

By Mr. Wetmore, a petition (accompanied by bill, Senate, No. 199) of H. Kenneth Fish and Robert D. Wetmore for legislation to provide for indemnification of directors and officers of business corporations. Commerce and Labor.

*The Commonwealth of Massachusetts*

In the Year One Thousand Nine Hundred and Eighty-one.

AN ACT RELATIVE TO INDEMNIFICATION OF DIRECTORS AND OFFICERS OF BUSINESS CORPORATIONS.

*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 Section 67 in its entirety and substitut-  
 3 ing therefor the following: —

4 *Section 67. Indemnification of Directors and Officers.*

5 (a) A corporation shall have the power to indemnify its  
 6 directors and officers against all expenses (as herein defined)  
 7 incurred by them in connection with any proceeding (as herein  
 8 defined) in which they are involved as a result of their serving  
 9 in such capacities, except that (i) no indemnification shall be  
 10 provided for any director or officer regarding any matter as to  
 11 which it shall be finally determined that he did not act in good  
 12 faith and in the reasonable belief that his action was in the  
 13 best interests of the corporation, or with respect to a criminal  
 14 matter, that he had reasonable cause to believe that his con-  
 15 duct was unlawful, and (ii) indemnification may be provided  
 16 with respect to a claim that an officer or director received in  
 17 improper personal benefit by reason of his position, regard-  
 18 less of whether the claim arises out of his service in such ca-  
 19 pacity, subject to the provisions of clause (i), unless it is fi-  
 20 nally determined that such an improper personal benefit was  
 21 received by the director or officer.

22 (b) The determination of whether the corporation has the  
 23 power to indemnify a director or officer under paragraph (a)  
 24 of this section and any award of indemnification may be made

25 (i) by a majority vote of a quorum of the directors consist-

26 ing of persons who are not at that time parties to the pro-  
27 ceeding; or

28 (ii) if such quorum cannot be obtained, by a majority vote  
29 of a committee of two or more directors who are not at that  
30 time parties to the proceeding and are selected for this pur-  
31 pose by the full board (in which selection directors who are  
32 parties may participate); or

33 (iii) by a majority vote of a quorum of shares of stock en-  
34 titled to vote for the election of directors, which quorum shall  
35 consist of stockholders who are not at that time parties to the  
36 proceeding.

37 The determination of whether the corporation has power to  
38 indemnify a director or officer may also be made by inde-  
39 pendent legal counsel appointed for the purpose by vote of a  
40 majority of such a disinterested quorum or committee of the  
41 directors or stockholders, or if there is no such quorum or  
42 committee of the directors, by vote of a majority of the di-  
43 rectors or of the holders of a majority of the shares of stock  
44 entitled to vote for the election of directors, which majority  
45 may include persons who are parties to the proceeding; and  
46 any award of indemnification which said counsel has deter-  
47 mined that the corporation has power to grant shall be made  
48 in the manner provided above for appointment of said coun-  
49 sel. Notwithstanding the foregoing, in the case of a proceed-  
50 ing by or in the right of the corporation in which a director  
51 or officer is adjudged liable to the corporation, indemnification  
52 shall be provided only upon a determination by a court having  
53 jurisdiction that in view of all the circumstances of the case  
54 said director or officer is fairly and reasonably entitled to in-  
55 demnify for such expenses as the court shall deem proper.

56 (c) Unless the articles of organization or by-laws of the  
57 corporation otherwise provide, if a director or officer of the  
58 corporation has been wholly successful on the merits in defense  
59 of any proceeding in which he was involved by reason of his  
60 position or as a result of his serving in such capacity (includ-  
61 ing termination of investigative or other proceedings without  
62 a finding of fault on the part of the director or officer), he  
63 shall be indemnified by the corporation against all expenses  
64 incurred by him in connection therewith.

65 (d) For purposes of this section

66 (1) A "director or officer" also includes (1) a director or  
67 officer of the corporation serving at the request of the corpo-  
68 ration as a director, officer, employee, trustee, partner or other  
69 agent of another organization, and (ii) any person who for-  
70 merly served as a director or officer;

71 (2) "Expenses" means all expenses (including attorneys'  
72 fees and disbursements) actually and reasonably incurred in  
73 defense of a proceeding or in seeking indemnification under  
74 paragraph (c) of this section and, except for claims by or in  
75 the right of the corporation or alleging that a director or offi-  
76 cer received an improper personal benefit, any judgments,  
77 awards, fines, penalties and reasonable amounts paid in settle-  
78 ment of a proceeding; and

79 (3) A "proceeding" is any threatened, pending or completed  
80 action, suit or proceeding, whether civil, criminal, administra-  
81 tive or investigative.

82 (e) Expenses incurred by a director or officer in defending  
83 any proceeding may be paid by the corporation in advance of  
84 its final disposition to the extent authorized as provided in  
85 paragraph (b) of this section, upon receipt of (i) a written af-  
86 firmation of the person being indemnified of his good faith  
87 belief that his conduct was consistent with the standards set  
88 forth in paragraph (a), and (ii) his written undertaking to re-  
89 pay such amount if it is ultimately determined that he is not  
90 eligible to be indemnified, which undertaking shall be an un-  
91 limited general obligation but need not be secured and may  
92 be accepted without regard to the financial ability of such  
93 person to make repayment; provided, that no such advance  
94 payment shall be made if a determination shall have been  
95 made by a court or by the directors, committee, stockholders  
96 or counsel who propose to act on the matter pursuant to para-  
97 graph (b) that the circumstances known at that time (without  
98 any further investigation) establish that the corporation ulti-  
99 mately will have no power to indemnify said person.

100 (f) A corporation shall have power to purchase and maintain  
101 insurance on behalf of any director or officer against any lia-  
102 bility or cost incurred by him as a director or officer or arising  
103 out of his status as such, whether or not the corporation would

104 have power to indemnify him against such liability or cost.

105 (g) Notwithstanding the provisions of this section, a cor-  
106 poration may adopt provisions relating to indemnification of  
107 its directors or officers in (i) its articles of organization, (ii)  
108 a by-law adopted by the stockholders, or (iii) a general vote  
109 adopted by a majority of a quorum of the holders of shares  
110 of stock entitled to vote for directors, and specific rights to  
111 indemnification may be granted under any other agreement  
112 or arrangement approved by a majority vote of a quorum of  
113 disinterested directors or stockholders; provided, that the  
114 standards set forth in any such provisions, agreements or  
115 arrangements for determining whether the corporation has  
116 power to indemnify a director or officer may not be more  
117 lenient than those set forth in paragraph (a) of this section.  
118 In addition, a corporation shall have power to indemnify any  
119 of its agents or employees who are not directors or officers on  
120 any terms consistent with law which it deems to be appropri-  
121 ate. The absence of any express provision for indemnification  
122 shall not limit any right of indemnification existing independ-  
123 ently of this section.

124 (h) The indemnification provided by this section shall inure  
125 to the benefit of the heirs and personal representatives of a  
126 director or officer.

127 (i) If a corporation or any of its directors or officers spon-  
128 sors or undertakes any responsibility as a fiduciary with re-  
129 spect to an employee benefit plan, then, for purposes of in-  
130 demnification of such persons under this section (i) a "di-  
131 rector" or "officer" shall be deemed to include any director or  
132 officer of the corporation whose duties involve duties or serv-  
133 ices to said plan or its participants or beneficiaries, (ii) such  
134 director or officer shall be deemed to have acted in good faith  
135 in the reasonable belief that his action was in the best inter-  
136 ests of the corporation if he acted in good faith in the reason-  
136 able belief that his action was in the best interests of the  
138 participants or beneficiaries of said plan and (iii) "expenses"  
139 shall be deemed to include any taxes or penalties assessed on  
140 such director or officer with respect to said plan under appli-  
141 cable law.

1 SECTION 2. Amendment of Section 67 of Chapter 156B by  
2 this Act shall not invalidate any provisions in the articles of  
3 organization, by-laws or corporate action or agreements of  
4 any corporation subject to chapter 156B relating to the in-  
5 demnification of its officers or directors, which are inconsis-  
6 tent with Section 67 as amended by this Act; however, such  
7 provisions shall be deemed limited by, and indemnity there-  
8 under shall be payable only in accordance with, the provisions  
9 of Section 67 as amended by this Act, with respect to any  
10 claims or proceedings initiated subsequent to the effective date  
11 of this Act.

1 SECTION 3. This Act shall take effect on





