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Report from Chair of Partnership Committee

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The State Bar of Georgia

BUSINESS LAW SECTION

Newsletter

Paul Cushing, Chair

July 2006

Elizabeth H. Noe, Editor

SAVE THE DATE

25th Annual Business Law Institute – October 20-21, 2006, The Ritz-Carlton, Amelia Island Florida.

To celebrate the 25th anniversary of the Business Law Institute, the Executive Committee of the Business Law Section decided to return the Institute to the coast. This year's Institute will be held at the beautiful Ritz-Carlton on Amelia Island.

Walter Jospin of Paul Hastings and Sid Nurkin of Alston Bird, program co-chairs, have put together a great seminar. The seminar contains 8 CLE hours, including 1 ethics hour and 1 professionalism hour. As you will see on the enclosed agenda, the program speakers include many of the leaders of our corporate bar during the last 25 years and special guests from Delaware and the SEC.

Space will be limited at this year's Institute, so we urge you not to delay in making your hotel reservations. We are also organizing golf and tennis tournaments, and we will host a cocktail reception on the evening of October 20. Information on registration for the seminar and these events will be forwarded at a later date.

ICLE has negotiated a special room rate at the Ritz-Carlton of \$199/night. There are three ways to reserve your room:

- 1) Call the national reservation line at 1-800-241-3333, and ask for a room from our group block, which is listed as "**Business Law Institute**" or "**ICLE**;"
- 2) Call the hotel directly at 1-904-277-1100 and ask for a room from our block;
- 3) Go online to www.ritzcarlton.com, click on "Reservations," select the Amelia island property, and enter our group code "**INSINSA**."

The cutoff date for our block is September 18, 2006.

Take advantage of this opportunity to visit this exceptional resort with your family. We look forward to seeing you on Amelia Island in October.

BUSINESS LAW INSTITUTE

October 20-21, 2006

Ritz Carlton

Amelia Island, Florida

Presiding: *Walter Jospin*, Program Co-Chair, Paul, Hastings, Janofsky & Walker LLP
Sid Nurkin, Program Co-Chair, Alston & Bird LLP

FRIDAY, OCTOBER 20, 2006

- 7:45 **REGISTRATION** (All attendees must check in upon arrival. A removable jacket or sweater is recommended.)
- 8:20 **WELCOME AND PROGRAM OVERVIEW**
Paul M. Cushing, Chair, Business Law Section, State Bar of Georgia; Alston & Bird LLP
- 8:25 **INTRODUCTORY REMARKS AND FRIDAY SESSION OVERVIEW**
Sid Nurkin
- 8:30 **THE INVESTMENT BANKER'S VIEW OF THE M&A MARKET PLACE**
Charles Mills, Giuliani Capital Advisors
- 9:00 **WHAT IS "MARKET" IN M&A TRANSACTIONS**
L. Briley Brisendine, Jr., The Home Depot USA, Inc.
Michael E. Hollingsworth, Jr., Kilpatrick Stockton LLP
H. Frank Layson, III, Paul, Hastings, Janofsky & Walker LLP
Charles Mills
- 10:00 **BREAK**
- 10:15 **CURRENT DEVELOPMENTS IN M&A AND PRIVATE EQUITY**
C. William Baxley, King & Spalding LLP
J. Vaughn Curtis, Alston & Bird LLP
W. Randy Eaddy, Kilpatrick Stockton LLP
Steven E. Fox, Rogers & Hardin LLP
Mark D. Kaufman, Sutherland Asbill & Brennan LLP
Cooper Mills, SunTrust Robinson-Humphrey
- 11:30 **DELAWARE LAW UPDATE AND CORPORATE GOVERNANCE**
R. Franklin Balotti, Richards Layton & Finger, PA, Wilmington, De
Nils H. Okeson, Arby's Restaurant Group
Lizanne Thomas, Jones Day
- 12:35 **RECESS**

- 6:30 **RECEPTION FOR ATTENDEES AND GUESTS**
(ends at 7:30)

SATURDAY, OCTOBER 21, 2006

- 8:15 **BUSINESS LAW SECTION MEETING**
- 8:25 **INTRODUCTORY REMARKS AND SATURDAY SESSION OVERVIEW**
Walter Jospin
- 8:30 **DEVELOPMENTS IN OUTSOURCING**
Scott M. Hobby, Paul, Hastings, Janofsky & Walker LLP
- 9:00 **REPRESENTING A PUBLIC COMPANY IN CRISIS**
Todd R. David, Alston & Bird LLP
James Doty, Baker Botts LLP, Washington, DC
Christopher L. Ideker, Ernst & Young LLP
Cheryl Scarboro, Assistant Director of the Division of Enforcement, Securities and Exchange Commission, Washington, DC
- 10:15 **BREAK**
- 10:30 **RECENT DEVELOPMENTS IN GEORGIA LAW**
Thomas S. Richey, Powell Goldstein LLP
- 11:00 **THE LAWYER'S ROLE IN TRANSACTIONS: ETHICAL AND PROFESSIONAL CONCERNS**
Charles R. Beaudrot, Jr., Morris, Manning & Martin, LLP
John A. Chandler, Sutherland Asbill & Brennan LLP
Jonathan Golden, Arnall Golden Gregory LLP
John Hopkins, Womble Carlyle Sandridge & Rice, PLLC
John T. Marshall, Powell Goldstein LLP
- 12:40 **ADJOURN**

REPORT FROM CHAIR OF CORPORATE CODE REVISION COMMITTEE

By Tom McNeill

Powell Goldstein LLP

As mentioned briefly in the last newsletter, the Corporate Code Revision Committee was very busy during 2005 and the first part of 2006. In September 2005, we prepared and submitted to the Advisory Committee on Legislation a proposal to amend several provisions of the Georgia Business Corporation Code relating to the approval process for corporate transactions, the advancement of expenses to persons entitled to indemnification as corporate directors and officers, the obligation of a corporation to indemnify approvals during bankruptcy proceedings, and the process by which corporations, limited liability companies, and partnerships, may elect another legal form.

At the legislative session, Senators Smith, Meyer von Bremen, Harp, and Reed, and Representative Tumlin, graciously agreed to sponsor our proposals. Each proposal received a careful review by the Senate and House Judiciary Committees, and following favorable recommendations by each committee, approval was obtained from the House and the Senate, and the bill was signed by Governor Perdue on May 5, with an effective date of July 1, 2006. I would like to particularly recognize the able work of Mark Middleton, who helped us navigate the often unpredictable waters of the state legislature.

The new amendments to the Georgia Code include the following:

1. An express recognition of the possibility of different treatment of shareholders in a plan of merger or share exchange.
2. Provisions enabling a corporation to amend, in immaterial respects, a plan of merger subsequent to shareholder approval.
3. Sections confirming that a board of directors can submit a matter for shareholder approval even if the board of directors subsequently decides to abstain from, or recommend against, the matter.

4. Revisions permitting officers or directors who have to enforce their indemnification or advancement rights in court, the ability to collect attorney's fees and costs of litigation incurred in the process under certain circumstances.

5. Revisions authorizing a court to decide issues of advancement of defense costs on a summary basis.

6. With regard to "standard" provisions in articles of incorporation or bylaws which obligate the corporation to indemnify officers and directors "to the fullest extent permitted by law", a clarification as to the effect and meaning of that language, while leaving ample leeway to the corporation to specify alternative standards and mechanisms.

7. Confirmation of the corporation's authority to undertake many fundamental changes or actions pursuant to the decree or order of a bankruptcy court, including amendments to articles of incorporation, without obtaining director or shareholder approval.

8. A new provision, which would permit a qualified foreign entity that changes its corporate form (from corporation to limited liability company or limited partnership, for example), to notify the Secretary of State no later than its next annual report (rather than undertaking the cumbersome process of withdrawing as a foreign corporation and requalifying as a foreign limited liability company or limited partnership in Georgia). If it does so, its qualification continues uninterrupted, and the Secretary of State's records are adjusted to reflect the change in form.

I want to thank each of the participants in our subcommittee process, and particularly Bruce Wanamaker, Tom Richey, Cass Brewer, and Lou Spelios, for their work in finalizing the text of our amendments and making presentations to the various committees.

I am pleased to announce that Bruce Wanamaker has graciously agreed to take my position as Chair of the Corporate Code Revision Committee. The Committee is beginning its organizational work for future sessions, and there are a number of initiatives that the Committee already has on its agenda. We very much welcome and encourage the thoughts and suggestions from any of the members of the Section, so please do not hesitate to

contact Bruce, me or any other Committee member with your ideas.

Finally, the Corporate Code Revision Committee is open to all members of the Section, and Bruce and I encourage anyone who has an interest to participate. If you would like to participate in this year's work, please send Bruce an email at BWanamaker@KilpatrickStockton.com.

REPORT FROM CHAIR OF PARTNERSHIP COMMITTEE

By Cassidy V. Brewer

Morris, Manning & Martin, LLP

During the past legislative session, the Partnership Committee, along with the Corporate Code Committee, was actively involved in pursuing a number of proposals to facilitate inter-entity conversions. These proposals were similar to provisions that have been enacted in several other states. We are pleased to report the following new amendments:

Effective May 5, 2006, the Georgia Business Corporation Code, Limited Partnership Act, and Limited Liability Company Act were updated and amended (i) to accommodate conversions of non-Georgia entities required to qualify to do business in Georgia and (ii) to permit a broader range of inter-entity conversions of Georgia entities than previously permitted under Georgia law.

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 change streamlines the process. A qualified foreign entity that changes its form notifies the Secretary of State no later than thirty days after the

conversion. If it does so, its qualification continues uninterrupted, and the Secretary of State's records are adjusted to reflect the change in form.

This legislative change amends 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.

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 legislative change corrects that oversight.

Improvements to LLC and LP Conversion Statutes

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

Since then, conversion statutes have become common. This legislative change updates 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) making it clear that after conversion the entity continues as the same entity.

Under the new law, parallel changes are made to LLC Act Section 14-11-212 and Limited Partnership Act Section 14-9-206.2.

New Provisions

In addition to the foregoing changes, these legislative changes 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 is 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 are 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 are 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 dissenters' rights.

2006-2007 OFFICERS

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Walter Jospin, Vice-Chair

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Cassady Brewer, Chair, Partnership Committee

Ed Snow, Chair, UCC Committee

Carolyn Alford, Chair, Opinion Committee

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Elizabeth Noe, Chair, Publications Committee

SHARE YOUR KNOWLEDGE – GET PUBLISHED

We are accepting submissions for publication in this newsletter. Contact Elizabeth Noe by e-mail at (elizabethnoe@paulhastings.com) as soon as possible to reserve space and to obtain a copy of our submission guidelines. If you have encountered an interesting legal development or issue recently, please consider sharing your knowledge with your colleagues by submitting a piece for publication in this newsletter.

THANK YOU TO OUR SUPPORTERS

On behalf of the Section, we want to express our gratitude to **ICLE in Georgia, Bowne of Atlanta, Inc.** and the **Staff of the State Bar of Georgia** for their assistance in printing and mailing this newsletter, which reaches 1,500 members throughout Georgia and in other states. We depend on the assistance of these supporters to produce this newsletter and value their continued support.