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SPECIAL CONTRIBUTION

The ALI Principles of Corporate Governance Compared with Georgia Law

by Marjorie Fine Knowles*
and
Colin Flannery**

Few law reform efforts in this century have been as controversial as the often bitter fourteen-year battle within the American Law Institute . . . over its efforts to articulate a set of rules about American corporate law. This epic struggle ended on May 13, 1992, when the ALI formally

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approved the *Principles of Corporate Governance* at its annual meeting in Washington.¹

I. INTRODUCTION

The American Law Institute ("ALI") is a unique institution. As one writer describes it:

The ALI is perhaps the most elite group of lawyers in the United States. Selected from the ranks of distinguished scholars and practitioners, the Institute is best known for drafting "Restatements of the Law" in various areas. These Restatements provide lawyers and judges with carefully formulated descriptions of the law and traditionally have served as authoritative guides for both legal briefs and judicial opinions.²

Admission to membership in the ALI is by election, and the debates on the various works the Institute produces are most often scholarly, if not ponderous. The Project on Corporate Governance was different. "The final approval of the American Law Institute's . . . *Principles of Corporate Governance: Analysis and Recommendations* . . . represents the culmination of the most controversial event in the history of American corporate law."³ This has surely been the most contentious project in which the ALI has ever engaged. The debates, including numerous lengthy written analyses of various drafts as well as the discussions on the floor of the ALI's Annual Meetings, where the actual voting occurs, were uncharacteristic; they were sometimes angry in tone, and some speakers went so far as to question the motives of the ALI in undertaking the Project, while officials of the Institute felt it necessary to defend their work. "Attendance at ALI meetings discussing corporate governance issues tripled as a result of the controversy surrounding the Project."⁴

The very need for such a project was questioned almost continuously, from the Project's formal initiation in 1978, to its publication in final form in 1994. The criticism of the work over the years, as successive

1. Jonathan R. Macey, *The Transformation of the American Law Institute*, 61 GEO. WASH. L. REV. 1212, 1212 (1993) (footnote omitted).

2. *Id.* at 1216.

3. William J. Carney, *The ALI's Corporate Governance Project: The Death of Property Rights?*, 61 GEO. WASH. L. REV. 898, 898 (1993) (footnotes omitted). For a favorable review of the finished product, see John T. Subak, *This Baby Was Worth The Wait*, BUS. L. TODAY, Sept.-Oct. 1994, at 58.

4. Macey, *supra* note 1, at 1232 (footnote omitted).

tentative drafts were published, has been "harsh and varied."⁵ The attacks have come from a variety of sources, ranging from the Business Roundtable⁶ to liberal scholars, one of whom labelled the Project "A Sheep in Wolf's Clothing."⁷

Over the life of the Project⁸ there have been numerous law review articles and position papers published; symposia have appeared examining and criticizing various parts of the *Principles of Corporate Governance: Analysis and Recommendations* ("Principles") from different and often conflicting perspectives.⁹ A special committee of the American Bar Association's Section of Business Law was created to monitor the Project; it evolved into a group which worked closely with the Reporters on the Project, another novel arrangement for the ALI.¹⁰ And once drafts were presented to the ALI membership for debate, intense lobbying efforts, unparalleled in ALI experience, were reported in attempts to influence the votes of members on portions of this Project. This culminated in the especially heated debate on the section on shareholder derivative suits.¹¹ There were rumors and allegations that corporations were trying to protect their interests both by hiring members of the ALI to represent their interests in that body's deliberations and by firing law

5. Kathryn N. Fine, Project, *The Corporate Governance Debate and the ALI Proposals: Reform or Restatement?*, 40 VAND. L. REV. 693, 695 (1987).

6. See, e.g., Edmund T. Pratt Jr., NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST, *The ALI Corporate Governance Project: A Radical Cure for a Healthy Patient*. Vol. 1, No. 1, (March 1, 1989) (Pratt was then Chairman of the Business Roundtable.).

7. Joel Seligman, *A Sheep in Wolf's Clothing: The American Law Institute Principles of Corporate Governance Project*, 55 GEO. WASH. L. REV. 325, 328 (1987).

8. While it seems to many that this Project has taken longer than any other ALI work, the Chief Reporter points out that this is not so:

Although formally initiated in 1978, the Corporate Governance Project really did not begin in earnest until 1980, when a full complement of Reporters was in place, so that the Project took approximately 12 years to complete. By way of comparison, the Federal Securities Code took 12 years to complete, the Restatement (Second) of Contracts took 19 years, the Restatement (Second) of Conflict of Laws also took 19 years, and the Restatement (Second) of Torts took 21 years.

Melvin Aron Eisenberg, *An Overview of the Principles of Corporate Governance*, 48 BUS. LAW. 1271, 1271 n. 1 (1993).

9. See, e.g., *Symposium on Corporate Governance*, 48 BUS. LAW. 1267 (1993); *Symposium on Corporate Governance*, 8 CARDOZO L. REV. 657 (1987); *Symposium: The American Law Institute's Principles of Corporate Governance*, 61 GEO. WASH. L. REV. 871 (1993). The last contains analyses of the *Principles* from perspectives as different as "law and economics" and "law and literature." *Symposium: The American Law Institute's Principles of Corporate Governance*, 61 GEO. WASH. L. REV. 871 (1993).

10. Elliott Goldstein, *CORPRO: A Committee That Became an Institution*, 48 BUS. LAW. 1333, 1334-35 (1993).

11. Macey, *supra* note 1, at 1223-24.

firms that strongly supported the ALI's efforts to transform American corporate law.¹² Among the groups said to have "acted in various ways to influence the ALI's deliberations" were the "American Corporate Counsel Association, the American Society of Corporate Secretaries, the Business Roundtable, and the National Association of Manufacturers."¹³ That such conduct would have occurred should not have been surprising, given the strong likelihood that the *Principles* would have a powerful impact for two reasons:

First, the extraordinary prestige enjoyed by the ALI would, by itself, produce this outcome. Second, well before the Report had been finalized, a number of courts had begun to cite even the most preliminary work of the Reporters as authoritative. Indeed, at least one court cited as authoritative portions of the *Principles* that were later abandoned by the ALI itself.¹⁴

The leadership of the ALI, unaccustomed to this activity, reacted with dismay and even outrage.¹⁵ The meeting at which the final version of the Project was approved was marked by repeated entreaties from the presiding officer to ALI members to remember to vote their consciences rather than the interests of their clients. Roswell Perkins, then-president of the ALI and partner in the prestigious New York law firm Debevoise & Plimpton, expressed his concern that the ALI not become a "forum for power plays by clients" and told ALI members that "the precept of leaving one's client at the door must be honored if we are to preserve our integrity as an organization."¹⁶ Such an appeal was unprecedented in the history of this "elite" decision-making body. Scholars accustomed to the usual drone of ALI proceedings remarked on the different tone: "Consideration of the . . . Project within the ALI involved an apparently unprecedented amount of lobbying-type activities by members from firms representing corporate management, a large number of close votes at the plenary session, and extensive consideration and reconsideration of many provisions."¹⁷

As noted above, even before the promulgation of the final version, the *Principles* had been cited in court opinions, and had influenced the thinking of the profession as reflected in legal journals. "Indeed, even before the ALI formally approved the final report in 1992, courts in nine

12. *Id.* at 1229.

13. *Id.*

14. *Id.* at 1230 (footnotes omitted).

15. *Id.* at 1229.

16. *Id.* (footnote omitted).

17. ROBERT W. HAMILTON, CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED PARTNERSHIPS, CASES AND MATERIALS 201 (5th ed. 1994).

jurisdictions had adopted the pronouncements in the tentative drafts as law.”¹⁸ Given the history of the “enormous influence” which the ALI has had in the past,¹⁹ it is to be expected that the *Principles* will play a significant role in the development of the law in this area.

The *Principles* do not “cover all of corporate law, but only a limited number of selected topics”²⁰ These are dealt with in Introductory Notes, rules of law, recommendations of corporate practice and the Comments thereto, which represent the Institute’s position, and the Reporter’s Notes, which reflect his views.²¹ The president of the ALI, in explaining why the term “Principles” was chosen for this work, describes its range:

The term “Principles” in the title of the Project was not intended to denote a level of treatment different from that found in traditional ALI Restatements or in an ALI project such as the Federal Securities Code. The term was not an expression of a purpose to deal in generalities. It was intended, rather, to signify that neither a model state corporation law nor a new Federal corporation law would be drafted. The Project was to focus on issues of governance responsibilities and to state existing or recommended ground rules—some to be implemented by the courts, some by legislatures, and some by corporations themselves.²²

Corporation law is state-based law. Georgia corporations are governed, in the first instance, by the Georgia Business Corporation Code.²³ Because the ALI *Principles* are expected to have a significant impact on the thinking of courts, lawyers, and scholars in this area, it is important to understand how they compare to present Georgia law.

What follows is a comparison of the ALI *Principles* with Georgia law, principally the Georgia Business Corporation Code, and relevant case law. References to selected journal articles are included as well. Parts I-VI of the ALI’s *Principles* will be covered in this Article; Part VII, Remedies, will be covered in the second part of this Article, to be published in the *Georgia Survey* next year.

18. Macey, *supra* note 1, at 1216 (footnote omitted).

19. JOEL SELIGMAN, INVESTOR RESPONSIBILITY RESEARCH CENTER, AN ANALYSIS OF THE AMERICAN LAW INSTITUTE’S CORPORATE GOVERNANCE PROJECT 13 (1986); *see also* Martha Middleton, *The ALI’s Bitter Battle Over Corporate Law*, NAT’L L.J., June 10, 1985, at 1.

20. Melvin A. Eisenberg, *Chief Reporter’s Foreword* to 1 AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS at xxv (1994).

21. *Id.*

22. Roswell B. Perkins, *President’s Foreword* to 1 AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS at xx-xxi (1994).

23. O.C.G.A. §§ 14-2-101 to -1703 (1994 & Supp. 1995).

II. THE OBJECTIVE AND CONDUCT OF THE CORPORATION

Part II of the ALI's *Principles* addresses the corporation's objective. The ALI *Principles* state that a corporation should have an "economic objective,"²⁴ operating to increase corporate profits and shareholder gains.²⁵ Unlike the ALI *Principles*, the Georgia statutes do not expressly establish an objective for the corporate entity.²⁶ Rather, every corporation established under the Georgia Business Corporation Code has the purpose of "engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation."²⁷ The economic objective can be implied from the use of the term "business," as well as the existence of separate code provisions for nonprofit corporations.²⁸

The ALI-mandated economic objective is tempered somewhat by section 2.01(b), which allows the corporation to recognize legal and ethical considerations as well as to devote reasonable resources to philanthropic, educational, humanitarian, and public welfare purposes.²⁹ The Comments and Illustrations make clear that the "economic objective" should be focused on long-run profitability and shareholder gain rather than on merely extracting the greatest amount of profit out of each transaction.³⁰

In 1989 the Official Code of Georgia Annotated ("O.C.G.A." or "Code") was amended expressly to permit the consideration by the board of directors of the interests of other constituencies; that is, constituencies other than shareholders, such as employees, suppliers, and bondholders.³¹ This statute requires that a corporation "opt-in" to its provisions by adopting such a clause in its articles of incorporation.³² However,

24. PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01 cmt. e (1994) [hereinafter ALI PRINCIPLES]. On § 2.01, see generally Donald E. Schwartz, *Defining the Corporate Objective: Section 2.01 of the ALI's Principles*, 52 GEO. WASH. L. REV. 511 (1984). The ALI Principles apply only to "business corporations," and not to those corporations which are "non-profit." ALI PRINCIPLES, *supra* § 2.01 cmt. d. The Georgia Business Corporations Code applies "[t]o all corporations for profit" as well as to other corporations where special provisions do not apply. O.C.G.A. § 14-2-1701(a)(1) (1989).

25. ALI PRINCIPLES, *supra* note 24, § 2.01(a).

26. O.C.G.A. § 14-2-301 (1989).

27. *Id.*

28. *Id.* The Georgia Non-Profit Corporations Code allows a corporate purpose of "any lawful activity" rather than any lawful business. *Id.*

29. ALI PRINCIPLES, *supra* note 24, § 2.01 cmt. e.

30. *Id.* § 2.01 cmt. f, illus. 1-6.

31. O.C.G.A. § 14-2-202(b)(5) (1989).

32. *Id.*; see also William E. Eason, Jr., *Some Distinctive Features of the Georgia Business Corporation Code*, 28 GA. ST. B.J. 101, 105-06 (1991).

these other constituencies are expressly denied standing to bring derivative actions.³³

III. THE STRUCTURE OF THE CORPORATION

In these sections, the ALI *Principles* recognize the need both for flexibility in the structure of the management of a corporation, and a system for insuring accountability to shareholders.³⁴ Part III of the ALI *Principles* addresses the required corporate structure, while Part III-A contains recommended practices.³⁵ The provisions in these parts are stated in one of three formulations: (1) based on the rules that a well-instructed court would likely embrace; (2) recommendations intended for voluntary adoption; and (3) recommendations for use as a statutory provision.³⁶

A. Size

In an effort to distinguish among the needs of different sized corporations, the *Principles* employ a three tier system of classification.³⁷ The first tier consists of large publicly held corporations, defined as having at least two thousand record holders of its equity securities and one-hundred million dollars of total assets.³⁸ The second tier consists of smaller publicly held corporations, defined as having at least five-hundred record holders of equity securities and five million dollars of total assets.³⁹ The third tier acts as a residual classification.⁴⁰ All of the provisions in this Part apply to the first tier, all but a few to the second tier, and only one, section 3.03, which deals with directors' informational rights, applies to the third.⁴¹

The O.C.G.A. does not establish a classification system based on the size of a corporation; therefore, its provisions are applicable to all business corporations regardless of size. The one exception is when a corporation with fifty or fewer shareholders elects to become a statutory

33. O.C.G.A. § 14-2-202(b)(5) (1989).

34. ALI PRINCIPLES, *supra* note 24, *Introductory Note to Parts III and III-A (Structure of the Corporation)*.

35. *Id.*

36. *Id.*

37. *Id.*

38. ALI PRINCIPLES, *supra* note 24, § 1.24.

39. *Id.* §§ 1.31, 1.35.

40. *Id.* *Introductory Note to Parts III and III-A (Structure of the Corporation)*.

41. *Id.*

close corporation and therefore is governed by the close corporation statutes.⁴²

B. Management

Section 3.01 establishes the proposition that principal senior executives appointed by the board of directors are responsible for the management of the corporation.⁴³ A basic function of the board is to select and oversee management, although section 3.02(b)(6) makes it clear that the board may manage the business of the corporation itself.⁴⁴ In performing its management duties, senior management is subject to the functions and powers of the board under section 3.02, discussed below, and is also governed by the "standard of the corporation" as defined in section 1.36.⁴⁵

The O.C.G.A. states that "[a]ll corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors"⁴⁶ The Comment to this section indicates that the flexible "by or under" language was chosen in order to meet the needs of varying sizes of corporations.⁴⁷

The *Principles* encourage a modern approach regarding a senior executive's apparent authority in dealing with third parties.⁴⁸ This would recognize actions that are considered to be in the ordinary course of business, but not extraordinary actions.⁴⁹ The apparent authority of senior managers discussed in the ALI *Principles* is virtually identical to the position which is adopted through Georgia case law.⁵⁰

42. O.C.G.A. §§ 14-2-901 to -950 (1989).

43. ALI PRINCIPLES, *supra* note 24, § 3.01. Principal senior executive is defined to include "the chief executive, operating, financial, legal, and accounting officers of a corporation." *Id.* §§ 1.30, 1.27(a).

44. *Id.* § 3.02(b)(6).

45. *Id.* § 3.01 cmt. c. As the Comment to § 1.36 states, this term "is used to describe rules of governance that are generated by voluntary corporate action, as contrasted with rules imposed by law." *Id.* § 1.36 cmt. It is, thus, defined to mean "a valid certificate or bylaw provision or board of directors or shareholder's resolution." *Id.* § 1.36.

46. O.C.G.A. § 14-2-801(b) (1989).

47. *Id.* § 14-2-801 cmt.

48. ALI PRINCIPLES, *supra* note 24, *Reporter's Note* to § 3.01.

49. *Id.*

50. See, e.g., *Holliday Constr. Co. v. Sandy Springs Assocs.*, 198 Ga. App. 20, 400 S.E.2d 380 (1990); see also *Cooper v. G.E. Constr. Co.*, 116 Ga. App. 690, 158 S.E.2d 305 (1967) (noting that, although the decision was based on grounds of the corporation's ratification of its president's actions, the president has apparent authority to perform any acts in the usual course of business).

C. *Board Functions and Powers*

The *Principles* provide a list of five functions the board of directors *should* perform,⁵¹ and a list of seven it *may* perform.⁵² The first list is designed to establish the minimum functions of the board:

- (1) Select, regularly evaluate, fix the compensation of, and, where appropriate, replace the principal senior executives . . . ;
- (2) Oversee the conduct of the corporation's business to evaluate whether the business is being properly managed;
- (3) Review and, where appropriate, approve the corporation's financial objectives and major corporate plans and actions;
- (4) Review and, where appropriate, approve major changes in, and determinations of other major questions of choice respecting, the appropriate auditing and accounting principles and practices to be used in the preparation of the corporation's financial statements;
- (5) Perform such other functions as are prescribed by law, or assigned to the board under a standard of the corporation⁵³

The functions contained in the second list are designed to allow for flexibility in dealing with senior management:

- (1) Initiate and adopt corporate plans, commitments, and actions;
- (2) Initiate and adopt changes in accounting principles and practices;
- (3) Provide advice and counsel to the principal senior executives;
- (4) Instruct any committee, principal senior executive, or other officer . . . , and review the actions of any committee, principal senior executive, or other officer;
- (5) Make recommendations to shareholders;
- (6) Manage the business of the corporation;
- (7) Act as to all other corporate matters not requiring shareholder approval.⁵⁴

This section also recognizes the board's ability to delegate authority to its committees.⁵⁵

The O.C.G.A. contains a broad general statement that "[a]ll corporate powers" may be exercised by the board of directors; board powers may be limited by the articles of incorporation, by the bylaws approved by the shareholders, or by a shareholders agreement.⁵⁶ A Georgia corporation

51. ALI PRINCIPLES, *supra* note 24, § 3.02(a).

52. *Id.* § 3.02(b).

53. *Id.* § 3.02(a).

54. *Id.* § 3.02(b).

55. *Id.* § 3.02(c).

56. O.C.G.A. § 14-2-801 (1994).

may dispense with a board of directors if it elects close corporation status or a valid shareholder agreement so provides; of course, publicly traded companies must comply with the rules of the market on which their shares are traded.⁵⁷

The O.C.G.A., like the ALI *Principles*, provides for the delegation of authority by a board to its committees.⁵⁸ Although the O.C.G.A. does not enumerate the functions a board of directors must perform, specified functions cannot be delegated to committees,⁵⁹ and would, thus, have to be performed by the board itself.⁶⁰ The O.C.G.A. also makes no attempt to enumerate functions that may be performed by the board. Unlike the ALI *Principles*, which are "intended to make recommendations for corporate governance . . . includ[ing] the general practice of corporations and the management of their businesses,"⁶¹ the Model Business Corporation Act, upon which the Georgia Business Corporation Code is based, focuses on enabling provisions more appropriate to a state statute.⁶²

D. Board Rights to Information

The informational rights of the directors are addressed in section 3.03 of the ALI *Principles*.⁶³ This section recognizes the right of every director to inspect and copy all corporate documents, and to inspect physical facilities at any reasonable time.⁶⁴ A judicial remedy may be sought if access to information is not granted, and should be withheld only if the information requested is not reasonably related to the performance of the director's functions or duties, or if the director intends to utilize the information in a manner which violates his fiduciary duty to the corporation.⁶⁵ A court may include in its order provisions to assure that compliance with the request for information is not so expensive and burdensome as to disrupt business, and that the

57. *Id.* § 14-2-801(a); ELLIOTT GOLDSTEIN, *GEORGIA CORPORATION LAW & PRACTICE* § 8.1(a) (1989).

58. O.C.G.A. § 14-2-825 (1989).

59. *Id.* § 14-2-825(d).

60. Except, of course, actions requiring shareholder approval, which the board can neither personally perform nor delegate to a committee. *Id.*

61. Elliott Goldstein, *The Relationship Between the Model Business Corporation Act and the Principles of Corporate Governance: Analysis and Recommendations*, 52 GEO. WASH. L. REV. 501, 507 (1984).

62. Goldstein, *supra* note 61. The Georgia Business Corporations Code, adopted in 1989, is based on the 1984 Revised Model Business Corporations Act. William J. Carney, *Georgia's New Business Corporation Code*, 24 GA. ST. B.J. 158, 158 (1988).

63. ALI PRINCIPLES, *supra* note 24, § 3.03.

64. *Id.* § 3.03(a).

65. *Id.* § 3.03(b)(1).

director does not use the information to violate the director's fiduciary duty to the corporation.⁶⁶ If a director who is denied access to requested information seeks the assistance of the courts, the corporation would have the burden of proving the existence of a relevant exception.⁶⁷

Neither the O.C.G.A. nor the Georgia courts have specifically addressed the informational rights of directors. Shareholder rights to information are restricted by statute to specified documents as well as to information that is requested "in good faith and for a proper purpose that is reasonably relevant to his legitimate interest as a shareholder."⁶⁸ If faced with the issue of a director's rights to information, a court could reason in a manner parallel to the law on shareholder rights and restrictions or, given statutory silence, a court might assume that there are no restrictions, or fewer restrictions, on the informational rights of directors.⁶⁹

E. Outside Experts

Section 3.04 of the ALI *Principles* recognizes the right of directors, at the corporation's expense, to retain outside experts in order to gain advice on problems related to their function.⁷⁰ This resource is only available to the directors who have no significant relationship with the corporation's senior executives and who act as a group through a majority vote.⁷¹ In addition, payment must be authorized by the full board⁷² or by a court upon application by directors without significant relationships.⁷³ The applying directors must have reasonably believed that the retention of an expert was necessary in order to perform their function properly, that the compensation paid to the expert was reasonable, and that corporate experts would not have sufficed.⁷⁴

The O.C.G.A. does not specify whether directors have the authority to retain outside experts, nor has the issue been addressed in case law.⁷⁵

66. *Id.* § 3.03(b)(3).

67. *Id.* § 3.03 cmt. c.

68. O.C.G.A. 14-2-1602(d)(1) (1989).

69. The Georgia Court of Appeals has noted in dicta that "shareholders have less right to acquire corporate information than do directors." *Riser v. Genuine Parts Co.*, 150 Ga. App. 502, 504, 258 S.E.2d 184, 186 (1979) (quoting with approval *Goldstein v. Lees*, 120 Cal. Rptr. 253, 257 (Cal. App. 1975)).

70. ALI PRINCIPLES, *supra* note 24, § 3.04.

71. *Id.* "Significant relationship" is defined in § 1.34 to include employment, professional, or business ties. *Id.* § 1.34(a).

72. *Id.* § 3.04(a).

73. *Id.* § 3.04(b).

74. *Id.*

75. O.C.G.A. § 14-2-101 to -1703 (1994 & Supp. 1995).

F. Board Composition

The ALI *Principles*, in Part III-A, present recommendations regarding the composition of the board of directors in publicly held corporations.⁷⁶ In the case of a large publicly held (first tier) corporation, the majority of the directors should not have significant relationships with the senior executives.⁷⁷ Under the *Principles*, such a relationship exists if the director is or was employed by the corporation within the last two years, if a member of the director's immediate family is or was employed as a senior executive within the last two years, or if a member of the director's immediate family is presently an officer at any level.⁷⁸ Significant relationships with senior executives are also presumed to exist if the director has paid to, or received from, the corporation a commercial payment of over two-hundred thousand dollars,⁷⁹ or if the director is the principal manager of a business organization that has paid to, or received from, the corporation a commercial payment of over two-hundred thousand dollars or five percent of the organization's gross annual revenue.⁸⁰ A significant relationship with senior executives is also presumed to exist if the director is, or was in the past two years, an attorney affiliated with a law firm that was the corporation's primary counsel for general corporate or securities law matters, or if the director is, or was in the past two years, an investment banker affiliated with a firm that advised the corporation or that acted as managing underwriter for an issue of the corporation's securities.⁸¹ When the presumed significant relationship arises from a commercial payment or from an attorney or investment banker relationship, the presumption is overcome if under the circumstances, it cannot be reasonably believed that the relationship would adversely affect the corporation.⁸²

76. ALI PRINCIPLES, *supra* note 24, § 3A.01.

77. *Id.* § 3A.01(a).

78. *Id.* § 1.34(a)(1)-(2). "Senior executive" is defined to include the chief executive; the officers responsible for operating, financial, legal, and accounting matters; the chairman of the board; the president; the treasurer; the secretary; and vice-presidents or vice-chairmen who are in charge of major business divisions or functions or who perform major policymaking. *Id.* §§ 1.33, 1.27.

79. *Id.* § 1.34(a)(3). The payment can be personal, through a corporation the director owns (or partially owns, but then the money is prorated so that the director's portion must exceed \$200,000). *Id.*

80. *Id.* § 1.34(a)(4).

81. *Id.* § 1.34(a)(5).

82. *Id.* § 1.34(b).

The Comment to this definitional section makes clear that it is applicable only to the provisions in Parts III and III-A, which deal with the structure of the corporation, and that it

is not synonymous with the definition of “interested” in section 1.23. Thus a director who has a significant relationship with the senior executives under section 1.34 may nevertheless be disinterested with respect to a particular transaction for purposes of Part IV (Duty of Care and the Business Judgment Rule), Part V (Duty of Fair Dealing), and Part VI (Role of Directors and Shareholders in Transactions in Control and Tender Offers).⁸³

The Comment goes on to explain that the crucial distinction is between “directors who have a significant economic or professional relationship with the senior executives, and directors who do not.”⁸⁴ This is different from the more traditional distinction that is made between “inside” and “outside” directors. The purpose of this distinction is to ensure that the board of a publicly held corporation, and its essential committees, may perform its functions unaffected by factors based on relationships with the members that might inhibit their objectivity.⁸⁵

If a single person, control group, or family owns a majority of the stock of a first tier corporation, the *Principles* do not suggest that a majority of directors be free of significant relationships.⁸⁶ In these situations, and for all second tier corporations, it is recommended that at least three directors be free of significant relationships with the senior executives.⁸⁷ It is suggested that this will ensure an objective analysis of managerial performance.⁸⁸

The O.C.G.A. does not contain recommendations regarding the composition of the board of directors, with the exception of section 14-2-802 which states that “[d]irectors shall be natural persons who are 18 years of age or older”⁸⁹ The articles of incorporation or bylaws may establish additional qualifications, although only the articles can require that directors be residents of Georgia or that they be sharehold-

83. *Id.* § 1.34 cmt. a.

84. *Id.* § 1.34 cmt. b.

85. *Id.*

86. *Id.* § 3A.01(a).

87. *Id.* § 3A.01(b).

88. *Id.* § 3A.01 cmt. c. For different definitions of independent or outside director, albeit for different purposes, see e.g., New York Stock Exchange Listed Company Manual, § 303.00 (noting composition of audit committee) and Treas. Reg. § 1.162-27(a) (1995) (disallowing deductions for employee remuneration in excess of \$1 million).

89. O.C.G.A. § 14-2-802 (1989).

ers of the corporation.⁹⁰ The number of directors must be set by the articles of incorporation or bylaws, or if permitted by those documents, may be set by the shareholders or the board.⁹¹

G. Committees

The ALI *Principles* require that large publicly held corporations have an audit committee, and suggest such a committee for smaller corporations.⁹² In addition, all corporations are advised to have a committee responsible for the nomination of directors, and large corporations are advised to have a committee for executive compensation.⁹³ The O.C.G.A. does not contain recommendations or requirements for any committees, although auditing, nominating, and compensation committees are among those commonly found in large publicly held corporations.⁹⁴ Section 14-2-825 of the O.C.G.A. authorizes the board to establish committees for the exercise of almost any board function.⁹⁵

Under the ALI *Principles*, every large publicly held corporation should have an audit committee,⁹⁶ and it is recommended that, as a matter of good corporate practice, every small publicly held corporation should also have an audit committee.⁹⁷ An audit committee is to consist of at least three directors, the majority of whom have no significant relationship with the corporation's senior executives.⁹⁸ In addition, the members may not currently be employed by the corporation or have been employed by the corporation within the previous two years.⁹⁹ The purpose of the audit committee is to implement and support the board's oversight function.¹⁰⁰

90. *Id.*

91. *Id.* § 14-2-803. See generally James P. Hermance & Paul A. Quirós, *The Dynamics Among Shareholders, Directors, and Officers in Corporate Organizations Under Georgia Law*, 37 MERCER L. REV. 79 (1985).

92. ALI PRINCIPLES, *supra* note 24, §§ 3.05, 3A.02.

93. *Id.* §§ 3A.04, 3A.05.

94. GOLDSTEIN, *supra* note 57, § 8.2(e).

95. O.C.G.A. § 14-2-825 (1989); GOLDSTEIN, *supra* note 57, § 8.2(e).

96. ALI PRINCIPLES, *supra* note 24, § 3.05. As Comment a points out, "the New York Stock Exchange requires listed companies to establish and maintain an audit committee" made up of independent directors, and "[t]he population of corporations covered by § 3.05 is roughly coextensive with the population of corporations listed on that Exchange." *Id.* § 3.05 cmt. a.

97. *Id.* § 3A.02.

98. *Id.* §§ 3.05, 3A.02. For definitions of "significant relationship" and "senior executive," see *supra* notes 71, 78 and accompanying text.

99. ALI PRINCIPLES, *supra* note 24, § 3.05, 3A.02.

100. *Id.*

The ALI *Principles* recommend eight specific duties to be performed by the audit committee.¹⁰¹ (1) recommend the hiring of, and review the proposed termination of, the corporation's external auditor;¹⁰² (2) review the external auditor's employment agreement;¹⁰³ (3) review the appointment and replacement of the corporation's senior internal auditing executive;¹⁰⁴ (4) provide a channel of communication through which the internal and external auditors communicate with the board;¹⁰⁵ (5) review results of external audits;¹⁰⁶ (6) review all financial statements prepared by external auditors and any significant related disputes with management;¹⁰⁷ (7) consult with internal and external auditors regarding the adequacy of the corporation's internal controls;¹⁰⁸ and (8) consider major changes in the auditing and accounting procedures employed.¹⁰⁹ The duties listed are representative in that the committee may also perform other functions which fall within the scope of its general purpose.¹¹⁰

Section 3A.04 of the ALI *Principles* recommends that every publicly held corporation, except when closely controlled, establish a nominating committee for the purpose of recommending candidates for all directorships.¹¹¹ This committee should be composed exclusively of directors who are not officers or employees of the corporation and a majority of whom do not have any significant relationship with the corporation's senior executives.¹¹² The intent is to insure that the board will be made up of directors who can objectively evaluate the performance of senior management.¹¹³ As noted above, the O.C.G.A. does not make any statement regarding the establishment or make-up of a nominating committee; however, section 14-2-825 authorizes the board of directors to delegate the nominating function, although not the election of directors, to a committee.¹¹⁴

101. *Id.* § 3A.03.

102. *Id.* § 3A.03(a).

103. *Id.* § 3A.03(b).

104. *Id.* § 3A.03(c).

105. *Id.* § 3A.03(d).

106. *Id.* § 3A.03(e).

107. *Id.* § 3A.03(f).

108. *Id.* § 3A.03(g).

109. *Id.* § 3A.03(h).

110. *Id.* § 3A.03 cmt. c.

111. *Id.* § 3A.04(a).

112. *Id.* For definitions of "significant relationship" and "senior executives," see *supra* notes 71, 78 and accompanying text.

113. ALI PRINCIPLES, *supra* note 24, § 3A.04 cmt. c.

114. O.C.G.A. § 14-2-825 (1989).

In section 3A.05, the ALI *Principles* state that every large public corporation should have a compensation committee.¹¹⁵ The committee should be composed entirely of directors who are not employees of the corporation, and a majority of whom have no significant relationships with the corporation's senior executives.¹¹⁶ The basic purpose of the committee is to implement and support the oversight function of the board by: (1) recommending salary, bonus, stock options, and other compensation for senior executives;¹¹⁷ (2) reviewing new executive compensation programs and taking steps to modify existing programs that are not reasonably related to executive performance;¹¹⁸ and (3) establishing and periodically reviewing policies regarding management perquisites.¹¹⁹ In order to perform its function properly, the committee should acquire relevant information, using methods such as securing comparative data about compensation practices in similar companies or retaining outside consultants to advise the corporation.¹²⁰

IV. DUTY OF CARE AND THE BUSINESS JUDGMENT RULE

Part IV of the ALI *Principles* states the duty of care and the business judgment rule applicable to directors and officers.¹²¹ They are in the form of general legal standards and are intended to be consistent with the majority position in most jurisdictions.¹²² The principles stated in this Part are, except where specifically noted, designed to apply to all types and sizes of business corporations, and so are "drafted flexibly to take account of variations among them."¹²³ Rejecting the suggestion made in some cases, the *Principles* do not impose a higher degree of care on the directors of banks and other financial institutions than that which is required for the directors of other business corporations; the Introductory Note labels such distinctions "unjustified and anachronistic."¹²⁴ And the ALI *Principles* demand the same duty of care and

115. ALI PRINCIPLES, *supra* note 24, § 3A.05(a).

116. *Id.* For definitions of "significant relationship" and "senior executives," see *supra* notes 71, 78 and accompanying text.

117. ALI PRINCIPLES, *supra* note 24, § 3A.05(b)(1).

118. *Id.* § 3A.05(b)(2).

119. *Id.* § 3A.05(b)(3).

120. *Id.* § 3A.05 cmt. d.

121. *Id.* Part IV, Introductory Note a.

122. *Id.*

123. *Id.* Part IV, Introductory Note d.

124. *Id.*; see also 3A FLETCHER, CYC CORP. § 1042 (perm. ed.).

business judgment standards from corporate officers as they do from directors.¹²⁵

A. Duty of Care

In section 4.01(a), the *Principles* set forth the duty of care standards for both officers and directors: performance of their functions (1) in good faith; (2) in a manner believed to be in the best interest of the corporation; (3) and with the care, which under similar circumstances would be exercised by an ordinarily prudent person.¹²⁶ The duty includes an obligation to ensure that inquiries are made where the circumstances would alert a reasonable director or officer to the need.¹²⁷

The O.C.G.A. addresses the general standards for directors in section 14-2-830.¹²⁸ Like the *ALI Principles*, the O.C.G.A. requires that directors act in good faith.¹²⁹ Georgia, however, did not adopt the requirement found in the *ALI Principles* that a director reasonably believe he is acting in the best interests of the corporation; the belief need only be in good faith.¹³⁰ In dropping the reasonableness requirement, the O.C.G.A. also departed from the Model Business Corporations Act upon which it is based.¹³¹ The difference reflects a desire not to treat reasonableness as a separate and isolated factor but rather to view it as one aspect of good faith.¹³²

The O.C.G.A. describes the "prudent person" portion of a director's duty of care in terms almost identical to those of the *ALI Principles*.¹³³ According to the Official Comment, the prudent person standard

125. ALI PRINCIPLES, *supra* note 24, § 4.01 cmt. a. For an analysis and critique of Part IV, see Charles Hansen, *The Duty of Care, the Business Judgment Rule, and the American Law Institute Corporate Governance Project*, 48 BUS. LAW. 1355 (1993).

126. ALI PRINCIPLES, *supra* note 24, § 4.01(a). For a critical analysis of § 4.01, see William J. Carney, *Section 4.01 of the American Law Institute's Corporate Governance Project: Restatement or Misstatement?*, 66 WASH. U. L.Q. 239 (1988).

127. ALI PRINCIPLES, *supra* note 24, § 4.01(a)(1).

128. O.C.G.A. § 14-2-830 (1989).

129. *Id.* Good faith is a question not only of what is "best for the corporation" but for its shareholders as well. *Quinn v. Cardiovascular Physicians, P.C.*, 254 Ga. 216, 217-18, 326 S.E.2d 460, 463 (1985); *Comolli v. Comolli*, 241 Ga. 471, 475, 246 S.E.2d 278, 281 (1978).

130. Furthermore, Georgia's definition of "good faith" may extend beyond the best interests of the corporation to the protection of minority shareholder. *Comolli*, 241 Ga. at 465, 246 S.E.2d at 281. See O.C.G.A. § 14-2-830 (1989).

131. See William J. Carney, *Changes in Corporate Practice Under Georgia's New Business Corporation Code*, 40 MERCER L. REV. 655, 676 (1989).

132. O.C.G.A. § 14-2-830 cmt. (1989).

133. *Id.* The Comment to § 14-2-830 refers to the Tentative Draft No. 4 of the ALI PRINCIPLES.

incorporates the "basic director attributes of common sense, practical wisdom, and informed judgment."¹³⁴ No express duty of inquiry is contained in the O.C.G.A. However, the duty could be implied from holdings that even an inactive director owes a duty of due care to the corporation.¹³⁵

The O.C.G.A. section on "Standards of Conduct for Officers," repeats the standards for directors almost verbatim.¹³⁶

B. *The Business Judgment Rule*

The ALI *Principles* codify the "business judgment rule," stating that a business judgment which is made in good faith will satisfy an officer's or director's duty of care so long as the officers or directors: (1) are not classified as "interested;"¹³⁷ (2) are reasonably informed regarding the business judgment; and (3) rationally believe that the judgment is in the best interest of the corporation.¹³⁸ A party alleging a claim under these provisions has the burden of proof regarding both the breach of a duty as well as the resulting damages.¹³⁹

If the conduct of a director or officer meets these criteria, there can be no violation of the duty of care under the *Principles*.¹⁴⁰ On the other hand, where a challenging party can meet its burden of proof in demonstrating a failure to meet these criteria, the safe harbor of the "business judgment rule" will be unavailable.¹⁴¹ The *Principles* provide several illustrations regarding the application of these duties and obligations.¹⁴²

The business judgment rule is not codified in Georgia. The Comment to section 14-2-830 expressly states that the development and applica-

134. O.C.G.A. § 14-2-830 cmt.

135. *Super Valu Stores, Inc. v. First Nat'l Bank*, 463 F. Supp. 1183, 1196 (M.D. Ga. 1979) (citing and applying Georgia law).

136. O.C.G.A. § 14-2-842 (1989).

137. ALI PRINCIPLES, *supra* note 24, § 4.01(c). Section 1.23 defines interested as either: (1) being a party to the transaction; (2) having a business, financial, or familial relationship with a party to the transaction which would be expected to adversely affect judgment; (3) having a pecuniary interest; or (4) being "subject to a controlling influence by a party to the transaction or conduct or a person who has a material pecuniary interest in the transaction." *Id.* § 1.23(a).

138. *Id.* § 4.01(c).

139. *Id.* § 4.01(d).

140. *Id.* § 4.01 cmt. d.

141. *Id.*

142. *Id.* § 4.01(a) cmt. b, c. For a discussion and critique of the PRINCIPLES' treatment of the business judgement rule, see R. Franklin Balotti & James J. Hanks, Jr., *Rejudging the Business Judgment Rule*, 48 BUS. LAW. 1337 (1993).

tion of that rule should be left to the judiciary.¹⁴³ The Georgia Supreme Court has observed, “No principle of law is more firmly fixed in our jurisprudence than the one which declares that the courts will not interfere in matters involving merely the judgment of the majority in exercising control over corporate affairs.”¹⁴⁴

C. *Reliance on Others*

In section 4.01(b), the *ALI Principles* reiterate the board’s authority to delegate any function of the board, and present examples of the parties to whom functions may be delegated.¹⁴⁵ A director may fulfill the duty of care through reliance on a delegated party so long as the reliance is in accordance with sections 4.02 and 4.03.¹⁴⁶ In section 4.02, the *Principles* elaborate on the ability of directors and officers to rely on information obtained from directors, officers, corporate employees, experts, and other persons who are believed to merit confidence.¹⁴⁷ In order to be entitled to rely, the director or officer must “reasonably believe[] that reliance is warranted.”¹⁴⁸ In most cases, the party relying on the information does not have a duty to verify independently the information unless the circumstances indicated that it would have been prudent to do so.¹⁴⁹

Section 4.03 of the *ALI Principles* expands on the authorization given in section 4.01(b) for a director to rely on information obtained from a committee of the board.¹⁵⁰ The information that may be relied upon includes decisions, judgments, opinions, and statements prepared by a duly authorized committee of the board.¹⁵¹ In order for the director to rely, he must be acting in good faith, not serving as a member of the committee providing the information, and reasonably believe that reliance is warranted.¹⁵²

Section 14-2-830(b) of the O.C.G.A. is almost identical to the language of the *ALI Principles* regarding directors’ and officers’ ability to rely on

143. O.C.G.A. § 14-2-830 cmt.

144. *Regenstein v. J. Regenstein Co.*, 213 Ga. 157, 159, 97 S.E.2d 693, 695 (1957) (quoting with approval *Bartow Lumber Co. v. Enwright*, 131 Ga. 329, 333, 62 S.E. 233, 235 (1908)). In *Regenstein*, the court refused to inquire into the wisdom of a corporation continuing to operate one of its three stores at a loss. 213 Ga. at 161, 97 S.E.2d at 696.

145. *ALI PRINCIPLES*, *supra* note 24, § 4.01(b).

146. *Id.*

147. *Id.* § 4.02.

148. *Id.*

149. *Id.* § 4.02 cmt. i.

150. *Id.* § 4.03.

151. *Id.*

152. *Id.*

information.¹⁵³ Although this Code section is not applicable to officers, the same standard is applied to officers through section 14-2-842.¹⁵⁴

V. DUTY OF FAIR DEALING

Part V of the ALI *Principles* sets forth the duty of fair dealing as it applies to directors, officers, and controlling shareholders who make decisions affecting the corporation in matters in which they have a pecuniary interest.¹⁵⁵ Only officers who are "senior executives" are covered in this Part; the duties of other officers and employees are governed by corporation or agency law.¹⁵⁶ A controlling shareholder also has a duty of fair dealing; because this is "not necessarily the same as that of a director or senior executive," it is dealt with in a separate chapter of this Part.¹⁵⁷ The materials related to the duty of fair dealing are broken down into four chapters.¹⁵⁸ Chapter 1, which consists of section 5.01, states the general principle of fair dealing.¹⁵⁹ Chapter 2 sets forth the legal principles which govern the conduct of

153. O.C.G.A. § 14-2-830(b) (1989).

154. *Id.* § 14-2-842.

155. ALI PRINCIPLES, *supra* note 24, Part V, Introductory Note a. As the Introductory Note states, this Part "does not address nonpecuniary conflict-of-interest situations which might be dealt with by the courts in appropriate cases." *Id.* Thus, the term "duty of fair dealing" is used to make clear that these principles apply only to pecuniary interests and not to a broader range of concerns which have been discussed under the label "duty of loyalty." *Id.* For a good description of this Part by the Reporter, see Marshall L. Small, *Conflicts of Interest and the ALI Corporate Governance Project—A Reporter's Perspective*, 48 BUS. LAW. 1377 (1993). For a different perspective, see John F. Johnson & Frederick H. Alexander, *The Effect of Disinterested Director Approval of Conflict Transactions under the ALI Corporate Governance Project—A Practitioner's Perspective*, 48 BUS. LAW. 1394 (1993).

156. ALI PRINCIPLES, *supra* note 24, Part V, Introductory Note b. Section 1.33 states that "senior executive" means the officers described in section 1.27(a)-(b). *Id.* § 1.33. Section 1.27(a) defines "officer" as "the chief executive, operating, financial, legal, and accounting officers of a corporation." *Id.* § 1.27(a). Section 1.27(b) includes within the definition of officer,

to the extent not encompassed by the foregoing, the chairman of the board of directors (unless the chairman neither performs a policymaking function other than as a director nor receives a material amount of compensation in excess of director's fees), president, treasurer, and secretary, and a vice-president or vice-chairman who is in charge of a principal business unit, division, or function (such as sales, administration, or finance) or performs a major policymaking function for the corporation.

Id. § 1.27(b).

157. *Id.*

158. *Id.* Part V, Introductory Note d.

159. *Id.* § 5.01.

senior executives and directors.¹⁶⁰ Chapter 3 discusses the duty of fair dealing as it relates to controlling shareholders.¹⁶¹ The final chapter addresses the issue of transfer of control as it relates to the duty of fair dealing.¹⁶²

A. *Duty of Fair Dealing*

In section 5.01, the *Principles* set forth the general proposition that directors, senior executives, and controlling shareholders are bound by a duty of fair dealing when confronted with matters affecting the corporation for which they are classified as being “interested.”¹⁶³ This duty may include the disclosure of information as set forth in subsequent sections of this Part.¹⁶⁴

The O.C.G.A. addresses this subject matter under the heading of “Conflicting Interest Transactions.”¹⁶⁵ The term “conflicting interest,” as defined by the Code, is substantially the same as the *Principles*’ definition of “interested.”¹⁶⁶ The Comment to the Code section indicates that the definition is exclusive and that a director’s interest is only conflicting if it falls within the definition.¹⁶⁷ While the *Principles* are silent regarding the exclusiveness of the definition of “interested,”¹⁶⁸ it would seem to operate in the same way. The O.C.G.A. provisions apply only to transactions, not to policy decisions;¹⁶⁹ section 5.02 of the ALI *Principles* appears to have the same limitation.¹⁷⁰

B. *General Safe Harbor*

In section 5.02, the *Principles* set forth the “safe harbor” provisions for directors and senior executives who enter into transactions with the corporation.¹⁷¹ All of the safe harbor provisions require that the interested director or senior executive make the required disclosure to

160. *Id.* §§ 5.02-5.09.

161. *Id.* §§ 5.10-5.14. For the definition of “controlling shareholder,” see *infra* note 266 and accompanying text.

162. *Id.* §§ 5.15, 5.16.

163. *Id.* § 5.01. For the definition of “interested,” see *supra* note 137.

164. *Id.* § 5.01.

165. O.C.G.A. §§ 14-2-860 to -864.

166. *Id.* § 14-2-860; see *supra* note 137.

167. O.C.G.A. § 14-2-860 cmt. (1989).

168. See ALI PRINCIPLES, *supra* note 24, § 1.23.

169. O.C.G.A. § 14-2-860 cmt.

170. ALI PRINCIPLES, *supra* note 24, § 5.02.

171. *Id.* § 5.02. This section explicitly excludes the payment of compensation from its coverage. *Id.*

the corporate decisionmaker.¹⁷² Disclosure must be of the conflict of interest, as described in section 1.14(a), and of material facts known to the insider about the transaction, as described in section 1.14(b).¹⁷³ Following disclosure, the interested director or senior executive can fulfill the duty of fair dealing with the corporation in four ways.

First, if the transaction is fair to the corporation, the interested director or senior executive must obtain authorization or ratification from the corporate decisionmaker.¹⁷⁴

Second, the interested director or senior executive may obtain consent in advance of the transaction from disinterested directors "who could reasonably have concluded that the transaction was fair to the corporation at the time of such authorization."¹⁷⁵ If the interested party is a senior executive but not a director, a disinterested superior may grant the authorization.¹⁷⁶

Third, under certain circumstances, the interested director or senior executive may secure ratification after the transaction occurs.¹⁷⁷ Ratification can be granted by disinterested directors who could have reasonably concluded that the transaction was fair to the corporation at the time it was entered into.¹⁷⁸ The required circumstances are that the transaction must have been approved in advance by a corporate

172. *Id.* § 5.02(a)(1). Disclosure occurs when the interested director advises the decision maker of material facts known to the interested director. *Id.* § 1.14. "Corporate decisionmaker" is defined as "that corporate official or body with the authority to make a particular decision for the corporation." *Id.* § 1.11.

173. *Id.* § 5.02(a)(1). Section 1.14 provides:

(a) *Disclosure Concerning a Conflict of Interest.* A director [§ 1.13], senior executive [§ 1.33], or controlling shareholder [§ 1.10] makes "disclosure concerning a conflict of interest" if the director, senior executive, or controlling shareholder discloses to the corporate decisionmaker [§ 1.11] who authorizes in advance or ratifies the transaction in question the material facts [§ 1.25] known to the director, senior executive, or controlling shareholder concerning the conflict of interest, or if the corporate decisionmaker knows of those facts at the time the transaction is authorized or ratified.

(b) *Disclosure Concerning a Transaction.* A director, senior executive, or controlling shareholder makes "disclosure concerning a transaction" if the director, senior executive, or controlling shareholder discloses to the corporate decisionmaker who authorizes in advance or ratifies the transaction in question the material facts known to the director, senior executive, or controlling shareholder concerning the transaction, or if the corporate decisionmaker knows of those facts at the time the transaction is authorized or ratified.

Id. § 1.14.

174. *Id.* § 5.02(a)(2)(A).

175. *Id.* § 5.02(a)(2)(B).

176. *Id.*

177. *Id.* § 5.02(a)(2)(C).

178. *Id.*

decision-maker to whom advance disclosure was made,¹⁷⁹ that failure to seek broader advance approval was not unreasonable,¹⁸⁰ and that failure to seek broader advance approval did not significantly harm the corporation.¹⁸¹

Fourth, the interested director may secure consent or ratification from disinterested shareholders, provided the transaction “does not constitute a waste of corporate assets . . . at the time of the shareholder action.”¹⁸²

The burden of proof regarding a challenge to a transaction lies with the challenging party except where there was not adherence to any of the safe harbor provisions of section 5.02, in which case the affected director or senior executive would have the burden of proving that the transaction was fair to the corporation.¹⁸³

This section also provides that failure to disclose, or defective disclosure, may be cured by a subsequent ratification by a majority of disinterested directors after disclosure of facts which should have been disclosed initially, so long as such ratification occurs within a reasonable period of time after a suit has been filed.¹⁸⁴

The *Principles* provide several illustrations regarding the application of this section.¹⁸⁵ The Comments also make clear that de minimis transactions are not to be considered under section 5.02.¹⁸⁶

Like the ALI *Principles*, the O.C.G.A. provides a safe harbor from judicial inquiry into corporate transactions with interested directors and officers when the transaction is fair to the corporation, or when disinterested directors or shareholders consent to, or ratify, the transaction following disclosure by the interested party.¹⁸⁷ However, the O.C.G.A. differs in what information must be disclosed and the requirements for each safe harbor.

When a transaction is fair to the corporation, the O.C.G.A. unlike the ALI *Principles*, allows the transaction to stand even if the interested party never disclosed the conflict of interest.¹⁸⁸ As long as the court

179. *Id.* § 5.02(a)(2)(C)(i), (ii).

180. *Id.* § 5.02(a)(2)(C)(iii).

181. *Id.* § 5.02(a)(2)(C)(iv).

182. *Id.* § 5.02(a)(2)(D).

183. *Id.* § 5.02(b).

184. *Id.* § 5.02(c).

185. *Id.* § 5.02 cmt. c.

186. *Id.*

187. O.C.G.A. §§ 14-2-861 to -864 (1989).

188. *Id.* §§ 14-2-861(b)(3), -864(c)(3). *But see id.* § 14-2-864 cmt. (suggesting that contrary to the text of the O.C.G.A., full disclosure must precede defense of a transaction on the grounds of fairness). Of course, other sections of the Code such as that governing

is persuaded that the transaction is fair to the corporation, no corporate decision-maker is required to consent to, or ratify, the interested transaction.¹⁸⁹

If disinterested directors approve an interested transaction, the O.C.G.A. places no requirement of reasonableness on the decision of those directors.¹⁹⁰ Furthermore, when ratification occurs, the Code does not require any justification for failure to secure approval in advance.¹⁹¹ For both consent in advance and later ratification, the only restriction is that the decision follow adequate disclosure.¹⁹² For directors only, the Code allows more limited disclosure if the interested director is unable to provide full information because of a professional canon or a duty of confidentiality.¹⁹³ The ALI *Principles* do not appear to address this type of situation.

The O.C.G.A. also requires no judicial inquiry regarding the reasonableness of disinterested shareholder consent or ratification.¹⁹⁴ Interested directors and officers must provide the required disclosure prior to a shareholder vote.¹⁹⁵ In addition, an interested director must identify which votes are controlled by that director or a related party.¹⁹⁶ However, if interested shares are not properly identified in advance, the O.C.G.A. permits a court to uphold the shareholder vote if the interested director demonstrates that withholding the information did not influence, or was not intended to influence, the shareholder vote.¹⁹⁷

C. Director Compensation

In section 5.03, the ALI *Principles* address the duty of fair dealing as it applies to the compensation received by a corporate director or senior executive.¹⁹⁸ This section only applies to compensation which is received for the services performed by a director or senior executive in that capacity.¹⁹⁹ If the compensation is received for services in some

fraud may mandate disclosure. See generally, GOLDSTEIN, *supra* note 57, § 8.8(c).

189. O.C.G.A. §§ 14-2-861(b)(3), -864(c)(3) (1989).

190. *Id.* §§ 14-2-862(a), -864(c)(1). Arguably, a director's duty of good faith and ordinary diligence includes some degree of reasonableness.

191. *Id.*

192. *Id.*

193. *Id.* § 14-2-862(b).

194. *Id.* §§ 14-2-863, -864(c)(2).

195. *Id.* §§ 14-2-863(a), -864(c)(2).

196. *Id.* § 14-2-863(d).

197. *Id.* § 14-2-863(e).

198. ALI PRINCIPLES, *supra* note 24, § 5.03.

199. *Id.* § 5.03 cmt. f.

other capacity, it will be governed by section 5.02.²⁰⁰ And if the senior executive's compensation is governed by a plan of general applicability, it will be dealt with under Part IV, the Duty of Care and the Business Judgment Rule.²⁰¹

The *Principles* state four alternative approaches for meeting the duty of fair dealing with respect to director or senior executive compensation:²⁰² (1) "[t]he compensation is fair to the corporation when approved;"²⁰³ (2) "[t]he compensation is authorized in advance by disinterested directors;"²⁰⁴ (3) the compensation is subsequently ratified by disinterested directors acting in accordance with the business judgment rule;²⁰⁵ or (4) the compensation is authorized in advance or subsequently ratified and does not constitute a waste of corporate assets at the time of the shareholder action.²⁰⁶ In the same manner as section 5.02, a party challenging the compensation of a director or senior officer has the burden of proof, except where it is established that there was not compliance with any of the provisions of this section, in which case the burden shifts.²⁰⁷

The O.C.G.A., through a 1989 amendment, removed director compensation transactions from the enumerated safe harbor provisions of section 14-2-861.²⁰⁸ The Code specifically authorizes the board of directors to determine directors' compensation "[u]nless the articles of incorporation or bylaws provide otherwise."²⁰⁹ As a result, the issue would be handled in the same manner as any other director's conflict of interest: through disinterested director or shareholder approval or under the fairness standard.²¹⁰

Senior executive compensation is similarly not specifically addressed by the O.C.G.A.'s safe harbor provisions for conflict of interest transac-

200. *Id.*

201. *Id.*

202. *Id.* § 5.03.

203. *Id.* § 5.03(a)(1).

204. *Id.* § 5.03(a)(2). In the case of an executive who is not a director, the ALI *Principles* allows advance approval by a superior acting in accordance with the business judgment rule. *Id.*

205. *Id.* § 5.03(a)(3). In addition, the *Principles* requires justification for the failure to obtain advance authorization from directors: That a disinterested corporate decisionmaker approved in advance, that the interested party acted reasonably, and that the absence of advance authorization did not significantly harm the corporation. *Id.*

206. *Id.* § 5.03(a)(4).

207. *Id.* § 5.03(b).

208. O.C.G.A. § 14-2-861 cmt. (1989).

209. *Id.* § 14-2-811; GOLDSTEIN, *supra* note 57, § 8.1(j).

210. O.C.G.A. § 14-2-861 cmt.

tions, and would thus be handled through director approval, shareholder approval, or by evaluation under the fairness standard.²¹¹

D. Corporate Position, Property, and Information

In section 5.04, the ALI *Principles* set forth the general rule that a director or senior executive may not use corporate position, corporate property, or material nonpublic information to secure a personal pecuniary gain.²¹² The *Principles* recognize exceptions to this general rule: (1) when the use is paid for and the transaction is in accordance with section 5.02;²¹³ (2) when the use constitutes compensation;²¹⁴ (3) when nonproprietary information is being used for a purpose other than trading of the corporation's securities, and the corporation is not harmed;²¹⁵ (4) when the use was authorized in advance or ratified;²¹⁶ or (5) when the benefit is received as a shareholder, and is a benefit available to all similarly situated shareholders.²¹⁷ Liability under this section is limited to the value of the improper benefit which was received and retained, except where the conduct resulted in foreseeable harm beyond the benefit received.²¹⁸

Rather than specifically outlining a duty not to use corporate position, property, or nonpublic information for personal pecuniary gain, the O.C.G.A. specifies that articles of incorporation cannot exculpate a director for "any transaction from which the director received an improper personal benefit."²¹⁹ Because the O.C.G.A. provisions on conflicting interests apply only to transactions with the corporation, they do not provide a safe harbor for directors and officers who use corporate position, property, or information.²²⁰ In fact, the safe harbors for conflicting interests do not shelter directors in any "situations not involving transactions, such as corporate inaction, or actions by directors

211. *Id.* § 14-2-864 (1989).

212. ALI PRINCIPLES, *supra* note 24, § 5.04(a).

213. *Id.* § 5.04(a)(1).

214. *Id.* § 5.04(a)(2).

215. *Id.* § 5.04(a)(3).

216. *Id.* § 5.04(a)(4). Authorization or ratification must be by disinterested directors or shareholders, and must follow the requirements of § 5.02 regarding disclosure and review. *Id.* § 5.04(a)(4).

217. *Id.* § 5.04(a)(5).

218. *Id.* § 5.04(c).

219. O.C.G.A. § 14-2-202(b)(4)(D) (1989); *see also* Carney, *supra* note 131, at 676-77. Furthermore, the duty can be implied from the general standards of conduct. *Quinn v. Cardiovascular Physicians, P.C.*, 254 Ga. 216, 217, 326 S.E.2d 460, 463 (1985).

220. O.C.G.A. § 14-2-860 cmt. (1989); *see also* Carney, *supra* note 131, at 678.

that are taken with respect to third parties, if no corporate transaction is involved.”²²¹

E. Corporate Opportunities

In section 5.05, the ALI *Principles* establish the requirement that a director or senior executive must first offer a corporate opportunity to the corporation prior to taking it for personal advantage.²²² If the opportunity is rejected by the corporation,²²³ the director or senior executive may pursue the opportunity within the guidelines of section 5.06 regarding the ability to compete with the corporation.²²⁴

A failure to offer an opportunity to the corporation, or a defective disclosure of material facts, may be cured through a subsequent ratification which occurs no later than a reasonable time after a suit contesting the matter has been filed.²²⁵ However, such ratification will cure complete failure to offer the opportunity to the corporation in advance only if there was a good faith belief that the opportunity was not a corporate one.²²⁶

Improper appropriation of corporate opportunities is clearly prohibited under Georgia law,²²⁷ and the O.C.G.A. provides that the articles of incorporation may not eliminate a director's liability for misappropriation of a corporate opportunity.²²⁸ However, the O.C.G.A. does not define a safe harbor when it is appropriate for a director or officer to take a corporate opportunity. The statutory provisions which provide a safe harbor for conflicting interests do not apply, because they cover only transactions involving the corporation, and provide that their definition of “conflicting interest” is both comprehensive and exclusive.²²⁹ However, the general statutory safe harbor may provide guidance for

221. O.C.G.A. § 14-2-860 cmt.; see also Carney, *supra* note 131, at 678.

222. ALI PRINCIPLES, *supra* note 24, § 5.05(a).

223. *Id.* The rejection must be one of the following: (1) fair to the corporation; (2) approved in advance by disinterested directors; (3) authorized in advance by a disinterested superior following the business judgment rule; or (4) authorized or ratified by disinterested shareholders, provided the rejection is not a waste of corporate assets. *Id.*

224. *Id.* § 5.05, cmt. to § 5.05(a); see also Michael Begert, *The Corporate Opportunity Doctrine and Outside Business Interests*, 56 U. CHI. L. REV. 827 (1989).

225. ALI PRINCIPLES, *supra* note 24, §§ 5.05(d), (e).

226. *Id.* § 5.05(e).

227. See, e.g., *Quinn*, 254 Ga. at 218, 326 S.E.2d at 463. The court characterized the appropriation of a corporate opportunity as “but specie of the command that fiduciaries act with undivided loyalty, and is another manifestation of the requirement of utmost good faith.” *Id.*

228. O.C.G.A. § 14-2-202(b)(4)(A) (1989).

229. *Id.* § 14-2-861, -860 cmt.

proper appropriation of an opportunity that might otherwise qualify as a corporate one.²³⁰

Furthermore, the Georgia Supreme Court has expressly adopted criteria to determine whether or not a director or officer has improperly taken a corporate opportunity.²³¹ First, in order for the business opportunity to qualify as a corporate one, it must be in the line of business of the corporation, and the corporation must have a "legal or equitable interest or expectancy" from a prior relationship or right.²³² Second, if the opportunity is a corporate one, the court determines whether its appropriation was fair under the circumstances.²³³ Although a director in Georgia does not have the benefit of a statutory safe harbor, it seems extremely unlikely that a claim would arise if the corporation had expressly declined to take advantage of the corporate opportunity. It is even less likely that a Georgia court would find appropriation of the opportunity to be unfair under such circumstances.²³⁴

F. Competition with the Corporation

In section 5.06, the ALI *Principles* prohibit directors and senior executives from engaging in competition with the corporation in order to realize a pecuniary gain unless:²³⁵ (1) there is no foreseeable harm to the corporation,²³⁶ or (2) the competition is authorized in advance.²³⁷

230. GOLDSTEIN, *supra* note 57, § 8.8(c).

231. Southeast Consultants, Inc. v. McCrary Eng'g Corp., 246 Ga. 503, 507-08, 273 S.E.2d 112, 117 (1980).

232. *Id.* The Court followed the lead of the Minnesota Supreme Court in merging the "line of business test" with the "interest or expectancy" tests commonly used to define business opportunities. *Id.* The Georgia Supreme Court later elaborated on the "interest or expectancy" test in United Seal & Rubber Co. v. Bunting, 248 Ga. 814, 816, 285 S.E.2d 721, 723 (1982) (holding that a corporation does not have an expectancy in its customers, where there is no contract between them and no discrete project is at issue, as in *Southeastern Consultants*).

233. *Southeastern Consultants*, 246 Ga. at 508, 273 S.E.2d at 117. At this stage of the inquiry, the director or officer bears the burden of proving that taking the opportunity was fair. Phoenix Airline Serv. v. Metro Airlines, 260 Ga. 584, 587, 397 S.E.2d 699, 702-03 (1990).

234. In *Southeastern Consultants*, the appropriating former president had secretly created a new company, at the expense of the existing company, in order to appropriate the existing company's business opportunities. *Id.* at 503, 273 S.E.2d at 114.

235. ALI PRINCIPLES, *supra* note 24, § 5.06(a).

236. *Id.* § 5.06(a)(1). The ALI *Principles* permits competition causing foreseeable harm only if the harm is outweighed by foreseeable benefit. *Id.*

237. *Id.* § 5.06(a)(2). Disinterested director approval must conform to the business judgment rule; disinterested shareholder approval must not waste corporate assets. *Id.* § 5.06(a)(2)-(a)(3).

This section is intended to include competition for customers, suppliers, employees, and assets used in the business.²³⁸ Maintaining a position on the board of a competing corporation does not in and of itself constitute a violation of this section.²³⁹

Although the O.C.G.A. does not directly address the question of competition, the Georgia Supreme Court has confronted the issue in *Regenstein v. J. Regenstein Co.*²⁴⁰ The court held that

“so long as they act in good faith toward their company and its associates, [corporate officers and directors] are not precluded from engaging in a business similar to that carried on by their corporation, either on their own behalf or for another corporation of which they are likewise directors or officers.”²⁴¹

This approach would appear to be somewhat broader than that of the *Principles*.²⁴²

G. Transactions Between Corporations

In section 5.07, the *Principles* set forth the circumstances under which a transaction between two corporations with a common director or senior executive will be considered an interested transaction.²⁴³ If the common director or senior executive personally and substantially participates in the negotiation,²⁴⁴ or if the common director casts a deciding vote to approve the transaction, then section 5.02 (Transactions with the Corporation) will govern the transaction.²⁴⁵

Rather than focusing on a specific director's behavior in the transaction, Georgia law focuses on the level at which such a transaction is approved. In its definition of “conflicting interest,” the O.C.G.A. includes transactions between corporations with a common director (or a director in one corporation who is an agent or employee of the other corporation) if the transaction requires action by the board on which the common director sits.²⁴⁶ Such “board level” transactions²⁴⁷ must be evaluated

238. *Id.* § 5.06 cmt. c.

239. *Id.*

240. 213 Ga. 157, 97 S.E.2d 693 (1957).

241. *Id.* at 162, 97 S.E.2d at 696 (quoting 3 FLETCHER CYCLOPEDIA CORPORATIONS 214, § 856).

242. *ALI Principles*, *supra* note 24, § 5.06, cmt. a (citing *Regenstein v. J. Regenstein Co.*, 213 Ga. 157, 97 S.E.2d 693, as an example of a more permissive attitude).

243. *Id.* § 5.07(a).

244. *Id.* § 5.07(a)(1). The participation can take place on behalf of either corporation. *Id.*

245. *Id.* § 5.07(a)(2)-(b).

246. O.C.G.A. § 14-2-860(1)(B) (1989).

as conflicts of interest.²⁴⁸ Under Georgia law, a director of two corporations could thus be involved in a conflict despite having played a passive role.

H. Associates

The ALI *Principles* impose a duty that a director, senior executive, or shareholder, when advancing the interests of an associate, must abide by the same duty of fair dealing which govern their activities when dealing with their own interests.²⁴⁹ Real persons defined as associates are enumerated relatives, in-laws, and relatives of persons sharing the director's or senior executive's home.²⁵⁰ Entities defined as associates include trusts and estates which benefit people who are associates.²⁵¹ In addition, associates include trusts, estates, incompetents, conservatees, or minors for whom the director, senior executive, or shareholder serves as a fiduciary.²⁵² However, business organizations are presumed to be associates only when the director, senior executive, or shareholder owns more than ten percent of any equity class.²⁵³

The O.C.G.A. does not list a separate duty applicable when advancing the interests of an associate. However, conflicting interests for directors and officers include the interests of "related persons,"²⁵⁴ which the Code defines very similarly to the ALI *Principles'* definition of an associate, except that business organizations are not included.²⁵⁵ This definition is exclusive and would appear to govern even though in subsequent sections reference is made to the duties of directors and officers when they involve the interests of "any person with whom or with which he has a personal, economic, or other association."²⁵⁶

247. GOLDSTEIN, *supra* note 57, § 8.8(c).

248. *Id.*

249. ALI PRINCIPLES, *supra* note 24, § 5.08.

250. *Id.* § 1.03(a)(1)(A).

251. *Id.*

252. *Id.* § 1.03(a)(1)(B).

253. *Id.* § 1.03(b).

254. O.C.G.A. § 14-2-860(3) (1989).

255. *Id.* The O.C.G.A. provides:

(3) "Related person" of a director means:

(A) The spouse (or a parent or sibling thereof) of the director or a child, grandchild, sibling, parent (or spouse of any thereof), or an individual having the same home as the director or a trust or estate of which an individual specified in this subparagraph is a substantial beneficiary; or

(B) A trust, estate, incompetent, conservatee, or minor of which the director is a fiduciary.

Id.

256. *Id.* § 14-2-861(a).

I. Exculpation

Notwithstanding other prohibitions in the ALI *Principles*, section 5.09 allows a director or senior executive to engage in selected conflict of interest transactions if doing so is consistent with existing standards of the corporation.²⁵⁷ Such standards can permit interested transactions, use of corporate position, or use of property, if expected to recur in the ordinary course of business and corporate opportunities, if not learned of on the job, if not reasonably believed offered to the corporation, or if not learned of through the use of corporate information or property.²⁵⁸ Section 1.36 defines standard of the corporation as “a valid certificate or bylaw provision or board of directors or shareholder resolution.”²⁵⁹ The intent is to allow disinterested directors or shareholders to establish guidelines in advance in order that certain transactions or activities may be conducted without requesting approval from the board.²⁶⁰

The O.C.G.A. in section 14-2-801 sets forth the requirements and duties of the board of directors.²⁶¹ The Code is silent on senior executives. In this section, the Code recognizes that limitations on the board may be stated in the articles of incorporation, bylaws, and shareholder agreements.²⁶² It would appear that the concept of a standard of the corporation may be established through these provisions.²⁶³

However, the Code specifically forbids adoption of any provision in the articles of incorporation that waives or limits a director's liability for “any appropriation, in violation of his duties, of any business opportunity of the corporation,”²⁶⁴ and for “any transaction from which the director received an improper personal benefit.”²⁶⁵

257. ALI PRINCIPLES, *supra* note 24, § 5.09.

258. *Id.*

259. *Id.* § 1.36.

260. *Id.* § 5.09 cmt. c; see also Douglas M. Branson, *Assault on Another Citadel: Attempts to Curtail the Fiduciary Standard of Loyalty Applicable to Corporate Directors*, 57 FORDHAM L. REV. 375 (1988) (discussing an earlier draft of the ALI *Principles* which merely allowed the Board to delegate approval of conflict of interest transactions to a committee or individual).

261. O.C.G.A. § 14-2-801 (1989).

262. *Id.* § 14-2-801(b).

263. *Id.*

264. *Id.* § 14-2-202(b)(4)(A).

265. *Id.* § 14-2-202(b)(4)(D).

J. Controlling Shareholder's Duty of Fair Dealing

The ALI *Principles* define a controlling shareholder's²⁶⁶ duty of fair dealing as follows: when transacting business with the corporation, this duty is fulfilled if the transaction was fair to the corporation at the time it was entered into,²⁶⁷ or the transaction is authorized in advance or subsequently ratified by disinterested shareholders following disclosure.²⁶⁸ In addition, an authorized or ratified transaction must not "constitute a waste of corporate assets . . . at the time of the shareholder action."²⁶⁹

In the following section, the ALI *Principles* set forth a general rule that a controlling shareholder may not use position or corporate property to secure a personal pecuniary gain.²⁷⁰ Further, when trading that corporation's securities, a controlling shareholder may not use nonpublic information for gain.²⁷¹ Exceptions are recognized where: (1) value is given for the use, and the use meets one of the shareholder safe harbors of section 5.10;²⁷² (2) the benefit is made available proportionately to other shareholders similarly situated;²⁷³ or (3) in the case of benefit derived solely from the position of controlling shareholder and is not unfair to other shareholders.²⁷⁴ All of these exceptions are subject to the general requirement that the use not be unlawful.²⁷⁵

Section 5.12 of the ALI *Principles* establishes the general rule that a controlling shareholder is prohibited from taking advantage of a corporate opportunity unless:²⁷⁶ (1) it is fair to the corporation;²⁷⁷ or (2) the taking is authorized in advance or subsequently ratified by disinterested shareholders, and the taking does not constitute waste.²⁷⁸

266. ALI PRINCIPLES, *supra* note 24, § 1.10. A controlling shareholder is defined as one who: (1) owns voting share of over 50%; (2) "[o]therwise exercises a controlling influence over the management or policies of the corporation or the transaction or conduct in question;" or (3) owns or controls voting shares of over 25%, unless another person has a greater percentage of control. *Id.*

267. *Id.* § 5.10(a)(1).

268. *Id.* § 5.10(a)(2).

269. *Id.*

270. *Id.* § 5.11.

271. *Id.*

272. *Id.* § 5.11(a)(1).

273. *Id.* § 5.11(a)(2).

274. *Id.*

275. *Id.* § 5.11(a).

276. *Id.* § 5.12.

277. *Id.* § 5.12(a)(1).

278. *Id.* § 5.12(a)(2).

A corporate opportunity is very narrowly defined for purposes of section 5.12.²⁷⁹ If a business opportunity is developed or received by the corporation, or if the shareholder learns of it primarily because of the relationship with the corporation, then it is a corporate opportunity.²⁸⁰ Alternatively, a corporate opportunity exists when the controlling shareholder holds out to other shareholders that, rather than being within the controlling shareholder's scope of activities, the opportunity is within the scope of the corporation's current or projected activities.²⁸¹ This narrow definition of a corporate opportunity is designed to balance a shareholder's right to compete with the corporation against the shareholder's obligation not to seize opportunities of the corporation.²⁸²

In section 5.13, the *ALI Principles* extend the special duties of a controlling shareholder to situations when the controlling shareholder is advancing the interests of an associate.²⁸³ Associates of controlling shareholders would appear to be defined in the same way as associates of directors, senior executives, or shareholders.²⁸⁴

In section 5.14, the *ALI Principles* provide a safe harbor for a controlling shareholder who relies upon a standard of the corporation in the same manner that section 5.09 protects a director or senior executive.²⁸⁵ The effect is to allow disinterested shareholders to establish a standard of the corporation in advance of a transaction with a controlling shareholder.²⁸⁶

The O.C.G.A. is silent as to a duty of fair dealing for a controlling shareholder. Cases address duties of "majority" shareholders, but the term seems to encompass only owners of fifty percent or more of voting equities²⁸⁷ rather than the ALI's more comprehensive definition. When Georgia courts condemn the actions of a majority shareholder, that shareholder is usually also a director or officer of the corporation.²⁸⁸

279. *Id.* § 5.12(b), cmt. d; see Begert, *supra* note 224, at 842-43.

280. ALI PRINCIPLES, *supra* note 24, § 5.12(b)(1).

281. *Id.* § 5.12 (b)(2).

282. *Id.* § 5.12 cmt. d; Begert, *supra* note 224.

283. ALI PRINCIPLES, *supra* note 24, § 5.13.

284. *Id.* §§ 1.03, 1.23.

285. *Id.* § 5.14. However, unlike directors and senior executives, a controlling shareholder may not rely on a standard authorizing appropriation of corporate opportunities or appropriation or engagement in a competing business. See *id.* § 5.09.

286. *Id.* § 5.09 cmt. c.

287. See generally Hermance & Quirós, *supra* note 91, at 86, 91-93; see also Southern Cellular Telecom, Inc., 208 Ga. App. 286, 431 S.E.2d 115 (1993) (in which the holder of 49% of the shares was referred to as a minority shareholder).

288. See, e.g., *Quinn*, 254 Ga. 216, 326 S.E.2d 460.

However, the Georgia Court of Appeals has distinguished a separate duty solely based on the status of a majority shareholder:

Under such circumstances ['close corporations'], it would be inconsistent with the realities of the business world to impose a fiduciary relationship upon the directors and officers of a close corporation to protect minority shareholders, but not on the majority shareholder who really controls the corporation. Thus, . . . majority shareholders must act in good faith when managing corporate affairs.²⁸⁹

Other than this obligation of good faith, the Georgia courts have yet to outline the parameters of a majority shareholder's duty of care; however, it is likely to parallel that of officers and directors.

K. *Management Buyout*

In section 5.15, the ALI *Principles* deal with the issue of a management buyout of the corporation.²⁹⁰ Where directors, principal senior executives, or their associates are interested in the transaction, they will have the burden of proving that the transaction was fair to the shareholders of the corporation.²⁹¹ An exception exists when the controlling shareholder makes a transfer.²⁹² In addition, this burden may be shifted where: (1) there was a public disclosure of the proposed transaction; (2) the parties interested in making a competing proposal have access to relevant information and a reasonable opportunity to make a proposal; (3) the transaction was approved in advance by disinterested directors; and (4) the transaction was approved in advance or ratified by disinterested shareholders.²⁹³ Burden shifting does not apply unless the corporation is publicly held.²⁹⁴ When the burden shifts, a challenger may prevail by proving that the terms of the transaction amount to a waste of corporate assets.²⁹⁵

The O.C.G.A. has no specific procedures for avoiding conflict of interest charges in a management buyout situation. If the corporation is party to the sale, interested directors and senior executives would be

289. *Marshall v. W.E. Marshall Co.*, 189 Ga. App. 510, 512, 376 S.E.2d 393, 396 (1988). In *Marshall*, the majority shareholder was also the corporation's president and chairman of its board of directors. A separate claim was allowed to proceed against the majority shareholder for breach of his majority shareholder duty. *Id.*

290. ALI PRINCIPLES, *supra* note 24, § 5.15 cmt. a.

291. *Id.* § 5.15(a).

292. *Id.*

293. *Id.* § 5.15(b).

294. *Id.*

295. *Id.*

protected by the general safe harbors for fair dealing.²⁹⁶ Unlike the *Principles*, under Georgia law, purchasers in such a sale might omit disclosure altogether if the transaction is fair to the corporation, or might need approval or ratification by directors only, or shareholders only, rather than by both.²⁹⁷ If the corporation is not a party to the sale of the corporation, and directors and officers personally purchase securities from third parties, the directors and officers apparently owe no special duty to the corporation.²⁹⁸ The existence of a motive to obtain control of the corporation is apparently irrelevant.²⁹⁹

L. Shareholder Sales

In section 5.16, the ALI *Principles* address the issue of a controlling shareholder disposing of voting equity securities.³⁰⁰ The *Principles* adopt the general approach that a shareholder has the right to dispose of shares to anyone and at any price.³⁰¹ There are two exceptions to this rule. First, disposal of the shares must be accompanied by disclosure to any minority shareholders involved in connected transactions with the purchaser.³⁰² This disclosure must be made so that minority holders are informed of the control share premium when they set their prices for selling noncontrol shares.³⁰³ The second situation in which a controlling shareholder is restricted in selling voting shares is when "[i]t is apparent from the circumstances that the purchaser is likely to violate the duty of fair dealing" for financial gain.³⁰⁴

The O.C.G.A. does not appear to restrict the transfer of shares except where restrictions are adopted in the articles of incorporation, bylaws, shareholder agreements, or agreement between shareholders and the

296. O.C.G.A. §§ 14-2-861 to -864 (1989); *Oliver v. Oliver*, 118 Ga. 362, 45 S.E. 232 (1903). The court held that a director who knows non-public information is required to disclose it before he deals with a shareholder, or to refrain from dealing with the shareholder altogether if disclosure violates a duty of confidentiality. *Id.* at 368, 45 S.E. at 234.

297. O.C.G.A. §§ 14-2-861 to -864.

298. *King Mfg. Co. v. Clay*, 216 Ga. 581, 585-86, 118 S.E.2d 581, 584-85 (1961) (This case was decided before the current version of the Georgia Business Corporation Act was adopted; the statute is silent on the question).

299. *Id.*

300. ALI PRINCIPLES, *supra* note 24, § 5.16.

301. *Id.* § 5.16 cmt. c.

302. *Id.* § 5.16(a).

303. *Id.* § 5.16 cmt. d.

304. *Id.* § 5.16(b).

corporation.³⁰⁵ The restrictions may be adopted for specified reasons, or for "any . . . reasonable purpose."³⁰⁶

Although the corporation has a duty to minority shareholders when purchasing the stock of a controlling shareholder,³⁰⁷ Georgia courts do not appear to have addressed the issue of whether a controlling shareholder owes a duty of care regarding the sale of stock to third parties.³⁰⁸

VI. TRANSACTIONS IN CONTROL AND TENDER OFFERS

Part VI of the ALI *Principles* address the role of directors and shareholders in transactions in control and in tender offers in two separate sections.³⁰⁹

A. Transactions in Control

The ALI *Principles* define the term "transactions in control" as a shift of control in which the corporation has taken part in negotiating the transaction.³¹⁰ Transactions in control include mergers, consolidations, an issuance of voting equity securities "to effect an acquisition of the assets of another corporation" such that it would be a transaction in control of the other corporation, and certain voting share exchanges.³¹¹ In addition a transaction in control includes "[a] sale of assets that would leave the corporation without a significant continuing business,"³¹² and an issuance of securities or other transaction that would cause a change in corporate control.³¹³

The ALI *Principles* provide that a decision by the board of directors to approve, reject, or decline to consider a proposal to engage in a transaction in control is governed by the business judgment rule.³¹⁴

305. O.C.G.A. § 14-2-627 (1989).

306. *Id.* § 14-2-627(c).

307. Hermance & Quirós, *supra* note 91, at 89-90. In addition, a corporation owes a duty to one minority shareholder when purchasing shares of another minority shareholder to obtain a majority block. *Comolli*, 241 Ga. at 475, 246 S.E.2d at 281.

308. GOLDSTEIN, *supra* note 57, § 8.8(b); Hermance & Quirós, *supra* note 91, at 89-90.

309. ALI PRINCIPLES, *supra* note 24, Part VI, Introductory Note.

310. *Id.* § 1.38.

311. *Id.* "Voting equity security" is defined in § 1.40 as an equity security, defined in § 1.20 as "(a) a share in a corporation or similar security, or (b) a security convertible, with or without consideration, into such a security . . .," that is a "voting security," which is defined in § 1.41(a) as one which "entitles its record holder . . . to vote for the election of directors." *Id.* §§ 1.40, 1.21, 1.41.

312. *Id.* § 1.38(a)(2).

313. *Id.* § 1.38(a)(3). Control is defined in § 1.08. *Id.* § 1.08.

314. *Id.* § 6.01(a) cmt. a. However, if a director or principal senior executive is an interested party, § 5.15 will govern review of the action. *Id.* § 6.01 cmt. a.

If the corporation engages in a transaction in control, the *Principles* state a preference, though not a requirement, for shareholder approval of the transaction.³¹⁵

In contrast, the O.C.G.A. requires shareholder approval for any mergers and share exchanges, whether or not the action is large enough to affect control of the corporation;³¹⁶ however, shareholders need not approve the rejection or refusal to consider an offer. Shareholders must also approve the sale of all or substantially all assets.³¹⁷ In determining whether a sale is of all or substantially all the property, the Code provides for a quantitative test:

Assets shall be deemed to be less than substantially all of a corporation's property if the fair value of the assets as of the date of the most recent available financial information does not exceed two-thirds of the fair value of all the assets of the corporation, and the annual revenues of the corporation for the most recent fiscal year for which such financial information is available represented or produced by such assets do not exceed two-thirds of the total revenues of the corporation for that period.³¹⁸

The O.C.G.A., unlike the ALI *Principles*, allows issuance of securities that would change control of the corporation without requiring shareholder approval through the use of options to purchase beyond authorized shares.³¹⁹ Their primary use would be to defend against a possible takeover.³²⁰ In addition, when there are authorized shares which have not yet been issued, case law confirms the authority of the board of directors to issue those shares without shareholder approval.³²¹

315. *Id.* § 6.01(b). Approval by the shareholders is defined in § 1.02 to mean "approval by a majority of the voting shares, unless a greater percentage is required by the corporation's charter documents . . . pursuant to" a subsequent sub-section § 1.02(b), which requires any such provisions to require approval by the same percentage as will be required by the provision. *Id.* § 1.02(b).

316. O.C.G.A. §§ 14-2-1101 to -1103 (1989); *see also* Carney, *supra* note 131.

317. O.C.G.A. § 14-2-1202. This provision is an attempt to avoid the difficulty in ascertaining which assets are sold in the usual course of business, the sale of which were restricted in the old code. Carney, *supra* note 62, at 163.

318. O.C.G.A. § 14-2-1201(b)(4) (1994).

319. *Id.* § 14-2-624(c) (1989); Carney, *supra* note 131, at 664.

320. Carney, *supra* note 131, at 663-64.

321. *Tallant v. Executive Equities, Inc.*, 232 Ga. 807, 209 S.E.2d 159 (1974). In *Tallant*, a majority shareholder objected to a new issue of securities, claiming that the objective of the board of directors was to perpetuate its own position. *Id.* at 809, 209 S.E.2d at 160. The court held that as long as the board offered valid business reasons for the issuance—in this case to raise needed capital, and to broaden the base of shareholders—the transfer in control was irrelevant unless there was "firm evidence that the transaction was

B. Tender Offers

The ALI *Principles* define the term "unsolicited tender offer" to mean:

an offer to purchase or invitation to tender made to holders of voting equity securities . . . of a corporation, without the approval of the corporation's board of directors, to effect a change in control . . . of the corporation by purchasing the holders' securities for cash, securities, other consideration, or any combination thereof.³²²

The ALI *Principles* authorize a board of directors to take actions that have the foreseeable effect of blocking an unsolicited tender offer as long as the actions are a "reasonable response to the offer."³²³ In considering whether the actions were a reasonable response to the offer, relevant inquiries include the best interests of the corporation and the shareholders, as well as the interests of other constituents, provided that these latter concerns do not "significantly disfavor the long-term interests of shareholders."³²⁴ Unlike the position taken in Delaware law,³²⁵ under the ALI *Principles*, the challenging party has the burden of proving that the action was unreasonable.³²⁶

The ALI *Principles* also provide separate "standards for review of director action for purposes of injunctive relief on the one hand, and for purposes of damages on the other;"³²⁷ this separation is seen as central to the approach taken in the *Principles* to hostile takeovers.³²⁸ Accordingly, section 6.02(d) provides that an action taken by a board in response to an unsolicited tender offer which is not reasonable may be the basis for injunctive relief, but damages may be awarded against the members of such a board only if their actions do not meet the standards of the business judgment rule.³²⁹

The O.C.G.A. would appear to allow this type of transaction to be evaluated under the general standards for director action.³³⁰

This completes the review of Parts I through VI of the ALI *Principles* compared with Georgia Law. A comparison of Part VII of the ALI

fraudulent." *Id.* at 810, 209 S.E.2d at 161.

322. ALI PRINCIPLES, *supra* note 24, § 1.39.

323. *Id.* § 6.02(a).

324. *Id.* § 6.02(b).

325. *Id.* § 6.02 cmt. a (discussing *Unocal v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985), and other cases).

326. *Id.*

327. *Id.* Part VI, Introductory Note (2).

328. *Id.*

329. *Id.* § 6.02(d).

330. O.C.G.A. § 14-2-830 (1989); *see also* Eason, *supra* note 32.

Principles, which deals with remedies, will appear in *Mercer Law Review's Annual Survey of Georgia Law* next year.

