

By: Senator(s) Ross

To: Judiciary, Division A

## SENATE BILL NO. 2592

1 AN ACT TO AMEND SECTION 79-4-1.40, MISSISSIPPI CODE OF 1972,  
2 TO ENACT A DEFINITION OF "PUBLIC CORPORATION"; TO CREATE NEW  
3 SECTION 79-4-1.43, MISSISSIPPI CODE OF 1972, TO ENACT A DEFINITION  
4 FOR "QUALIFIED DIRECTOR"; TO AMEND SECTION 79-4-7.32, MISSISSIPPI  
5 CODE OF 1972, TO CLARIFY PROVISIONS CONCERNING AGREEMENTS AMONG  
6 SHAREHOLDERS OF A CORPORATION THAT GOES PUBLIC; TO AMEND SECTION  
7 79-4-7.44, MISSISSIPPI CODE OF 1972, TO REVISE PROVISIONS RELATING  
8 TO DISMISSAL OF A DERIVATIVE ACTION UPON MOTION OF A CORPORATION;  
9 TO AMEND SECTION 79-4-8.50, MISSISSIPPI CODE OF 1972, TO REVISE  
10 DEFINITIONS DEALING WITH INDEMNIFICATION; TO AMEND SECTION  
11 79-4-8.53, MISSISSIPPI CODE OF 1972, TO REVISE THE ADVANCEMENT OF  
12 EXPENSES IN INDEMNIFICATION; TO AMEND SECTION 79-4-8.55,  
13 MISSISSIPPI CODE OF 1972, TO REVISE THE DETERMINATION AND  
14 AUTHORIZATION OF INDEMNIFICATION; TO AMEND SECTION 79-4-8.60,  
15 MISSISSIPPI CODE OF 1972, TO REVISE DEFINITIONS DEALING WITH A  
16 DIRECTOR'S CONFLICTS OF INTEREST; TO AMEND SECTION 79-4-8.61,  
17 MISSISSIPPI CODE OF 1972, TO CLARIFY WHEN A DIRECTOR'S ACTIONS ARE  
18 NOT SANCTIONABLE; TO AMEND SECTION 79-4-8.62, MISSISSIPPI CODE OF  
19 1972, TO CLARIFY DISCLOSURE REQUIRED OF A DIRECTOR CONCERNING A  
20 CONFLICTING INTEREST; TO AMEND SECTION 79-4-8.63, MISSISSIPPI CODE  
21 OF 1972, TO REVISE REQUIREMENTS NECESSARY FOR SHAREHOLDER APPROVAL  
22 OF A DIRECTOR'S CONFLICTING INTEREST TRANSACTION; TO CREATE NEW  
23 SECTION 79-4-8.70, MISSISSIPPI CODE OF 1972, TO SPECIFY EQUITABLE  
24 RELIEF AVAILABLE TO A CORPORATION FOR A DIRECTOR'S UTILIZATION OF  
25 A BUSINESS OPPORTUNITY; TO AMEND SECTIONS 79-4-14.31 AND  
26 79-4-14.34, MISSISSIPPI CODE OF 1972, TO CLARIFY THE PROCEDURE FOR  
27 DISSOLUTION OF A NONPUBLIC CORPORATION; AND FOR RELATED PURPOSES.

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

29 **SECTION 1.** Section 79-4-1.40, Mississippi Code of 1972, is  
30 amended as follows:

31 79-4-1.40. In Section 79-4-1.01 et seq.:

32 (1) "Articles of incorporation" include amended and  
33 restated articles of incorporation and articles of merger.

34 (2) "Authorized shares" means the shares of all classes  
35 a domestic or foreign corporation is authorized to issue.

36 (3) "Conspicuous" means so written that a reasonable  
37 person against whom the writing is to operate should have noticed  
38 it. For example, printing in italics or boldface or contrasting  
39 color, or typing in capitals or underlined, is conspicuous.

40           (4) "Corporation" or "domestic corporation" means a  
41 corporation for profit, which is not a foreign corporation,  
42 incorporated under or subject to the provisions of Section  
43 79-4-1.01 et seq.

44           (5) "Deliver" or "delivery" means any method of  
45 delivery used in conventional commercial practice, including  
46 delivery by hand, mail, commercial delivery and electronic  
47 transmission.

48           (6) "Distribution" means a direct or indirect transfer  
49 of money or other property (except its own shares) or incurrence  
50 of indebtedness by a corporation to or for the benefit of its  
51 shareholders in respect of any of its shares. A distribution may  
52 be in the form of a declaration or payment of a dividend; a  
53 purchase, redemption or other acquisition of shares; a  
54 distribution of indebtedness; or otherwise.

55           (7) "Effective date of notice" is defined in Section  
56 79-4-1.41.

57           (8) "Electronic transmission" or "electronically  
58 transmitted" means any process of communication not directly  
59 involving the physical transfer of paper that is suitable for the  
60 retention, retrieval and reproduction of information by the  
61 recipient.

62           (9) "Employee" includes an officer but not a director.  
63 A director may accept duties that make him also an employee.

64           (10) "Entity" includes corporation and foreign  
65 corporation; not-for-profit corporation; profit and not-for-profit  
66 unincorporated association; business trust, estate, partnership,  
67 trust and two (2) or more persons having a joint or common  
68 economic interest; and state, United States and foreign  
69 government.

70           (11) "Facts objectively ascertainable" outside of a  
71 filed document or plan is defined in Section 79-4-1.20(k).

72           (12) "Filing entity" means an other entity that is of a  
73 type that is created by filing a public organic document.

74           (13) "Foreign corporation" means a corporation for  
75 profit incorporated under a law other than the law of this state.

76           (14) "Governmental subdivision" includes authority,  
77 county, district and municipality.

78           (15) "Includes" denotes a partial definition.

79           (16) "Individual" includes the estate of an incompetent  
80 or deceased individual.

81           (17) "Means" denotes an exhaustive definition.

82           (18) "Notice" is defined in Section 79-4-1.41.

83           (19) "Person" includes individual and entity.

84           (20) "Principal office" means the office (in or out of  
85 this state) so designated in the annual report where the principal  
86 executive offices of a domestic or foreign corporation are  
87 located.

88           (21) "Proceeding" includes civil suit and criminal,  
89 administrative and investigatory action.

90           (22) "Public corporation" means a corporation that has  
91 shares listed on a national securities exchange or regularly  
92 traded in a market maintained by one or more members of a national  
93 or affiliated securities association.

94           (23) "Record date" means the date established under  
95 Article 6 or 7 on which a corporation determines the identity of  
96 its shareholders and their shareholdings for purposes of Section  
97 79-4-1.01 et seq. The determinations shall be made as of the  
98 close of business on the record date unless another time for doing  
99 so is specified when the record date is fixed.

100           (24) "Secretary" means the corporate officer to whom  
101 the board of directors has delegated responsibility under Section  
102 79-4-8.40(c) for custody of the minutes of the meetings of the  
103 board of directors and of the shareholders and for authenticating  
104 records of the corporation.

105           (25) "Shares" means the unit into which the proprietary  
106 interests in a corporation are divided.

107           (26) "Shareholder" means the person in whose name  
108 shares are registered in the records of a corporation or the  
109 beneficial owner of shares to the extent of the rights granted by  
110 a nominee certificate on file with a corporation.

111           (27) "Sign" or "signature" includes any manual,  
112 facsimile, conformed or electronic signature.

113           (28) "State," when referring to a part of the United  
114 States, includes a state and commonwealth (and their agencies and  
115 governmental subdivisions) and a territory, and insular possession  
116 (and their agencies and governmental subdivisions) of the United  
117 States.

118           (29) "Subscriber" means a person who subscribes for  
119 shares in a corporation, whether before or after incorporation.

120           (30) "United States" includes district, authority,  
121 bureau, commission, department and any other agency of the United  
122 States.

123           (31) "Voting group" means all shares of one or more  
124 classes or series that under the articles of incorporation or  
125 Section 79-4-1.01 et seq. are entitled to vote and be counted  
126 together collectively on a matter at a meeting of shareholders.  
127 All shares entitled by the articles of incorporation or Section  
128 79-4-1.01 et seq. to vote generally on the matter are for that  
129 purpose a single voting group.

130           (32) "Voting power" means the current power to vote in  
131 the election of directors.

132           **SECTION 2.** The following shall be codified as Section  
133 79-4-1.43, Mississippi Code of 1972:

134           79-4-1.43. **Qualified director.** (a) A "qualified director"  
135 is a director who, at the time action is to be taken under:

136           (1) Section 79-4-7.44, does not have (i) a material  
137 interest in the outcome of the proceeding, or (ii) a material  
138 relationship with a person who has such an interest;

139           (2) Section 79-4-8.53 or 79-4-8.55, (i) is not a party  
140 to the proceeding, (ii) is not a director as to whom a transaction  
141 is a director's conflicting interest transaction or who sought a  
142 disclaimer of the corporation's interest in a business opportunity  
143 under Section 8.70, which transaction or disclaimer is challenged  
144 in the proceeding, and (iii) does not have a material relationship  
145 with a director described in either clause (i) or clause (ii) of  
146 this subsection (a)(2);

147           (3) Section 79-4-8.62, is not a director (i) as to whom  
148 the transaction is a director's conflicting interest transaction,  
149 or (ii) who has a material relationship with another director as  
150 to whom the transaction is a director's conflicting interest  
151 transaction; or

152           (4) Section 79-4-8.70, would be a qualified director  
153 under subsection (a)(3) if the business opportunity were a  
154 director's conflicting interest transaction.

155           (b) For purposes of this section:

156           (1) "Material relationship" means a familial,  
157 financial, professional, employment or other relationship that  
158 would reasonably be expected to impair the objectivity of the  
159 director's judgment when participating in the action to be taken;  
160 and

161           (2) "Material interest" means an actual or potential  
162 benefit or detriment (other than one which would devolve on the  
163 corporation or the shareholders generally) that would reasonably  
164 be expected to impair the objectivity of the director's judgment  
165 when participating in the action to be taken.

166           (c) The presence of one or more of the following  
167 circumstances shall not automatically prevent a director from  
168 being a qualified director:

169           (1) Nomination or election of the director to the  
170 current board by any director who is not a qualified director with  
171 respect to the matter (or by any person that has a material  
172 relationship with that director), acting alone or participating  
173 with others;

174           (2) Service as a director of another corporation of  
175 which a director who is not a qualified director with respect to  
176 the matter (or any individual who has a material relationship with  
177 that director), is or was also a director; or

178           (3) With respect to action to be taken under Section  
179 79-4-7.44, status as a named defendant, as a director against whom  
180 action is demanded, or as a director who approved the conduct  
181 being challenged.

182           **SECTION 3.** Section 79-4-7.32, Mississippi Code of 1972, is  
183 amended as follows:

184           79-4-7.32. (a) An agreement among the shareholders of a  
185 corporation that complies with this section is effective among the  
186 shareholders and the corporation even though it is inconsistent  
187 with one or more other provisions of this chapter in that it:

188           (1) Eliminates the board of directors or restricts the  
189 discretion or powers of the board of directors;

190           (2) Governs the authorization or making of  
191 distributions whether or not in proportion to ownership of shares,  
192 subject to the limitations in Section 79-4-6.40;

193           (3) Establishes who shall be directors or officers of  
194 the corporation, or their terms of office or manner of selection  
195 or removal;

196           (4) Governs, in general or in regard to specific  
197 matters, the exercise or division of voting power by or between  
198 the shareholders and directors or by or among any of them,  
199 including use of weighted voting rights or director proxies;

200           (5) Establishes the terms and conditions of any  
201 agreement for the transfer or use of property or the provision of

202 services between the corporation and any shareholder, director,  
203 officer or employee of the corporation or among any of them;

204 (6) Transfers to one or more shareholders or other  
205 persons all or part of the authority to exercise the corporate  
206 powers or to manage the business and affairs of the corporation,  
207 including the resolution of any issue about which there exists a  
208 deadlock among directors or shareholders;

209 (7) Requires dissolution of the corporation at the  
210 request of one or more of the shareholders or upon the occurrence  
211 of a specified event or contingency; or

212 (8) Otherwise governs the exercise of the corporate  
213 powers or the management of the business and affairs of the  
214 corporation or the relationship among the shareholders, the  
215 directors and the corporation, or among any of them, and is not  
216 contrary to public policy.

217 (b) An agreement authorized by this section shall be:

218 (1) Set forth (A) in the articles of incorporation or  
219 bylaws and approved by all persons who are shareholders at the  
220 time of the agreement, or (B) in a written agreement that is  
221 signed by all persons who are shareholders at the time of the  
222 agreement and is made known to the corporation;

223 (2) Subject to amendment only by all persons who are  
224 shareholders at the time of the amendment, unless the agreement  
225 provides otherwise; and

226 (3) Valid for ten (10) years, unless the agreement  
227 provides otherwise.

228 (c) The existence of an agreement authorized by this section  
229 shall be noted conspicuously on the front or back of each  
230 certificate for outstanding shares or on the information statement  
231 required by Section 79-4-6.26(b). If at the time of the agreement  
232 the corporation has shares outstanding represented by  
233 certificates, the corporation shall recall the outstanding  
234 certificates and issue substitute certificates that comply with

235 this subsection. The failure to note the existence of the  
236 agreement on the certificate or information statement shall not  
237 affect the validity of the agreement or any action taken pursuant  
238 to it. Any purchaser of shares who, at the time of purchase, did  
239 not have knowledge of the existence of the agreement shall be  
240 entitled to rescission of the purchase. A purchaser shall be  
241 deemed to have knowledge of the existence of the agreement if its  
242 existence is noted on the certificate or information statement for  
243 the shares in compliance with this subsection (c) and, if the  
244 shares are not represented by a certificate, the information  
245 statement is delivered to the purchaser at or prior to the time of  
246 purchase of the shares. An action to enforce the right of  
247 rescission authorized by this subsection (c) must be commenced  
248 within the earlier of ninety (90) days after discovery of the  
249 existence of the agreement or two (2) years after the time of  
250 purchase of the shares.

251 (d) An agreement authorized by this section shall cease to  
252 be effective when \* \* \* the corporation becomes a public  
253 corporation. If the agreement ceases to be effective for any  
254 reason, the board of directors may, if the agreement is contained  
255 or referred to in the corporation's articles of incorporation or  
256 bylaws, adopt an amendment to the articles of incorporation or  
257 bylaws, without shareholder action, to delete the agreement and  
258 any references to it.

259 (e) An agreement authorized by this section that limits the  
260 discretion or powers of the board of directors shall relieve the  
261 directors of, and impose upon the person or persons in whom such  
262 discretion or powers are vested, liability for acts or omissions  
263 imposed by law on directors to the extent that the discretion or  
264 powers of the directors are limited by the agreement.

265 (f) The existence or performance of an agreement authorized  
266 by this section shall not be a ground for imposing personal  
267 liability on any shareholder for the acts or debts of the



268 corporation even if the agreement or its performance treats the  
269 corporation as if it were a partnership or results in failure to  
270 observe the corporate formalities otherwise applicable to the  
271 matters governed by the agreement.

272 (g) Incorporators or subscribers for shares may act as  
273 shareholders with respect to an agreement authorized by this  
274 section if no shares have been issued when the agreement is made.

275 **SECTION 4.** Section 79-4-7.44, Mississippi Code of 1972, is  
276 amended as follows:

277 79-4-7.44. (a) A derivative proceeding shall be dismissed  
278 by the court on motion by the corporation if one of the groups  
279 specified in subsection (b) or (e) \* \* \* has determined in good  
280 faith, after conducting a reasonable inquiry upon which its  
281 conclusions are based, that the maintenance of the derivative  
282 proceeding is not in the best interests of the corporation.

283 (b) Unless a panel is appointed pursuant to subsection (e),  
284 the determination in subsection (a) shall be made by:

285 (1) A majority vote of qualified directors present at a  
286 meeting of the board of directors if the qualified directors  
287 constitute a quorum; or

288 (2) A majority vote of a committee consisting of two  
289 (2) or more qualified directors appointed by majority vote of  
290 qualified directors present at a meeting of the board of  
291 directors, regardless of whether \* \* \* such qualified directors  
292 constitute a quorum.

293 \* \* \*

294 (c) If a derivative proceeding is commenced after a  
295 determination has been made rejecting a demand by a shareholder,  
296 the complaint shall allege with particularity facts establishing  
297 either (1) that a majority of the board of directors did not  
298 consist of qualified directors at the time the determination was  
299 made or (2) that the requirements of subsection (a) have not been  
300 met.

301        (d) If a majority of the board of directors consisted of  
302 qualified directors at the time the determination \* \* \* was made,  
303 the plaintiff shall have the burden of proving that the  
304 requirements of subsection (a) have not been met; if not, the  
305 corporation shall have the burden of proving that the requirements  
306 of subsection (a) have been met.

307        (e) Upon motion by the corporation, the court may appoint a  
308 panel of one or more individuals \* \* \* to make a determination  
309 whether the maintenance of the derivative proceeding is in the  
310 best interests of the corporation. In such case, the plaintiff  
311 shall have the burden of proving that the requirements of  
312 subsection (a) have not been met.

313        **SECTION 5.** Section 79-4-8.50, Mississippi Code of 1972, is  
314 amended as follows:

315        79-4-8.50. In this subarticle:

316            (1) "Corporation" includes any domestic or foreign  
317 predecessor entity of a corporation in a merger.

318            (2) "Director" or "officer" means an individual who is  
319 or was a director or officer, respectively, of a corporation or  
320 who, while a director or officer of the corporation, is or was  
321 serving at the corporation's request as a director, officer,  
322 partner, trustee, employee or agent of another domestic or foreign  
323 corporation, partnership, joint venture, trust, employee benefit  
324 plan or other entity. A director or officer is considered to be  
325 serving an employee benefit plan at the corporation's request if  
326 the individual's duties to the corporation also impose duties on,  
327 or otherwise involve services by, the individual to the plan or to  
328 participants in or beneficiaries of the plan. "Director" or  
329 "officer" includes, unless the context requires otherwise, the  
330 estate or personal representative of a director or officer.

331        \* \* \*

332            (3) "Expenses" includes counsel fees.

333           (4) "Liability" means the obligation to pay a judgment,  
334 settlement, penalty, fine (including an excise tax assessed with  
335 respect to an employee benefit plan), or reasonable expenses  
336 incurred with respect to a proceeding.

337           (5) "Official capacity" means: (i) when used with  
338 respect to a director, the office of director in a corporation;  
339 and (ii) when used with respect to an officer, as contemplated in  
340 Section 79-4-8.56, the office in a corporation held by the  
341 officer. "Official capacity" does not include service for any  
342 other domestic or foreign corporation or any partnership, joint  
343 venture, trust, employee benefit plan or other entity.

344           (6) "Party" means an individual who was, is, or is  
345 threatened to be made a defendant or respondent in a proceeding.

346           (7) "Proceeding" means any threatened, pending, or  
347 completed action, suit or proceeding, whether civil, criminal,  
348 administrative, arbitratative or investigative and whether formal or  
349 informal.

350           **SECTION 6.** Section 79-4-8.53, Mississippi Code of 1972, is  
351 amended as follows:

352           79-4-8.53. (a) A corporation may, before final disposition  
353 of a proceeding, advance funds to pay for or reimburse the  
354 reasonable expenses incurred in connection with the proceeding by  
355 an individual who is a party to the proceeding because that  
356 individual is a member of the board of directors if the director  
357 delivers to the corporation:

358           (1) A written affirmation of the director's good faith  
359 belief that \* \* \* the relevant standard of conduct described in  
360 Section 79-4-8.51 has been met by the director or that the  
361 proceeding involves conduct for which liability has been  
362 eliminated under a provision of the articles of incorporation as  
363 authorized by Section 79-4-2.02(b)(4); and

364           (2) A written undertaking of the director to repay any  
365 funds advanced if the director is not entitled to mandatory

366 indemnification under Section 79-4-8.52 and it is ultimately  
367 determined under Section 79-4-8.54 or Section 79-4-8.55 that the  
368 director has not met the relevant standard of conduct described in  
369 Section 79-4-8.51.

370 (b) The undertaking required by subsection (a)(2) must be an  
371 unlimited general obligation of the director but need not be  
372 secured and may be accepted without reference to the financial  
373 ability of the director to make repayment.

374 (c) Authorizations under this section shall be made \* \* \*:

375 (1) By the board of directors:

376 (i) If there are two (2) or more qualified  
377 directors, by a majority vote of all the qualified directors (a  
378 majority of whom shall for such purpose constitute a quorum) or by  
379 a majority of the members of a committee of two (2) or more  
380 qualified directors appointed by such a vote; or

381 (ii) If there are fewer than two (2) qualified  
382 directors, by the vote necessary for action by the board in  
383 accordance with Section 79-4-8.24(c), in which authorization  
384 directors who are not qualified directors may participate; or

385 (2) By the shareholders, but shares owned by or voted  
386 under the control of a director who at the time is not \* \* \* a  
387 qualified director may not be voted on the authorization.

388 **SECTION 7.** Section 79-4-8.55, Mississippi Code of 1972, is  
389 amended as follows:

390 79-4-8.55. (a) A corporation may not indemnify a director  
391 under Section 79-4-8.51 unless authorized for a specific  
392 proceeding after a determination has been made that  
393 indemnification \* \* \* is permissible because the director has met  
394 the relevant standard of conduct set forth in Section 79-4-8.51.

395 (b) The determination shall be made:

396 (1) If there are two (2) or more qualified directors,  
397 by the board of directors by a majority vote of all the qualified  
398 directors (a majority of whom shall for such purpose constitute a

399 quorum), or by a majority of the members of a committee of two (2)  
400 or more qualified directors appointed by such a vote;

401 (2) By special legal counsel:

402 (i) Selected in the manner prescribed in  
403 subdivision (1); or

404 (ii) If there are fewer than two (2) qualified  
405 directors, selected by the board of directors (in which selection  
406 directors who are not qualified directors may participate); or

407 (3) By the shareholders, but shares owned by or voted  
408 under the control of a director who at the time is not \* \* \* a  
409 qualified director may not be voted on the determination.

410 (c) Authorization of indemnification shall be made in the  
411 same manner as the determination that indemnification is  
412 permissible, except that if there are fewer than two (2) qualified  
413 directors, or if the determination is made by special legal  
414 counsel, authorization of indemnification shall be made by those  
415 entitled \* \* \* to select special legal counsel under subsection  
416 (b)(2)(ii).

417 **SECTION 8.** Section 79-4-8.60, Mississippi Code of 1972, is  
418 amended as follows:

419 79-4-8.60. In Sections 79-4-8.60 through 79-4-8.63 and  
420 Section 79-4-8.70:

421 (1) "Director's conflicting interest transaction" \* \* \*  
422 means \* \* \* a transaction effected or proposed to be effected by  
423 the corporation (or by an entity controlled by the  
424 corporation) \* \* \*:

425 (i) \* \* \* To which, at the relevant time, the  
426 director is a party; or

427 (ii) \* \* \* Respecting which, at the relevant time,  
428 the director had knowledge and a material financial interest known  
429 to the director; or

430                   (iii) Respecting which, at the relevant time, the  
431 director knew that a related person was a party or had a material  
432 financial interest.

433                   (2) "Control" (including the term "controlled by")  
434 means (i) having the power, directly or indirectly, to elect or  
435 remove a majority of the members of the board of directors or  
436 other governing body of an entity, whether through the ownership  
437 of voting shares or interests, by contract, or otherwise, or (ii)  
438 being subject to a majority of the risk of loss from the entity's  
439 activities or entitled to receive a majority of the entity's  
440 residual returns.

441                   (3) "Relevant time" means (i) the time at which  
442 directors' actions respecting the transaction is taken in  
443 compliance with Section 79-4-8.62, or (ii) if the transaction is  
444 not brought before the board of directors of the corporation (or  
445 its committee) for action under Section 79-4-8.62, at the time the  
446 corporation (or an entity controlled by the corporation) becomes  
447 legally obligated to consummate the transaction.

448                   (4) "Material financial interest" means a financial  
449 interest in a transaction that \* \* \* would reasonably be expected  
450 to impair the objectivity of the director's judgment when  
451 participating in action on the authorization of the transaction.

452                   (5) "Related person" \* \* \* means:

453                   (i) The director's spouse \* \* \*;

454                   (ii) A child, stepchild, grandchild, parent,  
455 stepparent, grandparent, sibling, \* \* \* (or spouse of any thereof)  
456 of the director or of the director's spouse;

457                   (iii) An individual living in the same home as the  
458 director; \* \* \*

459                   (iv) An entity (other than the corporation or an  
460 entity controlled by the corporation) controlled by the director  
461 or any person specified in this paragraph (5);

462                   (v) A domestic or foreign (A) business or  
463 nonprofit corporation (other than the corporation or an entity  
464 controlled by the corporation) of which the director is a  
465 director, (B) unincorporated entity of which the director is a  
466 general partner or a member of the governing body, or (C)  
467 individual, trust or estate for whom or of which the director is a  
468 trustee, guardian, personal representative or like fiduciary; or  
469                   (vi) A person that is, or an entity that is  
470 controlled by, an employer of the director.

471                   (6) "Fair to the corporation" means, for purposes of  
472 Section 79-4-8.61(b)(3), that the transaction as a whole was  
473 beneficial to the corporation, taking into appropriate account  
474 whether it was (i) fair in terms of the director's dealings with  
475 the corporation, and (ii) comparable to what might have been  
476 obtainable in an arms' length transaction, given the consideration  
477 paid or received by the corporation.

478                   (7) "Required disclosure" means disclosure \* \* \* of (i)  
479 the existence and nature of the director's conflicting interest,  
480 and (ii) all facts known to the director respecting the subject  
481 matter of the transaction that a director free of such conflicting  
482 interest would reasonably believe to be material in deciding  
483 whether \* \* \* to proceed with the transaction.

484                   \* \* \*

485                   **SECTION 9.** Section 79-4-8.61, Mississippi Code of 1972, is  
486 amended as follows:

487                   79-4-8.61. (a) A transaction effected or proposed to be  
488 effected by the corporation or by an \* \* \* entity controlled by  
489 the corporation \* \* \* may not be the subject of equitable relief,  
490 or give rise to an award of damages or other sanctions against a  
491 director of the corporation, in a proceeding by a shareholder or  
492 by or in the right of the corporation, on the ground that the  
493 director \* \* \* has an interest respecting the transaction, if it  
494 is not a director's conflicting interest transaction.

495 (b) A director's conflicting interest transaction may not be  
496 the subject of equitable relief, \* \* \* or give rise to an award of  
497 damages or other sanctions against a director of the corporation,  
498 in a proceeding by a shareholder or by or in the right of the  
499 corporation on the ground that the director \* \* \* has an interest  
500 respecting the transaction, if:

501 (1) Directors' action respecting the transaction  
502 was \* \* \* taken in compliance with Section 79-4-8.62 at any time;  
503 or

504 (2) Shareholders' action respecting the transaction  
505 was \* \* \* taken in compliance with Section 79-4-8.63 at any time;  
506 or

507 (3) The transaction, judged according to the  
508 circumstances at the relevant time \* \* \*, is established to have  
509 been fair to the corporation.

510 **SECTION 10.** Section 79-4-8.62, Mississippi Code of 1972, is  
511 amended as follows:

512 79-4-8.62. (a) Directors' action respecting a director's  
513 conflicting interest transaction is effective for purposes of  
514 Section 79-4-8.61(b)(1) if the transaction has been authorized by  
515 the affirmative vote of a majority (but no fewer than two (2)) of  
516 the qualified directors \* \* \* who voted on the transaction,  
517 after \* \* \* required disclosure by the conflicted director of  
518 information \* \* \* not already known by such qualified directors or  
519 after modified disclosure in compliance with subsection (b),  
520 provided that: \* \* \*

521 (1) \* \* \* The qualified directors have deliberated and  
522 voted outside the presence of and without the participation by any  
523 other director; and

524 (2) Where the action has been taken by a committee, all  
525 members of the committee were qualified directors, and either (i)  
526 the committee was composed of all the qualified directors on the  
527 board of directors, or (ii) the members of the committee were



528 appointed by the affirmative vote of a majority of the qualified  
529 directors on the board.

530 (b) Notwithstanding subsection (a), when a transaction is a  
531 director's conflicting interest transaction only because a related  
532 person described in Section 79-4-8.60(5)(v) or (vi) is a party to  
533 or has material financial interest in the transaction, the  
534 conflicted director is not obligated to make required disclosure  
535 to the extent that the director reasonably believes that doing so  
536 would violate a duty imposed under law, a legally enforceable  
537 obligation of confidentiality, or a professional ethics rule,  
538 provided that the conflicted director discloses to the qualified  
539 directors voting on the transaction:

540 (1) All information required to be disclosed that is  
541 not so violative;

542 (2) The existence and nature of the director's  
543 conflicting interest \* \* \*; and

544 (3) The nature of the conflicted director's duty not to  
545 disclose the confidential information.

546 (c) A majority (but no fewer than two (2)) of all the  
547 qualified directors on the board of directors, or on the  
548 committee, constitutes a quorum for purposes of action that  
549 complies with this section. \* \* \*

550 (d) Where directors' action under this section does not  
551 satisfy a quorum or voting requirement applicable to the  
552 authorization of the transaction by reason of the articles of  
553 incorporation, the bylaws, or provision of law, independent action  
554 to satisfy those authorization requirements must be taken by the  
555 board of directors or a committee, in which action directors who  
556 are not qualified directors may participate.

557 **SECTION 11.** Section 79-4-8.63, Mississippi Code of 1972, is  
558 amended as follows:

559 79-4-8.63. (a) Shareholders' action respecting a director's  
560 conflicting interest transaction is effective for purposes of

561 Section 79-4-8.61(b)(2) if a majority of the votes \* \* \* cast by  
562 the holders of all qualified shares are in favor of the  
563 transaction after (1) notice to shareholders describing the action  
564 to be taken respecting the transaction, (2) provision to the  
565 corporation of the information referred to in subsection (b), and  
566 (3) communication to the shareholders entitled to vote on the  
567 transaction of the information that is the subject of required  
568 disclosure, to the extent the information is not known by them.

569 (b) A director who has a conflicting interest respecting the  
570 transaction shall, before the shareholders' vote, inform the  
571 secretary or other officer or agent of the corporation authorized  
572 to tabulate votes, in writing, of the number of shares that the  
573 director knows are not qualified shares under subsection (c), and  
574 the identity of the holders of those shares.

575 (c) For purposes of this section, (1) "holder" means, and  
576 "held by" refers to shares held by, both a record shareholder (as  
577 defined in Section 79-4-13.01(7)) and a beneficial shareholder (as  
578 defined in Section 79-4-13.01(2)); and (2) "qualified shares"  
579 means all shares entitled to be voted with respect to the \* \* \*  
580 transaction except for shares that \* \* \* the secretary (or other  
581 officer or agent of the corporation authorized to tabulate votes)  
582 either knows, or under subsection (b) is notified, are held by (A)  
583 a director who has a conflicting interest respecting the  
584 transaction, or (B) a related person of the director (excluding a  
585 person described in Section 79-4-8.60(5)(vi)).

586 (d) A majority of the votes entitled to be cast by the  
587 holders of all qualified shares constitutes a quorum for purposes  
588 of compliance with this section. Subject to the provisions of  
589 subsection \* \* \* (e), shareholders' action that otherwise complies  
590 with this section is not affected by the presence of holders, or  
591 by the voting, of shares that are not qualified shares.

592 \* \* \*

593 (e) If a shareholders' vote does not comply with subsection  
594 (a) solely because of a \* \* \* director's failure to comply with  
595 subsection (b), and if the director establishes that the  
596 failure \* \* \* was not intended \* \* \* to influence and did not in  
597 fact determine the outcome of the vote, the court may \* \* \* take  
598 such action respecting the transaction and the director, and may  
599 give such effect, if any, to the shareholders' vote, as the court  
600 considers appropriate in the circumstances.

601 (f) Where shareholders' action under this section does not  
602 satisfy a quorum or voting requirement applicable to the  
603 authorization of the transaction by reason of the articles of  
604 incorporation, the bylaws or a provision of law, independent  
605 action to satisfy those authorization requirements must be taken  
606 by the shareholders, in which action shares that are not qualified  
607 shares may participate.

608 **SECTION 12.** The following shall be codified as Section  
609 79-4-8.70, Mississippi Code of 1972:

610 79-4-8.70. Business opportunities. (a) A director's taking  
611 advantage, directly or indirectly, of a business opportunity may  
612 not be the subject of equitable relief, or give rise to an award  
613 of damages or other sanctions against the director, in a  
614 proceeding by or in the right of the corporation on the ground  
615 that such opportunity should have first been offered to the  
616 corporation, if before becoming legally obligated respecting the  
617 opportunity the director brings it to the attention of the  
618 corporation and:

619 (1) Action by qualified directors disclaiming the  
620 corporation's interest in the opportunity is taken in compliance  
621 with the procedures set forth in Section 79-4-8.62, as if the  
622 decision being made concerned a director's conflicting interest  
623 transaction; or

624 (2) Shareholders' action disclaiming the corporation's  
625 interest in the opportunity is taken in compliance with the

626 procedures set forth in Section 79-4-8.63, as if the decision  
627 being made concerned a director's conflicting interest  
628 transaction;  
629 except that, rather than making "required disclosure" as defined  
630 in Section 79-4-8.60, in each case the director shall have made  
631 prior disclosure to those acting on behalf of the corporation of  
632 all material facts concerning the business opportunity that are  
633 then known to the director.

634 (b) In any proceeding seeking equitable relief or other  
635 remedies based upon an alleged improper taking advantage of a  
636 business opportunity by a director, the fact that the director did  
637 not employ the procedure described in subsection (a) before taking  
638 advantage of the opportunity shall not create an inference that  
639 the opportunity should have been first presented to the  
640 corporation or alter the burden of proof otherwise applicable to  
641 establish that the director breached a duty to the corporation in  
642 the circumstances.

643 **SECTION 13.** Section 79-4-14.31, Mississippi Code of 1972, is  
644 amended as follows:

645 79-4-14.31. (a) Venue for a proceeding brought by any party  
646 named in Section 79-4-14.30 lies in the county where a  
647 corporation's principal office (or, if none in this state, its  
648 registered office) is or was last located.

649 (b) It is not necessary to make shareholders parties to a  
650 proceeding to dissolve a corporation unless relief is sought  
651 against them individually.

652 (c) A court in a proceeding brought to dissolve a  
653 corporation may issue injunctions, appoint a receiver or custodian  
654 pendente lite with all powers and duties the court directs, take  
655 other action required to preserve the corporate assets wherever  
656 located, and carry on the business of the corporation until a full  
657 hearing can be held.

658 (d) Within ten (10) days of the commencement of a proceeding  
659 under Section 79-4-14.30(2) to dissolve a corporation that is not  
660 a public corporation, the corporation shall send to all  
661 shareholders, other than the petitioner, a notice stating that the  
662 shareholders are entitled to avoid the dissolution of the  
663 corporation by electing to purchase the petitioner's shares under  
664 Section 79-4-14.34 and accompanied by a copy of Section  
665 79-4-14.34.

666 **SECTION 14.** Section 79-4-14.34, Mississippi Code of 1972, is  
667 amended as follows:

668 79-4-14.34. (a) In a proceeding under Section 79-4-14.30(2)  
669 to dissolve a corporation that is not a public corporation, the  
670 corporation may elect or, if it fails to elect, one or more  
671 shareholders may elect to purchase all shares owned by the  
672 petitioning shareholder at the fair value of the shares. An  
673 election pursuant to this section shall be irrevocable unless the  
674 court determines that it is equitable to set aside or modify the  
675 election.

676 (b) An election to purchase pursuant to this section may be  
677 filed with the court at any time within ninety (90) days after the  
678 filing of the petition under Section 79-4-14.30(2) or at such  
679 later time as the court in its discretion may allow. If the  
680 election to purchase is filed by one or more shareholders, the  
681 corporation shall, within ten (10) days thereafter, give written  
682 notice to all shareholders, other than the petitioner. The notice  
683 must state the name and number of shares owned by the petitioner  
684 and the name and number of shares owned by each electing  
685 shareholder and must advise the recipients of their right to join  
686 in the election to purchase shares in accordance with this  
687 section. Shareholders who wish to participate must file notice of  
688 their intention to join in the purchase no later than thirty (30)  
689 days after the effective date of the notice to them. All  
690 shareholders who have filed an election or notice of their

691 intention to participate in the election to purchase thereby  
692 become parties to the proceeding and shall participate in the  
693 purchase in proportion to their ownership of shares as of the date  
694 the first election was filed, unless they otherwise agree or the  
695 court otherwise directs. After an election has been filed by the  
696 corporation or one or more shareholders, the proceeding under  
697 Section 79-4-14.30(2) may not be discontinued or settled, nor may  
698 the petitioning shareholder sell or otherwise dispose of his  
699 shares, unless the court determines that it would be equitable to  
700 the corporation and the shareholders, other than the petitioner,  
701 to permit such discontinuance, settlement, sale or other  
702 disposition.

703 (c) If, within sixty (60) days of the filing of the first  
704 election, the parties reach agreement as to the fair value and  
705 terms of purchase of the petitioner's shares, the court shall  
706 enter an order directing the purchase of petitioner's shares upon  
707 the terms and conditions agreed to by the parties.

708 (d) If the parties are unable to reach an agreement as  
709 provided for in subsection (c), the court, upon application of any  
710 party, shall stay the Section 79-4-14.30(2) proceedings and  
711 determine the fair value of the petitioner's shares as of the day  
712 before the date on which the petition under Section 79-4-14.30(2)  
713 was filed or as of such other date as the court deems appropriate  
714 under the circumstances.

715 (e) Upon determining the fair value of the shares, the court  
716 shall enter an order directing the purchase upon such terms and  
717 conditions as the court deems appropriate, which may include  
718 payment of the purchase price in installments, where necessary in  
719 the interests of equity, provision for security to assure payment  
720 of the purchase price and any additional costs, fees and expenses  
721 as may have been awarded, and, if the shares are to be purchased  
722 by shareholders, the allocation of shares among them. In  
723 allocating petitioner's shares among holders of different classes

724 of shares, the court should attempt to preserve the existing  
725 distribution of voting rights among holders of different classes  
726 insofar as practicable and may direct that holders of a specific  
727 class or classes shall not participate in the purchase. Interest  
728 may be allowed at the rate and from the date determined by the  
729 court to be equitable, but if the court finds that the refusal of  
730 the petitioning shareholder to accept an offer of payment was  
731 arbitrary or otherwise not in good faith, no interest shall be  
732 allowed. If the court finds that the petitioning shareholder had  
733 probable grounds for relief under \* \* \* Section 79-4-14.30(2)(ii)  
734 or (iv), it may award to the petitioning shareholder reasonable  
735 fees and expenses of counsel and of any experts employed by him.

736 (f) Upon entry of an order under subsection (c) or (e), the  
737 court shall dismiss the petition to dissolve the corporation under  
738 Section 79-4-14.30, and the petitioning shareholder shall no  
739 longer have any rights or status as a shareholder of the  
740 corporation, except the right to receive the amounts awarded to  
741 him by the order of the court which shall be enforceable in the  
742 same manner as any other judgment.

743 (g) The purchase ordered pursuant to subsection (e) shall be  
744 made within ten (10) days after the date the order becomes final  
745 unless before that time the corporation files with the court a  
746 notice of its intention to adopt articles of dissolution pursuant  
747 to Sections 79-4-14.02 and 79-4-14.03, which articles must then be  
748 adopted and filed within fifty (50) days thereafter. Upon filing  
749 of such articles of dissolution, the corporation shall be  
750 dissolved in accordance with the provisions of Sections 79-4-14.05  
751 through 79-4-14.07 and the order entered pursuant to subsection  
752 (e) shall no longer be of any force or effect, except that the  
753 court may award the petitioning shareholder reasonable fees and  
754 expenses in accordance with the provisions of the last sentence of  
755 subsection (e) and the petitioner may continue to pursue any  
756 claims previously asserted on behalf of the corporation.

757           (h) Any payment by the corporation pursuant to an order  
758 under subsection (c) or (e), other than an award of fees and  
759 expenses pursuant to subsection (e), is subject to the provisions  
760 of Section 79-4-6.40.

761           (i) Nothing contained in this section shall diminish the  
762 inherent equity powers of the court to fashion alternative  
763 remedies to judicial dissolution.

764           **SECTION 15.** This act shall take effect and be in force from  
765 and after July 1, 2006.