

14A:3-5
LEGISLATIVE HISTORY CHECKLIST
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LAWS OF: 2011 **CHAPTER:** 31

NJSA: 14A:3-5 (Maintains right of corporate directors to indemnification under certain circumstances)

BILL NO: S2493 (Substituted for A3254)

SPONSOR(S) Sarlo and others

DATE INTRODUCED: December 6, 2010

COMMITTEE: **ASSEMBLY:** ---

SENATE: Budget and Appropriations

AMENDED DURING PASSAGE: No

DATE OF PASSAGE: **ASSEMBLY:** January 10, 2011

SENATE: January 10 2011

DATE OF APPROVAL: March 1, 2011

FOLLOWING ARE ATTACHED IF AVAILABLE:

FINAL TEXT OF BILL (Introduced version of bill enacted)

S2493

SPONSOR'S STATEMENT: (Begins on page 6 of original bill)	Yes
COMMITTEE STATEMENT:	ASSEMBLY: No
	SENATE: Yes

(Audio archived recordings of the committee meetings, corresponding to the date of the committee statement, *may possibly* be found at www.njleg.state.nj.us)

FLOOR AMENDMENT STATEMENT:	No
LEGISLATIVE FISCAL ESTIMATE:	No

A3254

SPONSOR'S STATEMENT: (Begins on page 6 of original bill)	Yes
COMMITTEE STATEMENT:	ASSEMBLY: Yes
	SENATE: No
FLOOR AMENDMENT STATEMENT:	No
LEGISLATIVE FISCAL ESTIMATE:	No

(continued)

VETO MESSAGE: No

GOVERNOR'S PRESS RELEASE ON SIGNING: No

FOLLOWING WERE PRINTED:

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REPORTS: No

HEARINGS: No

NEWSPAPER ARTICLES: No

LAW/KR

P.L.2011, CHAPTER 31, *approved March 1, 2011*

Senate, No. 2493

1 **AN ACT** concerning indemnification of certain corporate directors
2 and officers and 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 directors
15 upon receipt of an undertaking by or on behalf of the corporate
16 agent to repay such amount if it shall ultimately be determined that
17 he is not entitled to be indemnified as provided in this section.
- 18 (7) (a) If a corporation upon application of a corporate agent has
19 failed or refused to provide indemnification as required under
20 subsection 14A:3-5(4) or permitted under subsections 14A:3-5(2),
21 14A:3-5(3) and 14A:3-5(6), a corporate agent may apply to a court
22 for an award of indemnification by the corporation, and such court
- 23 (i) may award indemnification to the extent authorized under
24 subsections 14A:3-5(2) and 14A:3-5(3) and shall award
25 indemnification to the extent required under subsection 14A:3-5(4),
26 notwithstanding any contrary determination which may have been
27 made under subsection 14A:3-5(5); and
- 28 (ii) may allow reasonable expenses to the extent authorized by,
29 and subject to the provisions of, subsection 14A:3-5(6), if the court
30 shall find that the corporate agent has by his pleadings or during the
31 course of the proceeding raised genuine issues of fact or law.
- 32 (b) Application for such indemnification may be made
- 33 (i) in the civil action in which the expenses were or are to be
34 incurred or other amounts were or are to be paid; or
- 35 (ii) to the Superior Court in a separate proceeding. If the
36 application is for indemnification arising out of a civil action, it
37 shall set forth reasonable cause for the failure to make application
38 for such relief in the action or proceeding in which the expenses
39 were or are to be incurred or other amounts were or are to be paid.
- 40 The application shall set forth the disposition of any previous
41 application for indemnification and shall be made in such manner
42 and form as may be required by the applicable rules of court or, in
43 the absence thereof, by direction of the court to which it is made.
44 Such application shall be upon notice to the corporation. The court
45 may also direct that notice shall be given at the expense of the
46 corporation to the shareholders and such other persons as it may
47 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
47 in favor of an officer or director pursuant to a corporation's
48 certificate of incorporation or bylaws shall not be eliminated or

1 impaired by an amendment to the certificate of incorporation or
2 bylaws after the occurrence of an act or omission that is the subject
3 of a civil, criminal, administrative or investigative action, suit or
4 proceeding for which indemnification or advancement of expenses
5 is sought, unless the certificate of incorporation or bylaws in effect
6 at the time of the act or omission explicitly authorizes that
7 elimination or impairment after the action or omission has occurred.
8 (cf: P.L.1989, c.17, s.2)

9

10 2. This act shall take effect immediately.

11

12

13

STATEMENT

14

15 This bill provides that, under the “New Jersey Business
16 Corporation Act,” a right to indemnification for a corporation’s
17 officer or director under a corporation’s certificate of incorporation
18 or bylaws shall not be eliminated or impaired by an amendment to
19 the certificate of incorporation or bylaws after the occurrence of an
20 act or omission by the officer or director that is the subject of a
21 civil, criminal, administrative or investigative action, suit or
22 proceeding, unless the certificate of incorporation or bylaws in
23 effect at the time of such act or omission explicitly authorizes the
24 elimination or impairment after the action or omission has occurred.

25

26

27

28

29 _____
30 Maintains right of corporate directors and officers to
indemnification under certain circumstances.

SENATE, No. 2493

STATE OF NEW JERSEY 214th LEGISLATURE

INTRODUCED DECEMBER 6, 2010

Sponsored by:

Senator PAUL A. SARLO

District 36 (Bergen, Essex and Passaic)

Senator NIA H. GILL

District 34 (Essex and Passaic)

Assemblyman PATRICK J. DIEGNAN, JR.

District 18 (Middlesex)

Assemblywoman CLEOPATRA G. TUCKER

District 28 (Essex)

Assemblywoman ANNETTE QUIJANO

District 20 (Union)

Co-Sponsored by:

**Assemblymen Fuentes, Caputo, Johnson, Mainor, Conaway, Schaer,
Assemblywoman Riley, Assemblyman Greenwald, Assemblywomen Pou,
Spencer, Assemblymen Chivukula, Giblin, Burzichelli, Assemblywoman
Quigley and Assemblyman Coughlin**

SYNOPSIS

Maintains right of corporate directors and officers to indemnification under certain circumstances.

CURRENT VERSION OF TEXT

As introduced.



(Sponsorship Updated As Of: 1/11/2011)

1 AN ACT concerning indemnification of certain corporate directors
2 and officers and 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 directors
12 upon receipt of an undertaking by or on behalf of the corporate
13 agent to repay such amount if it shall ultimately be determined that
14 he is not entitled to be indemnified as provided in this section.

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

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

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

29 (b) Application for such indemnification may be made

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

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

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

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

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

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

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

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

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

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

1 is sought, unless the certificate of incorporation or bylaws in effect
2 at the time of the act or omission explicitly authorizes that
3 elimination or impairment after the action or omission has occurred.
4 (cf: P.L.1989, c.17, s.2)

5

6 2. This act shall take effect immediately.

7

8

9

STATEMENT

10

11 This bill provides that, under the “New Jersey Business
12 Corporation Act,” a right to indemnification for a corporation’s
13 officer or director under a corporation’s certificate of incorporation
14 or bylaws shall not be eliminated or impaired by an amendment to
15 the certificate of incorporation or bylaws after the occurrence of an
16 act or omission by the officer or director that is the subject of a
17 civil, criminal, administrative or investigative action, suit or
18 proceeding, unless the certificate of incorporation or bylaws in
19 effect at the time of such act or omission explicitly authorizes the
20 elimination or impairment after the action or omission has occurred.

SENATE BUDGET AND APPROPRIATIONS COMMITTEE

STATEMENT TO

SENATE, No. 2493

STATE OF NEW JERSEY

DATED: DECEMBER 16, 2010

The Senate Budget and Appropriations Committee reports favorably Senate Bill No. 2493.

The bill maintains the right of corporate directors and officers to indemnification under certain circumstances.

“Indemnification” and “advancement” refer to the rights that a director or officer has to be compensated for expenses incurred as a result of legal proceedings related to the person’s service as a director or officer of the company. Corporations often include indemnification and fee advancement provisions for directors in their bylaws to provide extra security to directors in the event claims are asserted against them. These provisions promote board service and ensure that directors will not be held personally liable for their actions on behalf of the corporation. Advancement, while similar to indemnification, differs in that a director or officer who is entitled to receive advancement has the right to have his legal expenses paid on an as-incurred basis, rather than at the conclusion of litigation (as is typically the case with indemnification).

This bill amends N.J.S.A.14A:3-5 of the “New Jersey Business Corporation Act,” adding a new subsection to address concerns that indemnification or advancement of expense provisions contained in certificates of incorporation or bylaws could be amended after an individual stopped serving as a director or officer to eliminate or modify the protection that previously had been afforded to the individual.

In *Schoon v. Troy Corporation*, 948 A.2d 1157 (Del.Ch. 2008), the court allowed the board of directors of a corporation to amend its bylaws to revoke a former director’s right to receive advancement even though the bylaws that were in place during his service expressly stated that the director’s right to receive advancement would continue even after his tenure on the board ended.

This bill is intended to confirm that a director’s or officer’s right to indemnification or advancement of expenses under a corporation’s certificate of incorporation or bylaws “vests,” and so can be relied upon, at the time of the act or omission that might give rise to the indemnification or advancement of expenses. The bill provides that the right to indemnification or advancement of expenses in favor of the directors or officers may not be eliminated or impaired by amendments

to the certificate of incorporation or bylaws after the occurrence of the act or omission for which indemnification or advancement is sought, unless the corporation's certificate of incorporation or bylaws in effect at the time of the act or omission contains an explicit authorization of such right to retroactively eliminate or limit the applicable indemnification or advancement.

The amendment to the "New Jersey Business Corporation Act" makes New Jersey law consistent with the amendment to the Delaware General Corporation Law that Delaware made in 2009 following the decision.

FISCAL IMPACT:

This bill was not certified as requiring a fiscal note.

ASSEMBLY, No. 3254

STATE OF NEW JERSEY 214th LEGISLATURE

INTRODUCED SEPTEMBER 30, 2010

Sponsored by:

Assemblyman PATRICK J. DIEGNAN, JR.

District 18 (Middlesex)

Assemblywoman CLEOPATRA G. TUCKER

District 28 (Essex)

Assemblywoman ANNETTE QUIJANO

District 20 (Union)

Co-Sponsored by:

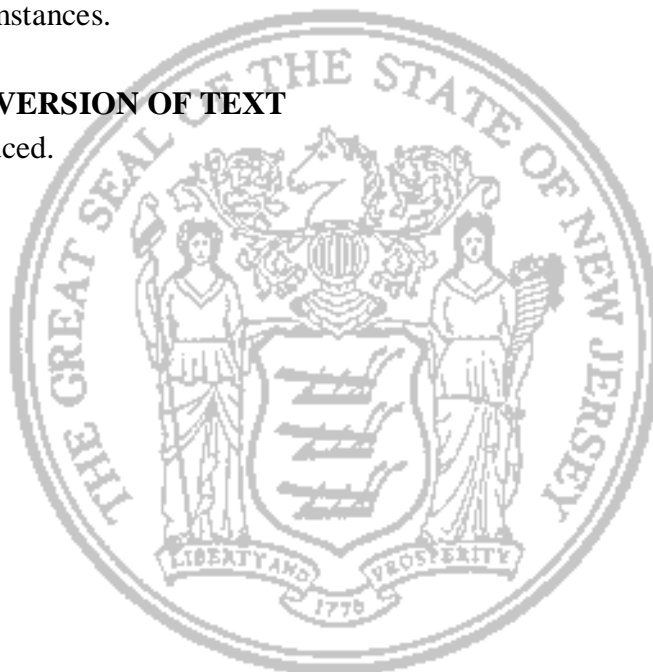
**Assemblymen Fuentes, Caputo, Johnson, Mainor, Conaway, Schaer,
Assemblywoman Riley, Assemblyman Greenwald, Assemblywomen Pou,
Spencer, Assemblymen Chivukula, Giblin, Burzichelli, Assemblywoman
Quigley and Assemblyman Coughlin**

SYNOPSIS

Maintains right of corporate directors and officers to indemnification under certain circumstances.

CURRENT VERSION OF TEXT

As introduced.



(Sponsorship Updated As Of: 1/7/2011)

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

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

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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 directors
12 upon receipt of an undertaking by or on behalf of the corporate
13 agent to repay such amount if it shall ultimately be determined that
14 he is not entitled to be indemnified as provided in this section.

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

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

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

29 (b) Application for such indemnification may be made

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

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

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

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

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

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

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

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

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

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

1 is sought, unless the certificate of incorporation or bylaws in effect
2 at the time of the act or omission explicitly authorizes that
3 elimination or impairment after the action or omission has occurred.
4 (cf: P.L.1989, c.17, s.2)

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6 2. This act shall take effect immediately.

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STATEMENT

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11 This bill provides that, under the “New Jersey Business
12 Corporation Act,” a right to indemnification for a corporation’s
13 officer or director under a corporation’s certificate of incorporation
14 or bylaws shall not be eliminated or impaired by an amendment to
15 the certificate of incorporation or bylaws after the occurrence of an
16 act or omission by the officer or director that is the subject of a
17 civil, criminal, administrative or investigative action, suit or
18 proceeding, unless the certificate of incorporation or bylaws in
19 effect at the time of such act or omission explicitly authorizes the
20 elimination or impairment after the action or omission has occurred.

ASSEMBLY BUDGET COMMITTEE

STATEMENT TO

ASSEMBLY, No. 3254

STATE OF NEW JERSEY

DATED: DECEMBER 16, 2010

The Assembly Budget Committee reports favorably Assembly Bill No. 3254.

Assembly Bill No. 3254 maintains the right of corporate directors and officers to indemnification under certain circumstances.

“Indemnification” and “advancement” refer to the rights that a director or officer has to be compensated for expenses incurred as a result of legal proceedings related to the person’s service as a director or officer of the company. Corporations often include indemnification and fee advancement provisions for directors in their bylaws to provide extra security to directors in the event claims are asserted against them. These provisions promote board service and ensure that directors will not be held personally liable for their actions on behalf of the corporation. Advancement, while similar to indemnification, differs in that a director or officer who is entitled to receive advancement has the right to have his legal expenses paid on an as-incurred basis, rather than at the conclusion of litigation (as is typically the case with indemnification).

This bill amends N.J.S.A.14A:3-5 of the “New Jersey Business Corporation Act,” adding a new subsection to address concerns that indemnification or advancement of expense provisions contained in certificates of incorporation or bylaws could be amended after an individual stopped serving as a director or officer to eliminate or modify the protection that previously had been afforded to the individual.

In *Schoon v. Troy Corporation*, 948 A.2d 1157 (Del.Ch. 2008), the court allowed the board of directors of a corporation to amend its bylaws to revoke a former director’s right to receive advancement even though the bylaws that were in place during his service expressly stated that the director’s right to receive advancement would continue even after his tenure on the board ended.

This bill is intended to confirm that a director’s or officer’s right to indemnification or advancement of expenses under a corporation’s certificate of incorporation or bylaws “vests,” and so can be relied upon, at the time of the act or omission that might give rise to the indemnification or advancement of expenses. The bill provides that the right to indemnification or advancement of expenses in favor of the directors or officers may not be eliminated or impaired by amendments

to the certificate of incorporation or bylaws after the occurrence of the act or omission for which indemnification or advancement is sought, unless the corporation's certificate of incorporation or bylaws in effect at the time of the act or omission contains an explicit authorization of such right to retroactively eliminate or limit the applicable indemnification or advancement.

The amendment to the "New Jersey Business Corporation Act" makes New Jersey law consistent with the amendment to the Delaware General Corporation Law that Delaware made in 2009 following the decision.

FISCAL IMPACT:

This bill was not certified as requiring a fiscal note.