
T h e S t a t e B a r o f G e o r g i a

BUSINESS LAW SECTION

N e w s l e t t e r

Charles R. Beaudrot, Jr., Chair

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Elizabeth H. Noe, Editor

CHAIRMAN'S REPORT

By Charles R. Beaudrot, Jr.

Morris, Manning & Martin

The Business Law Section has continued its tradition of providing significant educational opportunities and pragmatic assistance to its members during the 2003-2004 year.

I am happy to report that last year's Business Law Institute represented a further increase in attendance to a total of over 165. In addition, the Section sponsored programs on Basic Securities Law in Atlanta on March 26, 2004, and is sponsoring the upcoming presentation on Partnerships and LLCs in Atlanta on May 13, 2004, and continues to support activities of interest.

Walter Jospin and the Securities Committee are to be commended for their efforts working with the Secretary of State on new state securities (or Blue Sky) legislation. Although a bill sponsored by the Secretary of State, this represents a laudable effort to correct a number of glitches in the current statute and shows how the Section can be effective in its assistance to the office of the Secretary of State. Although the bill was one of many victims of a confused legislative session, the prospects for the bill in the next session are encouraging. Walter provides some additional detail in his report appearing below.

I also want to thank and commend the efforts of Tom McNeil, Randy Johnson and members of our Corporate Code Revision Committee, who have worked to achieve significant corrections to our Non Profit Corporate Code. A fuller report appears below.

Finally, I want to solicit every member of the Section to consider active participation in one or more of our committees. Our committees are important in providing legislative proposals to address corporate questions, providing a venue for the interchange of information among practitioners, and addressing issues of concern to all business lawyers. If you are interested in participating, I encourage you to contact the Chair of the relevant subcommittee and join in their activities. The current committees and their Chairs are as follows:

Corporate Code	Tom McNeil
Partnerships and LLCs	Mike Wasserman
UCC	Ed Snow
Securities	Walter Jospin
Publications	Elizabeth Noe

THE SEC APPROVES SIGNIFICANT NEW FORM 8-K DISCLOSURE EVENTS AND FILING DEADLINES

By Geoffrey Edwards

Sutherland Asbill & Brennan LLP, Atlanta

I. Executive Summary

Recently, the Securities and Exchange Commission (the "SEC") approved rule changes that will dramatically change the content and timing of current disclosures required by publicly traded companies. These changes add ten disclosure items to Form 8-K, the form used by public companies to disclose important corporate events on a current basis. The changes approved by the SEC also accelerate the time in which a Form 8-K must be filed, from the current five business and 15 calendar day deadlines to a uniform four business day deadline. These new rules impose significant new burdens on public companies in terms of the volume and speed of disclosure required of them. Compliance with these new rules will be required as of August 23, 2004.

II. Summary of Amendments to Form 8-K

The SEC adopted the recent changes to Form 8-K at an open meeting on March 11, 2004. The SEC release containing the full text of the final amendments to Form 8-K, along with the SEC's description of the background and purpose of the amendments, was published on March 16, 2004 and is available at <http://www.sec.gov/rules/final/33-8400.htm>.

The amendments to Form 8-K are responsive to the current disclosure goals of Section 409 of the

Sarbanes-Oxley Act of 2002 by requiring public companies to disclose, on a "rapid and current basis," material information regarding changes in a company's financial condition or operations. The latest amendments to Form 8-K bring the present regime of securities filings closer to the SEC's ultimate goal of "real time disclosure."

Significantly, unlike the originally proposed Form 8-K changes, the SEC did not adopt a portion of the proposed rule that would have required public companies to disclose non-binding letters of intent related to material events such as proposed mergers and acquisitions. This proposal drew a great deal of criticism in the comment process related to the burdens imposed by requiring premature disclosure of pending transactions that are subject to significant contingencies.

The amendments to Form 8-K add eight new disclosure items, which are:

entry into a material non-ordinary course agreement;

termination of a material non-ordinary course agreement;

creation of a material direct financial obligation or a material obligation under an off-balance sheet arrangement;

triggering events that accelerate or increase a material direct financial obligation or a material obligation under an off-balance sheet arrangement;

material costs associated with exit or disposal activities;

material impairments;

notice of delisting, failure to satisfy a continued listing rule or standard, or transfer of listing; and

non-reliance on previously issued financial statements or a related audit report or completed interim review (i.e., financial restatements).

The amendments to Form 8-K also add two disclosure items previously included in periodic reports, such as Forms 10-K and 10-Q, which are:

unregistered sales of equity securities; and

material modifications to the rights of security holders.

Finally, the amendments to Form 8-K expand two current Form 8-K items to add additional disclosure, which are:

departure of directors or principal officers, election of directors, or appointment of principal officers (previously required disclosure only of director departures in connection with disagreements with management or removal for cause); and

change in fiscal year and amendments to articles of incorporation or bylaws (previously only change in fiscal year required a Form 8-K filing).

III. Limited Safe Harbor

The amendments will create a limited safe harbor under the Securities Exchange Act of 1934, as amended. The safe harbor will preclude “antifraud” liability under Exchange Act Section 10(b) and Rule 10b-5 for failure to file timely certain of the new items on Form 8-K. The SEC clarified in its final release that the safe harbor will not apply to, or impact, any other duty to disclose a company may have and extends only until the due date of the company’s periodic report for the relevant period. A company will not lose its eligibility to use “short form” registration statements such as Form S-3 if it files a Form 8-K late in reliance on the safe harbor. Similarly, failure to file a timely Form 8-K in

reliance on the safe harbor will not prohibit shareholders from selling their securities in reliance on Rule 144 of the Securities Act of 1933, as amended. The SEC revised Rule 144 to clarify that such a failure to file a timely Form 8-K would not cause a company to be in violation of the “current public information” requirement of Rule 144.

IV. Conclusions

The SEC’s amendments to Form 8-K implement the bulk of changes proposed nearly two years ago in a release dated June 12, 2002. The intervention of the Sarbanes-Oxley Act and the rule changes that it mandated had delayed action by the SEC on these proposed amendments. Comments on the proposed changes to Form 8-K were numerous, and the SEC’s final amendments to Form 8-K were responsive to many of the comments. Nonetheless, the new Form 8-K requirements will undoubtedly impose new burdens on public companies and increase the already substantial efforts associated with Sarbanes-Oxley Act compliance.

REPORT FROM CHAIR OF SECURITIES COMMITTEE

By Walter Jospin

Paul, Hastings, Janofsky & Walker LLP

The Securities Committee has been very busy these past six months. We have attempted to pass legislation amending the Georgia Securities Act of 1973, and have held two very successful ICLE programs.

1. Proposed Amendment to the Securities Act of 1973.

We formed a subcommittee, comprised of Walter Jospin, Jeff Schulte, David Prince, David Thunhorst, Lenny Silverstein, Ken Zirkman, Wayne Howell and Ashley Hodges. We worked many months on a proposed amendment to the Securities

Act, the objective of which was, among other things, to modernize the statute, make it congruent with recent Federal legislation, including the Sarbanes-Oxley Act of 2002, make it gender neutral and generally clean up some existing inconsistencies. The proposed amendment (Senate Bill 488) had the support of Republican and Democrat members of the Senate and the House as well as the support of Secretary of State, Cathy Cox. Unfortunately, due to political influences, SB 488 is, at press time, still languishing in committee. It is not expected to reach the Senate floor this term.

Our Committee has promised the Secretary of State's office that we will continue to assist it in connection with amending the Securities Act.

2. Basic Securities Law Program – Capital Markets Practice.

On March 26, 2004 the Securities Committee sponsored a well attended seminar on capital markets practice. The speakers addressed topics such as:

<u>Topic</u>	<u>Attorney</u>
What is a Security?	Mike Wolensky, Kutak Rock
Private Placements: Exemptions from Registration and Resale of Securities	Bob Hussle, Rogers & Hardin
Role of Counsel: Due Diligence, Drafting Disclosure Documents and Legal Opinions	Randy Eaddy, Kilpatrick Stockton and Joe Alley, Arnall, Golden & Gregory
Minimizing Risks in a Capital Markets Transaction: Potential Liabilities and What Not to Do	Todd David and Rebecca Lamberth, Alston & Bird

Report of Georgia Securities Commissioner	Wayne Howell
Anatomy of a Private Equity Transaction	Elizabeth Noe, Paul Hastings, and Bill Lyman, Alliance Technology Ventures, LP
Initial Public Offering Role Play	Tom Herman, Sutherland, Asbill & Brennan Jerry Robinson, Stephens, Inc. Michael Rosenzweig, McKenna Long Aldridge Jeff Schulte, Morris, Manning & Martin Jeff Stein, King & Spalding

3. Securities Litigation and Regulatory Practice Seminar – November 14, 2003.

The Committee also sponsored a securities litigation and regulatory practice seminar in November. This program focused on two major topics: SEC Enforcement post Sarbanes-Oxley and practical considerations in handling securities investigations, civil litigation and criminal prosecutions.

This seminar was co-chaired by Mike Wolensky, Scott Sorrells and Walter Jospin.

**REPORT FROM CHAIR OF
CORPORATE CODE
REVISIONS COMMITTEE**

By Tom McNeil

Powell, Goldstein, Frazer and Murphy LLP

The Corporate Code Revision Committee undertook a number of substantive projects in 2003. As in 2002, the Committee divided into subgroups to closely evaluate different initiatives. One subgroup took a careful look at proposals to update the Georgia Business Corporation Code based upon recent amendments to the Model Business Corporation Act, the Delaware Corporate Code and other state codes. A separate committee took a new look at the revised Model Act provisions regarding director liability and a number of other proposals with respect to director indemnification. A third subgroup looked at the Georgia Nonprofit Corporation Code.

The group looking at updating amendments recommended seven separate proposals for consideration by our Committee. The subcommittee dealing with director liability and indemnification issues took a close and favorable look at proposed amendments with respect to director liability issues but concluded that the political climate in this year's legislative session was not likely conducive to considering such a bill. The nonprofit subcommittee undertook the significant task of attempting to update the Nonprofit Code, which had not been updated or amended since 1991.

Our Committee managed to work the overwhelming majority of our proposals through the Advisory Committee on Legislation, although one proposal which sought to better conform the interplay among the Business Corporation Code, the LLC Code and the LLP Code was strategically withdrawn from consideration. All of the remaining proposals successfully survived adoption by the State Bar's Board of Governors, despite some opposition from the floor with respect to one of our proposals. I want to thank John Chandler for helping us work through issues at the Board of Governors meeting.

At the legislative session, Senators Chuck Clay and Randy Hall graciously agreed to sponsor our Corporate and Nonprofit proposals, respectively, and both were passed through the Senate Judiciary Committee and the Senate.

At the House, we faced a more tumultuous reception inasmuch as the hearing on our bill was scheduled just as it was announced that the chairperson of the House Judiciary Committee was being redesignated in mid-session. Following a postponement, the House Judiciary Committee passed all of our proposals except for one which would have permitted shareholders or a board to renounce business opportunities in advance, consistent with a recent amendment to Delaware law in this regard. The Bar legislative team, ably assisted by Mark Middleton, managed to work the balance of our bill through the House approval process, notwithstanding attempts by House members to hold it up for other purposes. Given the differences in the House and Senate version, a final reconciliation was required on the last day of the session. We are awaiting the Governor's signature but do not anticipate a significant problem.

The amendments which have passed the legislature include the following:

1. A proposal to modify Section 14-2-705 to provide an exception to the shareholder notice requirement when multiple notices of annual meetings or dividend payments have been returned as undeliverable. This change is consistent with Delaware law and the shareholder notice provisions of SEC rules.

2. A number of amendments which have the effect of permitting notices, consents, and similar deliveries under the Corporate Code to be provided by email or other electronic means. There are a number of protective mechanisms, such as those requiring a shareholder to consent to receiving notices electronically. Again, these provisions are based upon provisions in the revised Model Business Corporation Act and recent updates to Delaware law.

3. A series of technical amendments to Sections 14-2-602(e), 14-2-1003(c), (i), and (j), and 14-2-1202(c) which afford additional flexibility to condition the effectiveness of an amendment to the articles of incorporation or a plan of merger or share exchange on a wider variety of events. These proposals are based upon revised Model Business Corporation Act language providing this additional flexibility.

4. A proposal to make clear that mailings by "first class" include any of the myriad of mail classifications that now are the equivalent or better than "first class".

5. An amendment to Section 14-2-624 to clarify Georgia law that a board of directors may delegate to an officer the authority to specify the officers and employees of the corporation or its subsidiaries who receive options and to determine the number of options to be received by each such officer or employee, so long as the Board has specified the total number of options to be awarded.

With respect to the Nonprofit Code, the changes are numerous, but fall into three basic categories: (i) changes which conform to updates which occurred in the Business Corporation Code in the years after 1991, including updates proposed in this year's legislative initiative; (ii) changes to permit communications by electronic transmission in the same fashion as that proposed with respect to the Business Corporation Code; and (iii) a number of "housekeeping" changes involving erroneous cross-references, typographical errors, etc.

I want to thank each of the participants in our subcommittee process, and particularly Randy Johnson, Stan Blackburn, Bruce Wanamaker, Rob Joseph and Lou Spelios for their work in finalizing the text of our amendments and making presentations to the various committees. Randy did a particularly good job in leading the charge to bring the Nonprofit Code up to date.

The Committee is beginning its organizational work for the 2005 legislative session, and there are a

number of initiatives that the Committee already has on its agenda as holdovers. In particular, we would like to organize a complete look at the interplay between the Corporate, LLC and LLP Codes. Bob Bryant has already done a good deal of work in this regard. We very much welcome and encourage additional thoughts and suggestions from any of the members of the Section; so if you have ideas, please let any Committee member know.

Finally, the Corporate Code Revisions Committee is open to all members of the Section, and I encourage anyone who has an interest to participate. It is a great way to keep up-to-date with legislative initiatives as well as to develop an understanding of the subtleties and occasional eccentricities of our Codes. If you would like to participate in this year's work, please send me an email at tmcneill@pgfm.com.

REPORT FROM CHAIR OF UCC COMMITTEE

Edgar C. Snow

Jones Day

The Georgia State Bar Association, Business Law Section, UCC Committee held a meeting on March 9, 2004. The following is a summary report of that meeting.

Mike Smith, Communications Director from the Georgia Superior Court Clerks' Cooperative Authority, spoke at the meeting. Mike gave a very helpful demonstration of the Clerk's Cooperative website located at <http://www.gscca.org/> and answered committee member questions.

Among other things, the Committee members present at the meeting discussed the meaning of Georgia UCC Section 9-506(c) in light of the Clerk's Cooperative function as the central filing index for Georgia UCC filings. Section 9-506(c) provides as follows:

“(c) Financing statement not seriously misleading. If a search of the records of the filing office under the debtor’s correct name, using the filing office’s standard search logic, if any, would disclose a financing statement that fails sufficiently to provide the name of the debtor in accordance with subsection (a) of Code Section 11-9-503, the name provided does not make the financing statement seriously misleading.”

Under Georgia UCC Section 9-102(a)(38), the term “filing office” is defined as “an office designated in Code Section 11-9-501 as the place to file a financing statement.” Section 501(a)(2) indicates the general rule that the place to file a financing statement is in the “office of the clerk of the superior court of any county of [Georgia]” After much discussion, Committee members suggested that Section 9-506(c) be amended to clarify that the records of the filing office referred to in this section be changed from the records of an office of a clerk of the superior court of any county to the records of the Clerk's Cooperative.

The members discussed further the Section 9-506(c) “safe harbor” implications of the Clerk's Cooperative not having a “standard search logic.” As currently in operation, the Clerk's Cooperative allows for name “stem” searches, as well as exact name searches. The Committee will undertake further discussions of this issue and make a recommendation to the Clerk's Cooperative.

The Committee also discussed the possible significance of an apparent typographical error in Georgia UCC Section 9-324(a) which, when compared to Revised Article 9 as promulgated by NCCUSL, lacks a comma between “priority” and “if” in the 6th line of Georgia UCC Section 9-324(a).

Because of possible ambiguities arising from this apparent error, the Committee will also recommend an amendment to correct this section.

Finally, the Committee discussed Georgia UCC Sections 9-501(b) and 9-502(b) and whether UCC financing statement filings covering fixtures of a transmitting utility filed with the clerk of a superior court must contain legal descriptions and names of record. After reviewing the definition of “fixture filing” under Georgia UCC Section 102(a)(41), Committee members believed that financing statements covering goods of a transmitting utility which are or are to become fixtures do not need to include legal descriptions or names of record.

The Committee will meet again in the fall of 2004 on a yet to be determined date. We have invited Bill Henning, visiting professor of commercial law at the University of Alabama school of law, to address the topic “The State of the Uniform Commercial Code” and to facilitate a discussion concerning recent NCCUSL revisions to the UCC that have not yet been adopted by Georgia and whether they should be adopted.

SHARE YOUR KNOWLEDGE – GET PUBLISHED

We are accepting submissions for publication in this newsletter. Contact Elizabeth Noe by e-mail at (elizabethnoe@paulhastings.com) as soon as possible to reserve space and to obtain a copy of our submission guidelines. If you have encountered an interesting legal development or issue recently, please consider sharing your knowledge with your colleagues by submitting a piece for publication in this newsletter.

THANK YOU TO OUR SUPPORTERS

On behalf of the Section, we want to express our gratitude to **ICLE in Georgia, Bowne of Atlanta, Inc.** and the **Staff of the State Bar of Georgia** for their assistance in printing and mailing this newsletter, which reaches 1,500 members throughout Georgia and in other states. We depend on the assistance of these supporters to produce this newsletter and value their continued support.