CHAPTER 2

Control Share Acquisitions; Business Combinations

ARTICLE 1

Control Share Acquisitions

**SECTIONS 35‑2‑10 to 35‑2‑100.** Repealed by 1988 Act No. 444, Section 5, eff from and after April 22, 1988.

Editor’s Note

Former Sections 35‑2‑10 to 35‑2‑100 were derived from 1981 Act No. 146, Section 9.

Former chapter 2, Sections 35‑2‑10 through 35‑2‑130 was part of the Take‑over Bid Disclosure Act.

**SECTION 35‑2‑101.** “Control shares” defined.

 As used in this article, “control shares” means shares that, except for this article, would have voting power with respect to shares of an issuing public corporation that, when added to all other shares of the issuing public corporation owned by a person or in respect to which that person may exercise or direct the exercise of voting power would entitle that person, immediately after acquisition of the shares (directly or indirectly, alone or as a part of a group), to exercise or direct the exercise of the voting power of the issuing public corporation in the election of directors within any of the following ranges of voting power:

 (1) one‑fifth or more but less than one‑third of all voting power;

 (2) one‑third or more but less than a majority of all voting power;

 (3) a majority or more of all voting power.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

Editor’s Note

1988 Act No. 444 Sections 1, 6 and 9 provide as follows:

“Section 1. Whenever ‘this act’ appears in Section 2 of this act it means Chapters 1 through 20 of Title 33 of the 1976 Code, and these chapters may be cited as the ‘South Carolina Business Corporation Act of 1988’.”

“Section 6. For purposes of this act, when the terms ‘effective date of this chapter’ or ‘effective date of this article’ or similar derivations thereof are used in Chapter 2, Title 35 of the 1976 Code, as contained in Section 5 of this act, these terms must be construed to mean the effective date of the amendments to Chapter 2 of Title 35 as contained in this act.’”

“Section 9. If any provision of this act or its application to any person or circumstance is held invalid by a court of competent jurisdiction, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application and, to this end, the provisions of the act are severable.”

**SECTION 35‑2‑102.** “Control share acquisition” defined.

 (a) As used in this article, “control share acquisition” means the acquisition (directly or indirectly) by any person of ownership of, or the power to direct the exercise of voting power with respect to, issued and outstanding control shares.

 (b) For purposes of this section, shares acquired within ninety days or shares acquired pursuant to a plan to make a control share acquisition are considered to have been acquired in the same acquisition.

 (c) For purposes of this section, a person who acquires shares in the ordinary course of business for the benefit of others in good faith and not for the purpose of circumventing this article has voting power only of shares in respect of which that person would be able to exercise or direct the exercise of votes without further instruction from others.

 (d) The acquisition of any shares of an issuing public corporation does not constitute a control share acquisition if the acquisition is consummated in any of the following circumstances:

 (1) before the effective date of this chapter;

 (2) pursuant to a contract existing before the effective date of this chapter;

 (3) pursuant to the laws of descent and distribution;

 (4) pursuant to the satisfaction of a pledge or other security interest created in good faith and not for the purpose of circumventing this article;

 (5) pursuant to a merger or plan of share exchange in compliance with law if the issuing public corporation is a party to the agreement of merger or plan of share exchange.

 (e) The acquisition of shares of an issuing public corporation in good faith and not for the purpose of circumventing this article by or from:

 (1) any person whose voting rights had previously been authorized by shareholders in compliance with this article; or

 (2) any person whose previous acquisition of shares of an issuing public corporation would have constituted a control share acquisition but for subsection (d) does not constitute a control share acquisition, unless the acquisition entitles any person (directly or indirectly, alone or as a part of a group) to exercise or direct the exercise of voting power of the corporation in the election of directors in excess of the range of the voting power otherwise authorized.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

**SECTION 35‑2‑103.** “Interested shares” defined; “Exchange Act” defined.

 (A) As used in this article, “interested shares” means the shares of an issuing public corporation in respect of which any of the following persons may exercise or direct the exercise of the voting power of the corporation in the election of directors:

 (1) an acquiring person or member of a group with respect to a control share acquisition;

 (2) any officer of the issuing public corporation;

 (3) any employee of the issuing public corporation who is also a director of the corporation.

 (B) As used in this article, “Exchange Act” means the act of Congress known as the Securities Exchange Act of 1934, as amended.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

Federal Aspects

Securities Exchange Act of 1934, see 15 U.S.C.A. Sections 78a et seq.

**SECTION 35‑2‑104.** “Issuing public corporation” defined.

 (a) As used in this article, “issuing public corporation” means a domestic corporation that has either:

 (1) a class of voting shares registered with the Securities and Exchange Commission or another federal agency under Section 12 of the 1934 Exchange Act; and

 (2) its principal place of business, its principal office, or substantial assets within South Carolina; and either:

 (A) more than ten percent of its shareholders resident in South Carolina;

 (B) more than ten percent of its shares owned by South Carolina residents; or

 (C) ten thousand shareholders resident in South Carolina.

 (b) The residence of a shareholder is presumed to be the address appearing in the records of the corporation.

 (c) Shares held by banks (except as trustee or guardian), brokers, or nominees must be disregarded for purposes of calculating the percentages or numbers described in this section.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988; 1990 Act No. 446, Section 9, eff May 7, 1990.

Effect of Amendment

The 1990 amendment in subsection (a), item (1), inserted “or another federal agency” and substituted “and” for “or” at the end; deleted the provisions of former items (2) and (3), and renumbered former item (4) as item (2).

Federal Aspects

Securities Exchange Act of 1934, see 15 U.S.C.A. Sections 78a et seq.

**SECTION 35‑2‑105.** Voting rights under Section 35‑2‑109.

 Unless the corporation’s articles of incorporation or bylaws provide that this article does not apply to control share acquisitions of shares of the corporation before the control share acquisition, control shares of an issuing public corporation acquired in a control share acquisition have only those voting rights as are conferred by Section 35‑2‑109.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

RESEARCH REFERENCES

Forms

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

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

**SECTION 35‑2‑106.** Acquiring person statement.

 Any person who proposes to make or has made a control share acquisition may at the person’s election deliver an acquiring person statement to the issuing public corporation at the issuing public corporation’s principal office. The acquiring person statement must set forth all of the following:

 (1) the identity of the acquiring person and each other member of any group of which the person is a part for purposes of determining control shares;

 (2) a statement that the acquiring person statement is given pursuant to this article;

 (3) the number of shares of the issuing public corporation owned (directly or indirectly) by the acquiring person and each other member of the group;

 (4) the range of voting power under which the control share acquisition falls or, if consummated, would fall;

 (5) if the control share acquisition has not taken place:

 (A) a description in reasonable detail of the terms of the proposed control share acquisition; and

 (B) representations of the acquiring person, together with a statement in reasonable detail of the facts upon which they are based, that the proposed control share acquisition, if consummated, will not be contrary to law, and that the acquiring person has the financial capacity to make the proposed control share acquisition.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

**SECTION 35‑2‑107.** Special meeting of shareholders.

 (a) If the acquiring person requests at the time of delivery of an acquiring person statement and gives an undertaking to pay the corporation’s expenses of a special meeting, within ten days thereafter, the directors of the issuing public corporation shall call a special meeting of shareholders of the issuing public corporation for the purpose of considering the voting rights to be accorded the shares acquired or to be acquired in the control share acquisition.

 (b) Unless the acquiring person agrees in writing to another date, the special meeting of shareholders must be held within fifty days after receipt by the issuing public corporation of the request.

 (c) If no request is made, the voting rights to be accorded the shares acquired in the control share acquisition must be presented to the next special or annual meeting of shareholders.

 (d) If the acquiring person requests in writing at the time of delivery of the acquiring person statement, the special meeting must not be held sooner than thirty days after receipt by the issuing public corporation of the acquiring person statement.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

**SECTION 35‑2‑108.** Notice of shareholder meeting.

 (a) If a special meeting is requested, notice of the special meeting of shareholders must be given as promptly as reasonably practicable by the issuing public corporation to all shareholders of record as of the record date set for the meeting, whether or not entitled to vote at the meeting.

 (b) Notice of the special or annual shareholder meeting at which the voting rights are to be considered must include or be accompanied by both of the following:

 (1) a copy of the acquiring person statement delivered to the issuing public corporation pursuant to this article;

 (2) a statement by the board of directors of the corporation, authorized by its directors, of its position or recommendation, or that it is taking no position or making no recommendation, with respect to the proposed control share acquisition.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

**SECTION 35‑2‑109.** Voting rights of acquired control shares; resolution.

 (a) Control shares acquired in a control share acquisition have the same voting rights as were accorded the shares before the control share acquisition only to the extent granted by resolution approved by the shareholders of the issuing public corporation.

 (b) To be approved under this section, the resolution must be approved by:

 (1) each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that voting group, with the holders of the outstanding shares of a class being entitled to vote as a separate voting group if the proposed control share acquisition, if fully carried out, would result in any of the following changes:

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

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

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

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

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

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

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

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

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

 (2) each voting group entitled to vote separately on the proposal by a majority of all the votes entitled to be cast by that group, excluding all interested shares.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

**SECTION 35‑2‑110.** Redemption of acquired control shares.

 (a) If authorized in a corporation’s articles of incorporation or bylaws before a control share acquisition has occurred, control shares acquired in a control share acquisition with respect to which no acquiring person statement has been filed with the issuing public corporation, at any time during the period ending sixty days after the last acquisition of control shares by the acquiring person, may be subject to redemption by the corporation at the fair value thereof pursuant to the procedures adopted by the corporation.

 (b) Control shares acquired in a control share acquisition are not subject to redemption after an acquiring person statement has been filed unless the shares are not accorded full voting rights by the shareholders as provided in Section 35‑2‑109.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

Editor’s Note

Former Section 35‑2‑110 [1981 Act No. 146, Section 9; Repealed by 1988 Act No. 444, Section 5, eff April 22, 1988] was part of the Take‑over Bid Disclosure Act.

LAW REVIEW AND JOURNAL COMMENTARIES

Recovery of Attorneys’ Fees as Costs or Damages in South Carolina. 38 S.C. L. Rev. 823.

**SECTION 35‑2‑111.** Dissenters’ rights; “fair value” defined.

 (a) Unless otherwise provided in a corporation’s articles of incorporation or bylaws before a control share acquisition has occurred, in the event control shares acquired in a control share acquisition are accorded full voting rights and the acquiring person has acquired control shares with a majority or more of all voting power, all shareholders of the issuing public corporation have dissenters’ rights to receive fair value for their shares as provided in this article.

 (b) As soon as practicable after these events have occurred, the board of directors shall cause a notice to be sent to all shareholders of the corporation advising them of the facts and that they have dissenters’ rights to receive the fair value of their shares.

 (c) As used in this section, ‘fair value’ with respect to a dissenter’s shares, means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable. The value of the shares is to be determined by techniques that are accepted generally in the financial community, except that this value may not be less than the highest price paid per share by the acquiring person in the control share acquisition.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

CROSS REFERENCES

Shareholder’s right to dissent and obtain payment of fair value of shares, see Section 33‑13‑102.

**SECTIONS 35‑2‑120, 35‑2‑130.** Repealed by 1988 Act No. 444, Section 5, eff from and after April 22, 1988.

Editor’s Note

Former Sections 35‑2‑120, 35‑2‑130 were derived from 1981 Act No. 146, Section 9.

Former chapter 2, Sections 35‑2‑120 and 35‑2‑130 was part of the Take‑over Bid Disclosure Act.

ARTICLE 2

Business Combinations

**SECTION 35‑2‑201.** “Affiliate” defined.

 As used in this article, “affiliate” means a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with a specified person.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

Editor’s Note

1988 Act No. 444 Section 6 provides as follows:

“For purposes of this act, when the terms ‘effective date of this chapter’ or ‘effective date of this article’ or similar derivations thereof are used in Chapter 2, Title 35 of the 1976 Code, as contained in Section 5 of this act, these terms must be construed to mean the effective date of the amendments to Chapter 2 of Title 35 as contained in this act.”

CROSS REFERENCES

South Carolina Research Authority, powers of board of trustees, see Section 13‑17‑70.

**SECTION 35‑2‑202.** “Announcement date” defined.

 As used in this article, “announcement date”, when used in reference to any business combination, means the date of the first public announcement of the definitive proposal for the business combination, without regard to subsequent amendments.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

**SECTION 35‑2‑203.** “Associate” defined.

 As used in this article, “associate”, when used to indicate a relationship with any person, means:

 (1) any corporation or organization of which the person is an officer or partner or is (directly or indirectly) the beneficial owner of ten percent or more of any class of voting shares;

 (2) any trust or other estate in which the person has a substantial beneficial interest or as to which the person serves as trustee or in a similar fiduciary capacity; and

 (3) any relative or spouse of the person, or any relative of the spouse, who has the same home as the person.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

**SECTION 35‑2‑204.** “Beneficial owner” defined.

 As used in this article, “beneficial owner”, when used with respect to any shares, means a person that:

 (1) individually or with or through any of its affiliates or associates beneficially owns the shares (directly or indirectly);

 (2) individually or with or through any of its affiliates or associates has:

 (A) the right to acquire the shares (whether the right is exercisable immediately or only after the passage of time) under any agreement, arrangement, or understanding (whether or not in writing), or upon the exercise of conversion rights, exchange rights, warrants or options, or otherwise. However, a person is not considered the beneficial owner of shares tendered under a tender or exchange offer made by the person or any of the person’s affiliates or associates until the tendered shares are accepted for purchase or exchange; or

 (B) the right to vote the shares under any agreement, arrangement, or understanding (whether or not in writing). However, a person is not considered the beneficial owner of any shares under this subitem (B) if the agreement, arrangement, or understanding to vote the shares arises solely from a revocable proxy or consent given in response to a proxy or consent solicitation made in accordance with the applicable regulations under the Exchange Act and is not then reportable on a Schedule 13D under the Exchange Act, or any comparable or successor report; or

 (3) has any agreement, arrangement, or understanding (whether or not in writing) for the purpose of acquiring, holding, voting (except voting under a revocable proxy or consent as described in subitem (B) of item (2) of this section or disposing of the shares with any other person that beneficially owns, or whose affiliates or associates beneficially own (directly or indirectly) the shares.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

Federal Aspects

Securities Exchange Act of 1934, see 15 U.S.C.A. Sections 78a et seq.

**SECTION 35‑2‑205.** “Business combination” defined.

 As used in this article, “business combination”, when used in reference to any resident domestic corporation and any interested shareholder of the resident domestic corporation, means any of the following:

 (1) Any merger of the resident domestic corporation or any subsidiary of the resident domestic corporation with:

 (A) the interested shareholder; or

 (B) any other corporation (whether or not itself an interested shareholder of the resident domestic corporation) that is, or after the merger or consolidation would be, an affiliate or associate of the interested shareholder.

 (2) Any sale, lease, exchange, mortgage, pledge, transfer, or other disposition in one transaction or a series of transactions to or with the interested shareholder or any affiliate or associate of the interested shareholder of assets of the resident domestic corporation or any subsidiary of the resident domestic corporation:

 (A) having an aggregate market value equal to ten percent or more of the aggregate market value of all the assets, determined on a consolidated basis, of the resident domestic corporation;

 (B) having an aggregate market value equal to ten percent or more of the aggregate market value of all the outstanding shares of the resident domestic corporation; or

 (C) representing ten percent or more of the earning power or net income, determined on a consolidated basis, of the resident domestic corporation.

 (3) The issuance or transfer by the resident domestic corporation or any subsidiary of the resident domestic corporation in one transaction or a series of transactions of any shares of the resident domestic corporation or any subsidiary of the resident domestic corporation that have an aggregate market value equal to five percent or more of the aggregate market value of all the outstanding shares of the resident domestic corporation to the interested shareholder or any affiliate or associate of the interested shareholder except under the exercise of warrants or rights to purchase shares offered, or a dividend or distribution paid or made, pro rata to all shareholders of the resident domestic corporation.

 (4) The adoption of any plan or proposal for the liquidation or dissolution of the resident domestic corporation proposed by, or under any agreement, arrangement, or understanding (whether or not in writing) with, the interested shareholder or any affiliate or associate of the interested shareholder.

 (5) Any:

 (A) reclassification of securities (including without limitation any share split, share dividend, or other distribution of shares in respect of shares, or any reverse share split);

 (B) recapitalization of the resident domestic corporation;

 (C) merger or consolidation of the resident domestic corporation with any subsidiary of the resident domestic corporation; or

 (D) other transaction (whether or not with or into or otherwise involving the interested shareholder) proposed by, or under any agreement, arrangement, or understanding (whether or not in writing) with, the interested shareholder or any affiliate or associate of the interested shareholder, that has the effect (directly or indirectly) of increasing the proportionate share of the outstanding shares of any class or series of voting shares or securities convertible into voting shares of the resident domestic corporation or any subsidiary of the resident domestic corporation that is (directly or indirectly) owned by the interested shareholder or any affiliate or associate of the interested shareholder, except as a result of immaterial changes due to fractional share adjustments.

 (6) Any receipt by the interested shareholder or any affiliate or associate of the interested shareholder of the benefit (directly or indirectly, except proportionately as a shareholder of the resident domestic corporation) of any loans, advances, guarantees, pledges, or other financial assistance or any tax credits or other tax advantages provided by or through the resident domestic corporation.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

**SECTION 35‑2‑206.** “Common stock” defined.

 As used in this article, “common stock” means any shares other than preferred shares.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

**SECTION 35‑2‑207.** “Consummation date” defined.

 As used in this article, “consummation date”, with respect to any business combination, means the date of consummation of the business combination or, in the case of a business combination as to which a shareholder vote is taken, the later of:

 (1) the business day before the vote; or

 (2) twenty days before the date of consummation of the business combination.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

**SECTION 35‑2‑208.** “Control” defined.

 (a) As used in this article, “control”, including the terms “controlling”, “controlled by”, and “under common control with”, means the possession (directly or indirectly) of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

 (b) A person’s beneficial ownership of ten percent or more of the voting power of a corporation’s outstanding voting shares creates a presumption that the person has control of the corporation.

 (c) Notwithstanding subsections (a) and (b), a person is not considered to have control of a corporation if the person holds voting power, in good faith and not for the purpose of circumventing this article, as an agent, bank, broker, nominee, custodian, or trustee for one or more beneficial owners who do not individually or as a group have control of the corporation.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

**SECTION 35‑2‑209.** “Exchange Act” defined.

 As used in this article, “Exchange Act” means the act of Congress known as the Securities Exchange Act of 1934, as amended.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

Federal Aspects

Securities Exchange Act of 1934, see 15 U.S.C.A. Sections 78a et seq.

**SECTION 35‑2‑210.** “Interested shareholder” defined.

 (a) As used in this article, “interested shareholder”, when used in reference to any resident domestic corporation, means any person (other than the resident domestic corporation or any subsidiary of the resident domestic corporation) that is:

 (1) the beneficial owner (directly or indirectly) of ten percent or more of the voting power of the outstanding voting shares of the resident domestic corporation; or

 (2) an affiliate or associate of the resident domestic corporation and at any time within the two‑year period immediately before the date in question was the beneficial owner (directly or indirectly) of ten percent or more of the voting power of the then outstanding shares of the resident domestic corporation.

 (b) For the purpose of determining whether a person is an interested shareholder, the number of voting shares of the resident domestic corporation considered to be outstanding includes shares considered to be beneficially owned by the person through application of Section 35‑2‑204, but does not include any other unissued shares of voting shares of the resident domestic corporation that may be issuable under any agreement, arrangement, or understanding, or upon exercise of conversion rights, warrants, or options, or otherwise.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

**SECTION 35‑2‑211.** “Market value” defined.

 As used in this article, “market value”, when used in reference to shares or property of any resident domestic corporation, means the following:

 (1) In the case of shares, the highest closing sale price of a share during the thirty‑day period immediately preceding the date in question on the composite tape for New York Stock Exchange listed shares, or, if the shares are not quoted on the composite tape or not listed on the New York Stock Exchange, on the principal United States securities exchange registered under the Exchange Act on which the shares are listed, or, if the shares are not listed on any such exchange, the highest closing bid quotation with respect to a share during the thirty‑day period preceding the date in question on the National Association of Securities Dealers, Inc., Automated Quotations System or any system then in use, or if no such quotation is available, the fair market value on the date in question of a share as determined by the board of directors of the resident domestic corporation in good faith.

 (2) In the case of property other than cash or shares, the fair market value of the property on the date in question as determined by the board of directors of the resident domestic corporation in good faith.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

Federal Aspects

Securities Exchange Act of 1934, see 15 U.S.C.A. Sections 78a et seq.

**SECTION 35‑2‑212.** “Preferred stock” defined.

 As used in this article, “preferred stock” means any class or series of shares of a resident domestic corporation that under the bylaws or articles of incorporation of the resident domestic corporation:

 (1) is entitled to receive payment of dividends before any payment of dividends on some other class or series of shares; or

 (2) is entitled in the event of any voluntary liquidation, dissolution, or winding up of the corporation to receive payment or distribution of a preferential amount before any payments or distributions are received by some other class or series of shares.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

**SECTION 35‑2‑213.** “Resident domestic corporation” defined.

 (a) As used in this article, “resident domestic corporation” means a domestic corporation that has a class of voting shares registered with the Securities and Exchange Commission or another federal agency under Section 12 of the 1934 Exchange Act.

 (b) A resident domestic corporation does not cease to be a resident domestic corporation by reason of events occurring or actions taken while the resident domestic corporation is subject to this article.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988; 1990 Act No. 446, Section 10, eff May 7, 1990.

Effect of Amendment

The 1990 amendment revised, in subsection (a), the definition of “resident domestic corporation”.

**SECTION 35‑2‑214.** “Share” defined.

 As used in this article, “share” means:

 (1) any share or similar security, any certificate of interest, and participation in any profit sharing agreement, any voting trust certificate, or any certificate of deposit for a share; and

 (2) any security convertible, with or without consideration, into shares, or any warrant, call, or other option or privilege of buying shares without being bound to do so, or any other security carrying any right to acquire, subscribe to, or purchase shares.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

**SECTION 35‑2‑215.** “Share acquisition date” defined.

 As used in this article, “share acquisition date”, with respect to any person and any resident domestic corporation, means the date that the person first becomes an interested shareholder of the resident domestic corporation.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

**SECTION 35‑2‑216.** “Subsidiary” defined.

 As used in this article, “subsidiary” of any resident domestic corporation means any other corporation of which voting shares having a majority of the outstanding voting shares of the other corporation entitled to be cast are owned (directly or indirectly) by the resident domestic corporation.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

**SECTION 35‑2‑217.** “Voting shares” defined.

 As used in this article, “voting shares” means shares of capital stock of a corporation entitled to vote generally in the election of directors.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

**SECTION 35‑2‑218.** Business combination with interested shareholder within two years of share acquisition date.

 (a) Notwithstanding any other provision of law, except Sections 35‑2‑220 through 35‑2‑223, a resident domestic corporation may not engage in any business combination with any interested shareholder of the resident domestic corporation for a period of two years following the interested shareholder’s share acquisition date unless the business combination or the purchase of shares made by the interested shareholder on the interested shareholder’s share acquisition date is approved by a majority of the disinterested members of the board of directors of the resident domestic corporation before the interested shareholder’s share acquisition date. As used in this section, a director or person is ‘disinterested’ if the director or person is not a present or former officer or employee of the resident domestic corporation, or related corporation. If the board has less than three disinterested directors, the board shall appoint three or more disinterested persons to serve as a committee to vote on the issue.

 (b) If a good faith proposal regarding a business combination is made in writing to the board of directors of the resident domestic corporation, the board of directors shall respond in writing within thirty days or that shorter period, if any, as may be required by the Exchange Act, setting forth its reasons for its decision regarding the proposal.

 (c) If a good faith proposal to purchase shares is made in writing to the board of directors of the resident domestic corporation, the board of directors, unless it responds affirmatively in writing within thirty days or that shorter period, if any, as may be required by the Exchange Act, is considered to have disapproved the share purchase.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

Federal Aspects

Securities Exchange Act of 1934, see 15 U.S.C.A. Sections 78a et seq.

**SECTION 35‑2‑219.** Business combination with interested shareholder; requirements.

 Notwithstanding any other provision of law, except Sections 35‑2‑218 and 35‑2‑220 through 35‑2‑223, a resident domestic corporation may not engage at any time in any business combination with any interested shareholder of the resident domestic corporation other than a business combination meeting all requirements of the articles of incorporation of the domestic corporation and the requirements specified in any of the following:

 (1) a business combination approved by the board of directors of the resident domestic corporation before the interested shareholder’s share acquisition date, or as to which the purchase of shares made by the interested shareholder on the interested shareholder’s share acquisition date had been approved by the board of directors of the resident domestic corporation before the interested shareholder’s share acquisition date;

 (2) a business combination approved by the affirmative vote of the holders of a majority of the outstanding voting shares not beneficially owned by the interested shareholder proposing the business combination, or any affiliate or associate of the interested shareholder proposing the business combination, at a meeting called for that purpose no earlier than two years after the interested shareholder’s share acquisition date;

 (3) a business combination that meets all of the following conditions:

 (A) The aggregate amount of the cash and the market value as of the consummation date of consideration other than cash to be received per share by holders of outstanding shares of common stock of the resident domestic corporation in the business combination is at least equal to the higher of the following:

 (i) the highest per share price paid by the interested shareholder, at a time when the interested shareholder was the beneficial owner (directly or indirectly) of five percent or more of the outstanding voting shares of the resident domestic corporation, for any shares of common stock of the same class or series acquired by it within the two‑year period immediately before the announcement date with respect to the business combination or within the two‑year period immediately before, or in, the transaction in which the interested shareholder became an interested shareholder, whichever is higher; plus, in either case, interest compounded annually from the earliest date on which the highest per share acquisition price was paid through the consummation date at the rate for one‑year United States Treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of common stock since the earliest date, up to the amount of the interest;

 (ii) the market value per share of common stock on the announcement date with respect to the business combination or on the interested shareholder’s share acquisition date, whichever is higher; plus interest compounded annually from that date through the consummation date at the rate for one‑year United States Treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of common stock since that date, up to the amount of the interest.

 (B) The aggregate amount of the cash and the market value as of the consummation date of consideration other than cash to be received per share by holders of outstanding shares of any class or series of shares, other than common stock, of the resident domestic corporation is at least equal to the highest of the following (whether or not the interested shareholder has previously acquired any shares of the class or series of shares):

 (i) the highest per share price paid by the interested shareholder, at a time when the interested shareholder was the beneficial owner (directly or indirectly) of five percent or more of the outstanding voting shares of the resident domestic corporation, for any shares of the class or series of shares acquired by it within the two‑year period immediately before the announcement date with respect to the business combination or within the two‑year period immediately before, or in, the transaction in which the interested shareholder became an interested shareholder, whichever is higher; plus, in either case, interest compounded annually from the earliest date on which the highest per share acquisition price was paid through the consummation date at the rate for one‑year United States Treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of the class or series of shares since the earliest date, up to the amount of the interest;

 (ii) the highest preferential amount per share to which the holders of shares of the class or series of shares are entitled in the event of any voluntary liquidation, dissolution, or winding up of the resident domestic corporation, plus the aggregate amount of any dividends declared or due as to which the holders are entitled before payment of dividends, on some other class or series of shares (unless the aggregate amount of the dividends is included in the preferential amount);

 (iii) the market value per share of the class or series of shares on the announcement date with respect to the business combination or on the interested shareholder’s share acquisition date, whichever is higher; plus interest compounded annually from that date through the consummation date at the rate of one‑year United States Treasury obligations from time to time in effect less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of the class or series of shares since that date, up to the amount of the interest.

 (C) The consideration to be received by holders of a particular class or series of outstanding shares, including common stock, of the resident domestic corporation in the business combination is in cash or in the same form as the interested shareholder has used to acquire the largest number of shares of the class or series of shares previously acquired by it, and the consideration must be distributed promptly.

 (D) The holders of all outstanding shares of the resident domestic corporation not beneficially owned by the interested shareholder immediately before the consummation of the business combination are entitled to receive in the business combination cash or other consideration for the shares in compliance with subitems (A), (B), and (C).

 (E) After the interested shareholder’s share acquisition date and before the consummation date with respect to the business combination, the interested shareholder has not become the beneficial owner of any additional voting shares of the resident domestic corporation except:

 (i) as part of the transaction that resulted in the interested shareholder becoming an interested shareholder;

 (ii) by virtue of proportionate share splits, share dividends, or other distributions of shares in respect of shares not constituting a business combination under Section 35‑2‑205(5);

 (iii) through a business combination meeting all of the conditions of Section 35‑2‑218 and this section; or

 (iv) through purchase by the interested shareholder at any price that, if the price had been paid in an otherwise permissible business combination the announcement date and consummation date of which were the date of the purchase, would have satisfied the requirement of subitems (A), (B), and (C).

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

**SECTION 35‑2‑220.** Amendment of articles of incorporation making corporation subject to this article; application of article.

 This article does not apply to any business combination of a resident domestic corporation of which the articles of incorporation have been amended to provide that the resident domestic corporation is not subject to this article, and is a business combination with an interested shareholder whose share acquisition date is before the effective date of the amendment.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

Editor’s Note

1988 Act No. 444 Section 6 provides as follows:

“For purposes of this act, when the terms ‘effective date of this chapter’ or ‘effective date of this article’ or similar derivations thereof are used in Chapter 2, Title 35 of the 1976 Code, as contained in Section 5 of this act, these terms must be construed to mean the effective date of the amendments to Chapter 2 of Title 35 as contained in this act.”

**SECTION 35‑2‑221.** Election not to be covered by this article; application of article.

 This article does not apply to any business combination of a resident domestic corporation:

 (1) the original articles of incorporation of which contain a provision expressly electing not to be governed by this article; or

 (2) that adopts an amendment of the resident domestic corporation’s articles of incorporation expressly electing not to be governed by this article; or

 (3) with an interested shareholder whose share acquisition date is on or before the effective date of this article; or

 (4) such business combination was the subject of a written agreement in existence and binding upon the resident domestic corporation on the effective date of this article and such agreement is not amended or modified in any material respect after the effective date of this article.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

Editor’s Note

1988 Act No. 444 Section 6 provides as follows:

“For purposes of this act, when the terms ‘effective date of this chapter’ or ‘effective date of this article’ or similar derivations thereof are used in Chapter 2, Title 35 of the 1976 Code, as contained in Section 5 of this act, these terms must be construed to mean the effective date of the amendments to Chapter 2 of Title 35 as contained in this act.”

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 3:4 , Checklist‑Drafting Articles of Incorporation.

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

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

**SECTION 35‑2‑222.** Inadvertent interested shareholder; application of article.

 This article does not apply to any business combination of a resident domestic corporation with an interested shareholder of the resident domestic corporation who became an interested shareholder inadvertently, if the interested shareholder:

 (1) as soon as practicable, divests itself of a sufficient amount of the voting shares of the corporation so that it no longer is the beneficial owner (directly or indirectly) of ten percent or more of the outstanding voting shares of the resident domestic corporation; and

 (2) at any time within the two‑year period preceding the announcement date with respect to the business combination would not have been an interested shareholder but for the inadvertent acquisition.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

**SECTION 35‑2‑223.** Interested shareholder on the effective date of this chapter; application of article.

 This article does not apply to any business combination with an interested shareholder who was an interested shareholder on the effective date of this chapter.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

Editor’s Note

1988 Act No. 444 Section 6 provides as follows:

“For purposes of this act, when the terms ‘effective date of this chapter’ or ‘effective date of this article’ or similar derivations thereof are used in Chapter 2, Title 35 of the 1976 Code, as contained in Section 5 of this act, these terms must be construed to mean the effective date of the amendments to Chapter 2 of Title 35 as contained in this act.”

**SECTION 35‑2‑224.** Applicability to foreign corporations.

 (a) The provisions of this article also apply to a foreign corporation incorporated in any state other than South Carolina that has:

 (1) a class of voting shares registered with the Securities and Exchange Commission or another federal agency under Section 12 of the 1934 Exchange Act; and

 (2) its principal place of business, its principal office, or more than forty percent of its assets within South Carolina; and either:

 (A) more than ten percent of its shareholders resident in South Carolina;

 (B) more than ten percent of its shares owned by South Carolina residents; or

 (C) ten thousand shareholders resident in South Carolina.

 (b) The residence of a shareholder is presumed to be the address appearing in the records of the corporation.

 (c) Shares held by banks (except as trustee or guardian), brokers, or nominees must be disregarded for purposes of calculating the percentages or numbers described in this section.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988; 1990 Act No. 446, Section 11, eff May 7, 1990.

Effect of Amendment

The 1990 amendment, in subsection (a), item (1), inserted “or another federal agency” and substituted “and” for “or” at the end; the provisions of former items (2) and (3) were deleted, and former item (4) was renumbered item (2).

Federal Aspects

Securities Exchange Act of 1934, see 15 U.S.C.A. Sections 78a et seq.

**SECTION 35‑2‑225.** Severability.

 If any section, subsection, item, paragraph, subparagraph, sentence, clause, or phrase of this article is declared invalid, unenforceable, unlawful, or unconstitutional by a court of competent jurisdiction by final judgment, that judgment shall not affect or does not affect any other section, subsection, item, paragraph, subparagraph, sentence, clause, or phrase of this article which will remain in full force and effect as if the portion declared invalid or unconstitutional was not a part thereof originally.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.

**SECTION 35‑2‑226.** Conflict of laws with respect to foreign corporations.

 If the laws of the State under which a foreign corporation otherwise affected by this article was incorporated, chartered, or otherwise organized are expressly inconsistent with any section, subsection, item, paragraph, subparagraph, sentence, clause, or phrase of this article, that portion of this article has no force and effect with respect to that foreign corporation and the remainder of this article remains in full force and effect with respect to that foreign corporation as if that inconsistent section, subsection, item, paragraph, subparagraph, sentence, clause, or phrase of this article was not a part thereof originally.

HISTORY: 1988 Act No. 444, Section 5, eff April 22, 1988.