

DELAWARE LAW AMENDED TO PROTECT DIRECTORS
AND OFFICERS AGAINST ELIMINATION OF
INDEMNIFICATION RIGHTS

April 17, 2009

To Our Clients and Friends:

The Delaware General Corporation Law has been amended to provide that rights to indemnification may not be eliminated after the occurrence of the act or omission giving rise to a claim in respect of which indemnification is sought, unless the relevant indemnification provision expressly permits such elimination.

The amendment reverses the outcome in *Schoon et al. v. Troy Corporation*, 948 A.2d 1157 (Del. Ch. 2008), about which we wrote in our client update of May 19, 2008. By establishing that indemnification provisions contained in a corporation's charter and bylaws while a director or officer serves will cover claims arising out of that service, the amendment will relieve some of the pressure to put in place separate indemnification agreements that followed the *Schoon* decision. (Corporations and their directors and officers may still determine for other reasons—such as where it is impracticable to amend the charter or bylaws or where the corporation desires to give individually-tailored rights to certain indemnitees—to provide separate indemnification agreements.)

The amendment was effected by adding the following sentence to the end of section 145(f) of the DGCL:

A right to indemnification or to advancement of expenses arising under a provision of the certificate of incorporation or a bylaw shall not be eliminated or impaired by an amendment to such provision after the occurrence of the act or omission that is the subject of the civil, criminal, administrative or investigative action, suit or proceeding for which indemnification or advancement of expenses is sought, unless the provision in effect at the time of such act or omission explicitly authorizes such elimination or impairment after such action or omission has occurred.

The amendment is effective on August 1, 2009.

Other notable amendments to the DGCL in the same bill include:

- Amendments to sections 112 and 113 providing that bylaws may require a corporation to (1) include in its proxy materials stockholder-nominated candidates for director and (2) reimburse stockholders for proxy solicitation expenses. Such requirements may be subject to conditions, such as a minimum level of shareholding.
- Amendments to section 213 (and related changes to other sections) permitting a board to set a record date for determining the stockholders entitled to vote at a meeting that is later than the record date for determining the stockholders entitled to notice of the meeting.

If you have any questions or comments, please feel free to contact us.

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