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Sens. Bonini, Hansen, Sokola; Reps. Bush, Griffith,
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DELAWARE STATE SENATE
151st GENERAL ASSEMBLY

SENATE BILL NO. 203

AN ACT TO AMEND TITLE 8 OF THE DELAWARE CODE RELATING TO THE GENERAL CORPORATION LAW.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Two-thirds of all members elected to each house thereof concurring therein):

1 Section 1. Amend § 145, Title 8 of the Delaware Code by making deletions as shown by strike through and
2 insertions as shown by underline as follows:

3 § 145 Indemnification of officers, directors, employees and agents; insurance.

4 (c) (1) To the extent that a present or former director or officer of a corporation has been successful on the merits
5 or otherwise in defense of any action, suit or proceeding referred to in subsections (a) and (b) of this section, or in defense
6 of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually
7 and reasonably incurred by such person in connection therewith. For indemnification with respect to any act or omission
8 occurring after December 31, 2020, references to "officer" for purposes of ~~this~~ paragraphs (c)(1) and (2) of this section
9 shall mean only a person who at the time of such act or omission is deemed to have consented to service by the delivery of
10 process to the registered agent of the corporation pursuant to § 3114(b) of Title 10 (for purposes of this sentence only,
11 treating residents of this State as if they were nonresidents to apply § 3114(b) of Title 10 to this sentence).

12 (g) A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a
13 director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director,
14 officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability
15 asserted against such person and incurred by such person in any such capacity, or arising out of such person's status as
16 such, whether or not the corporation would have the power to indemnify such person against such liability under this
17 section. For purposes of this subsection, insurance shall include any insurance provided directly or indirectly (including
18 pursuant to any fronting or reinsurance arrangement) by or through a captive insurance company organized and licensed in
19 compliance with the laws of any jurisdiction, including any captive insurance company licensed under Chapter 69 of Title
20 18 of the Delaware Code, provided that the terms of any such captive insurance shall:

21 (1) exclude from coverage thereunder, and provide that the insurer shall not make any payment for, loss in
22 connection with any claim made against any person arising out of, based upon or attributable to any (i) personal profit or

23 other financial advantage to which such person was not legally entitled or (ii) deliberate criminal or deliberate fraudulent
24 act of such person, or a knowing violation of law by such person, if (in the case of the foregoing clause (i) or (ii))
25 established by a final, non-appealable adjudication in the underlying proceeding in respect of such claim (which shall not
26 include an action or proceeding initiated by the insurer or the insured to determine coverage under the policy), unless and
27 only to the extent such person is entitled to be indemnified therefor under this section;

28 (2) require that any determination to make a payment under such insurance in respect of a claim against a current
29 director or officer (as defined in paragraph (c)(1) of this section) of the corporation shall be made by a third-party
30 administrator or in accordance with the provisions of paragraphs (d)(1) through (4) of this section; and

31 (3) require that, prior to any payment under such insurance in connection with any dismissal or compromise of any
32 action, suit or proceeding brought by or in the right of a corporation as to which notice is required to be given to
33 stockholders, such corporation shall include in such notice that a payment is proposed to be made under such insurance in
34 connection with such dismissal or compromise.

35 For purposes of paragraph (1) of this subsection, the conduct of an insured person shall not be imputed to any
36 other insured person. A corporation that establishes or maintains a captive insurance company that provides insurance
37 pursuant to this section shall not, solely by virtue thereof, be subject to the provisions of Title 18 of the Delaware Code.

SYNOPSIS

Section 1. Section 1 of this Act amends Sections 145(c) and 145(g). Amended Section 145(c) corrects a typographical error but otherwise makes no substantive changes.

The amendments to Section 145(g) expressly authorize a corporation to purchase and maintain insurance on behalf of its directors, officers, employees and other indemnifiable persons by or through a “captive insurance company,” which, in general, is an insurer directly or indirectly owned, controlled and funded by the corporation. The captive insurer may be licensed in Delaware or another jurisdiction.

Like third-party insurance, the captive insurance may provide coverage for liabilities incurred by directors, officers, employees and others whether or not the corporation would have the power to indemnify them under Section 145. Thus, captive insurance could be used to provide coverage for, among other things, amounts paid to satisfy judgments and settlements of claims brought by or in the right of the corporation, even though the corporation would not have the power to indemnify the covered persons against such amounts.

Amended Section 145(g) contemplates that captive insurance may be procured pursuant to any “fronting” or other reinsurance arrangement (such as when a corporation obtains insurance from a third-party insurer but, through a reinsurance policy, all or part of the risk of loss is transferred to a captive insurer).

Section 145(g)(1) requires that a captive insurance policy must exclude from coverage, and must provide that the insurer may not make payment in respect, of any loss that arises out of, is based upon or is attributable to any personal profit or financial advantage to which the covered person was not legally entitled (e.g., an undue financial benefit from a self-dealing transaction), any deliberate criminal or deliberate fraudulent act, or any knowing violation of law. Despite these exclusions, directors may be covered under a captive insurance policy for certain liabilities that are not exculpable under Section 102(b)(7), including non-exculpated liability stemming from so-called Caremark or oversight claims where there is not otherwise a finding that the directors knowingly caused the corporation to violate the law.

The coverage exclusions in Section 145(g)(1) only apply if the proscribed conduct has been established in a final, non-appealable adjudication in the underlying proceeding in respect of the claim. They do not apply if the proscribed

conduct has been established in an adjudication in an ancillary proceeding by the insurer or the insured to determine coverage. Because the exclusions in Section 145(g)(1) are invoked only after an adjudication in the underlying proceeding, a captive insurance policy could cover amounts paid in settlement of proceedings that allege conduct referenced in Section 145(g)(1). Amended Section 145(g) makes clear that the conduct of one person insured under the captive policy will not be imputed to any other insured person for purposes of applying the conduct exclusions set forth in Section 145(g)(1). In addition, the exclusions in Section 145(g)(1) do not apply to the extent the corporation would otherwise be entitled to indemnify the covered person under the other provisions of Section 145. A corporation that establishes a captive insurance program may include in the insurance policy limitations or exclusions from coverage that are in addition to those prescribed by statute.

Amended Section 145(g)(2) provides that any determination to make a payment under a captive insurance policy must be made either by a third-party administrator or in accordance with the procedures set forth in paragraphs (d)(1) through (4) of Section 145, to ensure that the persons claiming entitlement to payment under the captive insurance policy are not the same persons making the decision whether to pay claims under the policy.

Amended Section 145(g)(3) provides that if any payment is to be made under the captive insurance policy in connection with the dismissal or compromise of any action, suit or proceeding by or in the right of the corporation as to which notice is required to be given to stockholders, the corporation must include in the notice that a payment is proposed to be made under the captive insurance policy in connection with the dismissal or compromise. Section 145(g)(3) thereby affords the reviewing court and stockholders an opportunity to consider the use of assets of the captive insurance company in connection with a compromise of such actions, suits or proceedings. However, amended Section 145(g) does not require a court to make any specific determinations with respect to payments by a captive insurer.

The amendments to Section 145(g) make clear that a corporation that establishes and maintains a captive insurance company shall not, solely by virtue thereof, be subject to the provisions of Title 18 of the Delaware Code regulating insurance companies.

The amendments to Section 145(g) are not intended to prohibit other forms of insurance that would have been permitted under the provisions of Section 145(g) that predated this amendment.

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