

Senate Bill 128

By: Senators Kennedy of the 18th, Bethel of the 54th, Hill of the 32nd, Jones II of the 22nd and Parent of the 42nd

**AS PASSED SENATE**

**A BILL TO BE ENTITLED  
AN ACT**

1 To amend Article 8 of Chapter 2 of Title 14 of the Official Code of Georgia Annotated,  
2 relating to directors and officers, so as to enact reforms consistent with the Model Act; to  
3 change provisions relating to the functions of a board of directors; to change provisions  
4 relating to elections of directors; to change provisions relating to terms for directors; to  
5 change provisions relating to actions without meetings; to change provisions relating to  
6 committees; to change provisions relating to derivative actions; to change provisions relating  
7 to officers; to change provisions relating to functions of officers; to change provisions  
8 relating to resignation and removal of officers; to enact provisions relating to business  
9 opportunities; to provide for related matters; to repeal conflicting laws; and for other  
10 purposes.

11 **BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:**

12 **SECTION 1.**

13 Article 8 of Chapter 2 of Title 14 of the Official Code of Georgia Annotated, relating to  
14 directors and officers, is amended by revising subsections (a) and (b) of Code Section  
15 14-2-801, relating to the requirement for and duties of board of directors, as follows:

16 "~~(a) Except Each corporation must have a board of directors, except~~ as provided in Article  
17 9 of this chapter or in a written agreement meeting the requirements of Code Section  
18 14-2-732, each corporation must have a board of directors.

19 (b) All corporate powers shall be exercised by or under the authority of the board of  
20 directors of the corporation, and the business and affairs of the corporation shall be  
21 managed by or under the direction, and subject to oversight, of; its board of directors,  
22 subject to any limitation set forth in the articles of incorporation, in rights, options, or  
23 warrants permitted by paragraph (2) of subsection (d) of Code Section 14-2-624, or except  
24 as provided in an agreement among the shareholders meeting the requirements of Code  
25 Section 14-2-732."

26 **SECTION 2.**

27 Said article is further amended by revising subsection (b) of Code Section 14-2-803, relating  
28 to number and election of directors, as follows:

29 "(b) The number of directors may be increased or decreased from time to time by  
30 amendment to, or in the manner provided in, the articles of incorporation or the bylaws.

31 ~~The articles of incorporation or bylaws may authorize the shareholders or the board of~~  
32 ~~directors to fix or change the number of directors or may establish a variable range for the~~  
33 ~~size of the board of directors by fixing a minimum and maximum number of directors. If~~  
34 ~~a variable range is established, the number of directors may be fixed or changed from time~~  
35 ~~to time, within the minimum and maximum, by the shareholders or, if the articles or bylaws~~  
36 ~~so provide, by the board of directors."~~

37 **SECTION 3.**

38 Said article is further amended by revising Code Section 14-2-806, relating to staggered  
39 terms for directors, as follows:

40 "14-2-806.

41 (a) The articles of incorporation or a bylaw adopted by the shareholders may provide for  
42 staggering the terms of the directors by dividing the total number of directors into two or  
43 three groups, ~~with each group containing one-half or one-third of the total, as near as may~~  
44 ~~be.~~ In that event, the terms of directors in the first group expire at the first annual  
45 shareholders' meeting after their election, the terms of the second group expire at the  
46 second annual shareholders' meeting after their election, and the terms of the third group,  
47 if any, expire at the third annual shareholders' meeting after their election. At each annual  
48 shareholders' meeting held thereafter, directors shall be chosen for a term of two years or  
49 three years, as the case may be, to succeed those whose terms expire.

50 (b) ~~If directors have staggered terms and the number of directors is thereafter changed:~~

51 ~~(1) Any increase or decrease in the number of directors shall be so apportioned among~~  
52 ~~the classes as to make all classes as nearly equal in number as possible; and~~

53 ~~(2) When the number of directors is increased and any newly created directorships are~~  
54 ~~filled by the board, the terms of the additional directors shall expire at the next annual~~  
55 ~~election of directors by the shareholders."~~

56 **SECTION 4.**

57 Said article is further amended by revising Code Section 14-2-821, relating to action without  
58 meeting, as follows:

59 "14-2-821.

60 (a) ~~Except to the extent Unless the articles of incorporation or bylaws provide otherwise~~  
 61 ~~require that action by the board of directors be taken at a meeting, action required or~~  
 62 ~~permitted by this chapter to be taken at a by the board of directors' meeting directors may~~  
 63 ~~be taken without a meeting if the action is taken by all members of the board. The action~~  
 64 ~~must be evidenced by one or more consents in writing or by electronic transmission~~  
 65 ~~describing the action taken, signed by each director, and delivered to the corporation for~~  
 66 ~~inclusion in the minutes or filing with the corporate records~~ each director signs a consent  
 67 describing the action to be taken or ratified and delivers it to the corporation.

68 (b) A director's consent may be withdrawn by a revocation signed by the director and  
 69 delivered to the corporation prior to delivery to the corporation of unrevoked written  
 70 consents signed by all the directors.

71 (c) Action taken under this Code section is the act of the board of directors when one or  
 72 more consents signed by all the directors are delivered to the corporation. The consent may  
 73 specify the time at which the action taken thereunder is to be effective.

74 ~~(b)~~(d) A consent signed and delivered by a director under this Code section has the effect  
 75 of action taken at a meeting ~~vote of the board of directors~~ and may be described as such in  
 76 any document."

77 **SECTION 5.**

78 Said article is further amended by revising Code Section 14-2-825, relating to committees,  
 79 as follows:

80 "14-2-825.

81 (a) Unless this chapter, the articles of incorporation, or the bylaws provide otherwise, a  
 82 board of directors may create one or more committees and appoint members of the board  
 83 of directors to serve on ~~them~~ any such committee. Each committee may have one or more  
 84 members, who serve at the pleasure of the board of directors.

85 (b) Code Sections 14-2-820 through 14-2-824, ~~which govern meetings, action without~~  
 86 ~~meetings, notice and waiver of notice, and quorum and voting requirements~~ apply both to  
 87 committees of the board of directors, ~~apply to committees and to~~ their members as well.

88 (c) To the extent specified by the board of directors or in the articles of incorporation or  
 89 bylaws, each committee may exercise the authority powers of the board of directors under  
 90 Code Section 14-2-801.

91 (d) A committee may not, however:

92 (1) Approve or propose to shareholders action that this chapter requires to be approved  
 93 by shareholders;

- 94 (2) Fill vacancies on the board of directors or, subject to subsection (f) of this Code  
 95 section, on any of its committees;
- 96 (3) Amend articles of incorporation pursuant to Code Section 14-2-1002 except that a  
 97 committee may, to the extent authorized ~~in a resolution or resolutions adopted by action~~  
 98 of the board of directors, amend the articles of incorporation to fix the designations,  
 99 preferences, limitations, and relative rights of shares pursuant to Code Section 14-2-602  
 100 or to increase or decrease the number of shares contained in a series of shares established  
 101 in accordance with Code Section 14-2-602 but not below the number of such shares then  
 102 issued; or
- 103 (4) Adopt, amend, or repeal bylaws; ~~or~~
- 104 ~~(5) Approve a plan of merger not requiring shareholder approval.~~
- 105 (e) The creation of, delegation of authority to, or action by a committee does not alone  
 106 constitute compliance by a director with the standards of conduct described in Code  
 107 Section 14-2-830.
- 108 (f) The board of directors may appoint one or more directors as alternate members of any  
 109 committee to replace any absent or disqualified member during the member's absence or  
 110 disqualification. Unless the articles of incorporation or the bylaws or the board action  
 111 creating the committee or appointing one or more directors as alternate members provide  
 112 otherwise, in the event of the absence or disqualification of a member of a committee, the  
 113 member or members of the committee present at any meeting and not disqualified from  
 114 voting, unanimously, may appoint another director to act in place of the absent or  
 115 disqualified member."

## 116 SECTION 6.

117 Said article is further amended by revising subsection (a) of Code Section 14-2-831, relating  
 118 to derivative actions, as follows:

119 "(a) Subject to Code Sections 14-2-830 and 14-2-842, a ~~A~~ derivative proceeding, as  
 120 defined in ~~subsection (a) paragraph (1)~~ of Code Section 14-2-740, may be brought by a  
 121 shareholder, or an action may be brought by the corporation, against one or more directors  
 122 or officers of the corporation to procure for the benefit of the corporation a judgment for  
 123 the following relief:

124 (1) Subject to any provision of the articles of incorporation authorized pursuant to  
 125 paragraph (4) of subsection (b) of Code Section 14-2-202, to ~~To~~ compel the defendant  
 126 to account for official conduct or to decree any other relief called for by his or her official  
 127 conduct in the following cases:

128 (A) The neglect of, failure to perform, or other violation of his or her duties in the  
 129 management of the corporation or in the disposition of corporate assets;

- 130 (B) The acquisition, transfer to others, loss, or waste of corporate assets due to any  
 131 neglect of, failure to perform, or other violation of duties; or  
 132 (C) The appropriation, in violation of his or her duties, of any business opportunity of  
 133 the corporation;
- 134 (2) To enjoin a proposed unlawful conveyance, assignment, or transfer of corporate  
 135 assets or other unlawful transaction where there is sufficient evidence that it will be  
 136 made; and
- 137 (3) To set aside an unlawful conveyance, assignment, or transfer of corporate assets  
 138 where the transferee knew of its unlawfulness and is made a party to the action."

139 **SECTION 7.**

140 Said article is further amended by revising subsections (b) and (c) of Code Section 14-2-840,  
 141 relating to required officers, as follows:

142 "(b) The board of directors may elect individuals to fill one or more offices of the  
 143 corporation. A duly appointed officer may appoint one or more officers ~~or assistant~~  
 144 ~~officers~~ if authorized by the bylaws or the board of directors.

145 (c) The bylaws or the board of directors shall ~~delegate~~ assign to one of the officers  
 146 responsibility for preparing the minutes of the directors' and shareholders' meetings and for  
 147 maintaining and authenticating records of the corporation required to be kept under  
 148 subsections (a) of Code Sections 14-2-1601 and 14-2-1602."

149 **SECTION 8.**

150 Said article is further amended by revising Code Section 14-2-841, relating to duties of  
 151 officers, as follows:

152 "14-2-841.

153 Each officer has the authority and shall perform the ~~duties~~ functions set forth in the bylaws  
 154 or, to the extent consistent with the bylaws, the ~~duties~~ functions prescribed by the board of  
 155 directors or by direction of an officer authorized by the board of directors to prescribe the  
 156 ~~duties~~ functions of other officers. Unless the articles of incorporation, bylaws, or a  
 157 ~~resolution~~ action of the board of directors of a corporation provide otherwise, the chief  
 158 executive officer (or the president if no person has been designated as chief executive  
 159 officer) of a corporation shall have authority to conduct all ordinary business on behalf of  
 160 such corporation and may execute and deliver on behalf of a corporation any contract,  
 161 conveyance, or similar document not requiring approval by the board of directors or  
 162 shareholders as provided in this chapter."

163 **SECTION 9.**

164 Said article is further amended by revising Code Section 14-2-843, relating to resignation and  
 165 removal of officers, as follows:

166 "14-2-843.

167 (a) An officer may resign at any time by delivering notice ~~in writing or by electronic~~  
 168 ~~transmission~~ to the corporation. A resignation is effective when the notice is ~~effective~~  
 169 delivered unless the notice specifies a future later effective ~~date~~ time. A copy of the notice  
 170 of resignation as delivered to the corporation may be filed with the Secretary of State.

171 (b) ~~A board of directors may remove any officer at any time with or without cause. Unless~~  
 172 ~~the bylaws provide otherwise, any officer or assistant officer appointed by an authorized~~  
 173 ~~officer pursuant to subsection (b) of Code Section 14-2-840 may be removed at any time~~  
 174 ~~with or without cause by any officer having authority to appoint such officer or assistant~~  
 175 ~~officer. An officer may be removed at any time with or without cause by:~~

176 (1) The board of directors;

177 (2) The officer who appointed such officer, unless the bylaws or the board of directors  
 178 provide otherwise; or

179 (3) Any other officer if authorized by the bylaws or the board of directors."

180 **SECTION 10.**

181 Said article is further amended by revising paragraph (1) of subsection (f) of Code Section  
 182 14-2-859, relating to application of part, as follows:

183 "(1) To advance funds to pay for or reimburse expenses in accordance with Code Section  
 184 14-2-853 or subsection (c) of Code Section 14-2-856 to the fullest extent permitted by  
 185 law; and"

186 **SECTION 11.**

187 Said article is further amended by adding a new part to read as follows:

188 "Part 7

189 14-2-870.

190 (a) A corporation may disclaim, in its articles of incorporation or bylaws or by action of  
 191 its shareholders or board of directors, any interest of the corporation in, or in being offered,  
 192 or in excluding directors or officers from taking advantage of or participating in, specific  
 193 business opportunities or classes or categories of business opportunities that are, have been,  
 194 or may be in the future presented to the corporation or to one or more of its directors or  
 195 officers. For purposes of this part, the terms 'director' and 'directors' include a person or

196 persons other than directors to the extent discretion or powers of the board of directors are  
197 vested in such person or persons pursuant to Code Sections 14-2-732, 14-2-920, or  
198 14-2-922.

199 (b) A director's or officer's taking advantage of, or participating in, directly or indirectly,  
200 a specific business opportunity may not be the subject of equitable relief, or give rise to an  
201 award of damages or other sanctions against the director or officer, in a proceeding by a  
202 shareholder or by or in the right of the corporation on the ground that such opportunity  
203 should have been first offered to the corporation or that the corporation had an interest in,  
204 or in being offered, or in excluding the director or officer from taking advantage of or  
205 participating in, such opportunity, to the extent the corporation has disclaimed any such  
206 interest with respect to such business opportunity pursuant to subsection (a) of this Code  
207 section, either with respect to the specific business opportunity or with respect to a class  
208 or category of business opportunities that includes such opportunity.

209 (c) Action by the shareholders or board of directors of the corporation approving a  
210 disclaimer pursuant to subsection (a) of this Code section that applies to a director with  
211 respect to a specific past, present, or future business opportunity shall be effective for all  
212 purposes if the director brings such opportunity to the attention of the corporation (if such  
213 opportunity is not known to the corporation) and:

214 (1) Such disclaimer is approved by qualified directors in compliance with the procedures  
215 set forth in Code Section 14-2-862, as if the decision being made concerned a director's  
216 conflicting interest transaction; or

217 (2) Such disclaimer is approved by shareholders' action taken in compliance with the  
218 procedures set forth in Code Section 14-2-863, as if the decision being made concerned  
219 a director's conflicting interest transaction;

220 except that, rather than making 'required disclosure' as defined in Code Section 14-2-860,  
221 in each case the director shall have made prior disclosure to those approving such  
222 disclaimer on behalf of the corporation of all material facts concerning the business  
223 opportunity that are then known to the director, subject to subsection (e) of this Code  
224 section, and that a 'qualified director' is a director who, at the time action is to be taken  
225 under paragraph (1) of subsection (c) of this Code section, would be a qualified director  
226 under subsection (d) of Code Section 14-2-862 if the business opportunity were a director's  
227 conflicting interest transaction.

228 (d) Action by the board of directors or shareholders of the corporation approving a  
229 disclaimer pursuant to subsection (a) of this Code section that applies to an officer with  
230 respect to a specific past, present, or future business opportunity shall be effective for all  
231 purposes if the officer brings such opportunity to the attention of the corporation (if such  
232 opportunity is not known to the corporation) and such disclaimer is approved by the board

233 of directors or shareholders in compliance with the procedures set forth in Code Section  
 234 14-2-864, as if the decision being made concerned an officer's conflicting interest  
 235 transaction, except that, rather than making 'required disclosure' as defined in Code Section  
 236 14-2-864, in each case the officer shall have made prior disclosure to those approving such  
 237 disclaimer on behalf of the corporation of all material facts concerning the business  
 238 opportunity that are then known to the officer, subject to subsection (e) of this Code  
 239 section.

240 (e) Notwithstanding subsections (c) or (d) of this Code section, a director or officer is not  
 241 obligated to make prior disclosure to those approving a disclaimer on behalf of the  
 242 corporation pursuant to subsection (c) or (d) of this Code section of all material facts  
 243 concerning the business opportunity subject to such disclaimer that are then known to the  
 244 director or officer to the extent that the director or officer reasonably believes that doing  
 245 so would violate a duty imposed under law, a legally enforceable obligation of  
 246 confidentiality, or a professional ethics rule, provided that such director or officer discloses  
 247 to those acting on behalf of the corporation:

248 (1) All information required to be disclosed that is not so violative; and  
 249 (2) The nature of the director's or officer's duty not to disclose the confidential  
 250 information.

251 (f) In any proceeding seeking equitable relief or other remedies based upon an alleged  
 252 improper taking advantage of or participation in a business opportunity by a director or  
 253 officer, directly or indirectly, the fact that the director or officer did not employ the  
 254 procedures described in this Code section before taking advantage of the opportunity shall  
 255 not:

256 (1) Create an inference that the opportunity should have been first presented to the  
 257 corporation, that the corporation had an interest in, or in being offered, or in excluding  
 258 the director or officer from taking advantage of or participating in, such opportunity or  
 259 that the director or officer has or will have appropriated the opportunity in violation of  
 260 his or her duties by taking advantage of or participating in the opportunity; or

261 (2) Alter the burden of proof otherwise applicable to establish that the director or officer  
 262 breached a duty to the corporation in the circumstances."

263 **SECTION 12.**

264 All laws and parts of laws in conflict with this Act are repealed.