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Kutak Rock Client Alert

Proposed DGCL Amendment—Exculpation of Senior Corporate Officers for Breach of Fiduciary Duty Claims

BACKGROUND

Earlier this year, the Council of the Corporation Law Section of the Delaware State Bar Association (“Council”) announced its annual proposed amendments to the Delaware General Corporation Law (“DGCL”) before the Delaware General Assembly. Historically, the Council’s recommendations have usually been adopted by the Delaware General Assembly, and these new proposed amendments are likely to be adopted, with an effective date of August 1, 2022.

LIMITING PERSONAL LIABILITY OF SENIOR OFFICERS UNDER DGCL § 102(b)(7)

One of the proposed amendments to the DGCL would permit a corporation’s certificate of incorporation to include a provision eliminating or limiting monetary liability for certain senior corporate officers for breach of the fiduciary duty of care under DGCL § 102(b)(7). Since 1986, DGCL § 102(b)(7) has permitted such exculpation of members of the board of directors from such claims, but not officers. If adopted, the proposed amendments would reduce but not eliminate the differences in the treatment of directors and officers when confronted with stockholder actions alleging breaches of the fiduciary duty of care.

The proposed amendments would allow for the exculpation of certain officers only in connection with direct claims brought by stockholders, including class actions, but would not eliminate officers’ monetary liability for breach of fiduciary duty claims brought by the corporation itself or for derivative claims brought by stockholders in the name of the corporation. As is the case with directors, the proposed amendments would not limit the liability of officers for: any breach of the duty of loyalty to the corporation or its stockholders, any acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of the law, and any transaction from which the officer derived an improper personal benefit. If adopted, the 2022 amendments to DGCL § 102(b)(7) would also prohibit retroactive amendments that would retroactively impose monetary liability on corporate officers.

In addition, not all officers would be entitled to the protection of an exculpation clause. Rather, only the following senior officers are entitled to the benefit of an exculpation clause: the CEO, president, CFO, COO, chief legal officer, controller, treasurer and chief accounting officer, as well as any other persons identified as “named executive officers” in the corporation’s most recent SEC filings and other officers who consent in writing to accept service of process on the corporation’s registered agent for any action against the corporation for which the officer is a necessary party.

RECOMMENDATIONS

This new limitation of liability is not automatically effective, and the approval of the board of directors and stockholders would be required for an amendment to the certificate of incorporation to limit the monetary liability of officers. If the proposed amendments are enacted, you should consult with your Kutak Rock attorney, or one of the attorneys listed on the left, to discuss whether to amend the certificate of incorporation of your Delaware corporation to provide for exculpation of senior officers. For more information regarding our practices, please visit us at www.kutakrock.com.

