Changes in the Model Business Corporation Act—
Proposed Amendments to Sections 2.02 and 8.70
(and Related Changes to Sections 1.43, 8.31 and 8.60)
Permitting Advance Action to Limit or Eliminate
Duties Regarding Business Opportunity

By the Committee on Corporate Laws, ABA Business Law Section*

The Committee on Corporate Laws of the ABA Business Law Section (the
“Committee”) develops and from time to time proposes changes in the Model
Business Corporation Act (the “Act” or “Model Act”).

The Committee has approved the changes described in this Report on second
reading and invites comments from interested persons. Comments should be
addressed to Karl John Ege, Chair, Committee on Corporate Laws, 1201
3d Avenue, Suite 4900, Seattle, Washington 98101, or sent to him by e-mail
at kege@perkinscoie.com. Comments should be received by July 31, 2014,
in order to be considered by the Committee before adoption of the amend-
ments on third reading.

The proposed amendments would permit corporations to include in their ar-
ticles of incorporation a provision that limits or eliminates a director’s or an of-
finger’s duty to present a business opportunity to the corporation. The authori-
ization could apply to officers but only if accompanied by action of qualified
directors, incorporating the procedures used elsewhere in the Act (and leading
to some additional changes in other sections described below). Over the last
two decades, more than a half-dozen states have added provisions to their gen-
eral corporation laws giving corporations the power to limit, eliminate, or re-
nounce in advance duties of directors, officers, or shareholders to present busi-
ness or corporate opportunities to the entity. Such private ordering by provisions
in the articles or sometimes by board action has been used by private equity fi-
nanced companies in the high tech and other industries as well as by companies
involved in joint ventures or in spin-offs. These amendments would permit ac-
tion by appropriate provisions in the articles of incorporation.

The proposed amendments are set forth below. Changes to existing provisions
are marked to show changes from the current act. New language is indicated by
double underscoring and deletions are shown by strikeouts.

* Karl John Ege, Chair.
1.43. **Qualified Director**

(a) A “qualified director” is a director who, at the time action is to be taken under:

1. section 7.44, does not have (i) a material interest in the outcome of the proceeding, or (ii) a material relationship with a person who has such an interest;

2. section 8.53 or 8.55, (i) is not a party to the proceeding, (ii) is not a director as to whom a transaction is a director's conflicting interest transaction or who sought a disclaimer of the corporation's interest in a business opportunity under section 8.70, which transaction or disclaimer is challenged in the proceeding, and (iii) does not have a material relationship with a director described in either clause (i) or clause (ii) of this subsection (a)(2);

3. section 8.62, is not a director (i) as to whom the transaction is a director's conflicting interest transaction, or (ii) who has a material relationship with another director as to whom the transaction is a director's conflicting interest transaction;

4. section 8.70, would be a qualified director under subsection (a)(3) if the business opportunity were a director's conflicting interest transaction;

5. section 2.02(b)(6), is not a director (i) to whom the limitation or elimination of the duty of an officer to offer potential business opportunities to the corporation would apply, or (ii) who has a material relationship with another officer to whom the limitation or elimination would apply.

(b) For purposes of this section:

1. “material relationship” means a familial, financial, professional, employment or other relationship that would reasonably be expected to impair the objectivity of the director's judgment when participating in the action to be taken; and

2. “material interest” means an actual or potential benefit or detriment (other than one which would devolve on the corporation or the shareholders generally) that would reasonably be expected to impair the objectivity of the director's judgment when participating in the action to be taken.

(c) The presence of one or more of the following circumstances shall not automatically prevent a director from being a qualified director:

1. nomination or election of the director to the current board by any director who is not a qualified director with respect to the matter
(or by any person that has a material relationship with that director), acting alone or participating with others;

(2) service as a director of another corporation of which a director who is not a qualified director with respect to the matter (or any individual who has a material relationship with that director), is or was also a director; or

(3) with respect to action to be taken under section 7.44, status as a named defendant, as a director against whom action is demanded, or as a director who approved the conduct being challenged.

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**Official Comment**

The definition of the term “qualified director” identifies those directors: (i) who may take action on the dismissal of a derivative proceeding (section 7.44); (ii) who are eligible to make, in the first instance, the authorization and determination required in connection with the decision on a request for advance for expenses (section 8.53(c)) or for indemnification (sections 8.55(b) and (c)); (iii) who may authorize a director’s conflicting interest transaction (section 8.62); and (iv) who may disclaim the corporation’s interest in a business opportunity (section 8.70(a)); and (v) who may make applicable the limitation or elimination of a duty of an officer to offer the corporation business opportunities before the officer or a related person of the officer pursues or takes the opportunity (section 2.02(b)(6)).

* * *

1. Disqualification Due to Conflicting Interest

The “qualified director” concept prescribes significant disqualifications, depending upon the purpose for which a director might be considered eligible to participate in the action to be taken. In each context in which the definition applies, it excludes directors who should not be considered disinterested:

– In the case of action on dismissal of a derivative proceeding under section 7.44, the definition excludes any directors who have a material interest in the outcome of the proceeding, such as where the proceeding involves a challenge to the validity of a transaction in which the director has a material financial interest. As defined in subsection (b)(2), a “material interest” in the outcome of the proceeding involves an actual or potential benefit (other than one that would devolve on the corporation or the shareholders generally) that would arise from dismissal of the proceeding and would reasonably be expected to impair the objectivity of the director’s judgment in acting on dismissal of the proceeding.

– In the case of action to approve indemnification or advance of funds for expenses, the definition excludes any directors who are a party to the proceeding (see section 8.50(6) for the definition of “party” and sec-
tion 8.50(7) for the definition of “proceeding”). It also excludes a director who is not a party to the proceeding but as to whom a transaction is a director’s conflicting interest transaction or who sought a disclaimer of the corporation’s interest in a business opportunity, where that transaction or disclaimer is challenged in the proceeding.

- In the case of action to approve a director’s conflicting interest transaction, the definition excludes any director whose interest, knowledge or status results in the transaction being treated as a “director’s conflicting interest transaction.” See section 8.60(1) for the definition of “director’s conflicting interest transaction.”

- Finally, in the case of action under section 8.70(a) to disclaim corporate interest in a business opportunity, the definition excludes any director who would not be considered a “qualified director” if the business opportunity were a “director’s conflicting interest transaction.”

- Finally, in the case of action under a provision adopted under the authority of section 2.02(b)(6) to limit or eliminate any duty of an officer to offer the corporation business opportunities, the definition excludes any director who is also an officer and to whom the provision would apply or who has a material relationship with an officer to whom the provision would apply.

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2. Disqualification Due to Relationships with Interested Persons

In each context in which the “qualified director” definition applies, it also excludes any director who has a “material relationship” with another director (or, with respect to a provision applying to an officer under section 2.02(b)(6) or section 8.70, a “material relationship” with that officer) who is not disinterested for one or more of the reasons outlined in the preceding paragraph. Any relationship with such a person director, whether the relationship is familial, financial, professional, employment or otherwise, is a “material relationship,” as that term is defined in subsection (b)(1), where it would reasonably be expected to impair the objectivity of the director’s judgment when voting or otherwise participating in action to be taken on a matter referred to in subsection (a). The determination of whether there is a “material relationship” should be based on the practicalities of the situation rather than on formalistic considerations. For example, a director employed by a corporation controlled by another director should be regarded as having an employment relationship with that director. On the other hand, a casual social acquaintance with another director should not be regarded, on its own, as a disqualifying relationship. See Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040, 1050 (Del. 2004).

Although the term “qualified director” embraces the concept of independence it does so only in relation to the director’s interest or involvement in the specific
situations to which the definition applies. Thus, the term “qualified director” is
distinct from the generic term “independent director” used in section 8.01(c) of
the Act to describe a director’s general status. As a result, an “independent direc-
tor” may in some circumstances not be a “qualified director,” and vice versa. For
example, in action being taken under section 8.70 concerning a business oppor-
tunity, an “independent” director who has a material interest in the business op-
portunity would not be a “qualified director” eligible to vote on the matter. Con-
versely, a director who does not have “independent” status may be a “qualified
director” for purposes of voting on that action. See also the Official Comment to
section 8.01(c).

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2.02. ARTICLES OF INCORPORATION

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(b) The articles of incorporation may set forth:

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(4) a provision eliminating or limiting the liability of a director to the corporation
or its shareholders for money damages for any action taken, or any failure to take
any action, as a director, except liability for (A) the amount of a financial benefit
received by a director to which the director is not entitled; (B) an intentional in-
fliction of harm on the corporation or the shareholders; (C) a violation of sec-
tion 8.33; or (D) an intentional violation of criminal law; and

(5) a provision permitting or making obligatory indemnification of a director for
liability (as defined in section 8.50(5)) to any person for any action taken, or
any failure to take any action, as a director, except liability for (A) receipt of a fi-
nancial benefit to which the director is not entitled, (B) an intentional infliction
of harm on the corporation or its shareholders, (C) a violation of section 8.33, or
(D) an intentional violation of criminal law; and

(6) a provision limiting or eliminating any duty of a director or any other per-
son to offer the corporation the right to have or participate in any, or one or
more classes or categories of, business opportunities, prior to the pursuit or
taking of the opportunity by the director or other person, provided that any
application of such a provision to an officer or a related person of that officer
(i) also requires a determination by the board of directors by action of qualified
directors taken in compliance with the same procedures as are set forth in sec-
tion 8.62 subsequent to the effective date of the provision applying the provi-
sion to a particular officer or any related person of that officer, and (ii) may be
limited by the authorizing action of the board.

* * *

(e) As used in this section “related person” has the meaning specified in sec-
tion 8.60(5).
OFFICIAL COMMENT

H. Self-Dealing Transactions

When subsidiaries or corporate joint ventures are being formed, special consideration should be given to the inclusion of provisions designed to limit or avoid the unexpected application of the doctrines of corporate opportunity and conflict of interest. While this type of clause will not provide total protection, it may be given limited effect, for example, by shifting the burden of proving unfairness or “exonerating” an arrangement from “adverse influences.” See Spiegel v. Beacon Participations Inc., 297 Mass. 398, 8 N.E.2d 895 (1937); see generally the Introductory Note and Official Comment to chapter 8F; see also section 8.70 and Official Comment regarding “business opportunities.”

I-H. Director Liability

Financial Benefit

Permitting limitation of the liability of a director for receipt of a financial benefit to which the director is not entitled would validate conduct in which the director could realize a personal gain. Corporate law has long subjected transactions from which a director could benefit personally to special scrutiny. The exception is limited, however, to the amount of the benefit actually received. Thus, liability for punitive damages could be eliminated. However, punitive damages are not eliminated in either the exception for infliction of harm or for violation of criminal law and, thus, in a particular case (for example, theft), punitive damages may be available. The benefit must be financial rather than in less easily measurable and more conjectural forms, such as business goodwill, personal reputation, or social ingratiation. The phrase “received by a director” is not intended to be a “bright line.” As a director’s conduct moves toward the edge of what may be excused, he should bear the risk of miscalculation. Depending upon the circumstances, a director may be deemed to have received a benefit that the director caused to be directed to another person, for example, a relative, friend, or affiliate.

What constitutes a financial benefit “to which the director is not entitled” is left to judicial development. For example, a director is clearly entitled to reasonable compensation for the performance of services or to an increase in the value of stock or stock options held by him; just as clearly, a director is not entitled to a bribe, a kick-back, or the profits from a corporate opportunity improperly taken by the director. See section 8.70 as to procedures for disclaiming the corporation’s interest in a business opportunity by action of qualified directors or shareholders. See section 2.02(b)(6) for optional provisions permitted in the articles of incorporation to limit or eliminate, in advance, any duty of directors and others to bring business opportunities to the corporation. If the corporation declines the opportunity after it has been presented to the corporation by the director in accordance with the provisions of section 8.70(a)(1)(i) or (ii), or if a
provision under 2.02(b)(6) limits or eliminates the duty to bring the particular opportunity to the corporation, if the director pursues or takes the opportunity, the corporation will have no right to participate in any financial benefit arising from the opportunity.

I. BUSINESS OPPORTUNITIES

Section 2.02(b)(6) authorizes the inclusion of a provision in the articles of incorporation to limit or eliminate, in advance, the duty of a director or other person to bring a business opportunity to the corporation. The limitation or elimination may be blanket in nature and apply to any business opportunities, or it may extend only to one or more specified classes or categories of business opportunities. The adoption of such a provision constitutes a curtailment of the duty of loyalty which, under the case law as developed, includes the doctrine of corporate opportunity. If such a provision is included in the articles, taking advantage of a business opportunity covered by the provision of the articles without offering it to the corporation will not expose the director or other person to whom it is made applicable either to monetary damages or to equitable or any other relief in favor of the corporation upon compliance with the requirements of section 2.02(b)(6).

This provision may be useful, for example, in the context of a private equity investor that wishes to have a nominee on the board but conditions its investment on an advance limitation or elimination of the corporate opportunity doctrine because of the uncertainty over the application of the corporate opportunity doctrine inherent when investments are made in multiple enterprises in particular industries. Another example is in the setting of a joint venture in corporate form where the participants in the joint venture want to be sure that the corporate opportunity doctrine would not apply to their activities outside the joint venture.

The focus of the advance limitation or elimination is on the duty of the director which extends indirectly to the investor through the application of the related party definition in section 8.60(5). This provision also permits extension of the limitation or elimination of the duty to any other persons who might be deemed to have a duty to offer business opportunities to the corporation. For example, court decisions have held that the corporate opportunity doctrine extends to officers of the corporation. Although officers may be included in a provision under this subsection, 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. Accordingly, section 2.02(b)(6) requires that the application of an advance limitation or elimination of the duty to offer a business opportunity to the corporation to any person who is an officer of the corporation or a related person of an officer also requires action by the board of directors acting through qualified directors. This action must be taken subsequent to the inclusion of the provision in the articles of incorporation and may limit the application. This means that if the advance limitation or elimination of the duty of an officer to offer to the corporation business opportunities is in-
cluded in the articles by an amendment recommended by the directors and ap-
proved by the shareholders, that recommendation of the directors does not serve
as the required authorization by qualified directors; rather, separate authoriza-
tion by qualified directors after the amendment is included in the articles is nec-
essary to applying the provision to the particular or any related person of that
officer. See section 1.43(a)(5) and section 8.60(5) for the definition of “qualified
directors” and “related persons,” respectively.

Whether or not a provision for advance limitation or elimination of duty in the
articles should be a broad “blanket” provision or one more tailored to specific
categories or classes of transactions deserves careful consideration in the partic-
ular circumstances of the corporation.

Limitation or elimination of the duty of a director or officer to present a busi-
ness opportunity to the corporation does not limit or eliminate the director’s or
officer’s duty not to make unauthorized use of corporate property or information
or to compete unfairly with the corporation.

8.31. Standards of Liability for Directors

(a) A director shall not be liable to the corporation or its shareholders for
any decision to take or not to take action, or any failure to take any ac-
tion, as a director, unless the party asserting liability in a proceeding es-
tablishes that:

(1) no defense interposed by the director based on (i) any provision in
the articles of incorporation authorized by section 2.02(b)(4) or by
section 2.02(b)(6), or (ii) the protection afforded by section 8.61
(for action taken in compliance with section 8.62 or section 8.63),
or (iii) the protection afforded by section 8.70, precludes liability; and

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Official Comment

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Note on Directors’ Liability

A director’s financial risk exposure (e.g., in a lawsuit for money damages suf-
fered by the corporation or its shareholders claimed to have resulted from mis-
feasance or nonfeasance in connection with the performance of the director’s du-
ties) can be analyzed as follows:

1. Articles of incorporation limitation of liability for money damages. If the cor-
poration’s articles of incorporation contain a provision eliminating its di-
rectors’ liability to the corporation or its shareholders for money damages,
adopted pursuant to section 2.02(b)(4), there is no liability unless the di-
rector’s conduct involves one of the prescribed exceptions that preclude
the elimination of liability. See section 2.02 and its Official Comment.
2. *Director’s conflicting interest transaction safe harbor.* If the matter at issue involves a director’s conflicting interest transaction (as defined in section 8.60(2)) and a safe harbor procedure under section 8.61 involving action taken in compliance with section 8.62 or 8.63 has been properly implemented, there is no liability for the interested director arising out of the transaction. See subchapter F of this chapter 8.

3. *Business opportunities safe harbors.* Similarly, if the matter involves a director’s pursuit or taking of a business opportunity and (i) an applicable limitation or elimination of any duty to offer that business opportunity to the corporation has been adopted pursuant to section 2.02(b)(6), or (ii) a safe harbor procedure under section 8.70 has been properly implemented, there is no liability for the director arising out of the pursuit or taking of the business opportunity. See subchapter G of this chapter 8.

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1. *Section 8.31(a)*

If a provision in the corporation’s articles of incorporation (i) (adopted pursuant to section 2.02(b)(4)) shelters the director from liability for money damages, or (ii) (adopted pursuant to section 2.02(b)(6)) limits or eliminates any duty to offer the particular business opportunity to the corporation, or if a safe harbor provision, under subsection (b)(1) or (b)(2) of section 8.61 or section 8.70(a)(1), shelters the director’s conduct in connection with a conflicting interest transaction or the pursuit or taking of a business opportunity, and such defense applies to all claims in plaintiff’s complaint, there is no need to consider further the application of section 8.31’s standards of liability. In that event, the court would presumably grant the defendant director’s motion for dismissal or summary judgment (or the equivalent) and the proceeding would be ended. If the defense applies to some but not all of plaintiff’s claims, defendant is entitled to dismissal or summary judgment with respect to those claims.

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**G. Other Breaches of a Director’s Duties**

Subsection (a)(2)(v) is, in part, a catchall provision that implements the intention to make section 8.31 a generally inclusive provision but, at the same time, to recognize the existence of other breaches of common-law duties that can give rise to liability for directors. As developed in the case law, these actionable breaches include unauthorized use of corporate property or information, unfair competition with the corporation and taking of a corporate opportunity. In the latter case, if the director is alleged to have wrongfully diverted a business opportunity as to which the corporation had a prior right, the Act provides two possible safe harbors. First, any duty to offer the business opportunity to the corporation may have been limited or eliminated pursuant to a provision in the articles of incorporation authorized by section 2.02 (b)(6). Second, section 8.70(a)(1) provides a safe harbor mechanism for a director who wishes to pursue or take advantage of a business opportunity, regardless of whether such opportunity would be characterized as
a “corporate opportunity” under existing case law. Note that section 8.70(b) provides that the fact that a director did not employ the safe harbor provisions of section 8.70(a)(1) does not create an inference that the opportunity should have first been presented to the corporation or alter the burden of proof otherwise applicable to establish a breach of the director’s duty to the corporation.

8.60. SUBCHAPTER DEFINITIONS

(5) “Related person” means:

(i) the director’s individual’s spouse;

(ii) a child, stepchild, grandchild, parent, step parent, grandparent, sibling, step sibling, half sibling, aunt, uncle, niece or nephew (or spouse of any thereof) of the director individual or of the director’s individual’s spouse;

(iii) an individual a natural person living in the same home as the director individual;

(iv) an entity (other than the corporation or an entity controlled by the corporation) controlled by the director individual or any person specified above in this subdivision (5);

(v) a domestic or foreign (A) business or nonprofit corporation (other than the corporation or an entity controlled by the corporation) of which the director individual is a director, (B) unincorporated entity of which the director individual is a general partner or a member of the governing body, or (C) individual, trust or estate for whom or of which the director individual is a trustee, guardian, personal representative or like fiduciary; or

(vi) a person that is, or an entity that is controlled by, an employer of the director individual.

OFFICIAL COMMENT

The definitions set forth in section 8.60 apply only to Subchapter F’s provisions and except to the extent where relevant to subchapter G and section 2.02(b)(6). They have no application elsewhere in the Model Act.

5. Related Person

The term “employer” as used in subdivision (5)(vi) is not separately defined but should be interpreted sensibly in light of the purpose of the subdivision.
The relevant inquiry is whether D, because of an employment relationship with an employer who has a significant stake in the outcome of the transaction, is likely to be influenced to act in the interest of that employer rather than in the interest of X Co.

References in the foregoing to “director” or “D” include the term “officer” where relevant in section 2.02(b)(6) and section 8.70.

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8.70. BUSINESS OPPORTUNITIES

(a) A director’s or officer’s or related person’s if a director or officer or related person of either pursues or takes advantage, directly or indirectly, of a business opportunity, that action may not be the subject of equitable relief, or give rise to an award of damages or other sanctions against the director, officer or related person, in a proceeding by or in the right of the corporation on the ground that such opportunity should have first been offered to the corporation, if

(1) before the director, officer or related person becomes legally obligated respecting the opportunity, the director or officer brings it to the attention of the corporation and:

(i) action by qualified directors disclaiming the corporation’s interest in the opportunity is taken in compliance with the same procedures set forth in section 8.62, as if the decision being made concerned a director’s conflicting interest transaction, or

(ii) shareholders’ action disclaiming the corporation’s interest in the opportunity is taken in compliance with the procedures set forth in section 8.63, as if the decision being made concerned a director’s conflicting interest transaction;

except that, rather than making “required disclosure” as defined in section 8.60, in each case the director or officer shall have made prior disclosure to those acting on behalf of the corporation of all material facts concerning the business opportunity that are then known to the director or officer; or

(2) the duty to offer the corporation the particular business opportunity has been limited or eliminated pursuant to a provision of the articles of incorporation adopted (and in the case of officers and their related persons, made effective by action of qualified directors) in accordance with section 2.02(b)(6).

(b) In any proceeding seeking equitable relief or other remedies based upon an alleged improper pursuit or taking advantage of a business opportunity by a director or officer, the fact that the director or officer did
not employ the procedure described in subsection (a)(1)(i) or (ii) before taking advantage of the opportunity shall not create an inference that the opportunity should have been first presented to the corporation or alter the burden of proof otherwise applicable to establish that the director breached a duty to the corporation in the circumstances.

(c) As used in this section “related person” has the meaning specified in section 8.60(5).

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OFFICIAL COMMENT
Section 8.70(a)(1) provides a safe harbor for a director or officer weighing possible involvement with a prospective business opportunity that might constitute a “corporate opportunity.” By action of the board of directors or shareholders of the corporation under section 8.70(a)(1), the director or officer can receive a disclaimer of the corporation’s interest in the matter before proceeding with such involvement. In the alternative, the corporation may (i) decline to disclaim its interest, (ii) delay a decision respecting granting a disclaimer pending receipt from the director or officer of additional information (or for any other reason), or (iii) attach conditions to the disclaimer it grants under section 8.70(a). The safe harbor granted to the director or officer pertains only to the specific opportunity and does not have broader application, such as to a line of business or a geographic area. Section 8.70(a)(2) confirms that if the duty of an officer or director to present an opportunity has been limited or eliminated by a provision in the articles of incorporation under section 2.02(b)(6) (and in the case of officers and their related persons, appropriate action by qualified directors as required by that section) a safe harbor exists for the director or officer (or related person) in connection with the pursuit or taking of the opportunity.

The common law doctrine of “corporate opportunity” has long been recognized as a core part of the director’s duty of loyalty and, under court decisions, extends to officers. The doctrine stands for the proposition that the corporation has a right prior to that of its director or officer to act on certain business opportunities that come to the attention of the director or officer. In such situations, a director or officer who acts on the opportunity for the benefit of the director or officer or another without having first presented it to the corporation can be held to have “usurped” or “intercepted” a right of the corporation. A defendant director or officer who is found by a court to have violated the duty of loyalty in this regard is subject to damages or an array of equitable remedies, including injunction, disgorgement or the imposition of a constructive trust in favor of the corporation. While the doctrine’s concept is easily described, whether it will be found to apply in a given case depends on the facts and circumstances of the particular situation and is thus frequently unpredictable. Ultimately, the doctrine requires the court to balance the corporation’s legitimate expectations that its directors will faithfully promote its best interests against the legitimate right of individual directors to pursue their own economic interests in other contexts and venues.
In response to this difficult balancing task, courts have developed several (sometimes overlapping) principles to cabin the doctrine. Although the principles applied have varied from state to state, courts have sought to determine, for example, whether a disputed opportunity presented a business opportunity that was the same as, or similar to, the corporation’s current or planned business activities (“line of business” test); one that the corporation had already formulated plans or taken steps to acquire for its own use (“expectancy” test); developed by the director through the use of the corporation’s property, personnel, or proprietary information (“appropriation” test); or presented to the director with the explicit or implicit expectation that the director would present it to the corporation for its consideration or in contrast, one that initially came to the director’s attention in the director's individual capacity unrelated to the director's corporate role (“capacity” test).

Finally, in recognition that the corporation need not pursue every business opportunity of which it becomes aware, an opportunity coming within the doctrine’s criteria that has been properly presented to and declined by the corporation may then be pursued by the presenting director or officer without breach of the director’s duty of loyalty.

The fact-intensive nature of the corporate opportunity doctrine resists statutory definition. Instead, subchapter G employs the broader notion of “business opportunity” that encompasses any opportunity, without regard to whether it would come within the judicial definition of a “corporate opportunity” as it may have been developed by courts in a jurisdiction. When properly employed, it provides a safe-harbor mechanism enabling a director or officer to pursue an opportunity for his or her own account or for the benefit of another free of possible challenge claiming conflict with the director’s or officer’s duty of loyalty on the ground that the opportunity should first have been offered to the corporation. Section 8.70 is modeled on the safe-harbor and approval procedures of subchapter F pertaining to directors’ conflicting interest transactions with, however, some modifications necessary to accommodate differences in the two topics.

1. Section 8.70(a)(1)

Subsection (a)(1) describes the safe harbor available to a director or officer who elects to subject a business opportunity, regardless of whether the opportunity would be classified as a “corporate opportunity,” to the disclosure and approval procedures set forth therein. The safe harbor provided is as broad as that provided for a director’s conflicting interest transaction in section 8.61: if the director or officer makes required disclosure of the facts specified and the corporation’s interest in the opportunity is disclaimed by director action under subsection (a)(1)(i) or shareholder action under subsection (a)(21)(ii), the director or officer has foreclosed any claimed breach of the duty of loyalty and may not be subject to equitable relief, damages or other sanctions if the director or officer thereafter takes the opportunity for his or her own account or for the benefit of another person. As a general proposition, disclaimer by director action under subsection (a)(1)(i) must meet all of the requirements provided in section 8.62
with respect to a director’s conflicting interest transaction and disclaimer by
shareholder action under subsection (a)(21)(ii) must likewise comply with all
of the requirements for shareholder action under section 8.63. Note, however,
two important differences.

First, in contrast to director or shareholder action under sections 8.62 and
8.63, which may be taken at any time, section 8.70(a)(1) requires that the director
or officer must present the opportunity and secure director or shareholder
action disclaiming it before acting on the opportunity. The safe-harbor concept
contemplates that the corporation’s decision maker will have full freedom of ac-
tion in deciding whether the corporation should take over a proffered opportu-
nity or elect to disclaim the corporation’s interest in it. If the interested director
or officer could seek ratification after acting on the opportunity, the option of
taking over the opportunity would, in most cases, in reality be foreclosed and
the corporation’s decision maker would be limited to denying ratification or
blessing the interested director’s or officer’s past conduct with a disclaimer. In
sum, the safe harbor’s benefit is available only when the corporation can enter-
tain the opportunity in a fully objective way.

The second difference also involves procedure. Instead of employing section
8.60(7)’s definition of “required disclosure” that is incorporated in sections
8.62 and 8.63, section 8.70(a)(1) requires the alternative disclosure to those act-
ing for the corporation of “all material facts concerning the business opportunity
that are then known to the director.” As a technical matter, section 8.60(7) calls
for, in part, disclosure of “the existence and nature of the director’s conflicting
interest” that information is not only nonexistent but irrelevant for purposes
of subsection (a). But there is another consideration justifying replacement of
the section 8.60(7) definition. In the case of the director’s conflicting interest
transaction, the director proposing to enter into a transaction with the corpora-
tion has presumably completed due diligence and made an informed judgment
respecting the matter; accordingly, that interested director is in a position to dis-
close “all facts known to the director respecting the subject matter of the trans-
action that a director free of such conflicting interest would reasonably believe to
be material in deciding whether to proceed with the transaction.” The interested
director, placing himself or herself in the independent director’s position, should
be able to deal comfortably with the objective materiality standard. In contrast,
the director or officer proffering a business opportunity will often not have un-
dertaken due diligence and made an informed judgment to pursue the oppor-
tunity following a corporate disclaimer. Thus, the disclosure obligation of sub-
section (a)(1) requires only that the director or officer reveal all material facts
concerning the business opportunity that, at the time when disclosure is made,
are known to the director or officer. The safe-harbor procedure shields the direc-
tor or officer even if a material fact regarding the business opportunity is not dis-
closed, so long as the proffering director or officer had no knowledge of such
fact. In sum, the disclosure requirement for subsection (a)(1) must be and
should be different from that called for by subchapter F’s provisions.
Section 8.70(a)(2) confirms the effect of any applicable provision in the articles of incorporation to limit or eliminate a duty to offer the corporation a particular business opportunity adopted under the authority of section 2.02(b)(6).

2. Section 8.70(b)

Subsection (b) reflects a fundamental difference between the coverage of subchapters F and G. Because subchapter F provides an exclusive definition of “director’s conflicting interest transaction,” any transaction meeting the definition that is not approved in accordance with the provisions of subchapter F is not entitled to its safe harbor. Unless the interested director can, upon challenge, establish the transaction’s fairness, the director’s conduct is presumptively actionable and subject to the full range of remedies that might otherwise be awarded by a court. In contrast, the concept of “business opportunity” under section 8.70 is not defined but is intended to be broader than what might be regarded as an actionable “corporate opportunity.” This approach recognizes that, given the vagueness of the corporate opportunity doctrine, a director or officer might be inclined to seek safe harbor protection under section 8.70(a)(1) before pursuing an opportunity that might or might not at a later point be subject to challenge as a “corporate opportunity.” By the same token, a director or officer might conclude that a business opportunity is not a “corporate opportunity” under applicable law and choose to pursue it without seeking a disclaimer by the corporation under section 8.70(a)(1). Accordingly, subsection (b) provides that a director’s decision not to employ the procedures of section 8.70(a)(1) neither creates a negative inference nor alters the burden of proof in any subsequent proceeding seeking damages or equitable relief based upon an alleged improper taking of a “corporate opportunity.”