CHAPTER 5

Office and Agent

**SECTION 33‑5‑101.** Registered office and registered agent.

 Each corporation must continuously maintain in this State:

 (1) a registered office that may be the same as any of its places of business; and

 (2) a registered agent, who may be:

 (i) an individual who resides in this State and whose business office is identical with the registered office;

 (ii) a domestic corporation or not‑for‑profit domestic corporation whose business office is identical with the registered office; or

 (iii) a foreign corporation or not‑for‑profit foreign corporation authorized to transact business in this state whose business office is identical with the registered office.

HISTORY: Derived from 1976 Code Section 33‑5‑40 [1962 Code Section 12‑13.4; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

The requirements that a corporation continuously maintain a registered office and a registered agent at that office are based on the premises that at all times a corporation should have an office where it may be found and a person at that office on whom any notice or process required or permitted by law may be served. This covers not only service of process in connection with litigation but also tax notices and communications from the secretary of state and other governmental offices. The street address of the registered office must appear in the public records maintained by the secretary of state. A mailing address, such as a post office box, is not sufficient since the registered office is the designated location for service of process.

The Model Act assumes that formal communications to the corporation will normally be addressed to the registered agent at the registered office. If the communication itself deals with the registered office or registered agent, however, copies must be sent to the principal office of the corporation. Moreover, the Act authorizes corporations to retain records at, or to provide information to shareholders through, offices other than the registered office. The Model Act consistently recognizes that the registered office may be a “legal” rather than a “business” office.

Many corporations designate their registered office to be a business office of the corporation and a corporate officer at that office to be the registered agent. Since most of the communication to the registered agent at the registered office deals with legal matters, however, corporations often designate their regular legal counsel or his nominee as their registered agent and the counsel’s office as the registered office of the corporation. This practice may also encourage regular communication between the corporation and its legal counsel.

The registered agent need not be an individual. Corporation service companies often provide, as a commercial service, registered offices and registered agents at the office of the corporation service company.

The voluntary dissolution of the corporation does not of itself terminate the authority of the registered agent to accept service of process or other communications on behalf of the dissolved corporation. See section 14.05 (Section 33‑14‑105).

SOUTH CAROLINA REPORTERS’ COMMENTS

Other than deleting the statutory requirement that the Secretary of State must maintain a list of agents, and now permitting a nonprofit corporation to be a statutory agent, this section continues the requirements for statutory agents and registered offices previously set forth in Section 33‑5‑40 of the 1981 South Carolina Business Corporation Act. Although not mentioned in this section, but mentioned in Section 33‑2‑102(a)(3), the actual street address (not post office box) must be listed for the office and agent. There is now a separate section, with identical language, specifying the requirements for a registered office and agent for foreign corporations. See Section 33‑15‑107.

DERIVATION: 1984 Model Act Section 5.01.

CROSS REFERENCES

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

Changing registered office or agent, see Section 33‑5‑102.

Effect of dissolution of corporation, see Section 33‑14‑105.

Foreign corporations, see Sections 33‑15‑101 et seq.

Involuntary dissolution for failure to appoint and maintain registered agent and office, see Section 33‑14‑200.

Naming registered agent and office in articles of incorporation, see Section 33‑2‑102.

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

Resignation of registered agent, see Section 33‑5‑103.

Service on corporation, see Sections 15‑9‑210 et seq. and 33‑5‑104.

Library References

Corporations 392, 645, 646.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 580, 900.

Attorney General’s Opinions

The provisions in general corporation laws requiring a corporation to maintain a registered office and a registered agent are based upon the idea that it should be possible at all times to find a corporation and to have a person upon whom and a place at which any notice or process required or permitted by law may be served on the corporation (interpreting former law). 1963‑64 Op Atty Gen, No. 1716, p 187.

The comprehensive legislation governing railroad corporations when considered in connection with the savings clause in the Business Corporation Act for any class of corporations subject to statutory provisions authorizing and governing such special types of corporations, indicates a legislative intent to exclude railroad corporations from the operation of this section [Code 1962 Section 12‑13.4]. 1963‑64 Op Atty Gen, No. 1716, p 187.

Domestic railroad corporations required under the Constitution to maintain a principal place of business in this State, and regulated under the general railroad laws of this State, and amenable to service of process, are not required additionally to maintain a registered office and a registered agent within contemplation of the general corporation laws (interpreting former law). 1963‑64 Op Atty Gen, No. 1716, p 187.

NOTES OF DECISIONS

In general 1

1. In general

An agent designated by a corporation pursuant to Section 33‑5‑101 is an agent in fact and not a statutory agent for purposes of determining the removal period under 28 USCA Section 1446(b). Colello v. Baker Material Handling Corp., D.Me.1994, 849 F.Supp. 3.

**SECTION 33‑5‑102.** Change of registered office or registered agent.

 (a) A corporation may change its registered office or registered agent by delivering to the Secretary of State for filing a statement of change that sets forth:

 (1) the name of the corporation;

 (2) the street address of its current registered office;

 (3) if the current registered office is to be changed, the street address of the new registered office;

 (4) the name of its current registered agent;

 (5) if the current registered agent is to be changed, the name of the new registered agent and the new agent’s written consent (either on the statement or attached to it) to the appointment; and

 (6) that after the change or changes are made, the street addresses of its registered office and the business office of its registered agent will be identical.

 (b) If a registered agent changes the street address of his business office, he may change the street address of the registered office of any corporation for which he is the registered agent by notifying the corporation in writing of the change and signing (either manually or in facsimile) and delivering to the Secretary of State for filing a statement that complies with the requirements of subsection (a) and recites that the corporation has been notified of the change.

HISTORY: Derived from 1976 Code Section 33‑5‑50 [1962 Code Section 12‑13.5; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Changes of registered office or registered agent are usually routine matters which do not affect the rights of shareholders. The purpose of this section is to permit these changes without a formal amendment of the articles of incorporation, without approval of the shareholders, and, indeed, even without formal approval of the board of directors.

Changes of registered office or registered agent are often of particular concern to corporation service companies which routinely serve as registered agent and routinely provide a registered office for literally thousands of corporations within many states.

Experience with the change of registered agent and registered office provisions in earlier versions of the Model Act and the statutes of many states revealed several minor problems with these largely formal provisions that are addressed in the revised Model Act:

(1) Changes of registered office or registered agent need not be authorized by the board of directors. Many changes (such as the name of a specific registered agent at a registered office) are so routine that they should not require action by the board of directors, particularly in publicly held corporations.

(2) In the case of a change of registered agent, the written consent of the new registered agent is required. This is designed to prevent naming persons as registered agents without their knowledge.

(3) The procedure by which a registered agent may change the street address of the registered office applies to any location within the state and the agent is expressly required to notify the corporation of the change. But a facsimile signature of the agent is acceptable since a corporation service company changing its street address may be required to file a form for each of the thousands of corporations for which it serves as registered agent and to notify each corporation of the change.

Resignation of the registered agent is separately treated in section 5.03 (Section 33‑5‑103).

SOUTH CAROLINA REPORTERS’ COMMENTS

The new process for changing agents or changing the registered office is similar to Section 33‑5‑50 of the 1981 South Carolina Business Corporation Act. If a new agent is being appointed, he must specifically consent to this appointment in writing on the application. Very different from the prior statute, an authorized officer can appoint a new agent without formal board of directors’ approval.

The prior statute specifically stated that, if an agent died or became incapacitated, the company had the duty to appoint a new agent. This provision is no longer specifically set forth but is still clearly implied from Section 33‑5‑101 which states that each company must continuously maintain an agent.

Resignation of registered agents is covered in Section 33‑5‑103.

The prior statute recognized that the company could fire an agent (revoke its authority) and, once notice of the firing was filed, authority would cease. Although this language is not included specifically in this section, no change is intended. The introductory language of this section designates that the corporation controls whom it wants as its agent. The registered agent, like any agent, serves at the pleasure of the principal, the corporation.

If the agent merely moves its office, the agent itself may notify both the company and Secretary of State of the move. The notification to the Secretary of State shall contain all the same information as if the company were directing the change. In regard to changing the address, the new statute is very specific in requiring a street address. This is effectively the same procedure as was previously set forth in Section 33‑5‑50(d) of the 1981 South Carolina Business Corporation Act. The prior statute applied to both domestic and foreign corporations. This act contains an identical separate provision applicable to foreign corporations. See Section 33‑15‑108.

DERIVATION: 1984 Model Act Section 5.02.

CROSS REFERENCES

Deletion of initial agent and office from articles of incorporation, see Section 33‑10‑102.

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

Effect of dissolution of corporation, see Section 33‑14‑105.

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.

Involuntary dissolution for failure to file notice of change of registered agent or office, see Section 33‑14‑200.

“Notice” defined, see Section 33‑1‑410.

Resignation of registered agent, see Section 33‑5‑103.

Library References

Corporations 392, 645, 646.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 580, 900.

NOTES OF DECISIONS

In general 1

1. In general

A plaintiff properly served the defendant corporation as required by Rule 4, SCRCP, where (1) the plaintiff could not serve the registered agent because the registered agent had retired, (2) the defendant had failed to inform the Secretary of State of the new agent, (3) the individual who was actually served was the defendant’s office manager, (4) at the time of the service, the office manager assured the server that she was authorized to accept service. Schenk v. National Health Care, Inc. (S.C.App. 1996) 322 S.C. 316, 471 S.E.2d 736, rehearing denied, certiorari denied.

**SECTION 33‑5‑103.** Resignation of registered agent.

 (a) A registered agent may resign his agency appointment by signing and delivering to the Secretary of State for filing the signed original and two exact or conformed copies of a statement of resignation. The statement may include a statement that the registered office is also discontinued.

 (b) After filing the statement the Secretary of State shall mail one copy to the registered office (if not discontinued) and the other copy to the corporation at its principal office.

 (c) The agency appointment is terminated, and the registered office discontinued if so provided, on the thirty‑first day after the date on which the statement was filed.

HISTORY: Derived from 1976 Code Section 33‑5‑50 [1962 Code Section 12‑13.5; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

The resignation of registered agents in states with statutes similar to earlier versions of the Model Act created special problems. Most of these problems arose in connection with corporation service companies who serve as registered agent for an annual fee. If the fee was not paid, the corporation service company obviously desired to terminate the representation promptly. Often the agent did not have a current business address for the corporation and was uncertain whether the corporation was still actively engaged in business. The earlier Model Act provision required the agent to submit his statement of resignation in duplicate and the secretary of state was directed to mail one copy “forthwith . . . to the corporation at its registered office.” This resulted in a circularity in notice: the duplicate was mailed back to the resigned agent who originally filed the copy. The probability that the corporation would receive a copy of the resignation under these circumstances was obviously low.

Section 5.03 (Section 33‑5‑103) resolves the circularity problem by requiring the resigning agent to submit two copies of its statement of resignation, one to be sent to the corporation at its registered office and the other to the corporation “at its principal office.” Mailing to this second address appears to be the only option regularly available to “break the circle” of the corporation “receiving” the notice through an agent whose resignation is being communicated.

This section also permits the discontinuance of the registered office as well as the resignation of the agent. Corporation service companies desiring to resign their agency for nonpayment of fees will normally wish to discontinue the registered office as well as the registered agent.

SOUTH CAROLINA REPORTERS’ COMMENTS

The 1981 South Carolina Business Corporation Act dealt with resignation as a subsection of the general topic, “change in agents”. The new law singles out resignations for individual treatment and significantly changes the process.

Under Section 33‑5‑50(b) of the 1981 South Carolina Business Corporation Act, the agent sent notice of quitting to the Secretary of State and to the company. The resignation was effective thirty days after the Secretary received the notice or upon the appointment of a successor, whichever was earlier.

This section establishes a much different procedure. The agent notifies only the Secretary of State that he is quitting, and then the Secretary of State must notify the company by mailing one copy to the principal office and the other back to the registered office. If the registered agent also is canceling the registered office, there is no need to send a copy to the old office. The Secretary of State will know where the company’s principal office is located from the information in the annual report. The prior statute stated nothing directly about canceling the registered office along with the resignation, but this section specifically acknowledges that the agent also may discontinue the registered office. The Official Comment states that this new procedure is intended to protect service companies.

Although there may be overlap if one agent quits and another one is appointed within the thirty‑day grace period, it would appear that service on either would be proper.

The old law directed the company to immediately appoint a successor when its agent quit. Although there is no longer a subsection specifically mandating this, see Section 33‑5‑101 which requires the company to maintain an agent continuously.

As with Sections 33‑5‑101 and 33‑5‑102, there is now an identical, separate section, Section 33‑15‑109, dealing with the resignation of agents of foreign corporations.

DERIVATION: 1984 Model Act Section 5.03.

CROSS REFERENCES

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

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

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

Effect of dissolution of corporation, see Section 33‑14‑105.

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

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

Filing fees, see Section 33‑1‑220.

Filing requirements, see Section 33‑1‑200.

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

“Principal office”: designated in annual report, see Sections 12‑20‑30 and 33‑16‑220.

Library References

Corporations 392, 645, 646.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 580, 900.

**SECTION 33‑5‑104.** Service on corporation.

 Service of process on a corporation must be in accord with the applicable provisions of Title 15.

HISTORY: Derived from 1976 Code Section 33‑5‑60 [1962 Code Section 12‑13.6; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

[Note: This Official Comment accompanies Section 5.04 of the 1984 Model Act. Service of process on corporations in South Carolina is governed by Section 15‑9‑210, related statutes, and the Rules of Civil Procedure, which are discussed in the South Carolina Reporters’ Comments to this section.].

Somewhat the same circularity problem that arose in connection with the resignation of registered agents (see the Official Comment to section 5.03 (Section 33‑5‑103)) also sometimes arose in connection with service of process under statutes based on the former Model Act provision. Under that provision, if service could not be made on the registered agent at its registered office, a duplicate of the process was forwarded to the secretary of state who served it at the registered office (where the agent previously could not be found). It is unlikely that this arrangement resulted in the copy being forwarded routinely to the corporation. Instead of providing for service on the secretary of state if service cannot be perfected on the registered agent, therefore, section 5.04 (Section 15‑9‑210) provides for service by registered or certified mail addressed to the secretary of the corporation at its principal office shown in its most recent annual report.

If service is not perfected on the corporation at its registered office, section 5.04(b) (Section 15‑9‑210(b)) provides that service is deemed perfected at the earliest of:

(1) the date the corporation receives the mail;.

(2) the date shown on the return receipt if the receipt is signed on behalf of the corporation;.

(3) five days after the certified or registered mail is delivered to the post office or deposited in the mail by the person seeking to serve the corporation, if the return receipt was not returned or not signed on behalf of the corporation.

Section 5.04 (Section 15‑9‑210) also simplifies the recordkeeping requirements of the secretary of state, who is no longer required to keep records of service of process on domestic corporations.

Section 5.04(c) (Section 15‑9‑210(c)) provides that this section does not prescribe the only, or necessarily the required, means of serving a corporation. Service may also be perfected under civil practice statutes, under rules of civil procedure, or under statutes that provide special service requirements applicable to certain types of corporations.

SOUTH CAROLINA REPORTERS’ COMMENTS

The South Carolina provision for service of process on a corporation is somewhat different from the 1984 Model Act in that the actual procedures are set forth in Title 15, dealing with court procedures, rather than in Title 33, the corporate code. It was determined that since there was confusion already as to how various entities are served, it is advantageous to keep all the service procedures together in one title. It is recognized that this may be somewhat of a detriment to out‑of‑state lawyers who will assume initially that they can find the procedures for suing a South Carolina corporation in the corporate code, or from a law reporter service that contains only the corporate codes for all jurisdictions. On the other hand, most litigation involving South Carolina corporations will be of a local nature or will involve South Carolina lawyers. Therefore, it was thought prudent to continue existing South Carolina policy of including the service provisions in Title 15. Therefore, the 1984 Model Act provision, Section 5.04, has been added to the statutes as Section 15‑9‑210 of the 1976 Code.

For informational purposes, as of the date this new Section 15‑9‑210 was adopted, it made the following changes (the reader is cautioned particularly to review Section 15‑9‑210, since its provision may change after these comments are written).

The most significant change in effecting service on a domestic corporation is that the Secretary of State is no longer involved. If service cannot be made on the statutory agent, then service is made directly on the company to the attention of the company secretary. If the company has no secretary, the service still is good if the letter is mailed in accordance with the procedure set forth in Section 15‑9‑210(b).

A second major change involves when service may be made directly on the company (and not on the statutory agent). The prior version of Section 15‑9‑210 stated that alternate service was proper only if there was no statutory agent, or if the registered agent could not be found with reasonable diligence. The revised Section 15‑9‑210 states that alternate service on the company itself can be made if there is no agent or if the “agent cannot with reasonable diligence be served.” This new test of cannot be served is somewhat more liberal than the prior test of cannot be found. For example, one might know that the agent was at the location but had skillfully avoided receiving mail or refused to answer the door. If such occurs, the attorney might use the alternative procedure. Note, that except as to the alternative procedure, there is nothing in revised Section 15‑9‑210 that specifies how the statutory agent is served. For this the attorney should refer to Rule 4 of the South Carolina Rules of Civil Procedure.

In respect to effective service on the company secretary, the Model Act provision has been modified and the South Carolina provision, revised Section 15‑9‑210(b)(3), states that service is perfected:

“(3) five days after its deposit in the United States mail as evidenced by the postmark, if mailed postpaid and correctly addressed to the address of the company’s principal office which is listed on the last filed annual report of the company (or if none has been filed, the address of the principal office specified in the initial report of the corporation filed with the South Carolina Tax Commission).”

The italicized new language is necessary to clarify that a properly mailed letter to the last filed address is in fact notice, whether or not the company elects to receive the letter. Otherwise, the company could, merely by canceling its statutory agent and refusing receipt of all letters, make itself immune from service (at least pursuant to the Model Act service method).

It is important to note that, like the prior version of Section 15‑9‑210, the revised statute states that the company can be served by any other proper means. In this regard, attention is directed to South Carolina Rules of Civil Procedure Rule 4(d)(3) which provides a very different but yet fully authorized manner of serving domestic corporations. Rule 4(d)(3) provides that corporations (including foreign corporations) can be served as follows:

“4(d)(3). Corporations and Partnerships. Upon a corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.”

The Supreme Court has upheld serving any general agent of the corporation even though the corporation has a specific statutory agent whose job is specifically to receive service and other notices, Renney v. Dobbs Houses, Inc., 275 S.C. 562, 274 S.E.2d 290 (1981).

However, the Supreme Court more recently held that serving both a key employee of a registered foreign corporation and also the Secretary of State was improper service since the plaintiff failed to serve the existing registered agent. Kreke v. Ohio Gear‑Wallace Murray Corporation, 287 S.C. 388, 339 S.E.2d 115 (1986). The court overlooked the language, which was also in the statute regarding serving a corporation, that stated that “nothing herein contained shall limit or affect the right to serve any process, notice or demand, required or permitted by law to be served on a corporation in any other manner now or hereafter permitted by law.” Also, the court in the first footnote stated, “we express no opinion whether Rule 4(d)(3) of SCRCP would change the result in a suit or case.”

Clearly, the revised language of new Section 15‑9‑210(c) permits service by Rule 4(d)(3) and reverses the result of Kreke v. Ohio Gear‑Wallace Murray Corporation (even assuming this case was decided rightly).

If a South Carolina corporation has one or more nonresident directors, Section 15‑9‑430 should be consulted. This section has no counterpart in the 1984 Model Act. However, Section 12‑19‑20, which is based in part on the Model Act, requires each corporation to file annually a listing of its directors, along with their current business addresses. Any interested citizen has access to this information through either the Secretary of State’s office or from the Tax Commission. Since the information on addresses of all directors is updated on an annual filing, it will save the Secretary of State time if it only has to monitor those changes which occur between annual reports. Therefore, Section 15‑9‑430 has been amended to provide that a corporation that has a director who is or becomes a nonresident between annual report filings must file with the Secretary of State the names and addresses (both business and home) of such nonresident directors. The amendment also states that service is proper when made to the out‑of‑state directors’ “business office” (rather than home address).

If a director who lives in South Carolina and also has his business office in South Carolina moves only his home to North Carolina (and not his business), this change is to be filed, but service is proper by delivering the documents at his South Carolina business address.

The statutory method for serving foreign corporations is similar but somewhat different than serving domestic companies. For these procedures see Section 15‑9‑240 and the South Carolina Reporters’ Comments to Section 33‑15‑110 of this act.

DERIVATION: 1984 Model Act Section 5.04— But see the South Carolina Reporters’ Comments.

CROSS REFERENCES

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

Foreign corporations, see Sections 33‑15‑101 et seq.

“Notice” defined, see Section 33‑1‑410.

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

Registered office and agent: required, see Section 33‑5‑101.

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

Service on corporations, see Sections 15‑9‑210 et seq.

Library References

Corporations 507.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 721 to 735.