

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.