CHAPTER 1

General Provisions

ARTICLE 1

Short Title and Reservation of Power

**SECTION 33‑1‑101.** Short title.

 Chapters 1 through 20 of Title 33 is known and may be cited as the “South Carolina Business Corporation Act of 1988”.

HISTORY: Derived from 1976 Code Section 33‑1‑10 [1962 Code Section 12.11.1; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

The short title provided by section 1.01 (Section 33‑1‑101) creates a convenient name for the state’s business corporation act.

See the Introduction for a general description of the development of the Model Act, the purposes it is intended to serve, the principles under which the 1984 Revised Model Business Corporation Act was prepared, and the roles of the Cross References and Official Comments.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section specifies that “the act” encompasses Chapters 1 through 20 of Title 33 of the 1976 Code. Chapters 1 through 18 of this act replace Act 146 of 1981, referred to in the South Carolina Reporters’ Comments as the 1981 South Carolina Business Corporation Act, which in turn replaced Act 847 of 1962, referred to in these comments as the 1962 South Carolina Business Corporation Act. Chapter 19, which governs professional corporations, replaces Act 194 of 1962, codified as Chapter 51 of Title 33 of the 1976 Code, referred to in these comments as the 1962 South Carolina Professional Corporation Act.

This act is derived from the 1984 Model Business Corporation Act (referred to in both the official and South Carolina reporters’ comments as the “1984 Model Act” and sometimes as the “Model Act”), promulgated by the American Bar Association Committee on Corporate Laws of the Section of Corporation, Banking and Business Law. The Official Comments following each section were approved by the Committee on Corporate Laws and are reproduced with permission. As is pointed out in the introduction to the 1984 Model Act, referred to in the second paragraph of the Official Comments to this section, the Official Comments describe the substantive decisions made in the drafting process and in many cases explain the meaning and purpose of the section.

The South Carolina Reporters’ Comments which follow each section were drafted as part of the preparation of this act by the Reporters to the Corporate Code Study Committee appointed in November, 1985, by Senator Marshall Williams of the Senate Judiciary Committee. These South Carolina Reporters’ Comments explain the purpose of each section, the differences, if any, between the section and the 1981 South Carolina Business Corporation Act, and any differences between the section and the official text of the 1984 Act.

The Official and South Carolina Reporters’ Comments are intended to assist those who use and interpret this act to determine the intention of the drafters and the interrelationship between the various sections. As such, the comments serve the same function and purpose as the Comments to the Uniform Commercial Code, Title 36, of the 1976 Code. See Farnsworth and Honnold, COMMERCIAL LAW (3rd ed., 1976), pp. 8‑10. They can be useful particularly in a state like South Carolina because the State does not have a large body of corporate case law. The comments are not, however, part of the statutory law and, therefore, are not binding on any court or other adjudicatory body.

The cross references following each section were prepared by the 1984 Model Act Reporter for the convenience of the user. These cross references, which have been modified by the South Carolina Reporters, are not exhaustive and are not a substitute for a careful review of the entire act when researching a corporate law issue.

The Code section numbering system used in this act differs somewhat from the Model Act. Whenever the Official Comments mention a specific section number, the section number of the 1976 Code is placed beside it in parenthesis.

The derivation clause following the South Carolina Reporters’ Comments gives the 1984 Model Act section from which the section is derived. This enables persons researching corporate law issues to compare the South Carolina provisions with the Model Act Official Text and to obtain easy access to the section by section case and law review annotations in the Model Business Corporation Act Annotated (3rd ed., 1984).

DERIVATION: 1984 Model Act Section 1.01.

CROSS REFERENCES

Application of act to existing domestic corporation, see Section 33‑20‑101.

Application of act to qualified existing foreign corporation, see Section 33‑20‑102.

Close corporations, see Statutory Close Corporation Supplement, see Sections 33‑18‑101 et seq.

Professional corporations, see Professional Corporation Supplement, see Sections 33‑19‑101 et seq.

Saving provisions, see Section 33‑20‑105.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:1 , Introduction‑South Carolina Business Corporation Act.

**SECTION 33‑1‑102.** Reservation of power to amend or repeal.

 The General Assembly of South Carolina has power to provide regulations regarding Chapters 1 through 20 of this Title and to amend or repeal all or any part of Chapters 1 through 20 of Title 33 or its regulations at any time; and all domestic and foreign corporations subject to Chapters 1 through 20 of this Title are governed by the amendment or repeal.

HISTORY: Derived from 1976 Code Section 33‑1‑90 [1962 Code Section 12‑11.9; 1962 (52) 1996; 1981 Act No. 146 Section 2; Repealed 1988 Act No. 444 Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Provisions similar to section 1.02 (Section 33‑1‑102) have their genesis in Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat) 518 (1819), which held that the United States Constitution prohibited the application of newly enacted statutes to existing corporations while suggesting the efficacy of a reservation of power similar to section 1.02 (Section 33‑1‑102). The purpose of section 1.02 (Section 33‑1‑102) is to avoid any possible argument that a corporation has contractual or vested rights in any specific statutory provision and to ensure that the state may in the future modify its corporation statutes as it deems appropriate and require existing corporations to comply with the statutes as modified.

All articles of incorporation or certificates of authority granted under the Model Act are subject to the reservation of power set forth in section 1.02 (Section 33‑1‑102). Further, corporations “governed” by this Act—which includes all corporations formed or qualified under earlier, general incorporation statutes that contain a reservation of power—are also subject to the reservation of power of section 1.02 (Section 33‑1‑102) and bound by subsequent amendments to the Act.

Many states have constitutional provisions mandating the reservation of power to amend or modify corporate statutes and charters. In these states section 1.02 (Section 33‑1‑102) is also supported by specific constitutional authorization.

SOUTH CAROLINA REPORTERS’ COMMENTS

1. History.

In 1841 the Legislature passed Act 2846 which provided in Section XLI:

“XLI. Be it further enacted, That it shall become part of the charter of every corporation, which shall at the present, or any succeeding session of the General Assembly, receive a grant of a charter, or any renewal, amendment or modification thereof, (unless the Act granting such charter, renewal, amendment or modification, shall in express terms except it,) that every charter of incorporation granted, renewed, or modified, as aforesaid, shall at all times remain subject to amendment, alteration or repeal, by the Legislative authority.”

(Reported in XI Statutes at Large of S.C. 177, Republican Print. Co. 1873) This act was adopted pursuant to the authority of Article VIII, Section 2, of the Constitution of 1790, which provided:

“The rights, privileges, immunities and estates of both civil and religious societies, and of corporate bodies, shall remain as if the Constitution of this State had not been altered or amended.”

(This language was adopted verbatim as Article VIII, Section 2, of the Constitution of 1861.).

Upon adoption of the Constitution of 1868 which eliminated the need for special chartering of corporations by the Legislature, and stated at Article XII, Section 1, that “corporations may be formed under general laws, but all such laws may from time to time be altered or repealed,” the legislature thereupon changed the language of the prior act in adopting Act 288, 19 Statutes of South Carolina, 546, Section 21 (1886), which stated:

“It shall be deemed a part of the charter of every corporation created under the provisions of any general law, and of every charter granted, renewed or amended by Act or Joint Resolution of the General Assembly, (unless such Act or Joint Resolution shall, in express terms, declare the contrary,) that such charter, and every amendment and renewal thereof, shall always remain subject to amendment, alteration or repeal by the General Assembly.”

This “reserved power to amend” provision was codified in 1902 as S.C. Code Ann. Section 1842 (State Company, 1902). The identical language was carried forward through various subsequent codifications, namely: S.C. Code Ann. Section 2783 (Michie, 1912); S.C. Civil Code Section 4250 (R.L. Bryan, 1922); S.C. Code Ann. Section 7676 (Michie, 1932); S.C. Code Ann. Section 7676 (Jacobs Press, 1942); S.C. Code Ann. Section 12‑401 (Michie, 1952); and S.C. Code Ann. Section 12‑401 (Michie, 1962).

Effective January 1, 1964, the language of the reserved powers section was changed slightly to read:

“Section 12‑11.9. Reservation of power by General Assembly.—The General Assembly of South Carolina reserves at all times the power and right:

(a) to prescribe, as it may deem advisable, regulations, provisions, limitations, and requirements which shall be binding upon any and all corporations, domestic and foreign, subject to the provisions of chapters 1.1 to 1.14 of this Title, and.

(b) to amend, repeal, or modify chapters 1.1 to 1.14 of this Title, in whole or in part, at pleasure. (1962 (52) 1996.)”.

S.C. Code Ann. Section 12‑11.9 (Michie, 1975 Supplement).

This language was again codified as Section 33‑1‑90 in the 1976 Code and has been in place until the adoption of this act.

ARTICLE IX, Section 2, of the Constitution of 1895, which remained in place until 1971, contained the following enabling language:

“Section 2. No charter of incorporation shall be granted, changed or amended by special law, except in the case of such charitable, educational, penal or reformatory corporations as may be under the control of the State, or may be provided for in this Constitution, but the General Assembly shall provide by general laws for changing or amending existing charters, and for the organization of all corporations hereafter to be created, and any such law so passed, as well as all charters now existing or hereafter created, shall be subject to future repeal or alteration: Provided, That the General Assembly may by a two‑thirds vote of each house on a concurrent resolution allow a Bill for a special charter to be introduced, and when so introduced may pass the same as other Bills.”

In 1971, the phrase “any such law [relating to corporations] so passed as well as all [corporate] charters now existing or hereafter created shall be subject to future repeal or alteration” was deleted.

In spite of this deletion, there would not seem to be any implication that the Legislature no longer has the constitutional right to adopt amended statutes that may modify existing rights, duties, and responsibilities of corporations, shareholders, directors, and officers. Article IX, Section 2, of the Constitution continues to provide that the General Assembly shall adopt statutes governing corporations, and implicit within this grant is the power to amend. Since the corporate code, even before this constitutional amendment, always has mentioned the Legislature’s reserved power to amend, there should be no question that this reserved power is an existing provision of all corporate charters adopted since 1841, as if it were written therein.

As early as 1878, the United States Supreme Court in Hoge v. Richmond and D.R.R. 99 U.S. 348 (1878) recognized the right of the South Carolina Legislature to change the provisions regulating a corporation’s charter, and that such reserved power was a provision of each charter as if it had been specifically set forth in the charter.

A description of other cases dealing with the State’s reserved power to amend these statutes and thus modify existing corporate charters is collected in the Code volumes containing the South Carolina Constitution at Article IX, Section 2. See e.g., Witt v. Peoples State Bank 166 S.C. 1, 164 S.E. 306 (1932) (charters of state banks are subject to the state’s reserved powers).

2. Non‑Model Act Provision.

The South Carolina statute, different from the Model Act, retains the language in the 1981 South Carolina Business Corporation Act giving the Legislature the power to adopt regulations regarding the act.

DERIVATION: 1984 Model Act Section 1.02.

CROSS REFERENCES

Application of act to existing domestic corporation, see Section 33‑20‑101.

Application of act to qualified existing foreign corporation, see Section 33‑20‑102.

Saving provisions, see Section 33‑20‑105.

**SECTION 33‑1‑103.** Designation of representation in magistrates’ court; unauthorized practice of law.

 A corporation or partnership, as defined in this section, may designate an employee or principal of the corporation or partnership to represent it in magistrates’ court. This designation must be in writing and must be submitted to the magistrate at the time the initial pleading in the case is filed by the party. Notwithstanding the provisions of Chapter 5 of Title 40 or any other provision of law, the person so designated, while representing the corporation or partnership in magistrates’ court, is not engaging in the unauthorized practice of law.

 As used in this section, a corporation or partnership is defined as a general partnership, a limited liability partnership, a limited liability company, a limited partnership, a professional association, a professional corporation, a nonprofit corporation, a business corporation, or a statutory close corporation.

HISTORY: 2002 Act No. 201, Section 1.

Library References

Attorney and Client 11(2.1).

Corporations 508.

Westlaw Topic Nos. 101, 45.

C.J.S. Attorney and Client Sections 29 to 32.

C.J.S. Corporations Sections 568, 715.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Attorney and Client Section 4, Unauthorized Practice of Law.

ARTICLE 2

Filing Documents

**SECTION 33‑1‑200.** Filing requirements.

 (a) A document must satisfy the requirements of this section, and of any other section that adds to or varies from these requirements, to be entitled to filing by the Secretary of State.

 (b) Chapters 1 through 20 of this Title must require or permit filing the document in the office of the Secretary of State.

 (c) The document must contain the information required by Chapters 1 through 20 of this Title. It may contain other information as well.

 (d) The document must be in a medium and form as permitted by the Secretary of State.

 (e) The document must be in the English language. A corporate name need not be in English if written in English letters or Arabic or Roman numerals, and the certificate of existence required of foreign corporations need not be in English if accompanied by a reasonably authenticated English translation.

 (f) The document must be executed:

 (1) by the chairman of the board of directors of a domestic or foreign corporation, or by its president, or by another of its officers;

 (2) if directors have not been selected or the corporation has not been formed, by an incorporator; or

 (3) if the corporation is in the hands of a receiver, trustee, or other court‑appointed fiduciary, by that fiduciary.

 (g) The person executing the document shall sign it and state beneath or opposite his signature his name and the capacity in which he signs. The document may but need not contain: (1) the corporate seal, (2) an attestation by the secretary or an assistant secretary, and (3) an acknowledgment, verification, or proof.

 (h) If the Secretary of State has prescribed a mandatory form for the document under Section 33‑1‑210, the document must be in or on the prescribed form.

 (i) The document must be delivered to the office of the Secretary of State for filing and must be accompanied by one exact or conformed copy (except as provided in Sections 33‑5‑103 and 33‑15‑109), the correct filing fee, and any franchise tax, license fee, or penalty required by the act or other law.

HISTORY: Derived from 1976 Code Section 33‑1‑40 [1962 Code Section 12‑11.4; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], Section 33‑1‑50 [1962 Code Section 12‑11.5; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], Section 33‑1‑60 [1962 Code Section 12‑11.6; 1962 (52) 1996; 1963 (53) 327; 1964 (53) 1910; 1968 (55) 3046; 1970 (56) 1932; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], Section 33‑1‑70 [1962 Code Section 12‑11.7; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed 1988 Act No. 444, Section 2], Section 33‑7‑30 [1962 Code Section 12‑14.3; 1952 Code Section 12‑58; 1942 Code Sections 7726, 7729; 1932 Code Sections 7726, 7729; Civ. C. ‘22 Sections 4301, 4304; Civ. C. ‘12 Sections 1883, 2834; Civ. C. ‘02 Sections 1880, 1883; 1896 (22) 92, 94; 1897 (22) 522; 1900 (23) 386; 1903 (24) 75; 1920 (31) 754; 1923 (33) 157; 1936 (39) 1337; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], and Section 33‑7‑40 [1962 Code Section 12‑14.4; 1962 (52) 1996; 1976 Act No. 553, Section 2; 1981 Act No. 146, Section 2; Repealed 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2; 2005 Act No. 101, Section 1, eff June 1, 2005.

OFFICIAL COMMENT

Section 1.20 (Section 33‑1‑200) standardizes the filing requirements for all documents required or permitted by the Model Act to be filed with the secretary of state. In a few instances, other sections of the Act impose additional requirements which must also be complied with if the document in question is to be filed. Section 1.20 (Section 33‑1‑200) relates only to documents which the Model Act expressly requires or permits to be filed with the secretary of state; it does not authorize or direct the secretary of state to accept or reject for filing other documents relating to corporations and does not treat documents required or permitted to be filed under other statutes.

The purposes of the filing requirements of chapter 1 are: (1) to simplify the filing requirements by the elimination of formal or technical requirements that serve little purpose, (2) to minimize the number of pieces of paper to be processed by the secretary of state, and (3) to eliminate all possible disputes between persons seeking to file documents and the secretary of state as to the legal efficacy of documents.

The requirements of section 1.20 (Section 33‑1‑200) may be summarized as follows:

1. FORM.

To be eligible for filing, a document must be typed or printed and in the English language (except to the limited extent permitted by section 1.20(e) (Section 33‑1‑200(e)). The secretary of state is not authorized to prescribe forms (except to the extent permitted by section 1.21 (Section 33‑1‑210)) and as a result may not reject documents on the basis of form (see section 1.25 (Section 33‑1‑250)) if they contain the information called for by the specific statutory requirement and meet the minimal formal requirements of this section.

2. EXECUTION.

To be filed a document must simply be executed by a corporate officer. Section 1.21(f) (Section 33‑1‑210(f)). No specific corporate officer is designated as the appropriate officer to sign though the signing officer must designate his office or the capacity in which he signs the document. Among the officers who are expressly authorized to sign a document is the chairman of the board of directors, a choice that may be appropriate if the corporation has a board of directors but has not appointed officers. If a corporation has not been formed or has neither officers nor a board of directors, an incorporator may execute the document.

The requirement in earlier versions of the Model Act and in many state statutes that documents must be acknowledged or verified as a condition for filing has been eliminated. These requirements serve little purpose in connection with documents filed under corporation statutes. (See in this connection section 1.29 (Section 33‑1‑290), which makes it a criminal offense for any person to sign a document for filing with knowledge that it contains false information.) On the other hand, many organizations, like lenders or title companies, may desire that specific documents include acknowledgements, verifications, or seals; section 1.21(g) (Section 33‑1‑210(g)) therefore provides that the addition of these forms of execution does not affect the eligibility of the document for filing.

3. CONTENTS.

A document must be filed by the secretary of state if it contains the information required by the Model Act. The document may contain additional information or statements and their presence is not ground for the secretary of state to reject the document for filing. These documents must be accepted for filing even though the secretary of state believes that the language is illegal or unenforceable. In view of this very limited discretion granted to secretaries of state under this section, section 1.25(d) (Section 33‑1‑250(d)) defines the secretary of state’s role as “ministerial” and provides that no inference or presumption arises from the fact that the secretary of state accepted a document for filing. See the Official Comments to sections 1.25 (Section 33‑1‑250) and 1.30 (Section 33‑1‑300).

4. NUMBER OF COPIES.

Section 1.20(i) (Section 33‑1‑200(i)) requires that a document filed with the secretary of state must be accompanied by “one exact or conformed copy.” The requirement in early versions of the Model Act and in many state statutes that “duplicate originals” (each being executed as an original document) be submitted has been eliminated. Under section 1.20(i) (Section 33‑1‑200(i)) an “exact” copy is a reproduction of the executed original document by photographic or xerographic process; a “conformed” copy is a copy on which the existence of signatures is entered or noted on the copy. The substitution of exact or conformed copies for duplicate originals reflects advances in the art of office copying machines that permit the routine reproduction of exact copies of executed documents. However, a person submitting “duplicate originals” meets the requirement of this section since the secretary of state may treat the duplicate original as a “conformed copy.” The reasons for requiring an exact or conformed copy of a filed document to accompany the signed original, and the processing of these documents by the secretary of state, are discussed in the Official Comment to section 1.25 (Section 33‑1‑250).

SOUTH CAROLINA REPORTERS’ COMMENTS

1. This provision contains the mechanical requirements for preparing various documents. It is similar to Sections 33‑1‑40 through 33‑1‑70, 33‑7‑30, and 33‑7‑40 of the 1981 South Carolina Business Corporation Act.

2. Content of Filed Documents.

Nothing in this section specifies the content of the various documents required or permitted to be filed. For these substantive requirements, please see:

Section 33‑1‑280. Certificate of existence (good standing).

Section 33‑2‑102. Contents of the articles of incorporation.

Section 33‑4‑102. Reserved name.

Section 33‑5‑102. Change of registered agent.

Section 33‑10‑106. Articles of amendment.

Section 33‑11‑105. Articles of merger or share exchange.

Section 33‑14‑103. Articles of dissolution.

Section 33‑15‑103. Application for certificate of authority.

Section 33‑15‑108. Change of registered office of foreign corporation.

Section 12‑19‑20. Annual report.

3. Mechanical Provisions.

Subsection (a) is similar to Section 33‑1‑60(a) of the 1981 South Carolina Business Corporation Act. It establishes the requirements as to the form and method of execution for a document to be filed with the Secretary of State. This provision, as its predecessors, has no application for executing other documents such as a corporate deed. Subsection (b) is new but is merely ministerial. Subsection (c) is new and adds explicit language that a document may contain additional information. This may be important particularly in filing articles which include nonstandard provisions.

All filed documents must be typed (printed) and be in English. Although prior law was not specific on these provisions, these requirements were implied and certainly reflect existing custom. One original and a conformed or “xerox” copy still must be filed. See Section 33‑1‑200(i).

4. Who May Execute.

Under prior law, provision was made for directors and shareholders to execute documents for filing (see Section 33‑1‑40(b)(2)(B), (C), and (D) of the 1981 South Carolina Business Corporation Act). This power or right has been deleted. Further, the revision anticipates that after incorporation the chairman of the board, rather than the president, may be the primary responsible officer for executing documents. Many corporations will not normally have a chairman of the board. Therefore, this section clarifies the Model Act provision in stating that the president or other appropriate officer has the right and power to execute documents for filing. With domestic South Carolina corporations, it is more likely that most filings will be signed by the president. The new law adds the power of a court‑appointed fiduciary to execute documents.

In keeping with prior law, the person must sign his name, presumably in ink as has always been the custom (Section 33‑1‑40(b) of the 1981 South Carolina Business Corporation Act), and designate his capacity either opposite, or “below”, his name (subsection (g)).

5. Verification.

Although documents such as the articles of incorporation previously required a verification, and other documents required an attestation, neither step is now required for filing any document (new subsection (g)). Thus, Section 33‑1‑50 of the 1981 South Carolina Business Corporation Act which sets forth the steps required to verify has been deleted.

The optional verification now means whatever the corporation desires. A verification can be included in any filed document (Section 33‑1‑200(c) and (g)). Companies are not required to but may follow the prior procedure of having a certificate signed by each person who executed the document, which certificate would verify that each signer:

(1) has read and understands the meaning and purport of the statements contained in the document;.

(2) asserts that the statements are true or he is informed or believes that the statements are true;.

(3) has signed the document, and, in case of one signing in a representative capacity, that he had the authority so to sign.

6. Seal.

Under both the new subsection (g) and prior law, the use of the corporate seal is optional (see Section 33‑1‑70 of the 1981 South Carolina Business Corporation Act). Under prior law, if it was affixed to a document, this was prima facie evidence that the document was executed by proper corporate authority. This no longer will be the case.

It seems unlikely that the removal of this presumption will have any negative effect on title searching, (where abstractors are more likely to rely on “certified” minutes) or in the introduction of corporate documents in litigation. These would seem to be the only areas which previously might have benefited by this presumption.

7. Technical Deletions.

Many obvious steps, previously set forth in the statute, such as comparing the original and conformed copy and returning the copy, are deleted as unnecessary (Section 33‑1‑60(a)(3) through (5) of the 1981 South Carolina Business Corporation Act). A title for each document is no longer required (Section 33‑1‑40(d) of the 1981 South Carolina Business Corporation Act), and no longer must the address of the current registered office be included with each filed document.

8. Local Filing of Name Changes.

Although for years there has been no requirement that the articles or other corporate documents be filed with a local office [see Folk, Reconsiderations and Prospects 15 S.C.L. Rev. 467, 469‑471 (1963)], Section 33‑1‑60(a)(6) of the 1981 South Carolina Business Corporation Act provided that any corporate name change for any corporation owning real property had to be filed in the register of mesne conveyances office in order to provide notice to subsequent purchasers. This requirement is being continued and is set forth as Section 33‑4‑104. This filing requirement applies where the corporation simply changes its name, or where the name change is the result of a merger, share exchange, or reorganization.

DERIVATION: 1984 Model Act Section 1.20.

Effect of Amendment

The 2005 amendment, in subsection (d), substituted “in a medium and form as permitted by the Secretary of State” for “typewritten or printed”.

CROSS REFERENCES

Certificate of authority for foreign corporation, see Section 33‑15‑103.

Change of name filing when real property owned, see Section 33‑4‑104.

Corporate name, see Section 33‑4‑101 et seq.; Section 33‑15‑106.

Correcting filed document, see Section 33‑1‑240.

“Deliver” includes mail, see Section 33‑1‑400.

Effective time and date of filing, see Section 33‑1‑230.

Filing fees, see Section 33‑1‑220.

Forms, see Section 33‑1‑210.

Penalty for signing false document, see Section 33‑1‑290.

Secretary of corporation, see Section 33‑1‑400.

Secretary of State’s filing duty, see Section 33‑1‑250.

Library References

Corporations 17.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 25 to 27, 33.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:5 , Formation‑Filing Articles of Incorporation.

South Carolina Legal and Business Forms Section 1:34 , Official Forms.

South Carolina Legal and Business Forms Section 1:59 , Formation‑Transmittal Letter.

Attorney General’s Opinions

Powers and duties of Secretary of State in filing articles of incorporation for domestic corporations are ministerial in nature (interpreting former law). 1984 Op Atty Gen, No. 84‑35, p. 78.

NOTES OF DECISIONS

In general 1

1. In general

Former Code 1962 Section 12‑59 did not leave the issuance of the corporate charter to the discretion of the Secretary of State, once the preliminary statutory requirements had been met. In such event the statute plainly provided that he “shall issue” a certified copy of the declaration which shall constitute the charter of the corporation. Where an application met all of the requirements of the statutes, the Secretary of State was required to issue a charter. Commonwealth Inv. Co. of Columbia v. Thornton (S.C. 1964) 244 S.C. 146, 135 S.E.2d 762.

**SECTION 33‑1‑210.** Forms.

 (a) The Secretary of State may prescribe and furnish on request forms for:

 (1) an application for a certificate of existence,

 (2) a foreign corporation’s application for a certificate of authority to transact business in this State,

 (3) a foreign corporation’s application for a certificate of withdrawal, and

 (4) in conjunction with the Department of Revenue, the annual report. If the Secretary of State so requires, use of these forms is mandatory. The Secretary of State, through regulation, may prescribe a mandatory form in regard to any other forms required or permitted by Chapters 1 through 20 of this Title to be filed in his office. All such mandatory forms must comply with all statutory requirements contained in Chapters 1 through 20 of this Title.

 (b) The Secretary of State may prescribe and furnish on request forms for other documents required or permitted to be filed by Chapters 1 through 20 of this Title but their use is not mandatory.

HISTORY: 1988 Act No. 444, Section 2; 1993 Act No. 181, Section 512.

OFFICIAL COMMENT

As described in the Official Comment to section 1.20 (Section 33‑1‑200), documents are entitled to filing under the Model Act if they meet the substantive and formal requirements of the Act; they may also contain additional information if the person submitting the document so elects. See the Official Comments to sections 1.20 (Section 33‑1‑200) and 1.25 (Section 33‑1‑250). In these circumstances it is not appropriate to vest the secretary of state with general authority to establish mandatory forms for use under the Model Act. Certain types of reports and requests for documents may be processed efficiently only if uniform forms are prescribed by the secretary of state. Certificates of existence, for example, should require specific information located at specific places on the form; similarly, processing of large‑volume, largely routine filings is expedited if standardized forms are required. Also, the disclosure requirements of the annual report may be administered on a systematic basis if a standardized form is mandated. Section 1.21(a)(Section 33‑1‑210(a)) recognizes that these considerations may exist in limited cases, and expressly enumerates those forms for which the secretary of state is authorized to establish mandatory forms.

Section 1.21(b) (Section 33‑1‑210(b)) authorizes (but does not require) the secretary of state to prepare forms suitable for use for other documents required or permitted to be filed under the Act. However, the use of these forms is permissive and cannot be required by the secretary of state.

SOUTH CAROLINA REPORTERS’ COMMENTS

Although under the previous law there was no explicit statutory authority for the Secretary of State to promulgate required forms, the Secretary has developed mandatory forms and in the past has developed a form of annual report. These forms have been routinely used, and making their use mandatory by statute will merely continue existing policy.

Different from the Model Act, this Section 33‑1‑210 permits the Secretary of State to adopt by regulation other mandatory forms. Any such additional form, such as a required articles of incorporation format, will be valid only if it meets all the requirements of this act. The need for standardization is important primarily in regard to simplifying the review process and facilitating the clerical processing of the various applications. The Secretary of State’s office will be able to review more quickly and then file documents if standard forms are used. This will save time for South Carolina corporations and make the Secretary of State’s office more efficient. There is little risk that any additional forms might not be sufficiently flexible to meet a particularly unique need, since Section 33‑1‑200(c) states that any filed document may contain any additional information which the client desires. By requiring that any future mandatory forms be promulgated through the regulation process, lawyers and affected corporations will have an opportunity to raise any concern that the proposed forms might either not meet statutory requirements or might cause practical problems (or both).

DERIVATION: 1984 Model Act Section 1.21.

CROSS REFERENCES

Annual report, see Sections 12‑20‑30 and 33‑16‑220.

Application for certificate of authority, see Section 33‑15‑103.

Application for certificate of withdrawal, see Section 33‑15‑200.

Certificate of existence, see Section 33‑1‑280.

Effective time and date of filing, see Section 33‑1‑230.

Filing fees, see Section 33‑1‑220.

Filing requirements, see Section 33‑1‑200.

Library References

Corporations 17, 338, 644, 651.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 25 to 27, 33, 542, 900, 919.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:34 , Official Forms.

**SECTION 33‑1‑220.** Filing, service, and copying fees.

 (a) The Secretary of State shall collect the following fees when the documents described in this subsection are delivered to him for filing:

|  |  |  |
| --- | --- | --- |
|  |  |  |
|   | DOCUMENT | FEE |
| (1) | Articles of incorporation | $10.00. |
| (2) | Application for use of indistinguishable name | $10.00. |
| (3) | Application for reserved name | $10.00. |
| (4) | Notice of transfer of reserved name | $ 3.00. |
| (5) | Application for registered name | $10.00. |
| (6) | Application for renewal of registered name | $10.00. |
| (7) | Corporation’s statement of change of registered agent or registered office or both | $10.00. |
| (8) | Agent’s statement of change of registered office for each affected corporation | $ 2.00. |
| (9) | Agent’s statement of resignation | $ 3.00. |
| (10) | Amendment of articles of incorporation | $10.00. |
| (11) | Restatement of articles of incorporation with amendment of articles | $10.00. |
| (12) | Articles of merger or share exchange | $10.00. |
| (13) | Articles of dissolution | $10.00. |
| (14) | Articles of revocation of dissolution | $10.00. |
| (15) | Certificate of administrative dissolution | No fee. |
| (16) | Application for reinstatement following administrative dissolution | $25.00. |
| (17) | Certificate of reinstatement | No fee. |
| (18) | Certificate of judicial dissolution | No fee. |
| (19) | Application for certificate of authority | $10.00. |
| (20) | Application for amended certificate of authority | $10.00. |
| (21) | Application for certificate of withdrawal | $10.00. |
| (22) | Certificate of revocation of authority to transact business | No fee. |
| (23) | Annual report‑As provided in Section 12‑19‑20 | Fee Paidto theDepartmentof Revenue |
| (24) | Articles of correction | $10.00. |
| (25) | Application for certificate of existence or authorization | $ 2.00. |
| (26) | Articles of domestication | $10.00. |
| (27) | Articles of conversion | $10.00. |
| (28) | Any other document required or authorized to be filed by this act. | $ 10.00. |

 (b) The Secretary of State shall collect a fee of ten dollars each time process is served on him under Chapters 1 through 20 of this Title. The party to a proceeding causing service of process is entitled to recover this fee as costs if he prevails in the proceeding.

 (c) The Secretary of State shall collect the following fees for copying and certifying the copy of any filed document relating to a domestic or foreign corporation:

 (1) for copying, one dollar for the first page and fifty cents for each additional page; and

 (2) two dollars for the certificate.

 (d) Before filing any of the following documents, the Secretary of State shall collect the following taxes that must be remitted to the State Treasurer for use of the State:

 (1) articles of incorporation, one hundred dollars plus the minimum license fee imposed pursuant to Chapter 19 of Title 12;

 (2) amendment to articles of incorporation, one hundred dollars;

 (3) articles of merger or share exchange, one hundred dollars;

 (4) application by a foreign corporation for a certificate of authority to do business in South Carolina, one hundred dollars plus the minimum license fee imposed pursuant to Chapter 19 of Title 12;

 (5) amendment by a foreign corporation of its certificate of authority, one hundred dollars;

 (6) articles of conversion pursuant to either Section 33‑11‑111 or Section 33‑11‑113, one hundred dollars;

 (7) articles of domestication pursuant to Section 33‑9‑100, one hundred dollars.

HISTORY: Derived from 1976 Code Section 33‑29‑10 [1962 Code Section 12‑31; 1963 (53) 146; 1981 Act No. 146, Section 8; 1985 Act No. 72 Section 4; Repealed, 1988 Act No. 659, Section 31], Section 33‑29‑20 [1962 Code Section 12‑31.1; 1963 (53) 146; Repealed, 1988 Act No. 659, Section 31], and Section 33‑29‑30 [1962 Code Section 12‑31.2; 1963 (53) 146; Repealed, 1988 Act No. 659, Section 31]; 1988 Act No. 444, Section 2; 1994 Act No. 378, Section 4; 2004 Act No. 221, Section 8.

OFFICIAL COMMENT

Section 1.22 (Section 33‑1‑220) establishes in a single section the filing fees for all documents that may be filed under the Model Act. The dollar amounts for each document should be inserted by each state as it adopts the Act.

The list of documents in section 1.22 (Section 33‑1‑220) includes all documents that are authorized to be filed with the secretary of state under the Model Act. The catch‑all in subdivision (26) will apply to any document for which a state does not establish a specific filing fee plus any document that later amendments to the statute may authorize or direct be filed with the secretary of state without establishing a specific filing fee.

Subdivision (9) states that no fee is applicable to filing the resignation of a registered agent. This provision permits a person who is named as a registered agent without his consent, or who agrees to serve as registered agent for a fee and the fee is not paid, to eliminate any reference to himself in the records of the secretary of state without expense.

Subdivision (8) contains a maximum fee for filing a change of address of a registered agent. Since corporation service companies serve as registered agents for thousands of corporations in many jurisdictions, their change of address may require a very large number of filings. Hence, the fee is broadly based on the number of corporations affected but a maximum fee is specified to reflect that as the number of changes increases the cost per change should decrease.

Sections 11.07 (Section 33‑11‑107), 15.20 (Section 33‑15‑200), and 15.31 (Section 33‑15‑310) require the secretary of state to serve process on foreign corporations under the circumstances there specified. The fee for this service is set forth in section 1.22(b) (Section 33‑1‑220(b)).

Section 1.22(c) (Section 33‑1‑220(c)) establishes standard fees for copying filed documents and certifying that copies are true copies under section 1.27(Section 33‑1‑270).

SOUTH CAROLINA REPORTERS’ COMMENTS

1. Different from the prior law, the filing fee for most documents is ten dollars.

Many of the separately stated fees (Section 33‑20‑10 of the 1981 South Carolina Business Corporation Act) have been combined.

2. Fees Deleted.

The only previous fees specified in Section 33‑29‑10 of the 1981 South Carolina Business Corporation Act which no longer are provided for are: filing amended articles of a foreign corporation; application upon death or incapacity of agent; notice of revocation of appointment; notice of resignation of nonresident director; change in nonresident directors; statements regarding series, or retirement of, shares and reduction of capital; statement that any surviving merged corporation is foreign; statement of intent to dissolve; application for reinstatement; and notice of termination of existence of foreign corporation.

3. New Fees.

If an agent for many corporations changes its address, it shall pay a fee of two dollars for each represented company. South Carolina did not adopt the 1984 Model Act Official Text which recommends a total dollar limit on the fee when the agent represents multiple corporations. If the articles are corrected the usual ten‑dollar fee is charged (new paragraph (24)), and if a certificate of existence is issued, this will cost two dollars (new paragraph (25)).

4. Taxes.

Under the 1981 South Carolina Business Corporation Act, the Secretary of State collected a one‑time tax based on the company’s authorized stated capital. Since stated capital no longer has any significance, and since most all domestic corporations could structure their capital in such a way as to pay the minimum, the new law imposes a one hundred‑dollar tax for the filing of any articles, any amended articles, or for articles of merger, consolidation, or exchange.

Although it might have been possible to have continued to base the amount of filing tax by computing the amount of stated capital, the company would have had under the prior law, such did not seem very pragmatic. (See Lyles v. McCown, 82 S.C. 127, 63 S.E. 355 (1909) allowing the amount of fees to be based on the provisions of a repealed statute.).

In addition, a one‑time tax of one hundred dollars is levied when a foreign corporation qualifies to do business in this State, or when it amends its certificate of authority.

Fixing a flat tax for each transaction avoids problems such as occurred in Pacolet Mfg. Co. v. Gantt, 68 S.C. 199, 46 S.E. 1005 (1909). In that case, the court, under a prior tax law, held that a fee to increase a company’s capital was authorized and permissible even though the company would have paid a smaller fee if the amount of total capitalization had been set forth in its original application.

These taxes are not part of the Model Act but follow in concept Section 33‑29‑30 of the 1981 South Carolina Business Corporation Act.

5. Initial Report.

In addition to the above fees and taxes, all domestic and foreign corporations authorized to transact business in South Carolina must file an initial annual report with the South Carolina Tax Commission at the time the articles of incorporation (or, in the case of a foreign corporation, at the time the application for authority to transact business in South Carolina) is filed. The filing fee for this report is twenty‑five dollars. See Section 12‑19‑20 of the 1976 Code and the South Carolina Reporters’ Comments to Section 33‑16‑220.

DERIVATION: 1984 Model Act Section 1.22.

CROSS REFERENCES

Administrative dissolution, see Section 33‑14‑210.

Agent’s resignation, see Section 33‑5‑103.

Amended certificate of authority, see Section 33‑15‑104.

Amendment of articles of incorporation, see Sections 33‑6‑310, 33‑10‑106, and 33‑10‑108.

Annual report, see Sections 12‑20‑20, 33‑16‑220.

Articles of incorporation, certificate, and organization fees to be transmitted to Secretary of State, see Section 38‑90‑60.

Articles of merger, see Section 33‑11‑105.

Certificate of authority, see Section 33‑15‑103.

Certificate of existence, see Section 33‑1‑280.

Certificate of withdrawal, see Section 33‑15‑200.

Corporation’s change of registered agent or office, see Section 33‑5‑102.

Correction of filed document, see Section 33‑1‑240.

Evidentiary effect of certified copy, see Section 33‑1‑270.

Incorporation, see Sections 33‑2‑101 et seq.

Judicial dissolution, see Section 33‑14‑310.

Name of corporation, see Section 33‑4‑101.

Registered name, see Section 33‑4‑103.

Reinstatement after dissolution, see Section 33‑14‑220.

Renewal of registered name, see Section 33‑4‑103.

Reserved name, see Section 33‑4‑102.

Restatement of articles of incorporation, see Section 33‑10‑107.

Revocation of certificate of authority, see Section 33‑15‑310.

Revocation of dissolution, see Section 33‑14‑104.

Service on Secretary of State, see Sections 33‑11‑107, 33‑15‑200, and 33‑15‑310.

Share exchange, see Section 33‑11‑105.

Voluntary dissolution, see Sections 33‑14‑101 through 33‑14‑103.

Library References

Corporations 19.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 25 to 27, 44.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:1 , Introduction‑South Carolina Business Corporation Act.

South Carolina Legal and Business Forms Section 1:5 , Formation‑Filing Articles of Incorporation.

South Carolina Legal and Business Forms Section 1:34 , Official Forms.

South Carolina Legal and Business Forms Section 1:59 , Formation‑Transmittal Letter.

**SECTION 33‑1‑230.** Effective time and date of filing.

 (a) Except as provided in subsection (b) of this section and Section 33‑1‑240(c), a document accepted for filing is effective:

 (1) at the time for filing on the date it is filed, as evidenced by the Secretary of State’s date and time endorsement on the original document; or

 (2) at the time specified in the document as its effective time on the date it is filed.

 (b) A document may specify a delayed effective time and date, and if it does so the document becomes effective at the time and date specified. If a delayed effective date but no time is specified, the document is effective at the close of business on that date. A delayed effective date for a document may not be later than the ninetieth day after the date it is filed.

HISTORY: Derived from 1976 Section 33‑1‑60 [1962 Code Section 12‑11.6; 1962 (52) 1996; 1963 (53) 327; 1964 (53) 1910; 1968 (55) 3046; 1970 (56) 1932; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], Section 33‑7‑30 [1962 Code Section 12‑14.3; 1952 Code Section 12‑58; 1942 Code Sections 7726, 7729; 1932 Code Sections 7726, 7729; Civ. C. ‘22 Sections 4301, 4304; Civ. C. ‘12 Sections 1883, 2834; Civ. C. ‘02 Sections 1880, 1883; 1896 (22) 92, 94; 1897 (22) 522; 1900 (23) 386; 1903 (24) 75; 1920 (31) 754; 1923 (33) 157; 1936 (39) 1337; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], and Section 33‑7‑50 [1962 Code Section 12‑14.5; 1952 Code Sections 12‑59, 12‑60; 1942 Code Section 7730; 1932 Code Section 7730; Civ. C. ‘22 Section 4305; Civ. C. ‘12 Section 2838; Civ. C. ‘02 Section 1884; 1896 (22) 94; 1920 (31) 754; 1936 (39) 1320; 1960 (51) 1927; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 1.23(a) (Section 33‑1‑230(a)) provides that documents accepted for filing become effective at the time and date of filing, or at another specified time on that date, unless a delayed effective date is selected under section 1.23(b) (Section 33‑1‑230(b)). This section gives express statutory authority to the common practice of most secretaries of state of ignoring processing time and treating a document as effective as of the date it is submitted for filing even though it may not be reviewed and accepted for filing until several days later.

Section 1.23(a) (Section 33‑1‑230(a)) requires secretaries of state to maintain a date and time stamp for recording the receipt of documents and provides that documents become effective at the stamped time on the date of filing. This provision should eliminate any doubt about situations involving same‑day transactions in which documents, for example articles of merger, are filed on the morning of the date the merger is to become effective. Section 1.23(a) (Section 33‑1‑230(a)) contemplates that the time of filing, as well as the date, will be routinely recorded.

Section 1.23(b) (Section 33‑1‑230(b)) provides an alternative method of establishing the effective date of a document. The document itself may fix as its effective date any date within 90 days after the date it is filed; it may also fix the time it becomes effective on that date. If no time is specified, the document becomes effective as of the close of business on the specified date. The Model Act also allows the effective date fixed in a document to be corrected to a limited extent. See the Official Comment to section 1.24 (Section 33‑1‑240).

Section 1.23(b) (Section 33‑1‑230(b)) does not authorize or contemplate the retroactive establishment of an effective date before the date of filing.

SOUTH CAROLINA REPORTERS’ COMMENTS

The new law is similar to the provisions of Section 33‑1‑60(a)(3) and (b) plus Section 33‑7‑30(f) of the 1981 South Carolina Business Corporation Act. Some provisions previously included in prior Section 33‑1‑60 are now included in new Section 33‑1‑200.

Subsection (a)(2) adds the provision that a document can be effective at any time on the day that it is filed. In regard to documents that are to be effective some days after they are filed, subsection (b) only permits a maximum ninety‑day delay and specifies the mechanism for establishing the time of day the document is to be effective. The 1981 South Carolina Business Corporation Act had no restriction on how long of a delay the document could specify.

Section 33‑1‑60(b) of the 1981 South Carolina Business Corporation Act provided that the filing of a document with a delayed effective date would not affect the company’s right to abandon any plan, merger, consolidation, exchange, or sale of assets. This provision, like the delayed effective date provision, was added in 1982 and was based on Michigan Section 131(2) and Delaware Section 103(d). Although this language, recognizing a corporation’s right to abandon the merger or other activity has not been retained, the deletion is based on the assumption that it was merely surplusage and a mere recitation of the law. It was not a grant of any right or power. See, for example, Section 33‑11‑103(i) regarding mergers and exchanges which clearly indicates that the mere prefiling of the documents is not an irrevocable act.

DERIVATION: 1984 Model Act Section 1.23.

CROSS REFERENCES

Effective date of amendment of articles of incorporation, see Sections 33‑10‑101, 33‑10‑106, 33‑10‑108.

Effective date of merger or share exchange, see Section 33‑11‑105.

Effective date of restatement of articles of incorporation, see Section 33‑14‑220.

Effective date of voluntary dissolution, see Section 33‑14‑103.

Filing duty of Secretary of State, see Section 33‑1‑250.

Filing fees, see Section 33‑1‑220.

Filing requirements, see Section 33‑1‑200.

Library References

Corporations 22, 35.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 25 to 27, 37, 39, 51.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 3:7 , Articles of Incorporation‑General Form.

South Carolina Legal and Business Forms Section 1:34 , Official Forms.

South Carolina Legal and Business Forms Section 1:55 , Formation‑Articles of Incorporation.

South Carolina Legal and Business Forms Section 1:57 , Formation‑Statutory Close Corporation.

South Carolina Legal and Business Forms Section 1:61 , Articles of Amendment.

South Carolina Legal and Business Forms Section 1:64 , Dissolution‑Articles of Dissolution.

**SECTION 33‑1‑240.** Correcting filed document.

 (a) A domestic or foreign corporation may correct a document filed by the Secretary of State if the document (1) contains an incorrect statement or (2) was defectively executed, attested, sealed, verified, or acknowledged.

 (b) A document is corrected:

 (1) by preparing articles of correction that (i) describe the document (including its filing date) or attach a copy of it to the articles, (ii) specify the incorrect statement and the reason it is incorrect or the manner in which the execution was defective, and (iii) correct the incorrect statement or defective execution; and

 (2) by delivering the articles to the Secretary of State for filing.

 (c) Articles of correction are effective on the effective date of the document they correct except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, articles of correction are effective when filed.

HISTORY: 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 1.24 (Section 33‑1‑240) permits making corrections in filed documents without refiling the entire document or submitting formal articles of amendment. This correction procedure has two advantages: (1) filing articles of correction may be less expensive than refiling the document or filing articles of amendment, and (2) articles of correction do not alter the effective date of the underlying document being corrected. Indeed, under section 1.24(c) (Section 33‑1‑240(c)), even the correction relates back to the original effective date of the document except as to persons relying on the original document and adversely affected by the correction. As to these persons, the effective date of articles of correction is the date the articles are filed.

A document may be corrected either because it contains an “incorrect statement” or because it was defectively executed (including defects in optional forms of execution that do not affect the eligibility of the original document for filing).

A provision in a document setting an effective date (section 1.23 (Section 33‑1‑230)) may be corrected under this section, but the corrected effective date must comply with section 1.23 (Section 33‑1‑230) measured from the date of the original filing of the document being corrected, i.e., it cannot be before the date of filing of the document or more than 90 days thereafter.

SOUTH CAROLINA REPORTERS’ COMMENTS

This provision has no existing counterpart in the 1981 South Carolina Business Corporation Act.

DERIVATION: 1984 Model Act Section 1.24.

CROSS REFERENCES

“Deliver” includes mail, see Section 33‑1‑400.

Effective time and date of filing, see Section 33‑1‑230.

Filing fees, see Section 33‑1‑220.

Filing requirements, see Section 33‑1‑200.

Library References

Corporations 40.

Westlaw Topic No. 101.

C.J.S. Corporations Section 38.

**SECTION 33‑1‑250.** Filing duty of Secretary of State.

 (a) If a document delivered to the office of the Secretary of State for filing satisfies the requirements of Section 33‑1‑200, the Secretary of State shall file it.

 (b) The Secretary of State files a document by stamping or otherwise endorsing “Filed”, together with his name and official title and the date and time of receipt, on both the original and document copy, together with a further endorsement that the document copy is a true copy of the original document. After filing a document, except as provided in Sections 33‑5‑103 and 33‑15‑200, the Secretary of State shall deliver the document copy to the domestic or foreign corporation or its representative and the document copy must be retained as a part of the permanent records of the corporation.

 (c) If the Secretary of State refuses to file a document, he shall return it to the domestic or foreign corporation or its representative within five days after the document was delivered, together with a brief, written explanation of the reason for his refusal.

 (d) The Secretary of State’s duty to file documents under this section is ministerial. His filing or refusing to file a document does not:

 (1) affect the validity or invalidity of the document in whole or part;

 (2) relate to the correctness or incorrectness of information contained in the document;

 (3) create a presumption that the document is valid or invalid or that information contained in the document is correct or incorrect.

HISTORY: Derived from 1976 Code Section 33‑1‑60 [1962 Code Section 12‑11.6; 1962 (52) 1996; 1963 (53) 327; 1964 (53) 1910; 1968 (55) 3046; 1970 (56) 1932; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], and Section 33‑7‑40 [1962 Code Section 12‑14.4; 1962 (52) 1996; 1976 Act No. 553, Section 2; 1981 Act No. 146, Section 2; Repealed 1788 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

1. FILING DUTY IN GENERAL.

Under section 1.25 (Section 33‑1‑250), the secretary of state is required to file a document if it “satisfies the requirements of section 1.20 (Section 33‑1‑200).” This language should be contrasted with earlier versions of the Model Act (and many state statutes) that required the secretary of state to ascertain whether the document “conformed with law” before filing it. The purpose of this change is to limit the discretion of the secretary of state to a ministerial role in reviewing the contents of documents. If the document submitted is in the form prescribed and contains the information required by section 1.20 (Section 33‑1‑200) and the applicable provision of the Model Act, the secretary of state under section 1.25 (Section 33‑1‑250) must file it even though it contains additional provisions the secretary of state may feel are irrelevant or not authorized by the Model Act or by general legal principles. Consistently with this approach, section 1.25 (Section 33‑1‑250(d)) states that the filing duty of the secretary of state is ministerial and provides that filing a document with the secretary of state does not affect the validity or invalidity of any provision contained in the document and does not create any presumption with respect to any provision. Persons adversely affected by provisions in a document may test their validity in a proceeding appropriate for that purpose. Similarly, the attorney general of the state may also question the validity of provisions of documents filed with the secretary of state in an independent suit brought for that purpose; in neither case should any presumption or inference be drawn about the validity of the provision from the fact that the secretary of state accepted the document for filing.

2. MECHANICS OF FILING.

Section 1.25(b) (Section 33‑1‑250(b)) provides that when the secretary of state files a document, he stamps or endorses it as filed, retains the signed original document for his records, and returns the exact or conformed copy (which must accompany the document under section 1.20(i) (Section 33‑1‑200(i)) to the corporation or its representative with the secretary of state’s fee receipt or acknowledgement of receipt if no fee is required. This will establish that a document has been filed in the form of the copy. Consideration was given to dispensing with the document copy entirely and providing only for the return of a fee receipt or equivalent document. Several states currently follow this practice with respect to articles of incorporation and other documents. It was felt to be important, however, to continue a practice by which each corporation receives back from the secretary of state for its records a document that on its face shows that it is an exact or conformed copy of the document that was filed with the secretary of state. This copy is usually placed in the minute book and is available for informal inspection without requiring a person to examine the records of the secretary of state. Of course, a person desiring a certified copy of any filed document may obtain it from the office of the secretary of state by paying the fee prescribed in section 1.22(c) (Section 33‑1‑ 220(c)).

3. ELIMINATION OF CERTIFICATES OF INCORPORATION AND SIMILAR DOCUMENTS.

Section 1.25(b) (Section 33‑1‑250(b)) provides that acceptance of articles of incorporation or other documents is evidenced merely by the issuance of a fee receipt or acknowledgement of receipt if no fee is required. Earlier versions of the Model Act and the statutes of many states provided that acceptance by the secretary of state is evidenced by a “certificate” (e.g., of incorporation, of merger, or of amendment). This older practice was not retained in the revised Model Act because it was felt desirable to reduce the number of pieces of paper issued by the secretary of state. Under the older practice most state offices routinely issued both fee receipts and certificates. A single document—the fee receipt or acknowledgement—should sufficiently indicate that the document has been accepted for filing, and in fact many states in recent years have dispensed with the formal certificate.

4. REJECTION OF DOCUMENT BY SECRETARY OF STATE.

Because of the simplification of formal filing requirements and the limited discretion granted to the secretary of state by the Model Act, it is probable that rejection of documents for filing will occur only rarely. Section 1.25(c) (Section 33‑1‑250(c)) provides that if the secretary of state does reject a document for filing he must return it to the corporation or its representative within five days together with a brief written explanation of his reason for rejection. This rejection may be the basis of judicial review under section 1.26 (Section 33‑1‑260).

SOUTH CAROLINA REPORTERS’ COMMENTS

1. History.

The analogous provisions to this section previously appeared in Sections 33‑1‑60 and 33‑7‑40 of the 1981 South Carolina Business Corporation Act.

Subsection (a) continues the existing South Carolina law that, if the document meets the minimum requirements, the Secretary of State must file it.

For a number of years, the law of South Carolina has clearly limited the Secretary of State’s discretion in deciding whether or not to accept applications for corporate charters. For example, the Secretary of State once refused to accept various charters from applicants wanting to file as industrial banks just before a change in the law. If the Secretary of State were to accept these charters, then these entities would have been “grandfathered” and thus not subject to new restrictive regulations which were about to go into effect. The Secretary of State’s sole reason for rejecting the charters was that he believed that the entities were being formed merely to avoid the new law.

Interpreting the then corporate code, the Supreme Court confirmed that the Secretary of State did not have any discretion as to whether or not to accept the filings. Since the statute then said, as is true of the new statute, that the Secretary of State “shall issue” the certificate once the statutory requirements were met, he was required to accept the documents. Commonwealth Investment Co. of Columbia v. Thornton, 244 S.C. 146, 135 S.E.2d 762 (1964).

Section 33‑7‑40 of the 1981 South Carolina Business Corporation Act previously provided that the Secretary of State had the duty to determine that the articles:

(1) comply with requirements of execution, verification, and filing;.

(2) set forth the information required to be in the articles;.

(3) do not adopt a similar name;.

(4) have an attorney certificate [no longer required];.

(5) are accompanied by an initial tax report and initial license fee.

This section, by referencing Section 33‑1‑200 effectively requires the Secretary of State to make the same ministerial determinations.

As noted in the Official Comment, there generally is no formal document prepared by the Secretary of State, such as a “certificate of incorporation”. Rather, the stamped conformed copy evidences the proper filing. This procedure is in conformity with the existing practice of the Secretary of State.

This provision and others emphasize and clarify that the duties of the Secretary of State are purely ministerial and are intended to give no discretion if statutory requirements are met.

2. Non‑Model Act Provisions.

This section differs from the 1984 Model Act Official Text in three respects:

(1) Continuing existing practice, the Secretary of State will endorse on the copy that it is a “true copy” of the original.

(2) The Secretary of State has not, and will not, issue a separate receipt of payment. The conformed, stamped copy (and any canceled check) is sufficient verification of payment.

(3) Also continuing existing South Carolina practice, subsection (b) requires the company to retain the conformed copy as part of its official records.

(4) Paragraph (d)(3) is limited by Section 33‑1‑270. Although the actual filing of a document does not generally create any presumption that the information contained in the document is correct, a certified document, pursuant to Section 33‑1‑270, shall be treated as being prima facie evidence of the facts therein stated. To the extent Section 33‑1‑250(d)(3) appears to be inconsistent with Section 33‑1‑270, the provisions of Section 33‑1‑270 are to control.

DERIVATION: 1984 Model Act Section 1.25.

CROSS REFERENCES

Appeal from rejection of document, see Section 33‑1‑260.

“Deliver” includes mail, see Section 33‑1‑400.

Effective time and date of filing, see Section 33‑1‑230.

Evidentiary effect of copy of filed document, see Section 33‑1‑270.

Filing requirements: fees, see Section 33‑1‑220.

Filing requirements: generally, see Section 33‑1‑200.

Filing requirements: resignation of registered agent, see Sections 33‑5‑103 and 33‑15‑109.

Filing requirements: service on foreign corporation, see Sections 33‑15‑110.

Powers of Secretary of State, see Section 33‑1‑300.

Library References

Corporations 22.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 25 to 27, 37, 39.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:2 , Preincorporation‑Generally.

South Carolina Legal and Business Forms Section 1:5 , Formation‑Filing Articles of Incorporation.

South Carolina Legal and Business Forms Section 1:59 , Formation‑Transmittal Letter.

Attorney General’s Opinions

Powers and duties of Secretary of State in filing articles of incorporation for domestic corporations are ministerial in nature (interpreting former law). 1984 Op Atty Gen, No. 84‑35, p. 78.

**SECTION 33‑1‑260.** Appeal from Secretary of State’s refusal to file document.

 (a) If the Secretary of State refuses to file a document delivered to his office for filing, the domestic or foreign corporation may appeal the refusal within thirty days after the return of the document to the Circuit Court of Richland County. The appeal is commenced by petitioning the court to compel filing the document and by attaching to the petition the document and the Secretary of State’s explanation of his refusal to file.

 (b) The court may summarily order the Secretary of State to file the document or take other action the court considers appropriate.

 (c) The court’s final decision may be appealed as in other civil proceedings.

HISTORY: 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

1. THE COURT WITH JURISDICTION TO HEAR APPEALS FROM THE SECRETARY OF STATE.

The identity of the specific court with jurisdiction to hear appeals from the secretary of state under section 33‑1‑260 must be supplied by each state when enacting this section. It is intended that this should be a court of general civil jurisdiction. It may either be the court located in the capital of the state or the court in the county where the corporation’s principal business office is located in the state or, if the corporation does not have a principal office in the state, the court located in the county in which its registered office is located. The annual report of the corporation must state where the principal office of the corporation (which need not be within the state) is located. See section 16.22 (Section 33‑16‑220). Other sections of the Model Act also contemplate that the court with jurisdiction over substantive corporate matters will be designated in the statute. See, for example, section 7.03 (Section 33‑7‑103), relating to the ordering of a shareholders’ meeting after the corporation fails to hold such a meeting. It is expected that jurisdiction over litigation with respect to substantive matters will normally be vested in the court in the county of the corporation’s principal or registered office. See the Official Comment to section 7.03 (Section 33‑7‑103).

2. “SUMMARY” ORDERS.

In view of the limited discretion of the secretary of state under the Act, a “summary” order appears to be appropriate in section 1.26 (Section 33‑1‑260). Throughout the Model Act the term “summarily order” or similar language is used where courts are authorized to order action taken and the person charged with taking the original action has little or no discretion. The word “summary” is not used in a technical sense but to refer to a class of cases where the court might appropriately order that action be taken on the face of the pleadings or after an oral hearing but without any need to resolve disputed factual issues.

3. BURDEN OF PROOF AND REVIEW STANDARD.

The revised Model Act, unlike earlier versions, does not address either the burden of proof or the standard for review in judicial proceedings challenging action of the secretary of state. It is contemplated that these matters will be governed by general principles of judicial review of agency action in each adopting state.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section is entirely new. It is anticipated that this section will be used very little. For governmental convenience and to reduce costs, the Circuit Court of Richland County has been designated as the appropriate court.

In regard to the burden of proof and standard of review, Article I, Section 22, of the Constitution of the State of South Carolina, 1895, guarantees judicial review of administrative decisions. Section 1‑23‑380 of the 1976 Code (the Administrative Procedures Act) provides the appropriate procedure when the Secretary of State refuses any filing. Section 1‑23‑380(g) specifically provides:

“(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional or statutory provisions;.

(2) In excess of the statutory authority of the agency;.

(3) Made upon unlawful procedure;.

(4) Affected by other error of law;.

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or.

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”

DERIVATION: 1984 Model Act Section 1.26.

CROSS REFERENCES

“Deliver” includes mail, see Section 33‑1‑400.

Filing fees, see Section 33‑1‑220.

Filing requirements, see Section 33‑1‑200.

“Principal office”: defined, see Section 33‑1‑400.

Registered office: requirement, see Sections 33‑2‑102 and 33‑5‑101.

Secretary of State’s filing duty, see Section 33‑1‑250.

Library References

Corporations 22.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 25 to 27, 37, 39.

**SECTION 33‑1‑270.** Evidentiary effect of copy of filed document.

 A certificate attached to a copy of a document filed by the Secretary of State, bearing his signature (which may be in facsimile) and the seal of this State, is conclusive evidence that the original document is on file with the Secretary of State and must be taken and received in all courts, public offices, official bodies, and in all proceedings as prima facie evidence of the facts therein stated.

HISTORY: Derived from 1972 Code Section 33‑1‑60 [1962 Code Section 12‑11.6; 1962 (52) 1996; 1963 (53) 327; 1964 (53) 1910; 1968 (55) 3046; 1970 (56) 1932; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

The secretary of state may be requested to certify that a specific document has been filed with him upon payment of the fees specified in section 1.22(c) (Section 33‑1‑220(c)). Section 1.27 (Section 33‑1‑270) provides that the certificate is conclusive evidence only that the original document is on file. The limited effect of the certificate is consistent with the ministerial filing obligation imposed on the secretary of state under the Model Act.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section is a combination of Section 1.27 of the 1984 Model Act Official Text language and Section 33‑1‑60 of the 1981 South Carolina Business Corporation Act. The retention of the broader provision from the prior statute, which stated that the certified document is prima facie evidence of not only its existence, but also of the truth of its contents, was felt necessary in order to protect the operation of the Secretary of State’s office.

The Secretary of State is routinely subpoenaed to testify in cases wherein often all that is being asked of him is to confirm that a document is on file and does contain the information in the copy, or, for example, that a company was formed, authorized certain stock, and named certain people as its initial directors.

This information is basically uncontroverted, and thus to require the Secretary to actually testify in these many proceedings truly would be an unreasonable request and policy. Therefore, the South Carolina provision is much broader in order to insure that there will be no need to call the Secretary of State to testify.

To the extent the provisions of this Section 33‑1‑270 might appear to be inconsistent with Section 33‑1‑250(d)(3), the provisions of this Section 33‑1‑270 are to control. The certified document shall be at least prima facie evidence of the facts therein stated.

DERIVATION: 1984 Model Act Section 1.27.

CROSS REFERENCES

Certifying fee, see Section 33‑1‑220.

Forms, see Section 33‑1‑210.

Secretary of State’s filing duty, see Section 33‑1‑250.

Library References

Corporations 22.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 25 to 27, 37, 39.

**SECTION 33‑1‑280.** Certificate of existence.

 (a) Anyone may apply to the Secretary of State to furnish a certificate of existence for a domestic corporation or a certificate of authorization for a foreign corporation.

 (b) A certificate of existence or authorization sets forth:

 (1) the domestic corporation’s corporate name or the foreign corporation’s corporate name used in this State;

 (2) that (i) the domestic corporation is duly incorporated under the law of this State, the date of its incorporation, and the period of its duration if less than perpetual; or (ii) the foreign corporation is authorized to transact business in this State;

 (3) that all fees, taxes, and penalties owed to the Secretary of State have been paid;

 (4) that the Secretary of State has not mailed notice to the corporation pursuant to either Section 33‑14‑210 or 33‑15‑310 that the corporation is subject to being dissolved or its authority revoked;

 (5) that articles of dissolution have not been filed; and

 (6) other facts of record in the office of the Secretary of State that may be requested by the applicant.

 (c) Subject to any qualification stated in the certificate, a certificate of existence or authorization issued by the Secretary of State may be relied upon as conclusive evidence that the domestic or foreign corporation is in existence or is authorized to transact business in this State.

HISTORY: 1988 Act No. 444, Section 2; 1988 Act No. 659, Section 22.

OFFICIAL COMMENT

Section 1.28 (Section 33‑1‑280) establishes a procedure by which anyone may obtain a conclusive certificate from the secretary of state that a particular domestic or foreign corporation is in existence or is authorized to transact business in the state. The certificate will probably be a standardized form. The secretary of state is to make the judgment whether or not the corporation is in existence or is authorized to transact business from public records only and is not expected to make a more extensive investigation. In appropriate cases, the secretary of state may issue a certificate subject to specified qualifications.

Section 1.28(b)(5) (Section 33‑1‑280(b)(5)) refers only to taxes, fees, or penalties collected by the secretary of state or collected by other agencies and reported to the secretary of state. In some states the secretary of state may ascertain from other agencies that franchise or other taxes have been paid and include this information in the certificate. In states where this procedure does not unduly delay the issuance of certificates, section 1.28 (Section 33‑1‑280) may be revised appropriately. Section 1.28(b)(5) (Section 33‑1‑280(b)(5)) relates only to taxes, fees or penalties to the extent their nonpayment affects the existence or authorization to transact business of the corporation.

A certificate of existence or authorization that may be relied on as binding and conclusive is of material assistance to attorneys who may be required to give formal legal opinions in connection with corporate transactions.

SOUTH CAROLINA REPORTERS’ COMMENTS

(South Carolina Reporters’ Comments appearing in 1988 Act No. 444, amended by 1988 Act No. 659, Section 22).

Although the 1981 South Carolina Business Corporation Act did not explicitly provide for the Secretary of State to issue a certificate of existence or authorization, it has been current policy for the Secretary to issue a certificate of good standing.

1. Warning—Tax certificate must also be obtained.

The granting of the certificate of existence gives very limited protection. It only assures that the corporation has not been dissolved and that the Secretary of State has not brought an action to administratively dissolve the company. It does not warn the lawyer that the company may be dissolved the very next day because it has failed to file a tax return. Nor does it disclose that other grounds may then exist which give the Secretary of State the right to begin dissolution proceedings.

If the Tax Commission has notified a corporation that it has failed to file a required tax return and the corporation does not file within sixty days of this notice, the Tax Commission will then so advise the Secretary of State and he will immediately dissolve the company (see Sections 33‑14‑210(c) and 33‑15‑310(c)). However, the Secretary of State will have no knowledge of this delinquency notice while it is pending and will issue a certificate of existence (good standing) even though the company is in the process of being dissolved for failure to file a tax return. Most administrative dissolutions will occur in this manner.

The only way that the lawyer can be certain that the company is not about to be dissolved for failure to file a tax return is to obtain a separate certificate of compliance from the Tax Commission. In most situations it will be necessary to obtain this certificate.

There may be other existing grounds for the Secretary of State to administratively dissolve the company. They, likewise, will not be disclosed by the certificate.

2. Differences from Model Act.

Section 1.28(b)(3) of the 1987 Model Act Official Text requires the Secretary of State to provide information on unpaid taxes, fees, and penalties only if such information is available in the Secretary’s records. Since the Secretary of State does not routinely have access to current tax information, subsection (b)(3) has been revised. The South Carolina version specifies that the Secretary of State will only certify the payment of any taxes and fees owed to him.

Subsection (b)(4) differs from the Model Act Official Text in two respects. First, since the annual report is filed with the Tax Commission (see Sections 33‑16‑220 and 12‑19‑20), the Secretary of State will not certify whether the annual report has been filed. Lawyers and others desiring to know whether the corporation has filed its annual report will have to obtain this information from the Tax Commission. Second, subsection (b)(4) has been amended to require the Secretary of State to certify that he has not mailed notice to the corporation that it is subject to being dissolved. This does not assure that the Tax Commission has not mailed such a notice.

3. Certificate does not negate the possibility that other actions are pending to dissolve the company.

The Attorney General has authority pursuant to Section 12‑37‑2270 to bring an action to vacate the corporation’s charter for failure to pay property taxes or for other stated causes. Technically, the charter may be automatically “forfeited or annulled’ without the actual court action if property taxes have not been paid. The Attorney General also has the power to bring an action to dissolve a corporation for obtaining articles by fraud or abusing its authority (see Section 33‑14‑300). A shareholder has the continuing right to bring an action to dissolve the company (see Section 33‑14‑300(2)). The certificate of existence will not negate the possibility of any of these events or any others not within the jurisdiction of the Secretary of State. However, if an action has been brought under any of these sections, the corporation (or its officers or directors) will receive notice of the proceeding.

4. Other changes to prior law.

Section 33‑1‑280 additionally provides for disclosure:

(1) that no articles of dissolution have been filed (subsection (b)(5)); and.

(2) of other facts of record in the Secretary of State’s office requested by the applicant (subsection (b)(6)).

It is clear also that any person, regardless of his relationship with the corporation, has the right to obtain a certificate of existence (subsection (a)).

DERIVATION: 1984 Model Act Section 1.28.

CROSS REFERENCES

Certificate of authority of foreign corporation, see Sections 33‑15‑101 to 33‑15‑110.

Filing fees, see Section 33‑1‑220.

Filing requirements, see Section 33‑1‑200.

Forms, see Section 33‑1‑210.

“Principal office”: defined, see Section 33‑1‑400.

Registered office: requirement, see Sections 33‑2‑102, 33‑5‑101, and 33‑15‑107.

Library References

Corporations 18, 32(7).

Westlaw Topic No. 101.

C.J.S. Corporations Sections 25 to 27, 33, 41, 48, 559.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Mortgages Section 12, Capacity of Parties.

Forms

South Carolina Legal and Business Forms Section 1:5 , Formation‑Filing Articles of Incorporation.

South Carolina Legal and Business Forms Section 1:34 , Official Forms.

**SECTION 33‑1‑290.** Penalty for signing false document.

 (a) A person commits an offense if he signs a document he knows is false in any material respect (including an omission of a material fact necessary in order to make the statements made in light of the circumstances under which they were made, not misleading) with intent that the document be delivered to the Secretary of State for filing.

 (b) An offense under this section is a misdemeanor punishable by a fine of not to exceed five hundred dollars.

 (c) Any person who violates subsection (a) is liable to any person who is damaged thereby.

HISTORY: Derived from 1976 Code Section 33‑25‑60 [1962 Code Section 12‑24:6; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed 1988 Act 444, Section 4(1)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 1.29 (Section 33‑1‑290) makes it a criminal offense for any person to sign a document that he knows is false in any material respect with intent that the document be submitted for filing to the secretary of state.

Section 1.29(b) (Section 33‑1‑290(b)) is keyed to the classification of offenses provided by the Model Penal Code. If a state has not adopted this classification, the dollar amount of the fine should be substituted for the misdemeanor classification.

SOUTH CAROLINA REPORTERS’ COMMENTS

Section 1.29 of the 1984 Model Act Official Text has been amended in two primary respects in order to continue the provisions of Section 33‑25‑60 of the 1981 South Carolina Business Corporation Act. The South Carolina version specifically provides:

(a) an intentional material omission makes a document false, and.

(b) any injured person has a private (civil) cause of action against the wrongdoer.

Although the predecessors to this provision apparently have not been acted upon for a number of years, prior statutes likewise made it a crime for directors to make false statements in regard to a corporation’s financial position, and another overlapping statute once made it a crime to make a false and misleading statement, but only if the person to whom the statement was made could prove damage. This second statute is discussed in State v. Bolyn 143 S.C. 63, 86‑90 141 S.E. 165, 172‑173 (1928) and the two statutes are compared in State v. Johnson 149 S.C. 195, 205‑206, 146 S.E. 657, 660 (1929).

DERIVATION: 1984 Model Act Section 1.29.

CROSS REFERENCES

Administrative dissolution, see Section 33‑14‑200.

“Deliver” includes mail, see Section 33‑1‑400.

Revocation of certificate of authority of foreign corporation, see Section 33‑15‑300.

Library References

Corporations 323, 324.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 552 to 553.

ARTICLE 3

Secretary of State

**SECTION 33‑1‑300.** Powers.

 The Secretary of State has the power reasonably necessary to perform the duties required of him by Chapters 1 through 20 of this Title.

HISTORY: Derived from 1976 Code Section 33‑25‑20 [1962 Code Section 12‑24.2; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed Act No. 444, Section 4(1)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 1.30 (Section 33‑1‑300) is intended to grant the secretary of state the authority necessary for his efficient performance of the filing and other duties imposed on him by the Act but is not intended to give him general authority to establish public policy. The most important aspects of a modern corporation statute relate to the creation and maintenance of relationships among persons interested in or involved with a corporation; these relationships basically should be a matter of concern to the parties involved and not subject to regulation or interpretation by the secretary of state. Further, even in situations where it is claimed that the corporation has been formed or is being operated for purposes that may violate the public policies of the state, the secretary of state generally should not be the governmental official that determines the scope of public policy through administration of his filing responsibilities under the Act. Rather, the attorney general may seek to enjoin the illegal conduct or to dissolve involuntarily the offending corporation.

Section 1.30 (Section 33‑1‑300) is more narrowly drafted than earlier versions of the Model Act and the statutes of many states.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section is essentially the same as Section 33‑25‑20 of the 1981 South Carolina Business Corporation Act; but, as noted in the Official Comment, the new law is more narrowly drafted than the prior law and specifies that the Secretary of State only has the “power reasonably necessary to perform” his duties, rather than the previous more expansive grant of authority giving him that power and authority “reasonably necessary” to enable him to “administer the act efficiently” along with the power to perform his duties.

DERIVATION: 1984 Model Act Section 1.30.

CROSS REFERENCES

Administrative dissolution, see Section 33‑14‑200.

Judicial dissolution, see Section 33‑14‑300.

Professional corporation, dissolution, see Section 33‑19‑420.

Revocation of certificate of authority of foreign corporation, see Section 33‑15‑300.

Secretary of State’s filing duty, see Section 33‑1‑250.

Library References

Corporations 22.

States 73.

Westlaw Topic Nos. 101, 360.

C.J.S. Corporations Sections 25 to 27, 37, 39.

C.J.S. States Sections 123, 130 to 136.

ARTICLE 4

Definitions

**SECTION 33‑1‑400.** Act definitions.

 As used in Chapters 1 through 19 of this title:

 (1) “Agreement” includes a valid agreement, written or oral, of the shareholders or between any of the shareholders and the corporation as to the affairs of the corporation and the conduct of its business. The bylaws of a corporation are an agreement.

 (2) “Articles of incorporation” includes amended and restated articles of incorporation and articles of merger.

 (3) “Authorized shares” means the shares of all classes a domestic or foreign corporation is authorized to issue.

 (4) “Corporation” or “domestic corporation” means a corporation for profit, which is not a foreign corporation, incorporated pursuant or subject to the provisions of Chapters 1 through 20 of this Title. “Corporation” or “domestic corporation” also may include a “ nonprofit” corporation to the extent permitted by the provisions of Section 33‑20‑103.

 (5) “Conspicuous” means written so that a reasonable person against whom the writing is to operate should notice it. For example, printing in italics, boldface, or contrasting color, or typing in capitals or underlined is conspicuous.

 (6) “Deliver” includes mail.

 (7) “Distribution” means a direct or indirect transfer of money or other property, except its own shares, or incurring of indebtedness by a corporation to or for the benefit of its shareholders in respect to its shares. A distribution may be in the form of a declaration or payment of a dividend, a purchase, redemption, or other acquisition of shares, a distribution of indebtedness, or other distribution.

 (8) “Effective date of notice” is defined in Section 33‑1‑410.

 (9) “Electronic transmission” or “electronically transmitted” means a process of communication not directly involving the physical transfer of paper that is suitable for the retention, retrieval, and reproduction of information by the recipient.

 (10) “Employee” includes an officer but not a director, unless a director accepts duties that make him also an employee.

 (11) “Entity” includes corporation and foreign corporation; not‑for‑profit corporation; profit and not‑for‑profit unincorporated association; business trust, estate, partnership, trust, and two or more persons having a joint or common economic interest; and state, United States, and foreign government.

 (12) “Foreign corporation” means a corporation for profit incorporated pursuant to a law other than the law of this State.

 (13) “Governmental subdivision” includes authority, county, district, and municipality.

 (14) “Includes” denotes a partial definition.

 (15) “Individual” includes the estate of an incompetent or deceased individual.

 (16) “Limited partnership” means a limited partnership created pursuant to the Uniform Limited Partnership Act, Chapter 42 of Title 33, a predecessor law, or a comparable law of another jurisdiction.

 (17) “Means” denotes an exhaustive definition.

 (18) “Notice” is defined in Section 33‑1‑410.

 (19) “Partnership” means a general partnership subject to the Uniform Partnership Act, Chapter 41 of Title 33, a predecessor law, or a comparable law of another jurisdiction.

 (20) “Person” includes individual and entity.

 (21) “Principal office” means the in‑state or out‑of‑state location of the principal executive offices of a domestic or foreign corporation as designated in the annual report.

 (22) “Proceeding” includes civil suit and criminal, administrative, and investigatory action, and formal or informal arbitration.

 (23) “Record date” means the date established by Chapter 6 or 7 on which a corporation determines the identity of its shareholders for purposes of Chapters 1 through 20 of this title.

 (24) “Secretary” means the corporate officer to whom the board of directors has delegated responsibility pursuant to Section 33‑8‑400(c) for custody of the minutes of the meetings of the board of directors and of the shareholders and for authenticating records of the corporation.

 (25) “Shares” mean the units into which the proprietary interests in a corporation are divided.

 (26) “Shareholder” means the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent rights granted by a nominee certificate are on file with a corporation. Creditors of a corporation may have the rights of a shareholder as allowed in the corporation’s articles of incorporation.

 (27) “State” includes a state, commonwealth, territory, and insular possession, and their agencies and governmental subdivisions, of the United States and the District of Columbia.

 (28) “Subscriber” means a person who subscribes for shares in a corporation before or after incorporation.

 (29) “United States” includes district, authority, bureau, commission, department, and other agency of the United States.

 (30) “Voting group” means all shares of one or more classes or series that may vote and be counted together collectively on a matter at a meeting of shareholders pursuant to the articles of incorporation or Chapters 1 through 20 of this title. Shares entitled to vote generally on the matter are for that purpose a single voting group.

 (31) “Public corporation” means a corporation that has a class of equity securities registered with a federal agency pursuant to the Securities Exchange Act of 1934 or a successor act to the Securities Exchange Act of 1934.

HISTORY: Derived from 1976 Code Section 33‑1‑20 [1962 Code Section 12‑11.2; 1962 (52) 1996; 1981 Act No. 146, Section 2; 1985 Act No. 72, Section 7; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2; 1998 Act No. 328, Section 9; 2000 Act No. 371, Section 1; 2004 Act No. 221, Section 9.

OFFICIAL COMMENT

[Note: Because this Act added the definition of Agreement to those in the Model Act Official Text, the subsection numbers in the Official Comment differ from those in this Act, which are shown in parentheses following the Model Act citation.].

Section 1.40 (Section 33‑1‑400) collects in a single section definitions of terms used throughout the Model Act. Subchapters and sections of the Act in a few instances contain specialized definitions applicable only to those subchapters or sections.

Most of the definitions of section 1.40 (Section 33‑1‑400) are drawn directly from earlier versions of the Model Act and are reasonably self‑explanatory. A number of definitions, however, are new or deserve further explanation.

1. CONSPICUOUS.

“Conspicuous” is defined in section 1.40(3) (Section 33‑1‑400(5)) basically as defined in section 1‑201(10) of the UNIFORM COMMERCIAL CODE. Even though the definition indicates some of the methods by which a provision may be made attention‑calling, the test is whether attention can reasonably be expected to be called to it.

2. CORPORATION, DOMESTIC CORPORATION, AND FOREIGN CORPORATION.

“Corporation,” “domestic corporation,” and “foreign corporation” are defined in sections 1.40(4) and (10) (Section 33‑1‑400(4) and (11)). The word “corporation,” when used alone, refers only to domestic corporations. In a few instances, the phrase “domestic corporation” has been used in order to contrast it with a foreign corporation.

3. DISTRIBUTION.

The term “distribution” defined in section 1.40(6) (Section 33‑1‑400(7)) is a fundamental element of the financial provisions of the Model Act as amended in 1980. Section 6.40 (Section 33‑6‑400) sets forth a single, unitary test for the validity of any “distribution.” Section 1.40(6) (Section 33‑1‑400(7)) in turn defines “distribution” to include all transfers of money or other property made by a corporation to any shareholder in respect of the corporation’s shares, except mere changes in the unit of interest such as share dividends and share splits. Thus, a “distribution” includes the declaration or payment of a dividend, a purchase by a corporation of its own shares, a distribution of evidences of indebtedness or promissory notes of the corporation, and a distribution in voluntary or involuntary liquidation. If a corporation incurs indebtedness in connection with a distribution (as in the case of a distribution of a debt instrument or an installment purchase of shares), the creation, incurrence, or distribution of the indebtedness is the event which constitutes the distribution rather than the subsequent payment of the debt by the corporation.

The term “indirect” in the definition of “distribution” is intended to include transactions like the repurchase of parent company shares by a subsidiary whose actions are controlled by the parent. It also is intended to include any other transaction in which the substance is clearly the same as a typical dividend or share repurchase, no matter how structured or labeled.

4. ENTITY.

The term “entity,” defined in section 1.40(9) (Section 33‑1‑400(10)), appears in the definition of “person” in section 1.40(16) (Section 33‑1‑400(17)) and is included to cover all types of artificial persons. See also the definitions of “governmental subdivision,” in section 1.40(11) (Section 33‑1‑400(12)), “state,” in section 1.40(23) (Section 33‑1‑400(24)), and “United States,” in section 1.40(25) (Section 33‑1‑400(26)).

5. PRINCIPAL OFFICE.

Section 1.40(17) (Section 33‑1‑400(18)) defines the principal office of a corporation to be the office, within or without the state, where the principal executive office of the corporation is located. Many corporations maintain numerous offices, but there is usually one office, sometimes colloquially referred to as the home office, headquarters, or executive suite, where the principal corporate officers are located. The corporation must designate its principal office address in the annual report required by section 16.22 (Section 33‑16‑220). In case of doubt as to which corporate office is the principal office, the designation by the corporation in its annual report should be accepted as establishing the principal office of the corporation.

6. SHAREHOLDER.

The definition of “shareholder” in section 1.40(22) (Section 33‑1‑400(23)) includes a beneficial owner of shares named in a nominee certificate under section 7.23 (Section 33‑7‑230), but only to the extent of the rights granted the beneficial owner in the certificate—for example, the right to receive notice of, and vote at, shareholders’ meeting. Various substantive sections of the Model Act also permit holders of voting trust certificates or beneficial owners of shares (not subject to a nominee certificate under section 7.23 (Section 33‑7‑230)) to exercise some of the rights of a “shareholder.” See, for example, section 7.40 (Section 33‑7‑400) (derivative proceedings).

7. SECRETARY.

The term “secretary” is defined in section 1.40(20) (Section 33‑1‑400(21)) since the Model Act does not require the corporation to maintain any specific or titled officers. See section 8.40 (Section 33‑8‑400). However, some corporate officer, however titled, must perform the functions described in this definition, and that officer is referred to as the “secretary” in various sections of the Act that impose a duty on him.

8. PERSON.

The term “person” is defined in section 1.40(16) (Section 33‑1‑400(17)) to include an individual or an entity. In the case of an individual the Model Act assumes that the person is competent to act in the matter under general state law independent of the corporation statute.

9. VOTING GROUP.

Section 1.40(26) (Section 33‑1‑400(27)) defines “voting group” for purposes of the Act as a matter of convenient reference. A “voting group” consists of all shares of one or more classes or series that under the articles of incorporation or the revised Model Act are entitled to vote and be counted together collectively on a matter. Shares entitled to vote “generally” on a matter under the articles of incorporation or this Act are for that purpose a single voting group. The word “generally” signifies all shares entitled to vote on the matter by the articles of incorporation or this Act that do not expressly have the right to be counted or tabulated separately. “Voting groups” are thus the basic units of collective voting at a shareholders’ meeting, and voting by voting groups may provide essential protection to one or more classes or series of shares against actions that are detrimental to the rights or interests of that class or series.

The determination of which shares form part of a single voting group must be made from the provisions of the articles of incorporation and of this Act. In a few instances under the Model Act, the board of directors may establish the right to vote by voting groups. On most matters coming before shareholders’ meetings, only a single voting group, consisting of a class of voting or common shares, will be involved, and action on such a matter is effective when approved by that voting group pursuant to section 7.25 (Section 33‑7‑250). See section 7.26(a) (Section 33‑7‑260(a)). If a second class of shares is also entitled to vote on the matter, then a further determination must be made as to whether that class is to vote as a separate voting group or whether it is to vote along with the other voting shares as part of a single voting group.

Members of the board of directors are usually elected by the single voting group of shares entitled to vote generally; in some circumstances, however, some members of the board may be selected by one voting group and other members by one or more different voting groups. See section 8.03 (Section 33‑8‑103).

The definition of a voting group permits the establishment by statute of quorum and voting requirements for a variety of matters considered at shareholders’ meetings in corporations with multiple classes of shares. See sections 7.25 (Section 33‑7‑250) and 7.26 (Section 33‑7‑260). Depending on the circumstances, two classes or series of shares may vote together collectively on a matter as a single voting group, they may be entitled to vote on the matter separately as two voting groups, or one or both of them may not be entitled to vote on the matter at all.

SOUTH CAROLINA REPORTERS’ COMMENTS

This provision has both added, and deleted, various definitions.

1. Deletions from the 1981 South Carolina Business Corporation Act.

Numerous previously defined terms no longer have a statutory definition. Many of these deletions relate to the overall revision of the financial provisions of the act. Under the prior law, concepts of par value, capital surplus, earned surplus, etc., were very significant. The overall revision makes these terms obsolete.

The terms for which there no longer is a definition are:

Assets.

Bond.

Cancel.

Capital surplus.

Court.

Creditors.

Debts.

Earned surplus.

Fraud.

Insolvent.

National Securities Exchange.

Net assets.

Preemptive rights.

Secretary of State.

Stated capital.

Surplus.

Treasury shares.

2. New Terms.

The following new terms now have a statutory definition:

Agreement.

Conspicuous.

Deliver.

Distribution.

Effective date of notice.

Employee.

Entity.

Governmental subdivision.

Includes.

Individual.

Means.

Notice.

Principal office.

Proceeding.

Secretary.

Shareholder (revised).

United States.

Voting group.

As the Official Comment states, the new concept of “voting group” is the most significant new definition.

3. Non‑Model Act Definitions.

The definition of “proceeding” in subsection (19) is explicitly broader than the Model Act Official Text. It specifically includes either a formal or informal arbitration within the definition of a proceeding. Likewise, a nonexclusive definition of “agreement” has been added (see subsection (1)) to specify that “agreement” includes an agreement between the shareholders and corporation and that the bylaws can constitute an agreement. Nothing in this definition, however, permits an agreement that is required by any statute or common‑law principle to be in writing to be made orally.

The definition of “shareholder” (subsection (23)) has been amended to recognize that debt instruments can be given voting or other rights if so specified in the articles. See the South Carolina Reporters’ Comments to Section 33‑7‑210 for an explanation of this provision.

Since South Carolina’s nonprofit corporation laws are currently inadequate, Section 33‑20‑103 permits South Carolina nonprofit corporations to be generally governed by these provisions. Thus, the definition of “corporation” (subsection (4)) has been amended to reflect this fact.

DERIVATION: 1984 Model Act Section 1.40.

CROSS REFERENCES

Annual report, see Sections 12‑20‑20, 33‑16‑220.

“Conflict of interest transaction”, see Section 33‑8‑310.

“Corporation”, see Sections 33‑8‑500 and 33‑13‑101.

“Director”, see Section 33‑8‑500.

“Dissenter”, see Section 33‑13‑101.

“Expenses”, see Section 33‑8‑500.

“Fair value”, see Section 33‑13‑101.

“Interest”, see Section 33‑13‑101.

“Liability”, see Section 33‑8‑500.

“Nominee”, see Section 33‑7‑230.

“Official capacity”, see Section 33‑8‑500.

“Outstanding shares”, see Section 33‑6‑103.

“Participating shares”, see Section 33‑11‑103.

“Party”, see Section 33‑8‑500.

“Proceeding”, see Section 33‑8‑500.

“Shares”, see Sections 33‑6‑270 and 33‑6‑300.

“Voting shares”, see Section 33‑11‑103.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:1 , Introduction‑South Carolina Business Corporation Act.

South Carolina Legal and Business Forms Section 1:2 , Preincorporation‑Generally.

South Carolina Legal and Business Forms Section 1:10 , Corporate Finance‑Shares of Stock.

South Carolina Legal and Business Forms Section 1:14 , Shareholders‑Generally.

South Carolina Legal and Business Forms Section 1:26 , Foreign Corporations.

Treatises and Practice Aids

Fletcher Cyclopedia Law of Private Corporations Section 1363, Subscriptions and Subscribers Defined.

**SECTION 33‑1‑410.** Notice.

 (a) Notice under Chapters 1 through 20 of this Title must be in writing unless oral notice is reasonable under the circumstances.

 (b) Notice may be communicated in person; by telephone, telegraph, teletype, or other form of wire or wireless communication; or by mail or private carrier. If these forms of personal notice are impracticable, notice may be communicated by a newspaper of general circulation in the area where published; or by radio, television, or other form of public broadcast communication.

 (c) Written notice by a domestic or foreign corporation to its shareholder, if in a comprehensible form, is effective when mailed, if mailed postpaid and correctly addressed to the shareholder’s address shown in the corporation’s current record of shareholders; however, a notice to a shareholder of a public corporation of a meeting of shareholders which accompanies a proxy statement or information statement is effective when it is addressed and mailed or transmitted in any manner which satisfies the applicable rules of the Securities and Exchange Commission requiring delivery of a proxy statement including, without limitation, rules regarding delivery to shareholders sharing an address and implied consent to such delivery.

 (d) Written notice to a domestic or foreign corporation (authorized to transact business in this State) may be addressed to its registered agent at its registered office or to the corporation or its secretary at its principal office shown in its most recent annual report or, in the case of a foreign corporation that has not yet delivered an annual report, in its application for a certificate of authority.

 (e) Except as provided in subsection (c), written notice, if in a comprehensible form, is effective at the earliest of the following:

 (1) when received;

 (2) five days after its deposit in the United States mail, as evidenced by the postmark, if mailed postpaid and correctly addressed;

 (3) on the date shown on the return receipt, if sent by registered or certified mail, return receipt requested, and the receipt is signed by or on behalf of the addressee.

 (f) Oral notice is effective when communicated if communicated in a comprehensible manner.

 (g) If Chapters 1 through 20 of this Title prescribes notice requirements for particular circumstances, those requirements govern. If articles of incorporation or bylaws prescribe notice requirements, not inconsistent with this section or other provisions of Chapters 1 through 20 of this Title, those requirements govern.

HISTORY: 1988 Act No. 444, Section 2; 2004 Act No. 221, Section 10.

OFFICIAL COMMENT

Section 1.41 (Section 33‑1‑410) establishes rules for determining how notice may be given and when notice is effective for a variety of purposes under the Model Act.

1. NOTICE BY A CORPORATION TO ITS SHAREHOLDERS.

Section 1.41(c) (Section 33‑1‑410(c)) provides that notice by a corporation to its shareholders is effective when mailed if correctly addressed with sufficient postage. The correct address for this purpose is the address shown in the corporation’s records. The effect of this section is to permit the corporation to compute the statutory time periods for notice of shareholders’ meetings and other actions from the date the notice is mailed without regard to where its shareholders are located or the time it takes for the mail to reach them.

Written notice to shareholders by persons other than the corporation is effective as provided in section 1.41(e) (Section 33‑1‑410(e)). Notice by the corporation to its shareholders that is not addressed to the record address of the shareholder is effective when received under section 1.41(e) (Section 33‑1‑410(e)).

2. NOTICE TO THE CORPORATION.

Section 1.41(d) (Section 33‑1‑410(d)) provides that notice to a corporation may be addressed to the registered agent of the corporation at its registered office or to the corporation or its secretary at the principal office of the corporation as shown in its most recent public filing. An officer, director, or shareholder of a corporation will normally give written notice to the corporation by delivering or mailing a copy of that notice to the corporation or to the secretary of the corporation at its principal office. Such a notice is effective when it is received. Such notice may be given for a variety of purposes under this Act, e.g., giving notice of intent to dissent (section 13.21 (Section 33‑13‑210)), notice of a demand to inspect books and records (section 16.02 (Section 33‑16‑102)), and notices of resignation (sections 8.07 (Section 33‑8‑107) and 8.43 (Section 33‑8‑430)). This method of giving notice to the corporation, however, is not exclusive, and an officer, director, or shareholder may give notice in other ways as well.

Persons who have no prior relationship with the corporation may give notice either to the registered agent of the corporation, or if they wish, to the corporation or its secretary at its principal office.

3. MISCELLANEOUS PROVISIONS.

Section 1.41 (Section 33‑1‑410) also contains a variety of general provisions dealing with notice. It recognizes, for example, that notice on some occasions may be given orally if that is reasonable under the circumstances. It also deals with situations where notice may be sought to be given to persons for whom no current address is available, or where personal notice is impractical. Notice delivered to the person’s last known address is effective as described in section 1.41(e) (Section 33‑1‑410(e)) even though never actually received by the person. Section 1.41(b) (Section 33‑1‑410(b)) also authorizes notice by publication in some circumstances, including radio, television, or other form of public wire or wireless communication.

Section 1.41(g) (Section 33‑1‑410(g)) recognizes that other sections of the Act prescribe specific notice requirements for particular situations—e.g., service of process on a corporation’s registered agent under section 5.04 (Section 33‑5‑104)—and that these specific requirements, rather than the general requirements of section 1.41 (Section 33‑1‑410), control. Finally, the second sentence of subsection 1.41(g) (Section 33‑1‑410(g)) permits a corporation’s articles of incorporation or bylaws to prescribe the corporation’s own notice requirements, if they are not inconsistent with the general requirements of this section or specific requirements of other sections of the Act.

The rules set forth in section 1.41 (Section 33‑1‑410) permit many other sections of the Model Act to be phrased simply in terms of giving or delivering notice without repeating details with respect to how notice should be given and when it is effective in various circumstances.

SOUTH CAROLINA REPORTERS’ COMMENTS

The 1981 South Carolina Business Corporation Act provision labeled “Notice” (Section 33‑1‑80) dealt with how one determined whether a certain time period has elapsed. It was effectively the same provision which continues to be set forth in Section 15‑1‑200, which section has been construed to apply to nonlitigation situations. Therefore, Section 33‑1‑80 of the 1981 South Carolina Business Corporation Act was generally redundant and has thus been deleted.

This provision dealing with notice is entirely different and its provisions are all new. Under prior South Carolina law, notice often was required to be given in writing (e.g., Section 33‑11‑210 of the 1981 South Carolina Business Corporation Act, notice of shareholders meeting). Although the new law specifies that written notice is the preferred method of communication, oral notice is permitted if “reasonable under the circumstances”. In the normal situation, the giving of oral notice will not cause any problem and will be in keeping with standard business practice. However, the new provision may invite disputes as to whether proper notice has been given. One party may claim “I told you” and the other deny “ever hearing anything about the matter”. Therefore, corporation officers, directors, and their advisors are cautioned not to utilize oral notice, particularly in matters potentially involving disputes among members of the corporation.

Likewise, subsection (b) should be used cautiously. Questions are likely to be raised as to whether or not a more direct way of communication was practical. It is assumed that the provisions of subsection (b) for newspaper, television, or radio notice will be used only in the most unusual situations.

Other provisions of this section effect technical changes in prior South Carolina law. Particular attention should be given to the fact that notice to a shareholder at the address on file with the corporation is effective even though he has moved (subsection (c)). There is a statutory presumption that notice is received within five days after a correct mailing (subsection (e)).

Notice to the corporation is given to either the registered agent or company secretary. Prior South Carolina law often merely said “file with the corporation” (e.g., 1981 South Carolina Business Corporation Act Section 33‑11‑270 dealing with dissenter’s rights) which created some ambiguity as to who within the company actually should be notified. As set forth in the Official Comments, other specific provisions of the act control over this one, and the company can specify other methods of notice so long as in accordance with the act (subsection (g)).

DERIVATION: 1984 Model Act Section 1.41.

CROSS REFERENCES

Annual report, see Sections 12‑20‑30 and 33‑16‑220.

Application for certificate of authority, see Section 33‑15‑103.

Definitions referred to this section for “notice” and “effective date of notice”, see Section 33‑1‑400.

“Principal office”: defined, see Section 33‑1‑400.

Record of shareholders, see Section 33‑16‑101.

Special notice requirements: derivative proceedings, see Section 33‑7‑400.

Special notice requirements: resignation of registered agent, see Sections 33‑5‑103 and 33‑15‑109.

Special notice requirements: service on corporation, see Sections 33‑5‑104 and 33‑15‑110.

Library References

Corporations 428, 429.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 587, 632 to 638.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:34 , Official Forms.

Attorney General’s Opinions

Absent amendment of notice statutes requiring notice in a newspaper of general circulation by the General Assembly, the term newspaper of general circulation cannot be extended to include online newspapers. S.C. Op.Atty.Gen. (October 21, 2015) 2015 WL 6745997.

**SECTION 33‑1‑420.** Number of shareholders.

 (a) For purposes of Chapters 1 through 20 of this Title, the following identified as a shareholder in a corporation’s current record of shareholders constitutes one shareholder:

 (1) three or fewer co‑owners;

 (2) a corporation, partnership, trust, estate, or other entity;

 (3) the trustees, guardians, custodians, or other fiduciaries of a single trust, estate, or account.

 (b) For purposes of Chapters 1 through 20 of this Title, shareholdings registered in substantially similar names constitute one shareholder if it is reasonable to believe that the names represent the same person.

HISTORY: 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 1.42 (Section 33‑1‑420) provides rules for determining the number of shareholders in a corporation. The Model Act generally avoids provisions that are based on the number of shareholders of a corporation, since these provisions may encourage individual shareholders to divide or combine their holdings for private strategic advantage. But in two instances the number of shareholders is critical: to permit a corporation to dispense with a board of directors as its principal form of corporate governance under section 8.01 (Section 33‑8‑101) and to elect close corporations status under the Model Statutory Close Corporation Supplement. The determination of the precise number of shareholders may also become important in other contexts in the future.

SOUTH CAROLINA REPORTERS’ COMMENTS

As noted in the Official Comment, this provision is entirely new. It merely clarifies who or what counts as one shareholder. Under the old law and new law, the number of shareholders, for state law purposes is relevant, for example, in determining whether ten percent of all the shareholders have called a special meeting (see Section 33‑11‑30(d)(4) of the 1981 South Carolina Business Corporation Act and Section 33‑7‑102 of this act).

Attorneys and others should continue to be aware that there are different definitions as to whether a “group” is one or many shareholders depending upon whether one is applying the federal securities laws (e.g., Rule 501(e) of Regulation D. of the Securities Act of 1933), South Carolina securities laws (e.g., Section 35‑1‑20(9)), or the tax laws (e.g., Subchapter S of the Internal Revenue Code).

This act does not adopt the Model Act Official Text language preventing corporations with over fifty shareholders from dispensing with a board of directors or electing to become a statutory close corporation. See the South Carolina Reporters’ Comments to Sections 33‑8‑101 and 33‑18‑103. The reference to these limitations in the Official Comment, therefore, should be disregarded.

DERIVATION: 1984 Model Act Section 1.42.

CROSS REFERENCES

Board of directors, see Section 33‑8‑101.

Close corporations, see Statutory Close Corporation Supplement, see Sections 33‑18‑101 et seq.

“Entity” defined, see Section 33‑1‑400.

Record of shareholders, see Sections 33‑7‑200 and 33‑16‑101.

“Shareholder” defined, see Section 33‑1‑400.

Voting trusts, see Section 33‑7‑300.

Library References

Corporations 170.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 305, 308 to 309, 312, 314, 317.