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## CORPORATIONS, PARTNERSHIPS, AND ASSOCIATIONS Business Corporations: Provide for the Creation of One or More Series of Shares Within a Class; Provide for the Number of Shares; Provide That All Shares of a Series Have Identical Preferences; Provide for Exceptions; Provide for a Non-exhaustive List of Characteristics of the Shares of a Series

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## **CORPORATIONS, PARTNERSHIPS, AND ASSOCIATIONS**

*Business Corporations: Provide for Creation of One or More Series of Shares Within a Class; Provide for the Number of Shares; Provide That All Shares of a Series Have Identical Preferences; Provide for Exceptions; Provide for a Non-exhaustive List of Characteristics of the Shares of a Series*

**CODE SECTIONS:** O.C.G.A. §§ 14-2-601, -602, -624, -731 (amended), -732 (new), -801, -825, -1004, -1020 (amended)

**BILL NUMBER:** SB 397

**ACT NUMBER:** 910

**GEORGIA LAWS:** 2000 Ga. Laws 1567

**SUMMARY:** The Act requires that all shares of a class of a Georgia corporation's stock must have identical references, limitations, and relative rights unless the class is divided into a series. The Act also permits the creation of one or more series of shares within a class. In addition, the Act provides that the board of directors has authority to determine the terms and conditions of rights, options, or warrants issuable pursuant to the Code. The Act limits the transferability of rights, options, or warrants and the power of future directors to vote on redemption of certain rights. The Act also strikes out certain sections referring to the transferability and effect of shareholder agreements. The Act adds a new Code section that applies to shareholder agreements. The Act also addresses boards of directors, committees, voting on amendments by groups, and amendments by board of directors or shareholders.

EFFECTIVE DATE: July 1, 2000

### *History*

SB 397 was introduced at the request of the Georgia Bar Association to codify the *Invacare Corp. v. Healthdyne Technologies, Inc.*<sup>1</sup> decision issued by the U.S. District Court.<sup>2</sup> Richard Brody, Chairman of the Corporations Section of the Georgia Bar Association, testified on behalf of the State Bar for the bill.<sup>3</sup>

In an attempt to protect against a hostile takeover by Invacare, Healthdyne adopted a shareholder rights plan (the "Rights Plan") or "poison pill."<sup>4</sup> When the poison pill was triggered, each Healthdyne shareholder, with the exception of the hostile bidder, had the right to purchase additional shares of common stock at half-price.<sup>5</sup> The Healthdyne Rights Plan also had a "continuing director" feature, which required that any redemption or amendment to the Rights Plan be approved by one or more directors who were members of the board prior to the adoption of the poison pill, or who the board later elected with the recommendation and approval of the other continuing directors.<sup>6</sup> Healthdyne's "continuing director" feature prevented Invacare's directors, had they been voted in after the takeover, from redeeming the Rights Plan because they would not be "continuing directors."<sup>7</sup>

Invacare sought a preliminary injunction declaring the continuing directors provision invalid and directing Healthdyne to remove the provision from the Rights Plan.<sup>8</sup> Invacare argued that the continuing director provision violated Code section 14-2-801(b) because it was a significant limitation on the board of directors' power.<sup>9</sup> However, the court found that Healthdyne

1. 968 F. Supp. 1578 (N.D. Ga. 1997).

2. *See id.*; Interview with Richard Brody, Attorney, Troutman Sanders LLP (July 5, 2000) [hereinafter Brody Interview]; Interview with Rep. Robert Reichert, House District No. 126 (July 6, 2000) [hereinafter Reichert Interview].

3. *See* Reichert Interview, *supra* note 2.

4. *See Invacare*, 968 F. Supp. at 1579.

5. *See id.* at 1580.

6. *See id.* at 1581.

7. *See id.*

8. *See id.*

9. *See id.* Code section 14-2-801(b) provides, in relevant part, "all corporate powers

properly exercised its discretion to include a continuing director provision in the Rights Plan.<sup>10</sup>

SB 397 makes certain that a shareholder rights plan that contains a continuing director provision is allowed in Georgia.<sup>11</sup> The bill continues prior Georgia Code provisions to allow the issuance of additional shares of stock, or new classes of stock, pursuant to a rights plan as a defensive measure to a hostile takeover.<sup>12</sup> In addition, newly elected members of the board of directors can be precluded from voting to rescind the issuance of additional classes of stock but for only a period of six months.<sup>13</sup>

### *SB 397*

Senator Mike Egan of the 40th District sponsored SB 397.<sup>14</sup> The bill was introduced on the Senate floor on February 3, 2000.<sup>15</sup> The Senate assigned the bill to its Special Judiciary Committee, which favorably reported the bill, as substituted, on February 8, 2000.<sup>16</sup> The Senate Special Judiciary Committee substitute changed the language, insignificantly, in the introduction.<sup>17</sup> Also, the Committee added that although the definition of "beneficial owner," provided in Code section 14-2-1110, will apply to the Act, the new law will permit any exclusion from the definition.<sup>18</sup> The Senate adopted the Special Judiciary Committee substitute and passed the bill unanimously on February 14, 2000.<sup>19</sup>

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shall be exercised by or under the authority of . . . its board of directors. . . ." 1988 Ga. Laws 983, § 8, at 1131 (formerly found at O.C.G.A. § 14-2-801(b) (1994)).

10. *See Invacare*, 968 F. Supp. 1578; *see also* 1989 Ga. Laws 946, § 16, at 962 (codified at O.C.G.A. § 14-2-824(a) (Supp. 2000)) (providing, in relevant part, "[a] corporation may issue rights, options, or warrants [, and] . . . [t]he board of directors shall determine the terms upon which the rights, options, or warrants are issued . . . including the time or times, the conditions precedent . . .").

11. *See* Brody Interview, *supra* note 2; Reichert Interview, *supra* note 2.

12. *See* Brody Interview, *supra* note 2; Reichert Interview, *supra* note 2.

13. *See* Brody Interview, *supra* note 2; Reichert Interview, *supra* note 2.

14. *See* SB 397, as introduced, 2000 Ga. Gen. Assem.

15. *See* State of Georgia Final Composite Status Sheet, Mar. 22, 2000.

16. *See id.*

17. *Compare* SB 397, as introduced, 2000 Ga. Gen. Assem., *with* SB 397 (SCS), 2000 Ga. Gen. Assem.

18. *Compare* SB 397, as introduced, 2000 Ga. Gen. Assem., *with* SB 397 (SCS), 2000 Ga. Gen. Assem.

19. *See* Georgia Senate Voting Record, SB 397 (Feb. 14, 2000).

On February 15, 2000, the House assigned the bill to its Judiciary Committee, which favorably reported the bill, on March 8, 2000.<sup>20</sup> On March 15, 2000, the House passed the bill without making any changes.<sup>21</sup> Governor Roy Barnes signed SB 397 into law on May 1, 2000.<sup>22</sup>

### *The Act*

The Act amends Code section 14-2-601 by authorizing a corporation, within its articles of incorporation, to create one or more series of shares within a class of stock.<sup>23</sup> This section allows different series of stock within a class, with voting rights determined by facts ascertained outside the articles of incorporation.<sup>24</sup> The Act amends Code section 14-2-602 by requiring that all shares of a class or a series within a class have the same preferences, limitations, and relative rights that are identical to those of other series within the same class.<sup>25</sup>

The Act amends Code section 14-2-624 relating to share options by limiting the transferability of rights and restricting the power of future directors to vote for redemption of such rights.<sup>26</sup> The Code section also defines the terms 'beneficial owner,' 'affiliate,' 'associate,' and 'interested shareholder.'<sup>27</sup> This section lowers the limitation on future elected directors to rescind the poison pill to only 180 days after election.<sup>28</sup> This is the compromise that precludes rescission, but only for six

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20. See State of Georgia Final Composite Status Sheet, Mar. 22, 2000.

21. See Georgia House of Representatives Voting Record, SB 397 (Mar. 15, 2000).

22. See 2000 Ga. Laws 1567, § 11, 1578.

23. Compare 1989 Ga. Laws 946, § 14, at 959-61 (formerly found at O.C.G.A. § 14-2-601 (1994)), with O.C.G.A. § 14-2-601 (Supp. 2000).

24. Compare 1989 Ga. Laws 946, § 14, at 959-61 (formerly found at O.C.G.A. § 14-2-601 (1994)), with O.C.G.A. § 14-2-601 (Supp. 2000). See also Reichert Interview, *supra* note 2.

25. Compare 1989 Ga. Laws 946, § 15, at 961-62 (formerly found at O.C.G.A. § 14-2-602 (1994)), with O.C.G.A. § 14-2-602 (Supp. 2000).

26. Compare 1989 Ga. Laws 946, § 15, at 962-63 (formerly found at O.C.G.A. § 14-2-624 (1994)), with O.C.G.A. § 14-2-624 (Supp. 2000).

27. Compare 1989 Ga. Laws 946, § 15, at 962-63 (formerly found at O.C.G.A. § 14-2-624 (1994)), with O.C.G.A. § 14-2-624 (Supp. 2000).

28. Compare 1989 Ga. Laws 946, § 15, at 962-63 (formerly found at O.C.G.A. § 14-2-624 (1994)), with O.C.G.A. § 14-2-624 (Supp. 2000). See also Reichert Interview, *supra* note 2.

months.<sup>29</sup> The also Act amends Code section 14-2-731 by changing the phrase “permitted under” to “created under.”<sup>30</sup>

The Act adds a new Code section, 14-2-732, which applies to shareholder agreements.<sup>31</sup> This section provides for agreement between shareholders, if unanimous at the time of agreement and if provided for in the articles of incorporation.<sup>32</sup> This section also requires that corporations place a notice on stock certificates that shareholder agreements are permitted.<sup>33</sup> The Act amends Code section 14-2-801 by deleting the phrase “bylaws approved by the shareholders or agreements” and replacing it with the phrase “in rights, options, or warrants permitted by paragraph (2) of subsection (d) of Code section 14-2-624, or in an agreement.”<sup>34</sup> The Act also deletes the phrase “which are otherwise lawful” and replaces it with “meeting the requirements of Code section 14-2-732.”<sup>35</sup>

The Act amends Code section 14-2-825, relating to committees, by permitting committees to amend the articles of incorporation, including relative rights of shares, or to increase or decrease the number of shares so long as the number does not fall below the shares issued in accordance with 14-2-602.<sup>36</sup> The Act also amends Code section 14-2-1004, relating to voting on amendments by voting groups, by changing the word “shareholder” to the phrase “of such class.”<sup>37</sup> Finally, the Act amends 14-2-1020, relating to amendment by boards of directors or shareholders, by requiring that a bylaw limiting the authority

29. Compare 1989 Ga. Laws 946, § 15, at 962-63 (formerly found at O.C.G.A. § 14-2-624 (1994)), with O.C.G.A. § 14-2-624 (Supp. 2000). See also Reichert Interview, *supra* note 2.

30. Compare 1989 Ga. Laws 946, § 28, at 970-71 (formerly found at O.C.G.A. § 14-2-731 (1994)), with O.C.G.A. § 14-2-731 (Supp. 2000).

31. See O.C.G.A. § 14-2-732 (Supp. 2000).

32. See *id.*

33. See *id.*

34. Compare 1988 Ga. Laws 1070, § 1, at 1131-32 (formerly found at O.C.G.A. § 14-2-801 (1994)), with O.C.G.A. § 14-2-801 (Supp. 2000).

35. Compare 1988 Ga. Laws 1070, § 1, at 1131-32 (formerly found at O.C.G.A. § 14-2-801 (1994)), with O.C.G.A. § 14-2-801 (Supp. 2000).

36. Compare 1988 Ga. Laws 1070, § 1, at 1138 (formerly found at O.C.G.A. § 14-2-825 (1994)), with O.C.G.A. § 14-2-825 (Supp. 2000).

37. Compare 1989 Ga. Laws 946, § 47, at 983-84 (formerly found at O.C.G.A. § 14-2-1004 (1994)), with O.C.G.A. § 14-2-1004 (Supp. 2000).

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of the board of directors can only be adopted in an agreement that complies with the requirements of Code section 14-2-732.<sup>33</sup>

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38. Compare 1993 Ga. Laws 946, § 12, at 1242 (formerly found at O.C.G.A. § 14-2-1020 (1994)), with O.C.G.A. § 14-2-1020 (Supp. 2000).