CHAPTER 15

Foreign Corporations

ARTICLE 1

Certificate of Authority

**SECTION 33‑15‑101.** Authority to transact business required.

(a) A foreign corporation may not transact business in this State until it obtains a certificate of authority from the Secretary of State.

(b) The following activities, among others, do not constitute transacting business within the meaning of subsection (a):

(1) maintaining, defending, or settling a proceeding;

(2) holding meetings of the board of directors or shareholders or carrying on other activities concerning internal corporate affairs;

(3) maintaining bank accounts;

(4) maintaining offices or agencies for the transfer, exchange, and registration of the corporation’s own securities or maintaining trustees or depositories with respect to those securities;

(5) selling through independent contractors;

(6) soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside this State before they become contracts;

(7) creating or acquiring any indebtedness, mortgages, and security interests in real or personal property;

(8) securing or collecting debts or enforcing mortgages, security interests, or other rights in property securing debts;

(9) owning, without more, real or personal property;

(10) conducting an isolated transaction that is completed within thirty days and that is not one in the course of repeated transactions of a like nature;

(11) transacting business in interstate commerce;

(12) owning and controlling a subsidiary corporation incorporated in or transacting business within this State; or

(13) owning, without more, an interest in a limited liability company organized or transacting business in this State.

(c) The list of activities in subsection (b) is not exhaustive.

HISTORY: Derived from 1976 Code Section 33‑23‑10 [1962 Code Section 12‑23.1; 1952 Code Section 12‑701; 1942 Code Section 7764; 1932 Code Section 7764; Civ. C. ‘22 Section 4028; Civ. C. ‘12 Section 2664; Civ. C. ‘02 Section 1779; R. S. 1465; 1893 (21) 409; 1904 (24) 436; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 4(1)]; 1988 Act No. 444, Section 2; 1990 Act No. 446, Section 12004 Act No. 221, Section 21.

OFFICIAL COMMENT

A state may prescribe the terms and conditions upon which a foreign corporation is permitted to transact business within the state, subject, of course, to the restrictions of the United States Constitution. Chapter 15 requires that a foreign corporation seeking to transact business within the state must (1) obtain a certificate of authority from the secretary of state and (2) maintain a registered office and appoint a registered agent within the state.

Section 15.01(a) (Section 33‑15‑101(a)) states the basic requirement that a foreign corporation must obtain a certificate of authority before it transacts business within the state. Section 15.05 (Section 33‑15‑105) describes the scope of the privilege obtained by a certificate of authority while Section 15.02 (Section 33‑15‑102) describes the consequences of transacting business in the state without first obtaining the certificate of authority.

The Model Act does not attempt to formulate an inclusive definition of what constitutes the transaction of business. Rather, the concept is defined in a negative fashion by section 15.01(b) (Section 33‑15‑101(b)), which states that certain activities do not constitute the transaction of business. In general terms, any conduct more regular, systematic, or extensive than that described in section 15.01(b) (Section 33‑15‑101(b)) constitutes the transaction of business and requires the corporation to obtain a certificate of authority. Typical conduct requiring a certificate of authority includes maintaining an office to conduct local intrastate business, selling personal property not in interstate commerce, entering into contracts relating to the local business or sales, and owning or using real estate for general corporate purposes. But the passive owning of real estate for investment purposes does not constitute transacting business. See section 15.01(b)(9) (Section 33‑15‑101(b)(9)).

The test of “transacting business” defined in a negative way in section 15.01(b) (Section 33‑15‑101(b)) applies only to the question whether the corporation’s contacts with the state are such that it must obtain a certificate of authority. It is not applicable to other questions such as whether the corporation is amenable to service of process under state “long‑arm” statutes or liable for state or local taxes. A corporation that has obtained (or is required to obtain) a certificate of authority to transact business under chapter 15 will generally be subject to suit and state taxation in the state, while a corporation that is subject to service of process or state taxation in a state will not necessarily be required to obtain a certificate of authority under chapter 15.

The list of activities set forth in section 15.01(b) (Section 33‑15‑101(b)) is not exhaustive. See section 15.01(c) (Section 33‑15‑101(c)). The list excludes several different types of activities from the definition of “transacting business,” which are discussed below.

1. ENGAGING IN LITIGATION.

Section 15.01(b)(1) (Section 33‑15‑101(b)(1)) excludes “maintaining, defending or settling any proceeding.” The word “proceeding” is defined in section 1.40 (Section 33‑1‑400) to include all civil, criminal, administrative, or investigative suits or actions. Thus, a corporation is not “transacting business” solely because it resorts to the courts of the state to recover an indebtedness, enforce an obligation, recover possession of personal property, obtain the appointment of a receiver, intervene in a pending proceeding, bring a petition to compel arbitration, file an appeal bond, or pursue appellate remedies. Similarly, a foreign corporation is not required to obtain a certificate of authority merely because it files a complaint with the state securities commission or other governmental agency or participates in an administrative proceeding within the state.

2. INTERNAL AFFAIRS OF THE CORPORATION.

A corporation does not “transact business” within a state under section 15.01 (Section 33‑15‑101) merely because some of its internal affairs occur within a state. Thus, a corporation may hold meetings of its board of directors or shareholders within a state without first obtaining a certificate of authority (section 15.01(b)(2)). It also may maintain offices or agencies within a state relating solely to the transfer, registration, or exchange of its shares without obtaining a certificate of authority (section 15.01(b)(4)). Other activities relating to the internal affairs of the corporation that do not constitute the transaction of business under section 15.01(b) (Section 33‑15‑101(b)) include having officers or representatives of a corporation who reside within or are physically present in the state; while there, the officers or representatives may make executive decisions relating to the affairs of the corporation without imposing on the corporation the requirement that it obtain a certificate of authority in the state, provided these activities are not so regular and systematic as to cause the residence to be viewed as a business office.

3. MAINTAINING BANK ACCOUNTS.

A foreign corporation may maintain a bank account with a bank within the state, make deposits and write checks on the account without obtaining a certificate of authority (section 15.01(b)(3)) (Section 33‑15‑101(b)(3)).

4. INTERSTATE TRANSACTIONS.

A corporation is not “transacting business” within the meaning of section 15.01(a) (Section 33‑15‑101(a)) if it is transacting business in interstate commerce (section 15.01(b)(10)) (Section 33‑15‑101(b)(10)) or soliciting or obtaining orders that must be accepted outside the state before they become contracts (section 15.01(b)(6)) (Section 33‑15‑101(b)(6)). These limitations reflect the provisions of the United States Constitution that grant to the United States Congress exclusive power over interstate commerce, and preclude states from imposing restrictions or conditions upon this commerce. These sections should be construed in a manner consistent with judicial decisions under the United States Constitution. Under these decisions, a foreign corporation is not required to obtain a certificate of authority even though it sells goods within the state if they are shipped to the purchasers in interstate commerce. A corporation need not obtain a certificate of authority even if it also does work and performs acts within the state incidental to the interstate business, e.g., if it takes or enforces a security interest incidental to these transactions. Nor is it required to obtain a certificate of authority merely because it sends traveling salesmen or solicitors into a state so long as contracts are not made within the state. Similarly, an office may be maintained by a corporation in a state without obtaining a certificate of authority if the office’s functions relate solely to interstate commerce.

Purchases of goods may of course be in interstate commerce as readily as sales. Thus, the purchase of personal property by a foreign corporation for shipment in interstate commerce out of the state does not require the corporation to obtain a certificate of authority.

5. SALES THROUGH INDEPENDENT CONTRACTORS.

A foreign corporation does not need to obtain a certificate of authority if it sells goods in the state through independent contractors (section 15.01(b)(5)) (Section 33‑15‑101(b)(5)). These transactions are viewed as transactions by the independent contractors, not by the corporation itself, even though the corporation sets some limits or ground rules for its contractors. If these controls are sufficiently pervasive, however, the corporation may be deemed to be selling for itself in intrastate commerce, and not through the independent contractors, and therefore engaged in the transaction of business in the state.

6. CREATING, ACQUIRING, OR COLLECTING DEBTS.

The mere act of making a loan by a foreign corporation that is not in the business of making loans does not constitute transacting business in the state in which the loan is made. On the same theory a foreign corporation may obtain security for the repayment of a loan, and foreclose or enforce the lien or security interest to collect the loan, without being deemed to be transacting business. See sections 15.01(b)(7) and (8) (Section 33‑15‑101(b)(7) and (8)). Similarly, a refunding or “roll over” of a loan or its adjustment or compromise does not involve the transaction of business.

7. ISOLATED TRANSACTIONS.

The concept of “transacting business” involves regular, repeated, and continuing business contacts of a local nature. A single agreement or isolated transaction within a state does not constitute the transaction of business if there is no intention to repeat the transaction or engage in similar transactions. Since the question is entirely one of fact, section 15.01(b)(10) (Section 33‑15‑101(b)(10)) retains the partially objective test from earlier versions of the Model Act that a transaction completed within 30 days does not constitute “transacting business” if it is not one in the course of “repeated transactions of a like nature.” A continuing transaction that is not completed within 30 days will likely require obtaining a certificate of authority, whether or not it is one of a number of repeated transactions, but that issue is not addressed by the Model Act. The 30‑day provision is, in other words, a “safe harbor” for not requiring a certificate of authority.

8. OTHER TRANSACTIONS.

Section 15.01(c) (Section 33‑15‑101(c)) makes clear that the list of transactions in section 15.01(b) (Section 33‑15‑101(b)) is not exhaustive. Among the large number of other transactions which do not give rise to the requirement that a certificate of authority be obtained are the ownership of all the shares of stock in a corporation that is engaged in local business within the state or as a limited partner in a limited partnership engaged in local business, or taking ministerial actions such as filing financing statements or registering trademarks.

SOUTH CAROLINA REPORTERS’ COMMENTS

1. Overview.

This section makes few changes. The 1981 South Carolina Business Corporation Act, as does this provision, states that a foreign corporation may not do business in South Carolina until authorized. Note that pursuant to Section 33‑20‑103, a foreign nonprofit corporation can qualify to transact business in South Carolina pursuant to this chapter. The Model Act Official Text only contemplates for‑profit corporations being covered. See the South Carolina Reporters’ Comments to Section 33‑20‑103 for a discussion of the rationale for this variation from the Model Act.

The fact that the foreign corporation is subject to regulation by some other agency of the State of South Carolina does not mean that it is exempt therefore from also qualifying with the Secretary of State, cf. State v. National Postal Transport Association , 234 S.C. 260, 107 S.E.2d 763 (1959), Equitable Surety Co. v. Illinois Surety Co . 108 S.C. 364, 94 S.E. 882 (1918). Likewise, the fact that a company may not be required to qualify with the Secretary of State does not mean that the company is exempt from South Carolina taxes, workers’ compensation laws, etc.

The Attorney General has stated that the mere fact that a corporation is required to qualify to do business, may not automatically mean that it is required to pay South Carolina income taxes, see 1966 Op. S.C. Att’y Gen. 37 (#1984), interpreting an earlier version of Section 33‑15‑101.

Although there are constitutional limits on the ability of South Carolina to regulate foreign corporations and require them to qualify before conducting business (see the South Carolina Reporters’ Comments to Section 33‑15‑105), the State has fairly broad authority to regulate. See British‑American Mortgage Co. v. Jones 76 S.C. 218, 56 S.E. 983 (1907) rehearing, 77 S.C. 443, 58 S.E. 417 (1907).

The prior analogous section, Section 33‑23‑10 of the 1981 South Carolina Business Corporation Act specifically provided that a corporation could not be denied permission to do business simply because the laws where incorporated differ from the laws of South Carolina. Although this phrase has been deleted, the same prohibition is inferred from new Sections 33‑1‑200 and 33‑1‑250 which require the Secretary of State to file a document if the specific provisions of this act are met.

The provision which grants a foreign corporation the same rights as a South Carolina corporation is now contained in Section 33‑15‑105. The prior subsection which prohibited South Carolina from regulating the internal affairs of a foreign corporation is discussed in detail at Section 33‑15‑105.

2. Definition: Transacting Business.

The new law, like the prior provision, contains a “laundry list” of activities that do not constitute transacting business.

The 1981 South Carolina Business Corporation Act specifically said that this listing was not a “standard” for determining whether a corporation was subject to service of process (“long arm” jurisdiction). The new law indicates the same thing by limiting the application of the list to the purpose of the subsection, i.e., defining what is meant by transacting business for registration purposes. See the Official Comment to this section. A corporation can be qualified to do business in South Carolina and have appointed an agent for service of process but still not be conducting sufficient activities in South Carolina to be subject to suit here. See Ratliff v. Cooper Laboratories, Inc. 444 F.2d 745 (4th Cir. 1971). For a discussion of the long arm jurisdiction of South Carolina courts over foreign corporations see, e.g., Yarborough and Company v. Schoolfield Furniture Ind., Inc. 275 S.C. 151, 268 S.E.2d 42 (1980), and State v. Ford, 208 S.C. 379, 38 S.E.2d 242 (1942) discussing the differences between qualification to do business and amenability to long arm jurisdiction.

The new law adds more emphasis to the fact that the list is not to be taken as an exhaustive list of “exempt” activities (subsection (c)). The new law both adds and deletes activities that are not to be deemed transacting business. Many of the items are identical to the old law, including item (3) bank accounts, (5) independent contractors, and (6) acceptance outside of State.

Agency principles may determine whether a company is transacting business. For example, the court found that an out‑of‑state distributor of medicines and notions (which were sold in South Carolina through dealers who bought their inventory F.O.B. Virginia) was not doing business. See State of South Carolina v. W.T. Rawleigh Co., 172 S.C. 415, 174 S.E. 385 (1932). Even though the distributor suggested territories, required weekly reports of dealers, required a bond for credit purchases, provided for a return of unsold products, encouraged South Carolina dealers to recruit other dealers, provided advertising and sales material, and furnished a sales manual, the court concluded that the dealers were not agents and the out‑of‑state distributor was not doing business in South Carolina. The case mentions that what constitutes doing business must be determined on the circumstances of each case.

3. New Provisions.

The most significant new provision is that the mere ownership of real or personal property is not transacting business (item (9)). The Official Comment explains the purpose of this section in the introductory paragraphs. However, no attempt is made to define the difference between passive investment and active management. For example, the ownership of timberland may be permitted without qualification but, if there are any forestry activities, this could require qualification. Similarly, a passive investment in a warehouse might be exempt but, if the corporation directly or indirectly were involved also in the management, this could require qualification.

It should be noted that merely because a corporation which owns property in South Carolina may be exempt from qualifying to do business it does not mean that the property is exempt from attachment. See, for example, Williamson v. Eastern Building and Loan Association 54 S.C. 582, 598‑599, 32 S.E. 765, 770‑771 (1898), cf. Tillinghast v. Boston and Port Royal Lumber Companies 39 S.C. 484, 496‑497, 18 S.E. 120, 124 (1893). See also, Wilson v. Keels 54 S.C. 545, 32 S.E. 702 (1899); Guimarin v. Southern Life and Trust Company, 100 S.C. 12, 84 S.E. 298 (1915); and LaVarre v. International Paper Company, 37 F.2d 141 (E.D.S.C. 1929).

The old law exempted holding of directors and shareholders meetings (Section 33‑23‑10(2)). This provision has been specifically expanded to exempt “other activities concerning internal corporate affairs.”

4. Nonmodel Act Provisions (Amended, 1990 Act No. 446, Section 14).

Since 1962, a foreign parent has not been required to qualify merely because it owned a South Carolina subsidiary. The Official Comments to the Model Act suggest that this activity should be exempt. Therefore, for clarification, the prior South Carolina provision has been retained as new subsection (b)(12). This provision was originally derived from the provisions of Cal. Corporate Code Section 6301. See LaVarre v. International Paper Company 37 F. 2d 141 (E.D.S.C. 1929).

Likewise, the mere leasing of South Carolina real property from a nonqualified corporation to its South Carolina subsidiary does not require the parent to qualify to do business in South Carolina since the general rule is that the mere holding and leasing of property by a foreign corporation is an isolated incident and not the conduct of business, unless the corporation is in the business generally of buying and leasing real property. Further, the parent and subsidiary are treated as separate entities unless it would appear proper to “pierce the corporate veil”. 1977 Op. S.C. Att’y Gen., 233, (#77‑305).

Subsection (8) of the Official Text of Model Act Section 15.01 dealing with enforcing mortgages and loans has been slightly broadened in keeping with prior South Carolina law (Section 35‑23‑10(b)(6) of the 1981 South Carolina Business Corporation Act). Subsection (8) permits out‑of‑state lenders to enforce not only mortgages and security interests but also “any rights” in the property.

The first sentence of Official Comment #6 to Section 33‑15‑101 does not reflect the interpretation intended to be given to Section 33‑15‑101(b)(7). South Carolina has for years employed model act language to designate that the creation of indebtedness, mortgages and security interests, without more, does not constitute transacting business. Different from the first sentence of Official Comment #6, the current language, and the predecessor phraseology (which essentially was identical wording) is not limited to only those foreign corporations which are not in the business of making loans. A foreign corporate lender which is in the business of making loans, but which only conducts those activities listed in Section 33‑15‑101(b)(7), e.g., does not also have an office in South Carolina or employees within the State, is not deemed to be doing business in South Carolina. See, 1966 Op. S.C. Att’y Gen. 27 (#1977).

However, the purchase of mortgage notes and mortgages by an out‑of‑state bank or mortgage pool has historically not been viewed as the transaction of business in South Carolina. This is true even though the out‑of‑state mortgage buyer might be required to pursue foreclosure actions and might be required to take possession of the properties and rent them pending their sale in foreclosure. See 1964 Op. S.C. Att’y Gen. 119 (#1674).

5. Deletions and Changes.

Under the 1962 version of the Corporate Code, isolated transactions which occurred within thirty days were exempt. The time period was extended to one hundred eighty days in the 1981 South Carolina Business Corporation Act but has now been returned to the original thirty‑day period. See subsection (b)(10). Although the thirty‑day period may be too short to accomplish certain transactions that might legitimately otherwise seem exempt, i.e., merger activities that only tangentially touch South Carolina, the reduction was deemed necessary because of abuses of the one hundred eighty‑day period. For example, various contractors have come into South Carolina and within six months have built significant projects. Although there was no intention under the prior law to exempt such undertakings, the wording of the one hundred eighty‑day period clause could have been construed improperly as authorizing this construction as being an exempt activity. Like other provisions which are listed below, the wording of this subsection differs from the language in the 1981 South Carolina Business Corporation Act. The old law lumped together any transactions that were in a series or were repeated in determining if, in fact, there was only an “isolated” transaction. The new law is more liberal and only lumps together multiple transactions which are of a “like nature”.

The isolated transaction exemption was recognized in an older case, Kirven v. Virginia Carolina Chemical Co. 145 F. 288, 293‑294 (1908), and in an older Attorney General Opinion, 1948‑1949 Op. S.C. Att’y Gen. 126‑128.

In spite of the exemption for isolated transactions and independent contractors, in Thiel v. Electric Sales and Supply Co. 187 F. Supp. 640 (W.D.S.C. 1960), Judge Wyche held that a contract of purchase signed in South Carolina caused the foreign seller to be doing business in South Carolina even though the sale was negotiated by a third corporation which was incorporated in North Carolina and acted as sales agent for the seller in South Carolina.

However, the Thiel case may not reflect how these sections are interpreted today. It seems very unlikely that any company whose only contacts with South Carolina are sales by out‑of‑state agents will be required to qualify to do business. Its transactions would be either “too few” and thus exempt under subsection (b)(10) or “purely interstate” and thus exempt under subsection (b)(11). In regard to the interstate commerce exception, the primary older South Carolina authority is State v. Ford Motor Co. 208 S.C. 379, 38 S.E.2d 242 (1946), but the court has more recently stated:

“ [R]espondent, a North Carolina corporation, employed a salesman during 1973 and 1974 to solicit sales from businesses throughout South Carolina. Respondent also admitted that its salesman called on at least five firms and that his solicitation resulted in sales requiring at least 100 separate shipments during this period. While admitting to the aforementioned business activity within South Carolina, respondent made it clear that its salesman was not “located” in the State, but only travelled into South Carolina from his base in North Carolina . . . .

It is uniformly held that domestication statutes have no application if the foreign corporation’s contacts within a state are confined to the purpose of soliciting business and facilitating the sale and delivery of merchandise flowing within interstate commerce.

In our leading case on domestication, Ford, supra, this Court recognized that where a foreign corporation’s contacts involve only soliciting, cultivating, and supervising its interstate business, such corporation is not subject to domestication requirements. There is no evidence that respondent has an office, warehouse, or telephone listing in South Carolina. The respondent merely ships merchandise into the state from North Carolina to fill orders solicited by its sales representative.”

Carolina Components v. Brown Wholesale Co. 272 SC 220,221‑223, 250 S.E.2d 332, 333‑334 (1978).

These and other subsections of this new definition of “transacting business” employ slightly different wording than their predecessor sections. Subsections with new phraseology include:

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| Topic | New Law | 1981 S.C.  Business  Corp. Act |
| Participation in law suits, etc. | (b)(1) | (b)(1) |
| Employing stock transfer agents, etc. | (b)(4) | (b)(4) |
| Mortgages and security interests | (b)(7) | (b)(5) |
| Collecting, debts and enforcing mortgages | (b)(8) | (b)(6) |
| Interstate Commerce | (b)(11) | (b)(7) |

None of the language changes in these similar provisions appear to be significant, particularly since many of the new subsections use terms which are defined in other sections and thus effectively are identical to the prior law. For example, the new provision does not specifically mention participation in an arbitration or administration action as being exempt. However, it does exempt participating in a “proceeding” which is a defined term and includes administrative actions and arbitrations. See Section 33‑1‑400(18).

DERIVATION: 1984 Model Act Section 15.01.

CROSS REFERENCES

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

Board of directors’ meetings, see Section 33‑8‑200.

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

“Foreign corporation” defined, see Section 33‑1‑400.

Penalty for transacting business without authority, see Section 33‑15‑102.

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

Service on foreign corporation, see Section 15‑9‑240 and Section 33‑15‑110.

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

Library References

Corporations 642, 648, 654, 661.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 884, 900, 907 to 908, 911 to 921, 924 to 925, 936, 941.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Constitutional Law Section 82, South Carolina Long Arm Statute.

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

S.C. Jur. Private Business Franchises and Business Opportunities Section 55, State Law on Qualification to Do Business.

Forms

Am. Jur. Pl. & Pr. Forms Foreign Corporations Section 1 , Introductory Comments.

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

Treatises and Practice Aids

Bruner and O’Connor on Construction Law Section 16:28, Foreign Incorporation Requirements: Taxing Authority.

Fletcher Cyclopedia Law of Private Corporations Section 8448, Certificate of Authority to Transact Business in State.

Attorney General’s Opinions

Under South Carolina’s domestication statutes, Sections 33‑23‑10, et seq., 1976 Code of Laws of S.C., assuming proof of the separate nature of a foreign parent corporation, vis‑a‑vis its subsidiary corporation the parent company possessing title to real property in the State and leasing such property to its subsidiary, would not be “doing business”, provided such leasing is not part of the “ordinary and customary” businesses of the parent corporation (interpreting former law). 1976‑77 Op Atty Gen, No. 77‑305, p 233.

NOTES OF DECISIONS

In general 1

1. In general

Private foreign bank’s filing of lawsuit in South Carolina against South Carolina citizens, who purchased real property in Anguilla and then defaulted on loan agreement entered with bank in order to finance property and also defaulted on overdraft agreement with bank, did not constitute “transacting business” in South Carolina, within meaning of statute prohibiting foreign corporation from transacting business in South Carolina until corporation obtained certificate of authority from Secretary of State, but expressly stating that maintaining, defending, or settling proceeding did not constitute transacting business in South Carolina, since South Carolina citizens reached into Anguilla to obtain loan, rather than bank reaching into South Carolina to finance their purchase of property. National Bank of Anguilla (Private Banking and Trust) Ltd. v. Considine, 2017, 2017 WL 3263763. Banks and Banking 18

Allegation that out‑of‑state bank holding company was registered as a bank holding corporation with the South Carolina Board of Financial Institutions and that it had designated an agent for service of process in South Carolina, did not establish personal jurisdiction over the bank holding company, in action by franchisor, corporate franchisee, and corporate franchisee’s owner, relating to loan from bank holding company’s wholly‑owned subsidiary to franchisee and liquidation of collateral pursuant to subordination agreement between subsidiary and franchisor. Builder Mart of America, Inc. v. First Union Corp. (S.C.App. 2002) 349 S.C. 500, 563 S.E.2d 352. Banks And Banking 528

Contacts between defendant foreign corporation and forum state in wrongful death and negligence action were insufficient to assert in personam jurisdiction over defendant where contacts consisted of sending defendant’s chief executive officer to forum state for contract‑negotiation session, accepting checks drawn on bank located in forum state, purchasing equipment and services from a manufacturer located in forum state, and sending personnel to manufacturer’s facilities for training in the state. Helicopteros Nacionales de Colombia, S.A. v. Hall, U.S.Tex.1984, 104 S.Ct. 1868, 466 U.S. 408, 80 L.Ed.2d 404, on remand 677 S.W.2d 19.

**SECTION 33‑15‑102.** Consequences of transacting business without authority.

(a) A foreign corporation transacting business in this State without a certificate of authority may not maintain a proceeding in any court in this State until it obtains a certificate of authority.

(b) The successor to a foreign corporation that transacted business in this State without a certificate of authority and the assignee of a cause of action arising out of that business may not maintain a proceeding based on that cause of action in any court in this State until the foreign corporation or its successor obtains a certificate of authority.

(c) A court may stay a proceeding commenced by a foreign corporation, its successor, or assignee until it determines whether the foreign corporation or its successor requires a certificate of authority. If it so determines, the court may further stay the proceeding until the foreign corporation or its successor obtains the certificate.

(d) A foreign corporation is liable for a civil penalty of ten dollars for each day but not to exceed a total of one thousand dollars for each year it transacts business in this State without a certificate of authority. The Attorney General may collect all penalties due under this subsection.

(e) Notwithstanding subsections (a) and (b), the failure of a foreign corporation to obtain a certificate of authority does not impair the validity of its corporate acts or prevent it from defending any proceeding in this State.

HISTORY: Derived from 1976 Code Section 33‑23‑140 [1962 Code Section 12‑23.14; 1962 (52) 1996; Reenacted 1984 Act No. 494, Section 1; Repealed, 1988 Act No. 444, Section 4(1)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

The purpose of section 15.02 (Section 33‑15‑102) is to induce corporations that are required to obtain a certificate of authority but have not to qualify promptly, without imposing harsh or erratic sanctions. The Model Act rejects the provisions adopted in a few states that make unenforceable intrastate transactions by unqualified corporations or that impose punitive sanctions or forfeitures on nonqualifying corporations. Often the failure to qualify is a result of inadvertence or bona fide disagreement as to the scope of the provisions of section 15.01 (Section 33‑15‑101), which are necessarily imprecise; the imposition of harsh sanctions in these situations is inappropriate. Further, as a matter of state policy it is generally preferable to encourage qualification in case of doubt rather than to impose severe sanctions that may cause corporations to resist obtaining a certificate of authority in doubtful situations.

Section 15.02 (Section 33‑15‑102) closes the courts of the state to suits maintained by corporations which should have but which have not obtained a certificate of authority. However, this sanction is not a punitive one: section 15.02(e) (Section 33‑15‑102(e)) states that the failure of the corporation to qualify does not affect the validity of corporate acts, including contracts. Thus, a contract made by a nonqualified corporation may be enforced by the corporation simply by obtaining a certificate. Further, section 15.02(c) (Section 33‑15‑102(c)) authorizes a court to stay a proceeding to determine whether a corporation should have qualified to transact business and, if it concludes that qualification is necessary, it may grant a further stay to permit the corporation to do so. Thus, the corporation will not be compelled to refile a suit if the corporation qualifies to transact business within a reasonable period. The purpose of these provisions is to encourage corporations to obtain certificates of authority and to eliminate the temptation to raise section 15.02 (Section 33‑15‑102) defenses only after applicable statutes of limitation have run.

Section 15.02(e) (Section 33‑15‑102(e)) does not prevent a foreign corporation that has failed to obtain a certificate of authority from “defending any proceeding.” The distinction between “maintaining” a proceeding under section 15.02(a) (Section 33‑15‑102(a)) and “defending any proceeding” under section 15.02(e) (Section 33‑15‑102(e)) is determined on the basis of whether affirmative relief is sought. A nonqualified corporation may interpose any defense or permissive or mandatory counterclaim to defeat a claimed recovery, but may not obtain an affirmative judgment or decree based on the counterclaim unless it has obtained a certificate of authority.

In addition to closing the courts of the state to a nonqualified foreign corporation, many states impose a penalty equal to all fees and franchise taxes that the foreign corporation would have been liable for if it had qualified to transact business when it was first required to do so. This penalty is usually defined to equal the sum of fees and franchise taxes for each year or part thereof the corporation transacted business in the state without a certificate of authority. Similar provisions appeared in earlier versions of the Model Act, but were modified in the present revision in favor of a specific dollar amount (which each state adopting the revised Model Act should insert in section 15.02(d)) (Section 33‑15‑102(d)) for each day and year the foreign corporation fails to qualify. The revised Model Act does not treat liability for taxes.

Section 15.02(b) (Section 33‑15‑102(b)) prevents evasion of section 15.02(a) (Section 33‑15‑102(a)) by an assignment of a claim on which the foreign corporation is barred from bringing suit under section 15.02(a) (Section 33‑15‑102(a)). If the successor has acquired all or substantially all of the assets of the foreign corporation, the successor may maintain suit after it has qualified. In the case of all other assignments, the foreign corporation itself must obtain a certificate of authority before the assignee may maintain suit on the claim. The phrase “all or substantially all” has the meaning set forth in the Official Comment to section 12.01 (Section 33‑12‑101).

SOUTH CAROLINA REPORTERS’ COMMENTS

Subsection (a) is essentially similar to parts of Section 33‑23‑140(A) and (B) of the 1981 South Carolina Business Corporation Act. The company cannot sue until qualified. The prior requirement that the company which failed to qualify when it was required to had to pay all “fees, penalties, and franchise taxes” has been dropped in favor of requiring the payment of a penalty. The penalty is ten dollars a day, one thousand dollars a year maximum. Likewise, requalification after a disqualification only requires the payment of the penalty, not any additional taxes.

An earlier version of this section granted a sixty‑day grace period before filing was due. The Supreme Court, interpreting the prior language, concluded that, this being a narrowly construed penalty section, the penalty should be computed excluding the grace period days. State v. Guy Mobile Home Corp. 248 S.C. 386, 149 S.E.2d 913 (1966). Under the new language, the penalty will run from the first day the company actually is transacting business in South Carolina.

Subsection (c) authorizes the court to determine if a company should be qualified.

The 1981 South Carolina Business Corporation Act allowed a receiver, trustee, or representative of creditors of a nonqualified company to sue. Likewise, prior law allowed an assignee for value without knowledge of a right from a nonqualified corporation to sue. In the new subsection (b), all successors and assignees from a nonqualified company are barred from suing. There are no exemptions.

Subsection (d) continues the long‑existing precedent that failure to qualify does not affect the validity of any contract executed by the nonqualified corporation. See Gallentley v. Strickland, 74 S.C. 394, 54 S.E. 756 (1906), and 1971 Op. S.C. Att’y Gen. 292 (#3008). Although the prior act specified that neither corporate acts nor contracts were invalidated by failure to qualify, no change is intended even though “contract” is not specifically mentioned in the new wording.

Lastly, the new provision continues prior South Carolina law that a nonqualified corporation can defend a suit brought in South Carolina.

DERIVATION: 1984 Model Act Section 15.02.

CROSS REFERENCES

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

“Foreign corporation” defined, see Section 33‑1‑400.

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

Transacting business, see Section 33‑15‑101.

Library References

Corporations 652, 661.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 919 to 921, 923 to 925, 936.

RESEARCH REFERENCES

ALR Library

23 ALR 5th 744 , Application of Statute Denying Access to Courts or Invalidating Contracts Where Corporation Fails to Comply With Regulatory Statute as Affected by Compliance After Commencement of Action.

Encyclopedias

S.C. Jur. Action Section 24, Capacity.

S.C. Jur. Private Business Franchises and Business Opportunities Section 55, State Law on Qualification to Do Business.

LAW REVIEW AND JOURNAL COMMENTARIES

Jurisdiction Over a Foreign Corporation. 19 S.C. L. Rev. 806.

NOTES OF DECISIONS

In general 1

Sufficiency of evidence 2

1. In general

Private foreign bank’s filing of lawsuit in South Carolina against South Carolina citizens, who purchased real property in Anguilla and then defaulted on loan agreement entered with bank in order to finance property and also defaulted on overdraft agreement with bank, did not constitute “transacting business” in South Carolina, within meaning of statute prohibiting foreign corporation from transacting business in South Carolina until corporation obtained certificate of authority from Secretary of State, but expressly stating that maintaining, defending, or settling proceeding did not constitute transacting business in South Carolina, since South Carolina citizens reached into Anguilla to obtain loan, rather than bank reaching into South Carolina to finance their purchase of property. National Bank of Anguilla (Private Banking and Trust) Ltd. v. Considine, 2017, 2017 WL 3263763. Banks and Banking 18

The failure of a foreign corporation to obtain a certificate of authority prior to bringing an action to recover monies owed on an account did not affect the trial court’s subject matter jurisdiction, but merely affected the corporation’s capacity to sue; thus, the defendant’s failure to raise the issue of a lack of certification prior to its appellate reply brief constituted a waiver of his right to complain. Chet Adams Co. v. James F. Pedersen Co. (S.C. 1992) 307 S.C. 33, 413 S.E.2d 827, on remand 308 S.C. 410, 418 S.E.2d 337, rehearing denied, certiorari denied.

2. Sufficiency of evidence

There was no evidence that judgment creditor’s alleged successor in interest was in fact creditor’s successor, or that it had certificate of authority required for foreign corporation to bring supplemental proceeding. A Fast Photo Exp., Inc. v. First Nat. Bank of Chicago (S.C.App. 2006) 369 S.C. 80, 630 S.E.2d 285. Corporations And Business Organizations 3253; Corporations And Business Organizations 3254(5)

There was no evidence that foreign corporation, after dissolving and surrendering its authority to do business in the state, had applied for a certificate of authority, as required to bring supplemental proceeding respecting pre‑dissolution judgment. A Fast Photo Exp., Inc. v. First Nat. Bank of Chicago (S.C.App. 2006) 369 S.C. 80, 630 S.E.2d 285. Corporations And Business Organizations 3254(5)

**SECTION 33‑15‑103.** Application for certificate of authority.

(a) A foreign corporation may apply for a certificate of authority to transact business in this State by delivering an application to the Secretary of State for filing. The application must set forth:

(1) the name of the foreign corporation or, if its name is unavailable for use in this State, a corporation name that satisfies the requirements of Section 33‑15‑106;

(2) the name of the state or country under whose law it is incorporated;

(3) its date of incorporation and period of duration;

(4) the street address of its principal office;

(5) the address of its proposed registered office in this State and the name of its proposed registered agent at that office;

(6) the names and usual business addresses of its current directors and officers;

(7) a statement of the aggregate number of shares which the corporation has authority to issue, itemized by classes and series, if any, within a class.”

(b) The foreign corporation shall deliver with the completed application a certificate of existence (or a document of similar import) duly authenticated by the Secretary of State or other official having custody or corporate records in the state or country under whose law it is incorporated.

(c) The foreign corporation shall deliver with the completed application the initial annual report of the corporation as specified in Section 12‑20‑40.

HISTORY: Derived from 1976 Code Section 33‑23‑20 [1962 Code Section 12‑23.2; 1952 Code Sections 12‑721, 12‑724; 1942 Code Sections 7765, 7766; 1932 Code Sections 7765, 7766; Civ. C. ‘22 Sections 4029, 4030; Civ. C. ‘12 Sections 2665, 2666; Civ. C ‘02 Sections 1780, 1781; R. S. 1466; 1893 (21) 409; 1922 (32) 1023; 1923 (33) 9; 1933 (38) 486; 1962 (52) 1996; 1963 (53) 327; 1976 Act No. 553 Section 3; 1981 Act No. 146, Section 2; 1984 Act No. 496, Section 3; Repealed, 1988 Act No. 444, Section 4(1)]; 1988 Act No. 444, Section 2; 1990 Act No. 446, Section 1994 Act No. 466, Section 3; 2004 Act No. 221, Section 22.

OFFICIAL COMMENT

1. DISCLOSURE REQUIREMENTS IN GENERAL.

Section 15.03 (Section 33‑15‑103) provides that a foreign corporation seeking a certificate of authority to transact business in the state must file an application that contains the information set forth in this section. These disclosure requirements are supplemented by the requirements of other sections in this chapter—Sections 15.04, 15.06, and 15.07 (Sections 33‑15‑104, 33‑15‑106, 33‑15‑107)—which require amended or supplemental filings in certain circumstances, and by section 16.22 (Section 33‑16‑220 and Section 12‑19‑20), which requires every qualified foreign corporation to file annual reports containing specified information. Generally, the revised Model Act eliminates repetitious filings, so that information need be submitted to the secretary of state in only one document.

The purposes of these disclosure requirements are: (1) to ensure that citizens of the state have adequate information about foreign corporations in their transactions with them; (2) to put them in a status of equality with domestic corporations with respect to information required to be furnished; (3) to facilitate their subjection to the jurisdiction of the state’s courts, thereby removing any disadvantage citizens of the state may have when dealing with them; and (4) to provide readily accessible evidence of their existence. Other statutes relating to franchise taxes and regulatory matters may require a qualified foreign corporation to provide additional information.

2. THE APPLICATION FOR A CERTIFICATE OF AUTHORITY.

The information required to be included in the application for a certificate of authority by section 15.03 (Section 33‑15‑103) is the minimum needed to administer the filing requirements of the Model Act. The application must also be accompanied by a certificate of existence and the filing fee required by section 1.22 (Section 33‑1‑220). A corporation that qualifies to transact business in a state must comply with the requirements of other statutes, including franchise tax and similar statutes. See section 15.05 (33‑15‑105).

SOUTH CAROLINA REPORTER’S COMMENTS

1. Must Be Lawful Purpose.

If a similar South Carolina corporation could not conduct business in this State, neither can an out‑of‑state corporation. For example, a Georgia corporation (not a professional association) which practices medicine will not be allowed to qualify to do business in South Carolina since in South Carolina a corporation cannot practice medicine. The proper procedure is for the Georgia doctors to form a South Carolina professional association pursuant to Chapter 19 of this title. See Section 33‑19‑101, et seq., 1977 Op. S.C. Att’y Gen. 298 (#77‑374).

2. Deletions.

The application for a certificate of authority no longer will require that the foreign corporation list:

a. a specific purpose (Section 33‑23‑20(a)(4) of the 1981 South Carolina Business Corporation Act) since this is not required of domestic companies;.

b. a description of its capital structure since this information is primarily only of interest for tax purposes—the new law requires this disclosure to be in the annual report. See Section 33‑16‑220; or,.

c. copies of the corporate articles (Section 33‑23‑20(b)(1) of the 1981 South Carolina Business Corporation Act).

3. New Provisions.

a. Foreign companies requesting authority to do business have filed on a standard form. The new law (Section 33‑1‑210(c)) allows, and the Secretary of State has adopted, a mandatory application form.

b. The application now must contain the names and business addresses of the foreign corporation’s directors and principal officers.

c. The applicant may (where necessary, see Section 33‑15‑106) use a fictitious name that distinguishes the foreign corporation from another domestic or qualified corporation.

4. Similar Provisions.

Different from the Model Act, but in keeping with existing South Carolina practice, the application must be accompanied by an attorney’s certificate that the filing is proper. (This continues Section 33‑23‑20(b)(3) of the 1981 South Carolina Business Corporation Act.) As was true under prior provisions, the filing of the application must comply with the general provisions governing all filings (Section 33‑1‑200) and be accompanied by the ten dollar fee and one hundred dollar filing tax (Section 33‑1‑220). The application must be accompanied by an initial annual report to the Tax Commission as required by Section 12‑19‑20 of the 1976 Code along with the minimum license fee of twenty‑five dollars.

The application can have a delayed effective date (Section 33‑1‑230) and can be corrected (Section 33‑1‑240).

Section 33‑1‑250 is important particularly since it provides that, upon delivery of the application to the Secretary of State, the application (like all documents) must be filed by him. The stamped returned copy of the application constitutes the Certificate of Authority. No formal separate document is required (but, of course, can be issued if desired). The general provisions of Chapter 1 defining the Secretary of State’s duties as ministerial are applicable to the issuance of this certificate. If the Secretary of State refuses to file, he has a duty of notification and the company has the right of appeal (Sections 33‑1‑250 and 33‑1‑260).

Subsection (b), which requires the filing of an authenticated certificate of existence from the domiciliary state, has the same substantive effect as Section 33‑28‑20(b)(2) of the 1981 South Carolina Business Corporation Act which required filing a “good standing” certificate. All other provisions of the new law are either the same or essentially no different from the prior law (see Section 33‑23‑20 of the 1981 South Carolina Business Corporation Act).

DERIVATION: 1984 Model Act Section 15.03.

CROSS REFERENCES

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

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

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

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

Corporate purposes, see Section 33‑3‑101.

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

Filing fees, see Section 33‑1‑220.

Filing requirements, see Section 33‑1‑200.

Forms, see Section 33‑1‑210.

Principal office defined, see Section 33‑1‑400.

Professional corporation, see Section 33‑19‑510.

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

Report to Secretary of State, see Sections 12‑20‑30 and 33‑16‑220.

Library References

Corporations 648.

Westlaw Topic No. 101.

C.J.S. Corporations Section 900.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Private Business Franchises and Business Opportunities Section 55, State Law on Qualification to Do Business.

Forms

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

**SECTION 33‑15‑104.** Amended certificate of authority.

(a) A foreign corporation authorized to transact business in this State must obtain an amended certificate of authority from the Secretary of State if it changes:

(1) its corporate name;

(2) the period of its duration; or

(3) the state or country of its incorporation.

(b) The requirements of Section 33‑15‑103 for obtaining an original certificate of authority apply to obtaining an amended certificate under this section.

HISTORY: Derived from 1976 Code Section 33‑23‑80 [1962 Code Section 12‑23.8; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 4(1)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 15.04 (Section 33‑15‑104) requires a foreign corporation to obtain an amended certificate of authority if it changes its corporate name, its duration, or the state or country of its incorporation. An amendment is not necessary to reflect changes in its principal office address or in its current officers or directors since that information is supplied in the annual report. In addition, section 15.07 (Section 33‑15‑107) requires an immediate filing if the foreign corporation changes its registered office or registered agent within the state.

Other fundamental changes by a foreign corporation do not require amendments to the certificate of authority. The secretary of state will be advised of most of these changes through the annual report. See section 16.22 (Section 33‑16‑220 and Section 12‑19‑20). Thus, a person seeking to obtain current information about a foreign corporation should examine the annual reports of the corporation as well as the application for certificate of authority and amendments to it. This procedure of requiring most changes to be reported in the annual reports rather than as amendments to the certificate of authority should eliminate many unnecessary filings with the secretary of state without reducing the information available through the secretary of state’s office.

SOUTH CAROLINA REPORTERS’ COMMENTS

1. Changes No Longer Requiring Amendment.

Certain events no longer require the foreign corporation to amend its South Carolina qualification:

(a) Since no specific purpose must be listed, if the major purpose of the company does change, this is no longer cause to amend the filing.

(b) Since articles are not filed with the application, any change in them likewise does not have to be filed (this deletes Section 33‑23‑60 of the 1981 South Carolina Business Corporation Act).

2. New Items Requiring Amendment.

(a) Section 33‑15‑103(a)(3) requires an amended certificate if the company changes its state or country of incorporation.

(b) If the duration changes, this requires an amendment.

3. Similar Items.

Both the new and old law require an amendment if there is a name change. The prior provisions which only required the amendment if the name change had been effected under the laws of its jurisdiction of incorporation (Section 33‑23‑80(a)(1) of the 1981 South Carolina Business Corporation Act) probably was a meaningless qualification, since a “name change” could be official only if authorized within the domicile state.

4. Filing Procedure.

Section 33‑23‑80(b) of the 1981 South Carolina Business Corporation Act spelled out in some detail the application process for an amendment. The contents varied somewhat from that required for an original application. The new provision merely provides that the amendment must meet the requirements for an original application. By making this change, certain technical amendments have been made to Section 33‑23‑80(b) of the 1981 South Carolina Business Corporation Act, but none have any practical or substantive effect. For example, the prior law required that the amendment list the date of original qualification. This is no longer required, but its omission is hardly significant.

DERIVATION: 1984 Model Act Section 15.04.

CROSS REFERENCES

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

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

Change of registered office or agent, see Section 33‑15‑108.

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

Duration, see Section 33‑3‑102.

Filing fees, see Section 33‑1‑220.

Filing requirements, see Section 33‑1‑220.

Forms, see Section 33‑1‑210.

Resignation of registered agent, see Section 33‑15‑109.

Library References

Corporations 648.

Westlaw Topic No. 101.

C.J.S. Corporations Section 900.

**SECTION 33‑15‑105.** Effect of certificate of authority.

(a) A certificate of authority authorizes the foreign corporation to which it is issued to transact business in this State subject, however, to the right of the State to revoke the certificate as provided in Chapters 1 thru 20 of this title.

(b) A foreign corporation with a valid certificate of authority has the same but no greater rights and has the same but no greater privileges as, and except as otherwise provided by Chapters 1 thru 20 of this title is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character.

(c) This title does not authorize this State to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this State.

(d) By obtaining a certificate of authority, the foreign corporation agrees to be subject to the jurisdiction of the Department of Revenue and the courts of this State to determine its South Carolina tax liability, including withholding and estimated taxes, together with related interest and penalties, if any. Obtaining a certificate of authority is not an admission of tax liability.

HISTORY: Derived from 1976 Code Section 33‑23‑10 [1962 Code Section 12‑23.1; 1952 Code Section 12‑701; 1942 Code Section 7764; 1932 Code Section 7764; Civ. C. ‘22 Section 4028; Civ. C. ‘12 Section 2664; Civ. C. ‘02 Section 1779; R. S. 1465; 1893 (21) 409; 1904 (24) 436; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 4(1)], Section 33‑23‑30 [1962 Code Section 12‑23.3; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 4(1)], and Section 33‑23‑40 [1962 Code Section 12‑23.4; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 4(1)]; 1988 Act No. 444, Section 2; 1994 Act No. 497, Part II, Section 49B.

OFFICIAL COMMENT

A certificate of authority authorizes a foreign corporation to transact business in the state subject to the right of the state to revoke the certificate. The privileges of this status are defined in section 15.05(b) (Section 33‑15‑105(b)): a qualified foreign corporation has the same (but no greater) privileges as a domestic corporation.

Section 15.05(b) (Section 33‑15‑105(b)), by granting to qualified foreign corporations all of the rights and privileges enjoyed by a domestic corporation, avoids discrimination that might otherwise be subject to constitutional challenge. On the other hand, section 15.05(b) (Section 33‑15‑105(b)) also contains a restriction or limitation: a qualified foreign corporation is subject to the same restrictions as a domestic corporation, including the same duties, penalties, and liabilities. This latter aspect of section 15.05(b) (Section 33‑15‑105(b)) has declined in importance as states have eliminated unnecessary or outdated restrictions on domestic corporations and, as a consequence of section 15.05(b) (Section 33‑15‑105(b)), on qualified foreign corporations as well. In particular, section 15.05(b) (Section 33‑15‑105(b)) makes section 3.01 (Section 33‑3‑101) (corporate purposes) applicable to a qualified foreign corporation, and grants substantially the same powers to it as are possessed by a domestic corporation.

Section 15.05(c) (Section 33‑15‑105(c)) preserves the judicially developed doctrine that internal corporate affairs are governed by the state of incorporation even when the corporation’s business and assets are located primarily in other states.

SOUTH CAROLINA REPORTERS’ COMMENTS

1. Overview.

As noted in the South Carolina Reporter’s Comments to Section 33‑15‑103, an application stamped filed by the Secretary of State is the only document required to evidence that the foreign company has been authorized to do business in South Carolina.

Under Section 33‑23‑30 of 1981 South Carolina Business Corporation Act, the statute provided that the certificate authorized the company to transact any business (as set forth in its application) so long as the corporation retained its authority where incorporated, had not surrendered its South Carolina authority, or the authority had not been suspended or revoked. The new provision simplifies this somewhat in stating that the authority is subject always to being revoked. Implied within subsection (a) and the next subsection (b), which refers to a “valid certificate”, is the obvious provision that the foreign corporation has no power if it surrenders its certificate or if it is no longer a valid corporation in its state of incorporation.

Likewise, new subsection (b) is identical effectively to Section 33‑23‑40 of the 1981 South Carolina Business Corporation Act. See Thompson v. Ford Motor Co. 200 S.C. 393, 420, 428, 21 S.E.2d, 34, 45, 49 (1941) pointing out that the authority granted foreign corporations to do business in South Carolina does not give immunities and rights superior to those of domestic corporations. The qualified foreign corporation has the same, but no greater, rights and privileges as a domestic company and is generally subject to the same liabilities.

At one point, certain foreign corporations were not permitted to do business in South Carolina unless they reincorporated in this State. See, e.g., Lyles v. McCown, 82 S.C. 127, 63 S.E. 355 (1909). This is obviously no longer the case.

For an older discussion of the differences between being a domestic corporation as compared to a qualified foreign corporation, particularly in regard to amenability to suit, see Blue Ridge Power Co. v. Southern Railway Co. 122 S.C. 222, 115 S.E. 306 (1920). The fact that a foreign insurance corporation is qualified to do business in South Carolina does not mean that the statutes of South Carolina governing the contents of insurance policies will be applied to a foreign corporation’s policies purchased out of state by a policy holder who later moves to South Carolina, Jones v. Prudential Insurance Co. , 210 S.C. 264, 42 S.E.2d 331 (1947). See, also, Livingston v. Atlantic Coast Line Railway Co. 176 S.C. 385, 180 S.E. 343 (1935). Cf. Owen v. Bankers Life Insurance Co. 84 S.C. 253, 66 S.E. 290 (1909).

Like domestic companies, the foreign corporation does not have to designate a specified purpose and thus can conduct any business not otherwise restricted by other statutes.

2. Scope of Regulation of Foreign Corporations.

Both this section and Section 33‑23‑10(a) of the 1981 South Carolina Business Corporation Act prohibit South Carolina from regulating the organization or internal affairs of a foreign corporation.

In 1962, it was then the opinion of the draftsman that a provision prohibiting South Carolina from regulating the internal affairs of a foreign corporation should not be adopted:

“It may very well be that a corporation, incorporated elsewhere, consists exclusively or primarily of South Carolina shareholders, and that such corporation proposes an internal change which is contrary to South Carolina law, is injurious to South Carolina shareholders, but which is yet lawful under the law of the state in which the corporation is formally organized. Several cases have indicated, and there is reason to expect the trend to establish, that the South Carolina courts would, in such a situation, have jurisdiction to regulate the internal affairs of the corporation so as to protect South Carolina interests which predominate in this instance. See Western Air Lines, Inc. v. Sobieski, 12 Cal. Rep. 719 (D.Ct. App. 1961), [Comment, 15 S.C. L. Rev. (1963)], where the court sustained the California Corporations Commissioner in forbidding amendment of the articles of incorporation of a Delaware corporation which operates primarily in California and a large percentage of whose shareholders are Californians. New York has recently made statutory provision for ‘domiciled foreign corporations’, which, in rough terms, are New York enterprises which run away to a loose jurisdiction to escape corporate law requirements which New York thinks essential to protect New York shareholders and other local interests. New York Bus. Corp. Act Sections 1317‑1319. Although we do not now need such a provision [as in New York], we should not hamstring our own courts in meeting a situation which might later justify intervention of South Carolina courts into the affairs of a South Carolina enterprise for the benefit of South Carolina shareholders, just because the corporation has chosen to incorporate elsewhere under looser standards. In short, there is no reason to cut off a beneficent jurisdiction of our courts should it be necessary to invoke that jurisdiction. See Reese and Kaufman, The Law Governing Corporate Affairs, 58 Columbia L. Rev. 1118 (1958). [For a survey of the general law, see Latty, Pseudo‑Foreign Corporation, 65 Yale L. J. 137 (1955).]”.

E. Folk, Reporters Notes, in South Carolina Business Corporation Act, Annotated Edition at p. 190 (1964).

Since 1962, there have been additional cases from other jurisdictions where states have attempted to control what might be viewed as the internal affairs of a foreign company. See, e.g., Valtz v. Penta Investment Corp., 139 Cal. App. 3d 803, 188 Cal. Rptr. 922 (Cal. Ct. App. 4th Dist., 1983), and Wilson v. Louisiana‑Pacific Resources Inc. 138 Cal. App. 3d 216, 187 Cal. Rptr. 852 (Ct. App. lst Dist., 1983). In some of these cases, the regulating state has attempted to protect the interests of shareholders (see e.g. Gries Sports Enterprises, Inc. v. Model, 15 Ohio St. 3d 284, 473 N.E.2d 807 (1984)). See generally, D. DeMott, Perspectives on Choice of Law For Corporate Internal Affairs, 48 LAW AND CONTEMPORARY PROBLEMS 161 (1985) and J. Kozyris Corporate Wars and Choice of Law, 1985 DUKE L.J 1 (1985).

However, there has been significant recent litigation regarding a state’s right to impose local requirements in regard to mergers and takeovers. See Edgar v. MITE Corp. 457 U.S. 624 (1982), CTS Corp. v. Dynamics Corp. of America, 107 S. Ct. 1637 (1987). These cases generally have been decided on constitutional principles.

Even though South Carolina has been a leader in imposing internal controls on corporations to protect the rights of its shareholders (see, e.g., Jacobson v. Yashick, 249 S.C. 580, 155 S.E.2d 601 (1967) which protections might arguably be appropriately extended to South Carolina shareholders of foreign corporations, subsection (c), which prohibits South Carolina from regulating the internal affairs of a foreign corporation has been retained. It was felt that many South Carolina businesses elect to incorporate in Delaware and other states or are incorporated in another state and conduct a substantial amount of business in South Carolina, as well as in other states, and there needs to be certainty as to whose law applies. There is the obvious advantage that as more states adopt similar legislation there will be much more certainty throughout the country which, in the long run, will be advantageous to all corporations and their advisors.

DERIVATION: 1984 Model Act Section 15.05.

CROSS REFERENCES

Corporate powers, see Section 33‑3‑102.

Corporate purposes, see Section 33‑3‑101.

Revocation of certificate of authority, see Sections 33‑15‑300 through 33‑15‑320.

Withdrawal of foreign corporations, see Section 33‑15‑200.

Library References

Corporations 638, 639, 651.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 893, 919.

RESEARCH REFERENCES

Forms

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

**SECTION 33‑15‑106.** Corporate name of foreign corporation.

(a) Except as authorized by subsection (f), if the corporate name of a foreign corporation does not satisfy the requirements of Section 33‑4‑101, the foreign corporation to obtain or maintain a certificate of authority to transact business in this State may:

(1) add “corporation”, “incorporated”, “company”, or “limited” or the abbreviation “corp.”, “inc.”, “co.”, or “ltd.” to its corporate name for use in this State; or

(2) use a fictitious name in this State if its real name is unavailable and it delivers to the Secretary of State for filing a copy of the resolution of its board of directors, certified by its secretary, adopting the fictitious name which includes one or more of the words or abbreviations in item (1) of this subsection.

(b) Except as authorized by subsections (c) and (d), the corporate name (including a fictitious name) of a foreign corporation must be distinguishable upon the records of the Secretary of State from:

(1) the corporate name of a corporation incorporated or authorized to transact business in this State;

(2) a corporate name reserved or registered under Section 33‑4‑102 or 33‑4‑103;

(3) the fictitious name of another foreign corporation authorized to transact business in this State; and

(4) the corporate name of a not‑for‑profit corporation incorporated or authorized to transact business in this State.

(c) A foreign corporation may apply to the Secretary of State for authorization to use in this State the name of another corporation incorporated or authorized to transact business in this State that is not distinguishable upon his records from the name applied for. The Secretary of State shall authorize use of the name applied for if:

(1) the other corporation consents to the use in writing and submits an undertaking in form satisfactory to the Secretary of State to change its name to a name that is distinguishable upon the records of the Secretary of State from the name of the applying corporation; or

(2) the applicant delivers to the Secretary of State a certified copy of a final judgment of a court of competent jurisdiction establishing the applicant’s right to use the name applied for in this State.

(d) A foreign corporation may use in this State the name (including the fictitious name) of another domestic or foreign corporation that is used in this State if the other corporation is incorporated or authorized to transact business in this State and the foreign corporation has:

(1) merged with the other corporation;

(2) been formed by reorganization of the other corporation; or

(3) acquired all or substantially all of the assets, including the corporate name, of the other corporation.

(e) If a foreign corporation authorized to transact business in this State changes its corporate name to one that does not satisfy the requirements of Section 33‑4‑101, it may not transact business in this State under the changed name until it adopts a name satisfying the requirements of Section 33‑4‑101 and obtains an amended certificate of authority under Section 33‑15‑104.

(f) If any foreign corporation authorized to transact business in South Carolina had filed, prior to the effective date of Chapters 1 thru 20 of this title, a certificate with the Secretary of State adopting an assumed name pursuant to Section 33‑5‑35 in Section 2 of Act 146 of 1981 which does not meet the requirements of either Section 33‑4‑101(a) and (b) or Section 33‑15‑106(a) through (e) of Chapters 1 thru 20 of this title, it may continue to use the assumed name as its name until December 31, 1994, at which time the name of the corporation must meet the requirements of Chapters 1 thru 20 of this title and, if necessary to meet them, must be adopted by an amended certificate of authority under Section 33‑15‑104. If any filed assumed name does not meet the requirements of Section 33‑4‑101(a) and (b), but does meet the requirements of this section, the corporation may continue to use the name in this State as its name and is not required to file the certificate mentioned in item (2) of subsection (a) of this section.

HISTORY: Derived from 1976 Code Section 33‑5‑35 [1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2] and Section 33‑23‑50 [1962 Code Section 12‑23.5; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 4(1)], and Section 33‑23‑70 [1962 Code Section 12‑23.7; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed 1988 Act No. 444, Section 4(1)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

The purpose of section 15.06 (Section 33‑15‑106), like that of section 4.01 (Section 33‑4‑101) relating to the name of a domestic corporation, is to ensure that names are distinguishable from one another upon the records of the secretary of state. Like section 4.01 (Section 33‑4‑101), it does not impose upon the secretary of state the responsibility of deciding issues of unfair competition or commercial similarity of names.

A foreign corporation applying for a certificate of authority must apply under its true corporate name if that name qualifies under section 15.06(a) or (c) (Section 33‑15‑106(a) or (c)). If the true corporate name qualifies except that it does not contain one of the words of corporateness set forth in section 15.06(a) (Section 33‑15‑106(a)), the corporation may simply add one of those words to its true corporate name and apply under that name as modified. Section 15.06(a)(1) (Section 33‑15‑106(a)(1)). If the true corporate name is unavailable because it is indistinguishable upon the records of the secretary of state from a name already in use or reserved, the corporation may use a fictitious name (if available) under section 15.06(a)(2) (Section 33‑15‑106(a)(2)) simply by delivering to the secretary of state for filing, together with its application for a certificate of authority, a certified copy of a resolution of its board of directors authorizing the use of the fictitious name in the state. Finally, the otherwise unavailable name of a foreign corporation may be augmented by the name of the state of its incorporation so as to make it distinguishable upon the records of the secretary of state. For example, a Delaware corporation, “Utopian Products, Inc.” which finds that a domestic corporation is using that name, may qualify under the name “Utopian Products, Inc. (Delaware).”

A corporation that qualifies to transact business in the state may do business under an assumed name to the same extent as a domestic corporation. The name requirements of section 15.06 (Section 33‑15‑106), including the fictitious name of a corporation whose real name is unavailable, are designed to ensure that each corporation qualified to transact business in this state has a unique official name. For a fuller description of the policies underlying section 15.06 (Section 33‑15‑106), see the Official Comment to section 4.01 (Section 33‑4‑101).

If a foreign corporation changes its name it may (1) file an amended certificate of authority under its new name or, if the new name is not available, (2) continue to conduct business under its former name as an assumed name, or (3) adopt a new assumed name, by filing a certified resolution of its board of directors authorizing it to do so.

SOUTH CAROLINA REPORTERS’ COMMENTS

1. New Provisions.

A substantial portion of this section is entirely new. Subsections (b), (c), and (d) adopt the same provisions for foreign corporation names as is applied to domestic corporations and as such is discussed in the Official and South Carolina Reporters Comments to Section 33‑4‑101. New subsection (d) is comparable to Section 33‑23‑70 of the 1981 South Carolina Business Corporation Act. The old section was narrower in applying only to mergers (not reorganizations) and required a filing of authenticated articles of merger.

In keeping with the new philosophy that corporate names, for corporate law purposes, only need be grammatically distinguishable from each other (see the Official Comment to Section 33‑4‑101), the most important change is that a foreign corporation can adopt a fictitious South Carolina name if its actual name does not meet South Carolina requirements.

This may entail merely adding “Inc.”, “Corp.”, etc., if such is not required where incorporated, or it may require adopting an official “fictitious” name. See the Official Comment for an explanation of this process. Although not required specifically by the statute, the Secretary of State will index the company on his records under both the “fictitious” South Carolina name and its name as listed on its charter.

In addition to new subsection (d) mentioned above, subsection (e) and the first sentence of subsection (a) have the same operative effect as Section 33‑23‑50 of the 1981 South Carolina Business Corporation Act in prohibiting a corporation from transacting business without an approved name and requiring an amendment to its filings if it changes to a nonqualified name. Although the new law does not require that any new name be filed within thirty days as was true under the prior law, this does not seem significant. The Official Comment suggests that a corporation which changes its name would be permitted to continue operating under its old name as an assumed name.

2. Non‑Model Act Provisions.

Subsection (a)(2) has been clarified. As revised, subsection (a)(2) specifies that for those foreign corporations whose actual names are unavailable for use in South Carolina and who will have to apply under a fictitious name that, in addition to any other requirements such as provided in subsections (b) and (d), the fictitious name must include one or more terms indicating that it is an incorporated business, e.g., the term “corporation” or “corp.”. This is primarily a matter of parity since corporations incorporated in South Carolina are not permitted to file without such a designation. It should be noted that nothing in this section (or elsewhere in this act) controls whether a foreign corporation which is qualified under a fictitious name may do business under that name, any derivation of the name, or any other trade name or service mark. The language of subsection (a)(2) has been clarified so that no inference can be drawn that the foreign corporation would be limited to using only the exact fictitious name even though it has a registered service mark or other name under which it might elect to do business. See the South Carolina Reporters’ Comments to Section 33‑4‑101 as to some of the matters which should be considered before doing business other than in the formally filed name.

3. Assumed Name.

Some foreign corporations in the past have been authorized to transact business under an “assumed name” pursuant to Section 33‑5‑35 of the 1981 South Carolina Business Corporation Act. This section, by cross‑referencing Section 33‑4‑101, incorporates the limitations of the use of an assumed name by a foreign corporation. A foreign company will be required to obtain, prior to December 31, 1994, an amended certificate of authority if its assumed name does not meet the requirements of this section. However, if the assumed name meets the requirements of this section, namely subsection (a), then the corporation is not required to refile its name, and the previously filed certificate is sufficient compliance with this section. See also, the South Carolina Reporters’ Comments to Section 33‑4‑101.

DERIVATION: 1984 Model Act Section 15.06.

CROSS REFERENCES

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

Application for certificate of authority to state name of foreign corporation, see Section 33‑15‑103.

Corporate names generally, see Sections 33‑4‑101 et seq.

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

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

Filing fees, see Section 33‑1‑220.

Filing requirements, see Section 33‑1‑200.

Professional corporation supplement, see Section 33‑19‑150.

Registered name, see Section 33‑4‑103.

Reserved name, see Section 33‑4‑102.

Library References

Corporations 43 to 50.

Westlaw Topic No. 101.

C.J.S. Corporations Section 98.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Intellectual Property Section 58, Corporations.

Attorney General’s Opinions

Intent of Section 33‑15‑106(a)(2) is to permit foreign corporation to adopt for use in this State no more than one fictitious name at a time. 1990 Op Atty Gen No. 90‑3.

**SECTION 33‑15‑107.** Registered office and registered agent of foreign corporation.

Each foreign corporation authorized to transact business in this State must maintain continuously in this State:

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

(2) a registered agent, who may be:

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

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

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

HISTORY: Derived from 1976 Code Section 33‑23‑20 [1962 Code Section 12‑23.2; 1952 Code Sections 12‑721, 12‑724; 1942 Code Sections 7765, 7766; 1932 Code Sections 7765, 7766; Civ. C. ‘22 Sections 4029, 4030; Civ. C. ‘12 Sections 2665, 2666; Civ. C. ‘02 Sections 1780, 1781; R. S. 1466; 1893 (21) 409; 1922 (32) 1023; 1923 (33) 9; 1933 (38) 486; 1962 (52) 1996; 1963 (53) 327; 1976 Act No. 553 Section 3; 1981 Act No. 146, Section 2; 1984 Act No. 496, Section 3; Repealed, 1988 Act No. 444, Section 4(1)], and Section 33‑23‑40 [1962 Code Section 12‑23.4; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed 1988 Act No. 444, Section 4(1)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

A foreign corporation that obtains a certificate of authority in a state thereby agrees that it is amenable to suit in the state. Section 15.07 (Section 33‑15‑107) requires every such corporation continuously to maintain a registered office and registered agent within the state upon whom service of process may be made. As is the case with a domestic corporation, the registered office may, but need not be, a business office of the foreign corporation.

Section 15.07 (Section 33‑15‑107) is patterned after section 5.01 (Section 33‑15‑101), relating to the registered office and registered agent of a domestic corporation. For a fuller description of the policies underlying section 15.07 (Section 33‑15‑107), see the Official Comment to section 5.01 (Section 33‑15‑101).

SOUTH CAROLINA REPORTERS’ COMMENTS

This section is the foreign corporation counterpart of Section 33‑5‑101 dealing with domestic corporations. It regulates the appointment of a statutory agent. Although the new language differs significantly from the prior statutes (Section 33‑23‑20 and Section 33‑5‑40 of the 1981 South Carolina Business Corporation Act) there is practically no difference in their meaning. For a more detailed comparison of this language with the prior South Carolina law, see the Official and South Carolina Reporters’ Comments for Section 33‑5‑101 since the language of both new sections is identical.

For a case demonstrating the need to identify specific persons who are authorized to accept service for foreign corporations see McSwain v. Adams Grain and Provision Co., 93 S.C. 103, 76 S.E. 117 (1911). See also, Big Robins Farms v. California Spray‑Chemical Corp., 161 F. Supp. 646 (W.D.S.C. 1958) holding that the county office of a foreign corporation’s agent will not necessarily determine the venue of an action against the foreign corporation.

DERIVATION: 1984 Model Act Section 15.07.

CROSS REFERENCES

Changing registered office or agent, see Section 33‑15‑108.

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

Resignation of registered agent, see Section 33‑15‑109.

Revocation of certificate of authority does not affect authority of registered agent, see Section 33‑15‑310.

Revocation of certificate of authority for failure to appoint and maintain registered office and agent, see Section 33‑15‑300.

Service on foreign corporation, see Sections 15‑9‑240, 33‑15‑110, 33‑15‑200, and 33‑15‑310.

Library References

Corporations 645.

Westlaw Topic No. 101.

C.J.S. Corporations Section 900.

NOTES OF DECISIONS

In general 1

1. In general

A registered agent was not a person designated by statute to accept service, and thus, statute that extended by five days the period in which to respond after service by mail of a notice or other paper upon a party or a person designated by statute to accept service did not apply to affidavit of default that was served on foreign corporation’s registered agent; while foreign corporation was required to designate an agent under statute, the statute did not itself make such a designation. Harbor Island Owners’ Ass’n v. Preferred Island Properties, Inc. (S.C. 2006) 369 S.C. 540, 633 S.E.2d 497. Corporations And Business Organizations 3264

A foreign corporation doing business in the State impliedly agrees that service of process may be served on its agent. H.L. & L.F. McSwain v. Adams Grain & Provision Co. (S.C. 1912) 93 S.C. 103, 76 S.E. 117, Am.Ann.Cas. 1914D,981.

**SECTION 33‑15‑108.** Change of registered office or registered agent of foreign corporation.

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

(1) its name;

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

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

(4) the name of its current registered agent;

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

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

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

HISTORY: Derived from 1976 Code Section 33‑5‑50 [1962 Code Section 12‑13.5; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], and Section 33‑23‑50 [1962 Code Section 12‑23.5; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 4(1)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

A foreign corporation that changes its registered agent or registered office, or both, must file a statement with the secretary of state containing the information set forth in section 15.08(a) (Section 33‑15‑108(a)). A registered agent, typically a corporation service company, that changes the street address of its business office (and thereby the street address of the registered office of all corporations for which it serves as registered agent) may notify the secretary of state by complying with section 15.08(b) (Section 33‑15‑108(b)) rather than with section 15.08(a) (Section 33‑15‑108(a)).

This section is patterned after section 5.02 (Section 33‑5‑102), relating to changes of registered office or registered agent of a domestic corporation. For a fuller description of the policies underlying section 15.08 (Section 33‑15‑108), see the Official Comment to section 5.02 (Section 33‑5‑102).

SOUTH CAROLINA REPORTERS’ COMMENTS

This provision is the identical counterpart to the provision dealing with domestic corporations, Section 33‑5‑102. Although the new language differs from the equivalent section in the 1981 South Carolina Business Corporation Act, the actual provisions are generally the same. For a discussion of these changes, see the Official and South Carolina Reporters Comments to Section 33‑5‑102 which employ identical language.

DERIVATION: 1984 Model Act Section 15.08.

CROSS REFERENCES

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

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

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

Filing fees, see Section 33‑1‑220.

Filing requirements, see Section 33‑1‑200.

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

Resignation of registered agent, see Section 33‑15‑109.

Revocation of certificate of authority for failure to file notice of change of registered office or agent, see Section 33‑15‑300.

Library References

Corporations 645.

Westlaw Topic No. 101.

C.J.S. Corporations Section 900.

**SECTION 33‑15‑109.** Resignation of registered agent of foreign corporation.

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

(b) After filing the statement, the Secretary of State shall attach the filing receipt to one copy and mail the copy and receipt to the registered office if not discontinued. The Secretary of State shall mail the other copy to the foreign corporation at its principal office address shown in its most recent annual report.

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

HISTORY: Derived from 1976 Code Section 33‑5‑50 [1962 Code Section 12‑13.5; 1962 (52) 1966; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], and Section 33‑23‑50 [1962 Code Section 12‑23.5; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 4(1)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 15.09 (Section 33‑15‑109) permits the registered agent of a foreign corporation to resign by following the procedure set forth in the section, which is designed to maximize the probabilities that the corporation is advised of the resignation of the agent. This section is principally used by compensated registered agents who are corporation service companies and who desire to resign as registered agent as a result of nonpayment of fees. Section 15.09 (Section 33‑15‑109) is patterned after section 5.03 (Section 33‑5‑103), relating to the resignation of a registered agent of a domestic corporation. For a fuller description of the policies underlying section 15.09 (Section 33‑15‑109), see the Official Comment to section 5.03 (Section 33‑5‑103).

SOUTH CAROLINA REPORTERS’ COMMENTS

Section 33‑5‑50(b) of the 1981 South Carolina Business Corporation Act provided for the resignation of a foreign corporation’s agent. This section changes prior South Carolina practices but is identical to the new resignation procedures for agents of domestic corporations. See the Official and South Carolina Reporters’ Comments to Section 33‑5‑103 for a detailed discussion of these provisions.

DERIVATION: 1984 Model Act Section 15.09.

CROSS REFERENCES

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

Change of registered agent, see Section 33‑15‑108.

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

Filing fees, see Section 33‑1‑220.

Filing requirements, see Section 33‑1‑200.

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

Revocation of certificate of authority for failure to file notice of resignation of registered agent, see Section 33‑15‑300.

Library References

Corporations 645.

Westlaw Topic No. 101.

C.J.S. Corporations Section 900.

**SECTION 33‑15‑110.** Service on foreign corporation.

Service of process on foreign corporations must be in accord with the applicable provision of Title 15.

HISTORY: Derived from 1976 Code Section 33‑23‑130 [1962 Code Section 12‑23.13; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 4(1)], and Section 33‑23‑140 [1962 Code Section 12‑23.14; 1962 (52) 1996; Reenacted, 1984 Act No. 494 Section 1; Repealed, 1988 Act No. 444, Section 4(1)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

[Note: this Official Comment accompanies Section 15.10 of the 1984 Model Act, the substance of which has been incorporated into revised Section 15‑9‑240 of the 1976 South Carolina Code. Therefore, this Comment should be read in conjunction with Section 15‑9‑240, which is discussed in the South Carolina Reporters’ Comments to this section.].

Service on the registered agent is the typical method of service of process on a qualified foreign corporation. Section 15.10(a) (Section 15‑9‑240(a)). But if the corporation does not have a registered agent, or if the agent cannot be found at the registered office, section 15.10(b) (Section 15‑9‑240(b)) authorizes service on the secretary of the corporation at its principal office as shown in its certificate of authority or most recent annual report. Service may be effected in the same way on a corporation which has withdrawn from the state or whose certificate of authority has been revoked. Section 15.10(c) (Section 15‑9‑100(c)) establishes the date on which service is effective under section 15.10(c) (Section 15‑9‑240(c)), while section 15.10(d) (Section 15‑9‑240(d)) makes clear that the method of service provided by this section does not preclude the use of other means of effecting service of process. Service of process may also be effected, for example, under a “long‑arm” statute or under other special statutes authorizing service in some other manner.

Section 15.10 (Section 15‑9‑240) is patterned after section 5.04 (Section 33‑5‑104), relating to service of process on domestic corporations. For a fuller description of the policies underlying section 15.10 (Section 15‑9‑240), see the Official Comment to section 5.04 (Section 33‑5‑104).

SOUTH CAROLINA REPORTERS’ COMMENTS

The method for serving corporations and other entities has been contained traditionally in Title 15 of the 1976 Code. South Carolina Rule of Civil Procedure 4(d)(3) provides additional methods for service of process on both domestic and foreign corporations.

In order to minimize the confusion that might result from having varying procedures scattered throughout the Code, it was determined that the Model Act provisions relating to service of process on corporations should not be included in Title 33 but should be retained in Title 15. With respect to foreign corporations, the applicable Code section is Section 15‑9‑240.

Section 15‑9‑240 has been amended significantly. If the foreign corporation’s registered agent cannot be served, then service should be made on the corporation secretary, not upon the Secretary of State (which was the previous process).

Serving the company secretary (rather than Secretary of State) may alleviate the practical problem that in the past by the time the Secretary of State received and forwarded the summons and complaint, often the time to answer had already expired. See Y. C. Ballenger Electrical Contractors Inc. v. Reach‑All Sales, 276 S.C. 394, 279 S.E.2d 127 (1981) upholding the constitutionality of such “delayed” service. See also, Wagenberg v. Charleston Wood Products, 122 F. Supp. 745 (E.D.S.C. 1954) wherein Judge Wyche held as constitutional the South Carolina procedure that an out‑of‑state director can be served by serving the Secretary of State even though this may delay actual notice to the director.

The Official Text of 1984 Model Act Section 15.10 has been slightly changed to state in Section 15‑9‑240(c)(3) that service is perfected five days after mailing if it is correctly addressed to the secretary of the company at the last address on file with the Secretary of State.

In addition, the Model Act and Section 15‑9‑240 provide that either the procedure in South Carolina Civil Procedure Rule 4(d)(3) (serving an officer) or that contained in Section 15‑9‑240 (serving the agent) is proper.

The new language clearly reverses the result of Kreke v. Ohio Gear‑Wallace Murray Corporation, 287 S.C. 388, 339 S.E.2d 115 (1986). In that case, the court held that service on both a key employee of a foreign corporation and the Secretary of State was invalid where the foreign company properly had designated C.T. Corporation as its South Carolina agent for service of process. Although the court overlooked the then existing statutory language which stated that “nothing herein contained shall limit or affect the right to serve any process, . . . in any other manner now or hereafter permitted by law,” and although in footnote #1 the court stated: “we express no opinion whether Rule 4(d)(3) SCRCP, would change the result in a similar case,” the new language of subsection (d) clearly states that the service method in Kreke (or under Rule 4(d)(3)) is now valid. This is in keeping with the court’s earlier opinion, Renney v. Doobs House, Inc., 275 S.C. 562, 274 S.E.2d 290 (1981) (one can serve any “authorized agent” even though the company has a specific “statutory agent”).

If the foreign corporation has withdrawn or has been disqualified, counsel has the specific option of serving the company secretary (Section 15‑9‑240(b)(2) and (3)) or serving the Secretary of State (Section 33‑15‑20(b)(3) and Section 33‑15‑31(d)). The attorney can also serve the withdrawn or disqualified foreign corporation pursuant to Rule 4(d)(3) given the language of Section 15‑9‑240(d).

If the foreign corporation has never been qualified in South Carolina, the proper method of service is set forth in Section 15‑9‑245.

See also Section 33‑55‑150, which deals with service of process on a foreign charitable organization that solicits funds in South Carolina.

DERIVATION: 1984 Model Act Section 15.10—but see the South Carolina Reporters’ Comments.

CROSS REFERENCES

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

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

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

Revocation of certificate of authority does not revoke authority of registered agent, see Section 33‑15‑310.

Service of process fees, see Section 33‑1‑220.

Service on foreign corporation with revoked certificate of authority, see Section 33‑15‑310.

Service on withdrawn foreign corporation, see Section 33‑15‑200.

Library References

Corporations 646, 668.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 900, 939, 947, 952.

ARTICLE 2

Withdrawal

**SECTION 33‑15‑200.** Withdrawal of foreign corporation.

(a) A foreign corporation authorized to transact business in this State may not withdraw from this State until it obtains a certificate of withdrawal from the Secretary of State.

(b) A foreign corporation authorized to transact business in this State may apply for a certificate of withdrawal by delivering an application to the Secretary of State for filing. The application must set forth:

(1) the name of the foreign corporation and the name of the state or country under whose law it is incorporated;

(2) that it is not transacting business in this State and that it surrenders its authority to transact business in this State;

(3) that it revokes the authority of its registered agent to accept service on its behalf and appoints the Secretary of State as its agent for service of process in any proceeding based on a cause of action arising during the time it was authorized to transact business in this State;

(4) a mailing address to which the Secretary of State may mail a copy of any process served on him under item (3); and

(5) a commitment to notify the Secretary of State in the future of any change in its mailing address.

(c) After the withdrawal of the corporation is effective, service of process on the Secretary of State under this section is service on the foreign corporation. Upon receipt of process, the Secretary of State shall mail a copy of the process to the foreign corporation at the mailing address set forth under subsection (b).

HISTORY: Derived from 1976 Code Section 33‑23‑90 [1962 Code Section 12‑23.9; 1952 Code Section 12‑725; 1942 Code Section 2690; 1932 Code Section 2690; 1922 (32) 947; 1953 (48) 301; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; 1985 Act No. 72 Section 3; Repealed, 1988 Act No. 444, Section 4(1)], and Section 33‑23‑100 [1962 Code Section 12‑23.10; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 4(1)]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

A foreign corporation that ceases to transact business within a state may withdraw from the state only by obtaining a certificate of withdrawal. A foreign corporation that ceases to transact business in the state but fails to obtain a certificate of withdrawal will continue to be (1) subject to service of process on its registered agent or on its secretary pursuant to section 15.10 (Section 33‑15‑110) and (2) liable for franchise and other taxes under other statutes.

The certificate of withdrawal provided by this section is recognition by the state that the foreign corporation has ceased to transact business in the state.

The application for certificate of withdrawal must appoint the secretary of state as the withdrawing corporation’s agent for service of process in any proceeding based on a cause of action which arose during the time it was authorized to transact business in the state. The application must also set forth a mailing address to which the secretary of state may forward any process received, and the corporation must agree to notify the secretary of state of any change in that address. There is no time limit on the obligation to advise the secretary of state of changes of mailing address. To ensure that the appointment of the secretary of state is unqualified and meets the precise requirements of this section, the secretary of state may require that an application for certificate of withdrawal be on a form prescribed by him. See section 1.21 (Section 33‑1‑210).

Service of process on the secretary of state pursuant to the statements in the application for certificate of withdrawal effects service on the corporation under section 15.20(c) (Section 33‑15‑200(c)). The secretary of state must then mail the process to the corporation at the mailing address specified in the application or in a subsequent communication to the secretary of state advising him of a change in mailing address.

SOUTH CAROLINA REPORTERS’ COMMENTS

This provision adds to the equivalent sections in the 1981 South Carolina Business Corporation Act the requirement that the Secretary of State must consent to the application for withdrawal. If the application meets the statutory requirements, then the Secretary of State can issue its consent by stamping the duplicate copy (see Section 33‑1‑250).

The Secretary of State is empowered to adopt a mandatory application form (see Section 33‑1‑210). The required contents are essentially the same as have been required in the past (see Section 33‑23‑90 of the 1981 South Carolina Business Corporation Act) except that there is a new requirement that the withdrawing company notify the Secretary of State of any change in address. Subsection (c) continues existing policy that service on a withdrawn corporation is made on the Secretary of State (Section 33‑23‑100(c) of the 1981 South Carolina Business Corporation Act). It should be noted, however, that the plaintiff, pursuant to Section 15‑9‑240(b)(2) of the 1976 Code, is permitted to directly serve the secretary of any withdrawn foreign corporation at its principal office. See State v. Ford Motor Co. 208 S.C. 379, 38 S.E.2d 242 (1946), upholding the propriety of serving the Secretary of State in situations where a corporation was exempt from qualifying but was conducting interstate business in South Carolina. See also, Y.C. Ballenger Electric Contractors, Inc. v. Reach‑All Sales, Inc. 279 S.C. 394, 279 S.E.2d 127 (1981). However, in Foster v. Morrison 226 S.C. 149, 84 S.E.2d 344 (1954), the court made clear that if the cause of action arose prior to withdrawal and did not arise out of the South Carolina transaction, then service on the South Carolina Secretary of State is improper. There is nothing in the new law that would seem to change the result. See also, Terry Packing Co. v. Southern Express Co. 125 S.C. 198, 118 S.E. 628 (1920).

DERIVATION: 1984 Model Act Section 15.20.

CROSS REFERENCES

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

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

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

Filing fees, see Section 33‑1‑220.

Filing requirements, see Section 33‑1‑200.

Forms, see Section 33‑1‑210.

Registered agent, see Section 33‑15‑107.

Service of process fees, see Section 33‑1‑220.

Service of process on foreign corporation, see Sections 15‑9‑240 and 33‑15‑110.

Transacting business, see Section 33‑15‑101.

Library References

Corporations 651.

Westlaw Topic No. 101.

C.J.S. Corporations Section 919.

RESEARCH REFERENCES

Forms

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

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

Treatises and Practice Aids

Fletcher Cyclopedia Law of Private Corporations Section 8588.10, Voluntary Withdrawal of Foreign Corporation from State.

ARTICLE 3

Revocation of Certificate of Authority

**SECTION 33‑15‑300.** Grounds for revocation.

(a) The Secretary of State shall commence a proceeding under Section 33‑15‑310 to revoke the certificate of authority of a foreign corporation authorized to transact business in this State if:

(1) the foreign corporation does not deliver its annual report to the Department of Revenue when due;

(2) the foreign corporation does not pay, when they are due, any franchise taxes, taxes payable under Chapter 7 of Title 12, or penalties imposed by this act or other law;

(3) the foreign corporation is without a registered agent or registered office in this State;

(4) the foreign corporation does not inform the Secretary of State under Section 33‑15‑108 or 33‑15‑109 that its registered agent or registered office has changed, that its registered agent has resigned, or that its registered office has been discontinued;

(5) an incorporator, director, officer, or agent of the foreign corporation signed a document he knew was false in any material respect with intent that the document be delivered to the Secretary of State for filing;

(6) the Secretary of State receives a duly authenticated certificate from the secretary of state or other official having custody of corporate records in the state or country under whose law the foreign corporation is incorporated stating that it has been dissolved or disappeared as the result of a merger.

(b) The Secretary of State shall proceed pursuant to Section 33‑15‑310(c) to revoke the certificate of authority of a foreign corporation authorized to transact business in this State if he is notified by the Department of Revenue that the corporation has failed to file a required tax return within sixty days of the notice required by Section 12‑6‑5520.

HISTORY: Derived from 1976 Code Section 33‑23‑100 [1962 Code Section 12‑23.10; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 4(1)], and Section 33‑23‑110 [1962 Code Section 12‑23.11; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 4(1)]; 1988 Act No. 444, Section 2; 1988 Act No. 659, Section 27; 1992 Act No. 361, Section 31; 1993 Act No. 181, Section 516; 2004 Act No. 221, Section 23.

OFFICIAL COMMENT

Section 15.30 (Section 33‑15‑300) authorizes the administrative revocation of the certificate of authority of a foreign corporation on the grounds specified. Administrative revocation is effective only upon compliance with the procedure specified in section 15.31 (Section 33‑15‑310). A foreign corporation that believes the administrative revocation is unwarranted may obtain judicial review of the secretary of state’s determination pursuant to section 15.32 (Section 33‑15‑320).

If a qualified foreign corporation has dissolved or merged into another corporation, the secretary of state may proceed to revoke its certificate of authority to transact business solely on the basis of a certificate from the secretary of state or other official of the state of incorporation. Section 15.30(6) (Section 33‑15‑300(6)). This subdivision provides a simple and inexpensive method to eliminate the names of corporations that are no longer in existence from the records of the secretary of state thereby making available the corporation names for use by other entities.

Section 15.30 (Section 33‑15‑300) is patterned after section 14.20 (Section 33‑14‑200) relating to the administrative dissolution of domestic corporations. See the Official Comment to section 14.20 (Section 33‑14‑200) for a fuller description of the policies underlying section 15.30 (Section 33‑15‑300).

SOUTH CAROLINA REPORTERS’ COMMENTS

South Carolina Reporters’ Comments amended by 1988 Act No. 659).

The grounds whereby the Secretary of State can revoke the foreign corporation’s qualification are almost identical to those in Sections 33‑23‑100 and 33‑23‑110 of the 1981 South Carolina Business Corporation Act. There are only two differences.

The prior law allowed cancelation if the company failed to make any required filing. Now cancelation is specified only for failure to file the annual report. Second, under the prior law (Section 33‑23‑100 of the 1981 South Carolina Business Corporation Act), if the company went out of business, it or its trustee was required to file notice of its dissolution with South Carolina. If the company failed to make this filing, then the Secretary of State of South Carolina could move to cancel the qualification. Under item (6) of this section, there is no expressed duty for the corporation to notify South Carolina. However, the Secretary of State will likely know when a company goes out of business since it will no longer be sending annual reports. Thus, the Secretary can cancel the qualification because of either the failure to file or lack of existing charter.

The Attorney General in 1965 Op. S.C. Att’y Gen. 13 (#1780) held that the Secretary of State could not cancel a foreign corporation’s qualification for its failure to pay the then annual license fee. The annual license fee was collected by the Tax Commissioner, and the Secretary of State could only cancel for failure to pay those fees he collected. A different result will exist under this statute since the Secretary of State has the power to terminate a foreign corporation’s qualification for failure to pay any franchise taxes prescribed by the law of South Carolina. It is irrelevant who collects the tax.

This provision adds to those contained in Model Act Section 15.30, the failure to file an income tax return or corporate license tax return within sixty days after the Tax Commission has notified the corporation of its delinquency under Section 12‑7‑675. The Secretary of State revokes the certificate of authority of the foreign corporation upon notification by the Tax Commission.

In South Carolina the annual report is filed with the Tax Commission rather than with the Secretary of State (as is the procedure in most states). See Sections 33‑16‑220 and 12‑19‑20. Subsection (a)(1) has been appropriately worded to specify that the foreign corporation is in default if the annual report is not filed with the Tax Commission.

Sections 15.30 and 15.40 of the 1984 Model Act Official Text generally give a delinquent foreign corporation two sixty‑day grace periods before the Secretary of State can revoke its authority. For example, if the company does not file its annual report within sixty days after it is due, the Secretary of State is only then (after the sixty‑day grace period) empowered to send a notice of the failure to file. If the foreign corporation does not do anything about this, then, after the expiration of a second sixty‑day period, the Secretary of State can revoke the foreign corporation’s authority to do business. In keeping with prior law, and in accordance with the procedure to dissolve administratively a domestic corporation, the Model Act language has been amended to empower the Secretary of State to send a sixty‑day final notice as soon as the company fails to file its annual report. If the company fails to cure its problem within sixty days of the deficiency notice, the Secretary of State then can revoke the authority without any further delay.

Although the language of the new section varies from the prior law, except as noted, the content of the provisions remains the same.

DERIVATION: 1984 Model Act Section 15.30.

CROSS REFERENCES

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

Appeal from revocation, see Section 33‑15‑320.

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

Delivery of false document to Secretary of State, see Section 33‑1‑290.

Foreign professional corporation, revocation of certificate of authority, see Section 33‑19‑520.

Procedure for revocation, see Section 33‑15‑310.

Registered office and agent, see Section 33‑15‑107 and 33‑15‑108.

Library References

Corporations 651.

Westlaw Topic No. 101.

C.J.S. Corporations Section 919.

**SECTION 33‑15‑310.** Procedure for and effect of revocation.

(a) If the Secretary of State determines that grounds exist under Section 33‑15‑300(a) for revocation of a certificate of authority, he shall mail written notice of his determination to the foreign corporation.

(b) If the foreign corporation does not correct each ground for revocation or demonstrate to the reasonable satisfaction of the Secretary of State that each ground determined by the Secretary of State does not exist within sixty days after the notice required by subsection (a) was mailed, the Secretary of State shall revoke the foreign corporation’s certificate of authority by signing a certificate of revocation that recites the grounds for revocation and its effective date. The Secretary of State shall file the original of the certificate and send a copy to the foreign corporation by registered or certified mail addressed to its registered agent at its registered office or to the office of the secretary of the corporation at its principal office.

(c) If the Secretary of State is notified by the Department of Revenue that the foreign corporation has failed to file a required tax return within sixty days of the notice required by Section 12‑6‑5520, the Secretary of State shall revoke the foreign corporation’s certificate of authority by signing a certificate of revocation that recites the grounds for revocation and its effective date. The Secretary of State shall file the original of the certificate and send a copy to the foreign corporation by registered or certified mail addressed to its registered agent at its registered office or to the office of the secretary of the corporation at its principal office.

(d) The authority of a foreign corporation to transact business in this State ceases on the date shown on the certificate revoking its certificate of authority.

(e) The Secretary of State’s revocation of a foreign corporation’s certificate of authority appoints the Secretary of State as the foreign corporation’s agent for service of process in any proceeding based on a cause of action which arose during the time the foreign corporation was authorized to transact business in this State. Service of process on the Secretary of State under this subsection is service on the foreign corporation. Upon receipt of process, the Secretary of State shall mail a copy of the process to the secretary of the foreign corporation at its principal office shown in its most recent annual report or in any subsequent communication received from the corporation stating the current mailing address of its principal office or, if none is on file, in its application for a certificate of authority.

(f) Revocation of a foreign corporation’s certificate of authority does not terminate the authority of the registered agent of the corporation.

HISTORY: Derived from 1976 Code Section 33‑23‑100 [1962 Code Section 12‑23.10; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 4(1)], and Section 33‑23‑110 [1962 Code Section 12‑23.11; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 4(1)] 1988 Act No. 444, Section 2; 1988 Act No. 659, Section 28; 1993 Act No. 181, Section 517; 2004 Act No. 221, Section 24.

OFFICIAL COMMENT

The procedure for revocation of a certificate of authority in section 15.31 (Section 33‑15‑310) establishes a simple method of completing the revocation while at the same time ensuring that the foreign corporation is advised of the contemplated action and has an opportunity to contest it in appropriate situations. In most situations, revocation by the secretary of state will not be contested.

After revocation, the secretary of state is appointed the foreign corporation’s agent for service of process; upon receipt of service, the secretary of state must forward the process to the foreign corporation’s principal address, as last reflected in his records. Revocation, however, does not of itself terminate the authority of the foreign corporation’s registered agent, so that process served on the agent by a third person who was unaware of the revocation may be effective.

Section 15.31 (Section 33‑15‑310) is patterned after section 14.21 (Section 33‑14‑210), relating to the administrative dissolution of a domestic corporation. See the Official Comment to section 14.21 (Section 33‑14‑210) for a fuller statement of the policies underlying section 15.31 (Section 33‑15‑310).

SOUTH CAROLINA REPORTERS’ COMMENTS

(South Carolina Reporters’ Comments amended by 1988 Act No. 659).

This section establishes more precision in the method to be used in revoking a foreign company’s qualification than the 1981 South Carolina Business Corporation Act. It grants the corporation sixty days to cure its default. Prior South Carolina practice was to allow ninety days. This provision provides for mailing of the notices to the foreign corporation, rather than service upon it as required by Section 15.31 of the 1984 Model Act. See the South Carolina Reporters’ Comments to Section 33‑14‑210. If the ground for revocation is the failure to file an income tax return or license tax return, the initial notice is given by the Tax Commission rather than the Secretary of State. If the return is not filed within the sixty‑day period following the notice, the Tax Commission notifies the Secretary of State, who then revokes the certificate of authority.

As was previously specified in Section 33‑23‑100 of the 1981 South Carolina Business Corporation Act, if the qualification is revoked, service of process is proper on the Secretary of State. See State v. Ford Motor Co. 208 S.C. 379, 38 S.E.2d 242 (1946), upholding the propriety of serving the Secretary of State in situations where a corporation was exempt from qualifying but was conducting interstate business in South Carolina. Subsection (f) also allows service of process to be made on the company’s agent, if the company or agent has not revoked this appointment. See also, Section 33‑15‑110, which permits service also to be made on the company’s secretary. Except as mentioned above, the provisions of this section are comparable to Section 33‑23‑110(b) and (c) of the 1981 South Carolina Business Corporation Act.

DERIVATION: 1984 Model Act Section 15.31.

CROSS REFERENCES

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

Appeal from revocation, see Section 33‑15‑320.

Contents of certificate of existence from Secretary of State, see Section 33‑1‑280.

Foreign professional corporation, revocation of certificate of authority, see Section 33‑19‑520.

Grounds for revocation, see Section 33‑15‑300.

Issuance of certificate of existence where Secretary of State has not mailed notice that corporation is subject to being dissolved, see Section 33‑1‑280.

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

Service on foreign corporation, see Sections 15‑9‑240, 33‑15‑110.

Library References

Corporations 651.

Westlaw Topic No. 101.

C.J.S. Corporations Section 919.

RESEARCH REFERENCES

Encyclopedias

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

Attorney General’s Opinions

Service of process on foreign corporation whose certificate of authority has been revoked by Secretary of State may be made upon Secretary of State in appropriate cases. 1990 Op Atty Gen No. 90‑1.

**SECTION 33‑15‑320.** Appeal from revocation.

(a) A foreign corporation may appeal the Secretary of State’s revocation of its certificate of authority to the Richland County Circuit Court within thirty days after the certificate of revocation was received. The foreign corporation appeals by petitioning the court to set aside the revocation and attaching to the petition copies of its certificate of authority and the Secretary of State’s certificate of revocation.

(b) The court may summarily order the Secretary of State to reinstate the certificate of authority or may take any other action the court considers appropriate.

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

HISTORY: 1988 Act No. 444, Section 2; 1988 Act No. 659, Section 29.

OFFICIAL COMMENT

A corporation whose certificate of authority is revoked may obtain judicial review of the revocation decision. In the review proceeding the court may summarily order the secretary of state to reinstate the corporation or take other action it deems appropriate.

The court with jurisdiction over an appeal should be specified; it is typically either a court in the state capital or a court in the country in which the corporation’s principal office is located. Moreover, states adopting this section of the Model Act should specify who has the burden of proof on appeal and the standard for judicial review. See the Official Comment to section 1.26 (Section 33‑1‑260).

SOUTH CAROLINA REPORTERS’ COMMENTS

(South Carolina Reporters’ Comments amended by 1988 Act No. 659).

This section has no counterpart in the 1981 South Carolina Business Corporation Act. Because of convenience, the Circuit Court of Richland County is designated to hear any appeal. As noted in the South Carolina Reporters’ Comments to Section 33‑1‑260, the provisions of the Administrative Procedures Act (as guaranteed by Article I, Section 22, of the Constitution of South Carolina, 1895) specify the appropriate procedures for reviewing the Secretary of State’s revocation of a foreign corporation’s certificate of authority. See specifically Section 1‑23‑380 of the 1976 Code.

A change has been made to subsection (a) to conform it to the procedure for mailing the notice of revocation under Section 33‑15‑310(b) and (c). The thirty‑day period for appeal starts to run upon receipt, rather than service, of the notice. This is when the notice would be effective under the general provisions of Section 33‑1‑410(e). If a dispute arises about the date or fact of receipt, the Secretary of State can obtain from the United States Postal Service a record of delivery of the notice since the notice has to be sent registered or certified mail.

DERIVATION: 1984 Model Act Section 15.32.

CROSS REFERENCES

Effective date of service, see Sections 15‑9‑240 and 33‑15‑110.

Foreign professional corporation, revocation of certificate of authority, see Section 33‑19‑520.

Grounds for revocation, see Section 33‑15‑300.

Procedure for revocation, see Section 33‑15‑310.

Library References

Appeal and Error 35.

Corporations 651.

Westlaw Topic Nos. 101, 30.

C.J.S. Appeal and Error Sections 48, 53.

C.J.S. Corporations Section 919.

RESEARCH REFERENCES

Treatises and Practice Aids

Fletcher Cyclopedia Law of Private Corporations Section 8604, Appeal from Revocation and Judicial Review.

**SECTION 33‑15‑330.** Reinstatement.

(A) A foreign corporation whose certificate of authority has been revoked administratively under Section 33‑15‑310 may apply to the Secretary of State for reinstatement at any time after the effective date of revocation. The application must:

(1) recite the name of the foreign corporation and the effective date of its administrative revocation;

(2) state that the grounds for revocation either did not exist or have been eliminated;

(3) state that the foreign corporation’s name satisfies the requirements of Section 33‑4‑101;

(4) contain a certificate from the South Carolina Department of Revenue stating that all taxes, penalties, and interest owed by the corporation, whether assessed or not, have been paid.

(B) If the Secretary of State determines that the application contains the information required by subsection (A) and that the information is correct, he shall cancel the certificate of revocation and prepare a certificate of reinstatement that recites his determination and the effective date of reinstatement, file the original of the certificate, and send a copy to the foreign corporation.

(C) When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative revocation and the foreign corporation may resume carrying on its business as if the administrative revocation had never occurred.

HISTORY: 1991 Act No. 109, Section 7; 1993 Act No. 181, Section 518.

Library References

Corporations 648.

Westlaw Topic No. 101.

C.J.S. Corporations Section 900.