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A NEW CORPORATE STATUTE: ADDING EXPLICIT PROCEDURES TO MARYLAND’S CORPORATE OPPORTUNITY WAIVER PROVISION

Martha M. Effinger*

I. INTRODUCTION

This Comment will reflect on the history of the duty of loyalty and the corporate opportunity doctrine to further understand how and why corporate opportunity waivers were codified; it will also identify why states should look into codifying procedures to disclose conflict of interests within the waiver provisions.1 This Comment will analyze the corporate opportunity waiver provision under the Corporations & Associations title of the Maryland Annotated Code under the Corporations subtitle.2

A director may have a business opportunity, which could be deemed a corporate opportunity.3 The corporate opportunity doctrine came from the common law duty of loyalty owed by the directors and officers to the corporation.4 It is most commonly defined as the taking of a business opportunity from a corporation by one of its directors.5

After several years of litigation regarding what was considered a corporate opportunity, and corporations attempting to limit or eliminate the duty of loyalty through contracts, Delaware codified corporate opportunity waivers.6 Corporate opportunity waivers allow corporations to renounce, in advance, any corporate opportunities in

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1. See infra Parts II–V.
2. See infra Section III.B.
their charter or by resolution. In 2014, Maryland enacted a very similar waiver provision. There is no language in the enacted waiver provision that provides procedures for corporations to adopt waivers, just language granting them that power. Conflicts of interest could occur when adopting a waiver, and with procedures in place directors can be held accountable and shareholders can be more protected. Improperly taking a corporate opportunity could result in a loss for the corporation, which affects the shareholders’ interests in profits and the corporation’s wellbeing.

This Comment will argue that although all directors have a duty of loyalty, a more straightforward and direct requirement should be placed within the statute. There are many models that provide effective examples, which set out procedures for adopting corporate opportunity waivers. Corporate opportunity waiver provisions should explicitly state procedures that require full disclosure of any conflicts of interest, all material facts, and allow disinterested directors or shareholders to vote to adopt waivers.

Four parts will follow this introduction. Part II will provide background on the duty of loyalty and the corporate opportunity doctrine, including the importance of the duty of loyalty and how the corporate opportunity doctrine arose. Part III will provide background on how and why corporate opportunity waivers were adopted and codified, first in Delaware, and then in many other states, including Maryland. Part IV will provide the pitfalls of Maryland’s statute and what models could be helpful to resolve the issue, such as including language that requires a board of directors to follow certain procedures. Part V will review the models and

7. See Rauterberg & Talley, supra note 6, at 1095.
9. See id.
10. See Rauterberg & Talley, supra note 6, at 1116.
11. See id.
12. See infra Part IV.
14. See infra Part V.
15. See infra Part II.
16. See infra Part III.
17. See infra Part IV.
provide a recommended provision for Maryland’s corporate opportunity waiver.  

II. HISTORY AND BACKGROUND OF THE DUTY OF LOYALTY AND THE CORPORATE OPPORTUNITY DOCTRINE

The root of the corporate opportunity waiver is the duty of loyalty and the corporate opportunity doctrine. Directors and officers have a fiduciary duty to the corporation. Directors generally have three fiduciary obligations towards the corporation—the duties of care, good faith, and loyalty. “The fiduciary duty of a corporation's director is not intermittent or occasional, but instead the constant compass by which all director actions for the corporation and interactions with its shareholders must be guided.”

The following subsections will provide the history of the duty of loyalty, the history of the corporate opportunity doctrine, the various tests the courts have created and implemented, and the test that Maryland utilizes.

A. Duty of Loyalty

The duty of loyalty in corporate law has been around since at least the mid-nineteenth century, and has been described as “preeminent in the constellation of the fiduciary duties recognized by common law.” The duty of loyalty demands fiduciaries to advance, in good faith and within their authority, the corporation and its objectives. A “duty of loyalty is generally owed by directors, officers, and

18. See infra Part V.
19. See Rauterberg & Talley, supra note 6, at 1086–87.
21. Id.
22. Id. (citing Storetrax.com, Inc. v. Gurland, 915 A.2d 991 (Md. 2007)).
23. See infra Section II.A.
24. See infra Section II.B.
25. See infra Section II.C.
26. See infra Section II.D.
employees to the corporation.” Additionally, the duty of loyalty is often associated with conflict of interests between directors and officers, and the corporation. It also requires that a fiduciary provide “an undivided and unselfish loyalty to the corporation” so that there is “no conflict between duty and self-interest.”

B. Corporate Opportunity Doctrine

The corporate opportunity doctrine “is a common law doctrine that limits a corporate fiduciary’s ability to pursue new business prospects individually without first offering them to the corporation.” It arose from the common law duty of loyalty in order to clarify a fiduciary’s duty and minimize court involvement, similar to the impact of the business judgment rule. It remains one of the most important and discussed areas of corporation law today.

If directors or officers violate the corporate opportunity doctrine, then essentially, they are not acting with a duty of loyalty, and therefore, violating their fiduciary duty. The purpose behind the corporate opportunity doctrine is to “remov[e] . . . any incentive [for] directors and officers to benefit personally at the expense of the corporation.”

Under the corporate opportunity doctrine, directors and officers are prohibited from “personally taking advantage” of opportunities that could be taken by their corporation. If directors or officers are found to have taken a corporate opportunity then “that . . . acquisition

30. Id.
33. MODEL BUS. CORP. ACT § 8.70 cmt. 1 (AM. BAR ASS'N 2016); Business Judgment Rule, BLACK'S LAW DICTIONARY (10th ed. 2014) (“The rule shields directors and officers from liability for unprofitable or harmful corporate transactions if the transactions were made in good faith, with due care, and within the directors’ or officers’ authority.”).
34. Rauterberg & Talley, supra note 6, at 1087.
37. Wertz, supra note 5, at *1.
violated [their] . . . fiduciary duties of loyalty, good faith, and fair dealing toward the corporation.”

For instance, a director may discuss at a board of directors meeting an opportunity that the director has been offered and the corporation must decide if it will reject or take advantage of the opportunity. “[I]f the corporation rejects the opportunity,” then typically the director is allowed to take the opportunity for the director’s own use. If the corporation accepts the opportunity, then the director must relinquish it to the corporation or simply not engage in the opportunity.

The corporate opportunity doctrine requires a director or officer to first offer the opportunity to the board of directors. If the director or officer does not disclose the opportunity and simply takes it for themselves, then the corporation may seek damages. Further, the corporate opportunity does not apply if the corporation, or an agent thereof, has knowledge and assents to the action of the supposed usurper. However, not all business opportunities are deemed corporate opportunities.

C. Corporate Opportunity Tests

Determining what is deemed a corporate opportunity has been highly litigated, and various tests have arisen in order for courts to rule determinatively. Courts have generally developed four main tests: (1) the line of business test, (2) the business interest or expectancy test, (3) the fairness test, and (4) the Miller two-step test.

First is the line of business test, which is sometimes referred to as the Guth v. Loft test. The Delaware court identified four elements

38. FLETCHER ET AL., supra note 3.
39. See HANKS, supra note 36.
40. Id. (“Only if the corporation rejects the opportunity may a director or officer exploit it for his [or her] own benefit.”); see also Wertz, supra note 5, at *1.
42. Wertz, supra note 5, at *1.
43. Id.
44. FLETCHER ET AL., supra note 3.
46. See generally Wertz, supra note 5.
47. See id. at *1.
when applying this test: (1) the corporation is “financially able to undertake” the opportunity; (2) the opportunity is “in the line of the corporation’s business;” (3) the corporation has an “interest or . . . expectancy” in the opportunity; and (4) by pursuing the opportunity the director or officer will be in a position that would impair their duties to the corporation.  

Second is the business interest/expectancy test. This test states that a business opportunity can be identified if the corporation has a foothold in an interest that already exists or an “expectancy growing out of an existing right.” This standard is narrower than the business line test. The highest court in Georgia uses the business interest test. The court held that although a business “had long-standing [deals] with the customers in question” and the purchases were a “large percentage of the corporation’s business,” the customers were not restricted to that corporation. Therefore, there was no taking of a corporate opportunity.

Third is the fairness test. This test relies solely on “what is fair and equitable under the circumstances.” In Durfee v. Durfee & Canning, Inc., a Massachusetts court declared that the standard of unfairness should be used. The court’s reasoning was that a director has a fiduciary duty towards the corporation and “taking advantage of an opportunity for his personal [benefit] when the interests of the corporation justly call[s] for protection.”

Finally, the Miller two-step test combines the line of business test and the fairness test. First, the courts ask if the business opportunity is a “corporate” opportunity by using a “flexible application” of the line of business test. Here, however, the fact-finder answers this question, not only using the factors in Guth, but others as well. If the fact-finder deems the opportunity a non-

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49. Wertz, supra note 5, at *3.
50. Id.
51. Id.
52. Id.
54. Wertz, supra note 5.
56. Id. (quoting BALLANTINE ON CORPORATIONS 204–05 (rev. ed. 1946)) (emphasis added).
57. Wertz, supra note 5, at *3–4.
58. Id. at *4.
59. Id. The other factors include:
corporate opportunity, then the director is not held liable.\textsuperscript{60} If the opportunity is deemed a corporate opportunity, then, in step two, the fairness test is utilized.\textsuperscript{61} The facts and circumstances are reviewed and closely examined for “equitable considerations existing prior to, at the time of, and following the officer’s acquisition.”\textsuperscript{62} The court considered several factors in the second step of the test.\textsuperscript{63} Many of them consider the relationship of the director to the corporation and how, if at all, the director “exercised . . . diligence, devotion, care, and fairness towards the corporation,” which a reasonable person in a similar position and circumstance would act.\textsuperscript{65}

\section*{D. Maryland’s Corporate Opportunity Test}

Maryland has “adopted the interest or [reasonable] expectancy test.”\textsuperscript{66} In \textit{Shapiro v. Greenfield}, the Maryland Court of Special Appeals described the interest or reasonable expectancy test, and stated that a director or officer may not usurp the opportunity if “the corporation could realistically expect to seize and develop the opportunity.”\textsuperscript{67} In Maryland, “corporate personnel are ‘precluded from diverting unto themselves opportunities which in fairness ought to belong to the corporation.’”\textsuperscript{68} The Maryland Court of Special Appeals defines the corporate opportunity doctrine as “prohibit[ing] a fiduciary from usurping, for his [or her] personal benefit, a business

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\item the nature of the officer’s relationship to the management and control of the corporation; whether the opportunity was presented to him in his official or individual capacity; his prior disclosure of the opportunity to the board of directors or shareholders and their response; whether or not he used or exploited corporate facilities, assets, or personnel in acquiring the opportunity; whether his acquisition harmed or benefited the corporation; and all other facts and circumstances bearing on the officer’s good faith and whether he exercised the diligence, devotion, care, and fairness toward the corporation which ordinarily prudent men would exercise under similar circumstances in like positions.
\end{itemize}

\begin{itemize}
\item \textit{Id.} at *5.
\item \textit{Id.}
\item \textit{Id.}
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opportunity rightfully belonging to the corporation.”69 It is clear that “over time [the court] developed its own labyrinth of rules, subcategories, standards, and tests,” and practically every jurisdiction follows a different test.70

III. ADOPTION OF CORPORATE OPPORTUNITY WAIVER

Consequently, as the various tests developed, the corporate opportunity doctrine became unpredictable and over complicated.71 In 2000, Delaware codified the first corporate opportunity waiver provision.72 The provision was added to Delaware’s corporate statute under the specific powers subtitle.73 This provision allows corporations to renounce, in advance, and in its charter or “by action of its board of directors” corporate opportunities.74 In the years following the enactment, eight other states joined Delaware and “grant[ed] their own incorporated entities the statutory authority to execute corporate opportunity waivers.”75

Corporate opportunity waivers allow a board of directors to renounce opportunities.76 This means that directors and officers can move forward if they are interested in a business opportunity that has already been renounced without first offering it to the corporation.77 Consequently, corporate opportunity waivers not only have the ability to simplify the corporate opportunity doctrine, but could encourage organizations to incorporate in states that have adopted a

70. Rauterberg & Talley, supra note 6, at 1087–88; see also infra Section II.C.
71. Rauterberg & Talley, supra note 6, at 1087–88.
72. DEL. CODE ANN. tit. 8, § 122(17) (West 2018).
73. Id.
74. Rauterberg & Talley, supra note 6, at 1095; DEL. CODE ANN. tit. 8 § 122(17) (West 2018).
75. See DEL. CODE ANN. tit. 8 § 122; 10978; see also KAN. STAT. ANN. § 17-6102(q) (West 2018); MD. CODE ANN., CORPS. & ASS’NS § 2-103(17) (West 2018); MO. REV. STAT. § 351.385(16) (West 2016); NEV. REV. STAT. ANN. § 78.070(8) (West 2017); N.J. STAT. ANN. § 14A:3-1(q) (West 2018); OKLA. STAT. ANN. tit. 18 § 1016(17) (West 2018); TEX. BUSINESS ORGS. CODE ANN. § 2.101(21) (West 2017); WASH. REV. CODE § 23B.02.020(5)(k) (West 2018).
76. See tit. 8, § 122; 17-6102(q); CORPS. & ASS’NS § 2-103(17); § 351.385(16); § 78.070(8); § 14A:3-1(q); tit. 18, § 1016(17); BUS. ORGS. § 2.101(21); § 23B.02.020(5)(k).
77. See Rauterberg & Talley, supra note 6, at 1077–78.
waiver provision. The simplification, practicability, and balancing of interests that a waiver provision provides proves beneficial to corporations.

There are two main interests that are balanced in these provisions. One is the shareholders’ general interest in the wellbeing of the corporation. Another is a director’s interest in certainty when they become a director, such as knowing what opportunities will be available to him or her.

Additionally, it is in the interest of the corporation to be a “healthy, growing and profitable business organization[].” A study on corporations that have adopted opportunity waivers found that the corporations “are on average, reasonably established firms with moderate-to-high asset values.” Furthermore, “[t]hey typically generate sizeable revenues, and they tend to deliver larger overall market returns to their capital investors by comparison to other public companies.”

Moreover, corporations benefit from corporate opportunity waivers beyond the simplification of the doctrine and balancing of interests. Georgia’s commentary on their waiver statute provides practical business-related reasons for adopting corporate opportunity waivers. The comment, in pertinent part, states that the subsection “will allow corporations to attract, for example, directors who might be reluctant to jeopardize future business opportunities through service on the board without an advance agreement clarifying any obligation they might have to present opportunities to the corporation or to refrain from pursuing opportunities presented to them.” The commentary goes on to state that directors who wish to engage in

78. See generally id. at 1129 (discussing Delaware's significant over representation of companies that embrace corporate opportunity waivers and possible explanations for such statistics).
79. Id. at 1079–80.
80. Id. at 1079.
82. Corporate Governance, INVESTOPEDIA, https://www.investopedia.com/terms/c/corporategovernance.asp (last visited Jan. 13, 2019) (“Good corporate governance creates a transparent set of rules and controls in which shareholders, directors and officers have aligned incentives.”).
83. Rauterberg & Talley, supra note 6, at 1081.
84. Id. at 1080–81.
85. Id. at 1081.
86. See id. at 1117.
87. GA. CODE ANN. § 14-2-870 (West 2018).
88. Id. (emphasis added).
“venture capital financing, financial advisory services or other businesses in which they receive . . . a variety of business opportunities from third parties with no relationship to the corporation” would more readily agree to a position.\textsuperscript{89} This is primarily because the directors have the ability to know beforehand what opportunities they may still take advantage of without fear of usurping one from the corporation.\textsuperscript{90}

There are many reasons a state may enact corporate opportunity waivers.\textsuperscript{91} The following sections will explain why Delaware created the corporate opportunity waiver and discuss Delaware and Maryland’s waiver provisions.\textsuperscript{92}

\textbf{A. Delaware Codified the First Corporate Opportunity Waiver Provision to Clarify Ambiguous Case Law}

Delaware, as with most issues concerning corporation law,\textsuperscript{93} was the first state to adopt the corporate opportunity waiver statute in 2000.\textsuperscript{94} Delaware “dramatically departed from tradition” when it adopted this statute, and since then, eight states have enacted similar statutes.\textsuperscript{95} The statute was enacted to clarify \textit{Sigman v. Tri-Star}, in which companies attempted to limit or eliminate the duty of loyalty that a director owes to the corporation in the drafting of an article of a contract between the companies.\textsuperscript{96} The court’s ruling left room for questions and interpretation.\textsuperscript{97} The court held a particular article of the contract invalid, as it may “operate to eliminate or limit the directors’ liability for breach of their duty of loyalty to Tri-Star or its

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\item \textsuperscript{89} \textit{Id.}
\item \textsuperscript{90} \textit{Id.}
\item \textsuperscript{91} \textit{See infra} notes 95–96 and accompanying text.
\item \textsuperscript{92} \textit{See infra} Section III.A–B.
\item \textsuperscript{93} \textit{Rauterberg & Talley, supra} note 6, at 1101.
\item \textsuperscript{94} \textit{Id.} at 1077–78.
\item \textsuperscript{95} \textit{Id.; see also} KAN. STAT. ANN. § 17-6102(q); MD. CODE ANN., CORPS. & ASS’NS § 2-103(17) (West 2018); MO. REV. STAT. § 351.385(16) (West 2016); NEV. REV. STAT. ANN. § 78.070(8) (West 2017); N.J. STAT. ANN. § 14A:3-1(q) (West 2018); OKLA. STAT. ANN. tit. 18 § 1016(17) (West 2018); TEX. BUS. ORGS. CODE ANN. § 2.101(21) (West 2017); WASH. REV. CODE § 23B.02.050(5)(k) (West 2018).
\item \textsuperscript{97} \textit{See Siegman}, 1989 WL 48746, at *8.
\end{itemize}
shareholders.” The court reasoned that if a possible scenario were found when a director could breach their duty without real consequences then the article would be invalid. The court postulated the following scenario:

Under this intricately drafted provision, a case could possibly arise where a Tri-Star director who is also a director of Coca-Cola or Time (a) learns of a corporate opportunity that should otherwise be directed to Tri-Star, (b) causes that opportunity to be offered to himself, but not “in writing,” (c) alternatively, causes the opportunity to be offered to himself in writing but not “solely in his . . . capacity as a [Tri-Star] director,” and then (d) directs the opportunity to Coca-Cola or Time but not to Tri-Star. By negative implication, under Article Sixth that director would not be liable to Tri-Star or its shareholders “for breach of any fiduciary duty” arising out of that conduct.

This excerpt outlines the concerns about the duty of loyalty in corporate opportunity waivers, such as protecting shareholders from directors taking advantage of their position. It also illustrates the situation the waiver provision aims to eliminate. Therefore, by codifying the advance waivers, the duty of loyalty cannot be limited or eliminated through a contract, like the companies attempted in Siegman, and the directors’ fiduciary duty is upheld. Thus, the waiver provision is now statute-based, rather than solely based on common law, unlike the corporate opportunity doctrine. The waiver provision gives corporations the power to adopt waivers for themselves, in some ways making the duty of loyalty a business judgment. The legislative summary to Delaware’s waiver provision states, in relevant part:

98. Id.
99. Id.; Rauterberg & Talley, supra note 6, at 1092; see also Del. S. Res. 363, supra note 96 (“The subsection is intended to eliminate uncertainty regarding the power of a corporation to renounce corporate opportunities in advance raised in Siegman v. Tri-Star Pictures, Inc.”) (citation omitted) (emphasis added).
101. See id.
102. See supra note 100 and accompanying text.
103. DEL. CODE ANN. tit. 8, § 102(b)(7) (West 2018); Del. S. Res. 363, supra note 96.
104. Del. S. Res. 363, supra note 96; MBCA § 8.70.
105. See Del. S. Res. 363, supra note 96.
[The provision] permits the corporation to determine in advance whether a specified business opportunity or class or category of business opportunities is a corporate opportunity of the corporation rather than to address such opportunities as they arise. The subsection does not change the level of judicial scrutiny that will apply to the renunciation of an interest or expectancy of the corporation in a business opportunity, which will be determined based on the common law of fiduciary duty, including the duty of loyalty.106

Delaware clarified the Seigman opinion and simplified the corporate opportunity doctrine without compromising the duty of loyalty.107 However, there is no language in the actual waiver provision regarding the duty of loyalty, disclosure, or any procedures for a corporation to adopt such waivers.108 Although it does state that judicial scrutiny will still apply, it would most likely be minimal compared to interference in the past.109 The Delaware provision states:

Renounce, in its certificate of incorporation or by action of its board of directors, any interest or expectancy of the corporation in, or in being offered an opportunity to participate in, specified business opportunities or specified classes or categories of business opportunities that are presented to the corporation or 1 or more of its officers, directors or stockholders.110

Essentially, a board is allowed to disclaim any interest in possible corporate opportunities in their articles of incorporation, sometimes referred to as a charter, or by resolution of the board.111 The board can name specific opportunities or categories.112 For example, the charter of an online retail start-up company may provide that a director may take opportunities in online markets.113 This would allow the company to obtain directors who may be interested in

106. Id. (emphasis added).
107. See id.
108. See id.
109. See supra note 33 and accompanying text.
110. DEL. CODE ANN. tit. 8, § 122(17) (West 2018).
111. Id.
112. Id.
113. See id.
another company, develop an experienced board, and gain shareholders by showing an experienced board of directors is involved.\footnote{See Rauterberg & Talley, supra note 6, at 1079–80.}

Additionally, the fact that the corporate opportunity waiver may be executed in a resolution, not just the charter, is an intriguing factor since they are easily passed procedurally.\footnote{Rauterberg & Talley, supra note 6, at 1097. Compare Md. Code Ann., Corps. & Ass’ns § 2-408 (West 2018) (stating procedures for actions by directors), with Md. Code Ann., Corps. & Ass’ns § 2-604 (West 2018) (stating procedures for amending the charter with outstanding stock).} Other provisions in Delaware’s code that allow the waiver of fiduciary duties are required to be made in the charter.\footnote{Rauterberg & Talley, supra note 6, at 1097.} Here, Delaware does not even mention the directors continued fiduciary duty; it is only mentioned in the legislative summary.\footnote{See supra notes 106, 108 and accompanying text; see also Del. S. Res. 363, supra note 96.} As previously mentioned, the legislative summary states that the amendment “does not change the level of judicial scrutiny” as it applies to the duty of loyalty.\footnote{See also Del. S. Res. 363, supra note 96.} This means that corporate opportunity waivers should be looked at like most other decisions of the board, and that disinterested directors should make them after disclosure by the director or directors that have a conflicting interest.\footnote{See Rauterberg & Talley, supra note 6, at 1097–98.}

B. Fourteen Years Later, Maryland Adopted the Corporate Opportunity Waiver Provision

In 2014, Maryland followed Delaware and several other states by adopting the corporate opportunity waiver. In relevant part, Maryland’s corporate opportunity waiver states:

Unless otherwise provided by law or its charter, a Maryland corporation has the general powers, whether or not they are set forth in its charter, to . . . Renounce, in its charter or by resolution of its board of directors, any interest or expectancy of the corporation in, or in being offered an opportunity to participate in, business opportunities or classes or categories of business opportunities that are: (i) Presented to the corporation; or (ii) Developed by or presented to one or more of its directors or officers.

This is very similar to Delaware’s provision. For example, a waiver may not only be made in a charter, but also by a resolution of the board of directors. Further, no formal procedures are referenced for adopting a corporate opportunity waiver. Although corporate opportunity waiver provisions are an excellent step forward in corporation law, there are still some shortcomings.

There is some ambiguity in the waiver provision regarding the duty of loyalty and conflicts of interest. The duty of loyalty, although an underlying principle in directors’ actions, is not specifically mentioned in this provision. For instance, if a director requests an amendment to the charter or a resolution to renounce a particular corporate opportunity, but the director was already approached about possible involvement in the opportunity, then there is most likely a conflict of interest.

123. See supra note 122 and accompanying text.
125. Id.
126. Compare supra note 125 and accompanying text, with supra note 110 and accompanying text.
127. Corps. & Ass’ns § 2-103(15).
128. See id.
129. See infra text accompanying notes 130–32.
130. See Corps. & Ass’ns § 2-103(15).
131. Id.
132. See id.
However, the waiver provision does not compel disclosure explicitly. If a conflict of interest exists, the director could still propose the resolution. Although the adoption of the waiver could be challenged later, the provision does not specifically require any disclosure or voting procedure.

In the alternative, if the waiver provision required procedures for adopting corporate opportunities waivers, such as full disclosure and approval by disinterested directors, then it would provide guidance and there would be a standard for the directors to follow that procedure. As many of the waiver provisions now stand, the conflict of interest duty of loyalty is implied, though not explicitly stated it arguably should be.

IV. DUTY OF LOYALTY AND CONFLICTS OF INTERESTS IN PROCEDURES FOR ADOPTING WAIVERS

Although directors have an underlying duty of loyalty, Maryland should adopt wording that explicitly states the procedure for adopting corporate opportunity waivers. The new provision should require a director to disclose all material facts and state that the waiver needs to be approved by disinterested directors or shareholders. In order to have a successful provision, the new provision must balance both the shareholders’ and the directors’ interests. The following statutory models address these interests differently. In fact, Maryland’s Partnership title already has similar director disclosure wording that could be utilized.

In comparison, the American Law Institute (ALI) developed a corporate opportunity waiver, but still requires the director to offer the opportunity to the corporation. The Model Business Corporation Act (MBCA) created a business opportunities section, which refers to other sections regarding procedures and requirements

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133.  Id.
134.  Id.
135.  Id.
136.  See id.
137.  See id.
139.  See discussion infra Part V.
140.  See supra text accompanying notes 80–82.
141.  See infra Sections IV.A–D.
142.  See infra Section IV.A.
143.  See infra Section IV.B.
for adopting corporate opportunity waivers. Finally, Georgia’s corporate opportunity waiver statute is based off of the MBCA, but it balances shareholder and director interests differently. Each of these provisions is discussed below.

A. Maryland’s Revised Uniform Partnership Act

Maryland’s waiver provision fails to explicitly state procedures for a corporation’s board of directors to adopt corporate opportunity waivers. However, Maryland’s Revised Uniform Partnership Act regarding non-waivable provisions explicitly states, in relevant part:

(i) The partnership agreement may identify specific types or categories of activities that do not violate the duty of loyalty; however, the partnership agreement may not be amended to expand or add any specific types or categories of activities that do not violate the duty of loyalty without the consent of all partners after full disclosure of all material facts; or

(ii) All of the partners or a number or percentage of not less than a majority of disinterested partners specified in the partnership agreement may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty . . .

Subsection (i) permits the partnership agreement to identify categories of opportunities “that do not violate the duty of loyalty.” A partnership agreement is similar to a corporation’s charter and bylaws; all three documents lay out key information about the entity and the relations between its agents—partners or directors. This subsection also states that the partnership agreement may not be “amended to expand or add” any opportunity or category of opportunity without full disclosure and “consent of all partners.” On the other hand a corporation may amend its charter “from time to time in any respect[;]” depending on the corporation’s circumstances

144. See infra Section IV.C.
145. See infra Section IV.D.
148. Id.
150. Corps. & Ass’ns § 9A-103(b)(3).
the amendment would be fairly easy and may only require approval by a majority of the board.\textsuperscript{151} However, if there is outstanding stock, in order to amend the corporation’s charter a board must obtain board approval and approval from two-thirds of the shareholder votes.\textsuperscript{152} A waiver provision may not need unanimous approval because the provision appears to allow for a resolution or a charter, unlike a partnership, which requires unanimous consent.\textsuperscript{153}

Subsection (ii) allows disinterested partners to approve acts that would violate the duty of loyalty after full disclosure.\textsuperscript{154} This authorization may only be made by all, or at least a majority, of the disinterested partners listed in the agreement.\textsuperscript{155} However, there is no language that would allow this to occur in advance, except as provided in subsection (i)—i.e. in the partnership agreement.\textsuperscript{156}

This is an excellent example of a simple and effective wording that includes procedures and requires disclosure.\textsuperscript{157} Further, although this is wording of a previously enacted Maryland statute, it was not drafted or tailored to corporation law.\textsuperscript{158} Here, the statute only mentions the partnership agreement, as it is the controlling document, and is similar to a corporation’s charter.\textsuperscript{159} However, Maryland corporate law gives deference to the corporation’s bylaws and resolutions as well.\textsuperscript{160} Therefore, the new provision would also provide for those documents.\textsuperscript{161}

One of the weaknesses of Maryland’s current waiver provision is that it is only a subsection of the general powers subtitle.\textsuperscript{162} In that

\textsuperscript{151} MD. CODE ANN., CORPS. & ASS’NS § 2-602 (West 2018). See generally MD. CODE ANN., CORPS. & ASS’NS §§ 2-601–12 (West 2018) (stating the restrictions and circumstances for amending or restating the charter).

\textsuperscript{152} CORPS. & ASS’NS § 2-604.

\textsuperscript{153} Compare id. (requiring a two-thirds vote to pass a proposed charter amendment), with MD. CODE ANN., CORPS. & ASS’NS § 4A-101 (West 2018) (requiring unanimous voter consent for partnerships).

\textsuperscript{154} CORPS. & ASS’NS § 9A-103(b)(3)(ii).

\textsuperscript{155} Id.

\textsuperscript{156} CORPS. & ASS’NS § 9A-103(b)(3).

\textsuperscript{157} See id.

\textsuperscript{158} See generally id. § 9A-103 (discussing the details of a partnership and the laws and rules that govern those entities).


\textsuperscript{160} See generally MD. CODE ANN., CORPS. & ASS’NS §§ 2-110, -401, -404, -408 (West 2018) (providing “[u]nless the bylaws of the corporation provide otherwise” and illustrating general powers of the bylaws).

\textsuperscript{161} See CORPS. & ASS’NS § 9A-103; UPCOUNSEL, supra note 159.

\textsuperscript{162} MD. CODE ANN., CORPS. & ASS’NS § 2-103(15) (West 2018).
regard, this model is similar to the corporate opportunity waiver enacted now. However, this model provides procedures for adopting certain waivers.

B. American Law Institute

The ALI’s Principles of Corporate Governance addresses the corporate opportunity doctrine and in an exception, grants the right to renounce corporate opportunities. The ALI’s § 5.05(3)(B), (C) allows for corporations to renounce in advance any corporate opportunities provided that they are rejected “following such disclosure, by disinterested directors” that “satisfies the standards of the business judgment rule” or disclosure by shareholders or superiors that does not amount to corporate waste. However, there is no mention of permitting a board to renounce the opportunity in advance in a charter or resolution. Moreover, this model does not fully allow advance waivers, as the officer must still offer the corporation the opportunity, but it does provide a standard for disclaiming an opportunity. Later in the section, corporate opportunity is defined, which provides even more clarity to corporations and their directors.

This is a good model to consult because it references procedures for disclaiming an opportunity, which are detailed in other areas of the ALI model. This model also defines a corporate opportunity, which would be helpful in deciding if an opportunity would fall under this provision or not. However, the ALI does not permit advance rejections of opportunities in the charter because it still requires directors and officers to offer the opportunity to the board. This model provides a lot of protection for the shareholders’

163. See infra Part V.
164. See MD. CODE ANN., CORPS. & ASS'NS § 2-504 (West 2018).
165. See ALI, supra note 13.
166. E.g., id.
167. Id. § 5.05(a)(3)(B)–(C).
168. Id.
169. See generally id. § 5.05 cmt. (a) (consistent with the approach taken generally in Part V, which permits a director or senior executive to deal with the corporation so long as the director or senior executive deals fairly with full disclosure, and places the burden of proving fairness on the director or senior executive unless the corporation was represented by disinterested decision makers).
170. Id. § 5.05(b).
171. See id. §§ 1.15–16, 1.42, 4.01(c), 5.05(b).
172. Id. § 5.05(b).
173. Id. § 5.05(a).
interests, but does not provide a director with certainty.\footnote{174}{See id.} Since the advance disclaimer is the primary purpose of corporate opportunity waivers, this model should be used as an example for format only, not substantive language.\footnote{175}{See id.}

C. Model Business Corporation Act

The MBCA § 8.70 sets out the provisions regarding business opportunities.\footnote{176}{MODEL BUS. CORP. ACT § 8.70(1)(a) (AM. BAR ASS’N 2016).} Subsection (a) broadly states that directors or officers are not liable for the taking of a business opportunity on grounds that they should have brought it to the corporation first if one of the exceptions are met;\footnote{177}{Id. § 8.70(a)(1)–(2).} the exceptions are stated in subsection (a)(1) and (2).\footnote{178}{Id. § 8.70 cmt.}

The exception in subsection (a)(1) only applies to specific opportunities, not categories of opportunities.\footnote{179}{Id. § 8.70(a)(1).} This exception is met if a director or officer brings the opportunity before they are “legally obligated respecting the opportunity” and disinterested directors or shareholders disclaim the opportunity.\footnote{180}{Id. §§ 8.62–.63, 8.70(a)(1).} The subsection also references another section regarding the procedure for disclosure and approval, whereby after disclosure of all material facts, only disinterested directors, or disinterested shareholders as the case may be, vote on the disclaimer.\footnote{181}{Id. § 8.70 cmt. 1.} An important distinction between §§ 8.62–.63—the sections dealing with conflicts of interest with directors and shareholders—and this subsection, is that the disclosure must be before the director is legally obligated to the opportunity, not at any time, like the other sections provide.\footnote{182}{Id. §§ 8.62–.63, 8.70(a)(1).} Second, unlike those sections where there is “required disclosure,” disclosure regarding business opportunities must “reveal all material facts concerning the business opportunity known to the director or officer.”\footnote{183}{Id. § 8.70(2).}

The second exception in subsection (a)(2) illustrates a more familiar version of the corporate opportunity waiver.\footnote{184}{Id. § 8.70(2).} Unlike subsection (a)(1), the exception in (a)(2) can apply to classes or
categories of opportunities. Under this exception, the director is not required to go to the corporation first if “the duty to offer the corporation the business opportunity has been limited or eliminated pursuant to a provision of the articles of incorporation adopted . . . in accordance with section 2.02(b)(6).”

Subsection (a)(2) then references the section on the articles of incorporation, which is where the details of the corporate opportunity waiver are, including what can be disclaimed and how. Requirements regarding disclosure and voting by disinterested directors set out in § 8.62, procedures for directors’ conflicts of interests, are embedded within § 2.02(b)(6). However, this only applies to officers and requires subsequent approval.

Under § 2.02(b)(6), officers can be included; however, “the limitation or elimination of corporate opportunity obligations of officers must be addressed by the board of directors in specific cases or by the directors’ authorizing provisions in employment agreements or other contractual arrangements with such officers.” This means that officers must present an opportunity to the board once it becomes ripe, unless it is in another contractual document.

Therefore, the MBCA does not allow officers to fully utilize the waiver provision because officers must still bring the opportunity to the board. This provision is attempting to balance the directors’ interest in certainty regarding opportunities allowed in advance, with the shareholders’ interests regarding the wellbeing of the corporation. Here, officers, including directors who are also officers, are lacking certainty because their opportunities are still subject to disinterested approval. Unlike Georgia’s statute, which is discussed below, this clearly dictates that officers must bring a ripe opportunity to the board of directors for approval even if it is within a category that is already disclaimed.

185. Id. § 8.70 cmt.
186. Id. § 8.70(a)(2)(6).
187. Id.; see also id. § 2.02(b)(6).
188. Id. § 2.02(b)(6).
189. Id.
190. Id. § 2.02(b)(6) cmt. 3(G) (emphasis added).
191. See id.
192. Id.
193. See id.
194. Id. § 2.02(b)(6).
195. See infra Section IV.D.
196. CORPS. & ASS’NS § 2.02(b)(6).
This style of model is effective because it provides procedures for two instances—the creation of the waiver in the articles and when deciding if an officer is liable.\textsuperscript{197} However, the MBCA does not state whether a corporation may disclaim an opportunity after it has been taken.\textsuperscript{198} This is contrary to many of the states adopted waiver provisions;\textsuperscript{199} as discussed earlier, Maryland and Delaware allow waivers via resolution as well, which this model does not allow.\textsuperscript{200}

Additionally, the fact that officers must still obtain approval further protects the process of disclaiming a category of opportunities, as there are safeguards in place to prevent a board from improperly disclaiming corporate opportunities.\textsuperscript{201} This model does not give the same type of certainty to a director, only to an outside director.\textsuperscript{202} Nevertheless, if standards and procedures are explicitly provided in a waiver provision, there should be no reason not to allow a disclaimer via resolution, or officers to utilize the provision without offering the opportunity first.\textsuperscript{203}

\textbf{D. Georgia’s Statute}

In 2016, Georgia enacted one of the most comprehensive and modern waiver statutes.\textsuperscript{204} It is comprised of six subsections, and not only allows an action of the board to disclaim opportunities, but also shareholders.\textsuperscript{205} Subsection (a) states, in pertinent part:

\begin{quote}
A corporation may disclaim, in its articles of incorporation or bylaws or by action of its shareholders or board of directors, any interest of the corporation in, or in being offered, or in excluding directors or officers from taking advantage of or participating in, specific business opportunities or classes or categories of business opportunities that are, have been, or may be in the future
\end{quote}

\textsuperscript{197.} See id.
\textsuperscript{198.} See id.
\textsuperscript{199.} GA. CODE ANN. § 14-2-870 (West 2018).
\textsuperscript{200.} DEL. CODE ANN. tit. 8, § 122(17) (West 2018); MD. CODE ANN., CORPS. & ASS’NS § 2-103(15) (West 2018).
\textsuperscript{201.} MODEL BUS. CORP. ACT § 8.70(4)(1), § 8.70 cmt. (AM. BAR’N 2016).
\textsuperscript{202.} Id. § 2.02(b)(6) cmt. (noting that an outside director is a director who is not an officer).
\textsuperscript{203.} See supra text accompanying notes 197–202.
\textsuperscript{204.} § 14-2-870.
\textsuperscript{205.} Id.
presented to the corporation or to one or more of its directors or officers.\textsuperscript{206}

Georgia modeled this statute off the MBCA § 8.70 and various other state statutes addressing the corporate power “to disclaim any interest the corporation may have in certain business opportunities.”\textsuperscript{207} Georgia allows corporations to disclaim opportunities as they arise, in advance, and those already taken.\textsuperscript{208} This differs from Maryland and the MBCA because here, corporations are permitted to disclaim opportunity interests after a director or officer has become involved.\textsuperscript{209} The statute states that a corporation may waive an opportunity “after the fact, permitting the corporation to disclaim any arguable interest it may have had in a business opportunity in which a director or officer is participating.”\textsuperscript{210} Subsection (b) further supports subsection (a) and “forecloses a claim against the director or officer based on the matters disclaimed, whether based on the Code or common law.”\textsuperscript{211}

Subsection (c) states that subsection (a), as it applies to directors, “shall be effective for all purposes if the director brings such opportunity to the attention of the corporation (if such opportunity is not known to the corporation).”\textsuperscript{212} Subsection (d) has a similar provision regarding officers.\textsuperscript{213} Additionally, both subsections allow either directors or shareholders to approve the opportunity.\textsuperscript{214} These subsections appear to require directors and officers to obtain approval of an opportunity using these procedures; however, the commentary states that “[s]ubsection (c) describes a procedure available to a director who elects to subject a business opportunity, regardless of whether the opportunity would be classified as an opportunity in which the corporation has an interest to the disclosure and approval procedures.”\textsuperscript{215} The disclosure and approval procedures state that the

\begin{itemize}
\item \textsuperscript{206} Id. § 14-2-870(a) (emphasis added).
\item \textsuperscript{207} Id. § 14-2-870 cmt.
\item \textsuperscript{208} Id. § 14-2-870(a).
\item \textsuperscript{209} Id.
\item \textsuperscript{210} Id. § 14-2-870 cmt.
\item \textsuperscript{211} Id.
\item \textsuperscript{212} Id. § 14-2-870(c).
\item \textsuperscript{213} Compare id. § 14-2-870(d), with Model Bus. Corp. Act § 2.2(b)(6) (Am. Bar Ass’n 2016).
\item \textsuperscript{214} § 14-2-870(c)–(d).
\item \textsuperscript{215} Id. § 14-2-870 cmt. (emphasis added).
\end{itemize}
approval should be made as if it was a conflicts of interest issue and that all known material facts must be disclosed.\textsuperscript{216} Additionally, subsection (f) is fairly vague but states that it is not enough for a director or officer to not “employ the procedures” in subsections (c) and (d).\textsuperscript{217} This means that a director or officer cannot be held liable solely because they do not offer the opportunity to the corporation beforehand.\textsuperscript{218} In fact, the comment states that “failure to follow the procedures in subsection (c) would not taint a particular disclaimer or imply that the director should have presented an opportunity to the corporation.”\textsuperscript{219} A director or officer can bring an opportunity for approval as a safe harbor provision, but it is not a requirement.\textsuperscript{220}

Georgia’s statute is somewhat unclear regarding when the directors and officers should bring the opportunity to the board (or shareholders) and if it is required or just suggested.\textsuperscript{221} However, the comments clarify Georgia’s intent that these provisions are intended to “provide[] a safe harbor with respect to the approval process.”\textsuperscript{222} However, the comments clarify Georgia’s intent.\textsuperscript{223}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{216} Id. § 14-2-870(c).
\item \textsuperscript{217} Id. § 14-2-870 (f).
\item \textsuperscript{218} See id.
\item \textsuperscript{219} Id. § 14-2-870 cmt.
\item \textsuperscript{220} Id.
\item \textsuperscript{221} Id. § 14-2-870(c)- (d).
\item \textsuperscript{222} Id. § 14-2-870 cmt. (“The efficacy and consequences of disclaimers approved outside the parameters of the safe harbor provision of subsection (c) would be governed by
\end{enumerate}
\end{footnotesize}
The Georgia statute is sufficiently comprehensive, and even though there is still some ambiguity regarding subsections (c) and (d), it is an excellent model.\textsuperscript{224} Georgia’s model, unlike the MBCA, appears to allow directors and officers to obtain approval for opportunities.\textsuperscript{225} Similarly, while the MBCA requires subsequent approval solely for officers, Georgia does not.\textsuperscript{226} This is beneficial because it allows directors and officers to know certain opportunities that are disclaimed pursuant to subsection (a), but also obtain approval for particular opportunities.\textsuperscript{227}

Georgia also balances the shareholders’ interests and allows them to approve the disclaimers as well, when necessary.\textsuperscript{228} And although it does not appear that subsequent approval is required, the wording and construction of subsections (c) and (d) certainly look like they are at first glance.\textsuperscript{229} A more effective provision may explicitly state that the subsequent approval is available, but does not affect the disclaimers efficacy.\textsuperscript{230} Georgia recognizes that this statute is necessary to provide structured guidelines and procedures for corporate opportunity waivers.\textsuperscript{231}

V. RECOMMENDATION

Although the codification of a provision allowing corporate opportunity waivers is an excellent step forward, the duty of loyalty is too important not to be specifically mentioned.\textsuperscript{232} Maryland’s corporate opportunity waiver provision should require full disclosure and votes from disinterested directors or shareholders, as the case may be.\textsuperscript{233} In order to effectively provide these procedures, Maryland should enact a separate statute and use various elements from the models discussed above.\textsuperscript{234}

\begin{flushright}
the rules otherwise applicable to corporate decisions, including, as noted above, any applicable duties of directors approving the disclaimer.”).
\end{flushright}

\begin{itemize}
\item \textsuperscript{223} See supra text accompanying notes 204–22.
\item \textsuperscript{224} § 14-2-870.
\item \textsuperscript{225} See id.; see also supra text accompanying note 189.
\item \textsuperscript{226} See id. § 14-2-870(a), (c)–(d).
\item \textsuperscript{227} See id. § 14-2-870(a).
\item \textsuperscript{228} See id. § 14-2-870(c)–(d).
\item \textsuperscript{229} See id.
\item \textsuperscript{230} See generally id. § 14-2-870 (outlining the procedures by which specific business opportunities can be disclaimed).
\item \textsuperscript{231} See supra notes 129–37 and accompanying text.
\item \textsuperscript{232} See supra notes 130–37 and accompanying text.
\item \textsuperscript{233} See supra Part IV.
\item \textsuperscript{234} See supra Section IV.A.
\end{itemize}
Maryland’s Revised Uniform Partnership Act is a succinct and efficient model. However, it is geared towards a different form of entity and would need to be changed to incorporate corporation law. Additionally, consent from all directors is not a common requirement in board decisions.

The ALI model protects the shareholders’ interests since the opportunity must still be offered to the board, and does not allow potential opportunities to be waived in advance. Further, unlike Maryland and Delaware’s existing waiver provisions, the opportunity being waived should be ripe and presented before the board. For this reason, the model is effective in structure only, such as referencing other procedures detailed elsewhere.

The MBCA is effective because it has a section devoted to business opportunities. However, it provides detailed procedures for disclaiming a corporate opportunity in a different section, and in a completely different section from that, it grants the right to actually waive corporate opportunities in the charter. Although the structure and drafting essentially have the same effect as embedding the procedures in the same statute, it is somewhat convoluted and unnecessary to go to three different sections when attempting to properly disclaim an opportunity. It is more practical to grant the right to waive corporate opportunities in the section where the procedures for doing so are specified.

Substantively, the MBCA requires officers to offer the opportunity and obtain approval from disinterested directors for categories of opportunities that are already disclaimed. Thus, disclaimed categories of opportunities are ineffective for officers, and are not protected by the disclaimer, until they obtain subsequent approval.

235. See supra Section IV.A.
236. See supra Section IV.A.
237. See Md. Code Ann., Corps. & Ass’ns § 2-408(a) (West 2018); see also supra notes 150–53 and accompanying text.
238. See supra Section IV.B.
240. See supra notes 173–75 and accompanying text.
242. See supra notes 181–89 and accompanying text.
243. See supra Section IV.C.
244. See supra notes 223–30 and accompanying text.
245. See supra notes 190–94 and accompanying text.
246. See supra notes 190–94 and accompanying text.
Georgia’s statute strikes a balance between Maryland’s current waiver provision and the MBCA.247 Additionally, Georgia’s statute incorporates all of the elements into one statute.248 It would be prudent for Maryland to have a separate section for business opportunities instead of being listed under the general powers section.249 Although Georgia’s statute details procedures for disclaiming an opportunity in a separate section, there are some procedures within the statute providing that the disclaimer must be approved by “qualified directors” and that the decision must be made as if it were a conflict of interest issue.250 Furthermore, the Georgia statute provides certainty to the directors and officers while still protecting the corporation and its shareholders.251

The structures of Maryland’s Revised Uniform Partnership Act, the ALI section, the MBCA section, and Georgia’s statute all have the wording for full disclosure of conflicts or refer to sections of procedure that must be met first.252 Therefore, Maryland should consult various elements from these models to create a statute that would work best and balance the shareholders’ and directors’ interests.253 The recommended statute should require full disclosure and only allow disinterested director or shareholder votes.254 However, the recommended statute should not require officers (like in the MBCA) or directors to offer the opportunity to the corporation for the disclaimer to be effective.255

It would be beneficial to separate the corporate opportunity waiver so that it is its own section and not a subsection of another section; this could be done by simply using the wording that is already in the provision.256 A possible drafting of the new statute would simply add language after subsection (ii) of the existing clause.257 The new statute would state the following:

(a) A corporation may disclaim, in its charter or by resolution of its board of directors, any interest or

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247. See supra notes 204–09 and accompanying text.
248. See supra notes 223–30 and accompanying text.
251. See supra notes 223–30 and accompanying text.
252. See supra note 13 and accompanying text.
253. See supra Sections IV.A–D.
254. See supra Sections IV.A–D.
255. See supra notes 192–93, 217–20, 225–26 and accompanying text.
256. See supra notes 246–49 and accompanying text.
expectancy of the corporation in, or in being offered an opportunity to participate in, business opportunities or classes or categories of business opportunities that are presented to the corporation or developed by or presented to one or more of its directors or officers.

(b) A director's or officer's taking advantage of, or participating in, directly or indirectly, a specific business opportunity may not be the subject of equitable relief, or give rise to an award of damages or other sanctions against the director or officer, in a proceeding by a stockholder or by or in the right of the corporation on the ground that such opportunity should have been first offered to the corporation or that the corporation had an interest in, or in being offered, or in excluding the director or officer from taking advantage of or participating in, such opportunity, to the extent the corporation has disclaimed any such interest with respect to such business opportunity pursuant to subsection (a) of this section in a disclaimer that either meets the procedures provided in subsection (c)(1) or is otherwise determined to be effective as described in subsection (c)(2), either with respect to the specific business opportunity or with respect to a class or category of business opportunities that includes such opportunity.

(c) (1) Action by the stockholders or board of directors of the corporation approving a disclaimer pursuant to subsection (a) of this section that applies to a director or officer with respect to a specific past, present, or future business opportunity shall be effective for all purposes if the director or officer brings such opportunity to the attention of the corporation (if such opportunity is not known to the corporation) and such disclaimer is approved by the board of directors or committee, or stockholder entitled to vote, pursuant to the procedures provided in 2-419(b)(1)(i) or 2-419(b)(1)(ii) of this Title, respectively.

(2) The efficacy and consequences of disclaimers approved outside subsection (c)(1) would be governed by the rules otherwise applicable to corporate decisions, including any applicable duties of directors approving the disclaimer.

(d) In any proceeding seeking equitable relief or other remedies based upon an alleged improper taking advantage of or participation in a business opportunity by a director or officer, directly or indirectly, the fact that the director or
officer did not employ the procedures described in this section before taking advantage of the opportunity shall not:

(1) Create an inference that the opportunity should have been first presented to the corporation, that the corporation had an interest in, or in being offered, or in excluding the director or officer from taking advantage of or participating in, such opportunity or that the director or officer has or will have appropriated the opportunity in violation of his or her duties by taking advantage of or participating in the opportunity; or

(2) Alter the burden of proof otherwise applicable to establish that the director or officer breached a duty to the corporation in the circumstances. 258

This utilizes Maryland’s existing clause in the general powers provision, 259 while explicitly providing certain procedures regarding corporate opportunity waivers. 260 This recommended provision would be a separate statute under subtitle 1 of the Maryland Corporations & Associations Title. 261 Additionally, this recommendation gives directors certainty regarding the opportunities they may take outside the corporation and gives shareholders security since the approval procedures must be followed any time a new waiver is adopted. 262

Furthermore, this recommended provision encompasses parts of Georgia’s statute regarding procedure and effectiveness. 263 Specifically, this provision allows directors and officers to obtain approval of a specific opportunity. 264 Subsection (a) generally grants corporations the power to disclaim opportunities in the charter or by resolution. 265 Subsection (b) states that an effective disclaimer under subsection (a) bars a claim against the director or officer who took the opportunity at issue, as long as the disclaimer was made pursuant to the procedures in subsection (c)(1) or (2). 266

Further, subsection

258. This recommended statute was taken, in large part, from Georgia’s statute. Ga. Code Ann. § 14-2-870 (West 2018).
259. See supra note 257 and accompanying text.
260. See supra text accompanying note 258.
261. See CORPS. & ASS’NS § 2-103(15); see also supra notes 246–49 and accompanying text.
262. See supra text accompanying note 258.
263. See supra note 258 and accompanying text.
264. See supra text accompanying note 258.
265. See supra text accompanying note 258.
266. See supra text accompanying note 258.
(c)(1) effectuates a director or stockholder’s opportunity if the
director or officer brings the opportunity to the corporation and it is
approved pursuant to §§ 2-419(b)(1)(i) or 2-419(b)(1)(ii). Subsection (c)(2) states that any disclaimers approved outside (c)(1)
are subject to the rules of corporate decisions, like a director’s duty
of loyalty owed to the corporation. Finally, subsection (d) states
that any proceeding or suit brought against a director or officer
regarding an alleged improper taking cannot imply that the
procedures should have been offered or switch the burden of proof
onto the director or officer.

This provision balances the shareholders’ interests in the wellbeing
of the company by providing procedures for directors and officers to
follow. Directors’ interests are also taken into consideration by
not allowing a per se judgment or shifting the burden of proof on
them just because the procedures were not employed. Directors
are provided with certainty and a safe harbor provision, while
shareholders have the protection of procedures explicitly stated in the
statute.

VI. CONCLUSION

Corporate opportunity waivers will simplify the overcomplicated,
unpredictable, and highly litigated issue of the corporate opportunity
doctrine. Corporate opportunity waiver statutes should specifically
provide procedures or require full disclosure of all material facts for
interested directors and approval by disinterested directors.

The duty of loyalty is one of the longest standing and most
important pillars of corporation law. Therefore, it is vital for a
statute limiting the duty of loyalty to explicitly state proper
procedures and guidelines for corporations who take advantage of the
corporate opportunity waivers. The procedures should provide for
full disclosure of any material facts by interested directors and
approval from disinterested directors. By separating the provision

267. See supra Part V.
268. See supra Part V.
269. See supra Part V.
270. See supra Part V.
271. See supra Part V; see also GA. CODE ANN. § 14-2-870(f) (West 2018).
272. See supra Part V; see also § 14-2-870(f).
273. See supra Section II.C.
274. See supra Part IV.
275. See supra note 27 and accompanying text.
276. See supra Section II.B.
277. See supra Part IV.
into a separate statute, the requirements plainly uphold the fiduciary
duty of loyalty, provide corporations with clear and conspicuous
procedures, and balance shareholder and director interests.\textsuperscript{278}

\textsuperscript{278} See supra Part V.