CHAPTER 10

Amendment of Articles of Incorporation and Bylaws

ARTICLE 1

Amendment of Articles of Incorporation

**SECTION 33‑10‑101.** Authority to amend.

 (a) A corporation may amend its articles of incorporation to add or change a provision that is required or permitted in the articles of incorporation or to delete a provision not required in the articles of incorporation. Whether a provision is required or permitted in the articles of incorporation is determined as of the effective date of the amendment.

 (b) A shareholder of the corporation does not have a vested property right resulting from any provision in the articles of incorporation, including provisions relating to management, control, capital structure, dividend entitlement, or purpose or duration of the corporation.

HISTORY: Derived from 1976 Code Section 33‑15‑10 [1962 Code Section 12‑19.1; 1952 Code Sections 12‑401 to 12‑404; 1942 Code Sections 7676, 7736, 7741, 7744; 1932 Code Sections 7676, 7736, 7741, 7744; Civ. C. ‘22 Sections 4250, 4310, 4315, 4318; Civ. C. ‘12 Sections 2846, 2849, 2873; Civ. C. ‘02 Sections 1842, 1851, 1892; R. S. 1499; 1886 (19) 846; 1896 (22) 97; 1898 (22) 769, 771; 1901 (23) 710; 1917 (30) 36; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.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 10.01(a) (Section 33‑10‑101(a)) authorizes a corporation to amend its articles of incorporation by adding a new provision to its articles of incorporation, modifying an existing provision, or deleting a provision in its entirety. The sole test for the validity of an amendment is whether the provision could lawfully have been included in (or in the case of a deletion, omitted from), the original articles of incorporation as of the effective date of the amendment.

The power of amendment must be exercised pursuant to the procedures set forth in the rest of this chapter, which require significant amendments to be approved either by a majority of the votes cast on the proposed amendment or by a majority of all of the votes eligible to be cast on the proposed amendment (section 10.03)(Section 33‑10‑103). This majority vote requirement is supplemented by section 10.04 (Section 33‑10‑104), which establishes a right of voting by voting group on amendments that directly affect a single class or series of shares, and by section 7.27 (Section 33‑7‑270), which treats amendments that change the voting requirements for future amendments.

Section 10.01(b) (Section 33‑10‑101(b)) restates explicitly the policy embodied in earlier versions of the Model Act and in all modern state corporation statutes, that a shareholder “does not have a vested property right” in any provision of the articles of incorporation. Corporations and their shareholders are also subject to amendments of the governing statute by the state under section 1.02 (Section 33‑1‑102).

Section 10.01(b) (Section 33‑10‑101(b)) should be construed liberally and without qualification or restriction to achieve the fundamental purpose of this chapter of permitting corporate adjustment and change by majority vote. Section 10.01(b) (Section 33‑10‑101(b)) rejects decisions by a few courts that have applied a “vested rights” or “property right” doctrine to restrict or invalidate amendments to articles of incorporation because they modified particular rights conferred on shareholders by the original articles of incorporation. These holdings are rejected because their effect often is to create a tyranny of the minority; the individual consent of each shareholder becomes necessary to adopt any important change, and each shareholder, no matter how small his holding, can prevent the change.

Section 10.01(b) (Section 33‑10‑101(b)) does not change in any way the purpose of similar provisions in earlier versions of the Model Act, which included, along with general language similar to section 10.01(b) (Section 33‑10‑101(b)), a long list of specific permissible amendments. This list was designed to eliminate the last possible vestige of the “vested rights” theory by expressly referring to and validating all types of amendments to which a vested rights challenge could be made. Section 10.01(b) (Section 33‑10‑101(b)) omits this “laundry list” of permissible amendments as prolix and unnecessary to carry out the policies of the section. Examples of amendments that may be made under section 10.01 (Section 33‑10‑101) include:

(1) Amendments to eliminate a narrow or limited purpose clause (thereby authorizing the corporation to engage in any lawful business) or a limited duration clause (thereby authorizing the corporation to have perpetual duration).

(2) Amendments increasing or decreasing the number of shares a corporation is authorized to issue.

(3) Amendments exchanging, classifying, reclassifying, or cancelling any part of a corporation’s shares, whether or not previously issued.

(4) Amendments limiting or cancelling the right of holders of a class of shares to receive dividends, whether or not the dividends or rights to receive the dividends had accumulated or accrued in the past.

(5) Amendments creating new classes of shares whether superior or inferior to shares already outstanding, or changing the designations of shares, or the preferences, limitations, or rights of classes of shares, whether or not previously issued.

(6)Amendments dividing a class of shares into series and authorizing the directors to fix the relative rights and preferences of a class or series.

(7) Amendments changing the voting rights of outstanding shares, including elimination of the power to vote cumulatively or assigning multiple or fractional votes per share, or denying the power to vote entirely to classes of shares, whether or not previously issued.

This listing is partial and illustrative only.

A provision in the articles of incorporation is subject to amendment under section 10.01 (Section 33‑10‑101) even though the provision is described, referred to, or stated in a share certificate, information statement, or other document issued by the corporation that reflects provisions of the articles of incorporation. The only exception to this unlimited power of amendment is section 6.27 (Section 33‑6‑270), which provides that share transfer restrictions may not be imposed by amendment on shares that were previously issued without the consent of the holder.

Section 10.01 (Section 33‑10‑101) relates only to amendments to articles of incorporation. It does not relate to the impairment of obligations of a corporation to its shareholders based upon contracts independent of the articles of incorporation. An amendment permitted by this section may constitute a breach of such a contract or of a contract between the shareholders themselves. A shareholder with contractual rights (or who otherwise is concerned about possible onerous amendments) may obtain complete protection against these amendments only by establishing procedures in the articles of incorporation or bylaws that limit the power of amendment without his consent. In appropriate cases, a shareholder may be able to enjoin an amendment that constitutes a breach of a contract.

Minority shareholders are protected from the power of the majority to impose onerous or objectionable amendments by two basic devices: the right to vote on amendments by separate voting groups (section 10.04) (Section 33‑10‑104) and the right to dissent under chapter 13. In addition, courts have held that a decision by majority shareholders to exercise the powers granted by this section in a way that is arguably detrimental or unfair to minority interests may be examined by a court under its inherent equity power to review transactions for good faith and fair dealing. McNulty v. W. & J. Sloane, 184 Misc. 835, 54 N.Y.S.2d 253 (Sup. Ct. 1945); Kamena v. Janssen Dairy Corp., 133 N.J. Eq. 214, 31 A.2d 200, 203 (1943), aff’d, 134 N.J. Eq. 359, 35 A.2d 894 (1944) (where the court stated that it “is more a question of fair dealing between the strong and the weak than it is a question of percentages or proportions of the votes favoring the plan.”) See also Teschner v. Chicago Title & Trust Co., 59 Ill. 2d 452, 322 N.E.2d 54, 57 (1974), where the court, in upholding a transaction that had a reasonable business purpose, relied partially on the fact that there was “no claim of fraud or deceptive conduct . . . [or] that the exchange offer was unfair or that the price later offered for the shares was inadequate.”

Because of the broad power of amendment contained in this section, it is unnecessary and undesirable to make any reference to, or reserve, an express power to amend in articles of incorporation.

SOUTH CAROLINA REPORTERS’ COMMENTS

The 1984 Model Act provision (Section 10.01) has been adopted unchanged. It represents no substantive change from the 1981 South Carolina Business Corporation Act. The laundry list of permissible amendments that was contained in prior Section 33‑15‑10(b) is unnecessary and is not continued. The right to dissent contained in prior Section 33‑15‑10(d) has been moved to new Section 33‑13‑102, in accordance with the pattern of the Model Act, placing all of the dissenters’ rights provisions in Chapter 13.

DERIVATION: 1984 Model Act Section 10.01.

CROSS REFERENCES

Amendment before issuance of shares, see Section 33‑10‑105.

Amendment by directors, see Section 33‑10‑102.

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

Amendment pursuant to court reorganization, see Section 33‑10‑108.

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

Dissenters’ rights, see Sections 33‑13‑101 et seq.

Duration of corporate existence, see Section 33‑3‑102.

Effective date of amendment, see Section 33‑1‑230.

Powers of corporation, see Section 33‑3‑102.

Procedure for amendment, see Sections 33‑10‑102 through 33‑10‑104.

Purposes of corporation, see Section 33‑3‑101.

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

Share transfer restrictions, see Section 33‑6‑270.

Voting by voting groups, see Sections 33‑7‑250, 33‑7‑260, and 33‑10‑104.

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

Library References

Corporations 40.

Westlaw Topic No. 101.

C.J.S. Corporations Section 38.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:6 , Formation‑Content of Articles of Incorporation.

South Carolina Legal and Business Forms Section 1:21 , Amendment of Articles and Bylaws.

**SECTION 33‑10‑102.** Amendment by board of directors.

 Unless the articles of incorporation provide otherwise, a corporation’s board of directors may adopt one or more amendments to the corporation’s articles of incorporation without shareholder action to:

 (1) delete the names and addresses of the initial directors;

 (2) delete the name and address of the initial registered agent or registered office, if a statement of change is on file with the Secretary of State;

 (3) change each issued and unissued authorized share of an outstanding class into a greater number of whole shares if the corporation has only shares of that class outstanding;

 (4) change the corporate name by substituting the word “corporation”, “incorporated”, “company”, “limited”, or the abbreviation “corp.”, “inc.”, “co.”, or “ltd.” for a similar word or abbreviation in the name or by adding, deleting, or changing a geographical attribution for the name; or

 (5) make any other change expressly permitted by Chapters 1 thru 20 of this title to be made without shareholder action.

HISTORY: Derived from 1976 Code Section 33‑15‑30 [1962 Code Section 12‑19.3; 1952 Code Sections 12‑401 to 12‑404; 1942 Code Sections 7676, 7736, 7741, 7744; 1932 Code Sections 7676, 7736, 7741, 7744; Civ. C. ‘22 Sections 4250, 4310, 4315, 4318; Civ. C. ‘12 Sections 2846, 2849, 2873; Civ. C. ‘02 Sections 1842, 1889, 1892; R. S. 1499; 1886 (19) 546; 1896 (22) 97; 1898 (22) 769, 771; 1901 (23) 710; 1917 (30) 36; 1962 (52) 1996; repealed by implication by 1981 Act No. 146 Section 2; Repealed, 1988 Act No. 444 Section 2], and Section 33‑15‑80 [1962 Code Section 12‑19.8; 1952 Code Sections 12‑401 to 12‑404; 1942 Code Sections 7676, 7736, 7741, 7744; 1932 Code Sections 7676, 7736, 7741, 7744; Civ. C. ‘22 Sections 4250, 4310, 4315, 4318; Civ. C. ‘12 Sections 2846, 2849, 2873; Civ. C. ‘02 Sections 1842, 1889, 1892; R. S. 1499; 1886 (19) 546; 1896 (22) 97; 1898 (22) 769, 771; 1901 (23) 710; 1917 (30) 36; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444 Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

The amendments described in clauses (1) through (6) are so routine and “housekeeping” in nature as not to require action by shareholders. None affects substantive rights in any meaningful way. For example, section 10.02(1) (not adopted in South Carolina—see the South Carolina Reporters’ Comments) authorizes amendments by the board of directors to extend the duration of a corporation that was formed at a time when limited duration was required by law. The extension normally will be in the form of an amendment to delete all reference to the duration of the corporation, which automatically makes the duration perpetual. See section 3.02 (Section 33‑3‑102). Similarly, sections 10.02(2) and (3) (Section 33‑10‑102(1) and (2)) authorize the board of directors to delete the names of initial directors, or the name and address of the initial registered agent and registered office, set forth in the original articles if that information is obsolete. Section 10.02(4) (Section 33‑10‑102(3)) authorizes the board of directors to change each issued and unissued share of an outstanding class of shares into a greater number of whole shares if the corporation has only that class of shares outstanding. All shares of the class being changed must be treated identically under this clause. Section 10.02(5) (Section 33‑10‑102(4)) authorizes minor name changes without shareholder approval.

Section 10.02(6) (Section 33‑10‑102(5)) recognizes that other sections of the Model Act expressly permit other amendments to be made by the board of directors without prior shareholder approval. Examples of these include section 6.02 (Section 33‑6‑102) (creation of series of shares pursuant to authority already granted in the articles) and section 6.31 (Section 33‑6‑310) (cancellation of reacquired shares if the articles provide they are not to be reissued).

Amendments provided for in this section may be included in restated articles of incorporation under section 10.07 (Section 33‑10‑107) or in articles of merger under chapter 11.

SOUTH CAROLINA REPORTERS’ COMMENTS

The 1984 Model Act provision (Section 10.02) has been adopted with one change. Although the 1981 South Carolina Business Corporation Act provided no similar procedure for such “housekeeping” amendments, it formerly did allow amendments by the directors to change the registered agent or registered office of the corporation. See Section 33‑15‑30 of the 1976 Code, repealed by Section 2 of Act 146 of 1981. In addition, prior Section 33‑15‑80(d) allowed the board of directors to omit the names of incorporators from restated articles. It is desirable to permit such amendments to be authorized by the board of directors without shareholder approval, since no rights of shareholders or third parties will be impaired. For example, anyone desiring to find out who the registered agent or initial directors of a corporation were can check the initial articles of incorporation in the Secretary of State’s archives even if that information has been deleted by an amendment approved by the board of directors.

However, subsection (1) of the Model Act section, which authorizes amendments by the board of directors to extend the duration of a corporation that was formed at a time when limited duration was required by law, has not been included in this section because it would have no possible application. Limited duration has not been required by South Carolina law since 1869. Because the maximum duration prior to that was fourteen years, the provision is purely hypothetical; any corporation to which it could apply has been dissolved for more than a century.

DERIVATION: 1984 Model Act Section 10.02.

CROSS REFERENCES

Action by board of directors, see Sections 33‑8‑200 through 33‑8‑240.

Articles of amendment, see Section 33‑10‑106.

Classes and series of shares, see Sections 33‑6‑101 and 33‑6‑102.

Duration of corporate existence, see Section 33‑3‑102.

Effective date of amendment, see Section 33‑1‑230.

Initial directors, see Section 33‑2‑102.

Merger, see Sections 33‑11‑101 et seq.

Name of corporation, see Sections 33‑4‑101 et seq.

Reacquisition of shares, see Section 33‑6‑310.

Registered office and agent, see Sections 33‑5‑101 et seq.

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

Library References

Corporations 40.

Westlaw Topic No. 101.

C.J.S. Corporations Section 38.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:6 , Formation‑Content of Articles of Incorporation.

South Carolina Legal and Business Forms Section 1:21 , Amendment of Articles and Bylaws.

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

South Carolina Legal and Business Forms Section 1:146 , Shareholders’ Rights‑Reservation of Power to Adopt, Amend, and Repeal Bylaws.

South Carolina Legal and Business Forms Section 1:333 , Directors’ Resolution‑Amending Articles‑No Shareholder Action Required.

Treatises and Practice Aids

Fletcher Cyclopedia Law of Private Corporations Section 4099, Extension Under General Laws‑In General.

**SECTION 33‑10‑103.** Amendment by board of directors and shareholders.

 (a) A corporation’s board of directors may propose amendments to the articles of incorporation for submission to the shareholders.

 (b) For an amendment proposed by the board of directors to be adopted:

 (1) the board of directors must recommend the amendment to the shareholders unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates the basis of its determination to the shareholders with the amendment; and

 (2) the shareholders entitled to vote on the amendment must approve the amendment as provided in subsection (f).

 (c) The board of directors may condition on any basis its submission of an amendment that it proposes.

 (d) In the case of a corporation which is not a public corporation, if the holders of at least ten percent of any class of voting shares of the corporation propose amendments to the articles of incorporation, the board of directors shall submit the proposed amendments to the shareholders at the next possible special or annual meeting.

 (e) The corporation shall notify each shareholder, whether or not entitled to vote, of the shareholders’ meeting in accordance with Section 33‑7‑105. The notice of meeting must state also that the purpose, or one of the purposes, of the meeting is to consider the proposed amendment and contain or be accompanied by a copy or summary of the amendment.

 (f) Unless Chapters 1 thru 20 of this title or the articles of incorporation require a different vote or the board of directors (acting pursuant to subsection (c)) requires a greater vote than that specified by this subsection or the articles of incorporation, to be adopted the amendment must be approved by: (1) two‑thirds of the votes entitled to be cast on the amendment, regardless of the class or voting group to which the shares belong, and (2) two‑thirds of the votes entitled to be cast on the amendment within each voting group entitled to vote as a separate voting group on the amendment.

 (g) The articles of incorporation may require a lower or higher vote for approval than that specified in subsection (f), but the required vote must be at least (1) a majority of the votes entitled to be cast on the amendment by any voting group with respect to which the amendment would create dissenters’ rights, and (2) the votes required by Sections 33‑7‑250 and 33‑7‑260 by every other voting group entitled to vote on the amendment.

HISTORY: Derived from 1976 Code Section 33‑15‑40 [1962 Code Section 12‑19.4; 1952 Code Sections 12‑401 to 12‑404; 1942 Code Sections 7676, 7736, 7741, 7744; 1932 Code Sections 7676, 7736, 7741, 7744; Civ. C. ‘22 Sections 4250, 4310, 4315, 4318; Civ. C. ‘12 Sections 2846, 2849, 2873; Civ. C. ‘02 Sections 1842, 1889, 1892; R. S. 1499; 1886 (19) 546; 1896 (22) 97; 1898 (22) 769, 771; 1901 (23) 710; 1917 (30) 36; 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 5.

OFFICIAL COMMENT

Significant amendments to articles of incorporation must be approved by the shareholders after being proposed by the board of directors. When proposing an amendment, the board of directors must make a recommendation to the shareholders that the amendment be approved, unless it determines that because of conflict of interest or other special circumstances it should make no recommendation. If the board of directors so determines, it must describe the conflict or circumstance, and communicate the basis for its determination, when presenting the proposed amendment to the shareholders.

Section 10.03(c) (Section 33‑10‑103(c)) codifies existing practice by expressly permitting the board of directors to submit an amendment to the shareholders on a conditional basis. This power of the board of directors does not alter the balance of power between the board of directors and shareholders since the board of directors may always withhold its approval entirely and not submit an amendment. Examples of conditions commonly imposed are that the amendment not be approved unless (1) a favorable vote by a specified proportion (larger than ordinarily required) of the shareholders is obtained, (2) no more than a specified fraction of the shareholders file written dissents, or (3) a class or series of shares must approve the amendment as a separate voting group. These conditions may be used, for example, to discourage unwise depletion of corporate assets by the adoption of the amendment. The board of directors is not limited to conditions of these types, however, and may condition the submission on any basis.

The vote of shareholders needed to approve an amendment depends in part on the voting groups entitled to vote separately on the amendment and in part on whether any of those voting groups would be entitled to dissenters’ rights if the amendment were adopted. See section 10.04 (Section 33‑10‑104). However, section 10.03(e) (Section 33‑10‑103(e)) itself establishes a dual requirement for approval by shareholders of each voting group depending on the nature of the amendment; under section 7.25 (Section 33‑7‑250) and 7.26 (Section 33‑7‑260) a majority of the votes cast affirmatively and negatively on the amendment at a meeting at which a quorum is present is necessary to approve most amendments; but if the amendment would give rise to dissenters’ rights under chapter 13, section 10.03(e) (Section 33‑10‑103(e)) requires that it be approved by a majority of the votes of the outstanding shares of each voting group that will have dissenters’ rights if the amendment were adopted, and by the vote required by sections 7.25 (Section 33‑7‑250) and 7.26 (Section 33‑7‑260) by other voting groups that are entitled to vote on the amendment. This increased voting requirement reflects the importance of these proposals. Of course, the articles of incorporation may specify a greater quorum or voting requirement for a voting group to approve an amendment of any type. See section 7.27 (Section 33‑7‑270).

The articles of incorporation or the board of directors may require that a proposed amendment be approved by a class or series of shares voting as a separate voting group; such a requirement may only be in addition to that otherwise required by section 10.04 (Section 33‑10‑104) of this Act.

SOUTH CAROLINA REPORTERS’ COMMENTS

The Official Text of the Model Act provision (Section 10.03) would have effected two major changes in South Carolina law: eliminating the power of the holders of ten percent of the shares of any class to require that a proposed amendment be submitted to the shareholders for approval and reducing to a majority the shareholder vote required for approval of amendments.

The first of these changes would diminish shareholders’ rights and, thus, was found to be unacceptable. If holders of a significant block of shares favor an amendment, they should be able to propose it to their fellow shareholders. Furthermore, it is possible under the Model Act that the will of the holders of a majority of the shares could be thwarted by the board of directors’ refusal to propose an amendment to the shareholders. The new section continues the prior South Carolina law allowing shareholders to propose amendments to the articles of incorporation but limits the right to holders of voting shares. The board of directors is required to submit the shareholder‑proposed amendment to the shareholders the next time they meet (either at an annual or a special meeting) unless the proposal was made too late for inclusion on the agenda or in the proxy materials. The board does not have to call a special meeting to consider the proposal although, of course, it may do so. Under Section 33‑7‑102, the shareholders may call a special meeting to consider the amendment.

It was concluded that the second of the Model Act changes is not desirable either, and it is not included in the new law. During the process of preparing and adopting the 1981 South Carolina Business Corporation Act, extensive consideration was given to what vote should be required for amendment of the articles of incorporation and other major corporate changes. The decision was made to join the growing rank of states that provide a standard requirement of a two‑thirds vote but allow particular corporations to reduce this to a simple majority. Louisiana and Ohio have had such provisions for a number of years. In addition to South Carolina’s 1981 adoption, this provision has been approved recently in Colorado, Massachusetts, and Virginia. Virginia’s adoption is especially significant since Virginia is the first state to enact the 1984 Model Act. Connecticut accomplishes a similar result by requiring a two‑thirds vote for the amendment of the articles of all corporations having fewer than one hundred shareholders of record; amendment of the articles of corporations having one hundred or more shareholders requires a majority vote. In addition, eleven states require a two‑thirds vote to amend the articles, with no provision for lowering the requirement in the articles: Alaska, Arkansas, Illinois, Maryland, Mississippi, Nebraska, South Dakota, Texas, Vermont, Washington, and Wyoming.

A major reason for concern about lowering the normal required vote is that most of the seventy thousand existing South Carolina corporations would be affected. In 1978, Professor Harry J. Haynsworth had a survey conducted of all of the articles of incorporation filed with the Secretary of State in 1967 and 1977. The survey demonstrated, among other things, that it is quite rare for special control provisions to be included in the articles of South Carolina corporations. See Haynsworth, The 1981 Revision of the South Carolina Business Corporation Act: A Critique and Agenda for Further Reform, 33 S.C.L. Rev. 449, 461 n. 49 (1982). Thus, one of the few protections available to minority shareholders in tens of thousands of South Carolina corporations is the two‑thirds vote required to amend the articles of incorporation and to make other major corporate changes. Adopting the Model Act proposal would destroy this protection in every one of these corporations. Only in those corporations where the shareholders recognized the problem and the minority could persuade the majority to join them in amending their articles to raise the required vote back to two‑thirds would the present protection be restored. Horizon House Microwave, Inc. v. Bazzy, 487 N.E.2d 70 (Mass. App. Ct. 1985) demonstrates how real this danger is. Following a 1976 amendment of the Massachusetts corporation act reducing the vote required to amend the articles of incorporation or approve a merger from two‑thirds to a simple majority, the majority shareholder of Horizon House Microwave, Inc., froze out the minority shareholder, whose statutory protection had been destroyed by the legislature. It is particularly noteworthy that Massachusetts afterwards replaced its recently‑adopted majority voting requirement with the provision continued in the South Carolina Business Corporation Act of 1988.

In 1971, the Wisconsin corporation statute was amended to reduce the required vote from two‑thirds to a majority. The Official Comment noted the problem of such a change and discussed the Wisconsin solution:

“Because the two‑thirds affirmative voting requirement on special matters has been statutory in Wisconsin for many years, it has in effect become an implied provision in the articles of incorporation of existing corporations and undoubtedly many corporate relationships have been created in reliance thereon. Therefore, the two‑thirds requirement is preserved for pre‑existing corporations . . . but all such corporations are permitted to amend their articles by a two‑thirds vote so as to change for the future to the majority vote rule on any or all of these special subjects.”

The problem pointed out is significant. However, it is believed that the solution of the 1981 South Carolina revision and the new law (and of Louisiana, Ohio, Colorado, Massachusetts, and Virginia) is much better than that of Wisconsin (and New Mexico)—having dual standards depending upon when the corporation was incorporated. This section maintains the protection of minority shareholders afforded by the two‑thirds vote in the typical closely‑held corporation while allowing publicly‑held corporations, and other corporations where majority voting requirements are desirable, to adopt them. The minimum voting requirement that this section permits is identical to the standard proposed in the Model Act.

In addition to these two major changes, the Model Act provision requires that the board of directors recommend the amendment to the shareholders unless a conflict of interest or other special circumstances make this inappropriate, in which case the board must explain why it makes no recommendation. Also, the board is allowed to condition its submission on any basis, such as the occurrence of a specified event or the receipt of a higher favorable vote than otherwise required. Both of these changes are included in this section, but only for amendments proposed by the board of directors and not for those proposed by shareholders under subsection (d).

Finally, the Model Act provision requires that notice of the proposed amendment be given to all shareholders, whether entitled to vote on the proposal or not. The 1981 South Carolina Business Corporation Act only required notice to shareholders entitled to vote. This section contains the broader Model Act notice requirement.

DERIVATION: 1984 Model Act Section 10.03.

CROSS REFERENCES

Articles of amendment, see Section 33‑10‑106.

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

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

Quorum at shareholders’ meeting, see Section 33‑7‑250.

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

Right to dissent, see Section 33‑13‑102.

Standards of conduct for directors, see Sections 33‑8‑300 through 33‑8‑320.

Supermajority quorum and voting requirements, see Section 33‑7‑270.

Voting by voting group, see Sections 33‑7‑250, 33‑7‑260, and 33‑10‑104.

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

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

Voting on merger plan, see Section 33‑11‑103.

Library References

Corporations 40.

Westlaw Topic No. 101.

C.J.S. Corporations Section 38.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:21 , Amendment of Articles and Bylaws.

South Carolina Legal and Business Forms Section 1:327 , Shareholders’ Resolution‑Amending Articles‑Adding Material.

**SECTION 33‑10‑104.** Voting on amendments by voting groups.

 (a) The holders of the outstanding shares of a class are entitled to vote as a separate voting group (if shareholder voting is otherwise required by Chapters 1 thru 20 of this title) on a proposed amendment if the amendment would:

 (1) increase or decrease the aggregate number of authorized shares of the class;

 (2) effect an exchange or reclassification of all or part of the shares of the class into shares of another class;

 (3) effect an exchange or reclassification, or create the right of exchange, of all or part of the shares of another class into shares of the class;

 (4) change the designation, rights, preferences, or limitations of all or part of the shares of the class;

 (5) change the shares of all or part of the class into a different number of shares of the same class;

 (6) create a new class of shares having rights or preferences with respect to distributions or to dissolution that are prior, superior, or substantially equal to the shares of the class;

 (7) increase the rights, preferences, or number of authorized shares of any class that, after giving effect to the amendment, have rights or preferences with respect to distributions or to dissolution that are prior, superior, or substantially equal to the shares of the class;

 (8) limit or deny an existing preemptive right of all or part of the shares of the class; or

 (9) cancel or otherwise affect rights to distributions or dividends that have accumulated but not yet been declared on all or part of the shares of the class.

 (b) If a proposed amendment would affect a series of a class of shares in one or more of the ways described in subsection (a), the shares of that series are entitled to vote as a separate voting group on the proposed amendment.

 (c) If a proposed amendment that entitles two or more series of a class of shares to vote as separate voting groups under this section would affect those two or more series in the same or a substantially similar way, the shares of all the series so affected must vote together as a single voting group on the proposed amendment.

 (d) Shares are entitled to the voting rights granted by this section although the articles of incorporation provide that the shares are nonvoting shares.

HISTORY: Derived from 1976 Code Section 33‑15‑50 [1962 Code Section 12‑19.5; 1952 Code Sections 12‑401 to 12‑404; 1942 Code Sections 7676, 7736, 7741, 7744; 1932 Code Sections 7676, 7736, 7741, 7744; Civ. C. ‘22 Sections 4250, 4310, 4315, 4318; Civ. C. ‘12 Sections 2846, 2849, 2873; Civ. C. ‘02 Sections 1842, 1889, 1892; R. S. 1499; 1886 (19) 546; 1896 (22) 97; 1898 (22) 769, 771; 1901 (23) 710; 1917 (30) 36; 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 class or series of shares is generally entitled to vote separately as a voting group on any amendment that affects the class or series in the manner described in subdivisions (1) through (9) of section 10.04(a) (Section 33‑10‑104(a)). Shares are entitled to vote as separate voting groups under this section even though they are designed as nonvoting shares in the articles of incorporation, or the articles of incorporation purport to deny them entirely the right to vote on the proposal in question, or purport to allow other classes or series of shares to vote as part of the same voting group. See section 10.04(d) (Section 33‑10‑104(d)). If an amendment would create dissenters’ rights with respect to any class or series of shares, the amendment must be approved by each voting group that would have dissenters’ rights by a majority of all votes entitled to be cast on the amendment, and by other voting groups by the vote required by sections 7.25 and 7.26 (Sections 33‑7‑250 and 33‑7‑260). See section 10.04(b) (Section 33‑10‑104(b)). All other amendments are subject to the voting requirements generally applicable to voting groups under sections 7.25 and 7.26 (Sections 33‑7‑250 and 33‑7‑260).

The right to vote by voting groups under section 10.04 (Section 33‑10‑104) is applicable only if “shareholder voting is otherwise required by this Act.” An amendment that does not require shareholder approval, such as the creation of a new series of shares pursuant to authority reserved in the original articles of incorporation (see section 6.02 (Section 33‑6‑102)), does not trigger the right to vote by voting groups under this section.

The right to vote as a separate voting group provides a major protection for classes or series of shares with preferential rights or classes or series of limited or nonvoting shares against amendments that are especially burdensome to that class. This section, however, does not make the right to vote by separate voting group dependent on an evaluation of whether the amendment is detrimental to the class or series; if the amendment is one of those described in section 10.04(a) (Section 33‑10‑104(a)), the class or series is automatically entitled to vote as a separate voting group on the amendment. The question whether an amendment is detrimental is often a question of judgment, and approval by the affected class or series is required, irrespective of whether the board or other shareholders believe it is beneficial or detrimental to the affected class or series.

The nine types of changes that give rise to voting by voting groups are essentially the same as in earlier versions of the Model Act, though their number has been reduced based on the conclusion that some of the changes listed in earlier versions were subsumed within other listed changes. Subsections (b) and (c) extend the privilege of voting by separate voting group to one or more series of a class of shares if the series has unique financial or voting provisions and is affected in one or more of the ways described in subsection (a). These subsections must necessarily be phrased in general terms; any significant distinguishing feature of a series, which an amendment affects or alters, should trigger the right of voting by separate voting group for that series.

The application of subsections (b) and (c) may best be illustrated by an example. Assume there is a class of shares with preferential rights comprised of three series, each with different preferential dividend rights. A proposed amendment would reduce the rate of dividend applicable to the “Series A” shares and would change the dividend right of the “Series B” shares from a cumulative to a noncumulative right. The amendment would not affect the preferential dividend right of the “Series C” shares. Both Series A and B would be entitled to vote as separate voting groups on the proposed amendment; the holders of the Series C shares, not directly affected by the amendment, would not be entitled to vote at all unless the shares are otherwise voting shares under the articles of incorporation, in which case they would not vote as a separate voting group but in the voting group consisting of all shares with general voting rights under the articles of incorporation. If the proposed amendment would reduce the dividend right of Series A and change the dividend right of both Series B and C from a cumulative to a noncumulative right, the holders of Series A would be entitled to vote as a single voting group, and the holders of Series B and C would be required to vote together as a single, separate voting group.

Sections 7.25 and 7.26 (Sections 33‑7‑250 and 33‑7‑260) set forth the mechanics of voting by multiple voting groups.

Section 10.04(d) (Section 33‑10‑104(d)) makes clear that the limited right to vote by separate voting groups provided by section 10.04 (Section 33‑10‑104) may not be narrowed or eliminated by the articles of incorporation. Even if a class or series of shares is described as “nonvoting” and the articles purport to make that class or series nonvoting “for all purposes,” that class or series nevertheless has the limited voting right provided by this section. Section 10.04(d) (Section 33‑10‑104(d)) was included because of the ambiguity that would normally arise whenever a class or series of nonvoting shares is created; no inference of any kind should be drawn from section 10.04(d) (Section 33‑10‑104(d)) as to whether other, unrelated sections of the Model Act may be modified by the provisions in the articles of incorporation.

SOUTH CAROLINA REPORTERS’ COMMENTS

The 1984 Model Act provision (Section 10.04) is substantively similar to the 1981 South Carolina Business Corporation Act and was adopted with one minor change.

Subsection (c) of the Model Act implies that two or more series of different classes can be aggregated into one voting group, although that is not the intent. In the new section, the words “of a class” have been added to the Model Act provision to make it clear that only series of a single class may be aggregated.

The Model Act provision eliminates the enumeration of the kinds of changes in a class’s designation, rights, preferences, or limitations that give rise to the right to vote as a group. See Section 33‑15‑50(a)(4)(A) through (I) of the 1981 South Carolina Business Corporation Act. This is merely a stylistic revision, with no change in the law intended. Preemptive rights, however, are so significant that they are listed separately in the Model Act and the new law, as they were in prior South Carolina law. See Section 33‑6‑300 of this act.

DERIVATION: 1984 Model Act Section 10.04.

CROSS REFERENCES

Authorized shares, see Section 33‑6‑101.

Classes of shares, see Sections 33‑6‑101 and 33‑6‑102.

Quorum for shareholders’ meeting, see Section 33‑7‑250.

Right to dissent, see Section 33‑13‑102.

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

Share rights and limitations, see Section 33‑6‑101.

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

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

Library References

Corporations 40.

Westlaw Topic No. 101.

C.J.S. Corporations Section 38.

**SECTION 33‑10‑105.** Amendment before issuance of shares.

 (a) If a corporation has not yet issued shares, its board of directors or, if directors have not been named, its incorporators may adopt amendments to the corporation’s articles of incorporation by a unanimous vote.

 (b) If any amendment permitted by subsection (a) effects a material change in the articles of incorporation, subscribers not assenting to the amendment may rescind their subscriptions without liability, notwithstanding any contrary provision of the subscription agreement or Chapters 1 thru 20 of this title.

HISTORY: Derived from 1976 Code Section 33‑15‑20 [1962 Code Section 12‑19.2; 1952 Code Sections 12‑401 to 12‑404; 1942 Code Sections 7676, 7736, 7741, 7744; 1932 Code Sections 7676, 7736, 7741, 7744; Civ. C. ‘22 Sections 4250, 4310, 4315, 4318; Civ. C. ‘12 Sections 2846, 2849, 2873; Civ. C. ‘02 Sections 1842, 1889, 1892; R. S. 1499; 1886 (19) 546; 1896 (22) 97; 1898 (22) 769, 771; 1901 (23) 710; 1917 (30) 36; 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 10.05 (Section 33‑10‑105) provides that, before any shares are issued, amendments may be made by the persons empowered to complete the organization of the corporation. Under section 2.04 (Section 33‑2‑104) the organizers may, at the option of the corporation, be either the incorporators or the initial directors named in the articles of incorporation. An amendment to the articles made at this stage of the formation process should involve a minimum of formality.

SOUTH CAROLINA REPORTERS’ COMMENTS

The 1984 Model Act provision (Section 10.05) differs substantially from the 1981 South Carolina Business Corporation Act in three regards:

1. It allows either the incorporators or the directors to amend the articles before shares are issued.

2. It does not require unanimity for such an amendment.

3. It does not release subscribers from their obligations if the amendment materially changes the articles.

Although the first of these changes may be desirable, its implementation in the Model Act is too ambiguous to be adopted verbatim. The second and third changes represent undesirable shifts in policy.

The new section makes it clear that the incorporators have the power to amend the articles only if the directors have not been named in the articles or elected by the incorporators. This is the intended meaning of the Model Act provision, according to the Official Comment. Additionally, the new section continues the prior law’s requirement of unanimity and allows dissenting subscribers to rescind their subscriptions if the amendment effects a material change.

DERIVATION: 1984 Model Act Section 10.05.

CROSS REFERENCES

Articles of amendment, see Section 33‑10‑106.

Effective date of amendment, see Section 33‑1‑230.

Incorporators, see Section 33‑2‑101.

Initial directors, see Section 33‑2‑102.

Organization of corporation, see Section 33‑2‑105.

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

Library References

Corporations 30(1), 38, 40.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 38, 54 to 61, 67 to 84, 87 to 90.

RESEARCH REFERENCES

Forms

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

**SECTION 33‑10‑106.** Articles of amendment.

 A corporation amending its articles of incorporation shall deliver to the Secretary of State for filing articles of amendment setting forth:

 (1) the name of the corporation;

 (2) the text of each amendment adopted;

 (3) if an amendment provides for an exchange, reclassification, or cancellation of issued shares, provisions for implementing the amendment if not contained in the amendment itself;

 (4) the date of each amendment’s adoption;

 (5) if an amendment was adopted by the incorporators or board of directors without shareholder action, a statement to that effect and that shareholder action was not required;

 (6) if an amendment was approved by the shareholders:

 (i) the designation, number of outstanding shares, number of votes entitled to be cast by each voting group entitled to vote separately on the amendment, and number of votes of each voting group indisputably represented at the meeting;

 (ii) either the total number of votes cast for and against the amendment by each voting group entitled to vote separately on the amendment or the total number of undisputed votes cast for the amendment by each voting group and a statement that the number cast for the amendment by each voting group was sufficient for approval by that voting group.

HISTORY: Derived from 1976 Code Section 33‑15‑60 [1962 Code Section 12‑19.6; 1952 Code Sections 12‑401 to 12‑404; 1942 Code Sections 7676, 7736, 7741, 7744; 1932 Code Sections 7676, 7736, 7741, 7744; Civ. C. ‘22 Sections 4250, 4310, 4315, 4318; Civ. C. ‘12 Sections 2846, 2849, 2873; Civ. C. ‘02 Sections 1842, 1889, 1892; R. S. 1499; 1886 (19) 546; 1896 (22) 97; 1898 (22) 769, 771; 1901 (23) 710; 1917 (30) 36; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

The articles of amendment must set forth both the amendment itself and the manner in which it was adopted. In the case of an amendment approved by shareholder vote (sections 10.03 and 10.04 (Sections 33‑10‑103 and 33‑10‑104)), the articles must state either the total vote in favor and against the proposal or the undisputed vote for and a statement that this vote was sufficient to adopt the amendment. The latter tally method is permitted because in many situations the precise vote may depend on the resolution of protracted disputes with respect to proxy votes. The filing of the articles of amendment should not be dependent on the resolution of every dispute if it is certain that a sufficient vote has been obtained without considering the disputed votes. In most situations, of course, the precise vote can be readily determined, and when it can the articles should record it.

Section 10.06(3) (Section 33‑10‑106(3)) requires the articles of amendment to contain a statement of the manner in which an exchange, reclassification, or cancellation of issued shares is to be put into effect if not set forth in the amendment itself. This requirement avoids any possible confusion that may arise as to how the amendment is to be put into effect and also permits the amendment itself to be limited to provisions of permanent applicability, with transitional provisions having no long‑range effect appearing only in the articles of amendment.

SOUTH CAROLINA REPORTERS’ COMMENTS

The 1984 Model Act provision has been adopted unchanged. It represents no substantive change from the 1981 South Carolina Business Corporation Act. The signature and filing requirements which were contained in former Section 33‑15‑60 are located in new Section 33‑1‑200, and the provision for a delayed effective date is found in new Section 33‑1‑230(b). The provision of former Section 33‑15‑60(a)(6) requiring that the Articles of Amendment specify the manner in which stated capital was effected, if it was, is not contained in the Model Act or the new law because stated capital has no legal significance under them.

DERIVATION: 1984 Model Act Section 10.06.

CROSS REFERENCES

Amendment by board of directors, see Section 33‑10‑102.

Amendment by incorporators or initial directors, see Section 33‑10‑105.

Amendment by shareholders, see Sections 33‑10‑103 and 33‑10‑104.

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

Effective date of amendment, see Section 33‑1‑230.

Filing fees, see Section 33‑1‑220.

Filing requirements, see Section 33‑1‑200.

Merger, see Sections 33‑11‑101 et seq.

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

Share exchange, see Sections 33‑11‑101 et seq.

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

Library References

Corporations 40.

Westlaw Topic No. 101.

C.J.S. Corporations Section 38.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:21 , Amendment of Articles and Bylaws.

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

South Carolina Legal and Business Forms Section 1:336 , Articles of Amendment‑Restating Articles of Incorporation.

**SECTION 33‑10‑107.** Restated articles of incorporation.

 (a) A corporation’s board of directors may restate its articles of incorporation with or without shareholder action.

 (b) The restatement may include amendments to the articles. If the restatement includes an amendment requiring shareholder approval, it must be adopted as provided in Section 33‑10‑103.

 (c) If the board of directors submits a restatement for shareholder action, the corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders’ meeting in accordance with Section 33‑7‑105. The notice must state also that the purpose, or one of the purposes, of the meeting is to consider the proposed restatement and contain or be accompanied by a copy of the restatement that identifies any amendment or other change it would make in the articles.

 (d) A corporation restating its articles of incorporation shall deliver to the Secretary of State for filing articles of restatement setting forth the name of the corporation (and, if it has been changed, all of its former names), the date of filing of its original articles, and the text of the restated articles of incorporation together with a certificate setting forth:

 (1) whether the restatement contains an amendment to the articles requiring shareholder approval and, if it does not, that the board of directors adopted the restatement; or

 (2) if the restatement contains an amendment to the articles requiring shareholder approval, the information required by Section 33‑10‑106.

 (e) Duly adopted restated articles of incorporation supersede the original articles of incorporation and all amendments to them.

 (f) The Secretary of State may certify restated articles of incorporation, as the articles of incorporation currently in effect, without including the certificate information required by subsection (d).

HISTORY: Derived from 1976 Code Section 33‑15‑80 [1962 Code Section 12‑19.8; 1952 Code Sections 12‑401 to 12‑404; 1942 Code Sections 7676, 7736, 7741, 7744; 1932 Code Sections 7676, 7736, 7741, 7744; Civ. C. ‘22 Sections 4250, 4310, 4315, 4318; Civ. C. ‘12 Sections 2846, 2849, 2873; Civ. C. ‘02 Sections 1842, 1889, 1892; R. S. 1499; 1886 (19) 546; 1896 (22) 97; 1898 (22) 769, 771; 1901 (23) 710; 1917 (30) 36; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Restated articles of incorporation serve the useful purpose of permitting articles of incorporation that have been amended from time to time to be consolidated into a single document. Such a restatement may also eliminate “historical” or obsolete provisions that have no present relevance.

A restatement of articles of incorporation that does not involve any substantive change in the articles (or that makes only amendments that may be made by the board of directors without shareholder approval) may be approved by the board of directors alone. In order to increase the reliability of restated articles as the definitive governing document of the corporation, section 10.07 (Section 33‑10‑107) authorizes the restated articles of incorporation to be submitted to the shareholders for approval in the same manner as amendments to the articles. If duly submitted to the shareholders, substantive variation between the original articles of incorporation, as amended, and the restated articles becomes academic if the shareholders’ vote is the appropriate one required to amend the articles to the extent of the inconsistency.

Substantive amendments may also be adopted as part of a restatement. If substantive amendments are proposed, the same procedure must be followed as for the adoption of amendments under sections 10.02 (Section 33‑10‑102), 10.03 (Section 33‑10‑103), or 10.05 (Section 33‑10‑105).

If restated articles are submitted to the shareholders, the notice of meeting should identify changes in the articles that may reasonably be viewed as more than mere changes of form.

Section 10.07(e) (Section 33‑10‑107(e)) makes it clear that the restated articles of incorporation supersede the original articles of incorporation and all amendments to them, and section 10.07(f) (Section 33‑10‑107(f)) permits the secretary of state to certify the restatement uncluttered by the information set forth in subsection (e).

SOUTH CAROLINA REPORTERS’ COMMENTS

The 1984 Model Act provision (Section 10.07) is substantively similar to the 1981 South Carolina Business Corporation Act and has been adopted with two minor changes. Former Section 33‑15‑80(d) required that the restated articles list all of the corporation’s prior names and the date of filing of its original articles of incorporation. This helpful information is not required by the Model Act provision but is included in this provision. See subsection (d).

Section 33‑15‑80(d) of the 1981 South Carolina Business Corporation Act permitted the restated articles to omit the names of the incorporators and original subscribers and required retention of statements about initial stated capital and the minimum consideration to be received before commencing business. The Model Act has no similar provisions, and they have not been included in the revised statute.

DERIVATION: 1984 Model Act Section 10.07.

CROSS REFERENCES

Amendment of articles of incorporation: before issuance of shares, see Section 33‑10‑105.

Amendment of articles of incorporation: by board of directors, see Section 33‑10‑102.

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

Certified copies, see Section 33‑1‑220.

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

Effective date of restatement, see Section 33‑1‑230.

Filing fees, see Section 33‑1‑220.

Filing requirements, see Section 33‑1‑200.

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

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

Library References

Corporations 40.

Westlaw Topic No. 101.

C.J.S. Corporations Section 38.

**SECTION 33‑10‑108.** Amendment pursuant to reorganization.

 (a) A corporation’s articles of incorporation may be amended without action by the board of directors or shareholders to carry out a plan of reorganization ordered or decreed by a court of competent jurisdiction under federal statute if the articles of incorporation after amendment contain only provisions required or permitted by Section 33‑2‑102.

 (b) The individual designated by the court shall deliver to the Secretary of State for filing articles of amendment setting forth:

 (1) the name of the corporation;

 (2) the text of each amendment approved by the court;

 (3) the date of the court’s order or decree approving the articles of amendment;

 (4) the title of the reorganization proceeding in which the order or decree was entered; and

 (5) a statement that the court had jurisdiction of the proceeding under federal statute.

 (c) Shareholders of a corporation undergoing reorganization do not have dissenters’ rights except as and to the extent provided in the reorganization plan.

 (d) This section does not apply after entry of a final decree in the reorganization proceeding even though the court retains jurisdiction of the proceeding for limited purposes unrelated to consummation of the reorganization plan.

HISTORY: Derived from 1976 Code Section 33‑15‑90 [1962 Code Section 12‑19.9; 1952 Code Sections 12‑401 to 12‑404; 1942 Code Sections 7676, 7736, 7741, 7744; 1932 Code Sections 7676, 7736, 7741, 7744; Civ. C. ‘22 Sections 4250, 4310, 4315, 4318; Civ. C. ‘12 Sections 2846, 2849, 2873; Civ. C. ‘02 Sections 1842, 1889, 1892; R. S. 1499; 1886 (19) 546; 1896 (22) 97; 1898 (22) 769, 771; 1901 (23) 710; 1917 (30) 36; 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 10.08 (Section 33‑10‑108) provides a simplified method of conforming corporate documents filed under state law with the federal statutes relating to corporate reorganization. If a federal court confirms a plan of reorganization that requires articles of amendment to be filed, those amendments may be prepared and filed by the persons designated by the court and the approval of neither the shareholders nor the board of directors is required. Further, shareholders do not have dissenters’ rights unless the plan specifically provides for them.

This section applies only to amendments in articles of incorporation approved before the entry of a final decree in the reorganization plan.

SOUTH CAROLINA REPORTERS’ COMMENTS

The 1984 Model Act provision (Section 10.08) has been adopted unchanged. It represents no substantive change from the 1981 South Carolina Business Corporation Act, except that it is limited to reorganizations under federal statute. Because there is no state corporate reorganization statute and these proceedings take place under the federal Bankruptcy Code or other federal statutes, this limitation makes no difference in practice.

DERIVATION: 1984 Model Act Section 10.08.

CROSS REFERENCES

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

Dissenters’ rights, see Sections 33‑13‑101 et seq.

Effective date of amendment, see Section 33‑1‑230.

Filing fees, see Section 33‑1‑220.

Filing requirements, see Section 33‑1‑200.

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

Library References

Corporations 40, 574.

Westlaw Topic No. 101.

C.J.S. Corporations Section 38.

**SECTION 33‑10‑109.** Effect of amendment.

 An amendment to articles of incorporation does not affect a cause of action existing against or in favor of the corporation, a proceeding to which the corporation is a party, or the existing rights of persons other than shareholders of the corporation. An amendment changing a corporation’s name does not abate a proceeding brought by or against the corporation in its former name.

HISTORY: Derived from 1976 Code Section 33‑15‑70 [1962 Code Section 12‑19.7; 1952 Code Sections 12‑401 to 12‑404; 1942 Code Sections 7676, 7736, 7741, 7744; 1932 Code Sections 7676, 7736, 7741, 7744; Civ. C. ‘22 Sections 4250, 4310, 4315, 4318; Civ. C. ‘12 Sections 2846, 2849, 2873; Civ. C. ‘02 Sections 1842, 1889, 1892; R. S. 1499; 1886 (19) 546; 1896 (22) 97; 1898 (22) 769, 771; 1901 (23) 710; 1917 (30) 36; 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

Under section 10.09 (Section 33‑10‑109), amendments to articles of incorporation do not interrupt the corporate existence and do not abate a proceeding by or against the corporation even though the amendment changes the name of the corporation.

Amendments are effective when filed unless a delayed effective date is elected. See section 1.23 (Section 33‑1‑230).

SOUTH CAROLINA REPORTERS’ COMMENTS

The 1984 Model Act provision (Section 10.09) has been adopted unchanged. It represents no substantive change from the 1981 South Carolina Business Corporation Act. The provision for a delayed effective date which was contained in former Section 33‑15‑70(a) is located in new Section 33‑1‑230(b).

DERIVATION: 1984 Model Act Section 10.09.

CROSS REFERENCES

Amendment after issuance of shares, see Sections 33‑10‑102 through 33‑10‑104.

Amendment before issuance of shares, see Section 33‑10‑105.

Delayed effective date, see Section 33‑1‑230.

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

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

Library References

Corporations 40.

Westlaw Topic No. 101.

C.J.S. Corporations Section 38.

**SECTION 33‑10‑110.** Conversion to nonprofit public benefit corporation.

 (A) A corporation formed under this chapter may, by amendment of its articles pursuant to this section, convert to a nonprofit public benefit corporation as defined in Section 33‑31‑140 or to a nonprofit mutual benefit corporation as defined in Section 33‑31‑140. Upon conversion, the corporation is considered to have previously filed articles of incorporation under Section 33‑31‑202 upon the date of its incorporation under this chapter and to have filed articles of amendment pursuant to Section 33‑10‑106.

 (B) The amendment of the articles to convert to a nonprofit corporation shall:

 (1) revise the statement of purpose for which the corporation is organized;

 (2) set forth one of the statements provided for in Section 33‑31‑202(a)(2);

 (3) set forth the address, including zip code, of the proposed principal office for the corporation which may be either within or outside this State;

 (4) delete the authorization for shares and any other provisions relating to authorized or issued shares;

 (5) state whether or not the corporation will have members;

 (6) set forth provisions not inconsistent with law regarding the distribution of assets on dissolution;

 (7) make other changes as necessary or desired pursuant to Section 33‑31‑202; and

 (8) if any shares have been issued, provide either for the cancellation of those shares or for the conversion of those shares to memberships of the nonprofit corporation.

 (C) If shares have been issued, an amendment to convert to a nonprofit corporation must be approved by all of the outstanding shares of all classes regardless of limitations or restrictions on the voting rights of the shares.

 (D) Upon conversion, the corporation’s bylaws must be amended to comply with the provisions of Chapter 31 of this title, the South Carolina Nonprofit Corporation Act of 1994, and any successor act.

HISTORY: 2004 Act No. 221, Section 41.

Library References

Corporations 40, 56, 68.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 38, 111, 113 to 114, 119, 177, 180 to 183.

ARTICLE 2

Amendment of Bylaws

**SECTION 33‑10‑200.** Amendment by board of directors or shareholders.

 (a) A corporation’s board of directors may amend or repeal the corporation’s bylaws unless:

 (1) the articles of incorporation or Chapters 1 thru 20 of this title reserves this power exclusively to the shareholders in whole or part; or

 (2) the shareholders in adopting, amending, or repealing a particular bylaw provide expressly that the board of directors may not adopt, amend, or repeal that bylaw or any bylaw on that subject.

 (b) A corporation’s shareholders may amend or repeal the corporation’s bylaws even though the bylaws also may be amended or repealed by its board of directors.

 (c) Any notice of a meeting of shareholders at which bylaws are to be adopted, amended, or repealed shall state that the purpose, or one of the purposes, of the meeting is to consider the adoption, amendment, or repeal of bylaws and contain or be accompanied by a copy or summary of the proposal.

HISTORY: Derived from 1976 Code Section 33‑11‑10 [1962 Code Section 12‑16.1; 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

In the absence of a provision in the articles of incorporation, the power to amend or repeal bylaws is shared by the board of directors and shareholders. Amendment of bylaws by the board of directors is often simpler and more convenient than amendment by the shareholders and avoids the expense of calling a shareholders’ meeting, a cost that may be significant in publicly held corporations. As used in this subchapter, “amendment” includes the adoption of a bylaw on a new subject as well as the alteration of existing bylaws.

Section 10.20(a) (Section 33‑10‑200(a)) provides, however, that the power to amend or repeal bylaws may be reserved exclusively to the shareholders by an appropriate provision in the articles of incorporation. This option may appropriately be elected by a closely held corporation—for example, where control arrangements appear in the bylaws but one shareholder or group of shareholders has the power to name a majority of the board of directors. In such a corporation, the control arrangements may alternatively be placed in the articles of incorporation rather than the bylaws if there is no objection to making them a matter of public record.

Section 10.20(a)(1) (Section 33‑10‑200(a)(1)) provides that the power to amend or repeal the bylaws may be reserved to the shareholders “in whole or part.” This language permits the reservation of power to be limited to specific articles or sections of the bylaws or to specific subjects or topics addressed in the bylaws. It is important that the areas reserved exclusively to the shareholders be delineated clearly and unambiguously.

Section 10.20(a)(2) (Section 33‑10‑200(a)(2)) permits the shareholders to adopt or amend a bylaw and reserve exclusively to themselves the power to amend or repeal it later. This reservation must be expressed in the action by the shareholders adopting or amending the bylaw. This option is also included for the benefit of closely held corporations.

Section 10.20(b) (Section 33‑10‑200(b)) states that the power of shareholders to amend or repeal bylaws exists even though that power is shared with the board of directors. This section makes inapplicable the holdings of a few cases under differently phrased statutes that shareholders do not have a general or residual power to amend bylaws or that the power to amend bylaws may be vested exclusively in the board of directors. Under the Model Act the shareholders always have the power to amend or repeal the bylaws.

Sections 10.21 (Section 33‑10‑210) and 10.22 (Section 33‑10‑220) limit the power of directors to adopt or amend supermajority provisions in bylaws.

SOUTH CAROLINA REPORTERS’ COMMENTS

The Official Text of the 1984 Model Act provision (Section 10.20) has been adopted with two changes. Under the Model Act, shareholders are not entitled to notice that bylaws are to be adopted, amended, or repealed at the annual meeting of the shareholders. This notice was required under the 1981 South Carolina Business Corporation Act and is required under the new statute. However, the new statute does not continue the prior law’s requirement of notice to directors that bylaw action is on the agenda for a board meeting.

Another change is that the new statute explicitly states in subsection (a)(2) that in adopting or amending a particular bylaw the shareholders may prohibit the board of directors from amending or repealing that bylaw. The Model Act states that the shareholders may do so in amending or repealing a particular bylaw, although the Official Comment makes it clear that it intended to grant the power to shareholders in adopting as well as in amending a particular bylaw. Further, the new law broadens the Model Act language to allow the shareholders to restrict the power of the board of directors to adopt, amend, or repeal bylaws on a particular subject. The shareholders had this power under Section 33‑11‑10(c) of the 1981 South Carolina Business Corporation Act. The new statute and the Model Act, however, do not contain the prior South Carolina law’s unbridled shareholder power to use the bylaws generally to limit the power of the directors to amend or repeal bylaws. If control provisions for a closely‑held corporation are placed in the bylaws, it may be desirable to provide in the articles of incorporation that the bylaws may not be amended by the board of directors or to provide in the bylaws that the control provisions may not be amended or repealed by the board. Otherwise, there is danger that the protection of control provisions may be removed by those intended to be restricted by those very provisions. See Blount v. Taft, 295 N.C. 472, 246 S.E.2d 763 (1978). In addition, it may be desirable to require in the articles of incorporation, pursuant to Section 33‑10‑210, a supermajority shareholder vote to amend or repeal control provisions in the bylaws.

The Model Act and the new statute do not contain special voting requirements for action on the bylaws but leave this to the general shareholder and director voting requirements. The result is to reduce the shareholder vote required from that under prior South Carolina law, a majority of all of the shares entitled to vote, to the general requirement for shareholder action, that the votes cast in favor of the proposal exceed those cast against it. See Section 33‑7‑250(c). The required vote of the directors likewise is reduced from the prior law’s majority of all directors to a majority of the directors present. See Section 33‑8‑240(c).

DERIVATION: 1984 Model Act Section 10.20.

CROSS REFERENCES

Action by: board of directors, see Sections 33‑8‑200 through 33‑8‑240.

Action by: shareholders, see Sections 33‑7‑101 through 33‑7‑104.

Articles of incorporation, see Sections 33‑2‑102 and 33‑10‑101 et seq.

Bylaws, see Sections 33‑2‑106 and 33‑2‑107.

Close corporations, Statutory Close Corporation Supplement, see Section 33‑18‑220.

Supermajority requirements, see Section 33‑10‑210.

Library References

Corporations 56.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 111, 113 to 114, 119.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:9 , Formation‑Bylaws.

South Carolina Legal and Business Forms Section 1:21 , Amendment of Articles and Bylaws.

South Carolina Legal and Business Forms Section 1:198 , Shareholders’ Rights‑Amendment of Bylaws.

South Carolina Legal and Business Forms Section 1:340 , Resolution of Directors or Stockholders‑Amendment of Bylaws.

Treatises and Practice Aids

Fletcher Cyclopedia Law of Private Corporations Section 4178, Who May Amend the Bylaws.

**SECTION 33‑10‑210.** Bylaw increasing quorum or voting requirement for shareholders.

 (a) If authorized by the articles of incorporation, the shareholders may adopt or amend a bylaw that fixes a greater quorum or voting requirement for shareholders (or voting groups of shareholders) than is required by Chapters 1 thru 20 of this title. The adoption or amendment of a bylaw that adds, changes, or deletes a greater quorum or voting requirement for shareholders 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 requirement then in effect or proposed to be adopted, whichever is greater.

 (b) A bylaw that fixes a greater quorum or voting requirement for shareholders under subsection (a) may not be adopted, amended, or repealed by the board of directors.

HISTORY: 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

This section permits “supermajority” provisions relating to shareholder meetings to appear in the bylaws if express authorization for the provisions appears in the articles of incorporation.

The Model Act generally requires that supermajority provisions relating to shareholder voting appear in the articles of incorporation where they are a matter of public record. See section 7.27 (Section 33‑7‑270). Section 10.21(a) (Section 33‑10‑210(a)) is consistent with this general principle since it permits a supermajority provision relating to shareholders to appear in the bylaws only if expressly authorized in the articles of incorporation. The option to place shareholder supermajority provisions in the bylaws rather than in the articles is designed primarily for the benefit of closely held corporations. Such a supermajority provision, like supermajority provisions appearing in articles of incorporation (section 7.27 (Section 33‑7‑270)), may be adopted or amended only by the shareholders (section 10.21(b) (Section 33‑10‑210(b)) and the vote must meet the supermajority requirement then being imposed or amended, whichever is greater (section 10.21(a) (Section 33‑10‑210(a)). For an example of the application of this language, see the Official Comment to section 7.27 (Section 33‑7‑270).

A supermajority provision in the bylaws relating to shareholder voting that is not expressly authorized by the articles of incorporation is not effective under the Model Act. The Model Act does not, however, address whether such a provision may be binding as a contract upon those shares voting in favor of the bylaw or upon subsequent holders of those shares with knowledge of the bylaw provision.

SOUTH CAROLINA REPORTERS’ COMMENTS

The 1984 Model Act provision (Section 10.21) has been adopted unchanged. There was no similar provision in the 1981 South Carolina Business Corporation Act.

DERIVATION: 1984 Model Act Section 10.21.

CROSS REFERENCES

Bylaws: amendment, see Section 33‑10‑200.

Bylaws: generally, see Section 33‑2‑106.

Director supermajority requirements, see Section 33‑10‑220.

Quorum and voting of shareholders: normal, see Sections 33‑7‑250 and 33‑7‑260.

Quorum and voting of shareholders: supermajority requirements, see Section 33‑7‑270.

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

Library References

Corporations 56.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 111, 113 to 114, 119.

**SECTION 33‑10‑220.** Bylaw increasing quorum or voting requirement for directors.

 (a) A bylaw that fixes a greater quorum or voting requirement for the board of directors may be amended or repealed:

 (1) if originally adopted by the shareholders, only by the shareholders;

 (2) if originally adopted by the board of directors, either by the shareholders or by the board of directors.

 (b) A bylaw adopted or amended by the shareholders that fixes a greater quorum or voting requirement for the board of directors may provide that it may be amended or repealed only by a specified vote of either the shareholders or the board of directors.

 (c) Action by the board of directors under subsection (a)(2) to adopt or amend a bylaw that changes the quorum or voting requirement for the board of directors must meet the same quorum requirement and be adopted by the same vote required to take action under the quorum and voting requirement then in effect or proposed to be adopted, whichever is greater.

HISTORY: 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Supermajority provisions relating to the board of directors may appear in the bylaws of the corporation without specific authorization in the articles of incorporation. See section 8.24(a) and (c) (Section 33‑8‑240(a) and (c)). Like other bylaw provisions, they may be adopted either by the board of directors or by the shareholders. See section 10.20 (Section 33‑10‑200). Such provisions, further, may be amended or repealed by the board of directors or shareholders as provided in this section. This treatment of supermajority provisions for the board of directors should be contrasted with the treatment of analogous provisions for shareholders which must either be set forth in the articles of incorporation, section 7.27 (Section 33‑7‑270), or included in the bylaws when expressly authorized by the articles, section 10.21 (Section 33‑10‑210), and their adoption, amendment, or repeal must be approved by the shareholders by the vote specified in sections 7.27 (Section 33‑7‑270) and 10.21 (Section 33‑10‑210).

Supermajority provisions relating to the board of directors are usually part of control arrangements in closely held corporations, and section 10.22 (Section 33‑10‑22) is designed with this end in view. Its basic purpose is to ensure that control arrangements negotiated by shareholders for their own protection will not be prematurely terminated by a majority vote of the shareholders or the board of directors. Thus, section 10.22(a)(1) (Section 33‑10‑220(a)(1)) provides that if a supermajority requirement is originally imposed by a bylaw adopted by the shareholders, only the shareholders may amend or repeal it. Further, under section 10.22(b) (Section 33‑10‑220(b)), that bylaw may impose restrictions on the manner in which it may be thereafter amended or repealed by the shareholders. On the other hand, if a supermajority requirement is originally imposed in a bylaw adopted by the board of directors, that bylaw may be amended either by the board of directors or shareholders (see section 10.22(a)(2)(Section 33‑10‑220(a)(2)), but if it is to be amended by the board of directors, section 10.22(c) (Section 33‑10‑22(c)) requires approval by the supermajority requirement then being imposed or amended, whichever is greater. This requirement is analogous to that imposed on supermajority amendments appearing in the articles of incorporation. See section 7.27 (Section 33‑7‑270). For an example of the application of this language, see the Official Comment to section 7.27 (Section 33‑7‑270).

SOUTH CAROLINA REPORTERS’ COMMENTS

The 1984 Model Act provision (Section 10.22) has been adopted unchanged. There was no similar provision in the 1981 South Carolina Business Corporation Act.

DERIVATION: 1984 Model Act Section 10.22.

CROSS REFERENCES

Bylaws: amendment, see Section 33‑10‑200.

Bylaws: generally, see Section 33‑2‑106.

Quorum and voting of directors, see Section 33‑8‑240.

Quorum and voting of shareholders: normal, see Sections 33‑7‑250 and 33‑7‑260.

Quorum and voting of shareholders: supermajority requirements, see Section 33‑7‑270.

Library References

Corporations 56.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 111, 113 to 114, 119.