



## Securities Litigation / Securities Law ADVISORY ■

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### Recent Amendments to the Delaware Code Expand Personal Liability Protections to Corporate Officers

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Section 102(b)(7) of the Delaware General Corporation Law (DGCL) has been [amended](#), effective August 1, 2022, to permit Delaware companies to exculpate certain corporate officers from monetary liability for breaches of the fiduciary duty of care. Previously, similar protections extended only to directors. Going forward, Delaware companies and their in-house counsel should consider including language in new corporate charters or updating existing charters to reflect these changes, keeping in mind the following:

- As with directors, exculpation of officers extends only to duty-of-care breaches and to actions or omissions in good faith. Duty-of-loyalty violations, actions or omissions not in good faith, and transactions from which an officer received an “improper personal benefit” are not covered.
- Officer exculpation is not permitted for liability arising from actions brought by the company or asserted derivatively on behalf of the company.
- Actions or omissions occurring before the effective date of the exculpation provision are not covered.
- Exculpatory provisions protect against “monetary damages” only. The provisions do not apply to equitable remedies such as injunctive relief.
- The new protections extend only to those individuals who (1) serve or served as president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer, or chief accounting officer; (2) are or were identified in SEC filings as one of the company’s “most highly compensated executive officers”; or (3) through written agreement with the company have consented to being identified as an “officer” for purposes of Delaware Code § 3114(b).

It is important to note that expansion of exculpation to corporate officers is not automatic. Corporate charters must be affirmatively amended unless existing exculpatory language in the charter extends to cover both directors *and* officers (which is unlikely) and also limits liability to the “fullest extent permitted

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under Delaware law” or contains similar language. Express language that expands the scope of exculpation to account for future changes in the law may also be needed to avoid amendment. For existing companies, any charter amendment that expands the scope of exculpation would likely require board and stockholder approval pursuant to DGCL § 242.

Extending exculpation to corporate officers could meaningfully reduce personal legal exposure and help curb corporate litigation costs. It may also help companies attract and retain qualified management teams. Delaware courts regularly dismiss claims against corporate directors at the outset of litigation based on exculpation provisions. See *In re Cornerstone Therapeutics, Inc., Shareholder Litigation*, 115 A.3d 1173, 1176 (Del. 2015) (“When the independent directors are protected by an exculpatory charter provision and the plaintiffs are unable to plead a non-exculpated claim against them, those directors are entitled to have the claims against them dismissed.”). Claims brought against officers are likely to be treated the same way, subject to the limitations set forth above. Companies considering whether to update their charters to reflect these amendments will need to weigh these potential benefits against the logistical hurdles (e.g., board and stockholder approval) required for adoption and against any company-specific corporate governance considerations.

Language within corporate charters reflecting the new changes is expected to become industry standard in the coming months, particularly for newly formed companies. Delaware companies and their counsel should assess whether these amendments should be addressed in the next round of charter amendments.

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