

# SENATE BILL REPORT

## SB 5031

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As Passed Senate, February 24, 2015

**Title:** An act relating to permitting advance action regarding business opportunities under the business corporation act.

**Brief Description:** Permitting advance action regarding business opportunities under the business corporation act.

**Sponsors:** Senators Pedersen and O'Ban; by request of Washington State Bar Association.

**Brief History:**

**Committee Activity:** Law & Justice: 1/20/15, 2/03/15 [DP].

Passed Senate: 2/24/15, 47-0.

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### SENATE COMMITTEE ON LAW & JUSTICE

**Majority Report:** Do pass.

Signed by Senators Padden, Chair; O'Ban, Vice Chair; Pedersen, Ranking Minority Member; Darneille, Kohl-Welles, Pearson and Roach.

**Staff:** Melissa Burke-Cain (786-7755)

**Background:** Corporate directors and officers must always act in the corporation's best interests because they are bound by their fiduciary duty of loyalty. Under the duty of loyalty, a director or officer must not take advantage of a business opportunity for personal gain when the business opportunity rightfully belongs to the corporation. A fiduciary who violates this duty is held responsible under the common law corporate opportunity doctrine.

Some states protect corporate officers and directors from potential liability under the corporate opportunity doctrine with statutory safe harbor provisions allowing the fiduciary to seek the corporation's approval and obtain the corporation's disclaimer of all rights to the business opportunity. Currently Washington's Business Corporations Act (WBCA) does not provide this safe harbor.

Other states allow a corporation to include a provision in its articles of incorporation relieving directors and officers of their duty to offer a business opportunity to the corporation before pursuing the opportunity for personal interests. The corporation may limit the

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provision to specific circumstances. Currently WBCA does not authorize a corporation to include this provision in its articles of incorporation.

**Summary of Bill:** Articles of incorporation may limit or eliminate a director's or officer's duty to offer a business opportunity to the corporation before pursuing it for personal interests.

A corporation or its shareholders cannot sue a director or officer for breach of duty under the corporate opportunity doctrine if:

- the director or officer offers the business opportunity to the corporation before acting on it; and
- the corporation disclaims its interests by following specific statutory disclaimer procedures.

The fact that a director or officer failed to offer a business opportunity to the corporation, and failed to obtain a corporate disclaimer before acting, is not enough evidence to prove a breach of duty in a lawsuit.

**Appropriation:** None.

**Fiscal Note:** Not requested.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony:** PRO: This bill brings Washington's corporation law into line with the American Bar Association's proposed model act. It will allow Washington to be a more competitive state and protect businesses by promoting investment in Washington corporations. The bill allows shareholders to waive the corporation's interest up front in the articles of incorporation and also provides a process for a director or officer to get a formal corporate waiver. This bill is important in the current business climate when corporations and venture capital companies often have directors or officers on each other's governing boards. Without protections for corporate directors and officers, companies may be reluctant to invest in a Washington corporation. Five other states, including Delaware, have adopted this provision in statute.

**Persons Testifying:** PRO: Senator Pedersen, prime sponsor; Stephan Coonrod, WA State Bar Assn. Corporate Act Revision Committee.