



2019

A New Corporate Statute: Adding Explicit Procedures to Maryland's Corporate Opportunity Waiver Provision

Martha M. Effinger

Follow this and additional works at: <https://scholarworks.law.ubalt.edu/ublr>



Part of the [Law Commons](#)

Recommended Citation

Effinger, Martha M. (2019) "A New Corporate Statute: Adding Explicit Procedures to Maryland's Corporate Opportunity Waiver Provision," *University of Baltimore Law Review*: Vol. 48 : Iss. 2 , Article 5.
Available at: <https://scholarworks.law.ubalt.edu/ublr/vol48/iss2/5>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Review by an authorized editor of ScholarWorks@University of Baltimore School of Law. For more information, please contact hmorrell@ubalt.edu.

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

* J.D. Candidate, May 2019, University of Baltimore School of Law; B.S., Business Administration, 2014, Towson University. Special thanks to Professor Fred Brown for his valuable feedback and guidance on this Comment; to *University of Baltimore Law Review* staff for their devotion and work; and especially, to my family and friends for their continued and unwavering support.

1. *See infra* Parts II–V.

2. *See infra* Section III.B.

3. *See* 3 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 862, Westlaw (database updated Sept. 2018).

4. *See* MODEL BUS. CORP. ACT § 8.70 (AM. BAR ASS'N 2016).

5. *See* Jeanne D. Wertz, *The Corporate Opportunity Doctrine*, LAW. BRIEF, Jan. 15, 2006, 2006 WL 224009, at *1.

6. Gabriel Rauterberg & Eric Talley, *Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 COLUM. L. REV. 1075, 1087, 1095 (2017); *see also* Wertz, *supra* note 5, at *2.

their charter or by resolution.⁷ In 2014, Maryland enacted a very similar waiver provision.⁸ There is no language in the enacted waiver provision that provides procedures for corporations to adopt waivers, just language granting them that power.⁹ 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.¹⁰ 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.¹¹

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.¹² There are many models that provide effective examples, which set out procedures for adopting corporate opportunity waivers.¹³ 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.¹⁴

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.¹⁵ 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.¹⁶ 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.¹⁷ Part V will review the models and

7. See Rauterberg & Talley, *supra* note 6, at 1095.

8. MD. CODE ANN., CORPS. & ASS'NS § 2-103 (West 2018).

9. *See id.*

10. See Rauterberg & Talley, *supra* note 6, at 1116.

11. *See id.*

12. *See infra* Part IV.

13. See MD. CODE ANN., CORPS. & ASS'NS § 9A-103 (West 2018); PRINCIPLES OF CORP. GOVERNANCE: ANALYSIS & RECOMMENDATIONS § 5.05 (AM. LAW INST. 2018) [hereinafter ALI]; MODEL BUS. CORP. ACT § 8.70 (AM. BAR ASS'N 2016); GA. CODE ANN. § 14-2-870 (West 2017).

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.¹⁸

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.¹⁹ Directors and officers have a fiduciary duty to the corporation.²⁰ Directors generally have three fiduciary obligations towards the corporation—the duties of care, good faith, and loyalty.²¹ “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.”²²

The following subsections will provide the history of the duty of loyalty,²³ the history of the corporate opportunity doctrine,²⁴ the various tests the courts have created and implemented,²⁵ and the test that Maryland utilizes.²⁶

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.”²⁷ The duty of loyalty demands fiduciaries to advance, in good faith and within their authority, the corporation and its objectives.²⁸ 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.

20. 6 M.L.E. Corporations § 159 (2018).

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.

27. See David Kershaw, *The Path of Corporate Fiduciary Law*, 8 N.Y.U. J.L. & BUS. 395, 428–33 (2012) (discussing *Aberdeen Ry. v. Blaikie Bros.* (1854) and subsequent cases and effects); Frances S. Fendler, *Losing Faith: Limited Liability Companies in Arkansas and the Fiduciary Duties of Loyalty and Good Faith*, 31 U. ARK. LITTLE ROCK L. REV. 245, 259 (2009).

28. Rauterberg & Talley, *supra* note 6, at 1086–87.

employees to the corporation.”²⁹ Additionally, the duty of loyalty is often associated with conflict of interests between directors and officers, and the corporation.³⁰ 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.”³¹

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.”³² 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.³³ It remains one of the most important and discussed areas of corporation law today.³⁴

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.³⁵ 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.”³⁶

Under the corporate opportunity doctrine, directors and officers are prohibited from “personally taking advantage” of opportunities that could be taken by their corporation.³⁷ If directors or officers are found to have taken a corporate opportunity then “that . . . acquisition

29. Eric G. Orlinsky, *Corporate Opportunity Doctrine and Interested Director Transactions: A Framework for Analysis in an Attempt to Restore Predictability*, 24 DEL. J. CORP. L. 451, 452–53 (1999).

30. *Id.*

31. *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939).

32. Eric Talley & Mira Hashmall, *The Corporate Opportunity Doctrine*, USC GOULD SCH. L. (Feb. 2001), <https://weblaw.usc.edu/why/academics/cle/icc/assets/docs/articles/iccfinal.pdf>.

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.

35. 6 M.L.E. *Corporations* § 172 (2018).

36. JAMES J. HANKS, JR., MARYLAND CORPORATION LAW § 6.23 (Supp. 2017).

37. Wertz, *supra* note 5, at *1.

violated [their] . . . fiduciary duties of loyalty, good faith, and fair dealing toward the corporation.”³⁸

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.³⁹ “[I]f the corporation rejects the opportunity,” then typically the director is allowed to take the opportunity for the director’s own use.⁴⁰ If the corporation accepts the opportunity, then the director must relinquish it to the corporation or simply not engage in the opportunity.⁴¹

The corporate opportunity doctrine requires a director or officer to first offer the opportunity to the board of directors.⁴² If the director or officer does not disclose the opportunity and simply takes it for themselves, then the corporation may seek damages.⁴³ 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.⁴⁴ 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.⁴⁵ 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.⁴⁶

First is the line of business test, which is sometimes referred to as the *Guth v. Loft* test.⁴⁷ 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.

41. See David J. Brown, Note, *When Opportunity Knocks: An Analysis of the Brudney & Clark and ALI Principles of Corporate Governance Proposals for Deciding Corporate Opportunity Claims*, 11 J. CORP. L. 255, 270 (1986).

42. Wertz, *supra* note 5, at *1.

43. *Id.*

44. FLETCHER ET AL., *supra* note 3.

45. Wertz, *supra* note 5, at *1; see also *Shapiro v. Greenfield*, 764 A.2d 270, 278 (Md. Ct. Spec. App. 2000); *Indep. Distributions, Inc. v. Katz*, 637 A.2d 886, 894 (Md. Ct. Spec. App. 1994).

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.⁴⁸

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.”⁴⁹ This standard is narrower than the business line test.⁵⁰ The highest court in Georgia uses the business interest test.⁵¹ 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.⁵² Therefore, there was no taking of a corporate opportunity.⁵³

Third is the fairness test. This test relies solely on “what is fair and equitable under the circumstances.”⁵⁴ In *Durfee v. Durfee & Canning, Inc.*, a Massachusetts court declared that the standard of unfairness should be used.⁵⁵ 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.”⁵⁶

Finally, the *Miller* two-step test combines the line of business test and the fairness test.⁵⁷ First, the courts ask if the business opportunity is a “corporate” opportunity by using a “flexible application” of the line of business test.⁵⁸ Here, however, the fact-finder answers this question, not only using the factors in *Guth*, but others as well.⁵⁹ If the fact-finder deems the opportunity a non-

48. *Guth v. Loft*, 5 A.2d 503, 511 (Del. 1939).

49. *Wertz*, *supra* note 5, at *3.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*; *see also* *United Seal & Rubber Co., Inc. v. Bunting*, 285 S.E.2d 721, 722–23 (Ga. 1982).

54. *Wertz*, *supra* note 5.

55. *See Durfee v. Durfee & Canning, Inc.*, 80 N.E.2d 522, 529 (Mass. 1948).

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.⁶⁰ If the opportunity is deemed a corporate opportunity, then, in step two, the fairness test is utilized.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.”⁶² The court considered several factors in the second step of the test.⁶³ Many of them consider the relationship of the director to the corporation⁶⁴ 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.⁶⁵

D. Maryland’s Corporate Opportunity Test

Maryland has “adopted the interest or [reasonable] expectancy test.”⁶⁶ In *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.”⁶⁷ In Maryland, “corporate personnel are ‘precluded from diverting unto themselves opportunities which in fairness ought to belong to the corporation.’”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

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.

Id. at *5.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Indep. Distrib., Inc. v. Katz*, 637 A.2d 866, 894 (Md. Ct. Spec. App. 1994).

67. *Shapiro v. Greenfield*, 764 A.2d 270, 278 (Md. Ct. Spec. App. 2000) (quoting *Katz*, 637 A.2d at 894).

68. *Id.* at 277 (quoting *Md. Metals, Inc. v. Metzner*, 382 A.2d 564, 574 n.5 (Md. 1978)).

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

69. Lyon v. Campbell, 707 A.2d 850, 864 (Md. Ct. Spec. App. 1998) (citing Pittman v. Am. Metal Forming Corp., 649 A.2d 356, 359 (Md.1994)).

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. Rauterberg & Talley, *supra* note 6, at 1078; *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.⁷⁸ The simplification, practicability, and balancing of interests that a waiver provision provides proves beneficial to corporations.⁷⁹

There are two main interests that are balanced in these provisions.⁸⁰ One is the shareholders' general interest in the wellbeing of the corporation.⁸¹ 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.⁸²

Additionally, it is in the interest of the corporation to be a "healthy, growing and profitable business organization[]." ⁸³ 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."⁸⁴ 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."⁸⁵

Moreover, corporations benefit from corporate opportunity waivers beyond the simplification of the doctrine and balancing of interests.⁸⁶ Georgia's commentary on their waiver statute provides practical business-related reasons for adopting corporate opportunity waivers.⁸⁷ 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."⁸⁸ 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.

81. *Shareholder*, INVESTOPEDIA, <https://www.investopedia.com/terms/s/shareholder.asp> (last visited Jan. 13, 2019).

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.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.⁹⁰

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

A. *Delaware Codified the First Corporate Opportunity Waiver Provision to Clarify Ambiguous Case Law*

Delaware, as with most issues concerning corporation law,⁹³ was the first state to adopt the corporate opportunity waiver statute in 2000.⁹⁴ Delaware “dramatically departed from tradition” when it adopted this statute, and since then, eight states have enacted similar statutes.⁹⁵ The statute was enacted to clarify *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.⁹⁶ The court’s ruling left room for questions and interpretation.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

89. *Id.*

90. *Id.*

91. *See infra* notes 95–96 and accompanying text.

92. *See infra* Section III.A–B.

93. Rauterberg & Talley, *supra* note 6, at 1101.

94. *Id.* at 1077–78.

95. *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).

96. Rauterberg & Talley, *supra* note 6, at 1090–91 (citing An Act to Amend Title 8 of the Delaware Code Relating to the General Corporation Law, S. Res. 363, 140th Gen. Assemb. (Del. 2000), <http://legis.delaware.gov/BillDetail/10399> (last visited Jan. 13, 2019)); *see also* *Sigman v. Tri-Star Pictures, Inc.*, No. 9477, 1989 WL 48746, at *7–8 (Del. Ch. May 5, 1989).

97. *See Sigman*, 1989 WL 48746, at *8.

shareholders.”⁹⁸ 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.⁹⁹ 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.¹⁰⁰

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.¹⁰¹ It also illustrates the situation the waiver provision aims to eliminate.¹⁰² 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.¹⁰³

Thus, the waiver provision is now statute-based, rather than solely based on common law, unlike the corporate opportunity doctrine.¹⁰⁴ The waiver provision gives corporations the power to adopt waivers for themselves, in some ways making the duty of loyalty a business judgment.¹⁰⁵ 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).

100. *Siegman*, 1989 WL 48746, at *8.

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.¹¹⁴

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.¹¹⁵ Other provisions in Delaware's code that allow the waiver of fiduciary duties are required to be made in the charter.¹¹⁶ Here, Delaware does not even mention the directors continued fiduciary duty; it is only mentioned in the legislative summary.¹¹⁷ 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.¹¹⁸ 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.¹¹⁹

Delaware was the first state to adopt corporate opportunity waivers but has not amended this provision further to explicitly include procedure regarding how corporations adopt waivers.¹²⁰ Delaware is a leader in corporate law,¹²¹ and many states have followed by adopting corporate opportunity waivers, including Maryland, and used the same or similar wording in their waiver provision.¹²²

-
114. See Rauterberg & Talley, *supra* note 6, at 1079–80.
115. 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).
116. Rauterberg & Talley, *supra* note 6, at 1097.
117. See *supra* notes 106, 108 and accompanying text; see also Del. S. Res. 363, *supra* note 96.
118. See also Del. S. Res. 363, *supra* note 96.
119. Rauterberg & Talley, *supra* note 6, at 1097–98.
120. DEL. CODE ANN. tit. 8, § 122(17) (West 2018).
121. LEWIS S. BLACK, JR., WHY CORPORATIONS CHOOSE DELAWARE 1–2 (2007), https://corpfiles.delaware.gov/whycorporations_web.pdf.
122. E.g., KAN. STAT. ANN. § 17-6102(q) (West 2018); MD. CODE ANN., CORPS. & ASS'NS § 2-103(15) (West 2018); MO. REV. STAT. § 351.385(16) (West 2018); NEV. REV. STAT. ANN. § 78.070(8) (West 2018); 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.02.020(5)(k) (West 2018).

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

In 2014, Maryland followed Delaware and several other states¹²³ by adopting the corporate opportunity waiver.¹²⁴ 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.¹²⁵

This is very similar to Delaware's provision.¹²⁶ For example, a waiver may not only be made in a charter, but also by a resolution of the board of directors.¹²⁷ Further, no formal procedures are referenced for adopting a corporate opportunity waiver.¹²⁸ Although corporate opportunity waiver provisions are an excellent step forward in corporation law, there are still some shortcomings.¹²⁹

There is some ambiguity in the waiver provision regarding the duty of loyalty and conflicts of interest.¹³⁰ The duty of loyalty, although an underlying principle in directors' actions, is not specifically mentioned in this provision.¹³¹ 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.¹³²

123. See *supra* note 122 and accompanying text.

124. MD. CODE ANN., CORPS. & ASS'NS § 2-103(15) (West 2018).

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.¹³³ If a conflict of interest exists, the director could still propose the resolution.¹³⁴ Although the adoption of the waiver could be challenged later, the provision does not specifically require any disclosure or voting procedure.¹³⁵

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.¹³⁶ As many of the waiver provisions now stand, the conflict of interest duty of loyalty is implied, though not explicitly stated¹³⁷ 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,¹³⁸ 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.¹³⁹ In order to have a successful provision, the new provision must balance both the shareholders' and the directors' interests.¹⁴⁰ The following statutory models address these interests differently.¹⁴¹ In fact, Maryland's Partnership title already has similar director disclosure wording that could be utilized.¹⁴²

In comparison, the American Law Institute (ALI) developed a corporate opportunity waiver, but still requires the director to offer the opportunity to the corporation.¹⁴³ The Model Business Corporation Act (MBCA) created a business opportunities section, which refers to other sections regarding procedures and requirements

133. *Id.*

134. *Id.*

135. *Id.*

136. *See id.*

137. *See id.*

138. *Indep. Distributions, Inc. v. Katz*, 637 A.2d 886, 895 (Md. Ct. Spec. App. 1994); *see also* MD. CODE ANN., CORPS. & ASS'NS § 2-405.1 (West 2018).

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.¹⁴⁴ Finally, Georgia's corporate opportunity waiver statute is based off of the MBCA, but it balances shareholder and director interests differently.¹⁴⁵ 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.¹⁴⁶ 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 loyalty¹⁴⁷

Subsection (i) permits the partnership agreement to identify categories of opportunities "that do not violate the duty of loyalty."¹⁴⁸ 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.¹⁴⁹ 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."¹⁵⁰ 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.

146. *See* MD. CODE ANN., CORPS. & ASS'NS § 2-103(15) (West 2018).

147. MD. CODE ANN., CORPS. & ASS'NS § 9A-103(b)(3) (West 2018) (emphasis added).

148. *Id.*

149. *Compare id.*, with MD. CODE ANN., CORPS. & ASS'NS § 2-104 (West 2018), and MD. CODE ANN., CORPS. & ASS'NS § 2-110 (West 2018).

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.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.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.¹⁵³

Subsection (ii) allows disinterested partners to approve acts that would violate the duty of loyalty after full disclosure.¹⁵⁴ This authorization may only be made by all, or at least a majority, of the disinterested partners listed in the agreement.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.¹⁵⁶

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

One of the weaknesses of Maryland's current waiver provision is that it is only a subsection of the general powers subtitle.¹⁶² In that

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).

152. CORPS. & ASS'NS § 2-604.

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).

154. CORPS. & ASS'NS § 9A-103(b)(3)(ii).

155. *Id.*

156. CORPS. & ASS'NS § 9A-103(b)(3).

157. *See id.*

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

159. *Id.*; *What Is a Corporate Charter: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/what-is-a-corporate-charter> (last visited Jan. 13, 2019).

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).

161. *See* CORPS. & ASS'NS § 9A-103; UPCOUNSEL, *supra* note 159.

162. MD. CODE ANN., CORPS. & ASS'NS § 2-103(15) (West 2018).

regard, this model is similar to the corporate opportunity waiver enacted now.¹⁶³ However, this model provides procedures for adopting certain waivers.¹⁶⁴

B. American Law Institute

The ALI's Principles of Corporate Governance addresses the corporate opportunity doctrine¹⁶⁵ and in an exception, grants the right to renounce corporate opportunities.¹⁶⁶ 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.¹⁶⁷ However, there is no mention of permitting a board to renounce the opportunity in advance in a charter or resolution.¹⁶⁸ 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.¹⁶⁹ Later in the section, corporate opportunity is defined, which provides even more clarity to corporations and their directors.¹⁷⁰

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.¹⁷¹ This model also defines a corporate opportunity, which would be helpful in deciding if an opportunity would fall under this provision or not.¹⁷² 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.¹⁷³ 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.¹⁷⁴ 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.¹⁷⁵

C. Model Business Corporation Act

The MBCA § 8.70 sets out the provisions regarding business opportunities.¹⁷⁶ 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;¹⁷⁷ the exceptions are stated in subsection (a)(1) and (2).¹⁷⁸

The exception in subsection (a)(1) only applies to specific opportunities, not categories of opportunities.¹⁷⁹ 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.¹⁸⁰ 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.¹⁸¹ 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.¹⁸² 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.”¹⁸³

The second exception in subsection (a)(2) illustrates a more familiar version of the corporate opportunity waiver.¹⁸⁴ Unlike subsection (a)(1), the exception in (a)(2) can apply to classes or

174. *See id.*

175. *See id.*

176. MODEL BUS. CORP. ACT § 8.70(1)(a) (AM. BAR ASS’N 2016).

177. *Id.* § 8.70(a).

178. *Id.* § 8.70(a)(1)–(2).

179. *Id.* § 8.70 cmt.

180. *Id.* § 8.70(a)(1).

181. *Id.* §§ 8.62–.63, 8.70(a)(1).

182. *Id.* § 8.70 cmt. 1.

183. *Id.*

184. *Id.* § 8.70(a)(2).

categories of opportunities.¹⁸⁵ 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).”¹⁸⁶

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.¹⁸⁷ 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).¹⁸⁸ However, this only applies to officers and requires subsequent approval.¹⁸⁹

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.”¹⁹⁰ This means that officers must present an opportunity to the board once it becomes ripe, unless it is in another contractual document.¹⁹¹

Therefore, the MBCA does not allow officers to fully utilize the waiver provision because officers must still bring the opportunity to the board.¹⁹² 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.¹⁹³ Here, officers, including directors who are also officers, are lacking certainty because their opportunities are still subject to disinterested approval.¹⁹⁴ Unlike Georgia’s statute, which is discussed below,¹⁹⁵ 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.¹⁹⁶

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.¹⁹⁷ However, the MBCA does not state whether a corporation may disclaim an opportunity after it has been taken.¹⁹⁸ This is contrary to many of the states adopted waiver provisions;¹⁹⁹ as discussed earlier, Maryland and Delaware allow waivers via resolution as well, which this model does not allow.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.²⁰¹ This model does not give the same type of certainty to a director, only to an outside director.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.²⁰³

D. Georgia's Statute

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

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*

197. *See id.*

198. *See id.*

199. GA. CODE ANN. § 14-2-870 (West 2018).

200. DEL. CODE ANN. tit. 8, § 122(17) (West 2018); MD. CODE ANN., CORPS. & ASS'NS § 2-103(15) (West 2018).

201. MODEL BUS. CORP. ACT § 8.70(a)(1), § 8.70 cmt. (AM. BAR ASS'N 2016).

202. *Id.* § 2.02(b)(6) cmt. (noting that an outside director is a director who is not an officer).

203. *See supra* text accompanying notes 197–202.

204. § 14-2-870.

205. *Id.*

presented to the corporation or to one or more of its directors or officers.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.”²⁰⁷ Georgia allows corporations to disclaim opportunities as they arise, in advance, and those already taken.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.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.”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.”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).”²¹² Subsection (d) has a similar provision regarding officers.²¹³ Additionally, both subsections allow either directors or shareholders to approve the opportunity.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.”²¹⁵ The disclosure and approval procedures state that the

206. *Id.* § 14-2-870(a) (emphasis added).

207. *Id.* § 14-2-870 cmt.

208. *Id.* § 14-2-870(a).

209. *Id.*

210. *Id.* § 14-2-870 cmt.

211. *Id.*

212. *Id.* § 14-2-870(c).

213. *Compare id.* § 14-2-870(d), with MODEL BUS. CORP. ACT § 2.2(b)(6) (AM. BAR ASS’N 2016).

214. § 14-2-870(c)–(d).

215. *Id.* § 14-2-870 cmt. (emphasis added).

approval should be made as if it was a conflicts of interest issue and that all known material facts must be disclosed.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).²¹⁷ This means that a director or officer cannot be held liable solely because they do not offer the opportunity to the corporation beforehand.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.”²¹⁹ A director or officer can bring an opportunity for approval as a safe harbor provision, but it is not a requirement.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.²²¹ However, the comments clarify Georgia’s intent that these provisions are intended to “provide[] a safe harbor with respect to the approval process.”²²² However, the comments clarify Georgia’s intent.²²³

216. *Id.* § 14-2-870(c).

(1) Such disclaimer is approved by qualified directors in compliance with the procedures set forth in Code Section 14-2-862, as if the decision being made concerned a director’s conflicting interest transaction; or (2) Such disclaimer is approved by shareholders’ action taken in compliance with the procedures set forth in Code Section 14-2-863, as if the decision being made concerned a director’s conflicting interest transaction; except that, rather than making ‘required disclosure’ as defined in Code Section 14-2-860, in each case the director shall have made prior disclosure to those approving such disclaimer on behalf of the corporation of all material facts concerning the business opportunity that are then known to the director, subject to subsection (e) of this Code section, and that a “qualified director” is a director who, at the time action is to be taken under paragraph (1) of subsection (c) of this Code section, would be a qualified director under subsection (d) of Code Section 14-2-862 if the business opportunity were a director’s conflicting interest transaction.

Id. § 14-2-870(c).

217. *Id.* § 14-2-870 (f).

218. *See id.*

219. *Id.* § 14-2-870 cmt.

220. *Id.*

221. *Id.* § 14-2-870(c)–(d).

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

The Georgia statute is sufficiently comprehensive, and even though there is still some ambiguity regarding subsections (c) and (d), it is an excellent model.²²⁴ Georgia's model, unlike the MBCA, appears to allow directors and officers to obtain approval for opportunities.²²⁵ Similarly, while the MBCA requires subsequent approval solely for officers, Georgia does not.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.²²⁷

Georgia also balances the shareholders' interests and allows them to approve the disclaimers as well, when necessary.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.²²⁹ A more effective provision may explicitly state that the subsequent approval is available, but does not affect the disclaimers efficacy.²³⁰ Georgia recognizes that this statute is necessary to provide structured guidelines and procedures for corporate opportunity waivers.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.²³² Maryland's corporate opportunity waiver provision should require full disclosure and votes from disinterested directors or shareholders, as the case may be.²³³ In order to effectively provide these procedures, Maryland should enact a separate statute and use various elements from the models discussed above.²³⁴

the rules otherwise applicable to corporate decisions, including, as noted above, any applicable duties of directors approving the disclaimer.").

223. *See supra* text accompanying notes 204–22.

224. § 14-2-870.

225. *See id.*; *see also supra* text accompanying note 189.

226. *See id.* § 14-2-870(a), (c)–(d).

227. *See id.* § 14-2-870(a).

228. *See id.* § 14-2-870(c)–(d).

229. *See id.*

230. *See generally id.* § 14-2-870 (outlining the procedures by which specific business opportunities can be disclaimed).

231. *See supra* notes 129–37 and accompanying text.

232. *See supra* notes 130–37 and accompanying text.

233. *See supra* Part IV.

234. *See supra* Section IV.A.

Maryland's Revised Uniform Partnership Act is a succinct and efficient model.²³⁵ However, it is geared towards a different form of entity and would need to be changed to incorporate corporation law.²³⁶ Additionally, consent from all directors is not a common requirement in board decisions.²³⁷

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.²³⁸ Further, unlike Maryland and Delaware's existing waiver provisions, the opportunity being waived should be ripe and presented before the board.²³⁹ For this reason, the model is effective in structure only, such as referencing other procedures detailed elsewhere.²⁴⁰

The MBCA is effective because it has a section devoted to business opportunities.²⁴¹ 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.²⁴² 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.²⁴³ It is more practical to grant the right to waive corporate opportunities in the section where the procedures for doing so are specified.²⁴⁴

Substantively, the MBCA requires officers to offer the opportunity and obtain approval from disinterested directors for categories of opportunities that are already disclaimed.²⁴⁵ Thus, disclaimed categories of opportunities are ineffective for officers, and are not protected by the disclaimer, until they obtain subsequent approval.²⁴⁶

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.

239. *Compare* MD. CODE ANN., CORPS. & ASS'NS § 2-103(15) (West 2018), *and* DEL. CODE ANN. tit. 8, § 122(17) (West 2018), *with* ALI, *supra* note 13.

240. *See supra* notes 173–75 and accompanying text.

241. MODEL BUS. CORP. ACT § 8.70 (AM. BAR ASS'N 2016).

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

247. See *supra* notes 204–09 and accompanying text.

248. See *supra* notes 223–30 and accompanying text.

249. MD. CODE ANN., CORPS. & ASS'NS § 2-103(15) (West 2018).

250. GA. CODE ANN. § 14-2-870(c) (West 2018).

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.

257. See MD. CODE ANN., CORPS. & ASS'NS § 2-103(15) (West 2018).

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).²⁶⁷ 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.²⁶⁸ 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.²⁶⁹

This provision balances the shareholders' interests in the wellbeing of the company by providing procedures for directors and officers to follow.²⁷⁰ 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.²⁷¹ Directors are provided with certainty and a safe harbor provision, while shareholders have the protection of procedures explicitly stated in the statute.²⁷²

VI. CONCLUSION

Corporate opportunity waivers will simplify the overcomplicated, unpredictable, and highly litigated issue of the corporate opportunity doctrine.²⁷³ Corporate opportunity waiver statutes should specifically provide procedures or require full disclosure of all material facts for interested directors and approval by disinterested directors.²⁷⁴

The duty of loyalty is one of the longest standing and most important pillars of corporation law.²⁷⁵ 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.²⁷⁶ The procedures should provide for full disclosure of any material facts by interested directors and approval from disinterested directors.²⁷⁷ 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.²⁷⁸

278. *See supra* Part V.