

Corporation Law: Georgia

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A Q&A guide to corporation law in Georgia. This Q&A addresses key areas of corporate law such as formation, foreign qualification, mergers, anti-takeover laws and dissolution. Answers to questions can be compared across a number of jurisdictions (see *Corporation Law: State Q&A Tool* (<http://us.practicallaw.com/5-517-3521>)).

FORMING A CORPORATION AND CORPORATE ACTIONS

1. What is required to form and organize a corporation in your jurisdiction? Please include information on:

- Documents.
- Corporate actions (board versus incorporator actions).
- Name requirements and reservation options.
- Filing requirements (including what must be filed and where, timing, electronic versus paper and availability of expedited/rush services).

DOCUMENTS

Articles of Incorporation

The incorporator must file articles of incorporation with the *Georgia Secretary of State* (GA SOS). The articles of incorporation must include the following information:

- The name of the corporation.
- The number of shares of stock that the corporation is authorized to issue.
- The street address and county of the corporation's initial registered office and the name of its initial registered agent at that office.
- The name and address of each incorporator.
- The mailing address of the initial principal office of the corporation, if different from the initial registered office.

(*Ga. Code Ann. § 14-2-202.*)

Every Georgia corporation is presumed to be formed to engage in any lawful business unless a more limited purpose is set out in the articles of incorporation (*Ga. Code Ann. § 14-2-301*). The Georgia

Business Corporation Code provides that the articles of incorporation can include other provisions not inconsistent with law regarding the management and regulation of certain aspects of the corporation (*Ga. Code Ann. § 14-2-202*). However, some optional provisions can be included only if they are first adopted.

Bylaws

Bylaws set out the governance rules of a corporation and can contain any provision for managing the corporation that is not inconsistent with law or with the articles of incorporation (*Ga. Code Ann. § 14-2-206*). If the bylaws conflict with the articles of incorporation, the articles of incorporation govern because the bylaws are secondary to the articles of incorporation. Bylaws are not required to be filed with the state.

Typical areas covered by the bylaws include:

- The procedures for shareholder and director meetings (including record date, notice and voting).
- The officers and committees of the corporation.
- The issuance and transfer of stock certificates.

Bylaws are adopted by either:

- The incorporators.
- The board of directors.

(*Ga. Code Ann. § 14-2-206.*)

Bylaws can usually be amended or repealed by either the directors or the shareholders unless the articles of incorporation:

- Reserve the power to amend or repeal the bylaws to the shareholders.
- Provide that a particular bylaw cannot be amended or repealed by the directors.

(*Ga. Code Ann. § 14-2-1020.*)

CORPORATE ACTIONS

If the initial directors are named in the articles of incorporation, then they must hold an organizational meeting at the call of a majority of the directors to complete the organization of the corporation by:

- Appointing officers.
- Adopting bylaws.
- Carrying on any other business brought before the meeting.

(*Ga. Code Ann. § 14-2-205(a)(1).*)



If the initial directors are not named in the articles of incorporation, the incorporators must hold an organizational meeting at the call of a majority of the incorporators to either:

- Elect directors and complete the organization of the corporation.
- Elect directors who must then complete the organization of the corporation.

(*Ga. Code Ann. § 14-2-205(a)(2).*)

The completion of the corporate organization is customarily accomplished by holding an initial meeting of the directors (once elected), either in person or by written consent, to:

- Adopt the bylaws.
- Elect officers.
- Open bank accounts.
- Issue stock.
- Approve other actions necessary for the corporation's business at that time.

NAME REQUIREMENTS AND RESERVATION OPTIONS

The name of the corporation must include one of the following words or their abbreviations or equivalent words or their abbreviations in another language:

- Corporation.
- Company.
- Incorporated.
- Limited.

(*Ga. Code Ann. § 14-2-401(a).*)

The name cannot:

- Contain language stating or implying that the corporation is organized for a purpose that would be beyond the scope of its legally permitted purpose.
- Exceed 80 characters (including spaces and punctuation).
- Contain anything that is, in the GA SOS's reasonable judgment, obscene.

(*Ga. Code Ann. § 14-2-401(b).*)

A corporate name must be distinguishable in the GA SOS's records from the names of other entities on file with the Georgia Corporations Division (*Ga. Code Ann. § 14-2-401*). The issuance of a corporate name does not affect the commercial availability of the name, so names that are issued by the Corporations Division might not be available for use in the marketplace. Additionally, the issuance of a name by the Corporations Division does not necessarily give a person the exclusive right to use that name.

Corporations can reserve a name for a period of 30 days by submitting an application online through the GA SOS's *website* or by mail. The fee for reserving a name is \$25. Name reservations can be renewed for another 30 days for a \$25 fee. (*Ga. Code Ann. §§ 14-2-122 and 14-2-402.*)

FILING REQUIREMENTS

The articles of incorporation must be filed with the GA SOS. Many law firms and companies use a service company to file the articles of incorporation for a fee. Typically, the articles of incorporation can be submitted to the service company electronically. If a service company is not used, the articles of incorporation can be filed by mail or online, as detailed on the Corporations Division's website.

The fee for filing articles of incorporation is \$100. Expedited processing costs an additional \$100 or \$250. Regular expedited processing requests are typically completed within 48 hours after receipt. Same day expedited processing is available if the request is received by noon. (*GA SOS: Filing Fees.*) Articles of incorporation are effective on the date received by the Corporations Division unless a later date is specified.

After receiving the articles of incorporation and fees, the Corporations Division certifies that the articles of incorporation were filed by endorsing the articles of incorporation with:

- The word "Filed."
- The date and time of its filing.

2. What are the annual reporting or other filing requirements (including franchise tax amounts) for a corporation in your jurisdiction?

Georgia corporations must file an annual registration with the Georgia Secretary of State (GA SOS). The initial annual registration form must be filed:

- Between January 1 and April 1 for corporations formed between October 2 and December 31 of the prior year.
- Within 90 days of incorporation for all other corporations.

Subsequent annual registrations must be filed between January 1 and April 1 of each year. (*Ga. Code Ann. § 14-2-1622(c).*)

Annual registrations must set out:

- The name of the corporation and the state or country of incorporation.
- The street address and county of its registered office in Georgia and the name of its registered agent.
- The mailing address of its principal office.
- The names and addresses of its chief executive officer, chief financial officer and secretary, or individuals holding similar positions.

(*Ga. Code Ann. § 14-2-1622(a).*)

The registration form should be filed *online*, along with a \$50 filing fee. There is a \$25 penalty if the annual report is not timely filed. Additionally, changes to a corporation's address or officers during the year require another registration form and payment of a \$50 filing fee. (*GA SOS: Filing Fees.*)

A corporation that does not submit its annual registration within 60 days after it is due is subject to administrative dissolution (*Ga. Code Ann. § 14-2-1420(2)*). There is a \$250 fee to reinstate an administratively dissolved corporation (*Ga. Code Ann. § 14-2-122*). An administratively dissolved corporation can be reinstated within five years after its dissolution date. Its name remains reserved during that time period. (*Ga. Code Ann. § 14-2-1422.*)

Georgia corporations must prepare financial statements annually. The financial statements must be prepared within four months after the close of the corporation's fiscal year and before the corporation's annual meeting of shareholders. They must consist of a:

- Reasonably detailed balance sheet.
- Profit and loss statement showing the results of the corporation's operations during the fiscal year.

The Georgia Business Corporation Code requires corporations to provide these financial statements to shareholders on their request. (*Ga. Code Ann. § 14-2-1620.*)

Georgia does not impose franchise taxes on corporations, but the Corporate Income Tax Section of the Georgia Department of Revenue (GA DOR) handles corporate and S-corporation tax returns. Corporate income tax is a non-graduated percentage based on a corporation's federal taxable net income. Corporations that own property in Georgia, do business in Georgia or receive income from Georgia sources are subject to corporate income tax. The rate of taxation is 6% of a corporation's Georgia taxable net income. (*GA DOR: Corporate Income and Net Worth Tax.*)

Certain corporations also pay a net worth tax. This tax is based on the corporation's net worth and is levied in exchange for the privilege of doing business or exercising a corporate franchise in Georgia. The minimum tax is \$10 for a net worth less than \$10,001. The maximum is \$5,000 for a net worth of more than \$22 million. The initial net worth return must be filed on or before the 15th day of the third calendar month after incorporation or qualification in Georgia. (*GA DOR: Corporate Income and Net Worth Tax.*)

3. What are the requirements for holding an annual meeting of shareholders in your jurisdiction?

Georgia corporations must hold an annual meeting of shareholders at a time stated in, or fixed according to, its bylaws (*Ga. Code Ann. § 14-2-701*). Directors are elected by the shareholders at each annual shareholders' meeting unless their terms are staggered (*Ga. Code Ann. § 14-2-803(d)*). Because a statement of the purpose of the meeting is not required to be included in the notice of the annual meeting, any matters concerning the business of the corporation, other than those that require a special notice to shareholders (such as plans of merger or share exchange), can be considered at the annual meeting (*Ga. Code Ann. §§ 14-2-705(b) and 14-2-1103(d)*).

Any action required or permitted to be taken at a shareholders' meeting can be taken without a meeting if the action is taken by either:

- All of the shareholders entitled to vote on the action.
- If provided in the articles of incorporation, persons who would be entitled to vote at a meeting having voting power to cast at least the minimum number of votes necessary to authorize or take the action at a meeting in which all shareholders entitled to vote were present and voted.

(*Ga. Code Ann. § 14-2-704(a).*)

Certain other limitations and requirements apply (*Ga. Code Ann. § 14-2-704*).

Any shareholder can apply to the superior court of the county where the corporation's registered office is located to demand an order to hold a shareholders' meeting if the annual meeting is not held, or action by written consent in lieu of a meeting is not taken, within the earlier of:

- Six months after the end of the corporation's fiscal year.
- 15 months after the corporation's last annual meeting.

(*Ga. Code Ann. § 14-2-703(a).*)

PRELIMINARY REQUIREMENTS

Annual shareholders' meetings can be held in or out of Georgia at the place stated in the bylaws. If the bylaws do not state a place, annual meetings must be held at the corporation's principal office. Failure to hold an annual meeting does not affect the validity of any of the corporation's actions. (*Ga. Code Ann. § 14-2-701.*)

Corporations must give notice of the annual meeting ten to 60 days before the meeting date, including all of the following:

- Date.
- Time.
- Place.

(*Ga. Code Ann. § 14-2-705(a).*)

Unless the articles of incorporation require otherwise:

- Corporations must give notice only to shareholders entitled to vote at the meeting.
- The notice of an annual meeting does not need to include a description of the meeting's purpose.

(*Ga. Code Ann. § 14-2-705(a), (b).*)

Record Date Requirements

Bylaws can fix or provide the manner of fixing the record date for one or more voting groups to determine the shareholders entitled to:

- Notice of a shareholders' meeting.
- Demand a special meeting.
- Vote.
- Take any other action.

(*Ga. Code Ann. § 14-2-707(a).*)

If the bylaws do not fix or provide for fixing a record date, the corporation's board of directors may fix a future date as the record date. A record date may not be more than 70 days before the meeting or action requiring a determination of shareholders. (*Ga. Code Ann. § 14-2-707(a), (b).*)

A determination of shareholders entitled to notice of or to vote at a shareholders' meeting is effective for any adjournment of the meeting, unless the board of directors fixes a new record date. The board of directors must fix a new record date if the meeting is adjourned to a date more than 120 days after the date fixed for the original meeting. If a court adjourns a meeting to a date more than 120 days after the date fixed for the original meeting, it can order that the original record date continues in effect or it can fix a new record date. (*Ga. Code Ann. § 14-2-707(c), (d).*)

If not otherwise fixed under Sections 14-2-703 or 14-2-707 of the Georgia Code Annotated, the record date for determining shareholders entitled to notice of and to vote at an annual or special shareholders' meeting is the close of business on the day before the first notice is delivered to shareholders (*Ga. Code Ann. § 14-2-705(d)*).

A corporation does not need to provide notice to a shareholder to whom, during a 12 month period, either of the following was mailed at the address in the record of shareholders and returned as undeliverable:

- Notices of two consecutive annual meetings.
- All and at least two payments of dividends or interest on securities or dividend reinvestment confirmations.

(*Ga. Code Ann. § 14-2-705(f)*.)

VOTING AND APPROVAL

Unless the articles of incorporation or the Georgia Business Corporation Code (GBCC) provide otherwise, a majority of votes entitled to be cast on the matter by the voting group constitutes a quorum (*Ga. Code Ann. § 14-2-725(a)*).

Unless the articles of incorporation provide otherwise, each share, regardless of class, is entitled to one vote on each matter voted on at a shareholder's meeting (*Ga. Code Ann. § 14-2-721(a)*).

However, absent special circumstances, the shares of a corporation are not entitled to vote if they are:

- Owned by the corporation as treasury shares.
- Held, directly or indirectly, by a second corporation, of which the first corporation owns, directly or indirectly, shares sufficient to elect a majority of the directors of the second corporation.

This does not limit the power of a corporation to vote any shares held by it in a fiduciary capacity. (*Ga. Code Ann. § 14-2-721(b), (c)*.)

If a quorum exists, action on a matter by a voting group is approved if the votes cast within the voting group favoring the action exceed the votes opposing the action, unless the articles of incorporation, the bylaws or the GBCC provide for a greater number of affirmative votes (*Ga. Code Ann. § 14-2-725(c)*).

Proxies

Shareholders may vote shares in person or by proxy (*Ga. Code Ann. § 14-2-722(a)*). Proxies may be appointed by either:

- Signing an appointment form.
- An electronic transmission.

(*Ga. Code Ann. § 14-2-722(b)*.)

Electronic transmissions must contain or be accompanied by information from which it can be determined that one of the following persons authorized the electronic transmission:

- The shareholder.
- The shareholder's agent.
- The shareholder's attorney.

(*Ga. Code Ann. § 14-2-722(b)*.)

An appointment of a proxy is valid for 11 months unless a longer period is expressly provided in the appointment (*Ga. Code Ann. § 14-*

2-722(c)). Appointments of proxies are revocable unless:

- The appointment form or electronic transmission states that it is irrevocable.
- The appointment is coupled with an interest.

An appointment made irrevocable is revoked when the interest with which it is coupled is extinguished. (*Ga. Code Ann. § 14-2-722(d), (f)*.)

Appointments coupled with an interest include the appointment of:

- A pledgee.
- A person who purchased or agreed to purchase the shares.
- A creditor of the corporation who extended it credit under terms requiring the appointment.
- An employee of the corporation whose employment contract requires the appointment.
- A party to a voting agreement under Section 14-2-731 of the Georgia Code Annotated.

(*Ga. Code Ann. § 14-2-722(d)*.)

Cumulative Voting

Unless the articles of incorporation provide otherwise, shareholders cannot cumulate their votes for directors. Shares otherwise entitled to vote cumulatively cannot be voted cumulatively at a particular meeting unless either:

- The meeting notice or proxy statement accompanying the notice states that cumulative voting will be in effect.
- A shareholder who has the right to cumulate his votes gives notice of his intent to cumulate to the corporation at least 48 hours before the time set for the meeting. If one shareholder gives notice, all other shareholders in the same voting group participating in the election are entitled to cumulate their votes without giving notice.

(*Ga. Code Ann. § 14-2-728(d)*.)

OTHER REQUIREMENTS

Action required or permitted to be taken at a shareholders' meeting may be taken without a meeting if the action is taken by either:

- All the shareholders entitled to vote on the action.
- If the articles of incorporation provide, by persons who would be entitled to vote at a meeting shares having voting power to cast at least the minimum number (or numbers, in the case of voting by groups) of votes that would be necessary to authorize or take the action at a meeting at which all shareholders entitled to vote were present and voted.

(*Ga. Code Ann. § 14-2-704(a)*.)

Actions must be evidenced by one or more written consents:

- Bearing the date of signature.
- Describing the action taken.
- Signed by shareholders entitled to take action without a meeting.
- Delivered to the corporation within 60 days for:
 - inclusion in the minutes; or
 - filing with the corporate records.

(*Ga. Code Ann. § 14-2-704(a), (d)*.)

Written consent is not valid unless either:

- The consenting shareholder has been provided the same material that would have been required to be sent to shareholders in a notice of a meeting at which the proposed action would have been submitted to the shareholders for action, including notice of any applicable dissenters' rights.
- The written consent contains an express waiver of the right to receive the material otherwise required to be provided.

(*Ga. Code Ann. § 14-2-704(b).*)

If action is taken by less than all of the shareholders entitled to vote on the action, all voting shareholders on the record date who did not participate in taking the action must be given, within ten days after the action:

- Written notice of the action.
- The material that would have been required to be sent to shareholders in a notice of a meeting at which the proposed action would have been submitted to the shareholders for action, including notice of any applicable dissenters' rights.

(*Ga. Code Ann. § 14-2-704(f).*)

Shareholder proposals for publicly traded corporations incorporated in Georgia are also governed by Rule 14a-8 under the Securities Exchange Act of 1934. For more information on the shareholder proposal process, see *Rule 14a-8 Shareholder Proposal Process Flowchart* (<http://us.practicallaw.com/7-508-8268>).

FOREIGN CORPORATIONS

4. When and how does a corporation qualify to do business in your jurisdiction? Please include information on:

- State nexus analysis.
- Filing requirements.
- Fees.
- Name requirements.

STATE NEXUS ANALYSIS

To transact business in Georgia, a foreign corporation must obtain a certificate of authority from the Georgia Secretary of State (*Ga. Code Ann. § 14-2-1501(a)*). However, the following acts are not considered to be "transacting business" in Georgia:

- Maintaining or defending any action, administrative proceeding or arbitration proceeding, or settling claims or disputes.
- Holding meetings of directors or shareholders, or carrying on other internal affairs.
- Maintaining bank accounts.
- Maintaining offices or agencies for the transfer, exchange and registration of the corporation's securities.
- Appointing and maintaining trustees or depositaries for the corporation's securities.
- Effecting sales through independent contractors.
- Soliciting or procuring orders, where the orders require acceptance outside of Georgia before becoming binding contracts and where the contracts do not involve local performance other than delivery and installation.

- Making loans or creating or acquiring evidences of debt, mortgages or liens on real or personal property.
- Securing or collecting debts or enforcing any rights in property securing them.
- Owning, without more, real or personal property.
- Conducting an isolated transaction not in the course of a number of repeated transactions of a similar nature.
- Transacting any business in interstate or foreign commerce.
- Serving as a trustee, executor, administrator, guardian or other fiduciary.
- Owning an interest in, or controlling, another entity organized under the laws of, or transacting business in, Georgia.
- Serving as a manager of a limited liability company organized under the laws of, or transacting business in, Georgia.

(*Ga. Code Ann. § 14-2-1501(b).*)

FILING REQUIREMENTS

Registration Documents

To qualify to do business in Georgia, a foreign corporation must file the following documents with the Georgia Secretary of State (GA SOS):

- An application for a certificate of authority to transact business in Georgia, setting out:
 - the name of the corporation (the corporation name must be available for use);
 - the jurisdiction under which it is incorporated;
 - its date of incorporation;
 - the mailing address of its principal and registered offices and the name of its registered agent; and
 - the names and business addresses of its chief executive officer, chief financial officer and secretary, or individuals holding similar positions.
- A certificate of existence (or similar document) authenticated by the GA SOS (or similar authority) in its state or country of incorporation.

(*Ga. Code Ann. § 14-2-1503.*)

Annual Reports

Foreign corporations authorized to transact business in Georgia must file an annual registration with the GA SOS. The first annual registration must be delivered to the GA SOS between January 1 and April 1 of the year following the calendar year in which a foreign corporation became authorized to transact business in Georgia. Subsequent annual registrations must be delivered to the GA SOS between January 1 and April 1 each year. (*Ga. Code Ann. § 14-2-1622(c).*) A foreign corporation that does not deliver its annual registration to the GA SOS within 60 days after it is due may have its certificate of authority revoked (*Ga. Code Ann. § 14-2-1530(1)*).

FEES

Registration Documents

The fee for filing an application for a certificate of authority is:

- \$225 for foreign corporations, limited liability companies and limited partnerships.
- \$200 for foreign limited liability partnerships.

Expedited processing costs an additional \$100 or \$250. Regular expedited processing requests are typically completed within 48 hours after receipt. Same day expedited processing is available if the request is received by noon. (*GA SOS: Filing Fees.*) A foreign corporation must pay a \$500 penalty to the GA SOS if it conducted business in Georgia more than 30 days before the date of its application for a certificate of authority (*Ga. Code Ann. §§ 14-2-122 and 14-2-1502*).

Annual Reports

Foreign corporations should file the annual report online at the GA SOS's website. The filing fee is \$50. Foreign corporations must pay a penalty of \$25 if the annual report is not timely filed.

NAME REQUIREMENTS

The name of a foreign corporation must comply with Georgia's rules on corporate names (see *Name Requirements and Reservation Options*). It must be different than the name of any existing Georgia entity, registered foreign entity or name that has been reserved with the GA SOS, unless the other entity provides written consent (*Ga. Code Ann. § 14-2-1506*). If no consent is obtained, the foreign corporation can adopt a trade or fictitious name for doing business in Georgia. If a foreign corporation does adopt a trade or fictitious name, it should register that name with the clerk of the superior court of the county in which its principal office is located and in every county where it intends to conduct business.

FIDUCIARY DUTIES

5. Please summarize the fiduciary duties of directors and officers in your jurisdiction.

Directors must generally discharge their duties:

- In a manner that they believe in good faith to be in the best interests of the corporation (*Ga. Code Ann. § 14-2-830(a)(1)*).
- With the care an ordinarily prudent person in a like position would exercise under similar circumstances (*Ga. Code Ann. § 14-2-830(a)(2)*).

Accordingly, each director of a Georgia corporation owes the typical fiduciary duties of:

- Duty of care.
- Duty of loyalty.

Directors are not liable to the corporation or its shareholders for any action taken as a director, or any failure to take action, if they perform the duties of the office complying with the Georgia Business Corporation Code (*Ga. Code Ann. § 14-2-830(d)*).

DUTY OF CARE

The statutory requirement that a director discharge his duties in a manner that he believes in good faith to be in the corporation's best interests enables Georgia corporations to include a provision in their articles of incorporation that a director, in discharging his duties, may consider the effects of any action on:

- The corporation.
- Its subsidiaries.
- Its shareholders.

The Georgia business judgment rule precludes claims against officers and directors for business decisions amounting to ordinary negligence, except where those decisions are shown to have been made either:

- Without deliberation.
- Without the necessary diligence to assess the facts and circumstances on which the decisions are based.
- In bad faith.

(*FDIC v. Loudermilk*, 761 S.E.2d 332, 338 (Ga. 2014).)

A director may violate the standard of care if he fails to exercise the diligence, care and skill of an "ordinarily prudent" person acting under similar circumstances in like position regarding the process by which he makes decisions. Directors who have breached the duty of care can be held personally liable for losses suffered by the corporation as a direct and proximate result of the breach. (See *Loudermilk*, 761 S.E. 2d at 339.)

A director is also entitled to rely on information, reports and statements of:

- Officers or employees of the corporation which the director reasonably believes to be reliable and competent in the manner presented (*Ga. Code Ann. § 14-2-830(b)(1)*).
- Legal counsel, public accountants, investment bankers or others on matters the director reasonably believes to be within the person's professional competence (*Ga. Code Ann. § 14-2-830(b)(2)*).
- A committee of the board of directors of which the director is not a member if the director reasonably believes the committee merits confidence (*Ga. Code Ann. § 14-2-830(b)(3)*).

DUTY OF LOYALTY

A director's duty of loyalty is encompassed by the statutory standard that a director must discharge his duties in a manner that he believes in good faith to be in the best interests of the corporation (*Ga. Code Ann. § 14-2-830(a)(1)*). In addition to this statutory standard, Georgia has enacted extensive statutory provisions that address director conflicts of interest (*Ga. Code Ann. §§ 14-2-860 to 14-2-864*). Other statutory provisions prohibit:

- The appropriation, in violation of a director's duties, of any business opportunity of the corporation (*Ga. Code Ann. § 14-2-831(a)(1)(C)*).
- The making of unlawful conveyances, assignments or transfers of corporate assets or other unlawful transactions (*Ga. Code Ann. § 14-2-831(a)(2), (3)*).
- The voting for or assent to an unlawful distribution (*Ga. Code Ann. § 14-2-832*).

Additionally, statutory provisions permitting the limitation or elimination of liability for directors do not allow:

- The appropriation of business opportunities.
- Acts or omissions that involve intentional misconduct or a knowing violation of law.
- Voting for or assenting to an unlawful distribution.
- Any transaction from which the director receives an improper personal benefit.

(*Ga. Code Ann. § 14-2-202(b)(4)*.)

FIDUCIARY DUTIES OF OFFICERS

Officers have the same duties and are held to the same standards of conduct as directors (*Ga. Code Ann. § 14-2-842*).

MERGERS

6. What is required to complete a merger in your jurisdiction?

Please include information on:

- Documents.
- Board actions.
- Filing requirements (including timing, electronic versus paper and availability of expedited/rush services).
- Shareholder actions.
- Availability of appraisal rights (including requirements to exercise such rights).

DOCUMENTS

Plan of Merger

To complete a merger, the participating corporation must enter into a plan of merger. Also known as an agreement and plan of merger or a merger agreement, the plan of merger is the main transaction document in a merger. A plan of merger must set out:

- The name of each corporation or other entity that will be merged and the name of the surviving corporation or other entity into which each other corporation or other entity plans to merge.
- The terms and conditions of the merger.
- The manner and basis of converting the shares of each corporation and the shares, memberships or financial benefits or units in each of the entities into:
 - shares or other securities or obligations of the surviving corporation or any other corporation; or
 - cash or other property.
- Whether shares of any shareholder will be converted in a manner that is different from any other shareholder.

(*Ga. Code Ann. § 14-2-1101(b)*.)

The plan of merger may set out:

- Amendments to the articles of incorporation or governing agreements of the surviving corporation or other entity.
- Other provisions relating to the merger.

(*Ga. Code Ann. § 14-2-1101(c)*.)

Articles of Merger

After approving a merger, the surviving corporation must file either articles of merger or a certificate of merger with the Georgia Secretary of State (GA SOS) and pay a \$20 filing fee. The articles of merger must set out:

- The plan of merger.
- If shareholder approval was not required, a statement to that effect.
- If approval of the shareholders of one or more parties to the merger was required, a statement that the merger was approved by those shareholders.

(*Ga. Code Ann. § 14-2-1105(a)*.)

Certificate of Merger

The Georgia Business Corporation Code (GBCC) allows the surviving corporation to file a certificate of merger in place of the articles of merger. Corporations typically choose to file a certificate of merger because certificates of merger allow corporations to preserve certain confidential information that may be in the plan of merger. The certificate of merger must set out:

- The name and state of incorporation of each corporation that is merging and the name of the surviving corporation.
- Any amendments to the articles of incorporation of the surviving corporation.
- The address of the surviving corporation's principal place of business and a statement that the executed plan of merger is on file at that address.
- A statement that a copy of the plan of merger will be provided by the surviving corporation, on request and without cost, to any shareholder of any corporation that is a party to the merger.
- If shareholder approval was not required, a statement to that effect.
- If approval of the shareholders of one or more parties to the merger was required, a statement that the merger was approved by those shareholders.

(*Ga. Code Ann. § 14-2-1105(b)*.)

Certificate of Publication

Together with the articles or certificate of merger, the surviving corporation must deliver a certificate of publication to the GA SOS that:

- States that a request to publish a notice of the merger will be made to a newspaper in the county where the registered office of the surviving corporation is located.
- Is accompanied by a payment of \$40 to cover the publishing costs.

(*Ga. Code Ann. § 14-2-1105.1*.)

The publication certification can either be:

- Included in the articles or certificate of merger.
- Filed as a separate document if it is signed by an officer or other person authorized to act on the corporation's behalf.

The surviving corporation must make the request for publication to the newspaper by the next business day after filing the articles or certificate of merger. (*Ga. Code Ann. § 14-2-1105.1*.)

BOARD ACTIONS

The board of directors of each corporation that is a party to the merger must adopt a resolution that approves the plan of merger. If shareholder approval is required, the board of directors must also recommend and submit the plan of merger (or summary of its terms) to the shareholders for their vote (*Ga. Code Ann. § 14-2-1103(b)(1)*).

A parent corporation owning at least 90% of the outstanding shares of each class of a subsidiary corporation can merge the subsidiary into itself or another such subsidiary, or merge itself into the subsidiary, without the approval of the board of directors of the subsidiary (*Ga. Code Ann. § 14-2-1104(a)*).

SHAREHOLDER ACTIONS

Generally, the plan of merger must be approved by the shareholders of the corporations that are party to the merger (*Ga. Code Ann. § 14-2-1103(b)(2)*). Shareholders must be given notice of the meeting at which the plan of merger will be considered no fewer than ten and no more than 60 days before the meeting date (*Ga. Code Ann. § 14-2-705(a)*). The notice must:

- State that the purpose, or a purpose, of the meeting is to consider the plan of merger.
- Contain a copy or summary of the plan of merger.
- Provide notice on dissenters' rights, if applicable.

(*Ga. Code Ann. §§ 14-2-1103(d) and 14-2-1302.*)

A merger must be approved by:

- The shareholders of a majority of all outstanding shares entitled to vote (not merely a majority of the votes present at the meeting), voting as a single voting group.
- A majority of all the votes entitled to be cast by holders of the shares of each voting group entitled to vote separately on the plan of merger as a voting group (even if the class is otherwise non-voting stock).

(*Ga. Code Ann. § 14-2-1103(e).*)

The articles of incorporation, bylaws or board of directors may provide that a greater percentage of the vote or a vote by voting groups must approve a plan of merger.

Shareholders of the surviving corporation are not, however, required to approve the plan of merger if:

- The articles of incorporation of the surviving or acquiring corporation will not be changed by the merger (except in a respect that can be amended by the directors without shareholder approval).
- Each share of stock of the surviving or acquiring corporation outstanding immediately before the effective date of the merger will be an identical outstanding or reacquired share immediately after the merger.
- The number and kind of shares outstanding immediately after the merger (including shares issuable as a result of the merger) will not exceed the total number and kind of shares of the surviving or acquiring corporation authorized by its articles of incorporation immediately before the merger.

(*Ga. Code Ann. § 14-2-1103(h).*)

Additionally, a parent corporation owning at least 90% of the outstanding shares of each class of a subsidiary corporation can merge the subsidiary into itself or another such subsidiary, or merge itself into the subsidiary, without the approval of the shareholders of the subsidiary (*Ga. Code Ann. § 14-2-1104*).

MERGERS WITH FOREIGN CORPORATIONS

One or more foreign corporations can merge with one or more Georgia corporations if:

- The merger is permitted by the law of the state or country under whose law each foreign corporation is incorporated, and each foreign corporation complies with that law in effecting the merger.
- The foreign corporation complies with Section 14-2-1105 of the Georgia Code Annotated (Articles or Certificate of Merger) if it is the surviving corporation of the merger.
- Each Georgia corporation complies with the applicable provisions of Sections 14-2-1101 (Merger), 14-2-1103 (Action on Plan), 14-2-1104 (Merger with Subsidiary) and 14-2-1105 (Articles or Certificate of Merger) of the Georgia Code Annotated (*Ga. Code Ann. §§ 14-2-1101, 14-2-1103, 14-2-1104, 14-2-1105*), if the Georgia corporation is the surviving corporation of the merger.

MERGERS WITH OTHER ENTITIES

Corporations can merge with non-corporate entities, such as domestic or foreign limited liability companies, joint stock associations and limited partnerships, if the board of directors of each corporation and the appropriate body of each non-corporate entity adopt a plan of merger according to:

- Each corporation's and non-corporate entity's governing agreements.
- The laws of the jurisdiction under which it was formed.

(*Ga. Code Ann. § 14-2-1109(c).*)

FILING REQUIREMENTS

The surviving entity must file with the GA SOS either:

- Articles of merger, which must include the plan of merger.
- A certificate of merger (see *Documents*).

The articles or certificate of merger can be filed before the effective date of the merger if they specify a delayed effective date.

The fee for filing the articles or certificate of merger is \$20. Expedited processing costs an additional \$100 or \$250. (*GA SOS: Filing Fees.*)

APPRAISAL RIGHTS

The GBCC generally provides for appraisal rights in mergers if either:

- Approval of the shareholders is required.
- The corporation is a subsidiary that is merged with its parent.

(*Ga. Code Ann. § 14-2-1302(a).*)

Shareholders who own shares that were either listed on a national stock exchange or held of record by more than 2,000 shareholders do not have appraisal rights unless either:

- The holders of the shares must accept anything other than shares of the surviving corporation or another publicly held corporation that is listed on a national securities exchange or held of record by more than 2,000 shareholders as of the effective date of the merger.
- The articles of incorporation or board of directors provide otherwise.

(*Ga. Code Ann. § 14-2-1302(c).*)

ASSET SALES

7. What is required for an asset sale in your jurisdiction? Please include any distinctions for a sale of substantially all of the assets. In particular, please include information on:

- Documents.
- Board actions.
- Shareholder actions.
- Bulk sales compliance.
- Successor liability or de facto merger analysis.

DOCUMENTS

Although the Georgia Business Corporation Code does not require any filings to effect an asset sale, generally a corporation that wishes to sell its property or assets enters into an asset purchase agreement with the buyer. The asset purchase agreement sets out:

- What is being sold.
- Details of the sale process.
- The liabilities and obligations of the parties.

BOARD ACTIONS

Unless shareholder approval is required by the articles of incorporation, a corporation can engage in the following transactions, on the terms and conditions determined by the board of directors, without seeking shareholder approval:

- Any mortgage, pledge or other encumbrance of any property of the corporation.
- The transfer of any or all of its property to a wholly-owned subsidiary of the corporation.
- The sale, lease, exchange or other disposition of less than all or substantially all of the corporation's property.
- The sale, lease, exchange or other disposition of all or substantially all of the corporation's property if:
 - the corporation is insolvent and a sale for cash or its equivalent is deemed advisable by the board; or
 - the corporation was incorporated for liquidating the property and assets.

(*Ga. Code Ann. § 14-2-1201(b).*)

Except as set out above, the sale, lease, exchange or other disposition of all or substantially all of a corporation's property requires the corporation's board to propose and its shareholders to approve the transaction (*Ga. Code Ann. § 14-2-1202(a).*)

SHAREHOLDER ACTIONS

Unless the articles of incorporation, bylaws or board of directors require a greater vote or a vote by voting groups, a sale of all or substantially all of the property or assets of a corporation requires the approval of the majority of all votes entitled to be cast by shareholders (*Ga. Code Ann. § 14-2-1202(e).*) Shareholders must be given notice of the meeting at least ten and no more than 60 days before the meeting date (*Ga. Code Ann. § 14-2-705(a).*) The notice must:

- State that the purpose, or a purpose, of the meeting is to consider the sale, lease, exchange or other disposition of all or substantially all of the corporation's property.
- Contain a description of the transaction.
- Provide notice on dissenters' rights, if applicable.

(*Ga. Code Ann. §§ 14-2-1202(d) and 14-2-1302.*)

BULK SALES

Effective July 1, 2015, the Bulk Sales Act is no longer applicable to sales by companies in Georgia (*Senate Bill 65, Reg. Sess. (Ga. 2015).*)

SUCCESSOR LIABILITY OR DE FACTO MERGER ANALYSIS

Georgia courts follow the general rule that the buyer of assets in an asset sale is not liable for the debts and liabilities of the seller. However, a buyer may be held responsible for the liabilities of a seller if a court determines that one of the following exceptions is met:

- The buyer expressly or impliedly assumed the liabilities.
- The transaction amounted to a consolidation or merger of the seller into the buyer.
- The buyer was merely a continuation of the seller under a different name.
- The transfer was fraudulent or intended to defraud creditors.

(*Bullington v. Union Tool Corp., 328 S.E.2d 726, 727 (Ga. 1985).*)

Georgia has also adopted a "product line" exception for when a successor:

- Continues to manufacture the same type of product.
- Carries over the experience and expertise of the transferor.
- Is in a better position to assume the liabilities of the product's manufacture.

(*See Bullington, 328 S.E.2d at 727s *+/5.*)

ANTI-TAKEOVER LAWS

8. Please describe any state anti-takeover laws. Do corporations have the ability to opt in or out of these laws?

The Georgia Business Corporation Code has two main anti-takeover provisions which:

- Prohibit mergers, other combinations and acquisitions of corporations with or by an acquirer of 10% or more of the corporation's shares unless either:
 - the board of directors approves the transaction or combination; or
 - the interested shareholder becomes the owner of 90% or more of the corporation's shares.

(*Ga. Code Ann. § 14-2-1132.*)

- Permit a 180-day dead-hand poison pill (*Ga. Code Ann. § 14-2-624(d)(2).*)

For more information on dead-hand poison pills, see *Practice Note, Poison Pills: Defending Against Takeovers and Protecting NOLs* (<http://us.practicallaw.com/3-386-0340>).

DISSOLVING A CORPORATION

9. What is required to dissolve a corporation in your jurisdiction?

Please include information on:

- Documents.
- Board actions.
- Filing requirements (including timing, electronic versus paper and availability of expedited/rush services).
- Shareholder action.

DOCUMENTS

Generally, a corporation that wishes to dissolve must file the following documents with the Georgia Secretary of State (GA SOS):

- A notice of intent to dissolve and cease all business activity except as is necessary to wind up its affairs.
- Articles of dissolution signed by an authorized officer of the corporation.

The notice of intent to dissolve must include:

- The name of the corporation.
- The date the dissolution was authorized.
- If shareholder approval was required for dissolution, a statement that the dissolution was approved by the shareholders.

(*Ga. Code Ann. § 14-2-1403.*)

The articles of dissolution must include:

- The name of the corporation.
- The date on which a notice of intent to dissolve was filed and a statement that it has not been revoked.
- A statement that:
 - all known debts, liabilities and obligations of the corporation have been paid and discharged; or
 - adequate provision has been made for their payment and discharge.
- A statement that:
 - all remaining property and assets of the corporation have been distributed among its shareholders according to their respective rights and interests;
 - adequate provision has been made for a distribution; or
 - the property and assets have been deposited with the Office of Treasury and Fiscal Services.
- A statement that:
 - there are no actions pending against the corporation in any court; or
 - adequate provision has been made for the satisfaction of any judgment, order or decree which may be entered against it in any pending action.

(*Ga. Code Ann. § 14-2-1408(a).*)

To dissolve a corporation that has not issued shares or that has not commenced business, the corporation must file articles of dissolution with the GA SOS. The articles of dissolution must be authorized by

a majority of the incorporators or initial directors and must state, among other things, that either:

- No shares of stock were issued.
- Business activity was not commenced.

(*Ga. Code Ann. § 14-2-1401.*)

BOARD ACTIONS

The board of directors must:

- Adopt a resolution that approves the dissolution of the corporation.
- Submit the proposal to the shareholders for their vote.

(*Ga. Code Ann. § 14-2-1402.*)

FILING REQUIREMENTS

Before a corporation can file its articles of dissolution, the corporation must publish a notice of intent to dissolve (*Ga. Code Ann. § 14-2-1403.1*). After the board and shareholders approve the dissolution and the notice of intent to dissolve has been filed with the GA SOS, a corporation must begin the winding-up process before it can be dissolved. To wind-up its affairs, a corporation must:

- Send a notice of intent to dissolve to all creditors.
- Collect all of its assets.
- Discharge all of its obligations.
- Dispose of its property that will not be distributed to shareholders.
- Distribute the remainder of its assets to its shareholders.

After the corporation has finished winding up its affairs, it can file articles of dissolution with the GA SOS. On filing the articles of dissolution, the corporation ceases to exist. At any time before filing the articles of dissolution, a corporation can revoke its intent to dissolve by both:

- Authorizing the revocation (following the same basic procedure needed to authorize the dissolution).
- Subsequently filing with the GA SOS a:
 - notice of revocation of the intent to dissolve; and
 - copy of the notice of intent to dissolve.

(*Ga. Code Ann. § 14-2-1404.*)

The GA SOS does not charge a filing fee for:

- A notice of intent to dissolve.
- Articles of dissolution.
- A notice of revocation of the intent to dissolve.

SHAREHOLDER ACTION

Unless the articles of incorporation, bylaws or board of directors require a greater vote or a vote by voting groups, a corporation must obtain the approval of a majority of all the votes entitled to be cast by the shareholders on the proposal. Shareholders must be given at least ten days' (but not more than 60 days') notice of the meeting and the notice must state that the purpose, or a purpose, of the meeting is to consider dissolving the corporation (*Ga. Code Ann. §§ 14-2-705 and 14-2-1402*).

ACTIVITIES REQUIRING SHAREHOLDER CONSENT

10. What activities require shareholder consent in your jurisdiction?

Generally, a corporation can require shareholder approval for specific corporate actions by stating so in its articles of incorporation. However, for certain fundamental corporate changes, the Georgia Business Corporation Code requires a corporation to obtain shareholder approval. Fundamental corporate changes requiring shareholder approval include:

- A merger or share exchange with other corporations (*Ga. Code Ann. §§ 14-2-1101 to 14-2-1103*). Certain exceptions apply (see *Question 6*) (*Ga. Code Ann. § 14-2-1103(h)*).
- A voluntary dissolution of the corporation (*Ga. Code Ann. § 14-2-1402*).
- A sale, lease or exchange of all or substantially all of a corporation's property or assets (*Ga. Code Ann. § 14-2-1202*).
- The conversion of a corporation to a limited liability company or limited partnership (*Ga. Code Ann. § 14-2-1109.1*).
- The conversion of a corporation to a foreign limited liability company, foreign limited partnership or foreign corporation (*Ga. Code Ann. § 14-2-1109.3*).
- Amendments to the articles of incorporation (*Ga. Code Ann. § 14-2-1003*). However, unless the articles of incorporation provide otherwise, the board of directors can amend the articles of incorporation without shareholder action in certain limited circumstances (*Ga. Code Ann. § 14-2-1002*).

For these fundamental corporate changes, Georgia law requires a minimum approval of:

- The shareholders of a majority of all outstanding shares entitled to vote (not merely a majority of the votes present at the meeting), voting as a single voting group.
- For a plan of merger, a majority of all the votes entitled to be cast by holders of the shares of each voting group entitled to vote separately on the plan of merger as a voting group (even if the class is otherwise nonvoting stock).

However, all shareholders must approve a conversion of a corporation to another entity, domestic or foreign. The articles of incorporation or the board of directors can provide that a greater percentage of the vote or a vote by voting groups must approve certain fundamental corporate changes (*Ga. Code Ann. § 14-2-1402*).

PREEMPTIVE RIGHTS

11. Is there a statutory provision for preemptive rights? Do corporations have the ability to opt in or out of this provision?

Preemptive rights exist for the following corporations, unless the articles of incorporation provide otherwise:

- Close corporations.
- Corporations in existence on July 1, 1989 if:
 - shareholders had preemptive rights as of this date; or
 - the corporations' restated or amended their articles of incorporation after July 1, 1989 to include preemptive rights and provided notice to shareholders.

(*Ga. Code Ann. § 14-2-630(b)*.)

Shareholders of a corporation (other than a close corporation) formed after July 1, 1989 do not have preemptive rights unless those rights are provided in the articles of incorporation (*Ga. Code Ann. § 14-2-630(a)*).

Preemptive rights, even if applicable to a corporation, do not exist regarding the following (unless the articles of incorporation expressly provide otherwise):

- Shares issued as a dividend.
- Fractional shares.
- Shares issued to effect a merger, share exchange or plan of reorganization.
- Shares issued as compensation to corporate employees or to satisfy conversion or option rights created to compensate corporate employees.
- Shares authorized in the articles of incorporation that are issued within a year of the date of incorporation.
- Shares issued for consideration other than money.
- Shares released by waiver from preemptive rights by a vote of at least two-thirds of the shares of the class to be issued.

(*Ga. Code Ann. § 14-2-630(c)*.)

LIMITATIONS ON CLASSES OR SERIES OF STOCK

12. Are there any limits on the classes or series of stock that can be issued in your jurisdiction?

The Georgia Business Corporation Code does not impose any limits on the classes or series of capital stock that can be issued by a corporation. Any limitations or restrictions on any classes or series of capital stock must appear in the articles of incorporation or, if the articles of incorporation provide, in a board resolution authorizing the stock. However, before issuing any shares of a class or series, the corporation must file articles of amendment with the Georgia Secretary of State (GA SOS), which are effective without shareholder action. The board can also change the number of shares in a series and can amend the rights of unissued shares of the series by filing articles of amendment with the GA SOS. (*Ga. Code Ann. § 14-2-602*.)

LIMITATIONS ON DIVIDENDS

13. Please describe any limitations on the ability of a corporation to pay dividends on capital stock.

Subject to any restrictions in the articles of incorporation, directors can declare and cause the corporation to make distributions to its shareholders out of cash, property or its own shares (*Ga. Code Ann. § 14-2-640(a)*). However, no distribution may be made if, after making the distribution, either:

- The corporation would not be able to pay its debts as they become due.
- The corporation's total assets would be less than the sum of:
 - its total liabilities; and
 - the amount that would be needed to satisfy preferential rights on dissolution.

(*Ga. Code Ann. § 14-2-640(c)*.)

A director who votes for or assents to an improper distribution is personally liable to the corporation for the amount that exceeds what could have been lawfully distributed (*Ga. Code Ann. § 14-2-832(a)*). Any director found liable for approving an improper distribution is entitled to contribution from every other director who could be held liable and from each shareholder who accepted the unlawful distribution with knowledge that the distribution was unlawful (*Ga. Code Ann. § 14-2-832(b)*).

BOARD OF DIRECTORS

14. Please describe any minimum requirements to serve as corporate director. What are the requirements for or limits on the size of the board of directors?

A corporate director must be at least 18 years old. Unless provided for in the articles of incorporation, corporate directors do not need to be either:

- Residents of Georgia.
- Shareholders of the corporation.

The articles of incorporation or bylaws may specify additional requirements. (*Ga. Code Ann. § 14-2-802.*)

A board of directors must consist of at least one individual. The number may be specified or fixed in the articles of incorporation or bylaws. Shareholders or directors can establish a variable range for the size of the board of directors, if provided for in the articles of incorporation or bylaws. (*Ga. Code Ann. § 14-2-803.*) Terms of directors generally expire at the next annual shareholders' meeting following their election unless their terms are staggered. Directors continue to serve past the expiration of their terms until successors are elected and qualify, or until there is a decrease in the number of directors. (*Ga. Code Ann. § 14-2-805.*)

Corporations having cumulative voting may amend the minimum number of directors only through adoption by shareholders (*Ga. Code Ann. § 14-2-803(c)*).

Directors may resign at any time by delivering notice in writing or by electronic transmission to either:

- The board of directors.
- The chairperson of the board of directors.
- The corporation.

A resignation is effective when the notice is delivered, unless a later effective date is specified. (*Ga. Code Ann. § 14-2-807(a), (b).*)

Shareholders may remove one or more directors with or without cause, unless the articles of incorporation or bylaws provide otherwise. However, directors with staggered terms can only be removed for cause. (*Ga. Code Ann. § 14-2-808(a), (d).*)

If a director is elected by a voting group of shareholders, only the shareholders of that voting group may participate in the vote to remove him. If cumulative voting is authorized, a director may not be removed if the number of votes sufficient to elect him under cumulative voting is voted against his removal. If cumulative voting is not authorized, a director may be removed only by a majority of the votes entitled to be cast. (*Ga. Code Ann. § 14-2-808(b), (c).*)

A director may be removed only at a meeting called for the purpose of removing him, and the meeting notice must state removal as a purpose (*Ga. Code Ann. § 14-2-808*).

15. Please summarize the board of directors' ability to designate committees and subcommittees. Are there any limitations on the board of directors' ability to delegate authority to those committees?

Unless the articles of incorporation or bylaws provide otherwise, a board of directors may create committees and appoint one or more directors to serve on them. Sections 14-2-820 to 14-2-824 of the Georgia Code Annotated, which govern meetings, action without meetings, notice and waiver of notice, and quorum and voting requirements of the board of directors also apply to committees and their members. Each committee may exercise the authority of the board of directors to the extent specified by the board or in the articles of incorporation or bylaws. (*Ga. Code Ann. § 14-2-825(a)-(c).*)

However, committees may not:

- Approve or propose to shareholders any action requiring shareholder approval.
- Fill vacancies on the board of directors or any of its committees.
- Amend articles of incorporation, except to:
 - amend the articles of incorporation to fix the designations, preferences, limitations and relative rights of shares; or
 - increase or decrease the number of shares contained in a series of shares established under Section 14-2-602 of the Georgia Code Annotated, but not below the number of shares then issued.
- Adopt, amend or repeal bylaws.
- Approve a plan of merger not requiring shareholder approval.

(*Ga. Code Ann. § 14-2-825(d).*)

INDEMNIFICATION

16. Please describe the corporation's ability, and any requirements or limits on that ability, to indemnify its directors and officers in your jurisdiction.

A corporation may indemnify an individual who is a party to a proceeding because that individual is or was a director against liability incurred in the proceeding if the individual:

- Conducted himself in good faith.
- Reasonably believed that the conduct:
 - was in the best interests of the corporation, in the case of conduct in the director's official capacity; or
 - was at least not opposed to the best interests of the corporation, in all other cases.
- Had no reasonable cause to believe his conduct was unlawful, in the case of any criminal proceeding.

(*Ga. Code Ann. § 14-3-851(a).*)

However, a corporation may not indemnify a director under Section 14-2-851 of the Georgia Code Annotated unless a determination has been made for a specific proceeding that indemnification of the director is permissible in the circumstances because he has met the relevant standard of conduct (*Ga. Code Ann. § 14-2-855(a)*).

This determination must be made by either:

- If there are two or more disinterested directors:
 - the board of directors by a majority vote of all the disinterested directors; or
 - a majority of the members of a committee of two or more disinterested directors appointed by such a vote.
- Special legal counsel:
 - selected by the board of directors or a committee as provided above; or
 - if there are fewer than two disinterested directors, selected by the board of directors.
- The shareholders. However, shares owned by or voted under the control of a director who at the time does not qualify as a disinterested director may not be voted on the determination.

(*Ga. Code Ann. §§ 14-2-855(b).*)

A corporation may not indemnify a director in connection with:

- A proceeding by or in the right of the corporation, except for reasonable expenses incurred in connection with the proceeding if it is determined that the director has met the relevant standard of conduct.
- Any proceeding regarding conduct for which the director was adjudged liable on the basis that personal benefit was improperly received by him, whether or not involving action in his official capacity.

(*Ga. Code Ann. § 14-2-851(d).*)

A corporation must indemnify a director who was wholly successful in the defense of any proceeding to which he was a party because he was a director of the corporation (*Ga. Code Ann. § 14-2-852*).

A corporation may indemnify an officer, employee or agent of the corporation:

- To the same extent as a director.
- As provided by:
 - the articles of incorporation;
 - the bylaws;
 - a resolution of the board of directors; or
 - contract.

(*Ga. Code Ann. § 14-2-857(a)(1)-(2).*)

However, a corporation may not indemnify an officer, employee or agent of the corporation for liability that arises out of conduct constituting:

- Appropriation, in violation of his duties, of any business opportunity of the corporation.
- Acts or omissions that involve intentional misconduct or a knowing violation of law.
- The types of liability set out in Section 14-2-832 of the Georgia Code Annotated.
- Receipt of an improper personal benefit.

(*Ga. Code Ann. § 14-2-857(a)(2).*)

AMENDMENT OF ORGANIZATIONAL DOCUMENTS

17. What is required to amend the corporation's certificate of incorporation and bylaws? Please include information on:

- Documents.
- Corporate actions (board and shareholder actions).
- Filing requirements.

ARTICLES OF INCORPORATION

A corporation may amend its articles of incorporation at any time to either:

- Add or change a provision that is required or permitted in the articles of incorporation.
- Delete a provision not required in the articles of incorporation.

(*Ga. Code Ann. § 14-2-1001(a).*)

Generally, amendments to the articles of incorporation require shareholder action. For an amendment to be adopted:

- The board of directors must transmit to shareholders a recommendation that the shareholders approve the amendment.
- Shareholders must approve the amendment.

(*Ga. Code Ann. § 14-2-1003(b).*)

Unless the Georgia Business Corporation Code (GBCC), the articles of incorporation or the board of directors require a greater vote or a vote by voting groups, the amendment to be adopted must be approved by a majority of the votes entitled to be cast on the amendment by each voting group entitled to vote on the amendment (*Ga. Code Ann. § 14-2-1003(e).*)

Unless the articles of incorporation provide otherwise, the board of directors may adopt the following amendments without shareholder action:

- To extend the duration of the corporation if it was incorporated at a time when limited duration was required by law.
- To delete the names and addresses of the initial directors.
- To delete the name and address of the initial registered agent or registered office, if an annual registration is on file with the Georgia Secretary of State (GA SOS).
- To delete the name and address of each incorporator.
- To delete the mailing address of the corporation's initial principal office if an annual registration is on file with the GA SOS.
- To change each issued, or each issued and unissued, authorized share of an outstanding class into a greater number of whole shares if the corporation has only shares of that class outstanding.
- To change or eliminate the par value of each issued and unissued share of an outstanding class if the corporation has only shares of that class outstanding.
- To change the corporate name.
- To make any other change expressly permitted by this chapter to be made without shareholder action.

(*Ga. Code Ann. § 14-2-1002.*)

A corporation amending its articles of incorporation must file articles of amendment with the GA SOS containing:

- The corporation's name.
- The text of each amendment adopted.
- Provisions for implementing the amendment, if the amendment provides for an exchange, reclassification or cancellation of issued shares and this information is not contained in the amendment itself.
- The date each amendment was adopted.
- If an amendment was adopted by the incorporators or board of directors without shareholder action, a statement to that effect and that shareholder action was not required.
- If approval of shareholders was required, a statement that the amendment was duly approved by the shareholders.

(*Ga. Code Ann. § 14-2-1006.*)

BYLAWS

A corporation's board of directors may amend or repeal its bylaws unless either:

- The articles of incorporation reserve that power exclusively to shareholders.
- The shareholders have expressly provided in amending or repealing a particular bylaw that the board of directors may not amend or repeal that bylaw.

(*Ga. Code Ann. § 14-2-1020(a).*)

Shareholders may amend, repeal or adopt bylaws. However, unless the articles of incorporation provide otherwise, shareholders may not:

- Amend (but can repeal) a bylaw adopted by the board of directors that fixes a greater voting requirement for the election of directors than the plurality standard.
- Adopt a bylaw changing the plurality standard for the election of directors.

(*Ga. Code Ann. § 14-2-1020(b).*)

Bylaws adopted by the incorporators or board of directors before the issuance of any of the corporation's shares can be amended by the incorporators or the board of directors before the issuance of any of the corporation's shares (*Ga. Code Ann. § 14-2-1020(e).*)

Shareholders may adopt bylaws fixing a greater quorum or voting requirement for shareholders than is required by the GBCC. Except as provided in the GBCC, the board of directors may not amend or repeal a bylaw adopted by shareholders that fixes a greater quorum or voting requirement for shareholders. (*Ga. Code Ann. § 14-2-1021.*)

Unless the articles of incorporation or the bylaws provide otherwise, a bylaw that fixes a greater quorum or voting requirement for the board of directors can be adopted, amended or repealed by either:

- The shareholders by the affirmative vote of a majority of the votes entitled to be cast.
- The directors by a majority of the entire board of directors.

(*Ga. Code Ann. § 14-2-1022(a).*)

A bylaw adopted or amended by the shareholders that fixes a greater quorum or voting requirement for the board of directors may provide that it may be amended or repealed only by a specified vote of either the shareholders or the board of directors (*Ga. Code Ann. § 14-2-1022(b).*)

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