

Department of Legislative Services  
Maryland General Assembly  
2016 Session

FISCAL AND POLICY NOTE  
Third Reader - Revised

House Bill 354  
Economic Matters

(Delegate Kramer)

Judicial Proceedings

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Corporations and Real Estate Investment Trusts - Directors and Trustees -  
Duties and Immunity From Liability

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The bill alters the duties and clarifies the immunity from liability of a director of a corporation or a trustee in a real estate investment trust (REIT). Except as otherwise specified in the declaration of trust, the bill also extends the duties and immunity from liability of a director of a corporation to a trustee in a REIT.

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**Fiscal Summary**

**State Effect:** The bill does not materially affect governmental finances or operations.

**Local Effect:** The bill does not materially affect local government finances or operations.

**Small Business Effect:** Minimal.

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**Analysis**

**Bill Summary:** The bill establishes that all business and affairs of a corporation, whether or not in the ordinary course, must be managed by or under the direction of a board of directors. The bill clarifies that “act” includes not only an act but also an omission, a failure to act, or a determination not to act. The bill also clarifies that the statute setting forth the standard of care of a director applies to an individual who is or was a director of a corporation and is acting or was acting in the individual’s official capacity as a director of a corporation.

The bill specifies that a director is not required to act solely because of the amount or type of any consideration that may be offered or paid to stockholders in a potential acquisition of control of the corporation.

The bill also establishes that the statutory duties of a director are the sole source of duties of a director to the corporation or the stockholders of the corporation, whether or not a decision has been made to enter into an acquisition or potential acquisition of control of the corporation or enter into any other transaction involving the corporation. The statutory duties apply to any act of a director, including an act as a member of a committee of the board of directors.

The bill repeals a provision establishing that the duties of a director are enforceable only by the corporation or in the right of the corporation.

### **Current Law:**

*Director of a Corporation:* The business and affairs of a corporation must be managed under the direction of a board of directors. A director of a corporation must perform the duties of a director (1) in good faith; (2) in a manner the director reasonably believes to be in the corporation's best interest; and (3) with the care that an ordinarily prudent person in a like position would use under similar circumstances. A person who performs his or her duties in accordance with this standard is immune from liability by reason of being or having been a director. An act of a director is presumed to satisfy this standard.

In performing his or her duties, a director may reasonably rely on any officer or employee of the corporation, a professional such as a lawyer or certified public accountant, or a committee of the board on which the director does not serve. A director is not acting in good faith if he or she has any knowledge concerning the matter in question which would cause such reliance to be unwarranted.

*Trustee of a REIT:* A shareholder or trustee of a REIT is not personally liable for the obligations of the REIT unless the person's act constitutes bad faith, willful misfeasance, gross negligence, or reckless disregard of the trustee's duties. However, the REIT's declaration may expand or limit the liability of its trustees and officers to the trust to some extent.

*REITs and Corporations:* The duties of a director of a corporation or a trustee of a REIT do not require them to perform specified actions, including acting or failing to act solely because of *either* the effect of the act or failure to act on an acquisition or potential acquisition of control of the corporation or REIT *or* the amount or type of any consideration that may be offered or paid in an acquisition. An act of a director or trustee relating to such acquisition is not subject to a higher duty or greater scrutiny than any other act of a director.

A duty of any director of a corporation or trustee of a REIT may not be enforced by any person or entity other than the corporation (or REIT) or in the right of the corporation (or REIT).

**Background:** The bill is a result of recommendations by the Committee on Corporation Law of the Business Law Section of the Maryland State Bar Association. According to the committee, it regularly reviews the Corporations and Associations Article in an attempt to clarify unclear provisions and eliminate outdated language.

In *Shenker v. Laureate Education*, 411 Md. 317 (2009), the Court of Appeals held that:

- the directors of a corporation that was purchased in a cash-out merger owed the shareholders common law fiduciary duties of candor and maximization of value in connection with the merger;
- the statute setting forth the duties directors owed when they undertook managerial decisions on behalf of a corporation did not provide the sole source of directorial duties, and other common law duties remained in place; and
- shareholders could sue directors directly for breach of the fiduciary duties of candor and maximization of value in connection with a cash-out merger.

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### **Additional Information**

**Prior Introductions:** SB 459 of 2015, a similar bill, received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken on the bill. Its cross file, HB 521, passed the House and was assigned to the Senate Judicial Proceedings Committee, but no further action was taken. SB 601 of 2011, a similar bill, was heard in the Senate Judicial Proceedings Committee, but no further action was taken. Its cross file, HB 741, passed second reading in the House and was recommitted to the House Economic Matters Committee, where no further action was taken.

**Cross File:** SB 148 (Senator Feldman) - Judicial Proceedings.

**Information Source(s):** Judiciary (Administrative Office of the Courts), State Department of Assessments and Taxation, Maryland State Bar Association, Department of Legislative Services

**Fiscal Note History:**  
min/kdm

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