

May 9, 1986

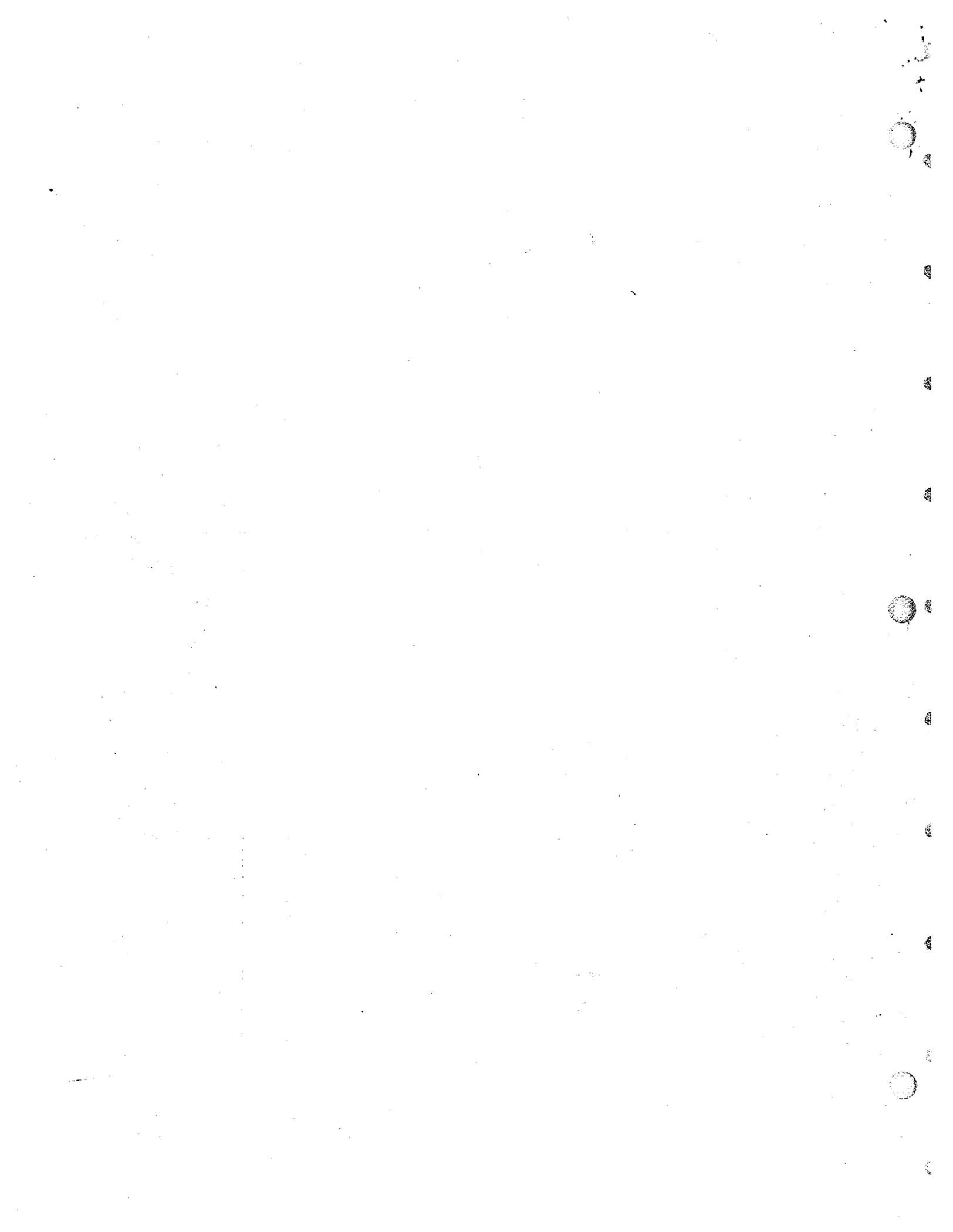
To Our Clients

Directors and Officers Liabilities  
and Indemnification

There is a proposal to amend the Delaware Corporation Law along the lines suggested in my memo of March 6, 1986. Enclosed is a copy of the draft legislation. If this legislation is enacted it will go a long way toward solving the D&O insurance problem.

M. Lipton

Enclosure



SPONSOR: \_\_\_\_\_  
\_\_\_\_\_

HOUSE OF REPRESENTATIVES

\_\_\_\_\_ GENERAL ASSEMBLY

HOUSE BILL NO. \_\_\_\_\_

AN ACT TO AMEND TITLE 8 OF THE DELAWARE CODE RELATING TO THE DELAWARE 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 HEREIN):

Section 1. Amend subsection (b)(6) of Section 102, Title 8, Delaware Code, by deleting the period at the end of the subsection and substituting therefor a semicolon.

Section 2. Amend subsection (b) of Section 102, Title 8, Delaware Code, by adding a new subsection (7) to read as follows:

(7) A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director (i) for any breach of the director's duty of loyalty to the corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under section 174 of this title, or (iv) for any transaction from which the director derived an improper personal benefit. No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective. All references in this subsection to a director shall also be deemed to refer to a member of the governing body of a corporation which is not authorized to issue capital stock.

Section 3. Amend subsection (b) of Section 145, Title 8, Delaware Code, by deleting the phrase "for negligence or misconduct in the performance of his duty."

Section 4. Amend the first sentence of subsection (e) of Section 145, Title 8, Delaware Code, by (a) deleting the phrase "in the specific case," (b) deleting the word "unless" after the word "amount" and substituting therefor the word "if" and (c) by adding the word "not" after the phrase "determined that he is."

Section 5. Amend subsection (f) of Section 145, Title 8, Delaware Code, by (a) adding to the first sentence thereof the words "and advancement of expenses" after the phrase "the indemnification", (b) adding to that sentence the phrase ", or granted pursuant to, the other subsections of" after the words "provided by", (c) adding to that sentence the phrase "or advancement of expenses" after the phrase "seeking indemnification", (d) deleting the comma after the word "office" and substituting therefor a period, and (e) deleting from that sentence the phrase "and shall continue as to a person who has ceased to be a director, officer, employee or agent, and shall inure to the benefit of the heirs, executors and administrators of such a person."

Section 6. Amend Section 145, Title 8, Delaware Code, by adding a new subsection (j) to read as follows:

The indemnification and advancement of expenses provided by, or granted pursuant to, this section shall, unless otherwise provided when authorized or ratified, continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to

the benefit of the heirs, executors and administrators of such a person.

Section 7. This Act shall become effective on \_\_\_\_\_.

#### SYNOPSIS

Section 102(b)(7) and the amendments to Section 145 represent a legislative response to recent changes in the market for directors' liability insurance. Such insurance has become a relatively standard condition of employment for directors. Recent changes in that market, including the unavailability of the traditional policies (and, in many cases, the unavailability of any type of policy from the traditional insurance carriers) have threatened the quality and stability of the governance of Delaware corporations because directors have become unwilling, in many instances, to serve without the protection which such insurance provides and, in other instances, may be deterred by the unavailability of insurance from making entrepreneurial decisions. The amendments are intended to allow Delaware corporations to provide substitute protection, in various forms, to their directors and to limit director liability under certain circumstances.

#### Commentary on Section 102(b)(7)

This provision enables a corporation in its original certificate of incorporation or an amendment thereto validly approved by stockholders to eliminate or limit personal liability of members of its board of directors or governing body for violations of a director's fiduciary duty of care. However, the amendment makes clear that no such provision shall eliminate or limit the liability of a director for breaching his duty of loyalty, failing to act in good faith, engaging in intentional misconduct or knowingly violating a law, paying a dividend or approving a stock repurchase which was illegal under 8 Del. C. §174, or obtaining an improper personal benefit. This provision would have no effect on the availability of equitable remedies, such as an injunction or rescission, for breach of fiduciary duty.

#### Commentary on Section 145(b)

Paragraph (b) has been amended to conform the standard for indemnification under the statute with the recent holdings of the Delaware Supreme Court. No substantive change in the law is intended.

#### Commentary on Section 145(e)

The first amendment to Section 145(e) deletes the previous requirement for authorization of advancement of

litigation expenses, "in the specific case" so as to permit general authorization of advancement of expenses including a mandatory certificate of incorporation or by-law provision to that effect. The second amendment to Section 145(e) changes the undertaking required for the advancement of expenses to directors and officers so as not to create an obligation to repay unless a specific determination is made that the director or officer is not entitled to be indemnified as authorized in Section 145. Nothing in these changes to subsection (e) relieves the board of directors from its affirmative duty to see that the determination required by subsection (d) is made for any indemnification under subsections (a) and (b).

Commentary on Section 145(f)

The addition of the phrase "and advancement of expenses" is intended to make clear that the "other rights" provided for in Section 145(f) may include rights to have expenses advanced on terms other than those provided in Section 145(e). The phrase "and shall continue as to a person who has ceased to be a director, officer, employee or agent" has been relocated to a new subsection (j).

Commentary on Section 145(j)

New subsection 145(j) has been added to set forth the provision from Section 145(f) referred to above. No substantive change in the law is intended.

Amendment to 8 Del. C. §102(b)

[New § 102(b)(7)]

(b) In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section the certificate of incorporation may also contain any or all of the following matters --

\* \* \*

(7) A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director (i) for any breach of the director's duty of loyalty to the corporation or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under section 174 of this title, or (iv) for any transaction from which the director derived an improper personal benefit. No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective. All references in this subsection to a director shall also be deemed to refer to a member of the governing body of a corporation which is not authorized to issue capital stock.

Amendment to 8 Del. C. § 145(b)

Amend subsection (b) of §145, Title 8, Delaware Code, by deleting the phrase "for negligence or misconduct in the performance of his duty" so that subsection (b) reads in its entirety as follows (bracketing indicates deletion):

(b) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against expenses (including attorneys' fees) actually and reasonably incurred by him in connection with the defense or settlement of such action or suit if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation and except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable [for negligence or misconduct in the performance of his duty] to the corporation unless and only to the extent that the Court of Chancery or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the Court of Chancery or such other court shall deem proper.

Amendment to 8 Del. C. § 145(e)

Amend the first sentence of Section 145(e) to read as follows  
(brackets indicate deletions and underlining indicates  
additions):

(e) Expenses incurred by an officer or director in defending a civil or criminal action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding as authorized by the board of directors [in the specific case] upon receipt of an undertaking by or on behalf of such director or officer to repay such amount [unless] if it shall ultimately be determined that he is not entitled to be indemnified by the corporation as authorized in this Section.

Amendment to 8 Del. C. § 145(f)

Amend Section 145(f) to read as follows (brackets indicate deletions and underlining indicates additions):

(f) The indemnification and advancement of expenses provided by, or granted pursuant to, the other subsections of this section shall not be deemed exclusive of any other rights to which a person seeking indemnification or advancement of expenses may be entitled under any by-law, agreement, vote of stockholders or disinterested directors, or otherwise, both as to action in his official capacity and as to action in another capacity while holding such office [and shall continue as to a person who has ceased to be a director, officer, employee or agent, and shall inure to the benefit of the heirs, executors and administrators of such a person].

Amendment to § 145

[New § 145(j)]

Add a new subsection (j) to read as follows:

(j) The indemnification and advancement of expenses provided by, or granted pursuant to, this section shall, unless otherwise provided when authorized or ratified, continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such a person.

