CHAPTER 7

Shareholders

ARTICLE 1

Meetings

**SECTION 33‑7‑101.** Annual meeting.

(a) A corporation shall hold a meeting of shareholders annually at a time stated in or fixed in accordance with the bylaws or, in the alternative, may take such action as would be taken at an annual meeting by taking action by unanimous written consent under Section 33‑7‑104.

(b) Annual shareholders’ meetings may be held in or out of this State at the place stated in or fixed in accordance with the bylaws. If no place is stated in or fixed in accordance with the bylaws, annual meetings must be held at the corporation’s principal office.

(c) The failure to hold an annual meeting at the time stated in or fixed in accordance with a corporation’s bylaws does not affect the validity of any corporate action.

HISTORY: Derived from 1976 Code Section 33‑11‑30 [1962 Code Section 12‑16.3; 1952 Code Sections 12‑251 to 12‑253; 1942 Code Sections 7679, 7680; 1932 Code Sections 7679, 7680; Civ. C. ‘22 Sections 4253, 4254; Civ. C. ‘12 Sections 2786, 2787; Civ. C. ‘02 Sections 1845, 1846; R. S. 1502; 1901 (21) 811; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.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

Section 7.01(a) (Section 33‑7‑101(a)) requires every corporation to hold an annual meeting each year of shareholders entitled to participate in the election of directors and to consider other matters coming before the meeting of shareholders. In most instances, the meeting will involve only the holders of a single class of voting shares. The principal action to be taken at the annual meeting is the election of directors pursuant to section 8.03 (Section 33‑8‑103), but the purposes of an annual meeting are not limited and all matters appropriate for shareholder action may also be considered at that meeting. An annual meeting is also the appropriate forum for a shareholder to raise any relevant question about the corporation’s operations.

The requirement of section 7.01 (Section 33‑7‑101(a)) that an annual meeting be held is phrased in mandatory terms to ensure that every shareholder entitled to participate in the meeting has the unqualified rights (1) to demand that the annual meeting be held and (2) to compel the holding of the meeting under section 7.03 (Section 33‑7‑103) if the corporation does not promptly hold the meeting. Many corporations, such as non‑public subsidiaries and closely held corporations, do not regularly hold annual meetings, and if no shareholder objects, that practice creates no problem under section 7.01 (Section 33‑7‑101), since section 7.01(c) (Section 33‑7‑101(c)) provides that failure to hold an annual meeting does not affect the validity of any corporate action. Rather than holding an annual meeting, the shareholders may elect directors and take other appropriate action by unanimous written consent under section 7.04 (Section 33‑7‑104). And, even if the shareholders fail to elect directors, the directors currently in office continue in office under section 7.05 (Section 33‑8‑105) beyond the expiration of their terms.

The time and place of the annual meeting may be “stated in or fixed in accordance with the bylaws.” If the bylaws do not themselves fix a time and place for the annual meeting, authority to fix them may be delegated to the board of directors or to a specified corporate officer. This section thus gives corporations the flexibility to hold annual meetings in varying places at varying times as convenience may dictate.

The annual meeting may be held either inside or outside the state or in a foreign country, but if the bylaws do not fix, or state the method of fixing, the place of the meeting, the meeting must be held at the “principal office” of the corporation. The principal office is defined in section 1.40 (Section 33‑1‑400) as the location of the principal executive office of the corporation and may or may not be its registered or official office under section 5.01 (Section 33‑5‑101). Section 16.22 (Section 33‑16‑220) requires that the address of the principal office be specified in the corporation’s annual report.

If the annual meeting is not held either within 6 months of the close of the corporation’s fiscal year or within 15 months of the last annual meeting, a shareholder may compel an annual meeting to be held under section 7.03 (Section 33‑7‑103). In the absence of a demand for a meeting, a corporation can operate indefinitely without actually holding an annual meeting. The shareholders may act by unanimous consent under section 7.04 (Section 33‑7‑104), and in any event directors, once duly elected, remain in office until their successors are qualified. See section 8.05 (Section 33‑8‑105).

Authority granted to the board of directors or some individual to fix the time and place of the annual meeting must be exercised in good faith. See Schnell v. Chris‑Craft Industries, Inc., 285 A.2d 437 (Del. 1971).

SOUTH CAROLINA REPORTERS’ COMMENTS

The location of the meeting, if none is fixed by the bylaws, is the corporation’s “principal office” (defined in Section 33‑1‑400(18)) as the office designated in the company’s annual report where the principal executive offices are located) rather than its “registered office.” Otherwise, there is no significant change.

Prior South Carolina law, Section 33‑11‑30(b) of the 1981 South Carolina Business Corporation Act, made the obligation to hold a meeting subject to Section 33‑11‑180, which provided for action by unanimous consent without a meeting. The Official Text of Section 7.01 of the 1984 Model Act demands point blank that there be an annual meeting of shareholders; yet, the Official Comment indicates that action by unanimous written consent under Section 33‑7‑104 is an alternative to holding a meeting. It was decided to make clear in the statute that the option of acting through unanimous written consent without a meeting is still available.

DERIVATION: 1984 Model Act Section 7.01.

CROSS REFERENCES

Action without meeting, see Section 33‑7‑104.

Bylaws, see Sections 33‑2‑106 and 33‑10‑200 et seq.

Close corporations, see Statutory Close Corporation Supplement, Section 33‑18‑230.

Court‑ordered meeting, see Section 33‑7‑103.

Director holdover terms, see Section 33‑8‑105.

Notice of meeting, see Section 33‑7‑105.

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

Proxies, see Section 33‑7‑220.

Quorum and voting requirements, see Sections 33‑7‑250 through 33‑7‑270.

Shareholders’ list for meeting, see Section 33‑7‑200.

Special meeting, see Section 33‑7‑102.

Voting entitlement of shares, generally, see Section 33‑7‑210.

“Voting group” defined, see Section 33‑1‑400.

Library References

Corporations 191, 193, 194.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 362 to 365, 374.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:15 , Shareholders‑Meetings.

NOTES OF DECISIONS

In general 1

1. In general

Where no meeting of the stockholders had been held for years, a stockholders’ meeting called by the president, who also owned or controlled practically all of the stock of a corporation, was properly called and became the annual meeting, although the meeting was not held on the date established by the bylaws for holding the annual meeting. Freeman v. King Pontiac Co. (S.C. 1960) 236 S.C. 335, 114 S.E.2d 478.

**SECTION 33‑7‑102.** Special meeting.

(a) A corporation shall hold a special meeting of shareholders:

(1) on call of its board of directors or the person authorized to do so by the articles of incorporation or bylaws; or

(2) in the case of a corporation which is not a public corporation or of a public corporation which elects in its articles of incorporation, if the holders of at least ten percent of all the votes entitled to be cast on any issue proposed to be considered at the proposed special meeting sign, date, and deliver to the corporation’s secretary one or more written demands for the meeting describing the purpose for which it is to be held.

(b) If not otherwise fixed under Section 33‑7‑103 or 33‑7‑107, the record date for determining shareholders entitled to demand a special meeting is the date the first shareholder signs the demand.

(c) Special shareholders’ meetings may be held in or out of this State at the place stated in or fixed in accordance with the bylaws. If no place is stated or fixed in accordance with the bylaws, special meetings must be held at the corporation’s principal office.

(d) Only business within the purpose described in the meeting notice required by Section 33‑7‑105(c) may be conducted at a special shareholders’ meeting.

HISTORY: Derived from 1976 Code Section 33‑11‑30 [1962 Code Section 12‑16.3; 1952 Code Sections 12‑251 to 12‑253; 1942 Code Sections 7679, 7680; 1932 Code Sections 7679, 7680; Civ. C. ‘22 Sections 4253, 4254; Civ. C. ‘12 Sections 2786, 2787; Civ. C. ‘02 Sections 1845, 1846; R. S. 1502; 1901 (21) 811; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], and Section 33‑11‑40 [1962 Code Section 12‑16.4; 1952 Code Sections 12‑251 to 12‑253; 1942 Code Sections 7679, 7680; 1932 Code Sections 7679, 7680; Civ. C. ‘22 Sections 4253, 4254; Civ. C. ‘12 Sections 2786, 2787; Civ. C. ‘02 Sections 1845, 1846; R. S. 1502; 1901 (21) 811; 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; 1998 Act No. 328, Section 2.

OFFICIAL COMMENT

Any meeting other than an annual meeting is a special meeting under section 7.02 (Section 33‑7‑102). The principal formal differences between an annual and a special meeting are that at an annual meeting directors are elected and, subject to the special notice requirements of section 7.05(b) (Section 33‑7‑105(b)), any relevant issue pertaining to the corporation may be considered, while a special meeting must be called for specific purposes and may only consider matters within those purposes.

1. WHO MAY CALL A SPECIAL MEETING.

A special meeting may be called under section 7.02(a) (Section 33‑7‑102 (a)) by the board of directors or the person or persons authorized to do so by the articles of incorporation or bylaws. Typically, the person or persons holding certain designated offices within the corporation, e.g., the president, chairman of the board of directors, or chief executive officer, are given authority to call special meetings of the shareholders. In addition, the holders of at least 10 percent of the votes entitled to be cast on a proposed issue at the special meeting may require the corporation to hold a special meeting by signing, dating, and delivering one or more writings that demand a special meeting and set forth the purpose or purposes of the desired meeting. Shareholders demanding a special meeting do not have to sign a single piece of paper, but the writings signed must all describe essentially the same purpose or purposes. Upon receipt of writings evidencing a demand by holders of 10 percent of the votes, the corporation (through an appropriate officer) must call the special meeting at a reasonable time and place. The shareholders’ demand may suggest a time and place but the final decision on such matters is the corporation’s. If no meeting is held within the time periods specified in section 7.03 (Section 33‑7‑103), the shareholders may obtain a summary court order under that section requiring that the meeting be held.

Section 7.02(b) (Section 33‑7‑102(b)) fixes a record date for determining the shareholders entitled to sign a demand for a special shareholders’ meeting. Unless a record date is otherwise fixed for this purpose, the record date is the date the first shareholder signs the demand. If a shareholder initially signs a demand but later seeks to withdraw his demand, the corporation may permit the shareholder to do so.

2. DISCRETION AS TO CALLS OF SPECIAL MEETING.

Under section 7.02(a)(2) (Section 33‑7‑102(a)(2)) it is possible that more than one faction of shareholders may demand meetings at roughly the same time or that a single (or changing) faction of shareholders may request consecutive, overlapping, or repetitive meetings. The responsible corporate officers have some discretion as to the call and purposes of a meeting, and where demands are repetitious or overlapping, they may refuse to call a meeting for a purpose identical or similar to a purpose for which a previous special meeting was held in the recent past. Similarly, they may decline to call a special meeting when an annual meeting will be held in the near future. This limited discretion of the corporation to deny repetitive or overlapping demands may ultimately be tested under section 7.03 (Section 33‑7‑103), which itself gives the court discretion whether or not to compel the holding of a special meeting under these circumstances. See the Official Comment to section 7.03 (Section 33‑7‑103).

3. THE BUSINESS THAT MAY BE CONDUCTED AT A SPECIAL MEETING.

Section 7.05(c) (Section 33‑7‑105(c)) provides that a notice of a special meeting must include a “description of the purpose or purposes for which the meeting is called.” Section 7.02(d) (Section 33‑7‑102(d)) states that only business that is within that purpose or those purposes may be conducted at a special meeting. The word “within” was chosen, rather than a broader phrase like “reasonably related to,” to describe the relationship between the notice and the authorized business to assure a shareholder who does not attend a special meeting that new or unexpected matters will not be considered in his absence.

SOUTH CAROLINA REPORTERS’ COMMENTS

Under the revision, the president and the chairman of the board lack authority to call a special meeting absent express authorization in the articles or bylaws. Bylaws generally identify persons who may call special meetings, however. Under the 1981 South Carolina Business Corporation Act, the articles allowed a meeting to be called by shareholders having less than ten percent of the shares entitled to vote. The revision establishes ten percent as the absolute minimum.

The revision adds clarity by specifying steps to be followed by a shareholder who wishes to call a special meeting (subsection (a)(2)); a means of fixing a record date for calculation of the percentage of stock ownership (subsection (b)); where the meetings may be held (subsection (c)); and what may be on the agenda (subsection (d)).

Section 33‑8‑100(d) specifically empowers any shareholder to call a special meeting for the election of directors in cases where the corporation has no directors in office.

DERIVATION: 1984 Model Act Section 7.02.

CROSS REFERENCES

Action without meeting, see Section 33‑7‑104.

Annual meeting, see Section 33‑7‑101.

Articles of incorporation, see Section 33‑2‑102.

Bylaws, see Sections 33‑2‑106, 33‑10‑200 et seq.

Court‑ordered meeting, see Section 33‑7‑103.

Notice of meeting, see Section 33‑7‑105.

Objection to extraneous business, see Section 33‑7‑106.

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

Quorum and voting requirements, see Sections 33‑7‑250 through 33‑7‑270.

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

Shareholders’ list for meeting, see Section 33‑7‑200.

Voting entitlement of shares generally, see Section 33‑7‑210.

“Voting group” defined, see Section 33‑1‑400.

Waiver of notice, see Section 33‑7‑106.

Library References

Corporations 193, 194, 196.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 363 to 369, 371 to 372.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Banks and Banking Section 67, Notice of Meeting.

S.C. Jur. Banks and Banking Section 71, Special Meeting.

Forms

South Carolina Legal and Business Forms Section 1:15 , Shareholders‑Meetings.

South Carolina Legal and Business Forms Section 1:183 , Shareholders’ Meetings‑Special Meeting‑Contents of Notice.

South Carolina Legal and Business Forms Section 1:260 , Call of Special Shareholders’ Meeting‑By President.

NOTES OF DECISIONS

In general 1

1. In general

Where no meeting of the stockholders had been held for years, a stockholders’ meeting called by the president, who also owned or controlled practically all of the stock of a corporation, was properly called under this section and became the annual meeting, although the meeting was not held on the date established by the bylaws for holding the annual meeting. Freeman v. King Pontiac Co. (S.C. 1960) 236 S.C. 335, 114 S.E.2d 478.

**SECTION 33‑7‑103.** Court‑ordered meeting.

(a) The circuit court of the county where a corporation’s principal office (or, if none in this State, its registered office) is located may order a meeting to be held:

(1) on application of any shareholder of the corporation entitled to participate in an annual meeting if an annual meeting was not held within the earlier of nine months after the end of the corporation’s fiscal year or eighteen months after its last annual meeting; or

(2) on application of a shareholder who signed a demand for a special meeting valid under Section 33‑7‑102 if:

(i) notice of the special meeting was not given within thirty days after the date the demand was delivered to the corporation’s secretary; or

(ii) the special meeting was not held in accordance with the notice.

(b) The court may fix the time and place of the meeting, determine the shares entitled to participate in the meeting, specify a record date for determining shareholders entitled to notice of and to vote at the meeting, prescribe the form and content of the meeting notice, fix the quorum required for specific matters to be considered at the meeting (or direct that the votes represented at the meeting constitute a quorum for action on those matters), and enter other orders necessary to accomplish the purpose of the meeting.

HISTORY: Derived from 1976 Code Section 33‑11‑30 [1962 Code Section 12‑16.3; 1952 Code Sections 12‑251 to 12‑253; 1942 Code Sections 7679, 7680; 1932 Code Sections 7679, 7680; Civ. C. ‘22 Sections 4253, 4254; Civ. C. ‘12 Sections 2786, 2787; Civ. C. ‘02 Sections 1845, 1846; R. S. 1502; 1901 (21) 811; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], and Section 33‑11‑40 [1962 Code Section 12‑16.4; 1952 Code Sections 12‑251 to 12‑253; 1942 Code Sections 7679, 7680; 1932 Code Sections 7679, 7680; Civ. C. ‘22 Sections 4253, 4254; Civ. C. ‘12 Sections 2786, 2787; Civ. C. ‘02 Sections 1845, 1846; R. S. 1502; 1901 (21) 811; 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; 1994 Act No. 461, Section 5.

OFFICIAL COMMENT

Section 7.03 (Section 33‑7‑103) provides the remedy for shareholders if the corporation refuses or fails to hold a shareholders’ meeting as required by section 7.01 (Section 33‑7‑101) or 7.02 (Section 33‑7‑102). A shareholder entitled to participate in a meeting may apply for a summary court order to command the holding of a meeting if (1) an annual meeting is not held within 6 months after the end of the corporation’s fiscal year or 15 months after its last annual meeting, or (2) a special meeting is not properly noticed within 30 days after a valid demand is delivered to the secretary of the corporation, or, if properly noticed, is not held in accordance with the notice. Since the meeting must be held within 60 days of the notice date under section 7.05 (Section 33‑7‑105), the maximum delay between the demand for a special meeting and the right to petition a court for a summary order is 90 days.

1. THE COURT WITH JURISDICTION TO ADMINISTER SECTION 7.03 (Section 33‑7‑103).

The identity of the specific court with jurisdiction to order a shareholder’s meeting under section 7.03(a) (Section 33‑7‑103(a)) must be supplied by each state when enacting this section. It is intended that this should be a court of general civil jurisdiction. Generally, all matters relating to a corporation should be addressed to the court in the county where the corporation’s principal office is located in the state or, if the corporation does not have a principal office in the state, to the court in the county in which its registered office is located.

2. THE DISCRETION OF THE COURT.

The court has discretion under section 7.03 (Section 33‑7‑103) since the language of the statute is that the court “may summarily order” that a meeting be held. A court, for example, may refuse to order a special meeting if the specified purpose is repetitive of the purpose of a special meeting held in the recent past. See the Official Comment to section 7.02 (Section 33‑7‑102). Alternatively, the court may view the demand as a good faith request for reconsideration of an action taken in the recent past and may order a meeting to be held. Similarly, even though a demand for an annual meeting is not a formal prerequisite for an application for a summary order under this section, the court may withhold setting a time and date for the annual meeting for a reasonably short period in order to permit the corporation to do so.

3. BURDEN OF PROOF.

In any event, a shareholder applying for a summary order to hold a meeting has the burden of showing that he is entitled to the order. In the case of a special meeting, he has the burden of showing that the demand was executed by the holders of at least 10 percent of the votes entitled to be cast on the record date and that the demand was duly delivered to the corporation’s secretary.

4. NOTICE, TIME, PLACE, AND QUORUM REQUIREMENTS.

If the court orders that a meeting be held, it may fix the time and place of the meeting, determine the voting groups entitled to participate in the meeting, set the record date, order notice to be given as required by section 7.05 (Section 33‑7‑105), and enter such other orders as may be appropriate for the holding of the meeting. The court may also establish the quorum requirements for specific matters to be considered at the meeting or direct that the votes represented at the meeting automatically constitute a quorum for the taking of any action without regard to section 7.25 (Section 33‑7‑250) or any provision to the contrary in the corporation’s articles of incorporation or bylaws. The latter alternative prevents a holder of the majority of the votes (who may not desire that a meeting be held) from frustrating the court‑ordered meeting by not attending to prevent the existence of a quorum. In order to prevent misunderstanding about a special quorum requirement, if one is imposed, it is appropriate for the court to order that the notice of the meeting state specifically and conspicuously that a special quorum requirement is applicable to the court‑ordered meeting.

5. STATUS AS ANNUAL MEETING.

The court may provide that a meeting it has ordered is to be the annual meeting. If so provided, the meeting should be viewed as compliance with section 7.01 (Section 33‑7‑101), precluding all other shareholder requests for an annual meeting for that year.

SOUTH CAROLINA REPORTERS’ COMMENTS

The revision gives management more time to hold a meeting before being sued. It also gives the court more leeway in fixing the quorum requirement for the substitute annual meeting. Under present law an eighty percent shareholder can frustrate the court’s intervention by refusing to attend, thereby preventing the existence of a quorum. Under the revision, the court can fix a quorum requirement as low as one share.

Under Section 33‑11‑30(c)(1) of the 1981 South Carolina Business Corporation Act, persons entitled to call special meetings could call substitute annual meetings. Thus, a ten percent shareholder could call a substitute annual meeting under prior law. This power no longer exists. The shareholder’s remedy is to go to court.

The revision departs from the Model Act by elimination of “summarily” before “order” in subsection (a). The change is to eliminate any implication that an order compelling corporate action could be issued without giving the corporation notice and an opportunity to be heard.

DERIVATION: 1984 Model Act Section 7.03.

CROSS REFERENCES

Action without meeting, see Section 33‑7‑104.

Annual meeting, see Section 33‑7‑101.

Effective date of notice, see Section 33‑1‑410.

Notice of meeting, see Section 33‑7‑105.

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

Quorum and voting requirements, see Sections 33‑7‑250 through 33‑7‑270.

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

Shareholders’ list for meeting, see Section 33‑7‑200.

Special meetings, see Section 33‑7‑102.

Voting entitlement of shares generally, see Section 33‑7‑210.

Library References

Corporations 193, 194.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 363 to 365.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Banks and Banking Section 67, Notice of Meeting.

**SECTION 33‑7‑104.** Action without meeting.

(a) Action required or permitted by Chapters 1 through 20 of this Title to be taken at a shareholders’ meeting may be taken without a meeting if the action is taken by all the shareholders entitled to vote on the action. The action must be evidenced by one or more written consents describing the action taken, signed by all the shareholders entitled to vote on the action, and delivered to the corporation for inclusion in the minutes or filing with the corporate records.

(b) If not otherwise fixed under Section 33‑7‑103 or 33‑7‑107, the record date for determining shareholders entitled to take action without a meeting is the date the first shareholder signs the consent under subsection (a).

(c) A consent signed under this section has the effect of a meeting vote and may be described as such in any document.

(d) If Chapters 1 through 20 of this Title requires that notice of proposed action be given to nonvoting shareholders and the action is to be taken by unanimous consent of the voting shareholders, the corporation must give its nonvoting shareholders written notice of the proposed action at least ten days before the action is taken. The notice must contain or be accompanied by the same material that must be sent to nonvoting shareholders in a notice of meeting at which the proposed action is submitted to the shareholders for action.

HISTORY: Derived from 1976 Code Section 33‑11‑180 [1962 Code Section 12‑16.18; 1952 Code Sections 12‑251 to 12‑253; 1942 Code Sections 7679, 7680; 1932 Code Sections 7679, 7680; Civ. C. ‘22 Sections 4253, 4254; Civ. C. ‘12 Sections 2786, 2787; Civ. C. ‘02 Sections 1845, 1846; R. S. 1502; 1901 (21) 811; 1962 (52) 1996; 1963 (53) 327; 1964 (53) 1910; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 7.04 (Section 33‑7‑104) provides that all the shareholders entitled to vote on an issue may validly act by unanimous written consent without a meeting. Unanimous written consent is obtainable, as a practical matter, only on matters on which there are only a relatively few shareholders entitled to vote.

Section 7.04 (Section 33‑7‑104) is based on the fundamental premise that if all the voting shareholders desire some action to be taken, no purpose is served by requiring the formality of holding a meeting of shareholders. Action by unanimous written consent has the same effect as a meeting vote and may be described as such in any document, including documents delivered to the secretary of state for filing. Section 7.04 (Section 33‑7‑104) is applicable to any shareholder action, including, without limitation, election of directors, approval of mergers or sales of substantially all the corporate property not in the ordinary course of business, amendments of articles of incorporation, and dissolution.

1. FORM OF WRITTEN CONSENT.

To be effective, consents must be in writing, signed by all the shareholders entitled to vote, and delivered to the secretary of the corporation. The phrase “one or more written consents” is included in section 7.04(a) (Section 33‑7‑104(a)) to make it clear that all shareholders do not need to sign the same piece of paper. The record date for determining who is entitled to vote, if not otherwise fixed by or in accordance with the bylaws, is the date the first shareholder signs the consent.

2. REVOCATION OF CONSENT.

Action by unanimous written consent is effective only when the last shareholder has signed the appropriate written consent and all consents have been delivered to the secretary of the corporation. Before that time, any shareholder may withdraw his consent simply by advising the secretary of that fact. Cf. Calumet Industries, Inc. v. McClure, 464 F. Supp. 19 (N.D. III. 1978). The withdrawal of a single consent, of course, destroys the unanimous written consent required by this section. If a shareholder seeks to withdraw his consent after all shareholders have signed written consents and filed them with the secretary of the corporation, the corporation may treat the attempted withdrawal as too late or give it effect, thereby requiring the matter to be presented at a shareholders’ meeting.

3. CONSENT TO FUNDAMENTAL CORPORATE CHANGES.

Section 7.04 (Section 33‑7‑104) is applicable to all shareholder actions, including the approval of fundamental corporate changes described in chapters 10, 11, 12, and 14. If these actions were taken at an annual or special meeting, shareholders who were not entitled to vote on the matter would nevertheless be entitled to receive notice of the meeting, including a description of the transaction proposed to be considered at the meeting. See, e.g., sections 10.03 (Section 33‑10‑103) (notice of proposed amendment), 11.03 (Section 33‑11‑103) (notice of proposed merger). In order to ensure that nonvoting shareholders have essentially the same right if action is taken by consent rather than at a meeting, section 7.04(d) (Section 33‑7‑104(d)) provides that all nonvoting shareholders must be given at least 10 days’ written notice of the fundamental corporate changes that are proposed for approval by consent.

SOUTH CAROLINA REPORTERS’ COMMENTS

Section 33‑11‑180(b) of the 1981 South Carolina Business Corporation Act allows shareholder action by unanimous consent without a meeting through a written consent signed by a shareholder’s agent (attorney‑in‑fact or proxyholder). The Model Act provision does not speak to use of agents; Section 7.04(a) of the 1984 Model Act Official Text calls for written consents signed by “all the shareholders.” Section 7.22 of the Model Act specifies that a proxy may “vote or otherwise act for” a shareholder but does not mention whether a proxy has authority to sign consents or waivers. Since Model Act Section 7.24(a) seems to contemplate that consents and waivers may be signed only by shareholders, subsection (a) was amended to make clear that proxy holders have power to sign consents and waivers under this act.

Prior law was likewise more detailed in requiring the consents to be filed with the secretary of the corporation; the revision merely calls for delivery to the corporation. Prior law envisioned only one consent signed by all; the revision allows use of more than one document to gather the requisite consents.

The Model Act adds in subsection (b) helpful clarification by stating a method for determining a record date for shareholders entitled to take action without a meeting.

Model Act subsection (d) treats the problem of giving notice to nonvoting shareholders. This problem was not dealt with in the old statute.

The issue of waiver of notice, previously given duplicative coverage by Sections 33‑11‑50 and 33‑11‑180(a) of the 1981 South Carolina Business Corporation Act, is covered by Section 33‑7‑106) of this act, infra.

DERIVATION: 1984 Model Act Section 7.04.

CROSS REFERENCES

Acceptance of consents, see Section 33‑7‑240.

Amendment of articles of incorporation, see Sections 33‑10‑101 et seq.

Annual meetings, see Section 33‑7‑101.

Dissolution, see Sections 33‑14‑101 et seq.

Merger and share exchange, see Sections 33‑11‑101 et seq.

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

Sale of assets, see Sections 33‑12‑101 et seq.

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

Voting entitlement of shares generally, see Section 33‑7‑210.

Library References

Corporations 191.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 362, 374.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:15 , Shareholders‑Meetings.

South Carolina Legal and Business Forms Section 1:268 , Consent of Shareholders to Corporate Action Taken Without Meeting.

**SECTION 33‑7‑105.** Notice of meeting.

(a) A corporation shall notify shareholders of the date, time, and place of each annual and special shareholders’ meeting no fewer than ten nor more than sixty days before the meeting date. Unless Chapters 1 through 20 of this Title or the articles of incorporation require otherwise, the corporation is required to give notice only to shareholders entitled to vote at the meeting.

(b) Unless Chapters 1 through 20 of this Title or the articles of incorporation require otherwise, notice of an annual meeting need not include a description of the purpose for which the meeting is called.

(c) Notice of a special meeting must include a description of the purpose for which the meeting is called.

(d) If not otherwise fixed under Section 33‑7‑103 or 33‑7‑107, the record date for determining shareholders entitled to notice of and to vote at an annual or special shareholders’ meeting is the close of business on the day before the first notice is delivered to shareholders.

(e) Unless the bylaws require otherwise, if an annual or special shareholders’ meeting is adjourned to a different date, time, or place, notice need not be given of the new date, time, or place if the new date, time, and place is announced at the meeting before adjournment. If a new record date for the adjourned meeting is or must be fixed under Section 33‑7‑107, however, notice of the adjourned meeting must be given under this section to persons who are shareholders as of the new record date.

HISTORY: Derived from 1976 Code Section 33‑11‑40 [1962 Code Section 12‑16.4; 1952 Code Sections 12‑251 to 12‑253; 1942 Code Sections 7679, 7680; 1932 Code Sections 7679, 7680; Civ. C. ‘22 Sections 4253, 4254; Civ. C. ‘12 Sections 2786, 2787; Civ. C. ‘02 Sections 1845, 1846; R. S. 1502; 1901 (21) 811; 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

Shareholders entitled to notice must be given notice of annual and special meetings pursuant to section 7.05 (Section 33‑7‑105) unless the notice is waived pursuant to section 7.06 (Section 33‑7‑106). Notice must be given at least 10 but not more than 60 days before the meeting date.

1. SHAREHOLDERS ENTITLED TO NOTICE.

Generally, only shareholders who are entitled to vote at a meeting are entitled to notice. Thus, notice usually needs to be sent only to holders of shares entitled to vote for an election of directors or generally on other matters (in the case of an annual meeting), and on matters within the specified purposes set forth in the notice (in the case of a special meeting), and only to holders of shares of those classes or series of shares on the record date. The last sentence of section 7.05(a) (Section 33‑7‑105(a)), however, recognizes that other sections of the Act require that notice of meetings at which certain types of fundamental corporate changes are to be considered must be sent to all shareholders, including holders of shares who are not entitled to vote on any matter at the meeting. See sections 10.03 (Section 33‑10‑103), 11.03 (Section 33‑11‑103), 12.02 (Section 33‑12‑102), and 14.02 (Section 33‑14‑102). In addition, the articles of incorporation may require that notice of meetings be given to all or specified voting groups of shareholders who are not entitled to vote on the matters considered at those meetings.

2. STATEMENT OF MATTERS TO BE CONSIDERED AT AN ANNUAL MEETING.

Notice of all special meetings must include a description of the purpose or purposes for which the meeting is called and the matters acted upon at the meeting are limited to those within the notice of meeting. By contrast, the notice of an annual meeting usually need not refer to any specific purpose or purposes, and any matter appropriate for shareholder action may be considered. As recognized in subsection (b), however, other provisions of the revised Model Act provide that certain types of fundamental corporate changes may be considered at an annual meeting only if specific reference to the proposed action appears in the notice of meeting. See sections 10.03 (Section 33‑10‑103), 11.03 (Section 33‑11‑103), 12.02 (Section 33‑12‑102), and 14.02 (Section 33‑14‑102). In addition, if the board of directors chooses, a notice of an annual meeting may contain references to purposes or proposals not required by statute. In either event, if a notice of an annual meeting refers specifically to one or more purposes, the meeting is not limited to those purposes.

3. RECORD DATE.

Section 7.05(d) (Section 33‑7‑105(d)) is a catch‑all record date provision for both annual and special meetings. If the record date for notice and for voting entitlement is not otherwise fixed pursuant to section 7.03 (Section 33‑7‑103) or 7.07 (Section 33‑7‑107), the record date for purposes of determining who is entitled to notice and to vote at the meeting is the close of business on the day before the notice is mailed to the voting groups of shareholders. If notice is mailed to shareholders over a period of more than one day, the day before the notice is delivered to the first shareholders is the record date.

The selection of the close of business on the day before the notice is mailed as the catch‑all record date is intended to permit the corporation to mail notices to shareholders on a given day without regard to any requests for transfer that may have been received during that day. For this reason, this section is not inconsistent with the general principle set forth in the last sentence of section 7.07(a) (Section 33‑7‑107(a)) that the board of directors may not fix a retroactive record date.

4. NOTICE OF ADJOURNED MEETINGS.

Section 7.05(e) (Section 33‑7‑105(e)) provides rules for adjourned meetings and determines whether new notice must be given to shareholders. Under this subsection, a meeting may be adjourned to a different date, time, or place without additional notice to the shareholders (unless the bylaws require otherwise) if the new date, time, or place is announced before adjournment. But new notice is required if a new record date is or must be fixed under section 7.07(c) (Section 33‑7‑107(c)). If a new record date is or must be fixed, the 10‑to‑60 day notice requirement and all other requirements of section 7.05 (Section 33‑7‑105) must be complied with as notice is given to the persons who are shareholders as of the new record date. A new quorum for the adjourned meeting must also be established. See section 7.25 (Section 33‑7‑250).

Section 7.25 (Section 33‑7‑250) provides that if a quorum exists for a meeting, it is deemed to continue to exist automatically for an adjourned meeting unless a new record date is or must be set for the adjourned meeting.

SOUTH CAROLINA REPORTERS’ COMMENTS

Section 33‑7‑105(a) extends the maximum lead time for giving notice from fifty days under prior law to sixty days. Otherwise, Section 33‑7‑105(a), (b), and (c) merely restate the requirements of Section 33‑11‑40(a) of the 1981 South Carolina Business Corporation Act. Under Section 33‑1‑400(6), mailing is a form of delivery, and, under Section 33‑1‑400(23), shareholders are those persons “whose names are registered on the books of the corporation” or beneficial owners shown by a nominee certificate on file with the corporation. The definition of shareholders has been enlarged to provide that creditors may have such rights enjoyed by shareholders as allowed by the corporation’s articles of incorporation.

Notice as to a special meeting called by shareholders is dealt with in Sections 33‑7‑102 and 33‑7‑103. Previous law, Section 33‑11‑40(b), had a self‑help provision which allowed the shareholder calling the special meeting to set a date and send the notice if management refused to cooperate. The revision leaves the decision as to time and place up to the corporation. See Section 33‑7‑102, Official Comment 1. The snubbed shareholders may petition for judicial relief under Section 33‑7‑103. The revision’s treatment is preferable. If management refuses to discharge its obligation to call a meeting on request, it is preferable to have judicial intervention, rather than self‑help (which usually is futile).

Section 7.05(e) of the Model Act Official Text made a significant change in the law by not requiring, absent bylaw provision, the giving of notice of an adjourned meeting if the new date, time, or place is announced at the meeting prior to adjournment. It was decided to change the “or” to “and” to assure full notice is given.

DERIVATION: 1984 Model Act Section 7.05.

CROSS REFERENCES

Annual meeting, see Section 33‑7‑101.

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

Effective date of notice, see Section 33‑1‑410.

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

Notice otherwise required: amendment of articles of incorporation, see Section 33‑10‑103.

Notice otherwise required: dissolution, see Section 33‑14‑102.

Notice otherwise required: merger and share exchange, see Section 33‑11‑103.

Notice otherwise required: sale of assets, see Section 33‑12‑102.

Special meeting, see Section 33‑7‑102.

Waiver of notice, see Section 33‑7‑106.

Library References

Corporations 194.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 364 to 365.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Banks and Banking Section 67, Notice of Meeting.

Forms

South Carolina Legal and Business Forms Section 1:15 , Shareholders‑Meetings.

South Carolina Legal and Business Forms Section 1:182 , Shareholders’ Meetings‑Notice.

South Carolina Legal and Business Forms Section 1:183 , Shareholders’ Meetings‑Special Meeting‑Contents of Notice.

South Carolina Legal and Business Forms Section 1:259 , Notice of Annual Meeting.

South Carolina Legal and Business Forms Section 1:263 , Notice of Special Meeting.

**SECTION 33‑7‑106.** Waiver of notice.

(a) A shareholder may waive any notice required by Chapters 1 through 20 of this Title, the articles of incorporation, or bylaws before or after the date and time stated in the notice. The waiver must be in writing, be signed by the shareholder entitled to the notice, and be delivered to the corporation for inclusion in the minutes or filing with the corporate records.

(b) A shareholder’s attendance at a meeting:

(1) waives objection to lack of notice or defective notice of the meeting, unless the shareholder at the beginning of the meeting objects to holding the meeting or transacting business at the meeting;

(2) waives objection to consideration of a particular matter at the meeting that is not within the purpose described in the meeting notice, unless the shareholder objects to considering the matter when it is presented.

HISTORY: Derived from 1976 Code Section 33‑11‑50 [1962 Code Section 12‑16.5; 1952 Code Sections 12‑251 to 12‑253; 1942 Code Sections 7679, 7680; 1932 Code Sections 7679, 7680; Civ. C. ‘22 Sections 4253, 4254; Civ. C. ‘12 Sections 2786, 2787; Civ. C. ‘02 Sections 1845, 1846; R. S. 1502; 1901 (21) 811; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed 1988 Act No. 444, Section 2], and Section 33‑11‑180 [1962 Code Section 12‑16.18; 1952 Code Sections 12‑251 to 12‑253; 1942 Code Sections 7679, 7680; 1932 Code Sections 7679, 7680; Civ. C. ‘22 Sections 4253, 4254; Civ. C. ‘12 Sections 2786, 2787; Civ. C. ‘02 Sections 1845, 1846; R. S. 1502; 1901 (21) 811; 1962 (52) 1996; 1963 (53) 327; 1964 (53) 1910; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 7.06(a) (Section 33‑7‑106(a)) permits any shareholder to waive any notice required by section 7.05 (Section 33‑7‑105) by a written waiver, signed by the shareholder and delivered to the corporation. A waiver is effective even though it is signed at or after the time set for the meeting.

1. INFORMAL WAIVER OF NOTICE.

A notice of shareholder meetings serves two principal purposes: (1) it advises shareholders of the date, time and place of the annual or special meeting, and (2) in the case of a special meeting (or an annual meeting at which fundamental changes may be made), it advises shareholders of the purposes of the meeting. If a shareholder attends a meeting, he has probably received some form of notice of the date, time, and place of the meeting whether from the corporation or from another source. As a result, section 7.06(b)(1) (Section 33‑7‑106(b)(1)) provides that attendance at a meeting constitutes waiver of any failure to receive the notice or defects in the statement of the date, time, and place of any meeting. Defects waived by attendance for this purpose include a failure to send the notice altogether, delivery to the wrong address, a misstatement of the date, time, or place of the meeting, and a failure to notice the meeting within the time periods specified in section 7.05(a) (Section 33‑7‑105(a)). If a shareholder believes that the defect in or failure of notice was in some way prejudicial, he may preserve his objection by stating at the beginning of the meeting that he objects to holding the meeting or transacting any business. If this objection is made, the corporation may correct the defect by sending proper notice to the shareholders for a subsequent meeting or by obtaining written waivers of notice from all shareholders who did not receive the notice required by section 7.05 (Section 33‑7‑105).

For purposes of this section, “attendance” at a meeting involves the presence of the shareholder in person or by proxy. A shareholder who attends a meeting solely for the purpose of objecting to the notice may be counted as present for purposes of determining whether a quorum is present. See the Official Comment to section 7.25 (Section 33‑7‑250).

In the case of special meetings, or annual meetings at which fundamental corporate changes are considered, a second purpose of the notice is to tell shareholders what is to be considered at the meeting. An objection that a particular matter is not within the stated purposes of the meeting obviously cannot be raised until the matter is presented. Thus section 7.06(b)(2) (Section 33‑7‑106(b)(2)) provides that a shareholder waives this kind of objection if he fails to object promptly after the matter is first presented. If this objection is made, the corporation may correct the defect by sending proper notice to the shareholders for a subsequent meeting or obtaining written waivers of notice from all shareholders. Of course, whether or not a specific matter is within a stated purpose of a meeting is ultimately a matter for judicial determination, typically in a suit to invalidate action taken at the meeting brought by a shareholder who was not present at the meeting or who was present at the meeting and preserved his objection under section 7.06(b) (Section 33‑7‑106(b)).

The purpose of both waiver rules in section 7.06(b) (Section 33‑7‑106(b)) is to require shareholders with technical objections to holding the meeting or considering a specific matter to raise them at the outset and not reserve them to be raised only if they are unhappy with the outcome of the meeting. The rules set forth in this section differ in some respects from the waiver rules for directors set forth in section 8.23 (Section 33‑8‑230) where a waiver is inferred if the director acquiesces in the action taken at a meeting even if he raised a technical objection to the notice of a meeting at the outset.

2. WAIVER OF NOTICE WHERE FUNDAMENTAL CORPORATE ACTIONS ARE CONSIDERED.

Other sections of the Model Act require that shareholders who are not entitled to vote are entitled to notice of meetings at which certain fundamental corporate changes are to be considered. See sections 10.03 (Section 33‑10‑103), 11.03 (Section 33‑11‑103), 12.02 (Section 33‑12‑102), and 14.02 (Section 33‑14‑102). In order to obtain an effective waiver of notice for these meetings under this section, waivers must be obtained from the nonvoting shareholders who are entitled to notice as well as from the voting shareholders.

SOUTH CAROLINA REPORTERS’ COMMENTS

The 1981 South Carolina Business Corporation Act provided for written waiver of notice by a shareholder or proxy. The revision requires that the waiver be signed by the shareholder; the possibility of waiver by a shareholder’s proxy is handled by Section 33‑7‑220.

The Model Act specifies the need for delivery of the waiver to the corporation; the 1981 South Carolina Business Corporation Act did not, although consents to action without a meeting were required to be filed with the secretary of the corporation under former Section 33‑11‑180.

Prior law also contemplated waivers by attendance without objection from shareholders or proxies, whereas the revision speaks only of shareholders. Again, however, this issue is resolved by the change in Section 33‑7‑220(b) to make clear that proxies may give waivers and consents.

The revision contemplates and requires objections based on technical deficiencies in the notice, such as lack of timeliness, as well as deficiencies based on consideration of matters beyond the scope of those described in the notice. Failure to object to consideration of an extraneous matter waives the objection. The 1981 South Carolina Business Corporation Act did not consider the possibility of a shareholder raising, in the course of a meeting, an objection to corporate action based on inadequate notice caused by faulty disclosure.

DERIVATION: 1984 Model Act Section 7.06.

CROSS REFERENCES

Acceptance of waiver, see Section 33‑7‑240.

Action without meeting, see Section 33‑7‑104.

Meeting notice, see Section 33‑7‑105.

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

Proxies, see Section 33‑7‑220.

Waiver of quorum objection, see Section 33‑7‑250.

Library References

Corporations 194.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 364 to 365.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:15 , Shareholders‑Meetings.

South Carolina Legal and Business Forms Section 1:182 , Shareholders’ Meetings‑Notice.

**SECTION 33‑7‑107.** Record date.

(a) The bylaws may fix or provide the manner of fixing the record date for one or more voting groups in order to determine the shareholders entitled to notice of a shareholders’ meeting, to demand a special meeting, to vote, or to take any other action. If the bylaws do not fix or provide for fixing a record date, the board of directors of the corporation may fix a future date as the record date.

(b) A record date fixed under this section may not be more than seventy days before the meeting or action requiring a determination of shareholders.

(c) A determination of shareholders entitled to notice of or to vote at a shareholders’ meeting is effective for any adjournment of the meeting unless the board of directors fixes a new record date, which it must do if the meeting is adjourned to a date more than one hundred twenty days after the date fixed for the original meeting.

(d) If a court orders a meeting adjourned to a date more than one hundred twenty days after the date fixed for the original meeting, it may provide that the original record date continues in effect or it may fix a new record date.

HISTORY: Derived from 1976 Code Section 33‑11‑60 [1962 Code Section 12‑16.6; 1952 Code Sections 12‑251 to 12‑253; 1942 Code Sections 7679, 7680; 1932 Code Sections 7679, 7680; Civ. C. ‘22 Sections 4253, 4254; Civ. C. ‘12 Sections 2786, 2787; Civ. C. ‘02 Sections 1845, 1846; R. S. 1502; 1901 (21) 811; 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 7.07 (Section 33‑7‑107) authorizes the board of directors to fix record dates for any action unless the bylaws themselves fix or provide for the fixing of a record date. A separate record date may be established for each voting group entitled to vote separately on a matter at a meeting, or a single record date may be established for all voting groups entitled to participate in the meeting. If neither the bylaws nor the board of directors fix a record date for a specific action, the section of this Act that deals with that action itself fixes the record date. For example, section 7.05(d) (Section 33‑7‑105(d)), relating to giving notice of a meeting, provides that the record date for determining who is entitled to notice of a meeting (if not fixed by the directors or the bylaws) is the close of business on the day before the date the corporation first gives notice to shareholders of the meeting.

A record date may not be fixed more than 70 days before the meeting or action in question and may not be fixed retroactively. Once set, the same record date may be utilized for an adjournment of the meeting that reconvenes within 120 days after the date fixed for the original meeting or the board of directors may fix a new record date. If the adjourned meeting takes place more than 120 days after the date fixed for the original meeting, section 7.07(c) (Section 33‑7‑107(c)) requires that a new record date be fixed. But if an adjournment is ordered by a court, section 7.07(d) (Section 33‑7‑107(d)) allows the court to provide that the original record date continues to be applicable or to fix a different date. In any event, if a different record date is or must be fixed under this section, section 7.05 (Section 33‑7‑105) requires that new notice be given to the persons who are shareholders as of the new record date, and section 7.25 (Section 33‑7‑250) requires that a quorum be reestablished for that meeting.

SOUTH CAROLINA REPORTERS’ COMMENTS

The revision is more permissive in allowing a record date any time within seventy days of the action, whereas the 1981 South Carolina Business Corporation Act required that the record date be at least ten, but no more than fifty, days in advance of the action. If neither the bylaws nor the board fixes a record date, then the specific statute governing the action fixes the record date (see, e.g., Section 33‑7‑105(d) dealing with record dates for meetings).

The revision abandons the practice allowed under 1981 South Carolina Business Corporation Act Section 33‑11‑60(d) of allowing the directors to close the stock transfer books for a stated period in lieu of fixing a record date. The mandatory selection of a new record date for adjournments of more than one hundred twenty days (absent judicial intervention) is new. If the adjournment lasts more than one hundred twenty days and is provoked by court order, the setting of a new record date is discretionary with the court.

DERIVATION: 1984 Model Act Section 7.07.

CROSS REFERENCES

Annual meeting, see Section 33‑7‑101.

Bylaws, see Sections 33‑2‑106 and 33‑10‑200 et seq.

Court‑ordered meeting, see Section 33‑7‑103.

Other record date provisions: action without meeting, see Section 33‑7‑104.

Other record date provisions: distributions to shareholders, see Section 33‑6‑400.

Other record date provisions: special meeting, see Section 33‑7‑102.

Other record date provisions: notice of meeting, see Section 33‑7‑105.

“Voting group” defined, see Section 33‑1‑400.

Library References

Corporations 194, 197.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 364 to 365, 373, 375 to 378.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Banks and Banking Section 67, Notice of Meeting.

Forms

South Carolina Legal and Business Forms Section 1:15 , Shareholders‑Meetings.

NOTES OF DECISIONS

In general 1

1. In general

The general rule is that a statute providing for the vote of shareholders is interpreted as requiring the vote of shareholders of record as of the date of the vote, absent a contrary bylaw. Rogers v. First Nat. Bank of St. George (C.A.4 (S.C.) 1969) 410 F.2d 579. Corporations And Business Organizations 1617

ARTICLE 2

Voting

**SECTION 33‑7‑200.** Shareholders’ list for meeting.

(a) After fixing a record date for a meeting, a corporation shall prepare an alphabetical list of the names of all its shareholders who are entitled to notice of a shareholders’ meeting. The list must be arranged by voting group (and within each voting group by class or series of shares) and show the address of and number of shares held by each shareholder.

(b) The shareholders’ list must be available for inspection by any shareholder, beginning, in the case of corporations which are not public corporations, on the date on which notice of the meeting is given for which the list was prepared and, in the case of public corporations, not later than the fifth business day following such date, in either case, continuing through the meeting, at the corporation’s principal office or at place identified in the meeting notice in the city where the meeting is to be held. A shareholder, his agent, or attorney is entitled on written demand to inspect and, subject to the requirements of Section 33‑16‑102(c), to copy the list, during regular business hours and at his expense, during the period it is available for inspection.

(c) The corporation shall make the shareholders’ list available at the meeting, and any shareholder, his agent, or attorney is entitled to inspect the list at any time during the meeting or any adjournment.

(d) If the corporation refuses to allow a shareholder, his agent, or attorney to inspect the shareholders’ list before or at the meeting (or copy the list as permitted by subsection (b)), the circuit court of the county where a corporation’s principal office (or, if none in this State, its registered office) is located, on application of the shareholder, may summarily order the inspection or copying at the corporation’s expense and may postpone the meeting for which the list was prepared until the inspection or copying is complete.

(e) Refusal or failure to prepare or make available the shareholders’ list does not affect the validity of action taken at the meeting.

HISTORY: Derived from 1976 Code Section 33‑11‑70 [1962 Code Section 12‑16.7; 1952 Code Sections 12‑251 to 12‑253; 1942 Code Sections 7679, 7680; 1932 Code Sections 7679, 7680; Civ. C. ‘22 Sections 4253, 4254, Civ. C. ‘12 Sections 2786, 2787; Civ. C. ‘02 Sections 1845, 1846; R. S. 1502; 1901 (21) 811; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed 1988 Act No. 444, Section 2], Section 33‑11‑250 [1962 Code Section 12‑16.25; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], and Section 33‑11‑260 [1962 Code Section 12‑16.26; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2; 1998 Act No. 328, Section 3.

OFFICIAL COMMENT

Section 7.20 (Section 33‑7‑200) requires the preparation of a list of shareholders entitled to notice of a meeting and requires that this list be made available on request to shareholders within two business days after the meeting notice is given.

The list of shareholders is often referred to as the “voting list” and usually the list will include only the names of those shareholders entitled to vote at the meeting. The list, however, must also include the names and shareholdings of shareholders of nonvoting shares if they are entitled to notice of the meeting by reason of the nature of the actions proposed to be taken at the meeting. See section 7.05 (Section 33‑7‑105) and its Official Comment.

Making the list of shareholders available before the meeting marks a change from the 1969 version of the Model Act. Through this device, a shareholder may learn the identity of the owners of substantial blocks of shares or the owners of shares similarly situated and communicate with them to see if his concerns are shared and should be pursued.

1. WHEN THE LIST MUST BE AVAILABLE.

The list must generally be available for inspection two business days after notice of the meeting is given and continuously thereafter until the meeting occurs. If, however, notice of the meeting is waived by all the shareholders, the list need be available only at the meeting itself under section 7.20(c) (Section 33‑7‑20(c)) unless one or more waivers are conditioned upon receipt of the list.

2. WHERE THE LIST MUST BE MAINTAINED.

Section 7.20(b) (Section 33‑7‑200(b)) permits the list to be maintained either at the corporation’s principal office or at another location in the city in which the meeting is to be held, the precise location to be designated in the notice of meeting. If the corporation changes the location of its annual meeting, it thus may correspondingly change the location of the list of shareholders pursuant to this subsection.

Section 7.20(c) (Section 33‑7‑200(c)) also requires a copy of the shareholders’ list to be available at the meeting itself for inspection. This list may be used to determine attendance, the presence or absence of a quorum, and the right to vote.

3. THE FORM IN WHICH THE LIST IS MAINTAINED.

Section 7.20 (Section 33‑7‑200) does not require the list of shareholders to be in any particular form. It may be maintained, for example, in electronic form. If the list is maintained in other than written form, however, suitable equipment must be provided so that a comprehensible list may be inspected by a shareholder as permitted by this section.

4. CONSEQUENCES OF FAILING TO PREPARE THE LIST OR REFUSAL TO MAKE IT AVAILABLE.

Section 7.20 (Section 33‑7‑200) creates a corporate obligation rather than an obligation imposed upon a corporate officer. If the corporation fails to prepare the list or refuses to permit a shareholder to inspect it, either before the meeting as required by section 7.20(b) (Section 33‑7‑200(b)) or at the meeting itself as required by section 7.20(c) (Section 33‑7‑200(c)), a shareholder may apply to the appropriate court under section 7.20(d) (Section 33‑7‑200(d)) for a summary order permitting inspection of the list; the court may further order the meeting to be postponed for a reasonable time. If the court orders a copy of the list to be provided to the shareholders, the copying is at the corporation’s expense; if the corporation produces the list voluntarily pursuant to section 7.20(b) or (c) (Section 33‑7‑200(b) or (c)), any inspection and copying are at the shareholder’s expense.

This judicial remedy is the only sanction for violation of section 7.20 (Section 33‑7‑200) since section 7.20(e) (Section 33‑7‑200(e)) provides that the failure to prepare, maintain, or produce the list does not affect the validity of any action taken at the meeting.

5. THE RIGHT TO OBTAIN A COPY OF THE LIST.

Section 7.20(b) (Section 33‑7‑200(b)) permits shareholders to “inspect” the list without limitation, but permits the shareholder to “copy” the list only if the shareholder complies with the requirement of section 16.02(c) (Section 33‑16‑102(c)), that the demand be “made in good faith and for a proper purpose.” The right to copy the list includes, if reasonable, the right to receive a copy of the list upon payment of a reasonable charge. See sections 16.03(b) and (c) (Section 33‑16‑103(b) and (c)). The distinction between “inspection” and “copying” set forth in section 7.20(b) (Section 33‑7‑200(b)) reflects an accommodation between competing considerations of permitting shareholders access to the list before a meeting and possible misuse of the list.

6. RELATIONSHIP TO RIGHT TO INSPECT CORPORATE RECORDS GENERALLY.

Section 7.20 (Section 33‑7‑200) creates a right of shareholders to inspect a list of shareholders in advance of and at a meeting that is independent of the rights of shareholders to inspect corporate records under chapter 16A. A shareholder may obtain the right to inspect the list of shareholders as provided in chapter 16, Art. 1 without regard to the provisions relating to the pendency of a meeting in section 7.20 (Section 33‑7‑200), and similarly the limitations of chapter 16A are not applicable to the right of inspection created by section 7.20 (Section 33‑7‑200) except to the extent the shareholder seeks to copy the list in advance of the meeting.

The right to inspect under chapter 16, Art. 1 is also broader in the sense that in some circumstances the shareholder may be entitled to receive copies of the documents he may inspect. See section 16.03 (Section 33‑16‑103).

SOUTH CAROLINA REPORTERS’ COMMENTS

The revision expands the content of the list by requiring inclusion of data for all shareholders entitled to notice of the meeting, not just those entitled to vote. The 1981 South Carolina Business Corporation Act required the list to be made available for inspection as soon as notice is given (Section 33‑11‑70(a)). The Official Text of the 1984 Model Act, which is incorporated into this act, does not require that the list be made available until two business days after notice is given. Thus, mailing of notice Friday morning will permit a delay until the following Tuesday in supplying the list. This was considered undesirable. The requirement that the list be made available when notice is given was retained accordingly.

Under the revision, a shareholder’s sole recourse in the event of mistreatment concerning the list, before or at the meeting, is to seek an order from the circuit court allowing inspection or copying at the corporation’s expense and granting postponement of the meeting “until the inspection or copying is complete.” The order is to be issued only after the corporation has an opportunity to appear and be heard.

The revision abandons the provision in the 1981 South Carolina Business Corporation Act, Section 33‑11‑70(e), allowing adjournment of a meeting “on the demand of any shareholder in person or by proxy,” until the list inspection requirements are honored. Under the revision the sole sanction for abusing a shareholder’s inspection rights is that the corporation might be ordered to pay the shareholder’s copying costs.

Under Sections 33‑11‑250 and 33‑11‑260 of the 1981 South Carolina Business Corporation Act, shareholders were entitled to inspect and copy the corporation’s record of shareholders, provided assurances were given that the information would not be misused. While Section 33‑7‑200(b) freely permits inspection, copying is made subject to the requirements of Section 33‑16‑102(c), which generally parallels the requirements of Section 33‑11‑260(b) of the 1981 South Carolina Business Corporation Act.

DERIVATION: 1984 Model Act Section 7.20.

CROSS REFERENCES

Annual meeting, see Section 33‑7‑101.

Charge for providing copy of records, see Section 33‑16‑103.

Effective date of notice, see Section 33‑1‑410.

Inspection of corporate records generally, see Sections 33‑16‑101 et seq.

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

Notice of meeting, see Section 33‑7‑105.

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

Proper purpose for copying records, see Section 33‑16‑102.

Record date, see Section 33‑7‑107.

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

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

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

Special meeting, see Section 33‑7‑102.

Voting entitlement of shares generally, see Section 33‑7‑210.

“Voting group” defined, see Section 33‑1‑400.

Library References

Corporations 181, 197.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 331 to 339, 373, 375 to 378.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Banks and Banking Section 66, Inspection of Records by Shareholders.

S.C. Jur. Banks and Banking Section 68, Shareholders’ List for Meeting.

Forms

South Carolina Legal and Business Forms Section 1:15 , Shareholders‑Meetings.

Treatises and Practice Aids

Fletcher Cyclopedia Law of Private Corporations Section 2215.20, Statutory Provisions‑Voting List Statutes.

**SECTION 33‑7‑210.** Voting entitlement of shares.

(a) Except as provided in subsections (b) and (c), unless the articles of incorporation provide otherwise, each outstanding share, regardless of class, is entitled to one vote on each matter voted on at a shareholders’ meeting.

(b) Absent special circumstances, the shares of a corporation are not entitled to vote if they are owned, directly or indirectly, by a second corporation, domestic or foreign, and the first corporation owns, directly or indirectly, a majority of the shares entitled to vote for directors of the second corporation.

(c) Subsection (b) does not limit the power of a corporation to vote any shares, including its own shares, held by it in a fiduciary capacity.

(d) Redeemable shares are not entitled to vote after notice of redemption is mailed to the holders and a sum sufficient to redeem the shares has been deposited with a bank, trust company, or other financial institution under an irrevocable obligation to pay the holders the redemption price on surrender of the shares.

HISTORY: Derived from 1976 Code Section 33‑11‑110 [1962 Code Section 12‑16.11; 1952 Code Sections 12‑251 to 12‑253; 1942 Code Sections 7679, 7680; 1932 Code Sections 7679, 7680; Civ. C. ‘22 Sections 4253, 4254; Civ. C. ‘12 Sections 2786, 2787; Civ. C. ‘02 Sections 1845, 1846; R. S. 1502; 1901 (21) 811; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed 1988 Act No. 444, Section 2], and Section 33‑11‑120 [1962 Code Section 12‑16.12; 1952 Code Sections 12‑251 to 12‑253; 1942 Code Sections 7679, 7680; 1932 Code Sections 7679, 7680; Civ. C. ‘22 Sections 4253, 4254; Civ. C. ‘12 Sections 2786, 2787; Civ. C. ‘02 Sections 1845, 1846; R. S. 1502; 1901 (21) 811; 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 7.21 (Section 33‑7‑210) deals with the entitlement of shareholders to vote, while section 7.22 (Section 33‑7‑220) deals with voting by proxy and section 7.24 (Section 33‑7‑240) establishes rules for the corporation’s acceptance or rejection of proxy votes.

1. VOTING POWER OF SHARES.

Section 7.21(a) (Section 33‑7‑210(a)) provides that each outstanding share, regardless of class, is entitled to one vote per share unless otherwise provided in the articles of incorporation. See section 6.01 and its Official Comment. The articles of incorporation may provide for multiple or fractional votes per share, and may provide that some classes of shares are nonvoting on some or all matters, or that some classes have a single vote per share or different multiple or fractional votes per share, or that some classes constitute one or more separate voting groups and are entitled to vote separately on the matter.

The articles of incorporation may also authorize the board of directors to create classes or series of shares with preferential rights, which may be voting or nonvoting in whole or in part. See section 6.02 (Section 33‑6‑102) and its Official Comment.

Fractional or multiple votes per share, or nonvoting shares, are often used in the planning of business ventures, particularly closely held ventures, when the contributions of participants vary in kind or quality. It is possible through these devices, for example, to give persons with relatively small financial contributions a relatively large voting power within the corporation.

The power to vary or condition voting power is also often used to give increased protection to financial interests in the corporation. It is customary, for example, to make classes of shares with preferential rights nonvoting, but the power to vote may be granted to those classes if distributions are omitted for a specified period. This conditional right to vote may permit the class of shares with preferential rights to vote separately as a voting group to elect one or more directors or to vote with the shares having general voting rights in the election of the directors.

In order to reflect the possibility that shares may have multiple or fractional votes per share, all provisions relating to quorums, voting, and similar matters in the Model Act are phrased in terms of “votes” rather than “shares”.

2. VOTING POWER OF NONSHAREHOLDERS.

Under the last sentence of section 7.21(a) (Section 33‑7‑210(a)), the power to vote cannot be granted generally to nonshareholders. The statutes of some states permit bondholders to be given the power to vote under certain specified circumstances; this option is not available under the Model Act. But creditors may in effect be given the power to vote, e.g., by creating a special class of redeemable voting shares for them, by creating a voting trust at the time the credit is extended with power in the creditors to name the voting trustees, by registering the shares in the name of the creditors as pledgees with power to vote, or by granting the creditors a revocable or irrevocable proxy to vote some or all of the outstanding shares. See the Official Comment to section 7.22 (Section 33‑7‑220).

3. CIRCULAR HOLDINGS.

Section 7.21(b) (Section 33‑7‑210(b)) prohibits the voting of shares held by a domestic or foreign corporation that is itself a majority‑owned subsidiary of the corporation issuing the shares. The purpose of this prohibition is to prevent management from using a corporate investment to perpetuate itself in power. Similar public policy considerations may be present in situations where the issuing corporation owns a large but not a majority interest in the corporation voting the shares. The inclusion of section 7.21(b) (Section 33‑7‑210(b)) is not intended to affect the possible application of common law principles that may invalidate circular holding situations not within its literal prohibition. As to the possible existence of these common law principles, see, e.g., Cleveland Trust Co. v. Eaton, 11 Ohio Misc. 151, 229 N.E.2d 850 (1967), rev’d on the basis of statutory amendment, 20 Ohio St. 2d 129, 256 N.E.2d 198 (1970). The phrase “absent special circumstances” is included to enable a court to permit the voting of shares where it deems that the purpose of the section is not violated.

4. SHARES HELD IN A FIDUCIARY CAPACITY.

Section 7.21(c) (Section 33‑7‑210(c)) makes the prohibition against voting of circularly‑owned shares of section 7.21(b) (Section 33‑7‑210(b)) inapplicable to shares held in a fiduciary capacity. Compare DEL. GEN. CORP. LAW Section 160(c). The Ohio statute involved in the Eaton case authorized a bank to vote its own shares that were held by it in a fiduciary capacity. A state may grant or prohibit such voting by another statute; section 7.21(c) (Section 33‑7‑210(c)) provides only that such voting is not prohibited by the Model Act.

5. REDEEMABLE SHARES.

Redeemable shares are often redeemed in connection with a transaction such as a merger or the issuance of a new senior class of shares that requires shareholder approval. Section 7.21(d) (Section 33‑7‑210(d)) avoids subjecting a transaction to approval by a class of redeemable shares that will be redeemed as a result of the transaction if adequate provision has been made to ensure that the holders of the redeemable shares will in fact receive the amount payable to them on redemption.

SOUTH CAROLINA REPORTERS’ COMMENTS

Section 33‑11‑110(d) of the 1981 South Carolina Business Corporation Act defined the rights of bondholders to vote. The last sentence of Model Act Section 7.21(a), the section on which this provision is modeled, abolishes the right of bondholders to vote. That sentence has been deleted and a provision that creditors may be treated as shareholders to the extent provided in the corporation’s articles of incorporation has been added to Section 33‑1‑400(23).

The treatment of circular holdings in Section 33‑7‑210(b) and (c) is new. The treatment of redeemable shares in Section 33‑7‑210(d) parallels prior law. See Section 33‑11‑120(k) of the 1981 South Carolina Business Corporation Act.

DERIVATION: 1984 Model Act Section 7.21.

CROSS REFERENCES

Acceptance of votes, see Section 33‑7‑240.

Articles of incorporation, see Section 33‑2‑102.

Cumulative voting, see Section 33‑7‑280.

Establishment of voting rights by board of directors, see Section 33‑6‑102.

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

Proxy voting, see Section 33‑7‑220.

Redeemable shares, see Section 33‑6‑101.

Series of shares, see Section 33‑6‑102.

Shareholders’ meetings, see Sections 33‑7‑101 through 33‑7‑103.

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

Voting by nominees, see Section 33‑7‑230.

Voting by voting groups, see Sections 33‑7‑250 and 33‑7‑260.

Library References

Corporations 197.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 373, 375 to 378.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Banks and Banking Section 61, Voting of Shares.

Forms

South Carolina Legal and Business Forms Section 1:16 , Shareholders‑Voting and Proxies.

Treatises and Practice Aids

Bogert ‑ the Law of Trusts and Trustees Section 543, Trustee’s Duty of Loyalty to the Beneficiaries.

Attorney General’s Opinions

A bank cannot vote shares of its own stock held in a fiduciary capacity; a bank may vote shares in its parent bank holding company held in a fiduciary capacity for third parties (interpreting former law). 1980 Op Atty Gen, No. 80‑47, p 94.

NOTES OF DECISIONS

In general 1

1. In general

Whatever may be the propriety of a parent voting, as natural guardian, stock registered solely in the name of his minor child, the voting of stock in a fiduciary capacity is proper when the fiduciary relationship is revealed in the stock registration and the fiduciary is the record holder of the legal title. Rogers v. First Nat. Bank of St. George (C.A.4 (S.C.) 1969) 410 F.2d 579.

There is no indication in the Constitution and this section of the Code that it is against the public policy of the State for stock in corporations to be held and voted by others than the true owners. Alderman v. Alderman (S.C. 1935) 178 S.C. 9, 181 S.E. 897, 105 A.L.R. 102.

**SECTION 33‑7‑220.** Proxies.

(a) A shareholder may vote his shares in person or by proxy.

(b) A shareholder or his agent or attorney in fact may appoint a proxy to vote or otherwise act for him, including giving waivers and consents, by signing an appointment form or by an electronic transmission of appointment. The electronic transmission must contain or be accompanied by sufficient information to determine that the transmission appointing the proxy is authorized. A proxy must have an effective date. If not dated by the person giving the proxy, the effective date of the proxy is the date on which it is received by the person appointed to serve as proxy, and that date must be noted by the appointee on the appointment form.

(c) An appointment of a proxy is effective when the appointment form or electronic transmission is received by the secretary or other officer or agent authorized to tabulate votes. Unless a time of expiration is otherwise specified, an appointment is valid for eleven months.

(d) An appointment of a proxy is revocable by the shareholder unless the appointment form or electronic transmission conspicuously states that it is irrevocable and the appointee is:

(1) a pledgee;

(2) a person who purchased or agreed to purchase the shares;

(3) a creditor of the corporation who extended it credit under terms requiring the appointment;

(4) an employee of the corporation whose employment contract requires the appointment; or

(5) a party to a voting agreement created under Section 33‑7‑310.

(e) The death or incapacity of the shareholder appointing a proxy does not affect the right of the corporation to accept the proxy’s authority unless notice of the death or incapacity is received by the secretary or other officer or agent authorized to tabulate votes before the proxy exercises his authority pursuant to the appointment.

(f) An appointment made irrevocable as provided by subsection (d) is revoked when the interest with which it is coupled is extinguished.

(g) A transferee for value of shares subject to an irrevocable appointment may revoke the appointment if he did not know of its existence when he acquired the shares and the existence of the irrevocable appointment was not noted conspicuously on the certificate representing the shares or on the information statement for shares without certificates.

(h) Subject to Section 33‑7‑240 and to an express limitation on the proxy’s authority appearing on the face of the appointment form or electronic transmission, a corporation may accept the proxy’s vote or other action as that of the shareholder making the appointment.

(i) A proxy may not be solicited on the basis of any proxy statement or other communication, written or oral, containing a statement which, at the time and in light of the circumstances under which it was made, was false or misleading with respect to a material fact or which omits to state a material fact necessary to make the statements made not false or misleading.

(j) A copy, facsimile transmission, or other reliable reproduction of the appointment form or electronic transmission created pursuant to subsection (b) of this section may be substituted or used instead of the original appointment form or electronic transmission for all purposes for which the original appointment form or electronic transmission is used, except that the copy, facsimile transmission, or other reproduction must be a complete reproduction of the entire original appointment form or electronic transmission.

HISTORY: Derived from 1976 Code Section 33‑11‑50 [1962 Code Section 12‑16.5; 1952 Code Sections 12‑251 to 12‑253; 1942 Code Sections 7679, 7680; 1932 Code Sections 7679, 7680; Civ. C. ‘22 Sections 4253, 4254; Civ. C. ‘12 Sections 2786, 2787; Civ. C. ‘02 Sections 1845, 1846; R. S. 1502; 1901 (21) 811; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], Section 33‑11‑90 [1962 Code Section 12‑16.9; 1952 Code Sections 12‑251 to 12‑253; 1942 Code Sections 7679, 7680; 1932 Code Sections 7679, 7680; Civ. C. ‘22 Sections 4253, 4254; Civ. C. ‘12 Sections 2786, 2787; Civ. C. ‘02 Sections 1845, 1846; R. S. 1502; 1901 (21) 811; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed 1988 Act No. 444, Section 2], Section 33‑11‑130 [1962 Code Section 12‑16.13; 1952 Code Sections 12‑251 to 12‑253; 1942 Code Sections 7679, 7680; 1932 Code Sections 7679, 7680; Civ. C. ‘22 Sections 4253, 4254; Civ. C. ‘12 Sections 2786, 2787; Civ. C. ‘02 Sections 1845, 1846; R. S. 1502; 1901 (21) 811; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed 1988 Act No. 444, Section 2], and Section 33‑11‑140 [1962 Code Section 12‑16.14; 1952 Code Sections 12‑251 to 12‑253; 1942 Code Sections 7679, 7680; 1932 Code Sections 7679, 7680; Civ. C. ‘22 Sections 4253, 4254; Civ. C. ‘12 Sections 2786, 2787; Civ. C. ‘02 Sections 1845, 1846; R. S. 1502; 1901 (21) 811; 1962 (52) 1996; 1963 (53) 327; 1964 (53) 1899; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2; 2000 Act No. 371, Section 2.

OFFICIAL COMMENT

Section 7.22 (Section 33‑7‑220) provides that shareholders may vote in person or by proxy and establishes the basic rules for appointing a proxy. As business organizations have increased in size and complexity, the number of shareholders has also increased. As a result, proxy voting is an essential step in the governance of many corporations.

1. NOMENCLATURE.

The word “proxy” is often used ambiguously, sometimes referring to the grant of authority to vote, sometimes to the document granting the authority, and sometimes to the person to whom the authority is granted. In the revised Model Act the word “proxy” is used only in the last sense; the term “appointment form” is used to describe the document appointing the proxy; and the word “appointment” is used to describe the grant of authority to vote.

2. APPOINTMENT OF PROXY.

A shareholder may appoint a proxy to vote for him simply by signing an appointment form, either personally or by his attorney‑in‑fact. The appointment is effective when it is received by the secretary or other officer or agent authorized to receive and tabulate votes. The proxy has the same power to vote as that possessed by the shareholder, unless the appointment form contains an express limitation on the power to vote or direction as to how to vote the shares on a particular matter, in which event the corporation must tabulate the votes in a manner consistent with that limitation or direction. See section 7.22(h) (Section 33‑7‑220(h)).

3. DURATION OF PROXY.

An appointment form that contains no expiration date is valid for 11 months. See section 7.22(c) (Section 33‑7‑220(c)). This ensures that in the normal course a new appointment will be solicited at least once every 12 months. But an appointment form may validly specify a longer period if the parties agree.

The appointment of a proxy is essentially the appointment of an agent and is revocable in accordance with the principles of agency law unless it is “coupled with an interest.” See section 7.22(d) (Section 33‑7‑220(d)). Thus, an appointment may be revoked either expressly or by implication, as when a shareholder later executes a second appointment form inconsistent with an earlier one, or attends the meeting in person and seeks to vote on his own behalf. The revised Model Act does not attempt to codify these common law principles of agency law.

While death or incapacity of the appointing shareholder revokes an agency appointment under common law principles, section 7.22(e) (Section 33‑7‑220(e)) modifies the common law rule to provide that the corporation may accept the vote of the proxy until the appropriate corporate officer or agent receives notice of the shareholder’s death or incapacity. In view of the widespread dispersal of shareholders in many corporations, it is not feasible for the corporation to learn of these events independently of notice. On the other hand, section 7.22(e) (Section 33‑7‑220(e)) does not affect the validity of the proxy appointment or its manner of exercise as between the proxy and the personal representatives of the decedent or incompetent. That relationship is governed by the law of agency independent of the Model Act.

4. IRREVOCABLE PROXIES.

Section 7.22(d) (Section 33‑7‑220(d)) deals with the irrevocable appointment of a proxy. The general test adopted is the common law test that all appointments are revocable unless “coupled with an interest.” But section 7.22(d) (Section 33‑7‑220(d)) provides considerable certainty since it describes several accepted forms of relationship as revocable unless “coupled with an interest.” But section 7.22(d) (Section 33‑7‑220(d)) provides considerable certainty since it describes several accepted forms of relationship as examples of “proxies coupled with an interest.” These examples are not exhaustive and other arrangements may also be held to be “coupled with an interest.” See Comment, “The Irrevocable Proxy and Voting Control of Small Business Corporations,” 98 U. PA. L. REV. 40l, 405‑7 (1950); see generally 1 RESTATEMENT OF AGENCY (SECOND) Section 138 (1958).

Section 7.22(f) (Section 33‑7‑220(f)) provides that an irrevocable proxy is revoked when the interest with which it was coupled is extinguished—for example, by repayment of the loan or release of the pledge.

A transferee for value of shares that are subject to an irrevocable appointment takes free of the appointment if (1) he did not know of the existence of the appointment; and (2) the existence of the irrevocable appointment was not noted conspicuously on the certificate or information statement. See section 7.22(g) (Section 33‑7‑220(g)). Under this subsection, both the appointment and the irrevocable nature of the appointment must conspicuously appear on the certificate.

SOUTH CAROLINA REPORTERS’ COMMENTS

The Model Act Official Text has been modified by adding to subsection (b) after “otherwise act for him” the phrase “including giving waivers and consents,”. This was done to resolve the issues mentioned above in connection with Sections 33‑7‑104 and 33‑7‑106. See the South Carolina Reporters’ Comments to those sections.

The requirement found in Section 33‑11‑140(c) of the 1981 South Carolina Business Corporation Act that the proxy be dated was deemed desirable and was incorporated into the revision in subsection (b). If not dated by the person giving the proxy, the burden of supplying a date is put on the proxyholder. In order to comply with the dating requirement, the proxyholder is required to note on the proxy form the date he received the proxy.

Under prior law a revocable proxy was valid only until the next meeting or any adjournment thereof. See Section 33‑11‑140(c) of the 1981 South Carolina Business Corporation Act. The Model Act Official Text provides for an eleven‑month duration, subject to providing expressly for a longer period in the appointment form. The Model Act was modified to allow for proxies having a duration of less than eleven months. See subsection (c).

The 1981 South Carolina Business Corporation Act attempted to codify common law agency principles relating to revocation of authority in Section 33‑11‑140(c). It was considered unnecessary to incorporate these principles expressly for they apply as a matter of common law agency theory.

The attempted reintroduction through Model Act subsection (d) of the concept of “powers coupled with an interest” was opposed; instead the basic format in Section 33‑11‑130(f) of the 1981 South Carolina Business Corporation Act was retained.

The provision in subsection (e) dealing with the death or incapacity of a shareholder does not supersede or modify the rights of an agent appointed under a durable power of attorney pursuant to Section 32‑13‑10 of the 1976 Code.

Not found in Section 7.22 of the Model Act is a requirement of full and fair disclosure paralleling rule 14a‑9 under the Securities Exchange Act of 1934, 17 C.F.R. Section 240.14a‑9 (1985). Consequently, new subsection (i), which carries forward the language in Section 33‑11‑140(e) of the 1981 South Carolina Business Corporation Act embracing the full disclosure concept of rule 14a‑9 under the Securities Exchange Act of 1934, has been added.

DERIVATION: 1984 Model Act Section 7.22.

CROSS REFERENCES

Acceptance of proxy votes, see Section 33‑7‑240.

Certificateless shares, see Section 33‑6‑260.

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

Information on share certificates, see Section 33‑6‑250.

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

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

Library References

Corporations 198.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 373, 385 to 394.

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S.C. Jur. Banks and Banking Section 61, Voting of Shares.

Forms

South Carolina Legal and Business Forms Section 1:16 , Shareholders‑Voting and Proxies.

South Carolina Legal and Business Forms Section 1:194 , Proxies‑Duration‑Method of Revocation.

South Carolina Legal and Business Forms Section 1:270 , General Form.

South Carolina Legal and Business Forms Section 1:275 , Revocation of Proxy.

Treatises and Practice Aids

Restatement (3d) of Agency Section 3.12, Power Given as Security; Irrevocable Proxy.

Restatement (3d) of Agency Section 3.12 TD 2, Power Given as Security; Irrevocable Proxy.

NOTES OF DECISIONS

In general 1

1. In general

The South Carolina requirement that all proxies be dated is designed to enforce the rule that no proxy shall be valid more than eleven months after the date of its execution. Rogers v. First Nat. Bank of St. George (C.A.4 (S.C.) 1969) 410 F.2d 579.

The ill sought to be cured by the South Carolina statute is the prevention of the voting of a general proxy over a prolonged period. Rogers v. First Nat. Bank of St. George (C.A.4 (S.C.) 1969) 410 F.2d 579.

A provision of the bylaws of a homeowners association, calling for a majority of the association’s board of administration to vote on behalf of unit owners, was valid and enforceable under Section 33‑7‑310 where the complaining homeowner had consented to the voting agreement, as evidenced by her signature on the indenture deed. Ortega v. Kingfisher Homeowners Ass’n, Inc. (S.C.App. 1994) 314 S.C. 180, 442 S.E.2d 202.

**SECTION 33‑7‑230.** Shares held by nominees.

(a) A corporation may establish a procedure by which the beneficial owner of shares that are registered in the name of a nominee is recognized by the corporation as the shareholder. The extent of this recognition may be determined in the procedure.

(b) The procedure may set forth:

(1) the types of nominees to which it applies;

(2) the rights or privileges that the corporation recognizes in a beneficial owner;

(3) the manner in which the procedure is selected by the nominee;

(4) the information that must be provided when the procedure is selected;

(5) the period for which selection of the procedure is effective; and

(6) other aspects of the rights and duties created.

HISTORY: 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Traditionally, a corporation recognizes only the registered owner as the owner of shares. Indeed, section 1.40 (Section 33‑1‑400) defines “shareholder” basically as the registered owner of shares. But it has become a common practice for persons purchasing shares to have them registered in the “street name” of a broker‑dealer or other financial institution, principally to facilitate transfer by eliminating the need for the beneficial owner’s signature and delivery. In addition, in order to avoid the burdens of processing securities transfers, which caused a crisis in the securities industry in the late 1960s, a system of securities depositories (defined as “clearing corporations” in section 8‑102(3) of the UNIFORM COMMERCIAL CODE) (see Section 36‑8‑102(3) of the 1976 South Carolina Code) has been developed. In this system, financial institutions deposit securities with the depository, which becomes the registered owner of the shares. Transfers between depositories are then accomplished by book entry of the depository. As a result, there may be two entities interposed between the corporation and the beneficial owner with the depository being the registered owner for the account of the brokerage firm that in turn holds the shares for the account of the beneficial owner.

The purpose of section 7.23 (Section 33‑7‑230) is to facilitate direct communication between the corporation and the beneficial owner by authorizing the corporation to create a procedure for bypassing both the registered owner and intermediate brokerage firms. The adoption of this procedure is discretionary with each corporation and affirmative action by the corporation is necessary to accomplish it. The procedure is also discretionary with the shareholder, who must elect to follow the applicable procedure prescribed by the corporation. The shareholder retains all of his rights except those granted to the beneficial owner.

The corporation may limit or qualify the procedure as it deems appropriate. For example, the corporation may:

(1) limit the procedure to certain classes of shareholders, such as depositories, broker‑dealers and banks, or their nominees, or make the procedure available to all shareholders;.

(2) permit a shareholder to adopt the procedure with respect to some but not all of the shares registered in his name (and in that case he continues to be treated as the shareholder with respect to the balance);.

(3) specify the purpose or purposes for which the certification is effective, e.g., for giving notice of, and voting at, shareholders’ meetings, for the distribution of proxy statements and annual reports, or for payment of cash dividends;.

(4) specify the form of the certification, e.g., a written list, computer tape, or some other form of compatible input;.

(5) specify the type of information that must be provided, e.g., the name and address of the beneficial owner, his taxpayer identification number, and the number of shares registered directly in his name;.

(6) establish deadlines for receipt of the certifications after the establishment of a record date so that the corporation may schedule its mailings;.

(7) provide that a new certification is required following each record date or that a certification as of a certain date may continue until changed by the certifying shareholder.

This listing is illustrative and not exhaustive. It is expected that experimentation with various devices under this section may reveal other areas which the corporation’s plan should address.

The definition of “shareholder” in section 1.40 (Section 33‑1‑400) includes beneficial owners to the extent they obtain the rights of shareholders pursuant to the procedure authorized by this section.

SOUTH CAROLINA REPORTERS’ COMMENTS

Section 33‑7‑230 is of value mainly for public companies, providing a means of facilitating direct communication between the corporation and the beneficial owner by allowing the corporation to bypass depositories and brokerage firms. Use of the section is discretionary with each corporation and its shareholders.

DERIVATION: 1984 Model Act Section 7.23.

CROSS REFERENCES

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

Library References

Corporations 197.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 373, 375 to 378.

**SECTION 33‑7‑240.** Corporation’s acceptance of votes.

(a) If the name signed on a vote, consent, waiver, or proxy appointment corresponds to the name of a shareholder, the corporation, if acting in good faith, is entitled to accept the vote, consent, waiver, or proxy appointment and give it effect as the act of the shareholder.

(b) If the name signed on a vote, consent, waiver, or proxy appointment does not correspond to the name of its shareholder, the corporation, if acting in good faith, is entitled nevertheless to accept the vote, consent, waiver, or proxy appointment and give it effect as the act of the shareholder if:

(1) the shareholder is an entity and the name signed purports to be that of an officer or agent of the entity;

(2) the name signed purports to be that of an administrator, executor, guardian, or conservator representing the shareholder and, if the corporation requests, evidence of fiduciary status acceptable to the corporation has been presented with respect to the vote, consent, waiver, or proxy appointment;

(3) the name signed purports to be that of a receiver or trustee in bankruptcy of the shareholder and, if the corporation requests, evidence of this status acceptable to the corporation has been presented with respect to the vote, consent, waiver, or proxy appointment;

(4) the name signed purports to be that of a pledgee, beneficial owner, or attorney‑in‑fact of the shareholder and, if the corporation requests, evidence acceptable to the corporation of the signatory’s authority to sign for the shareholder has been presented with respect to the vote, consent, waiver, or proxy appointment;

(5) two or more persons are the shareholder as cotenants or fiduciaries and the name signed purports to be the name of at least one of the co‑owners and the person signing appears to be acting on behalf of all the co‑owners.

(c) The corporation is entitled to reject a vote, consent, waiver, or proxy appointment if the secretary or other officer or agent authorized to tabulate votes, acting in good faith, has reasonable basis for doubt about the validity of the signature on it or about the signatory’s authority to sign for the shareholder.

(d) The corporation and its officer or agent who accepts or rejects a vote, consent, waiver, or proxy appointment in good faith and in accordance with the standards of this section are not liable in damages to the shareholder for the consequences of the acceptance or rejection.

(e) Corporate action based on the acceptance or rejection of a vote, consent, waiver, or proxy appointment under this section is valid unless a court of competent jurisdiction determines otherwise.

HISTORY: Derived from 1976 Code Section 33‑11‑120 [1962 Code Section 12‑16.12; 1952 Code Sections 12‑251 to 12‑253; 1942 Code Sections 7679, 7680; 1932 Code Sections 7679, 7680; Civ. C. ‘22 Sections 4253, 4254; Civ. C. ‘12 Sections 2786, 2787; Civ. C. ‘02 Sections 1845, 1846; R. S. 1502; 1901 (21) 811; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Corporations are often asked to accept a written instrument as evidence of action by a shareholder. These instruments usually involve appointment forms for a proxy to vote the shares, but may also include waivers of notice, consents to action without a meeting, requests for a special meeting of shareholders, and similar instruments involving action by the shareholders. Usually the corporation or its officers will have no personal knowledge of the circumstances under which the instrument was executed and no way of verifying whether the signature on the instrument is in fact the signature of the shareholder. This problem is particularly acute in large corporations with thousands of shareholders.

Section 7.24 (Section 33‑7‑240) establishes general rules permitting the corporation and its officers or agents to accept these instruments if they appear to be executed by the shareholder or by a person who has authority to execute the instrument for the shareholder and they are accompanied by whatever authenticating evidence the corporation reasonably requests. The rules set forth in this section are not exclusive and may be supplemented by additional rules established by the corporation pursuant to section 2.06(b) (Section 33‑2‑106(b)). Section 7.24(a) (Section 33‑7‑240(a)) authorizes acceptance of an instrument if the name appearing on the instrument “corresponds” to the name of the shareholder, while section 7.24(b) (Section 33‑7‑240(b)) permits the acceptance of an instrument executed by a person other than the shareholder if there is a designation or evidence of the capacity of the person executing the instrument that indicates the act of the person is the act of the shareholder. On the other hand, section 7.24(c) (Section 33‑7‑240(c)) permits rejection of an instrument if the officer or agent tabulating votes has a “reasonable basis for doubt” about the validity of the signature or about the authority of the person acting on behalf of the shareholder. These principles are described in greater detail below.

The purpose of section 7.24 (Section 33‑7‑240) is to protect the corporation and its officers or agents from liability for damages to the shareholder if action is taken in accordance with the section. Thus section 7.24(d) (Section 33‑7‑240(d)) provides that there is no liability to the shareholder if the corporation’s officer or agent, acting in good faith, accepts an instrument that meets the requirements of section 7.24(a) or (b) (Section 33‑7‑240(a) or (b)), even if it turns out that the execution was invalid or unauthorized; similarly, no liability exists if the officer or agent, again acting in good faith, rejects an instrument because of a “reasonable basis for doubt,” even though it turns out that the instrument was properly executed by the shareholder. But section 7.24 (Section 33‑7‑240) does not address the question whether an action was properly or improperly taken or approved, and section 7.24(e) (Section 33‑7‑240(e)) makes clear that the validity or invalidity of corporate action is ultimately a matter for judicial resolution through review of the results of an election in a suit to enjoin or compel corporate action. It is contemplated that any such suit will be brought promptly, typically before the corporate action is consummated or the corporation’s position otherwise changes in reliance on the vote, and that any suit that is not brought promptly under the circumstances would normally be barred because of laches.

Similarly, section 7.24 (Section 33‑7‑240) does not address the liability of the proxy to the shareholder for exercising authority beyond that granted to him or for disobeying instructions. These matters are governed by the law of agency and not by section 7.24 (Section 33‑7‑240).

The American Society of Corporate Secretaries has established principles for the acceptance of proxy appointments in routine elections in which there is no proxy contest. Many of the examples of the application of section 7.24 (Section 33‑7‑240) set forth below are based on these principles.

1. EXAMPLES OF EXECUTIONS “CORRESPONDING WITH” THE NAME OF THE SHAREHOLDER.

a. Assuming that shares are registered in the name of an individual, an instrument may be accepted as corresponding to the name of the shareholder:

(1) Whether executed in ink, pencil, ballpoint, crayon, etc.

(2) Regardless of where the signature appears on the instrument (whether or not in the space provided), if there is no reason to doubt the intent to execute.

(3) Whether the name is handwritten, handprinted, or rubberstamped in facsimile‑signature or printed form.

(4) Whether there are deviations between the registered name and the signature, provided that the deviations are not inconsistent with the registered name. For example, if the shares are registered in the name of “John F. Smith,” the following are acceptable: “J. Foster Smith,” “J. Smith,” “J.F. Smith,” “J.F.S.,” “J.S.,” “John F.,” and even simply “Smith.” Similarly, if “John Smith” is the name of the shareholder, “John F. Smith” and “J. Foster Smith” is the name of the shareholder, “John F. Smith” and “J. Foster Smith” are also acceptable.

(5) If marked by an “X” and witnessed by one other person.

(6) If not executed at all, a signed letter or telegram from the shareholder states that he has signed the instrument or approves of the action taken by the instrument.

(7) The signature is illegible, unless it cannot reasonably be considered to be the signature of the shareholder. For example, if shares are registered in the name of “John F. Smith,” the signature is not acceptable if the first letter of the signature is clearly an “M” or the first word is “Mark.”

b. If the shares are registered in the maiden name of a woman, e.g., Mary Smith, and the instrument is executed:

(1) In her married name, clearly indicated as such, e.g., “Mary Smith Jones (formerly Mary Smith): or “Mary Smith (now Mrs. Mary Smith Jones).”

(2) In her married name or in a form that implies her married status, e.g., “Mary Smith Anderson,” “Mrs. Mary S. Anderson,” “Mrs. Mary Smith Anderson,” or “Mrs. Mary Anderson.”

c. If the shares are registered in the name “Peter Smith, Sr.” but the designation “Sr.” is omitted, e.g., “Peter Smith.” The execution “Peter Smith, Jr.,” however, does not correspond with the shareholder.

2. EXAMPLES OF EXECUTIONS THAT “INDICATE THE CAPACITY” OF THE PERSON SIGNING.

In all the following instances, the corporation may request additional evidence of authority but is not required to do so; officers and agents are protected from liability if they routinely accept the instrument without requiring additional evidence.

a. Assuming that the shares are registered in the name of a partnership, e.g., “Smith Bros.,” an instrument may be accepted if executed either in the form “Smith Bros. by John Able, Partner” or simply “Smith Bros.”

b. Assuming that the shares are registered in the name of a corporation, e.g., “Smith Corporation,” an instrument may be accepted if executed in the name of the corporation, by an officer or agent designated as holding a responsible position, by a person with a surname similar to the corporate name, or simply in the name of the corporation, e.g., “Smith Corporation by John Able, President,” “Smith Corporation by Peter Apt, Agent,” “Smith Corporation by John Smith,” or “Smith Corporation.”

c. Assuming that the shares are registered in the name of an individual who is deceased, incompetent, a minor, in bankruptcy, or in receivership, an instrument may be accepted if it is executed by an executor, administrator, guardian, receiver, or trustee who signs as such. Shares registered in the name of a minor may be voted by a parent of the shareholder if he is identified as such, e.g., “Ralph Able by John Able, Father.”

d. Assuming that the shares are registered in the name of an individual, an instrument may be accepted if it is executed by another individual who indicates (1) that he is signing as an agent or attorney‑in‑fact or the shareholder (see section 7.22 (Section 33‑7‑220)); (2) that he has a close family or other relationship with the shareholder from which authority can be inferred; or (3) that he is the beneficial owner of shares, a pledgee of the shares, or a donee of the shares. For example: if shares are registered in the name of “Peter Jones,” “Ed Smith, Agent,” “Paul Smith, Son.” “Mary Smith Jones, Wife,” “Emelia Able, Attorney,” “Arthur Peters, Private Secretary,” “Paul Jones, Trustee under Deed of Trust dated April 1, 1980,” or “Mary Smith, Donee,” are all acceptable absent some indication that the execution was unauthorized.

e. Assuming that the shares are registered in the names of two or more persons—as joint tenants or tenants in common, executors or administrators, guardians or conservators, a committee for an incompetent, or trustees—an instrument may be accepted if signed by or on behalf of fewer than all the persons named. This conclusion proceeds on the assumption that the signer or signers have authority to act for the others and there is nothing on the face of the instrument that rebuts this assumption.

3. EXAMPLES OF “REASONABLE BASIS FOR DOUBT”.

The phrase “reasonable basis for doubt” about the validity of a signature or about the signer’s authority creates an objective standard for the exercise of the authority granted by section 7.24(c) (Section 33‑7‑240(c)) to reject proffered instruments. In the absence of a proxy fight or a seriously contested issue, instruments should be rejected only if there seems to be no basis for finding the execution regular on its face. In a proxy fight or other contested issue, the possibility of illegal or unauthorized execution is greatly increased, and a more cautious attitude should therefore be adopted. The following are examples in which a “reasonable basis for doubt” could be found to exist:

a. The shares are registered in the name of “John F. Smith” and the instrument is executed by “Joseph F. Smith” or by “Frank W. Smith.”

b. The shares are registered in the name of “Ellen Smith, a Minor” or “John Smith, Custodian for Ellen Smith, a Minor,” and the instrument is executed by “Ellen Smith.” There is no “reasonable basis for doubt,” however, if the instrument is accompanied by evidence satisfactory to the corporation that the shareholder is no longer a minor.

c. A proxy appointment is received that is regular on its face, and the secretary or other corporate officer or agent receives a telephone call from a person who identifies himself as the shareholder and says either that he wishes to revoke the appointment or that he did not authorize its original execution.

d. Shares are registered in the name of two or more persons as co‑owners, the instrument is executed by fewer than all of them, and the instrument shows on its face that not all the registered owners granted authority to the signers, as where the instrument states that it was not possible to obtain all the co‑owners’ signatures or that some refused to sign. For the normal rule of acceptability of proxies executed by fewer than all co‑owners, however, see section 7.24(b)(5) (Section 33‑7‑240(b)(5)) and part 2.e of this Official Comment.

e. The corporation receives a copy of letters of appointment of a receiver, executor, administrator or other fiduciary, and the instrument is executed in the name of the shareholder rather than by the fiduciary.

4. OTHER PRINCIPLES APPLICABLE TO PROXY APPOINTMENTS.

As indicated in the Official Comment to section.

7.22 (Section 33‑7‑220), a proxy is simply an agent of the shareholder, and his appointment therefore involves primarily the law of agency. The law of agency determines the rights and duties of the shareholder and the proxy, and it is important to recognize that section 7.24 (Section 33‑7‑240) is not intended to affect these rights and duties. Rather, it recognizes that the great bulk of instruments executed in the name of a shareholder or on his behalf are in fact authorized and the corporation and its officers should be encouraged to accept them rather than to adopt unduly narrow requirements.

SOUTH CAROLINA REPORTERS’ COMMENTS

Section 33‑7‑240 parallels to some extent Section 33‑11‑120 of the 1981 South Carolina Business Corporation Act which described how voting is handled for shareholders who are entities, fiduciaries, minors, trustees in bankruptcy, pledgees, etc. The basic rule, stated in subsection (a), is that record ownership controls voting power. Under subsection (b), the corporation is given discretion to accept votes cast by representatives along the lines of Section 33‑11‑120 of the 1981 South Carolina Business Corporation Act. The corporation and its agents have immunity from liability if they incorrectly allow or disallow votes, consents, waivers, or proxies, provided they act in good faith and have a reasonable basis for their action.

Any corporation that wishes to add refinement to the ground rules spelled out in Section 33‑7‑240 may do so through a bylaw provision under Section 33‑2‑106(b).

DERIVATION: 1984 Model Act Section 7.24.

CROSS REFERENCES

Consents, see Section 33‑7‑104.

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

Officers, see Section 33‑8‑400.

Proxies, see Section 33‑7‑220.

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

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

Voting by nominees, see Section 33‑7‑230.

Waiver of notice, see Section 33‑7‑106.

Library References

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Westlaw Topic No. 101.

C.J.S. Corporations Sections 373, 375 to 378, 385 to 394.

**SECTION 33‑7‑250.** Quorum and voting requirements for voting groups.

(a) Shares entitled to vote as a separate voting group may take action on a matter at a meeting only if a quorum of those shares exists with respect to that matter. Unless the articles of incorporation or Chapters 1 through 20 of this Title provides otherwise, a majority of the votes entitled to be cast on the matter by the voting group constitutes a quorum of that voting group for action on that matter.

(b) Once a share is represented for any purpose at a meeting, it is considered present for quorum purposes for the remainder of the meeting and for any adjournment of that meeting unless a new record date is or must be set for that adjourned meeting.

(c) If a quorum exists, action on a matter (other than the election of directors) by a voting group is approved if the votes cast within the voting group favoring the action exceed the votes cast opposing the action, unless the articles of incorporation or Chapters 1 through 20 of this Title requires a greater number of affirmative votes.

(d) An amendment of the articles of incorporation adding, changing, or deleting a quorum or voting requirement for a voting group greater than specified in subsection (a) or (c) is governed by Section 33‑7‑270.

(e) The election of directors is governed by Section 33‑7‑280.

HISTORY: Derived from 1976 Code Section 33‑11‑80 [1962 Code Section 12‑16.8; 1952 Code Sections 12‑251 to 12‑253; 1942 Code Sections 7679, 7680; 1932 Code Sections 7679, 7680; Civ. C. ‘22 Sections 4253, 4254; Civ. C. ‘12 Sections 2786, 2787; Civ. C. ‘02 Sections 1845, 1846; R. S. 1502; 1901 (21) 811; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed 1988 Act No. 444 Section 2], Section 33‑11‑90 [1962 Code Section 12‑16.9; 1952 Code Sections 12‑251 to 12‑253; 1942 Code Sections 7679, 7680; 1932 Code Sections 7679, 7680; Civ C. ‘22 Sections 4253, 4254; Civ C ‘12 Sections 2786, 2787; Civ. C. ‘02 Sections 1845, 1846; R. S. 1502; 1901 (21) 811; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed 1988 Act No. 444, Section 2], and Section 33‑11‑100 [1962 Code Section 12‑16.10; 1952 Code Sections 12‑251 to 12‑253; 1942 Code Sections 7679, 7680; 1932 Code Sections 7679, 7680; Civ. C. ‘22 Sections 4253, 4254; Civ. C. ‘12 Sections 2786, 2787; Civ. C. ‘02 Sections 1845, 1846; R. S. 1502; 1901 (21) 811; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed 1988 Act No. 445, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 7.25 (Section 33‑7‑250) establishes general quorum and voting requirements for voting groups for purposes of the Act. As defined in section 1.40 (Section 33‑1‑400), a “voting group” consists of all shares of one or more classes or series that under the articles of incorporation or the revised Model Business Corporation Act are entitled to vote and be counted together collectively on a matter. Shares entitled to vote “generally” on a matter (that is, 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) are a single voting group. 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. On most matters coming before shareholders’ meetings, only a single voting group, consisting of a class of voting 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)).

The voting group concept permits a single section of the revised Model Act to deal with quorum and voting rules applicable to a variety of single and multiple voting group situations. Section 7.25 (Section 33‑7‑250) covers, for example, quorum and voting requirements for all actions by the shareholders of a corporation with a single class of voting shares; it also covers quorum and voting requirements for a matter on which both common and preferred shares are entitled to vote, either together as a single voting group under the articles of incorporation or separately as two voting groups under either the articles of incorporation or this Act.

1. DETERMINATION OF VOTING GROUPS UNDER THE MODEL ACT.

Under the revised Model Act, classes or series of shares are generally not entitled to vote separately by voting group except to the extent specifically authorized by the articles of incorporation. But sections 10.04 and 11.03 (Sections 33‑10‑104 and 33‑11‑103) of the Act grant classes or series of shares the right to vote separately when fundamental changes are proposed that may adversely affect that class. Section 10.04 (Section 33‑10‑104) provides, further, that when two or more series are affected in essentially the same way, the series are lumped together and must vote as a single voting group rather than as multiple voting groups on the matter. Under the revised Model Act even a class or series of shares that is expressly described as nonvoting under the articles of incorporation may be entitled to vote separately on a matter affecting the class or series in a designated way. See section 10.04(e) (Section 33‑10‑104(e)).

In addition to the provisions of this Act, separate voting by voting group may be authorized by the articles of incorporation in such instances and on such terms as may be desired (except that the statutory privilege of voting by separate voting groups cannot be diluted or reduced). Finally, on some matters the board of directors may condition their submission of matters to shareholders on their approval by specific voting groups designated by the board of directors. Sections 7.25 and 7.26 (Sections 33‑7‑250 and 33‑7‑260) establish the mechanics by which all voting by single or multiple voting groups is carried out.

In some situations, shares of a single class may be entitled to vote in two different voting groups. See the Official Comment to section 7.26 (Section 33‑7‑260).

2. QUORUM AND VOTING REQUIREMENTS IN GENERAL.

Implicit in section 7.25 (Section 33‑7‑250) is the concept that the determination of the voting groups entitled to vote, and the quorum and voting requirements applicable thereto, must be determined separately for each “matter” coming before a meeting. As a result, different quorum and voting requirements may be applicable to different portions of a meeting, depending on the matter being considered. In this respect, sections 7.25 and 7.26 (Sections 33‑7‑250 and 33‑7‑260) differ in structure from earlier versions of the Model Act and state statutes which contemplated that a single set of quorum and voting requirements would be applicable to a “meeting.” There is no difference in substance, however, since it was generally recognized that different quorum and voting requirements should be applicable in class voting situations. And, under the revised Model Act, in the normal case where only a single voting group is entitled to vote on all matters coming before a meeting of shareholders, a single quorum and voting requirement will usually be applicable to the entire meeting.

3. QUORUM REQUIREMENTS FOR ACTION BY VOTING GROUP.

Sections 7.25(a) and (b) (Section 33‑7‑250(a) and (b)) provide standard rules for the determination of a quorum for each voting group required to act at a shareholders’ meeting on a matter. In the absence of a provision in the articles of incorporation, section 7.25(a) (Section 33‑7‑250(a)) provides that a quorum consists of a majority of the votes entitled to be cast on the matter at the meeting.

Section 7.25(b) (Section 33‑7‑250(b)) retains the common law view that once a share is present at a meeting, it is deemed present for quorum purposes throughout the meeting. Thus, a voting group may continue to act despite the withdrawal of persons having the power to vote one or more shares in an effort “to break the quorum.” In this respect, a meeting of shareholders is governed by a different rule than a meeting of directors, where a sufficient number of directors be present to constitute a quorum at the time action is taken. See section 8.24 (Section 33‑8‑240) and its Official Comment.

Once a share is present at a meeting it is also deemed to be present at any adjourned meeting unless a new record date is or must be set for that adjourned meeting. See section 7.07 (Section 33‑7‑107). If a new record date is set, new notice must be given to holders of shares of a voting group and a quorum must be established from within the holders of shares of that voting group on the new record date.

The shares owned by a shareholder who comes to the meeting to object on grounds of lack of notice may be counted toward the presence of a quorum. Similarly, the holdings of a shareholder who attends a meeting solely for purposes of raising the objection that a quorum is not present is counted toward the presence of a quorum. Attendance at a meeting, however, does not constitute a waiver of other objections to the meeting such as the lack of notice. Such waivers are governed by section 7.06(b) (Section 33‑7‑106(b)).

As used in sections 7.25 and 7.26 (Sections 33‑7‑250 and 33‑7‑260), “represented at the meeting” means the physical presence of the shareholder (whether in person or by his written authorization) in the meeting room after the meeting has been called to order or the presiding officer has commenced consideration of the business of the meeting, and before the final adjournment of the meeting. If a person owns shares of different classes or series that are entitled to vote in separate voting groups, the presence of the person at the meeting constitutes representation at the meeting of all the shares owned by that person.

4. VOTING REQUIREMENTS FOR APPROVAL BY VOTING GROUP.

Section 7.25(c) (Section 33‑7‑250(c)) provides that an action (other than the election of directors, which is governed by section 7.28 (Section 33‑7‑280)) is approved by a voting group at a meeting at which a quorum is present if the votes cast in favor of the action exceed the votes cast opposing the action. This section changes the traditional rule appearing in earlier versions of the Model Act and many state statutes that an action is approved at a meeting at which a quorum is present if it receives the affirmative vote “of a majority of the shares represented at that meeting.” The traditional rule in effect treated abstentions as negative votes; the revised Model Act treats them truly as abstentions. The rule set forth in section 7.25(c) (Section 33‑7‑250(c)) is considered desirable in part because it permits action to be taken by the shareholders when considered appropriate by a majority of those with views on the matter in question. Potential concern about the effect of abstentions in publicly held corporations has also been increased by changes in the SEC proxy regulations that permit shareholders of publicly held companies to abstain on issues.

The treatment of abstaining votes under the traditional rule gave rise to anomalous results in some situations. For example, if a corporation has 1,000 shares of a single class outstanding, all entitled to cast one vote each, a quorum consists of 501 shares; if 600 shares are represented and the vote on a proposed action is 280 in favor, 225 opposed, and 95 abstaining, the action is not approved since fewer than a majority of the 600 shares attending voted in favor of the action. This is anomalous since if the shares abstaining had not been present at the meeting at all, a quorum would have been present and the action would have been approved. Under section 7.25(c) (Section 33‑7‑250(c)) the action would not be defeated by the 95 abstaining votes.

In the absence of specific provision in the articles of incorporation, shares of classes or series that are entitled by statute to vote as a separate voting group are entitled to one vote per share. See section 7.21 (Section 33‑7‑210).

5. MODIFICATION OF STANDARD REQUIREMENTS.

The articles of incorporation may modify the quorum and voting requirements of section 7.25 (Section 33‑7‑250) for a single voting group or for all voting groups entitled to vote on any matter. The articles of incorporation may increase the quorum and voting requirements to any extent desired up to and including unanimity upon compliance with section 7.27 (Section 33‑7‑270); they may also require that shares of different classes or series are entitled to vote separately or together on specific issues or provide that actions are approved only if they receive the favorable vote of a majority of the shares of a voting group present at a meeting at which a quorum is present. The articles may also decrease the quorum requirement as desired. Earlier versions of the Model Act limited the power to reduce the quorum to a minimum of one‑third; this restriction was eliminated from the revised Model Act because it was thought to be unreasonably confining in certain situations, such as where a class of shares with preferential rights is given a limited right to vote that may be exercisable only rarely.

Section 7.25(d) (Section 33‑7‑250(d)) provides that section 7.27 (Section 33‑7‑270) governs the adoption or amendment of provisions in the articles of incorporation that impose greater quorum or voting requirements than provided for in this section.

6. SPECIAL APPROVAL REQUIREMENTS.

The phrase “or this Act” in section 7.25(a) and (c) (Section 33‑7‑250(a) and (c)) makes clear that wherever the provisions of the Model Act provide more stringent voting or quorum requirements, they control over section 7.25 (Section 33‑7‑250). More stringent requirements are provided for the approval of certain fundamental corporate changes—for example, certain amendments to the articles of incorporation, mergers, and the sale of all or substantially all the corporate property not in the ordinary course of business. See sections 10.03 (Section 33‑10‑103), 11.03 (Section 33‑11‑103), and 12.02 (Section 33‑12‑102). See also section 8.31 (Section 33‑8‑310), which imposes a special voting and quorum requirement for approval of conflict of interest transactions by members of the board of directors.

SOUTH CAROLINA REPORTERS’ COMMENTS

The revision eliminates the minimum one‑third quorum requirement found in Section 33‑11‑80 of the 1981 South Carolina Business Corporation Act. It also changes prior law on abstentions. Under Section 33‑11‑100(b) of the 1981 South Carolina Business Corporation Act, subject to the act, the articles, and the bylaws, affirmative action not involving election of directors required a majority of the votes cast. Subsection (c) of this act requires only that the votes cast in favor outnumber those votes cast against. Thus, if there were one thousand votes cast and four hundred ten were in favor, three hundred ninety were opposed, and two hundred abstained, under prior law the matter would be defeated (subject to a special provision in the bylaws, articles, or the act), whereas the matter would carry under the revision (which is not subject to bylaw provision, but which is subject to modification by the act and the articles).

DERIVATION: 1984 Model Act Section 7.25.

CROSS REFERENCES

Adjourned meeting record date, see Section 33‑7‑107.

Amendment of articles of incorporation by directors and shareholders, see Section 33‑10‑103.

Amendment of bylaws, see Sections 33‑10‑200 et seq.

Dissolution by directors and shareholders, see Section 33‑14‑102.

Election of directors, see Section 33‑7‑280.

Merger and share exchange, see Section 33‑11‑103.

Multiple voting groups, see Section 33‑7‑260.

Proxy voting, see Section 33‑7‑220.

Record date, see Section 33‑7‑107.

Sale of assets, see Sections 33‑12‑101 et seq.

Supermajority requirements, see Sections 33‑7‑270 and 33‑10‑210.

“Voting group” defined, see Section 33‑1‑400.

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RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:16 , Shareholders‑Voting and Proxies.

South Carolina Legal and Business Forms Section 1:148 , Shareholders’ Meetings‑High Quorum Requirement.

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**SECTION 33‑7‑260.** Action by single and multiple voting groups.

(a) If the articles of incorporation or Chapters 1 through 20 of this Title provides for voting by a single voting group on a matter, action on that matter is taken when voted upon by that voting group as provided in Section 33‑7‑250.

(b) If the articles of incorporation or Chapters 1 through 20 of this Title provides for voting by two or more voting groups on a matter, action on that matter is taken only when voted upon by each of those voting groups counted separately as provided in Section 33‑7‑250. Action may be taken by one voting group on a matter even though no action is taken by another voting group entitled to vote on the matter.

HISTORY: 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 7.26(a) (Section 33‑7‑260(a)) provides that when a matter is to be voted upon by a single voting group, action is taken when the voting group votes upon the action as provided in section 7.25 (Section 33‑7‑250). In most instances the single voting group will consist of all the shares of the class or classes entitled to vote by the articles of incorporation; voting by two or more voting groups as contemplated by section 7.26(b) (Section 33‑7‑260(b)) is the exceptional case.

Section 7.26(b) (Section 33‑7‑260(b)) basically requires that if more than one voting group is entitled to vote on a matter, favorable action on a matter is taken only when it is voted upon favorably by each voting group, counted separately. Implicit in this section are the concepts that (1) different quorum and voting requirements may be applicable to different matters considered at a single meeting and (2) different quorum and voting requirements may be applicable to different voting groups voting on the same matter. See the Official Comment to section 7.25 (Section 33‑7‑250). Thus, each group entitled to vote must independently meet the quorum and voting requirements established by section 7.25 (Section 33‑7‑250). But if a quorum is present for one or more voting groups but not for all voting groups, section 7.26(b) (Section 33‑7‑260(b)) provides that the voting groups for which a quorum is present may vote upon the matter.

A single meeting, furthermore, may consider matters on which action by several voting groups is required and also matters on which only a single voting group may act. Action may be taken on the matters on which the single voting group may act even though no quorum is present to take action on other matters. For example, in a corporation with one class of nonvoting shares with preferential rights (“preferred shares”) and one class of general voting shares without preferential rights (“common shares”), a matter to be considered at the annual meeting may be a proposed amendment to the articles of incorporation that reduces the cumulative dividend right of the preferred shares (a matter on which the preferred shares have a statutory right to vote as a separate voting group). Other matters to be considered may include the election of directors and the appointment of an auditor, both matters on which the preferred shares have no vote. If a quorum of the voting group consisting of the common shares but no quorum of the voting group consisting of the preferred shares is present, the common shares may proceed to elect directors and appoint the auditor. The common shares voting group may also vote to approve the proposed amendment to the articles of incorporation, but that amendment will not be approved until the preferred shares voting group also votes to approve the amendment.

1. VOTING REQUIREMENTS ON MULTIPLE VOTING GROUP MATTERS.

In many multiple voting group situations under the Model Act, proposals are adopted only if a majority of all the votes entitled to be cast by each voting group approve the proposal. This percentage of votes is higher than that required by section 7.25 (Section 33‑7‑250), and is required, for example, under sections 10.03(e)(1) and 10.04(b) (Sections 33‑10‑103(e)(1) and 33‑10‑104(b)) for all amendments to articles of incorporation that create dissenters’ rights with respect to part or all of the shares of the voting group.

2. PARTICIPATION OF SHARES IN MULTIPLE VOTING GROUPS.

As described in section 7.26(b) (Section 33‑7‑260(b)), if voting by multiple voting groups is required, the votes of members of each voting group must be separately tabulated. Normally, each class or series of shares will participate in only a single voting group. But since holders of shares entitled by the articles of incorporation to vote generally on a matter are always entitled to vote in the voting group consisting of the general voting shares, in some instances classes or series of shares may be entitled to be counted simultaneously in two voting groups. This will occur whenever a class or series of shares entitled to vote generally on a matter under the articles of incorporation is affected by the matter in a way that gives rise to the right to have its vote counted separately as an independent voting group under the Act. For example, assume that corporation Y has outstanding one class of general voting shares without preferential rights (“common shares”), 500 shares issued, and one class of shares with preferential rights (“preferred shares”), 100 shares issued, that also have full voting rights under the articles of incorporation, i.e., the preferred may vote for election of directors and on all other matters on which common may vote. The preferred and the common therefore are part of the general voting group. The directors propose to amend the articles to create a new class of nonvoting shares that will have preferential rights senior to the existing preferred’s preferential rights. All shares are present at the meeting and they divide as follows on the proposal to adopt the amendment:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  |  |  |  |  |
|  | Yes | — | common | 230 |
|  |  | — | preferred | 100 |
|  | No | — | common | 270 |
|  |  | — | preferred | 0 |

Both the preferred and the common are entitled to vote on the amendment to the articles of incorporation since they are part of a general voting group pursuant to the articles. But the vote of the preferred is also entitled to be counted separately on the proposal by section 10.04(a)(7) of the 1984 Model Act. The result is that the proposal passes by a vote of 330 to 270 in the voting group consisting of the shares entitled to vote generally and 100 to 0 in the voting group consisting solely of the preferred shares:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  |  |  |  |  |
|  | (a) First voting group | | | |
|  | Yes: |  | Common | 230 |
|  |  |  | Preferred | 100 |
|  |  |  |  | 330 |
|  | No: |  | Common | 270 |
|  |  |  | Preferred | 0 |
|  |  |  |  | 270 |
|  | (b) Second voting group (preferred) | | | |
|  | Yes: |  | Common | 100 |
|  |  |  | Preferred | 0 |

In this situation, in the absence of a special quorum requirement, a meeting could approve the proposal to amend the articles of incorporation if—and only if—a quorum of each voting group is present, i.e., at least 51 shares of preferred and 301 shares of common and preferred were represented at the meeting.

SOUTH CAROLINA REPORTERS’ COMMENTS

Section 33‑7‑260 simply states basic rules of voting for “voting groups,” which is the generic definition applicable to all the shares of one or more classes or series that under the articles are entitled to vote and be counted together on a matter at a shareholders’ meeting. Subsection (b) clarifies the validity of corporate action taken at a meeting by one voting group when another voting group is unable to muster a quorum. The action taken is valid.

DERIVATION: 1984 Model Act Section 7.26.

CROSS REFERENCES

Amendment of articles of incorporation, see Sections 33‑10‑101 et seq.

Change of voting group requirements, see Section 33‑7‑270.

Merger and share exchange, see Section 33‑11‑103.

Number of votes a share, see Section 33‑7‑210.

Quorum and voting requirements, see Section 33‑7‑250.

Sale of assets, see Sections 33‑12‑101 et seq.

Supermajority requirements, see Section 33‑7‑270.

Voting by voting groups on amendments of articles of incorporation, see Section 33‑10‑104.

“Voting group” defined, see Section 33‑1‑400.

Library References

Corporations 195.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 370, 383.

**SECTION 33‑7‑270.** Greater quorum or voting requirements.

(a) The articles of incorporation may provide for a greater quorum or voting requirement for shareholders (or voting groups of shareholders) than is provided for by Chapters 1 through 20 of this Title.

(b) An amendment to the articles of incorporation that adds, changes, or deletes a greater quorum or voting requirement must meet the same quorum requirement and be adopted by the same vote and voting groups required to take action under the quorum and voting requirements then in effect or proposed to be adopted, whichever is greater.

(c) A corporation in existence on the effective date of Chapters 1 through 20 of this Title that has authorized a greater quorum or voting right for shareholders (or voting groups of shareholders) than is provided in Chapters 1 through 20 of this Title solely in its bylaws shall amend its articles of incorporation to meet the requirements of subsection (a) by January 1, 1991, in order for these shareholder voting rights to remain effective beyond that date.

HISTORY: Derived from 1976 Code Section 33‑11‑80 [1962 Code Section 12‑16.8; 1952 Code Sections 12‑251 to 12‑253; 1942 Code Sections 7679, 7680; 1932 Code Sections 7679, 7680; Civ. C. ‘22 Sections 4253, 4254; Civ. C. ‘12 Sections 2786, 2787; Civ. C. ‘02 Sections 1845, 1846; R. S. 1502; 1901 (21) 811; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed 1988 Act No. 444, Section 2], and Section 33‑11‑100 [1962 Code Section 12‑16.10; 1952 Code Sections 12‑251 to 12‑253; 1942 Code Sections 7679, 7680; 1932 Code Sections 7679, 7680; Civ. C. ‘22 Sections 4253, 4254; Civ. C. ‘12 Sections 2786, 2787; Civ. C. ‘02 Sections 1845, 1846; R. S. 1502; 1901 (21) 811; 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 7.27(a) (Section 33‑7‑270(a)) permits the articles of incorporation to increase the quorum or voting requirements for approval of an action by shareholders up to any desired amount including unanimity. These provisions may relate to ordinary or routine actions by the general voting group (which otherwise may be acted upon under section 7.25 (Section 33‑7‑250) if the number of affirmative votes exceeds the number of negative votes at a meeting at which a quorum of that voting group is present) or to one or more other voting groups or to actions for which the Model Act provides a greater voting requirement—for example, changes of a fundamental nature in the corporation like certain amendments to articles of incorporation (section 10.03 (Section 33‑10‑103)), mergers (section 11.03 (Section 33‑11‑103)), sales of all or substantially all the property of a corporation not in the ordinary course of business (section 12.02 (Section 33‑12‑102)), and dissolution (section 14.02 (Section 33‑14‑102)). Generally, the Model Act requires these fundamental changes to receive the affirmative vote of a majority of the votes entitled to be cast on the proposal by each voting group entitled to vote thereon rather than by a majority of the shares voting affirmatively or negatively at a meeting at which a quorum is present.

A provision that increases the requirement for approval of an ordinary matter or a fundamental change is usually referred to as a “supermajority” provision.

Section 7.27(b) (Section 33‑7‑270(b)) requires any amendment of the articles of incorporation that adds, modifies, or repeals any supermajority provision to be approved by the greater of the proposed quorum and vote requirement or by the quorum and vote required by the articles before their amendment. Thus, a supermajority provision that requires 80 percent affirmative vote of all eligible votes of a voting group present at the meeting may not be removed from the articles of incorporation or reduced in any way except by an 80 percent affirmative vote. If the 80 percent requirement is coupled with a quorum requirement for a voting group that shares representing two‑thirds of the total votes must be present in person or by proxy, both the 80 percent voting requirement and the two‑thirds quorum requirement are immune from reduction except at a meeting of the voting group at which the two‑thirds quorum requirement is met and the reduction is approved by an 80 percent affirmative vote. If the proposal is to increase the 80 percent voting requirement to 90 percent, that proposal must be approved by a 90 percent affirmative vote at a meeting of the voting group at which the two‑thirds quorum requirement is met; if the proposal is to increase the two‑thirds quorum requirement to three‑fourths without changing the 80 percent voting requirement, that proposal must be approved by an 80 percent affirmative vote at a meeting of the voting group at which a three‑fourths quorum requirement is met.

SOUTH CAROLINA REPORTERS’ COMMENTS

The revision is consistent with Section 33‑11‑100 of the 1981 South Carolina Business Corporation Act in allowing greater quorum or voting requirements. However, under prior law, supermajority voting could be imposed by bylaw provision; the revision requires that power be drawn from the articles. A provision giving existing corporations having supermajority voting rights in their bylaws two years to amend their articles of incorporation to be in compliance with this section is included in subsection (c). In this connection, see Section 33‑10‑210, which authorizes the articles of incorporation to contain a provision allowing the bylaws to contain shareholder supermajority voting rights.

Subsection (b) in part protects against careless drafting of a greater voting or quorum requirement that could be eliminated by an amendment of the articles passed by a lesser percentage. Subsection (b) is even‑handed. It makes it impossible to amend away a greater quorum or vote requirement by a lesser percentage, but it also requires that a change to a greater quorum or voting requirement be approved by the greater number.

DERIVATION: 1984 Model Act Section 7.27.

CROSS REFERENCES

Amendment of articles of incorporation, see Sections 33‑10‑101 et seq.

Bylaw provisions changing quorum and voting requirements, see Sections 33‑10‑210 and 33‑10‑220.

Quorum and voting requirements in general, see Section 33‑7‑250.

Voting by voting group, see Section 33‑7‑260.

“Voting group” defined, see Section 33‑1‑400.

Library References

Corporations 195.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 370, 383.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:16 , Shareholders‑Voting and Proxies.

Treatises and Practice Aids

Fletcher Cyclopedia Law of Private Corporations Section 5760.10, Statutory, Charter and Bylaw Provisions‑Greater Voting Requirements.

**SECTION 33‑7‑280.** Voting for directors; cumulative voting.

(a) Unless otherwise provided in the articles of incorporation, directors are elected by a plurality of the votes cast by the shares entitled to vote in the election at a meeting at which a quorum is present.

(b) Shareholders have a right to cumulate their votes for directors unless the articles of incorporation otherwise provide. The right to cumulate votes means that the shareholders are entitled to multiply the number of votes they are entitled to cast by the number of directors for whom they are entitled to vote and cast the product for a single candidate or distribute the product among two or more candidates.

(c) Shares otherwise entitled to vote cumulatively may not be voted cumulatively at a particular meeting unless:

(1) the meeting notice or proxy statement accompanying the notice states conspicuously that cumulative voting is authorized; or

(2) a shareholder who has the right to cumulate his votes shall either (1) give written notice of his intention to the president or other officer of the corporation not less than forty‑eight hours before the time fixed for the meeting, which notice must be announced in the meeting before the voting, or (2) announce his intention in the meeting before the voting for directors commences; and all shareholders entitled to vote at the meeting shall without further notice be entitled to cumulate their votes. If cumulative voting is to be used, persons presiding may, or if requested by any shareholder shall, recess the meeting for a reasonable time to allow deliberation by shareholders, not to exceed two hours.

(d) The articles of a corporation may not be amended to remove cumulative voting if the votes cast against the amendment would be sufficient to elect a director to the board of directors if cumulatively voted at an election of the entire board of directors, or, if there are classes of directors, at an election of a director of any class of directors.

HISTORY: Derived from 1976 Code Section 33‑11‑200 [1962 Code Section 12‑16.20; 1952 Code Sections 12‑251 to 12‑253; 1942 Code Sections 7679, 7680; 1932 Code Sections 7679, 7680; Civ. C. ‘22 Sections 4253, 4254; Civ. C. ‘12 Sections 2786, 2787; Civ. C. ‘02 Sections 1845, 1846; R. S. 1502; 1901 (21) 811; 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; 1990 Act No. 446, Section 12.

OFFICIAL COMMENT

[Note: this Act retains the “opt‑out” format in Section 33‑11‑200 of the 1981 South Carolina Business Corporation Act rather than the “opt‑in” format of the 1984 Model Act—See the South Carolina Reporters’ Comments].

Section 7.28(a) (Section 33‑7‑280(a)) provides that directors are elected by a plurality of the votes cast in an election of directors at a meeting at which a quorum is present of the voting group entitled to participate in the election. A “plurality” means that the individuals with the largest number of votes are elected as directors up to the maximum number of directors to be chosen at the election. In elections in which several factions are competing within a voting group, the individuals elected may have fewer than a majority of all the votes cast in the election. The articles of incorporation or bylaws of the corporation may, however, provide a different manner of election of directors.

The entire board of directors may be elected by a single voting group or the articles of incorporation may provide that different voting groups are entitled to elect a designated number or fraction of the board of directors. See section 8.04 (Section 33‑8‑104). Elections are contested only within specific voting groups.

Under section 7.28(b) (Section 33‑7‑280(b)) each corporation may determine whether or not to elect its directors by cumulative voting. If directors are elected by different voting groups, the articles of incorporation may provide that specified voting groups are entitled to vote cumulatively while others are not. Cumulative voting affects the manner in which votes may be cast by shares participating in the election but does not affect the plurality principle set forth in section 7.28(a) (Section 33‑7‑280(a)).

1. THE MANNER OF ELECTING CUMULATIVE VOTING.

[not applicable—see the South Carolina Reporters’ Comments].

Section 7.28(b) provides basically for an “opt in” election. A corporation has cumulative voting with respect to a voting group only if an affirmative provision to that effect appears in its articles of incorporation. Under section 7.28(c) this election may be made simply by inserting a statement that “all directors are elected by cumulative voting” or “holders of class A shares are entitled to cumulate their votes,” or words of similar import. The effect of such a statement is to make applicable automatically the detailed provisions of subsections (c) and (d) describing the cumulative right to vote at elections of directors by the voting group or groups specified.

2. THE MECHANICS OF CUMULATIVE VOTING.

Section 7.28(c) (Section 33‑7‑280(b)) describes the mechanics of cumulative voting: each shareholder may multiply the number of votes he is entitled to cast (based on the number of shares held by him) by the number of directors to be elected by the voting group at the meeting and may cast the product for a single candidate or distribute the product among two or more candidates. By casting all his votes for a single candidate or a limited number of candidates, a minority shareholder increases his voting power and may be able to elect one or more directors.

Section 7.28(d) (Section 33‑7‑280(c)) applies only if cumulative voting is potentially available under section 7.28(b) (Section 33‑7‑280(b)). It is designed to ensure that all shareholders participating in the election understand the rules and to avoid the distortions that may be created when some shareholders vote cumulatively while others do not. Cumulative voting will be employed if the notice of meeting or accompanying proxy statement conspicuously announces that a shareholder is entitled to cumulate his votes or a shareholder who is entitled to vote gives notice to the corporation of his intent to do so at least 48 hours before the meeting. This notice puts the corporation and all shareholders who are entitled to vote in the election with that shareholder on notice that voting will be on a cumulative basis. If this notice is given by any shareholder, all other shareholders who are part of the same voting group are entitled to vote cumulatively without giving further notice.

The proxy regulations of the Securities and Exchange Commission require proxy statements to include a statement that persons have the right to vote cumulatively, if that is the case, and briefly to describe that right.

SOUTH CAROLINA REPORTERS’ COMMENTS

Cumulative voting used to inhere in stock ownership in South Carolina as a matter of right under Article IX, Section 11, of the Constitution of South Carolina, 1895, repealed by Act 64 of 1971. Repeal of the constitutional right still left shareholders with an absolute statutory right to engage in cumulative voting.

The statutory right was watered down subsequently by the 1981 South Carolina Business Corporation Act which allowed an “opt‑out” procedure by making the right to vote cumulatively subject to a contrary provision in the articles.

The Model Act proposed to further the erosion of shareholders’ rights by requiring an “opt‑in” procedure, whereby cumulative voting does not apply absent authorization in the articles. This provision would have had a dramatic effect on South Carolina minority shareholders used to voting cumulatively as a matter of right and lacking the power to put over an amendment to the articles that would allow them to continue to do so.

The drafters of the Model Act advanced no reason for switching from the opt‑out procedure, which in itself was a watering down of shareholders’ rights over prior practice. The Model Act’s opt‑in approach was rejected in favor of the status quo.

Model Act Section 7.28(d)(2) would have changed prior practice by requiring forty‑eight hours notice of an intention to vote cumulatively. Section 33‑11‑200(b) of the 1981 South Carolina Business Corporation Act was more permissive. It called for either forty‑eight hours’ written notice or simply an announcement at the meeting before voting for directors starts. Shareholders “caught by surprise” at the meeting by the cumulative voting request could seek a recess of up to two hours in order to plan strategy. This provision has been incorporated into this act. See paragraph (2) of subsection (c).

DERIVATION: 1984 Model Act Section 7.28.

CROSS REFERENCES

Articles of incorporation: amendment, see Sections 33‑10‑101 et seq.

Articles of incorporation: content, see Section 33‑2‑102.

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

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

Election of directors by voting group, see Section 33‑8‑104.

Notice of meeting, see Section 33‑7‑105.

“Notice” to the corporation, see Section 33‑1‑410.

Proxies, see Section 33‑7‑220.

Quorum of shareholders, see Section 33‑7‑250.

“Voting group” defined, see Section 33‑1‑400.

Library References

Corporations 200, 283(2).

Westlaw Topic No. 101.

C.J.S. Corporations Sections 373, 384, 434.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Banks and Banking Section 61, Voting of Shares.

Forms

South Carolina Legal and Business Forms Section 1:16 , Shareholders‑Voting and Proxies.

South Carolina Legal and Business Forms Section 1:119 , Cumulative Voting Rights.

South Carolina Legal and Business Forms Section 1:192 , Voting Rights‑Cumulative Voting by Shareholders.

ARTICLE 3

Voting Trusts and Agreements

**SECTION 33‑7‑300.** Voting trusts.

(a) One or more shareholders may create a voting trust, conferring on a trustee the right to vote or otherwise act for them, by signing an agreement setting out the provisions of the trust (which may include anything consistent with its purpose) and transferring their shares to the trustee. When a voting trust agreement is signed, the trustee shall prepare a list of names and addresses of all owners of beneficial interests in the trust, together with the number and class of shares each transferred to the trust, and deliver copies of the list and agreement to the corporation’s principal office. A complete and current list of the names and addresses of all owners of beneficial interests in the trust and the number and class of shares represented by the certificates held by them and the dates on which they became owners must be kept on file at the office of the trustee and at the corporation’s principal office.

(b) A voting trust becomes effective on the date the first shares subject to the trust are registered in the trustee’s name. A voting trust is valid for not more than ten years after its effective date unless extended under subsection (c).

(c) All or some of the parties to a voting trust may extend the voting trust for additional terms of not more than ten years each by signing an extension agreement and obtaining the voting trustee’s written consent to the extension. An extension is valid for ten years from the date the first shareholder signs the extension agreement. The voting trustee must deliver copies of the extension agreement and list of beneficial owners to the corporation’s principal office. An extension agreement binds only those parties signing it.

(d) To the extent provided by the voting trust agreement, the trustees are entitled to vote without the consent of the voting trust certificate holders upon all amendments of the articles and upon any merger, consolidation, dissolution, sale of assets, reduction of stated capital of the corporation, or other matter on which a record owner of shares is entitled to vote. Except to the extent provided otherwise by the voting trust agreement, the voting trust certificate holder has all voting rights, dissenter’s rights, inspection rights, and other rights available to shareholders under this section.

HISTORY: Derived from 1976 Code Section 33‑11‑160 [1962 Code Section 12‑16.16; 1952 Code Sections 12‑251 to 12‑253; 1942 Code Sections 7679, 7680; 1932 Code Sections 7679, 7680; Civ. C. ‘22 Sections 4253, 4254; Civ. C. ‘12 Sections 2786, 2787; Civ. C. ‘02 Sections 1845, 1846; R. S. 1502; 1901 (21) 811; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

A voting trust is a device by which one or more shareholders divorce the voting rights of their shares from the ownership, retaining the latter, but transferring the former to one or more trustees in whom the voting rights of all the shareholders who are parties to the trust are pooled. Following the long established pattern of earlier versions of the Model Act and the statutes of many states, a voting trust under section 7.30(b) (Section 33‑7‑300(b)) is valid for a maximum of 10 years after its effective date.

At common law voting trusts were often viewed with hostility and were narrowly construed. They are, however, a reasonable voting device to accomplish legitimate objectives. As a result, much of the original judicial hostility to these arrangements has disappeared. See, e.g., Oceanic Exploration Co. v. Grynberg, 428 A.2d 1 (Del. 1981).

1. CREATION OF A VOTING TRUST.

Section 7.30(a) (Section 33‑7‑300(a)) provides a simple and direct procedure for the creation of an enforceable voting trust. The shareholders agreeing to participate in the trust and the trustees must sign the trust agreement and the shares must be registered in the name of the trustee. Typically, the trust agreement provides that all attributes of beneficial ownership other than the power to vote are retained by the beneficial owners. In addition, the voting trustees may issue to the beneficial owners voting trust certificates which may be transferable in much the same way as shares.

Upon the creation of the voting trust, the trustees must prepare a list of the beneficial owners and deliver it, together with a copy of the agreement, to the corporation’s principal office, where both documents are available for inspection by shareholders under section 7.20 (Section 33‑7‑200). This simple disclosure requirement eliminates the possibility that the voting trust may be used to create “secret, uncontrolled combinations of stockholders to acquire control of the corporation to the possible detriment of non‑participating shareholders” Lehrman v. Cohen, 222 A.2d 800, 807 (Del. 1966).

The purpose of section 7.30 (Section 33‑7‑300) is not to impose narrow or technical requirements on voting trusts. For example, a voting trust that by its terms extends beyond the 10‑year maximum should be treated as being valid for the maximum permissible term of 10 years.

2. EXTENSION OF RENEWAL OF VOTING TRUST.

Section 7.30(c) (Section 33‑7‑300(c)) permits a voting trust to be extended for successive terms of 10 years commencing with the date the first shareholder signs the extension agreement. Shareholders who do not agree to an extension are entitled to the return of their shares upon the expiration of the original term.

SOUTH CAROLINA REPORTERS’ COMMENTS

The revision addresses two points not treated in the Official Text of the Model Act: (1) under subsection (a), the trustees and the corporation are required to keep a current list of holders of voting trust certificates as was the case under Section 33‑11‑160(c) of the 1981 South Carolina Business Corporation Act; (2) a new subsection (d) is added to clarify the relative powers of voting trust trustees and certificate holders.

DERIVATION: 1984 Model Act Section 7.30.

CROSS REFERENCES

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

Delivery to corporation, see Section 33‑1‑410.

Inspection of shareholder lists, see Sections 33‑7‑200, 33‑16‑101 et seq.

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

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

Shares held by nominees, see Section 33‑7‑230.

Voting agreements, see Section 33‑7‑310.

Library References

Corporations 198.1.

Westlaw Topic No. 101.

C.J.S. Corporations Section 380.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Banks and Banking Section 61, Voting of Shares.

Forms

South Carolina Legal and Business Forms Section 1:17 , Shareholders‑Shareholders’ Agreements and Voting Trusts.

South Carolina Legal and Business Forms Section 1:190 , Voting Agreements‑Voting Trust.

South Carolina Legal and Business Forms Section 1:279 , Voting Trust Agreement.

**SECTION 33‑7‑310.** Voting agreements.

(a) Two or more shareholders may provide for the manner in which they will vote their shares by signing an agreement for that purpose. A voting agreement created under this section is not subject to the provisions of Section 33‑7‑300.

(b) A voting agreement created under this section is specifically enforceable.

HISTORY: Derived from 1976 Code Section 33‑11‑150 [1962 Code Section 12‑16.15; 1952 Code Sections 12‑251 to 12‑253; 1942 Code Sections 7679, 7680; 1932 Code Sections 7679, 7680; Civ. C. ‘22 Sections 4253, 4254; Civ. C. ‘12 Sections 2786, 2787; Civ. C. ‘02 Sections 1845, 1846; R. S. 1502; 1901 (21) 811; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 1; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 7.31(a) (Section 33‑7‑310(a)) explicitly recognizes agreements among two or more shareholders as to the voting of shares and makes clear that these agreements are not subject to the rules relating to a voting trust. These agreements are often referred to as “pooling agreements.” The only formal requirements are that they be in writing and signed by all the participating shareholders; in other respects their validity is to be judged as any other contract. They are not subject to the 10‑year limitation applicable to voting trusts.

Section 7.31(b) (Section 33‑7‑310(b)) provides that voting agreements may be specifically enforceable. A voting agreement may provide its own enforcement mechanism, as by the appointment of a proxy to vote all shares subject to the agreement; the appointment may be made irrevocable under section 7.22 (Section 33‑7‑220). If no enforcement mechanism is provided, a court may order specific enforcement of the agreement and order the votes cast as the agreement contemplates. This section recognizes that damages are not likely to be an appropriate remedy for breach of a voting agreement, and also avoid the result reached in Ringling Bros. Barnum & Bailey Combined Shows v. Ringling, 53 A.2d 441 (Del. 1947), where the court held that the appropriate remedy to enforce a pooling agreement was to refuse to permit any voting of the breaching party’s shares.

SOUTH CAROLINA REPORTERS’ COMMENTS

Section 33‑7‑310, unlike Section 33‑11‑150 of the 1981 South Carolina Business Corporation Act, puts no termination date on the voting agreement. Otherwise it is basically a concise statement of prior law.

DERIVATION: 1984 Model Act Section 7.31.

CROSS REFERENCES

Irrevocable proxies, see Section 33‑7‑220.

Voting trust, see Section 33‑7‑300.

Library References

Corporations 199.

Westlaw Topic No. 101.

C.J.S. Corporations Section 379.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:16 , Shareholders‑Voting and Proxies.

South Carolina Legal and Business Forms Section 1:17 , Shareholders‑Shareholders’ Agreements and Voting Trusts.

South Carolina Legal and Business Forms Section 1:188 , Voting Agreements.

NOTES OF DECISIONS

In general 1

1. In general

A provision of the bylaws of a homeowners association, calling for a majority of the association’s board of administration to vote on behalf of unit owners, was valid and enforceable under Section 33‑7‑310 where the complaining homeowner had consented to the voting agreement, as evidenced by her signature on the indenture deed. Ortega v. Kingfisher Homeowners Ass’n, Inc. (S.C.App. 1994) 314 S.C. 180, 442 S.E.2d 202.

ARTICLE 4

Derivative Proceedings

**SECTION 33‑7‑400.** Procedure in derivative proceedings.

Derivative suits may be maintained on behalf of South Carolina corporations in federal and state court in accordance with the applicable rules of civil procedure.

HISTORY: 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

[Note: Section 33‑7‑400 provision differs substantially from 1984 Model Act Official Text Section 7.40. See the South Carolina Reporters’ Comments. Therefore, this Official Comment has only limited applicability to derivative suits filed in South Carolina.].

Section 7.40 (Section 33‑7‑400) deals with the procedural requirements applicable to derivative suits. A great deal of controversy has surrounded the derivative suit, and widely different perceptions as to the value and efficacy of this litigation continue to exist. On the one hand, the derivative action has historically been the principal method of challenging allegedly improper, illegal, or unreasonable action by management. On the other hand, it has long been recognized that the derivative suit may be instituted more with a view to obtaining a settlement favorable to the plaintiff and his attorney than to righting a wrong to the corporation (the so‑called “strike suit”).

Earlier versions of section 7.40 (Section 33‑7‑400), and similar statutes in many states, imposed a series of procedural requirements designed in part to deter or prevent strike suits. The FEDERAL RULES OF CIVIL PROCEDURE, rule 23.1, also imposes procedural requirements on derivative litigation brought in federal court. There has thus been a great deal of experience with procedural devices to control abuses of the derivative suit. Section 7.40 reflects a reappraisal of these devices in light of major developments in corporate governance, the public demand for corporate accountability, and the corporate response in the form of greater independence and sense of responsibility in boards of directors.

1. PROCEDURAL REQUIREMENTS.

The procedural requirements imposed by section 7.40 are as follows:

a. The plaintiff may be either a registered or beneficial owner of shares held by a nominee in his behalf.

Many statutes, including earlier versions of the Model Act, required the plaintiff to be a shareholder “of record.” This limiting requirement was dropped in revising section 7.40 (Section 33‑7‑400), in light of the widespread use of street name or nominee ownership of shares. At the same time, it was determined that the beneficial owner of shares held in a voting trust should also be permitted to serve as a plaintiff in a derivative suit. These changes were accomplished by the addition of a special definition of “shareholder” in subsection (e) to broaden the definition of that term in section 1.40 (Section 33‑1‑400).

b. The plaintiff must have been an owner of shares at the time of the transaction in question.

The Model Act and the statutes of many states have long imposed a “contemporaneous ownership” rule, i.e., the plaintiff must have been an owner of shares at the time of the transaction in question. This rule has been criticized as being unduly narrow and technical and unnecessary to prevent the transfer of purchase of lawsuits. A few states, particularly California, Cal. G.C.L. Section 800(B), have relaxed this rule to the extent of allowing some subsequent purchasers of shares to be plaintiffs in limited circumstances.

The decision to retain the contemporaneous ownership rule in section 7.40 was based primarily on the view that it was simple, clear, and easy to apply while the California approach might encourage litigation on peripheral issues like the extent of the plaintiff’s knowledge of the transaction in question when he acquired his shares. Further, there has been no persuasive showing that the contemporaneous ownership rule has prevented the litigation of substantial suits since there appear to be many persons who might qualify as plaintiffs to bring suit even if subsequent purchasers are disqualified.

c. The complaint must be verified.

Section 7.40(b) requires the complaint in a derivative suit to be verified, i.e., sworn to. Compare FEDERAL RULES OF CIVIL PROCEDURE, rule 23.1; Surowitz v. Hilton Hotels Corp., 383 U.S. 363 (1966). This requirement provides some protection against groundless litigation without deterring suits brought in good faith.

d. Option holders and convertible debenture holders are not permitted to sue.

Arguments may be made that long‑term creditors and investors with the privilege of becoming shareholders by the exercise of options or conversion rights should be permitted to bring derivative suits. These arguments, however, appear to involve the substantive rights of these various classes of investors more than the procedures required for the assertion of derivative rights on behalf of the corporation. See, e.g., Harff v. Kerkorian, 324 A.2d 215 (Del. Ch. 1974), rev’d in part, 347 A.2d 133 (Del. 1975). Therefore, section 7.40(a) does not permit option holders or convertible debenture holders to serve as derivative plaintiffs.

e. There must be prior notice and demand on directors in most circumstances.

The purpose of a demand on the board of directors is to stimulate the board of directors to enforce the rights of the corporation on its own. Modern trends in corporate governance—particularly the increasing number of outside directors and greater director sensitivity to their roles in the corporation and to the possibility of personal liability—improve the likelihood that the board of directors will weigh carefully the shareholder’s demand. Therefore, section 7.40(b) requires an allegation with particularity of the demand made, if any, on the board of directors. On the other hand, there may be circumstances showing that a demand on the board of directors would be useless, and in those circumstances it should be sufficient to allege the reasons why the plaintiff did not make the demand.

Of itself, the rejection by the board of directors of the shareholder’s demand neither permits nor precludes the shareholder’s suit. See paragraph 2a. below.

f. There need be no prior notice to or demand on shareholders.

Rule 23.1 of the FEDERAL RULES OF CIVIL PROCEDURE requires that, in addition to a demand on the board of directors, a demand be made on shareholders “if necessary.” The statutes of a number of states, including California and New York, require demands only on boards of directors.

Although a demand on shareholders seems generally consistent with the broad doctrine of requiring exhaustion of all internal avenues of relief before commencement of suit, the board of directors, not the shareholders, is charged with governance of the corporation, including the commencement and management of litigation. Further, to require a demand on shareholders would virtually require the plaintiff to engage in a preliminary proxy contest and, in the case of publicly held corporations, would greatly increase the costs of filing all derivative suits, discouraging even legitimate cases.

For these reasons, it was concluded that the requirement of a demand on shareholders would add uncertainty, expense, and delay without commensurately improving the prospects of resolving the substantive issues.

g. A court may stay a derivative suit while the board of directors investigates.

The last sentence of section 7.40(b) provides that if the corporation undertakes an investigation, the court may stay the proceeding until the investigation of the charges made in the demand or complaint is completed. The purpose of this stay is to preserve the right of the board of directors to consider whether or not to seek to enforce on its own the corporation’s claim.

h. Plaintiffs are not required to post bond as security for expenses.

Earlier versions of the Model Act and the statutes of many states required a plaintiff to give security for reasonable expenses, including attorneys’ fees, if his holdings of shares did not reach a specified size or value—five percent of the outstanding shares or a value of $25,000 in the earlier version of the Model Act. This requirement has been deleted. The security for expenses requirement, to the extent it was based on the size or value of the plaintiff’s holdings rather than on the apparent good faith of his claim, was subject to criticism that it unreasonably discriminated against small shareholders.

The basic policy question with respect to the requirement of a bond for small shareholders is how far to go in protecting the corporation and its officers and directors from suits. The choice is between making the right to sue widely available, without obstacles except in obviously baseless cases, or imposing obstacles in the way of the small shareholder without imposing a similar obstacle in the way of the large shareholder. Moreover, no bond requirement exists for class actions, antitrust cases, or individual actions for personal injury, all of which involve the corporation in substantial expense of defending against suit.

Several states have concluded on the basis of these considerations that the bond requirement for small plaintiffs should be repealed or not adopted.

i. Recovery of reasonable expenses of suit, including attorneys’ fees, if suit is brought without good cause.

In lieu of the bond requirement, section 7.40(d) provides that on termination of a proceeding the court may require the complainant to pay the defendants’ reasonable expenses, including attorneys’ fees, if it finds that the proceeding “was commenced without reasonable cause.” This test is similar to but not identical with the test utilized in section 13.31, relating to dissenters’ rights, where the standard for award of expenses and attorneys’ fees is that dissenters “acted arbitrarily, vexatiously or not in good faith” in demanding a judicial appraisal of their shares. The derivative action situation is sufficiently different from the dissenters’ rights situation to justify a different and less onerous test for imposing costs on the plaintiff. The test of section 7.40 that the action was brought without reasonable cause is appropriate to deter strike suits, on the one hand, and on the other hand to protect plaintiffs whose suits have a reasonable foundation.

Section 7.40(d) does not refer to the award of expenses, including attorneys’ fees, to successful plaintiffs. The right of successful plaintiffs in derivative suits to this recovery is so universally recognized, both by statute and on the theory of a recovery of a fund or benefit for the corporation, that specific reference was thought to be unnecessary. The intention is to preserve fully these nonstatutory rights of reimbursement. Therefore, no negative inference should be drawn from section 7.40(d) as to the rights of plaintiffs to reimbursement.

Abuses in the conduct of derivative litigation may occur on the part of defendants and their counsel as well as by plaintiffs and their counsel. Abuses may occur with respect to motions, pleadings, requests for discovery and resistance to discovery when conducted either in bad faith or without good cause. Sanctions to deal with such conduct are not included in this Act because courts possess adequate power to impose appropriate sanctions under rules of civil procedure or the general equity power of courts. See Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980).

j. Settlement or discontinuance of derivative litigation requires judicial approval.

Section 7.40(c) follows the FEDERAL RULES OF CIVIL PROCEDURE, and the statutes of a number of states, including New York and Michigan, and requires that all proposed settlements and discontinuances must receive judicial approval. This requirement seems a natural consequence of the proposition that a derivative suit is brought on behalf of the class of all shareholders and avoids many of the evils of the strike suit by preventing the individual shareholder‑plaintiff from settling privately with the defendants.

Section 7.40(c) also requires notice to all affected shareholders if the court determines that the proposed settlement may substantially affect the interest of one or more classes of shareholders. Unlike the statutes of some states, however, section 7.40(c) does not address the issue of which party should bear the cost of giving this notice. That is a matter left to the discretion of the court reviewing the proposed settlement.

2. ISSUES UNRESOLVED BY SECTION 7.40.

Several issues relating to section 7.40 were reserved for future consideration because it was felt that further experience or experimentation was desirable before their resolution was encapsulated in model statutory language. The issues so reserved include the following:

a. Should a decision by the board of directors that maintenance of a derivative suit is against the corporation’s interest bar the suit?.

The case law concerning the power of the board of directors or of an independent committee of the board to bar a derivative suit without judicial review is in a state of flux. See, e.g., Burks v. Lasker, 441 U.S. 471 (1979); Auerbach v. Bennett, 47 N.Y.2d 619, 419 N.Y.S.2d 920, 393 N.E.2d 994 (1979); Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981); Aronson v. Lewis, 473 A.2d 800 (Del. 1984). For the present it should be permitted to continue to develop. Moreover, this issue may be the subject of an amendment to the Model Act at a later date.

b. Should the method of calculating attorneys’ fees be specified?.

Courts are today scrutinizing plaintiffs’ fees more closely than they have in the past. This trend should be encouraged, and it was therefore concluded that the subject was not appropriate for statutory language at the present time. It is believed that the problem is more acute with respect to plaintiffs’ fees recoverable under general principles of derivative litigation than it is under section 7.40(d).

c. Should there be a maximum limit on an individual’s liability?.

The sums involved in claims of alleged wrongdoing by a corporation and its officers and directors are often extremely large when viewed in the light of the personal resources of even an affluent person. Claims for millions of dollars may create a high leverage to settle, and the potential exposure to these claims is an undesirable deterrent to service on the board of directors, particularly by outside directors. The proposed Federal Securities Code imposes a limit on individual liability resulting from certain violations of the Code and similar suggestions have also been made by others. On the other hand, where a director’s or officer’s conduct has proved to be wrongful and detrimental to the corporation, he should clearly be required to disgorge the entire benefit, and it also may be appropriate to require him rather than the victimized corporation and shareholders to bear any other loss suffered.

Since no state has yet adopted a limitation of liability provision, and there is no experience with these provisions, it was thought inappropriate at the present time to discard the principle of unlimited liability.

SOUTH CAROLINA REPORTERS’ COMMENTS

Rule 23(b)(1) of the South Carolina Rules of Civil Procedure adopts the federal derivative suit provision, Fed. R. Civ. P. 23.1. Bringing an additional set of litigation rules into the South Carolina Business Corporation Act on top of Rule 23(b)(1) was deemed inadvisable, particularly since courts called on to interpret the new South Carolina rule have a large body of federal precedent from which to draw.

A reference in the corporate statute to the availability of derivative suits under the civil rules is appropriate, however, in order to negate any implication that derivative suits may not be maintained under the new statute.

DERIVATION: 1984 Model Act Section 7.40 with substantial modifications. See the South Carolina Reporters’ Comments.

Library References

Corporations 202 to 214.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 397 to 401, 406 to 412.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Attorney Fees Section 36, Stockholder Derivative Suit.

S.C. Jur. Banks and Banking Section 74, Procedure in Derivative Proceedings.

NOTES OF DECISIONS

In general 1

Minority shareholder oppression action 3

Misappropriation of corporate property or assets 2

Sufficiency of evidence 4

1. In general

Under South Carolina law, a “derivative action” is brought by a corporation or its shareholders on the corporation’s behalf when a corporation suffered an injury from actionable wrongs committed by its officers and directors; if any relief is granted, it goes to the corporation, as shareholders cannot recover the damages in their individual capacities because their loss is the indirect result of the injury to the corporation. In re Greenwood Supply Co. (Bkrtcy.D.S.C. 2002) 295 B.R. 787. Corporations And Business Organizations 2074; Corporations And Business Organizations 2075

Under South Carolina law, where there are no allegations of a distinct injury to the shareholder or where there is an action for misappropriation of corporate property, the action is derivative. In re Greenwood Supply Co. (Bkrtcy.D.S.C. 2002) 295 B.R. 787. Corporations And Business Organizations 2024

Homeowners were not entitled to an award of attorney’s fees pursuant to derivative action statute in their declaratory judgment action against developers, even if their action was construed as a derivative action; derivative action statute did not specifically authorize recovery of attorney’s fees, and official comment which noted the right of successful plaintiffs in derivative suits to attorney’s fees was so universally recognized that specific reference in the statute was thought unnecessary was specifically limited to “successful plaintiffs.” Cullen v. McNeal (S.C.App. 2010) 390 S.C. 470, 702 S.E.2d 378, rehearing denied, certification granted, certiorari dismissed as improvidently granted 411 S.C. 270, 768 S.E.2d 401. Corporations And Business Organizations 2163; Costs 194.40

Shareholders’ obligation to make a demand on the corporation before bringing a derivative action assures compliance with the most fundamental principle of corporate governance, i.e., directors are answerable to the shareholders and are charged with the duty and responsibility to manage all aspects of corporate affairs. Carolina First Corp. v. Whittle (S.C.App. 2000) 343 S.C. 176, 539 S.E.2d 402, rehearing denied, certiorari granted. Corporations And Business Organizations 2037

2. Misappropriation of corporate property or assets

Under South Carolina law, prepetition state court cause of action for an accounting based upon a diversion of corporate assets, brought by Chapter 11 debtor‑corporation’s minority shareholders against debtor and its majority shareholders, was a derivative action belonging to the bankruptcy estate, and so could not be pursued by minority shareholders; the injury alleged would have run to the corporation as a whole and not just to minority shareholders, and the cause of action closely mirrored one for misappropriation of corporate property, a cause of action that South Carolina courts have treated as derivative. In re Greenwood Supply Co. (Bkrtcy.D.S.C. 2002) 295 B.R. 787. Bankruptcy 2154.1; Bankruptcy 2553

3. Minority shareholder oppression action

In minority shareholder oppression action, issue of minority shareholder’s entitlement to award of unpaid shareholder distributions was tried by consent; issue concerning shareholder distributions was extensively discussed at trial and was tried before court without objection. Pertuis v. Front Roe Restaurants, Inc. (S.C.App. 2016) 2016 WL 757503, Unreported. Pleading 427

In minority shareholder oppression case, there was no inconsistency between trial court’s finding that corporate entities were operated as a de facto partnership but that separate consideration of their valuations was appropriate; there was substantial evidence to support valuation of entities separately instead of as a whole. Pertuis v. Front Roe Restaurants, Inc. (S.C.App. 2016) 2016 WL 757503, Unreported. Corporations and Business Organizations 1526(7)

In minority shareholder oppression action, corporations’ tax returns provided evidence to support award of unpaid shareholder distributions. Pertuis v. Front Roe Restaurants, Inc. (S.C.App. 2016) 2016 WL 757503, Unreported. Corporations and Business Organizations 1590

4. Sufficiency of evidence

In minority shareholder oppression action, evidence supported finding that locus of de facto partnership between three corporate entities was in certain city; there was evidence that entities shared personnel, one individual served as general managing partner of each, managing partner relocated to that city, and he traveled to various locations four to six days per week from that location. Pertuis v. Front Roe Restaurants, Inc. (S.C.App. 2016) 2016 WL 757503, Unreported. Partnership 625

In minority shareholder oppression action, evidence supported award to minority shareholder of 7.2% interest in one company; trial court recounted evidence minority shareholder presented in support of his claim of 10% interest and recognized contradictory testimony that minority shareholder had not achieved 10% interest pursuant to vesting schedule, and minority shareholder acknowledged his 10% acquisition in company was tied to profits and that minority shareholder could not, himself, testify to specific provisions in missing vesting schedule. Pertuis v. Front Roe Restaurants, Inc. (S.C.App. 2016) 2016 WL 757503, Unreported. Corporations and Business Organizations 1526(7)

In minority shareholder oppression action, evidence supported finding that one corporation had no value; expert placed fair value at $0 and noted that business was not making money and had negative equity, and expert noted that excluding loans to and from shareholders, corporation would have small positive adjusted net asset value. Pertuis v. Front Roe Restaurants, Inc. (S.C.App. 2016) 2016 WL 757503, Unreported. Corporations and Business Organizations 1526(7); Evidence 571(7)

Evidence supported finding of minority shareholder oppression; there was evidence that majority shareholders failed to provide formal documentation of minority shareholder’s ownership interest, that minority shareholder parted ways only after he tried in vain to have his agreement with majority formally documented, that majority shareholders continued to receive substantial benefits from corporations, that majority offered minority shareholder an extremely low buyout offer, that majority withheld information from minority, and that majority commingled bonus and distribution compensation due minority. Pertuis v. Front Roe Restaurants, Inc. (S.C.App. 2016) 2016 WL 757503, Unreported. Corporations and Business Organizations 1526(5)