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Delaware Corporate Law Amended to Permit Protection of Officers From Personal Liability for Breach of Fiduciary Duty Claims

by Ken Witt and Geoffrey Neal

As anticipated in our earlier [Client Alert](#), Delaware has adopted an amendment to the Delaware General Corporation Law (DGCL) that will permit corporations to protect certain senior corporate officers from personal monetary liability for breach of the fiduciary duty of care. Delaware corporations have been able to protect directors from such liability since 1986, and the amendment to the DGCL will extend this permitted “exculpation” to officers.

The amendment will permit the exculpation of covered officers from fiduciary duty claims other than breaches of the fiduciary duty of loyalty, intentional misconduct or knowing violations of law, the same protection as afforded directors. However, unlike directors, officers may not be protected from claims made “in any action by or in the right of the corporation.” As a result, Delaware corporations will retain the right to bring actions against officers, and stockholder derivative claims may be brought against officers for breach of the duty of care if the demand requirements are met. Directors can be protected against a direct claim or class action brought by stockholders for breach of the duty of care. Retroactive amendments to the certificate of incorporation that would impose monetary liability on officers are prohibited.

The officers who may be covered by the expanded exculpation include the president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer or chief accounting officer, the company’s most highly compensated executive officers identified in SEC filings and certain other officers who have consented to be identified as an officer and to service of process.

This additional protection of officers is not automatically effective. The certificate of incorporation of the Delaware corporation must be amended to include the exculpation of liability, requiring the approval of the board of directors and stockholders. Newly incorporated Delaware corporations may include the provision in the originally filed certificate of incorporation.

If you have questions about amending the certificate of incorporation of your Delaware corporation to give effect to the exculpation of senior officers, you should consult with your Kutak Rock attorney, the authors of this Client Alert or any attorney in Kutak Rock’s [Business, Corporate & Securities Practice Group](#). You may also visit us at www.KutakRock.com.

