the authority to exercise the corporate powers or to manage the business and affairs of the corporation;

(g) Provides a process by which a deadlock among directors or shareholders may be resolved;

(h) Requires dissolution of the corporation at the request of one or more shareholders or upon the occurrence of a specified event or contingency; or

(i) Otherwise governs the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship among the shareholders, the directors, and the corporation, or among any of them.

(2) An agreement authorized by this section shall be:

(a) Set forth in a written agreement that is signed by all persons who are shareholders at the time of the agreement and is made known to the corporation;

(b) Subject to amendment only by all persons who are shareholders at the time of the amendment, unless the agreement provides otherwise; and

(c) Valid for ten years, unless the agreement provides otherwise.

(3) The existence of an agreement authorized by this section shall be noted conspicuously on the front or back of each certificate for outstanding shares or on the information statement required by RCW 23B.06.260(2). If at the time of the agreement the corporation has shares outstanding represented by certificates, the corporation shall recall the outstanding certificates and issue substitute certificates that comply with this subsection. The failure to note the existence of the agreement on the certificate or information statement shall not affect the validity of the agreement or any action taken pursuant to it. Unless the agreement provides

otherwise, any person who acquires outstanding or newly issued shares in the corporation after an agreement authorized by this section has been effected, whether by purchase, gift, operation of law, or otherwise, is deemed to have assented to the agreement and to be a party to the agreement. A purchaser of shares who is aggrieved because he or she at the time of purchase did not have actual or constructive knowledge of the existence of the agreement may either: (a) Bring an action to rescind the purchase within the earlier of ninety days after discovery of the existence of the agreement or two years after the purchase of the shares; or (b) continue to hold the shares subject to the agreement but with a right of action for any damages resulting from nondisclosure of the existence of the agreement. A purchaser shall be deemed to have constructive knowledge of the existence of the agreement if its existence is noted on the certificate or information statement for the shares in compliance with this subsection and, if the shares are not represented by a certificate, the information statement is delivered to the purchaser at or prior to the time of purchase of the shares.

(4) An agreement authorized by this section shall cease to be effective when shares of the corporation are listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national or affiliated securities association.

(5) An agreement authorized by this section that limits the discretion or powers of the board of directors shall relieve the directors of, and impose upon the person or persons in whom such discretion or powers are vested, liability for acts or omissions imposed by law on directors to the extent that the discretion or powers of the directors are limited by the agreement.

(6) The existence or performance of an agreement authorized by this section shall not be a ground for imposing personal liability on any shareholder for the acts or debts of the corporation even if the agreement or its performance treats the corporation as if it were a partnership or results in failure to observe the corporate formalities otherwise applicable to the matters governed by the agreement.

(7) Incorporators or subscribers for shares may act as shareholders with respect to an agreement authorized by this section if no shares have been issued when the agreement is made.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1993, ch. 290, §4 (eff. 7-25-93)

1) An agreement among the shareholders of a corporation that complies with this section is effective among the shareholders and the corporation even though it is inconsistent with one or more other provisions of this title in that it:

(a) Eliminates the board of directors or restricts the discretion or powers of the board of directors;

(b) Governs the authorization or making of distributions whether or not in proportion to ownership of shares, subject to the limitations in RCW 23B.06.400;

(c) Establishes who shall be directors or officers of the corporation, or their terms of office or manner of selection or removal;
(d) Governs, in general or in regard to specific matters, the exercise or division of voting power by or between the shareholders and directors or by or among any of them, including use of weighted voting rights or director proxies;
(e) Establishes the terms and conditions of any agreement for the transfer or use of property or the provision of services between the corporation and any shareholder, director, officer, or employee of the corporation or among any of them;
(f) Transfers to one or more shareholders or other persons all or part of the authority to exercise the corporate powers or to manage the business and affairs of the corporation;
(g) Resolves any issue about which there exists a deadlock among directors or shareholders;
(h) Requires dissolution of the corporation at the request of one or more shareholders or upon the occurrence of a specified event or contingency; or
(i) Otherwise governs the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship among the shareholders, the directors, and the corporation, or among any of them, and is not contrary to public policy.
(2) An agreement authorized by this section shall be:
(a) Set forth in a written agreement that is signed by all persons who are shareholders at the time of the agreement and is made known to the corporation;
(b) Subject to amendment only by all persons who are shareholders at the time of the amendment, unless the agreement provides otherwise; and
(c) Valid for ten years, unless the agreement provides otherwise.
(3) The existence of an agreement authorized by this section shall be noted conspicuously on the front or back of each certificate for outstanding shares or on the information statement required by RCW 23B.06.260(2). If at the time of the agreement the corporation has shares outstanding represented by certificates, the corporation shall recall the outstanding certificates and issue substitute certificates that comply with this subsection. The failure to note the existence of the agreement on the certificate or information statement shall not affect the validity of the agreement or any action taken pursuant to it. Any purchaser of shares who, at the time of purchase, did not have knowledge of the existence of the agreement shall be entitled to rescission of the purchase. A purchaser shall be deemed to have knowledge of the existence of the agreement if its existence is noted on the certificate or information statement for the shares in compliance with this subsection and, if the shares are not represented by a certificate, the information statement is delivered to the purchaser at or prior to the time of purchase of the shares. An action to enforce the right of rescission authorized by this subsection must be commenced within the earlier of ninety days after discovery of the existence of the agreement or two years after the time of purchase of the shares.
(4) An agreement authorized by this section shall cease to be effective when shares of the corporation are listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national or affiliated securities association.
(5) An agreement authorized by this section that limits the discretion or powers of the board of directors shall relieve the directors of, and impose upon the person or persons in whom such discretion or powers are vested, liability for acts or omissions imposed by law on directors to the extent that the discretion or powers of the directors are limited by the agreement.
(6) The existence or performance of an agreement authorized by this section shall not be a ground for imposing personal liability on any shareholder for the acts or debts of the corporation even if the agreement or its performance treats the corporation as if it were a partnership or results in failure to observe the corporate formalities otherwise applicable to the matters governed by the agreement.
(7) Incorporators or subscribers for shares may act as shareholders with respect to an agreement authorized by this section if no shares have been issued when the agreement is made.

CARC COMMENTARY

Shareholders of closely-held corporations, ranging from family businesses to joint ventures owned by large public corporations, frequently enter into agreements that govern the operation of the enterprise. Very early decisions in Washington upheld shareholder agreements that simply

authorized shareholders to pool votes in election of directors. *See, e.g.* Winsor v. Commonwealth Coal Co., 63 Wash. 62 (1911). On the other hand, shareholder agreements that did such things as select officers, set salaries etc. were invalidated by Washington courts for a variety of reasons, including so-called "sterilization" of the board of directors and failure to follow the statutory norms of the applicable corporation act. *See, e.g.* Hampton v. Buchanan, 51 Wash. 155 (1908). The more modern decisions in other jurisdictions reflect a greater willingness to uphold the latter type of shareholder agreement, *see, e.g.* Galler v. Galler, 32 Ill. 2d 16, 203 N.E.2d 577 (1964). In addition, many corporation acts in other states now contain provisions validating such shareholder agreements. Heretofore, however, the Washington Business Corporation Act has never expressly validated shareholder agreements affecting directors' discretion. (The Act for a number of years has authorized provisions in corporate articles of incorporation that limit directors' discretion, or transfer their functions to others. *See* RCW 23B.08.010 as the current example).

Rather than relying on further uncertain and sporadic development of the law in the courts, the proposed section rejects the older line of cases. It adds an important element of predictability currently absent from the Washington Business Corporation Act and affords participants in closely held corporations greater contractual freedom to tailor the rules of their enterprise.

The proposed section is not intended to establish or legitimize an alternative form of corporation. Instead, it is intended to add, within the context of the traditional corporate structure, legal certainty to shareholder agreements that embody various aspects of the business arrangement established by the shareholders to meet their business and personal needs. The subject matter of these arrangements include governance of the entity, allocation of the economic return from the business, and other aspects of the relationships among shareholders, directors and the corporation which are a part of the business arrangement. The proposed section also recognizes that many of the corporate norms continued in the Washington Business Corporation Act, as well as the corporation statutes of most states, were designed with an eye towards public companies, where management and share ownership are quite distinct. *Cf.* O'Neal & Thompson, O'Neal's Close Corporations, section 5.06 (3d ed.). These functions are often conjoined in the close corporation. Thus, the proposed section validates for nonpublic corporations various types of agreements among shareholders even when the agreements are inconsistent with the statutory norms contained in the Washington Business Corporation Act.

Importantly, the proposed section only addresses the parties to the shareholder agreement, their transferees, and the corporation, and does not have any binding legal effect on the state, creditors, or other third person.

The proposed section supplements the other provisions of the Washington Business Corporation Act. If an agreement is not in conflict with another section of the Washington Business Corporation Act, no resort need be made to the propose section, with its requirement of unanimity. For example, special provisions can be included in the articles of incorporation or bylaws with less than unanimous shareholder agreement so long as such provisions are not in conflict with other provisions of the Act. Similarly, the proposed section would not have to be relied upon to validate typical buy-sell agreements among two or more shareholders or the covenants and other terms of a stock purchase agreement entered into in connection with the issuance of shares by a corporation, since that subject is governed by RCW 23B.06.270.

The types of provisions validated by the proposed section are many and varied. Subsection (1) defines the range of permissible subject matter for shareholder agreements largely by illustration, enumerating eight types of agreements that are expressly validate to the extent they would not be valid absent the proposed section. The enumeration of these types of agreements is not exclusive; nor should it give rise to a negative inference that an agreement of a type that is or might be embraced by one of the categories of subsection (1) is, *ipso facto*, a type of agreement that is not

valid unless it complies with the proposed section. Subsection (1) also contains a "catch all" which adds a measure of flexibility to the eight enumerated categories.

Omitted from enumeration in subsection (1) is a provision found in the statutes of many of the states, broadly validating any arrangement the effect of which is to treat the corporation as a partnership. This type of provision was considered to be too elastic and indefinite, as well as unnecessary in light of the more detailed enumeration of permissible subject areas contained in subsection (1). Note, however, that under subsection (6) the fact that an agreement authorized by subsection (1) or its performance treats the corporation as if it were a partnership is not a ground for imposing personal liability on the parties if the agreement is otherwise authorized by subsection (1).

1. SUBSECTION (1)

Subsection (1) is the heart of the proposed section. It states that certain types of agreements are effective among the shareholders and the corporation even if inconsistent with another provision of the Washington Business Corporation Act. Thus, an agreement authorized by the proposed section is, by virtue of that section, "not inconsistent with law" within the meaning of RCW 23B.02.020(5)(c) and is "not in conflict with law" within the meaning of RCW 23B.02.060(4). In contrast, a shareholder agreement that is not inconsistent with any provisions of the Washington Business Corporation Act is not subject to the requirements of the proposed section.

The range of agreements validated by subsection (1) is expansive though not unlimited. The most difficult problem encountered in crafting a shareholder agreement validation provision is to determine the reach of the provision. Some states have tried to articulate the limits of a shareholder agreement validation provision in terms of negative grounds, stating that no shareholder agreement shall be invalid on specified grounds. *See, e.g.*, Del. Code Ann. Tit. 8, sections 350, 354 (1983); N.C. Gen. Stat. Section 55-73(b) (1982). The deficiency in this type of statute is the uncertainty introduced by the ever present possibility of articulating another ground on which to challenge the validity of the agreement. Other states have provided that shareholder agreements may waive or alter all provisions in the corporation act except certain enumerated provisions that cannot be varied. *See, e.g.* Cal. Corp. Code section 300(b)-(c) (West 1989 and Supp. 1990). The difficulty with this approach is that any enumeration of the provisions that can never be varied will almost inevitably be subjective, arbitrary, and incomplete.

The approach chosen in the proposed section is more pragmatic. It defines the types of agreements that can be invalidated largely by illustration. The eight specific categories that are listed are designed to cover the most frequently used arrangements. The outer boundary is provided by subsection (1)(i), which provided an additional "catch all" for any provisions that, in a manner inconsistent with any other provision of the Washington Business Corporation Act, otherwise govern the exercise of the corporate powers, the management of the business and affairs of the corporation, or the relationship between and among the shareholders, the directors, and the corporation or any of them. But even subsection (i) does not empower shareholders to adopt an agreement with provisions that are "contrary to public policy."

Since the provisions of a shareholder agreement authorized by subsection (1) will, in operation, conflict with the literal language of at least one subsection of the Washington Business Corporation Act, and often create ambiguity under one or more sections that the drafter may not have considered, courts should construe all related sections of the Act flexibly and in a manner consistent with the underlying intent of the shareholder agreement. Thus, for example, in the case of an agreement that provides for weighted voting by directors, every reference in the Act to a majority or other proportion of directors should be construed to refer to a majority or other proportion of the votes of the directors.

While the outer limits of the catch-all provision of subsection (1)(i) are left uncertain, the phrase "not contrary to public policy" clearly indicates that there are provisions of the Washington Business Corporation Act that cannot be overridden by resort to the catch-all. Subsection (1)(i), introduced by the term "otherwise," is intended to be read in context with the preceding eight subsections and to be subject to a *ejusdem generis* rule of construction. Thus, in defining the outer limits, courts should consider whether the variation from the Washington Business Corporation Act under consideration is similar to the variations permitted by the first eight subsections. More importantly, subsection (1)(i) is also subject to a public policy limitation, intended to give courts express authority to restrict the scope of the catch-all where there are substantial issues of public policy at stake. For example, a shareholder agreement that provides that the directors of the corporation have no duty of loyalty to the corporation or the shareholders would not be within the purview of subsection (1)(i), because it is not sufficiently similar to the types of arrangements suggested by the first eight subsections of proposed subsection (1) and because such a provision could be viewed as contrary to a public policy of substantial importance. Similarly, a provision that exculpates directors from liability more broadly than permitted by RCW 23B.02.020(5)(i) and RCW 23B.08.320 would not be validated under the proposed section because there are serious public policy reasons which support the few limitations that remain on the right to exculpate directors from liability.

As noted above, shareholder agreements validated by the proposed section are not legally binding on the state, on creditors, or on other third parties. For example, and agreement that dispenses with the need to make corporate filings required by the Washington Business Corporation Act would be ineffective. Similarly, an agreement among shareholders that provides that only the president has authority to enter into contracts for the corporation would not, without more, be binding against third parties, and ordinary principles of agency, including the concept of apparent authority, would continue to apply.

2. SUBSECTION (2)

The proposed section minimizes the formal requirements for a shareholder agreement so as not to restrict unduly the shareholders' ability to take advantage of the flexibility the section provides. Thus, unlike comparable provisions in special close corporation legislation in other states, it is not necessary to "opt in" to a special class of close corporations in order to obtain the benefits of the proposed section. An agreement can be validated under the proposed section whether or not the proposed section is specifically referenced in the agreement. The principle requirements are simply that the agreement be in writing and be approved or agreed to by all persons who are then shareholders. Where the corporation has a single shareholder, the requirement of an "agreement among the shareholders" is satisfied by the unilateral action of the shareholder in establishing the terms of the agreement, or in a writing signed by the sole shareholder. Similarly, while transferees are bound by a valid shareholder agreement, it may be desirable to obtain the affirmative written assent of the transferee at the time of the transfer. Subsection (2) also establishes and permits amendments by less than unanimous agreement if the shareholder agreement so provides.

Section (2) requires unanimous shareholder approval regardless of entitlement to vote. Unanimity is required because an agreement authorized by the proposed section can effect material organic changes in the corporation's operation and structure, and in the rights and obligations of shareholders, even if inconsistent with provisions in the Washington Business Corporation Act.

3. SUBSECTION (3)

Subsection (3) addresses the effect of a shareholder agreement on subsequent purchasers or transferees of shares. Typically, corporations with shareholder agreements also have restrictions on the transferability of the shares as authorized by RCW 23B.06.270, thus lessening the practical effects of the problem in the context of voluntary transferees. Transferees of shares acquiring shares upon the death of an original participant in a close corporation may, however, be heavily impacted. Weighing the burdens on transferees against the burdens on the remaining shareholders in the enterprise, subsection (3) affirms the continued validity of the shareholder agreement on all transferees, whether the transfer occurs by purchase, gift, operation of law, or otherwise. Unlike restrictions on transfer, it may be impossible to enforce a shareholder agreement against less than all of the shareholders. Thus, under the proposed section, one who inherits shares subject to a shareholder agreement must continue to abide by the agreement. If that is not the desired result, care must be exercised at the initiation of the shareholder agreement to ensure a different outcome, such as providing for a buy-back upon death or excluding specified types of transfer.

Where shares are transferred to a purchaser without knowledge of a shareholder agreement, the validity of the agreement is similarly unaffected, but the purchaser is afforded a recission remedy against the seller. The term "purchaser" implies consideration. Under subsection (3) the time at which notice to a purchaser is relevant for determining entitlement to recission is the time when a purchaser acquires the shares rather than when a commitment is made to acquire the shares. If the purchaser learns of the agreement after he or she is committed to purchase but before he or she acquires the shares, he or she should not be permitted to proceed with the purchase and still obtain the benefits of the remedies in subsection (3). Moreover, under contract principles and the securities laws a failure to disclose the existence of a shareholder agreement would in most cases constitute the omission of a material fact and may excuse performance of the commitment to purchase. The term purchaser includes a person acquiring shares newly issued to the corporation or by transfer, and also includes a pledgee, for whom the time of purchase is the time the shares are pledged.

The proposed section addresses the underlying rights that accrue to shares and shareholders and the validity of shareholder action which redefines those rights, as contrasted with questions regarding entitlement to ownership of the security, competing ownership claims, and disclosure issues. Consistent with this dichotomy, the rights and remedies available to purchasers under subsection (3) are independent of those provided by contract law, article 8 of the uniform commercial code, the securities laws, and other law outside the Washington Business Corporation Act. With respect to the related subject of restrictions on transferability of shares, note that the proposed subsection does not directly address or validate such restrictions, which are governed instead by RCW 23B.06.270. However, if such restrictions are adopted as part of a shareholder agreement that complies with the requirements of the proposed section, a court should, in light of the purpose of the proposed section to give participants in close corporations substantial freedom in tailoring the rules governing their enterprises, construe broadly the concept of reasonableness under RCW 23B.06.270 in determining the validity of such restrictions.

Subsection (3) contains an affirmative requirement that the share certificate or information statement for the shares to be legended to note the existence of a shareholder agreement. No specified form of legend is required, and a simple statement the "[t]he shares represented by this certificate are subject to a shareholder agreement" is sufficient. At that point a purchaser must obtain a copy of the shareholder agreement from his or her transferer or proceed at his or her peril. In the event a corporation fails to legend share certificates or information statements, a court may, in an appropriate case, imply a cause of action against the corporation in favor of an injured purchaser without knowledge of a shareholder agreement. The circumstances under which such a

remedy would be implied, the proper measure of damages, and other attributes of and limitations on such an implied remedy are left to development in the courts.

If the purchaser has no actual knowledge of a shareholder agreement, and is not charged with knowledge by virtue of a legend on the certificate or information statement, he or she has recission remedy against his or her transferor (which would be the corporation in the case of a new issue of shares). While the statutory recission remedy provided in subsection (3) does not preclude a court from awarding another remedy (*e.g.*, damages), it is anticipated that recission will be a purchaser's primary remedy.

If the shares are certificated and duly legended, a purchaser is charged with notice of the shareholder agreement even if the purchaser never saw the certificate. Thus, a purchaser is exposed to risk if he or she does not ask to see the certificate at or prior to the purchase of the shares. In the case of the uncertificated shares, however, the purchaser is not charged with notice of the shareholder agreement unless a duly-legended information statement is delivered to the purchaser at or prior to the time of purchase. This different rule for uncertificated shares is intended to provide an additional safeguard to protect innocent purchasers, and is necessary because RCW 23B.06.260(2) and section 8-408 of the UCC permit delivery of information statements after a transfer of shares.

4. SUBSECTION (4)

Subsection (4) contains a self-executing termination provision for a shareholder agreement when the shares of the corporation become publicly held. The statutory norms in the Washington Business Corporation Act become more necessary and appropriate as the number of shareholders increases, as there is greater opportunity to acquire or dispose of an investment in the corporation, and as there is less opportunity for negotiation over the terms under which the enterprise will be conducted. Given that the proposed section requires unanimity, however, in most cases a practical limit on the availability of a shareholder agreement will be reached before a public market develops.

5. **MISCELLANEOUS PROVISIONS**

Subsection (5) through (7) contain a number of technical provisions. Subsection (5) provides a shift of liability from the directors to any person or person in whom the discretion or powers otherwise exercised by the board of directors are vested. A shareholder agreement which provides for such a shift of responsibility, with the concomitant shift of liability provided by subsection (5), could also provide for exculpation from that liability to the extent otherwise authorized by RCW 23B.08.320. The transfer of liability provided by subsection (5) covers liabilities imposed on directors "by law," which is intended to include liabilities arising under the Washington Business Corporation Act, the common law, and statutory law outside the Act. Nevertheless, there could be cases where subsection (5) is ineffective and where a director is exposed to liability *qua* director, even though under a shareholder agreement he or she may have given up some or all of the powers normally exercised by directors.

Subsection (6) narrows the grounds for imposing personal liability on shareholders under the disregard of corporate entity doctrine for the liabilities of a corporation for acts or omissions authorized by a shareholder agreement validated by the proposed section. Subsection (7) addresses shareholder agreements for corporations that are in the process of being organized and do not yet have shareholders.

* * * * *

AMENDMENTS TO ORIGINAL SECTION
Laws 1995, ch. 47, §6 (eff. 7-23-95) *(amends only subsections (1) and (3) of original)*
(1) An agreement among the shareholders of a corporation that is not contrary to public policy and that complies with this section is effective among the shareholders and the corporation even though it is inconsistent with one or more other provisions of this title in that it:
(a) Eliminates the board of directors or restricts the discretion or powers of the board of directors;
(b) Governs the authorization or making of distributions whether or not in proportion to ownership of shares, subject to the limitations in RCW 23B.06.400;
(c) Establishes who shall be directors or officers of the corporation, or their terms of office or manner of selection or removal;
(d) Governs, in general or in regard to specific matters, the exercise or division of voting power by or between the shareholders and directors or by or among any of them, including use of weighted voting rights or director proxies;
(e) Establishes the terms and conditions of any agreement for the transfer or use of property or the provision of services between the corporation and any shareholder, director, officer, or employee of the corporation or among any of them;
(f) Transfers to one or more shareholders or other persons all or part of the authority to exercise the corporate powers or to manage the business and affairs of the corporation;
(g) ~~Resolves any issue about which there exists~~ Provides a process by which a deadlock among directors or shareholders may be resolved;
(h) Requires dissolution of the corporation at the request of one or more shareholders or upon the occurrence of a specified event or contingency; or
(i) Otherwise governs the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship among the shareholders, the directors, and the corporation, or among any of them~~, and is not contrary to public policy~~.

* * * * *

(3) The existence of an agreement authorized by this section shall be noted conspicuously on the front or back of each certificate for outstanding shares or on the information statement required by RCW 23B.06.260(2). If at the time of the agreement the corporation has shares outstanding represented by certificates, the corporation shall recall the outstanding certificates and issue substitute certificates that comply with this subsection. The failure to note the existence of the agreement on the certificate or information statement shall not affect the validity of the agreement or any action taken pursuant to it. ~~Any purchaser of shares who, at the time of purchase, did not have knowledge of the existence of the agreement shall be entitled to rescission of the purchase.~~ Unless the agreement provides otherwise, any person who acquires outstanding or newly issued shares in the corporation after an agreement authorized by this section has been effected, whether by purchase, gift, operation of law, or otherwise, is deemed to have assented to the agreement and to be a party to the agreement. A purchaser of shares who is aggrieved because he or she at the time of purchase did not have actual or constructive knowledge of the existence of the agreement may either: (a) Bring an action to rescind the purchase within the earlier of ninety days after discovery of the existence of the agreement or two years after the purchase of the shares; or (b) continue to hold the shares subject to the agreement but with a right of action for any damages resulting from nondisclosure of the existence of the agreement. A purchaser shall be deemed to have constructive knowledge of the existence of the agreement if its existence is noted on the certificate or information statement for the shares in compliance with this subsection and, if the shares are not represented by a certificate, the information statement is delivered to the purchaser at or prior to the time of purchase of the shares. ~~An action to enforce the right of rescission authorized by this subsection must be commenced within the earlier of ninety days after discovery of the existence of the agreement or two years after the time of purchase of the shares.~~

CARC COMMENTARY
The Committee proposes three clarifying amendments to RCW 23B.07.320: (a) the public policy limitation on shareholders' agreements is moved from subsection (1)(i) to the opening clause in subsection (1)(b); an ambiguity in subsection (1)(g) regarding deadlock resolving devices is

removed; and (c) subsection (3) is amended to clarify the rights of any transferee of shares subject to a shareholders' agreement. The first two proposed amendments are technical. The Committee assumed when RCW 23B.07.320 was first proposed that it was a condition of the validity of any shareholders' agreement that it not be contrary to public policy. It is now felt, however, that the current placement of the language articulating the requirement in current subsection (1)(i) both de-emphasizes the requirement and causes major confusion about the operation of subsection (1). The proposed amendment to subsection (1)(g) is meant only to clarify the original provision by eliminating any argument that a shareholders' agreement related to potential deadlocks was valid only if it *resolved* any such deadlock. The clause was originally intended to validate shareholders' agreements that provided a mechanism, or a device, for resolving a deadlock (*e.g.*, by arbitration).

The proposed amendment to subsection (3) is designed to eliminate substantial ambiguities in the current language governing rights of transferees of shares subject to a shareholders' agreement. The current statute states "any purchaser of shares who, at the time of purchase, did not have knowledge of the existence of the agreement shall be entitled to recission of the purchase." The original commentary to this sentence indicated its implications were more important than its explicit language. The words "any purchaser" were meant to imply that all types of transferees were bound by the shareholders' agreement. That important implication is now explicitly stated in the amendment. Similarly, the original sentence was unclear as to the impact of the existence of a purchaser's right to rescind upon the purchaser's other remedies. The amendment indicates that the right to rescind in such circumstances is in addition to other remedies the purchaser may have.

* * * * *

Laws 2009, ch. 189, §22 (eff. 7-26-09) *(amends only subsection (1)(b))*
(1)(b) Governs the ~~authorization~~ approval or making of distributions whether or not in proportion to ownership of shares, subject to the limitations in RCW 23B.06.400;

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.

* * * * *

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.08.030
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.

* * * * *

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").*

* * * * *

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.

* * * * *

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.

* * * * *

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.

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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.

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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.08.250
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.08.500
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.08.550
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.08.700
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.08.720
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.08.900
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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Title 23B RCW
Washington Business Corporation Act

Chapter 23B.10 RCW
AMENDMENT OF ARTICLES OF INCORPORATION AND BYLAWS

RCW23B.10.020
AMENDMENT OF ARTICLES OF INCORPORATION BY BOARD OF DIRECTORS

CURRENT SECTION

Unless the articles of incorporation provide otherwise, a corporation's board of directors may adopt one or more amendments to the corporation's articles of incorporation without shareholder approval:

(1) If the corporation has only one class of shares outstanding, to provide, change, or eliminate any provision with respect to the par value of any class of shares;

(2) To delete the names and addresses of the initial directors;

(3) To delete the name and address of the initial registered agent or registered office, if a statement of change is on file with the secretary of state;

(4) If the corporation has only one class of shares outstanding, solely to:

(a) Effect a forward split of, or change the number of authorized shares of that class in proportion to a forward split of, or stock dividend in, the corporation's outstanding shares; or

(b) Effect a reverse split of the corporation's outstanding shares and the number of authorized shares of that class in the same proportions;

(5) To change the corporate name; or

(6) To make any other change expressly permitted by this title to be made without shareholder approval.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165 §121 (eff. 7-1-90)

Unless the articles of incorporation provide otherwise, a corporation's board of directors may adopt one or more amendments to the corporation's articles of incorporation without shareholder action:

(1) If the corporation has only one class of shares outstanding, to provide, change, or eliminate any provision with respect to the par value of any class of shares;

(2) To delete the names and addresses of the initial directors;

(3) To delete the name and address of the initial registered agent or registered office, if a statement of change is on file with the secretary of state;

(4) If the corporation has only one class of shares outstanding, solely to change the number of authorized shares to effectuate a split of, or stock dividend in, the corporation's own shares, or solely to do so and to change the number of authorized shares in proportion thereto;

(5) To change the corporate name; or

(6) To make any other change expressly permitted by this title to be made without shareholder action.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3074-75 (1989)

Section 10.02 Amendment of Articles of Incorporation By Board of Directors.

The amendments described in clauses (1) through (6) are thought to be so routine and "housekeeping" in nature as not to require action by shareholders. None affects substantive rights in any meaningful way. For example, Proposed subsection 10.02(1) authorizes amendments by the board of directors to provide, change, or eliminate the par value of any class of shares if the corporation has only one class of shares outstanding. Similarly, Proposed subsections 10.02(2) and (3) authorize the board of directors to delete the

names of initial directors, or the name and address of the initial registered agent and registered office, set forth in the original articles if that information is obsolete. Proposed subsection 10.02(4) authorizes the board of directors to change the number of authorized shares to effectuate a split of, or stock dividend in, the corporation's own shares, if the corporation has only one class of shares outstanding. Proposed subsection 10.02(5) authorizes name changes without shareholder approval.

Proposed subsection 10.02(6) recognizes that other sections of the Proposed Act expressly permit other amendments to be made by the board of directors without prior shareholder approval. Examples of these include Proposed section 6.02 (creation of series of shares pursuant to authority already granted in the articles) and Proposed section 6.31 (cancellation of reacquired shares if the articles provide they are not to be reissued).

Amendments provided for in this section may be included in restated articles of incorporation under Proposed section 10.07 or in articles of merger under chapter 11.

The Committee deleted the RMA subsection empowering directors to extend the duration of a corporation incorporated at a time when limited duration was required by law. It felt that that provision overlapped specific reinstatement procedures, available for limited time periods, in the old act, and would thus cause confusion.

AMENDMENTS TO ORIGINAL SECTION
Laws 2003, Ch. 35, §3 (eff. 7-23-03)

Unless the articles of incorporation provide otherwise, a corporation's board of directors may adopt one or more amendments to the corporation's articles of incorporation without shareholder action:
(1) If the corporation has only one class of shares outstanding, to provide, change, or eliminate any provision with respect to the par value of any class of shares;
(2) To delete the names and addresses of the initial directors;
(3) To delete the name and address of the initial registered agent or registered office, if a statement of change is on file with the secretary of state;
(4) If the corporation has only one class of shares outstanding, solely to:
(a) Effect a forward split of, or change the number of authorized shares of that class in proportion to ~~effectuate~~ a forward split of, or stock dividend in, the corporation's ~~own~~ outstanding shares ~~, or solely to do so and to change the number of authorized shares in proportion thereto~~; or
(b) Effect a reverse split of the corporation's outstanding shares and the number of authorized shares of that class in the same proportions;
(5) To change the corporate name; or
(6) To make any other change expressly permitted by this title to be made without shareholder action.

CARC COMMENTARY

The proposed changes to RCW 23B.10.020 address ambiguities in the current statute as to whether a board of directors, acting on its own, can approved articles amendments in connection with a reverse stock split, and if so, whether the number of authorized shares must also be reduced in the same proportion as the reverse split. The proposed changes recognize that a board of directors should have the power to effect a reverse split that does not change the proportional relationship between outstanding shares and authorized but unissued shares. The proposed changes leave intact the current philosophy of the statute that fractional-share squeeze-outs are procedurally permissible, subject to potential dissenters' rights under RCW 23B.13.020(1)(d) and judicial relief under appropriate circumstances (see original Commentary to RCW 23B.13.020).

Laws 2009, ch. 189, §31 (eff. 7-26-09)*(amends only introductory paragraph and subsection (6))*
Unless the articles of incorporation provide otherwise, a corporation's board of directors may adopt one or more amendments to the corporation's articles of incorporation without shareholder ~~action~~ approval:

(6) To make any other change expressly permitted by this title to be made without shareholder ~~action~~ approval.

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.10.060
ARTICLES OF AMENDMENT

CURRENT SECTION

A corporation amending its articles of incorporation shall deliver to the secretary of state for filing articles of amendment setting forth:

(1) The name of the corporation;

(2) The text of each amendment adopted;

(3) If an amendment provides for an exchange, reclassification, or cancellation of issued shares, provisions for implementing the amendment if not contained in the amendment itself;

(4) The date of each amendment's adoption;

(5) If an amendment was adopted by the incorporators or board of directors without shareholder approval, a statement to that effect and that shareholder approval was not required; and

(6) If shareholder approval was required, a statement that the amendment was duly approved by the shareholders in accordance with the provisions of RCW 23B.10.030 and 23B.10.040.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §125 (eff. 7-1-90)

A corporation amending its articles of incorporation shall deliver to the secretary of state for filing articles of amendment setting forth:

(1) The name of the corporation;

(2) The text of each amendment adopted;

(3) If an amendment provides for an exchange, reclassification, or cancellation of issued shares, provisions for implementing the amendment if not contained in the amendment itself;

(4) The date of each amendment's adoption;

(5) If an amendment was adopted by the incorporators or board of directors without shareholder action, a statement to that effect and that shareholder action was not required; and

(6) If shareholder action was required, a statement that the amendment was duly approved by the shareholders in accordance with the provisions of RCW 23B.10.030 and 23B.10.040.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3077 (1989)

Section 10.06 Articles of Amendment.

The articles of amendment must set forth both the amendment itself and the manner in which it was adopted. In the case of an amendment approved by shareholder vote (Proposed section 10.03 and 10.04), the articles must state that the amendment was duly approved by the shareholders in accordance with the provisions of sections 10.03 and 10.04.

Proposed subsection 10.06(3) requires the articles of amendment to contain a statement of the manner in which an exchange, reclassification, or cancellation of issued shares is to be put into effect if not set forth in the amendment itself. This requirement avoids any possible confusion that may arise as to how the amendment is to be put into effect and also permits the amendment itself to be limited to provisions of permanent applicability, with transitional provisions having no long-range effect appearing only in the articles of amendment.

AMENDMENTS TO ORIGINAL SECTION
Laws 2009, ch. 189, §32 (eff. 7-26-09)*(amends only subsections (5) and (6))*
(5) If an amendment was adopted by the incorporators or board of directors without shareholder ~~action~~ approval, a statement to that effect and that shareholder ~~action~~ approval was not required; and
(6) If shareholder ~~action~~ approval was required, a statement that the amendment was duly approved by the shareholders in accordance with the provisions of RCW 23B.10.030 and 23B.10.040.

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.

* * * * *

RCW 23B.10.070
RESTATED ARTICLES OF INCORPORATION

CURRENT SECTION

(1) Any officer of the corporation may restate its articles of incorporation at any time.

(2) A restatement may include one or more amendments to the articles of incorporation. If the restatement includes an amendment not requiring shareholder approval, it must be adopted by the board of directors. If the restatement includes an amendment requiring shareholder approval, it must be adopted in accordance with RCW 23B.10.030.

(3) If the board of directors submits a restatement for shareholder action, the corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with RCW 23B.07.050. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the proposed restatement and contain or be accompanied by a copy of the restatement that identifies any amendment or other change it would make in the articles of incorporation.

(4) A corporation restating its articles of incorporation shall deliver to the secretary of state for filing articles of restatement setting forth the name of the corporation and the text of the restated articles of incorporation together with a certificate setting forth:

(a) If the restatement does not include an amendment to the articles of incorporation, a statement to that effect;

(b) If the restatement contains an amendment to the articles of incorporation not requiring shareholder approval, a statement that the board of directors adopted the restatement and the date of such adoption;

(c) If the restatement contains an amendment to the articles of incorporation requiring shareholder approval, the information required by RCW 23B.10.060; and

(d) Both the articles of restatement and the certificate must be executed.

(5) Duly adopted restated articles of incorporation supersede the original articles of incorporation and all amendments to them.

(6) The secretary of state may certify restated articles of incorporation, as the articles of incorporation currently in effect, without including the certificate information required by subsection (4) of this section.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §126 (eff. 7-1-90)

(1) Any officer of the corporation may restate its articles of incorporation at any time.

(2) A restatement may include one or more amendments to the articles of incorporation. If the restatement includes an amendment not requiring shareholder approval, it must be adopted by the board of directors. If the restatement includes an amendment requiring shareholder approval, it must be adopted in accordance with RCW 23B.10.030.

(3) If the board of directors submits a restatement for shareholder action, the corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with

RCW 23B.07.050. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the proposed restatement and contain or be accompanied by a copy of the restatement that identifies any amendment or other change it would make in the articles of incorporation.
(4) A corporation restating its articles of incorporation shall deliver to the secretary of state for filing articles of restatement setting forth the name of the corporation and the text of the restated articles of incorporation together with a certificate setting forth:
(a) If the restatement does not include an amendment to the articles of incorporation, a statement to that effect;
(b) If the restatement contains an amendment to the articles of incorporation not requiring shareholder approval, a statement that the board of directors adopted the restatement and the date of such adoption;
(c) If the restatement contains an amendment to the articles of incorporation requiring shareholder approval, the information required by RCW 23B.10.060; and
(5) Duly adopted restated articles of incorporation supersede the original articles of incorporation and all amendments to them.
(6) The secretary of state may certify restated articles of incorporation, as the articles of incorporation currently in effect, without including the certificate information required by subsection (4) of this section.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3077 (1989)
Section 10.07 Restated Articles of Incorporation.
Restated articles of incorporation serve the useful purpose of permitting articles of incorporation that have been amended from time to time to be consolidated into a single document. Such a restatement may also eliminate "historical" or obsolete provisions that have no present relevance. A restatement of articles of incorporation that does not involve any substantive change in the articles may be made by any officer of the corporation. The Committee deleted the RMA requirement of directors' action for such simple restatements on the ground that they were purely ministerial and therefore should not require director approval. If the restatement amends the articles of incorporation, either director (in the case of amendments described in Proposed section 10.02) or shareholder approval of the restatement must be obtained.

It restated articles are submitted to the shareholders, the notice of meeting should identify changes in the articles that may reasonably be viewed as more than mere changes of form.

Proposed subsection 10.07(e) makes it clear that the restated articles of incorporation supercede the original articles of incorporation and all amendments to them, and Proposed subsection 10.07(f) permits the secretary of state to certify the restatement uncluttered by the information set forth in Proposed subsection (e).

AMENDMENTS TO ORIGINAL SECTION
Laws 1991, ch. 72, §36 (eff. 7-28-91) *(amends only subsection (4))*
(4) A corporation restating its articles of incorporation shall deliver to the secretary of state for filing articles of restatement setting forth the name of the corporation and the text of the restated articles of incorporation together with a certificate setting forth:
(a) If the restatement does not include an amendment to the articles of incorporation, a statement to that effect;
(b) If the restatement contains an amendment to the articles of incorporation not requiring shareholder approval, a statement that the board of directors adopted the restatement and the date of such adoption; ~~or~~
(c) If the restatement contains an amendment to the articles of incorporation requiring shareholder approval, the information required by RCW 23B.10.060; and
(d) Both the articles of restatement and the certificate must be executed.~~.~~

CARC COMMENTARY
The proposed amendment offered at request of Office of Secretary of State.

* * * * *

Laws 2009, ch. 189, §33 (eff. 7-26-09)*(amends only subsection (3))*
(3) If the board of directors submits a restatement for shareholder ~~action~~ approval, the corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with RCW 23B.07.050. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the proposed restatement and contain or be accompanied by a copy of the restatement that identifies any amendment or other change it would make in the articles of incorporation.

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.10.080
AMENDMENT OF ARTICLES OF INCORPORATION PURSUANT TO REORGANIZATION

CURRENT SECTION

(1) A corporation's articles of incorporation may be amended without approval by the board of directors or shareholders to carry out a plan of reorganization ordered or decreed by a court of competent jurisdiction under federal statute if the articles of incorporation after amendment contain only provisions required or permitted by RCW 23B.02.020.

(2) The individual or individuals designated by the court shall deliver to the secretary of state for filing articles of amendment setting forth:

(a) The name of the corporation;

(b) The text of each amendment approved by the court;

(c) The date of the court's order or decree approving the articles of amendment;

(d) The title of the reorganization proceeding in which the order or decree was entered; and

(e) A statement that the court had jurisdiction of the proceeding under federal statute.

(3) Shareholders of a corporation undergoing reorganization do not have dissenters' rights except as and to the extent provided in the reorganization plan.

(4) This section does not apply after entry of a final decree in the reorganization proceeding even though the court retains jurisdiction of the proceeding for limited purposes unrelated to consummation of the reorganization plan.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §127 (eff. 7-1-90)

Same as current, except subsection (1) read:

(1) A corporation's articles of incorporation may be amended without action by the board of directors or shareholders to carry out a plan of reorganization ordered or decreed by a court of competent jurisdiction under federal statute if the articles of incorporation after amendment contain only provisions required or permitted by RCW 23B.02.020.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3077-78 (1989)

Section 10.08 Amendment of Articles of Incorporation Pursuant to Reorganization.

Proposed section 10.08 provides a simplified method of conforming corporate documents filed under state law with the federal statutes relating to corporate reorganization. If a federal court confirms a plan of reorganization that requires articles of amendment to be filed, those amendments may be prepared and filed by the individuals designated by the court and the approval of neither the shareholders nor the board of directors is required. Further, shareholders do not have dissenters' rights unless the plan specifically provides for them.

This section applies only to amendments in articles of incorporation approved before the entry of a final decree in the reorganization plan.

AMENDMENTS TO ORIGINAL SECTION
Laws 2009, ch. 189, §34 (eff. 7-26-09)*(amends only subsection (1))*
(1) A corporation's articles of incorporation may be amended without ~~action~~ -approval by the board of directors or shareholders to carry out a plan of reorganization ordered or decreed by a court of competent jurisdiction under federal statute if the articles of incorporation after amendment contain only provisions required or permitted by RCW 23B.02.020.

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.10.200
AMENDMENT OF BYLAWS BY BOARD OF DIRECTORS OR SHAREHOLDERS

CURRENT SECTION

(1) A corporation's board of directors may amend or repeal the corporation's bylaws, or adopt new bylaws, unless:

(a) The articles of incorporation, RCW 23B.10.205, or, if applicable, RCW 23B.10.210, or any other provision of this title reserve this power exclusively to the shareholders in whole or part; or

(b) The shareholders, in amending or repealing a particular bylaw, provide expressly that the board of directors may not amend or repeal that bylaw.

(2) A corporation's shareholders may amend or repeal the corporation's bylaws, or adopt new bylaws, even though the bylaws may also be amended or repealed, or new bylaws may also be adopted, by its board of directors.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §129 (eff. 7-1-90)

(1) A corporation's board of directors may amend or repeal the corporation's bylaws, or adopt new bylaws, unless:

(a) The articles of incorporation or this title reserve this power exclusively to the shareholders in whole or part; or

(b) The shareholders, in amending or repealing a particular bylaw, provide expressly that the board of directors may not amend or repeal that bylaw.

(2) A corporation's shareholders may amend or repeal the corporation's bylaws, or adopt new bylaws, even though the bylaws may also be amended or repealed, or new bylaws may also be adopted, by its board of directors.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3078 (1989)

Section 10.20 Amendment of Bylaws By Board of Directors or Shareholders.

In the absence of a provision in the articles of incorporation, the power to amend or repeal bylaws is shared by the board of directors and shareholders. Amendment of bylaws by the board of directors is often simpler and more convenient than amendment by the shareholders and avoids the expense of calling a shareholders' meeting, a cost that may be significant in publicly held corporations.

Proposed subsection 10.20(a) provides, however, that the power to amend or repeal bylaws (or adopt new bylaws) may be reserved exclusively to the shareholders by an appropriate provision in the articles of incorporation. This option may appropriately be elected by a closely held corporation -- for example, where control arrangements appear in the bylaws but one shareholder or group of shareholders has the power to name a majority of the board of directors. In such a corporation, the control arrangements may alternatively be placed in the articles of incorporation rather than the bylaws if there is no objection to making them a matter of public record.

Proposed subsection 10.20(a)(1) provides that the power to amend or repeal the bylaws (or adopt new bylaws) may be reserved to the shareholders "in whole or part." This language permits the reservation of power to be limited to specific articles or sections of the bylaws or to specific subjects or topics addressed in the bylaws. It is important that the areas reserved exclusively to the shareholders be delineated clearly and unambiguously.

Proposed subsection 10.20(a)(2) permits the shareholders to adopt or amend a bylaw and reserve exclusively to themselves the power to amend or repeal it later. This reservation must be expressed in the action by the shareholders adopting or amending the bylaw. This option is also included for the benefit of closely held corporations.

Proposed subsection 10.20(b) states that the power of shareholders to adopt, amend or repeal bylaws exists even though that power is shared with the board of directors. This section makes inapplicable the holdings of a few cases (e.g., Somers v. AAA Temporary Services, Inc., 284 N.E.2d 462 (Ill. App. 1972) under differently phrased statutes that shareholders do not have a general or residual power to amend bylaws or that the power to amend bylaws may be vested exclusively in the board of directors. Under the Proposed Act the shareholders always have the power to adopt, amend or repeal the bylaws.

The Committee decided not to include RMA section 10.21 in the Proposed Act. Other sections in the Proposed Act make clear that the quorum or voting requirements for shareholders can be increased by provisions in the corporation's articles of incorporation. RMA section 10.21 would have provided a mechanism to accomplish that end in the bylaws. However, its requirements are complex and appeared to outweigh any advantage of the provision.

AMENDMENTS TO ORIGINAL SECTION

Laws 2007, ch. 467, §7 (eff. 7-22-07) *(amends only subsection (1)(a))*

(a) The articles of incorporation, RCW 23B.10.220, or, if applicable, RCW 23B.07.290, or any other provision of this title reserve this power exclusively to the shareholders in whole or part; or

CARC COMMENTARY

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

This amendment is proposed as a conforming change to recognize the proposed new section RCW 23B.10.220, which limits the power of directors to repeal a bylaw adopted by shareholders which opts in to the provisions of that section. See section RCW 23B.10.220 and the Comment thereto.

* * * * *

Laws 2009, ch. 189, §35 (eff. 7-26-09)*(amends only subsection (1)(a))*

(1)(a) The articles of incorporation, RCW ~~23B.10.220~~ 23B.10.205, or, if applicable, RCW ~~23B.07.290~~ 23B.10.210, or any other provision of this title reserve this power exclusively to the shareholders in whole or part; or

CARC COMMENTARY

This is merely a correction in the cross reference number to the applicable WBCA subsection. The section that was inserted in the 2007 bill as passed erroneously refers to another newly adopted section providing for an inspector of elections; this should have been a reference to 23B.10.210, not to 23B.07.035.

* * * * *

RCW 23B.10.205
AMENDMENT OF BYLAWS – ELECTION OF DIRECTORS

CURRENT SECTION

(1) Unless the articles of incorporation specifically prohibit the adoption of a bylaw pursuant to this section, alter the vote specified in RCW 23B.07.280(2), or allow for or do not exclude cumulative voting, a public company may elect in its bylaws to be governed in the election of directors as follows:

(a) Each vote entitled to be cast may be voted for, voted against, or withheld for one or more candidates up to that number of candidates that is equal to the number of directors to be elected but without cumulating the votes, or a shareholder may indicate an abstention for one or more candidates;

(b) To be elected, a candidate must have received the number, percentage, or level of votes specified in the bylaws; provided that holders of shares entitled to vote in the election and constituting a quorum are present at the meeting. Except in a contested election as provided in (e) of this subsection, a candidate who does not receive the number, percentage, or level of votes specified in the bylaws but who was a director at the time of the election shall continue to serve as a director for a term that shall terminate on the date that is the earlier of (i) the date specified in the bylaw, but not longer than ninety days from the date on which the voting results are determined pursuant to RCW 23B.07.035(2), or (ii) the date on which an individual is selected by the board of directors to fill the office held by such director, which selection shall be deemed to constitute the filling of a vacancy by the board to which RCW 23B.08.100 applies;

(c) A bylaw adopted pursuant to this section may provide that votes cast against and/or withheld as to a candidate are to be taken into account in determining whether the number, percentage, or level of votes required for election has been received. Unless the bylaw specifies otherwise, only votes cast are to be taken into account and a ballot marked "withheld" in respect to a share is deemed to be a vote cast. Unless the bylaws specify otherwise, shares otherwise present at the meeting but for which there is an abstention or as to which no authority or direction to vote in the election is given or specified, are not deemed to be votes cast in the election;

(d) The board of directors may select any qualified individual to fill the office held by a director who did not receive the specified vote for election referenced in (b) of this subsection; and

(e) Unless the bylaw specifies otherwise, a bylaw adopted pursuant to this subsection (1) shall not apply to an election of directors by a voting group if (i) at the expiration of the time fixed under a provision requiring advance notification of director candidates, or (ii) absent such a provision, at a time fixed by the board of directors which is not more than fourteen days before notice is given of the meeting at which the election is to occur, there are more candidates for election by the voting group than the number of directors to be elected, one or more of whom are properly proposed by shareholders. An individual shall not be considered a candidate for purposes of this subsection (1)(e) if the board of directors determines before the

notice of meeting is given that such individual's candidacy does not create a bona fide election contest.
(2) A bylaw containing an election to be governed by this section may be repealed or amended:
(a) If originally adopted by the shareholders, only by the shareholders, unless the bylaw otherwise provides; or
(b) If adopted by the board of directors, by the board of directors or the shareholders.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 2007, ch. 467, §5 (eff. 7-22-07)

(1) Unless the articles of incorporation (a) specifically prohibit the adoption of a bylaw pursuant to this section, (b) alter the vote specified in RCW 23B.07.280(2), or (c) allow for or do not exclude cumulative voting, a public company may elect in its bylaws to be governed in the election of directors as follows:

(i) Each vote entitled to be cast may be voted for, voted against, or withheld for one or more candidates up to that number of candidates that is equal to the number of directors to be elected but without cumulating the votes, or a shareholder may indicate an abstention for one or more candidates;

(ii) To be elected, a candidate must have received the number, percentage, or level of votes specified in the bylaws; provided that holders of shares entitled to vote in the election and constituting a quorum are present at the meeting. Except in a contested election as provided in (c)(v)* of this subsection, a candidate who does not receive the number, percentage, or level of votes specified in the bylaws but who was a director at the time of the election shall continue to serve as a director for a term that shall terminate on the date that is the earlier of (A) the date specified in the bylaw, but not longer than ninety days from the date on which the voting results are determined pursuant to RCW 23B.07.290(2), or (B) the date on which an individual is selected by the board of directors to fill the office held by such director, which selection shall be deemed to constitute the filling of a vacancy by the board to which RCW 23B.08.100 applies;

(iii) A bylaw adopted pursuant to this section may provide that votes cast against and/or withheld as to a candidate are to be taken into account in determining whether the number, percentage, or level of votes required for election has been received. Unless the bylaw specifies otherwise, only votes cast are to taken into account and a ballot marked "withheld" in respect to a share is deemed to be a vote cast. Unless the bylaws specify otherwise, shares otherwise present at the meeting but for which there is an abstention or as to which no authority or direction to vote in the election is given or specified, are not deemed to be votes cast in the election;

(iv) The board of directors may select any qualified individual to fill the office held by a director who did not receive the specified vote for election referenced in (c)(ii)** of this subsection; and

(v) Unless the bylaw specifies otherwise, a bylaw adopted pursuant to this subsection (1) shall not apply to an election of directors by a voting group if (A) at the expiration of the time fixed under a provision requiring advance notification of director candidates, or (B) absent such a provision, at a time fixed by the board of directors which is not more than fourteen days before notice is given of the meeting at which the election is to occur, there are more candidates for election by the voting group than the number of directors to be elected, one or more of whom are properly proposed by shareholders. An individual shall not be considered a candidate for purposes of this subsection (1)(c)(v)*** if the board of directors determines before the notice of meeting is given that such individual's candidacy does not create a bona fide election contest.

(2) A bylaw containing an election to be governed by this section may be repealed or amended:

(a) If originally adopted by the shareholders, only by the shareholders, unless the bylaw otherwise provides; or

(b) If adopted by the board of directors, by the board of directors or the shareholders.

CARC COMMENTARY

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

Proposed RCW 23B.10.205 is new. RCW 23B.10.205 is effective only if a public company (defined in RCW 23B.01.400(24)) elects in a bylaw adopted either by shareholders or by the board of directors to be governed by its terms. As provided in section RCW 23B.10. 205(2), if such a bylaw is adopted by shareholders, it may be repealed only by shareholders unless the electing bylaw provides otherwise. If adopted by the board of directors, such a bylaw may be repealed by either the board of directors or the shareholders. The provisions of proposed new section RCW 23B.10.205 effectively modify the term and holdover provisions of section RCW 23B.08.050 pursuant to a limited exception recognized in the proposed revisions to that section. As noted in the comments to the amendments to RCW 23B.08.050 an incumbent director that does not receive the specified vote for election as provided in a bylaw adopted pursuant to new section RCW 23B.10.205 would only hold over for the shorter of the term specified in such bylaw or 90 days. Accordingly, a bylaw provision that would seek to alter the term and holdover provision of section RCW 23B.08.050 that varied in any manner from section RCW 23B.10.205 would not be effective.

Only public companies (as defined in section RCW 23B.01.400(24)) may elect to be governed by proposed new section RCW 23B.10.205. Public companies whose articles of incorporation require or do not exclude cumulative voting (see section RCW 23B.07.280(1)), specifically prohibit the adoption of a bylaw pursuant to section RCW 23B.10.205, or alter the vote specified in section RCW 23B.07.280(2), are not eligible to elect to be governed by proposed new section RCW 23B.10.205.

Proposed section RCW 23B.10.205 (1)(a) provides that each vote entitled to be cast in an election of directors may be voted for, voted against or withheld for up to the number of candidates that is equal to the number of directors to be elected (without cumulating the votes), or a shareholder may indicate an abstention for one or more candidates. Application of this rule is straightforward if the number of nominees for election equals the number of directorships up for election. In the unusual case that a bylaw adopted pursuant to section RCW 23B.10.205(1) were applicable to a contested election notwithstanding the provisions of section RCW 23B.10.205(1)(e) (i.e., in the absence of an advance notice bylaw, a contest arises as a result of candidates for director being proposed subsequent to the determination date under section RCW 23B.10.205(1)(e)), the holder of a single share would have to choose whether to indicate opposition to a slate by voting for a candidate or candidates on an opposing slate or by voting against the candidates on the disfavored slate, or to abstain. Since it would be in the interests of all contestants to explain in their proxy materials that against votes would not affect the result in a contested election, the rational voter in a contested election could be expected to vote in favor of all candidates on such voter's preferred slate to promote a simple plurality victory rather than voting against candidates on the disfavored slate. Nothing in proposed section RCW23B.10.205 would prevent the holder of more than one share from voting differently with respect to each share held.

Proposed subsection RCW 23B.10.205(1)(a) specifically contemplates that a corporate ballot for the election of directors would provide for "against" votes. Since "against" votes would have a potential effect with respect to corporations electing to be governed by new section RCW 23B.10.205, existing rules of the Securities and Exchange Commission would mandate that a means for voting "against" also be provided in the form of proxy. See SEC Rule 14a-4(b)(2), 17 C.F.R. § 240.14a-4(b)(2) (2005), Instruction 2. While there is no prohibition in RCW Chapter 23B against a corporation, outside of the context of new section RCW 23B.10.205 or an amendment to the articles of incorporation, offering to shareholders the opportunity to vote against candidates, unless new section RCW 23B.10.205 is elected or the articles of incorporation are

amended to make such a vote meaningful, an "against" vote generally is given no effect under RCW Chapter 23B. An exception is use of "against" votes as the basis of a corporation's resignation policy, e.g. a company policy that candidates must receive more votes cast for election than against, and failing achieve such result, the affected director agrees to resign. See discussion of amendment to RCW 23B.08.070. As noted in the discussion of the changes to RCW 23B.08.070, these amendments were intended in part to buttress enforceability of these types of company policy.

Proposed subsection RCW 23B.10.205(1)(b) gives the board or shareholders the ability to alter the plurality voting default standard by adoption of a new bylaw pursuant to this section. The provision is enabling in nature. The bylaws can set a number, percentage or level of vote required for election. The standard can be a majority, modified plurality or other level or percentage of votes. For example, the bylaw could provide that to be elected a candidate must receive a majority of votes cast in favor of that candidate's election. New subsection RCW 23B.10.205(1)(c) also provided default rules for determining "votes cast".

For a candidate that is not an incumbent director, failure to receive the number, level or percentage of votes specified in a bylaw adopted pursuant to RCW 23B.10.205 results in that candidate not being elected and there would be a resulting vacancy on the board. For an incumbent director candidate, failure to receive the vote specified in such a bylaw would result in such director continuing in office but the "holdover" term of that director would be shortened to a period ending no later than 90 days after the results of an election are determined by inspectors of election pursuant to the proposed new subsection RCW 23B.07.035(2)(e). There would be no hold over past such date, such that a vacancy would exist if not action is taken by the board prior to that date. As contemplated by proposed amended section RCW 23B.08.100, that vacancy may be filled by shareholders or by the board of directors, unless the articles of incorporation provide otherwise. In the alternative action could be taken by amendment to, or in the manner provided in, the articles of incorporation or bylaws to reduce the size of the board. See section RCW 23B.08.030.

Within the 90-day period, (or shorter period if specified in the enabling bylaw) immediately following determination of the election results, subsection RCW 23B.10.205(1)(d) also grants to the board of directors the right to fill the office held by any director who failed to receive the specified votes for election. That action would be deemed to constitute the filling of a vacancy, with the result that, under proposed amended subsection RCW 23B.08.050(4), the director filling the vacancy would be up for reelection at the next annual meeting, even if the term for that directorship would otherwise have been for more than one year, as in the case of a staggered board.

In the exercise of its power under proposed subsection RCW 23B.10.205(1)(d), a board can select as a director any qualified person, which could include a director or candidate who failed to receive the specified vote. Among other things, this power permits a board to respond to the use of subsection RCW 23B.10.205(1) as a takeover device or to prevent harm to the corporation resulting from a failed election. As a practical matter, however, and given the directors' consideration of their duties, boards are likely to be hesitant to select such director to fill the vacancy in other contexts. There is also no limitation in proposed new section RCW 23B.10.205 or elsewhere in RCW Chapter 23B on the power of either the board of directors or shareholders to fill a vacancy with the person who held such directorship before the vacancy arose.

As provided in subsection RCW 23B.02.020(5)(d), an election to have new section RCW 23B.10.205 apply also may be included in the articles of incorporation. As with any amendment to the articles of incorporation, the adoption of such an amendment requires the approval of both the directors and the shareholders. See section RCW 23B.10.030.

Under new subsection RCW 23B.10.205(1)(e), unless the bylaw electing to be governed by such section provides otherwise, when there are more candidates for election as directors by a voting group than seats to be filled, the resulting election contest would not be subject to the voting regime under proposed new subsection RCW 23B.10.205(1) but would be conducted by means of a plurality vote under subsection RCW 23B.07.280(2).

Whether there are more candidates than the number of directors to be elected, and therefore whether the voting regime provided in a bylaw adopted under subsection RCW 23B.10.205(1) is inapplicable (assuming no contrary bylaw provision), is determined if the corporation has a provision in the articles of incorporation or the bylaws requiring advance notification of director candidates, when the time for such notice expires; otherwise the determination is made no later than the date fixed by the board for such determination, which cannot be more than 14 days before the notice of meeting is given to the shareholders. This assures that the voting regime that will apply will be known in advance of the giving of notice, and that the disclosure of the voting rules and form of proxy will be clear and reflect the applicable voting regime. The determination of how many candidates there are to fill the number of seats up for election can be made by the board of directors. In addition, subsection RCW 23B.10.205(1)(e) gives the board the authority to determine that an individual shall not be considered a candidate for purposes of subsection RCW 23B.10.205(1)(e) if the candidacy does not create a bona fide election contest. This determination must be made before notice of the meeting is given. The board might choose, for example, to exercise this authority to preserve the voting regime under subsection RCW 23B.10.205(1)(e) when it is clear that an individual has designated himself or herself as a candidate without intending to solicit votes or for the purpose of frustrating the availability of the subsection RCW 23B.10.205(1) voting regime. A board can be expected to exercise its authority under subsection RCW 23B.10.205(1)(e) with care so as to give fair effect to the voting policies chosen by the corporation to govern the election of the corporation's directors.

The contested or uncontested nature of the election can change following the date for determining the voting regime that will apply. For example, an election that is contested at that date could become uncontested if a candidate withdraws, possibly as part of a settlement. Conversely, unless an advance notice bylaw has been adopted, an uncontested election could become contested before the vote is taken but after notice of the meeting has been given because in that situation there is nothing limiting the ability of shareholders to nominate candidates for directorships up until the time nominations are closed at the meeting. New subsection RCW 23B.10.205(1)(e) does not authorize changing the voting regime in these circumstances. In some circumstances, a board, in the exercise of its general authority and if consistent with its duties, might decide to reset the determination date so that the appropriate voting regime applies by renoticing the meeting, either with or without delaying the meeting depending upon the available time, and by providing revised disclosure of the applicable voting regime and a revised form of proxy, if necessary.

AMENDMENTS TO ORIGINAL SECTION
Laws 2009, ch. 189, §36 (eff. 7-26-09)

(1) Unless the articles of incorporation ~~(a)~~ specifically prohibit the adoption of a bylaw pursuant to this section, ~~(b)~~ alter the vote specified in RCW 23B.07.280(2), or ~~(c)~~ allow for or do not exclude cumulative voting, a public company may elect in its bylaws to be governed in the election of directors as follows:

~~(i)~~(a) Each vote entitled to be cast may be voted for, voted against, or withheld for one or more candidates up to that number of candidates that is equal to the number of directors to be elected but without cumulating the votes, or a shareholder may indicate an abstention for one or more candidates;

~~(ii)~~(b) To be elected, a candidate must have received the number, percentage, or level of votes specified in the bylaws; provided that holders of shares entitled to vote in the election and constituting a quorum are present at the meeting. Except in a contested election as provided in~~(c)(v)~~(e) of this subsection, a candidate who does not receive the number, percentage, or level of votes specified in the bylaws but who was a director at the time of the election shall continue to serve as a director for a term that shall terminate on

the date that is the earlier of ~~(A)~~(i) the date specified in the bylaw, but not longer than ninety days from the date on which the voting results are determined pursuant to RCW 23B.07.290(2), or ~~(B)~~(ii) the date on which an individual is selected by the board of directors to fill the office held by such director, which selection shall be deemed to constitute the filling of a vacancy by the board to which RCW 23B.08.100 applies;

~~(iii)~~(c) A bylaw adopted pursuant to this section may provide that votes cast against and/or withheld as to a candidate are to be taken into account in determining whether the number, percentage, or level of votes required for election has been received. Unless the bylaw specifies otherwise, only votes cast are to taken into account and a ballot marked "withheld" in respect to a share is deemed to be a vote cast. Unless the bylaws specify otherwise, shares otherwise present at the meeting but for which there is an abstention or as to which no authority or direction to vote in the election is given or specified, are not deemed to be votes cast in the election;

~~(iv)~~(d) The board of directors may select any qualified individual to fill the office held by a director who did not receive the specified vote for election referenced in ~~(c)(ii)~~(b) of this subsection; and

~~(v)~~(e) Unless the bylaw specifies otherwise, a bylaw adopted pursuant to this subsection (1) shall not apply to an election of directors by a voting group if ~~(A)~~(i) at the expiration of the time fixed under a provision requiring advance notification of director candidates, or ~~(B)~~(ii) absent such a provision, at a time fixed by the board of directors which is not more than fourteen days before notice is given of the meeting at which the election is to occur, there are more candidates for election by the voting group than the number of directors to be elected, one or more of whom are properly proposed by shareholders. An individual shall not be considered a candidate for purposes of this subsection (1)~~(c)(v)~~(e) if the board of directors determines before the notice of meeting is given that such individual's candidacy does not create a bona fide election contest.

(2) A bylaw containing an election to be governed by this section may be repealed or amended:

(a) If originally adopted by the shareholders, only by the shareholders, unless the bylaw otherwise provides; or

(b) If adopted by the board of directors, by the board of directors or the shareholders.

CARC COMMENTARY

When RCW 23B.10.205 was adopted in the 2007 session, this section of the bill included the agreed text but contained the amendment numbering rather than the standard code reviser renumbering. This amendment would correct the numbering system in 23B.10.205 to make it consistent with other provisions of the WBCA.

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RCW 23B.10.210
BYLAW INCREASING QUORUM OR VOTING REQUIREMENTS FOR DIRECTORS

CURRENT SECTION

(1) A bylaw that fixes a greater quorum or voting requirement for the board of directors may be amended or repealed:

(a) If originally adopted by the shareholders, only by the shareholders; or

(b) If originally adopted by the board of directors, either by the shareholders or by the board of directors.

(2) A bylaw adopted or amended by the shareholders that fixes a greater quorum or voting requirement for the board of directors may provide that it may be amended or repealed only by a specified vote of either the shareholders or the board of directors.

(3) If the corporation is a public company, approval by the board of directors under subsection (1)(b) of this section to adopt or amend a bylaw that changes the quorum or voting requirement for the board of directors must meet the quorum requirement and be approved by the vote required for approval under the quorum and voting requirement then in effect.

(4) If the corporation is not a public company, approval by the board of directors under subsection (1)(b) of this section to adopt or amend a bylaw that changes the quorum or voting requirement for the board of directors must meet the same quorum requirement and be approved by the same vote required for approval under the quorum and voting requirement then in effect or proposed to be adopted, whichever is greater.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §130 (eff. 7-1-90)

(1) A bylaw that fixes a greater quorum or voting requirement for the board of directors may be amended or repealed:

(a) If originally adopted by the shareholders, only by the shareholders; or

(b) If originally adopted by the board of directors, either by the shareholders or by the board of directors.

(2) A bylaw adopted or amended by the shareholders that fixes a greater quorum or voting requirement for the board of directors may provide that it may be amended or repealed only by a specified vote of either the shareholders or the board of directors.

(3) If the corporation is a public company, action by the board of directors under subsection (1)(b) of this section to adopt or amend a bylaw that changes the quorum or voting requirement for the board of directors must meet the quorum requirement and be adopted by the vote required to take action under the quorum and voting requirement then in effect.

(4) If the corporation is not a public company, action by the board of directors under subsection (1)(b) of this section to adopt or amend a bylaw that changes the quorum or voting requirement for the board of directors must meet the same quorum requirement and be adopted by the same vote required to take action under the quorum and voting requirement then in effect or proposed to be adopted, whichever is greater.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3078-79 (1989)
Section 10.21 Bylaw Increasing Quorum or Voting Requirements For Directors.
Supermajority provisions relating to the board of directors may appear in the bylaws of the corporation without specific authorization in the articles of incorporation. See Proposed subsections 8.24(a) and (c). Like other bylaw provisions, they may adopted either by the board of directors or by the shareholders. See Proposed section 10.20. Such provisions, further, may be amended or repealed by the board of directors or shareholders as provided in this section. This treatment of supermajority provisions for the board of directors should be contrasted with the treatment of analogous provisions for shareholders which must be set forth in articles of incorporation, Proposed section 7.27, and their adoption, amendment, or repeal must be approved by the shareholders by the vote specified in Proposed section 7.27.

Supermajority provisions relating to the board of directors are usually part of control arrangements in closely held corporations, and Proposed section 10.21 is designed with this end in view. Its basic purpose is to ensure that control arrangements negotiated by shareholders for their own protection will not be prematurely terminated by a majority vote of the shareholders or the board of directors. Thus, Proposed subsection 10.21(a)(1) provides that if a supermajority requirement is originally imposed by a bylaw adopted by the shareholders, only the shareholders may amend or repeal it. Further, under Proposed subsection 10.21(b), that bylaw may impose restrictions on the manner in which it may be thereafter amended or repealed by the shareholders. On the other hand, if a supermajority requirement is originally imposed in a bylaw adopted by the board of directors, that bylaw may be amended either by the board of directors or shareholders (see Proposed subsection 10.21(a)(2)), but if it is to be amended by the board of directors, and if the corporation is not a public company, Proposed subsection 10.21(d) requires approval by the supermajority requirement then being imposed or as amended, whichever is greater. This requirement is analogous to that imposed on supermajority amendments appearing in the articles of incorporation. See Proposed section 7.27. If the corporation is a public company, and the bylaw is to be amended by the board of directors, Proposed subsection 10.21 (c) requires approval by the voting requirement then in effect.

AMENDMENTS TO ORIGINAL SECTION
Laws 2009, ch. 189, §37 (eff. 7-26-09)*(amends only subsections (3) and (4))*
(3) If the corporation is a public company, ~~action~~ approval by the board of directors under subsection (1)(b) of this section to adopt or amend a bylaw that changes the quorum or voting requirement for the board of directors must meet the quorum requirement and be ~~adopted~~ approved by the vote required ~~to take action~~ for approval under the quorum and voting requirement then in effect.
(4) If the corporation is not a public company, ~~action~~ approval by the board of directors under subsection (1)(b) of this section to adopt or amend a bylaw that changes the quorum or voting requirement for the board of directors must meet the same quorum requirement and be ~~adopted~~ approved by the same vote required ~~to take action~~ for approval under the quorum and voting requirement then in effect or proposed to be adopted, whichever is greater.

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.11.030
ACTION ON PLAN OF MERGER OR SHARE EXCHANGE

CURRENT SECTION

(1) After adopting a plan of merger or share exchange, the board of directors of each corporation party to the merger, and the board of directors of the corporation whose shares will be acquired in the share exchange, shall submit the plan of merger, except as provided in subsection (7) of this section, or share exchange for approval by its shareholders.

(2) For a plan of merger or share exchange to be approved:

(a) The board of directors must recommend the plan of merger or share exchange to the shareholders, unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders with the plan; and

(b) The shareholders entitled to vote must approve the plan, except as provided in subsection (7) of this section.

(3) The board of directors may condition its submission of the proposed plan of merger or share exchange on any basis, including the affirmative vote of holders of a specified percentage of shares held by any group of shareholders not otherwise entitled under this title or the articles of incorporation to vote as a separate voting group on the proposed plan of merger or share exchange.

(4) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with RCW 23B.07.050. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the plan of merger or share exchange and must contain or be accompanied by a copy or summary of the plan.

(5) In addition to any other voting conditions imposed by the board of directors under subsection (3) of this section, the plan of merger must be approved by two-thirds of the voting group comprising all the votes entitled to be cast on the plan, and of each other voting group entitled under RCW 23B.11.035 or the articles of incorporation to vote separately on the plan, unless shareholder approval is not required under subsection (7) of this section. The articles of incorporation may require a greater or lesser vote than that provided in this subsection, or a greater or lesser vote by separate voting groups, so long as the required vote is not less than a majority of all the votes entitled to be cast on the plan of merger and of each other voting group entitled to vote separately on the plan. Separate voting by additional voting groups is required on a plan of merger under the circumstances described in RCW 23B.11.035.

(6) In addition to any other voting conditions imposed by the board of directors under subsection (3) of this section, the plan of share exchange must be approved by two-thirds of the voting group comprising all the votes entitled to be cast on the plan, and of each other voting group entitled under RCW 23B.11.035 or the articles of incorporation to vote separately on the plan. The articles of incorporation may require a greater or lesser vote than that provided in this subsection, or a greater or

lesser vote by separate voting groups, so long as the required vote is not less than a majority of all the votes entitled to be cast on the plan of share exchange and of each other voting group entitled to vote separately on the plan. Separate voting by additional voting groups is required on a plan of share exchange under the circumstances described in RCW 23B.11.035.

(7) Approval by the shareholders of the surviving corporation on a plan of merger is not required if:

(a) The articles of incorporation of the surviving corporation will not differ, except for amendments enumerated in RCW 23B.10.020, from its articles of incorporation before the merger;

(b) Each shareholder of the surviving corporation whose shares were outstanding immediately before the effective date of the merger will hold the same number of shares, with identical designations, preferences, limitations, and relative rights, immediately after the merger;

(c) The number of voting shares outstanding immediately after the merger, plus the number of voting shares issuable as a result of the merger, either by the conversion of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger, will not exceed the total number of voting shares of the surviving corporation authorized by its articles of incorporation immediately before the merger; and

(d) The number of participating shares outstanding immediately after the merger, plus the number of participating shares issuable as a result of the merger, either by the conversion of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger, will not exceed the total number of participating shares authorized by its articles of incorporation immediately before the merger.

(8) As used in subsection (7) of this section:

(a) "Participating shares" means shares that entitle their holders to participate without limitation in distributions.

(b) "Voting shares" means shares that entitle their holders to vote unconditionally in elections of directors.

(9) After a merger or share exchange is approved, and at any time before articles of merger or share exchange are filed, the planned merger or share exchange may be abandoned, subject to any contractual rights, without further shareholder approval, in accordance with the procedure set forth in the plan of merger or share exchange or, if none is set forth, in the manner determined by the board of directors.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §133 (eff. 7-1-90)

(1) After adopting a plan of merger or share exchange, the board of directors of each corporation party to the merger, and the board of directors of the corporation whose shares will be acquired in the share exchange, shall submit the plan of merger, except as provided in subsection (7) of this section, or share exchange for approval by its shareholders.

(2) For a plan of merger or share exchange to be approved:

(a) The board of directors must recommend the plan of merger or share exchange to the shareholders, unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders with the plan; and

(b) The shareholders entitled to vote must approve the plan.

(3) The board of directors may condition its submission of the proposed merger or share exchange on any basis.

(4) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with RCW 23B.07.050. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the plan of merger or share exchange and contain or be accompanied by a copy or summary of the plan.

(5) Unless this title, the articles of incorporation, or the board of directors, acting pursuant to subsection (3) of this section, require a greater vote or a vote by voting groups, the plan of merger to be authorized must be approved by each voting group entitled to vote separately on the plan by two-thirds of all the votes entitled to be cast on the plan by that voting group. The articles of incorporation may provide for a lesser vote than that provided in this subsection, or for a lesser vote by separate voting groups, so long as the vote provided for each voting group entitled to vote separately on the plan of merger is not less than a majority of all the votes entitled to be cast on the plan of merger by that voting group. Separate voting by voting groups is required on a plan of merger if the plan contains a provision that, if contained in a proposed amendment to articles of incorporation, would require action by one or more separate voting groups on the proposed amendment under RCW 23B.10.040.

(6) Unless this title, the articles of incorporation, or the board of directors acting pursuant to directors, subsection (3) of this section, require a greater vote or a vote by voting groups, the plan of share exchange to be authorized must be approved by each voting group entitled to vote separately on the plan by two-thirds of all the votes entitled to be cast on the plan by that voting group. The articles of incorporation may provide for a lesser vote than that provided in this subsection, or for a lesser vote by separate voting groups, so long as the vote provided for each voting group entitled to vote separately on the plan of share exchange is not less than a majority of all the votes entitled to be cast on the plan of share exchange by that voting group. Separate voting by voting groups is required on a plan of share exchange by each class or series of shares included in the exchange, with each class or series constituting a separate voting group.

(7) Action by the shareholders of the surviving corporation on a plan of merger is not required if:

(a) The articles of incorporation of the surviving corporation will not differ, except for amendments enumerated in RCW 23B.10.020, from its articles of incorporation before the merger;

(b) Each shareholder of the surviving corporation whose shares were outstanding immediately before the effective date of the merger will hold the same number of shares, with identical designations, preferences, limitations, and relative rights, immediately after the merger;

(c) The number of voting shares outstanding immediately after the merger, plus the number of voting shares issuable as a result of the merger, either by the conversion of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger, will not exceed the total number of voting shares of the surviving corporation authorized by its articles of incorporation immediately before the merger; and

(d) The number of participating shares outstanding immediately after the merger, plus the number of participating shares issuable as a result of the merger, either by the conversion of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger, will not exceed the total number of participating shares authorized by its articles of incorporation immediately before the merger.

(8) As used in subsection (7) of this section:

(a) "Participating shares" means shares that entitle their holders to participate without limitation in distributions.

(b) "Voting shares" means shares that entitle their holders to vote unconditionally in elections of directors.

(9) After a merger or share exchange is authorized, and at any time before articles of merger or share exchange are filed, the planned merger or share exchange may be abandoned, subject to any contractual rights, without further shareholder action, in accordance with the procedure set forth in the plan of merger or share exchange or, if none is set forth, in the manner determined by the board of directors.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3080-82 (1989)
Section 11.03 Action on Plan of Merger or Share Exchange.
Proposed section 11.03 requires mergers or share exchanges to be approved by the shareholders as follows:

In the case of a merger:
(1) the transaction must always be approved by the shareholders of the disappearing corporation (unless the merger is between parent and subsidiary pursuant to Proposed section 11.04); and
(2) the transaction must be approved by the shareholders of the surviving corporation only if the number of voting or participating shares authorized in its articles of incorporation is increased as a result of the transaction.

In the case of a share exchange:
(1) the transaction must always be approved by the shareholders of the corporation whose shares are being acquired; and
(2) the transaction need not be approved by the shareholders of the corporation acquiring the shares.

Proposed section 11.03 requires the board of directors to propose the plan of merger or share exchange and then submit the proposal to the shareholders. When proposing a plan of merger or share exchange, the board of directors must make a recommendation to the shareholders that the plan be approved, unless it determines that because of conflict of interest or other special circumstances it should make no recommendation. If the board of directors so determines, it must describe the conflict or circumstances, and communicate the basis for its determination, when presenting the proposed plan of merger or share exchange to the shareholders.

Proposed subsection 11.03(c) permits the board of directors to condition its submission of a plan of merger or share exchange on any basis; for example, the board may direct that the plan is approved only if it receives a favorable vote of specified percentage of the disinterested shareholders voting on the plan or that shareholders holding no more than a specified number or percentage of shares file notice of intent to demand payment under chapter 13.

Proposed subsection 11.03(d) requires the notice to shareholders to contain or be accompanied by a copy or summary of the plan. Any summary provided to shareholders must contain sufficient detail regarding the transaction to allow the shareholder to make an informed decision whether to approve the transaction and whether to exercise dissenters' rights pursuant to chapter 13. In the event a copy of the plan is included, it will not usually be necessary to include supporting exhibits and schedules in order for a shareholder to make an informed decision. A copy of the agreement and supporting exhibits and schedules should be provided to any shareholder requesting such in writing.

A plan of merger or share exchange, to be approved, generally must be approved by each voting group entitled to vote on the merger by two-thirds of all the votes entitled to be cast on the plan. However, the articles of incorporation may provide for a lesser vote than two-thirds, or for a lesser vote by separate voting groups, so long as the vote provided for each voting group entitled to vote separately on the plan of merger or share exchange is not less than a majority of all the votes entitled to be cast on the plan of merger or share exchange by that voting group. The Committee rejected a general majority vote standard set forth in the RMA on the ground that the two-thirds requirement in the old law had become an important feature in planning control structures of small corporations. It concluded that the optional article of incorporation provision gave most of the advantages of the RMA provision, without the potential for disrupting control structures.

The articles of incorporation of either corporation may require a greater vote by one or more voting groups of that corporation, and if the transaction involves an amendment to the articles of incorporation of the surviving corporation which affects the voting requirements for future amendments, the transaction must also be approved by the vote required by Proposed section 7.27. See Proposed subsections 11.03(e) and (f). In addition, voting by more than one voting group may be required by Proposed subsections 11.03(e) and

(f) or by the articles of incorporation. Finally, the board of directors may require a greater vote or a vote by voting groups under their power to make conditional submissions to shareholders described above. The articles of incorporation or the board of directors, however, may only require a vote by separate voting groups in addition to that otherwise required by this title.

Proposed subsection 11.03(g) describes when approval by the shareholders of the surviving corporation is not required. The Committee considered the requirement in RMA sections 11.03(g)(3) and (4) that shareholders of the surviving corporation vote on merger only if the number of outstanding participating or voting shares is increased by more than 20 percent as a result of the transaction. That requirement is consistent with provisions in a number of states (e.g., Delaware, Michigan, Pennsylvania) and with the requirements of the various stock exchanges. But the requirement generally is not applied to other acquisition forms (e.g., acquisition of assets; triangular mergers) that will achieve the same consequences as a merger. Thus, the Committee concluded that a vote by shareholders of the surviving corporation should only be necessary if an amendment to its articles of incorporation is required to authorize additional shares to consummate the merger. Listed corporations will, of course, continue to be subject to requirements imposed by particular exchanges related to voting.

Proposed subsection 11.03(e) requires voting by voting groups on a plan of merger if the plan contains a provision that "if contained in a proposed amendment to articles of incorporation, would require action by one or more separate voting groups on the proposed amendment." See Proposed section 10.04. Under this provision, voting by voting groups may be required for one or more classes or series of shares of the surviving corporation as well as for one or more classes or series of the disappearing corporation.

Proposed subsection 11.03(f) requires voting by voting groups in a share exchange, with each class or series of shares that is to be acquired in a share exchange entitled to vote as a separate voting group. This provision protects all classes of shareholders when more than one class or series of shares are being acquired on different terms.

In a merger transaction that involves an increase in the number of authorized shares of the surviving corporation, Proposed subsection 11.03(g) requires a shareholder vote. Proposed subsections 11.03(g)(3) and (4) separately apply the authorized share test to increases in the "voting shares" (as defined in Proposed subsection 11.03(h)(2)) and increases in "participating shares" (as defined in Proposed subsection 11.03(h)(1)). If the number of authorized shares of either type is increased in connection with the merger transaction, the transaction must be approved by the shareholders.

Under the definitions in Proposed subsections 11.03(h)(1) and (2), the authorized share requirement may be applied to shares with preferential rights if they are either voting or fully participating, and to deferred or contingent shares issued as a result of the merger. On the other hand, it is typically not applicable to shares issuable under antidilution clauses to balance share splits or share dividends; these shares would not become issuable "pursuant to the merger," but by virtue of later corporate action authorizing the split or dividend.

Proposed subsections 11.03(g)(3) and (4) only determine when a shareholders' vote is required; they do not relate to voting by voting groups. Whether or not a class or series of shares is entitled to vote as a separate voting group is determined by Proposed subsections 11.03(e) and (f).

Proposed subsection 11.03(i) makes it clear that the corporations may abandon without shareholder approval a merger or share exchange even though it has been previously approved by the shareholders. Abandonment under this section does not affect contract rights of third parties. The plan, however, may require that abandonments be approved by shareholders before they are effective.

AMENDMENTS TO ORIGINAL SECTION
Laws 2003, ch. 35, §6 (eff. 7-27-03) *(amends only subsections 2-6)*
(2) For a plan of merger or share exchange to be approved:

(a) The board of directors must recommend the plan of merger or share exchange to the shareholders, unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders with the plan; and
(b) The shareholders entitled to vote must approve the plan, except as provided in subsection (7) of this section.
(3) The board of directors may condition its submission of the proposed plan of merger or share exchange on any basis, including the affirmative vote of holders of a specified percentage of shares held by any group of shareholders not otherwise entitled under this title or the articles of incorporation to vote as a separate voting group on the proposed plan of merger or share exchange.
(4) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with RCW 23B.07.050. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the plan of merger or share exchange and must contain or be accompanied by a copy or summary of the plan.
(5) ~~Unless this title, the articles of incorporation, or~~ In addition to any other voting conditions imposed by the board of directors~~, acting pursuant to~~under subsection (3) of this section, ~~require a greater vote or a vote by voting groups,~~ the plan of merger to be authorized must be approved by ~~each voting group entitle to vote separately on the plan by~~ two-thirds of the voting group comprising all the votes entitled to be cast on the plan ~~by that voting group~~, and of each other voting group entitled under RCW 23B.11.035 of this act or the articles of incorporation to vote separately on the plan, unless shareholder action is not required under subsection (7) of this section. The articles of incorporation may ~~provide for a~~ require a greater or lesser vote than that provided in this subsection, or ~~for~~ a greater or lesser vote by separate voting groups, so long as the required vote ~~provided for each voting group entitled to vote separately on the plan of merger~~ is not less than a majority of all the votes entitled to be cast on the plan of merger ~~by that voting group~~ and of each other voting group entitled to vote separately on the plan. Separate voting by additional voting groups is required on a plan of merger ~~if the plan contains a provision that, if contained in a proposed amendment to articles of incorporation, would require action by one or more separate voting groups on the proposed amendment under RCW 23B.10.040.~~ under the circumstances described in RCW 23B.11.035 of this act.
(6) ~~Unless this title, the articles of incorporation, or~~ In addition to any other voting conditions imposed by the board of directors ~~acting pursuant to~~ under subsection (3) of this section~~, require a greater vote or a vote by voting groups,~~ the plan of share exchange to be authorized must be approved by ~~each voting group entitled to vote separately on the plan by~~ two-thirds of the voting group comprising all the votes entitled to be cast on the plan ~~by that voting group~~, and of each other voting group entitled under RCW 23B.11.035 of this act or the articles of incorporation to vote separately on the plan. The articles of incorporation may ~~provide for a~~ require a greater or lesser vote than that provided in this subsection, or ~~for~~ a greater or lesser vote by separate voting groups, so long as the required vote ~~provided for each voting group entitled to vote separately on the plan of share exchange~~ is not less than a majority of all the votes entitled to be cast on the plan of share exchange ~~by that voting group~~ and of each other voting group entitled to vote separately on the plan. Separate voting by voting groups is required on a plan of share exchange ~~by each class or series of shares included in the exchange, with each class or series constituting a separate voting group~~ under the circumstances described in RCW 23B.11.035 of this act.

CARC COMMENTARY
The proposed changes to RCW 23B.11.030 effect two general changes to the rules governing group voting on mergers and share exchanges:

(1) The proposed changes abandon the linkage of group voting on a plan of merger or share exchange to the confusing question of whether group voting would be required if the provisions of the plan were effected through an amendment to the articles of incorporation. Subsection (5) is modified to include a cross-reference to a proposed new section 23B.11.035 in place of the current cross-reference to the amendment sections.

(2) The proposed changes recognize that there is no particular reason for shareholders who receive stock of another corporation in a fundamental transaction to have different voting group rights

depending on whether the transaction is structured as a merger or as a share exchange. Accordingly, subsection (6) is modified so that shareholders are entitled to group voting as to a plan of share exchange in exactly the same circumstances as they would be relative to a plan of merger, under proposed new section 23B.11.035.

Language is also added to clarify that the requirement of separate approval by voting groups is in addition to, and not in lieu of, the required approval of a plan of merger or share exchange by the requisite percentage of all shareholders.

* * * * *

Laws 2009, ch. 189, §38 (eff. 7-26-09) *(amends only subsections (5), (6), (7) (introductory paragraph only), and (9))*

(5) In addition to any other voting conditions imposed by the board of directors under subsection (3) of this section, the plan of merger ~~to be authorized~~ must be approved by two-thirds of the voting group comprising all the votes entitled to be cast on the plan, and of each other voting group entitled under RCW 23B.11.035 or the articles of incorporation to vote separately on the plan, unless shareholder ~~action~~ approval is not required under subsection (7) of this section. The articles of incorporation may require a greater or lesser vote than that provided in this subsection, or a greater or lesser vote by separate voting groups, so long as the required vote is not less than a majority of all the votes entitled to be cast on the plan of merger and of each other voting group entitled to vote separately on the plan. Separate voting by additional voting groups is required on a plan of merger under the circumstances described in RCW 23B.11.035.

(6) In addition to any other voting conditions imposed by the board of directors under subsection (3) of this section, the plan of share exchange ~~to be authorized~~ must be approved by two-thirds of the voting group comprising all the votes entitled to be cast on the plan, and of each other voting group entitled under RCW 23B.11.035 or the articles of incorporation to vote separately on the plan. The articles of incorporation may require a greater or lesser vote than that provided in this subsection, or a greater or lesser vote by separate voting groups, so long as the required vote is not less than a majority of all the votes entitled to be cast on the plan of share exchange and of each other voting group entitled to vote separately on the plan. Separate voting by additional voting groups is required on a plan of share exchange under the circumstances described in RCW 23B.11.035.

(7) ~~Action~~ Approval by the shareholders of the surviving corporation on a plan of merger is not required if:

(9) After a merger or share exchange is ~~authorized~~approved, and at any time before articles of merger or share exchange are filed, the planned merger or share exchange may be abandoned, subject to any contractual rights, without further shareholder ~~action~~approval, in accordance with the procedure set forth in the plan of merger or share exchange or, if none is set forth, in the manner determined by the board of directors.

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.11.040
MERGER OF SUBSIDIARY

CURRENT SECTION

(1) A parent corporation owning at least ninety percent of the outstanding shares of each class of a subsidiary corporation may merge the subsidiary into itself without approval of the shareholders of the parent or subsidiary.

(2) The board of directors of the parent shall approve a plan of merger that sets forth:

(a) The names of the parent and subsidiary; and

(b) The manner and basis of converting the shares of the subsidiary into shares, obligations, or other securities of the parent or any other corporation or into cash or other property in whole or part.

(3) Within ten days after the corporate action becomes effective, the parent shall deliver a notice to each shareholder of the subsidiary, which notice shall include a copy of the plan of merger.

(4) Articles of merger under this section may not contain amendments to the articles of incorporation of the parent corporation, except for amendments enumerated in RCW 23B.10.020.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §134 (eff.7-1-90)

(1) A parent corporation owning at least ninety percent of the outstanding shares of each class of a subsidiary corporation may merge the subsidiary into itself without approval of the shareholders of the parent or subsidiary.

(2) The board of directors of the parent shall adopt a plan of merger that sets forth:

(a) The names of the parent and subsidiary; and

(b) The manner and basis of converting the shares of the subsidiary into shares, obligations, or other securities of the parent or any other corporation or into cash or other property in whole or part.

(3) Within ten days after the corporate action is taken, the parent shall mail a copy of the plan of merger to each shareholder of the subsidiary.

(4) Articles of merger under this section may not contain amendments to the articles of incorporation of the parent corporation, except for amendments enumerated in RCW 23B.10.020.

ORIGINAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3082-83 (1989)

Section 11.04 Merger of Subsidiary.

Proposed subsection 11.04(a) defines a "parent" corporation as one that owns at least 90 percent of the outstanding shares of each class of another corporation, and a "subsidiary" corporation as one whose shares are so owned. Proposed section 11.04 permits merger of a subsidiary into its parent corporation upon adoption of a plan of merger by the board of directors of the parent alone. Separate action by the board of directors of the subsidiary is unnecessary because the share ownership of the parent corporation is normally sufficient to permit it to elect or remove the subsidiary's board of directors.

Further, the merger transaction need not be approved by the shareholders of either corporation. Approval by the shareholders of the subsidiary is meaningless because the parent's share ownership is sufficient to ensure the plan will be approved. Approval by the parent's shareholders is also unnecessary because the transaction does not materially change their rights: the ownership of the parent corporation is being

changed only from 90 percent indirect ownership to 100 percent direct ownership of the same assets, and no significant amendment of the parent's articles of incorporation is being made. For the same reason, shareholders of the parent corporation do not have the right to dissent from the transaction under chapter 13.

Minority shareholders of the subsidiary corporation may receive shares, obligations, or other securities of the parent or any other corporation, or cash or other property in whole or in part in exchange for their shares. The parent must mail notice of the merger, within 10 days after corporate action is taken, to each shareholder of the subsidiary.

Shareholders of the subsidiary corporation have a right to dissent from the merger transaction under chapter 13. Courts have held that in some circumstances such a transaction may constitute a breach of duty owed by the parent corporation to the shareholders of the subsidiary. See Roland International Corp. v. Najjar, 407 A.2d 1032 (Del. 1979).

AMENDMENTS TO ORIGINAL SECTION *(amends only subsection (3))*
Laws 2002, ch. 297, §34 (eff. 6-13-02)
(3) Within ten days after the corporate action is taken, the parent shall ~~mail a copy of the plan of merger~~ deliver a notice to each shareholder of the subsidiary, which notice shall include a copy of the plan of merger.

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

* * * * *

Laws 2009, ch. 189, §39 (eff. 7-26-09)*(amends only subsections (2) and (3))*
(2) The board of directors of the parent shall ~~adopt~~ approve a plan of merger that sets forth:
(a) The names of the parent and subsidiary; and
(b) The manner and basis of converting the shares of the subsidiary into shares, obligations, or other securities of the parent or any other corporation or into cash or other property in whole or part.
(3) Within ten days after the corporate action ~~is taken~~ becomes effective, the parent shall deliver a notice to each shareholder of the subsidiary, which notice shall include a copy of the plan of merger.

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.11.080
MERGER [EFFECTIVE UNTIL JUNE 30, 2010] – SEE LAWS 2009, CH. 188, §1401

CURRENT SECTION

(1) One or more domestic corporations may merge with one or more limited liability companies, partnerships, or limited partnerships if:

(a) The board of directors of each corporation adopts and the shareholders of each corporation approve, if approval would be necessary, the plan of merger as required by RCW 23B.11.030;

(b) The partners of each limited partnership approve the plan of merger as required by RCW 25.10.810;

(c) The partners of each partnership approve the plan of merger as required by RCW 25.05.375; and

(d) The members of each limited liability company approve, if approval is necessary, the plan of merger as required by RCW 25.15.400.

(2) The plan of merger must set forth:

(a) The name of each limited liability company, partnership, corporation, and limited partnership planning to merge and the name of the surviving limited liability company, partnership, corporation, or limited partnership into which each other limited liability company, partnership, corporation, or limited partnership plans to merge;

(b) The terms and conditions of the merger; and

(c) The manner and basis of converting the shares of each corporation, the member interests of each limited liability company, and the partnership interests in each partnership and each limited partnership into shares, limited liability company member interests, partnership interests, obligations[,] or other securities of the surviving limited liability company, partnership, corporation, or limited partnership, or into cash or other property, including shares, obligations, or securities of any other limited liability company, partnership, or corporation, and partnership interests, obligations, or securities of any other limited partnership, in whole or in part.

(3) The plan of merger may set forth:

(a) Amendments to the articles of incorporation of the surviving corporation;

(b) Amendments to the certificate of limited partnership of the surviving limited partnership; and

(c) Other provisions relating to the merger.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1991, ch. 269, §38 (eff. 7-28-91)

(1) One or more domestic corporations may merge with one or more limited partnerships if:

(a) The board of directors of each corporation adopts and the shareholders of each corporation approve, if approval would be necessary, the plan of merger as required by RCW 23B.11.030; and

(b) The partners of each limited partnership approve the plan of merger as required by RCW 25.10.810;

(2) The plan of merger must set forth:

(a) The name of each corporation, and limited partnership planning to merge and the name of the surviving corporation, or limited partnership into which each other corporation, or limited partnership plans to merge;
(b) The terms and conditions of the merger; and
(c) The manner and basis of converting the shares of each corporation and the partnership interests of each limited partnership into shares, partnership interests, obligations or other securities of the surviving corporation, or limited partnership, or into cash or other property, including shares, obligations, or securities of any other corporation, and partnership interests, obligations, or securities of any other limited partnership, in whole or in part.
(3) The plan of merger may set forth:
(a) Amendments to the articles of incorporation of the surviving corporation;
(b) Amendments to the certificate of limited partnership of the surviving limited partnership; and
(c) Other provisions relating to the merger.

CARC COMMENTARY
RCW 23B.11.080-.110 were added to RCW 23B in 1991 by the Partnership Law Committee of the WSBA, to coordinate with merger provisions added to RCW 25.10 (Limited Partnerships) by Laws 1991, ch. 269.

* * * * *

AMENDMENTS TO ORIGINAL SECTION
Laws 1998, ch. 103, §1310 (eff. 6-11-98)
(1) One or more domestic corporations may merge with one or more limited liability companies, partnerships, or limited partnerships if:
(a) The board of directors of each corporation adopts and the shareholders of each corporation approve, if approval would be necessary, the plan of merger as required by RCW 23B.11.030; ~~and~~
(b) The partners of each limited partnership approve the plan of merger as required by RCW 25.10.810;
(c) The partners of each partnership approve the plan of merger as required by RCW 25.05.375; and
(d) The members of each limited liability company approve, if approval is necessary, the plan of merger as required by RCW 25.15.400.
(2) The plan of merger must set forth:
(a) The name of each limited liability company, partnership, corporation, and limited partnership planning to merge and the name of the surviving limited liability company, partnerships, corporation, or limited partnership into which each other limited liability company, partnership, corporation, or limited partnership plans to merge;
(b) The terms and conditions of the merger; and
(c) The manner and basis of converting the shares of each corporation, the member interests of each limited liability company, and the partnership interests ~~of~~ in each partnership and each limited partnership into shares, limited liability company member interests, partnership interests, obligations or other securities of the surviving limited liability company, partnership, corporation, or limited partnership, or into cash or other property, including shares, obligations, or securities of any other limited liability company, partnership, or corporation, and partnership interests, obligations, or securities of any other limited partnership, in whole or in part.
(3) The plan of merger may set forth:
(a) Amendments to the articles of incorporation of the surviving corporation;
(b) Amendments to the certificate of limited partnership of the surviving limited partnership; and
(c) Other provisions relating to the merger.

CARC COMMENTARY
RCW 23B.11.080-.110 were amended in 1998 by the Partnership Law Committee of the WSBA, to facilitate the adoption of the Revised Uniform Partnership Act in 1998. See generally Laws 1998, ch. 103.

* * * * *

RCW 23B.11.080
MERGER [EFFECTIVE JULY 1, 2010]

CURRENT SECTION

(1) One or more domestic corporations may merge with one or more limited liability companies, partnerships, or limited partnerships if:

(a) The board of directors of each corporation adopts and the shareholders of each corporation approve, if approval would be necessary, the plan of merger as required by RCW 23B.11.030;

(b) The partners of each limited partnership approve the plan of merger as required by RCW 25.10.781;

(c) The partners of each partnership approve the plan of merger as required by RCW 25.05.375; and

(d) The members of each limited liability company approve, if approval is necessary, the plan of merger as required by RCW 25.15.400.

(2) The plan of merger must set forth:

(a) The name of each limited liability company, partnership, corporation, and limited partnership planning to merge and the name of the surviving limited liability company, partnership, corporation, or limited partnership into which each other limited liability company, partnership, corporation, or limited partnership plans to merge;

(b) The terms and conditions of the merger; and

(c) The manner and basis of converting the shares of each corporation, the member interests of each limited liability company, and the partnership interests in each partnership and each limited partnership into shares, limited liability company member interests, partnership interests, obligations, or other securities of the surviving limited liability company, partnership, corporation, or limited partnership, or into cash or other property, including shares, obligations, or securities of any other limited liability company, partnership, or corporation, and partnership interests, obligations, or securities of any other limited partnership, in whole or in part.

(3) The plan of merger may set forth:

(a) Amendments to the articles of incorporation of the surviving corporation;

(b) Amendments to the certificate of limited partnership of the surviving limited partnership; and

(c) Other provisions relating to the merger.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1991, ch. 269, §38 (eff. 7-28-91)

(1) One or more domestic corporations may merge with one or more limited partnerships if:

(a) The board of directors of each corporation adopts and the shareholders of each corporation approve, if approval would be necessary, the plan of merger as required by RCW 23B.11.030; and

(b) The partners of each limited partnership approve the plan of merger as required by RCW 25.10.810;

(2) The plan of merger must set forth:

(a) The name of each corporation, and limited partnership planning to merge and the name of the surviving corporation, or limited partnership into which each other corporation, or limited partnership plans to merge;
(b) The terms and conditions of the merger; and
(c) The manner and basis of converting the shares of each corporation and the partnership interests of each limited partnership into shares, partnership interests, obligations or other securities of the surviving corporation, or limited partnership, or into cash or other property, including shares, obligations, or securities of any other corporation, and partnership interests, obligations, or securities of any other limited partnership, in whole or in part.
(3) The plan of merger may set forth:
(a) Amendments to the articles of incorporation of the surviving corporation;
(b) Amendments to the certificate of limited partnership of the surviving limited partnership; and
(c) Other provisions relating to the merger.

CARC COMMENTARY
RCW 23B.11.080-.110 were added to RCW 23B in 1991 by the Partnership Law Committee of the WSBA, to coordinate with merger provisions added to RCW 25.10 (Limited Partnerships) by Laws 1991, ch. 269.

* * * * *

AMENDMENTS TO ORIGINAL SECTION
Laws 1998, ch. 103, §1310 (eff. 6-11-98)
(1) One or more domestic corporations may merge with one or more limited liability companies, partnerships, or limited partnerships if:
(a) The board of directors of each corporation adopts and the shareholders of each corporation approve, if approval would be necessary, the plan of merger as required by RCW 23B.11.030; ~~and~~
(b) The partners of each limited partnership approve the plan of merger as required by RCW 25.10.810;
(c) The partners of each partnership approve the plan of merger as required by RCW 25.05.375; and
(d) The members of each limited liability company approve, if approval is necessary, the plan of merger as required by RCW 25.15.400.
(2) The plan of merger must set forth:
(a) The name of each limited liability company, partnership, corporation, and limited partnership planning to merge and the name of the surviving limited liability company, partnerships, corporation, or limited partnership into which each other limited liability company, partnership, corporation, or limited partnership plans to merge;
(b) The terms and conditions of the merger; and
(c) The manner and basis of converting the shares of each corporation, the member interests of each limited liability company, and the partnership interests ~~of~~ in each partnership and each limited partnership into shares, limited liability company member interests, partnership interests, obligations or other securities of the surviving limited liability company, partnership, corporation, or limited partnership, or into cash or other property, including shares, obligations, or securities of any other limited liability company, partnership, or corporation, and partnership interests, obligations, or securities of any other limited partnership, in whole or in part.
(3) The plan of merger may set forth:
(a) Amendments to the articles of incorporation of the surviving corporation;
(b) Amendments to the certificate of limited partnership of the surviving limited partnership; and
(c) Other provisions relating to the merger.

CARC COMMENTARY
RCW 23B.11.080-.110 were amended in 1998 by the Partnership Law Committee of the WSBA, to facilitate the adoption of the Revised Uniform Partnership Act in 1998. See generally Laws 1998, ch. 103.

* * * * *

Laws 2009, ch. 188, §1401 (eff. 7-1-10)*(amends only subsection (1)(b) and inserts a comma following the first reference to "obligations" in subsection (2)(c))*
(b) The partners of each limited partnership approve the plan of merger as required by RCW ~~25.10.810~~25.10.781;

CARC COMMENTARY
Amends the cross reference to the appropriate section of the Uniform Limited Partnership Act.

* * * * *

RCW 23B.11.090
ARTICLES OF MERGER [EFFECTIVE UNTIL JUNE 30, 2010] – SEE LAWS 2009, CH. 188, §1402

CURRENT SECTION

After a plan of merger for one or more corporations and one or more limited partnerships, one or more partnerships, or one or more limited liability companies is approved by the shareholders of each corporation (or adopted by the board of directors of any corporation for which shareholder approval is not required), is approved by the partners for each limited partnership as required by RCW 25.10.810, is approved by the partners of each partnership as required by RCW 25.05.380, or is approved by the members of each limited liability company as required by RCW 25.15.400, the surviving entity must:

(1) If the surviving entity is a corporation, file with the secretary of state articles of merger setting forth:

(a) The plan of merger;

(b) A statement that the merger was duly approved by the shareholders of each corporation pursuant to RCW 23B.11.030 (or a statement that shareholder approval was not required for a merging corporation); and

(c) A statement that the merger was duly approved by the partners of each limited partnership pursuant to RCW 25.10.810.

(2) If the surviving entity is a limited partnership, comply with the requirements in RCW 25.10.820.

(3) If the surviving entity is a partnership, comply with the requirements in RCW 25.05.380.

(4) If the surviving entity is a limited liability company, comply with the requirements in RCW 25.15.405.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1991, ch. 269, §39 (eff. 7-28-91)

After a plan of merger for one or more corporations and one or more limited partnerships is approved by the shareholders of each corporation (or adopted by the board of directors of any corporation for which shareholder approval is not required), and is approved by the partners for each limited partnership as required by RCW 25.10.810, the surviving entity must:

(1) If the surviving entity is a corporation, file with the secretary of state articles of merger setting forth:

(a) The plan of merger;

(b) A statement that the merger was duly approved by the shareholders of each corporation pursuant to RCW 23B.11.030 (or a statement that shareholder approval was not required for a merging corporation); and

(c) A statement that the merger was duly approved by the partners of each limited partnership pursuant to RCW 25.10.810.

(2) If the surviving entity is a limited partnership, comply with the requirements in RCW 25.10.820.

CARC COMMENTARY

See CARC Comment to the 1991 Amendment adding RCW 23B.11.080.

* * * * *

AMENDMENTS TO ORIGINAL SECTION
Laws 1998, ch. 103, §1311 (eff. 6-11-98)

After a plan of merger for one or more corporations and one or more limited partnerships, one or more partnerships, or one or more limited liability companies is approved by the shareholders of each corporation (or adopted by the board of directors of any corporation for which shareholder approval is not required), ~~and~~ is approved by the partners for each limited partnership as required by RCW 25.10.810, is approved by the partners of each partnership as required by section 907 of this act, or is approved by the members of each limited liability company as required by RCW 25.15.400, the surviving entity must:

(1) If the surviving entity is a corporation, file with the secretary of state articles of merger setting forth:

(a) The plan of merger;

(b) A statement that the merger was duly approved by the shareholders of each corporation pursuant to RCW 23B.11.030 (or a statement that shareholder approval was not required for a merging corporation); and

(c) A statement that the merger was duly approved by the partners of each limited partnership pursuant to RCW 25.10.810.

(2) If the surviving entity is a limited partnership, comply with the requirements in RCW 25.10.820.

(3) If the surviving entity is a partnership, comply with the requirements in RCW 25.05.380.

(4) If the surviving entity is a limited liability company, comply with the requirements in RCW 25.15.405.

CARC COMMENTARY

See CARC Comment to 1998 Amendment of RCW 23B.11.080.

* * * * *

RCW 23B.11.090
ARTICLES OF MERGER [EFFECTIVE JULY 1, 2010]

CURRENT SECTION

After a plan of merger for one or more corporations and one or more limited partnerships, one or more partnerships, or one or more limited liability companies is approved by the shareholders of each corporation (or adopted by the board of directors of any corporation for which shareholder approval is not required), is approved by the partners for each limited partnership as required by RCW 25.10.781, is approved by the partners of each partnership as required by RCW 25.05.380, or is approved by the members of each limited liability company as required by RCW 25.15.400, the surviving entity must:

(1) If the surviving entity is a corporation, file with the secretary of state articles of merger setting forth:

(a) The plan of merger;

(b) A statement that the merger was duly approved by the shareholders of each corporation pursuant to RCW 23B.11.030 (or a statement that shareholder approval was not required for a merging corporation); and

(c) A statement that the merger was duly approved by the partners of each limited partnership pursuant to RCW 25.10.781.

(2) If the surviving entity is a limited partnership, comply with the requirements in RCW 25.10.786.

(3) If the surviving entity is a partnership, comply with the requirements in RCW 25.05.380.

(4) If the surviving entity is a limited liability company, comply with the requirements in RCW 25.15.405.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1991, ch. 269, §39 (eff. 7-28-91)

After a plan of merger for one or more corporations and one or more limited partnerships is approved by the shareholders of each corporation (or adopted by the board of directors of any corporation for which shareholder approval is not required), and is approved by the partners for each limited partnership as required by RCW 25.10.810, the surviving entity must:

(1) If the surviving entity is a corporation, file with the secretary of state articles of merger setting forth:

(a) The plan of merger;

(b) A statement that the merger was duly approved by the shareholders of each corporation pursuant to RCW 23B.11.030 (or a statement that shareholder approval was not required for a merging corporation); and

(c) A statement that the merger was duly approved by the partners of each limited partnership pursuant to RCW 25.10.810.

(2) If the surviving entity is a limited partnership, comply with the requirements in RCW 25.10.820.

CARC COMMENTARY

See CARC Comment to the 1991 Amendment adding RCW 23B.11.080.

* * * * *

AMENDMENTS TO ORIGINAL SECTION

Laws 1998, ch. 103, §1311 (eff. 6-11-98)

After a plan of merger for one or more corporations and one or more limited partnerships, one or more partnerships, or one or more limited liability companies is approved by the shareholders of each corporation (or adopted by the board of directors of any corporation for which shareholder approval is not required), ~~and~~ is approved by the partners for each limited partnership as required by RCW 25.10.810, is approved by the partners of each partnership as required by section 907 of this act, or is approved by the members of each limited liability company as required by RCW 25.15.400, the surviving entity must:

(1) If the surviving entity is a corporation, file with the secretary of state articles of merger setting forth:

(a) The plan of merger;

(b) A statement that the merger was duly approved by the shareholders of each corporation pursuant to RCW 23B.11.030 (or a statement that shareholder approval was not required for a merging corporation); and

(c) A statement that the merger was duly approved by the partners of each limited partnership pursuant to RCW 25.10.810.

(2) If the surviving entity is a limited partnership, comply with the requirements in RCW 25.10.820.

(3) If the surviving entity is a partnership, comply with the requirements in RCW 25.05.380.

(4) If the surviving entity is a limited liability company, comply with the requirements in RCW 25.15.405.

CARC COMMENTARY

See CARC Comment to 1998 Amendment of RCW 23B.11.080.

* * * * *

Laws 2009, ch. 188, §1402 (eff. 7-1-10)

After a plan of merger for one or more corporations and one or more limited partnerships, one or more partnerships, or one or more limited liability companies is approved by the shareholders of each corporation (or adopted by the board of directors of any corporation for which shareholder approval is not required), is approved by the partners for each limited partnership as required by RCW ~~25.10.810~~ 25.10.781, is approved by the partners of each partnership as required by RCW 25.05.380, or is approved by the members of each limited liability company as required by RCW 25.15.400, the surviving entity must:

(1) If the surviving entity is a corporation, file with the secretary of state articles of merger setting forth:

(a) The plan of merger;

(b) A statement that the merger was duly approved by the shareholders of each corporation pursuant to RCW 23B.11.030 (or a statement that shareholder approval was not required for a merging corporation); and

(c) A statement that the merger was duly approved by the partners of each limited partnership pursuant to RCW ~~25.10.810~~ 25.10.781.

(2) If the surviving entity is a limited partnership, comply with the requirements in RCW ~~25.10.820~~ 25.10.786.

(3) If the surviving entity is a partnership, comply with the requirements in RCW 25.05.380.

(4) If the surviving entity is a limited liability company, comply with the requirements in RCW 25.15.405.

CARC COMMENTARY

Amends the cross reference to the appropriate section of the Uniform Limited Partnership Act.

* * * * *

RCW 23B.11.110
MERGER WITH FOREIGN AND DOMESTIC ENTITIES – EFFECT [EFFECTIVE UNTIL JULY 1, 2010] – SEE LAWS 2009, CH. 188, §1403

CURRENT SECTION

(1) One or more foreign limited partnerships, foreign corporations, foreign partnerships, and foreign limited liability companies may merge with one or more domestic partnerships, domestic limited liability companies, domestic limited partnerships, or domestic corporations, provided that:

(a) The merger is permitted by the law of the jurisdiction under which each foreign limited partnership was organized and the law of the state or country under which each foreign corporation was incorporated and each foreign limited partnership or foreign corporation complies with that law in effecting the merger;

(b) If the surviving entity is a foreign or domestic corporation, that corporation complies with RCW 23B.11.090;

(c) If the surviving entity is a foreign or domestic limited partnership, that limited partnership complies with RCW 25.10.820;

(d) Each domestic corporation complies with RCW 23B.11.080;

(e) Each domestic limited partnership complies with RCW 25.10.810;

(f) Each domestic limited liability company complies with RCW 25.15.400; and

(g) Each domestic partnership complies with RCW 25.05.375.

(2) Upon the merger taking effect, a surviving foreign corporation, foreign limited partnership, foreign limited liability corporation, [sic.] or foreign partnership is deemed:

(a) To appoint the secretary of state as its agent for service of process in a proceeding to enforce any obligation or the rights of dissenting shareholders or partners of each domestic corporation, domestic limited partnership, domestic limited liability company, or domestic partnership party to the merger; and

(b) To agree that it will promptly pay to the dissenting shareholders or partners of each domestic corporation, domestic limited partnership, domestic limited liability company, or domestic partnership party to the merger the amount, if any, to which they are entitled under chapter 23B.13 RCW, in the case of dissenting shareholders, or under chapter 25.10, 25.15, or 25.05 RCW, in the case of dissenting partners.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1991, ch. 269, §41 (eff. 7-28-91)

(1) One or more foreign limited partnerships and one or more foreign corporations may merge with one or more domestic corporations, provided that:

(a) The merger is permitted by the law of the jurisdiction under which each foreign limited partnership was organized and the law of the state or country under which each foreign corporation was incorporated and each foreign limited partnership or foreign corporation complies with that law in effecting the merger;

(b) If the surviving entity is a foreign or domestic corporation, that corporation complies with RCW 23B.11.090;

(c) If the surviving entity is a foreign or domestic limited partnership, that limited partnership complies with RCW 25.10.820;

(d) Each domestic corporation complies with RCW 23B.11.080;

(e) Each domestic limited partnership complies with RCW 25.10.810;
(2) Upon the merger taking effect, a surviving foreign corporation or limited partnership is deemed:
(a) To appoint the secretary of state as its agent for service of process in a proceeding to enforce any obligation or the rights of dissenting shareholders or partners of each domestic corporation or domestic limited partnership party to the merger; and
(b) To agree that it will promptly pay to the dissenting shareholders or partners of each domestic corporation or domestic limited partnership party to the merger the amount, if any, to which they are entitled under chapter 23B.13 RCW, in the case of dissenting shareholders, or under chapter 25.10 RCW, in the case of dissenting partners.

CARC COMMENTARY
See CARC Comment to 1991 Amendment adding RCW 23B.11.080.

* * * * *

AMENDMENT TO ORIGINAL SECTION
Laws 1998, ch. 103, §1313 (eff. 6-11-98)
(1) One or more foreign limited partnerships ~~and one or more,~~ foreign corporations, foreign partnerships, and foreign limited liability companies may merge with one or more domestic partnerships, domestic limited liability companies, domestic limited partnerships, or domestic corporations, provided that:
(a) The merger is permitted by the law of the jurisdiction under which each foreign limited partnership was organized and the law of the state or country under which each foreign corporation was incorporated and each foreign limited partnership or foreign corporation complies with that law in effecting the merger;
(b) If the surviving entity is a foreign or domestic corporation, that corporation complies with RCW 23B.11.090;
(c) If the surviving entity is a foreign or domestic limited partnership, that limited partnership complies with RCW 25.10.820;
(d) Each domestic corporation complies with RCW 23B.11.080; ~~and~~
(e) Each domestic limited partnership complies with RCW 25.10.810;
(f) Each domestic limited liability company complies with RCW 25.15.400; and
(g) Each domestic partnership complies with section 906 of this act.
(2) Upon the merger taking effect, a surviving foreign corporation ~~or~~, foreign limited partnership, foreign limited liability corporation, or foreign partnership is deemed:
(a) To appoint the secretary of state as its agent for service of process in a proceeding to enforce any obligation or the rights of dissenting shareholders or partners of each domestic corporation ~~or~~, domestic limited partnership, domestic limited liability company, or domestic partnership party to the merger; and
(b) To agree that it will promptly pay to the dissenting shareholders or partners of each domestic corporation ~~or~~, domestic limited partnership, domestic limited liability company, or domestic partnership party to the merger the amount, if any, to which they are entitled under chapter 23B.13 RCW, in the case of dissenting shareholders, or under chapter 25.10, 25.15, or 25.—(sections 101 through 1307 of this act) RCW, in the case of dissenting partners.

CARC COMMENTARY
See CARC Comment to 1998 Amendment of RCW 23B.11.080.

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RCW 23B.11.110
MERGER WITH FOREIGN AND DOMESTIC ENTITIES – EFFECT [EFFECTIVE JULY 1, 2010]

CURRENT SECTION

(1) One or more foreign limited partnerships, foreign corporations, foreign partnerships, and foreign limited liability companies may merge with one or more domestic partnerships, domestic limited liability companies, domestic limited partnerships, or domestic corporations, provided that:

(a) The merger is permitted by the law of the jurisdiction under which each foreign limited partnership was organized and the law of the state or country under which each foreign corporation was incorporated and each foreign limited partnership or foreign corporation complies with that law in effecting the merger;

(b) If the surviving entity is a foreign or domestic corporation, that corporation complies with RCW 23B.11.090;

(c) If the surviving entity is a foreign or domestic limited partnership, that limited partnership complies with RCW 25.10.786;

(d) Each domestic corporation complies with RCW 23B.11.080;

(e) Each domestic limited partnership complies with RCW 25.10.781;

(f) Each domestic limited liability company complies with RCW 25.15.400; and

(g) Each domestic partnership complies with RCW 25.05.375.

(2) Upon the merger taking effect, a surviving foreign corporation, foreign limited partnership, foreign limited liability corporation, or foreign partnership is deemed:

(a) To appoint the secretary of state as its agent for service of process in a proceeding to enforce any obligation or the rights of dissenting shareholders or partners of each domestic corporation, domestic limited partnership, domestic limited liability company, or domestic partnership party to the merger; and

(b) To agree that it will promptly pay to the dissenting shareholders or partners of each domestic corporation, domestic limited partnership, domestic limited liability company, or domestic partnership party to the merger the amount, if any, to which they are entitled under chapter 23B.13 RCW, in the case of dissenting shareholders, or under chapter 25.10, 25.15, or 25.05 RCW, in the case of dissenting partners.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1991, ch. 269, §41 (eff. 7-28-91)

(1) One or more foreign limited partnerships and one or more foreign corporations may merge with one or more domestic corporations, provided that:

(a) The merger is permitted by the law of the jurisdiction under which each foreign limited partnership was organized and the law of the state or country under which each foreign corporation was incorporated and each foreign limited partnership or foreign corporation complies with that law in effecting the merger;

(b) If the surviving entity is a foreign or domestic corporation, that corporation complies with RCW 23B.11.090;

(c) If the surviving entity is a foreign or domestic limited partnership, that limited partnership complies with RCW 25.10.820;

(d) Each domestic corporation complies with RCW 23B.11.080;

(e) Each domestic limited partnership complies with RCW 25.10.810;
(2) Upon the merger taking effect, a surviving foreign corporation or limited partnership is deemed:
(a) To appoint the secretary of state as its agent for service of process in a proceeding to enforce any obligation or the rights of dissenting shareholders or partners of each domestic corporation or domestic limited partnership party to the merger; and
(b) To agree that it will promptly pay to the dissenting shareholders or partners of each domestic corporation or domestic limited partnership party to the merger the amount, if any, to which they are entitled under chapter 23B.13 RCW, in the case of dissenting shareholders, or under chapter 25.10 RCW, in the case of dissenting partners.

CARC COMMENTARY
See CARC Comment to 1991 Amendment adding RCW 23B.11.080.

* * * * *

AMENDMENT TO ORIGINAL SECTION
Laws 1998, ch. 103, §1313 (eff. 6-11-98)
(1) One or more foreign limited partnerships ~~and one or more,~~ foreign corporations, foreign partnerships, and foreign limited liability companies may merge with one or more domestic partnerships, domestic limited liability companies, domestic limited partnerships, or domestic corporations, provided that:
(a) The merger is permitted by the law of the jurisdiction under which each foreign limited partnership was organized and the law of the state or country under which each foreign corporation was incorporated and each foreign limited partnership or foreign corporation complies with that law in effecting the merger;
(b) If the surviving entity is a foreign or domestic corporation, that corporation complies with RCW 23B.11.090;
(c) If the surviving entity is a foreign or domestic limited partnership, that limited partnership complies with RCW 25.10.820;
(d) Each domestic corporation complies with RCW 23B.11.080; ~~and~~
(e) Each domestic limited partnership complies with RCW 25.10.810;
(f) Each domestic limited liability company complies with RCW 25.15.400; and
(g) Each domestic partnership complies with section 906 of this act.
(2) Upon the merger taking effect, a surviving foreign corporation ~~or~~ , foreign limited partnership, foreign limited liability corporation, or foreign partnership is deemed:
(a) To appoint the secretary of state as its agent for service of process in a proceeding to enforce any obligation or the rights of dissenting shareholders or partners of each domestic corporation ~~or~~ , domestic limited partnership, domestic limited liability company, or domestic partnership party to the merger; and
(b) To agree that it will promptly pay to the dissenting shareholders or partners of each domestic corporation ~~or~~ ,domestic limited partnership, domestic limited liability company, or domestic partnership party to the merger the amount, if any, to which they are entitled under chapter 23B.13 RCW, in the case of dissenting shareholders, or under chapter 25.10, 25.15, or 25.—(sections 101 through 1307 of this act) RCW, in the case of dissenting partners.

CARC COMMENTARY
See CARC Comment to 1998 Amendment of RCW 23B.11.080.

* * * * *

Laws 2009, ch. 188, §1403 (eff. 7-1-10)*(amends only subsections (1)(c) and (1)(e))*
(1)(c) If the surviving entity is a foreign or domestic limited partnership, that limited partnership complies with RCW ~~25.10.820~~ 25.10.786;

(1)(e) Each domestic limited partnership complies with RCW ~~25.10.810~~ 25.10.781;

CARC COMMENTARY
Amends cross references to appropriate sections in the Uniform Limited Partnership Act.

* * * * *

RCW 23B.12.020
SALE OF ASSETS OTHER THAN IN REGULAR COURSE OF BUSINESS

CURRENT SECTION

(1) A corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property, otherwise than in the usual and regular course of business, on the terms and conditions and for the consideration determined by the corporation's board of directors, if the board of directors proposes and its shareholders approve the proposed transaction.

(2) For a transaction to be approved:

(a) The board of directors must recommend the proposed transaction to the shareholders unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders with the submission of the proposed transaction; and

(b) The shareholders entitled to vote must approve the transaction.

(3) The board of directors may condition its submission of the proposed transaction on any basis, including the affirmative vote of holders of a specified percentage of shares held by any group of shareholders not otherwise entitled under this title or the articles of incorporation to vote as a separate voting group on the proposed transaction.

(4) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with RCW 23B.07.050. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the sale, lease, exchange, or other disposition of all, or substantially all, the property of the corporation and contain or be accompanied by a description of the transaction.

(5) In addition to any other voting conditions imposed by the board of directors under subsection (3) of this section, the transaction must be approved by two-thirds of the voting group comprising all the votes entitled to be cast on the transaction, and of each other voting group entitled under the articles of incorporation to vote separately on the transaction. The articles of incorporation may require a greater or lesser vote than provided in this subsection, or a greater or lesser vote by any separate voting groups provided for in the articles of incorporation, so long as the required vote is not less than a majority of all the votes entitled to be cast on the transaction and of each other voting group entitled to vote separately on the transaction.

(6) After a sale, lease, exchange, or other disposition of property is approved, the transaction may be abandoned, subject to any contractual rights, without further shareholder approval, in a manner determined by the board of directors.

(7) A transaction that constitutes a distribution is governed by RCW 23B.06.400 and not by this section.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §139 (eff. 7-1-90)

(1) A corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property, otherwise than in the usual and regular course of business, on the terms and conditions and for the consideration determined by the corporation's board of directors, if the board of directors proposes and its shareholders approve the proposed transaction.

(2) For a transaction to be authorized:

(a) The board of directors must recommend the proposed transaction to the shareholders unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders with the submission of the proposed transaction; and

(b) The shareholders entitled to vote must approve the transaction.

(3) The board of directors may condition its submission of the proposed transaction on any basis.

(4) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with RCW 23B.07.050. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider the sale, lease, exchange, or other disposition of all, or substantially all, the property of the corporation and contain or be accompanied by a description of the transaction.

(5) Unless the articles of incorporation or the board of directors, acting pursuant to subsection (3) of this section, require a greater vote or a vote by voting groups, the transaction to be authorized must be approved by two-thirds of all the votes entitled to be cast on the transaction. The articles of incorporation may provide for a lesser vote than that provided for in this subsection, or for a lesser vote by separate voting groups, so long as the vote provided for each voting group entitled to vote separately on the transaction is not less than a majority of all the votes entitled to be cast on the transaction by that voting group.

(6) After a sale, lease, exchange, or other disposition of property is authorized, the transaction may be abandoned, subject to any contractual rights, without further shareholder action.

(7) A transaction that constitutes a distribution is governed by RCW 23B.06.400 and not by this section.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3085-86 (1989)

Section 12.02 Sale of Assets Other Than in the Regular Course of Business.

The scope of the phrase "all or substantially all" is discussed in the Comment to Proposed section 12.01. All transactions that involve the sale or transfer of "all or substantially all" the corporate property must be approved by the shareholders unless they fall within one of the exceptions of Proposed section 12.01

Proposed section 12.02 requires the board of directors to propose the sale and then submit the proposal to the shareholders. The board of directors must make a recommendation to the shareholders that the transaction be approved, unless the board determines that because of conflict of interest or other special circumstances it should make no recommendation. If the board so determines, it must describe the conflict or circumstances, and communicate the basis for its determination, to the shareholders when it presents the proposed sale.

The proposed sale, to be approved, generally must receive two-thirds of all the votes entitled by the articles of incorporation to be cast on the proposal. The Committee rejected the RMA approach that would have required only a majority vote on the ground that the two-thirds approval present in the old law had become such an important part of control structure planning that a reduction to a majority requirement would greatly upset expectations in numerous small corporations. However, the Committee added a provision permitting articles of incorporation to provide for a vote as low as a majority of all the votes entitled to be cast on the transaction by any voting group entitled to vote separately. It felt that such provision permitted the flexibility sought by the RMA provision without endangering control patterns generally.

Nonvoting classes of shares are not given a statutory right to vote on proposed sales (either as separate voting groups or together with voting shares) by the Proposed Act on the theory that classes or series of shares that are made nonvoting by the articles of incorporation generally did not retain a voice in the areas of business the corporation may engage in the future. The articles of incorporation, however, may stipulate that specified classes or series of shares are entitled to vote by separate voting groups. Thus, in the absence of special provision in the articles of incorporation, only the shares of the corporation entitled to vote generally by the articles of incorporation are entitled to vote on sales of substantially all the assets of the corporation. The articles of incorporation may also specify that a greater percentage of votes is required to approve the proposal than specified in Proposed section 12.02.

The board of directors may condition its submission of a proposal to the shareholders under Proposed subsection 12.02(c) on any basis--for example, on its receiving a certain percentage of shareholders' affirmative votes or that specified classes or series of shares, voting by separate voting groups, must approve the transaction or on some other basis.

Proposed subsection 12.02(d) requires the notice to shareholders to contain or be accompanied by a description of the transaction. The description of the transaction must provide sufficient detail so that a shareholder can make an informed decision whether to approve or disapprove the transaction or to exercise dissenters' rights pursuant to chapter 13. In some circumstances it may be appropriate to accompany the description with a copy of the assets sale agreement, although ordinarily supporting exhibits and schedules would not be necessary to allow the shareholder to make an informed decision. In any event, a copy of the asset sale agreement and supporting exhibits and schedule should be provided to a shareholder upon written request.

The approval of most sales of "all or substantially all" of the corporation's assets gives rise to dissenters' rights under chapter 13 to shareholders who are entitled to vote on the transaction and avail themselves of the procedures described in that chapter. Sales subject to Proposed section 12.02 that do not give rise to dissenters' rights even for voting shares include (1) sales pursuant to a court order and (2) sales that require all or substantially all of the net proceeds to be distributed to the shareholders in accordance with their respective interests within one year after the date of sale. See Proposed section 13.02. Shares not entitled to vote on the transaction do not have dissenters' rights by statute; the articles of incorporation may grant those rights or the board of directors may elect to make them available.

Proposed subsection 12.02(f) authorizes a board of directors to abandon a proposed sale without shareholder approval after it has been previously approved by the shareholders. An abandonment does not affect contractual rights that third persons may have against the corporation.

Certain corporate divisions, often called "spin offs," "split offs," or "split ups," sometimes involve transactions that may be formally characterized as sales of "all or substantially all" the corporate assets when in fact they are only a step in a corporate division that does not give rise to the problem of a major change in corporate direction and therefore does not need shareholder approval. Proposed subsection 12.02(g) is designed to make clear that transactions like this, which actually constitute a distribution, are not subject to Proposed section 12.02. See Siegal, "When Corporations Divide: A Statutory and Financial Analysis," 79 HARV. L. REV. 534 (1966).

AMENDMENTS TO ORIGINAL SECTION

Laws 2003, ch. 35, §8 (eff. 7-27-03) *(amends only subsections 3,5, and 6)*

(3) The board of directors may condition its submission of the proposed transaction on any basis, including the affirmative vote of holders of a specified percentage of shares held by any group of shareholders not otherwise entitled under this title or the articles of incorporation to vote as a separate voting group on the proposed transaction.

(5) ~~Unless the articles of incorporation or~~ In addition to any other voting conditions imposed by the board of directors~~, acting pursuant to~~ under subsection (3) of this section, ~~require a greater vote~~

~~or a vote by voting groups,~~ the transaction to be authorized must be approved by two-thirds of the voting group comprising all the votes entitled to be cast on the transaction, and of each other voting group entitled under the articles of incorporation to vote separately on the transaction. The articles of incorporation may ~~provide for a~~ require a greater or lesser vote than ~~that~~ provided ~~for~~ in this subsection, or ~~for~~ a greater or lesser vote by any separate voting groups provided for in the articles of incorporation, so long as the required vote ~~provided for each voting group entitled to vote separately on the transaction~~ is not less than a majority of all the votes entitled to be cast on the transaction ~~by that voting group~~ and of each other voting group entitled to vote separately on the transaction.

(6) After a sale, lease, exchange, or other disposition of property is authorized, the transaction may be abandoned, subject to any contractual rights, without further shareholder action, in a manner determined by the board of directors.

CARC COMMENTARY

The proposed changes to RCW 23B.12.020 are meant to clarify that the requirement of separate approval by voting groups is in addition to, and not in lieu of, the required approval of an asset sale by the requisite percentage of all shareholders.

* * * * *

Laws 2009, ch. 189, §40 (eff. 7-26-09) *(amends only subsections (2)(introductory paragraph only), (5) and (6))*

(2) For a transaction to be ~~authorized~~approved:

(5) In addition to any other voting conditions imposed by the board of directors under subsection (3) of this section, the transaction ~~to be authorized~~ must be approved by two-thirds of the voting group comprising all the votes entitled to be cast on the transaction, and of each other voting group entitled under the articles of incorporation to vote separately on the transaction. The articles of incorporation may require a greater or lesser vote than provided in this subsection, or a greater or lesser vote by any separate voting groups provided for in the articles of incorporation, so long as the required vote is not less than a majority of all the votes entitled to be cast on the transaction and of each other voting group entitled to vote separately on the transaction.

(6) After a sale, lease, exchange, or other disposition of property is ~~authorized~~approved, the transaction may be abandoned, subject to any contractual rights, without further shareholder ~~action~~approval, in a manner determined by the board of directors.

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.13.020
RIGHT TO DISSENT [EFFECTIVE UNTIL JULY 1, 2010 – SEE LAWS 2009, CH. 188, §1404]

CURRENT SECTION

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

(a) A plan of merger, which has become effective, to which the corporation is a party (i) if shareholder approval was required for the merger by RCW 23B.11.030, 23B.11.080, or the articles of incorporation, and the shareholder was entitled to vote on the merger, or (ii) if the corporation was a subsidiary that has been merged with its parent under RCW 23B.11.040;

(b) A plan of share exchange, which has become effective, to which the corporation is a party as the corporation whose shares have been acquired, if the shareholder was entitled to vote on the plan;

(c) A sale or exchange, which has become effective, of all, or substantially all, of the property of the corporation other than in the usual and regular course of business, if the shareholder was entitled to vote on the sale or exchange, including a sale in dissolution, but not including a sale pursuant to court order or a sale for cash pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed to the shareholders within one year after the date of sale;

(d) An amendment of the articles of incorporation, whether or not the shareholder was entitled to vote on the amendment, if the amendment effects a redemption or cancellation of all of the shareholder's shares in exchange for cash or other consideration other than shares of the corporation; or

(e) Any corporate action approved pursuant to a shareholder vote to the extent the articles of incorporation, bylaws, or a resolution of the board of directors provides that voting or nonvoting shareholders are entitled to dissent and obtain payment for their shares.

(2) A shareholder entitled to dissent and obtain payment for the shareholder's shares under this chapter may not challenge the corporate action creating the shareholder's entitlement unless the action fails to comply with the procedural requirements imposed by this title, RCW 25.10.900 through 25.10.955, the articles of incorporation, or the bylaws, or is fraudulent with respect to the shareholder or the corporation.

(3) The right of a dissenting shareholder to obtain payment of the fair value of the shareholder's shares shall terminate upon the occurrence of any one of the following events:

(a) The proposed corporate action is abandoned or rescinded;

(b) A court having jurisdiction permanently enjoins or sets aside the corporate action; or

(c) The shareholder's demand for payment is withdrawn with the written consent of the corporation.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §141 (eff. 7-1-90)

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

(a) Consummation of a plan of merger to which the corporation is a party (i) if shareholder approval is required for the merger by RCW 23B.11.030 or the articles of incorporation, and the shareholder is entitled to vote on the merger, or (ii) if the corporation is a subsidiary that is merged with its parent under RCW 23B.11.040;

(b) Consummation of a plan of share exchange to which the corporation is a party as the corporation whose shares will be acquired, if the shareholder is entitled to vote on the plan;

(c) Consummation of a sale or exchange of all, or substantially all, of the property of the corporation other than in the usual and regular course of business, if the shareholder is entitled to vote on the sale or exchange, including a sale in dissolution, but not including a sale pursuant to court order or a sale for cash pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed to the shareholders within one year after the date of sale;

(d) An amendment of the articles of incorporation that materially reduces the number of shares owned by the shareholder to a fraction of a share if the fractional share so created is to be acquired for cash under RCW 23B.06.040; or

(e) Any corporate action taken pursuant to a shareholder vote to the extent the articles of incorporation, bylaws, or a resolution of the board of directors provides that voting or nonvoting shareholders are entitled to dissent and obtain payment for their shares.

(2) A shareholder entitled to dissent and obtain payment for the shareholder's shares under this chapter may not challenge the corporate action creating the shareholder's entitlement unless the action fails to comply with the procedural requirements imposed by this title, the articles of incorporation, or the bylaws, or is fraudulent with respect to the shareholder or the corporation.

(3) The right of a dissenting shareholder to obtain payment of the fair value of the shareholder's shares shall terminate upon the occurrence of any one of the following events:

(a) The proposed corporate action is abandoned or rescinded;

(b) A court having jurisdiction permanently enjoins or sets aside the corporate action; or

(c) The shareholder's demand for payment is withdrawn with the written consent of the corporation.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3087-88 (1989)

Section 13.02 Right to Dissent.

Proposed subsection 13.02(a) establishes the scope of a shareholder's right to dissent (and the shareholder's resulting right to obtain payment for the shareholder's shares) by defining the transactions with respect to which a right to dissent exists. These transactions are:

(1) A plan of merger if the shareholder (i) is entitled to vote on the merger under Proposed section 11.03 or pursuant to provisions in the articles of incorporation, or (ii) is a shareholder of a subsidiary that is merged with a parent under Proposed section 11.04. The right to vote on a merger under Proposed section 11.03 extends to corporations whose separate existence disappears in the merger and to the surviving corporation if the number of its authorized shares is increased as a result of the merger.

(2) A share exchange under Proposed section 11.02 if the corporation is a party whose shares are being acquired by the plan and the shareholder is entitled to vote on the exchange.

(3) A sale or exchange of all or substantially all of the property of the corporation not in the usual course of business under Proposed section 12.02 if the shareholder is entitled to vote on the sale or exchange. Proposed subsection 13.02(a)(3) generally grants dissenters' rights in connection with sales in the process of dissolution but excludes them in connection with sales by court order and sales for cash that require substantially all the net proceeds to be distributed to the shareholders within one year. The inclusion of sales in dissolution is designed to ensure that the right to dissent cannot be avoided by

characterizing sales as made in the process of dissolution long before distribution is made. An exception is provided for sales for cash pursuant to a plan that provides for distribution within one year. These transactions are unlikely to be unfair to minority shareholders since majority and minority are being treated in precisely the same way and all shareholders will ultimately receive cash for their shares. A sale other than for cash gives rise to a right of dissent since property sometimes cannot be converted into cash until long after receipt and a minority shareholder should not be compelled to assume the risk of delays or market declines. Similarly, a plan that provides for a prompt distribution of the property received gives rise to the right of dissent since the minority shareholder should not be compelled to accept for the shareholder's shares different securities or other property that may not be readily marketable.

The exclusion of court-ordered sales from the dissenter's right is based on the view that court review and approval ensures that an independent appraisal of the fairness of the transaction has been made.

(4) The Committee rejected the extension made by RMA §13.02 of dissenters' rights to a significant number of amendments to articles of incorporation. The committee concluded that significant overreaching in such transactions would be limited by equity courts' investigations into the fairness of the exercise of majority power. It did preserve dissenters' rights for reverse stock splits resulting in fractions of shares, where the corporation is to pay cash for the shares. It felt that providing the dissenters' right in such circumstances would afford minority shareholders additional protection from such transactions, while enhancing the majority's freedom to make such changes.

(5) Any corporate action to the extent the articles, bylaws, or a resolution of the board of directors grant a right of dissent. Corporations may wish to grant on a voluntary basis dissenters' rights in connection with important transactions (e.g., those submitted for shareholder approval). The grant may be to nonvoting shareholders in connection with transactions that give rise to dissenters' rights with respect to voting shareholders. The grant of dissenters' rights may add to the attractiveness of preferred shares, and may satisfy shareholders who would, in the absence of dissenters' rights, sue to enjoin the transaction. Also, in situations where the existence of dissenters' rights may otherwise be disputed, the voluntary offer of those rights under this section will avoid a dispute.

Generally, only shareholders who are entitled to vote on the transaction are entitled to assert dissenters' rights with respect to the transaction. The right to vote may be based on the articles of incorporation or other provisions of the Proposed Act. For example, a class of nonvoting shares may nevertheless be entitled to vote (either as a separate voting group or as part of the general voting group) on an amendment to the articles of incorporation that affects them as provided in one of the ways set forth in Proposed section 10.04; such a class is entitled to vote under Proposed section 11.03 and to assert dissenters' rights if the transaction effecting such amendment to the articles also falls within Proposed section 13.02. On the other hand, such a class does not have the right to vote on a sale of substantially all the corporation's assets not in the ordinary course of business, and therefore, that class is not entitled to assert dissenters' rights with respect to that sale. One exception to this principle is the merger of a subsidiary into its parent under Proposed section 11.04 in which minority shareholders of the subsidiary have the right to assert dissenters' rights even though they have no right to vote.

Proposed subsection 13.02(b) basically adopts the New York formula as to exclusivity of the dissenters' remedy of this chapter. The remedy is the exclusive remedy unless the transaction fails to comply with procedural requirements or is "fraudulent." The theory underlying this section is as follows: when a majority of shareholders has approved a corporate change, the corporation should be permitted to proceed even if a minority considers the change unwise or disadvantageous, and persuades a court that this is correct. Since dissenting shareholders can obtain the fair value of their shares, they are protected from pecuniary loss. Thus in general terms an exclusivity principle is justified. But the prospect that shareholders may be "paid off" does not justify the corporation in proceeding without complying with procedural requirements or fraudulently. If the corporation attempts an action in violation of the corporation law on voting, in violation of clauses in articles of incorporation prohibiting it, by deception of shareholders, or in violation of a fiduciary duty--to take some examples--the court's freedom to intervene

should be unaffected by the presence or absence of dissenters' rights under this chapter. Because of the variety of situations in which procedural defects and fraud may appear, this section makes no attempt to specify particular illustrations. Rather, it is designed to recognize and preserve the principles that have developed in the case law of Delaware, New York and other states with regard to the effect of dissenters' rights on other remedies of dissident shareholders. See Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983)(appraisal remedy may not be adequate "where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross or palpable overreaching are involved"); Walter J. Schloss Associates v. Arkwin Industries, Inc., 455 N.Y.S.2d 844, 847-52 (App. Div. 1982)(dissenting opinion), reversed, with adoption of dissenting opinion, 460 N.E.2d 1090 (Ct. App. 1984). See also Vorenberg, "Exclusiveness of the Dissenting Stockholders' Appraisal Right," 77 HARV. L. REV. 1189 (1964).

The Committee added Proposed subsection 13.02(c) to retain the substance of the provisions in the old law related to circumstances in which a dissenting shareholder's right to obtain payment terminated.

AMENDMENTS TO ORIGINAL SECTION
Laws 1991, ch. 269, §37 (eff. 7-28-91) *(amends original subsection (1)(a) to add ", RCW 23B.11.080," following "RCW 23B.11.030" and amends subsection (2) to add "RCW 25.10.900 through 25.10.955," following "by this title.")*

CARC COMMENTARY
The current statute (in RCW 23B.13.020(1)(d)) grants dissenters' rights to minority shareholders who have been squeezed out by means of a reverse stock split and subsequent repurchase of their fractional shares. This provision originally represented a Washington variation from the comparable section of the Revised Model Business Corporation Act, but has now been adopted as the model approach in the latest revisions to the RMBCA. Under the proposed changes to RCW 23B.13.020(1)(d), this same basic stance is maintained, but the statutory language is conformed to that of proposed subsection RCW 23B.10.040(1)(i). Thus, any shareholder whose relationship to the corporation is being terminated via an articles amendment will continue to have at least a right to dissent and seek appraisal, even though the squeezed-out minority may not have been afforded separate voting group rights under proposed subsection RCW 23B.10.040(1)(i), or may not have had voting rights at all with respect to the squeeze-out.

* * * * *

Laws 2003, ch. 35, §9 (eff. 7-27-03) *(amends only subsection (1)(d) of the original section to read:)*
(d) An amendment of the articles of incorporation ~~that materially reduces the number of shares owned by the shareholder to a fraction of a share if the fractional share so created is to be acquired for cash under RCW 23B.06.040~~, whether or not the shareholder was entitled to vote on the amendment, if the amendment effects a redemption or cancellation of all of the shareholder's shares in exchange for cash or other consideration other than shares of the corporation; or

CARC COMMENTARY
See CARC Comment to 2003 addition of RCW 23B.11.035.

* * * * *

Laws 2009, ch. 189, §41 (eff. 7-26-09) *(amends only subsection (1))*
(1) A shareholder is entitled to dissent from, and obtain payment of the fair value of the shareholder's shares in the event of, any of the following corporate actions:
(a) ~~Consummation of a~~A plan of merger, which has become effective, to which the corporation is a party (i) if shareholder approval ~~is~~ was required for the merger by RCW 23B.11.030, 23B.11.080, or the articles of incorporation, and the shareholder ~~is~~ was entitled to vote on the merger, or (ii) if the corporation ~~is~~ was a subsidiary that ~~is~~ has been merged with its parent under RCW 23B.11.040;

(b) ~~Consummation of a~~A plan of share exchange, which has become effective, to which the corporation is a party as the corporation whose shares ~~will be~~ have been acquired, if the shareholder ~~is~~ was entitled to vote on the plan;
(c) ~~Consummation of a~~A sale or exchange, which has become effective, of all, or substantially all, of the property of the corporation other than in the usual and regular course of business, if the shareholder ~~is~~ was entitled to vote on the sale or exchange, including a sale in dissolution, but not including a sale pursuant to court order or a sale for cash pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed to the shareholders within one year after the date of sale;
(d) An amendment of the articles of incorporation, whether or not the shareholder was entitled to vote on the amendment, if the amendment effects a redemption or cancellation of all of the shareholder's shares in exchange for cash or other consideration other than shares of the corporation; or
(e) Any corporate action ~~taken~~ approved pursuant to a shareholder vote to the extent the articles of incorporation, bylaws, or a resolution of the board of directors provides that voting or nonvoting shareholders are entitled to dissent and obtain payment for their shares.

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.13.020
RIGHT TO DISSENT [EFFECTIVE JULY 1, 2010]

CURRENT SECTION

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

(a) A plan of merger, which has become effective, to which the corporation is a party (i) if shareholder approval was required for the merger by RCW 23B.11.030, 23B.11.080, or the articles of incorporation, and the shareholder was entitled to vote on the merger, or (ii) if the corporation was a subsidiary that has been merged with its parent under RCW 23B.11.040;

(b) A plan of share exchange, which has become effective, to which the corporation is a party as the corporation whose shares have been acquired, if the shareholder was entitled to vote on the plan;

(c) A sale or exchange, which has become effective, of all, or substantially all, of the property of the corporation other than in the usual and regular course of business, if the shareholder was entitled to vote on the sale or exchange, including a sale in dissolution, but not including a sale pursuant to court order or a sale for cash pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed to the shareholders within one year after the date of sale;

(d) An amendment of the articles of incorporation, whether or not the shareholder was entitled to vote on the amendment, if the amendment effects a redemption or cancellation of all of the shareholder's shares in exchange for cash or other consideration other than shares of the corporation; or

(e) Any corporate action approved pursuant to a shareholder vote to the extent the articles of incorporation, bylaws, or a resolution of the board of directors provides that voting or nonvoting shareholders are entitled to dissent and obtain payment for their shares.

(2) A shareholder entitled to dissent and obtain payment for the shareholder's shares under this chapter may not challenge the corporate action creating the shareholder's entitlement unless the action fails to comply with the procedural requirements imposed by this title, RCW 25.10.831 through 25.10.886, the articles of incorporation, or the bylaws, or is fraudulent with respect to the shareholder or the corporation.

(3) The right of a dissenting shareholder to obtain payment of the fair value of the shareholder's shares shall terminate upon the occurrence of any one of the following events:

(a) The proposed corporate action is abandoned or rescinded;

(b) A court having jurisdiction permanently enjoins or sets aside the corporate action; or

(c) The shareholder's demand for payment is withdrawn with the written consent of the corporation.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §141 (eff. 7-1-90)

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

(a) Consummation of a plan of merger to which the corporation is a party (i) if shareholder approval is required for the merger by RCW 23B.11.030 or the articles of incorporation, and the shareholder is entitled to vote on the merger, or (ii) if the corporation is a subsidiary that is merged with its parent under RCW 23B.11.040;

(b) Consummation of a plan of share exchange to which the corporation is a party as the corporation whose shares will be acquired, if the shareholder is entitled to vote on the plan;

(c) Consummation of a sale or exchange of all, or substantially all, of the property of the corporation other than in the usual and regular course of business, if the shareholder is entitled to vote on the sale or exchange, including a sale in dissolution, but not including a sale pursuant to court order or a sale for cash pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed to the shareholders within one year after the date of sale;

(d) An amendment of the articles of incorporation that materially reduces the number of shares owned by the shareholder to a fraction of a share if the fractional share so created is to be acquired for cash under RCW 23B.06.040; or

(e) Any corporate action taken pursuant to a shareholder vote to the extent the articles of incorporation, bylaws, or a resolution of the board of directors provides that voting or nonvoting shareholders are entitled to dissent and obtain payment for their shares.

(2) A shareholder entitled to dissent and obtain payment for the shareholder's shares under this chapter may not challenge the corporate action creating the shareholder's entitlement unless the action fails to comply with the procedural requirements imposed by this title, the articles of incorporation, or the bylaws, or is fraudulent with respect to the shareholder or the corporation.

(3) The right of a dissenting shareholder to obtain payment of the fair value of the shareholder's shares shall terminate upon the occurrence of any one of the following events:

(a) The proposed corporate action is abandoned or rescinded;

(b) A court having jurisdiction permanently enjoins or sets aside the corporate action; or

(c) The shareholder's demand for payment is withdrawn with the written consent of the corporation.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3087-88 (1989)

Section 13.02 Right to Dissent.

Proposed subsection 13.02(a) establishes the scope of a shareholder's right to dissent (and the shareholder's resulting right to obtain payment for the shareholder's shares) by defining the transactions with respect to which a right to dissent exists. These transactions are:

(1) A plan of merger if the shareholder (i) is entitled to vote on the merger under Proposed section 11.03 or pursuant to provisions in the articles of incorporation, or (ii) is a shareholder of a subsidiary that is merged with a parent under Proposed section 11.04. The right to vote on a merger under Proposed section 11.03 extends to corporations whose separate existence disappears in the merger and to the surviving corporation if the number of its authorized shares is increased as a result of the merger.

(2) A share exchange under Proposed section 11.02 if the corporation is a party whose shares are being acquired by the plan and the shareholder is entitled to vote on the exchange.

(3) A sale or exchange of all or substantially all of the property of the corporation not in the usual course of business under Proposed section 12.02 if the shareholder is entitled to vote on the sale or exchange. Proposed subsection 13.02(a)(3) generally grants dissenters' rights in connection with sales in the process of dissolution but excludes them in connection with sales by court order and sales for cash that require substantially all the net proceeds to be distributed to the shareholders within one year. The inclusion of sales in dissolution is designed to ensure that the right to dissent cannot be avoided by

characterizing sales as made in the process of dissolution long before distribution is made. An exception is provided for sales for cash pursuant to a plan that provides for distribution within one year. These transactions are unlikely to be unfair to minority shareholders since majority and minority are being treated in precisely the same way and all shareholders will ultimately receive cash for their shares. A sale other than for cash gives rise to a right of dissent since property sometimes cannot be converted into cash until long after receipt and a minority shareholder should not be compelled to assume the risk of delays or market declines. Similarly, a plan that provides for a prompt distribution of the property received gives rise to the right of dissent since the minority shareholder should not be compelled to accept for the shareholder's shares different securities or other property that may not be readily marketable.

The exclusion of court-ordered sales from the dissenter's right is based on the view that court review and approval ensures that an independent appraisal of the fairness of the transaction has been made.

(4) The Committee rejected the extension made by RMA §13.02 of dissenters' rights to a significant number of amendments to articles of incorporation. The committee concluded that significant overreaching in such transactions would be limited by equity courts' investigations into the fairness of the exercise of majority power. It did preserve dissenters' rights for reverse stock splits resulting in fractions of shares, where the corporation is to pay cash for the shares. It felt that providing the dissenters' right in such circumstances would afford minority shareholders additional protection from such transactions, while enhancing the majority's freedom to make such changes.

(5) Any corporate action to the extent the articles, bylaws, or a resolution of the board of directors grant a right of dissent. Corporations may wish to grant on a voluntary basis dissenters' rights in connection with important transactions (e.g., those submitted for shareholder approval). The grant may be to nonvoting shareholders in connection with transactions that give rise to dissenters' rights with respect to voting shareholders. The grant of dissenters' rights may add to the attractiveness of preferred shares, and may satisfy shareholders who would, in the absence of dissenters' rights, sue to enjoin the transaction. Also, in situations where the existence of dissenters' rights may otherwise be disputed, the voluntary offer of those rights under this section will avoid a dispute.

Generally, only shareholders who are entitled to vote on the transaction are entitled to assert dissenters' rights with respect to the transaction. The right to vote may be based on the articles of incorporation or other provisions of the Proposed Act. For example, a class of nonvoting shares may nevertheless be entitled to vote (either as a separate voting group or as part of the general voting group) on an amendment to the articles of incorporation that affects them as provided in one of the ways set forth in Proposed section 10.04; such a class is entitled to vote under Proposed section 11.03 and to assert dissenters' rights if the transaction effecting such amendment to the articles also falls within Proposed section 13.02. On the other hand, such a class does not have the right to vote on a sale of substantially all the corporation's assets not in the ordinary course of business, and therefore, that class is not entitled to assert dissenters' rights with respect to that sale. One exception to this principle is the merger of a subsidiary into its parent under Proposed section 11.04 in which minority shareholders of the subsidiary have the right to assert dissenters' rights even though they have no right to vote.

Proposed subsection 13.02(b) basically adopts the New York formula as to exclusivity of the dissenters' remedy of this chapter. The remedy is the exclusive remedy unless the transaction fails to comply with procedural requirements or is "fraudulent." The theory underlying this section is as follows: when a majority of shareholders has approved a corporate change, the corporation should be permitted to proceed even if a minority considers the change unwise or disadvantageous, and persuades a court that this is correct. Since dissenting shareholders can obtain the fair value of their shares, they are protected from pecuniary loss. Thus in general terms an exclusivity principle is justified. But the prospect that shareholders may be "paid off" does not justify the corporation in proceeding without complying with procedural requirements or fraudulently. If the corporation attempts an action in violation of the corporation law on voting, in violation of clauses in articles of incorporation prohibiting it, by deception of shareholders, or in violation of a fiduciary duty--to take some examples--the court's freedom to intervene

should be unaffected by the presence or absence of dissenters' rights under this chapter. Because of the variety of situations in which procedural defects and fraud may appear, this section makes no attempt to specify particular illustrations. Rather, it is designed to recognize and preserve the principles that have developed in the case law of Delaware, New York and other states with regard to the effect of dissenters' rights on other remedies of dissident shareholders. See Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983)(appraisal remedy may not be adequate "where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross or palpable overreaching are involved"); Walter J. Schloss Associates v. Arkwin Industries, Inc., 455 N.Y.S.2d 844, 847-52 (App. Div. 1982)(dissenting opinion), reversed, with adoption of dissenting opinion, 460 N.E.2d 1090 (Ct. App. 1984). See also Vorenberg, "Exclusiveness of the Dissenting Stockholders' Appraisal Right," 77 HARV. L. REV. 1189 (1964).

The Committee added Proposed subsection 13.02(c) to retain the substance of the provisions in the old law related to circumstances in which a dissenting shareholder's right to obtain payment terminated.

AMENDMENTS TO ORIGINAL SECTION
Laws 1991, ch. 269, §37 (eff. 7-28-91) *(amends original subsection (1)(a) to add ", RCW 23B.11.080," following "RCW 23B.11.030" and amends subsection (2) to add "RCW 25.10.900 through 25.10.955," following "by this title.")*

CARC COMMENTARY
The current statute (in RCW 23B.13.020(1)(d)) grants dissenters' rights to minority shareholders who have been squeezed out by means of a reverse stock split and subsequent repurchase of their fractional shares. This provision originally represented a Washington variation from the comparable section of the Revised Model Business Corporation Act, but has now been adopted as the model approach in the latest revisions to the RMBCA. Under the proposed changes to RCW 23B.13.020(1)(d), this same basic stance is maintained, but the statutory language is conformed to that of proposed subsection RCW 23B.10.040(1)(i). Thus, any shareholder whose relationship to the corporation is being terminated via an articles amendment will continue to have at least a right to dissent and seek appraisal, even though the squeezed-out minority may not have been afforded separate voting group rights under proposed subsection RCW 23B.10.040(1)(i), or may not have had voting rights at all with respect to the squeeze-out.

* * * * *

Laws 2003, ch. 35, §9 (eff. 7-27-03) *(amends only subsection (1)(d) of the original section to read:)*
(d) An amendment of the articles of incorporation ~~that materially reduces the number of shares owned by the shareholder to a fraction of a share if the fractional share so created is to be acquired for cash under RCW 23B.06.040~~, whether or not the shareholder was entitled to vote on the amendment, if the amendment effects a redemption or cancellation of all of the shareholder's shares in exchange for cash or other consideration other than shares of the corporation; or

CARC COMMENTARY
See CARC Comment to 2003 addition of RCW 23B.11.035.

* * * * *

Laws 2009, ch. 189, §41 (eff. 7-26-09) *(amends only subsection (1))*
(1) A shareholder is entitled to dissent from, and obtain payment of the fair value of the shareholder's shares in the event of, any of the following corporate actions:
(a) ~~Consummation of a~~A plan of merger, which has become effective, to which the corporation is a party (i) if shareholder approval ~~is~~ was required for the merger by RCW 23B.11.030, 23B.11.080, or the articles of incorporation, and the shareholder ~~is~~ was entitled to vote on the merger, or (ii) if the corporation ~~is~~ was a subsidiary that ~~is~~ has been merged with its parent under RCW 23B.11.040;

(b) ~~Consummation of a~~A plan of share exchange, which has become effective, to which the corporation is a party as the corporation whose shares ~~will be~~ have been acquired, if the shareholder ~~is~~ was entitled to vote on the plan;
(c) ~~Consummation of a~~A sale or exchange, which has become effective, of all, or substantially all, of the property of the corporation other than in the usual and regular course of business, if the shareholder ~~is~~ was entitled to vote on the sale or exchange, including a sale in dissolution, but not including a sale pursuant to court order or a sale for cash pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed to the shareholders within one year after the date of sale;
(d) An amendment of the articles of incorporation, whether or not the shareholder was entitled to vote on the amendment, if the amendment effects a redemption or cancellation of all of the shareholder's shares in exchange for cash or other consideration other than shares of the corporation; or
(e) Any corporate action ~~taken~~ approved pursuant to a shareholder vote to the extent the articles of incorporation, bylaws, or a resolution of the board of directors provides that voting or nonvoting shareholders are entitled to dissent and obtain payment for their shares.

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.

* * * * *

Laws 2009, ch. 188, §1404 (eff. 7-1-10) *(amends only subsection (2))*
(2) A shareholder entitled to dissent and obtain payment for the shareholder's shares under this chapter may not challenge the corporate action creating the shareholder's entitlement unless the action fails to comply with the procedural requirements imposed by this title, RCW ~~25.10.900 through 25.10.955~~ 25.10.831 through 25.10.886, the articles of incorporation, or the bylaws, or is fraudulent with respect to the shareholder or the corporation.

CARC COMMENTARY
Amends cross references to appropriate sections in the Uniform Limited Partnership Act.

* * * * *

RCW 23B.13.200
NOTICE OF DISSENTERS' RIGHTS

CURRENT SECTION

(1) If proposed corporate action creating dissenters' rights under RCW 23B.13.020 is submitted for approval by a vote at a shareholders' meeting, the meeting notice must state that shareholders are or may be entitled to assert dissenters' rights under this chapter and be accompanied by a copy of this chapter.

(2) If corporate action creating dissenters' rights under RCW 23B.13.020 is submitted for approval without a vote of shareholders in accordance with RCW 23B.07.040, the shareholder consent described in RCW 23B.07.040(1)(b) and the notice described in RCW 23B.07.040(3)(a) must include a statement that shareholders are or may be entitled to assert dissenters' rights under this chapter and be accompanied by a copy of this chapter.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §143 (eff. 7-1-90)

(1) If proposed corporate action creating dissenters' rights under RCW 23B.13.020 is submitted to a vote at a shareholders' meeting, the meeting notice must state that shareholders are or may be entitled to assert dissenters' rights under this chapter and be accompanied by a copy of this chapter.

(2) If corporate action creating dissenters' rights under RCW 23B.13.020 is taken without a vote of shareholders, the corporation, within ten days after effective date of such corporate action, shall notify in writing all shareholders entitled to assert dissenters' rights that the action was taken and send them the dissenters' notice described in RCW 23B.13.220.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3089 (1989)

Section 13.20 Notice of Dissenters' Rights.

Proposed subsection 13.20(a) requires the corporation to notify record shareholders of the existence of dissenters' rights before the vote is taken on the corporate action. This notice provides the reassurance to investors that the right to dissent is intended to provide because many shareholders have no idea what rights of dissent they may have or how to assert them. If the corporation is uncertain whether or not the shareholders have dissenters' rights, it may comply with this notice requirement by stating that the shareholders "may have" dissenters' rights.

A similar requirement of notice is expressly required by proxy rules, by the dissenters' rights statutes of several states, and possibly under more general disclosure requirements of federal and state securities laws.

Proposed subsection 13.20(b) requires that notice be given within 10 days after the effective date of corporate action in situations where the action is validly taken without a vote of shareholders, e.g., in a merger of a subsidiary into its parent under Proposed section 11.04. This notice may be combined with the dissenters' notice required by Proposed section 13.22.

AMENDMENTS TO ORIGINAL SECTION

Laws 2002, ch. 297, §36 (eff. 6-13-02) *(amends only subsection (2) of the original)*

(2) If corporate action creating dissenters' rights under RCW 23B.13.020 is taken without a vote of shareholders, the corporation, within ten days after the effective date of such corporate action, shall ~~notify in writing~~ deliver a notice to all shareholders entitled to assert dissenters' rights that the action was taken and send them the ~~dissenters'~~ notice described in RCW 23B.13.220.

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

* * * * *

Laws 2009, ch. 189, §42 (eff. 7-26-09)
(1) If proposed corporate action creating dissenters' rights under RCW 23B.13.020 is submitted ~~to~~ for approval by a vote at a shareholders' meeting, the meeting notice must state that shareholders are or may be entitled to assert dissenters' rights under this chapter and be accompanied by a copy of this chapter.
(2) If corporate action creating dissenters' rights under RCW 23B.13.020 is ~~taken~~ submitted for approval without a vote of shareholders~~, the corporation, within ten days after the effective date of such corporate action, shall deliver a notice to all shareholders entitled to assert dissenters' rights that the action was taken and send them the notice described in RCW 23B.13.220~~ in accordance with RCW 23B.07.040, the shareholder consent described in RCW 23B.07.040(1)(b) and the notice described in RCW 23B.07.040(3)(a) must include a statement that shareholders are or may be entitled to assert dissenters' rights under this chapter and be accompanied by a copy of this chapter.

CARC COMMENTARY
See comment to 2009 amendment to RCW 23B.07.040 regarding changes in procedures for obtaining shareholder approval without a vote.

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.13.210
NOTICE OF INTENT TO DEMAND PAYMENT

CURRENT SECTION

(1) If proposed corporate action creating dissenters' rights under RCW 23B.13.020 is submitted to a vote at a shareholders' meeting, a shareholder who wishes to assert dissenters' rights must (a) deliver to the corporation before the vote is taken notice of the shareholder's intent to demand payment for the shareholder's shares if the proposed corporate action is effected, and (b) not vote such shares in favor of the proposed corporate action.

(2) If proposed corporate action creating dissenters' rights under RCW 23B.13.020 is submitted for approval without a vote of shareholders in accordance with RCW 23B.07.040, a shareholder who wishes to assert dissenters' rights must not execute the consent or otherwise vote such shares in favor of the proposed corporate action.

(3) A shareholder who does not satisfy the requirements of subsection (1) or (2) of this section is not entitled to payment for the shareholder's shares under this chapter.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §144 (eff. 7-1-90)

(1) If proposed corporate action creating dissenters' rights under RCW 23B.13.020 is submitted to a vote at a shareholders' meeting, a shareholder who wishes to assert dissenters' rights must (a) deliver to the corporation before the vote is taken written notice of the shareholder's intent to demand payment for the shareholder's shares if the proposed action is effected, and (b) not vote such shares in favor of the proposed action.

(2) A shareholder who does not satisfy the requirements of subsection (1) of this section is not entitled to payment for the shareholder's shares under this chapter.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3089-90 (1989)

Section 13.21 Notice of Intent to Demand Payment.

If a shareholder's (sic) vote is called for, Proposed subsection 13.21(a) requires the shareholder to give notice of the shareholder's intent to demand payment before the vote on the corporate action is taken. This notice enables other voters to determine how much of a cash payment may be required. It also serves to limit the number of persons to whom the corporation must give further notice, including the technical details of depositing share certificates. This subsection has no application to actions taken without a shareholder vote.

In order to be and remain a dissenter eligible to demand payment for the shareholder's shares, the section requires that a shareholder must not only give the notice required by this section but must also vote against, or abstain from voting on, the proposal.

AMENDMENTS TO ORIGINAL SECTION

Laws 2002, ch. 297, §37 (eff. 6-13-02) *(deletes word "written" in original subsection (1)).*

CARC COMMENTARY

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

* * * * *

Laws 2009, ch. 189, §43 (eff. 7-26-09)

(1) If proposed corporate action creating dissenters' rights under RCW 23B.13.020 is submitted to a vote at a shareholders' meeting, a shareholder who wishes to assert dissenters' rights must (a) deliver to the corporation before the vote is taken notice of the shareholder's intent to demand payment for the shareholder's shares if the proposed corporate action is effected, and (b) not vote such shares in favor of the proposed corporate action.

(2) If proposed corporate action creating dissenters' rights under RCW 23B.13.020 is submitted for approval without a vote of shareholders in accordance with RCW 23B.07.040, a shareholder who wishes to assert dissenters' rights must not execute the consent or otherwise vote such shares in favor of the proposed corporate action.

(3) A shareholder who does not satisfy the requirements of subsection (1) or (2) of this section is not entitled to payment for the shareholder's shares under this chapter.

CARC COMMENTARY

See comment to 2009 amendment to RCW 23B.07.040 regarding changes in procedure for obtaining shareholder approval without a vote.

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.13.220
DISSENTERS' RIGHTS – NOTICE

CURRENT SECTION

(1) If proposed corporate action creating dissenters' rights under RCW 23B.13.020 is approved at a shareholders' meeting, the corporation shall within ten days after the effective date of the corporate action deliver to all shareholders who satisfied the requirements of RCW 23B.13.210(1) a notice in compliance with subsection (3) of this section.

(2) If proposed corporate action creating dissenters' rights under RCW 23B.13.020 is approved without a vote of shareholders in accordance with RCW 23B.07.040, the notice delivered pursuant to RCW 23B.07.040(3)(b) to shareholders who satisfied the requirements of RCW 23B.13.210(2) shall comply with subsection (3) of this section.

(3) Any notice under subsection (1) or (2) of this section must:

(a) State where the payment demand must be sent and where and when certificates for certificated shares must be deposited;

(b) Inform holders of uncertificated shares to what extent transfer of the shares will be restricted after the payment demand is received;

(c) Supply a form for demanding payment that includes the date of the first announcement to news media or to shareholders of the terms of the proposed corporate action and requires that the person asserting dissenters' rights certify whether or not the person acquired beneficial ownership of the shares before that date;

(d) Set a date by which the corporation must receive the payment demand, which date may not be fewer than thirty nor more than sixty days after the date the notice in subsection (1) or (2) of this section is delivered; and

(e) Be accompanied by a copy of this chapter.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §145 (eff. 7-1-90)

(1) If proposed corporate action creating dissenters' rights under RCW 23B.13.020 is authorized at a shareholders' meeting, the corporation shall deliver a written dissenters' notice to all shareholders who satisfied the requirements of RCW 23B.13.210.

(2) The dissenters' notice must be sent within ten days after the effective date of the corporate action, and must:

(a) State where the payment demand must be sent and where and when certificates for certificated shares must be deposited;

(b) Inform holders of uncertificated shares to what extent transfer of the shares will be restricted after the payment demand is received;

(c) Supply a form for demanding payment that includes the date of the first announcement to news media or to shareholders of the terms of the proposed corporate action and requires that the person asserting dissenters' rights certify whether or not the person acquired beneficial ownership of the shares before that date;

(d) Set a date by which the corporation must receive the payment demand, which date may not be fewer than thirty nor more than sixty days after the date the notice in subsection (1) of this section is delivered; and
(e) Be accompanied by a copy of this chapter.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3090 (1989)
Section 13.22 Dissenters' Notice.
The basic purpose of Proposed section 13.22 is to require the corporation to tell all actual or potential dissenters what they must do in order to take advantage of their right of dissent. The requirements of what this notice (called a "dissenters' notice") must contain are spelled out in detail to ensure that this notice serves this basic purpose.

In the case of an action that is submitted to the vote of shareholders, the dissenters' notice must be sent only to those persons who gave notice of their intention to dissent under Proposed section 13.21 and who refrained from voting in favor of the proposed actions (sic). In the case of a transaction not involving a vote by shareholders, the dissenters' notice must be sent to all persons who are eligible to dissent and demand payment. In either case the dissenters' notice must be sent within 10 days after the effective date of the corporate action and must be accompanied by a copy of this chapter.

The notice must contain or be accompanied by a form which a person asserting dissenters' right (sic) may use to complete the demand for payment under Proposed section 13.23. The form must specify the date by which it must be received by the corporation, which date must be not less than 30 days nor more than 60 days after the effective date of the notice of how to demand payment.

The dissenters' notice must also specify where and when share certificates must be deposited, or, in the case of uncertificated shares, when restrictions on transfer will become effective under Proposed section 13.24. The date for deposit of share certificates may not be set at a date earlier than the date for receiving the demand for payment.

Proposed subsection 13.22(b)(3) requires the corporation to specify the date of the first announcement to news media or to shareholders of the terms of the proposed corporate action. This is the critical date for determining the rights of shareholder-transferees: persons who became shareholders prior to that date are entitled to the full right to dissent and obtain payment for their shares, while persons who became shareholders on or after that date are entitled only to the more limited rights provided by Proposed section 13.27. It is appropriate for the corporation to furnish this critical date since it knows when information relating to the transaction was publicly released. The date selected should be the date the terms were announced, not the earlier date when consideration of the proposed transaction may have been announced.

AMENDMENTS TO ORIGINAL SECTION
Laws 2002, ch. 297, §38 (eff. 6-13-02)
(1) If proposed corporate action creating dissenters' rights under RCW 23B.13.020 is authorized at a shareholders' meeting, the corporation shall deliver a ~~written dissenters'~~ notice to all shareholders who satisfied the requirements of RCW 23B.13.210.
(2) The ~~dissenters'~~ notice must be sent within ten days after the effective date of the corporate action, and must:
(a) State where the payment demand must be sent and where and when certificates for certificated shares must be deposited;
(b) Inform holders of uncertificated shares to what extent transfer of the shares will be restricted after the payment demand is received;
(c) Supply a form for demanding payment that includes the date of the first announcement to news media or to shareholders of the terms of the proposed corporate action and requires that the person asserting dissenters' rights certify whether or not the person acquired beneficial ownership of the shares before that date;

(d) Set a date by which the corporation must receive the payment demand, which date may not be fewer than thirty nor more than sixty days after the date the notice in subsection (1) of this section is delivered; and
(e) Be accompanied by a copy of this chapter.

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

* * * * *

Laws 2009, ch. 189, §44 (eff. 7-26-09)
(1) If proposed corporate action creating dissenters' rights under RCW 23B.13.020 is ~~authorized~~ approved at a shareholders' meeting, the corporation shall within ten days after the effective date of the corporate action deliver ~~a notice~~ to all shareholders who satisfied the requirements of RCW 23B.13.210 210(1) a notice in compliance with subsection (3) of this section.
(2) ~~The~~ If proposed corporate action creating dissenters' rights under RCW 23B.13.020 is approved without a vote of shareholders in accordance with RCW 23B.07.040, the notice delivered pursuant to RCW 23B.07.040(3)(b) to shareholders who satisfied the requirements of RCW 23B.13.210(2) shall comply with subsection (3) of this section.
(3) Any notice under subsection (1) or (2) of this section must ~~be sent within ten days after the effective date of the corporate action, and~~:
(a) State where the payment demand must be sent and where and when certificates for certificated shares must be deposited;
(b) Inform holders of uncertificated shares to what extent transfer of the shares will be restricted after the payment demand is received;
(c) Supply a form for demanding payment that includes the date of the first announcement to news media or to shareholders of the terms of the proposed corporate action and requires that the person asserting dissenters' rights certify whether or not the person acquired beneficial ownership of the shares before that date;
(d) Set a date by which the corporation must receive the payment demand, which date may not be fewer than thirty nor more than sixty days after the date the notice in subsection (1) or (2) of this section is delivered; and
(e) Be accompanied by a copy of this chapter.

CARC COMMENTARY
See comment to 2009 amendment to RCW 23B.07.040 regarding changes in procedures for obtaining shareholder approval without a vote.

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. 13.240
SHARE RESTRICTIONS

CURRENT SECTION

(1) The corporation may restrict the transfer of uncertificated shares from the date the demand for payment under RCW 23B.13.230 is received until the proposed corporate action is effected or the restriction is released under RCW 23B.13.260.

(2) The person for whom dissenters' rights are asserted as to uncertificated shares retains all other rights of a shareholder until the effective date of the proposed corporate action.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §147 (eff. 7-1-90)

(1) The corporation may restrict the transfer of uncertificated shares from the date the demand for their payment is received until the proposed corporate action is effected or the restriction is released under RCW 23B.13.260.

(2) The person for whom dissenters' rights are asserted as to uncertificated shares retains all other rights of a shareholder until the effective date of the proposed corporate action.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3091 (1989)

Section 13.24 Share Restrictions.

Proposed section 13.24 deals with uncertificated shares in the dissent process. Proposed subsection 13.23(a) requires certificated shares to be deposited as directed by the corporation in its dissenters' notice; the restrictions on transfer of uncertificated shares provided by this section impose an analogous restriction on uncertificated shares for the same reasons. See Comment to Proposed section 13.23.

Proposed subsection 13.24(b) makes express that the restriction on transfer of shares provided by this section does not affect any other rights of the shareholder until the effective date of the proposed corporate action.

AMENDMENTS TO ORIGINAL SECTION

Laws 2009, ch. 189, §46 (eff. 7-26-09)

(1) The corporation may restrict the transfer of uncertificated shares from the date the demand for ~~their~~ payment under RCW 23B.13.230 is received until the proposed corporate action is effected or the restriction is released under RCW 23B.13.260.

(2) The person for whom dissenters' rights are asserted as to uncertificated shares retains all other rights of a shareholder until the effective date of the proposed corporate action.

CARC COMMENTARY

Amended to clarify uncertain reference in subsection (1).

* * * * *

RCW 23B.13.260
FAILURE TO TAKE ACTION

CURRENT SECTION

(1) If the corporation does not effect the proposed corporate action within sixty days after the date set for demanding payment and depositing share certificates, the corporation shall return the deposited certificates and release any transfer restrictions imposed on uncertificated shares.

(2) If after returning deposited certificates and releasing transfer restrictions, the corporation wishes to effect the proposed corporate action, it must send a new dissenters' notice under RCW 23B.13.220 and repeat the payment demand procedure.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §149 (eff. 7-1-90)

(1) If the corporation does not effect the proposed action within sixty days after the date set for demanding payment and depositing share certificates, the corporation shall return the deposited certificates and release any transfer restrictions imposed on uncertificated shares.

(2) If after returning deposited certificates and releasing transfer restrictions, the corporation wishes to undertake the proposed action, it must send a new dissenters' notice under RCW 23B.13.220 and repeat the payment demand procedure.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3091-92 (1989)

Section 13.26 Failure To Take Action.

Proposed section 13.26 essentially grants the corporation 60 days after the payment demand date to effect the transaction and make payment for the shares as required by Proposed section 13.25. If the corporation is unable to effect the corporate action within 60 days, it must release the shares, and give a new notice when it is ready to repeat the cycle. This requirement prevents the corporation from holding the dissenter indefinitely in a position where the dissenter has no possibility of realizing on the dissenter's shares either by obtaining payment from the corporation or by selling them. If the transaction has been effected but the corporation fails to make payment as required by this chapter, it is subject to the sanctions of Proposed subsection 13.31(b).

Proposed subsection 13.26(b) makes it clear that the corporation at any time after returning the deposited shares may send a new dissenters' notice under Proposed section 13.22 and repeat the procedure.

AMENDMENTS TO ORIGINAL SECTION
Laws 2009, ch. 189, §45 (eff. 7-26-09)

(1) If the corporation does not effect the proposed corporate action within sixty days after the date set for demanding payment and depositing share certificates, the corporation shall return the deposited certificates and release any transfer restrictions imposed on uncertificated shares.

(2) If after returning deposited certificates and releasing transfer restrictions, the corporation wishes to ~~undertake~~ effect the proposed corporate action, it must send a new dissenters' notice under RCW 23B.13.220 and repeat the payment demand procedure.

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.13.270
AFTER-ACQUIRED SHARES

CURRENT SECTION

(1) A corporation may elect to withhold payment required by RCW 23B.13.250 from a dissenter unless the dissenter was the beneficial owner of the shares before the date set forth in the dissenters' notice as the date of the first announcement to news media or to shareholders of the terms of the proposed corporate action.

(2) To the extent the corporation elects to withhold payment under subsection (1) of this section, after the effective date of the proposed corporate action, it shall estimate the fair value of the shares, plus accrued interest, and shall pay this amount to each dissenter who agrees to accept it in full satisfaction of the dissenter's demand. The corporation shall send with its offer an explanation of how it estimated the fair value of the shares, an explanation of how the interest was calculated, and a statement of the dissenter's right to demand payment under RCW 23B.13.280.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §150 (eff. 7-1-90)

(1) A corporation may elect to withhold payment required by RCW 23B.13.250 from a dissenter unless the dissenter was the beneficial owner of the shares before the date set forth in the dissenters' notice as the date of the first announcement to news media or to shareholders of the terms of the proposed corporate action.

(2) To the extent the corporation elects to withhold payment under subsection (1) of this section, after taking the proposed corporate action, it shall estimate the fair value of the shares, plus accrued interest, and shall pay this amount to each dissenter who agrees to accept it in full satisfaction of the dissenter's demand. The corporation shall send with its offer an explanation of how it estimated the fair value of the shares, an explanation of how the interest was calculated, and a statement of the dissenter's right to demand payment under RCW 23B.13.280.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3092 (1989)

Section 13.27 After-Acquired Shares.

Proposed section 13.27 provides for separate treatment of shares acquired on or after the date of public announcement of the proposed corporate action; this date is specified by the corporation in its dissenters' notice under Proposed section 13.22. At the corporation's option, holders of shares acquired on or after this date are not entitled to immediate payment under Proposed section 13.25; rather, they may receive only an offer of payment which is conditioned on their agreement to accept it in full satisfaction of their claim. If the right of unconditional immediate payment were granted as to all after-acquired shares, speculators and others might be tempted to buy shares merely for the purpose of dissenting. Since the function of dissenters' rights is to protect investors against unforeseen changes, there is no need to give equally favorable treatment to purchasers who knew or should have known about the proposed changes.

Corporations are given discretion whether to apply Proposed section 13.27 to after-acquired shares. Considerations of simplicity and harmony may prompt the corporation to make immediate payment for shares acquired on or after the specified date as well as for preacquired shares.

The date used as a cut-off for determining the application of this section is when "the terms" of the transaction are first announced to the news media or shareholders. The cut-off should not be set at an earlier date, such as when the first public statement that the corporate action was under consideration was

made, because the goal of this section is to prevent use of dissenters' rights as a speculative device after the terms of the transaction are announced.

A dissenter under this section may accept the offered payment in full satisfaction; if the dissenter does not, the dissenter is entitled to demand a judicial determination of the amount to which the dissenter is entitled under Proposed sections 13.28 and 13.30. The dissenter is then entitled to payment of the amount so determined at the termination of the proceeding.

AMENDMENTS TO ORIGINAL SECTION
Laws 2009, ch. 189, §47 (eff. 7-26-09)*(amends only subsection (2))*
(2) To the extent the corporation elects to withhold payment under subsection (1) of this section, after ~~taking~~ the effective date of the proposed corporate action, it shall estimate the fair value of the shares, plus accrued interest, and shall pay this amount to each dissenter who agrees to accept it in full satisfaction of the dissenter's demand. The corporation shall send with its offer an explanation of how it estimated the fair value of the shares, an explanation of how the interest was calculated, and a statement of the dissenter's right to demand payment under RCW 23B.13.280.

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.13.280
PROCEDURE IF SHAREHOLDER DISSATISFIED WITH PAYMENT OR OFFER

CURRENT SECTION

(1) A dissenter may deliver a notice to the corporation informing the corporation of the dissenter's own estimate of the fair value of the dissenter's shares and amount of interest due, and demand payment of the dissenter's estimate, less any payment under RCW 23B.13.250, or reject the corporation's offer under RCW 23B.13.270 and demand payment of the dissenter's estimate of the fair value of the dissenter's shares and interest due, if:

(a) The dissenter believes that the amount paid under RCW 23B.13.250 or offered under RCW 23B.13.270 is less than the fair value of the dissenter's shares or that the interest due is incorrectly calculated;

(b) The corporation fails to make payment under RCW 23B.13.250 within sixty days after the date set for demanding payment; or

(c) The corporation does not effect the proposed corporate action and does not return the deposited certificates or release the transfer restrictions imposed on uncertificated shares within sixty days after the date set for demanding payment.

(2) A dissenter waives the right to demand payment under this section unless the dissenter notifies the corporation of the dissenter's demand under subsection (1) of this section within thirty days after the corporation made or offered payment for the dissenter's shares.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §151 (eff. 7-1-90)

(1) A dissenter may notify the corporation in writing of the dissenter's own estimate of the fair value of the dissenter's shares and amount of interest due, and demand payment of the dissenter's estimate, less any payment under RCW 23B.13.250, or reject the corporation's offer under RCW 23B.13.270 and demand payment of the dissenter's estimate of the fair value of the dissenter's shares and interest due, if:

(a) The dissenter believes that the amount paid under RCW 23B.13.250 or offered under RCW 23B.13.270 is less than the fair value of the dissenter's shares or that the interest due is incorrectly calculated;

(b) The corporation fails to make payment under RCW 23B.13.250 within sixty days after the date set for demanding payment; or

(c) The corporation does not effect the proposed action and does not return the deposited certificates or release the transfer restrictions imposed on uncertificated shares within sixty days after the date set for demanding payment.

(2) A dissenter waives the right to demand payment under this section unless the dissenter notifies the corporation of the dissenter's demand under subsection (1) of this section within thirty days after the corporation made or offered payment for the dissenter's shares.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3092 (1989)

Section 13.28 Procedure If Shareholder Dissatisfied With Payment or Offer.

Proposed section 13.28 also departs significantly from the old law of dissenters' rights. Under Proposed section 13.28, the dissenter who is not content with the corporation's remittance must state in writing the amount the dissenter is willing to accept. A dissenter who acquired the dissenter's shares after public announcement of the transaction (Proposed section 13.27) and is dissatisfied with the corporation's offer must also state in writing the amount the dissenter is willing to accept. A dissenter cannot, by remaining

silent, force the corporation into the expense and delay of a judicial appraisal. Furthermore, if the dissenter's supplemental demand is unreasonable, the dissenter runs the risk of being assessed litigation expenses under Proposed section 13.31. These provisions are designed to encourage settlement without a judicial proceeding.

A dissenter to whom the corporation has made payment (or who has been offered payment under Proposed section 13.27) must make the dissenter's supplemental demand within 30 days after receipt of the payment (or offer of payment) in order to permit the corporation to make an early decision on initiating appraisal proceedings. If the dissenter fails to do so, the dissenter loses the right to demand additional payment under Proposed subsection 13.28(b).

If the corporation, having failed to make payment, also fails to return the certificates previously deposited or release the restrictions on transfer of uncertificated securities within 60 days, the shareholder may treat the shares as purchased by the corporation and demand payment of the full amount claimed under this section. See Proposed subsection 13.30(a). This provision creates no hardship for the corporation since, if it cannot complete the transaction within 60 days, it may return the certificates (or release the restrictions on uncertified shares) and start the process over again at any time.

AMENDMENTS TO ORIGINAL SECTION
Laws 2002, ch. 297, §40 (eff. 6-13-02)
(1) A dissenter may ~~notify~~ deliver a notice to the corporation informing the corporation ~~in writing~~ of the dissenter's own estimate of the fair value of the dissenter's shares and amount of interest due, and demand payment of the dissenter's estimate, less any payment under RCW 23B.13.250, or reject the corporation's offer under RCW 23B.13.270 and demand payment of the dissenter's estimate of the fair value of the dissenter's shares and interest due, if:
(a) The dissenter believes that the amount paid under RCW 23B.13.250 or offered under RCW 23B.13.270 is less than the fair value of the dissenter's shares or that the interest due is incorrectly calculated;
(b) The corporation fails to make payment under RCW 23B.13.250 within sixty days after the date set for demanding payment; or
(c) The corporation does not effect the proposed action and does not return the deposited certificates or release the transfer restrictions imposed on uncertificated shares within sixty days after the date set for demanding payment.
(2) A dissenter waives the right to demand payment under this section unless the dissenter notifies the corporation of the dissenter's demand ~~in writing~~ under subsection (1) of this section within thirty days after the corporation made or offered payment for the dissenter's shares.

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

* * * * *

Laws 2009, ch. 189, §47 (eff. 7-26-09)*(amends only subsection (1)(c))*
(1)(c) The corporation does not effect the proposed corporate action and does not return the deposited certificates or release the transfer restrictions imposed on uncertificated shares within sixty days after the date set for demanding payment.

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.14.010
DISSOLUTION BY INITIAL DIRECTORS, INCORPORATORS, OR BOARD OF DIRECTORS

CURRENT SECTION

(1) A majority of the initial directors, or, if initial directors were not named in the articles of incorporation and have not been elected, a majority of the incorporators, of a corporation that has not issued shares may approve dissolution of the corporation.

(2) Unless prohibited by the articles of incorporation, a majority of the board of directors may approve dissolution of the corporation without approval by the shareholders, upon a finding by the board of directors that:

(a) The corporation is not able to pay its liabilities as they become due in the usual course of business, or the corporation's assets are less than the sum of its total liabilities; and

(b) Ten or more days have elapsed since the corporation gave notice to all shareholders, whether or not they would otherwise be entitled to vote under RCW 23B.14.020, of the intent of the board of directors to approve dissolution under this subsection.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §154 (eff. 7-1-90)

A majority of the initial directors, or, if initial directors were not named in the articles of incorporation and have not been elected, the incorporators of a corporation that either has not issued shares or has not commenced business may dissolve the corporation by delivering to the secretary of state for filing:

(1) A copy of a revenue clearance certificate issued pursuant to RCW 82.32.260; and

(2) Articles of dissolution that set forth:

(a) The name of the corporation;

(b) The date of its incorporation;

(c) Either (i) that none of the corporation's shares have been issued or (ii) that the corporation has not commenced business;

(d) That no debt of the corporation remains unpaid;

(e) That the net assets of the corporation remaining after winding up have been distributed to the shareholders, if shares were issued; and

(f) That a majority of the initial directors authorized the dissolution, or that initial directors were not named in the articles of incorporation and have not been elected and a majority of incorporators authorized the dissolution.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3093 (1989)

Section 14.01 Dissolution By Initial Directors or Incorporators.

Proposed section 14.01 provides a simple method of voluntary dissolution for a corporation that has not either issued shares or commenced business. These provisions are alternative: a corporation may utilize Proposed section 14.01 if it has not issued shares (even though it has commenced business) or if it has issued shares but has not commenced business. Dissolution may be accomplished in either of these situations simply by a majority vote of the initial directors, or if none, by the incorporators. (See Proposed section 2.05 and its Comment for a discussion of the roles of "incorporators" or "initial directors" in the organization of a corporation.)

This simple method of dissolution is likely to be used by nameholding corporations or by corporations formed for the initiation of a new venture when the reasons for the initial creation of the corporation have been completely realized or will never come to fruition.

The form of articles of dissolution provided in Proposed section 14.01 takes account of the fact that a corporation may utilize this section even though it has received capital from the issuance of shares or has incurred liabilities either from the commencement of business without issuing shares or from its organization; hence the articles must state that no debts remain unpaid, and that the net assets of the corporation remaining after winding up have been distributed to the shareholders.

AMENDMENTS TO ORIGINAL SECTION
Laws 2006, ch. 52, §5 (eff. 6-7-06)

(1) A majority of the initial directors, or, if initial directors were not named in the articles of incorporation and have not been elected, a majority of the incorporators, of a corporation that ~~either~~ has not issued shares ~~or has not commenced business~~ may ~~dissolve~~ authorize dissolution of the corporation ~~by delivering to the secretary of state for filing:~~

~~(1) A copy of a revenue clearance certificate issued pursuant to RCW 82.32.260; and~~

~~(2) Articles of dissolution that set forth:~~

~~(a) The name of the corporation;~~

~~(b) The date of its incorporation;~~

~~(c) Either (i) that none of the corporation's shares have been issued or (ii) that the corporation has not commenced business;~~

~~(d) That no debt of the corporation remains unpaid;~~

~~(e) That the net assets of the corporation remaining after winding up have been distributed to the shareholders, if shares were issued; and~~

~~(f) That a majority of the initial directors authorized the dissolution, or that initial directors were not named in the articles of incorporation and have not been elected and a majority of incorporators authorized the dissolution~~.

(2) Unless prohibited by the articles of incorporation, a majority of the board of directors may authorize dissolution of the corporation without approval by the shareholders, upon a finding by the board of directors that:

(a)The corporation is not able to pay its liabilities as they become due in the usual course of business, or the corporation's assets are less than the sum of its total liabilities; and

(b) Ten or more days have elapsed since the corporation gave notice to all shareholders, whether or not they would otherwise be entitled to vote under RCW 23B.14.020, of the intent of the board of directors to authorize dissolution under this subsection.

CARC COMMENTARY

The provisions of RCW Ch. 23B.14 relating to dissolution of Washington corporations were adopted in 1989, based primarily upon the dissolution provisions recommended by the drafters of the Revised Model Business Corporations Act (RMBCA). They were subsequently revised in various respects on ten separate occasions between 1990 and 2004. Despite such continued attention, however, RCW Ch. 23B.14 remains one of the (if not *the*) most ambiguous, confusing, poorly understood and easily misinterpreted chapters of the Washington Business Corporation Act.

There are several reasons for this predicament, including the 1989 decision by the WSBA's Corporate Act Revision Committee (CARC) to defer any revisions to the preexisting provisions of Title 23A relating to survival of creditors' claims, pending the ongoing deliberations by the RMBCA drafters on that subject. The attached proposal addresses this long-deferred issue, as well as numerous other questions and uncertainties that have arisen over the years, not only among Washington practitioners but even in the judicial opinions since 1989.

The statutory revisions now proposed by CARC would make the following significant changes and

clarifications (among others) to Washington's corporate dissolution provisions

- We propose eliminating the potential argument that RCW 23B.14.340 allows claims against a corporation that arise after its dissolution to abate, leaving creditors with no remedy. As aberrant as this result may sound, it was recently upheld by the Washington Court of Appeals (*Ballard Sq. Condo Owners Assn. V. Dynasty Constr. Co.*, 2005 WL 581354 (Wash. App. Div. 1)) in a well-reasoned decision that explicitly exhorted the Legislature to resolve the competing policy considerations relating to survival of claims.
- We propose extending the survival period for claims from the current two years to three years, consistent with the weight of authority in other states that have addressed the survival issue and with the most recent recommendation of the RMBCA drafters.
- 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).
- We propose adding clarity as to procedures that a board of directors can undertake, either on its own or with the help of a court, to make reasonable provision for creditors' claims that are either known or reasonably likely to arise.
- We propose to reduce the potential for "stealth" discharge of creditors' claims by requiring voluntarily dissolved corporations to publish notice of their dissolution, and by denying the availability of statutory claims-barring procedures to corporations that have not given such notice (such as administratively dissolved corporations). This addresses a concern expressed by the Alaska Supreme Court in *Univ. of Alaska v. Thomas Arch. Prods., Inc.*, 907 P. 2d 448 (1995), which held that claims of known creditors against an administratively dissolved Washington corporation were not barred under the prior Washington survival statute (under RCW Title 23A) unless the corporation had given them notice.
- We propose conforming changes to clarify a dissolved corporation's ability to utilize receivership proceedings in connection with its liquidation, consistent with the 2004 overhaul of Washington's receivership statutes (RCW Chs. 7.08, 7.60).

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Laws 2009, ch. 189, §49 (eff. 7-26-09)

(1) A majority of the initial directors, or, if initial directors were not named in the articles of incorporation and have not been elected, a majority of the incorporators, of a corporation that has not issued shares may ~~authorize~~ approve dissolution of the corporation.

(2) Unless prohibited by the articles of incorporation, a majority of the board of directors may ~~authorize~~ approve dissolution of the corporation without approval by the shareholders, upon a finding by the board of directors that:

(a) The corporation is not able to pay its liabilities as they become due in the usual course of business, or the corporation's assets are less than the sum of its total liabilities; and

(b) Ten or more days have elapsed since the corporation gave notice to all shareholders, whether or not they would otherwise be entitled to vote under RCW 23B.14.020, of the intent of the board of directors to ~~authorize~~ approve dissolution under this subsection.

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.14.020
DISSOLUTION BY BOARD OF DIRECTORS AND SHAREHOLDERS

CURRENT SECTION

(1) A corporation's board of directors may propose dissolution for submission to the shareholders.

(2) For a proposal to dissolve to be approved:

(a) The board of directors must recommend dissolution to the shareholders unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders; and

(b) The shareholders entitled to vote must approve the proposal to dissolve as provided in subsection (5) of this section.

(3) The board of directors may condition its submission of the proposal for dissolution on any basis, including the affirmative vote of holders of a specified percentage of shares held by any group of shareholders not otherwise entitled under this title or the articles of incorporation to vote as a separate voting group on the proposed dissolution.

(4) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed dissolution either (a) by giving notice of a shareholders' meeting in accordance with RCW 23B.07.050 and stating that the purpose or one of the purposes of the meeting is to consider dissolving the corporation, or (b) in accordance with the requirements of RCW 23B.07.040 for approving the proposed dissolution without a meeting.

(5) In addition to any other voting conditions imposed by the board of directors under subsection (3) of this section, the proposed dissolution must be approved by two-thirds of the voting group comprising all the votes entitled to be cast on the proposed dissolution, and of each other voting group entitled under the articles of incorporation to vote separately on the proposed dissolution. The articles of incorporation may require a greater or lesser vote than provided in this subsection, or a greater or lesser vote by any separate voting groups provided for in the articles of incorporation, so long as the required vote is not less than a majority of all the votes entitled to be cast on the proposed dissolution and of each other voting group entitled to vote separately on the proposed dissolution.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §155 (eff. 7-1-90)

(1) A corporation's board of directors may propose dissolution for submission to the shareholders.

(2) For a proposal to dissolve to be adopted:

(a) The board of directors must recommend dissolution to the shareholders unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders; and

(b) The shareholders entitled to vote must approve the proposal to dissolve as provided in subsection (5) of this section.

(3) The board of directors may condition its submission of the proposal for dissolution on any basis.

(4) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting in accordance with RCW 23B.07.050. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider dissolving the corporation.
(5) Unless the articles of incorporation or the board of directors, acting pursuant to subsection (3) of this section, require a greater vote or a vote by voting groups, the proposal to dissolve must be approved by two-thirds of all the votes entitled to be cast on that proposal in order to be adopted. The articles of incorporation may provide for a lesser vote than that provided for in this subsection, or for a lesser vote by separate voting groups, so long as the vote provided for each voting group entitled to vote separately on the proposal to dissolve is not less than a majority of all the votes entitled to be cast on the proposal by that voting group.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3093-94 (1989)
Section 14.02 Dissolution By Board of Directors and Shareholders.
A corporation that has issued shares and commenced business may dissolve voluntarily only with the approval of its shareholders. Proposed section 14.02 requires the board of directors to propose dissolution and then submit the proposal to the shareholders. The board of director [sic] must make a recommendation to the shareholders that the proposal to dissolve be approved, unless it determines that because of conflict of interest or other special circumstances it should make no recommendation. If the board of directors so determines, it must describe the conflict or circumstances, and communicate the basis for its determination, to the shareholders when presenting the proposal to dissolve to the shareholders.

Dissolution, to be approved, generally must receive the vote of two-thirds of all the votes entitled by the articles of incorporation to vote on the proposal. As with other organic changes, the Committee rejected the RMA majority vote requirement in favor of generally continuing the two-thirds standard in the old law. However, provisions in the articles of incorporation may reduce the required vote to a majority of all shares of any voting group entitled to vote separately in the proposal.

Nonvoting classes of shares are not given a statutory right to vote on proposals to dissolve (either as separate voting groups or together with voting shares) by the Proposed Act on the theory that, upon dissolution, the rights of all classes or series of shares are fixed by the articles of incorporation. The articles of incorporation, however, may stipulate that specified classes or series of shares are entitled to vote by separate voting groups. Thus, in the absence of specific provision in the articles of incorporation, only the shares of the corporation entitled to vote generally by the articles of incorporation are entitled to vote on dissolution. The articles of incorporation may also specify that a greater percentage of votes is required to approve the proposal than is required by Proposed section 14.02.

The board of directors may condition its submission of a proposal to the shareholders under Proposed subsection (c) on its receiving a specified percentage of the votes of shareholders of one or more classes or series, voting by separate voting groups, or on some other basis.

Proposed section 14.04 permits the corporation to revoke the dissolution under the circumstances described.

The Committee agreed with the determination of the RMA drafters to omit a provision authorizing voluntary dissolution by consent of shareholders. See old RCW 23A.28.020. The only unique feature that that provision offered that the Proposed Act does not offer is dissolution without action of the board of directors. The Proposed Act provides for action by both directors (see Proposed section 8.21) and shareholders (see Proposed section 7.04) without a meeting. Those provisions were thought to offer sufficient flexibility to small corporations. Thus, voluntary dissolution by consent of shareholders was thought to be unnecessary.

AMENDMENTS TO ORIGINAL SECTION

Laws 2003, ch. 35, §10 (eff. 7-27-03) *(amends only subsections (3) and (5))*

(3) The board of directors may condition its submission of the proposal for dissolution on any basis, including the affirmative vote of holders of a specified percentage of shares held by any group of shareholders not otherwise entitled under this title or the articles of incorporation to vote as a separate voting group on the proposed dissolution.

(5) ~~Unless the articles of incorporation or~~ In addition to any other voting conditions imposed by the board of directors~~, acting pursuant to~~ under subsection (3) of this section, ~~require a greater vote or a vote by voting groups,~~ the proposal to dissolve must be approved by two-thirds of the voting group comprising all the votes entitled to be cast on ~~that~~ the proposal ~~in order to be adopted~~, and of each other voting group entitled under the articles of incorporation to vote separately on the proposal. The articles of incorporation may ~~provide for a~~ require a greater or lesser vote than ~~that~~ provided ~~for~~ in this subsection, or ~~for~~ a greater or lesser vote by any separate voting groups provided for in the articles of incorporation, so long as the required vote ~~provided for each voting group entitled to vote separately on the proposal to dissolve~~ is not less than a majority of all the votes entitled to be cast on the proposal ~~by that voting group~~ and of each other voting group entitled to vote separately on the proposal.

* * * * *

Laws 2006, ch. 52, §6 (eff. 6-7-06)*(amends only subsection (4))*

(4) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed dissolution either (a) by giving notice of a shareholders' meeting in accordance with RCW 23B.07.050~~. The notice must also state~~ and stating that the purpose~~,~~ or one of the purposes~~,~~ of the meeting is to consider dissolving the corporation, or (b) in accordance with the requirements of RCW 23B.07.040 for taking action on the proposal without a meeting.

CARC COMMENTARY

Amendment clarifies RCW 23B.14.020 by specifically recognizing that shareholders may approve the proposed dissolution of a corporation without a shareholders' meeting, pursuant to RCW 23B.07.040.

* * * * *

Laws 2009, ch. 189, §50 (eff. 7-26-09)*(amends only subsections (2)(introductory paragraph), (4), and (5))*

(2) For a proposal to dissolve to be ~~adopted~~ approved:

(4) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed dissolution either (a) by giving notice of a shareholders' meeting in accordance with RCW 23B.07.050 and stating that the purpose or one of the purposes of the meeting is to consider dissolving the corporation, or (b) in accordance with the requirements of RCW 23B.07.040 for ~~taking action on the proposal~~ approving the proposed dissolution without a meeting.

(5) In addition to any other voting conditions imposed by the board of directors under subsection (3) of this section, the ~~proposal to dissolve~~ proposed dissolution must be approved by two-thirds of the voting group comprising all the votes entitled to be cast on the ~~proposal~~ proposed dissolution, and of each other voting group entitled under the articles of incorporation to vote separately on the ~~proposal~~ proposed dissolution. The articles of incorporation may require a greater or lesser vote than provided in this subsection, or a greater or lesser vote by any separate voting groups provided for in the articles of incorporation, so long as the required vote is not less than a majority of all the votes entitled to be cast on the ~~proposal~~ proposed dissolution and of each other voting group entitled to vote separately on the ~~proposal~~ proposed dissolution.

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.14.030
ARTICLES OF DISSOLUTION – PUBLICATION OF NOTICE

CURRENT SECTION

(1) At any time after dissolution is authorized under RCW 23B.14.010 or 23B.14.020, the corporation may dissolve by delivering to the secretary of state for filing:

(a) A copy of a revenue clearance certificate issued pursuant to RCW 82.32.260; and

(b) Articles of dissolution setting forth:

(i) The name of the corporation;

(ii) The date dissolution was approved; and

(iii) A statement that dissolution was duly approved by the initial directors, the incorporators, or the board of directors in accordance with RCW 23B.14.010, or was duly proposed by the board of directors and approved by the shareholders in accordance with RCW 23B.14.020.

(2) A corporation is dissolved upon the effective date of its articles of dissolution.

(3) A dissolved corporation shall, within thirty days after the effective date of its articles of dissolution, publish notice of its dissolution and request that persons with claims against the dissolved corporation present them in accordance with the notice. The notice must be published once a week for three consecutive weeks in a newspaper of general circulation in the county where the dissolved corporation's principal office (or, if none in this state, its registered office) is or was last located. The notice must also describe the information that must be included in a claim, provide a mailing address where a claim may be sent, and state that claims against the dissolved corporation may be barred in accordance with the provisions of this chapter if not timely asserted. A dissolved corporation's failure to publish notice in accordance with this subsection does not affect the validity or the effective date of its dissolution.

(4) For purposes of this chapter, "dissolved corporation" means a corporation whose dissolution has been approved in accordance with RCW 23B.14.010 or 23B.14.020 and whose articles of dissolution have become effective, and includes any trust or other successor entity to which the remaining assets of such a corporation are transferred subject to its liabilities for purposes of liquidation in accordance with RCW 23B.14.050.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §156 (eff. 7-1-90)

(1) At any time after dissolution is authorized, the corporation may dissolve by delivering to the secretary of state for filing:

(a) A copy of a revenue clearance certificate issued pursuant to RCW 82.32.260; and

(b) Articles of dissolution setting forth:

(i) The name of the corporation;

(ii) The date of dissolution was authorized; and

(iii) If shareholder approval was required for dissolution, a statement that dissolution was duly approved by the shareholders in accordance with RCW 23B.14.020.

(2) A corporation is dissolved upon the effective date of its articles of dissolution.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3094 (1989)
Section 14.03 Articles of Dissolution.
The act of filing the articles of dissolution makes the decision to dissolve a matter of public record and establishes the time when the corporation must begin the process of winding-up and cease carrying on its business except to the extent necessary for winding-up.

Under the Proposed Act, articles of dissolution may be filed at the commencement of winding-up or at any time thereafter. This is the only filing required for voluntary dissolution; no filing is required to mark the completion of winding-up since the existence of the corporation continues for certain purposes even after the business is wound up and the assets remaining after satisfaction of all creditors are distributed to the shareholders. No time limit for filing the articles is specified, and it often may be desirable to postpone filing until winding up is far along or even complete. Indeed, the requirement in Proposed sections 14.01 and 14.03 that a copy of the revenue clearance certificate be filed with the articles of dissolution will necessitate postponement of the filing in many cases until the winding up is complete.

A corporation is dissolved on the date the articles of dissolution are effective. After this date the corporation is referred to as a "dissolved corporation," although its existence continues under Proposed section 14.05 for purposes of winding up.

AMENDMENTS TO ORIGINAL SECTION
Laws 2006, ch. 52, §7 (eff. 6-7-06)
(1) At any time after dissolution is authorized under RCW 23B.14.010 or 23B.14.020, the corporation may dissolve by delivering to the secretary of state for filing:
(a) A copy of a revenue clearance certificate issued pursuant to RCW 82.32.260; and
(b) Articles of dissolution setting forth:
(i) The name of the corporation;
(ii) The date dissolution was authorized; and
(iii) ~~If shareholder approval was required for dissolution, a~~ A statement that dissolution was duly authorized by the initial directors, the incorporators, or the board of directors in accordance with RCW 23B.14.010, or was duly proposed by the board of directors and approved by the shareholders in accordance with RCW 23B.14.020.
(2) A corporation is dissolved upon the effective date of its articles of dissolution.
(3) A dissolved corporation shall, within thirty days after the effective date of its articles of dissolution, publish notice of its dissolution and request that persons with claims against the dissolved corporation present them in accordance with the notice. The notice must be published once a week for three consecutive weeks in a newspaper of general circulation in the county where the dissolved corporation's principal office (or, if none in this state, its registered office) is or was last located. The notice must also describe the information that must be included in a claim, provide a mailing address where a claim may be sent, and state that claims against the dissolved corporation may be barred in accordance with the provisions of this chapter if not timely asserted. A dissolved corporation's failure to publish notice in accordance with this subsection does not affect the validity or the effective date of its dissolution.
(4) For purposes of this chapter, "dissolved corporation" means a corporation whose dissolution has been authorized in accordance with RCW 23B.14.010 or 23B.14.020 and whose articles of dissolution have become effective, and includes any trust or other successor entity to which the remaining assets of such a corporation are transferred subject to its liabilities for purposes of liquidation in accordance with RCW 23B.14.050.

CARC COMMENTARY
We propose to reduce the potential for "stealth" discharge of creditors' claims by requiring voluntarily dissolved corporations to publish notice of their dissolution, and by denying the availability of statutory claims-barring procedures to corporations that have not given such notice (such as administratively dissolved corporations). This addresses a concern expressed by the Alaska Supreme Court in *Univ. of Alaska v. Thomas Arch. Prods., Inc.*, 907 P. 2d 448 (1995), which held that claims of known creditors against an administratively dissolved Washington

corporation were not barred under the prior Washington survival statute (under RCW Title 23A) unless the corporation had given them notice. See general commentary on the 2006 amendments to RCW 23B.14 under RCW 23B.14.010.

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Laws 2009, ch. 189, §51 (eff. 7-26-09)*(amends only subsections (1) and (4))*
(1) At any time after dissolution is authorized under RCW 23B.14.010 or 23B.14.020, the corporation may dissolve by delivering to the secretary of state for filing:
(a) A copy of a revenue clearance certificate issued pursuant to RCW 82.32.260; and
(b) Articles of dissolution setting forth:
(i) The name of the corporation;
(ii) The date dissolution was ~~authorized~~ approved; and
(iii) A statement that dissolution was duly ~~authorized~~ approved by the initial directors, the incorporators, or the board of directors in accordance with RCW 23B.14.010, or was duly proposed by the board of directors and approved by the shareholders in accordance with RCW 23B.14.020.

(4) For purposes of this chapter, "dissolved corporation" means a corporation whose dissolution has been ~~authorized~~ approved in accordance with RCW 23B.14.010 or 23B.14.020 and whose articles of dissolution have become effective, and includes any trust or other successor entity to which the remaining assets of such a corporation are transferred subject to its liabilities for purposes of liquidation in accordance with RCW 23B.14.050.

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.14.040
REVOCATION OF DISSOLUTION

CURRENT SECTION

(1) A corporation may revoke its dissolution within one hundred twenty days of its effective date.

(2) Revocation of dissolution must be approved in the same manner as the dissolution was approved unless that approval permitted revocation upon approval by the board of directors alone, in which event the board of directors may revoke the dissolution without shareholder approval.

(3) After the revocation of dissolution is approved, the corporation may revoke the dissolution by delivering to the secretary of state for filing articles of revocation of dissolution, together with a copy of its articles of dissolution, that set forth:

(a) The name of the corporation and a statement that such name satisfies the requirements of RCW 23B.04.010; if the name is not available, the corporation must file articles of amendment changing its name with the articles of revocation of dissolution;

(b) The effective date of the dissolution that was revoked;

(c) The date that the revocation of dissolution was approved;

(d) If the corporation's board of directors, or incorporators, revoked the dissolution, a statement to that effect;

(e) If the corporation's board of directors revoked a dissolution authorized by the shareholders, a statement that revocation was permitted by action by the board of directors alone pursuant to that authorization; and

(f) If shareholder approval was required to revoke the dissolution, a statement that revocation of the dissolution was duly approved by the shareholders in accordance with RCW 23B.14.040(2) [subsection (2) of this section] and 23B.14.020.

(4) Revocation of dissolution is effective upon the effective date of the articles of revocation of dissolution.

(5) When the revocation of dissolution is effective, it relates back to and takes effect as of the effective date of the dissolution and the corporation resumes carrying on its business as if dissolution had never occurred.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §157 (eff. 7-1-90)

(1) A corporation may revoke its dissolution within one hundred twenty days of its effective date.

(2) Revocation of dissolution must be authorized in the same manner as the dissolution was authorized unless that authorization permitted revocation by action of the board of directors alone, in which event the board of directors may revoke the dissolution without shareholder action.

(3) After the revocation of dissolution is authorized, the corporation may revoke the dissolution by delivering to the secretary of state for filing articles of revocation of dissolution, together with a copy of its articles of dissolution, that set forth:

(a) The name of the corporation and a statement that such name satisfies the requirements of RCW 23B.04.010; if the name is not available, the corporation must file articles of amendment changing its name with the articles of revocation of dissolution;

(b) The effective date of the dissolution that was revoked;
(c) The date that the revocation of dissolution was authorized;
(d) If the corporation's board of directors, or incorporators, revoked the dissolution, a statement to that effect;
(e) If the corporation's board of directors revoked a dissolution authorized by the shareholders, a statement that revocation was permitted by action by the board of directors alone pursuant to that authorization; and
(f) If shareholder action was required to revoke the dissolution, a statement that revocation of the dissolution was duly approved by the shareholders in accordance with RCW 23B.14.040(2) and 23B.14.020.
(4) Revocation of dissolution is effective upon the effective date of the articles of revocation of dissolution.
(5) When the revocation of dissolution is effective, it relates back to and takes effect as of the effective date of the dissolution and the corporation resumes carrying on its business as if dissolution had never occurred.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3094-95 (1989)
Section 14.04 Revocation of Dissolution.
Voluntary dissolution may be revoked within 120 days of the effective date of the dissolution. Because of the importance and finality of dissolution, the decision to revoke dissolution generally requires shareholder authorization (unless the dissolution was approved solely by the initial director [sic] or incorporators under Proposed section 14.01). Proposed subsection 14.04(b), however, contemplates that the board of directors may revoke dissolution if specifically granted that authority in advance by the shareholders when approving the dissolution. Such authorization is often included in proposals to dissolve that are contingent upon the effectuation of another transaction, such as a sale of corporate assets not in the ordinary course of business.

Certain other action requiring shareholder approval may be revoked by the board of directors without express shareholder approval. (See Proposed sections 11.03 and 12.02). By contrast, dissolution under Proposed section 14.04 may not be revoked by the board of directors without approval of the shareholders.

Articles of revocation of dissolution must be filed to reflect the decision to resume the business of the corporation. The information required in these articles parallels the information required in the original articles of dissolution.

The effect of articles of revocation of dissolution is to eliminate the requirement that the corporation cease to conduct its business except as part of the winding-up process and permit it to resume its business without limitation and as if dissolution had never occurred.

* * * * *

Laws 2009, ch. 189, §52 (eff. 7-26-09)*(amends only subsections (2) and (3))*
(2) Revocation of dissolution must be ~~authorized~~ approved in the same manner as the dissolution was ~~authorized~~ approved unless that ~~authorization~~ approval permitted revocation upon approval by ~~action of~~ the board of directors alone, in which event the board of directors may revoke the dissolution without shareholder ~~action~~ approval.
(3) After the revocation of dissolution is ~~authorized~~ approved, the corporation may revoke the dissolution by delivering to the secretary of state for filing articles of revocation of dissolution, together with a copy of its articles of dissolution, that set forth:
(a) The name of the corporation and a statement that such name satisfies the requirements of RCW 23B.04.010; if the name is not available, the corporation must file articles of amendment changing its name with the articles of revocation of dissolution;
(b) The effective date of the dissolution that was revoked;
(c) The date that the revocation of dissolution was ~~authorized~~ approved;
(d) If the corporation's board of directors, or incorporators, revoked the dissolution, a statement to that effect;
(e) If the corporation's board of directors revoked a dissolution authorized by the shareholders, a statement that revocation was permitted by action by the board of directors alone pursuant to that authorization; and

(f) If shareholder ~~action~~ approval was required to revoke the dissolution, a statement that revocation of the dissolution was duly approved by the shareholders in accordance with RCW 23B.14.040(2) and 23B.14.020.

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.14.050
EFFECT OF DISSOLUTION

CURRENT SECTION

(1) A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including:

(a) Collecting its assets;

(b) Disposing of its properties that will be applied toward satisfaction or making reasonable provision for satisfaction of its liabilities or will otherwise not be distributed in kind to its shareholders, but in any case subject to applicable liens and security interests as well as any applicable contractual restrictions on the disposition of its properties;

(c) Satisfying or making reasonable provision for satisfying its liabilities, in accordance with their priorities as established by law, and on a pro rata basis within each class of liabilities;

(d) Subject to the limitations imposed by RCW 23B.06.400, distributing its remaining property among its shareholders according to their interests; and

(e) Doing every other act necessary to wind up and liquidate its business and affairs.

(2) Except as otherwise provided in this chapter, dissolution of a corporation does not:

(a) Transfer title to the corporation's property;

(b) Prevent transfer of its shares or securities, although the authorization to dissolve may provide for closing the corporation's share transfer records;

(c) Subject its directors or officers to standards of conduct different from those prescribed in chapter 23B.08 RCW;

(d) Change quorum or voting requirements for its board of directors or shareholders; change provisions for selection, resignation, or removal of its directors or officers or both; or change provisions for amending its bylaws;

(e) Prevent commencement of a proceeding by or against the corporation in its corporate name;

(f) Abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution; or

(g) Terminate the authority of the registered agent of the corporation.

(3) A dissolved corporation's board of directors may make a determination that reasonable provision for the satisfaction of any liability, whether arising in tort or by contract, statute, or otherwise, and whether matured or unmatured, contingent, or conditional, has been made by means of a purchase of insurance coverage, provision of security therefor, contractual assumption thereof by a solvent person, or any other means, that the board of directors determines is reasonably calculated to provide for satisfaction of the reasonably estimated amount of such liability. Upon making such a determination, the board of directors shall, for purposes of determining whether a subsequent distribution to shareholders is prohibited under RCW 23B.06.400(2), be entitled to treat such liability as fully satisfied by the assets used or committed in order to make such provision. In making determinations

under RCW 23B.06.400(2), the board of directors of a dissolved corporation may also disregard, and make no provision for the satisfaction of, any liabilities that are barred in accordance with RCW 23B.14.060(2), or that may exceed any provision for their satisfaction ordered by a superior court pursuant to RCW 23B.14.065, or that the board of directors does not consider, based on the facts known to it, reasonably likely to arise prior to expiration of the survival period specified in RCW 23B.14.340.

(4) The board of directors of a dissolved corporation may at any time petition to have the dissolution continued under court supervision in accordance with RCW 23B.14.300, or, upon a finding that the corporation is not able to pay its liabilities as they become due in the usual course of business or that its assets are less than the sum of its total liabilities, may dedicate the corporation's assets to the repayment of its creditors by making an assignment for the benefit of creditors in accordance with chapter 7.08 RCW or obtaining the appointment of a general receiver in accordance with chapter 7.60 RCW. The assumption of control over the corporation's assets by a court, an assignee for the benefit of creditors, or a general receiver relieves the directors of any further duties with respect to the liquidation of the corporation's assets or the application of any assets or proceeds toward satisfaction of its liabilities.

(5) Corporate actions to be approved by a corporation that has been dissolved under RCW 23B.14.030 or 23B.14.210, which are within the scope of activities permitted in this chapter, may be approved by the corporation's board of directors and, if required, by its shareholders, membership in both groups determined as of the effective date of the dissolution. If vacancies in the board of directors occur after the effective date of dissolution, the shareholders, or the remaining directors, even if less than a quorum of the board, may fill the vacancies. A special meeting of the shareholders for purposes of approving any corporate action required or permitted to be approved by shareholders, or for purposes of electing directors, may be called by any person who was an officer, director, or shareholder of the corporation at the effective date of the dissolution.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §158 (eff. 7-1-90)

(1) A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including:

(a) Collecting its assets;

(b) Disposing of its properties that will not be distributed in kind to its shareholders;

(c) Discharging or making provision for discharging its liabilities;

(d) Distributing its remaining property among its shareholders according to their interests; and

(e) Doing every other act necessary to wind up and liquidate its business and affairs.

(2) Dissolution of a corporation does not:

(a) Transfer title to the corporation’s property;

(b) Prevent transfer of its shares or securities, although the authorization to dissolve may provide for closing the corporation’s share transfer records;

(c) Subject its directors or officers to standards of conduct different from those prescribed in chapter 23B.08 RCW;

(d) Change quorum or voting requirements for its board of directors or shareholders; change provisions for selection, resignation, or removal of its directors or officers or both; or change provisions amending its bylaws;

(e) Prevent commencement of a proceeding by or against the corporation in its corporate name;

(f) Abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution; or

(g) Terminate the authority of the registered agent of the corporation.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3095 (1989)

Section 14.05 Effect of Dissolution.

Proposed subsection 14.05(a) provides that dissolution does not terminate the corporate existence but simply requires the corporation thereafter to devote itself to winding up its affairs and liquidating its assets; after dissolution, the corporation may not carry on its business except as may be appropriate for winding-up.

The Proposed Act uses the term "dissolution" in the specialized sense described above and not to describe the final step in the liquidation of the corporate business. This is made clear by Proposed subsection 14.05(b), which provides that chapter 14 dissolution does not have any of the characteristics of common law dissolution, which treated corporate dissolution as analogous to the death of a natural person and abated lawsuits, vested equitable title to corporate property in the shareholders, imposed the fiduciary duty of trustees on directors who had custody of corporate assets, and revoked the authority of the registered agent. Proposed subsection 14.05(b) expressly reverses all of these common law attributes of dissolution and makes clear that the rights, powers, and duties of shareholders, the directors, and the registered agent are not affected by dissolution and that suits by or against the corporation are not affected in any way.

AMENDMENTS TO ORIGINAL SECTION

Laws 2006, ch. 52, §8 (eff. 6-7-06)

(1) A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including:

(a) Collecting its assets;

(b) Disposing of its properties that will be applied toward satisfaction or making reasonable provision for satisfaction of its liabilities or will otherwise not be distributed in kind to its shareholders, but in any case subject to applicable liens and security interests as well as any applicable contractual restrictions on the disposition of its properties;

(c) ~~Discharging~~ Satisfying or making reasonable provision for ~~discharging~~ satisfying its liabilities, in accordance with their priorities as established by law, and on a pro rata basis within each class of liabilities;

(d) Subject to the limitations imposed by RCW 23B.06.400, distributing its remaining property among its shareholders according to their interests; and

(e) Doing every other act necessary to wind up and liquidate its business and affairs.

(2) Except as otherwise provided in this chapter, dissolution of a corporation does not:

(a) Transfer title to the corporation's property;

(b) Prevent transfer of its shares or securities, although the authorization to dissolve may provide for closing the corporation's share transfer records;

(c) Subject its directors or officers to standards of conduct different from those prescribed in chapter 23B.08 RCW;

(d) Change quorum or voting requirements for its board of directors or shareholders; change provisions for selection, resignation, or removal of its directors or officers or both; or change provisions for amending its bylaws;

(e) Prevent commencement of a proceeding by or against the corporation in its corporate name;

(f) Abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution; or

(g) Terminate the authority of the registered agent of the corporation.
(3) A dissolved corporation's board of directors may make a determination that reasonable provision for the satisfaction of any liability, whether arising in tort or by contract, statute, or otherwise, and whether matured or unmatured, contingent, or conditional, has been made by means of a purchase of insurance coverage, provision of security therefor, contractual assumption thereof by a solvent person, or any other means, that the board of directors determines is reasonably calculated to provide for satisfaction of the reasonably estimated amount of such liability. Upon making such a determination, the board of directors shall, for purposes of determining whether a subsequent distribution to shareholders is prohibited under RCW 23B.06.400(2), be entitled to treat such liability as fully satisfied by the assets used or committed in order to make such provision. In making determinations under RCW 23B.06.400(2), the board of directors of a dissolved corporation may also disregard, and make no provision for the satisfaction of, any liabilities that are barred in accordance with RCW 23B.14.060(2), or that may exceed any provision for their satisfaction ordered by a superior court pursuant to RCW 23B.14.065, or that the board of directors does not consider, based on the facts known to it, reasonably likely to arise prior to expiration of the survival period specified in RCW 23B.14.340.
(4) The board of directors of a dissolved corporation may at any time petition to have the dissolution continued under court supervision in accordance with RCW 23B.14.300, or, upon a finding that the corporation is not able to pay its liabilities as they become due in the usual course of business or that its assets are less than the sum of its total liabilities, may dedicate the corporation's assets to the repayment of its creditors by making an assignment for the benefit of creditors in accordance with chapter 7.08 RCW or obtaining the appointment of a general receiver in accordance with chapter 7.60 RCW. The assumption of control over the corporation's assets by a court, an assignee for the benefit of creditors, or a general receiver relieves the directors of any further duties with respect to the liquidation of the corporation's assets or the application of any assets or proceeds toward satisfaction of its liabilities.
(5) Actions and decisions to be taken by a corporation that has been dissolved under RCW 23B.14.030 or 23B.14.210, which are within the scope of activities permitted in this chapter, may be taken by the corporation's board of directors and, if required, by its shareholders, membership in both groups determined as of the effective date of the dissolution. If vacancies in the board of directors occur after the effective date of dissolution, the shareholders, or the remaining directors, even if less than a quorum of the board, may fill the vacancies. A special meeting of the shareholders for purposes of authorizing any action required or permitted to be authorized by shareholders, or for purposes of electing directors, may be called by any person who was an officer, director, or shareholder of the corporation at the effective date of the dissolution.

CARC COMMENTARY

We propose adding clarity as to procedures that a board of directors can undertake, either on its own or with the help of a court, to make reasonable provision for creditors' claims that are either known or reasonably likely to arise. See general commentary on 2006 amendments to RCW 23B.14 under RCW 23B.14.010.

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Laws 2009, ch. 189, §53 (eff. 7-26-09)*(amends only subsection (5))*
(5) Corporate ~~A~~actions ~~and decisions~~ to be ~~taken~~ approved by a corporation that has been dissolved under RCW 23B.14.030 or 23B.14.210, which are within the scope of activities permitted in this chapter, may be ~~taken~~ approved by the corporation's board of directors and, if required, by its shareholders, membership in both groups determined as of the effective date of the dissolution. If vacancies in the board of directors occur after the effective date of dissolution, the shareholders, or the remaining directors, even if less than a quorum of the board, may fill the vacancies. A special meeting of the shareholders for purposes of ~~authorizing~~ approving any corporate action required or permitted to be ~~authorized~~ approved by shareholders, or for purposes of electing directors, may be called by any person who was an officer, director, or shareholder of the corporation at the effective date of the dissolution.

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.16.010
CORPORATE RECORDS

CURRENT SECTION

(1) A corporation shall keep as permanent records minutes of all meetings of its shareholders and board of directors, a record of all corporate actions approved by the shareholders or board of directors by executed consent without a meeting, and a record of all corporate actions approved by a committee of the board of directors exercising the authority of the board of directors on behalf of the corporation.

(2) A corporation shall maintain appropriate accounting records.

(3) A corporation or its agent shall maintain a record of its shareholders, in a form that permits preparation of a list of the names and addresses of all shareholders, in alphabetical order by class of shares showing the number and class of shares held by each.

(4) A corporation shall maintain its records in written form or in another form capable of conversion into written form within a reasonable time.

(5) A corporation shall keep a copy of the following records at its principal office:

(a) Its articles or restated articles of incorporation and all amendments to them currently in effect;

(b) Its bylaws or restated bylaws and all amendments to them currently in effect;

(c) The minutes of all shareholders' meetings, and records of all corporate actions approved by shareholders without a meeting, for the past three years;

(d) The financial statements described in RCW 23B.16.200(1), for the past three years;

(e) All communications in the form of a record to shareholders generally within the past three years;

(f) A list of the names and business addresses of its current directors and officers; and

(g) Its initial report or most recent annual report delivered to the secretary of state under RCW 23B.16.220.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §182 (eff. 7-1-90)

(1) A corporation shall keep as permanent records minutes of all meetings of its shareholders and board of directors, a record of all actions taken by the shareholders or board of directors without a meeting, and a record of all actions taken by a committee of the board of directors exercising the authority of the board of directors on behalf of the corporation.

(2) A corporation shall maintain appropriate accounting records.

(3) A corporation or its agent shall maintain a record of its shareholders, in a form that permits preparation of a list of the names and addresses of all shareholders, in alphabetical order by class of shares showing the number and class of shares held by each.

(4) A corporation shall maintain its records in written form or in another form capable of conversion into written form within a reasonable time.

(5) A corporation shall keep a copy of the following records at its principal office:

(a) Its articles or restated articles of incorporation and all amendments to them currently in effect;

(b) Its bylaws or restated bylaws and all amendments to them currently in effect;
(c) The minutes of all shareholders' meetings, and records of all action taken by shareholders without a meeting, for the past three years;
(d) The financial statements described in RCW 23B.16.200(1), for the past three years;
(e) All written communications to shareholders generally within the past three years;
(f) A list of the names and business addresses of its current directors and officers; and
(g) Most recent annual report delivered to the secretary of state under RCW 23B.16.220.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3105-06 (1989)
Section 16.01 Corporate Records.
Proposed section 16.01 describes in general terms the records every corporation must keep or maintain, the form in which they may be maintained, and, to a limited extent, where the records must be kept.

Proposed subsection 16.01(a) requires a corporation to "keep" as permanent records the minutes of meetings of its shareholders and board of directors, and a record of actions taken by unanimous consent by its shareholders or board of directors. (In view of the requirements of Proposed sections 7.04 and 8.21, cautious counsel may well advise the corporation to keep the written consents related to such actions.) In addition, each corporation must "keep" a record of all actions taken by a committee of the board of directors when exercising the authority of the board of directors for the corporation; this includes, for example, action taken by an executive committee between meetings of the board and final action of a special litigation committee authorized to act on behalf of the board. Proposed subsection 16.01(a) does not require a record of actions taken by a committee when the committee is not exercising the authority of the board of directors, e.g., when the committee is discussing policy and formulating recommendations for action by the board of directors. Also, it does not require either minutes or a record of committee deliberations under any circumstances. Committee meetings are preserved as forums for open and frank discussion and discussion of sensitive corporate data without fear of recordation or disclosure.

Proposed section 16.01 also does not address the amount of detail that should appear in the minutes of meeting of shareholders or the board of directors--the content of minutes is largely fixed by tradition and no inference about their content should be drawn from the section's treatment of the records of committee deliberation and action.

Proposed subsections 16.01(b) and (c) require the corporation to "maintain" appropriate accounting and shareholder records. The word "maintain" is used to denote current records only and does not require the corporation to keep on hand as permanent records, data, or information of historical interest only; the periods for which these records, data, or information should be kept is not addressed by the Proposed Act.

Proposed subsection 16.01(b) relates to accounting records. The word "appropriate" is used to indicate that the nature of the financial records to be kept is dependent to some extent on the nature of the corporation's business; the phrase "adequate records" is used in some state statutes to convey essentially the same meaning. "Appropriate" records are generally records that permit financial statements to be prepared which fairly present the financial position and transactions of the corporation. In some very small businesses operating on a cash basis, however, "appropriate" accounting records may consist only of a check register, vouchers, and receipts.

Proposed subsection 16.01(c) requires the corporation to maintain such records of its shareholders as will permit it to compile a list of shareholders when required. These records may consist of stubs from which certificates have been detached in the case of corporations with a few shareholders or of elaborate electronic data retrievable only by modern technology in the case of large, publicly held corporations. The record may be retained by the corporation or an agent, who traditionally is the transfer agent but may be another agent.

Proposed subsection 16.01(d) generally authorizes corporations to retain records on microfilm, microfiche, computer memory or disc, or any other method that is convenient or appropriate under the circumstances. The basic requirement is that the method chosen must be capable of reduction to written form within a

reasonable time. In addition, in the case of the record of shareholders, the method must permit the development of an alphabetical list of shareholders of record as required by Proposed subsection 16.01(c).

Proposed subsection 16.01(e) requires certain basic records to be kept at the principal office of the corporation, including minutes of shareholders' meetings for the preceding three years and records of shareholder action taken without a meeting during the same period. This requirement is imposed because these records must be available for inspection by any shareholder at that office. See Proposed subsection 16.02(a). The "principal office" of the corporation is defined in Proposed section 1.40 to be the location of the executive offices of the corporation and its address must be set forth by the corporation in its annual report required by Proposed section 16.22. The Proposed Act does not generally specify where records other than those described in Proposed subsection 16.01(e) must be kept. They may be kept in one or more offices within or without the state; indeed, in the case of records kept in non-written form, it may be impossible to determine "where" they are located.

AMENDMENTS TO ORIGINAL SECTION
Laws 1991, ch. 72, §40 (eff. 7-28-91) *(amends only original subsection (5)(g) to read "Its initial report or most recent annual report delivered to the secretary of state under RCW 23B.16.220)*

* * * * *

Laws 2002, ch. 297, §45 (eff. 6-13-02) *(amends only subsection (5))*
(5) A corporation shall keep a copy of the following records at its principal office:
(a) Its articles or restated articles of incorporation and all amendments to them currently in effect;
(b) Its bylaws or restated bylaws and all amendments to them currently in effect;
(c) The minutes of all shareholders' meetings, and records of all action taken by shareholders without a meeting, for the past three years;
(d) The financial statements described in RCW 23B.16.200(1), for the past three years;
(e) All ~~written~~ communications in the form of a record to shareholders generally within the past three years;
(f) A list of the names and business addresses of its current directors and officers; and
(g) Its initial report or most recent annual report delivered to the secretary of state under RCW 23B.16.220.

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

* * * * *

Laws 2009, ch. 189, §54 (eff. 7-26-09) *(amends only subsections (1) and (5))*
(1) A corporation shall keep as permanent records minutes of all meetings of its shareholders and board of directors, a record of all corporate actions ~~taken~~ approved by the shareholders or board of directors by executed consent without a meeting, and a record of all corporate actions ~~taken~~ approved by a committee of the board of directors exercising the authority of the board of directors on behalf of the corporation.

(5) A corporation shall keep a copy of the following records at its principal office:
(a) Its articles or restated articles of incorporation and all amendments to them currently in effect;
(b) Its bylaws or restated bylaws and all amendments to them currently in effect;
(c) The minutes of all shareholders' meetings, and records of all ~~action~~ corporate actions approved taken by shareholders without a meeting, for the past three years;
(d) The financial statements described in RCW 23B.16.200(1), for the past three years;
(e) All communications in the form of a record to shareholders generally within the past three years;
(f) A list of the names and business addresses of its current directors and officers; and
(g) Its initial report or most recent annual report delivered to the secretary of state under RCW 23B.16.220.

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.16.020
INSPECTION OF RECORDS BY SHAREHOLDERS

CURRENT SECTION

(1) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at the corporation's principal office, any of the records of the corporation described in RCW 23B.16.010(5) if the shareholder gives the corporation notice of the shareholder's demand at least five business days before the date on which the shareholder wishes to inspect and copy.

(2) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at a reasonable location specified by the corporation, any of the following records of the corporation if the shareholder meets the requirements of subsection (3) of this section and gives the corporation notice of the shareholder's demand at least five business days before the date on which the shareholder wishes to inspect and copy:

(a) Excerpts from minutes of any meeting of the board of directors, or of any meeting of a committee of the board of directors while exercising the authority of the board of directors, minutes of any meeting of the shareholders, and records of corporate actions approved by the shareholders or board of directors or a committee thereof without a meeting, to the extent not subject to inspection under subsection (1) of this section;

(b) Accounting records of the corporation; and

(c) The record of shareholders.

(3) A shareholder may inspect and copy the records described in subsection (2) of this section only if:

(a) The shareholder's demand is made in good faith and for a proper purpose;

(b) The shareholder describes with reasonable particularity the shareholder's purpose and the records the shareholder desires to inspect; and

(c) The records are directly connected with the shareholder's purpose.

(4) The right of inspection granted by this section may not be abolished or limited by a corporation's articles of incorporation or bylaws.

(5) This section does not affect:

(a) The right of a shareholder to inspect records under RCW 23B.07.200 or, if the shareholder is in litigation with the corporation, to the same extent as any other litigant; or

(b) The power of a court, independently of this title, to compel the production of corporate records for examination.

(6) For purposes of this section, "shareholder" includes a beneficial owner whose shares are held in a voting trust or by a nominee on the beneficial owner's behalf.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §183 (eff. 7-1-90)

(1) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at the corporation's principal office, any of the records of the corporation described in RCW 23B.16.010(5) if the shareholder gives the corporation written notice of the shareholder's demand at least five business days before the date on which the shareholder wishes to inspect and copy.

(2) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at a reasonable location specified by the corporation, any of the following records of the corporation if the shareholder meets the requirements of subsection (3) of this section and gives the corporation written notice of the shareholder's demand at least five business days before the date on which the shareholder wishes to inspect and copy:

(a) Excerpts from minutes of any meeting of the board of directors, records of any action of a committee of the board of directors while exercising the authority of the board of directors, minutes of any meeting of the shareholders, and records of action taken by the shareholders or board of directors without a meeting, to the extent not subject to inspection under subsection (1) of this section;

(b) Accounting records of the corporation; and

(c) The record of shareholders.

(3) A shareholder may inspect and copy the records described in subsection (2) of this section only if:

(a) The shareholder's demand is made in good faith and for a proper purpose;

(b) The shareholder describes with reasonable particularity the shareholder's purpose and the records the shareholder desires to inspect; and

(c) The records are directly connected with the shareholder's purpose.

(4) The right of inspection granted by this section may not be abolished or limited by a corporation's articles of incorporation or bylaws.

(5) This section does not affect:

(a) The right of a shareholder to inspect records under RCW 23B.07.200 or, if the shareholder is in litigation with the corporation, to the same extent as any other litigant; or

(b) The power of a court, independently of this title, to compel the production of corporate records for examination.

(6) For purposes of this section, "shareholder" includes a beneficial owner whose shares are held in a voting trust or by a nominee on the beneficial owner's behalf.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3106-07 (1989)

Section 16.02 Inspection of Records By Shareholders.

Proposed subsection 16.02(a) provides that every shareholder is entitled to examine upon written request at the principal office of the corporation all documents described in Proposed subsection 16.01(e). These documents all deal with the shareholder's interest as such in the corporation. While some of these documents may also be a matter of public record in the office of secretary of state, a shareholder should not be compelled to go to a public office that may be physically distant to examine the basic documents relating to the corporation.

Proposed subsection 16.02(b) grants a shareholder who meets the requirements of Proposed subsection 16.02(c) the right to inspect three classes of corporate records:

(1) Excerpts from minutes of meetings of the board of directors, records of action of committees of the board of directors when exercising the authority of the board of directors, and minutes of meetings of shareholders (to the extent they do not fall within Proposed subsection 16.02(a)). The corporation is required to make available only relevant excerpts of minutes and need not make available minutes of entire meetings merely because a portion of the minutes is directly connected with the shareholder's purpose.

(2) The accounting records of the corporation. The Act does not attempt to define what accounting records must be kept. See the Comment to Proposed section 16.01.

(3) The record of shareholders, subject to Proposed subsection 16.03(d). If a shareholder makes a demand in good faith and with a proper purpose under Proposed subsection 16.02(c), the shareholder is entitled to inspect the shareholders' list under Proposed subsection 16.02(b) without regard to the size or value of the shareholder's holding. This right is independent of the right to inspect a shareholders' list immediately before a meeting under Proposed section 7.20. See Proposed subsection 16.02(e).

Proposed subsection 16.02(c) follows the old law and permits inspection of the records described in Proposed subsection 16.02(b) by a shareholder only if the shareholder's demand is made in good faith and for a "proper purpose." A "proper purpose" means a purpose that is reasonably relevant to the demanding shareholder's interest as a shareholder. Some statutes do not use the phrase "proper purpose;" the Proposed Act continues to use it because it is traditional and well-understood language defining the scope of the shareholder's right of inspection and its use ensures that the very substantial case law that has developed under it will continue to be applied under the Proposed Act.

As a practical matter, a shareholder who alleges a purpose in general terms, such as a desire to determine the value of the shareholder's shares, to communicate with other shareholders, or to determine whether improper transactions have occurred, has been held to allege a "proper purpose." Proposed subsection 16.02(c) thus attempts to require more meaningful statements of purpose, if feasible, by requiring that a shareholder designate "with reasonable particularity" the shareholder's purpose and the records the shareholder desires to inspect; the records demanded must also be "directly connected" with that purpose. If disputed by the corporation, the "connection" of the records to the shareholder's purpose may be determined by a court's in camera examination of the records.

Proposed subsection 16.02(d) states that the inspection rights granted by this chapter are inherent rights of shareholders and may not be abolished or limited by the articles of incorporation or bylaws; the subsection is based on CAL. CORP. CODE ANN. section 1600(d) (West 1977). No inference of any kind should be drawn from this subsection as to whether other, unrelated sections of the Proposed Act may be modified by provisions in the articles of incorporation or bylaws.

Proposed subsection 16.02(e) provides that the right of inspection granted by Proposed section 16.02 is an independent right of inspection that is not a substitute for or in derogation of rights of inspection that may exist (1) under Proposed section 7.20, to inspect the shareholders' list following the establishment of a record date for a meeting; (2) as part of a right of discovery that exists in connection with litigation; and (3) as a "common law" right of inspection to examine corporate records. See State ex rel. Grismer v. Merger Mines Corp., 3 Wn.2d 417 (1940). Proposed subsection 16.02(e) simply preserves whatever independent right of inspection exists under these sources and does not create or recognize any rights, either expressly or by implication.

AMENDMENTS TO ORIGINAL SECTION
Laws 2002, ch. 297, §46 (eff. 6-13-02) *(amends only original subsections (1) and (2) (general paragraph):*
(1) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at the corporation's principal office, any of the records of the corporation described in RCW 23B.16.010(5) if the shareholder gives the corporation ~~written~~ notice of the shareholder's demand at least five business days before the date on which the shareholder wishes to inspect and copy.
(2) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at a reasonable location specified by the corporation, any of the following records of the corporation if the shareholder meets the requirements of subsection (3) of this section and gives the corporation ~~written~~ notice of the shareholder's demand at least five business days before the date on which the shareholder wishes to inspect and copy:

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

* * * * *

Laws 2009, ch. 189, §55 (eff. 7-26-09) *(amends only subsection (2)(a))*
(2)(a) Excerpts from minutes of any meeting of the board of directors, ~~records of any action~~ or of any meeting of a committee of the board of directors while exercising the authority of the board of directors, minutes of any meeting of the shareholders, and records of ~~action taken~~ corporate actions approved by the shareholders or board of directors or a committee there of without a meeting, to the extent not subject to inspection under subsection (1) of this section;

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.

* * * * *

Title 23B RCW
Washington Business Corporation Act

Chapter 23B.19 RCW
SIGNIFICANT BUSINESS TRANSACTIONS

RCW 23B.19.040
APPROVAL OF SIGNIFICANT BUSINESS TRANSACTION REQUIRED – VIOLATION

CURRENT SECTION

(1)(a) Notwithstanding anything to the contrary contained in this title, a target corporation shall not for a period of five years following the acquiring person's share acquisition time engage in a significant business transaction unless:

(i) It is exempted by RCW 23B.19.030;

(ii) The significant business transaction or the purchase of shares made by the acquiring person is approved prior to the acquiring person's share acquisition time by a majority of the members of the board of directors of the target corporation; or

(iii) At or subsequent to the acquiring person's share acquisition time, such significant business transaction is approved by a majority of the members of the board of directors of the target corporation and approved at an annual or special meeting of shareholders, and not by written consent, by the affirmative vote of at least two-thirds of the outstanding voting shares, except shares beneficially owned by or under the voting control of the acquiring person.

(b) If a good faith proposal for a significant business transaction is made in writing to the board of directors of the target corporation prior to the significant business transaction or prior to the share acquisition time, the board of directors shall respond in writing, within thirty days or such shorter period, if any, as may be required by the exchange act setting forth its reasons for its decision regarding the proposal. If a good faith proposal to purchase shares is made in writing to the board of directors of the target corporation, the board of directors, unless it responds affirmatively in writing within thirty days or a shorter period, if any, as may be required by the exchange act shall be deemed to have disapproved such share purchase.

(2) Except for a significant business transaction approved under subsection (1) of this section or exempted by RCW 23B.19.030, in addition to any other requirement, a target corporation shall not engage at any time in any significant business transaction described in RCW 23B.19.020(15) (a) or (e) with any acquiring person of such a corporation other than a significant business transaction that either meets all of the conditions of (a), (b), and (c) of this subsection or meets the conditions of (d) of this subsection:

(a) The aggregate amount of the cash and the market value as of the consummation date of consideration other than cash to be received per share by holders of outstanding common shares of such a target corporation in a significant business transaction is at least equal to the higher of the following:

(i) The highest per share price paid by such an acquiring person at a time when the person was the beneficial owner, directly or indirectly, of five percent or more of the outstanding voting shares of a target corporation, for any shares of common shares of the same class or series acquired by it: (A) Within the five-year period immediately prior to the announcement date with respect to a significant business transaction; or (B) within the five-year period immediately prior to, or in, the

transaction in which the acquiring person became an acquiring person, whichever is higher plus, in either case, interest compounded annually from the earliest date on which the highest per share acquisition price was paid through the consummation date at the rate for one-year United States treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of common shares since the earliest date, up to the amount of the interest; and

(ii) The market value per share of common shares on the announcement date with respect to a significant business transaction or on the date of the acquiring person's share acquisition time, whichever is higher; plus interest compounded annually from such a date through the consummation date at the rate for one-year United States treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of common shares since the date, up to the amount of the interest.

(b) The aggregate amount of the cash and the market value as of the consummation date of consideration other than cash to be received per share by holders of outstanding shares of any class or series of shares, other than common shares, of the target corporation is at least equal to the highest of the following, whether or not the acquiring person has previously acquired any shares of such a class or series of shares:

(i) The highest per share price paid by an acquiring person at a time when the person was the beneficial owner, directly or indirectly, of five percent or more of the outstanding voting shares of a resident domestic corporation, for any shares of the same class or series of shares acquired by it: (A) Within the five-year period immediately prior to the announcement date with respect to a significant business transaction; or (B) within the five-year period immediately prior to, or in, the transaction in which the acquiring person became an acquiring person, whichever is higher; plus, in either case, interest compounded annually from the earliest date on which the highest per share acquisition price was paid through the consummation date at the rate for one-year United States treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of the same class or series of shares since the earliest date, up to the amount of the interest;

(ii) The highest preferential amount per share to which the holders of shares of the same class or series of shares are entitled in the event of any voluntary liquidation, dissolution, or winding up of the target corporation, plus the aggregate amount of any dividends declared or due as to which the holders are entitled prior to payment of dividends on some other class or series of shares, unless the aggregate amount of the dividends is included in the preferential amount; and

(iii) The market value per share of the same class or series of shares on the announcement date with respect to a significant business transaction or on the date of the acquiring person's share acquisition time, whichever is higher; plus interest compounded annually from such a date through the consummation date at the rate for one-year United States treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid and the market value of any dividends

paid other than in cash, per share of the same class or series of shares since the date, up to the amount of the interest.

(c) The consideration to be received by holders of a particular class or series of outstanding shares, including common shares, of the target corporation in a significant business transaction is in cash or in the same form as the acquiring person has used to acquire the largest number of shares of the same class or series of shares previously acquired by the person, and the consideration shall be distributed promptly.

(d) The significant business transaction is approved at an annual meeting of shareholders, or special meeting of shareholders called for such a purpose, no earlier than five years after the acquiring person's share acquisition time, by a majority of the votes entitled to be counted within each voting group entitled to vote separately on the transaction. The votes of all outstanding shares entitled to vote under this title or the articles of incorporation shall be entitled to be counted under this subsection except that the votes of shares as to which an acquiring person has beneficial ownership or voting control may not be counted to determine whether shareholders have approved a transaction for purposes of this subsection. The votes of shares as to which an acquiring person has beneficial ownership or voting control shall, however, be counted in determining whether a transaction is approved under other sections of this title and for purposes of determining a quorum.

(3) Subsection (2) of this section does not apply to a target corporation that on June 6, 1996, had a provision in its articles of incorporation, adopted under *RCW 23B.17.020(3)(d), expressly electing not to be covered under *RCW 23B.17.020, which is repealed by section 6, chapter 155, Laws of 1996.

(4) A significant business transaction that is made in violation of subsection (1) or (2) of this section and that is not exempt under RCW 23B.19.030 is void.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §200 (eff. 7-1-90)

(1)(a) Notwithstanding any provision of this title, a target corporation shall not engage in any significant business transaction for a period of five years following the acquiring person's share acquisition date unless the significant business transaction or the purchase of shares made by the acquiring person on the share acquisition date is approved prior to the acquiring person's share acquisition date by a majority of the members of the board of directors of the target corporation.

(b) If a good faith proposal for a significant business transaction is made in writing to the board of directors of the target corporation prior to the significant business transaction or prior to the share acquisition date, the board of directors shall respond in writing, within thirty days or such shorter period, if any, as may be required by the exchange act setting forth its reasons for its decision regarding the proposal. If a good faith proposal to purchase shares is made in writing to the board of directors of the target corporation, the board of directors, unless it responds affirmatively in writing within thirty days or a shorter period, if any, as may be required by the exchange act shall be deemed to have disapproved such share purchase.

(2) A target corporation that engages in a significant business transaction that violates subsection (1) of this section and that is not exempt under RCW 23B.19.010 shall have its certificate of incorporation or certificate of authority to transact business in this state revoked under RCW 23B.14.200 or 23B.15.300 for domestic or foreign target corporations, respectively. In addition, such significant transaction shall be void.

OFFICIAL LEGISLATIVE HISTORY
None.

AMENDMENTS TO ORIGINAL SECTION
Laws 1996, ch. 155, §3 (eff. 6-6-96)
(1)(a) Notwithstanding ~~any provision of this title~~anything to the contrary contained in this title, except under subsection (2) of this section and RCW 23B.19.030, a target corporation shall not engage in any significant business transaction for a period of five years following the acquiring person's share acquisition ~~date~~ time unless the significant business transaction or the purchase of shares made by the acquiring person ~~on the share acquisition date~~ is approved prior to the acquiring person's share acquisition ~~date~~ time by a majority of the members of the board of directors of the target corporation.
(b) If a good faith proposal for a significant business transaction is made in writing to the board of directors of the target corporation prior to the significant business transaction or prior to the share acquisition ~~date~~ time, the board of directors shall respond in writing, within thirty days or such shorter period, if any, as may be required by the exchange act setting forth its reasons for its decision regarding the proposal. If a good faith proposal to purchase shares is made in writing to the board of directors of the target corporation, the board of directors, unless it responds affirmatively in writing within thirty days or a shorter period, if any, as may be required by the exchange act shall be deemed to have disapproved such share purchase.
(2) Notwithstanding anything to the contrary contained in this title, except under subsection (1) of this section and RCW 23B.19.030, a target corporation shall not engage at any time in any significant business transaction with any acquiring person of such a corporation other than a significant business transaction that meets all of the following conditions:
(a) The aggregate amount of the cash and the market value as of the consummation date of consideration other than cash to be received per share by holders of outstanding common shares of such a target corporation in a significant business transaction is at least equal to the higher of the following:
(i) The highest per share price paid by such an acquiring person at a time when the person was the beneficial owner, directly or indirectly, of five percent or more of the outstanding voting shares of a target corporation, for any shares of common shares of the same class or series acquired by it: (A) Within the five-year period immediately prior to the announcement date with respect to a significant business transaction; or (B) within the five-year period immediately prior to, or in, the transaction in which the acquiring person became an acquiring person, whichever is higher plus, in either case, interest compounded annually from the earliest date on which the highest per share acquisition price was paid through the consummation date at the rate for one-year United States treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of common shares since the earliest date, up to the amount of the interest; and
(ii) The market value per share of common shares on the announcement date with respect to a significant business transaction or on the date of the acquiring person's share acquisition time, whichever is higher; plus interest compounded annually from such a date through the consummation date at the rate for one-year United States treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of common shares since the date, up to the amount of the interest.
(b) The aggregate amount of the cash and the market value as of the consummation date of consideration other than cash to be received per share by holders of outstanding shares of any class or series of shares, other than common shares, of the target corporation is at least equal to the highest of the following, whether or not the acquiring person has previously acquired any shares of such a class or series of shares:
(i) The highest per share price paid by an acquiring person at a time when the person was the beneficial owner, directly or indirectly, of five percent or more of the outstanding voting shares of a resident domestic corporation, for any shares of the same class or series of shares acquired by it: (A) Within the five-year period immediately prior to the announcement date with respect to a significant business transaction; or (B) within the five-year period immediately prior to, or in, the transaction in which the acquiring person became an acquiring person, whichever is higher; plus, in either case, interest compounded annually from the earliest date on which the highest per share acquisition price was paid through the consummation date at the rate for one-year United States treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of the same class or series of shares since the earliest date, up to the amount of the interest;

(ii) The highest preferential amount per share to which the holders of shares of the same class or series of shares are entitled in the event of any voluntary liquidation, dissolution, or winding up of the target corporation, plus the aggregate amount of any dividends declared or due as to which the holders are entitled prior to payment of dividends on some other class or series of shares, unless the aggregate amount of the dividends is included in the preferential amount; and

(iii) The market value per share of the same class or series of shares on the announcement date with respect to a significant business transaction or on the date of the acquiring person's share acquisition time, whichever is higher; plus interest compounded annually from such a date through the consummation date at the rate for one-year United States treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid and the market value of any dividends paid other than in cash, per share of the same class or series of shares since the date, up to the amount of the interest.

(c) The consideration to be received by holders of a particular class or series of outstanding shares, including common shares, of the target corporation in a business combination is in cash or in the same form as the acquiring person has used to acquire the largest number of shares of the same class or series of shares previously acquired by the person, and the consideration shall be distributed promptly.

(3) Subsection (2) of this section does not apply to a target corporation that on June 6, 1996, had a provision in its articles of incorporation, adopted under RCW 23B.17.020(3)(d), expressly electing not to be covered under RCW 23B.17.020, which is repealed by section 6, chapter 155, Laws of 1996.

(4) A ~~target corporation that engages in a~~ significant business transaction that ~~violates~~ is made in violation of subsection (1) or (2) of this section and that is not exempt under RCW ~~23B.19.010 shall have its certificate of incorporation or certificate of authority to transact business in this state revoked under RCW 23B.14.200 or 23B.15.300 for domestic or foreign target corporations, respectively. In addition, such significant transaction shall be~~ 23B.19.030 is void.

CARC COMMENTARY

Regarding the proposed amendments to current RCW 23B.19.040: The proposed amendment to current 19.040(10(a) recognizes that RCW 23B.19.030 (related to an acquiring person becoming such by inadvertence) must be an exception to the broad opening (notwithstanding) clause. It also adds an exception to the notwithstanding clause for a significant business transaction meeting the conditions set forth in new paragraph 2.

For reasons set forth above, the proposed amendments to current 19.040(1)(a) and (b) substitute "time" and "date" in every clause therein related to share acquisition date.

The proposed amendments add, as a new subsection 19,040(2), the fair price exception found in N.Y. Bus. Corp.L. §912(c)(3). In a general sense, the proposed amendment is recommended by the Committee as a replacement for current RCW 23B.17.020 (the repeal of which is recommended in a later section of this bill). The Committee's review of RCW 23B Ch. 19 resulted from its receipt of numerous comments regarding ambiguities in its provisions, and major inconsistencies between its provisions and those in current RCW 23B.17.020. The Committee initially attempted to modify the latter to make it consistent with RCW 23B Ch. 19. As it proceeds with that task, and as it examined business combination statutes elsewhere (few had free-standing fair price provisions), the Committee changed its objective to producing an integrated business combination – fair price series of provisions. N.Y. Bus. Corp.L. §912 was chosen as a model (in substantial part because it was the model for most business combination statutes). Under the proposed addition, and assuming the requirements of RCW 23B.19.030, or of RCW 23B.19.040(1), are not met, an acquiring person can effect a significant business transaction with a target corporation only if the acquiring person pays a statutorily defined "fair price" in the transaction. The fair price is the greatest of the following: (1) the highest price per share paid by the acquiring person after he or she became owner of 5 percent or more of the voting shares of the target corporation, and either within the 5 year period prior to the announcement date of the significant business transaction, or within the 5 year period prior to the date on which the person became and acquiring person; (2) the market value of the shares on the announcement date of the significant business transaction; or (3) the market value of the shares on the date of the acquiring persons' share acquisition time. Holders of all outstanding shares of any class or series are

entitled to receive the fair price for their shares (whether or not acquiring person has previously acquired shares of that class or series.) The proposed amendments represent a considerable refinement of the limited fair price provision in RCW 23B.17.020(3)(c). The Committee has added, as new RCW 23B.19.040(2)(d), a subsection to the New York fair price provisions that exempts from proposed subsections (2)(a) to (2)(c) corporations that have opted out of the coverage of current RCW 23B.17.020.

The proposed amendment to current RCW 19.040(2) deletes from the action provisions the present concept of the corporate "death penalty" for domestic corporations which violate the section. The current statute provides that a significant business transaction made by a target corporation which violates the statute results in its certificate of incorporation (or, in the case of a foreign corporation, its certificate of authority) being revoked as well as the transaction being void. The system in the present statute did not strike the Committee as logical or proportionate. If the transaction is void, why was the corporation dissolved; if dissolved, could it be reinstated? If a domestic corporation is dissolved it is a significantly greater penalty than revoking the certificate of authority for a foreign corporation. Accordingly, the Committee concluded that making a significant business transaction in violation of the section "void" was adequate to accomplish the purpose of the statute. That section would apply equally to foreign and domestic target corporations.

* * * * *

Laws 1997, ch. 19, §3 (eff. 7-27-97)

(1)(a) Notwithstanding anything to the contrary contained in this title, ~~except under subsection (2) of this section and RCW 23B.19.030,~~ a target corporation shall not ~~engage in any significant business transaction~~ for a period of five years following the acquiring person's share acquisition time engage in a significant business transaction unless it is exempted by RCW 23B.19.030 or unless the significant business transaction or the purchase of shares made by the acquiring person is approved prior to the acquiring person's share acquisition time by a majority of the members of the board of directors of the target corporation.

(b) If a good faith proposal for a significant business transaction is made in writing to the board of directors of the target corporation prior to the significant business transaction or prior to the share acquisition time, the board of directors shall respond in writing, within thirty days or such shorter period, if any, as may be required by the exchange act setting forth its reasons for its decision regarding the proposal. If a good faith proposal to purchase shares is made in writing to the board of directors of the target corporation, the board of directors, unless it responds affirmatively in writing within thirty days or a shorter period, if any, as may be required by the exchange act shall be deemed to have disapproved such share purchase.

(2) ~~Notwithstanding anything to the contrary contained in this title, except under subsection (1) of this section and RCW 23B.19.030~~ Except for a significant business transaction approved under subsection (1) of this section or exempted by RCW 23B.19.030, in addition to any other requirement, a target corporation shall not engage at any time in any significant business transaction described in RCW 23B.19.020(15) (a) or (e) with any acquiring person of such a corporation other than a significant business transaction that either meets all of the ~~following~~ conditions of (a), (b), and (c) of this subsection or meets the conditions of (d) of this subsection:

(a) The aggregate amount of the cash and the market value as of the consummation date of consideration other than cash to be received per share by holders of outstanding common shares of such a target corporation in a significant business transaction is at least equal to the higher of the following:

(i) The highest per share price paid by such an acquiring person at a time when the person was the beneficial owner, directly or indirectly, of five percent or more of the outstanding voting shares of a target corporation, for any shares of common shares of the same class or series acquired by it: (A) Within the five-year period immediately prior to the announcement date with respect to a significant business transaction; or (B) within the five-year period immediately prior to, or in, the transaction in which the acquiring person became an acquiring person, whichever is higher plus, in either case, interest compounded annually from the earliest date on which the highest per share acquisition price was paid through the

consummation date at the rate for one-year United States treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of common shares since the earliest date, up to the amount of the interest; and

(ii) The market value per share of common shares on the announcement date with respect to a significant business transaction or on the date of the acquiring person's share acquisition time, whichever is higher; plus interest compounded annually from such a date through the consummation date at the rate for one-year United States treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of common shares since the date, up to the amount of the interest.

(b) The aggregate amount of the cash and the market value as of the consummation date of consideration other than cash to be received per share by holders of outstanding shares of any class or series of shares, other than common shares, of the target corporation is at least equal to the highest of the following, whether or not the acquiring person has previously acquired any shares of such a class or series of shares:

(i) The highest per share price paid by an acquiring person at a time when the person was the beneficial owner, directly or indirectly, of five percent or more of the outstanding voting shares of a resident domestic corporation, for any shares of the same class or series of shares acquired by it: (A) Within the five-year period immediately prior to the announcement date with respect to a significant business transaction; or (B) within the five-year period immediately prior to, or in, the transaction in which the acquiring person became an acquiring person, whichever is higher; plus, in either case, interest compounded annually from the earliest date on which the highest per share acquisition price was paid through the consummation date at the rate for one-year United States treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of the same class or series of shares since the earliest date, up to the amount of the interest;

(ii) The highest preferential amount per share to which the holders of shares of the same class or series of shares are entitled in the event of any voluntary liquidation, dissolution, or winding up of the target corporation, plus the aggregate amount of any dividends declared or due as to which the holders are entitled prior to payment of dividends on some other class or series of shares, unless the aggregate amount of the dividends is included in the preferential amount; and

(iii) The market value per share of the same class or series of shares on the announcement date with respect to a significant business transaction or on the date of the acquiring person's share acquisition time, whichever is higher; plus interest compounded annually from such a date through the consummation date at the rate for one-year United States treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid and the market value of any dividends paid other than in cash, per share of the same class or series of shares since the date, up to the amount of the interest.

(c) The consideration to be received by holders of a particular class or series of outstanding shares, including common shares, of the target corporation in a significant business ~~combination~~ transaction is in cash or in the same form as the acquiring person has used to acquire the largest number of shares of the same class or series of shares previously acquired by the person, and the consideration shall be distributed promptly.

(d) The significant business transaction is approved at an annual meeting of shareholders, or special meeting of shareholders called for such a purpose, no earlier than five years after the acquiring person's share acquisition time, by a majority of the votes entitled to be counted within each voting group entitled to vote separately on the transaction. The votes of all outstanding shares entitled to vote under this title or the articles of incorporation shall be entitled to be counted under this subsection except that the votes of shares as to which an acquiring person has beneficial ownership or voting control may not be counted to determine whether shareholders have approved a transaction for purposes of this subsection. The votes of shares as to which an acquiring person has beneficial ownership or voting control shall, however, be counted in determining whether a transaction is approved under other sections of this title and for purposes of determining a quorum.

(3) Subsection (2) of this section does not apply to a target corporation that on June 6, 1996, had a provision in its articles of incorporation, adopted under *RCW 23B.17.020(3)(d), expressly electing not to be covered under *RCW 23B.17.020, which is repealed by section 6, chapter 155, Laws of 1996.

(4) A significant business transaction that is made in violation of subsection (1) or (2) of this section and that is not exempt under RCW 23B.19.030 is void.

CARC COMMENTARY

RCW 23B Chapter 19 was amended in 1996 with the adoption of SSB 6169. Unfortunately, the amendments to RCW 23B.19.040 as adopted and passed by the legislature in 1996 can be read to produce a conclusion that is at best ambiguous, and most likely reads in a manner inconsistent with the intent of the Corporate Act Revision Committee of the Washington State Bar Association ("CARC") when presenting the proposal. The intent of the 1996 amendments to the RCW 23B (SSB 6169) was to remove conflicts and ambiguities between RCW 23B.17.020 and RCW 23B Chapter 19. There was an error in the draft of SSB 6169 as presented and adopted. The confusion results from the insertion of the phrase "except under subsection 2 of this section and RCW 23B.19.030" to the lead-in to 19.040 (1)(a). The concern is that this language potentially results in two exceptions to the restriction on a target corporation engaging in a significant business transaction. First, approval by the board; the second would be meeting the fair price provisions of subsection (2) of RCW 23B.19.040. In reviewing the various drafts, it appears that the Committee's draft had a typo which was repeated in several drafts through the Bar Association review and approval process and then complicated by the Code Reviser's effort to remove a perceived ambiguity with insertion of the word "and". The initial CARC drafts had the provision "except under subsection (2) of this section 23B.19.030" and, at that point, 19.030 have several subsections including one for the inadvertent acquisition. As CARC revised 19.030 to remove the other subsections leaving just the inadvertent acquisition, we did not correct the reference. The phrase "subsection 2 of this section RCW 23B.19.030" placed in 23B.19.040 was itself confusing. The Code Reviser's answer to this confusion, the impact of which we unfortunately did not appreciate in the proofreading process or at the hearing on SSB 6169, was to insert "and" between "this section" and "RCW 23B.19.030".

The proposed corrections are in SB 5107. CARC, through the Bar Association review process, has proposed a series of revisions which would remove the ambiguity and clearly provide that the fair price provisions are additional requirements for a significant business transaction and not an alternative to the requirement of board approval of such a transaction within five years of becoming an acquiring person. The Committee also suggests restructuring the confusing New York "notwithstanding anything to the contrary … except" language which was used as a reference to further clarify our intent. As further refinements, the fair price provisions are limited to those relevant significant business transactions in subsections (a) (mergers, etc.) and (e) (liquidations) of RCW 23B.19.020. Also new is the addition of subsection (d) to RCW 23B.19.040(2) providing for an exception to the fair price provisions with approval of the significant business transaction by a shareholder vote.

* * * * *

Laws 2007, ch. 45, §1 (eff. 7-22-07)*(amends only subsection (1)(a)):*

(1)(a) Notwithstanding anything to the contrary contained in this title, a target corporation shall not for a period of five years following the acquiring person's share acquisition time engage in a significant business transaction unless:

(i) I~~i~~t is exempted by RCW 23B.19.030 ~~or unless~~ ;

(ii) ~~t~~The significant business transaction or the purchase of shares made by the acquiring person is approved prior to the acquiring person's share acquisition time by a majority of the members of the board of directors of the target corporation;~~.~~ or

(iii) At or subsequent to the acquiring person's share acquisition time, such significant business transaction is approved by a majority of the members of the board of directors of the target corporation and authorized at an annual or special meeting of shareholders, and not be written consent, by the affirmative vote of at least two-thirds of the outstanding voting shares, except shares beneficially owned by or under the voting control of the acquiring person.

CARC COMMENTARY

State takeover laws have been implemented in numerous states to protect corporations from hostile takeovers. These laws vary from state to state, and include a variety of mechanisms by which the ability to accomplish a business combination is limited. Washington's law (RCW 23B.19) is primarily a freeze-out statute, which bars, for five years after the acquiring person's share acquisition time, any significant business transaction with the acquiring person's share acquisition time, any significant business transaction with the acquiring person (a shareholder or group that has acquired ten percent or more of the corporation's shares). The legislative intent of the law is stated in RCW 23B.19.010. RCW 23B.19.040(1) currently provides the only way to bypass the five year bar is to obtain approval of the acquiring person's share acquisition or significant business transaction prior to the acquiring person's share acquisition time. Following the five-year period, the statute requires that certain fair price requirements be met in any such significant business transaction.

A survey of state laws recently published by Institutional Shareholder Services ("ISS") indicates that 32 states have adopted similar freeze-out statutes. CARC's review of those laws reveals that fewer than five of those states do not allow for post-acquisition circumvention of the bar imposed by the freeze-out statute – in other words, the "absolute bar" approach taken by the Washington statute is very much in the minority when compared to most other states. In the vast majority of states, the freeze-out can be circumvented and a significant business transaction with an otherwise barred shareholder can proceed if the significant business transaction is approved by both the board of directors and a supermajority of disinterested shareholders.

In the last five years there has been significant evolution in corporate governance and expectations of shareholders. The implementation of the Sarbanes-Oxley Act and the rise of large shareholder service and representation groups such as ISS has resulted in a reexamination of the impact of a number of state corporate act provisions. ISS, the largest and in many ways most influential advisor to large institutional shareholders, carefully considers, among other impacts, the impact of state takeover laws when reviewing proxy proposals. ISS also makes an assessment of each corporation's governance that it considers in recommending positions on proxy votes. It terms the assessment the "Corporate Governance Quotient" or "CGQ." A high CGQ favorably affects ISS's decision to vote in favor of a corporation's proposals to shareholders, while a low CGQ is an unfavorable factor. Based on our investigation, CARC understands that a corporation's anti-takeover position (through adoption of restrictive terms in the articles of incorporation or a shareholder rights plan such as a *poison pill*) will be an unfavorable element in the CGQ scoring. CARC also understands that incorporation in a state such as Washington, with freeze-out provisions that do not provide for post-acquisition circumvention, will also tend to lower the CGQ. Where possible, ISS recommends that corporations opt out of takeover statutes.

While we are aware of no circumstance where a Washington corporation has reincorporated to another to avoid Washington's takeover statute and improve its governance ratings, we note the possibility of that event, and that we are unable to assess whether the existence of the current law dissuades corporations that might otherwise think to reincorporate in Washington from doing so.

Several states, including Delaware, allow for the freeze-out provisions of takeover laws to be circumvented with shareholder and board of director approval of the business combination. Generally, a majority of the board members and two thirds of the disinterested shareholders need to approve of the business combination in order to obtain this after-the-fact exemption. Washington currently has no such provision for circumventing the freeze-out provision, and thus the only way to effect a significant business combination in Washington is to obtain the approval of the corporation's board of directors prior to becoming a ten percent beneficial owner. Using Delaware as a model, it would be relatively straight-forward to include such an after-the-fact approval provision in the Washington takeover law, specifically by amending RCW 23B.19.040(1)(a). CARC believes that an approach that allows after-the-fact circumvention of the

freeze-out only when there is a super-majority of disinterested shareholders in favor, would preserve the beneficial effect of the takeover statute and remain true to the original purposes set forth by the Legislature.

Laws 2009, ch. 189, §56 (eff. 7-26-09)*(amends only subsection (1)(a))*
(1)(a) Notwithstanding anything to the contrary contained in this title, a target corporation shall not for a period of five years following the acquiring person's share acquisition time engage in a significant business transaction unless:
(i) It is exempted by RCW 23B.19.030;
(ii) The significant business transaction or the purchase of shares made by the acquiring person is approved prior to the acquiring person's share acquisition time by a majority of the members of the board of directors of the target corporation; or
(iii) At or subsequent to the acquiring person's share acquisition time, such significant business transaction is approved by a majority of the members of the board of directors of the target corporation and ~~authorized~~ approved at an annual or special meeting of shareholders, and not by written consent, by the affirmative vote of at least two-thirds of the outstanding voting shares, except shares beneficially owned by or under the voting control of the acquiring person.

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.19.900
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 AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 2009, ch. 521, §64 (eff. 12-2-09)
Same as current.

OFFICIAL LEGISLATIVE HISTORY
None.

* * * *

APPENDIX A

SIGNIFICANT DISCUSSION OF RCW 23B PROVISIONS
WASHINGTON DECISIONS
(Cases follow alphabetically)

RCW 23B.02.040
Equipto Division (SC 1998)
White (App. Div. I 1995)

RCW 23B.03.040
Spokane Concrete (SC 1995)

RCW 23B.05.040
Crystal, China & Gold (App. Div. I 1999)

RCW 23B.06.220
Woods (App. Div. II 2004) (unpub)

RCW 23B.06.400
Metropolitan Mortgage (BR, ED 2006)
Spokane Concrete (SC 1995)
Woods (App. Div. II 2004) (unpub)

RCW 23B.07.400(2)
Cray, Inc. (WD 2006)
Fernandes (WD 2006)
F5 Networks (SC 2009)

RCW 23B.08.010(3)
Evans (SC 1994)

RCW 23B.08.300
Spokane Concrete (SC 1995)

RCW 23B.08.310
Grassmueck (WD 2003)
Metropolitan Mortgage (BR, ED 2006)
Woods (App. Div. II 2004) (unpub)

RCW 23B.08.320
Grassmueck (WD 2003)

RCW 23B.08.400
Woods (App. Div. II 2004) (unpub)

RCW 23B.08.410
Woods (App. Div. II 2004) (unpub)

RCW 23B.08.420
Woods (App. Div. II 2004) (unpub)

RCW 23B.08.520
Skarbo (App. Div. I 2005) (unpub)

RCW 23B.13.010(3)
Matthew G. Norton Co. (App. Div. I 2002)

RCW 23B.13.020(1)
China Prods. (App. Div. I 1993)

RCW 23B.13.020(2)
Matthews (App. Div. III 1998)
Sound Infiniti (App. Div. III 2009)

RCW 23B.14.050
Ballard Square (SC 2006)
Woods (App. Div. II 2004) (unpub)

RCW 23B.14.200
Equipto Division (SC 1998)

RCW 23B.14.220
Equipto Division (SC 1998)

RCW 23B.14.300(2)
Scott (SC 2003)
Skarbo (App. Div. I 2005) (unpub)

RCW 23B.14.340
Ballard Square (SC 2006)
Smith v. SeaVentures (App. Div. I 1999)

RCW 23B.15.010
Washington Equipment (App. Div. III 1997)

RCW 23B.15.070
Washington Equipment (App. Div. III 1997)

SIGNIFICANT WASHINGTON DECISIONS

Annotation to RCW 23B.14.050
RCW 23B.14.340

Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co., 126 Wash. App. 285, 108 P.3d 818 (Wash. App. 2005), aff'd, 158 Wash. 2d 603, 146 P.3d 914 (Wash. 2006)

A corporate real estate developer completed construction of a condominium facility in 1992, and was later administratively dissolved in 1995. Water leakage appeared shortly after completion of construction, and by 1997 this was attributed to construction defects. The homeowners' association finally sued the dissolved corporate developer for breach of contract in 2002, but the trial court dismissed the case on summary judgment. Division I of the Court of Appeals affirmed the dismissal, reasoning that: (1) since the Washington survival statute (RCW 23B.14.340) unambiguously applied only to claims existing *prior* to dissolution, its two-year bar on surviving claims was inapplicable to the homeowners' claim; and (2) under Washington common law, claims against corporations did not survive dissolution at all, and therefore claims arising after dissolution could be asserted only while the corporation was still in the process of winding up its affairs (citing RCW 23B.14.050). The Supreme Court of Washington affirmed the appellate court's decision, although on different grounds, reasoning instead that: (1) the homeowners' claim was not barred by common law abatement since RCW 23B.14.050(2)(e) demonstrated a clear legislative intent to supplant the common law rule; (2) as a result, claims arising before or after dissolution may be maintained against a dissolved corporation so long as they are brought within the statute of limitations associated with the particular cause of action and within the period allowed by RCW 23B.14.340 (as amended in June 2006 to apply to both pre- and post-dissolution claims); and (3) the 2006 amendment to RCW 23B.14.340 applies retroactively to bar the homeowners' post-dissolution claim because the legislature intended retroactivity and such application does not impair any vested right of the homeowners.

SIGNIFICANT WASHINGTON DECISIONS

Annotation to RCW 23B.13.020(1)

China Prods. N. Am. Inc. v. Manewal, 69 Wash. App. 767 (1993)

A Washington corporation reincorporated in Delaware by means of a merger with a shell Delaware corporation. When shareholders who had voted against the merger claimed appraisal rights, the corporation sought a declaratory judgment that the transfer did not give use to dissenters' rights, which the trial court denied. The appeals court reversed, applying substance over form analysis (including as authority a 1914 Washington Supreme Court decision):

> The Legislature has enumerated certain specific corporate actions that would trigger dissenters' rights. The unifying feature of all of such actions is that the action will result in a significant difference in the nature and scope of the business enterprise, or a significant change in the shareholders' rights in such enterprise. While "merger" is listed as one of the triggering events, in this case there may be a merger as a matter of form but not as a matter of substance. CPNW, a Washington corporation, is being "merged" into the hollow shell of CPNA, a Delaware corporation, which was created for the sole purpose of changing corporate domicile. There is no change in assets or liabilities, there is no change in the management, personnel or nature of the business, and there is no significant change in corporate structure or the rights of shareholders. As they should, courts look to the substance and not merely the form. We conclude that although the legal mechanism the corporation proposes to achieve the change of corporate domicile may be a "merger", it does not constitute a "merger" in the business sense of the term, nor within the meaning of the statute, and so does not trigger dissenters' rights. (Footnotes omitted).

The court did not discuss the implications of Matteson v. Ziebarth, 40 Wash. 2d 286 (1952) on its analysis.

SIGNIFICANT WASHINGTON DECISIONS

Annotation to RCW 23B.07.400(2)

In re Cray Inc. Derivative Litigation, 431 F.Supp. 2d 1114 (W.D. Wash. 2006)

Shareholders of Cray, Inc., a Washington corporation, filed a derivative action alleging that all of the corporation's directors, and 4 non-director officers, had breached fiduciary duties by knowingly misrepresenting the quality of the corporation's internal controls and the amount of its revenue. Plaintiffs made no demand that the corporation's board of directors take action on the allegations. Defendants, relying on RCW 23B.07.400(2), moved to dismiss the complaint for its failure to allege with particularity why a demand was not made. The court granted defendants' motion and dismissed without prejudice. The court said that subsection (2) strongly implies the existence of a substantive demand requirement in Washington state, and that the Washington Supreme Court would likely adopt an exception to the substantive demand requirement, similar to, if not the same as, the exception for futility, found in Delaware case law. Under those cases, the court must look to the complaint and determine whether its particularized allegations create a reasonable doubt that a majority (here 5) of the members of the board of directors, at the time the complaint was filed, could have properly exercised independent and disinterested business judgment in responding to the demand. The court rejected two futility allegations that plaintiffs argued in opposition to defendants' motion: (1) that four directors were interested simply because they were members of Cray's audit committee (the committee said that the mere threat of personal liability for failing to discover the misrepresentations was insufficient absent particularized facts of sustained or systematic failure by members of the audit committee); and (2) that four directors were interested because they engaged in stock sales while privy to inside information regarding Cray's internal controls and revenue shortfalls (the court said that common law insider trading claims would not likely be recognized in Washington; and the Delaware cases considering nearly identical allegations had found them conclusory and insufficient to demonstrate interestedness.) While the court found that two employee/directors were not independent because they received substantial income from Cray, plaintiff had failed to demonstrate that three other directors were interested or not independent, and thus did not allege particularized facts showing demand would be futile.

SIGNIFICANT WASHINGTON DECISIONS

Annotation to RCW 23B.05.040

Crystal, China & Gold, Ltd. V. Factoria Center Investments, Inc., 93 Wash. App. 606 (1999)

The court interpreted the term "reasonable diligence" in RCW 23B.05.040(2)(b) to mean that plaintiff, in order to justify service upon the secretary state, must "make honest and reasonable efforts to locate the … [registered agent of a defendant corporation] but "not all conceivable means need be employed." The plaintiff had hired a registered process server, who made two attempts to serve the corporation's registered agent at his registered office, and who was told on both occasions that the registered agent was not there. On the first occasion, the server left the summons and complaint with an individual in the registered office, who allegedly (but apparently incorrectly) said she was authorized to receive service for the agent. On the second occasion, after being told the agent would not be available until after the 90-day server period had expired, the server attempted to obtain the registered agent's home address; when he failed in that endeavor, he served the secretary of state. The court held that plaintiff had with reasonable diligence attempted to serve the registered agent prior to serving the secretary of state.

SIGNIFICANT WASHINGTON DECISIONS

Annotation to RCW 23B.02.040
RCW 23B.14.200
RCW 23B.14.220

Equipto Div. Aurora Eq. Co. v. Yarmouth, 134 Wash. 2d 356 (1998)

The court held that RCW 23B.02.040, rather than general agency principles, should be applied to determine the party liable for contracts entered in a corporation's name after its administrative dissolution. In support of its conclusion, the court cited language in the provision, its legislative history, cases interpreting RCW 23A.44.100, its Model Act predecessor section, and the common law defacto doctrine. It also noted that while neither party had raised the point, the legislature in 1995 extended the period for reinstatement in 23B.14.220 from two to five years, and that retroactive application of the revised provision as remedial amendment would have protected Yarmouth.

The court further held that the phrase "knowing there was no corporation" meant that Yarmouth had to have had actual knowledge of the dissolution in order to be found liable (noting the intent expressed in the legislative history to protect persons who act "with good faith belief that a corporation existed.") It remanded the case for fact-finding on that issue.

SIGNIFICANT WASHINGTON DECISIONS

Annotation to RCW 23B.08.010(3)

Evans v. Thompson, 124 Wash. 2d 435 (1994)

The issue in this case involved interpretation of RCW 51.24.030(1) (WA Industrial Insurance Act) which permits an injured worker or beneficiary to elect to seek damages from a person other than the employer, but only if that person is not in the worker's "same employ." Two employees of a corporation in which defendants were the only officers and directors were killed while dumping fill materials on land owned by defendants individually. Their widows sued defendants. The trial court granted defendant's motion for summary judgment on grounds that as officers and directors of the corporation defendants were in the "same employ" as the decedents. The Supreme Court in a 5-4 opinion reversed and remanded for a determination of whether defendants were in fact employees of the corporation. In the process, both the majority and the dissent cite RCW 23B.08.010(3) for the proposition that "the bylaws [sic.: articles of incorporation] may dispense with any specific duties for a director" [sic: the duties of the board of directors can be performed by another.]

SIGNIFICANT WASHINGTON DECISIONS

Annotation to RCW 23B.07.400(2)

In re F5 Networks, Inc., Derivative Litigation, 166 Wash. 2d 229 (2009)

Six F5 shareholder derivative actions were filed in 2006 in the District Court, Western District of Washington, alleging that 17 current and former F5 officers and directors had engaged in a pattern of backdating stock options to hide insider compensation. After consolidation of the actions, F5 moved to dismiss the resulting derivative action for failure by the plaintiffs to make a demand upon F5's board of directors prior to commencing the action. Judge Robert Lasnik then asked the Washington Supreme Court to answer two certified questions:

(1) What test does Washington apply to determine whether allegations made pursuant to RCW 23B.07.400(2) by a shareholder seeking to initiate derivative litigation on behalf of a Washington corporation excuse that shareholder from first making demand on the board of directors to bring that litigation on behalf of the corporation?

(2) If Washington follows Delaware's demand futility standard, does it also follow the reasoning of Ryan v. Gifford, 918 A.2d 341 (Del. Ch. 2007) in cases where the improper backdating of stock options has been alleged?

The Supreme Court held that Washington follows the Delaware demand futility standard and the reasoning of Ryan v. Gifford.

The court agreed with F5 that RCW 23B.07.400(2) is a procedural statute and that the legislature had left it to the court to determine substantive standards for its application. But the court rejected defendants' argument that Washington is, or should be, a "universal demand" state. It acknowledged that over 20 states now require demand on directors as a prerequisite to commencing a derivative action; but it stated that in virtually all of those states[1], the requirement was imposed by legislation (which often amended statutes with language similar to that in RCW 23B.07.400(2).) The court quoted language in early Washington decisions indicating that while demand on the board of directors was generally required, courts could determine in particular circumstances that such demand would be "useless." It said that "a plain reading" of RCW 23B.07.400(2) also supported its conclusion that Washington is a demand futility state. Then, stating that "Delaware's courts are well versed in this area," it adopted the Delaware futility standard: "demand is excused if 'under the particularized facts alleged, a reasonable doubt is created that: (1) directors are disinterested and independent and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment'." The court also adopted the reasoning in Ryan v. Gifford, stating it "follows naturally from Delaware's futility standard. It allows plaintiffs to rely on circumstantial evidence [e.g., analysis of stock option grants showing they were made at lowest share price of the month or year in which they were granted; evidence that average annualized returns from shares acquired in exercise of grants greatly exceeded such returns for company shares generally; numerous restatements of reported compensation] to show a

[1] The exception is the decision by the Pennsylvania Supreme Court to adopt the universal demand rule (along with a number of other provisions related to conduct of shareholder derivative actions) set forth in American Law Institute Principles of Corporate Governance section 7.03. See Cuker v. Mikalauskas, 692 A.2d 1042 (Pa. 1997).

pattern indicative of wrong doing" [at least by the compensation committee of the board of directors] sufficient to create a reasonable doubt as to whether the grants resulted from a valid exercise of business judgment.

SIGNIFICANT WASHINGTON DECISIONS

Annotation to RCW 23B.07.400(2)

Fernandes v. Bianco, 2006 U.S. Dist. LEXIS 42048 (W.D.Wash)

A shareholder filed a derivative action against 5 of the 9 directors of Cell Therapeutics, Inc. ("CTI"), a Washington corporation, alleging that defendants breached their fiduciary duties by permitting positive statements to be made by corporate personnel regarding the efficiacy of an experimental CTI chemotherapy treatment knowing that the treatment would be a failure. Plaintiff did not make a demand on CTI's board of directors to pursue these claims, asseting that such demand would have been futile. Defendants moved to dismiss the complaint arguing that plaintiff had failed to allege with particularity facts indicating why demand would be futile. The court granted defendants' motion to dismiss the complaint, with leave to the plaintiff to amend. The court said that because Washington cases provide little relevant authority, the parties agreed that the court should look to decisions in other states, particularly Delaware, for standards for evaluating allegations of demand futility. The court quoted the standard stated in Rales v. Blasband, 634 A.2d 927, 934 (DE 1993): "whether or not the [plaintiff's] particularized factual allegations … create a reasonable doubt that, as of the time the complaint is filed, [a majority of the members of] the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand." The court said a reasonable doubt about disinterestedness exists if the plaintiff can show a director faces a " substantial likelihood of liability," a burden made more difficult in the current case because CTI's articles of incorporation (as authorized by RCW 23B.08.320) limited directors' liability to the corporation except for acts or omissions that involve intentional misconduct or knowing violation of law. The court further noted that plaintiff had not challenged the independence of 4 of the CTI directors, and hence had to demonstrate that no one of the 5 could have exercised independent business judgment on the demand. It found that the plaintiff's allegations demonstrated that only one of the 5 directors (the corporation's CEO) faced a substantial likelihood of liability for knowing misrepresentations, and that only conclusory allegations from a related securities complaint in any way connected the other four defendants to the alleged misrepresentations.

The court said a reasonable doubt about independence of a director exists if the plaintiff alleges particularized facts showing that he/she is dominated by a director or officer or is so under his/her influence that the board member's discretion is sterilized. The court said that plaintiff's allegations that the defendants voted to retain the CEO or were members of various corporate committees did not demonstrate lack of independence.

SIGNIFICANT WASHINGTON DECISIONS

Annotation to RCW 23B.08.310
RCW 23B.08.320

Grassmueck v. Barnett, 281 F.Supp. 2d 1227 (W.D. Wash. 2003)

Receiver for a corporation (originally a Washington corporation, later merged into a Delaware corporation) brought an action against its directors, alleging "negligent and bad faith performance of their duties," and "breach of fiduciary duty." The complaint alleged that the directors had knowledge of, or recklessly failed to learn of, wrongful acts by the corporation's founder and principal shareholder when they recklessly and negligently allowed their names, services and work product to be used in furtherance of Lawrences' wrongful acts without taking steps to prevent them. It further alleged that directors acted in bad faith when they accepted compensation from the corporation for a job they did not intend to perform. It finally alleged that these same actions constituted a breach of directors' fiduciary duty. Defendant directors moved to dismiss the complaint on grounds that the corporation's articles of incorporation limited their liability pursuant to RCW 23B.08.320. The court denied the motion stating:

> In Washington, plaintiffs may bring a general claim of breach of fiduciary duty against directors as long they show that the directors' acts or omissions involved (1) "intentional misconduct," (2) "a knowing violation of law," (3) "conduct violating RCW 23B.08.310" (which includes discharging duties in good faith under RCW 23B.08.300) or (4) "any transaction from which the director will personally receive a benefit in money, property, or services to which the director is not legally entitled." Wash. Rev. Code § 23B.08.320. While the Defendants maintain that Plaintiff has not sufficiently pled that the Directors acted intentionally or knowingly, paragraphs 20 and 21 of the Complaint use those very words with respect to the Defendants' actions or inactions. In addition, the Plaintiff states that the Defendants acted in bad faith in that they knew or should have known of Lawrence's acts. Furthermore, the Plaintiff asserts that the Directors acted in their own self-interest at the expense of the company and its shareholders. In light of the federal rules, these allegations are sufficient to take the Plaintiff's claims out of the realm of the director protection statutes (and the director protection provision of the Articles) as adopted under Washington law.

Query whether the court's interpretation of RCW 23B.08.310 regarding conduct not in good faith is a fair reading of the statute.

SIGNIFICANT WASHINGTON DECISIONS

Annotation to RCW 23B.13.010(3) ("fair value" discounts)

Matthew G. Norton Co. v. Smyth, 112 Wash. App. 865 (2002)

In an action under RCW 23B.13.300 to determine in the context of a merger, the fair value of dissenters' shares, the trial court ruled as a matter of law that the corporation could not apply either a lack of marketability discount or a discount for future taxation of imbedded capital gains, in determining fair value of the shares. After an extensive review of authorities, and after noting the Revised Model Business Corporation Act had been amended in 1999 to preclude discounting the dissenters' shares for lack of marketability or minority statues, the court reversed the trial court's ruling in part and affirmed it in part. The court reversed the trial court's marketability discount ruling to the extent it precluded application of minority and lack of minority discounts at the corporate level to adjust the book value of corporate assets to determine their fair market value. However, the court affirmed the trial court's ruling to the extent it held that absent extraordinary circumstances, no discount for lack of marketability should be applied the value of a minority shareholders shares.

The court affirmed the trial court's ruling on a tax discount to the extent it denied a wholesale discount in the valuation process for built-in capital gains on all appreciated assets of the corporation based on a hypothetical liquidation at an indefinite future time. But it reversed the ruling to the extent that it precluded consideration of income taxes in determining the value of a corporate asset which is the normal course of the corporation's business was to be sold after the merger provided that the shareholder would not be effectively paying a proportionate share of tax on the same appreciation as part of the tax payable by the shareholder on redemption by the corporation of the shares.

SIGNIFICANT WASHINGTON DECISIONS

Annotation to RCW 23B.13.020(2) (exclusivity of appraisal)

Matthews v. Wenatchee Heights Water Co., 92 Wash. App. 541 (1998)

The shareholders of a for-profit water rights corporation voted to transfer its assets to a reclamation district and to dissolve. Under the plan, shareholders had the option of receiving case, or a water rights contract with the district, in exchange for their shares. Matthews signed a water rights contract with the district, but later sued to set aside the transfer claiming defects in the voting process approving the transfer. The trial court granted the district's motion for summary judgment, holding, interalia, that dissenter's rights under RCW 23B.13 provided Matthews his sole remedy to challenge the transfer. The appeals court affirmed on the point stating "the remedy provided under the dissenter's right statute to a minority shareholder that opposes any corporate decision or action is 'exclusive as to unfairness or breach of fiduciary duty short of actual fraud.' Matteson v. Ziebarth, 40 Wash. 2d 286, 297 …" Since Matthews had not alleged fraud, he was limited to dissenter's rights.

But see RCW 23B.13.020(2) which allows a shareholder to challenge a corporate action that fails to comply with procedural requirements imposed by this title.

SIGNIFICANT WASHINGTON DECISIONS

Annotation to RCW 23B.06.400
RCW.23B.08.310

In re Metropolitan Mortgage & Securities Co., 347 B.R. 406 (E.D.Wash. 2006)

Metropolitan, a publicly-held chapter 11 debtor, sued two of its shareholders seeking recovery of distributions they had received from the corporation that allegedly rendered it unable to pay its liabilities as they became due in the usual course of business (and thus to have been made in violation of RCW 23B.06.400(2)(a)). The complaint alleged that defendants were family members of the individual who controlled Metropolitan, but did not allege that either had any knowledge of its financial affairs. The court granted defendants' motion to dismiss for failure to state a cause of action against them under either RCW 23B.08.310 (directors' liability for illegal distributions) or RCW 19.40 (Washington Fraudulent Transfers Act). Metropolitan argued that RCW 23B.08.310 implied a cause of action on behalf of the corporation against all shareholders who received an illegal distribution irrespective of their knowledge of the illegality of the distribution. The court rejected the argument noting that RCW 23B.08.310 (2)(b) authorized only directors found liable to the corporation under RCW 23B.08.310(1) to sue shareholders, and even in such suits, only the shareholders who knowingly accepted the illegal distributions were potential defendants. Hence, if accepted, Metropolitan's argument would create an implied cause of action against a much larger class of shareholder-defendants (here of a publicly-held corporation) than the express statutory action, and would do so despite Metropolitan's failure to satisfy any of the requirements that Washington cases have established for implying a cause of action. The court also noted that the legislature, after the events involved in this case, specifically authorized a corporate action against knowing shareholder recipients of illegal distributions. See RCW 23B.08.310(3), added by Laws 2006, ch. 52, section 3. Finally, the court held that RCW 23B.06.400(6) deprived Metropolitan of any cause of action under RCW 19.40 related to the distributions.

SIGNIFICANT WASHINGTON DECISIONS

Annotation to RCW 23B.14.300(2)

Scott v. Trans-System Inc., 148 Wash. 2d 701 (2003)

The trial court had ordered dissolution of a corporation pursuant to RCW 23B.14.300(2)(b) and (d), finding that shareholders in control of corporation had acted oppressively and wasted corporate assets by causing it to enter unfair leases and to make interest payments for the benefit of their wholly-owned corporation, Trans-System. The Supreme Court reversed, and remanded for determination of an alternate remedy. The court first noted that authorities elsewhere state two different rests for oppressive conduct – frustration of a shareholder's reasonable expectations, and repetitive, incorrigible misconduct by parties in control – and that one or both such tests may be used in the same case. It then held that plaintiff Scott had failed to satisfy either test: the record gave no indication of his reasonable expectations; and while it was a breach of fiduciary duty for the majority shareholders to cause the corporation to pay interest on funds TSI borrowed, that isolated misconduct did not satisfy the second test, nor waste of corporate assets. It noted that dissolution would particularly benefit Scott, who had established a competing driver-training school. The court concluded by citing authorities elsewhere (but omitting reference to RCW 23B.14.330(1)) that courts in dissolution actions have power to order alternate, less harsh, remedies than dissolution.

SIGNIFICANT WASHINGTON DECISIONS

Annotation to RCW 23B.14.300(2)
RCW 23B.08.520

Skarbo v. Skarbo Scandinavian Furniture Import, Inc., 2005 Wash. App. LEXIS 2066 (Div. I, unpub)

Two brothers, Ron and Inge Skarbo, each owned 50 percent of the shares of the corporation, and were its only officers and directors. Inge's multiple sclerosis caused him to retire as an officer in 2000, and ultimately caused him to arrange to have his son Paul replace him as a director. Ron sought to acquire part or all of Inge's shares at their appraised value; Inge refused, and shortly thereafter accused Ron of theft of corporate funds. Relations between the brothers quickly deteriorated into unresolvable disputes over proposed expansions of the business, restructuring of the corporation's debts to the brothers, payment of bonuses and distributions, and scheduling of directors' and shareholders' meetings. Ron sued, seeking dissolution of the corporation pursuant to RCW 23B.14.300(2), or alternatively, the court-ordered sale of Inge's shares to Ron. The trial court held that the corporation's directors had been deadlocked for more that 2 years, that the shareholders had been unable to break the deadlock, and that the business and affairs of the corporation could no longer be conducted to the advantage of the shareholders. The court also held that Paul, acting as a director, had engaged in oppressive conduct by refusing to refinance the corporation's debts to its shareholders. It ordered Inge to sell to Ron his shares at the price to be determined by a court-appointed appraiser, finding that the parties did not dispute that the sale was preferable to dissolution. The court of appeals affirmed, rejecting Inge's arguments: (1) that RCW 23B.14.300(2)(a)'s requirement that the deadlock threaten either loss of shareholder advantage or irreparable harm was foreclosed if the corporation operated at a profit during the period of deadlock; (2) that RCW23B.14.300(2)(b) implicitly confines the statute to allegations of conduct by one of two directors; (3) that Paul's refusal to refinance debt owed to shareholders was not a breach of fiduciary duty owed to the other director, or in any event was not oppressive because of being burdensome, harsh, or wrongful conduct; and (4) that Paul was entitled to mandatory indemnification of attorney's fees under RCW 23B.08.520 because the trial court's finding that Paul's conduct was oppressive did not impose personal liability and hence that he had been wholly successful on the merits of the action.

SIGNIFICANT WASHINGTON DECISIONS

Annotation to RCW 23B.14.340

Smith v. Sea Ventures, Inc., 93 Wash. App. 613 (1999)

Smith purchased a fishing vessel and "all fishing rights as they may apply to the vessel" from Sea Ventures in 1990. Sea Ventures was administratively dissolved in 1993. Its former shareholders thereafter applied for, and despite Smith's request, received and sold fishing rights later derived from the corporation's ownership of the vessel. Smith sued in 1996, but the trial court dismissed his claim as barred under RCW 23B.14.340 because he had not filed suit within two years of the date of dissolution. The appeals court reversed, stating:

RCW 23B.14.340 does not, and never has, covered post-dissolution claims to corporate assets, based on pre-dissolution contractual rights, where shareholders have taken affirmative steps to appropriate those assets after corporate dissolution. Recovery of corporate assets distributed to former shareholders upon dissolution is permissible in certain cases. Such recovery may be proper here, and we hold that Smith may proceed against Lundvall, Morgan and Soriano [shareholders of Sea Ventures] individually. We reverse the trial court's grant of summary judgment, and remand this case for further proceedings. (Footnotes omitted).

SIGNIFICANT WASHINGTON DECISIONS

Annotation to RCW 23B.13.020(2)(exclusivity of appraisal)

Sound Infiniti, Inc. ex rel Pisheyar v. Snyder, 145 Wash. App. 333 (2008), review granted, 165 Wash.29 1019 (2009)

Pisheyar purchased 19 percent of the shares of Sound Infiniti, Inc. ("Sound"), an incorporated Washington automobile dealership in which Snyder and Hannah owned the remaining shares. The parties agreed that Pisheyar would have no role of the management of Sound. Pisheyar believed, and Snyder and Hannah vigorously disputed, that a result of a subsequent transaction between the parties was that Snyder orally agreed to include Pisheyar in any future dealerships that Snyder acquired. The following year, the three (along with another small investor) formed Infiniti of Tacoma, Inc. ("Tacoma"), Pisheyar again acquiring 19 percent of the shares. Both corporations prospered, but nevertheless relations between Snyder and Pisheyar soured after a confrontation between the two, apparently over the decision to have the two corporations loan Snyder $900,000 to purchase land for a new dealership from which Pisheyar was to be excluded. Pisheyar then demanded a more active role in the management of both dealerships, a request Snyder and Hannah refused, citing the original understanding that Pisheyar would not have a managerial role in the corporations. Pisheyar sued, alleging Snyder and Hannah had engaged in oppression, converted corporate assets, breached fiduciary duties, and breached the alleged oral agreement that Pisheyar would continue to participate in new ventures. Snyder and Hannah then voted to amend the articles of incorporation of each corporation to reduce the number of authorized shares in each to 4, and to authorize cash payments by the corporations in lieu of issuing fractional shares. Pisheyar obtained a temporary restraining order against implementation of the reverse stock split; but the trial court, after clarifying Pisheyar's claims as 4 derivative claims and 3 individual claims, dissolved the injuction finding Pisheyar had not demonstrated a likelihood he could succeed on the merits of any of his claims. Snyder and Hannah affected the reverse stock splits, Pisheyar dissented, and ultimately the corporation filed a separate appraisal proceeding. Snyder and Hannah then moved to dismiss Pisheyar's derivative and individual claims. The trial court held that Pisheyar could not maintain independent; individual claims against Snyder and Hannah for breach of fiduciary duty in relation to either the decision to eliminate his interest in the corporation, or for prior wrongdoing giving rise to corporate harm, as his right to dissent to the reverse stock split under RCW 23B.13.020(2) was his sole remedy. The trial court declined to dismiss Pisheyar's claims for deprivation of shareholder perquisites finding them valid individual claims. Both parties appealled. The court of appeals, on discretionary review, held that RCW 23B.13.020 provides the exclusive remedy for a minority shareholder whose ownership of shares in closely held corporation is eliminated in a reverse stock split, that Pisheyar's shareholder perquisite claims were derivative in nature, and these should have been dismissed. The court said the "unambigious text of the statute [RCW 23B.13.020(2)], its legislative history, and controlling case law all compel the conclusion that appraisal is the exclusive remedy for dissenting shareholders in such a circumstance."

SIGNIFICANT WASHINGTON DECISIONS

Annotation to **RCW 23B.03.040**
RCW 23B.06.400
RCW 23B.08.300

In re Spokane Concrete Products, Inc., 126 Wash. 2d 269 (1995)

In November 1978, Real Estate Equities Corporation ("REEC") acquired in a leveraged buy-out all of the shares of Spokane Concrete Products ("SPC"). Payment of the purchase price, to be made in a series of installments beginning in 1979, was guaranteed by SPC. To provide funds for the initial payment on the installment purchase, REEC caused SPC to borrow on March 15,1979, $500,000 from Old National Bank (a loan secured by SPC's real and personal property), and to distribute the funds to REEC as a dividend. On December 6, 1990, SPC filed for Chapter 11 protection, a proceeding ultimately converted into a Chapter 7 liquidation proceeding. The Trustee in Bankruptcy contested the enforceability of the March 15, 1979 loan and of a later guaranty by SPC of a bank loan obtained by REEC to pay the balance due to SPC's selling shareholders. The issue came to the Supreme Court in the form of three certified questions from the U.S. Bankruptcy Court for the Eastern District of Washington.

The court upheld the enforceability of the loan and guaranty with the following holdings:

1. Article 12, section 6 of the Washington Constitution (which in part provides that fictitious increases of indebtedness are void) does not apply to "promissory notes and guarantees issued by corporations in the course of business, unless such obligations were fraudulent in some fashion."
2. Neither the Mach 15, 1979 loan nor the later guaranty could be considered to be ultra vires — such claims by the trustee are barred by the doctrines of estoppel and ratification. "So long as the contractual agreement is not contrary to public policy or the terms of a statute, a corporation that has received directly or indirectly the benefits of a contract, including a contract of guaranty, generally is estopped from asserting the defense of ultra vires."..."While the extent of the tangible benefit received by Spokane Concrete is not clear from the record, it is clear there was at least some benefit received" from the loan and the guaranty.
3. Under Washington law, "a corporation has broad power to encumber or distribute its assets, so long as creditors of the corporation are not prejudiced thereby. RCW 23B.06.400; RCW 23B.12.010; Zimmerman v. Kyte, 53 Wn. App. 11, 17...(1988)."
4. "Unless there is evidence of fraud, dishonesty, or incompetence (i.e., failure to exercise proper care, skill and diligence), courts generally refuse to substitute their judgment for that of the directors."
5. "The Trustee's implication that the directors' actions were fraudulent, dishonest, or incompetent is not supported by the record, which does not show Spokane Concrete was left insolvent, with unreasonably small capital, or unable to meet its obligations to creditors as they came due." Supporting citations were to cases interpreting RCW 19.40.050 (the Washington Fraudulent Conveyances Act provision in effect at the time of the original transaction).

The court's statement of the requirements for the business judgment rule is its clearest statement thus far on the rule. The court subsequently applied the rule as so stated in Riss v. Angel, 141 WN 2d 612 (1997) in the context of a homeowners' association.

The court's extended discussion of pre-1965 ultra vires decisions is puzzling. The trustee's challenge to various actions by Spokane Concrete as ultra vires could have denied simply because of the language in RCW 23B.03.040 (and its predecessor 23A.08.040): with limited exceptions, a corporate action may not be challenged on the ground that the corporation lacked power to act; the relevant exception to this general rule – for actions brought on the corporation's behalf by a trustee – authorizes actions only against an incumbent or former director, officer, employee or agent of the corporation.

SIGNIFICANT WASHINGTON DECISIONS

Annotation to RCW 23B.15.010
RCW 23B.15.070

Washington Equipment Mfg. Co. v. Concrete Placing Co., 85 Wash. App. 240(1997)

An Idaho corporation (CPC) had obtained a certificate of authority to transact business in Washington, and had appointed a registered agent with a registered office in the state. CPC bought equipment from a Washington corporation (WEM). When CPC refused to pay, WEM served CPC's Washington registered agent and sued CPC in the Spokane County Superior Court. The court granted CPC's motion to dismiss for lack of jurisdiction. The appeals court affirmed, stating that CPC's acts of obtaining a certificate of authority and appointing a Washington registered agent could not be deemed to be consent to imposition of general jurisdiction. The court also held that CPC's contacts with Washington were not sufficient to support jurisdiction in Washington courts.

SIGNIFICANT WASHINGTON DECISIONS

Annotation to RCW 23B.02.040

White v. Dvorak, 78 Wash. App. 105 (1995)

White, a shareholder in a corporation administratively dissolved in 1986, signed a letter of intent in 1988 with defendants in the name of the dissolved corporation. When defendants failed to perform, White and the corporation sued. The trial court granted defendants' motion for summary judgment. The appeals court reversed, citing alternately RCW 23A.44.100 and RCW 23B.02.040 for the propositions that "when a person assumes to act as a corporation, the person is personally liable to the other party in the contract," and "an individual who purports to act as a corporation is liable as a promisor on the contract." It then held that "absent unfair prejudice to Dvorak from the use of a corporate name in the contract, White is a party to the contract and has an individual cause of action for its breach."

Query the relevance of RCW 23B.02.040 (effective July 1, 1990) to events occurring in 1988.

SIGNIFICANT WASHINGTON DECISIONS

Annotation to **RCW 23B.06.220**
RCW 23B.06.400
RCW 23B.08.310
RCW 23B.08.400
RCW 23B.08.410
RCW 23B.08.420
RCW 23B.14.050

Woods v. Noble Manor Co., 2004 Wash. App. LEXIS 2184 (Div. II unpubl.)

A corporate real estate developer built and sold a residence in 1992. The purchaser subsequently reported drainage and other construction defects to the developer, which made some repairs but then ignored further requests. In 1994, the purchaser brought suit *pro se* against the corporation and its two shareholders, and undertook a multi-year effort to conduct discovery. In 1998, with the case still pending, the corporate developer was voluntarily dissolver; and its assets and liabilities were disbursed to shareholders, without establishing a reserve for the purchaser's claim. The purchaser continued his discovery efforts, hired counsel, and in 2001 and again in 2003 amended his complaint to include additional causes of action. After trial, the Pierce County Superior Court awarded the purchaser contract damages against the dissolved corporation and its two officer/shareholders, because they "did not provide … in the corporate dissolution" for the corporation's duty of repair. On appeal, Division II reversed this award against the individual defendants, reasoning that: (1) there did not appear to be a basis for disregarding the corporate entity; and (2) neither the corporate distributions statute (RCW 23B.06.400), nor the statutory sections dealing with duties and liabilities of shareholders, officers and directors (RCW 23B.06.220, and 23B.08.400, .410 and .420), imposes a requirement to create a reserve for contingent liabilities upon dissolution. It is perhaps fortunate that Division II elected not to publish this decision, since it raised as many questions as it answered, such as: (a) why the disbursement of the dissolved corporation's "assets and liabilities" to the shareholders did not give rise to continuing personal liability; (b) whether the individual defendants were also directors and, if so, why the director-liability provisions of RCW 23B.08.310 were not discussed; and (c) why the language of RCW 23B.14.050(1)(c) regarding "making provision for discharging … liabilities" was not considered (particularly in light of the reference in the Official Comment to RMBCA §14.09 that this "earlier [statutory] version … inferred the obligation" to make the provision for claims). Without answers to these questions, it is difficult to assign any precedential weight to this decision.

APPENDIX E

SUBJECT INDEX TO RCW 23B
WASHINGTON BUSINESS CORPORATION ACT

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