



Impacts of the Recent Changes to Pennsylvania Business Corporation Law

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Are you up to date with the most recent changes to the Pennsylvania Business Corporation Law? In November 2022, the Pennsylvania legislature expanded Title 15 of the Pennsylvania Code, which is the Pennsylvania Business Corporation Law (PaBCL). Most of these amendments went into effect on January 2, 2023.

Corporate counsel for Pennsylvania entities and foreign entities must understand these changes, since their domestic and foreign entities are affected. Also, this is the first comprehensive update made to the PaBCL since 2015. These changes generally follow the Model Business Corporations Act and incorporate similar amendments to those seen recently in the Delaware General Corporation Law.

In this piece, we touch on some of the more significant provisions to be aware of but note that numerous other changes were made as well.

Pennsylvania now requires annual reports

Up until the recent Title 15 amendments went into effect, Pennsylvania was the only state that didn't compel an entity to file annual reports. Instead, reports were only required every 10 years.

As of January 2, 2024, the Pennsylvania Department of State mandates annual filing under Section 146. The required deadline for such a report is dependent on the type of entity involved. For example, domestic or foreign for-profit and not-for-profit corporations must file before July 1 annually. Domestic or foreign limited liability companies must file before October 1 every year. Any other form of domestic or foreign association must file on or before December 31.

Once per year and at least two months before the deadline, the Department of State will deliver a notice to the registered office or registered agent on record for the entity as a reminder that the annual report must be filed. Failure by the Department to deliver such notice or failure by the entity to receive the notice will not excuse the entity from failing to make an annual filing.

The Pennsylvania Department of State will eventually impose penalties on entities that fail to file their annual reports. Note, however, that there is some time before

penalties begin to kick in. The Department of State will not terminate the registration of foreign entities for such failures until 2026; the Department will not dissolve or cancel a domestic entity or partnership for failure to file until 2027.

Directors and officers

Definition of "recklessness"

In Section 102 of Title 15, the Pennsylvania legislature added a definition of recklessness to match the definition of the term in Pennsylvania's Crimes Code. The reason for this revision is an interpretation of the PaBCL by New York court *In re: Nine West LBO Sec. Litig.*, 505 F. Supp. 3d 292 (S.D.N.Y. Dec. 4, 2020). The court held that if directors and officers ignore facts they should know about, they may be found to have acted recklessly. The court determined that if an officer or director acts in this manner, they're not protected by Sections 1713 or 1735 of the PaBCL. The new definition states that recklessness means "Conduct that involves a conscious disregard of a substantial and unjustifiable risk. The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to the actor, its conscious disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation."

We can see that new definition makes it much harder to provide that a director or officer has been reckless and is therefore a direct rejection of the New York court's ruling in *In re: Nine West*.

Business Judgment Rule

In re: Nine West also provoked changes in the Pennsylvania Business Corporation Law regarding the Business Judgment Rule as it pertains to officers and directors. The legislature changed Section 1712(a) of Title 15 to clarify that a director's obligation to make reasonable inquiry applies only to issues that the PaBCL states are a director's duty. This discards the interpretation of Section 1712 by the New York court, where it was found that the board of directors of Nine West had breached their fiduciary duty by failing to investigate the transactions they knew would follow an initial merger.

Furthermore, Pennsylvania legislature added Section 1712(d) to clearly provide a Business Judgment Rule for directors. It states, "A director who makes a business judgment in good faith fulfills the duties under this section if: (2) the director is informed with respect to the subject of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances; and (3) the director rationally believes that the business judgment is in the best interests of the corporation."

Section 1712(e) states that for a successful claim that a director violated a duty of care, the claimant must show the following: "A person challenging the conduct of a director as violating the duty of care under this section has the burden of proving: (1) a breach of the duty of care, including that a requirement for fulfillment of that duty under subsection (d) has not been met; and (2) in a damage action, that the breach was the legal cause of damage suffered by the corporation."

Regarding the Business Judgment Rule and officers of a corporation, the previous 1712(c) stated that, "Except as otherwise provided in the bylaws, an officer shall perform his duties as an officer in good faith, in a manner he reasonably believes to be in the best interests of the corporation and with such care, including reasonable

inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances. A person who so performs his duties shall not be liable by reason of having been an officer of the corporation."

New Section 1734 instead adds a clear Business Judgment Rule for officers very similar to what was added to Section 1712 for directors. The only difference is that Section 1734 makes an exception in the case that the corporation's bylaws provide a different standard than the Business Judgment Rule; in that case, the Business Judgment Rule will not apply as stated in 1734.

Likewise, the same burden of proof that was added in Section 1712(e) as applicable to claims against directors has been added to 1734(e) to apply to claims of a violation of the duty of care by officers.

Board of directors can provide consent to apply at a later date

Under Section 1727(C) of the PaBCL, a board of directors can now sign a consent that will be delayed in effect until a later time. It does not matter if one or more of the directors who signed the consent are not directors at the time the consent goes into effect. Notwithstanding, if one of the directors changes their mind before the consent goes into effect, they can renege consent and it will no longer go into effect on that future date.

Form selection can be dictated by bylaws

Section 1513 of the PaBCL now allows a corporation to establish an exclusive forum for the adjudication of "internal corporate claims" (see 1513(c) for definition) by adding a forum selection clause into the bylaws or into the articles of incorporation. If a corporation adds a forum selection clause, at least one of the courts specified in it must be a Pennsylvania court. Courts in other jurisdictions may also be named but only if the corporation has a reasonable relationship with those courts. The corporation may also include it in its bylaws or articles that a claim arising under the Securities Act of 1933 must be brought exclusively in federal court.

Additional resources from CSC

For more information regarding the updates to the Pennsylvania Business Corporation Law amendments, CSC partnered with Faegre Drinker Biddle & Reath LLP to provide a high-level overview [in a recent webinar](#), available for viewing on demand.

Additionally, the 2023 edition of CSC's [Pennsylvania Laws Governing Business Entities Annotated](#) captures the update and provides analysis, a Table of Affected, and Blackline Amendment Notes to aid readers in understanding what's changed.