# BUSINESS LAW SECTION
# OF THE
# STATE BAR OF GEORGIA

September 21, 2005

Advisory Committee on Legislation
State Bar of Georgia
c/o Mr. Thomas M. Boller
Boller, Sewell & Segars, Inc.
1100 Spring Street, N.W., Suite 380
Atlanta, Georgia 30309

Dear Tom:

On behalf of the Business Law Section for the State Bar of Georgia (the "Section"), we are submitting herewith proposed amendments to the Georgia Business Corporation Code which our Section recommends be adopted.

Should you have any questions, please feel free to call either of us.

Very truly yours,

______________________________
Thomas R. McNeill
Powell Goldstein LLP
Chairman, Corporate Code Revision
Committee of the Business Law Section
of the State Bar of Georgia

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cc: Robert Bryant, Esq., Chair, Conforming Changes Subcommittee
John Latham, Esq., Chair, Director Liability Subcommittee
Michael G. Wasserman, Esq., Partnerships and LLC Committee
Bruce D. Wanamaker, Esq., Chair, Updating Amendments Subcommittee

**2006 STATE BAR LEGISLATIVE AGENDA**

**GEORIGA BUSINESS CORPORATION CODE, LIMITED PARTNERSHIP ACT, AND LIMITED LIABILITY COMPANY ACT LEGISLATIVE PROPOSAL**

1. Specific legislation (showing changes from current Georgia law) has been proposed and is attached hereto as Exhibit A.

2. An explanation of the proposed legislation is included on Exhibit A.

3. A summary of the relevant existing Georgia law is included in the explanation of the proposed legislation attached hereto as Exhibit A.

4. There are no known opponents of the proposed legislation.

5. No other section of the State Bar of Georgia is believed to have an interest in the proposed legislation.

6. The Business Law Section has adopted this proposal and recommends that this proposal be adopted by the State Bar of Georgia.

7. This proposal is submitted pursuant to Standing Board Policy 100, and the information included with this proposal is provided pursuant to that Policy.

**EXHIBIT A**

**Proposals to Amend**
**Georgia Business Corporation Code**
**Business Law Section**
**Corporate Code Revision Committee**

The Business Law Section of the State Bar of Georgia proposes to amend the Georgia Business Corporation Code, Limited Partnership Act and Limited Liability Company Act in the following respects. A brief description of each set of proposed changes, including the background and reasons for such proposed changes, is followed by a version of the proposed legislation marked to show the proposed changes from the existing statutory scheme, and notes to certain proposed new sections and existing sections that include proposed changes.


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# PROPOSAL 1
# BUSINESS OPPORTUNITIES

### *Advance Renunciation*

The amendments to Code Section 14-2-302 included in this proposal confirm that a corporation has the power to renounce in advance any interest or expectancy the corporation may have in specified business opportunities or classes or categories of business opportunities. This proposed addition is modeled on a similar provision under the General Corporation Law of the State of Delaware. The Kansas, Missouri, Oklahoma and Texas legislatures have also recently adopted statutory provisions similar to Delaware.

This subsection clarifies that a corporation may determine in advance whether a specified business opportunity or class or category of business opportunities is a corporate opportunity to be presented to the corporation, rather than to address such opportunities as they arise. This will allow corporations to attract, for example, directors who might be reluctant to jeopardize future business opportunities through service on the board without an advance agreement clarifying any obligation they might have to present opportunities to the corporation. Without an advance agreement, a corporation could have difficulty in attracting directors engaged in venture capital financing, financial advisory services or other businesses in which they receive, in the ordinary course of business, a variety of business opportunities from third parties with no relationship to the corporation. The proposed subsection is not intended to change existing law in this area, but to confirm and make explicit the corporation's power to enter into these advance agreements.

This subsection does not affect the level of judicial scrutiny that would apply to a board's renunciation of any interest or expectancy of the corporation in a business opportunity, which will continue to be determined based on compliance with the directors' normal duties. See Code Section 14-2-830.

The classes or categories of business opportunities referred to in this subsection may be specified by any manner of defining or delineating business opportunities or the corporation's or any other party's entitlement thereto or interest therein, including, without limitation, by line or type of business, identity of the originator of the business opportunity, identity of the party or parties to or having an interest in the business opportunity, identity of the recipient of the business opportunity, periods of time or geographical location.

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**14-2-302 General Powers.**

…Unless its articles of incorporation provide otherwise, every corporation has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including without limitation power:

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(16) **To renounce, in its articles of incorporation or by action of its board of directors, any interest or expectancy of the corporation in, or in being offered an opportunity to participate in, specified business opportunities or classes or categories of business opportunities that are or may be in the future presented to the corporation, one or more of its officers or directors, or, to the extent discretion or powers of the board of directors are vested in persons other than directors pursuant to Code Sections 14-2-732 or 14-2-920, or the corporation operates without a board of directors pursuant**

**to Code Section 14-2-922, one or more of such persons or shareholders of such corporations**; and

(17) To make payments or donations or do any other act not inconsistent with law that furthers the business and affairs of the corporation.

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**COMMENT**

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**Note to 2006 Amendment:**

New subsection (16) of Code Section 14-2-302 is generally based on Section 122(17) of the General Corporation Law of the State of Delaware, which confirms that a corporation has the power to renounce in advance any interest or expectancy the corporation may have in certain business opportunities. The Delaware provision was adopted to eliminate uncertainty regarding the power of a Delaware corporation to renounce corporate opportunities in advance raised in *Seigman v. Tri-Star Pictures, Inc.*, C.A. No. 9477 (Del. Ch. May 5, 1989, revised May 30, 1989). The Missouri, Oklahoma and Texas legislatures have also recently adopted statutory provisions similar to Delaware's. See Mo. Ann. Stat. § 351.385(20) (West 2003); Okla. Stat. Ann. tit. 18, § 1016(17) (West 2003); Tex. Bus. Corp. Act Ann. art. 2.02(16) (Vernon 2003).

This subsection clarifies that a corporation may determine in advance whether a specified business opportunity or class or category of business opportunities is a corporate opportunity to be presented to the corporation, rather than to address such opportunities as they arise. This will allow corporations to attract, for example, directors who might be reluctant to jeopardize future business opportunities through service on the board without an advance agreement clarifying any obligation they might have to present opportunities to the corporation. Without an advance agreement, a corporation could have difficulty in attracting directors engaged in venture capital financing, financial advisory services or other businesses in which they receive, in the ordinary course of business, a variety of business opportunities from third parties with no relationship to the corporation. The proposed subsection is not intended to change existing law in this area, but to confirm and make explicit the corporation's power to enter into these advance agreements.

This subsection does not affect the level of judicial scrutiny that would apply to a board's renunciation of any interest or expectancy of the corporation in a business opportunity, which will continue to be determined based on compliance with the directors' normal duties. See GBCC Section 14-2-830.

The classes or categories of business opportunities referred to in this subsection may be specified by any manner of defining or delineating business opportunities or the corporation's or any other party's entitlement thereto or interest therein, including, without limitation, by line or type of business, identity of the originator of the business opportunity, identity of the party or parties to or having an interest in the business opportunity, identity of the recipient or potential recipient of the business opportunity, periods of time or geographical location.

This subsection deviates from the Delaware example in some respects. The Delaware statute expressly authorizes renunciation of opportunities presented to shareholders. Code Section 14-2-302(16) refers to shareholders only to the extent that the discretion or powers of the board of directors are vested in such persons pursuant to Code Sections 14-2-732 or 14-2-920, or that the corporation is a statutory close corporation operating without a board of directors pursuant to Code Section 14-922. The Code does not generally establish the corporate opportunity doctrine applicable to officers and directors. Nevertheless, several provisions refer to and affect issues relating to director and officer business opportunities (See O.C.G.A. §§ 14-2-202(b)(4), 14-2-831(a)(1)(c), 14-2-856(b)(1), 14-2-857(a)(2)(A) and new Code Section 14-2-870), making it appropriate to codify the clarification intended by this new

subsection. On the other hand, a corporation would not normally have any interest or expectancy in opportunities available to a shareholder in the shareholder's capacity as such, except to the extent that the discretion or powers of the board of directors are vested in such persons pursuant to Code Sections 14-2-732 or 14-2-920 or such corporation is a statutory close corporation operating without a board of directors under Code Section 14-2-922. Accordingly, inclusion of shareholders in Section 14-2-302(16) absent these special circumstances was deemed unnecessary and potentially misleading in that such inclusion could imply that a shareholder has a general duty to present business opportunities to the corporation. This limitation is not intended to suggest that a corporation lacks authority to renounce in advance any interest or expectancy in business opportunities available to any shareholder that the corporation may have for any reason. Corporations may have reason to renounce such interests in favor of not only shareholders, but also employees, agents, and other persons who are not directors or officers. These and related matters are frequently addressed in shareholder agreements, noncompetition agreements, and employment agreements, as well as in established principles of agency and other law. Corporations remain free to address business opportunity matters with respect to such persons, including shareholders in their capacity as such, in advance or otherwise.

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***Safe Harbor for Business Opportunities***

The amendments to Article 8 of the Code included in this proposal add a new provision to be designated Part 7 (Code Section 14-2-870) pertaining to business opportunities. Proposed new Code Section 14-2-870, which is based on Subchapter G (Section 8.70) of Chapter 8 of the Model Business Corporation Act (the "Model Act"), provides a safe harbor for a director or officer considering possible involvement with a prospective business opportunity that might constitute a "corporate opportunity."

Proposed new Code Section 14-2-870 is modeled on the safe-harbor and approval procedures of part 6 of Article 8 pertaining to conflicting interest transactions with some modifications necessary to accommodate differences in the two topics.

The fact-intensive nature of the corporate opportunity doctrine resists statutory definition and Code Section 14-2-870 accordingly does not define corporate opportunities. Instead, proposed new Code Section 14-2-870 employs the broader notion of "business opportunity" that encompasses any opportunity, without regard to whether it would come within the judicial definition of a "corporate opportunity" as it may have been developed by courts in this state.

Proposed new Code Section 14-2-870 would allow a director or officer to present a business opportunity that might come within the judicial definition of a corporate opportunity to the board or its shareholders for consideration. By following the procedures set forth in Code Section 14-2-870 before proceeding with such involvement, the director or officer could receive a disclaimer of the corporation's interest in the matter by action of the board of directors or the shareholders of the corporation.

In the alternative, the corporation might (i) decline to disclaim its interest, (ii) delay a decision respecting granting a disclaimer pending receipt from the director of additional information (or for any other reason), or (iii) attach conditions to the disclaimer it grants under subsection (a) of Code Section 14-2-870. The safe harbor that would be granted to the director pertains only to the specific opportunity and does not have broader application, such as to a line of business or a geographic area.

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**CODE OF GEORGIA**
**TITLE 14. CORPORATIONS, PARTNERSHIPS, AND ASSOCIATIONS**
**CHAPTER 2. BUSINESS CORPORATIONS**
**ARTICLE 8. DIRECTORS AND OFFICERS**
**PART 7. BUSINESS OPPORTUNITIES**
**OFFICIAL CODE OF GEORGIA ANNOTATED**

**14-2-870 Business Opportunities.**

**(a) A director's taking advantage, directly or indirectly, of a business opportunity may not be the subject of equitable relief, or give rise to an award of damages or other sanctions against the director, in a proceeding by or in the right of the corporation on the ground that such opportunity should have first been offered to the corporation, if the corporation has renounced its interest in such business opportunity pursuant to Code Section 14-2-302 or the director, before becoming legally obligated respecting the opportunity, brings it to the attention of the corporation and:**

**(1) Action by qualified directors disclaiming the corporation's interest in the opportunity is taken 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) Shareholders' action disclaiming the corporation's interest in the opportunity is 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 paragraph (8) of Code Section 14-2-860, in each case the director shall have made prior disclosure to those acting on behalf of the corporation of all material facts concerning the business opportunity that are then known to the director or after modified disclosure in compliance with subsection (b) of this Code section.**

**(b) Notwithstanding subsection (a) of this Code section, if a related person described in subparagraph (E) or subparagraph (F) of paragraph (6) of Code Section 14-2-860 is a party to or has a material financial interest in the prospective business opportunity, the director is not obligated to make prior disclosure to those acting on behalf of the corporation of all material facts concerning the business opportunity that are then known to the director to the extent that the director 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 discloses to the qualified directors voting on the transaction:**

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

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

**(c) An officer's taking advantage, directly or indirectly, of a business opportunity may not be the subject of equitable relief, or give rise to an award of damages or other sanctions against the officer, in an action by or in the right of the corporation on the ground that such opportunity should have first been offered to the corporation, if the corporation has renounced its interest in such business opportunity pursuant to Code Section 14-2-302 or the officer, before becoming legally obligated respecting the opportunity, brings it to the attention of the corporation and:**

**(1) The transaction was approved by the board of directors; or**

**(2) The transaction was approved by the shareholders;**

**in each case after disclosure by the officer to those acting on behalf of the corporation of all material facts concerning the business opportunity that are then known to the officer.**

**(d) In any proceeding seeking equitable relief or other remedies based upon an alleged improper taking advantage of a business opportunity by a director or officer, the fact that the director or officer did not employ the procedure described in subsection (a) or subsection (b) of this Code section before taking advantage of the opportunity shall not create an inference that the opportunity should have been first presented to the corporation or alter the burden of proof otherwise applicable to establish that the director or officer breached a duty to the corporation in the circumstances.**

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**COMMENT**

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**Note to 2006 Amendment (14-2-870):**

Source: Model Act, § 8.70. The language of Code Section 14-2-870 is based on the text of the new Subchapter G of Chapter 8 of the Model Act and the Comments to Code Section 14-2-870 are drawn from and summarize the Official Comments to Subchapter G.

Subsection (a) describes the safe harbor available to a director who elects to subject a business opportunity, regardless of whether the opportunity would be classified as a "corporate opportunity," to the disclosure and approval procedures set forth therein. The safe harbor provided is as broad as that provided for a director's conflicting interest transaction in Code Section 14-2-861: if the director makes required disclosure of the facts specified and the corporation's interest in the opportunity is disclaimed by action by qualified directors under subsection (a)(1) or shareholder action under subsection (a)(2), the director has foreclosed any claimed breach of the duty of loyalty and may not be subject to equitable relief, damages or other sanctions if the director thereafter takes the opportunity for his or her own account or for the benefit of another person. As a general proposition, disclaimer by action by qualified directors under subsection (a)(1) must meet all of the requirements provided in Code Section 14-2-862 with respect to a director's conflicting interest transaction and disclaimer by shareholder action under subsection (a)(2) must likewise comply with all of the requirements for shareholder action under Code Section 14-2-863. Note, however, two important differences.

In contrast to director or shareholder action under Code Sections 14-2-862 and 14-2-863, which may be taken at any time, Code Section 14-2-870(a) requires that the director must present the opportunity and secure action by qualified directors or shareholder action disclaiming it before acting on the opportunity. The safe-harbor concept contemplates that the corporation's decision maker will have full freedom of action in deciding whether the corporation should take over a proffered opportunity or elect to disclaim the corporation's interest in it. If the conflicted director could seek ratification after acting on the opportunity, the option of taking over the opportunity would, in most cases, in reality be foreclosed and the corporation's decision maker would be limited to denying ratification or blessing the interested director's past conduct with a disclaimer. In sum, the safe harbor's benefit is available only when the corporation can entertain the opportunity in a fully objective way.

The second difference also involves procedure. Instead of employing Code Section 14-2-860's definition of "required disclosure" that is incorporated in Code Sections 14-2-862 and 14-2-863, Code Section 14-2-870(a) requires the alternative disclosure to those acting for the corporation of "all material facts concerning the business opportunity that are then known to the director." As a technical matter, Code Section 14-2-860 calls for, in part, disclosure of "the existence and nature of the director's conflicting interest" - that information is not only non-existent but irrelevant for purposes of subsection (a). But there is another consideration justifying replacement of the Code Section 14-2-860 definition. In the case of the director's conflicting interest transaction, the director proposing to enter into a transaction with the corporation has presumably completed due diligence and made an informed judgment respecting the matter; accordingly, that interested director is in a position to disclose "all facts known to the director

respecting the subject matter of the transaction that a director free of such conflicting interest would reasonably believe to be material in deciding whether to proceed with the transaction." The conflicted director, placing himself or herself in the independent director's position, should be able to deal comfortably with the objective materiality standard. In contrast, the director proffering a business opportunity will often not have undertaken due diligence and made an informed judgment to pursue the opportunity following a corporate disclaimer. Thus, the disclosure obligation of subsection (a) requires only that the director reveal all material facts concerning the business opportunity that, at the time when disclosure is made, are known to the director. The safe-harbor procedure shields the director even if a material fact regarding the business opportunity is not disclosed, so long as the proffering director had no knowledge of such fact. In sum, the disclosure requirement for subsection (a) must be and should be different from that called for by the provisions of Article 8, part 6.

Subsection (b), which has no counterpart in the Model Act, is designed to deal, in a manner similar to subsection (b) of Code Section 14-2-862, with situations in which certain entities or persons related to a director are parties to or have a material financial interest in the prospective business opportunity are not able to comply fully with the disclosure requirement of subsection (a) because of an extrinsic duty of confidentiality. Under certain circumstances, subsection (b) makes it possible for such a matter to be brought to the board for consideration under subsection (a) and thus enable both the company and the director to secure the protection afforded by Part 7 for the transaction despite the fact that D cannot make the full disclosure usually required. To comply with subsection (b), D must inform the directors who vote on the transaction of the nature of the duty of confidentiality (e.g., inform them that it arises out of an attorney-client privilege or his duty as a director of Y Co. that prevents him from making the disclosure called for by subsection (a)), disclose all material facts concerning the business opportunity that are then known to the director to the extent such disclosure is not violative of such duty, and then play no personal part in the board's deliberations.

Subsection (c) of Code Section 14-2-870, which has no counterpart in the Model Act, describes the safe harbor available to an officer who elects to subject a business opportunity, regardless of whether the opportunity would be classified as a "corporate opportunity," to the disclosure and approval procedures set forth therein. Subsection (c) is based on Code Section 14-2-864, which restored the safe harbor for conflicting interest transactions between the corporation and its officers formerly provided by O.C.G.A. § 14-2-155 (1982). Because Code Section 14-2-864 specifically provides a safe harbor for officer's conflicting interest transactions, it was feared that negative implications might arise were similar protections not provided by new Code Section 14-2-870 for business opportunities.

Subsection (d) reflects a fundamental difference between the coverage of Parts 6 and 7 of Article 8. Because Part 6 provides an exclusive definition of "director's conflicting interest transaction," any transaction meeting the definition that is not approved in accordance with the provisions of Part 6 is not entitled to its safe harbor. Unless the interested director can, upon challenge, establish the transaction's fairness, the director's conduct is presumptively actionable and subject to the full range of remedies that might otherwise be awarded by a court. In contrast, the concept of "business opportunity" under Code Section 14-2-870 is not defined but is intended to be broader than what might be regarded as an actionable "corporate opportunity." This approach recognizes that, given the vagueness of the corporate opportunity doctrine, a director or officer might be inclined to seek safe-harbor protection under Code Section 14-2-870 before pursuing an opportunity that might or might not at a later point be subject to challenge as a "corporate opportunity." By the same token, a director or officer might conclude that a business opportunity is not a "corporate opportunity" under applicable law and choose to pursue it without seeking a disclaimer by the corporation under Code Section 14-2-870. Accordingly, subsection (d) provides that a decision not to employ the procedures of Code Section 14-2-870(a) neither creates a negative inference nor alters the burden of proof in any subsequent proceeding seeking damages or equitable relief based upon an alleged improper taking of a "corporate opportunity."

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## PROPOSAL 2
## MERGER AND SHARE EXCHANGE; MANNER AND BASIS OF CONVERTING SHARES

The amendments to subsection (b)(3) of Code Section 14-2-1101, subsection (b)(3) of Code Section 14-2-1102, subsection (b)(2) of Code Section 14-2-1104, and clause (C) of subsection (b)(1) of Code Section 14-2-1109 included as part of this proposal are intended to clarify existing law by expressly recognizing the possibility of different treatment of shareholders in a plan of merger or share exchange (i.e., that some of the holders of a single class of shares or series of shares may be required to accept securities or properties while the remaining holders of such class or series may be compelled to accept different securities, property, or cash).

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**14-2-1101 Merger.**

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(b) The plan of merger must set forth:

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(3) The manner and basis of converting the shares of each corporation into shares, obligations, or other securities of the surviving or any other corporation or into cash or other property in whole or in part, and if any shares of any holder of a class or series of shares are to be converted in a manner or basis different than any other holder of shares of such class or series, the manner and basis applicable to each such holder.

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~~(Code 1981, § 14-2-1101, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 2003, p. 897, § 6.)~~

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**COMMENT**

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**Note to 2006 Amendment:**

The amendments to subsection (b)(3) of Code Section 14-2-1101, subsection (b)(3) of Code Section 14-2-1102, subsection (c)(2) of Code Section 14-2-1104 and clause (C) of subsection (c)(1) of Code Section 14-2-1109 are intended to clarify existing law by expressly recognizing the possibility of different treatment of shareholders in a plan of merger or share exchange (i.e., that some of the holders of a single class of shares or series of shares may be required to accept securities or properties while the remaining holders of such class or series may be compelled to accept different securities, property, or cash). The amendments require that where holders of the same class or series of shares are to be treated differently in a plan of merger or exchange, the plan of merger or exchange must set forth the manner and basis for the conversion of shares of each class or series or group of shareholders who are to be treated differently.

In order to protect shareholders who may be treated differently in a plan of merger or exchange, new clause (B) of subsection (d)(1) of Code Section 14-2-1302 would exclude such shareholders from the "market exception" of Code Section 14-2-1302, which eliminates dissenters rights for transactions involving the issuance of shares of a public corporation. This new clause provides that a shareholder shall not be required by the terms of the plan of merger or exchange to accept any consideration that is different than the consideration to be provided to the holder of any other shares of the same class or series of shares held by that shareholder, although it does not require dissenters' rights where the acquiring

entity's shares in the target company are canceled without consideration and all other shareholders are otherwise treated the same.

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**14-2-1102 Share exchange.**

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(b) The plan of share exchange must set forth:

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(3) The manner and basis of exchanging the shares to be acquired for shares, obligations, or other securities of the acquiring or any other corporation or for cash or other property in whole or in part, and if any shares of any holder of a class or series of shares are to be exchanged in a manner or basis different than any other holder of shares of such class or series, the manner and basis applicable to each such holder.

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~~(Code 1981, § 14-2-1102, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 2003, p. 897, § 7.)~~

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**14-2-1104 Merger with subsidiary.**

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(b) The board of directors of the parent shall adopt a plan of merger that sets forth:

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(2) The manner and basis of converting the shares of the parent or subsidiary into shares, obligations, or other securities of the surviving corporation or any other corporation or into cash or other property in whole or in part, and if any shares of any holder of a class or series of shares are to be converted in a manner or basis different than any other holder of shares of such class or series, the manner and basis applicable to each such holder.

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~~(Code 1981, § 14-2-1104, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1999, p. 405, § 8; Ga. L. 2003, p. 897, § 8.)~~

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**14-2-1109 Merger with other entities.**

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(d) The plan of merger:

(1) Must set forth:

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(C) The manner and basis of converting the shares of each corporation and the shares, memberships, or financial or beneficial interests or units in each of the entities into shares, obligations, or other securities of the surviving or any other corporation or entity or into cash or other property in whole or in part, and if any shares of any holder of a class or series of shares are to be converted in a manner or basis different than any other holder of shares of such class or series, the manner and basis applicable to each such holder;

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**14-2-1302 Right to dissent.**

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(c) Notwithstanding any other provision of this article, there shall be no right of dissent in favor of the holder of shares of any class or series which, at the record date fixed to determine the shareholders entitled to receive notice of and to vote at a meeting at which a plan of merger or share exchange or a sale or exchange of property or an amendment of the articles of incorporation is to be acted on, were either listed on a national securities exchange or held of record by more than 2,000 shareholders, unless:

(1) In the case of a plan of merger or share exchange, any holders of shares of the class or series are required under the plan of merger or share exchange to accept for their shares:

(A) anything except shares of the surviving corporation or another publicly held corporation which at the effective date of the merger or share exchange are either listed on a national securities exchange or held of record by more than 2,000 shareholders, except for scrip or cash payments in lieu of fractional shares; or

(B) any shares of the surviving corporation or another publicly held corporation which at the effective date of the merger or share exchange are either listed on a national securities exchange or held of record by more than 2,000 shareholders that are different (in type or exchange ratio per share) than the shares to be provided or offered to any other holder of shares of the same class or series of shares in exchange for such shares; or

(2) The articles of incorporation or a resolution of the board of directors approving the transaction provides otherwise.

~~(Code 1981, § 14-2-1302, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 58; Ga. L. 1999, p. 405, § 11; Ga. L. 2003, p. 897, § 11.)~~

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## PROPOSAL 3
## AUTHORIZATION OF MERGER AGREEMENT PROVISIONS PERMITTING CERTAIN AMENDMENTS AFTER SHAREHOLDER APPROVAL

Proposed new subsection (c)(2) of Code Section 14-2-1101 (Merger) would confirm and clarify a corporation's authority to include provisions in plan of merger that would permit a corporation to amend the plan in certain respects subsequent to shareholder approval. Comparable provisions with conforming changes are included in the proposed amendments to Code Sections 14-2-1102 (Share exchange) and 14-2-1109 (Merger with other entities). These proposed changes are based on Sections 11.02(e) and 11.03(e) of the Model Act, and Section 251(d) of the General Corporation Law of the State of Delaware (the "DGCL").

In general, the amendments to these provisions are designed to permit amendments to agreements of merger or share exchange after the shareholders have approved such an agreement and prior to the effective time of such a merger or share exchange. These amendments specifically do not permit such a change in the amount and kind of consideration to received in the merger or share exchange or in the terms of the articles of incorporation (or comparable governing document) of the surviving corporation (or other entity) to the extent such change would adversely affect the shareholder recipients without express prior authorization of the shareholders. In addition, no alteration or change in the terms and condition of the merger or share exchange would be permitted without express prior authorization of the shareholders if it would adversely affect the shareholders who have already voted on the agreement in any material respect.

Amendments to a plan of merger or share exchange made after the articles or a certificate of merger are filed but prior to the effective time of such merger or share exchange would require, in a manner similar to Section 251(d) of the DGCL, that a certificate of amendment be delivered to the Secretary of State of the State of Georgia for filing prior to the effectiveness of the merger or share exchange.

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**14-2-1101 Merger.**

(a) One or more corporations may merge into another corporation if the board of directors of each corporation adopts and its shareholders (if required by Code Section 14-2-1103) approve a plan of merger.

(b) The plan of merger must set forth:

(1) The name of each corporation planning to merge and the name of the surviving corporation into which each other corporation plans to merge;

(2) The terms and conditions of the merger; and

(3) The manner and basis of converting the shares of each corporation into shares or other securities, obligations, rights to acquire shares or other securities~~ of the surviving or any other corporation or into cash or other property in whole or in part~~, cash, other property, or any combination of the foregoing, and if any shares of any holder of a class or series of shares are to be converted in a manner or basis different than any other holder of shares of such class or series, the manner and basis applicable to each such holder.

(c) The plan of merger may set forth:

(1) Amendments to the articles of incorporation of the surviving corporation;~~ and~~

(2) A provision that the plan may be amended prior to the time that the merger has become effective, but if shareholders of a corporation that is a party to the merger are required or permitted to vote on the plan, subsequent to approval of the plan by such shareholders the plan may not be amended to change in any respect not expressly authorized by such shareholders in connection with the approval of the plan:

(A) The amount or kind of shares or other securities, obligations, rights to acquire shares or other securities, cash, or other property to be received under the plan by the shareholders of any party to the merger if the change would adversely affect such shareholders;

(B) The articles of incorporation of any corporation that will survive as a result of the merger, except for changes permitted by Code Section 14-2-1002 or changes that would not adversely affect such shareholders; or

(C) Any of the other terms or conditions of the plan if the change would adversely affect such shareholders in any material respect; and

in the event that the plan of merger is amended after articles or a certificate of merger has been filed with the Secretary of State but before the merger has become effective, a certificate of amendment of merger executed on behalf of each party to the merger by an officer or other duly authorized representative shall be delivered to the Secretary of State for filing prior to the effectiveness of the merger; and

(3) Other provisions relating to the merger.

(d) Any of the terms of the plan of merger may be made dependent upon facts ascertainable outside of the plan of merger, provided that the manner in which such facts shall operate upon the terms of the merger is clearly and expressly set forth in the plan of merger. As used in this subsection, the term “facts” includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation.

~~(Code 1981, § 14-2-1101, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 2003, p. 897, § 6.)~~

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**COMMENT**

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**Note to 2006 Amendment (14-2-1101):**

Source: Model Act, § 11.02(e) and Section 251(d) of the General Corporation Law of the State of Delaware.

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**14-2-1102 Share exchange.**

(a) A corporation may acquire all of the outstanding shares of one or more classes or series of another corporation through a share exchange if the board of directors of each corporation adopts and its shareholders (if required by Code Section 14-2-1103) approve the share exchange.

(b) The plan of share exchange must set forth:

(1) The name of the corporation whose shares will be acquired and the name of the acquiring corporation;

(2) The terms and conditions of the share exchange;

(3) The manner and basis of exchanging the shares to be acquired for shares or other securities,

obligations, rights to acquire shares or other securities ~~of the acquiring or any other corporation or for cash or other property in whole or in part~~, cash, other property, or any combination of the foregoing, and if any shares of any holder of a class or series of shares are to be exchanged in a manner or basis different than any other holder of shares of such class or series, the manner and basis applicable to each such holder.

(c) The plan of share exchange may set forth other provisions relating to the share exchange, including a provision that the plan may be amended prior to the time that the share exchange has become effective, but if shareholders of a corporation that is a party to the share exchange are required or permitted to vote on the plan, subsequent to approval of the plan by such shareholders the plan may not be amended to change in any respect not expressly authorized by such shareholders in connection with the approval of the plan:

(1) The amount or kind of shares or other securities, obligations, rights to acquire shares or other securities, cash, or other property to be issued by the corporation or to be received under the plan by the shareholders of any party to the share exchange if the change would adversely affect such shareholders;

(2) Any of the other terms or conditions of the plan if the change would adversely affect such shareholders in any material respect; and

in the event that the plan of share exchange is amended after articles or a certificate of share exchange has been filed with the Secretary of State but before the share exchange has become effective, a certificate of amendment of share exchange executed on behalf of each party to the share exchange by an officer or other duly authorized representative shall be delivered to the Secretary of State for filing prior to the effectiveness of the share exchange.

(d) Any of the terms of the plan of share exchange may be made dependent upon facts ascertainable outside of the plan of share exchange, provided that the manner in which such facts shall operate upon the terms of the share exchange is clearly and expressly set forth in the plan of share exchange. As used in this subsection, the term "facts" includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation.

(e) This Code section does not limit the power of a corporation to acquire all or part of the shares of one or more classes or series of another corporation through a voluntary exchange of shares or otherwise.

~~(Code 1981, § 14-2-1102, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 2003, p. 897, § 7.)~~

**COMMENT**

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**Note to 2006 Amendment (14-2-1102):**

Source: Model Act, § 11.03(e) and Section 251(d) of the General Corporation Law of the State of Delaware.

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**14-2-1109 Merger with other entities.**

(a) As used in this Code section, the term:

(1) "Entity" includes any domestic or foreign nonprofit corporation, domestic or foreign limited liability company, domestic or foreign joint stock association, or domestic or foreign limited partnership.

(2) "Governing agreements" includes the articles of incorporation and bylaws of a corporation or

nonprofit corporation, articles of association or trust agreement or indenture and bylaws of a joint stock association, articles of organization and operating agreement of a limited liability company, and the certificate of limited partnership and limited partnership agreement of a limited partnership, and agreements serving comparable purposes under the laws of other states or jurisdictions.

(3) "Joint-stock association" includes any association of the kind commonly known as a joint-stock association or joint-stock company and any unincorporated association, trust, or enterprise having members or having outstanding shares of stock or other evidences of financial and beneficial interest therein, whether formed by agreement or under statutory authority or otherwise, but does not include a corporation, partnership, limited liability partnership, limited liability company, or nonprofit organization. A joint-stock association as defined in this paragraph may be one formed under the laws of this state, including a trust created pursuant to Article 3 of Chapter 12 of Title 53, or one formed under or pursuant to the laws of any other state or jurisdiction.

(4) "Limited liability company" includes limited liability companies formed under the laws of this state or of any other state or territory or the District of Columbia, unless the laws of such other state or jurisdiction forbid the merger of a limited liability company with a corporation.

(5) "Limited partnership" includes limited partnerships formed under the laws of this state or of any other state or territory or the District of Columbia, unless the laws of such other state or jurisdiction forbid the merger of a limited partnership with a corporation.

(6) "Nonprofit corporation" includes corporations which may make no distributions to their members, directors, or officers, except as reasonable compensation for services rendered, and except as otherwise provided by law, formed under the laws of this state or of any other state or territory or the District of Columbia, unless the laws of such other state or jurisdiction forbid the merger of a nonprofit corporation with a corporation formed under a general corporation law.

(7) "Share" includes shares, memberships, financial or beneficial interests, units, or proprietary or partnership interests in a limited liability company, joint-stock association or a limited partnership, but does not include debt obligations of any entity.

(8) "Shareholder" includes every member of a limited liability company or a joint-stock association that is a party to a merger or holder of a share of stock or other evidence of financial or beneficial interest therein.

(b) Any one or more domestic corporations may merge with one or more entities, except an entity formed under the laws of a state or jurisdiction which forbids a merger with a corporation. The corporation or corporations and one or more entities may merge into a single corporation or other entity, which may be any one of the constituent corporations or entities.

(c) The board of directors of each merging corporation and the appropriate body of each entity, in accordance with its governing agreements and the laws of the state or jurisdiction under which it was formed, shall adopt a plan of merger in accordance with each corporation's and entity's governing agreements and the laws of the state or jurisdiction under which it was formed, as the case may be.

(d) The plan of merger:

(1) Must set forth:

(A) The name of each corporation and entity planning to merge and the name of the surviving corporation or entity into which each other corporation and entity plans to merge;

(B) The terms and conditions of the merger; and

(C) The manner and basis of converting the shares of each corporation and the shares, memberships, or financial or beneficial interests or units in each of the entities into shares or other

securities, obligations, rights to acquire shares or other securities~~ of the surviving or any other corporation or entity or into cash or other property in whole or in part~~, cash, other property, or any combination of the foregoing, and if any shares of any holder of a class or series of shares are to be converted in a manner or basis different than any other holder of shares of such class or series, the manner and basis applicable to each such holder;

(2) May set forth:

(A) Amendments to the articles of incorporation or governing agreements of the surviving corporation or entity; ~~and~~

(B) A provision that the plan may be amended prior to the time that the merger has become effective, but if shareholders of a domestic corporation that is a party to the merger or shareholders, partners, or members of a domestic entity that is a party to the merger are required or permitted to vote on the plan, subsequent to approval of the plan by such shareholders, partners, or members the plan may not be amended to change in any respect not expressly authorized by such approving shareholders, partners, or members in connection with the approval of the plan:

(i) The amount or kind of shares or other securities, obligations, rights to acquire shares or other securities, cash, or other property to be received under the plan by the shareholders, partners, or members of any party to the merger if the change would adversely affect such approving shareholders, partners, or members;

(ii) The articles or certificate of incorporation of any domestic or foreign corporation, or the governing agreements of any other entity, that will survive or be created as a result of the merger, except for changes permitted by Code Section 14-2-1002 or by comparable provisions of the laws of the state or jurisdiction under which any such other entity was organized or changes that would not adversely affect such approving shareholders, partners, or members; or

(iii) Any of the other terms or conditions of the plan if the change would adversely affect such approving shareholders, partners, or members in any material respect; and

in the event that the plan of merger is amended after articles or a certificate of merger has been filed with the Secretary of State but before the merger has become effective, a certificate of amendment of merger executed on behalf of each party to the merger by an officer or other duly authorized representative shall be delivered to the Secretary of State for filing prior to the effectiveness of the merger; and

(C) Other provisions relating to the merger.

(e) Any of the terms of the plan of merger may be made dependent upon facts ascertainable outside of the plan of merger, provided that the manner in which such facts shall operate upon the terms of the merger is clearly and expressly set forth in the plan of merger. As used in this subsection, the term “facts” includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation.

(f) For a plan of merger to be approved, the board of directors of each merging corporation must recommend the plan of merger to the shareholders in the same manner and to the same extent as provided in Code Section 14-2- 1103. In the case of any other entity, the plan of merger shall be approved in the manner required by its governing agreements and in compliance with any applicable laws of the state or jurisdiction under which it was formed. In addition, each of the corporations shall comply with all other Code sections of this chapter which relate to the merger of domestic corporations. Each other entity shall comply with all other provisions of its governing agreements and all provisions of the laws, if any, of the state or jurisdiction in which it was formed which relate to the merger.

(g) Each merging corporation shall comply with the requirements of Code Section 14-2-1105.

~~(Code 1981, § 14-2-1109, enacted by Ga. L. 1988, p. 1070, § 1; Ga. L. 1989, p. 946, § 51; Ga. L. 1991, p. 810, § 6; Ga. L. 1996, p. 1203, § 8; Ga. L. 1997, p. 143, § 14; Ga. L. 2003, p. 897, § 10.)~~

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**COMMENT**

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**Note to 2006 Amendment (14-2-1109):**

Source: Model Act, § 11.02(e) and Section 251(d) of the General Corporation Law of the State of Delaware.

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## PROPOSAL 4
## SUBMISSION OF MATTERS FOR SHAREHOLDER APPROVAL

The Code requires that certain matters, such as certain amendments to the articles of incorporation, certain mergers, dispositions of all or substantially all assets and dissolution, be submitted to shareholders for approval. In addition, stock exchange listing requirements mandate that certain matters be submitted for shareholder approval in the absence of a state law requirement, and shareholder approval may be necessary to secure certain benefits that are available under securities and tax laws or regulations. Proposed new Code Section 14-2-305, which is based on Section 146 of the General Corporation Law of the State of Delaware, and the corresponding amendments to Code Sections 14-2-1003, 14-2-1103, 14-2-1202 and 14-2-1402 included in this proposal, confirm that a board of directors can commit a corporation to submit a matter for shareholder approval even if the board of directors subsequently determines to recommend against the matter.

***

**14-2-305 Submitting a matter to shareholders for approval.**

Subject to the requirements set forth in subsection (b)(1) of Code Section 14-2-1003, in the case of amendments to the articles of incorporation, subsection (b)(1) of Code Section 14-2-1103, in the case of a plan of merger or share exchange, subsection (b)(1) of Code Section 14-2-1202, in the case of a disposition of assets requiring shareholder approval, and subsection (b)(1) of Code Section 14-2-1402, in the case of dissolution, a corporation may agree to submit a matter to a vote of its shareholders regardless of whether the board of directors determines at any time subsequent to adopting or approving such matter that such matter is no longer advisable and recommends that the shareholders reject or vote against the matter.

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**COMMENT**

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**Note to 2006 Amendment (14-2-305):**

The addition of new Code Section 14-2-305 coupled with the amendments to language in subsections (b)(1) of Code Sections 14-2-1003, 14-2-1103, 14-2-1202 and 14-2-1402, clarify that directors may authorize the corporation to agree with another person to submit a matter to shareholders, but reserve the ability to change their recommendation.

***

**14-2-1003 Amendment by board of directors and shareholders.**

***

(b) …

(1) The board of directors must ~~recommend the amendment~~also transmit to the shareholders a recommendation that the shareholders approve the amendment, unless the board of directors ~~elects,~~makes a determination that because of ~~a conflict~~conflicts of interest or other special circumstances~~, to make no recommendation and communicates the basis for its election to the shareholders with the amendment; and~~ it should either refrain from making such a recommendation or recommend that the shareholders reject or vote against the amendment, in which case the board of directors must transmit to the shareholders the basis for that determination.

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**14-2-1103 Action on plan.**

****

(b) …

(1) The board of directors must ~~recommend the plan of merger or share exchange~~also transmit to the shareholders a recommendation that the shareholders approve the plan, unless the board of directors ~~elects,~~makes a determination that because of ~~conflict~~conflicts of interest or other special circumstances~~, to make no recommendation and communicates the basis for its election to the shareholders with the plan; and~~ it should either refrain from making such a recommendation or recommend that the shareholders reject or vote against the plan, in which case the board of directors must transmit to the shareholders the basis for that determination.

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**14-2-1202 Sale of assets requiring shareholder approval.**

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(b) …

(1) The board of directors ~~must recommend the proposed transaction to the shareholders~~shall also transmit to the shareholders a recommendation that the shareholders approve the proposed disposition, unless the board of directors ~~elects,~~makes a determination that because of ~~conflict~~conflicts of interest or other special circumstances~~, to make no recommendation and communicates the basis for its election to the shareholders with the submission of the proposed transaction; and~~ it should either refrain from making such a recommendation or recommend that the shareholders reject or vote against the plan, in which case the board of directors shall transmit to the shareholders the basis for that determination.

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**14-2-1402 Dissolution by board of directors and shareholders.**

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(b) ~~…~~

(1) The board of directors must ~~recommend dissolution~~also transmit to the shareholders a recommendation that the shareholders approve the proposed dissolution, unless the board of directors ~~elects,~~makes a determination that because of ~~a conflict~~conflicts of interest or other special circumstances~~, to make no recommendation and communicates the basis for its determination to the shareholders; and~~ it should either refrain from making such a recommendation or recommend that the shareholders reject or vote against dissolution, in which case the board of directors shall transmit to the shareholders the basis for that determination.

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## PROPOSAL 5
## ACTIONS OF AND FUNDAMENTAL CHANGES TO CORPORATION IN PROCEEDING UNDER THE FEDERAL BANKRUPTCY CODE

In order to effect the orders of a bankruptcy court, Georgia corporations in bankruptcy must often take actions that would generally require the approval of directors or directors and shareholders. For example, the bankruptcy court might order changes to the bankrupt corporation's articles of incorporation and bylaws or order a sale of all or substantially all of the corporation's assets. Such actions would typically require director approval or director and shareholder approval under other sections of the Code. See., e.g., Code Sections 14-2-1003 and 14-2-1202. Although the Code currently provides a simplified method of conforming amendments to articles of incorporation filed under state law with federal statutes relating corporate reorganization pursuant to Code Section 14-2-1008, it is silent with respect to other fundamental changes or actions taken pursuant to the decree or order of a bankruptcy court.

Proposed new Code Section 14-2-104, which is based on Section 303 of the General Corporation Law of the State of Delaware, would confirm the corporation's authority to undertake all such actions, including amendments to articles of incorporation, without obtaining such approvals. Accordingly, the amendments included in this proposal would delete Code Section 14-2-1008.

Where the action requires the filing of articles or a certificate with the Secretary of State, subsection (c) of proposed new Code Section 14-2-104 specifically provides that the articles or certificate may certify that it was filed pursuant to the decree or order of a bankruptcy court.

Proposed new Code Section 14-2-104 applies to any type of federal bankruptcy proceeding, whether liquidation or reorganization, and the validity of the action taken thereunder would not be dependent on the existence or pendency of a confirmed plan of reorganization.

***

**14-2-104 Proceeding under the Federal Bankruptcy Code.**

**(a) Any corporation, an order for relief with respect to which has been entered pursuant to the Federal Bankruptcy Code, 11 U.S.C. §§101, et seq., or any successor statute, may put into effect and carry out any decrees and orders of the court or judge in such bankruptcy proceeding and may take any corporate action provided or directed by such decrees and orders, without further action by its directors or shareholders. Such power and authority may be exercised, and such corporate action may be taken, as may be directed by such decrees or orders, by the trustee or trustees of such corporation appointed or elected in the bankruptcy proceeding (or a majority thereof), or if none be appointed or elected and acting, by designated officers of the corporation, or by a representative appointed by the court or judge, with like effect as if exercised and taken by unanimous action of the directors and shareholders of the corporation.**

**(b) Such corporation may, in the manner provided in subsection (a) of this section, but without limiting the generality or effect of the foregoing, alter, amend or repeal its bylaws; constitute or reconstitute and classify or reclassify its board of directors, and name, constitute or appoint directors and officers in place of or in addition to all or some of the directors or officers then in office; amend its articles of incorporation, and make any change in its shares, or any other amendment, change, or alteration, or provision, authorized by this chapter; be dissolved, transfer all or part of its assets, merge or effect any share exchange in connection with any action taken under this Code section; change the location of its registered office, change its registered agent, and**

**remove or appoint any agent to receive service of process; authorize and fix the terms, manner and conditions of, the issuance of bonds, debentures or other obligations, regardless of whether convertible into shares of any class or series, or bearing warrants or other evidences of optional rights to purchase or subscribe for shares of any class or series; or lease its property and franchises to any corporation, if permitted by law. No shareholder shall have the right to dissent under Article 13 with respect to such shareholder's shares in connection with any action taken under this Code section.**

**(c) Articles or a certificate of any amendment, correction or of merger, share exchange or dissolution, made by such corporation pursuant to the foregoing provisions, shall be filed with the Secretary of State in accordance with Code Section 14-2-120, and, subject to Code Section 14-2-123 and Code Section 14-2-124, shall thereupon become effective in accordance with its terms and the provisions hereof. Such articles or certificate or other instrument shall be made, executed and acknowledged, as may be directed by such decrees or orders, by the trustee or trustees appointed or elected in the bankruptcy proceeding (or a majority thereof), or, if none be appointed or elected and acting, by the officers of the corporation, or by a representative appointed by the court or judge, and shall certify that provision for the making of such articles, certificate, or instrument is contained in a decree or order of a court or judge having jurisdiction of a proceeding under such Federal Bankruptcy Code or successor statute.**

**(d) This Code section shall cease to apply to such corporation upon the entry of a final decree in the bankruptcy proceeding closing the case and discharging the trustee or trustees, if any; provided, however, that the closing of a case and discharge of trustee or trustees, if any, will not affect the validity of any act previously performed pursuant to subsections (a) through (c) of this Code section.**

**(e) On filing any articles, certificate, report or other paper made or executed pursuant to this Code section, there shall be paid to the Secretary of State for the use of the State the same fees as are payable by corporations not in bankruptcy upon the filing of like articles, certificates, agreements, reports or other papers.**

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**COMMENT**

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**Note to 2006 Amendment (14-2-104):**

New Code Section 14-2-104 is an enabling provision confirming the authority of persons operating under authority of a federal bankruptcy court to implement plans of liquidation or reorganization approved by such court. It permits trustees or others empowered by a bankruptcy court to do that which is necessary as a matter of Georgia law to give effect corporate actions or fundamental changes without directorial or shareholder approval. The validity of the action taken under Code Section 14-2-104 is not be dependent on the existence or pendency of a confirmed plan of reorganization and the authority granted thereunder terminates upon the completion of such a bankruptcy proceeding.

***

**14-2-1008 ~~Amendment pursuant to reorganization~~Reserved.**

~~(a) A corporation's articles of incorporation may be amended without action by the board of directors or shareholders to carry out a plan of reorganization ordered or decreed by a court of competent jurisdiction under federal statute if the articles of incorporation after amendment contain only provisions required or permitted by Code Section 14-2-202.~~

~~(b) The individual or individuals designated by the court shall deliver to the Secretary of State for filing articles of amendment setting forth:~~

~~(1) The name of the corporation;~~

~~(2) The text of each amendment approved by the court;~~

~~(3) The date of the court's order or decree approving the articles of amendment;~~

~~(4) The title of the reorganization proceeding in which the order or decree was entered; and~~

~~(5) A statement that the court had jurisdiction of the proceeding under federal statute.~~

~~(c) Shareholders of a corporation undergoing reorganization do not have dissenters' rights except as and to the extent provided in the reorganization plan.~~

~~(d) This Code section does not apply after entry of a final decree in the reorganization proceeding even though the court retains jurisdiction of the proceeding for limited purposes unrelated to consummation of the reorganization plan.~~

~~(Code 1981, § 14-2-1008, enacted by Ga. L. 1988, p. 1070, § 1.)~~

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**PROPOSAL 6**
**INDEMNIFICATION**

## § 14-2-854. Court-ordered indemnification

(a) A director who is a party to a proceeding because he or she is a director may apply for indemnification or advance for expenses to the court conducting the proceeding or to another court of competent jurisdiction. After receipt of an application and after giving any notice it considers necessary, the court shall:

(1) Order indemnification or advance for expenses if it determines that the director is entitled to indemnification or advance for expenses under this part; or

(2) Order indemnification or advance for expenses if it determines, in view of all the relevant circumstances, that it is fair and reasonable to indemnify the director or to advance expenses to the director, even if the director has not met the relevant standard of conduct set forth in subsections (a) and (b) of Code Section 14-2-851, failed to comply with Code Section 14-2-853, or was adjudged liable in a proceeding referred to in paragraph (1) or (2) of subsection (d) of Code Section 14-2-851, but if the director was adjudged so liable, the indemnification shall be limited to reasonable expenses incurred in connection with the proceeding.

(b) If the court determines that the director is entitled to indemnification or advance for expenses under ~~this part~~subsection (a)(1), it ~~may~~shall also order the corporation to pay the director's reasonable expenses to obtain court-ordered indemnification or advance for expenses. If the court determines that the director is entitled to indemnification or advance for expenses under subsection (a)(2), it may also order the corporation to pay the director's reasonable expenses to obtain court-ordered indemnification or advance for expenses.

(c) The court may summarily determine, without a jury, a corporation's obligation to advance expenses.

Notes:

1. The proposed change to subsection (a)(1) is intended to make it clear that the court need not determine a director's ultimate entitlement to indemnification before ordering advancement of expenses. Advancement of expenses may be enforced if the director meets the conditions set forth in Code Section 14-2-853.
2. The proposed change to subsection (b) aligns Code Section 14-2-854 with the Model Business Corporation Act Section 8.54(b), which provides for a mandatory award of litigation expenses incurred by a director in successfully enforcing his or her rights to indemnification or advancement of expenses. Otherwise, the director will not receive the full benefit of the indemnification or advancement award, because it will be reduced by the additional expenses incurred in enforcing those rights. The remainder of subsection (b) preserves the court's discretion under the existing version of Code Section 14-2-854(b) to award litigation expenses when the court has awarded indemnification or advancement on a discretionary basis.

3. Subsection (c) is new. It is patterned after Section 145(k) of the Delaware General Corporation Code, which authorizes (but does not require) the Delaware Chancery Court to summarily determine advancement questions. As in Chancery Court, the Georgia courts should be empowered to determine advancement on a non-jury basis. See *Westbury Square Townhouses Association, Inc. v. Bryan*, 223 Ga. App. 885, 479 S.E.2d 190 (1996) (proceedings under O.C.G.A. § 14-2-1604 for enforcement of shareholder rights to inspection of corporate books and records that permit the court to "summarily order" inspection and copying of certain categories of records and mandate "expedited" disposition of applications to inspect other categories of records may proceed by means of a show-cause order and should be conducted on a non-jury basis).

**§ 14-2-859. Obligation for indemnification or advance for expenses in advance of act or omission**

(a) A corporation may, by a provision in its articles of incorporation or bylaws or in a resolution adopted or a contract approved by its board of directors or shareholders, obligate itself in advance of the act or omission giving rise to a proceeding to provide indemnification or advance funds to pay for or reimburse expenses consistent with this part. Any such obligatory provision shall be deemed to satisfy the requirements for authorization referred to in subsection (c) of Code Section 14-2-853 or subsection (c) of Code Section 14-2-855. Any such provision that obligates the corporation to provide indemnification to the fullest extent permitted by law shall be deemed to obligate the corporation to advance funds to pay for or reimburse expenses in accordance with Code Section 14-2-853 to the fullest extent permitted by law, unless the provision specifically provides otherwise.

(b) Any provision pursuant to subsection (a) of this Code section shall not obligate the corporation to indemnify or advance expenses to a director of a predecessor of the corporation, pertaining to conduct with respect to the predecessor, unless otherwise specifically provided. Any provision for indemnification or advance for expenses in the articles of incorporation, bylaws, or a resolution of the board of directors or shareholders, partners, or, in the case of limited liability companies, members or managers of a predecessor of the corporation or other entity in a merger or in a contract to which the predecessor is a party, existing at the time the merger takes effect, shall be governed by paragraph (3) of subsection (a) of Code Section 14-2-1106.
(c) A corporation may, by a provision in its articles of incorporation, limit any of the rights to indemnification or advance for expenses created by or pursuant to this part.

(d) This part does not limit a corporation's power to pay or reimburse expenses incurred by a director or an officer in connection with his or her appearance as a witness in a proceeding at a time when he or she is not a party.

(e) Except as expressly provided in Code Section 14-2-857, this part does not limit a corporation's power to indemnify, advance expenses to, or provide or maintain insurance on behalf of an employee or agent.

(f) Any provision in a corporation's articles of incorporation or bylaws or in a resolution adopted or contract approved by its board of directors or shareholders that obligates the corporation to provide indemnification to the fullest extent permitted by law shall, unless such provision or another provision in the corporation's articles of incorporation or bylaws or in a resolution adopted or a contract approved by its board of directors or shareholders expressly provides otherwise, be deemed to obligate the corporation:

**(i)** to advance funds to pay for or reimburse expenses in accordance with Code Section 14-2-853 to the fullest extent permitted by law; and
**(ii)** to indemnify directors to the fullest extent permitted in Code Section 14-2-856,

provided that such provision is duly authorized as required in Code Section 14-2-856(a), and to indemnify officers to the fullest extent permitted in Code Section 14-2-857(a)(2) and -(b).

Notes:

1. The proposed new subsection (f) of Code Section 14-2-859 is intended to provide statutory rules of construction for the language frequently used by corporate practitioners in drafting mandatory indemnification provisions, that obligates the corporation to indemnify its officers and directors to "the fullest extent permitted by law." Subsection (f)(i) relocates the existing language in the last sentence of existing Code Section 14-2-859(a). Subsection (f)(ii) is new. It is intended to remove any doubt regarding whether "fullest extent permitted by law" language effectively triggers the extra measures of indemnification available under Code Sections 14-2-856 (for directors) and 14-2-857 (for officers). Corporations who do not wish to extend those extra measures of indemnification can do so either by avoiding use of the "fullest extent" language or by expressly providing to the contrary.

## PROPOSAL 7
## OTHER TECHNICAL CORRECTIONS

***Rename Code Section 14-2-731 Voting Agreements***

Consistent with the comparable provision of the Model Act, change title of Code Section 14-2-731 from "Shareholders agreements" to "Voting agreements." This will eliminate confusion with Code Section 14-2-732, which was adopted in 2000 and is also entitled "Shareholder agreements."

***Corporate Name Provisions (Code Sections 14-2-403 and 14-2-1506)***

Amend clause 2 of subsection (b) of each of Code Section 14-2-401 (Corporate name) and Code Section 14-2-1506 (Corporate name of foreign corporation) to delete references to "or registered" and "or 14-2-403." Code Section 14-2-403, which was repealed in 2002, provided a means by which a foreign corporation, not qualified to transact business in Georgia, could preserve the right to use its unique real name if it subsequently elected to qualify in Georgia.

***Business Combinations (Part 3 of Article 11)***

Substitute the term "shareholder" for "stockholder" in the title of Article 11, Part 3 and Code Section 14-2-1132 (each entitled "Business Combinations with Interested Stockholders").

## PROPOSAL 8
## CONFORMING CHANGES

*Conversion of Qualified Foreign Entities*

It is now commonplace for state statutes to permit an entity to convert from one form into another; for example, from a corporation into a limited liability company. Georgia currently has no procedure that applies when an entity that is qualified as a foreign entity in Georgia changes its form in its home state. For example, if a Delaware corporation that is qualified as a foreign corporation in Georgia converts into a Delaware limited liability company, it must go through the cumbersome process of withdrawing as a foreign corporation and requalifying as a foreign LLC.

This legislative proposal streamlines the process. A qualified foreign entity that changes its form would notify the Secretary of State no later than its next annual report. If it does so, its qualification continues uninterrupted, and the Secretary of State's records are adjusted to reflect the change in form.

Because this proposal affects the Secretary of State's administrative functions, we will also submit it to the Secretary of State for approval.

This proposal would amend Section 14-2-1504 of the Business Corporation Code, Section 14-9-905 of the Limited Partnership Act, and Section 14-11-706 of the Limited Liability Company Act. Clean and marked copies of the affected sections are attached.

*Conforming Changes to Business Corporation Code §14-2-1109.1*

When it became possible to convert a Georgia corporation into an LLC, Section 14-2-1109.1 was added to the Business Corporation Code to provide procedural rules for the conversion. Later, it became possible to convert a Georgia corporation into a limited partnership, but corresponding changes were not made to Section 14-2-1109.1. This proposal corrects that oversight.

Clean and marked copies of proposed revised Section 14-2-1109.1 are attached.

*Improvements to LLC and LP Conversion Statutes*

In 1994 it became possible to convert a Georgia entity into a limited liability company, and in 1997 it became possible to convert into a limited partnership.

Since then, conversion statutes have become common. This legislative proposal would update the Georgia statutes by (1) allowing entities organized in other states to convert into Georgia LLCs or limited partnerships, (2) conforming the language governing the effect of a conversion to existing Georgia language on the effect of a merger, and (3) make clear that after conversion the entity continues as the same entity.

Under the proposal, parallel changes would be made to LLC Act Section 14-11-212 and Limited Partnership Act Section 14-9-206.2. Clean and blacklined copies of the affected sections are attached.

*New Provisions*

In addition to the foregoing changes, this legislative proposal would amend the Business Corporation Code, the Limited Partnership Act, and the Limited Liability Company Act by adding four new Sections and making a clarifying change to the Limited Liability Company Act to address the following: (i) conversions of foreign corporations, Georgia and foreign limited partnerships, Georgia and foreign general partnerships, and Georgia and foreign limited liability companies into Georgia corporations; and (ii) conversions of Georgia corporations, Georgia limited partnerships, and Georgia limited liability companies into foreign corporations, foreign limited liability companies, and foreign limited partnerships.

New Section 14-2-1109.2 would be added to the Business Corporation Code to address conversions of foreign corporations, Georgia and foreign limited partnerships, Georgia and foreign general partnerships, and Georgia and foreign limited liability companies into Georgia corporations.

New Sections 14-2-1109.3, 14-9-206.8, and 14-11-906 would be added to the Business Corporation Code, the Limited Partnership Act, and the Limited Liability Company Act, respectively, to address conversions of Georgia corporations, Georgia limited partnerships, and Georgia limited liability companies into foreign corporations, foreign limited partnerships, and foreign limited liability companies, respectively.

Finally, certain changes would be made to the Limited Liability Company Act to clarify that, unless otherwise agreed in writing, a conversion of a Georgia limited liability company into another entity will give rise to dissenter's rights.

Because this proposal affects the Secretary of State's administrative functions, we will also submit it to the Secretary of State for approval.

Clean versions of the proposed new Sections are attached, along with a marked version of the dissenter's rights provision of the Limited Liability Company Act.

14-2-1504. Amended certificate of authority ; conversion to different form.

(a) A foreign corporation authorized to transact business in this state must obtain an amended certificate of authority from the Secretary of State if it changes:

(1) Its corporate name;

(2) The period of its duration; or

(3) The state or country of its incorporation.

(b) The requirements of Code Section 14-2-1503 for obtaining an original certificate of authority apply to obtaining an amended certificate under this Code section.

(c) If a foreign corporation authorized to transact business in this state converts into a foreign limited liability company, (1) the foreign corporation shall notify the Secretary of State that such conversion has occurred no later than the otherwise applicable due date of its next annual registration with the Secretary of State, using such form as the Secretary of State shall specify, which form may require such information and statements as may be required to be submitted by a foreign limited liability company that applies for a certificate of authority to transact business in this State, and (2) if such notice is timely given (A) the authorization of such entity to transact business in this state shall continue without interruption, and (B) the certificate of authority issued to such foreign corporation under this part shall constitute a certificate of authority issued under Code Section 14-11-704 to the foreign limited liability company resulting from the conversion effective as of the date of the conversion. The Secretary of State shall adjust its records accordingly.

(d) If a foreign corporation authorized to transact business in this state converts into a foreign limited partnership, (1) the foreign corporation shall notify the Secretary of State that such conversion has occurred no later than the otherwise applicable due date of its next annual registration with the Secretary of State, using such form as the Secretary of State shall specify, which form may require such information and statements as may be required to be submitted by a foreign limited partnership that applies for a certificate of authority to transact business in this State, and (2) if such notice is timely given (A) the authorization of such entity to transact business in this state shall continue without interruption, and (B) the certificate of authority issued to such foreign corporation under this part shall constitute a certificate of authority issued under Code Section 14-9-903 to the foreign limited partnership resulting from the conversion effective as of the date of the conversion. The Secretary of State shall adjust its records accordingly.

14-9-905. Change of name or state of organization ; conversion to different form

(a) A foreign limited partnership authorized to transact business in this state must obtain an amended certificate of authority from the Secretary of State if it changes its name or its state of organization. The requirements of Code Sections 14-9-902 and 14-9-903 for obtaining an original certificate of authority shall apply to obtaining an amended certificate under this Code section.

(b) If a foreign limited partnership authorized to transact business in this state converts into a foreign limited liability company, (1) the foreign limited partnership shall notify the Secretary of State that such conversion has occurred no later than the otherwise applicable due date of its next annual registration with the Secretary of State, using such form as the Secretary of State shall specify, which form may require such information and statements as may be required to be submitted by a foreign limited liability company that applies for a certificate of authority to transact business in this State, and (2) if such notice is timely given (A) the authorization of such entity to transact business in this state shall continue without interruption, and (B) the certificate of authority issued to such foreign limited partnership under this article shall constitute a certificate of authority issued under Code Section 14-11-704 to the foreign limited liability company resulting from the conversion effective as of the date of the conversion. The Secretary of State shall adjust its records accordingly.

(c) If a foreign limited partnership authorized to transact business in this state converts into a foreign corporation, (1) the foreign limited partnership shall notify the Secretary of State that such conversion has occurred no later than the otherwise applicable due date of its next annual registration with the Secretary of State, using such form as the Secretary of State shall specify, which form may require such information and statements as may be required to be submitted by a foreign corporation that applies for a certificate of authority to transact business in this State, and (2) if such notice is timely given (A) the authorization of such entity to transact business in this state shall continue without interruption, and (B) the certificate of authority issued to such foreign limited partnership under this article shall constitute a certificate of authority issued under Code Sections 14-2-1501 and 14-2-1503 to the foreign corporation resulting from the conversion effective as of the date of the conversion. The Secretary of State shall adjust its records accordingly.

14-11-706. Amended certificate ~~required for change of name or jurisdiction of organization~~ of authority; conversion to different form

(a) A foreign limited liability company authorized to transact business in this state must procure an amended certificate of authority from the Secretary of State if it changes its name or its jurisdiction of organization. The requirements of Code Sections 14-11-702 and 14-11-704 for procuring an original certificate of authority shall apply to procuring an amended certificate under this Code section.

(b) If a foreign limited liability company authorized to transact business in this state converts into a foreign limited partnership, (1) the foreign limited liability company shall notify the Secretary of State that such conversion has occurred no later than the otherwise applicable due date of its next annual registration with the Secretary of State, using such form as the Secretary of State shall specify, which form may require such information and statements as may be required to be submitted by a foreign limited partnership that applies for a certificate of authority to transact business in this State, and (2) if such notice is timely given (A) the authorization of such entity to transact business in this state shall continue without interruption, and (B) the certificate of authority issued to such foreign limited liability company under this article shall constitute a certificate of authority issued under Code Section 14-9-903 to the foreign limited partnership resulting from the conversion effective as of the date of the conversion. The Secretary of State shall adjust its records accordingly.

(c) If a foreign limited liability company authorized to transact business in this state converts into a foreign corporation, (1) the foreign limited liability company shall notify the Secretary of State that such conversion has occurred no later than the otherwise applicable due date of its next annual registration with the Secretary of State, using such form as the Secretary of State shall specify, which form may require such information and statements as may be required to be submitted by a foreign corporation that applies for a certificate of authority to transact business in this State, and (2) if such notice is timely given (A) the authorization of such entity to transact business in this state shall continue without interruption, and (B) the certificate of authority issued to such foreign limited liability company under this article shall constitute a certificate of authority issued under Code Section 14-2-1501 to the foreign corporation resulting from the conversion effective as of the date of the conversion. The Secretary of State shall adjust its records accordingly.

14-2-1109.1. Election to become a limited liability company or a limited partnership

(a) As used in this Code section, the term ~~"~~'limited liability company~~"~~' means any limited liability company formed under Chapter 11 of this title, and the term 'limited partnership' means any limited partnership formed under Chapter 9 of this title.

(b) ~~A~~Pursuant to Code Section 14-11-212 or Code Section 14-9-206.2, and this Code Section 14-2-1109.1, a corporation may elect to become a limited liability company or a limited partnership if the board of directors adopts and its shareholders approve a plan of election.

(c) The plan of election must set forth:

(1) The name of the limited liability company or limited partnership to be formed pursuant to such election;

(2) The manner and basis of converting the shares of such corporation into interests as members of the limited liability company to be formed pursuant to such election or interests as partners of the limited partnership to be formed pursuant to such election or a statement that such information is contained in the written operating agreement proposed for such limited liability company or the written limited partnership agreement proposed for such limited partnership;

(3) The effective date and time of such election, if later than the date and time the certificate of election is filed;

(4) The contents of the articles of organization that shall be the articles of organization of the limited liability company to be formed pursuant to such election unless and until modified in accordance with the provisions of Chapter 11 of this title~~; and~~, or the contents of the certificate of limited partnership that shall be the certificate of limited partnership of the limited partnership to be formed pursuant to such election unless and until modified in accordance with the provisions of Chapter 9 of this title; and

(5) (i) The contents of the written operating agreement to be entered into among the persons who will be the members of the limited liability company to be formed pursuant to such election, which shall, if not separately provided in the plan of election, state (A) the manner and basis for the conversion of the shares of such corporation into interests as members of the limited liability company to be formed pursuant to such election and ~~that notification~~(B) that approval of the election will be deemed to be execution of the operating agreement by such persons; or (ii) the contents of the written limited partnership agreement to be entered into among the persons who will be the partners of the limited partnership to be formed pursuant to such election, which shall, if not separately provided in the plan of election, state (A) the manner and basis for the conversion of the shares of such corporation into interests as partners of the limited partnership to be formed pursuant to such election and (B) that approval of the election will be deemed to be execution of the limited partnership agreement by such persons.

(d) For a plan of election to become a limited liability company or limited partnership to be approved:

(1) The board of directors must recommend the plan of election to the shareholders in the same manner as provided in subsections (a) through (d) of ~~the~~ Code Section 14-2-1103; and

(2) All of the shareholders must approve the plan of election.

(e) After a plan of election is approved by the shareholders, the corporation shall deliver to the Secretary of State for filing a certificate of election complying with subsection (b) of Code Section 14-11-~~212.~~212 or subsection (b) of Code Section 14-9-206.2, as applicable.

14-11-212. Election to become a limited liability company

(a) A corporation, ~~limited~~foreign corporation, foreign limited liability company, limited partnership, foreign limited partnership, general partnership, or foreign general partnership may elect to become a limited liability company. Such election shall require (1) compliance with Code Section 14-2-1109.1 in the case of a Georgia corporation, or (2) the approval of all of its partners, members or shareholders (or such other approval or compliance as may be sufficient under applicable law or the governing documents of the electing entity to authorize such election) in the case of a foreign corporation, foreign limited liability company, limited partnership ~~or~~, foreign limited partnership, general partnership, or foreign general partnership.

(b) Such election is made by delivering a certificate of election to the Secretary of State for filing. The certificate shall set forth:

(1) The name ~~of the corporation, limited partnership, or general partnership~~and jurisdiction of organization of the entity making the election;

(2) That the ~~corporation, limited partnership, or general partnership~~entity elects to become a limited liability company;

(3) The effective date, or the effective date and time, of such election if later than the date and time the certificate of election is filed;

(4) That the election has been approved as required by subsection (a) of this Code section;

(5) That filed with the certificate of election are articles of organization that are in the form required by Code Section 14-11-204, that set forth a name for the limited liability company that satisfies the requirements of Code Section 14-11-207, and that shall be the articles of organization of the limited liability company formed pursuant to such election unless and until modified in accordance with this chapter; and

(6) A statement ~~that~~setting forth either (A) ~~states~~ the manner and basis for converting the ~~shares of the corporation or the interests of the partners in the limited partnership or general partnership~~ownership interests in the entity making the election into interests as members of the limited liability company formed pursuant to such election, or (B) ~~states~~ (i) that a written operating agreement has been entered into among the persons who will be the members of the limited liability company formed pursuant to such election, (ii) that such operating agreement will be effective immediately upon the effectiveness of such election, and (iii) that such operating agreement provides for the manner and basis of such conversion.

(c) Upon the election becoming effective:

(1) The ~~corporation, limited partnership, or general partnership~~electing entity shall become a limited liability company formed under this chapter by such election~~;~~, except that the existence of the limited liability company so formed shall be deemed to have commenced on the date the

entity making the election commenced its existence in the jurisdiction in which such entity was first created, formed, incorporated or otherwise came into being;

~~(2) The shares of the corporation or the interests of the partners of the limited partnership or general partnership~~(2) The ownership interests in the entity making the election shall be converted on the basis stated or referred to in the certificate of election in accordance with paragraph (6) of subsection (b) of this Code section;

(3) The articles of organization filed with the certificate of election shall be the articles of organization of the limited liability company formed pursuant to such election unless and until amended in accordance with this chapter;

(4) The ~~articles of incorporation and bylaws of the corporation, certificate of limited partnership and partnership agreement of the limited partnership, or partnership agreement and statement of partnership, if any, of the general partnership~~governing documents of the entity making the election shall be of no further force or effect;

(5) The limited liability company formed by such election shall thereupon and thereafter possess all of the rights, privileges, immunities, franchises, and powers of the ~~corporation, limited partnership, or general partnership~~entity making the election;~~ and~~ all property, real, personal, and mixed, all contract rights, and all debts due to such ~~corporation, limited partnership, or general partnership~~entity, as well as all other ~~choses~~choices in action, and each and every other interest of or belonging to or due to the ~~corporation, limited partnership, or general partnership~~entity making the election shall be taken and deemed to be vested in the limited liability company formed by such election without further act or deed;~~ and~~ the title to any real estate, or any interest therein, vested in the ~~corporation, limited partnership, or general partnership~~entity making the election shall not revert or be in any way impaired by reason of such election; and none of such items shall be deemed to have been conveyed, transferred or assigned by reason of such election for any purpose; and

(6) The limited liability company formed by such election shall thereupon and thereafter be responsible and liable for all the liabilities and obligations of the ~~corporation, limited partnership, or general partnership~~entity making the election, and any claim existing or action or proceeding pending by or against such ~~corporation, limited partnership, or general partnership~~entity may be prosecuted as if such election had not become effective. Neither the rights of creditors nor any liens upon the property of the ~~corporation, limited partnership, or general partnership~~entity making the election shall be impaired by such election.

(d) A conversion pursuant to this Code section shall not be deemed to constitute a dissolution of the entity making the election and shall constitute a continuation of the existence of the entity making the election in the form of a limited liability company. A limited liability company formed by an election pursuant to this Code section shall for all purposes be deemed to be the same entity as the entity making the election.

(e) A limited liability company formed by an election pursuant to this Code section may file a copy of such election to become a limited liability company, certified by the Secretary of State,

in the office of the clerk of the superior court of the county where any real property owned by such limited liability company is located and record such certified copy of the election in the books kept by such clerk for recordation of deeds in such county with the entity electing to become a limited liability company indexed as the grantor and the limited liability company indexed as the grantee. No real estate transfer tax under Code Section 48-6-1 shall be due with respect to recordation of such election.

14-9-206.2. Election to become a limited partnership

(a) A corporation, foreign corporation, limited liability company~~, or~~, foreign limited liability company, foreign limited partnership, general partnership, or foreign general partnership may elect to become a limited partnership. Such election shall require:

(1) Compliance with Code Section 14-2-1109.1 in the case of a Georgia corporation; or

(2) Approval of all of its ~~members, or such other approval as may be sufficient under applicable law, in the case of a limited liability company; or (3) The approval of all of its partners,~~ partners, members, or shareholders (or such other approval as may be sufficient under applicable law or the governing documents of the electing entity to authorize such election~~,~~) in the case of a foreign corporation, limited liability company, foreign limited liability company, foreign limited partnership, general partnership, or foreign general partnership.

(b) Such election is made by delivery of a certificate of election to the Secretary of State for filing. The certificate shall set forth:

(1) The name ~~of the corporation, limited liability company, or general partnership~~and jurisdiction of organization of the entity making the election;

(2) That the ~~corporation, limited liability company, or general partnership~~entity elects to become a limited partnership;

(3) The effective date and time of such election if later than the date and time the certificate of election is filed;

(4) That the election has been approved as required by subsection (a) of this Code section;

(5) That filed with the certificate of election is a certificate of limited partnership that is in the form required by Code Section 14-9-201, that sets forth a name for the limited partnership that satisfies the requirements of Code Section 14-9-102, and that shall be the certificate of limited partnership of the limited partnership formed pursuant to such election unless and until modified in accordance with this chapter; and

(6) A statement ~~that states:~~setting forth either:

(A) The manner and basis for converting the ~~shares of the corporation, the membership interests of the members of the limited liability company, or the interests of the partners in the general partnership~~ownership interests in the entity making the election into interests as ~~members~~partners of the limited partnership formed pursuant to such election; or

(B)(i) That a written limited partnership agreement has been entered into among the persons who will be the ~~members~~partners of the limited partnership formed pursuant to such election;

(ii) That such limited partnership agreement will be effective immediately upon the effectiveness of such election; and

(iii) That such limited partnership agreement provides for the manner and basis of such conversion.

(c) Upon the election becoming effective the:

~~(1) Corporation, limited liability company, or general partnership~~(1) Electing entity shall become a limited partnership formed under this chapter by such election, except that the existence of the limited partnership so formed shall be deemed to have commenced on the date the entity making the election commenced its existence in the jurisdiction in which such entity was first created, formed, incorporated or otherwise came into being;

(2) ~~Shares of the corporation,~~Ownership interests in the ~~limited liability company, or the interests of the partners of the general partnership~~entity making the election shall be converted on the basis stated or referred to in the certificate of election in accordance with paragraph (6) of subsection (b) of this Code section;

(3) Certificate of limited partnership filed with the certificate of election shall be the certificate of limited partnership of the limited partnership formed pursuant to such election unless and until amended in accordance with this chapter;

(4) ~~Articles of incorporation and bylaws of the corporation, articles of organization and operating agreement of the limited liability company, or partnership agreement and statement of partnership, if any, of the general partnership~~Governing documents of the entity making the election shall be of no further force or effect;

(5) Limited partnership formed by such election shall thereupon and thereafter possess all of the rights, privileges, immunities, franchises, and powers of the ~~corporation, limited liability company, or general partnership~~entity making the election;~~ and~~ all property, real, personal, and mixed, all contract rights, and all debts due to such ~~corporation, limited liability company, or general partnership~~entity, as well as all other ~~choses~~choices in action, and each and every other interest of, belonging to, or due to the ~~corporation, limited liability company, or general partnership~~entity making the election shall be taken and deemed to be vested in the limited partnership formed by such election without further act or deed; ~~and~~ the title to any real estate, or any interest in real estate, vested in the ~~corporation, limited liability company, or general partnership~~entity making the election shall not revert or be in any way impaired by reason of such election; and none of such items shall be deemed to have been conveyed, transferred or assigned by reason of such election for any purpose; and

(6) Limited partnership formed by such election shall thereupon and thereafter be responsible and liable for all the liabilities and obligations of the ~~corporation, limited liability company, or general partnership~~entity making the election, and any claim existing or action or proceeding pending by or against such ~~corporation, limited liability company, or general partnership~~entity may be prosecuted as if such election had not become effective. Neither the rights of creditors

nor any liens upon the property of the ~~corporation, limited liability company, or general partnership~~entity making the election shall be impaired by such election.

(d) A conversion pursuant to this Code section shall not be deemed to constitute a dissolution of the entity making the election and shall constitute a continuation of the existence of the entity making the election in the form of a limited partnership. A limited partnership formed by an election pursuant to this Code section shall for all purposes be deemed to be the same entity as the entity making the election.

(e) A limited partnership formed by the foregoing election may file a copy of the foregoing election to become a limited partnership, certified by the Secretary of State, in the office of the clerk of the superior court of the county where any real property owned by such limited partnership is located and record such certified copy of the election in the books kept by such clerk for recordation of deeds in such county with the entity electing to become a limited partnership indexed as the grantor and the limited partnership indexed as the grantee. No real estate transfer tax under Code Section 48-6-1 shall be due with respect to the recordation of such election.

(~~e~~f) The Secretary of State shall be authorized to promulgate such rules and charge such filing fees as are necessary to carry out the purpose of this Code section.

**14-2-1109.2. Election to Become a Corporation.**

**(a) A foreign corporation, domestic limited partnership, foreign limited partnership, domestic general partnership, foreign general partnership, domestic limited liability company, or foreign limited liability company may elect to become a corporation. Such election shall require the approval of all of the electing entity's partners, members or shareholders (or such other approval or compliance as may be sufficient under applicable law or the governing documents of the electing entity to authorize such election).**

**(b) Such election is made by delivering a certificate of election to the Secretary of State for filing. The certificate shall set forth:**

**(1) The name and jurisdiction of organization of the entity making the election;**

**(2) That the entity elects to become a corporation;**

**(3) The effective date, or the effective date and time, of such election if later than the date and time the certificate of election is filed;**

**(4) That the election has been approved as required by subsection (a) of this Code section;**

**(5) That filed with the certificate of election are articles of incorporation that are in the form required by Code Section 14-2-202, that set forth a name for the corporation that satisfies the requirements of Code Section 14-2-401, and that shall be the articles of incorporation of the corporation formed pursuant to such election unless and until modified in accordance with this chapter; and**

**(6) If not provided for in the articles of incorporation required by subsection (b)(5) of this Code section, a statement setting forth the manner and basis for converting the ownership interests in the entity making the election into shares of the corporation formed pursuant to such election.**

**(c) Upon the election becoming effective:**

**(1) The electing entity shall become a corporation formed under this chapter by such election, except that the existence of the corporation so formed shall be deemed to have commenced on the date the entity making the election commenced its existence in the jurisdiction in which such entity was first created, formed, incorporated or otherwise came into being;**

**(2) The ownership interests in the entity making the election shall be converted on the basis stated or referred to in the certificate of election in accordance with paragraph (6) of subsection (b) of this Code section;**

**(3) The articles of incorporation filed with the certificate of election shall be the articles of incorporation of the corporation formed pursuant to such election unless and until amended in accordance with this chapter;**

**(4) The governing documents of the entity making the election shall be of no further force or effect;**

**(5) The corporation formed by such election shall thereupon and thereafter possess all of the rights, privileges, immunities, franchises, and powers of the entity making the election; all property, real, personal, and mixed, all contract rights, and all debts due to such entity, as well as all other choses in action, and each and every other interest of or belonging to or due to the entity making the election shall be taken and deemed to be vested in the corporation formed by such election without further act or deed; the title to any real estate, or any interest therein, vested in the entity making the election shall not revert or be in any way impaired by reason of such election; and none of such items shall be deemed to have been conveyed, transferred or assigned by reason of such election for any purpose; and**

**(6) The corporation formed by such election shall thereupon and thereafter be responsible and liable for all the liabilities and obligations of the entity making the election, and any claim existing or action or proceeding pending by or against such entity may be prosecuted as if such election had not become effective. Neither the rights of creditors nor any liens upon the property of entity making the election shall be impaired by such election.**

**(d) A conversion pursuant to this Code section shall not be deemed to constitute a dissolution of the entity making the election and shall constitute a continuation of the existence of the entity making the election in the form of a corporation. A corporation formed by an election pursuant to this Code section shall for all purposes be deemed to be the same entity as the entity making the election.**

**(e) A corporation formed by an election pursuant to this Code section may file a copy of such election to become a corporation, certified by the Secretary of State, in the office of the clerk of the superior court of the county where any real property owned by such corporation is located and record such certified copy of the election in the books kept by such clerk for recordation of deeds in such county with the entity electing to become a corporation indexed as the grantor and the corporation indexed as the grantee. No real estate transfer tax under Code Section 48-6-1 shall be due with respect to recordation of such election.**

**(f) The Secretary of State shall be authorized to promulgate such rules and charge such filing fees as are necessary to carry out the purpose of this Code section.**

**14-2-1109.3. Conversion into a foreign entity.**

**(a) A corporation may convert into a foreign limited liability company, a foreign limited partnership, or a foreign corporation, if the conversion is permitted by the law of the state or jurisdiction under whose laws the resulting entity would be formed.**

**(b) To effect a conversion under this Code section, the corporation must adopt a plan of conversion that sets forth the manner and basis of converting the shares of the corporation into interests, shares, obligations, or other securities, as the case may be, of the resulting entity. The plan of conversion may set forth other provisions relating to the conversion.**

**(c) For the plan of conversion to be adopted:**

**(1) The board of directors must recommend the plan of conversion to the shareholders in the same manner as provided in subsections (a) through (d) of the Code Section 14-2-1103; and**

**(2) All of the shareholders must approve the plan of conversion.**

**(d) After a conversion is authorized, unless the plan of conversion provides otherwise, and at any time before the conversion becomes effective, the planned conversion may be abandoned (subject to any contractual rights) without further shareholder action, in accordance with the procedure set forth in the plan of conversion or, if none is set forth, in the manner determined by the board of directors.**

**(e) The conversion shall be effected as provided in, and shall have the effects provided by, the law of the state or jurisdiction under whose laws the resulting entity is formed and by the plan of conversion (to the extent not inconsistent with such law).**

**(f) If the resulting entity is required to obtain a certificate of authority to transact business in this state by the provisions of this title governing foreign corporations, foreign limited partnerships, or foreign limited liability companies, it shall do so.**

**14-9-206.8. Conversion into a foreign entity.**

**(a) A limited partnership may convert into a foreign limited liability company, a foreign limited partnership, or a foreign corporation, if the conversion is permitted by the law of the state or jurisdiction under whose laws the resulting entity would be formed.**

**(b) To effect a conversion under this Code section, the limited partnership must adopt a plan of conversion that sets forth the manner and basis of converting the interests of the partners of the limited partnership into interests, shares, obligations, or other securities, as the case may be, of the resulting entity. The plan of conversion may set forth other provisions relating to the conversion.**

**(c) The limited partnership shall have the plan of conversion authorized and approved by the unanimous consent of the partners, unless the limited partnership agreement of such limited partnership provides otherwise.**

**(d) After a conversion is authorized, unless the plan of conversion provides otherwise, and at any time before the conversion becomes effective, the planned conversion may be abandoned (subject to any contractual rights) in accordance with the procedure set forth in the plan of conversion or, if none is set forth, by the unanimous consent of the partners of the limited partnership, unless the limited partnership agreement of such limited partnership provides otherwise.**

**(e) The conversion shall be effected as provided in, and shall have the effects provided by, the law of the state or jurisdiction under whose laws the resulting entity is formed and by the plan of conversion (to the extent not inconsistent with such law).**

**(f) If the resulting entity is required to obtain a certificate of authority to transact business in this state by the provisions of this title governing foreign corporations, foreign limited partnerships, or foreign limited liability companies, it shall do so.**

**14-11-906. Conversion into a foreign entity.**

**(a) A limited liability company may convert into a foreign limited liability company, a foreign limited partnership, or a foreign corporation, if the conversion is permitted by the law of the state or jurisdiction under whose laws the resulting entity would be formed.**

**(b) To effect a conversion under this Code section, the limited liability company must adopt a plan of conversion that sets forth the manner and basis of converting the interests of the members of the limited liability company into interests, shares, obligations, or other securities, as the case may be, of the resulting entity. The plan of conversion may set forth other provisions relating to the conversion.**

**(c) The limited liability company shall have the plan of conversion authorized and approved by the unanimous consent of the members, unless the articles of organization or a written operating agreement of such limited liability company provides otherwise.**

**(d) After a conversion is authorized, unless the plan of conversion provides otherwise, and at any time before the conversion becomes effective, the planned conversion may be abandoned (subject to any contractual rights) in accordance with the procedure set forth in the plan of conversion or, if none is set forth, by the unanimous consent of the members of the limited liability company, unless the articles of organization or a written operating agreement of such limited liability company provides otherwise.**

**(e) The conversion shall be effected as provided in, and shall have the effects provided by, the law of the state or jurisdiction under whose laws the resulting entity is formed and by the plan of conversion (to the extent not inconsistent with such law).**

**(f) If the resulting entity is required to obtain a certificate of authority to transact business in this state by the provisions of this title governing foreign corporations, foreign limited partnerships, or foreign limited liability companies, it shall do so.**

14-11-1002. Right to dissent.

(a) Unless otherwise provided by the articles of organization or a written operating agreement, a record member of the limited liability company is entitled to dissent from, and obtain payment of the fair value of his or her membership interest in the event of, any of the following actions:

(1) Consummation of a plan of merger to which the limited liability company is a party if approval of less than all of the members of the limited liability company is required for the merger by the articles of organization or a written operating agreement and the member is entitled to vote on the merger;

(2) Consummation of an election to become a corporation pursuant to Code Section 14-2-1109.2 or consummation of a plan of conversion pursuant to Code Section 14-11-906;

(3) Consummation of a sale, lease, exchange, or other disposition of all or substantially all of the property of the limited liability company if approval of less than all of the members is required by the articles of organization or a written operating agreement and the member is entitled to vote on the sale, lease, exchange, or other disposition, but not including a sale pursuant to court order or a sale for cash pursuant to a plan by which all or substantially all of the net proceeds of the sale will be distributed to the members within one year after the date of sale;

(~~3~~4) An amendment of the articles of organization that materially and adversely affects rights in respect of a dissenter~~'~~’s membership interest in the limited liability company because it:

(A) Alters or abolishes a preferential right of the member~~'~~’s interest;

(B) Creates, alters, or abolishes a right in respect of redemption, including a provision respecting a sinking fund for the redemption or repurchase, of the membership interest;

(C) Alters or abolishes a preemptive right of the holder of the membership interest to acquire additional interest or other securities;

(D) Excludes or limits the right of the member to vote on any matter, other than a limitation by dilution through additional member contributions or other securities with similar voting rights; or

(E) Cancels, redeems, or repurchases all or part of the membership interest of the class; or

(~~4~~5) Any limited liability company action taken pursuant to a member vote to the extent that the articles of organization or a written operating agreement provides that voting or nonvoting members are entitled to dissent and obtain payment for their membership interests.

(b) A member entitled to dissent and obtain payment for his or her membership interest under this article may not challenge the limited liability company action creating his or her entitlement unless the limited liability company action fails to comply with procedural requirements of this chapter, the articles of organization, or the written operating agreement or if the vote required to

obtain approval of the limited liability company action was obtained by fraudulent and deceptive means, regardless of whether the member has exercised dissenters' rights.