

LEGISLATIVE CHANGES AFFECTING SHAREHOLDER CONSENTS

On July 26, 2009, new amendments to the Washington State Business Corporation Act (WSBCA)¹ became effective that (1) impose a new 60-day time limitation for the delivery of shareholder consents,² (2) change the rules regarding when shareholder consents are considered effective, and (3) impose new notice requirements for shareholder actions that are approved by written consent.

60-Day Period for Delivery of Shareholder Consents to Corporation

The amendments to the WSBCA impose a 60-day period for the delivery of executed shareholder consents. In order to approve a corporate action, consents executed by a sufficient number of shareholders to approve the corporate action must be delivered to the corporation within 60 days after the date of the earliest dated shareholder consent.³ From a practical standpoint, this 60-day window may prove difficult for corporations to comply with because the corporation will not necessarily know when the first shareholder signs the consent. It is therefore appropriate for corporations to closely track when shareholder consents are executed and to follow up, to the extent possible, to ensure that they receive the requisite number of shareholder consents to approve the corporate action within 60 days of the date of the earliest dated shareholder consent.

Effectiveness of Corporate Action by Shareholder Consent

In addition to the 60-day period, the amendments to the WSBCA also change the rules regarding when executed consents become effective. Unless the shareholder consents specify a later effective date, shareholder approval of an action is effective when:

- executed shareholder consents sufficient to approve the corporate action have been delivered to the corporation, either at an address designated by the corporation for delivery or at the corporation's registered office, or to an electronic address, location or system that the corporation has designated for delivery of shareholder consents ; and

¹ HB 1068

² Pursuant to RCW 23B.07.040(1)(a), action that is required or permitted 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 unanimous consent of the shareholders entitled to vote on the corporate action; or (ii) for non-public companies authorized by the articles of incorporation to approve corporate action by less than unanimous consent, the corporate action is approved by shareholders holding not less than the minimum number of votes that would be necessary to approve the corporate action at a meeting.

³ RCW 23B.07.040(4).

- any period of advance notice required by the articles of incorporation to be given to any nonconsenting shareholders has been satisfied.⁴

Shareholder Notice Requirements

Pursuant to the amendments to the WSBCA, there are now two separate notice requirements under RCW 23B.07.040(3) when shareholder consents are being sought:

- First, notice that shareholder consents are being sought must be given by the corporation or another person soliciting shareholder consents on behalf of the corporation on or promptly after the record date to all shareholders entitled to vote on the record date who have not yet executed a consent.⁵ This notice must also be given to all nonvoting shareholders as of the record date if the WSBCA would otherwise require such notice be given to nonvoting shareholders.⁶
- A second notice must be given promptly after delivery to the corporation of sufficient shareholder consents to approve the corporate action to all shareholders entitled to vote on the record date (and if the WSBCA would otherwise require notice of a meeting of shareholders be given to nonvoting shareholders, to all nonvoting shareholders) stating that sufficient shareholder consents have been executed to approve the proposed corporate action.⁷

A corporation may avoid having to provide the two notices to shareholders required by RCW 23B.07.040(3) if it receives delivery of waivers by shareholders of such notices for inclusion in the corporation's minutes.⁸

In light of the amendments to the WSBCA, corporations may need to revise the form of the shareholder consents that they use to ensure the following:

- that the consent includes a space for each shareholder to fill in the date of the shareholder's execution;
- that the consent specifies where the consent should be delivered to the corporation (which must be either at an address designated by the corporation for delivery of shareholder consents, or at the corporation's registered office, or to an electronic address, location or system that the corporation designates for delivery of shareholder consents); and
- if a separate waiver is not sought, that the consent itself includes language waiving the notice requirements of RCW 23B.07.040(3). Including the waiver in the consent will only work, however, in cases where the corporate action is approved by unanimous consent of the shareholders and the WSBCA does not otherwise require notice of a meeting to nonvoting shareholders. If the corporation allows for action to be taken by

⁴ RCW 23.07.040(4)

⁵ RCW 23B.07.040(3)(a)

⁶ Id.

⁷ RCW 23B.07.040(3)(b)

⁸ RCW 23B.07.060(1)

less than unanimous written consent, then either a separate waiver signed by all of the shareholders entitled to vote (and if applicable, also by those nonvoting shareholders who are required to receive notice) will need to be delivered to the corporation, or else the corporation will have to provide the two notices required by RCW 23B.07.040(3).

If you have questions regarding the new shareholder notice requirements or would like assistance in complying with such requirements and/or modifying the form of shareholder consent you use, please contact Carrie Soli at csoli@omwlaw.com or (206) 447-7000.