WASHINGTON'S NEW PROVISIONS ON ADVANCE WAIVERS OF CORPORATE OPPORTUNITIES: OPENING THE ROAD FOR INVESTORS

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On April 17, 2015, Governor Inslee signed a bill into law that effectively encourages venture capital and private equity funds to invest in Washington corporations. Senate Bill 5031 ("SB 5031") amended the Washington Business Corporation Act ("WBCA"), allowing corporations to include in their articles of incorporation an advance waiver of the corporate opportunity doctrine, a common law doctrine deriving from a director's or officer's duty of loyalty to the corporation. Venture capital and private equity firms commonly finance multiple investments in the same area of activity and require a seat on the board of directors as a condition to their investment. Without the ability to rely on an advance waiver, investors who hold board seats could be liable to the corporation for outside investments falling in the same area of activity.

1. What is the corporate opportunity doctrine?

   The corporate opportunity doctrine prohibits directors or officers from appropriating or "usurping" for themselves business opportunities that rightfully belong to the corporation. To determine whether something is a corporate opportunity, Delaware courts have analyzed factors such as: whether the opportunity is in the same line of business as the corporation, whether the corporation would be financially able to take the opportunity, whether the corporation has an interest or expectancy in the opportunity, and whether taking the opportunity would create a conflict of interest or be a breach of fiduciary duties for the officer or director.[1] If the director or officer fully discloses the opportunity to the corporation, and the corporation properly rejects the opportunity, then the director or officer can appropriate the project without incurring liability.

   Prior to the WBCA amendment, venture capital and private equity firms wanting to invest and hold board seats in Washington corporations, but also wanting to pursue other investments in the same line of business, were faced with the choice of either taking the risk or seeking absolute certainty through the time-consuming process of getting disclaimers from the board for each corporate opportunity on a case-by-case basis. This process was unpredictable and, because disclosure of the existence of corporate opportunities is often subject to non-disclosure agreements, could entail disclosure of confidential information.

2. What does the new Washington law mean?

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In response to this unpredictable, time-consuming process, Washington amended the WBCA to allow corporations to include in their articles of incorporation an advance waiver of corporate opportunities (referred to in the statute as "business opportunities").[2] The amendment will go into effect on July 26, 2015. The waiver may be with respect to any business opportunity (a broad "blanket" provision) or may be with respect to particular classes or categories of business opportunities delineated in the articles of incorporation. However, a waiver does not modify a director's or officer's other duties, for example, to keep confidential proprietary information of the corporation, to not use corporate assets, and to not compete unfairly with the corporation. The waiver included in the articles of incorporation can extend to directors, officers, and related persons; however, the waiver for officers and their related persons requires further specific board approval after the inclusion of such provision in the articles of incorporation.

This amendment to the WBCA also added a safe harbor for a director or officer considering a specific prospective opportunity. Under this safe harbor provision, in the absence of an applicable advance waiver of business opportunities in the corporation's articles of incorporation, the board of directors or shareholders of the corporation can disclaim the specific opportunity through a procedure comparable to the safe harbor provisions of the WBCA with respect to conflicting interest director transactions.[3] It is important to note that this safe harbor is available only if the specific business opportunity is presented to the board of directors or shareholders before the opportunity is taken by the director or officer—subsequent ratification does not work under this safe harbor provision.

3. Which states allow waiver of the corporate opportunity doctrine?

In 2000, Delaware amended its General Corporation Law by adding Section 122(17) to permit a corporation to renounce in advance, either in its certificate of incorporation or by action of the board of directors, any interest in specific corporate opportunities or classes or categories of corporate opportunities. Section 122(17) in effect permits a corporation to limit the scope of the opportunities to which it lays claim, even in advance of when those opportunities arise. A number of other states have amended their corporate statutes to enact similar provisions, including Texas, Oklahoma, New Jersey, Nevada, Missouri, and Kansas.

In 2014, the American Bar Association Committee on Corporate Laws proposed amending the Model Business Corporation Act ("MBCA") to incorporate a similar provision. The proposal would allow corporations to include in their articles of incorporation a provision renouncing any, or one or more classes of, corporate opportunities with respect to directors and, following further approving action by the board of directors, with respect to officers.

4. What effect does the new law have in Washington?

The amendment to the WBCA has the positive effect of encouraging venture capital and private equity funds to select Washington as the jurisdiction of incorporation for their business interests. The advance waiver of business opportunity provisions, if implemented in a corporation's articles of incorporation, can help avoid the time-consuming process that was previously required to clear specific business

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opportunities and affords directors and officers greater protection from potential liability. To take advantage of this provision, investors in Washington corporations can condition their investment on inclusion of an advance waiver of business opportunities in the corporation's articles of incorporation. In addition, to the extent that there is no applicable advance waiver of business opportunities in the articles of incorporation, directors and officers of Washington corporations now will have a clear process for clearing those business opportunities with disinterested directors or shareholders.

Notes:

[1] *Guth v. Loft, Inc.*, 5 A.2d 503 (Del. 1939).

[2] Wash. Rev. Code § 23B.02.020(5)(k) (2015).

[3] Wash. Rev. Code § 23B.08.720(1)(a) (2015).

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