

Client Alert | August 12, 2022
**Delaware General Corporation Law
Amendments Provide Greater Exculpation
Protections for Corporate Officers;
Expand Delegation Authority
for Granting Stock Options**



Effective Aug. 1, 2022, the Delaware General Corporation Law (DGCL) has been amended to include exculpation protections for corporate officers, as well as expanded flexibility in connection with the delegation of authority to corporate officers and others with respect to the granting of stock options and other rights to acquire stock.

The amendments are part of a growing trend within the DGCL to empower corporate officers with more flexibility and control with respect to employee equity award programs and provide additional protection for corporate officers against certain types of stockholder litigation.

Expanded Exculpation Protections for Corporate Officers

Historically, directors have benefited from protections in the DGCL, which provide that a corporation's charter can eliminate or limit such directors' personal liability for monetary damages arising from breaches of the fiduciary duty of care.¹ However, the DGCL did not authorize similar exculpation of corporate officers. As a result, corporate officers have increasingly become the target of stockholder litigation based upon breach of fiduciary duties.

As of Aug. 1, 2022, it will be possible for Delaware corporations to adopt charter provisions that provide for similar exculpation protection for certain corporate officers subject to various limitations as described below.

Newly formed corporations will be able to include exculpatory provisions for covered corporate officers in their original certificate of incorporation, similar to the current practice of including such provisions with respect to directors. For an existing corporation to benefit from the exculpation protections, it will require board and generally stockholder approval to amend the company's certificate of incorporation.

The protections provided under the adopted amendments are limited and only protect corporate officers from direct claims by stockholders. Unlike the provision for directors, the amendments do not permit exculpation from derivative claims brought by, or in the right of, the corporation. This means corporate officers are still subject to personal liability for monetary damages arising out of breach of fiduciary duty claims brought by the corporation or a derivative suit brought by stockholders. Similar to the exculpation provisions applicable to corporate directors, corporate officers also remain subject to personal liability for breaches of the fiduciary duty of loyalty, as well as for acts or omissions not in good faith, which involve intentional misconduct or knowing violation of law or involving receipt of an improper personal benefit.

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The exculpation protections provided under the newly amended DGCL are only applicable to certain corporate officers. The amendments limit applicability to only those officers who have consented to service of process under Delaware's long-arm statute (as described in 10 *Del. C.* § 3114(b)), as well as a corporation's president, CEO, CFO, COO, chief legal officer, controller, treasurer, chief accounting officer and other named executives in SEC filings.

Despite the availability of this expanded protection, boards and stockholders will need to carefully consider the implications of exculpating corporate officers from monetary damages arising out of the duty of care before adopting a charter amendment. While such provisions may provide protection from certain stockholder litigation, the duty of care is a very important protection for stockholders requiring that officers and directors exercise business judgment in good faith and in a reasonably prudent manner when acting on behalf of the corporation in a manner that they believe is in the best interests of the corporation and its stockholders. When Sec. 102(b)(7) was originally added to the DGCL, it was in response to a 1985 Delaware Supreme Court decision that held directors of a Delaware corporation liable for a multi-million dollar damage award for violating the duty of care in connection with the approval of a merger hastily without considering all of the relevant material information. As a result, there was concern that qualified individuals would be unwilling to serve as directors of Delaware corporations, making it impossible to find independent directors and that D&O premiums would skyrocket. The same considerations do not necessarily apply to officers, although corporations routinely extend indemnification protection to the extent permitted by law to the most senior officers. Of course, the same D&O implications apply in the case of officers as stockholder litigation proliferates.

Delegation of Authority to Grant Stock Options and other Rights to Acquire Stock

The Aug. 1, 2022, amendments to the DGCL provide for the delegation to corporate officers of expanded rights with respect to the grant and modification of stock options and other grants of rights to acquire stock. The amendments permit a board of directors to delegate authority to an officer to issue stock², sell treasury shares³ and issue rights or options to acquire stock.⁴ The changes are part of a trend within recent amendments to the DGCL which have increasingly permitted boards and board committees to delegate authority to officers with respect to the issuance of stock outright, subject to certain limiting parameters set by the board. Previously, boards had broad rights to delegate authority to officers to issue stock in the company, but this broad delegation authority did not extend to stock options and other rights to acquire stock which were limited. In particular, a board could delegate authority to officers to select the other officers or employees who would receive grants of stock options and the size of their awards so long as the board or board committee set a numerical "ceiling" within which such grants could be made and approved the terms of the awards. These recent changes now enhance the delegated authority by expanding the group of potential recipients of such grants to others besides corporate officers and employees and providing the ability to vary the terms of the grants. However, the amendments prohibit any delegated person or entity from issuance of stock, options or rights to themselves. The amendments also permit the issuance of rights or options in book entry or electronic form. These changes should provide corporations with increased flexibility in designing or amending equity award programs.

Importantly, any corporate instrument authorizing such a delegation to a corporate officer must contain language which sets parameters for the limit of an officer's authority. Specifically, the instrument delegating such authority to the officer must specify: (1) the maximum number of shares, rights or options that can be granted; (2) the time period during which the issuance of shares, rights or options may take place and (3) the minimum amount of consideration to be received for the issuance of shares, rights or options. Any provision in a corporate resolution delegating authority with respect to the grant of stock options or other rights to acquire equity may be made dependent on facts ascertainable outside the resolution, provided the manner in which such facts shall operate is clearly and expressly set forth in such resolution.⁵

Other Amendments

While the above are the most noteworthy of the recent amendments, the amendments also lowered the stockholder approval threshold required to convert a Delaware corporation to a foreign corporation or any other entity from unanimous approval to majority approval. Because stockholder approval of conversion no longer must be unanimous, non-consenting stockholders will now have appraisal rights in connection with a conversion.⁶ This

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amendment aligns the authorization requirements for conversion of a Delaware corporation with that for other fundamental transactions such as mergers. It is worth noting that the amendments also state that for existing corporations formed before Aug. 1, 2022, and in any applicable voting agreement relating to mergers and other similar transactions in effect before Aug. 1, 2022, those provisions will automatically be deemed to apply to conversions unless expressly provided otherwise. Therefore, corporations should consider reviewing and amending their existing governing documents (and stockholder agreements) if they do not want these provisions to apply automatically to conversions. Somewhat inconsistently, for newly formed corporations after Aug. 1, 2022, conversions will not automatically be deemed to be included in provisions relating to mergers and similar significant transactions, and conversions must be separately addressed in the certificate of incorporation and other documents impacting stockholder voting.⁷

Further, certain changes were made to the appraisal statute, including an amendment⁸ that allows a beneficial owner of stock to demand appraisal directly instead of relying on the record holder and eliminating appraisal rights in a merger, consolidation or conversion authorized by a plan of domestication under Section 388. There were also several other administrative amendments to the statute, including changes to the requirements regarding the availability of stockholder lists for examination at meetings and notices of adjournments of meetings which may require review and amendment of a corporation's bylaws in order to implement.

Conclusion

All of the above changes should be considered by both those newly forming Delaware corporations as well as existing corporations who may want to review their certificates of incorporation and bylaws in light of the changes. If a public corporation is considering any such changes based on the recent amendments, it should also consider whether any changes need to be made to any SEC filings that may describe matters such as exculpation or indemnification of officers. The changes relating to delegation of authority should also prompt a review of existing equity plans and practices, keeping in mind that equity compensation is also subject to other statutory limitations, including tax considerations.

¹See 8 Del. C. § 102(b)(7) (expanding exculpation protections to senior officers).

²See 8 Del. C. § 152.

³See 8 Del. C. § 153.

⁴See 8 Del. C. § 157.

⁵See 8 Del. C. § 157(d).

⁶See 8 Del. C. § 262.

⁷See 8 Del. C. § 266.

⁸See 8 Del. C. § 262.

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