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Client Advisory

Delaware Now Allows a Corporation to Protect its Officers from Personal Liability

Delaware recently amended its corporate statute, effective as of August 1, 2022, to allow a Delaware corporation to protect its officers from personal liability for money damages. Delaware corporations need to take action to implement this important protection.

New Protection for Officers

Prior to the amendment, a Delaware corporation was permitted to protect only its directors from personal liability to the corporation and its stockholders for money damages resulting from a breach of the fiduciary duty of care. This protection now extends to officers, with some differences.

Exceptions to Protection

Officers (and directors) may not be protected against claims made against them for (1) a breach of the fiduciary duty of loyalty to the corporation or its stockholders, (2) acts or omissions not made in good faith or which involve intentional misconduct or a knowing violation of law, or (3) a transaction resulting in an improper personal benefit. Unlike directors, officers are not protected against lawsuits made by or on behalf of a corporation. This means that although a stockholder may not file a direct lawsuit against an officer for breach of the fiduciary duty of care, a stockholder may file a derivative lawsuit against the officer on behalf of the corporation. Therefore, officers are protected against direct claims, but not against claims made by the corporation or derivative claims made by a stockholder on behalf of the corporation. Directors are protected against both direct and derivative claims.

Officers Protected

Only the corporation's top officers are protected from personal liability; meaning (1) the president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer or chief accounting officer, (2) for public corporations, the officers identified in the corporation's SEC filings as being one of the most highly compensated executive officers of the corporation, and (3) the officers who have agreed in writing to be served with process on behalf of the corporation.

Required Action

We recommend that Delaware corporations amend their certificate of incorporation to protect corporate officers (and directors) from personal liability for money damages. Such protection will require the approval of the board of directors and the stockholders of the corporation.

If you have any questions about the Delaware amendment allowing the protection of corporate officers, or any other corporate issues, please contact [Gianfranco Pietrafesa](mailto:gpietrafesa@archerlaw.com) at gpietrafesa@archerlaw.com or 201-498-8559, or [Shamila Ahmed](mailto:sahmed@archerlaw.com) at sahmed@archerlaw.com or 201-498-8516.

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