

By: Senator(s) Robertson

To: Business and
Financial
Institutions;
Judiciary

SENATE BILL NO. 2335

1 AN ACT TO AMEND THE MISSISSIPPI BUSINESS CORPORATION ACT; TO
2 AMEND SECTION 79-4-8.30, MISSISSIPPI CODE OF 1972, TO REVISE THE
3 STANDARD OF CONDUCT FOR DIRECTORS; TO CODIFY SECTION 79-4-8.31,
4 MISSISSIPPI CODE OF 1972, TO REVISE THE STANDARDS OF LIABILITY FOR
5 DIRECTORS; TO AMEND SECTION 79-4-8.33, MISSISSIPPI CODE OF 1972,
6 TO REVISE THE LIABILITY OF DIRECTORS FOR UNLAWFUL DISTRIBUTIONS;
7 TO AMEND SECTION 79-4-8.42, MISSISSIPPI CODE OF 1972, TO REVISE
8 THE STANDARD OF CONDUCT FOR OFFICERS; AND FOR RELATED PURPOSES.

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

10 SECTION 1. Section 79-4-8.30, Mississippi Code of 1972, is
11 amended as follows:

12 79-4-8.30. (a) Each member of the board of directors, when
13 discharging the duties of a director, shall act:

14 (1) In good faith, and

15 * * *

16 (2) In a manner the director reasonably believes to be
17 in the best interests of the corporation.

18 (b) The members of the board of directors or a committee of
19 the board, when becoming informed in connection with their
20 decision-making function or devoting attention to their oversight
21 function, shall discharge their duties with the care that a person
22 in a like position would reasonably believe appropriate under
23 similar circumstances.

24 * * *

25 (c) In discharging board or committee duties a director, who
26 does not have knowledge that makes reliance unwarranted, is
27 entitled to rely on the performance by any of the persons
28 specified in subsection (e)(1) or subsection (e)(3) to whom the
29 board may have delegated, formally or informally by course of

30 conduct, the authority or duty to perform one or more of the
31 board's functions that are delegable under applicable law.

32 (d) In discharging board or committee duties a director, who
33 does not have knowledge that makes reliance unwarranted, is
34 entitled to rely on information, opinions, reports or statements,
35 including financial statements and other financial data, prepared
36 or presented by any of the persons specified in subsection (e).

37 (e) A director is entitled to rely, in accordance with
38 subsection (c) or (d), on:

39 (1) One or more officers or employees of the
40 corporation whom the director reasonably believes to be reliable
41 and competent in the functions performed or the information,
42 opinions, reports or statements provided;

43 (2) Legal counsel, public accountants, or other persons
44 retained by the corporation as to matters involving skills or
45 expertise the director reasonably believes are matters (i) within
46 the particular person's professional or expert competence or (ii)
47 as to which the particular person merits confidence; or

48 (3) A committee of the board of directors of which the
49 director is not a member if the director reasonably believes the
50 committee merits confidence.

51 (f) For purposes of this section, a director, in
52 determining what he reasonably believes to be in the best
53 interests of the corporation, shall consider the interests of the
54 corporation's shareholders and, in his discretion, may consider
55 any of the following:

56 (1) The interests of the corporation's employees,
57 suppliers, creditors and customers;

58 (2) The economy of the state and nation;

59 (3) Community and societal considerations;

60 (4) The long-term as well as short-term interests of
61 the corporation and its shareholders, including the possibility
62 that these interests may be best served by the continued
63 independence of the corporation.

64 * * *

65 SECTION 2. The following provision shall be codified as
66 Section 79-4-8.31, Mississippi Code of 1972:

67 79-4-8.31. (a) A director shall not be liable to the
68 corporation or its shareholders for any decision to take or not to
69 take action, or any failure to take any action, as a director,
70 unless the party asserting liability in a proceeding establishes
71 that:

72 (1) Any provision in the articles of incorporation
73 authorized by section 2.02(b)(4) or the protection afforded by
74 section 8.61 for action taken in compliance with section 8.62 or
75 8.63, if interposed as a bar to the proceeding by the director,
76 does not preclude liability; and

77 (2) The challenged conduct consisted or was the result
78 of:

79 (i) Action not in good faith; or

80 (ii) A decision

81 (A) Which the director did not reasonably
82 believe to be in the best interests of the corporation, or

83 (B) As to which the director was not informed
84 to an extent the director reasonably believed appropriate in the
85 circumstances; or

86 (iii) A lack of objectivity due to the director's
87 familial, financial or business relationship with, or a lack of
88 independence due to the director's domination or control by,
89 another person having a material interest in the challenged
90 conduct

91 (A) Which relationship or which domination or
92 control could reasonably be expected to have affected the
93 director's judgment respecting the challenged conduct in a manner
94 adverse to the corporation, and

95 (B) After a reasonable expectation to such
96 effect has been established, the director shall not have
97 established that the challenged conduct was reasonably believed by
98 the director to be in the best interests of the corporation; or

99 (iv) A sustained failure of the director to be

100 informed about the business and affairs of the corporation, or
101 other material failure of the director to discharge the oversight
102 function; or

103 (v) Receipt of a financial benefit to which the
104 director was not entitled or any other breach of the director's
105 duties to deal fairly with the corporation and its shareholders
106 that is actionable under applicable law.

107 (b) The party seeking to hold the director liable:

108 (1) For money damages, shall also have the burden of
109 establishing that:

110 (i) Harm to the corporation or its shareholders
111 has been suffered, and

112 (ii) The harm suffered was proximately caused by
113 the director's challenged conduct; or

114 (2) For other money payment under a legal remedy, such
115 as compensation for the unauthorized use of corporate assets,
116 shall also have whatever persuasion burden may be called for to
117 establish that the payment sought is appropriate in the
118 circumstances; or

119 (3) For other money payment under an equitable remedy,
120 such as profit recovery by or disgorgement to the corporation,
121 shall also have whatever persuasion burden may be called for to
122 establish that the equitable remedy sought is appropriate in the
123 circumstances.

124 (c) Nothing contained in this section shall (1) in any
125 instance where fairness is at issue, such as consideration of the
126 fairness of a transaction to the corporation under Section
127 8.61(b)(3), alter the burden of proving the fact or lack of
128 fairness otherwise applicable, (2) alter the fact or lack of
129 liability of a director under another section of this act, such as
130 the provisions governing the consequences of an unlawful
131 distribution under Section 8.33 or a transactional interest under
132 Section 8.61, or (3) affect any rights to which the corporation or

133 a shareholder may be entitled under another statute of this state
134 or the United States.

135 SECTION 3. Section 79-4-8.33, Mississippi Code of 1972, is
136 amended as follows:

137 79-4-8.33. (a) A director who votes for or assents to a
138 distribution in excess of what may be authorized and made pursuant
139 to Section 79-4-6.40(a) * * * is personally liable to the
140 corporation for the amount of the distribution that exceeds what
141 could have been distributed without violating Section 79-4-6.40(a)
142 if the party asserting liability establishes that when taking the
143 action the director did not comply with Section 79-4-8.30. * * *

144 (b) A director held liable under subsection (a) for an
145 unlawful distribution is entitled to * * *:

146 (1) Contribution from every other director who could be
147 held liable under subsection (a) for the unlawful distribution;
148 and

149 (2) Recoupment from each shareholder of the pro rata
150 portion of the amount of the unlawful distribution the shareholder
151 accepted, knowing the distribution was made in violation of
152 Section 79-4-6.40(a) * * *.

153 (c) A proceeding to enforce:

154 (1) The liability of a director under subsection (a) is
155 barred unless it is commenced within two (2) years after the date
156 on which the effect of the distribution was measured under Section
157 79-4-6.40(e) or (g) or as of which the violation of Section
158 79-4-6.40(a) occurred as the consequence of disregard of a
159 restriction in the articles of incorporation; or

160 (2) Contribution or recoupment under subsection (b) is
161 barred unless it is commenced within one (1) year after the
162 liability of the claimant has been finally adjudicated under
163 subsection (a).

164 SECTION 4. Section 79-4-8.42, Mississippi Code of 1972, is
165 amended as follows:

166 79-4-8.42. (a) An officer, when performing in such
167 capacity, shall act:
168 (1) In good faith;
169 (2) With the care that a * * * person in a like
170 position would reasonably exercise under similar circumstances;
171 and
172 (3) In a manner the officer reasonably believes to be
173 in the best interests of the corporation.
174 (b) In discharging those duties an officer, who does not
175 have knowledge that makes reliance unwarranted, is entitled to
176 rely on * * *:
177 (1) The performance of properly delegated
178 responsibilities by one or more * * * employees of the corporation
179 whom the officer reasonably believes to be reliable and competent
180 in performing the responsibilities delegated; or
181 (2) Information, opinions, reports or statements,
182 including financial statements and other financial data, prepared
183 or presented by one or more employees of the corporation whom the
184 officer reasonably believes to be reliable and competent in the
185 matters presented or by legal counsel, public accountants, or
186 other persons retained by the corporation as to matters involving
187 skills or expertise the officer reasonably believes are matters
188 (i) within the particular person's professional or expert
189 competence or (ii) as to which the particular person merits
190 confidence.
191 (c) An officer shall not be liable to the corporation or its
192 shareholders for any decision to take or not to take action, or
193 any failure to take any action, as an officer, if the duties of
194 the office are performed in compliance with this section. Whether
195 an officer who does not comply with this section shall have
196 liability will depend in such instance on applicable law,
197 including those principles of Section 79-4-8.31 that have
198 relevance.

199 * * *

200 SECTION 5. This act shall take effect and be in force from
201 and after July 1, 1999.