

## DELAWARE CORPORATE LAW DEVELOPMENTS: WHAT YOU NEED TO KNOW FOR 2023

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Delaware corporate law continually evolves, and 2022 was no exception. As the year draws to a close and proxy season approaches, here are highlights of significant changes that may impact 2023 annual meeting plans, among other things, and may draw potential scrutiny from Glass Lewis and ISS under their recently announced 2023 policy guidelines. See [Delaware State Senate Bill No. 273](#) for the full text of the amendments, which became effective August 1, 2022.

***Officer Exculpation Now Allowed (Delaware General Corporation Law (“DGCL”) Section 102(b)(7))*** – Amended to allow Delaware corporations to adopt charter provisions to limit or eliminate the personal liability of officers for money damages for breaches of the fiduciary duty of care. Prior to such amendment, Section 102(b)(7) authorized such exculpation for directors but not for officers. As with director exculpation, the protection does not apply to breaches of the duty of loyalty, acts or omissions not in good faith or that involve intentional misconduct or knowing violations of the law, or transactions in which officers receive improper personal benefits. Unlike director exculpation, however, the protection for officers also does not apply to liability for claims brought against them by, or in the right of, the company (i.e., derivative actions). If a company amends its certificate of incorporation to include an officer exculpation provision, the protection would apply only with respect to acts or omissions occurring after the date of the amendment.

The amendment authorizes companies to provide for exculpation of the following officers: (1) president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer or chief accounting officer, (2) “named executive officers” identified in SEC filings and (3) individuals who have agreed to be identified as officers of the company.

Amendment of a company’s charter to include a provision for officer exculpation requires board and stockholder approval. Both Glass Lewis and ISS recently published their 2023 policy updates, which address officer exculpation proposals. Each proxy advisor indicates that it will review such proposals on a case-by-case basis, with ISS providing more color than Glass Lewis regarding the factors that it will consider in its review. Depending on the composition of a company’s stockholder base, it may be important for a company to consider whether Glass Lewis and ISS are likely to support a proposal to amend the company’s certificate of incorporation to include an officer

exculpation provision. This has been a case of first impression for proxy advisors as they have considered the handful of proposals that have been presented since the amendments became effective in August 2022. Some insight into the proxy advisors' likely views on officer exculpation proposals can be gained by reviewing their historic positions with regard to director exculpation.

*Glass Lewis.* Glass Lewis recently published [2023 Policy Guidelines](#) that apply to stockholder meetings held on and after January 1, 2023. Glass Lewis set out its new policy as follows:

“We will closely evaluate proposals to adopt officer exculpation provisions on a case-by-case basis. We will generally recommend voting against such proposals eliminating monetary liability for breaches of the duty of care for certain corporate officers, unless compelling rationale for the adoption is provided by the board, and the provisions are reasonable.”

*ISS.* ISS also recently [announced](#) the publication of its [2023 Policy Guidelines](#), which are generally effective for meetings held on or after February 1, 2023, subject to certain transition period exceptions and exceptions for off-cycle companies. ISS combined its policy regarding officer exculpation proposals with its pre-existing policy relating to director exculpation proposals. ISS intends to assess these proposals on a case-by-case basis and to generally recommend voting for such proposals. In assessing a proposal, ISS will consider, among other factors, the rationale for the proposal, as well as the extent to which the proposal would:

- Eliminate officers' liability for monetary damages for violating the duty of care and/or the duty of loyalty;
- Expand coverage beyond legal expenses to liability for acts that are more serious violations of fiduciary obligation than mere carelessness; and
- Expand the scope of indemnification to provide for mandatory indemnification of company officials in connection with acts for which the company was previously permitted, but not required, to provide indemnification, at the discretion of the company's board.

ISS noted that it will vote for expanded coverage proposals even where an officer's legal defense is unsuccessful, provided (1) the individual is found to have acted in good faith and in a manner reasonably believed to be in the best interests of the company and (2) only the individual's legal expenses would be covered.

While Glass Lewis' policy states that it will generally recommend voting against these proposals, and ISS' policy states that it will generally recommend voting for such proposals, it remains to be seen how the proxy advisors' respective case-by-case analyses will play out over the course of the upcoming proxy season.

**Stockholder Lists (DGCL Section 219)** – Amended to eliminate the requirement that, during a stockholder meeting, a company make its stockholder list available to its stockholders. Section 219

still requires that the company make the stockholder list available for inspection by its stockholders during the ten (10) days prior to the meeting.

**Adjournments of Virtual Meetings (DGCL Section 222)** - Amended to provide that, unless a company's bylaws state otherwise, if a virtual meeting of stockholders is adjourned, including due to a technical failure, the company is not required to re-notice the meeting if the time, date and place of the adjourned meeting are (1) announced at the meeting, (2) displayed during the time scheduled for the meeting on the virtual platform used for the meeting or (3) set forth in the original notice of meeting.

**Appraisal Rights (DGCL Section 262)** – Amended to permit beneficial owners of stock to demand appraisal rights directly; in other words, they are no longer required to cause the record holder (e.g., Cede & Co.) to demand such rights on the beneficial owners' behalf. Also amended to make certain other changes, including changes relating to notices of appraisal rights and appraisal procedures, and to establish appraisal rights for stockholders in connection with the conversion of Delaware corporations into other entities, subject to certain exceptions.

**Conversions of Delaware Corporations (DGCL Section 266)** – Amended to lower the stockholder approval required to convert a Delaware corporation to a foreign corporation (or other entity) from unanimous approval to majority approval. Also eliminated the requirement for non-voting shares to approve the conversion.

**Domestication of Non-U.S. Entities to Delaware (DGCL Section 388)** – With respect to a non-U.S. entity that wishes to domesticate as a Delaware corporation, amended to provide, among other things, for a foreign entity to prepare a plan of domestication. The statute provides that the plan may authorize corporate actions by the Delaware company following the domestication, and that separate approvals for such actions from the stockholders and/or board of directors of the Delaware company are not required.

**Delegation of Authority in Making Equity Grants (DGCL Sections 152 and 157)** – Amended to provide boards of directors and their committees with greater flexibility if and when they choose to delegate authority to others to grant stock options and other rights to acquire stock. The DGCL previously permitted boards and their committees to delegate limited authority to officers to grant stock options or other rights to acquire stock within certain strict parameters established by the board or its committee. For example, the board or its committee was required to approve the terms (other than recipient and size) of the awards.

The amended DGCL allows the board or its committee to delegate authority to *any* individual or entity, and not only to officers, and allows such individual or entity, as opposed to the board or its committee, to fix the terms of awards. Any such delegation must include: (1) the maximum number of shares, rights or options that may be granted, (2) the time period during which the shares, rights

or options may be granted or issued and (3) the minimum amount of consideration required to be received for the shares, rights or options.

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