



State of Washington

DEPARTMENT OF FINANCIAL INSTITUTIONS

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ISGC – 2009 – 001 – DOB

April 3, 2009

[REDACTED]
[REDACTED]
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[REDACTED]

RE: Winding-up the Affairs of Business Development Corporation [REDACTED]

Dear Mr. Murray:

By your letter of February 4, 2009, to Brad Williamson, Director of Banks, you have asked for a formal interpretation of the Business Development Company Act, Chapter 31.24 RCW (“Act”), with respect to a complete assignment of assets, delegation of liabilities and liquidation of Business Development Corporation [REDACTED] (“BDC [REDACTED]”).

The Division of Banks has forwarded your inquiry to me in my capacity as general legal counsel for the Department of Financial Institutions (“Department”).

Inquiry. You have asked what your legal and regulatory requirements are associated with (1) ceasing new lending, (2) distributing funds as the existing loans pay-off, and (3) dissolving BDCEW when the last loan pays-off (which you estimate to be in about three years). Please bear in mind, however, that the interpretation contained in this letter would apply equally to an immediate sale of all the assets of BDCEW (including loans), followed by a distribution of the proceeds to creditors and shareholders (members) and then dissolution of the corporation. Therefore, this interpretation is written in such a way that you will have flexible guidance as you move through the protracted process of winding up the affairs of BDCEW.

Application of the Business Development Company Act. Although the BDC [REDACTED] charter pre-dates the major amendments to the Act in 2006, BDC [REDACTED] is still subject to all provisions of the Act as amended.

RCW 31.24.150 is the threshold provision governing voluntary dissolution and distribution of assets of a business development company. It declares:

“A business development company, upon the affirmative vote of two-thirds of the votes of the stockholders entitled to vote their shares, shall dissolve the business development company as provided by Title 23B RCW, *to the extent that Title 23B RCW is not in conflict with this chapter*. Upon dissolution of the business development company, none of the business development company's assets shall be distributed to the stockholders until all sums due the creditors thereof have been paid in full.”

[Emphasis added.]

Notwithstanding RCW 31.24.150, RCW 31.24.200 specifically provides that “Chapter 30.44 RCW applies to the insolvency and *liquidation of a business development company organized under this chapter*.” [Emphasis added.] This includes your proposed sale of assets and *voluntary* liquidation. Therefore, the procedures for *voluntary* liquidation set forth in Chapter 30.44 RCW, Washington Commercial Bank Act, principally govern a proper answer to your inquiry.

Application of Washington Commercial Bank Act. In this regard, several provisions of Chapter 30.44 RCW apply to your proposed situation. However, articles of dissolution and conduct of the shareholder meeting to dissolve the business development corporation are governed by the Chapter 23B.14 RCW, Business Corporations Act.

Pursuant to RCW 31.24.200 and RCW 30.44.170,¹ a business development corporation –

“ . . . may, *upon receipt of written permission from the director, go into voluntary liquidation by a vote of its stockholders owning two-thirds of its capital stock. When such liquidation is authorized, the directors of such corporation shall publish* in a newspaper published in the place where such

¹ Pursuant to RCW 31.24.200 and RCW 30.44.160, a business development company –

“ . . . *may* place itself under the control of the [Director of Banks] to be liquidated [according to Chapter 30.44 RCW] by posting a notice on its door as follows: ‘This [business development company] is in the hands of the State Director of Financial Institutions.’”

“Immediately upon the posting of such notice, the officers of such corporation shall notify the [Director of Banks] thereof by telegraph and mail. The posting of such notice or the taking possession of any [business development company] by the [Director of Banks] shall be sufficient to place all of its assets and property of every nature in [the Director of Bank’s] possession and bar all attachment proceedings.”

[Emphasis added.]

Unless you have issues where you anticipate disputes with creditors or shareholders and want to avoid attachment, the Director of Banks does not recommend the procedure under RCW 30.44.160. Rather, BDCEW should voluntarily sell all of its loan assets, retain the proceeds pending voluntary liquidation, and apply the method of voluntary liquidation set forth beginning at RCW 30.44.170.

Pursuant to RCW 31.24.200, the shareholder vote requirements of RCW 30.44.170 supersede RCW 23B.14.010. However, the procedure for a shareholder meeting to dissolve a business development corporation may follow the protocols laid out in RCW 23B.14.010.

corporation is located, once a week for four consecutive weeks, ***a notice requiring creditors of such corporation to present their claims against it for payment.***”

[Emphasis added.]

The following other provisions of Chapter 30.44 RCW are important as well:

- RCW 30.44.180 – This provision covers unclaimed dividends and other amounts owed to shareholders and creditors and provides for a five (5) year hold on any unclaimed dividends and other amounts, after which unclaimed funds shall escheat to the state in the same manner as an unclaimed bank deposit.
- RCW 30.44.190 – This provision covers the procedure for handling unclaimed personal property.
- RCW 30.44.210 – This provision covers sale of unclaimed personal property by the Director of Banks after two years.
- RCW 30.44.220 – This provision covers unclaimed proceeds of sale of personal property and escheat to the state after five (5) years.
- RCW 30.44.230 – This provision covers a five (5) year retention period for papers and documents by the Director of Banks unless prior claimed by the owner.
- RCW 30.44.260 – This provision covers the authority of the Director of Banks to destroy records after one (1) year.

The provisions set forth above are attached as Exhibit A for your reference.

Recommended Procedure According to Law. Once the last loan is paid off or you have changed strategy and elected to earlier sell the loans, the Division of Banks recommends the following procedure:

- Notice to Creditors.** Initiate notice to creditors pursuant to RCW 31.24.200 and RCW 30.44.170 above.
- Dispose of Assets.**
 - Inventory and then sell all remaining assets. Retain the proceeds of sale.
 - Terminate any leaseholds.
 - Pay all known creditors. Prepare accounting for Director of Banks.

- Pay all remainder in dividends, profit-sharing or equivalent to shareholders (bank members) or other investors.
- Distribute all papers and documents to owners.
- Tender all remaining records to the Director of Banks.

Articles of Dissolution.

- Board of Directors should call a meeting of the shareholders for the purpose of dissolving the business development corporation, or otherwise obtain unanimous consent in writing. Since your Articles of Incorporation do not provide for dissolution without shareholder (member) approval, you must have a shareholder meeting. See *Exhibit B*, RCW 23B.14.010.
- In lieu of unanimous consent in writing, conduct a shareholder meeting as required by the Business Corporations Act. See *Exhibit B*, RCW 23B.14.020.
- Tender to Division of Banks:
 - Resolution of shareholder meeting.
 - Articles of Dissolution.
 - Revenue Clearance Certificate.
- Division of Banks then files with the Secretary of State articles of dissolution and a revenue clearance certificate. See *Exhibit B*, RCW 23B.14.030.

This interpretation may be subject to additional requirements of the Division of Banks, including payment of all outstanding assessments and fees or other conditions of any examination of BDC [REDACTED] by the Division of Banks, and other requirements of the Secretary of State not ascertainable in the Business Corporations Act at Chapter 23B.14 RCW. Prior to your proceeding, the Division of Banks will verify, upon your request, whether the Corporations Division of the Secretary of State may have other technical requirements not readily ascertainable by statute.

If you have any further questions, please do not hesitate to call upon Gloria McVey, Program Manager, Division of Banks, at (360) 902-8704 or gmcvey@dfi.wa.gov.

Yours very truly,

WASHINGTON STATE DEPARTMENT OF
FINANCIAL INSTITUTIONS

By:

Joseph M. Vincent
General Counsel

EXHIBIT A

30.44.180

Unclaimed dividends on voluntary liquidation.

Whenever any bank or trust company shall voluntarily liquidate, any dividends to depositors or other creditors of such bank or trust company remaining uncalled for and unpaid at the conclusion of the liquidation shall be transmitted to the director and shall be deposited by him or her in a bank or trust company to his or her credit in trust for the benefit of the persons entitled thereto, and shall be paid by him or her to them upon receipt of satisfactory evidence of their right thereto.

All moneys so deposited remaining unclaimed for five years after deposit shall escheat to the state for the benefit of the permanent school fund and shall be paid by the director into the state treasury. It shall not be necessary to have the escheat adjudged in a suit or action.

30.44.190

Disposition of unclaimed personal property.

Whenever any bank or trust company shall be liquidated, voluntarily or involuntarily, and shall retain in its possession at the conclusion of the liquidation, uncalled for and unclaimed personal property left with it for safekeeping, such property shall, in the presence of at least one witness, be inventoried by the liquidating agent and sealed in separate packages, each package plainly marked with the name and last known address of the person in whose name the property stands on the books of the bank or trust company. If the property is in safe deposit boxes, such boxes shall be opened by the liquidating agent in the presence of at least one witness, and the property inventoried, sealed in packages and marked as above required. All the packages shall be transmitted to the director, together with certificates signed by the liquidating agent and witness or witnesses, listing separately the property standing in the name of any one person on the books of the bank or trust company, together with the date of inventory, and name and last known address of the person in whose name the property stands.

30.44.210

Final notice after two years — Sale.

After the expiration of two years from the time of mailing the notice, the director shall mail in a securely closed postpaid registered letter, addressed to the person at his or her last known address, a final notice stating that two years have elapsed since the sending of the notice referred to in RCW 30.44.200, and that the director will sell all the property or articles of value set out in the notice, at a specified time and place, not less than thirty days after the time of mailing the final notice. Unless the person shall, on or before the day mentioned, claim the property, identify himself or herself and offer evidence of his or her right thereto, to the satisfaction of the director, the director may sell all the property or articles of value listed in the notice, at public auction, at the time and place stated in the final notice: PROVIDED, That a notice of the time and place of sale has been published once within ten days prior to the sale in a newspaper of general

circulation in the county where the sale is held. Any such property held by the director, the owner of which is not known, may be sold at public auction after it has been held by the director for two years, provided, that a notice of the time and place of sale has been published once within ten days prior to the sale in a newspaper of general circulation in the county where the sale is held.

30.44.220

Disposition of proceeds — Escheat.

The proceeds of such sale shall be deposited by the director in a bank or trust company to his or her credit, in trust for the benefit of the person entitled thereto, and shall be paid by him or her to such person upon receipt of satisfactory evidence of his or her right thereto.

All moneys so deposited remaining unclaimed for five years after deposit shall escheat to the state for the benefit of the permanent school fund and shall be paid by the director into the state treasury. It shall not be necessary to have the escheat adjudged in a suit or action.

30.44.230

Procedure as to papers, documents, etc.

Whenever the personal property held by a liquidated bank or trust company shall consist either wholly or in part, of documents, letters, or other papers of a private nature, such documents, letters, or papers shall not be sold, but shall be retained by the director for a period of five years, and, unless sooner claimed by the owner, may be thereafter destroyed in the presence of the director and at least one other witness.

30.44.260

Destruction of records after liquidation.

Where any files, records, documents, books of account or other papers have been taken over and are in the possession of the director in connection with the liquidation of any insolvent banks or trust companies under the laws of this state, the director may, in his or her discretion at any time after the expiration of one year from the declaration of the final dividend, or from the date when such liquidation has been entirely completed, destroy any of the files, records, documents, books of account or other papers which may appear to the director to be obsolete or unnecessary for future reference as part of the liquidation and files of his or her office.

EXHIBIT B

23B.14.010

Dissolution by initial directors, incorporators, or board of directors.

(1) A majority of the initial directors, or, if initial directors were not named in the articles of incorporation and have not been elected, a majority of the incorporators, of a corporation that has not issued shares may authorize dissolution of the corporation.

(2) Unless prohibited by the articles of incorporation, a majority of the board of directors may authorize dissolution of the corporation without approval by the shareholders, upon a finding by the board of directors that:

(a) The corporation is not able to pay its liabilities as they become due in the usual course of business, or the corporation's assets are less than the sum of its total liabilities; and

(b) Ten or more days have elapsed since the corporation gave notice to all shareholders, whether or not they would otherwise be entitled to vote under RCW [23B.14.020](#), of the intent of the board of directors to authorize dissolution under this subsection.

23B.14.020

Dissolution by board of directors and shareholders.

(1) A corporation's board of directors may propose dissolution for submission to the shareholders.

(2) For a proposal to dissolve to be adopted:

(a) The board of directors must recommend dissolution to the shareholders unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders; and

(b) The shareholders entitled to vote must approve the proposal to dissolve as provided in subsection (5) of this section.

(3) The board of directors may condition its submission of the proposal for dissolution on any basis, including the affirmative vote of holders of a specified percentage of shares held by any group of shareholders not otherwise entitled under this title or the articles of incorporation to vote as a separate voting group on the proposed dissolution.

(4) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed dissolution either (a) by giving notice of a shareholders' meeting in accordance with RCW 23B.07.050 and stating that the purpose or one of the purposes of the meeting is to consider dissolving the corporation, or (b) in accordance with the requirements of RCW 23B.07.040 for taking action on the proposal without a meeting.

(5) In addition to any other voting conditions imposed by the board of directors under subsection (3) of this section, the proposal to dissolve must be approved by two-thirds of the voting group comprising all the votes entitled to be cast on the proposal, and of each other voting group entitled under the articles of incorporation to vote separately on the proposal. The articles of incorporation may require a greater or lesser vote than provided in this subsection, or a greater or lesser vote by any separate voting groups provided for in the articles of incorporation, so long as the required vote is not less than a majority of all the votes entitled to be cast on the proposal and of each other voting group entitled to vote separately on the proposal.

RCW 23B.14.030

Articles of dissolution — Publication of notice.

(1) At any time after dissolution is authorized under RCW 23B.14.010 or 23B.14.020, the corporation may dissolve by delivering to the secretary of state for filing:

(a) A copy of a revenue clearance certificate issued pursuant to RCW 82.32.260; and

(b) Articles of dissolution setting forth:

(i) The name of the corporation;

(ii) The date dissolution was authorized; and

(iii) A statement that dissolution was duly authorized by the initial directors, the incorporators, or the board of directors in accordance with RCW 23B.14.010, or was duly proposed by the board of directors and approved by the shareholders in accordance with RCW 23B.14.020.

(2) A corporation is dissolved upon the effective date of its articles of dissolution.

(3) A dissolved corporation shall, within thirty days after the effective date of its articles of dissolution, publish notice of its dissolution and request that persons with claims against the dissolved corporation present them in accordance with the notice. The notice must be published once a week for three consecutive weeks in a newspaper of general circulation in the county where the dissolved corporation's principal office (or, if none in this state, its registered office) is or was last located. The notice must also describe the information that must be included in a claim, provide a mailing address where a claim may be sent, and state that claims against the dissolved corporation may be barred in accordance with the provisions of this chapter if not timely asserted. A dissolved corporation's failure to publish notice in accordance with this subsection does not affect the validity or the effective date of its dissolution.

(4) For purposes of this chapter, "dissolved corporation" means a corporation whose dissolution has been authorized in accordance with RCW 23B.14.010 or 23B.14.020 and whose articles of dissolution have become effective, and includes any trust or other successor entity to which the remaining assets of such a corporation are transferred subject to its liabilities for purposes of liquidation in accordance with RCW 23B.14.050.