CHAPTER 4

Name

**SECTION 33‑4‑101.** Corporate name.

 (a) Except as otherwise authorized by either subsection (f) or (g), a corporate name:

 (1) must contain the word “corporation”, “incorporated”, “company”, or “limited”, the abbreviation “corp.”, “inc.”, “co.”, or “ltd.”, or words or abbreviations of like import in another language; and

 (2) may not contain language stating or implying that the corporation is organized for a purpose other than that permitted by Section 33‑3‑101 and its articles of incorporation.

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

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

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

 (3) the fictitious name adopted by a foreign corporation authorized to transact business in this State because its real name is unavailable;

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

 (5) the name of a limited partnership authorized to transact business in this State.

 (c) A corporation may apply to the Secretary of State for authorization to use a name that is not distinguishable upon his records from one or more of the names described in subsection (b). The Secretary of State shall authorize use of the name applied for if:

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

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

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

 (1) has merged with the other corporation;

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

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

 (e) Chapters 1 through 20 of this title does not control the use of fictitious names.

 (f) The following corporations are exempt from subsection (a)(1):

 (1) a bank, building and loan association, savings and loan association, insurance company, public utility, and railroad;

 (2) a corporation which was organized before January 1, 1964, and whose charter or articles of incorporation on the effective date of this Business Corporation Act of 1988 specified a corporate name that would not meet the requirements of subsection (a) of this section, may continue to use that name as its official name;

 (3) nonprofit corporation; and

 (4) a professional corporation governed by Chapter 19 of this title, but the name of the professional corporation must comply with Section 33‑19‑150.

 (g) Any corporation incorporated in South Carolina which, prior to the effective date of Chapters 1 through 20 of this Title, filed a renewable certificate with the Secretary of State adopting an “assumed name” pursuant to the provisions of Section 33‑5‑35 in Section 2 of Act 146 of 1981, and which filed assumed name would not meet the requirements of subsection (a) of this section, may continue to use the name as its name until December 31, 1994, at which time the name of the corporation must meet the requirements of subsections (a) and (b) of this section. If necessary to meet the requirements of subsections (a) and (b), the corporation must amend its articles of incorporation prior to December 31, 1994.

 If any corporation incorporated in South Carolina prior to the effective date of Chapters 1 through 20 of this Title adopted an assumed name which complies with all of the provisions of subsections (a) and (b), that assumed name, upon filing of amended articles designating such name as the name of the corporation, is the corporation’s name.

 No certificate of assumed name may be renewed after the effective date of Chapters 1 through 20 of Title 33, and all such certificates, regardless of stated expiration date, automatically expire on December 31, 1994.

HISTORY: Derived from 1976 Code Section 33‑5‑10 [1962 Code Section 12‑13.1; 1952 Code Sections 12‑58, 12‑58.1; 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; 1951 (47) 196; 1962 (52) 1996; 1963 (53) 327; 1964 (53) 2065; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2; 1990 Act No. 446, Sections 2, 3.

OFFICIAL COMMENT

All of chapter 4, relating to corporate names, has been reviewed and revised in light of the responsibilities that should reasonably be placed on secretaries of state considering their available resources.

Section 4.01 (Section 33‑4‑101) deals with two basic name requirements: (1) the name must indicate “corporateness,” and (2) the name must be distinguishable upon the records of the secretary of state.

1. INDICATION OF CORPORATENESS.

Section 4.01(a) (Section 33‑4‑101(a)) permits the words indicating corporateness to include “corporation,” “incorporated,” “limited,” or “company” or an abbreviation of them. While the words “company” and “limited” are commonly used by partnerships or limited partnerships, and therefore do not uniquely indicate corporateness, their use is widespread and is continued since it creates no discernible harm. The Act also permits the use of words or abbreviations in another language that import corporateness.

2. NAMES THAT ARE “DISTINGUISHABLE UPON THE RECORDS OF THE SECRETARY OF STATE”.

The revision of the Model Act is based on the fundamental premise that its name provisions should only ensure that each corporation has a sufficiently distinctive name so that it may be distinguished from other corporations upon the records of the secretary of state. The general business corporation statute should not be a partial substitute for a general assumed name, unfair competition, or anti‑fraud statute. As a result, the Model Act does not restrict the power of a corporation to adopt or use an assumed or fictitious name with the same freedom as an individual or impose a requirement that an “official” name not be “deceptively similar” to another corporate name (a requirement of earlier versions of the Model Act). Principles of unfair competition, not the business corporation act, provide the limits on the competitive use of similar names.

The phrase “distinguishable upon the records of the secretary of state” is drawn from section 102(a)(1) of the Delaware General Corporation Law. The principal justifications for requiring a distinguishable official name are (1) to prevent confusion within the secretary of state’s office and the tax office and (2) to permit accuracy in naming and serving corporate defendants in litigation. Thus, confusion in an absolute or linguistic sense is the appropriate test under the Model Act, not the competitive relationship between the corporations, which is the test for fraud or unfair competition. The precise scope of “distinguishable upon the records of the secretary of state” is an appropriate subject of regulation by the office of secretary of state in order to ensure uniformity of administration. Corporate names that differ only in the words used to indicate corporateness are generally not distinguishable. Thus, if ABC Corporation is in existence, the names “ABC Inc.,” “ABC Co.,” or ABC Corp.” should not be viewed as distinguishable. Similarly, minor variations between names that are unlikely to be noticed, such as the substitution of a “.” for a “,” or the substitution of an arabic numeral for a word, such as “2” for “Two”, or the substitution of a lower case letter for a capital, such as “d” for “D,” generally should not be viewed as being distinguishable.

The elimination of the “deceptively similar” requirement that appeared in earlier versions of the Model Act and the specific recognition appearing in section 4.01(e) (Section 33‑4‑101(e)), that corporations may use artificial or fictitious names to the same extent an individual can, are based on the fact that the secretary of state does not generally police the unfair competitive use of names and, indeed, usually has no resources to do so. For example, assume that “ABC Corporation” operates a retail furniture store in Albany, New York, and another group wants to use the same name to engage in a business involving imports of textiles in New York City. An attempt to incorporate a second “ABC Corporation” (or a very close variant such as “ABC Corp.” or “ABC Inc.”) should be rejected because the names are not distinguishable upon the records of the secretary of state. If the second group uses a distinguishable official name, like “ABD Corporation”, it probably may lawfully assume the fictitious name “ABC Corporation” to import goods in New York City if it files the assumed name certificate required by New York law. In these situations, the secretary of state will usually not know in what business or in what geographical area “ABC Corporation” is active or what name ABD Corporation is actually using in its business; he simply maintains an alphabetical list of “official” corporate names as they appear from corporate records and makes his decision about whether a proposed name is distinguishable from other “official names” by comparing the proposed name with those on the list. This assumes that there is either no assumed name statute or that if there is such a statute it requires only local filing in counties or, as in New York, a central filing which does not become part of the corporate records maintained by the secretary of state’s office. These assumptions are generally if not universally correct.

3. CLASSES OF UNAVAILABLE NAMES.

Section 4.01(b)(3) (Section 33‑4‑101(b)(3)) lists classes of “official names” that are not available. Names in use and thus unavailable from the standpoint of the secretary of state’s uniqueness test for “official names” come from the following sources: (1) official names of profit or not‑for‑profit domestic corporations, (2) official names of foreign profit or not‑for‑profit corporations qualified to transact business, (3) reserved names, and (4) registered names. The secretary of state becomes involved with fictitious or assumed names only in the situation where a foreign corporation, planning to transact business in a state, discovers that its name is not available in that state. To qualify it must adopt an assumed or fictitious name as its “official name” in the state, see section 15.06 (Section 33‑15‑106). Such a fictitious or assumed name is thereafter an “official” name and is unavailable to the same extent as any other “official name” in use is unavailable.

4. CONSENT TO USE.

Section 4.01(c)(1) (Section 33‑4‑101(c)(1)) authorizes the secretary of state to accept a name that is indistinguishable from the name of another corporation if that corporation files an undertaking in a form satisfactory to the secretary of state that it will thereafter change its name to a name that is distinguishable upon the records of the secretary of state. This privilege may be important in acquisition transactions where a new corporation is to take over the business of an existing corporation without a change in corporate name. The secretary of state may require the undertaking to specify the new name which the corporation will adopt and the time period within which the change will be made. The requirements imposed on the undertaking should be consistent with the limited role of the secretary of state in the administration of section 4.01 (Section 33‑4‑101).

SOUTH CAROLINA REPORTER’S COMMENTS

This section makes eight major changes in the regulation of names of South Carolina corporations:

(1) Term “company” permitted.

The statute now allows the term “company” as one of the designating words (see Section 34‑4‑101(a)(1)).

(2) Limited partnerships can use term “limited”.

The statute now specifically allows limited partnerships to use the term “limited” in their names. See also Section 33‑42‑30 of the 1976 Code, as amended (South Carolina Uniform Limited Partnership Act).

(3) (Amended, 1990 Act No 446, Section 4) Exemptions from the requirement that “Inc.” or a similar designation be included as part of the official corporate name.

Subsection (f)(1) carries forward the provision in Section 33‑5‑10(b) of the 1981 act, originally enacted as part of the 1962 act, that exempts banks, savings institutions, insurance companies, public utilities, and railroads from the requirement that their official corporate name include the term “corporation,” “incorporated,” “company,” or “limited” or an abbreviation of one of these terms. Moreover, many industrial and mercantile corporations formed before the 1962 act had no such term in their official corporate name. The 1962 act exempted these corporations from the name designation requirement. This exemption was carried forward in the 1981 act and has been continued in this act in subsection (f)(2).

Subsection (f)(3) makes it clear that nonprofit corporations do not have to use the designation “corporation” and the like in their official corporate name. See Section 33‑20‑103. Hospitals, educational institutions, and the like traditionally have not used such designations, and there are no compelling public policy reasons why they should be required to do so.

Subsection (f)(4) exempts professional corporations from the designations required in subsection (a), but requires professional corporations to include in the articles of incorporation one of the special designations in Section 33‑19‑150 as part of their official corporate name.

The exemptions in subsection (f) are only with respect to the requirement in subsection (a)(1). Corporations qualifying for one of the exemptions must nevertheless meet all the remaining requirements in this section, e.g., subsection (b) which requires that the name of a corporation be distinguishable from the name of all other corporations and limited partnerships on file in the office of the South Carolina Secretary of State.

(4) Similar names permitted.

The new statute allows the use of an official name that may be similar to another corporation’s name so long as it is grammatically distinguishable on the Secretary of State’s books. The Secretary of State no longer has to determine whether the similarity in names might cause confusion. “Deceptively similar” is no longer the test. (compare Section 33‑5‑10(a)(2) of the 1981 South Carolina Business Corporation Act with Section 33‑4‑101(b) of this act). A company which has an “official” name that is similar to another business may not be permitted under notions of unfair trade practices and trade name principles to use such name other than in its official filings.

(5) Restriction on Use of certain names removed.

The new law no longer contains the extensive prohibitions restricting a corporation from using or indicating it is a bank, insurance company, or transportation company when it is not licensed properly or from claiming affiliation with a religious veterans, service, charitable or service organization without written certification. However, nothing in the new law permits any such behavior. In addition, the new provisions no longer impose any duty on the Secretary of State to monitor these problems. These types of prohibitions are continued in the more specific section dealing with the regulation of such companies. See, for example, Section 34‑3‑100 which prohibits the use of the term “bank” if the company is not properly qualified as a bank.

(6) The fact that the Secretary of State accepts a name for filing does not automatically mean that the corporation can use this name in conducting its business.

The Secretary of State has no obligation to prohibit unfair methods of commerce that might result from the use of deceptive or indistinguishable names. This is left up to existing common law doctrine and the activities of other regulating authorities. For example, the State Board of Financial Institutions has certain powers, including the right to regulate the use of deceptive names by financial institutions, and nonqualified institutions (see, e.g., Section 34‑3‑260 of the 1976 Code).

(7) No statutory control over noncorporations.

The prior law specifically stated that, unless an entity were incorporated formally, it could not use a name which would suggest that it was a corporation—for example, it could not use the term “Inc.” in its name. Although the new statute does not include this prohibition, no specific change in the law is intended; rather the prohibition against such deceptive activity would be governed by principles of unfair competition, fraud, and the like. In this regard, subsection (e) recognizes, as did Section 33‑5‑10(g) of the 1981 South Carolina Business Corporation Act, that this section is not intended to control trade names, unfair competition, the use of assumed names, and the like. See the Official Comment.

(8) Assumed Name Statute Repealed Effective December 31, 1944.

Section 33‑5‑35 of the 1981 South Carolina Business Corporation Act, which permitted a corporation to adopt as its quasi‑official name, its trade name or any assumed name, is repealed. However, those domestic corporations which had filed a certificate of assumed name can continue to treat such name as effectively their only name until December 31, 1994. No new assumed name registrations pursuant to the repealed Section 33‑5‑35 will be accepted. Regardless of when the old assumed name certificate was to be renewed (they were good for five years) all such certificates will automatically expire on December 31, 1994. A corporation whose name as stated on its articles does not then comply with these new name requirements will have to file amended articles and adopt a name which complies with this section. If a corporation whose assumed name would not have complied with the old law but will meet all of the requirements of the new law, e.g., a corporation whose prior assumed name included the words “company” rather than the word “corporation”, such company can use its assumed name as its “official” name. However, it also must amend its articles since, although it had filed an assumed name, it also had a different “official” name on its articles.

The fact that the corporation’s filed name must meet the requirements of subsections (a) and (b) of this section does not affect the corporation’s common law right to conduct business pursuant to a proper trade name or under a service mark. The repeal of this assumed name statute is not intended to change these rights. All that is being deleted is the right of the first corporation to object to a second corporation which desires to file, as its “official” or “assumed” name, one that is deceptively similar to the first filed name.

Whether a corporation can or should conduct its business under a fictitious name, a service mark, or some derivation of its official name is a subject beyond the scope of this comment. The company and its advisor should consider, at minimum, the factors mentioned in the balance of these comments.

(9) Effective Corporate Name.

Although the company must have an “official” name, the limited importance of the official name is somewhat demonstrated in the case of Sumter Tobacco and Cotton Warehouse Co. v. Phoenix Assurance Co. 26 S.C. 76, 82‑83, 56 S.E. 654, 656 (1905). In this case, an insurance company attempted to deny fire insurance coverage. They attempted to show that the insured (a corporation) did not properly have title because of a defect in its name. The court stated:

“One of the grounds of the motion for a new trial was that the deed of conveyance to the Sumter Tobacco & Cotton Warehouse Company conveying the lot on which the building stood was insufficient to prove title to the Sumter Warehouse Company. The deed was dated January the 16th, 1896, after the declaration looking to the charter of the Sumter Tobacco & Cotton Warehouse Company had been filed, but before the charter was actually issued in the name of the Sumter Tobacco Warehouse Company. It is the duty of Courts to give effect to deeds made in good faith rather than destroy them on technical grounds. A deed to a corporation made before the charter, will have effect as soon as the charter is obtained, on the ground that its acceptance should be presumed as soon as the corporation is competent to accept it (4 Thompson on Corporations, 5114 and 5115). The slight change in the name of the corporation can make no difference. Certain it is, that Moran, the grantor, would not be heard to allege against the validity of the deed on the ground taken by the defendant; and for a greater reason the defendant company, which had no interest in the land, after having issued its policy and having received its premium from the plaintiff as the owner of the property, cannot be allowed to do so.”

It is well‑known that many corporations conduct their day‑to‑day business under trade names or other designations which are not their official corporate names and may not even be an abbreviation or derivation of this officially filed name. As has been true under existing law (see 1964 Op. S.C. Att’y Gen. 279 (#1765)), nothing in this act regulates the use by corporations of these business names. The prior law, Section 35‑5‑35 “Assumed Name”, gave the Secretary of State certain control in this area. (See Comment (8) above.).

In the case of H. & H. Glass C., Inc. v. Wynne 289 S.C. 389, 346 S.E.2d 523 (S.C. 1986), the court indicated that a suit brought in a name which is not a legal entity (a corporation) is a nullity, and the action fails (citing Glenn v. E. I. DuPont DeNemours and Company, 254 S.C. 128, 174 S.E.2d 155 (1927)). However, if the pleading merely has a mistake as to the company’s name, this is not fatal (at least where the error has not been timely and properly raised). “ [A]n action in which a legally existing plaintiff has been misnamed is still a true action to which the court can give full effect, subject only to the defendant’s right to object at the threshold for misnomer.” Commercial and Savings Bank v. Ward 146 S.C. 77, 143 S.E.2d 546 (1928). Unless there has been a prejudiced misleading, such as through the omission of a material part of the corporate name, the misnomer will be a harmless error.

Under this section, the corporation must merely “file” a distinguishable name. It may, but does have to, use this name in dealing with the public. In determining whether to use a different name in dealing with the public, the corporation, for example, will need to be careful that:

(a) the name is not deceptively similar to a name already in use (or otherwise properly protected);.

(b) as may be required by other Code provisions or common law doctrine, the public is notified with whom it is dealing;.

(c) the name does not indicate a proprietorship or partnership, thus possibly exposing the shareholders to unlimited liability;.

(d) the name is not otherwise deceptive.

DERIVATION: 1984 Model Act Section 4.01.

CROSS REFERENCES

“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.

Foreign corporations, see Sections 33‑15‑101 et seq.

Inclusion of corporate name in application to reinstate dissolved corporation, see Section 33‑14‑220.

Professional corporations, Professional Corporation Supplement, see Section 33‑19‑150.

Registered name, see Section 33‑4‑103.

Requirement, for reinstatement of certificate of authority of foreign corporation which has been administratively revoked, that corporation’s name satisfy requirements of this section, see Section 33‑15‑330.

Reserved name, see Section 33‑4‑102.

Statement of name in articles, see Section 33‑2‑102.

Termination of professional corporation status, see Section 33‑19‑410.

Use of word “limited” or abbreviation thereof for name of limited partnership, see Section 33‑42‑30.

Federal Aspects

Statutes of United States with respect to right to acquire and protect trade names and trademarks, generally, see 15 U.S.C.A. Sections 1051 et seq.

Library References

Corporations 43 to 50.

Westlaw Topic No. 101.

C.J.S. Corporations Section 98.

RESEARCH REFERENCES

Encyclopedias

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

Forms

South Carolina Legal and Business Forms Section 1:4 , Preincorporation‑Corporate Name.

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

Treatises and Practice Aids

Fletcher Cyclopedia Law of Private Corporations Section 2418, Permissible Words and Language‑Words Indicating Corporateness.

Fletcher Cyclopedia Law of Private Corporations Section 2420, Identical or Similar Names‑Statutory Requirements.

Attorney General’s Opinions

Secretary of State has discretion to refuse to register or file corporate name, which in his view, is not sufficiently distinguishable from corporate name of corporation incorporated or authorized to transact business in this state. 1991 Op Atty Gen No. 91‑32, p 87.

Ultimate decision on distinguishability of names rests with Secretary of State. 1991 Op Atty Gen No. 91‑32, p 87.

Corporation formed by the merger of two companies may retain the name of one of original companies without the necessity of indicating its corporate character in the name, where the company had been organized prior to the passage of this section [Code 1962 Section 12‑13.1]. 1963‑64 Op Atty Gen, No. 1765, p 279.

**SECTION 33‑4‑102.** Reserved name.

 (a) A person may reserve the exclusive use of a corporate name, including a fictitious name for a foreign corporation whose corporate name is not available, by delivering an application to the Secretary of State for filing. The application must set forth the name and address of the applicant and the name proposed to be reserved. If the Secretary of State finds that the corporate name applied for is available, he shall reserve the name for the applicant’s exclusive use for a nonrenewable one hundred twenty‑day period.

 (b) The owner of a reserved corporate name may transfer the reservation to another person by delivering to the Secretary of State a signed notice of the transfer that states the name and address of the transferee.

 (c) The name of a corporation administratively dissolved under Section 33‑14‑210 is not subject to reservation for a period of two years from the date the Secretary of State sends a copy of the certificate of dissolution to the corporation as provided by Section 33‑14‑210(b).

HISTORY: Derived from 1976 Code Section 33‑5‑20 [1962 Code Section 12‑13.2; 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; 1991 Act No. 3, Section 3.

OFFICIAL COMMENT

The “reservation” of a corporate name is basically a device to simplify the formation of a new corporation or the qualification of a foreign corporation. By reserving a name, the persons considering the formation or qualification of the corporation can order stationery, prepare documents, etc. on the assumption that the reserved name will be available. Reference to a specific intent to form a new corporation is not required by the statute, however, since a secretary of state is not equipped and should not be asked to determine whether the requisite intent actually exists. For the same reason, “any person” is permitted to reserve a corporate name without reference to specific classes of persons who might wish to reserve a corporate name for various purposes.

Under section 4.02 of the Model Act (Section 33‑4‑102), an available corporate name may be reserved:

(1) by persons considering the formation of a new domestic corporation;.

(2) by persons considering the formation of a corporation in another state and the immediate qualification of that new corporation in this state; and.

(3) by a foreign corporation planning or considering qualification in this state. The name reserved may be the foreign corporation’s “official name” (if that name is available) or another name. The foreign corporation may thereafter use the reserved name as the name of a domestic subsidiary or, if its real name is unavailable, as a fictitious “official name” for its qualification under section 15.06 (Section 33‑15‑106). The illustrations are designed to suggest the scope and flexibility of section 4.02 (Section 33‑4‑102), and not to exhaust the possible uses to which a reserved name may be put.

Consideration was also given to whether reservation of a corporate name should be made renewable. The modern requirements for incorporation of a domestic corporation or the qualification of a foreign corporation are so simple that it is unlikely that more than 120 days could ever be realistically required to form or qualify a corporation. Also, it was believed to be undesirable to allow the reservation procedure to be used for other purposes, such as permanently setting aside a name by successive renewals. Therefore, only a single, one‑time reservation is provided for, although after the 120‑day period expires the name becomes available again and anyone, including the original reserver, may reserve the name. And nothing prevents the formation of an inactive corporation specifically to hold the desired name if a longer period of reservation is desired than the 120‑day period specified by section 4.02 (Section 33‑4‑102).

SOUTH CAROLINA REPORTERS’ COMMENTS

A difference in this section from the prior statute is that any person may now reserve a name for any purpose. Section 33‑5‑20 of the 1981 South Carolina Business Corporation Act specified certain limitations as to the purposes for which the name could be reserved, and also limited who could be the applicant. (See the Official Comment for the reasons for these changes.) The prior law permitted certain policing by the Secretary of State; i.e., he could revoke the reservation if he found that the application or transfer of it was not made in good faith. This is no longer his duty. Common sense requires the Secretary to maintain a list of names, so there is no longer a need to mention this in the statute. The reservation under prior law was renewable, but it is not under the new provision (see the Official Comment).

DERIVATION: 1984 Model Act Section 4.02.

CROSS REFERENCES

Availability or consent to use of names, see Section 33‑4‑101.

“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.

Foreign corporations, see Sections 33‑15‑101 et seq.

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

Registered name, see Section 33‑4‑103.

Library References

Corporations 49.

Westlaw Topic No. 101.

C.J.S. Corporations Section 98.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:4 , Preincorporation‑Corporate Name.

**SECTION 33‑4‑103.** Registered name.

 (a) A foreign corporation may register its corporate name, or its corporate name with any addition required by Section 33‑15‑106, if the name is distinguishable upon the records of the Secretary of State from the corporate names that are not available under Section 33‑4‑101(b)(3).

 (b) A foreign corporation registers its corporate name, or its corporate name with any addition required by Section 33‑15‑106, by delivering to the Secretary of State for filing an application:

 (1) setting forth its corporate name, or its corporate name with any addition required by Section 33‑15‑106, the state or country and date of its incorporation, and a brief description of the nature of the business in which it is engaged; and

 (2) accompanied by a certificate of existence (or a document of similar import) from the state or country of incorporation.

 (c) The name is registered for the applicant’s exclusive use upon the effective date of the application.

 (d) A foreign corporation whose registration is effective may renew it for successive years by delivering to the Secretary of State for filing a renewal application, which complies with the requirements of subsection (b), between October first and December thirty‑first of the preceding year. The renewal application, when filed, renews the registration for the following calendar year.

 (e) A foreign corporation whose registration is effective may qualify thereafter as a foreign corporation under the registered name or consent in writing to the use of that name by a corporation thereafter incorporated under Chapters 1 through 20 of this Title or by another foreign corporation thereafter authorized to transact business in this State. The registration terminates when the domestic corporation is incorporated or the foreign corporation qualifies or consents to the qualification of another foreign corporation under the registered name.

HISTORY: Derived from 1976 Code Section 33‑5‑30 [1962 Code Section 12‑13.3; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

The “registration” of a corporate name is basically a device by which a foreign corporation, not qualified to transact business in the state, can preserve the right to use its unique “real” name if it decides later to qualify in the state. In effect, registration ensures “real” name availability in areas of potential future expansion.

It is believed desirable to limit section 4.03 (Section 33‑4‑103) to this purpose and not allow it to become an indirect device for the preservation of trademarks, trade names, or possible assumed names. For this reason, generally only “real” names of foreign corporations may be registered (with exceptions described below). A broader approach would create issues better resolved under a trademark or similar statute, or by litigation under unfair competition principles, and might impose duties on secretaries of state that they are generally not equipped to handle, or could handle only at increased cost.

Registration of a name other than the “real” name is permitted in only one situation: if the “real” name of a foreign corporation is not available solely because it does not comply with section 15.06 (Section 33‑15‑106), requiring the words “incorporated,” “corporation,” “company,” or “limited,” or an abbreviation of one of these words, the corporation may add one of these words or abbreviations and register its “real” name as so modified under section 4.03(a) (Section 33‑4‑103(a)).

Confusion sometimes exists between “reservation” of names under section 4.02 (Section 33‑4‑102) and registration of names under section 4.03 (Section 33‑4‑103). A foreign corporation that is planning to qualify as a foreign corporation and finds that its name is available in the state may either register or reserve the name. Often a foreign corporation will have to decide whether to qualify or to create a domestic subsidiary; this well may be decided after the exclusive right to use the corporate name in the state is obtained either by reservation or by registration. If the corporation registers its name, it will be kept indefinitely; if it reserves, it will be kept for 120 days and then become available again. That is the foreign corporation’s choice. If a foreign corporation registers its name and then elects to form a domestic or foreign subsidiary, the written consent procedure of section 4.03(e) (Section 33‑4‑103(e)) allows the secretary of state to ascertain that the domestic subsidiary is related to the foreign corporation and that use of the registered name by that subsidiary is acceptable to the foreign parent.

If a foreign corporation’s “real” name is unavailable, a foreign corporation may reserve any name—including one that is assumed or fictitious when compared with the corporation’s “real” name—for 120 days. But it may not register this type of name in light of the policy against allowing the name provisions of the Model Act to be used for purposes broader than the “unique name” issue. Nevertheless, a foreign corporation that wishes to be certain that a particular fictitious or assumed name will be available in the future may create an inactive domestic subsidiary with the desired name to preserve its future availability. See also the Official Comment to section 15.06 (Section 33‑15‑106).

Section 4.03(e) (Section 33‑4‑103(e)) provides that the protection of the name provided by this section terminates when the name is used pursuant to this section by the foreign corporation or its domestic or foreign subsidiary.

SOUTH CAROLINA REPORTERS’ COMMENTS

A foreign corporation now wishing to register its name prior to qualifying only has to have a name that is grammatically distinguishable from existing corporate names. If its name is the same, or does not meet South Carolina standards, a modified name as set forth in Section 33‑15‑106, can be registered.

Section 33‑15‑106 also includes the mechanism for a company to obtain consent to register a name similar to an existing name, directs the Secretary of State to recognize a court‑ordered right to use a name, and provides a mechanism to handle registration of a name resulting from a merger.

The registration procedure, set forth in subsection (b), is effectively the same as existing procedures.

Subsection (e) is new and its purpose is described in the Official Comment.

As was true under the 1981 South Carolina Business Corporation Act, the application is good for a year and can be renewed annually. The registration is effective when filed. The prior statutory mandate for maintaining lists is deleted as being so obvious as to be unnecessary.

DERIVATION: 1984 Model Act Section 4.03.

CROSS REFERENCES

Availability or consent to use corporate name, see Section 33‑4‑101.

Certificate of existence, see Sections 33‑1‑280 and 33‑15‑103.

“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.

Foreign corporations, see Sections 33‑15‑101 et seq.

Reserved name, see Section 33‑4‑102.

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

Library References

Corporations 45, 639.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 98, 893.

**SECTION 33‑4‑104.** Name change filing requirement when real property owned.

 (a) If a corporation or foreign corporation that owns real property in South Carolina changes its corporate name by amendment of its articles or by merger, share exchange, domestication, conversion, or reorganization, the newly‑named, surviving, acquiring, domesticating, converting, or reorganizing corporation must file a notice of that name change in the office of the register of deeds of the county in South Carolina in which the real property is located. If there is no office in that county, a notice of name change must be filed with the clerk of court of the county in which that real property is located.

 (b) The filing must be by:

 (1) affidavit executed in accordance with the provisions of Section 33‑1‑200 and containing the old and new names of the corporation and describing the real property owned by that corporation; or

 (2) filing a certified copy of the amended articles, articles of merger, articles of conversion, articles of domestication, or articles of share exchange accompanied by a description of the real property; or

 (3) a duly recorded deed of conveyance to the newly‑named surviving, acquiring, domesticating, converting, or reorganizing corporation.

 (c) The affidavit or filed articles must be duly indexed in the index of deeds.

 (d) The purpose of this section is to establish record notice under Chapter 7 of Title 30. Failure to make the required filing of a corporate name change will not affect the legality, force, effect, or enforceability as between the parties of any conveyance or other transaction involving the real estate owned by the affected corporation that is made subsequent to the change in name.

HISTORY: Derived from 1976 Code Section 33‑1‑60 [1962 Code Section 12‑11.6; 1962 (52) 1996; 1963 (53) 327; 1964 (53) 1910; 1968 (55) 3046; 1970 (56) 1932; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2; 2004 Act No. 221, Section 12.

OFFICIAL COMMENT

None. This section has no Model Act counterpart.

SOUTH CAROLINA REPORTERS’ COMMENTS

Although for years there has been no requirement that the articles or other corporate documents be filed with a local office, [see Folk, Reconsiderations and Prospects 15 S.C.L. Rev. 467, 469‑471 (1963)], the prior law (Section 33‑1‑60(a)(6)) provided that any corporate name change for any corporation owning real property had to be filed in the register of deeds office in order to provide notice to subsequent purchasers. This non‑Model Act requirement has been continued.

The new provision follows the content of the existing law. Only corporations actually owning an estate interest in real property must file. Corporations which only hold liens, mortgages, or short‑term leasehold interests are not obligated to file. Persons dealing with liens and mortgage interests will be fully protected without a local filing. Since they will be able to more efficiently confirm a lienholder or mortgagee name change from the Secretary of State’s records than by possibly checking years of records in a local office. Although a short‑term lease could be an estate interest, for simplicity purposes, corporations owning only short‑term leases need not file, since there would likely be little practical benefit from such a filing. No attempt is made to define what is a long‑term lease, since the parties will make a business judgment whether they need the protection of the recording acts.

Although not required, a mortgage holder (or short‑term tenant) could elect to file a simple assignment form showing the mortgage “going” from one entity to another. In order to avoid any implication that such procedure is required, such procedure is not set forth as even an option in the statute. Nothing in this section prohibits this filing.

The revised act differs from existing South Carolina procedures in two respects. First, the filing can be accomplished by a simple affidavit. The purpose is to make this a much more simplistic process. Second, a filing is required for every name change. Although implied under the old law, the statute now clearly provides that any change which results in a name change requires a filing. Lawyers and others should be particularly careful to note that this section applies to all corporations owning real property, which could include foreign corporations which are not required to qualify to do business in South Carolina, since the mere ownership of real property will not require a corporation to qualify [see Section 33‑15‑101(b)(9)].

Library References

Corporations 47.

Westlaw Topic No. 101.

C.J.S. Corporations Section 98.

RESEARCH REFERENCES

Forms

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