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LEGISLATIVE FISCAL ESTIMATE: No

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LAW/KR

P.L.2014, CHAPTER 77, *approved December 11, 2014*

Assembly, No. 2603

1 AN ACT concerning indemnification of corporate agents and
2 amending N.J.S.14A:3-5.

3
4 **BE IT ENACTED** by the Senate and General Assembly of the State
5 of New Jersey:

6
7 1. N.J.S.14A:3-5 is amended to read as follows:

8 14A:3-5. Indemnification of directors, officers and employees.

9 (1) As used in this section,

10 (a) "Corporate agent" means any person who is or was a
11 director, officer, employee or agent of the indemnifying corporation
12 or of any constituent corporation absorbed by the indemnifying
13 corporation in a consolidation or merger and any person who is or
14 was a director, officer, trustee, employee or agent of any other
15 enterprise, serving as such at the request of the indemnifying
16 corporation, or of any such constituent corporation, or the legal
17 representative of any such director, officer, trustee, employee or
18 agent;

19 (b) "Other enterprise" means any domestic or foreign
20 corporation, other than the indemnifying corporation, and any
21 partnership, joint venture, sole proprietorship, trust or other
22 enterprise, whether or not for profit, served by a corporate agent;

23 (c) "Expenses" means reasonable costs, disbursements and
24 counsel fees;

25 (d) "Liabilities" means amounts paid or incurred in satisfaction
26 of settlements, judgments, fines and penalties;

27 (e) "Proceeding" means any pending, threatened or completed
28 civil, criminal, administrative or arbitative action, suit or
29 proceeding, and any appeal therein and any inquiry or investigation
30 which could lead to such action, suit or proceeding; and

31 (f) References to "other enterprises" include employee benefit
32 plans; references to "fines" include any excise taxes assessed on a
33 person with respect to an employee benefit plan; and references to
34 "serving at the request of the indemnifying corporation" include any
35 service as a corporate agent which imposes duties on, or involves
36 services by, the corporate agent with respect to an employee benefit
37 plan, its participants, or beneficiaries; and a person who acted in
38 good faith and in a manner the person reasonably believed to be in
39 the interest of the participants and beneficiaries of an employee
40 benefit plan shall be deemed to have acted in a manner "not
41 opposed to the best interests of the corporation" as referred to in
42 this section.

EXPLANATION – Matter enclosed in bold-faced brackets **[thus]** in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

1 (2) Any corporation organized for any purpose under any
2 general or special law of this State shall have the power to
3 indemnify a corporate agent against his expenses and liabilities in
4 connection with any proceeding involving the corporate agent by
5 reason of his being or having been such a corporate agent, other
6 than a proceeding by or in the right of the corporation, if

7 (a) such corporate agent acted in good faith and in a manner he
8 reasonably believed to be in or not opposed to the best interests of
9 the corporation; and

10 (b) with respect to any criminal proceeding, such corporate
11 agent had no reasonable cause to believe his conduct was unlawful.
12 The termination of any proceeding by judgment, order, settlement,
13 conviction or upon a plea of nolo contendere or its equivalent, shall
14 not of itself create a presumption that such corporate agent did not
15 meet the applicable standards of conduct set forth in paragraphs
16 14A:3-5(2)(a) and 14A:3-5(2)(b).

17 (3) Any corporation organized for any purpose under any
18 general or special law of this State shall have the power to
19 indemnify a corporate agent against his expenses in connection with
20 any proceeding by or in the right of the corporation to procure a
21 judgment in its favor which involves the corporate agent by reason
22 of his being or having been such corporate agent, if he acted in
23 good faith and in a manner he reasonably believed to be in or not
24 opposed to the best interests of the corporation. However, in such
25 proceeding no indemnification shall be provided in respect of any
26 claim, issue or matter as to which such corporate agent shall have
27 been adjudged to be liable to the corporation, unless and only to the
28 extent that the Superior Court or the court in which such proceeding
29 was brought shall determine upon application that despite the
30 adjudication of liability, but in view of all circumstances of the
31 case, such corporate agent is fairly and reasonably entitled to
32 indemnity for such expenses as the Superior Court or such other
33 court shall deem proper.

34 (4) Any corporation organized for any purpose under any
35 general or special law of this State shall indemnify a corporate
36 agent against expenses to the extent that such corporate agent has
37 been successful on the merits or otherwise in any proceeding
38 referred to in subsections 14A:3-5(2) and 14A:3-5(3) or in defense
39 of any claim, issue or matter therein.

40 (5) Any indemnification under subsection 14A:3-5(2) and,
41 unless ordered by a court, under subsection 14A:3-5(3) may be
42 made by the corporation only as authorized in a specific case upon a
43 determination that indemnification is proper in the circumstances
44 because the corporate agent met the applicable standard of conduct
45 set forth in subsection 14A:3-5(2) or subsection 14A:3-5(3). Unless
46 otherwise provided in the certificate of incorporation or bylaws,
47 such determination shall be made

- 1 (a) by the board of directors or a committee thereof, acting by a
2 majority vote of a quorum consisting of directors who were not
3 parties to or otherwise involved in the proceeding; or
- 4 (b) if such a quorum is not obtainable, or, even if obtainable and
5 such quorum of the board of directors or committee by a majority
6 vote of the disinterested directors so directs, by independent legal
7 counsel, in a written opinion, such counsel to be designated by the
8 board of directors; or
- 9 (c) by the shareholders if the certificate of incorporation or
10 bylaws or a resolution of the board of directors or of the
11 shareholders so directs.
- 12 (6) Expenses incurred by a corporate agent in connection with a
13 proceeding may be paid by the corporation in advance of the final
14 disposition of the proceeding [as authorized by the board of
15 directors] upon receipt of an undertaking by or on behalf of the
16 corporate agent to repay such amount if it shall ultimately be
17 determined that he is not entitled to be indemnified as provided in
18 this section.
- 19 (7) (a) If a corporation upon application of a corporate agent has
20 failed or refused to provide indemnification as required under
21 subsection 14A:3-5(4) or permitted under subsections 14A:3-5(2),
22 14A:3-5(3) and 14A:3-5(6), a corporate agent may apply to a court
23 for an award of indemnification by the corporation, and such court
- 24 (i) may award indemnification to the extent authorized under
25 subsections 14A:3-5(2) and 14A:3-5(3) and shall award
26 indemnification to the extent required under subsection 14A:3-5(4),
27 notwithstanding any contrary determination which may have been
28 made under subsection 14A:3-5(5); and
- 29 (ii) may allow reasonable expenses to the extent authorized by,
30 and subject to the provisions of, subsection 14A:3-5(6), if the court
31 shall find that the corporate agent has by his pleadings or during the
32 course of the proceeding raised genuine issues of fact or law.
- 33 (b) Application for such indemnification may be made
- 34 (i) in the civil action in which the expenses were or are to be
35 incurred or other amounts were or are to be paid; or
- 36 (ii) to the Superior Court in a separate proceeding. If the
37 application is for indemnification arising out of a civil action, it
38 shall set forth reasonable cause for the failure to make application
39 for such relief in the action or proceeding in which the expenses
40 were or are to be incurred or other amounts were or are to be paid.
- 41 The application shall set forth the disposition of any previous
42 application for indemnification and shall be made in such manner
43 and form as may be required by the applicable rules of court or, in
44 the absence thereof, by direction of the court to which it is made.
45 Such application shall be upon notice to the corporation. The court
46 may also direct that notice shall be given at the expense of the
47 corporation to the shareholders and such other persons as it may
48 designate in such manner as it may require.

1 (8) The indemnification and advancement of expenses provided
2 by or granted pursuant to the other subsections of this section shall
3 not exclude any other rights, including the right to be indemnified
4 against liabilities and expenses incurred in proceedings by or in the
5 right of the corporation, to which a corporate agent may be entitled
6 under a certificate of incorporation, bylaw, agreement, vote of
7 shareholders, or otherwise; provided that no indemnification shall
8 be made to or on behalf of a corporate agent if a judgment or other
9 final adjudication adverse to the corporate agent establishes that his
10 acts or omissions (a) were in breach of his duty of loyalty to the
11 corporation or its shareholders, as defined in subsection (3) of
12 N.J.S.14A:2-7, (b) were not in good faith or involved a knowing
13 violation of law or (c) resulted in receipt by the corporate agent of
14 an improper personal benefit.

15 (9) Any corporation organized for any purpose under any
16 general or special law of this State shall have the power to purchase
17 and maintain insurance on behalf of any corporate agent against any
18 expenses incurred in any proceeding and any liabilities asserted
19 against him by reason of his being or having been a corporate agent,
20 whether or not the corporation would have the power to indemnify
21 him against such expenses and liabilities under the provisions of
22 this section. The corporation may purchase such insurance from, or
23 such insurance may be reinsured in whole or in part by, an insurer
24 owned by or otherwise affiliated with the corporation, whether or
25 not such insurer does business with other insureds.

26 (10) The powers granted by this section may be exercised by the
27 corporation, notwithstanding the absence of any provision in its
28 certificate of incorporation or bylaws authorizing the exercise of
29 such powers.

30 (11) Except as required by subsection 14A:3-5(4), no
31 indemnification shall be made or expenses advanced by a
32 corporation under this section, and none shall be ordered by a court,
33 if such action would be inconsistent with a provision of the
34 certificate of incorporation, a bylaw, a resolution of the board of
35 directors or of the shareholders, an agreement or other proper
36 corporate action, in effect at the time of the accrual of the alleged
37 cause of action asserted in the proceeding, which prohibits, limits or
38 otherwise conditions the exercise of indemnification powers by the
39 corporation or the rights of indemnification to which a corporate
40 agent may be entitled.

41 (12) This section does not limit a corporation's power to pay or
42 reimburse expenses incurred by a corporate agent in connection
43 with the corporate agent's appearance as a witness in a proceeding
44 at a time when the corporate agent has not been made a party to the
45 proceeding.

46 (13) A right to indemnification or to advancement of expenses in
47 favor of an officer or director pursuant to a corporation's certificate
48 of incorporation or bylaws shall not be eliminated or impaired by an

1 amendment to the certificate of incorporation or bylaws after the
2 occurrence of an act or omission that is the subject of a civil,
3 criminal, administrative or investigative action, suit or proceeding
4 for which indemnification or advancement of expenses is sought,
5 unless the certificate of incorporation or bylaws in effect at the time
6 of the act or omission explicitly authorizes that elimination or
7 impairment after the action or omission has occurred.

8 (cf: P.L.2011, c.31, s.1)

9
10 2. This act shall take effect immediately.

11
12
13 STATEMENT

14
15 This bill amends the provision of law which allows corporations
16 to indemnify corporate agents, such as directors, officers, and
17 employees. Under current law, a corporation may advance a
18 corporate agent's expenses for a proceeding prior to a disposition in
19 that proceeding only if authorized by the board of directors. The
20 bill removes the requirement that the board of directors authorize
21 the advancement of expenses, allowing the board to delegate
22 responsibility for the authorization to the officers of the
23 corporation.

24 The bill provides greater flexibility in the decision making
25 process regarding the advancement of expenses. Each corporation
26 will now be free to determine the manner in which advancement
27 decisions are made, including, but not limited to, by: the adoption
28 of a policy by a board of directors; by the reservation of such
29 decisions to a board of directors; or by the determination of senior
30 management in the absence of any assertion by a board of directors
31 to control those decisions.

32 For many corporations, the decision regarding advancement of
33 expenses has more to do with the creditworthiness of the corporate
34 agent to repay the advanced funds if indemnification is not
35 permitted and the strength of the corporation's financial position,
36 rather than the nature of the underlying claim. Boards of directors
37 of large corporations may also prefer to delegate advancement
38 decisions. This bill makes the New Jersey corporate
39 indemnification law consistent with that of Delaware and New
40 York.

41
42
43
44
45 _____
46 Allows corporations to indemnify corporate agents without
approval from board of directors.

ASSEMBLY, No. 2603

STATE OF NEW JERSEY 216th LEGISLATURE

INTRODUCED FEBRUARY 20, 2014

Sponsored by:

Assemblyman PATRICK J. DIEGNAN, JR.

District 18 (Middlesex)

Assemblyman JAY WEBBER

District 26 (Essex, Morris and Passaic)

Co-Sponsored by:

Assemblywoman Caride, Assemblyman Coughlin and Senator Gill

SYNOPSIS

Allows corporations to indemnify corporate agents without approval from board of directors.

CURRENT VERSION OF TEXT

As introduced.



(Sponsorship Updated As Of: 10/24/2014)

1 AN ACT concerning indemnification of corporate agents and
2 amending N.J.S.14A:3-5.

3

4 **BE IT ENACTED** by the Senate and General Assembly of the State
5 of New Jersey:

6

7 1. N.J.S.14A:3-5 is amended to read as follows:

8 14A:3-5. Indemnification of directors, officers and employees.

9 (1) As used in this section,

10 (a) "Corporate agent" means any person who is or was a
11 director, officer, employee or agent of the indemnifying corporation
12 or of any constituent corporation absorbed by the indemnifying
13 corporation in a consolidation or merger and any person who is or
14 was a director, officer, trustee, employee or agent of any other
15 enterprise, serving as such at the request of the indemnifying
16 corporation, or of any such constituent corporation, or the legal
17 representative of any such director, officer, trustee, employee or
18 agent;

19 (b) "Other enterprise" means any domestic or foreign
20 corporation, other than the indemnifying corporation, and any
21 partnership, joint venture, sole proprietorship, trust or other
22 enterprise, whether or not for profit, served by a corporate agent;

23 (c) "Expenses" means reasonable costs, disbursements and
24 counsel fees;

25 (d) "Liabilities" means amounts paid or incurred in satisfaction
26 of settlements, judgments, fines and penalties;

27 (e) "Proceeding" means any pending, threatened or completed
28 civil, criminal, administrative or arbitative action, suit or
29 proceeding, and any appeal therein and any inquiry or investigation
30 which could lead to such action, suit or proceeding; and

31 (f) References to "other enterprises" include employee benefit
32 plans; references to "fines" include any excise taxes assessed on a
33 person with respect to an employee benefit plan; and references to
34 "serving at the request of the indemnifying corporation" include any
35 service as a corporate agent which imposes duties on, or involves
36 services by, the corporate agent with respect to an employee benefit
37 plan, its participants, or beneficiaries; and a person who acted in
38 good faith and in a manner the person reasonably believed to be in
39 the interest of the participants and beneficiaries of an employee
40 benefit plan shall be deemed to have acted in a manner "not
41 opposed to the best interests of the corporation" as referred to in
42 this section.

43 (2) Any corporation organized for any purpose under any
44 general or special law of this State shall have the power to
45 indemnify a corporate agent against his expenses and liabilities in

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

1 connection with any proceeding involving the corporate agent by
2 reason of his being or having been such a corporate agent, other
3 than a proceeding by or in the right of the corporation, if

4 (a) such corporate agent acted in good faith and in a manner he
5 reasonably believed to be in or not opposed to the best interests of
6 the corporation; and

7 (b) with respect to any criminal proceeding, such corporate
8 agent had no reasonable cause to believe his conduct was unlawful.
9 The termination of any proceeding by judgment, order, settlement,
10 conviction or upon a plea of nolo contendere or its equivalent, shall
11 not of itself create a presumption that such corporate agent did not
12 meet the applicable standards of conduct set forth in paragraphs
13 14A:3-5(2)(a) and 14A:3-5(2)(b).

14 (3) Any corporation organized for any purpose under any
15 general or special law of this State shall have the power to
16 indemnify a corporate agent against his expenses in connection with
17 any proceeding by or in the right of the corporation to procure a
18 judgment in its favor which involves the corporate agent by reason
19 of his being or having been such corporate agent, if he acted in
20 good faith and in a manner he reasonably believed to be in or not
21 opposed to the best interests of the corporation. However, in such
22 proceeding no indemnification shall be provided in respect of any
23 claim, issue or matter as to which such corporate agent shall have
24 been adjudged to be liable to the corporation, unless and only to the
25 extent that the Superior Court or the court in which such proceeding
26 was brought shall determine upon application that despite the
27 adjudication of liability, but in view of all circumstances of the
28 case, such corporate agent is fairly and reasonably entitled to
29 indemnity for such expenses as the Superior Court or such other
30 court shall deem proper.

31 (4) Any corporation organized for any purpose under any
32 general or special law of this State shall indemnify a corporate
33 agent against expenses to the extent that such corporate agent has
34 been successful on the merits or otherwise in any proceeding
35 referred to in subsections 14A:3-5(2) and 14A:3-5(3) or in defense
36 of any claim, issue or matter therein.

37 (5) Any indemnification under subsection 14A:3-5(2) and,
38 unless ordered by a court, under subsection 14A:3-5(3) may be
39 made by the corporation only as authorized in a specific case upon a
40 determination that indemnification is proper in the circumstances
41 because the corporate agent met the applicable standard of conduct
42 set forth in subsection 14A:3-5(2) or subsection 14A:3-5(3). Unless
43 otherwise provided in the certificate of incorporation or bylaws,
44 such determination shall be made

45 (a) by the board of directors or a committee thereof, acting by a
46 majority vote of a quorum consisting of directors who were not
47 parties to or otherwise involved in the proceeding; or

1 (b) if such a quorum is not obtainable, or, even if obtainable and
2 such quorum of the board of directors or committee by a majority
3 vote of the disinterested directors so directs, by independent legal
4 counsel, in a written opinion, such counsel to be designated by the
5 board of directors; or

6 (c) by the shareholders if the certificate of incorporation or
7 bylaws or a resolution of the board of directors or of the
8 shareholders so directs.

9 (6) Expenses incurred by a corporate agent in connection with a
10 proceeding may be paid by the corporation in advance of the final
11 disposition of the proceeding [as authorized by the board of
12 directors] upon receipt of an undertaking by or on behalf of the
13 corporate agent to repay such amount if it shall ultimately be
14 determined that he is not entitled to be indemnified as provided in
15 this section.

16 (7) (a) If a corporation upon application of a corporate agent has
17 failed or refused to provide indemnification as required under
18 subsection 14A:3-5(4) or permitted under subsections 14A:3-5(2),
19 14A:3-5(3) and 14A:3-5(6), a corporate agent may apply to a court
20 for an award of indemnification by the corporation, and such court

21 (i) may award indemnification to the extent authorized under
22 subsections 14A:3-5(2) and 14A:3-5(3) and shall award
23 indemnification to the extent required under subsection 14A:3-5(4),
24 notwithstanding any contrary determination which may have been
25 made under subsection 14A:3-5(5); and

26 (ii) may allow reasonable expenses to the extent authorized by,
27 and subject to the provisions of, subsection 14A:3-5(6), if the court
28 shall find that the corporate agent has by his pleadings or during the
29 course of the proceeding raised genuine issues of fact or law.

30 (b) Application for such indemnification may be made

31 (i) in the civil action in which the expenses were or are to be
32 incurred or other amounts were or are to be paid; or

33 (ii) to the Superior Court in a separate proceeding. If the
34 application is for indemnification arising out of a civil action, it
35 shall set forth reasonable cause for the failure to make application
36 for such relief in the action or proceeding in which the expenses
37 were or are to be incurred or other amounts were or are to be paid.

38 The application shall set forth the disposition of any previous
39 application for indemnification and shall be made in such manner
40 and form as may be required by the applicable rules of court or, in
41 the absence thereof, by direction of the court to which it is made.
42 Such application shall be upon notice to the corporation. The court
43 may also direct that notice shall be given at the expense of the
44 corporation to the shareholders and such other persons as it may
45 designate in such manner as it may require.

46 (8) The indemnification and advancement of expenses provided
47 by or granted pursuant to the other subsections of this section shall
48 not exclude any other rights, including the right to be indemnified

1 against liabilities and expenses incurred in proceedings by or in the
2 right of the corporation, to which a corporate agent may be entitled
3 under a certificate of incorporation, bylaw, agreement, vote of
4 shareholders, or otherwise; provided that no indemnification shall
5 be made to or on behalf of a corporate agent if a judgment or other
6 final adjudication adverse to the corporate agent establishes that his
7 acts or omissions (a) were in breach of his duty of loyalty to the
8 corporation or its shareholders, as defined in subsection (3) of
9 N.J.S.14A:2-7, (b) were not in good faith or involved a knowing
10 violation of law or (c) resulted in receipt by the corporate agent of
11 an improper personal benefit.

12 (9) Any corporation organized for any purpose under any
13 general or special law of this State shall have the power to purchase
14 and maintain insurance on behalf of any corporate agent against any
15 expenses incurred in any proceeding and any liabilities asserted
16 against him by reason of his being or having been a corporate agent,
17 whether or not the corporation would have the power to indemnify
18 him against such expenses and liabilities under the provisions of
19 this section. The corporation may purchase such insurance from, or
20 such insurance may be reinsured in whole or in part by, an insurer
21 owned by or otherwise affiliated with the corporation, whether or
22 not such insurer does business with other insureds.

23 (10) The powers granted by this section may be exercised by the
24 corporation, notwithstanding the absence of any provision in its
25 certificate of incorporation or bylaws authorizing the exercise of
26 such powers.

27 (11) Except as required by subsection 14A:3-5(4), no
28 indemnification shall be made or expenses advanced by a
29 corporation under this section, and none shall be ordered by a court,
30 if such action would be inconsistent with a provision of the
31 certificate of incorporation, a bylaw, a resolution of the board of
32 directors or of the shareholders, an agreement or other proper
33 corporate action, in effect at the time of the accrual of the alleged
34 cause of action asserted in the proceeding, which prohibits, limits or
35 otherwise conditions the exercise of indemnification powers by the
36 corporation or the rights of indemnification to which a corporate
37 agent may be entitled.

38 (12) This section does not limit a corporation's power to pay or
39 reimburse expenses incurred by a corporate agent in connection
40 with the corporate agent's appearance as a witness in a proceeding
41 at a time when the corporate agent has not been made a party to the
42 proceeding.

43 (13) A right to indemnification or to advancement of expenses in
44 favor of an officer or director pursuant to a corporation's certificate
45 of incorporation or bylaws shall not be eliminated or impaired by an
46 amendment to the certificate of incorporation or bylaws after the
47 occurrence of an act or omission that is the subject of a civil,
48 criminal, administrative or investigative action, suit or proceeding

1 for which indemnification or advancement of expenses is sought,
2 unless the certificate of incorporation or bylaws in effect at the time
3 of the act or omission explicitly authorizes that elimination or
4 impairment after the action or omission has occurred.
5 (cf: P.L.2011, c.31, s.1)

6

7 2. This act shall take effect immediately.

8

9

10 STATEMENT

11

12 This bill amends the provision of law which allows corporations
13 to indemnify corporate agents, such as directors, officers, and
14 employees. Under current law, a corporation may advance a
15 corporate agent's expenses for a proceeding prior to a disposition in
16 that proceeding only if authorized by the board of directors. The
17 bill removes the requirement that the board of directors authorize
18 the advancement of expenses, allowing the board to delegate
19 responsibility for the authorization to the officers of the
20 corporation.

21 The bill provides greater flexibility in the decision making
22 process regarding the advancement of expenses. Each corporation
23 will now be free to determine the manner in which advancement
24 decisions are made, including, but not limited to, by: the adoption
25 of a policy by a board of directors; by the reservation of such
26 decisions to a board of directors; or by the determination of senior
27 management in the absence of any assertion by a board of directors
28 to control those decisions.

29 For many corporations, the decision regarding advancement of
30 expenses has more to do with the creditworthiness of the corporate
31 agent to repay the advanced funds if indemnification is not
32 permitted and the strength of the corporation's financial position,
33 rather than the nature of the underlying claim. Boards of directors
34 of large corporations may also prefer to delegate advancement
35 decisions. This bill makes the New Jersey corporate
36 indemnification law consistent with that of Delaware and New
37 York.

ASSEMBLY FINANCIAL INSTITUTIONS AND INSURANCE
COMMITTEE

STATEMENT TO

ASSEMBLY, No. 2603

STATE OF NEW JERSEY

DATED: MAY 8, 2014

The Assembly Financial Institutions and Insurance Committee reports favorably Assembly Bill No. 2603.

This bill amends the provision of law which allows corporations to indemnify corporate agents, such as directors, officers, and employees, by modifying requirements relating to the advancement of expenses to corporate agents.

Under current law, a corporation may advance a corporate agent's expenses for a proceeding prior to a disposition in that proceeding only if authorized by the board of directors. The bill removes the requirement that the board of directors authorize the advancement of expenses, allowing the board to delegate responsibility for the authorization to the officers of the corporation.

The bill provides greater flexibility in the decision making process regarding the advancement of expenses. Each corporation will now be free to determine the manner in which advancement decisions are made, including, but not limited to, by: the adoption of a policy by a board of directors; the reservation of such decisions to a board of directors; or the determination of senior management in the absence of any assertion by a board of directors to control those decisions.

For many corporations, the decision regarding advancement of expenses has more to do with the creditworthiness of the corporate agent to repay the advanced funds if indemnification is not permitted and the strength of the corporation's financial position, rather than the nature of the underlying claim. Boards of directors of large corporations may also prefer to delegate advancement decisions. This bill makes the New Jersey corporate indemnification law consistent with that of Delaware and New York.

SENATE COMMERCE COMMITTEE

STATEMENT TO

ASSEMBLY, No. 2603

STATE OF NEW JERSEY

DATED: OCTOBER 9, 2014

The Senate Commerce Committee reports favorably Assembly Bill No. 2603.

This bill amends the provision of law which allows corporations to indemnify corporate agents, such as directors, officers, and employees. Under current law, a corporation may advance a corporate agent's expenses for a proceeding prior to a disposition in that proceeding only if authorized by the board of directors. The bill removes the requirement that the board of directors authorize the advancement of expenses, allowing the board to delegate responsibility for the authorization to the officers of the corporation.

The bill provides greater flexibility in the decision making process regarding the advancement of expenses. Each corporation will now be free to determine the manner in which advancement decisions are made, including, but not limited to, by: the adoption of a policy by a board of directors; by the reservation of such decisions to a board of directors; or by the determination of senior management in the absence of any assertion by a board of directors to control those decisions.

For many corporations, the decision regarding advancement of expenses has more to do with the creditworthiness of the corporate agent to repay the advanced funds if indemnification is not permitted and the strength of the corporation's financial position, rather than the nature of the underlying claim. Boards of directors of large corporations may also prefer to delegate advancement decisions. This bill makes the New Jersey corporate indemnification law consistent with that of Delaware and New York.

SENATE, No. 2405

STATE OF NEW JERSEY 216th LEGISLATURE

INTRODUCED SEPTEMBER 18, 2014

Sponsored by:
Senator NIA H. GILL
District 34 (Essex and Passaic)

SYNOPSIS

Allows corporations to indemnify corporate agents without approval from board of directors.

CURRENT VERSION OF TEXT

As introduced.



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2 amending N.J.S.14A:3-5.

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11 director, officer, employee or agent of the indemnifying corporation
12 or of any constituent corporation absorbed by the indemnifying
13 corporation in a consolidation or merger and any person who is or
14 was a director, officer, trustee, employee or agent of any other
15 enterprise, serving as such at the request of the indemnifying
16 corporation, or of any such constituent corporation, or the legal
17 representative of any such director, officer, trustee, employee or
18 agent;

19 (b) "Other enterprise" means any domestic or foreign
20 corporation, other than the indemnifying corporation, and any
21 partnership, joint venture, sole proprietorship, trust or other
22 enterprise, whether or not for profit, served by a corporate agent;

23 (c) "Expenses" means reasonable costs, disbursements and
24 counsel fees;

25 (d) "Liabilities" means amounts paid or incurred in satisfaction
26 of settlements, judgments, fines and penalties;

27 (e) "Proceeding" means any pending, threatened or completed
28 civil, criminal, administrative or arbitative action, suit or
29 proceeding, and any appeal therein and any inquiry or investigation
30 which could lead to such action, suit or proceeding; and

31 (f) References to "other enterprises" include employee benefit
32 plans; references to "fines" include any excise taxes assessed on a
33 person with respect to an employee benefit plan; and references to
34 "serving at the request of the indemnifying corporation" include any
35 service as a corporate agent which imposes duties on, or involves
36 services by, the corporate agent with respect to an employee benefit
37 plan, its participants, or beneficiaries; and a person who acted in
38 good faith and in a manner the person reasonably believed to be in
39 the interest of the participants and beneficiaries of an employee
40 benefit plan shall be deemed to have acted in a manner "not
41 opposed to the best interests of the corporation" as referred to in
42 this section.

43 (2) Any corporation organized for any purpose under any
44 general or special law of this State shall have the power to
45 indemnify a corporate agent against his expenses and liabilities in

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

1 connection with any proceeding involving the corporate agent by
2 reason of his being or having been such a corporate agent, other
3 than a proceeding by or in the right of the corporation, if

4 (a) such corporate agent acted in good faith and in a manner he
5 reasonably believed to be in or not opposed to the best interests of
6 the corporation; and

7 (b) with respect to any criminal proceeding, such corporate
8 agent had no reasonable cause to believe his conduct was unlawful.
9 The termination of any proceeding by judgment, order, settlement,
10 conviction or upon a plea of nolo contendere or its equivalent, shall
11 not of itself create a presumption that such corporate agent did not
12 meet the applicable standards of conduct set forth in paragraphs
13 14A:3-5(2)(a) and 14A:3-5(2)(b).

14 (3) Any corporation organized for any purpose under any
15 general or special law of this State shall have the power to
16 indemnify a corporate agent against his expenses in connection with
17 any proceeding by or in the right of the corporation to procure a
18 judgment in its favor which involves the corporate agent by reason
19 of his being or having been such corporate agent, if he acted in
20 good faith and in a manner he reasonably believed to be in or not
21 opposed to the best interests of the corporation. However, in such
22 proceeding no indemnification shall be provided in respect of any
23 claim, issue or matter as to which such corporate agent shall have
24 been adjudged to be liable to the corporation, unless and only to the
25 extent that the Superior Court or the court in which such proceeding
26 was brought shall determine upon application that despite the
27 adjudication of liability, but in view of all circumstances of the
28 case, such corporate agent is fairly and reasonably entitled to
29 indemnity for such expenses as the Superior Court or such other
30 court shall deem proper.

31 (4) Any corporation organized for any purpose under any
32 general or special law of this State shall indemnify a corporate
33 agent against expenses to the extent that such corporate agent has
34 been successful on the merits or otherwise in any proceeding
35 referred to in subsections 14A:3-5(2) and 14A:3-5(3) or in defense
36 of any claim, issue or matter therein.

37 (5) Any indemnification under subsection 14A:3-5(2) and,
38 unless ordered by a court, under subsection 14A:3-5(3) may be
39 made by the corporation only as authorized in a specific case upon a
40 determination that indemnification is proper in the circumstances
41 because the corporate agent met the applicable standard of conduct
42 set forth in subsection 14A:3-5(2) or subsection 14A:3-5(3). Unless
43 otherwise provided in the certificate of incorporation or bylaws,
44 such determination shall be made

45 (a) by the board of directors or a committee thereof, acting by a
46 majority vote of a quorum consisting of directors who were not
47 parties to or otherwise involved in the proceeding; or

1 (b) if such a quorum is not obtainable, or, even if obtainable and
2 such quorum of the board of directors or committee by a majority
3 vote of the disinterested directors so directs, by independent legal
4 counsel, in a written opinion, such counsel to be designated by the
5 board of directors; or

6 (c) by the shareholders if the certificate of incorporation or
7 bylaws or a resolution of the board of directors or of the
8 shareholders so directs.

9 (6) Expenses incurred by a corporate agent in connection with a
10 proceeding may be paid by the corporation in advance of the final
11 disposition of the proceeding [as authorized by the board of
12 directors] upon receipt of an undertaking by or on behalf of the
13 corporate agent to repay such amount if it shall ultimately be
14 determined that he is not entitled to be indemnified as provided in
15 this section.

16 (7) (a) If a corporation upon application of a corporate agent has
17 failed or refused to provide indemnification as required under
18 subsection 14A:3-5(4) or permitted under subsections 14A:3-5(2),
19 14A:3-5(3) and 14A:3-5(6), a corporate agent may apply to a court
20 for an award of indemnification by the corporation, and such court

21 (i) may award indemnification to the extent authorized under
22 subsections 14A:3-5(2) and 14A:3-5(3) and shall award
23 indemnification to the extent required under subsection 14A:3-5(4),
24 notwithstanding any contrary determination which may have been
25 made under subsection 14A:3-5(5); and

26 (ii) may allow reasonable expenses to the extent authorized by,
27 and subject to the provisions of, subsection 14A:3-5(6), if the court
28 shall find that the corporate agent has by his pleadings or during the
29 course of the proceeding raised genuine issues of fact or law.

30 (b) Application for such indemnification may be made

31 (i) in the civil action in which the expenses were or are to be
32 incurred or other amounts were or are to be paid; or

33 (ii) to the Superior Court in a separate proceeding. If the
34 application is for indemnification arising out of a civil action, it
35 shall set forth reasonable cause for the failure to make application
36 for such relief in the action or proceeding in which the expenses
37 were or are to be incurred or other amounts were or are to be paid.

38 The application shall set forth the disposition of any previous
39 application for indemnification and shall be made in such manner
40 and form as may be required by the applicable rules of court or, in
41 the absence thereof, by direction of the court to which it is made.
42 Such application shall be upon notice to the corporation. The court
43 may also direct that notice shall be given at the expense of the
44 corporation to the shareholders and such other persons as it may
45 designate in such manner as it may require.

46 (8) The indemnification and advancement of expenses provided
47 by or granted pursuant to the other subsections of this section shall
48 not exclude any other rights, including the right to be indemnified

1 against liabilities and expenses incurred in proceedings by or in the
2 right of the corporation, to which a corporate agent may be entitled
3 under a certificate of incorporation, bylaw, agreement, vote of
4 shareholders, or otherwise; provided that no indemnification shall
5 be made to or on behalf of a corporate agent if a judgment or other
6 final adjudication adverse to the corporate agent establishes that his
7 acts or omissions (a) were in breach of his duty of loyalty to the
8 corporation or its shareholders, as defined in subsection (3) of
9 N.J.S.14A:2-7, (b) were not in good faith or involved a knowing
10 violation of law or (c) resulted in receipt by the corporate agent of
11 an improper personal benefit.

12 (9) Any corporation organized for any purpose under any
13 general or special law of this State shall have the power to purchase
14 and maintain insurance on behalf of any corporate agent against any
15 expenses incurred in any proceeding and any liabilities asserted
16 against him by reason of his being or having been a corporate agent,
17 whether or not the corporation would have the power to indemnify
18 him against such expenses and liabilities under the provisions of
19 this section. The corporation may purchase such insurance from, or
20 such insurance may be reinsured in whole or in part by, an insurer
21 owned by or otherwise affiliated with the corporation, whether or
22 not such insurer does business with other insureds.

23 (10) The powers granted by this section may be exercised by the
24 corporation, notwithstanding the absence of any provision in its
25 certificate of incorporation or bylaws authorizing the exercise of
26 such powers.

27 (11) Except as required by subsection 14A:3-5(4), no
28 indemnification shall be made or expenses advanced by a
29 corporation under this section, and none shall be ordered by a court,
30 if such action would be inconsistent with a provision of the
31 certificate of incorporation, a bylaw, a resolution of the board of
32 directors or of the shareholders, an agreement or other proper
33 corporate action, in effect at the time of the accrual of the alleged
34 cause of action asserted in the proceeding, which prohibits, limits or
35 otherwise conditions the exercise of indemnification powers by the
36 corporation or the rights of indemnification to which a corporate
37 agent may be entitled.

38 (12) This section does not limit a corporation's power to pay or
39 reimburse expenses incurred by a corporate agent in connection
40 with the corporate agent's appearance as a witness in a proceeding
41 at a time when the corporate agent has not been made a party to the
42 proceeding.

43 (13) A right to indemnification or to advancement of expenses in
44 favor of an officer or director pursuant to a corporation's certificate
45 of incorporation or bylaws shall not be eliminated or impaired by an
46 amendment to the certificate of incorporation or bylaws after the
47 occurrence of an act or omission that is the subject of a civil,
48 criminal, administrative or investigative action, suit or proceeding

1 for which indemnification or advancement of expenses is sought,
2 unless the certificate of incorporation or bylaws in effect at the time
3 of the act or omission explicitly authorizes that elimination or
4 impairment after the action or omission has occurred.
5 (cf: P.L.2011, c.31, s.1)

6

7 2. This act shall take effect immediately.

8

9

10 STATEMENT

11

12 This bill amends the provision of law which allows corporations
13 to indemnify corporate agents, such as directors, officers, and
14 employees. Under current law, a corporation may advance a
15 corporate agent's expenses for a proceeding prior to a disposition in
16 that proceeding only if authorized by the board of directors. The
17 bill removes the requirement that the board of directors authorize
18 the advancement of expenses, allowing the board to delegate
19 responsibility for the authorization to the officers of the
20 corporation.

21 The bill provides greater flexibility in the decision making
22 process regarding the advancement of expenses. Each corporation
23 will now be free to determine the manner in which advancement
24 decisions are made, including, but not limited to, by: the adoption
25 of a policy by a board of directors; by the reservation of such
26 decisions to a board of directors; or by the determination of senior
27 management in the absence of any assertion by a board of directors
28 to control those decisions.

29 For many corporations, the decision regarding advancement of
30 expenses has more to do with the creditworthiness of the corporate
31 agent to repay the advanced funds if indemnification is not
32 permitted and the strength of the corporation's financial position,
33 rather than the nature of the underlying claim. Boards of directors
34 of large corporations may also prefer to delegate advancement
35 decisions. This bill makes the New Jersey corporate
36 indemnification law consistent with that of Delaware and New
37 York.

SENATE COMMERCE COMMITTEE

STATEMENT TO

SENATE, No. 2405

STATE OF NEW JERSEY

DATED: OCTOBER 9, 2014

The Senate Commerce Committee reports favorably Senate Bill No. 2405.

This bill amends the provision of law which allows corporations to indemnify corporate agents, such as directors, officers, and employees. Under current law, a corporation may advance a corporate agent's expenses for a proceeding prior to a disposition in that proceeding only if authorized by the board of directors. The bill removes the requirement that the board of directors authorize the advancement of expenses, allowing the board to delegate responsibility for the authorization to the officers of the corporation.

The bill provides greater flexibility in the decision making process regarding the advancement of expenses. Each corporation will now be free to determine the manner in which advancement decisions are made, including, but not limited to, by: the adoption of a policy by a board of directors; by the reservation of such decisions to a board of directors; or by the determination of senior management in the absence of any assertion by a board of directors to control those decisions.

For many corporations, the decision regarding advancement of expenses has more to do with the creditworthiness of the corporate agent to repay the advanced funds if indemnification is not permitted and the strength of the corporation's financial position, rather than the nature of the underlying claim. Boards of directors of large corporations may also prefer to delegate advancement decisions. This bill makes the New Jersey corporate indemnification law consistent with that of Delaware and New York.