

Delaware's 102(b)(7) Exculpation of Senior Officers - One Year Later

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For more than 35 years, Delaware law, pursuant to Section 102(b)(7) of the Delaware General Corporation Act (DGCL), has allowed Delaware corporations to exculpate their directors from personal liability for damages resulting from such directors' violations of their duties of care. It has become commonplace for the certificates of incorporation of Delaware corporations to expressly limit director liability based on Section 102(b)(7).

Until this past year, such protection was limited to directors of Delaware corporations. In August 2022, however, Delaware amended Section 102(b)(7) of the Delaware General Corporation Law (DGCL) to provide that Delaware corporations may extend limited liability protection to their senior officers, in certain circumstances. The change has been embraced by Delaware corporations. It is quickly becoming standard practice for Delaware corporations to amend their governing documents to include express exculpation of both directors and senior officers. However, the scope of the exculpation allowed by Section 102(b)(7) has its limits, which are worth reflecting on one year after the amendment.

Specifically, it is not clear where the line between "senior" and "non-senior officers" should be drawn for purposes of Section 102(b)(7). C-suite officers, presidents, controllers, treasurers, the corporation's most highly compensated executive officers, and certain officers who consent to service of process should clearly fall within the "senior" classification. On the other hand, we recommend that any officers who do not clearly fall within these categories inquire with their corporation's internal or external legal counsel to determine whether they may be able to participate in the protections permitted by Section 102(b)(7).

Additionally, while Section 102(b)(7) allows for exculpation from certain breaches of fiduciary duty by such senior officers, as with directors, Section 102(b)(7) does not protect senior officers from personal liability for their breaches of the duty of loyalty, acts or omissions not in good faith, transactions from which they derive an improper personal benefit, or acts or omissions occurring prior to the date that the provision in the certificate of incorporation exculpating such senior officers becomes effective.

Delaware corporations should remain mindful of these limitations to the amendment. Furthermore, to the extent Delaware corporations are interested in providing their senior officers with such protections, they should amend their governance documents, if they have not already, to expressly state that their senior officers will be entitled to the protections of Section 102(b)(7). Only directors and senior officers of Delaware corporations whose certificates of incorporation include such language are eligible to rely upon this protection.

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