


Companies seek liability protection for top execs

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A growing number of companies in Indiana and elsewhere are hoping to offer new legal protection for top executives following a 2022 change in Delaware’s corporation law.

This protection, commonly referred to as an exculpation provision, shields a company’s officers from personal financial liability in lawsuits where the officers are alleged to have breached their fiduciary duty to the company.

For decades, Delaware has allowed companies incorporated in that state to offer exculpation to their board members. The state amended its corporation law in August 2022 to allow Delaware-incorporated companies to offer that same protection to their presidents, CEOs, chief operating officers,

chief financial officers and other company officers if shareholders approve.

The change has nationwide implications because about 60% of U.S. public companies are incorporated in Delaware, regardless of where those companies are headquartered, said Justin Klein, director of the John L. Weinberg Center for Corporate Governance at the University of Delaware.



Justin Klein

Among Indiana's Delaware-incorporated public companies, four so far have put the question to shareholders in advance of their annual meetings.

Evansville-based [**i** Berry Global Group Inc.](#), which makes plastic consumer packaging, was the first to act. Its shareholders approved the company's exculpation provision at Berry's annual shareholders meeting Feb. 14.

Indianapolis-based agbiotech company [**i** Corteva Inc.](#), Elkhart-based manufacturer [**i** LCI Industries](#) and Lafayette-based [**i** Wabash National Corp.](#) plan to ask their shareholders to approve similar measures at their annual shareholders meetings in coming weeks.

Others might follow. Companies hold their annual meetings on different dates, and as of April 3, some companies still needed to file their proxy statement—the document in which a company details the proposals its shareholders will vote on.



Robert Greising

"I think the shift of this to officers is significant," said Indianapolis attorney Robert Greising, a

i Krieg DeVault LLP partner who specializes in corporate law. Officers can still be held legally liable for other deeds—if they spill company secrets, for instance, or if they engage in willful misconduct. But exculpation does mean that an officer making good-faith business decisions won't have to worry about legal liability if that decision doesn't work out.

“I don't see this as creating a free pass, but I do see it as helping them get comfort that if they're doing their job, they're not going to be at risk of being targeted at a personal level,” Greising said.

Jun Frank, managing director of compensation and governance advisory at Rockville, Maryland-based ISS-Corporate, estimated that a few hundred public companies took up the exculpation issue during the 2023 proxy season. ISS offers advisory services to public companies.

And now that the early adopters have acted, Frank said, he expects other companies to put the question to their shareholders this year. “Now that we have a lot of case studies from 2023, I think perhaps more and more companies are starting to feel more comfortable making the change and adapting.”



Jun Frank

From talent attraction to insurance costs, the Indiana companies cited in their proxy statements a variety of reasons their shareholders should approve exculpation provisions.

All of them said the provisions will help them attract and retain top talent.

Wabash National said exculpation would help it compete for talent. The company noted that some peers have adopted exculpation clauses, and it expects others to do so.

Berry used an even stronger argument in its proxy statement. The company said that because it expects a growing number of companies to adopt exculpation provisions, such provisions might become necessary for any Delaware corporation that wants to attract and retain corporate officers.

These arguments have merit, the experts say.

“Theoretically, they’re absolutely right,” Klein said.

Liability protections

A 2022 Delaware law allows companies incorporated in that state to adopt a provision, called officer exculpation, that protects top executives from personal financial liability if they are sued for breach of their fiduciary duty to the company.

Indiana manufacturers seeking officer exculpation*

	Products	Headquarters	Shareholder vote
Berry Global Group Inc.	plastic packaging and other products	Evansville	Approved Feb. 14
Corteva Inc.	agricultural seeds, pesticides, herbicides	Indianapolis	April 26
LCI Industries	components for recreational vehicles, other industries	Elkhart	May 16
Wabash National Corp.	truck trailers; other transportation, logistics, distribution products	Lafayette	May 22

*among companies who filed proxy statements as of April 3

Source: U.S. Securities and Exchange Commission filings

As part of the interview process, he said, candidates for top executive positions might well ask about exculpation provisions or other legal protections the company offers.

Greising offered a similar view. “If the company has these [exculpation] protections in, I think it is more likely to be a positive in attracting talent.”

The Indiana companies also said exculpation would offer legal and financial advantages.

LCI said in its proxy statement that its officers often must make critical and time-sensitive decisions that could lead to

investigations or lawsuits, “especially in the current litigious environment and regardless of merit.” Exculpating officers would help attract and retain top talent, LCI said, and it could protect the company against related litigation and insurance costs.

In its proxy statement, Corteva said exculpation of officers could discourage “frivolous lawsuits that can distract management.” It could also decrease the cost of (or eliminate the need for) securing directors’ and officers’ liability insurance, the company said.

Companies, though, need to do their homework before asking shareholders to approve exculpation amendments, Frank said. “For many of our clients or many companies, what they need to think about is, ‘What are the benefits of doing this? Is it a net positive or a net negative?’”

As an example, he said, shareholders who feel they don’t have a voice in company decisions, or who lack trust in a company’s management team, might not be eager to extend that team protection from litigation. In cases such as this, he said, “there may be a greater willingness to go against these types of proposals.”•

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