

HOUSE BILL REPORT

SSB 6037

As Passed House:
March 3, 2020

Title: An act relating to business corporations.

Brief Description: Concerning business corporations.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Pedersen, Wellman, Rivers, Keiser, Dhingra, Kuderer, Cleveland, Saldaña, Randall, Darneille, Rolfes, Das, Frockt, Carlyle, Wilson, C., Hunt and Stanford; by request of Washington State Bar Association).

Brief History:

Committee Activity:

Civil Rights & Judiciary: 2/14/20, 2/21/20 [DP].

Floor Activity:

Passed House: 3/3/20, 56-40.

Brief Summary of Substitute Bill

- Establishes provisions regarding gender diversity on a corporation's board of directors.
- Removes the specific listing of default and optional provisions that may be contained in a corporation's articles of incorporation and bylaws.
- Establishes rules for making terms of filed documents or plans dependent on facts objectively ascertainable outside the filed document or plan.
- Provides that a corporation may not vote shares owned by the corporation.
- Addresses standards for taking corporate action without a meeting or vote by written consent.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: Do pass. Signed by 8 members: Representatives Kilduff, Chair; Thai, Vice Chair; Goodman, Kirby, Orwall, Peterson, Valdez and Walen.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Minority Report: Do not pass. Signed by 6 members: Representatives Irwin, Ranking Minority Member; Dufault, Assistant Ranking Minority Member; Graham, Klippert, Rude and Ybarra.

Staff: Edie Adams (786-7180).

Background:

The Washington Business Corporations Act (WBCA) provides requirements for the creation, organization, and operation of corporations and the relationship between shareholders, directors, and officers of the corporation. Many of the provisions of the WBCA provide default rules that may be altered or modified in the corporation's articles of incorporation or bylaws. The WBCA is modeled largely after the American Bar Association's revised Model Business Corporations Act (MBCA), which was last updated in 2016.

The Corporate Act Revision Committee (CARC) of the Business Law Section of the Washington State Bar Association periodically reviews the WBCA and makes recommendations for updating the WBCA to keep it up to date with developments in the law and changes made to the MBCA and to Delaware corporations law, which is considered a leading jurisdiction in corporate law. The CARC recommends amendments to the WBCA addressing several areas to be more consistent with the 2016 MBCA. In addition, the CARC recommends establishing standards regarding gender diversity of a corporation's board of directors.

Board of Directors.

A corporation must have a board of directors unless the articles of incorporation or a shareholder agreement dispenses with or limits the authority of the board of directors. Directors are elected by the shareholders at the annual meeting of shareholders. All corporate powers must be exercised by or under the authority of the board of directors, and the business and affairs of the corporation must be managed under the direction of the board of directors, which has exclusive authority as to the substantive decisions concerning management of the corporation's affairs, except as limited by the articles of incorporation or shareholder agreement.

Articles of Incorporation and Bylaws.

The articles of incorporation and the bylaws are the governing documents for the corporation and set forth rules with respect to numerous organizational and operational issues. The articles of incorporation are required to include specified information such as the corporate name, number of authorized shares, and registered agent. The WBCA provisions governing the articles of incorporation and bylaws list many default rules that apply unless the articles of incorporation or bylaws provide otherwise. Each of these default rules are also addressed in other substantive provisions of the WBCA. In addition, the WBCA lists a number of other optional provisions that may be included in the articles of incorporation or bylaws.

Voting of Corporate Shares.

With exceptions, each outstanding share of a corporation, regardless of class, is entitled to one vote on each matter voted on at a shareholder's meeting. Shares of a corporation are not entitled to vote if they are owned, directly or indirectly, by a second corporation which is a

majority-owned subsidiary of the corporation issuing the shares. This does not prohibit a corporation from voting shares, including its own shares, that it holds in a fiduciary capacity. There is no specific prohibition stating that shares are not entitled to vote if they are owned by, or otherwise belong to, the corporation itself.

Corporate Action by Written Consent.

Corporate action that is required or permitted to be taken at a shareholder's meeting may be approved by written consent without a meeting or vote if the action is approved by all shareholders entitled to vote on the action. Corporate action may be approved by less than unanimous written consent if the corporation is a privately held corporation and such approval is authorized in the corporation's articles of incorporation. Action taken without a meeting is taken by shareholder consent by a written or electronically-transmitted record.

The corporation must provide notice to shareholders that shareholder consents are being sought and the notice must include the same information that would have been required to be included in a notice of meeting at which the proposed corporate action would have been submitted for shareholder approval. A second notice stating that sufficient shareholder consents have been executed must be given by the corporation promptly after delivery to the corporation of shareholder consents sufficient to approve the action.

Summary of Bill:

Provisions of the Washington Business Corporations Act (WBCA) are revised to address the following issues: gender diversity on the board of directors; default and optional provisions in the articles of incorporation and bylaws; terms of documents or plans made dependent on objectively ascertainable facts; voting of corporate shares; and corporate action by written consent.

Board of Directors.

By January 1, 2022, each public company must have a gender-diverse board of directors or the company must comply with specified requirements. A public company is deemed to have a gender-diverse board if persons who self-identify as women comprised at least 25 percent of the directors serving on the board for at least 270 days of the fiscal year preceding the annual meeting of shareholders.

A public company that does not have a gender-diverse board of directors must deliver a board diversity discussion and analysis to all shareholders entitled to vote at the annual shareholder meeting no fewer than 10 days nor more than 60 days before the annual meeting. The discussion and analysis may be delivered by posting the information on the company's principal website or including the information in a proxy statement filed under specific federal regulations.

The board diversity discussion and analysis must include the company's approach to developing and maintaining diversity on the board, and at a minimum should include a discussion of:

- how the board of directors considered the representation of any diverse groups in identifying and nominating candidates in connection with the last annual meeting of shareholders, or why such consideration was not given;

- any adopted policy relating to identifying and nominating members of diverse groups for election as directors, or why such policy was not adopted; and
- the use of mechanisms of refreshment of the board, such as term limits and mandatory retirement age policies, or why such mechanisms are not used.

A public company is exempt from the gender-diverse board requirements if:

- it does not have outstanding shares of any class or series listed on a United States (U.S.) national securities exchange;
- it is an emerging growth company or a smaller reporting company as defined in federal regulations;
- voting shares comprising more than 50 percent of the voting power of the public company are held by a person or group of persons;
- its articles of incorporation authorize election of all or a specific number of directors by one or more separate voting groups; or
- it is not required to hold an annual meeting of shareholders under state law or rules of any U.S. national securities exchange.

The gender diversity requirements do not alter the general standards for any director, and failure to comply with the requirements does not affect the validity of any corporate action. The exclusive remedy for a public company's failure to comply with the requirements is that any shareholder entitled to vote in the election of directors may seek a superior court order for the company to deliver the required information to shareholders.

Articles and Bylaws.

Provisions of the WBCA governing the contents of the articles of incorporation and the bylaws of the corporation are revised. The specific lists of default and optional provisions that may be included in a corporation's articles of incorporation or bylaws are removed, although a shorter list of nonexclusive optional provisions is retained. Provisions in the articles of incorporation may be made dependent on facts objectively ascertainable outside the articles of incorporation.

Terms Dependent on Objectively Ascertainable Facts.

Terms of the following filed documents or plans may be made dependent on facts objectively ascertainable outside the plan or filed document: the articles of incorporation, terms of shares, plans of conversion, plans of merger, and plans of share exchange.

Rules are established governing provisions that allow the terms of a plan or filed document to be dependent on facts objectively ascertainable outside the plan or filed document. The plan or filed document must include the manner in which the facts will operate upon the terms of the plan or filed document. The facts may include economic or financial data, a determination or action by any person or body, and terms of or actions taken under an agreement to which the corporation is a party. The facts must be available in a nationally recognized news or information medium.

Provisions of a plan or filed document that may not be made dependent on outside facts are specified, including, for example, the registered agent of an entity in a filed document, the number of authorized shares and designation of each class or series of shares, and the effective date of a filed document.

If a provision of a filed document is made dependent on a fact ascertainable outside the document and the fact is not ascertainable from a publicly available source, procedures are established for filing an article of amendment to the filed document stating the fact.

Corporate Shares.

Shares of a corporation are not entitled to vote if they are owned by or otherwise belong to the corporation, either directly or indirectly. Shares held by a corporation in a fiduciary capacity are entitled to vote unless they are held for the benefit of, or otherwise belong to, the corporation directly or indirectly through a second corporation which is a majority-owned subsidiary of the corporation issuing the shares.

Corporate Action by Written Consent.

Shareholders of all corporations may take corporate action with less than unanimous consent if authorized in the corporation's articles of incorporation. Shareholders may not elect directors by less than unanimous written consent if the articles of incorporation authorize shareholders to cumulate their votes when electing directors.

Failure to comply with the shareholder notice requirements with respect to seeking and obtaining written consents will not invalidate approval of corporate action by written consents.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) The bill is the result of the hardworking and dedicated volunteers of the Corporate Act Revisions Committee (CARC) of the Washington State Bar Association who work to keep the Washington Business Corporations Act up to date with changes in the law. The bill includes some modest changes to provisions of the law to make sure that Washington remains a favorable jurisdiction for incorporating businesses. The bill also addresses the important issue of gender diversity on corporate boards. The CARC has been working on this proposal for the last year, and they have developed a provision that has been widely accepted by the business community and that will make a difference for the public companies in this state that do not currently have a gender-diverse board.

The charter of the Washington State Women's Commission includes the charge that it look at strategies to increase women's presence on corporate boards. This bill takes one step toward achieving that goal. A common theme is that board candidates need a sponsor—they need someone to promote their abilities. Publicly traded corporate boards are male dominated, and their networks tend to be male dominated. Because of that, there are very few women who are sought to serve on corporate boards. It is important for women to have a voice, but they cannot have a voice if they do not have a seat at the table. Many of the organizations

that recommend stocks to investors are starting to say they will not recommend companies that do not have women on their corporate boards. These types of actions make a difference. There are many women who are highly qualified to serve on corporate boards and who want to serve. The statistics show that companies that have women on their boards make better decisions and do better economically than those that do not.

The bill was developed to avoid the problems that have arisen in other states. The goal is to have a meaningful provision and to avoid potential litigation. California adopted a gender diversity requirement and two lawsuits have been filed challenging the law. A number of other states have introduced legislation that were just turned into advisory statutes urging companies to look at gender diversity. This bill adopts a comply-or-explain approach that has worked well in Canada and other countries. If the company does not have a gender-diverse board, then it must explain not only its approach to gender diversity but its approach to overall diversity on the board. The idea is to raise awareness around this issue and encourage companies to think about mechanisms for refreshment of their boards to increase diversity.

(Opposed) None.

Persons Testifying: Senator Pedersen, prime sponsor; Senator Wellman; Michelle Gonzalez, Washington State Women's Commission; and Mike Hutchings, Corporate Act Revision Committee.

Persons Signed In To Testify But Not Testifying: None.