

# Alert

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## Amendment to DGCL §102(b)(7); Expanding Exculpation Rights to Apply to Corporate Officers

### Amendment to DGCL §102(b)(7); Expanding Exculpation Rights to Apply to Corporate Officers

For more than 35 years, Section 102(b)(7) of the General Corporation Law of the State of Delaware (DGCL) has permitted a Delaware corporation to include a provision in its certificate of incorporation that eliminates or limits a director's personal liability to the corporation or its stockholders for monetary damages for breaches of fiduciary duty, subject to certain exceptions in the law (most Delaware corporations take advantage of this provision). Effective August 1, 2022, Delaware amended the DGCL to permit a Delaware corporation to extend liability exculpation rights to certain officers of a corporation. In 2009, the Delaware Supreme Court held that both officers and directors owe fiduciary duties of care and loyalty to a corporation and its stockholders. However, personal liability for breaches of fiduciary duty differed for officers and directors because of the language of Section 102(b)(7). This amendment addresses the discrepancy in the statute between liability exculpation rights granted to directors and officers. In order to take advantage of this amendment, the certificate of incorporation must be amended.

The protections available to directors and officers under amended Section 102(b)(7) are similar but not identical. Corporations may not eliminate or limit the liability of officers for "any action by or in the right of the corporation." Thus claims may still be brought against officers by the corporation or derivatively by stockholders. The amendment permits the elimination of liability for direct claims by stockholders (including class actions) against an officer. In contrast, corporations may exculpate directors against claims brought by the corporation or derivatively by stockholders. For purposes of amended Section 102(b)(7), an officer is limited to an officer of the corporation who, at the time of an act or omission as to which liability is asserted:

- i. 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,
- ii. is or was identified in the corporation's public filings with the SEC because such person is or was one of the most highly compensated executive officers of the corporation, or
- iii. has, by written agreement with the corporation, consented to be identified as an officer for purposes of accepting service of process.

### Takeaway

Because the protections of Section 102(b)(7) of the DGCL are now available to officers of a corporation, Delaware corporations should consider whether to amend their certificates of incorporation to include officer exculpation provisions. Such an amendment would need to be approved by the corporation's board of directors and stockholders. An officer cannot take advantage of this new provision until the Delaware corporation's certificate of incorporation is amended to contain the necessary language and then only with respect to acts or omissions that occur after the effective date of the amendment.



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