

Delaware Further Updates its Framework for Equity Award Delegations

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Effective August 1, amendments (the 2023 amendments) to the Delaware General Corporation Law (DGCL) further update the framework under which a company's board of directors may delegate its authority to grant equity incentive awards.

Background

Delaware law allows a board^[1] to delegate its authority to grant equity awards if certain requirements are met. Section 152(b) of the DGCL governs the board's delegation of its authority to issue capital stock (which includes grants of restricted stock awards), and Section 157(c) governs options and rights (most commonly, time-vesting and performance-vesting restricted stock units (RSUs)). Historically, there was a misalignment between Section 152 and Section 157 of the DGCL, which resulted in boards having more flexibility to structure delegations to grant restricted stock awards than delegations to grant options or RSUs. The DGCL was previously amended, effective August 1, 2022 (the 2022 amendments) to address this issue, giving boards greater flexibility to structure delegations for all types of equity awards. While the 2022 amendments were welcomed by practitioners, the amendments raised certain ambiguities and interpretive questions, as discussed in our [prior client alert](#). The 2023 amendments seek to provide more clarity on the DGCL requirements for structuring a delegation to grant equity awards.

Overview

A board may delegate the authority to grant equity awards to any individual or group. The board must establish the delegation through authorizing resolutions that meet certain requirements enumerated in the DGCL. The delegate is free to establish the terms and conditions of equity awards granted pursuant to the delegation, within the parameters established by the board.

Authorizing Resolutions

The board resolution establishing a Section 157(c) delegation for the grant of options or RSUs must meet the following requirements:

I. Share Cap: Fixes the maximum number of shares issuable upon the exercise of the options or RSUs granted by the delegate.

Under the 2022 amendments, the board was required to fix both (i) a cap on the maximum number of options or RSUs that may be granted by the delegate, and (ii) a cap on the maximum number of shares issuable pursuant to the delegation. Clause (i) created interpretive confusion as it was unclear what additional cap was required above and beyond establishing a maximum number of shares

issuable pursuant to awards granted by the delegate. The 2023 amendments address this issue by eliminating clause (i) from the DGCL. Therefore, the only cap that is required in the authorizing resolutions is a maximum number of shares issuable pursuant to awards granted by the delegate.

II. Time Limit: Fixes the time period during which the options or RSUs may be granted, and the time period during which shares may be issued in respect of the exercise of awards granted by the delegate.

The 2023 amendments seek to clarify that there are two time periods that should be fixed in the authorizing resolution, which may be different: (i) a period during which the delegate is authorized to grant options or RSUs, and (ii) a period during which shares may be issued in respect of those options or RSUs.

To fulfill the first requirement, the board must establish a time period during which the delegation to grant awards remains in effect (*e.g.*, the delegate may grant awards for five years following the effective date of the resolutions).

To fulfill the second requirement, the board must establish a time period during which shares may be issued in respect of options or RSUs granted pursuant to the delegation. Setting this time period for options will likely be straightforward for many companies. It is common for public company equity incentive plans to specify a maximum term during which an option may be exercised (*e.g.*, 10 years), and shares must be delivered promptly following exercise.

Fixing a time period for the delivery of shares underlying RSUs, on the other hand, may raise more interpretive questions. Consider a company that grants RSUs that vest in annual installments over a four-year period. Typically, shares are issued in settlement of the RSUs within 30 days of each vesting event. However, the company also maintains a deferred compensation program under which the grantee can defer the settlement date of those shares. In that case, how can the authorizing resolution fix a specific time period during which the shares may be issued? Is it acceptable to state that the shares underlying an RSU granted by the delegate will be issued within five years from the grant date, or such later time as permitted under the company's deferred compensation program?

If the deferred compensation program is in effect when the delegation is established and specifies a maximum duration for deferrals, our view is that this construct should be acceptable. That is because the DGCL generally permits any provision in the authorizing resolutions to be made dependent on "facts ascertainable" outside of the resolution, so long as the manner in which the facts operate upon the resolution is clearly and expressly set forth in the resolution. In this case, we believe the terms of the written deferred compensation program maintained by the company as of the date of the delegation would suffice as "facts ascertainable" outside of the resolution.

III. Minimum Consideration: Fixes the minimum consideration (if any) for which options or RSUs may be issued and the minimum consideration for the shares issuable upon exercise of awards granted by the delegate.

Consistent with the 2022 amendments, the 2023 amendments provide that the authorizing resolution must state the minimum consideration payable by a grantee for the grant of an option or RSU, "if any." It is atypical for grantees to pay consideration for the grant of an option or RSU, so we continue to expect most authorizing resolutions to state that such awards may be granted for no consideration.

In addition, the board is required to fix the minimum consideration payable by the grantee for the shares issuable upon the exercise of awards granted by the delegate. Such shares shall be issued for no less than the consideration, "if any," required by Section 153. Under Section 153, new shares of stock with a par value may generally be issued for consideration that is at least equal in value to the

par value of the shares. Pursuant to the 2023 amendments, treasury shares, conversely, may generally be reissued for consideration worth less than the par value of the shares. The board may authorize such consideration to be paid in cash, tangible or intangible property, any benefit to the company, or any combination of the above. This broad list of permissible consideration should include the value of past or future services provided by a grantee to the company.

Consequently, we continue to believe that the authorizing resolution may simply provide that a grantee's provision of services to the company may constitute minimum consideration for the issuance of shares. In nearly any foreseeable case, we expect that such consideration will be sufficient for purposes of Section 153.

The board resolution establishing a Section 152(b) delegation for the grant of restricted stock must meet the following requirements:

Similar to Section 157(c), Section 152(b) provides that a board resolution establishing the delegation of authority to grant shares of restricted stock must set (i) a maximum number of shares that may be issued by the delegate, (ii) a time period during which the shares may be issued, and (iii) the minimum consideration for which the shares may be issued (also, as defined under Section 153).

Do's and Don'ts for Equity Award Delegations

Do	Don't
Confirm that a delegation is permitted under the company's governing documents and plan documents.	Allow delegates to make grants to members of the board or Section 16 officers or their respective family members.
Consider whether delegates are adequately indemnified for actions taken in their capacity as delegates.	Allow delegates to make grants to themselves or their family members.
Keep contemporaneous written records of grants made by delegates.	Forget to have good internal processes in place to document grants and report on grant activity to the board.

Bypassing the DGCL Requirements

Sections 152(b) and 157(c) of the DGCL are not the exclusive method for setting up an equity award delegation in Delaware. If a company's CEO sits on the board, for example, the board^[2] may create an "equity award committee" comprised of one director — the CEO — who is authorized to grant equity awards to nonofficers. Because the delegation rules of Sections 152(b) and 157(c) do not apply to the delegation of grant-making authority by a board to a committee of the board, these rules would not apply when establishing the equity award committee. While certain formalities must still be followed and safeguards must be put into place, this alternative delegation method is attractive to many companies whose governing documents allow it.

To discuss equity delegation matters at your company, please reach out to any of the authors of this client alert or your regular Troutman Pepper contacts.

[1] For simplicity, we refer throughout this alert to the full board as the body that may establish a delegation. However, a committee of the board, such as a compensation committee that has been duly authorized by the board to administer an equity incentive plan and to exercise the powers and authorities of the board in so doing, may also establish a Section 152(b) or 157(c) delegation.

[2] In this scenario, the full board must establish the equity award committee; it cannot be established by the compensation committee. While the compensation committee could technically establish a sub-committee, the sub-committee would need to consist of one or more members of the compensation committee. In a publicly listed company, the CEO would not typically be a member of the compensation committee, as the compensation committee would be comprised of independent directors for a number of reasons (including compliance with stock exchange listing requirements and the facilitation of an exemption under the short-swing profit disgorgement rules for equity awards granted to Section 16 insiders).

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