

New Annual Reporting Requirement for Co-Op & Condo Boards: BCL Section 727

Effective as of January 1, 2018, a new section – Section 727 (“Annual reports for certain transactions required”) – was added to New York Business Corporation Law (BCL), requiring all New York co-op and condo boards to distribute to all shareholders/unit owners, at least once annually, a written report disclosing any contracts made, entered into, or otherwise voted on by the board of directors/board of managers where one or more of the directors/board members was an “interested director” pursuant BCL Section 713. In addition, BCL Section 727 requires that each director/board member receive a copy of BCL Section 713 at least once each year. Copies of both Section 713 and Section 727 are enclosed herewith.

The content that must be included in the report required under Section 727(a) is enumerated in subparagraph (b) of Section 727. The required content includes, at a minimum: (1) identification of the contracts entered into by the board involving an interested director/board member and certain details about the contract (i.e., its purpose); (2) identification of the meeting(s) held to vote on such contract(s) and how each director/board member voted; and (3) the date each contract(s) was voted on and the effective dates for the contract. The report must be signed by each director/board member before distribution to all shareholders/unit owners.

Boards are advised to seek the assistance of counsel in determining whether any contracts entered into by the board during the particular reporting year would require disclosure under BCL Section 727, which requires an understanding of what makes a particular director/board member “interested” in a particular contract or transaction under BCL Section 713. Counsel can also assist boards and/or management in the preparation of the report, if desired, or at least review the report for compliance with Section 727 prior to distributing it to shareholders/unit owners.

Finally, it is important to note that, even if none of the contracts, agreements or transactions entered into by a board in the given year involved an “interested” director/board member, the board is still required to send a written document to all shareholders/unit owners disclosing same. BCL § 727(c). This document must also be signed by each director/board member, and must state: “No actions taken by the board were subject to the annual report required pursuant to section 727 of the Business Corporation Law.” BCL § 727(c).

Practice tip: *Managing agents should set a reminder at the start of every new reporting year to send each director/board member of their managed properties a copy of BCL Section 713, satisfying the first prong of BCL Section 727(a).*

BCL Section 727:

Annual reports for certain transactions required

(a) Every condominium or cooperative housing corporation, incorporated pursuant to this chapter, shall, at least once each year:

(1) require that each director, as defined in paragraph five of subdivision (a) of section one hundred two of this chapter, receive a copy of section seven hundred thirteen of this chapter; and

(2) submit an annual report to the shareholders, which shall be signed by each such director, containing information on any contracts made, entered into, or otherwise voted on by the board of directors where one or more of the directors was an interested director, pursuant to section seven hundred thirteen of this chapter.

(b) The annual report required by subdivision (a) of this section shall include, but not be limited to, the following:

(1) a list of all contracts voted on by the board of directors, including information on the contract recipient, contract amount, and the purpose of entering into the contract;

(2) the record of each meeting including director attendance, voting records for contracts, and how each director voted on such contracts; and

(3) the date of each vote on each contract, and the date the contract would be and remain valid.

(c) If the annual report required by subdivision (a) of this section would, notwithstanding the requirements of this section, contain no information because of the absence of any actions taken by the board that would otherwise qualify for inclusion in such annual report, then the board shall instead submit to the shareholders a document, signed by each director, indicating: "No actions taken by the board were subject to the annual report required pursuant to section 727 of the Business Corporation Law".

BCL Section 713:

Interested directors

(a) No contract or other transaction between a corporation and one or more of its directors, or between a corporation and any other corporation, firm, association or other entity in which one or more of its directors are directors or officers, or have a substantial financial interest, shall be either void or voidable for this reason alone or by reason alone that such director or directors are present at the meeting of the board, or of a committee thereof, which approves such contract or transaction, or that his or their votes are counted for such purpose:

(1) If the material facts as to such director's interest in such contract or transaction and as to any such common directorship, officership or financial interest are disclosed in good faith or known to the board or committee, and the board or committee approves such contract or transaction by a vote sufficient for such purpose without counting the vote of such interested director or, if the votes of the disinterested directors are insufficient to constitute an act of the board as defined in section 708 (Action by the board), by unanimous vote of the disinterested directors; or

(2) If the material facts as to such director's interest in such contract or transaction and as to any such common directorship, officership or financial interest are disclosed in good faith or known to the shareholders entitled to vote thereon, and such contract or transaction is approved by vote of such shareholders.

(b) If a contract or other transaction between a corporation and one or more of its directors, or between a corporation and any other corporation, firm, association or other entity in which one or more of its directors are directors or officers, or have a substantial financial interest, is not approved in accordance with paragraph (a), the corporation may avoid the contract or transaction unless the party or parties thereto shall establish affirmatively that the contract or transaction was fair and reasonable as to the corporation at the time it was approved by the board, a committee or the shareholders.

(c) Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board or of a committee which approves such contract or transaction.

(d) The certificate of incorporation may contain additional restrictions on contracts or transactions between a corporation and its directors and may provide that contracts or transactions in violation of such restrictions shall be void or voidable by the corporation.

(e) Unless otherwise provided in the certificate of incorporation or the by-laws, the board shall have authority to fix the compensation of directors for services in any capacity.