CHAPTER 2

Incorporation

**SECTION 33‑2‑101.** Incorporators.

 Any person may act as the incorporator of a corporation by delivering articles of incorporation to the Secretary of State for filing.

HISTORY: Derived from 1976 Code Section 33‑7‑20 [1962 Code Section 12‑14.2; 1952 Code Section 12‑52; 1942 Code Sections 7726, 7729; 1932 Code Sections 7726, 7729; Civ. C. ‘22 Sections 4301, 4304; Civ. C. ‘12 Sections 2834, 2837; Civ. C. ‘02 Sections 1880, 1883; 1896 (22) 92, 94; 1897 (22) 522; 1900 (23) 386; 1903 (24) 75; 1920 (31) 754; 1923 (33) 157; 1936 (39) 1337; 1952 (47) 2173; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

The only functions of incorporators under the Model Act are (1) to sign the articles of incorporation, (2) to deliver them for filing with the secretary of state, and (3) to complete the formation of the corporation to the extent set forth in section 2.05 (Section 33‑2‑105). One or more “persons” may serve as incorporator; “person” is defined in section 1.40 (Section 33‑1‑400) to include both individuals and entities; “entity” is also defined in that section to include corporations, unincorporated associations, partnerships, trusts, estates, and governments.

The Model Act also simplifies the formalities of execution and filing. The requirement in earlier versions of the Model Act and in many state statutes that articles be acknowledged or verified has been eliminated. Also, the requirement that “duplicate originals” (each being executed as an original document) be submitted has been replaced with the requirement that a signed original and an “exact or conformed” copy be submitted. See the Official Comment to section 1.20 (Section 33‑1‑200).

SOUTH CAROLINA REPORTERS’ COMMENTS

Nothing contained in this Section 33‑2‑101 should be construed as requiring that the company may only have one incorporator. As is clearly spelled out in Section 33‑2‑102(a)(5), there may be more than one incorporator.

There are only two substantive changes in this section:

(1) Additional entities can serve as the incorporator.

Although both the 1981 South Carolina Business Corporation Act and this act provide that either a corporation or other entity is a “person” and thus can be an incorporator, the definition of “entity” has been expanded. These additional organizations identified in the expanded definition of “entity” likewise can serve as an incorporator. Like the old law, the new law excludes “incompetents” from the definition of persons, and thus they cannot serve as incorporators.

(2) No verification.

The 1981 South Carolina Business Corporation Act required the articles to be verified. This act permits verification but does not require it.

The old law also spelled out that the incorporator did not need to be a resident of South Carolina. This is implicit in the new law, since the statute says “ any person” can be the incorporator. If only South Carolina residents could qualify, the statute would have to mention specifically this limitation. Although this section no longer states specifically that the articles must be executed, this is specified in Section 33‑1‑200.

In one case, decided pursuant to the terms of an earlier version of the Model Business Corporation Act, the South Carolina Supreme Court stated:

“The promoters of a corporation occupy a relation of trust and confidence towards the corporation which they are calling into existence as well as to each other, and the law requires of them the same good faith it exacts from directors and other fiduciaries.”

Duncan v. Brookview House, Inc., 262 S.C. 449, 456, 205 S.E.2d 707, 710 (1974).

DERIVATION: 1984 Model Act Section 2.01.

CROSS REFERENCES

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

“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.

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

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

Library References

Corporations 15.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 25 to 27, 32.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:2 , Preincorporation‑Generally.

South Carolina Legal and Business Forms Section 1:5 , Formation‑Filing Articles of Incorporation.

Treatises and Practice Aids

Fletcher Cyclopedia Law of Private Corporations Section 82, Residence and Citizenship Requirements.

**SECTION 33‑2‑102.** Articles of incorporation.

 (a) The articles of incorporation must set forth:

 (1) a corporate name for the corporation that satisfies the requirements of Section 33‑4‑101;

 (2) the number of shares the corporation is authorized to issue, itemized by classes;

 (3) the street address of the corporation’s initial registered office and the name of its initial registered agent at that office;

 (4) the name and address of each incorporator;

 (5) the signature of each incorporator; and

 (6) a certificate, signed by an attorney licensed to practice in this State, that all of the requirements of this section have been complied with.

 (b) The articles of incorporation may set forth:

 (1) The names and addresses of the individuals who are to serve as the initial directors;

 (2) Provisions not inconsistent with the law regarding:

 (i) the purpose for which the corporation is organized;

 (ii) managing the business and regulating the affairs of the corporation;

 (iii) defining, limiting, and regulating the powers of the corporation, its board of directors, and shareholders;

 (iv) a par value for authorized shares or classes of shares;

 (v) the imposition of personal liability on shareholders for the debts of the corporation to a specified extent and upon specified conditions; and

 (3) any provision that under Chapters 1 through 20 of this Title is required or permitted to be set forth in the bylaws.

 (c) The articles of incorporation need not set forth any of the corporate powers enumerated in Chapters 1 through 20 of this Title.

 (d) To be filed, the articles of incorporation must additionally be accompanied by the initial annual report of the corporation as specified in Section 12‑20‑40.

 (e) The articles of incorporation of any corporation that either has a class of voting shares registered with the Securities and Exchange Commission or another federal agency under Section 12 of the Securities Exchange Act of 1934, has gross assets at the end of its most recent fiscal year totalling twenty‑five million dollars or more or having five hundred or more shareholders of any class of stock, may also contain a provision eliminating or limiting the personal liability of a director to the corporation or its shareholders for monetary damages for breach of fiduciary duty as a director, provided that the provision shall not eliminate or limit the liability of a director (i) for any breach of the director’s duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve gross negligence, intentional misconduct, or a knowing violation of law; (iii) imposed under Section 33‑8‑330; or (iv) for any transaction from which the director derived an improper personal benefit. No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when the provision becomes effective. If any provision of this subsection or its application to any person is held invalid, unenforceable, or unconstitutional, this invalidity, unenforceability, or unconstitutionality shall negate the other provisions or applications of this subsection, and to this end, the provisions of this subsection are not severable.

HISTORY: Derived from 1976 Code Section 33‑7‑30 [1962 Code Section 12‑14.3; 1952 Code Section 12‑58; 1942 Code Sections 7726, 7729; 1932 Code Sections 7726, 7729; Civ. C. ‘22 Sections 4301, 4304; Civ. C. ‘12 Sections 1883, 2834; Civ. C. ‘02 Sections 1880, 1883; 1896 (22) 92, 94; 1897 (22) 522; 1900 (23) 386; 1903 (24) 75; 1920 (31) 754; 1923 (33) 157; 1936 (39) 1337; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2; 1990 Act No. 446, Section 1; 2004 Act No. 221, Section 11.

OFFICIAL COMMENT

1. INTRODUCTION.

Section 2.02(a) (Section 33‑2‑102(a)) sets forth the minimum mandatory requirements for all articles of incorporation while section 33‑2‑102(b) describes optional provisions that may be included. A corporation that is formed solely pursuant to the mandatory requirements will generally have the broadest powers and least restrictions on activities permitted by the Model Act. The Model Act thus permits the creation of a “standard” corporation by a simple and easily prepared one‑page document.

No reference is made in section 2.02(a) (Section 33‑2‑102(a)) either to the period of duration of the corporation or to its purposes. A corporation formed under these provisions will automatically have perpetual duration under section 3.02(1) (Section 33‑3‑102(1)) unless a special provision is included providing a shorter period. Similarly, a corporation formed without reference to a purpose clause will automatically have the purpose of engaging in any lawful business under section 3.01(a) (Section 33‑3‑101(a)). The option of providing a narrower purpose clause is also preserved in sections 2.02(b)(2) and 3.01 (Sections 33‑2‑102(b)(2) and 33‑3‑101), with the effect described in the Official Comment to section 3.01 (Section 33‑3‑101).

2. REQUIREMENTS.

The only information required in the articles of incorporation to form a “standard” corporation is:

(1) The name, which must meet the requirements of chapter 4 of the Model Act.

(2) The number of shares the corporation is authorized to issue. If a single class of shares is authorized, only the number of shares authorized need be disclosed; if more than one class of shares is authorized, however, both the number of authorized shares of each class and a description of the rights of each class must be included. See the Official Comment to sections 6.01 and 6.02 (Sections 33‑6‑101 and 33‑6‑102). It is unnecessary to specify par value, expected minimum capitalization, or contemplated issue price.

(3) The street address of the corporation’s initial registered office and the name of its initial registered agent. A mailing address consisting only of a post office box is not sufficient.

(4) The name and address of each incorporator.

No reference need be made in these “standard” articles to a variety of other matters that are referred to in earlier versions of the Model Act and the statutes of many states. For example, there is no need to refer to preemptive rights. See section 6.31 (Section 33‑6‑310) and the Official Comment. Generally, no substantive effect should be given to the absence of a specific reference to such matters in section 2.02 (Section 33‑2‑102) since they are referred to in other sections of the Model Act, which usually provide an “opt in” privilege that permits a draftsman to elect special treatment if he so desires. See particularly the list of optional provisions set forth in parts 4 and 5 of this Comment.

3. OPTIONAL PROVISIONS.

Section 2.02 (b) (Section 33‑2‑102(b)) describes specific options that may be elected by the draftsman and contains general authorization to include other provisions relevant to the authority of the corporation, its officers and board of directors, or to the management of the corporation’s internal affairs. These provisions include:

a. Initial directors.

Under section 2.02(b)(1) (Section 33‑2‑102(b)(1)) an election may be made to have the corporation organized by a person or persons other than the incorporators. See the Official Comment to section 2.03 (Section 33‑2‑103). These persons, described as “initial directors,” may be either the permanent directors or interim directors to be replaced by the shareholders after the corporation is organized.

b. Purpose clause.

Under section 2.02(b)(2)(i) (Section 33‑2‑102(b)(2)(i)), the corporation may elect a limited purpose clause or provide for specific purposes without limiting the broad purposes provided in section 3.01 (Section 33‑3‑101). (Specific purposes may be needed, among other reasons, for qualification in certain domestic and foreign jurisdictions and in order to obtain licenses.).

c. Duration.

Nearly every corporation today is formed with perpetual duration, but a corporation may elect a shorter duration under section 2.02 (b)(2)(iii) (Section 33‑2‑102(b)(2)(iii)).

d. Par value.

While par value is no longer a mandatory statutory concept, section 2.02(b)(2)(iv) (Section 33‑2‑102(b)(2)(iv)) permits the inclusion of optional “par value” provisions with regard to shares. Special provisions may give effect or meaning to “par value” essentially as a matter of contract between the parties. These provisions, whether appearing in the articles or in other documents, have only the effect any permissible contractual provision has in the absence of a prohibition by statute. Provisions in the articles establishing an optional par value may also be of use to corporations which are to be qualified in foreign jurisdictions if franchise or other taxes are computed upon the basis of par value.

For a general discussion of the treatment of par value, stated capital, and other historical concepts relating to capitalization, see the Official Comment to section 6.21 (Section 33‑6‑210).

e. Shareholder liability.

The basic tenet of modern corporation law is that shareholders are not liable for the corporation’s debts by reason of their status as shareholders. Section 2.02(b)(2)(v) (Section 33‑2‑102(b)(2)(v)) nevertheless permits a corporation to impose that liability under specified circumstances if that is desirable. If no provision of this type is included shareholders have no liability for corporate debts except to the extent they become liable by reason of their own conduct or acts. See section 6.22 (Section 33‑6‑220(b)).

f. Corporate powers.

Section 2.02(c) (Section 33‑2‑102(c)) makes it unnecessary to set forth any corporate powers in the articles. Section 3.02 (Section 33‑3‑102) grants every corporation essentially the same power that an individual possesses with respect to his affairs. This grant of power, however, may be considered overboard for certain corporations; if so, it may be qualified or narrowed by appropriate provisions in the articles.

g. Miscellaneous.

Under section 2.02(b)(2)(ii) and (iii) (Section 33‑2‑102(b)(2)(ii)) and (iii) the draftsman may include any provision not inconsistent with law for “managing the business and regulating the affairs of the corporation” and “defining, limiting, and regulating the powers of the corporation, its board of directors and shareholders.” This language is designed to allow the draftsman to place in the articles any number of miscellaneous provisions that he believes sufficiently important to be of public record or subject to amendment only by the processes applicable to amendments of articles of incorporation. Basically, the process of amendment of articles of incorporation requires shareholder approval, while bylaws typically may be amended by the board of directors acting alone, though in some instances the power of directors to amend bylaws is restricted. See sections 10.20—10.22 (Sections 33‑10‑200—33‑10‑220) and the Official Comments to those sections. Provisions relating to the business or affairs of the corporation that may be included in the articles may be subdivided into three general classes:

(1) Provisions that under the Model Act may be elected only by specific inclusion in the articles of incorporation. A list of these provisions is set forth in part 4 of this Comment.

(2) Provisions that under the Model Act may be elected by specific inclusion in either the articles of incorporation or the bylaws, and the draftsman elects to include the provision in the articles. A list of provisions that may be elected in either the bylaws or the articles is set forth in part 5 of this Comment.

(3) Other provisions not referred to in the Model Act that the draftsman decides should be included in the articles of incorporation. This includes but is not limited to any provision that the Act requires or permits to be set forth in the bylaws. See section 2.02(b)(3) (Section 33‑2‑102(b)(3)).

h. Self‑dealing transactions.

When subsidiaries or corporate joint ventures are being formed, special consideration should be given to the inclusion of provisions designed to limit or avoid the unexpected application of the doctrines of corporate opportunity and conflict of interest. While this type of clause will not provide total protection, it may be given limited effect, for example, by shifting the burden of proving unfairness or “exonerating” an arrangement from “adverse influences.” See Spiegal v. Beacon Participations Inc., 297 Mass. 398, 8 N.E.2d 895 (1937); see generally the Official Comment to section 8.31 (Section 33‑8‑310).

4. OPTIONS IN MODEL ACT THAT MAY BE ELECTED ONLY IN THE ARTICLES OF INCORPORATION.

a. Options with respect to directors.

(1) Board of directors may be dispensed with entirely in limited circumstances or its functions may be restricted, section 8.01 (Section 33‑8‑101).

(2) Power to compensate directors may be restricted or eliminated, section 8.11 (Section 33‑8‑111).

(3) Election of directors by cumulative voting may be authorized, section 7.28 (Section 33‑7‑280).

(4) Election of directors by greater than plurality of vote may be authorized, section 7.28 (Section 33‑7‑280).

(5) Directors may be elected by classes of shares, section 8.04 (Section 33‑8‑104).

(6) Power to remove directors without cause may be restricted or eliminated, section 8.08 (Section 33‑8‑108).

(7) Terms of directors may be staggered so that all directors are not elected in the same year, section 8.06 (Section 33‑8‑106).

(8) Power to fill vacancies may be limited to the shareholders, section 8.10 (Section 33‑8‑110).

(9) Power to indemnify directors, officers, and employees may be limited, sections 8.50—8.58 (Sections 33‑8‑500—33‑8‑580).

b. Options with respect to shareholders.

(1) Special voting groups of shareholders may be authorized, section 7.25 (Section 33‑7‑250).

(2) Quorum for voting groups of shareholders may be increased or reduced, sections 7.25, 7.60 and 7.27 (Sections 33‑7‑250, 33‑7‑260, and 33‑7‑270).

(3) Quorum for voting by voting groups of shareholders may be prescribed, section 7.26 (Section 33‑7‑260).

(4) Greater than majority vote may be required for action by voting groups of shareholders, section 7.27 (Section 33‑7‑270), see also section 10.21 (Section 33‑10‑210).

c. Options with respect to shares.

(1) Shares may be divided into classes and classes into series, sections 6.01 and 6.02 (Sections 33‑6‑101 and 33‑6‑102).

(2) Cumulative voting for directors may be permitted, section 7.28 (Section 33‑7‑280).

(3) Distributions may be restricted, section 6.40 (Section 33‑6‑400).

(4) Share dividends may be restricted, section 6.23 (Section 33‑6‑230).

(5) Voting rights of classes of shares may be limited or denied, section 6.01 (Section 33‑6‑101). (6) Classes of shares may be given more or less than one vote per share, section 7.21 (Section 33‑7‑210).

(6) Classes of shares may be given more or less than one vote per share, section 7.21 (Section 33‑7‑210).

(7) Shares may be redeemed at the option of the corporation or the shareholder, section 6.01 (Section 33‑6‑101).

(8) Reissue of redeemed shares may be prohibited, section 6.31 (Section 33‑6‑310).

(9) Shareholders may be given preemptive rights to acquire unissued shares, section 6.30 (Section 33‑6‑300).

(10) Redemption preferences may be ignored in determining lawfulness of distributions, section 6.40 (Section 33‑6‑400).

5. OPTIONS IN MODEL ACT THAT MAY BE ELECTED EITHER IN THE ARTICLES OF INCORPORATION OR IN THE BYLAWS.

a. Options with respect to directors.

(1) Number of directors may be fixed or changed within limits, section 8.03 (Section 33‑8‑103).

(2) Qualifications for directors may be prescribed, section 8.02 (Section 33‑8‑102).

(3) Notice of regular or special meetings of board of directors may be prescribed, section 8.22 (Section 33‑8‑220).

(4) Power of board of directors to act without meeting may be restricted, section 8.21 (Section 33‑8‑210).

(5) Quorum for meeting of board of directors may be increased or decreased (down to one‑third) from majority, section 8.24 (Section 33‑8‑240).

(6) Action at meeting of board of directors may require a greater than majority vote, section 8.24 (Section 33‑8‑240).

(7) Power of directors to participate in meeting without being physically present may be prohibited, section 8.20 (Section 33‑8‑200).

(8) Board of directors may create committees and specify their powers, section 8.25 (Section 33‑8‑250).

(9) Power of board of directors to amend bylaws may be restricted, sections 10.20 and 10.22 (Sections 33‑10‑200 and 33‑10‑220).

b. Options with respect to shares.

(1) Shares may be issued without certificates, section 6.26 (Section 33‑6‑260).

(2) Procedure for treating beneficial owner of street name shares as record owner may be prescribed, section 7.23 (Section 33‑7‑230).

(3) Transfer of shares may be restricted, section 6.27 (Section 33‑6‑270).

SOUTH CAROLINA REPORTERS’ COMMENTS

Significant changes have been made in the requirements for the articles of incorporation. The most significant change is that now very little is mandatory. Most of the provisions which were required under the predecessor statute, Section 33‑7‑30 of the 1981 South Carolina Business Corporation Act, are now optional.

1. Optional Provisions Previously Required.

The following previously mandatory provisions are now specifically mentioned only as optional provisions:

(1) a specific purpose clause (new subsection (b)(2)(i)). It should be noted that the articles can specify more than one purpose.

(2) the names of any initial or permanent directors (new subsection (b)(1));.

Neither actual directors, nor dummy directors, must be named since the incorporators now are given the power to formally organize the company (see Section 33‑2‑105 of this act). Previously, the organization could be done only by real or interim directors;.

(3) description of shares.

Unless there is more than one class of shares, the articles now are required to state only the number of shares authorized. However, if there is more than one class, then similar to prior requirements, the articles must describe carefully the characteristics of each type. Section 33‑6‑101 of this act, which sets forth these requirements, should be reviewed carefully in drafting the articles.

2. Retention of Attorney Certification, Deletion of Verification.

The former law required all articles to be accompanied by a South Carolina attorney certification that all requirements for incorporation had been complied with (see Section 33‑7‑30(d) of the 1981 South Carolina Business Corporation Act). This section has been retained. Empirical research showed that a large percentage of the articles certified by South Carolina attorneys had significant errors noticeable on the face of the application.

On the other hand, prior to the adoption of the attorney certification, the Secretary of State’s office would receive forms filled out in pencil, many of which made no sense. Many of these forms were prepared by non‑lawyers for the use of others. Many of these were drafted very poorly.

As discussed in Section 33‑2‑101, the incorporator, although free to do so, no longer is required to verify the articles (see the South Carolina Reporters’ Comments to Section 33‑1‑200).

3. Provisions Moved to Other Sections.

Although this act omits certain provisions which appeared in the 1981 South Carolina Business Corporation Act, many of these requirements still exist in other sections:

(1) All corporations still are deemed to have perpetual duration unless otherwise specified in the articles (see Section 33‑3‑102).

(2) Shareholders have preemptive rights unless otherwise specified (see Section 33‑6‑300).

(3) Articles may have a delayed effective date (see Section 33‑1‑230).

4. New Optional Provisions.

There are no new mandatory provisions, but there are new optional provisions specifically mentioned in this new section.

First, subsection (b)(2)(v) permits the articles to impose personal liability on shareholders.

Second, although new subsection (b)(2)(ii) looks similar to the language found in Section 33‑7‑30(a)(7)(c) of the 1981 South Carolina Business Corporation Act, as discussed in the Official Comment (3)(g) above, the new language is much broader. It allows the articles to include provisions regarding managing the business—not merely provisions that “relate to” the business (the old language). For example, Section 33‑8‑101(c) provides that certain corporations can dispense with, or limit, the authority of the board, if the articles provide who will perform the director’s duties.

Third, new subsection (e) authorizes large corporations that meet one of three criteria (1) a class of shares registered with the Securities and Exchange Commission or another federal agency under Section 12 of the Securities Exchange Act of 1934, (2) has gross assets at the end of its most recent fiscal year of twenty‑five million dollars or more, or (3) has at least five hundred shareholders of any class of stock to include in the articles of incorporation a provision exempting directors from liability for simple negligence in suits for damages based on a lack of due care brought by one or more of the corporation’s shareholders. This subsection, which is a modification of director limited liability statutes adopted in Delaware and many other states in the past few years, creates a very narrow exemption. The articles of incorporation cannot exempt a director:

(1) from injunctive liability; or.

(2) for any actions by a third party; or.

(3) in suits by shareholders for damage liability for any breach of loyalty, for any transaction from which the director derived an improper personal benefit, liability for acts and omissions which involve gross negligence, intentional misconduct or a knowing violation of law, or for improper distributions. Furthermore, any provision in the articles of incorporation limiting the liability of directors pursuant to this subsection has no effect on any liability arising out of an act or omission occurring prior to the date when the provision in the articles of incorporation becomes effective. Finally, the subsection contains a nonseverability clause which clearly states that if any part of the subsection is held invalid, unenforceable or unconstitutional, then the entire subsection will be invalid and any exemption from liability in a corporation’s articles of incorporation based on this subsection would likewise be invalid and unenforceable.

This subsection is intended to apply only to large solvent corporations. In determining whether any corporation has gross assets of twenty‑five million dollars, the board may base a determination either on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable in the circumstances (cf. the Official Comments and South Carolina Reporters’ Comments to Section 33‑6‑400 (d) for an explanation of similar language). The board of directors may, of course, rely on various financial statements and data as provided in Section 33‑8‑300(b).

It should be noted that each separate corporation in a group of affiliated companies, e.g. parent and subsidiary, will each have to meet the requisite size requirement and have specifically adopted the provision of Section 33‑2‑102(e) in order for the directors of each company to claim protection under this subsection.

The directors of all corporations, regardless of their eligibility for the limited exemption from liability authorized by this subsection, can invoke the business judgment rule as a defense to any action against them. See Dockside Association, Inc. v. Detyen, 294 S.C. 1986, 362 S.E. 2d 874.

5. Other Optional Provisions Found in Other Sections.

Other provisions which may be included in the articles are discussed in other sections and chapters of this title. Some of these are new. The Official Comment lists many of the optional provisions which are set forth in other parts of the act and which the attorney should consider in drafting any set of articles.

One important optional provision not found in the Model Act is the definition of “shareholder” in Section 33‑1‑400(23) which permits a company to give voting rights to debt instruments but only if included in the articles of incorporation.

6. Similar Provisions.

Most of the other provisions in this section, although often reworded, are substantively the same as the prior law.

For example, the language changes in subsections (a)(1), (a)(3), and (b)(2)(iv) do not appear significant. Subsection (b)(3) allows inclusion in the articles any provision which is permitted in the bylaws. This language seems slightly more restrictive than the predecessor section which allowed placing in the articles anything which the corporate code permitted in “an agreement or other instrument” (see Section 33‑7‑30(a)(7)(B) of the 1981 South Carolina Business Corporation Act). However, when you combine this new subsection (b)(3) with new subsection (b)(2)(ii) of this act, which permits provisions regarding management of the business and regulating the affairs of the corporation to be put in the articles, there is probably an expansion of items which can properly be included in the articles.

Some of the provisions now in this section were previously found in sections dealing with other topics. Both subsections (b)(2)(iii), dealing with limits on the board or shareholder power, and subsection (c), specifying that the articles need not contain all the statutory powers, are effectively the same as provisions found in Section 33‑3‑20 of the 1981 South Carolina Business Corporation Act.

7. Must be Accompanied by First Report and License Fee.

In order to file the articles in South Carolina, in keeping with existing practices, the articles must be accompanied by the initial annual report of the corporation to the Tax Commission and the payment of all fees and taxes owed to the Tax Commission, as is specified in Section 12‑19‑20.

As of the date these comments were written, the license fee to be paid with the initial annual report was twenty‑five dollars.

DERIVATION: 1984 Model Act Section 2.02.

CROSS REFERENCES

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

Bylaws, see Sections 33‑2‑106, 33‑2‑107, and 33‑10‑200 et seq.

Close corporations, Statutory Close Corporation Supplement, see Section 33‑18‑103.

Conflict of interest, see Section 33‑8‑310.

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

Filing fees, see Section 33‑1‑220.

Filing requirements, see Section 33‑1‑200.

General powers, see Section 33‑3‑102.

Incorporators, see Section 33‑2‑101.

Liability of shareholders, see Section 33‑6‑220.

Professional corporations, Professional Corporation Supplement, see Section 33‑19‑103.

Purposes, see Section 33‑3‑101.

Reorganization, amendment of articles of incorporation upon, see Section 33‑10‑108.

Restated articles, see Section 33‑10‑107.

Share classes, see Section 33‑6‑101.

Federal Aspects

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

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South Carolina Legal and Business Forms Section 3:7 , Articles of Incorporation‑General Form.

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.

South Carolina Legal and Business Forms Section 1:85 , Corporate Power‑All Power Granted by Law.

Treatises and Practice Aids

Fletcher Cyclopedia Law of Private Corporations Section 139.10, Contents‑Corporate Powers.

**SECTION 33‑2‑103.** Incorporation.

 (a) Unless a delayed effective date is specified, the corporate existence begins when the articles of incorporation are filed.

 (b) The Secretary of State’s filing of the articles of incorporation is conclusive proof that the incorporators satisfied all conditions precedent to incorporation except in a proceeding by the State to cancel or revoke the incorporation or involuntarily dissolve the corporation.

HISTORY: Derived from 1976 Code Section 33‑7‑50 [1962 Code Section 12‑14.5; 1952 Code Sections 12‑59, 12‑60; 1942 Code Section 7730; 1932 Code Section 7730; Civ. C. ‘22 Section 4305; Civ. C. ‘12 Section 2838; Civ. C. ‘02 Section 1884; 1896 (22) 94; 1920 (31) 754; 1936 (39) 1320; 1960 (51) 1927; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act. No. 444, Section 2.

OFFICIAL COMMENT

Section 2.03(a) (Section 33‑2‑103(a)) provides that the existence of a corporation begins when the articles of incorporation are filed, unless a delayed effective date is specified under section 1.23 (Section 33‑1‑230). Chapter 1 contains detailed rules for the filing and effective dates of documents, all of which are applicable to articles of incorporation and other documents. These filing rules simplify the process of creating a corporation in several respects.

1. WHAT TO FILE.

Section 1.20 (Section 33‑1‑200) requires that only one executed original and an exact or conformed copy of the articles need be delivered to the secretary of state for filing. This delivery must be accompanied by the applicable filing fee.

2. NATURE OF FILING.

Section 1.25 (Section 33‑1‑250) provides that the secretary of state files the articles by stamping them “filed” and recording the date and time of receipt; he then retains the signed original articles of incorporation for his records and returns the exact or conformed copy to the incorporators along with a receipt for the fee. The return of this copy and the fee receipt establishes that the articles have been filed in the form of the copy.

3. CERTIFICATE OF INCORPORATION ELIMINATED.

Section 1.25 (Section 33‑1‑250) provides that approval by the secretary of state is in the form of return of the copy of the articles with a fee receipt rather than a certificate of incorporation, as was the older practice still followed in many states. See the Official Comment to section 1.25 (Section 33‑1‑250).

4. PRECISE TIME OF INCORPORATION.

Section 1.03(a) (Section 33‑1‑103(a)) ties the precise time of incorporation to the date and time stamped on the articles. Section 1.23 (Section 33‑1‑230) provides in turn that this is the date and time the articles are received by the secretary of state; in other words, consistent with the practice of many secretaries of state, processing time is ignored and the date and time of receipt of the articles are the date and time of incorporation. The creators of the corporation may, however, specify that the corporation’s existence will begin on a later date than the date of filing, and at a precise time on such a date, to the extent permitted by section 1.23 (Section 33‑1‑230).

5. CONCLUSIVENESS OF SECRETARY OF STATE’S ACTION ON QUESTION OF INDIVIDUAL LIABILITY FOR CORPORATE ACTIONS.

Under section 2.03(b) (Section 33‑2‑103(b)) the filing of the articles of incorporation as evidenced by return of the stamped copy of the articles with the fee receipt is conclusive proof that all conditions precedent to incorporation have been met, except in proceedings brought by the state. Thus the filing of the articles of incorporation is conclusive as to the existence of limited liability for persons who enter into transactions on behalf of the corporation. If articles of incorporation have not been filed, section 2.04 (Section 33‑2‑104) generally imposes personal liability on all persons who prematurely act as or on behalf of a “corporation” knowing that articles have not been filed. Section 2.04 (Section 33‑2‑104) may protect some of these persons to a limited extent, however; see the Official Comment to that section.

SOUTH CAROLINA REPORTERS’ COMMENTS

It has long been the case in South Carolina that the grant of the corporate charter is the operative act, and its issuance establishes the corporation regardless that there is a later failure to carry out other steps in the formation process. See McKay v. Beard, 20 S.C. 156, 163 (1883). See also, however, the discussion of de facto and corporations by estoppel in the Official and South Carolina Reporters’ Comments to Section 33‑2‑104.

The contents of this section, as amplified by Section 33‑1‑230, essentially provide the same requirements as were previously set forth in Section 33‑7‑50 of the 1981 South Carolina Business Corporation Act. Unless a delayed date is set forth, the articles continue to be effective when filed. As was true under prior law, the term “filed” means the time a document which meets all the statutory requirements (see Section 33‑1‑200) is accepted by the Secretary of State and endorsed as being accepted (see Sections 33‑1‑230 and 33‑1‑250).

The only change from the old law is that Section 33‑7‑50(b)(2) of the 1981 South Carolina Business Corporation Act stated that the mere filing of articles did not prohibit the State of South Carolina from “enjoining any person from acting as a corporation within this State without being duly incorporated.” This language has not been adopted as part of the new law since this provision did not grant to the State any new rights.

DERIVATION: 1984 Model Act Section 2.03.

CROSS REFERENCES

Corporations de facto, see Section 33‑2‑104.

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

Duration, see Section 33‑3‑102.

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.

Secretary of State’s filing duty, see Section 33‑1‑250.

Library References

Corporations 21, 32(7), 35.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 25 to 27, 37, 48 to 51.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:2 , Preincorporation‑Generally.

Treatises and Practice Aids

Fletcher Cyclopedia Law of Private Corporations Section 4064, Statutes Governing Commencement of Corporate Existence.

Fletcher Cyclopedia Law of Private Corporations Section 4143, Documentary Evidence‑In General.

**SECTION 33‑2‑104.** Liability for preincorporation transactions.

 All persons purporting to act as or on behalf of a corporation, when there has been no incorporation under Chapters 1 through 20 of this Title, are jointly and severally liable for all liabilities created while so acting, provided that any person so acting while believing in good faith that the articles have been filed shall not have any liability under this section.

HISTORY: Derived from 1976 Code Section 33‑7‑60 [1962 Code Section 12‑14.6; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Earlier versions of the Model Act, and the statutes of many states, have long provided that corporate existence begins only with the acceptance of articles of incorporation by the secretary of state. Many states also have statutes that provide expressly that those who prematurely act as or on behalf of a corporation are personally liable on all transactions entered into or liabilities incurred before incorporation. A review of recent case law indicates, however, that even in states with such statutes courts have continued to rely on common law concepts of de facto corporations, de jure corporations, and corporations by estoppel that provide uncertain protection against liability for preincorporation transactions. These cases caused a review of the underlying policies represented in earlier versions of the Model Act and the adoption of a slightly more flexible or relaxed standard.

Incorporation under modern statutes is so simple and inexpensive that a strong argument may be made that nothing short of filing articles of incorporation should create the privilege of limited liability. A number of situations have arisen, however, in which the protection of limited liability arguably should be recognized even though the simple incorporation process established by modern statutes has not been completed.

(1) The strongest factual pattern for immunizing participants from personal liability occurs in cases in which the participant honestly and reasonably but erroneously believed the articles had been filed. In Cranson v. International Business Machines Corp., 234 Md. 477, 200 A.2d 33 (1964), for example, the defendant had been shown executed articles of incorporation some months earlier before he invested in the corporation and became an officer and director. He was also told by the corporation’s attorney that the articles had been filed, but in fact they had not been filed because of a mix‑up in the attorney’s office. The defendant was held not liable on the “corporate” obligation.

(2) Another class of cases, which is less compelling but in which the participants sometimes have escaped personal liability, involves the defendant who mails in articles of incorporation and then enters into a transaction in the corporate name; the letter is either delayed or the secretary of state’s office refuses to file the articles after receiving them or returns them for correction. E.g., Cantor v. Sunshine Greenery, Inc., 165 N.J. Super. 411, 398 A.2d 571 (1979). Many state filing agencies adopt the practice of treating the date of receipt as the date of issuance of the certificate even though delays and the review process may result in the certificate being backdated. The finding of nonliability in cases of this second type can be considered an extension of this principle by treating the date of original mailing or original filing as the date of incorporation.

(3) A third class of cases in which the participants sometimes have escaped personal liability involves situations where the third person has urged immediate execution of the contract in the corporate name even though he knows that the other party has not taken any steps toward incorporating. E.g., Quaker Hill v. Parr, 148 Colo. 45, 364 P.2d 1056 (1961).

(4) In another class of cases the defendant has represented that a corporation exists and entered into a contract in the corporate name when he knows that no corporation has been formed, either because no attempt has been made to file articles of incorporation or because he has already received rejected articles of incorporation from the filing agency. In these cases, the third person has dealt solely with the “corporation” and has not relied on the personal assets of the defendant. The imposition of personal liability in this class of cases, it has sometimes been argued, gives the plaintiff more than he originally bargained for. On the other hand, to recognize limited liability in this situation threatens to undermine the incorporation process, since one then may obtain limited liability by consistently conducting business in the corporate name. Most courts have imposed personal liability in this situation. E.g., Robertson v. Levy, 197 A.2d 443 (D.C. App. 1964).

(5) A final class of cases involves inactive investors who provide funds to a promoter with the instruction, “Don’t start doing business until you incorporate.” After the promoter does start business without incorporating, attempts have been made, sometimes unsuccessfully, to hold the investors liable as partners. E.g. Frontier Refining Co. v. Kunkels, Inc., 407 P.2d 880 (Wyo. 1965). One case held that the language of section 146 of the 1969 Model Act [“ persons who assume to act as a corporation are liable for preincorporation transactions”] creates a distinction between active and inactive participants, makes only the former liable as partners, and therefore relieves the latter of personal liability. Nevertheless, “active” participation was defined to include all investors who actively participate in the policy and operational decisions of the organization and is, therefore, a larger group than merely the persons who incurred the obligation in question on behalf of the “corporation.” Timberline Equipment Co. v. Davenport, 267 Or. 64, 72‑76, 514 P.2d 1109, 1113‑14 (1973).

After a review of these situations, it seemed appropriate to impose liability only on persons who act as or on behalf of corporations “knowing” that no corporation exists. Analogous protection has long been accorded under the uniform limited partnership acts to limited partners who contribute capital to a partnership in the erroneous belief that a limited partnership certificate has been filed. UNIFORM LIMITED PARTNERSHIP ACT Section 12 (1916); REVISED UNIFORM LIMITED PARTNERSHIP ACT Section 3.04 (1976). Persons protected under Section 3.04 of the latter are persons who “erroneously but in good faith” believe that a limited partnership certificate has been filed. The language of section 2.04 (Section 33‑2‑104) has essentially the same meaning.

While no special provision is made in section 2.04 (Section 33‑2‑104), the section does not foreclose the possibility that persons who urge defendants to execute contracts in the corporate name knowing that no steps to incorporate have been taken may be estopped to impose personal liability on individual defendants. This estoppel may be based on the inequity perceived when persons, unwilling or reluctant to enter into a commitment under their own name, are persuaded to use the name of a nonexistent corporation, and then are sought to be held personally liable under section 2.04 (Section 33‑2‑104) by the party advocating that form of execution. By contrast, persons who knowingly participate in a business under a corporate name are jointly and severally liable on “corporate” obligations under section 2.04 (Section 33‑2‑104) and may not argue that plaintiffs are “estopped” from holding them personally liable because all transactions were conducted on a corporate basis.

SOUTH CAROLINA REPORTERS’ COMMENTS

1. History.

It has long been the case in South Carolina that the grant of the corporate charter establishes the corporation, regardless of failures to carry out other steps of the formation process:

“After a corporation, duly constituted by act of the legislature, which corporation is composed of only two persons, has entered upon the work for which the corporation was established, appointed an agent, expended large sums of money on such work, and done acts which it would not have been lawful to do but for the charter granted by the legislature, it is too late to say that such corporation had never accepted the charter, or been organized as such, even though it does not appear that there was ever any formal organization by a meeting of the corporators and an election of the usual officers.” McKay v. Beard, 20 S.C. 156, 163 (1883).

Although the actual conclusion of the court is far from clear, it would appear that the holding of Bulova Watch Co. v. Roberts Jewelers, 240 S.C. 280, 125 S.E.2d 643 (1962), is to disapprove specifically of the doctrine of de facto corporations. In this case Bulova had dealt with Roberts Jewelers of Rock Hill, Inc. prior to the corporation losing its charter in 1955. From 1955 through 1959, Mr. Roberts, either in his individual capacity, or possibly on behalf of the old (defunct) corporation continued to order goods. Mr. Roberts testified that the business was being operated by him, that he continued the business under the name “Roberts Jewelers”, and all dealings were in the corporate name. Since the court was not able to conclude that Roberts was acting other than in his individual capacity (or possibly only for an undisclosed principal), the court was not required to determine if the doctrine of de facto corporations could be a defense for Mr. Roberts. However, language in the case indicates a strong dislike for the doctrine.

There are two South Carolina cases, one a Supreme Court opinion and one a Fourth Circuit opinion, which could be read to infer that South Carolina continued to recognize the doctrine of de facto corporation in spite of Section 33‑7‑60 in the 1981 South Carolina Business Corporation Act which reads: “Section 33‑7‑60. Requirements of capital before commencing business; personal liability.

(a) A corporation shall not transact any business or incur any indebtedness except such as shall be incidental to its organization or obtaining subscriptions or payment for its shares until the articles of incorporation have been filed with the Secretary of State.

(b) If a corporation has transacted any business in violation of this section, any person (whether a promoter, incorporator, shareholder, subscriber, or director) who has participated therein shall be jointly and severally liable for the debts or liabilities of the corporation arising therefrom. No such person shall be personally liable if he (1) dissented from such violation and caused his dissent to be recorded in the records of the corporation, or (2) being absent, recorded and filed his dissent promptly upon learning of the action.” However, both of these cases are much more properly viewed as situations where a person who represented he was a shareholder in a corporation later attempted to deny there was a corporation.

In Dargan v. Graves, 252 S.C. 641, 168 S.E.2d 306 (1969), a person who functioned not only as a shareholder, but also as a director and officer, later denied he and his “co‑owner” were shareholders. He claimed that since, as was then required, no shares were issued, that the relationship between him and his co‑owner was that of partners. He claimed that his “partner” therefore personally owed him certain debts owed to him by the business. The court prohibited him from denying his earlier representations that he was a shareholder and estopped him from claiming he was a partner. In addition, the court estopped him from denying the corporation’s existence. (Interestingly, it is difficult to see why estoppel is really proper in this case, since the other co‑owner was totally aware of all facts and could not really be said to have reasonably relied on the plaintiff’s acknowledgment that they were shareholders.).

It could be argued that neither this section, as drafted, nor the prior South Carolina version of this statute (Section 33‑2‑104 of the 1981 South Carolina Business Corporation Act) has anything to do with a situation such as Dargan v. Graves and that estoppel still would apply. On the other hand, if the corporation was not properly formed in Dargan v. Graves, the plain meaning of the new section might seem to indicate that the purported shareholder would be automatically liable unless he had a good faith belief that the corporation had been properly formed.

The Fourth Circuit and the Federal District Court in United States v. Theodore, 347 F.Supp. 1070 (1972), aff’d 479 F.2d 752 (1973), both cite Dargan v. Graves, supra, for the proposition that:

“We further agree with the District Court that South Carolina continues to recognize de facto corporations and corporations by estoppel . . .” 479 F.2d at 753.

However, the Theodore case, similar to Dargan v. Graves, involves an estoppel type situation. Theodore refused to disclose “corporate” books and records to the Internal Revenue Service on the theory that although he held himself out as a corporation (P.A.) that he never filed articles and thus there was no corporation. If there were no corporation, the government could not have obtained the books since they were personal and such disclosure would violate the Fifth Amendment protection against self‑incrimination.

The court held the individual was denied the right to challenge his prior claim of corporateness. Like Dargan, and except for a question of reasonable reliance on the government’s part, this Theodore case is more properly just an application of normal estoppel principles and does not need to rise to the level of de facto corporation.

It would seem that nothing in this section (or in the 1981 South Carolina Business Corporation Act) would necessarily change the outcome in Theodore.

One other case is mentioned in Theodore allegedly showing that South Carolina continues to recognize the de facto doctrine. This is the case of Bethea v. Allen, 177 S.C. 534, 181 S.E 893 (1935). However, the statute under which the Bethea corporation was organized did not specifically prohibit de facto corporations, and in fact, recognized the de facto doctrine. (See also, Francis Marion Hotel v. Chico, 131 S.C. 344, 127 S.E. 436 (1924)).

In the context of liability of incorporators, or those who act thinking they are a corporation and are not, the statements in Duncan v. Brookview House, Inc., 262 S.C. 449, 456, 205 S.E.2d 707, 710 (1974) should not be forgotten:

“The promoters of a corporation occupy a relation of trust and confidence toward the corporation which they are calling into existence as well as to each other, and the law requires of them the same good faith it exacts from directors and other fiduciaries.”

Nothing in this section changes this standard, and, in fact, it would seem that it is strengthened.

2. Intent of South Carolina Modification.

This section is significantly different than Section 2.04 of the 1984 Model Act upon which it is based. The Official Text of the Model Act imposes liability only upon a promoter acting on behalf of a nonexistent corporation with actual knowledge that it has not been incorporated under the act. There are several problems with this standard. First, the test is subjective (“knowing”) rather than objective (“knew or should have known”) and thus is insusceptible of proof or certain judicial determination. Second, the knowledge required is not that of a fact but of a legal conclusion—that incorporation has not occurred. Finally, the impossible burden of proving this subjective knowledge of a legal effect is upon the person asserting a claim instead of the person whose knowledge is at issue. This section cures those shortcomings. First, although it uses a subjective standard, it is conditioned with the requirement that the belief be held in good faith—a requirement that invites the court to scrutinize the surrounding circumstances. Second, the belief is to be that an operative fact, the filing of the articles, has occurred. Finally, the burden of proof is placed upon the person whose good faith belief is at issue, since he will usually be in a better position to provide evidence on the issue.

A person who merely agrees to subscribe to shares in a not‑yet formed corporation will not incur personal liability under this section if the promoters do something wrong before the formation is complete. Those subscribers would not be acting personally as or on behalf of the not‑formed corporation.

DERIVATION: 1984 Model Act Section 2.04.

CROSS REFERENCES

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

Library References

Corporations 448.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 69, 77, 84 to 85.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Banks and Banking Section 75, Extent of Liability.

Forms

South Carolina Legal and Business Forms Section 1:2 , Preincorporation‑Generally.

South Carolina Legal and Business Forms Section 1:35 , Preincorporation Agreements.

South Carolina Legal and Business Forms Section 1:76 , Agreement to Incorporate‑Another Form.

Treatises and Practice Aids

Fletcher Cyclopedia Law of Private Corporations Section 190.10, Statutory Provisions Governing Promoter Liability.

**SECTION 33‑2‑105.** Organization of corporation.

 (a) After incorporation:

 (1) If initial directors are named in the articles of incorporation, the initial directors shall hold an organizational meeting, at the call of a majority of the directors, to complete the organization of the corporation by appointing officers, adopting bylaws, and carrying on any other business brought before the meeting.

 (2) If initial directors are not named in the articles, the incorporator or incorporators shall hold an organizational meeting at the call of a majority of the incorporators:

 (i) to elect directors and complete the organization of the corporation; or

 (ii) to elect a board of directors who shall complete the organization of the corporation.

 (b) Action required or permitted by Chapters 1 through 20 of this Title to be taken by incorporators at an organizational meeting may be taken without a meeting if the action taken is evidenced by one or more written consents describing the action taken and signed by each incorporator.

 (c) An organizational meeting may be held in or out of this State.

HISTORY: Derived from 1976 Code Section 33‑7‑70 [1962 Code Section 12‑14.7; 1952 Code Section 12‑52; 1942 Code Sections 7726, 7729; 1932 Code Sections 7726, 7729; Civ. C. ‘22 Sections 4301, 4304; Civ. C. ‘12 Sections 2834, 2837; Civ. C. ‘02 Sections 1880, 1883; 1896 (22) 92, 94; 1897 (22) 522; 1900 (23) 386; 1903 (24) 75; 1920 (31) 754; 1923 (33) 157; 1936 (39) 1337; 1952 (47) 2173; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Following incorporation, the organization of a new corporation must be completed so that it may engage in business. This usually requires adoption of bylaws, the appointment of officers and agents, the raising of equity capital by the issuance of shares to the participants in the venture, and the election of directors.

Earlier versions of the Model Act required initial directors to be named in the articles and provided that they complete the organization of the corporation. Many states followed this pattern, but others provided that the incorporators organize the corporation or meet to elect a board of directors to organize the corporation. The goal of all these provisions was usually to permit the completion of the organization of the corporation with minimum expense and formality, though in many cases it was felt necessary for business decisions to be made at an early stage by the persons with responsibility for business operation.

Experience in states that followed the Model Act pattern revealed that multiple organizational meetings were often necessary, particularly where for reasons of convenience or secrecy both the incorporators and initial directors were “dummies” without any financial interest in the enterprise who were not expected to make any significant business decisions. In this situation, the initial directors formally organized the corporation, including issuing of at least some shares; immediately following this organizational meeting, the new shareholders met to elect a permanent board of directors who were to manage the business. In many instances, the permanent board of directors also had to meet immediately after its selection by the shareholders to consider business questions that must be resolved promptly, such as authorization of employment contracts or the valuation of property or services to be accepted as consideration for shares.

Section 2.05 (Section 33‑2‑105) simplifies the formation process by allowing alternative methods of completing the formation of the corporation.

First, section 2.05(a)(1) (Section 33‑2‑105(a)(1)) contemplates that if the draftsman elects to set forth the names of the initial directors in the articles of incorporation, the persons so named will organize the corporation. It is expected that initial directors will be named only if they will be the permanent board of directors and there is no objection to the disclosure of their identity in the articles of incorporation.

Section 2.05(a)(2) (Section 33‑2‑105(a)(2)) provides alternative methods for completing the organization of the corporation if initial directors are not named in the articles of incorporation. The incorporators may themselves complete the organization, or they may simply meet to elect a board of directors who are then to complete the organization. It is contemplated that in routine incorporations, the first alternative will be elected, while in more complex situations when prompt business decisions must be made, the second alternative will be chosen and the completion of the organization will be turned over to the board of directors representing the investment interests in the corporation.

Sections 2.05(b) and (c) (Sections 33‑2‑105(b) and (c)) are limited to meetings of incorporators since sections 8.21 and 8.22 (Sections 33‑8‑210 and 33‑8‑220) permit the same actions by the board of directors. If a meeting of shareholders is necessary, sections 7.01 and 7.04 (Sections 33‑7‑101 and 33‑7‑104) give them the same flexibility that is given incorporators under sections 2.05(b) and (c) (Section 33‑2‑105(b) and (c)).

SOUTH CAROLINA REPORTERS’ COMMENTS

South Carolina was one of the states which has traditionally required naming the initial directors in the articles. Often, for purposes of privacy, the initially named directors were “dummy directors” whose sole purpose was to complete the organizational process. After this was complete, the new shareholders would replace the initial or “dummy directors” with permanent directors.

This section, which follows 1984 Model Act Section 2.05, avoids the need for dummy directors since it now allows the incorporators to complete the organizational formalities.

If the actual directors are named in the articles, the call of the first meeting must be by a majority of the directors, rather than by a majority of the incorporators, as was the case under prior law (Section 33‑7‑70(a) of the 1981 South Carolina Business Corporation Act). As was true under the old law, the purpose of the organizational meeting is to adopt bylaws, elect officers, and elect directors (if the incorporators are the ones acting). Both the new and old statute provide that other actions can be taken (see Section 33‑2‑105(a)(1) of this act) which for most corporations also will include approval of a form for a share certificate, issuance of shares (and acceptance of subscriptions), and opening up a bank account.

By examining subsection (b) of this section and Chapter 8 of this title (dealing with director meetings), it is clear that the required action can be taken in writing without an actual meeting. Since an action in writing will likely be the normal method of action by the incorporators, it was not felt necessary to spell out in detail a method of calling a meeting of the incorporators, or requirements for a quorum, etc. In the event an actual meeting is called, the procedures for holding a directors meeting are implicitly acceptable for the incorporator’s meeting.

This provision makes clear that the organizational meeting can be held outside of South Carolina.

DERIVATION: 1984 Model Act Section 2.05.

CROSS REFERENCES

Action by directors without meeting, see Section 33‑8‑210.

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

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

Incorporators, see Section 33‑2‑101.

Library References

Corporations 24.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 25 to 27, 40.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Banks and Banking Section 76, Election.

S.C. Jur. Banks and Banking Section 85, Election of Officers.

Forms

South Carolina Legal and Business Forms Section 1:8 , Formation‑Organizational Meeting.

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

South Carolina Legal and Business Forms Section 1:312 , Directors’ Organizational Meeting‑Call and Waiver of Notice.

**SECTION 33‑2‑106.** Bylaws.

 (a) The incorporators or board of directors of a corporation shall adopt initial bylaws for the corporation.

 (b) The bylaws of a corporation may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with law or the articles of incorporation.

HISTORY: Derived from 1976 Code Section 33‑11‑10 [1962 Code Section 12‑16.1; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed 1988 Act No. 444 Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

The responsibility for adopting the original bylaws is placed on the person or persons completing the organization of the corporation.

Section 2.06(b) (Section 33‑2‑106(b)) restates the accepted scope of bylaw provisions. For a list of Model Act provisions that become effective only if specific reference is made to them in the bylaws, see the Official Comment to section 2.02 (Section 33‑2‑102). Provisions set forth in bylaws may additionally be contained in shareholder or board resolutions unless this Act requires them to be set forth in the bylaws.

The power to amend or repeal bylaws, or adopt new bylaws after the formation of the corporation is completed, is addressed in sections 10.20 through 10.22 (Sections 33‑10‑200 through 33‑10‑220) of the Model Act.

SOUTH CAROLINA REPORTERS’ COMMENTS

Section 33‑11‑10 of the 1981 South Carolina Business Corporation Act contained many more provisions than are set forth in this Section 33‑2‑106. Many of the provisions found in old subsections (c) through (e) of Section 33‑11‑10 are now contained in Sections 33‑10‑200, 33‑10‑210, and 33‑10‑220.

This section contains effectively the same provisions as were in subsections (a) and (b) of Section 33‑11‑10 of the 1981 South Carolina Business Corporation Act. Although the new language is briefer, no substantive change is intended.

Section 33‑11‑10(a) states that the incorporators or directors shall adopt bylaws. With the additional requirements of Section 33‑2‑105 the new law continues the requirement that the bylaws be adopted at the organizational meeting.

The prior provision, which stated that the articles could contain any provision permitted in the bylaws, is now found in Section 33‑2‑102(b)(3).

The prior law recognized the authority of shareholders to not only amend, but to adopt initial bylaws (see Section 33‑11‑10(b) of the 1981 South Carolina Business Corporation Act). The Official Comment to Section 33‑10‑200, in discussing that shareholders always have the ultimate authority to amend or repeal the bylaws, states that the term “amendment” includes the adoption of a bylaw on a new subject. Therefore, under this act, the shareholders do not have authority to adopt the initial bylaws although, once adopted, the shareholders can replace them. If the corporation pursuant to Section 33‑8‑101(c) has transferred the powers of the board of directors to the shareholders, then obviously the shareholders would have the power to adopt the initial bylaws.

With respect to the permitted content of the bylaws, the language of this section is essentially identical with the prior law.

DERIVATION: 1984 Model Act Section 2.06.

CROSS REFERENCES

Amendment of bylaws, see Sections 33‑10‑200, 33‑10‑210, and 33‑10‑220.

Bylaws for statutory close corporation, see Section 33‑18‑220.

Directors: action without meeting, see Section 33‑8‑210.

Directors: committees, see Section 33‑8‑250.

Directors: election by shareholders, see Section 33‑7‑280.

Directors: emergency bylaws, see Section 33‑2‑107.

Directors: majority vote at meeting, see Section 33‑8‑240.

Directors: nominee registration of shares, see Section 33‑7‑230.

Directors: notice of meeting, see Section 33‑8‑220.

Directors: number, see Section 33‑8‑103.

Directors: participation in meeting, see Section 33‑8‑200.

Directors: qualifications, see Section 33‑8‑102.

Directors: quorum for meeting, see Section 33‑8‑240.

Directors: supermajority vote at meeting, see Section 33‑8‑240.

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

Officers: appointment, see Section 33‑8‑400.

Officers: duties, see Section 33‑8‑410.

Organizing corporation, see Section 33‑2‑105.

Record date, see Section 33‑7‑107.

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

Shareholders’ meetings, see Sections 33‑7‑101 and 33‑7‑102.

Shares without certificates, see Section 33‑6‑260.

Subscriptions for shares prior to incorporation, see Section 33‑6‑200.

Supermajority vote at shareholders’ meeting, see Section 33‑7‑270.

Library References

Corporations 53.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 111 to 121.

RESEARCH REFERENCES

Forms

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

NOTES OF DECISIONS

In general 1

1. In general

The charter or other instrument by which an organization comes into being is not conclusive on the issue of the purposes for which it is organized, and the court may consider extrinsic evidence on the issue. And the fact that an organization was incorporated under the general business corporation laws, rather than under the laws relating to charitable, educational, or nonbusiness corporations does not preclude a finding that it was organized exclusively for exempt purposes. The purpose for which a corporation has been organized is a question of fact, to be determined from all the evidence, including statements in the charter and evidence concerning the circumstances surrounding its organization, the purposes and intentions of the incorporators, and the activities of the corporation and of any predecessor organization. Columbia Country Club v. Livingston (S.C. 1969) 252 S.C. 490, 167 S.E.2d 300.

The fact that an organization which desired to conduct an exempt activity organized a corporation under the general business corporation laws, rather than under the laws relating to charitable, educational, or nonbusiness corporations, does not preclude a finding that it was organized exclusively for exempt purposes. Columbia Country Club v. Livingston (S.C. 1969) 252 S.C. 490, 167 S.E.2d 300.

**SECTION 33‑2‑107.** Emergency bylaws.

 (a) Unless the articles of incorporation provide otherwise, the board of directors of a corporation may adopt bylaws to be effective only in an emergency defined in subsection (d) of this section. The emergency bylaws, which are subject to amendment or repeal by the shareholders, may make all provisions necessary for managing the corporation during the emergency, including:

 (1) procedures for calling a meeting of the board of directors;

 (2) quorum requirements for the meeting; and

 (3) designation of additional or substitute directors.

 (b) All provisions of the regular bylaws consistent with the emergency bylaws remain effective during the emergency. The emergency bylaws are not effective after the emergency ends.

 (c) Corporate action taken in good faith in accordance with the emergency bylaws:

 (1) binds the corporation; and

 (2) may not be used to impose liability on a corporate director, officer, employee, or agent.

 (d) An emergency exists for purposes of this section if a quorum of the corporation’s directors cannot readily be assembled because of some catastrophic event.

HISTORY: Derived from 1976 Code Section 33‑11‑20 [1962 Code Section 12‑16.2; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 2.07 (Section 33‑2‑107) is no longer an optional provision (as was the case with its predecessor in earlier versions of the Model Act) but is unqualifiedly recommended for adoption. The problem it addresses is potentially present in every state and in every corporation, and the widespread acceptance of the earlier provision to date by a number of states argues that it be uniformly adopted.

The adoption of emergency bylaws in advance of an emergency not only clarifies lines of command and responsibility but also tends to ensure continuity of responsibility. The board of directors may be authorized by the emergency bylaws, for example, to designate the officers or other persons, in order of seniority and subject to various conditions, who may be deemed to be directors during the emergency.

The definition of “emergency” adopted by subsection (d) is broader than a nuclear disaster or attack on the United States. It includes any catastrophic event, such as an airplane crash or fire, that makes it difficult or impossible for a quorum of the corporation’s board of directors to be assembled. While there apparently has been no recent illustration of a public corporation facing such a catastrophic event, its possibility should not be ignored. In order to encourage corporations to adopt emergency bylaws, section 2.07(c) (Section 33‑2‑107(c)) broadly validates all corporate actions taken “in good faith” pursuant to them and immunizes all corporate directors, officers, employees, and agents from liability as a result of these actions. The phrase “action taken in good faith in accordance with the emergency bylaws” has been substituted for “willful misconduct,” the language of the earlier Model Act provision. This change is designed to conform the standard for immunity here and elsewhere in the Model Act and represents no substantive change.

A corporation that does not adopt emergency bylaws under this section may nevertheless exercise the powers described in section 3.03 (Section 33‑3‑103) in the event of an emergency as defined in section 2.07(d) (Section 33‑2‑107(d)).

SOUTH CAROLINA REPORTERS’ COMMENTS

As noted in the Official Comment, the most significant change from the prior law is that an emergency is not limited to an attack on the United States or a nuclear disaster. An emergency includes any time a quorum of directors cannot be readily assembled because of some catastrophic event. Thus, if a number of directors were killed, the section might be triggered. Also, if there were a tornado which even temporarily prevented normal functioning, the company could operate under the emergency bylaws.

The company is not required to but may have emergency bylaws. Section 33‑11‑20(a) of the 1981 South Carolina Business Corporation Act allowed the company’s shareholders or directors to adopt the emergency bylaws either before, during, or even after the disaster. This act does not specify when these bylaws are to be adopted or, more importantly, how they are to be adopted. Since Section 33‑3‑103 of this act states what happens if there are no emergency bylaws, it is assumed that the emergency bylaws must be adopted following the normal statutory procedures.

The statute anticipates that the board will adopt emergency bylaws, but this power can be reserved to the shareholders. (The prior law granted plenenary authority to either the directors or shareholders). Like the old law, the shareholders have ultimate power to amend or repeal these emergency bylaws.

In drafting the emergency bylaws, attorneys might want to look at the old list of possible provisions which is much broader than the new list. The old listing included:

(1) prescribe emergency powers to any officer of the corporation;.

(2) authorize delegation to any officer or director of the powers of the board of directors;.

(3) designate lines of succession of officers and agents of the corporation in the event that any of them shall for any reason be unable to discharge their duties. Such designation may be made either before or during any emergency, and may from time to time be modified;.

(4) designate those persons who, in such order of priority and for such period of time as may be provided in the emergency bylaws or by resolution, shall be directors;.

(5) relocate the principal place of business, or designate successive or simultaneous principal places of business, or authorize the board of directors or officers to do so during the emergency;.

(6) authorize any officer or director, or designate any other person, to call a meeting of the board of directors or of any committee in such manner and under such conditions as the emergency bylaws prescribe;.

(7) authorize giving notice only to such directors as it may be feasible to contact at the time and by such means as may be most feasible at the time, including publication over radio or by any other available means of communication;.

(8) provide that the director or directors attending the meeting, or any greater number fixed by the emergency bylaws, shall constitute a quorum.

Although the language is different, both the old and new provisions state that the emergency powers exist only during the emergency.

The old law specified that officers, in order of seniority, could take the place of absent directors (see Section 33‑11‑20(c) of the 1981 South Carolina Business Corporation Act). Although this language is not specifically included in this section, it is a provision which would be proper if set forth in the company’s emergency bylaws. The companion section, Section 33‑3‑103 of this act, includes a similar provision as being operative even if not included in the bylaws.

The prior law also indicated that if the company did not adopt emergency bylaws, if it acted generally in accord with the described permissive sections, or in a manner necessary and practical, that the actions would be valid (see Section 33‑11‑20(d) of the 1981 South Carolina Business Corporation Act). This Section 33‑3‑103 covers this contingency in much more detail and precision, but also in a much more limiting way.

As mentioned in the Official Comment, directors who act in “good faith” pursuant to the emergency bylaws are exonerated. The old standard in South Carolina was absence of “willful misconduct” (see Section 33‑11‑20(a)(9) of the 1981 South Carolina Business Corporation Act). As used in this act, “good faith” would be as defined in Section 33‑8‑300(c).

Other technical differences between the 1981 South Carolina Business Corporation Act and this section include:

(a) The old law specifically provided that the emergency automatically activated the emergency bylaws. Although not stated, this concept is implied within the new law, but the bylaw draftsman still might want to provide this in the bylaws.

(b) The new law states that the regular bylaws remain in force during the emergency to the extent not inconsistent with the emergency bylaws (see Section 33‑2‑107(b)).

(c) The new law specifically provides that any action taken in good faith pursuant to the bylaw is binding on the company (see Section 33‑2‑107(c)(1)). See Section 33‑8‑300 for the definition of good faith.

DERIVATION: 1984 Model Act Section 2.07.

CROSS REFERENCES

Amendment of bylaws, see Sections 33‑10‑200, 33‑10‑210, and 33‑10‑220.

Bylaws generally, see Section 33‑2‑106.

Emergency powers without bylaw provision, see Section 33‑3‑103.

Library References

Corporations 53.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 111 to 121.