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## CORPORATIONS

### *Secretary of State: Retention of Documents*

<b>CODE SECTIONS:</b>	O.C.G.A. §§ 14-2-5 (new), 14-2-41 (amended), 14-2-172 (amended), 14-2-176 (amended), 14-2-231 (amended), 14-2-372 (amended), 14-5-20 (amended), 14-5-23 (new) and 14-7-2 (amended)
<b>BILL NUMBER:</b>	HB 1296
<b>ACT NUMBER:</b>	1632
<b>SUMMARY:</b>	The Act amends the Georgia Business Corporation Code and the Professional Corporation Act by: establishing retention periods for original corporate documents filed with the Secretary of State and documents in microform; expanding grounds for revocation of corporate name reservations; redefining the term "professional corporation" to include foreign corporations; granting rule-making authority to the Secretary of State and removing the term "ex-officio" before the title of Corporation Commissioner.

### *History*

The Georgia Business Corporation Code (Business Code) was enacted in 1968<sup>1</sup> and became effective, as amended, on April 1, 1969.<sup>2</sup> The new Business Code was generally patterned after the Model Business Corporation Act,<sup>3</sup> with some sections derived from statutes of a number of other states.<sup>4</sup> The Business Code has been amended almost annually

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1. 1968 Ga. Laws 565. For a comparison of corporation law prior to 1968 with the 1968 Georgia Business Corporation Code, see *Comparison of Features of Old and New Business Corporation Laws Relating to Domestic Corporations*, 5 GA. ST. B.J. 13 (1968).

2. 1969 Ga. Laws 152. The effective date of the 1968 Act was delayed to allow for further study. The 1969 amendments were the result of studies by the State Bar Association and the Lawyers Advisory Committee and suggestions submitted by independent corporate practitioners and legislators. See Bowman, *The New Georgia Corporation Law: 1969 Amendments*, 5 GA. ST. B.J. 433 n.2 (1969).

3. Model Business Corp. Act (1950).

4. See, e.g., O.C.G.A. § 14-2-5 (1982) (Comment) (derived from S.C. Code Ann. § 12-

since it was first enacted.<sup>5</sup>

A number of administrative housekeeping matters were the subject of changes proposed by the Secretary of State as the 1986 Session of the Legislature convened.<sup>6</sup> Though primarily concerned with the Georgia Business Corporation Code, these matters also involved the Georgia Professional Corporation Act, which was enacted in 1970.<sup>7</sup> It was to these administrative details that HB 1296 was directed.

### *HB 1296*

The Act amends several existing Business Code sections to clarify the powers of the Secretary of State and provide specific authority for certain actions.<sup>8</sup> For example, retaining original corporate documents in the files of the Secretary of State became burdensome, making it desirable to reduce some of these records to microform for storage. However, the Attorney General had advised that, without specific authority in the Code to convert to microform, the Secretary of State was required to retain the original documents for an unlimited time.<sup>9</sup> The Act provides a retention schedule, requiring that corporate documents such as articles of incorporation be retained in original form for seven years, after which they may be converted to microform.<sup>10</sup> Annual reports are to be retained for a period not to exceed five years.<sup>11</sup>

Another problem area was the lack of clarity of the grounds for revocation of a corporate name reservation. The Business Code provided that the Secretary of State could revoke a name reservation for lack of "good faith,"<sup>12</sup> a vague standard which did not clearly include problems such as presentation of a bad check in payment of the reservation fee.<sup>13</sup> The Act

11.6) and O.C.G.A. § 14-2-41 (1982) (Comment) (similar provisions found in S.C. Code Ann. § 12-13.2(d) and Va. Code § 13.1-7).

5. O.C.G.A. Title 14 (1982 & Supp. 1985) (Notes as to Comments).

6. Telephone interview with Valerie A. Hepburn, Director of Administration, Office of the Secretary of State (Apr. 1, 1986) [hereinafter cited as Hepburn Interview].

7. O.C.G.A. §§ 14-7-1—14-7-7 (1982).

8. HB 1296, 1986 Ga. Gen. Assem.

9. Hepburn Interview, *supra* note 6. This advice was rendered by informal communication between the Attorney General's office and the Office of the Secretary of State.

10. O.C.G.A. § 14-2-5(d) (Supp. 1986).

11. *Id.*

12. O.C.G.A. § 14-2-41(e) (1982). The Comments to this section identified the problem addressed by subsection (e) as follows:

This should help to prevent the type of extortion that could occur if the name selected for a prospective corporation but not yet reserved were seized by unscrupulous persons who could reserve the name and then compel the legitimate enterprise to buy them off. This kind of conduct easily could occur when an established foreign corporation's plans to expand into the state became known.

13. *See, e.g.*, Synopsis of HB 1296: Administrative Amendments to the Corporate Code, Governor's Press Packet (1986) [hereinafter cited as Synopsis].

retains the “good faith” requirement and adds three new grounds for revocation: 1) the name reserved is “in use by another corporation or is confusingly similar to another reserved or corporate name”; 2) fees for the reservation are not paid; or 3) the reservation was made “in violation of this chapter or any other law of this state.”<sup>14</sup> These grounds for revocation of the name reservation are only applicable prior to incorporation<sup>15</sup> and will not affect the validity of a corporate entity after incorporation.<sup>16</sup>

Other problems identified in the existing Business Code included the designation of the Secretary of State as “ex-officio Corporation Commissioner”<sup>17</sup> and the lack of rule-making authority of the Secretary of State.<sup>18</sup> The Act deletes the designation “ex-officio,” bringing the title of the Secretary of State as Corporation Commissioner into conformity with that used in other states and with that used to designate the Secretary of State as Commissioner of Securities.<sup>19</sup>

The Attorney General had advised that no rules could be promulgated by a state agency absent specific statutory authority.<sup>20</sup> The Act provides this authority, allowing the Secretary of State to formulate rules affecting practices and procedures under the Business Code.<sup>21</sup>

Other minor revisions to the Business Code include:

- 1) deleting the salutation “Dear Sir” in the form of the letter requesting publication notice;<sup>22</sup>
- 2) adding the words “or bylaws” to a provision relating to shareholder voting requirements to bring the section into conformity with other sections of the Business Code;<sup>23</sup>
- 3) transposing a misplaced clause in a section relating to shareholder notice requirements;<sup>24</sup> and

14. O.C.G.A. § 14-2-41(e) (Supp. 1986).

15. *Id.*

16. Hepburn Interview, *supra* note 6; *see also* Synopsis, *supra* note 13.

17. *See* O.C.G.A. § 14-5-20 (1982).

18. The Georgia Administrative Procedure Act authorizes state agencies to adopt rules of practice and procedure. O.C.G.A. § 50-13-3 (1982). However, no formal statutory authority was provided under the Georgia Business Corporation Code.

19. O.C.G.A. § 14-5-20 (Supp. 1986). It was considered anomalous that the Secretary of State was designated the “ex-officio corporate commissioner” while the Assistant Corporate Commissioner title did not contain the “ex-officio” designation. Hepburn Interview, *supra* note 6.

20. This determination was communicated informally. Hepburn Interview, *supra* note 6.

21. O.C.G.A. § 14-5-23 (Supp. 1986).

22. O.C.G.A. § 14-2-172(c)(4) (Supp. 1986). Rather than deal with a cumbersome form of address, such as “Dear Sir or Madam,” the salutation was dropped entirely. Hepburn Interview, *supra* note 6.

23. O.C.G.A. § 14-2-176(c) (Supp. 1986).

24. O.C.G.A. § 14-2-231(2) (Supp. 1986). The misplacement was an error in drafting the 1985 amendment which neutralized the intent of the amendment. The amendment under HB 1296 was made at the request of the State Bar, and gives effect to what was intended in the 1985 amendment. Hepburn Interview, *supra* note 6. *See* 1985 Ga.

4) establishing filing fees for resolutions "creating a residential care facilities authority, a downtown development authority, or a development authority."<sup>25</sup>

A problem was also perceived in the restrictive definition of a "professional corporation" found in the Georgia Professional Corporation Act.<sup>26</sup> An opinion of the Attorney General interpreted the language of the statute to exclude foreign corporations, absent clear legislative intent to include them in the definition.<sup>27</sup> The Act provides such authority by specifically including foreign corporations in the definition.<sup>28</sup>

The Act did not accomplish all the changes proposed by the Secretary of State. As introduced, the bill contained a provision requiring written consent to appointment from the appointees of the initial board.<sup>29</sup> Existing provisions for appointment of an initial board of directors allowed appointment without the consent or knowledge of board appointees.<sup>30</sup> Actions could be brought under O.C.G.A. § 14-2-153 against unsuspecting "directors" who would then be faced with the nuisance of defending the suit.<sup>31</sup> The consent requirement was intended to avoid this type of situation.

However, the proposed consent requirement was not well received as it was considered burdensome by corporate practitioners.<sup>32</sup> At the same time, there were doubts expressed as to the validity and practicality of requiring an initial board of directors. As a result, the consent proposal was dropped from the bill, with the understanding that there should be further study of the proposal and the policy underlying the requirement that an initial board of directors be appointed. This issue may be expected to reappear in legislation introduced in the next session of the General Assembly or in subsequent years.<sup>33</sup>

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Laws 1302, § 8.

25. See Synopsis, *supra* note 13; see also O.C.G.A. § 14-2-372(4), (5), (6) (Supp. 1986).

26. O.C.G.A. §§ 14-7-1—14-7-7 (1982).

27. 1970 Op. Att'y Gen. No. 70-64.

28. O.C.G.A. § 14-7-2(3) (Supp. 1986).

29. HB 1296, 1986 Ga. Gen. Assem. §§ 3, 4, 7.

30. Hepburn Interview, *supra* note 6. By contrast, appointment of a registered agent requires that a written consent be filed with the articles of incorporation. O.C.G.A. § 14-2-60(c) (1982).

31. O.C.G.A. § 14-2-153 (1982). This problem is particularly severe for well-known persons, such as Coretta Scott King, who may be appointed to numerous boards without their knowledge. Hepburn Interview, *supra* note 6.

32. Hepburn Interview, *supra* note 6. Legislators were concerned that the intent behind the consent proposal would be thwarted by lawyers reverting to the practice of appointing their secretaries to the initial boards of directors to avoid inconvenience.

33. *Id.*