

Senate Bill 373

By: Senators Kennedy of the 18th, Stone of the 23rd, Jones of the 10th, Gooch of the 51st,
Cowsert of the 46th and others

AS PASSED

A BILL TO BE ENTITLED
AN ACT

1 To amend Article 8 of Chapter 3 of Title 14 and Part 6 of Article 4 of Chapter 3 of Title 46
2 of the Official Code of Georgia Annotated, relating to directors and officers of nonprofit
3 corporations and directors and officers of electric membership corporations and foreign
4 electric cooperatives, respectively, so as to change provisions relating to the responsibilities
5 and standard of care of directors and officers of certain corporations; to clarify the ability of
6 directors and officers to rely on other individuals in the performance of their duties; to
7 provide for a rebuttable presumption when directors and officers are acting in good faith; to
8 provide for related matters; to provide for applicability; to repeal conflicting laws; and for
9 other purposes.

10 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

11 style="text-align:center">**SECTION 1.**

12 Article 8 of Chapter 3 of Title 14 of the Official Code of Georgia Annotated, relating to
13 directors and officers of nonprofit corporations, is amended by revising Code Section
14 14-3-830, relating to standards of conduct for directors, as follows:

15 "14-3-830.

16 (a) Unless a different standard is prescribed by law:

17 (1) ~~A~~ a director shall perform his or her duties as a director, ~~including his or~~
18 ~~her duties as a member of a committee:~~

19 (A) ~~In a manner the director believes in good faith to be in the best interests of the~~
20 ~~corporation; and~~

21 (B) ~~With the~~ in good faith and with the degree of care an ordinarily prudent person in
22 a like position would exercise under similar circumstances;

23 (2)(b) In ~~discharging~~ performing his or her duties, a director ~~is entitled to rely on~~
24 ~~information, opinions, reports, or statements, including financial statements and other~~
25 ~~financial data, if prepared or presented by~~ may rely upon:

26 ~~(A)(1) Officers, employees, or agents~~ One or more officers or employees of the
 27 corporation whom the director reasonably believes ~~believed~~ to be reliable and competent
 28 in the matters presented; functions performed; and

29 (2) Information, data, opinions, reports, or statements provided by officers, employees,
 30 or agents of the corporation or by legal counsel, public accountants, investment bankers,
 31 religious authorities, ministers, priests, rabbis, or other persons as to matters involving
 32 the skills, expertise, or knowledge reasonably believed to be reliable and within such
 33 person's professional or expert competence.

34 ~~(B) Legal counsel, public accountants, or other persons as to matters the director~~
 35 ~~reasonably believes are within the person's professional or expert competence;~~

36 ~~(C) A committee of the board of which the director is not a member, as to matters~~
 37 ~~within its jurisdiction, if the director reasonably believes the committee merits~~
 38 ~~confidence; or~~

39 ~~(D) Religious authorities, ministers, priests, rabbis, or other persons whose positions~~
 40 ~~or duties in the corporation the director believes justify reliance and confidence and~~
 41 ~~whom the director believes to be reliable and competent in the matters presented;~~

42 ~~(3) In the instances described in paragraph (2) of this Code section, a director is not~~
 43 ~~entitled to rely if he has knowledge concerning the matter in question that makes reliance~~
 44 ~~otherwise permitted by paragraph (2) of this Code section unwarranted;~~

45 ~~(4) A director is not liable to the corporation, any member, or any other person for any~~
 46 ~~action taken or not taken as a director if the director acted in compliance with this Code~~
 47 ~~section; and~~

48 (c) There shall be a presumption that the process a director followed in arriving at
 49 decisions was done in good faith and that such director exercised ordinary care; provided,
 50 however, that this presumption may be rebutted by evidence that such process constitutes
 51 gross negligence by being a gross deviation from the standard of care of a director in a like
 52 position under similar circumstances.

53 (d) Nothing contained in this Code section shall:

54 (1) In any instance when fairness is at issue, such as consideration of the fairness of a
 55 transaction to the corporation as evaluated under paragraph (4) of subsection (b) of Code
 56 Section 14-3-861, alter the burden of proving the fact or lack of fairness otherwise
 57 applicable;

58 (2) Alter the fact or lack of liability of a director under the Official Code of Georgia
 59 Annotated, including the governance of the consequences of an unlawful distribution
 60 under Code Section 14-3-831 or a conflicting interest transaction under Code
 61 Section 14-3-861;

- 62 (3) Affect any rights to which the corporation or its members may be entitled under
 63 another law of this state or of the United States; or
 64 (4) Deprive a director of the applicability, effect, or protection of the business judgment
 65 rule.
 66 ~~(5)(e)~~ A director shall not be deemed to be a trustee with respect to the corporation or with
 67 respect to any property held or administered by the corporation, including, without limit,
 68 property that may be subject to restrictions imposed by the donor or transferor of such
 69 property."

70 SECTION 2.

71 Said article is further amended by revising Code Section 14-3-842, relating to standards of
 72 conduct for officers, as follows:

73 "14-3-842.

74 (a) Unless a different standard is prescribed by law;

75 ~~(1) An an officer with discretionary authority shall discharge his or her duties under that~~
 76 ~~authority:~~

77 ~~(A) In a manner he or she believes in good faith to be in the best interests of the~~
 78 ~~corporation; and~~

79 ~~(B) With the shall perform his or her duties as an officer in good faith and with the~~
 80 ~~degree of care an ordinarily prudent person in a like position would exercise under~~
 81 ~~similar circumstances;~~

82 ~~(2)(b) In discharging performing his or her duties, an officer is entitled to rely on~~
 83 ~~information, opinions, reports, or statements, including financial statements and other~~
 84 ~~financial data, if prepared or presented by may rely upon:~~

85 ~~(A)(1) Officers, employees, or agents ~~One or more officers or employees of the~~~~
 86 ~~corporation whom the officer reasonably believes believed to be reliable and competent~~
 87 ~~in the matters presented; or functions performed; and~~

88 ~~(B)(2) Information, data, opinions, reports, or statements provided by officers,~~
 89 ~~employees, or agents of the corporation or by legal ~~Legal~~ counsel, public accountants,~~
 90 ~~investment bankers, religious authorities, ministers, priests, rabbis, or other persons as to~~
 91 ~~matters the officer reasonably believes are involving the skills, expertise, or knowledge~~
 92 ~~reasonably believed to be reliable and within the such person's professional or expert~~
 93 ~~competence;~~

94 ~~(3) In the instances described in paragraph (2) of this Code section, an officer is not~~
 95 ~~entitled to rely if he or she has knowledge concerning the matter in question that makes~~
 96 ~~reliance otherwise permitted by paragraph (2) of this Code section unwarranted; and~~

97 ~~(4) An officer is not liable to the corporation, any member, or other person for any action~~
 98 ~~taken or not taken as an officer, if the officer performed the duties of his or her office in~~
 99 ~~compliance with this Code section.~~

100 (c) There shall be a presumption that the process an officer followed in arriving at
 101 decisions was done in good faith and that such officer exercised ordinary care; provided,
 102 however, that this presumption may be rebutted by evidence that such process constitutes
 103 gross negligence by being a gross deviation from the standard of care of an officer in a like
 104 position under similar circumstances.

105 (d) Nothing contained in this Code section shall:

106 (1) In any instance when fairness is at issue, such as consideration of the fairness of a
 107 transaction to the corporation as evaluated under paragraph (4) of subsection (c) of Code
 108 Section 14-3-865, alter the burden of proving the fact or lack of fairness otherwise
 109 applicable;

110 (2) Alter the fact or lack of liability of an officer under the Official Code of Georgia
 111 Annotated, including the governance of the consequences of a conflicting interest
 112 transaction under Code Section 14-3-865;

113 (3) Affect any rights to which the corporation or its members may be entitled under
 114 another law of this state or of the United States; or

115 (4) Deprive an officer of the applicability, effect, or protection of the business judgment
 116 rule."

117 **SECTION 3.**

118 Part 6 of Article 4 of Chapter 3 of Title 46 of the Official Code of Georgia Annotated,
 119 relating to directors and officers of electric membership corporations and foreign electric
 120 cooperatives, is amended by revising Code Section 46-3-303, relating to duty of directors and
 121 officers to act in good faith and with due diligence, care, and skill and reliance on financial
 122 information prepared by others, as follows:

123 "46-3-303.

124 (a) A director shall perform his or her duties as a director in good faith and with the degree
 125 of care an ordinarily prudent person in a like position would exercise under similar
 126 circumstances. ~~Directors and officers shall discharge the duties of their respective~~
 127 positions in good faith and with that degree of diligence, care, and skill which ordinarily
 128 prudent men would exercise under similar circumstances in like positions. ~~In discharging~~
 129 their duties, directors and officers, when acting in good faith, may rely upon financial
 130 information concerning the electric membership corporation when such information is
 131 represented to them by the president of the electric membership corporation or by the
 132 employee of the electric membership corporation having charge of its books of account,

133 ~~or in the form of a written report by an independent or certified public accountant or firm~~
 134 ~~of such accountants, to be correct and to reflect fairly the financial condition of the electric~~
 135 ~~membership corporation.~~

136 (b) In performing his or her duties a director may rely upon:

137 (1) Officers, employees, or agents of the electric membership corporation whom the
 138 director reasonably believed to be reliable and competent in the functions performed; and

139 (2) Information, data, opinions, reports, or statements provided by officers, employees,
 140 or agents of the electric membership corporation or by legal counsel, public accountants,
 141 investment bankers, or other persons as to matters involving the skills, expertise, or
 142 knowledge reasonably believed to be reliable and within such person's professional or
 143 expert competence.

144 (c) There shall be a presumption that the process a director followed in arriving at
 145 decisions was done in good faith and that such director exercised ordinary care; provided,
 146 however, that this presumption may be rebutted by evidence that such process constitutes
 147 gross negligence by being a gross deviation from the standard of care of a director in a like
 148 position under similar circumstances.

149 (d) Nothing contained in this Code section shall:

150 (1) In any instance when fairness is at issue, such as consideration of the fairness of a
 151 transaction to the electric membership corporation as evaluated under paragraph (3) of
 152 subsection (a) of Code Section 46-3-305, alter the burden of proving the fact or lack of
 153 fairness otherwise applicable;

154 (2) Alter the fact or lack of liability of a director under the Official Code of Georgia
 155 Annotated, including the governance of the consequences of a conflicting interest
 156 transaction under Code Section 46-3-305;

157 (3) Affect any rights to which the electric membership corporation or its members may
 158 be entitled under another law of this state or of the United States; or

159 (4) Deprive a director of the applicability, effect, or protection of the business judgment
 160 rule."

161 **SECTION 4.**

162 Said part is further amended by revising Code Section 46-3-303.1, relating to standards of
 163 care for directors and officers in discharge of duties on or after July 1, 1988 and reliance
 164 upon financial information, as follows:

165 "46-3-303.1.

166 ~~(a)(1) A director shall discharge his duties as director, including his duties as a member~~
 167 ~~of a committee:~~ An officer shall perform his or her duties as an officer in

168 ~~(A) In good faith; and~~

169 ~~(B) With the~~ with the degree of care an ordinarily prudent person in a like position
 170 would exercise under similar circumstances.

171 ~~(2)(b) In performing his or her duties, an officer may rely upon~~ In discharging his duties,
 172 ~~a director is entitled to rely on information, opinions, reports, or statements, including~~
 173 ~~financial statements and other financial data, if prepared or presented by:~~

174 ~~(A)(1) Officers, employees, or agents~~ One or more officers or employees of the electric
 175 membership corporation whom the director ~~officer~~ reasonably believes ~~believed~~ to be
 176 reliable and competent in the ~~matters presented;~~ functions performed; and

177 ~~(B)(2) Information, data, opinions, reports, or statements provided by officers,~~
 178 ~~employees, or agents of the electric membership corporation or by legal~~ Legal ~~counsel,~~
 179 ~~public accountants, investment bankers, or other persons as to matters the director~~
 180 ~~reasonably believes are~~ involving the skills, expertise, or knowledge reasonably believed
 181 to be reliable and ~~within the~~ such ~~person's professional or expert competence; or.~~

182 ~~(C) A committee of the board of directors of which he is not a member if the director~~
 183 ~~reasonably believes the committee merits confidence.~~

184 ~~(3) A director is not acting in good faith if he has knowledge concerning the matter in~~
 185 ~~question that makes unwarranted the reliance otherwise permitted by paragraph (2) of this~~
 186 ~~subsection.~~

187 ~~(4) A director is not liable for any action taken as a director or any failure to take any~~
 188 ~~action if he performed the duties of his office in compliance with this subsection.~~

189 ~~(b)(1) An officer with discretionary authority shall discharge his duties under that~~
 190 ~~authority:~~

191 ~~(A) In good faith; and~~

192 ~~(B) With the care an ordinarily prudent person in a like position would exercise under~~
 193 ~~similar circumstances.~~

194 ~~(2) In discharging his duties, an officer is entitled to rely on information, opinions,~~
 195 ~~reports, or statements, including financial statements and other financial data, if prepared~~
 196 ~~or presented by:~~

197 ~~(A) One or more officers or employees of the electric membership corporation whom~~
 198 ~~the officer reasonably believes to be reliable and competent in the matters presented;~~
 199 ~~or~~

200 ~~(B) Legal counsel, public accountants, investment bankers, or other persons as to~~
 201 ~~matters the officer reasonably believes are within the person's professional or expert~~
 202 ~~competence.~~

203 ~~(3) An officer is not acting in good faith if he has knowledge concerning the matter in~~
 204 ~~question that makes unwarranted the reliance otherwise permitted by paragraph (2) of this~~
 205 ~~subsection.~~

- 206 ~~(4) An officer is not liable for any action as an officer or any failure to take any action~~
 207 ~~if he performed the duties of his office in compliance with this subsection.~~
- 208 (c) There shall be a presumption that the process an officer followed in arriving at
 209 decisions was done in good faith and that such officer exercised ordinary care; provided,
 210 however, that this presumption may be rebutted by evidence that such process constitutes
 211 gross negligence by being a gross deviation from the standard of care of an officer in a like
 212 position under similar circumstances. ~~The general standards of care and conduct for~~
 213 ~~actions of directors or officers of electric membership corporations, which actions occur~~
 214 ~~on July 1, 1988, shall be as provided in this Code section and not as provided in Code~~
 215 ~~Section 46-3-303.~~
- 216 (d) Nothing contained in this Code section shall: ~~This Code section shall not relieve any~~
 217 ~~director or officer from liability for the payment of taxes.~~
- 218 (1) In any instance when fairness is at issue, such as consideration of the fairness of a
 219 transaction to the electric membership corporation as evaluated under paragraph (3) of
 220 subsection (a) of Code Section 46-3-305, alter the burden of proving the fact or lack of
 221 fairness otherwise applicable;
- 222 (2) Alter the fact or lack of liability of an officer under the Official Code of Georgia
 223 Annotated, including the governance of the consequences of a conflicting interest
 224 transaction under Code Section 46-3-305;
- 225 (3) Affect any rights to which the electric membership corporation or its members may
 226 be entitled under another law of this state or of the United States; or
- 227 (4) Deprive an officer of the applicability, effect, or protection of the business judgment
 228 rule."

229 **SECTION 5.**

230 Said part is further amended by revising Code Section 46-3-305, relating to interested
 231 directors and officers, as follows:

232 "46-3-305.

- 233 (a) No contract or transaction between an electric membership corporation and one or
 234 more of its directors or officers, or between an electric membership corporation and any
 235 other corporation, partnership, association, or other organization in which one or more of
 236 its directors or officers are directors or officers or have a financial interest, shall give rise
 237 to an award of damages or other sanctions or be void or voidable solely for this reason, or
 238 solely because the director or officer is present at or participates in the meeting of the board
 239 of directors or committee thereof which authorizes the contract or transaction, or solely
 240 because ~~his or~~ any of their votes are counted for such purpose, if:

241 (1) The material facts as to his or her interest and as to the contract or transaction are
242 disclosed or are known to the board of directors or the committee, and the board or
243 committee in good faith authorizes the contract or transaction by the affirmative votes of
244 a majority of the disinterested directors, even though the disinterested directors are less
245 than a quorum; or

246 (2) The material facts as to his or her interest and as to the contract or transaction are
247 disclosed or are known to the members, and the contract or transaction is specifically
248 approved or ratified in good faith by vote of such members; or

249 (3) The contract or transaction is fair as to the electric membership corporation as of the
250 time it is authorized, approved, or ratified by the board, a committee thereof, or the
251 members.

252 (b) Interested directors may be counted in determining the presence of a quorum at a
253 meeting of the board or committee thereof which authorizes the contract or transaction."

254 **SECTION 6.**

255 This Act shall apply only to causes of action arising on or after July 1, 2020.

256 **SECTION 7.**

257 All laws and parts of laws in conflict with this Act are repealed.