

SENATE BILL REPORT

SB 6037

As of January 15, 2020

Title: An act relating to business corporations.

Brief Description: Concerning business corporations.

Sponsors: 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: Law & Justice: 1/14/20.

Brief Summary of Bill

- Requires a public company that does not have a gender-diverse board of directors by January 1, 2022, to prepare a discussion and analysis of its plans to attain gender diversity and deliver specified information to its shareholders.
- Removes the Washington Business Corporations Act's (WBCA) list of optional provisions for articles of incorporation and by-laws that appear elsewhere in the WBCA.
- Clarifies that a business corporation cannot vote its own shares of stock.
- Allows a public corporation's shareholders to approve corporate actions with less than unanimous written consent.
- Makes other changes to harmonize and align the WBCA with the American Bar Association's 2016 Model Corporation Act.

SENATE COMMITTEE ON LAW & JUSTICE

Staff: Melissa Burke-Cain (786-7755)

Background: Women on Corporate Boards. A corporation's board of directors is its governing body and is responsible for the oversight of the corporation and for voting on major business decisions. Board members may also perform in-depth work on standing

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committees such as risk assessments or audits. In many corporations, a board committee participates in succession planning and identifies potential candidates for board vacancies by recruiting, screening, and interviewing candidates.

Men hold the majority of seats on corporate boards compared to women directors. A 2018 report by Deloitte and the Alliance for Board Diversity found that women made up 25 percent of board seats at Fortune 100 companies, and 22.5 percent among Fortune 500 companies. An annual corporate directors survey by PricewaterhouseCoopers reported that as of July 2019, each company in the S&P 500 has at least one woman on its board.

Most recent state legislative action to address the issue of board diversity has been aspirational. Some states have passed nonbinding resolutions encouraging corporations to improve the diversity of their boards. In 2018, California became the first state to enact a law requiring its publicly-traded corporations to have a minimum number of women directors. Under the law, a publicly-traded California corporation must have at least one woman on its board by the end of 2019; by the end of 2021, a five-member board must have at least two women, or three women on a seven-member board. The California law authorizes the secretary of state to fine non-compliant corporations. The California law faces two constitutionally-based court challenges. In 2019, Illinois enacted a law requiring expanded corporate board demographics reporting to the secretary of state including mandatory reporting of board member selection criteria.

Washington Business Corporations Act Revisions. The WBCA is closely based on the American Bar Association's Revised Model Business Corporation Act (Model Act). Washington is a Model Act state making it easier to find persuasive authority on interpretive issues that Washington's court have not addressed, and easier to keep up with future developments in the law. The WBCA provides requirements for creating, organizing, and operating 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 in the corporation's articles of incorporation or bylaws. The articles of incorporation and the bylaws are the governing documents for the corporation and set forth rules about numerous organizational and operational issues. The Corporate Act Revision Committee (CARC) of the Business Law Section of the Washington State Bar Association periodically reviews and makes recommendations for updates to the WBCA to keep it up to date with developments in the law and changes made to the Model Act, and to corporate law in other states.

The American Bar Association adopted a new version of the Model Act in 2016. The CARC proposes periodic changes to the WBCA for consistency with the 2016 Model Act and to keep the law current with changes to corporate law.

Summary of Bill: Women on Corporate Boards. Each public company must have a gender-diverse board of directors or comply with specific requirements no later than January 1, 2022. If the company does not have a gender-diverse board, it must deliver a board diversity discussion and analysis to its shareholders. The discussion and analysis must include information about the company's approach to developing and maintaining diversity on its board including:

- representation of diverse groups when identifying and nominating board candidates;

- any policies adopted to identify and nominate members of any diverse groups as board candidates; and
- mechanisms to refresh the board such as term limits or mandatory retirement of board members.

The requirement to deliver the discussion and analysis may be satisfied by posting the information on the company's primary website or including the required information in a proxy statement filed under specific federal regulations. A public company is exempt from the requirements if:

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

Corporate actions are not invalidated because of a company's failure to comply with the requirements. The exclusive remedy for failing to comply is for shareholders to seek a superior court order to deliver the required information to the shareholders.

Washington Business Corporations Act Revisions. The list of optional and default provisions in the articles of incorporation and by-laws is removed. The requirement for stating the number of directors, or how the number of directors is determined in the articles of incorporation or by-laws is relocated within the WBCA. A corporation is permitted to include terms in its articles of incorporation made dependent on facts objectively ascertainable outside the articles. The same applies to plans for the terms of shares, the terms of a merger, and the terms of a share exchange. The phrase "facts objectively ascertainable outside a filed record or plan" is defined by standards and limitations for using this practice. A corporation cannot vote its shares whether they are owned by or otherwise belong to the corporation or by the corporation's controlled subsidiary. Shareholders of publicly-traded or privately-held Washington corporations may approve a corporate action by less than unanimous written consent if the articles of incorporation include this method for approval, except for electing directors where cumulative voting applies. Failure to comply with the notice requirements for seeking and obtaining shareholder consent will not invalidate the shareholder approval obtained by the consent.

Appropriation: None.

Fiscal Note: Not requested.

Creates Committee/Commission/Task Force that includes Legislative members: No.

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

Staff Summary of Public Testimony: PRO: The WSBA's Corporate Act Revision Committee continues to update the business corporations statute to bring it in line with changes in corporate practices and laws over the last 20 years. The changes are not done yet. This year's changes include removing lists of alternative provisions for corporate by-laws and articles of incorporation in current law. Washington's current law limits public corporations to unanimous written consent for decisions made without an actual meeting. Washington is one of only three states that has that requirement. Prohibiting a corporation from voting its own shares is implicit in the law, but a proposed change will make it explicit. As to gender diversity, taking the punitive approach might cause corporations to move out of Washington. Instead, this bill uses the approach found in many SEC rules, and in the policy approach used in some European countries to increase board diversity—either comply or explain why. The requirement in the bill for public disclosure of the required discussion and analysis that non-compliant corporations must provide will be an effective tool to move corporations toward compliance. Many corporations with large institutional shareholders favoring diversity choose to voluntarily comply. Many larger public companies in Washington already meet the requirements in the bill although there are a few notable hold-outs. There is no shortage of women qualified to serve on corporate boards, even within the tech industry. But, lack of diversity remains a problem and there are complex and consistent barriers for women to join corporate boards. Many corporations rely on their own largely male personal networks within the business community to fill board vacancies. Many boards have no term limits so there are fewer board vacancies. This bill will encourage boards to look more broadly to fill board vacancies. Nationally the trend is positive and more women are becoming board members. Some corporations have not even thought about board diversity, but this bill will cause them to consider and discuss diversity. Research studies show that diverse boards make corporations more profitable. Diverse boards make better decisions.

Persons Testifying: PRO: Senator Jamie Pedersen, Prime Sponsor; Michelle Gonzalez, Women's Commission; Michael Hutchings, CARC.

Persons Signed In To Testify But Not Testifying: No one.