

By Mr. Demers of Chicopee, petition of Richard H. Demers relative to the standard of conduct and liabilities of incorporators, officers and directors of corporations. Commerce and Labor.

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Seventy-Nine.

AN ACT RELATIVE TO THE STANDARD OF CONDUCT AND LIABILITIES OF INCORPORATORS, OFFICERS AND DIRECTORS OF A CORPORATION.

Be it enacted by the Senate and House of Representatives in General Court assembled and by the authority of the same, as follows:

1 SECTION 1. Chapter 156B of the General Laws shall be
2 amended by striking sections 61 through 67, inclusive, in their
3 entirety and by substituting therefor the following new sections:
4 *Section 61. Liability of Directors Authorizing Certain*
5 *Distributions.*

6 Directors of a corporation who vote to authorize any distribu-
7 tion by the corporation to one or more of its stockholders, whether
8 by way of a dividend, repurchase or redemption of stock, or
9 otherwise (except a distribution of stock of the corporation), which
10 is in violation of the corporation's articles of organization shall be
11 jointly and severally liable to the corporation for the amount by
12 which such distribution exceeds that which could have been made
13 without violation of the corporation's articles of organization, but
14 only to the extent such excess distribution is not repaid to the
15 corporation. If the corporation is insolvent or is rendered insolvent
16 by the making of any such distribution, the directors who voted to
17 authorize such distribution shall be jointly and severally liable to
18 the corporation for the amount of such distribution made when the
19 corporation is insolvent, or for the amount of such distribution
20 which exceeds that which could have been made without rendering
21 the corporation insolvent, but in either event only to the extent
22 such distribution, or such excess, is not repaid to the corporation.

23 *Section 62. Liability for Loans Made to Directors and Officers.*

24 No loan of any assets of a corporation shall be made to any of its
25 officers or directors unless a majority of the directors who are not
26 direct or indirect recipients of such loan or the holders of a majority
27 of the shares entitled to vote for directors which holders are not
28 direct or indirect recipients of such loan, shall have approved or
29 ratified the making of such loan as one which in the judgment of
30 such directors or such holders may reasonably be expected to
31 benefit the corporation. If a loan is made in violation of this
32 section, the obligations of the borrower shall not be affected there-
33 by, but the directors who voted for such loan, and the officers
34 who knowingly participated in the making of such loan, shall be
35 jointly and severally liable to the corporation for any portion of
36 such loan which is not repaid.

37 *Section 63. Liability for False Statement or Report.*

38 The directors and officers of a corporation who sign any state-
39 ment or report required by this chapter which is false in any
40 material representation shall be jointly and severally liable to any
41 creditor of the corporation who has relied upon such false repre-
42 sentation to the extent of the actual damage sustained by him by
43 reason of such reliance; except that such directors and officers shall
44 not be liable to any creditor on account of such false representation
45 for debts contracted or contracts entered into after the filing of a
46 statement or report in which such false representation is corrected.

47 *Section 64. Liability of Incorporators and Officers Signing*
48 *Articles of Organization, etc., Containing False Statement, etc.*

49 The incorporators and officers of a corporation who sign any
50 articles of organization, articles of amendment, or articles of con-
51 solidation or merger required by this chapter which are false in any
52 material respect with regard to said corporation shall be jointly and
53 severally liable to any stockholder of said corporation or of the
54 resulting or surviving corporation, as the case may be, for the
55 actual damage sustained by such stockholder by reason of reliance
56 on such false statement, except that such incorporators and offic-
57 ers shall not be liable to any such stockholder by reason of reliance
58 on such false statement occurring after the filing of corrected or
59 amended articles of organization, articles of amendment, or arti-

60 cles of consolidation or merger in which such false statement is
61 corrected.

62 *Section 65. Standard of Conduct for Directors, Officers and*
63 *Incorporators.*

64 A director, officer or incorporator of a corporation shall perform
65 his duties as such, including, in the case of a director, his duties as a
66 member of a committee of the board upon which he may serve, in
67 good faith and in a manner he reasonably believes to be in the best
68 interests of the corporation, and with such care as an ordinarily
69 prudent person in a like position would use under similar circum-
70 stances. In performing his duties, a director, officer or incorpora-
71 tor shall be entitled to rely on information, opinions, reports or
72 records, including financial statements, books of account and
73 other financial records, in each case presented by or prepared by or
74 under the supervision of

75 (1) one or more officers or employees of the corporation whom
76 the director, officer or incorporator reasonably believes to be
77 reliable and competent in the matters presented, or

78 (2) counsel, public accountants or other persons as to matters
79 which the director, officer or incorporator reasonably believes to
80 be within such person's professional or expert competence, or

81 (3) in the case of a director, a duly constituted committee of the
82 board upon which he does not serve, as to matters within its
83 delegated authority, which committee the director reasonably
84 believes to merit confidence, but he shall not be considered to be
85 acting in good faith if he has knowledge concerning the matter in
86 question that would cause such reliance to be unwarranted. The
87 fact that a director, officer or incorporator so performed his duties
88 shall be a complete defense to any claim asserted against him,
89 whether under sections sixty to sixty-four, inclusive, of this chapter
90 or otherwise, by reason of his being or having been a director,
91 officer or incorporator of the corporation.

92 *Section 66. Right to Contribution.*

93 Any incorporator, director or officer against whom a claim is
94 successfully asserted under this Chapter shall be entitled to contri-
95 bution from the other incorporators or directors who voted for,
96 and the other officers who participated in, the action upon which

97 the claim is asserted and who did not perform their duties in
98 connection with the matter upon which the claim is asserted in
99 accordance with the standards set forth in section sixty-five.

100 *Section 67. Indemnification.*

101 (a) A corporation shall have the power to indemnify its agents
102 (as herein defined) against all expenses (as herein defined)
103 incurred by them in connection with any proceeding (as herein
104 defined) in which they are involved as a result of their serving as
105 such agent, except that no indemnification shall be provided for
106 any agent regarding any matter as to which it shall be finally
107 determined (i) that he did not act in good faith and in the reason-
108 able belief that his action was in the best interests of the corporation,
109 or (ii) with respect to claims by or in the right of the corporation,
110 that he failed to exercise such care as an ordinarily prudent person
111 in a like position would use under similar circumstances, or (iii)
112 with respect to a criminal matter, that he had reasonable cause to
113 believe that his conduct was unlawful.

114 (b) The determination of whether the corporation has the power
115 to indemnify an agent under paragraph (a) of this section and any
116 award of indemnification may be made (i) by a majority vote of a
117 quorum of the directors, (ii) by a majority vote of a quorum of the
118 holders of shares of stock entitled to vote for the election of
119 directors, or (iii) by a majority vote of a committee of two or more
120 directors selected for this purpose by the full board, which quorum
121 or committee shall consist of persons who are not at that time
122 parties to such proceeding. The determination of whether the
123 corporation has power to indemnify may also be made by a written
124 opinion of independent legal counsel appointed for the purpose by
125 vote of a majority of such a disinterested quorum or committee of
126 the directors or stockholders, or if there is no such quorum or
127 committee of the directors by a vote of a majority of the directors
128 or of the holders of a majority of the shares of stock entitled to vote
129 for the election of directors, which majority may include persons
130 who are parties to such proceeding; and any award of indemnifica-
131 tion which said counsel has determined that the corporation has
132 power to grant shall be made by the entity which appointed said
133 counsel. Notwithstanding the foregoing, in the case of a proceeding

134 by or in the right of the corporation, unless the agent is entitled to
135 indemnity under paragraph (c), indemnification shall be provided
136 only upon a determination by a court having jurisdiction that in
137 view of all the circumstances of the case the agent is fairly and
138 reasonably entitled to indemnity for such expenses as the court
139 shall deem proper.

140 (c) Unless the articles or organization or by-laws of the corpora-
141 tion otherwise provide, if an agent of the corporation has been
142 wholly successful on the merits in defense of any proceeding in
143 which he was involved as a result of his serving as such agent
144 (including termination of investigative or other proceedings with-
145 out a finding of fault on the part of the agent), he shall be indemni-
146 fied by the corporation against all expenses incurred by him in
147 connection therewith.

148 (d) For purposes of this section

149 (1) An "agent" is (i) a director, officer, employee or agent of the
150 corporation, (ii) a person serving at the request of the corporation
151 as a director, officer, employee, trustee, partner or other agent of
152 another organization in which the corporation has any interest,
153 and (iii) any person who formerly held any of such positions;

154 (2) "Expenses" means all expenses (including attorneys' fees
155 and disbursements) actually and reasonably incurred in defense of
156 a proceeding or in seeking indemnification under paragraph (c) of
157 this section and, except for claims by or in the right of the corpora-
158 tion, any judgments, awards, fines and reasonable amounts paid in
159 settlement of a proceeding; and

160 (3) A "proceeding" is any threatened, pending or completed
161 action, suit or proceeding, whether civil, criminal, administrative
162 or investigative.

163 (e) Expenses incurred by an agent in defending any proceeding
164 may be paid by the corporation in advance of its final disposition to
165 the extent authorized as provided in paragraph (b) of this section,
166 upon receipt of a written undertaking of the agent being indemni-
167 fied to repay such amount if it is ultimately determined that he is
168 not eligible to be indemnified, which undertaking shall be an
169 unlimited general obligation but need not be secured and may be
170 accepted without regard to the financial ability of the agent to

171 make repayment; provided, that no such advance payment shall be
172 made until a preliminary determination shall have been made in
173 good faith in the manner provided by paragraph (b) that the
174 circumstances known to the directors, or such counsel making the
175 determination, as the case may be, at that time do not establish
176 beyond a reasonable doubt that the corporation ultimately will have
177 no power to indemnify said agent.

178 (f) A corporation shall have power to purchase and maintain
179 insurance on behalf of any agent against any liability or cost
180 incurred by him as an agent or arising out of his status as such,
181 whether or not the corporation would have power to indemnify
182 him against such liability or cost.

183 (g) Notwithstanding the provisions of this section, a corpora-
184 tion may adopt provisions relating to indemnification of its agents
185 in (i) its articles of organization, (ii) a by-law adopted by the
186 stockholders, or (iii) a general vote adopted by a majority of a
187 quorum of the holders of shares of stock entitled to vote for
188 directors, and specific rights to indemnification may be granted
189 under any other agreement or arrangement approved by a majority
190 vote of a quorum of disinterested directors or stockholders; pro-
191 vided, that the standards set forth in any such provisions, agree-
192 ments or arrangements for determining whether the corporation
193 has power to indemnify an agent may not be more lenient than
194 those set forth in paragraph (a) of this section.

195 (h) The indemnification provided by this section shall inure to
196 the benefit of the heirs and personal representatives of a deceased
197 agent.

198 (i) If a corporation or any of its agents sponsors or undertakes
199 any responsibility as a fiduciary with respect to an employee
200 benefit plan, then, for purposes of indemnification of such agents
201 under this section (i) an "agent" shall be deemed to include any
202 agent of the corporation whose duties involve duties or services to
203 said plan or its participants or beneficiaries, (ii) such agent shall be
204 deemed to have acted in good faith in the reasonable belief that his
205 action was in the best interests of the corporation if he acted in
206 good faith in the reasonable belief that his action was in the best
207 interests of the participants or beneficiaries of said plan and (iii)

208 “expenses” shall be deemed to include any taxes or penalties
209 assessed on such agent with respect to said plan under applicable
210 law.

1 SECTION 2. Amendment of section 67 of chapter 156B by this
2 Act shall not invalidate any provisions in the articles of organiza-
3 tion, by-laws or corporate actions or agreements of any corpora-
4 tion subject to chapter 156B relating to the indemnification of its
5 officers, directors, employees or agents which are inconsistent with
6 the section sixty-seven as amended by this Act; however, such
7 provisions shall be deemed limited by, and indemnity thereunder
8 shall be payable only in accordance with, the provisions of section
9 67 as amended by this Act.

1 SECTION 3. This Act shall take effect on _____.

