

Delaware Allows Companies to Exculpate Officers From Personal Liability!

It's that time of year when Delaware legislation announces changes to the Delaware General Corporation Law - and this year's changes are a biggie! Nothing scares an officer more than the prospect of personal liability for discharging their duties. Now [Section 102\(b\)\(7\) of the DGCL has been amended](#) to allow Delaware corporations to exculpate their officers for monetary liability for particular breaches of fiduciary duty.

Here's a few things to know:

1. **Not Quite the Same Exculpation That Directors Can Have** - Delaware companies have long been permitted to exculpate directors for monetary damages for personal liability. The Delaware legislation enacted Section 102(b)(7) to offer this protection to directors in 1986 in the wake of the *Smith v. Van Gorkom* decision.

Directors can be protected with four exceptions: (1) breach of loyalty; (2) acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (3) dealings with unlawful dividends or redemptions; or (4) any transaction for which an improper personal benefit is derived.

Exceptions (1), (2) and (4) listed above also apply to officers - but there is a new exception that officers can't be exculpated "in any action by or in the right of the corporation." This means that the company still has the right to sue its officers for breaches of the duty of care. And critically, this exception permits stockholder derivative claims that are otherwise permissible (e.g., demand requirements are met).

2. **Companies Will Need to Adopt a Charter Provision to Implement** - Just like director exculpation, a Delaware company will need to take action if they wish to protect officers under new Section 102(b)(7). The personal liability protection doesn't automatically apply. And since it will require an amendment to a company's charter, most companies will need to seek shareholder approval for this change - since most charter amendments require shareholder approval.
3. **Evaluate Which "Officers" Will Be Covered** - The definition of "officer" in Section 102(b)(7) refers to Section 3114(b)'s definition of officer, which is a person who:
 - Is or was the president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer or chief accounting officer of the corporation at any time during the course of conduct alleged in the action or proceeding to be wrongful;
 - Is or was identified in the corporation's public filings with the United States Securities and Exchange Commission because such person is or was one of the most highly compensated executive officers of the corporation at any time during the course of conduct alleged in the action or proceeding to be wrongful; or
 - Has, by written agreement with the corporation, consented to be identified as an officer for purposes of this section.

The second part of the definition picks up a company's "named executive officers" from the annual proxy statement. Although there is little case law interpreting this definition, one Delaware decision has clarified

that a person is not an officer for purposes of Section 3114 solely by virtue of having "officer" in his or her title.

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