

The House Committee on Judiciary offers the following substitute to SB 128:

A BILL TO BE ENTITLED
AN ACT

To amend Article 8 of Chapter 2 of Title 14 of the Official Code of Georgia Annotated, relating to directors and officers, so as to enact reforms consistent with the Model Act; to change provisions relating to the functions of a board of directors; to change provisions relating to elections of directors; to change provisions relating to terms for directors; to change provisions relating to actions without meetings; to change provisions relating to committees; to change provisions relating to derivative actions; to change provisions relating to officers; to change provisions relating to functions of officers; to change provisions relating to resignation and removal of officers; to enact provisions relating to business opportunities; to amend Title 14 of the Official Code of Georgia Annotated, relating to corporations, partnerships, and associations, so as to change certain provisions relating to definitions, registered agent, and service of process; to provide for certain definitions applicable to business corporations, nonprofit corporations, partnerships, and the "Georgia Revised Uniform Limited Partnership Act"; to change certain provisions relating to who may serve as a registered agent for certain domestic and foreign entities, including corporations, nonprofit corporations, limited liability partnerships, limited partnerships, and limited liability companies; to provide for one copy of a process, notice, or demand to be served upon the Secretary of State when he or she is acting as an agent for service of process for certain entities; to provide for related matters; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

PART I
SECTION 1-1.

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

S. B. 128 (SUB)

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

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

SECTION 1-2.

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

"(b) The number of directors may be increased or decreased from time to time by amendment to, or in the manner provided in, the articles of incorporation or the bylaws. ~~The articles of incorporation or bylaws may authorize the shareholders or the board of directors to fix or change the number of directors or may establish a variable range for the size of the board of directors by fixing a minimum and maximum number of directors. If a variable range is established, the number of directors may be fixed or changed from time to time, within the minimum and maximum, by the shareholders or, if the articles or bylaws so provide, by the board of directors.~~"

SECTION 1-3.

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

"14-2-806.

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

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

(1) ~~Any increase or decrease in the number of directors shall be so apportioned among the classes as to make all classes as nearly equal in number as possible; and~~
(2) When the number of directors is increased and any newly created directorships are filled by the board, the terms of the additional directors shall expire at the next annual election of directors by the shareholders."

SECTION 1-4.

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

"14-2-821.

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

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

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

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

SECTION 1-5.

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

"14-2-825.

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

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

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

(d) A committee may not, however:

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

(2) Fill vacancies on the board of directors or, subject to subsection (f) of this Code
section, on any of its committees;

(3) Amend articles of incorporation pursuant to Code Section 14-2-1002 except that a
 committee may, to the extent authorized ~~in a resolution or resolutions adopted by action~~
of the board of directors, amend the articles of incorporation to fix the designations,
 preferences, limitations, and relative rights of shares pursuant to Code Section 14-2-602
 or to increase or decrease the number of shares contained in a series of shares established
 in accordance with Code Section 14-2-602 but not below the number of such shares then
 issued; or

(4) Adopt, amend, or repeal bylaws; ~~or~~

~~(5) Approve a plan of merger not requiring shareholder approval.~~

(e) The creation of, delegation of authority to, or action by a committee does not alone
 constitute compliance by a director with the standards of conduct described in Code
 Section 14-2-830.

(f) The board of directors may appoint one or more directors as alternate members of any
committee to replace any absent or disqualified member during the member's absence or
disqualification. Unless the articles of incorporation or the bylaws or the board action
creating the committee or appointing one or more directors as alternate members provide
otherwise, in the event of the absence or disqualification of a member of a committee, the
member or members of the committee present at any meeting and not disqualified from
voting, unanimously, may appoint another director to act in place of the absent or
disqualified member."

SECTION 1-6.

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

"(a) Subject to Code Sections 14-2-830 and 14-2-842, a ~~A~~ derivative proceeding, as
 defined in ~~subsection (a) paragraph (1)~~ of Code Section 14-2-740, may be brought by a

shareholder, or an action may be brought by the corporation, against one or more directors or officers of the corporation to procure for the benefit of the corporation a judgment for the following relief:

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

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

(B) The acquisition, transfer to others, loss, or waste of corporate assets due to any neglect of, failure to perform, or other violation of duties; or

(C) The appropriation, in violation of his or her duties, of any business opportunity of the corporation;

(2) To enjoin a proposed unlawful conveyance, assignment, or transfer of corporate assets or other unlawful transaction where there is sufficient evidence that it will be made; and

(3) To set aside an unlawful conveyance, assignment, or transfer of corporate assets where the transferee knew of its unlawfulness and is made a party to the action."

SECTION 1-7.

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

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

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

SECTION 1-8.

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

"14-2-841.

Each officer has the authority and shall perform the ~~duties~~ functions set forth in the bylaws or, to the extent consistent with the bylaws, the ~~duties~~ functions prescribed by the board of directors or by direction of an officer authorized by the board of directors to prescribe the

~~duties~~ functions of other officers. Unless the articles of incorporation, bylaws, or a ~~resolution~~ action of the board of directors of a corporation provide otherwise, the chief executive officer (or the president if no person has been designated as chief executive officer) of a corporation shall have authority to conduct all ordinary business on behalf of such corporation and may execute and deliver on behalf of a corporation any contract, conveyance, or similar document not requiring approval by the board of directors or shareholders as provided in this chapter."

SECTION 1-9.

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

"14-2-843.

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

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

(1) The board of directors;

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

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

SECTION 1-10.

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

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

SECTION 1-11.

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

"Part 7

14-2-870.

(a) A corporation may disclaim, in its articles of incorporation or bylaws or by action of its shareholders or board of directors, any interest of the corporation in, or in being offered, or in excluding directors or officers from taking advantage of or participating in, specific business opportunities or classes or categories of business opportunities that are, have been, or may be in the future presented to the corporation or to one or more of its directors or officers. For purposes of this part, the terms 'director' and 'directors' include a person or persons other than directors to the extent discretion or powers of the board of directors are vested in such person or persons pursuant to Code Sections 14-2-732, 14-2-920, or 14-2-922.

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

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

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

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

except that, rather than making 'required disclosure' as defined in Code Section 14-2-860, in each case the director shall have made prior disclosure to those approving such disclaimer on behalf of the corporation of all material facts concerning the business opportunity that are then known to the director, subject to subsection (e) of this Code

section, and that a 'qualified director' is a director who, at the time action is to be taken under paragraph (1) of subsection (c) of this Code section, would be a qualified director under subsection (d) of Code Section 14-2-862 if the business opportunity were a director's conflicting interest transaction.

(d) Action by the board of directors or shareholders of the corporation approving a disclaimer pursuant to subsection (a) of this Code section that applies to an officer with respect to a specific past, present, or future business opportunity shall be effective for all purposes if the officer brings such opportunity to the attention of the corporation (if such opportunity is not known to the corporation) and such disclaimer is approved by the board of directors or shareholders in compliance with the procedures set forth in Code Section 14-2-864, as if the decision being made concerned an officer's conflicting interest transaction, except that, rather than making 'required disclosure' as defined in Code Section 14-2-864, in each case the officer shall have made prior disclosure to those approving such disclaimer on behalf of the corporation of all material facts concerning the business opportunity that are then known to the officer, subject to subsection (e) of this Code section.

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

(1) All information required to be disclosed that is not so violative; and

(2) The nature of the director's or officer's duty not to disclose the confidential information.

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

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

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

273 **PART II**

274 **SECTION 2-1.**

275 Title 14 of the Official Code of Georgia Annotated, relating to corporations, partnerships,
276 and associations, is amended in Code Section 14-2-140, relating to code definitions
277 applicable to business corporations, by adding two new paragraphs to read as follows:

278 "(13.1) 'Foreign limited liability company' means a limited liability company formed
279 under the laws of a jurisdiction other than this state."

280 "(16.1) 'Limited liability company' means any limited liability company formed under
281 Chapter 11 of this title."

282 **SECTION 2-2.**

283 Said title is further amended in Code Section 14-3-140, relating to definitions applicable to
284 nonprofit corporations, by adding two new paragraphs to read as follows:

285 "(16.1) 'Foreign limited liability company' means a limited liability company formed
286 under the laws of a jurisdiction other than this state."

287 "(19.1) 'Limited liability company' means any limited liability company formed under
288 Chapter 11 of this title."

289 **SECTION 2-3.**

290 Said title is further amended in Code Section 14-8-2, relating to definitions applicable to
291 partnerships, by adding two new paragraphs to read as follows:

292 "(4.1) 'Foreign limited liability company' means a limited liability company formed
293 under the laws of a jurisdiction other than this state."

294 "(6.1) 'Limited liability company' means any limited liability company formed under
295 Chapter 11 of this title."

296 **SECTION 2-4.**

297 Said title is further amended in Code Section 14-9-101, relating to definitions applicable to
298 the "Georgia Revised Uniform Limited Partnership Act," by adding two new paragraphs to
299 read as follows:

300 "(3.1) 'Foreign limited liability company' means a limited liability company formed
301 under the laws of a jurisdiction other than this state."

302 “(6.1) ‘Limited liability company’ means any limited liability company formed under
303 Chapter 11 of this title.”

304 **PART III**

305 **SECTION 3-1.**

306 Said title is further amended by revising Code Section 14-2-501, relating to registered office
307 and registered agent applicable to business corporations, as follows:

308 “14-2-501.

309 Each corporation must continuously maintain in this state:

310 (1) A registered office that may be the same as any of its places of business; and

311 (2) A registered agent, who may be:

312 (A) A person who resides in this state and whose business office is identical with the
313 registered office;

314 (B) A domestic corporation, ~~or~~ nonprofit domestic corporation, or domestic limited
315 liability company whose business office is identical with the registered office; or

316 (C) A foreign corporation, ~~or~~ nonprofit foreign corporation, or foreign limited liability
317 company authorized to transact business in this state whose business office is identical
318 with the registered office.”

319 **SECTION 3-2.**

320 Said title is further amended by revising Code Section 14-2-1507, relating to registered office
321 and registered agent of foreign corporation applicable to business corporations, as follows:

322 “14-2-1507.

323 Each foreign corporation authorized to transact business in this state must continuously
324 maintain in this state:

325 (1) A registered office that may be the same as any of its places of business; and

326 (2) A registered agent, who may be:

327 (A) An individual who resides in this state and whose business office is identical with
328 the registered office;

329 (B) A domestic corporation, ~~or~~ nonprofit domestic corporation, or domestic limited
330 liability company whose business office is identical with the registered office; or

331 (C) A foreign corporation, ~~or~~ foreign or nonprofit corporation, or foreign limited
332 liability company authorized to transact business in this state whose business office is
333 identical with the registered office.”

SECTION 3-3.

Said title is further amended by revising Code Section 14-3-501, relating to registered office and registered agent applicable to nonprofit corporations, as follows:

"14-3-501.

Each corporation must continuously maintain in this state:

(1) A registered office with the same address as that of the registered agent; and

(2) A registered agent, who may be:

(A) A person who resides in this state and whose office is identical with the registered office;

(B) A domestic business or nonprofit corporation or domestic limited liability company formed under this chapter or under Chapter 2 of this title whose office is identical with the registered office; or

(C) A foreign business or nonprofit corporation or foreign limited liability company authorized to transact business in this state whose office is identical with the registered office."

SECTION 3-4.

Said title is further amended by revising Code Section 14-3-1507, relating to registered office and registered agent of foreign corporation applicable to nonprofit corporations, as follows:

"14-3-1507.

Each foreign corporation authorized to transact business in this state must continuously maintain in this state:

(1) A registered office that may be the same as any of its places of business; and

(2) A registered agent, who may be:

(A) An individual who resides in this state and whose business office is identical with the registered office;

(B) A domestic corporation, ~~or~~ domestic business corporation, or domestic limited liability company whose business office is identical with the registered office; or

(C) A foreign corporation, ~~or~~ foreign business corporation, or foreign limited liability company authorized to transact business in this state whose business office is identical with the registered office."

SECTION 3-5.

Said title is further amended by revising subsection (b) of Code Section 14-8-46, relating to registered office and registered agent required for foreign limited liability partnership, as follows:

368 "(b) A registered agent must be an individual resident of this state, a domestic corporation,
369 professional corporation, or limited liability company, or a foreign corporation or limited
370 liability company authorized to do business in this state."

371 **SECTION 3-6.**

372 Said title is further amended by revising subsection (b) of Code Section 14-9-902.1, relating
373 to registered agent and office under the "Georgia Revised Uniform Limited Partnership Act,"
374 as follows:

375 "(b) An agent for service of process must be an individual resident of this state, a domestic
376 corporation, professional corporation, or limited liability company, or a foreign corporation
377 or limited liability company authorized to do business in this state."

378 **SECTION 3-7.**

379 Said title is further amended by revising subsection (b) of Code Section 14-11-209, relating
380 to registered office and registered agent applicable to limited liability companies, as follows:

381 "(b) A registered agent must be an individual resident of this state, a corporation, another
382 limited liability company, or a foreign corporation or a foreign limited liability company
383 having a certificate of authority to transact business in this state."

384 **SECTION 3-8.**

385 Said title is further amended by revising subsection (b) of Code Section 14-11-703, relating
386 to registered office and registered agent applicable to foreign limited liability companies, as
387 follows:

388 "(b) A registered agent must be an individual resident of this state, a corporation, limited
389 liability company, or a foreign corporation or another foreign limited liability company
390 having a certificate of authority to transact business in this state."

391 **PART IV**

392 **SECTION 4-1.**

393 Said title is further amended by revising subsection (i) of Code Section 14-8-46, relating to
394 registered office and registered agent required for foreign limited liability partnership,
395 Secretary of State as agent for service of process, and venue, as follows:

396 "(i) Whenever a foreign limited liability partnership required to procure a certificate of
397 authority to do business in this state shall fail to appoint or maintain a registered agent in
398 this state, or whenever its registered agent cannot with reasonable diligence be found at the
399 registered office, the Secretary of State shall be an agent of such foreign limited liability

partnership upon whom any process, notice, or demand may be served. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with the Secretary of State or with any persons designated by the Secretary of State to receive such service ~~two copies~~ a copy of such process, notice, or demand. The plaintiff or his or her attorney shall certify in writing to the Secretary of State that the foreign limited liability partnership failed either to maintain a registered office or appoint a registered agent in this state and that he or she has forwarded by registered mail or statutory overnight delivery such process, service, or demand to the last registered agent at the last registered office listed on the records of the Secretary of State and that service cannot be effected at such office."

SECTION 4-2.

Said title is further amended by revising subsection (f) of Code Section 14-11-209, relating to registered office and registered agent relative to limited liability companies, as follows:

"(f) Whenever a limited liability company shall fail to appoint or maintain a registered agent in this state or whenever its registered agent cannot with reasonable diligence be found at the registered office, then the Secretary of State shall be an agent of such limited liability company upon whom any process, notice, or demand may be served. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with him or her or with any other person or persons designated by the Secretary of State to receive such service ~~two copies~~ a copy of such process, notice, or demand. The plaintiff or his or her attorney shall certify in writing to the Secretary of State that the limited liability company failed either to maintain a registered office or appoint a registered agent in this state and that he or she has forwarded by registered or certified mail or statutory overnight delivery such process, notice, or demand to the most recent registered office listed on the records of the Secretary of State and that service cannot be effected at such office."

SECTION 4-3.

Said title is further amended by revising subsection (h) Code Section 14-11-703, relating to registered office and registered agent and service on Secretary of State relative to foreign limited liability companies, as follows:

"(h) Whenever a foreign limited liability company required to procure a certificate of authority to transact business in this state shall fail to appoint or maintain a registered agent in this state, or whenever its registered agent cannot with reasonable diligence be found at the registered office, then the Secretary of State shall be an agent of such foreign limited liability company upon whom any process, notice, or demand may be served. Service on

435 the Secretary of State of any such process, notice, or demand shall be made by delivering
436 to and leaving with him or her or with any other person or persons designated by the
437 Secretary of State to receive such service ~~two copies~~ a copy of such process, notice, or
438 demand. The plaintiff or his or her attorney shall certify in writing to the Secretary of State
439 that the foreign limited liability company failed either to maintain a registered office or
440 appoint a registered agent in this state and that he or she has forwarded by registered or
441 certified mail or statutory overnight delivery such process, notice, or demand to the last
442 registered agent at the most recent registered office listed on the records of the Secretary
443 of State and that service cannot be effected at such office."

444 **PART V**
445 **SECTION 5-1.**

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