

# Governing a Wholly Owned Subsidiary

When the board may act by written consent, and what the directors still owe

---

Governance Works

# The board of a wholly owned subsidiary may act by written consent

Directors may act without a meeting, for three reasons. They keep every duty they owe

1

**The directors may consent in writing**

Under § 141(f), a board may act without a meeting if every director consents in writing or by electronic transmission

Del. Code Ann. tit. 8, § 141(f)

2

**The company need not follow exchange rules**

A stock exchange requires each company whose stock trades there to seat independent directors, keep standing committees, and hold executive sessions. A subsidiary whose stock trades nowhere need not do any of these

NYSE § 303A; Nasdaq Rule 5605

3

**The directors serve the parent**

The directors of a solvent, wholly owned subsidiary must manage it “in the best interests of the parent and its shareholders”

*Anadarko*, 545 A.2d at 1174

Directors who act by consent take little legal risk. Directors who leave no record of oversight take the real risk

What the directors keep

**Oversight**

They must monitor the company’s central compliance risks

**Unanimity**

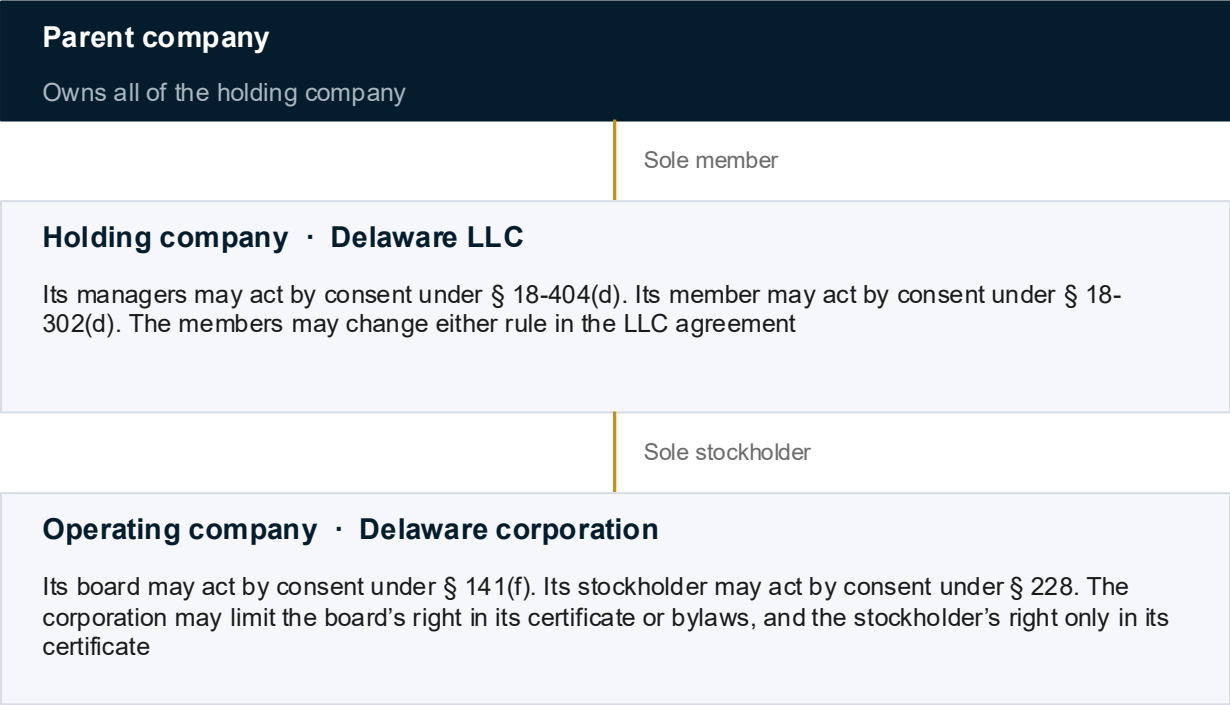
Any one director may refuse to sign and force a meeting

**Local law**

Some countries require the directors to hold an actual meeting

# Directors act under a different statute at each level

A common structure has three levels: a parent, an LLC holding company, and an operating corporation



## Read the governing documents first

The corporation may forbid board action by consent in its certificate or bylaws. It may limit stockholder consent only in its certificate

Under the LLC agreement, the member, managers the agreement names, or a board may manage the holding company

An LLC needs no board. Unless the LLC agreement provides otherwise, the members manage it

At each level, the parent may sign as sole owner in place of a meeting

# Every corporate director must sign. LLC managers need only the votes a full meeting would take

Who must sign a consent at each level

| Who acts                    | Delaware corporation                                                                                                       | Delaware LLC                                                                                                    |
|-----------------------------|----------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------|
| Board or managers           | Every director must sign · § 141(f)                                                                                        | Managers who hold the votes a full meeting would take may sign · § 18-404(d)                                    |
| Owner                       | Stockholders who hold the votes a full meeting would take may sign · § 228                                                 | Members who hold the votes a full meeting would take may sign · § 18-302(d)                                     |
| Form                        | Consent in writing or by electronic transmission, documented, signed, and delivered in any manner § 116 permits · § 141(f) | Consent in writing, by electronic transmission, or by any other means the law permits · §§ 18-302(d), 18-404(d) |
| Record                      | The secretary files each consent with the board's minutes · § 141(f)                                                       | Follow the LLC agreement                                                                                        |
| Who may limit board consent | The certificate or the bylaws · § 141(f)                                                                                   | The LLC agreement · § 18-404(d)                                                                                 |
| Who may limit owner consent | The certificate alone · § 228(a)                                                                                           | The LLC agreement · § 18-302(d)                                                                                 |

One corporate director cannot block the action. That director can force the board to meet and vote

# The directors owe their duties to the parent while the company stays solvent

If the company becomes insolvent, creditors may sue. At every stage, the directors must oversee the company

While solvent

## The parent holds the duties

The directors manage the company “in the best interests of the parent and its shareholders”

The parent may direct the company to act for the benefit of the corporate group

No minority owner exists to challenge the board’s procedure

*Anadarko*, 545 A.2d at 1174; *Trenwick*, 906 A.2d at 201

If insolvent

## Creditors gain standing

Creditors may sue the directors on the company’s behalf

Creditors may not sue the directors in their own right

Creditors will read every consent and every set of minutes

*Gheewalla*, 930 A.2d at 101–03

At every stage

## The directors must oversee

The board must make a good-faith effort to put in place a reasonable system of monitoring and reporting on central compliance risks

A board that makes no such effort breaches the duty of loyalty

Directors prove the effort with reports and minutes, not signatures

*Marchand*, 212 A.3d at 824

## Hold a meeting in six situations

Act by consent on routine business. In these six situations, meet and keep minutes

|   |                                         |                                                                                                                                                                |
|---|-----------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1 | <b>A director will not sign</b>         | Under § 141(f), every director must sign. If one refuses, the board must meet                                                                                  |
| 2 | <b>The directors disagree</b>           | At a meeting, the secretary records the debate and the vote. On a consent, the directors sign only the result                                                  |
| 3 | <b>The board reviews a central risk</b> | For safety, environmental, and regulatory risk, the directors should hear the report and minute their questions                                                |
| 4 | <b>The company nears insolvency</b>     | Creditors may later sue on the company's behalf. They will read the minutes                                                                                    |
| 5 | <b>Local law requires a meeting</b>     | Some countries do not accept written resolutions. There, the directors must meet                                                                               |
| 6 | <b>The company has barred consent</b>   | A corporation may bar board consent in its certificate or bylaws, and stockholder consent only in its certificate. An LLC may bar consent in its LLC agreement |

# Follow six rules for every consent

The parent keeps the subsidiary separate by keeping accurate records

|   |                                       |                                                                                              |
|---|---------------------------------------|----------------------------------------------------------------------------------------------|
| 1 | <b>Draft a consent as a consent</b>   | Never write minutes for a meeting that did not happen                                        |
| 2 | <b>Put the signing date on it</b>     | If an earlier date matters, state it in the text as the effective date                       |
| 3 | <b>Limit backdating to two weeks</b>  | Set the effective date no more than two weeks before signing. Never sign an undated document |
| 4 | <b>Attach what the directors read</b> | Attach the proposal, the management report, and the recommendation                           |
| 5 | <b>File it with the minutes</b>       | Under § 141(f), the corporation files each consent with the board’s minutes                  |
| 6 | <b>Tell finance and legal</b>         | Report each new entity, dissolution, name change, and change in ownership                    |

A power of attorney gives the holder no new authority. The holder uses it to prove authority to a third party. Issue one only when a third party asks for proof

# Seat one director from the control functions and one from the operations

Choose the directors of a corporation, and the managers of an LLC, by seven criteria

## Selection criteria

|                   |                                                                            |
|-------------------|----------------------------------------------------------------------------|
| Control functions | At least one director or officer from tax, finance, or legal               |
| Operations        | At least one director from the business, who sees its operations firsthand |
| Experience        | Relevant experience and a record of results                                |
| No conflict       | No outside role or interest that conflicts with the director’s duties      |
| Balance           | Skills that add to those of the other directors                            |
| Residency         | The ability to meet any local resident-director requirement                |
| Secretary         | A corporate secretary from the corporate legal group                       |

## What each director accepts

In a corporation, the board manages the business. In an LLC, the members manage it unless the LLC agreement names a manager

Each director acts within the governing documents and within the terms of any authorization

A director whose conflict the governing documents allow must still act in the company’s interest

Each director completes training on the entity, its operations, and local company law

# Appoint a director or officer in four steps

Finish each step before starting the next. Follow the same steps to appoint an LLC manager



Before step 1

|   |                 |                                                                                                                               |
|---|-----------------|-------------------------------------------------------------------------------------------------------------------------------|
| 1 | Count the seats | The company may fix the number of directors in its governing documents. If so, a new director may join only when a seat opens |
| 2 | Check local law | Each country sets its own appointment process. Follow it                                                                      |

After step 4, find the gaps in each director’s knowledge, new or serving, and close them with training. Counsel briefs the board on changes in company law

# Keep each entity’s governance current, and dissolve entities with no purpose

The corporate secretary performs five tasks for each entity

|   |                            |                                                                                                                                                                                   |
|---|----------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1 | <b>Governing documents</b> | Draft them to meet local law and the parent’s goals. Revise them when the law changes                                                                                             |
| 2 | <b>Formalities</b>         | Hold and document every meeting local law requires. Prepare and file every report the law requires                                                                                |
| 3 | <b>Appointments</b>        | Appoint and remove directors, officers, and managers under the written process                                                                                                    |
| 4 | <b>Powers of attorney</b>  | Grant them under a written policy. Revoke them when a holder leaves the role                                                                                                      |
| 5 | <b>Annual review</b>       | Each year, list the dormant entities. For each, ask whether it holds assets, does business, owns shares of an active entity, or faces a lawsuit. Propose the rest for dissolution |

Before forming a new entity, confirm that no existing entity can do the work

## Take six steps to put the practice in writing

The board can finish each step with one document or one decision

|   |                                      |                                                                                                       |
|---|--------------------------------------|-------------------------------------------------------------------------------------------------------|
| 1 | <b>Read the governing documents</b>  | Confirm that the certificate, the bylaws, and the LLC agreement allow action by consent at each level |
| 2 | <b>Adopt a consent protocol</b>      | On one page, list the matters for consent and the matters for a meeting                               |
| 3 | <b>Set a reporting calendar</b>      | Schedule a board report on each central risk. Keep minutes of each review                             |
| 4 | <b>Adopt the appointment process</b> | Follow the four steps for every director and officer                                                  |
| 5 | <b>Apply the records rules</b>       | Follow the six rules for every consent                                                                |
| 6 | <b>Review the entities</b>           | Once a year, review every entity and propose dormant ones for dissolution                             |

# Authorities

## Statutes and rules

---

Del. Code Ann. tit. 8, §§ 116, 141(a), 141(f), 228

Del. Code Ann. tit. 6, §§ 18-302(d), 18-402, 18-404(d)

N.Y. Stock Exch., Listed Company Manual § 303A

Nasdaq Stock Mkt. Rule 5605

## Cases

---

*Anadarko Petroleum Corp. v. Panhandle Eastern Corp.*, 545 A.2d 1171 (Del. 1988)

*Trenwick Am. Litig. Tr. v. Ernst & Young, L.L.P.*, 906 A.2d 168 (Del. Ch. 2006), *aff'd sub nom. Trenwick Am. Litig. Tr. v. Billett*, 931 A.2d 438 (Del. 2007) (table)

*N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007)

*In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996)

*Stone v. Ritter*, 911 A.2d 362 (Del. 2006)

*Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019)