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## CORPORATIONS, PARTNERSHIPS, AND ASSOCIATIONS

### *Business Corporations: Modify or Add Certain Definitions and Procedures Relating to Corporations*

**CODE SECTIONS:** O.C.G.A. § 14-2-101, -201.1, -630, -722, -841, -1103, -1105.5, -1403.1, -1420, -1501, -1509, -1622, 14-3-1420, 14-4-140 to -144, 14-5-20 (amended)

**BILL NUMBER:** HB 149

**ACT NUMBER:** 526

**SUMMARY:** The Act consists primarily of technical revisions to existing law, but includes several changes which are of general interest. The amended statute now allows a written facsimile or other copy of a proxy in place of the original, gives chief executive officers (CEOs) the authority to take all actions not requiring board approval and clarifies voting rules for mergers. In addition, the Act changes the provisions relating to publication of notices of intent to file articles of incorporation, clarifies preemptive rights issues, and deletes from the savings provision the section regarding claims against a corporation in dissolution.

**EFFECTIVE DATE:** July 1, 1993

#### *History*

The revisions to the Code encompassed in the Act were sponsored by the State Bar of Georgia and included changes recommended by the office of the Secretary of State.<sup>1</sup> The Corporate Code Committee of the State Bar generated a number of changes which were approved by the State Bar and introduced as legislative proposals into the General Assembly by Representative Tommy Chambless of the 163rd District. The Secretary of State's Office, which administers title 14, suggested further revisions to ease administration of the Code.<sup>2</sup> The Secretary of

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1. Telephone Interview with Tom Boller, Lobbyist for the State Bar of Georgia (May 7, 1993) [hereinafter Boller Interview].

2. Telephone Interview with Janet K. Jackson, Deputy Director of the Business Services and Regulation Division of the Office of the Secretary of State (May 19, 1993) [hereinafter Jackson Interview]. Some of these revisions were proposed in the 1992 General Assembly, but the legislation was never passed. *Id.*

State's revisions were incorporated in HB 149 by means of a substitute bill from the House Judiciary Committee.<sup>3</sup>

### HB 149

The Act amends title 14 of the Code relating to corporations, partnerships, and associations by making a number of "technical revisions" in the existing Code.<sup>4</sup> According to the State Bar, while more than thirty provisions of the Corporate Code are affected to some extent by the Act, most of the revisions are "conforming changes or effect technical corrections to the statutes."<sup>5</sup> The Act is an attempt to adopt an easier, more sensible approach for the 1990s,<sup>6</sup> and to simplify administration of title 14 by the Secretary of State's office.<sup>7</sup> The Corporate Code Committee of the State Bar considers several changes to be of general interest to practitioners.

One important revision is the change to Code section 14-2-722 relating to the form of proxies.<sup>8</sup> The Act now authorizes the use of "[a]ny copy, facsimile telecommunication, or other reliable reproduction" in lieu of the original.<sup>9</sup> While the Corporate Code Committee considered adopting a "Delaware-type" statute which would allow oral proxies, this approach was rejected.<sup>10</sup> Instead, the statute gives corporations broad authority "to adopt bylaws governing additional means or procedures for shareholders to exercise their voting rights."<sup>11</sup> Corporate bylaws could thus authorize the use of oral proxies.<sup>12</sup>

The revision to Code section 14-2-841, relating to the duties of officers, broadens the authority of the corporation's Chief Executive Officer (CEO), or the company president if no CEO is designated.<sup>13</sup> The Act confers on the CEO the "authority to conduct all ordinary business" on behalf of the corporation as well as the authority to execute and deliver "any contract, conveyance or similar document not requiring approval by the board of directors or shareholders as provided

3. Telephone Interview with William R. Goodell, Attorney and Corporate Code Committee Chairman of the State Bar's Corporation & Banking Section (May 19, 1993) [hereinafter Goodell Interview].

4. Telephone Interview with Rep. Tommy Chambless, House District No. 163 (May 7, 1993).

5. William R. Goodell, *Report from the Corporate Code Committee*, CORP. & BANKING SEC. NEWSL. (State Bar of Georgia), Winter 1993, at 7 [hereinafter CORPORATE AND BANKING NEWSLETTER].

6. Goodell Interview, *supra* note 3.

7. Jackson Interview, *supra* note 2.

8. O.C.G.A. § 14-2-722(b) (Supp. 1993).

9. *Id.*

10. CORPORATE AND BANKING NEWSLETTER, *supra* note 5.

11. *Id.*

12. *Id.*

13. O.C.G.A. § 14-2-841 (Supp. 1993).

by this chapter."<sup>14</sup> Such a general grant of authority could, of course, be negated by the articles of incorporation, the bylaws or by action of the board of directors.<sup>15</sup> However, this revision is significant because it overrules Georgia case law and brings Georgia law into line with the majority view on the issue of inherent authority in the office of the CEO.<sup>16</sup> It is also a recognition of the manner in which corporations and their CEOs must conduct day-to-day business.<sup>17</sup>

The Act also changes some procedures in conjunction with the filing of articles of incorporation. Previously, the Code required incorporators to submit requests for publication of notice of intent to file the articles of incorporation prior to the filing with the Secretary of State.<sup>18</sup> The new Act changes the wording of the filing of intent to publish and amends the publication provision of the Code to permit the submission of requests for publication within one business day of the filing of the documentation with the Secretary of State.<sup>19</sup> The Act changes the wording of Code section 14-2-1007(d) relating to restated articles of incorporation as well.<sup>20</sup> This change "conforms the statute to what is current practice about filing articles of restatement with a certificate' as required by the current code."<sup>21</sup>

The Act also attempts to clarify the provisions regarding preemptive rights in Code section 14-2-630.<sup>22</sup> The Act provides that statutory close corporations are still considered as having "opted-in" preemptive rights for shareholders of the corporation as provided by section 14-2-630(b)(1).<sup>23</sup> The Act also provides that shareholders of corporations in

14. *Id.*

15. *Id.*

16. Goodell Interview, *supra* note 3. For example, in 1984 the Georgia Court of Appeals reaffirmed earlier decisions when it stated that "[a] President of a corporation does not, by virtue of his office alone, have authority to contract in its behalf." *Computer Maintenance Corp. v. Tilley*, 322 S.E.2d 533, 536 (Ga. Ct. App. 1984) (quoting *Western Am. Life Ins. Co. v. Hicks*, 217 S.E.2d 323 (Ga. 1975)).

17. *Id.*

18. 1988 Ga. Laws 946 (formerly found at O.C.G.A. § 14-2-201.1(a)-(b) (1989)).

19. O.C.G.A. § 14-2-201.1(a)-(b) (Supp. 1993). The Act makes a similar change with regard to wording and timing of publication of notice of intent to dissolve a corporation and publication of notice of merger or share exchange. *Id.* Requests for publication may now be made within one business day after filing. *Id.* §§ 14-2-1403.1(a)-(b), -1105.1 (Supp. 1993).

20. *Id.* § 14-2-1007(d)-(f) (Supp. 1993).

21. Memorandum from Janet K. Jackson, Deputy Director of the Business Services and Regulation Division of the Office of the Secretary of State, to Kathy Drake Browning (Mar. 3, 1993) [hereinafter Jackson Memo] (available in Georgia State University College of Law Library). This memorandum is regarding the impact on the Office of the Secretary of State with respect to selected proposed changes to the Georgia Business Corporation Code. *Id.*

22. O.C.G.A. § 14-2-630(a)-(b) (Supp. 1993).

23. *Id.* § 14-2-630(b)(1) (1989).

existence before July 1, 1989 when preemptive rights had to be "opted-out" in the articles of incorporation had such preemptive rights under one of two conditions.<sup>24</sup> The first requires that "[s]hareholders had such rights as of [July 1, 1989]."<sup>25</sup> The second requires that the articles of incorporation have since been amended "with notice to the shareholders that such reinstatement of amendment would cause the shareholders of the corporation to have preemptive rights."<sup>26</sup> This revision applies to a small number of corporations left in limbo following changes to the law in July 1989.<sup>27</sup>

The Act also clarifies voting rules for mergers by amending Code section 14-2-1103, relating to action on a plan of merger or share exchange.<sup>28</sup> The Act provides that, unless otherwise stipulated in the articles, bylaws or by the board of directors, a plan of merger or share exchange to be authorized must be approved by a majority of all the votes entitled to be cast by shareholders, rather than by a majority of the shares.<sup>29</sup>

Except for the Committee substitute bill from the House Judiciary Committee which incorporated changes requested by the office of the Secretary of State,<sup>30</sup> the only substantive change made as HB 149 passed the House and Senate was in Code section 14-2-1703, the savings clause.<sup>31</sup> This change deletes from the savings clause Code section 14-2-1407 which related to claims against dissolved corporations.<sup>32</sup> The legislators recognized that the old Code had no provision for publication of intent to dissolve a corporation while the 1988 Code stipulates that the statute of limitations on claims against a dissolved corporation commences upon publication of notice of such intent.<sup>33</sup> This change to the bill corrects the oversight in the Code.

The revisions to the Code initiated by the office of the Secretary of State were incorporated into HB 149 by means of a Committee substitute bill in the House Judiciary Committee.<sup>34</sup> Two revisions requested by the Secretary of State seek to curb abuses stemming from

24. *Id.* § 14-2-630(b)(2) (Supp. 1993); Goodell Interview, *supra* note 3.

25. *Id.* § 14-2-630(b)(2)(A) (Supp. 1993).

26. *Id.* § 14-2-630(b)(2)(B) (Supp. 1993).

27. Goodell Interview, *supra* note 3.

28. O.C.G.A. § 14-2-1103(e) (Supp. 1993).

29. *Id.* § 14-2-1103(e)(2) (Supp. 1993). The wording and timing of the publication of a notice of merger or share exchange has been changed also. *See supra* note 19.

30. Goodell Interview, *supra* note 3.

31. O.C.G.A. § 14-2-1703(a) (Supp. 1993).

32. *Id.* § 14-2-1703(a)(2) (Supp. 1993); Goodell Interview, *supra* note 3. This change was initiated by the Senate Committee on Special Judiciary. Goodell Interview, *supra* note 3.

33. 1988 Ga. Laws 1070 (formerly found at O.C.G.A. § 14-2-1407(b)-(d) (1988)); Goodell Interview, *supra* note 3.

34. *See* Goodell Interview, *supra* note 3.

nonpayment of fees required by the Code to be collected by the Secretary of State.<sup>35</sup> The Act thus amends Code sections 14-2-1420 and 14-3-1420, relating to nonprofit corporations, to allow for administrative dissolution of a corporation upon failure of the corporation to submit payment for dishonored checks within sixty days from notice of nonpayment.<sup>36</sup>

Another change requested by the office of the Secretary of State is the revision to Code section 14-2-1622 relating to annual registration of corporations authorized to transact business in Georgia.<sup>37</sup> The Act changes the information required in an annual registration to include the corporation's employer identification number issued by the federal government and requires new corporations, which incorporated prior to October 1st, to file an initial annual registration within ninety days of the filing of the articles of incorporation with the Secretary of State's office.<sup>38</sup>

Several of the Act's revisions impact primarily on the office of the Secretary of State. The Act now allows the resignation of the registered agent of a foreign corporation through the filing of a new annual registration.<sup>39</sup> The Act also excludes from "transacting business" in Georgia "those foreign corporations which act as a general partner of a Georgia limited partnership or [] a foreign limited partnership that is qualified to do business in Georgia."<sup>40</sup> One final revision to chapter 2 of title 14 gives "clear cut authority" to the Secretary of State as corporation commissioner to appoint an assistant commissioner and to delegate power and duties to the assistant as the Secretary desires.<sup>41</sup>

In addition to revisions to chapter 2 (Business Corporations) and chapter 3 (Nonprofit Corporations), the Act also amends chapter 4 of title 14 which applies to "Secretary of State Corporations."<sup>42</sup> The revisions to chapter 4 allow these corporate entities (excluding banks or trust companies) to follow the requirements and procedures of the Business Corporation Code (chapter 2 of title 14) relating to corporate mergers and share exchanges.<sup>43</sup>

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35. Jackson Interview, *supra* note 2. The change addresses, for example, the issue of dishonored checks submitted along with a filing of articles of incorporation. *Id.*

36. O.C.G.A. §§ 14-2-1420(5), 14-3-1420(5) (Supp. 1993).

37. *Id.* § 14-2-1622 (Supp. 1993).

38. *Id.* § 14-2-1622(a)(1), (d) (Supp. 1993). This change applies to nonprofit corporations as well. *Id.* § 14-3-1622 (Supp. 1993); Jackson Memo, *supra* note 21.

39. O.C.G.A. § 14-2-1509(b)-(c) (Supp. 1993); Jackson Memo, *supra* note 21.

40. Jackson Memo, *supra* note 21 (referring to O.C.G.A. § 14-2-1501(b)(15) (Supp. 1993)).

41. Jackson Interview, *supra* note 2 (referring to O.C.G.A. § 14-5-20 (Supp. 1993)); Jackson Memo, *supra* note 21.

42. O.C.G.A. §§ 14-4-140 to -144 (Supp. 1993).

43. *Id.*; Jackson Memo, *supra* note 21.