CHAPTER 11

Merger and Share Exchange

**SECTION 33‑11‑101.** Merger.

(a) A business corporation may merge with or into:

(i) another business corporation, domestic or foreign;

(ii) a nonprofit corporation, to the extent authorized by Section 33‑31‑1101, if the board of directors of each corporation adopts and the shareholders of a business corporation or members of a nonprofit corporation approve the plan of merger, if required by Section 33‑11‑103 for business corporations or Section 33‑31‑1103 for nonprofit corporations;

(iii) a limited liability company, domestic or foreign;

(iv) a partnership, domestic or foreign; or

(v) a limited partnership, domestic or foreign.

(b) The plan of merger must include the:

(1) name of each entity planning to merge and the name of the surviving entity into which each other entity plans to merge;

(2) terms and conditions of the merger; and

(3) manner and basis of converting the shares of each business corporation into shares, obligations, other securities, or membership interests of the surviving entity or into cash or other property in whole or part.

(c) The plan of merger, when applicable, must set forth:

(1) amendments to the articles of incorporation, articles of organization, partnership agreement, or certificate of partnership of the surviving entity; and

(2) other provisions relating to the merger.

HISTORY: Derived from 1976 Code Section 33‑17‑10 [1962 Code Section 12‑20.1; 1952 Code Sections 12‑451, 12‑452; 1942 Code Section 7757; 1932 Code Section 7757; 1925 (34) 246; 1962 (52) 1996; 1969 (56) 231; 1978 Act No. 439 Section 1; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2; 1994 Act No. 384, Section 6; 2004 Act No. 221, Section 14.

OFFICIAL COMMENT

1. Introductory Comment.

Chapter 11 deals with mergers and compulsory share exchanges by corporations. A merger is a transaction by which one or more corporations disappear into the surviving corporation, which becomes vested with all the business and assets, and becomes liable for the debts and liabilities, of each disappearing corporation. A share exchange is a transaction by which a corporation becomes the owner of all the outstanding shares of one or more classes of another corporation by an exchange that is compulsory on all owners of the acquired shares. The two types of transactions have similar consequences, though in the case of a merger the separate existence of the non‑surviving corporations disappears while in a share exchange the separate existence of each corporation is not affected; if all the shares of a corporation are acquired through a share exchange, that corporation becomes a wholly owned subsidiary of the acquiring corporation.

Earlier versions of the Model Act also provided for a “consolidation,” which was similar to a merger, except that all corporate parties to the transaction disappeared and an entirely new corporation was created. In modern corporate practice consolidation transactions are obsolete since it is nearly always advantageous for one of the parties in the transaction to be the surviving corporation. (If creation of a new entity is considered desirable, a new entity may be created before the merger and the disappearing entities merged into it.) As a result all references to a statutory “consolidation” have been deleted from the Model Act.

The procedures required for approval of merger and share exchange transactions are relatively simple: adoption of a plan of merger or share exchange by the boards of directors of all corporations that are parties to the transaction, approval by the shareholders to the extent required by section 11.03 (Section 33‑11‑103), and filing articles of merger or share exchange under section 11.05 (Section 33‑11‑105).

2. Statutory Mergers.

Section 11.01(a) (Section 33‑11‑101(a)) authorizes a statutory merger, to be accomplished by the adoption of a plan of merger under section 11.01(b) (Section 33‑11‑101(b)), approval of the transaction by the shareholders (if required by section 11.03 (Section 33‑11‑103)), and filing articles of merger under section 11.05 (Section 33‑11‑105). Upon the effective date of the merger, the surviving corporation becomes vested with all the assets of the disappearing corporations and becomes subject to their liabilities.

Under the Model Act, there are virtually no restrictions or limitations on the terms of a statutory merger. Shareholders of the disappearing corporations may receive securities of the surviving corporation, securities of a third corporation, e.g., shares issued by the parent of the surviving or disappearing corporation (which may be publicly traded and marketable while the shares of the surviving or disappearing corporation are not), or cash or other property (a “cash” or “cash‑out” merger). Some of the holders of a single class of shares may be required to accept securities or properties while the remaining holders may be compelled to accept different securities, property, or cash. The capitalization of the surviving corporation may be restructured in the merger, or its articles of incorporation may be amended by the articles of merger in any way deemed appropriate. Any other provisions considered necessary or desirable with respect to the merger may be included in the plan of merger.

Merger transactions may give rise to voting by separate voting groups of shareholders under section 11.03(f) (Section 33‑11‑103(f)), and dissenting shareholders may have dissenters’ rights under chapter 13.

Courts have held that merger transactions that are formally authorized by the procedures set forth in this chapter may in some circumstances constitute a breach of duty to minority shareholders where the effect of the transaction is to eliminate them from further equity participation in the enterprise. See McBride, “Delaware Corporate Law: Judicial Scrutiny of Mergers—The Aftermath of Singer v. Magnavox Co.,” 33 BUS. LAW. 2231 (1978). In Delaware, case law establishes that these transactions must be fully disclosed and entirely fair to the minority shareholders. See Singer v. Magnavox Co., 380 A.2d 969 (Del. 1977); Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983); Harman v. Masoneilan International, Inc., 442 A.2d 487 (Del. 1982).

3. Equivalent Nonstatutory Transactions.

A transaction may have the same economic effect as a statutory merger even though it is cast in the form of a nonstatutory transaction. For example, assets of the disappearing corporations may be sold for consideration in the form of shares of the surviving corporation, followed by the distribution of those shares by the disappearing corporations to their shareholders and their subsequent dissolution. Transactions have sometimes been structured in nonstatutory form for tax reasons or in an effort to avoid some of the consequences of a statutory merger, particularly appraisal rights to dissenting shareholders. Faced with these transactions, a few courts have developed or accepted the “de facto merger” concept which, to some uncertain extent, grants to dissenting shareholders the rights they would have had if the transaction had been structured as a statutory merger. See Folk, “De Facto Mergers in Delaware: Hariton v. Arco Electronics, Inc.,” 49 VA. L. REV. 1261 (1963). These problems should not occur under the Model Act since the procedural requirements for authorization and consequences of various types of transactions are largely standardized. For example, dissenters’ rights are granted not only in mergers but also in share exchanges, in sales of all or substantially all the corporate assets, and in amendments to articles of incorporation that significantly affect rights of shareholders.

SOUTH CAROLINA REPORTERS’ COMMENTS

The 1984 Model Act provision was adopted unchanged. It represents no significant substantive change from the 1981 South Carolina Business Corporation Act’s provisions for mergers, although, as noted in the Official Comments, the Model Act does not provide for statutory consolidations. The Model Act and new South Carolina provision permit the inclusion in the plan of any amendments to the articles necessitated by the merger; under prior South Carolina law, their inclusion was mandatory. Additionally, the Model Act and the new provision do not contain a provision similar to Section 33‑17‑10(c) of the 1981 South Carolina Business Corporation Act authorizing the merger of a corporation with a joint stock company, an unincorporated association, a business trust, or a corporation organized under a special statute.

DERIVATION: 1984 Model Act Section 11.01.

CROSS REFERENCES

Abandonment of merger, see Section 33‑11‑103.

Amendment of articles of incorporation, see Section 33‑11‑106.

Articles of merger, see Section 33‑11‑105.

Approval by shareholders, see Section 33‑11‑103.

Close corporations, Statutory Close Corporation Supplement, see Section 33‑18‑300.

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

Effect of merger, see Section 33‑11‑106.

Merger of subsidiary into parent, see Section 33‑11‑104.

Merger with foreign corporation, see Section 33‑11‑107.

Share exchange, see Section 33‑11‑102.

Share transfer prohibition of statutory close corporations, see Section 33‑18‑110.

Library References

Corporations 581 to 583, 585.

Limited Liability Companies 49.

Partnership 227, 269, 376.

Westlaw Topic Nos. 101, 241E, 289.

C.J.S. Corporations Sections 792 to 798, 802 to 806.

C.J.S. Partnership Sections 104, 224, 302, 307, 313, 439 to 440.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:22 , Merger, Consolidation, and Conversion.

South Carolina Legal and Business Forms Section 1:344 , Plan of Merger.

NOTES OF DECISIONS

In general 1

1. In general

Corporations which are creatures of statute have no authority to consolidate or merge except as provided by statute. Stephenson Finance Co. v. South Carolina Tax Commission (S.C. 1963) 242 S.C. 98, 130 S.E.2d 72. Corporations And Business Organizations 2651

Former section contemplated the reorganization, consolidation, or merger of two or more corporations, resulting in their assets being held by one corporation, but it does not expressly or by necessary implication prohibit the creation, simultaneously with and as an integral part of the reorganizations, of a second corporation to which, in the course of the reorganization, some of assets of the merging corporations will pass. Beard v. South Carolina Tax Commission (S.C. 1956) 230 S.C. 357, 95 S.E.2d 628. Corporations And Business Organizations 2781

**SECTION 33‑11‑102.** Share exchange.

(a) A corporation may acquire all of the outstanding shares of one or more classes or series of another corporation if the board of directors of each corporation adopts and its shareholders, if required by Section 33‑11‑103, approve the exchange.

(b) The plan of exchange must set forth the:

(1) name of the corporation whose shares will be acquired and the name of the acquiring corporation;

(2) terms and conditions of the exchange;

(3) manner and basis of exchanging the shares to be acquired for shares, obligations, or other securities of the acquiring or any other corporation or for cash or other property in whole or part.

(c) The plan of exchange may set forth other provisions relating to the exchange.

(d) This section does not limit the power of a corporation to acquire all or part of the shares of one or more classes or series of another corporation through a voluntary exchange or otherwise.

HISTORY: Derived from 1976 Code Section 33‑17‑25 [1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 11.02 (Section 33‑11‑102) establishes a procedure by which a direct exchange of shares for cash or other consideration in corporate combinations may be effected under the same safeguards applicable to statutory mergers or similar transactions. A share exchange under section 11.02 (Section 33‑11‑102) is binding upon all shareholders of the acquired class or series of shares.

It is often desirable to effect a reorganization or combination so that the corporation being acquired does not go out of existence but becomes a subsidiary of the acquiring corporation or holding company, the securities of which are issued as part of the transaction. These objectives often are particularly important in the formation of holding company systems for, or for the acquisition of, insurance companies and banks, but are not limited to these transactions. In the absence of a share exchange procedure, this kind of a transaction often may be accomplished only by the process of a “reverse triangular merger”: the formation of a new subsidiary of the acquiring or holding company, followed by a merger of that subsidiary into the corporation to be acquired in which securities of the new subsidiary’s parent are exchanged for securities of the corporation to be acquired. Section 11.02 (Section 33‑11‑102) provides a straightforward procedure to accomplish the same end.

Under section 11.02 (Section 33‑11‑102), all shares of a particular class or series of shares must be acquired. However, shares of one or more classes or series may be excluded from the plan or may be included on different bases. After the plan is adopted and approved by the shareholders as required by section 11.03 (Section 33‑11‑103), it is binding on all holders of shares of the class or series to be acquired; members of the class or series, however, have the right to dissent under chapter 13.

It is not necessary that a share exchange under section 11.02 (Section 33‑11‑102) be on a share‑for‑share basis. The consideration for the shares being acquired may be “shares, obligations, or other securities of the acquiring or any other corporation or . . . cash or other property in whole or part.”

Section 11.02(c) (Section 33‑11‑102(c)) is designed to make it clear that the mandatory exchange provided by section 11.02 (Section 33‑11‑102) does not affect the power of corporations to acquire shares by voluntary exchange or otherwise by agreement with the shareholders.

SOUTH CAROLINA REPORTERS’ COMMENTS

The 1984 Model Act provision (Section 11.02) was adopted unchanged. It represents no significant substantive change from the 1981 South Carolina Business Corporation Act, although it does not continue the requirement of prior law that the plan set forth all of the statutory notice provisions.

DERIVATION: 1984 Model Act Section 11.02.

CROSS REFERENCES

Abandonment of share exchange, see Section 33‑11‑103.

Approval by shareholders, see Section 33‑11‑103.

Articles of share exchange, see Section 33‑11‑105.

Classes of shares, see Section 33‑6‑101.

Close corporations, Statutory Close Corporation Supplement, see Section 33‑18‑300.

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

Effect of share exchange, see Section 33‑11‑106.

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

Share exchange with foreign corporation, see Section 33‑11‑107.

Share transfer prohibition of statutory close corporations, see Section 33‑18‑110.

Library References

Corporations 581 to 583, 585.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 792 to 798, 802 to 806.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:22 , Merger, Consolidation, and Conversion.

**SECTION 33‑11‑103.** Action on plan.

(a) After adopting a plan of merger or share exchange, the board of directors of each corporation party to the merger, and the board of directors of the corporation whose shares are to be acquired in the share exchange, shall submit the plan of merger (except as provided in subsection (h)) or share exchange for approval by its shareholders.

(b) For a plan of merger or share exchange to be approved:

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

(2) the shareholders entitled to vote must approve the plan.

(c) The board of directors may condition its submission of the proposed merger or share exchange on any basis.

(d) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders’ meeting in accordance with Section 33‑7‑105. The notice also must state that the purpose, or one of the purposes, of the meeting is to consider the plan of merger or share exchange and contain or be accompanied by a copy or summary of the plan. In addition, the notice must be accompanied by balance sheets of each corporation participating in the merger or share exchange showing in reasonable detail the financial condition of the corporation as of the close of the two preceding fiscal years and by income statements of each participating corporation for the three preceding fiscal years.

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

(f) The articles of incorporation may require a lower or higher vote for approval than that specified in subsection (e), but the required vote must be at least a majority of the votes entitled to be cast on the plan by each voting group entitled to vote separately on the plan.

(g) Separate voting by voting groups is required:

(1) on a plan of merger if the plan contains a provision that, if contained in a proposed amendment to the articles of incorporation, would require action by one or more separate voting groups on the proposed amendment under Section 33‑10‑104;

(2) on a plan of share exchange by each class or series of shares included in the exchange, with each class or series constituting a separate voting group.

(h) Action by the shareholders of the surviving corporation on a plan of merger is not required if:

(1) the articles of incorporation of the surviving corporation will not differ (except for amendments enumerated in Section 33‑10‑102) from its articles before the merger;

(2) each shareholder of the surviving corporation whose shares were outstanding immediately before the effective date of the merger will hold the same number of shares, with identical designations, preferences, limitations, and relative rights, immediately after;

(3) the number of voting shares outstanding immediately after the merger, plus the number of voting shares issuable as a result of the merger (either by the conversion of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger), will not exceed by more than twenty percent the total number of voting shares of the surviving corporation outstanding immediately before the merger; and

(4) the number of participating shares outstanding immediately after the merger, plus the number of participating shares issuable as a result of the merger (either by the conversion of securities issued pursuant to the merger or the exercise of rights and warrants issued pursuant to the merger), will not exceed by more than twenty percent the total number of participating shares outstanding immediately before the merger.

(i) As used in subsection (h):

(1) “Participating shares” means shares that entitle their holders to participate without limitation in distributions.

(2) “Voting shares” means shares that entitle their holders to vote unconditionally in elections of directors.

(j) After a merger or share exchange is authorized, and at any time before articles of merger or share exchange are filed, the planned merger or share exchange may be abandoned (subject to any contractual rights), without further shareholder action, in accordance with the procedure set forth in the plan of merger or share exchange or, if none is set forth, in the manner determined by the board of directors.

HISTORY: Derived from 1976 Code Section 33‑17‑30 [1962 Code Section 12‑20.3; 1952 Code Section 12‑453; 1942 Code Section 7757; 1932 Code Section 7757; 1925 (34) 246; 1962 (52) 1996; 1963 (53) 327; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], and Section 33‑17‑80 [1962 Code Section 12‑20.8; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

1. Introduction.

Section 11.03 (Section 33‑11‑103) requires mergers or share exchanges to be approved by the shareholders as follows:

In the case of a merger:

(1) the transaction must always be approved by the shareholders of the disappearing corporation; and.

(2) the transaction must be approved by the shareholders of the surviving corporation if the number of voting or participating shares is increased by more than 20 percent as a result of the transaction.

In the case of a share exchange:

(1) the transaction must always be approved by the shareholders of the corporation whose shares are being acquired; and.

(2) the transaction need not be approved by the shareholders of the corporation acquiring the shares.

Section 11.03 (Section 33‑11‑103) requires the board of directors to propose the plan of merger or sale exchange and then submit the proposal to the shareholders. When proposing a plan of merger or share exchange, the board of directors must make a recommendation to the shareholders that the plan be approved, unless it determines that because of conflict of interest or other special circumstances it should make no recommendation. if the board of directors so determines, it must describe the conflict or circumstances, and communicate the basis of its determination, when presenting the proposed plan of merger or share exchange to the shareholders.

Section 11.03(c) (Section 33‑11‑103(c)) permits the board of directors to condition its submission of a plan of merger or share exchange on any basis; for example, the board may direct that the plan is approved only if it receives a favorable vote of a specified percentage of the disinterested shareholders voting on the plan or that shareholders holding no more than a specified number or percentage of shares file notice of intent to demand payment under chapter 13. See the discussion of conditional submissions in the Official Comment to section 10.03 (Section 33‑10‑103).

A plan of merger or share exchange, to be approved, must be approved by each voting group entitled to vote on the merger by a majority of all the votes entitled to be cast on the plan. This is a greater vote than that required for ordinary matters under section 7.25 (Section 33‑7‑250). The articles of incorporation of either corporation, however, may require a greater vote by one or more voting groups of that corporation, and if the transaction involves an amendment to the articles of incorporation of the surviving corporation which affects the voting requirements for future amendments, the transaction must also be approved by the vote required by section 7.27 (Section 33‑7‑270). See section 11.03(e) (Section 33‑11‑103(e)). In addition, voting by more than one voting group may be required by section 11.03(f) (Section 33‑11‑103(f)) or by the articles of incorporation. Finally, the board of directors may require a greater vote or a vote by voting groups under their power to make conditional submissions to shareholders described above. The articles of incorporation or the board of directors, however, may only require a vote by separate voting groups in addition to that otherwise required by this Act.

Only shareholders who have the right to vote on a merger or share exchange under section 11.03 (Section 33‑11‑103) have the right to dissent and obtain payment for their shares under chapter 13.

2. When Surviving Corporation Shareholder Approval is Not Required.

Section 11.03(g) (Section 33‑11‑103(g)) describes when approval by the shareholders of the surviving corporation is not required. The theory behind this subsection is that shareholders’ votes should be required only if the transaction fundamentally alters the character of the enterprise or substantially reduces the shareholders’ participation in voting or profit distribution. It is believed that the transactions for which shareholder approval is not required by subsection (g) do not alter the investors’ prospects any more than many other management decisions, and thus should not require a shareholder vote. In particular, the 20 percent requirement of subsections (g)(3) and (4) is broadly consistent with the statutes of several states, including Delaware (20 percent), Michigan (20 percent), and Pennsylvania (15 percent), and also with the New York Stock Exchange requirement that shareholders must be consulted if the number of outstanding shares is to be increased by more than 18.5 percent.

The requirement that shareholders of the surviving corporation in a statutory merger have a right to vote if the increase in the number of shares exceeds 20 percent may be avoided by arranging the transaction in the form of a merger involving a subsidiary of the acquiring corporation or as a share exchange under section 11.02 (Section 33‑11‑102). This anomaly reflects a compromise among basically conflicting points of view.

The 20 percent requirement is applicable only if the corporation has available enough authorized shares to permit it to issue the shares without amending its articles of incorporation to increase authorized capital. If it must amend its articles of incorporation to authorize the shares necessary to complete the transaction, a shareholder vote on the amendment will be necessary in all cases. See section 10.03 (Section 33‑10‑103).

3. Voting by Multiple Voting Groups.

Section 11.03(f) (1) (Section 33‑11‑103(f) (1)) requires voting by voting groups on a plan of merger if the plan contains a provision that “if contained in a proposed amendment to articles of incorporation, would require action by one or more separate voting groups on the proposed amendment.” See section 10.04 (Section 33‑10‑104). Under this provision, voting by voting groups may be required for one or more classes or series of shares of the surviving corporation as well as for one or more classes or series of the disappearing corporation.

Section 11.03(f)(2) (Section 33‑11‑103(f)(2)) requires voting by voting groups in a share exchange, with each class or series of shares that is to be acquired in a share exchange entitled to vote as a separate voting group. This provision protects all classes of shareholders when more than one class or series of shares are being acquired on different terms.

4. Application of the 20‑percent Requirement.

In a merger transaction that involves an increase in shares of more than 20 percent, section 11.03(g) (Section 33‑11‑103(g)) requires a shareholder vote in order to prevent significant dilution without the approval of the shareholders involved. Sections 11.03(g)(3) and (4) (Sections 33‑11‑103(g)(3) and 33‑11‑103(g)(4)) separately apply the 20‑percent test to increases in the “voting shares” (as defined in section 11.03(h)(2)) (Section 33‑11‑103(h)(2)) and increases in “participating shares” (as defined in section 11.03(h)(1)) (Section 33‑11‑103(h)(1)). If either type of shares is increased by more than 20 percent in the merger transaction, the transaction must be approved by the shareholders.

Under the definitions in subsections (h)(1) and (2), the 20 percent requirement may be applied to shares with preferential rights if they are either voting or fully participating, and to deferred or contingent shares issued as a result of the merger. On the other hand, it is typically not applicable to shares issuable under anti‑dilution clauses to balance share splits or share dividends; these shares would not become issuable “pursuant to the merger,” but by virtue of later corporate action authorizing the split or dividend.

Sections 11.03(g)(3) and (4) (Sections 33‑11‑103(g)(3) and 33‑11‑103(g)(4)) only determine when a shareholders’ vote is required; they do not relate to voting by voting groups. Whether or not a class or series of shares is entitled to vote as a separate voting group is determined by section 11.03(f) (Section 33‑11‑103(f)).

5. Abandonment of Merger or Share Exchange.

Section 11.03(i) (Section 33‑11‑103(i)) makes it clear that the corporations may abandon without shareholder approval a merger or share exchange even though it has been previously approved by the shareholders. Abandonment under this section does not affect contract rights of third parties. The plan, however, may require that abandonments be approved by shareholders before they are effective.

SOUTH CAROLINA REPORTERS’ COMMENTS

The Official Text of the 1984 Model Act (Section 11.03) differs significantly from the 1981 South Carolina Business Corporation Act in three major regards: (1) subsection (g) had no counterpart in prior South Carolina law, (2) it provides for approval by a majority vote rather than two‑thirds, and (3) it does not require that the notice to the shareholders be accompanied by financial statements for the participating corporations. The new provision adopts the first of these from the Model Act but generally follows prior South Carolina law on the other two matters. The voting provision is parallel to that of new Section 33‑10‑103 for amendment of the articles of incorporation. The financial statements which must be furnished with the notice are those required under federal proxy regulations—balance sheets for the two previous years and income statements for the three previous years—rather than balance sheets and income statements for the three previous years as formerly required by Section 33‑17‑30(b)(3) of the 1981 South Carolina Business Corporation Act. See Securities Exchange Act Rule 14a‑3, 17 C.F.R. Section 240.14a‑3. However, unlike SEC Rule 14a‑3, the new provision does not require that the financial statements be audited nor does it require that statements of changes of financial position be included. Although the financial statements under this provision do not have to be prepared in accordance with generally accepted accounting principles, they must not be false or misleading. See new Section 33‑7‑220.

DERIVATION: 1984 Model Act Section 11.03.

CROSS REFERENCES

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

Distributions, see Sections 33‑1‑400 and 33‑6‑400.

Merger of parent into subsidiary, see Section 33‑11‑108.

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

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

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

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

Unanimous consent of shareholders, see Section 33‑7‑104.

Voluntary share exchange, see Sections 33‑11‑102 and 33‑11‑107.

Voting by voting group on amendment of articles of incorporation, see Section 33‑10‑104.

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

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

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

Library References

Corporations 582, 583.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 798, 803.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:22 , Merger, Consolidation, and Conversion.

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

South Carolina Legal and Business Forms Section 1:348 , Notice of Special Shareholders’ Meeting‑Consideration of Proposed Merger or Consolidation.

South Carolina Legal and Business Forms Section 1:350 , Shareholders’ Resolution‑Adoption of Plan of Merger or Consolidation.

South Carolina Legal and Business Forms Section 1:351 , Resolution of Board of Directors‑Abandoning Merger or Consolidation.

**SECTION 33‑11‑104.** Merger of subsidiary.

(a) A parent corporation owning at least ninety percent of the outstanding shares of each class of a subsidiary corporation may merge the subsidiary into itself without approval of the shareholders of the parent or subsidiary.

(b) The board of directors of the parent shall adopt a plan of merger that sets forth the:

(1) names of the parent and subsidiary; and

(2) manner and basis of converting the shares of the subsidiary into shares, obligations, or other securities of the parent or any other corporation or into cash or other property in whole or part.

(c) The parent shall mail a copy or summary of the plan of merger to each shareholder of the subsidiary who does not waive the mailing requirement in writing.

(d) In the case of a corporation which is not a public corporation, the parent may not deliver articles of merger to the Secretary of State for filing until at least thirty days after the date it mailed a copy of the plan of merger to each shareholder of the subsidiary who did not waive the mailing requirement.

(e) Articles of merger under this section may not contain amendments to the articles of incorporation of the parent corporation (except for amendments enumerated in Section 33‑10‑102).

HISTORY: Derived from 1976 Code Section 33‑17‑50 [1962 Code Section 12‑20.5; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2; 1998 Act No. 328, Section 6.

OFFICIAL COMMENT

Section 11.04(a) (Section 33‑11‑104(a)) defines a “parent” corporation as one that owns at least 90 percent of the outstanding shares of each class of another corporation, and a “subsidiary” corporation as one whose shares are so owned. Section 11.04 (Section 33‑11‑104) permits merger of a subsidiary into its parent corporation upon adoption of a plan of merger by the board of directors of the parent alone. Separate action by the board of directors of the subsidiary is unnecessary because the share ownership of the parent corporation is normally sufficient to permit it to elect or remove the subsidiary’s board of directors.

Further, the merger transaction need not be approved by the shareholders of either corporation. Approval by the shareholders of the subsidiary is meaningless because the parent’s share ownership is sufficient to ensure the plan will be approved. Approval by the parent’s shareholders is also unnecessary because the transaction does not materially change their rights: the ownership of the parent corporation is being changed only from 90 percent indirect ownership to 100 percent direct ownership of the same assets, and no significant amendment of the parent’s articles of incorporation is being made. For the same reason, shareholders of the parent corporation do not have the right to dissent from the transaction under chapter 13.

Minority shareholders of the subsidiary corporation may receive shares, obligations, or other securities of the parent or any other corporation, or cash or other property in whole or in part in exchange for their shares. These shareholders are entitled to 30 days’ notice of the plan of merger before it is effectuated.

Shareholders of the subsidiary corporation have a right to dissent from the merger transaction under chapter 13. Courts have held that in some circumstances such a transaction may constitute a breach of duty owed by the parent corporation to the shareholders of the subsidiary. See Roland International Corp. v. Najjar, 407 A.2d 1032 (Del. 1979).

SOUTH CAROLINA REPORTERS’ COMMENTS

The 1984 Model Act provision (Section 11.04) has been adopted unchanged. The only significant substantive change from the 1981 South Carolina Business Corporation Act is that it does not apply to a merger of one subsidiary into another. Dissenters’ rights, which were mentioned in former Section 33‑17‑50, are now provided for solely in new Section 33‑13‑102. Subsection (e) of the Model Act section and the new provision merely state explicitly what was implicit in Section 33‑17‑50(b) of the 1981 South Carolina Business Corporation Act.

DERIVATION: 1984 Model Act Section 11.04.

CROSS REFERENCES

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

Articles of merger, see Section 33‑11‑105.

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

Merger with foreign corporations, see Section 33‑11‑107.

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

Library References

Corporations 582, 583.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 798, 803.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:22 , Merger, Consolidation, and Conversion.

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

NOTES OF DECISIONS

In general 1

1. In general

Until a subsidiary corporation and a parent corporation have merged pursuant to former Sections 33‑17‑50 and 33‑17‑60, both the parent corporation and the subsidiary corporation continue to remain separate and independent. Monroe v. Monsanto Co. (D.C.S.C. 1982) 531 F.Supp. 426.

**SECTION 33‑11‑105.** Articles of merger or share exchange.

(a) After a plan of merger or share exchange is approved by the shareholders, or adopted by the board of directors if shareholder approval is not required, the surviving or acquiring entity shall deliver to the Secretary of State for filing articles of merger or share exchange including:

(1) the plan of merger or share exchange;

(2) if shareholder approval was not required, a statement to that effect;

(3) if approval of the shareholders of one or more corporations party to the merger or share exchange was required:

(i) the designation, number of outstanding shares, and number of votes entitled to be cast by each voting group entitled to vote separately on the plan as to each corporation; and

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

(b) A merger or share exchange takes effect upon the effective date of the articles of merger or share exchange.

HISTORY: Derived from 1976 Code Section 33‑17‑40 [1962 Code Section 12‑20.4; 1952 Code Sections 12‑452 to 12‑454; 1942 Code Section 7757; 1932 Code Section 7757; 1925 (34) 246; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2; 2004 Act No. 221, Section 15.

OFFICIAL COMMENT

The articles of merger or share exchange formally make the terms of the transaction a matter of public record and the effective date of the articles is the effective date of their filing unless a delayed effective date is utilized. See section 1.23 (Section 33‑1‑230). The articles of merger or share exchange must describe whether the plan was submitted to the vote of one or more voting groups of the participating corporations entitled to vote separately on the plan, and, if so, either the total vote in favor and against the plan or a statement that the plan was approved by at least the number of undisputed votes required to approve the merger or share exchange by each voting group of each participating corporation entitled to vote separately on the plan.

SOUTH CAROLINA REPORTERS’ COMMENT

The 1984 Model Act provision (Section 11.05) was adopted unchanged. It makes no significant substantive change from Section 33‑17‑40 of the 1981 South Carolina Business Corporation Act.

DERIVATION: 1984 Model Act Section 11.05.

CROSS REFERENCES

Approval of merger or share exchange, see Sections 33‑11‑101 through 33‑11‑103.

“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.

Merger or share exchange with foreign corporation, see Section 33‑11‑107.

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

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

Library References

Corporations 585, 586.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 802, 804 to 807.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:22 , Merger, Consolidation, and Conversion.

South Carolina Legal and Business Forms Section 1:357 , Articles of Merger.

**SECTION 33‑11‑106.** Effect of merger or share exchange.

(a) When a merger takes effect:

(1) every other corporation party to the merger merges into the surviving entity and the separate existence of every corporation except the surviving entity ceases;

(2) the title to all real estate and other property owned by each corporation party to the merger is vested in the surviving entity without reversion or impairment;

(3) the surviving entity has all liabilities of each corporation party to the merger;

(4) a proceeding pending against a corporation party to the merger may be continued as if the merger did not occur or the surviving entity may be substituted in the proceeding for the corporation whose existence ceased;

(5) the articles of organization of the surviving entity are amended to the extent provided in the plan of merger; and

(6) the shares of each corporation party to the merger are converted into shares, obligations, or other securities of the surviving entity or into cash or other property as appropriate, and the former holders of the shares are entitled only to the rights provided in the articles of merger or to their rights pursuant to Chapter 13.

(b) When a share exchange takes effect, the shares of each acquired corporation are exchanged as provided in the plan, and the former holders of the shares are entitled only to the exchange rights provided in the articles of share exchange or to their rights under Chapter 13.

HISTORY: Derived from 1976 Code Section 33‑17‑60 [1962 Code Section 12‑20.6; 1952 Code Sections 12‑457, 12‑458, 12‑463, 12‑464; 1942 Code Sections 7758, 7760, 7761; 1932 Code Sections 7758, 7760, 7761; 1925 (34) 246; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2; 2004 Act No. 221, Section 16.

OFFICIAL COMMENT

Section 11.06 (Section 33‑11‑106) describes the legal consequences of a merger or share exchange on its effective date.

Section 11.06(a) (Section 33‑11‑106(a)) describes the effect of a merger. On the effective date every disappearing corporation that is a party to the merger disappears into the surviving corporation and the surviving corporation automatically becomes the owner of all real and personal property and becomes subject to all liabilities, actual or contingent, of each disappearing corporation. A merger is not a conveyance or transfer, and does not give rise to claims of reverter or impairment of title based on a prohibited conveyance or transfer. See section 11.06(a)(2) (Section 33‑11‑106(a)(2)). Further, all pending litigation is continued; the name of the surviving corporation may, but need not be, substituted for the name of a disappearing corporation that is a party to litigation.

Section 11.06(a)(6) (Section 33‑11‑106(a)(6)) provides that if any shareholders to any party to the merger are to receive different shares or cash or property under the plan of merger, the rights of those shareholders after the articles of merger are filed are limited to their rights under the plan of merger or their rights under chapter 13 of this Act.

The articles of incorporation of the surviving corporation are amended as provided in the plan of merger on the effective date of the merger. See section 11.06(a)(5) (Section 33‑11‑106(a)(5)).

Section 11.06(b) (Section 33‑11‑106(b)) describes the effect of a share exchange. On the effective date, the shareholders of the acquired class of shares cease to be shareholders of the acquired corporation. On that date they are entitled to receive only the consideration provided in the plan of share exchange, or the rights of dissenting shareholders under chapter 13.

SOUTH CAROLINA REPORTERS’ COMMENTS

The 1984 Model Act provision (Section 11.06) has been adopted unchanged. It represents no significant substantive change from Section 33‑17‑60 of the 1981 South Carolina Business Corporation Act.

DERIVATION: 1984 Model Act Section 11.06.

CROSS REFERENCES

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

Effective date of merger or share exchange, see Section 33‑1‑230.

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

Library References

Corporations 586.

Westlaw Topic No. 101.

C.J.S. Corporations Section 807.

NOTES OF DECISIONS

In general 1

1. In general

Until a subsidiary corporation and a parent corporation have merged pursuant to former Sections 33‑17‑50 and 33‑17‑60, both the parent corporation and the subsidiary corporation continue to remain separate and independent. Monroe v. Monsanto Co. (D.C.S.C. 1982) 531 F.Supp. 426.

**SECTION 33‑11‑107.** Merger or share exchange with foreign corporation.

(a) Foreign corporations may merge or enter into a share exchange with domestic corporations if:

(1) in a merger, the merger is permitted by the law of the state or country under whose law each foreign corporation is incorporated and each foreign corporation complies with that law in effecting the merger;

(2) in a share exchange, the corporation whose shares are to be acquired is a domestic corporation, whether or not a share exchange is permitted by the law of the state or country under whose law the acquiring corporation is incorporated;

(3) the foreign corporation complies with Section 33‑11‑105 if it is the surviving corporation of the merger or acquiring corporation of the share exchange; and

(4) each domestic corporation complies with the applicable provisions of Sections 33‑11‑101 through 33‑11‑104 and, if it is the surviving corporation of the merger or acquiring corporation of the share exchange, with Section 33‑11‑105.

(b) Upon the merger or share exchange taking effect, the surviving foreign corporation of a merger and the acquiring foreign corporation of a share exchange is considered to:

(1) appoint the Secretary of State as its agent for service of process in a proceeding to enforce any obligation or the rights of dissenting shareholders of each domestic corporation party to the merger or share exchange; and

(2) agree that it will pay promptly to the dissenting shareholders of each domestic corporation party to the merger or share exchange the amount, if any, to which they are entitled under Chapter 13.

(c) This section does not limit the power of a foreign corporation to acquire all or part of the shares of one or more classes or series of a domestic corporation through a voluntary exchange or otherwise.

HISTORY: Derived from 1976 Code Section 33‑17‑70 [1962 Code Section 12‑20.7; 1957 (50) 170; 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 11.07 (Section 33‑11‑107) permits mergers or share exchanges between domestic and foreign corporations.

In connection with a plan of merger, the plan must be permitted under the law of the state or country of incorporation of the foreign corporation as well as under the law of the domestic state. The surviving corporation, if it is a foreign corporation, must file articles of merger to accomplish the disappearance of the domestic corporation or corporations, and thereby irrevocably appoints the secretary of state as agent for service of process and agrees to pay dissenters in accordance with chapter 13.

A plan of share exchange, unlike a plan of merger, need not be authorized by the state or country of incorporation of the acquiring foreign corporation. If the domestic law authorizes a compulsory share exchange to acquire a class or series of shares of a domestic corporation, it makes no difference whether the acquiring corporation is foreign or domestic. This kind of transaction does not affect the separate corporate existence of, or impose the liabilities of the disappearing corporation on, the acquiring foreign corporation.

SOUTH CAROLINA REPORTERS’ COMMENTS

The 1984 Model Act provision (Section 11.07) has been adopted unchanged. It is less restrictive than the equivalent provision in the 1981 South Carolina Business Corporation Act in that it allows a share exchange with a foreign acquiring corporation regardless of whether the law of its state of incorporation authorizes the share exchange.

DERIVATION: 1984 Model Act Section 11.07.

CROSS REFERENCES

Articles of merger or share exchange, see Section 33‑11‑105.

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

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

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

Fee for service of process on Secretary of State, see Section 33‑1‑220.

Filing fees, see Section 33‑1‑220.

Filing requirements, see Section 33‑1‑200.

Foreign corporation’s authority to transact business in this State, see Sections 33‑15‑101 et seq.

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

Shareholder approval of merger or share exchange, see Section 33‑11‑103.

Library References

Corporations 581, 690.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 792 to 797, 931.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:22 , Merger, Consolidation, and Conversion.

**SECTION 33‑11‑108.** Merger of parent into subsidiary.

(a) A parent corporation owning at least ninety percent of the outstanding shares of each class of a subsidiary corporation may merge itself into the subsidiary without approval of the shareholders of the subsidiary if the plan of merger is submitted to and approved by the shareholders of the parent in accordance with Section 33‑11‑103.

(b) The board of directors of the parent shall adopt a plan of merger that sets forth the:

(1) names of the parent and subsidiary; and

(2) manner and basis of converting the shares of the parent pro rata into shares of the subsidiary.

(c) The subsidiary shall mail a copy or summary of the plan of merger to each of its shareholders who does not waive the mailing requirement in writing.

(d) The subsidiary may not deliver articles of merger to the Secretary of State for filing until at least thirty days after the date it mailed a copy of the plan of merger to each of its shareholders who did not waive the mailing requirement.

(e) Articles of merger under this section may not contain amendments to the articles of incorporation of the subsidiary corporation (except for amendments enumerated in Section 33‑10‑102).

HISTORY: 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

None. This section has no 1984 Model Act counterpart.

SOUTH CAROLINA REPORTERS’ COMMENTS

This provision is not found in the 1984 Model Act or the 1981 South Carolina Business Corporation Act but is based upon Section 253(a) of the Delaware General Corporation Law, Del. Code Ann. tit. 8, Section 253(a), allowing a short‑form merger of a parent corporation into any subsidiary of which the parent owns at least ninety percent of the outstanding shares of each class of stock. Since this is significantly different than the standard short‑form merger provided for in Section 33‑11‑104 in that it requires notice to and approval by the parent’s shareholders and entitles them to dissenters’ rights, the provision is a separate statutory section.

DERIVATION: This section has no 1984 Model Act counterpart—See the South Carolina Reporters’ Comments.

CROSS REFERENCES

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

Articles of merger, see Section 33‑11‑105.

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

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

Library References

Corporations 581 to 583.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 792 to 798, 803.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:22 , Merger, Consolidation, and Conversion.

**SECTION 33‑11‑109.** Conversion of partnership or limited partnership to corporation.

(a) A partnership or limited partnership may be converted to a corporation pursuant to this section.

(b) The terms and conditions of a conversion of a partnership or limited partnership to a corporation must be approved by all the partners or by the number or percentage of the partners required for conversion in the partnership agreement.

(c) An agreement of conversion must include the terms and conditions of the conversion of the interests of partners of a partnership or of a limited partnership into shares, obligations, or other securities in the converted corporation or the cash or other consideration to be paid or delivered as a result of the conversion of the interests of the partners, or both.

(d) After a conversion is approved pursuant to subsection (b), the partnership or limited partnership shall file with the Secretary of State articles of incorporation that satisfy the requirements of Section 33‑2‑102 and contain:

(1) a statement that the partnership or limited partnership is converted to a corporation from a partnership or limited partnership;

(2) its former name;

(3) a statement of the number of votes cast by the partners entitled to vote for and against the conversion and, if the vote is less than unanimous, the number or percentage required to approve the conversion pursuant to subsection (b); and

(4) in the case of a limited partnership, a statement that the certificate of limited partnership is canceled as of the date the conversion takes effect.

(e) In the case of a limited partnership, the filing of articles of incorporation pursuant to subsection (d) cancels its certificate of limited partnership as of the date the conversion takes effect.

(f) A conversion takes effect when the articles of incorporation are filed in the Office of the Secretary of State or at a later date specified in the articles of incorporation.

(g) A general partner who becomes a shareholder of a corporation as a result of a conversion remains liable as a partner for an obligation incurred by the partnership or limited partnership before the conversion takes effect.

(h) A limited partner who becomes a shareholder as a result of a conversion remains liable only to the extent the limited partner was liable for an obligation incurred by the limited partnership before the conversion takes effect.

(i) A partner’s liability for all obligations of the corporation incurred after the conversion takes effect is that of a shareholder of the corporation.

HISTORY: 2004 Act No. 221, Section 4.

Library References

Corporations 30(6).

Partnership 269, 376.

Westlaw Topic Nos. 101, 289.

C.J.S. Corporations Sections 67, 85.

C.J.S. Partnership Sections 302, 307, 313, 439 to 440.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 4:1 , Legal Principles.

South Carolina Legal and Business Forms Section 1:22 , Merger, Consolidation, and Conversion.

**SECTION 33‑11‑110.** When conversion takes effect; filing notice of name change as to real property.

(a) A partnership or limited partnership that is converted pursuant to Section 33‑11‑109 is for all purposes the same entity that existed before the conversion.

(b) When a conversion takes effect:

(1) all property owned by the converting partnership or limited partnership vests in the corporation;

(2) all debts, liabilities, and other obligations of the converting partnership or limited partnership continue as obligations of the corporation;

(3) an action or proceeding pending by or against the converting partnership or limited partnership may be continued as if the conversion has not occurred;

(4) except as prohibited by other law, all the rights, privileges, immunities, powers, and purposes of the converting partnership or limited partnership vest in the corporation; and

(5) except as otherwise provided in the agreement of conversion pursuant to Section 33‑11‑109(c), all the partners of the converting partnership continue as shareholders of the corporation.

(c)(1) If a partnership or limited partnership that owns real property in South Carolina changes its name by amendment of its articles or by merger, reorganization, domestication, or conversion, the newly‑named surviving, acquiring, reorganized, domesticated, or converted entity 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, the notice of name change must be filed with the clerk of court of the county in which that real property is located.

(2) The filing must be by:

(i) affidavit containing the old name of the partnership or limited partnership and new name of the entity and describing the real property owned by that entity; or

(ii) filing a certified copy of the amendment to certificate of limited partnership, articles of merger, articles of domestication, or articles of conversion and including a description of the real property; or

(iii) a duly recorded deed of conveyance to the newly‑named surviving, acquiring, reorganized, domesticated, or converted entity.

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

(4) The purpose of this subitem is to establish record notice pursuant to Chapter 7 of Title 30. Failure to make the required filing of a partnership or limited partnership name change does 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 entity that is made after the change in name.

HISTORY: 2004 Act No. 221, Section 4.

Library References

Corporations 30(6).

Partnership 269, 376.

Westlaw Topic Nos. 101, 289.

C.J.S. Corporations Sections 67, 85.

C.J.S. Partnership Sections 302, 307, 313, 439 to 440.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 4:1 , Legal Principles.

**SECTION 33‑11‑111.** Conversion of corporation to limited liability company; contents and filing of agreement of conversion.

(a) A corporation may be converted to a limited liability company pursuant to this section.

(b) After adopting a plan of conversion, the board of directors shall submit the plan of conversion for approval by its shareholders. For a plan of conversion to be approved:

(1) the corporation shall notify each shareholder of the proposed shareholders’ meeting in accordance with Section 33‑7‑105. The notice also must state that a purpose of the meeting is to consider a plan of conversion and must contain or be accompanied by a copy or summary of the plan;

(2) unless Chapters 1 through 20 of this title or the articles of incorporation require a different vote, the plan of conversion must be approved by:

(i) two‑thirds of the votes entitled to be cast on the plan, regardless of the class or voting group to which the shares belong; and

(ii) two‑thirds of the votes entitled to be cast on the plan within each voting group entitled to vote as a separate group on the plan;

(3) the articles of incorporation may require a lower or higher vote for approval than that specified in subitem (2), but the required vote must be at least a majority of the votes entitled to be cast on the plan by each voting group entitled to vote separately on the plan;

(4) separate voting by voting groups is required to approve the plan of conversion if the plan contains a provision that would require action by one or more separate voting groups if the provision were included in a proposed amendment to the articles of incorporation, pursuant to Section 33‑10‑104; and

(5) a shareholder may dissent from the plan of conversion and obtain payment of fair value of his shares as provided in Sections 33‑13‑101 through 33‑13‑310.

(c) An agreement of conversion must include the terms and conditions of the conversion of the shares of shareholders of a corporation into interests in the converted limited liability company or the cash or other consideration to be paid or delivered as a result of the conversion of the shares of the shareholders, or both.

(d) After a conversion is approved pursuant to subsection (b), the corporation shall file with the Secretary of State articles of organization that satisfy the requirements of Section 33‑44‑203 and contain:

(1) a statement that the corporation is converted to a limited liability company from a corporation;

(2) its former name;

(3) a statement of the number of votes cast by the shareholders entitled to vote for and against the conversion and, if the vote is less than unanimous, the number or percentage required to approve the conversion pursuant to subsection (b);

(4) if voting by voting group is required, the information in subitem (3) must be provided for each voting group entitled to vote separately on the plan of conversion; and

(5) a statement that the articles of incorporation are cancelled as of the date the conversion takes effect.

(e) The filing of articles of organization pursuant to subsection (d) cancels the articles of incorporation of the corporation as of the date the conversion takes effect.

(f) A conversion takes effect when the articles of organization are filed in the Office of the Secretary of State or at a later date specified in the articles of organization.

(g) A shareholder’s liability for all obligations of the limited liability company incurred after the conversion takes effect is that of a member of the company. A shareholder who becomes a member of a limited liability company as a result of a conversion remains liable only to the extent the shareholder was liable for an obligation incurred by the corporation before the conversion takes effect.

HISTORY: 2004 Act No. 221, Section 4.

Library References

Corporations 610.

Limited Liability Companies 4.

Westlaw Topic Nos. 101, 241E.

C.J.S. Corporations Sections 835 to 839.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 2:2 , Formation‑Content of Articles of Organization.

**SECTION 33‑11‑112.** When conversion takes place; notice of name change as to real property.

(a) A corporation that is converted to a limited liability company is for all purposes the same entity that existed before the conversion.

(b) When a conversion takes effect:

(1) all property owned by the converting corporation vests in the limited liability company;

(2) all debts, liabilities, and other obligations of the converting corporation continue as obligations of the limited liability company;

(3) an action or proceeding pending by or against the converting corporation may be continued as if the conversion has not occurred;

(4) except as prohibited by other law, all the rights, privileges, immunities, powers, and purposes of the converting corporation vest in the limited liability company; and

(5) except as otherwise provided in the agreement of conversion pursuant to Section 33‑11‑111(c), all the shareholders of the converting corporation continue as members of the limited liability company.

(c)(1) If an entity that owns real property in South Carolina is converted to a limited liability company, the newly‑named limited liability company 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.

(2) The filing must be by:

(i) affidavit containing the old name of the corporation and the new name of the limited liability company and describing the real property owned by that limited liability company; or

(ii) filing a certified copy of the articles of organization including a description of the real property; or

(iii) a duly recorded deed of conveyance to the newly‑named limited liability company.

(3) The affidavit, filed articles, or deed must be duly indexed in both the grantor and grantee indices to deeds in the index of deeds.

(4) The purpose of this subitem is to establish record notice pursuant to Chapter 7 of Title 30. Failure to make the required filing of a corporation name change does 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 limited liability company that is made after the change in name.

HISTORY: 2004 Act No. 221, Section 4.

Library References

Limited Liability Companies 4.

Westlaw Topic No. 241E.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 2:2 , Formation‑Content of Articles of Organization.

**SECTION 33‑11‑113.** Conversion of corporation to partnership or limited partnership; contents and filing of agreement of conversion.

(a) A corporation may be converted to a partnership or limited partnership pursuant to this section.

(b) After adopting a plan of conversion, the board of directors shall submit the plan of conversion for approval by its shareholders. For a plan of conversion to be approved:

(1) the corporation shall notify each shareholder of the proposed shareholders’ meeting in accordance with Section 33‑7‑105. The notice also must state that a purpose of the meeting is to consider a plan of conversion and must contain or be accompanied by a copy or summary of the plan;

(2) unless Chapters 1 through 20 of this title or the articles of incorporation require a different vote, the plan of conversion must be approved by:

(i) two‑thirds of the votes entitled to be cast on the plan, regardless of the class or voting group to which the shares belong; and

(ii) two‑thirds of the votes entitled to be cast on the plan within each voting group entitled to vote as a separate group on the plan;

(3) the articles of incorporation may require a lower or higher vote for approval than that specified in subitem (2), but the required vote must be at least a majority of the votes entitled to be cast on the plan by each voting group entitled to vote separately on the plan;

(4) separate voting by voting groups is required to approve the plan of conversion if the plan contains a provision that would require action by one or more separate voting groups if the provision was included in a proposed amendment to the articles of incorporation pursuant to Section 33‑10‑104; and

(5) a shareholder may dissent from the plan of conversion and obtain payment of the fair value of his shares as provided in Sections 33‑13‑101 through 33‑13‑310.

(c) An agreement of conversion must include the terms and conditions of the conversion of the shares of shareholders of a corporation into interests in the converted partnership or limited partnership or the cash or other consideration to be paid or delivered as a result of the conversion of the shares of the shareholders, or both.

(d) After a conversion is approved pursuant to subsection (b), the corporation shall file with the Secretary of State articles of conversion or certificate of limited partnership that satisfies the requirements of Section 33‑42‑210 and contains:

(1) a statement that the corporation was converted to a partnership or limited partnership from a corporation, as the case may be;

(2) its former name;

(3) a statement of the number of votes cast by the shareholders entitled to vote for and against the conversion and, if the vote is less than unanimous, the number or percentage required to approve the conversion pursuant to subsection (b);

(4) if voting by voting groups was required, the information in subitem (3) must be provided for each voting group entitled to vote separately on the plan of conversion; and

(5) a statement that the articles of incorporation are to be cancelled as of the date the conversion takes effect.

(e) The filing of articles of conversion or a certificate of limited partnership pursuant to subsection (d) cancels the articles of incorporation of the corporation as of the date the conversion takes effect.

(f) A conversion takes effect when the articles of conversion or certificate of limited partnership is filed with the Secretary of State or at a later date specified in the articles of conversion or certificate of limited partnership.

(g) A shareholder’s liability for all obligations of the limited partnership incurred after the conversion takes effect is that of a general partner or limited partner. A shareholder who becomes a partner of a partnership or limited partnership as a result of a conversion remains liable only to the extent the shareholder was liable for an obligation incurred by the corporation before the conversion takes effect.

HISTORY: 2004 Act No. 221, Section 4.

Library References

Corporations 610.

Partnership 20, 352.

Westlaw Topic Nos. 101, 289.

C.J.S. Corporations Sections 835 to 839.

C.J.S. Partnership Sections 8, 406, 418.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 4:1 , Legal Principles.

**SECTION 33‑11‑114.** When conversion takes effect.

(a) A corporation that is converted to a partnership or limited partnership is for all purposes the same entity that existed before the conversion.

(b) When a conversion takes effect:

(1) all property owned by the converting corporation vests in the partnership or limited partnership;

(2) all debts, liabilities, and other obligations of the converting corporation continue as obligations of the partnership or limited partnership;

(3) an action or proceeding pending by or against the converting corporation may be continued as if the conversion has not occurred;

(4) except as prohibited by other law, all of the rights, privileges, immunities, powers, and purposes of the converting corporation vest in the partnership or limited partnership; and

(5) except as otherwise provided in the agreement of conversion pursuant to Section 33‑11‑113(c), all of the shareholders of the converting corporation continue as either general partners or limited partners of the general or limited partnership and as specified in accord with the plan of conversion.

HISTORY: 2004 Act No. 221, Section 4.

Library References

Partnership 20, 352.

Westlaw Topic No. 289.

C.J.S. Partnership Sections 8, 406, 418.

**SECTION 33‑11‑115.** Conversion under other law.

This chapter does not preclude an entity from being converted pursuant to other law.

HISTORY: 2004 Act No. 221, Section 4.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 2:2 , Formation‑Content of Articles of Organization.

South Carolina Legal and Business Forms Section 4:1 , Legal Principles.

South Carolina Legal and Business Forms Section 1:22 , Merger, Consolidation, and Conversion.