CHAPTER 12

Sale of Assets

**SECTION 33‑12‑101.** Sale of assets in regular course of business; mortgage or transfer of assets; approval of shareholders.

(a) A corporation, on the terms and conditions and for the consideration determined by the board of directors, may:

(1) sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property in the usual and regular course of business; or

(2) mortgage, pledge, dedicate to the repayment of indebtedness (whether with or without recourse), or otherwise encumber all, or substantially all, of its property whether or not in the usual and regular course of business.

(b) A public corporation, on the terms and conditions and for the consideration determined by the board of directors, may transfer any or all of its property to a corporation, all the shares of which are owned by the public corporation.

(c) Unless the articles of incorporation require it, approval by the shareholders of a transaction described in subsection (a) or (b) is not required.

HISTORY: Derived from 1976 Code Section 33‑19‑20 [1962 Code Section 12‑12.2; 1952 Code Section 12‑631; 1942 Code Section 7705; 1932 Code Section 7705; 1926 (34) 1052; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], and Section 33‑19‑40 [1962 Code Section 12‑21.4; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2; 1998 Act No. 328, Section 7.

OFFICIAL COMMENT

This chapter deals with the procedures that corporations must follow when they transfer or dispose of “all, or substantially all,” of their property. It does not deal with transactions that involve less than “all, or substantially all,” of the corporation’s property.

A sale of “all or substantially all” the corporate assets in the regular course of business is governed by section 12.01 (Section 33‑12‑101). Mortgages of all of the corporation’s assets or redeployment of those assets through a wholly owned subsidiary are also covered by section 12.01 (Section 33‑12‑101). All other sales of “all or substantially all” the corporate assets are governed by section 12.02 (Section 33‑12‑102). Dispositions or transfers of property that do not involve “all or substantially all” the property of the corporation are not controlled by statute and may be approved by the board of directors (or authorized corporate officer) in the same manner as any other corporate transaction.

1. The Meaning of “All or Substantially All”.

The phrase “all or substantially all,” chosen by the draftsmen of the Model Act, is intended to mean what it literally says, “all or substantially all.” The phrase “substantially all is synonymous with “nearly all” and was added merely to make it clear that the statutory requirements could not be avoided by retention of some minimal or nominal residue of the original assets. A sale of all the corporate assets other than cash or cash equivalents is normally the sale of “all or substantially all” of the corporation’s property. A sale of several distinct manufacturing lines while retaining one or more lines is normally not a sale of “all or substantially all” even though the lines being sold are substantial and include a significant fraction of the corporation’s former business. If the lines retained are viewed only as a temporary operation or as a pretext to avoid the “all or substantially all” requirements, however, the statutory requirements of chapter 12 must be complied with. Similarly, a sale of a plant but retention of operating assets (e.g., machinery and equipment), accounts receivable, good will, and the like with a view toward continuing the operation at another location is not a sale of “all or substantially all” the corporation’s property.

Some court decisions have adopted a narrower construction of somewhat similar statutory language. These decisions should be viewed as resting on the diverse statutory language involved in those cases and should not be viewed as illustrating the meaning of “all or substantially all” intended by the draftsmen of the Model Act.

2. Transfers of “All or Substantially All” of a Corporation’s Assets that do not Require Shareholder Approval.

Section 12.01 (Section 33‑12‑101) describes transfers or dispositions of “all or substantially all” the corporate assets that do not require shareholder approval unless the articles of incorporation require it. These transactions consist of (1) mortgages or pledges of all the corporation’s property, whether or not the loan they secure is in the ordinary course of business, (2) transactions within the usual and regular course of business, and (3) transfers to wholly owned subsidiaries.

a. Mortgages or pledges.

Mortgages or pledges of all the corporate assets may be demanded by lenders. They are essentially and substantively different from a sale or other disposition of assets even though they may take the form of a formal transfer of title to the mortgagee for security purposes, or of a dedication of assets to the repayment of indebtedness, as in the case of oil and gas production payments. The corporation remains in possession of the mortgaged property, may continue to use it for corporate purposes, in most cases must continue to manage the property, and may recover full title to the property by discharging the indebtedness.

b. Sales in the usual and regular course of business.

Most transfers of “all or substantially all” the corporate property (as defined above) are, almost by definition, not in the usual and regular course of business; sales by real estate corporations and by corporations organized to liquidate a business are examples of sales that may be included in this part of section 12.01(a) (Section 33‑12‑101(a)). Typically, sales falling within the usual and regular course of business do not involve the sale of the corporate name or good will.

c. Transfers to a subsidiary.

Section 12.01 (Section 33‑12‑101) provides that a transfer of property to a wholly owned subsidiary does not require a vote of shareholders. This provision, however, may not be used as a device to avoid a vote of shareholders by a multiple‑step transaction.

SOUTH CAROLINA REPORTERS’ COMMENTS

The 1984 Model Act provision (Section 12.01) is substantively similar to the 1981 South Carolina Business Corporation Act except that it allows a sale of all or substantially all of a corporation’s assets to a wholly‑owned subsidiary without shareholder approval. Although the Official Comment to the section claims that “ [t]his provision, however, may not be used as a device to avoid a vote of shareholders by a multiple‑step transaction,” the opportunities for abuse are clear. The new provision therefore follows prior South Carolina law and does not dispense with the necessity for shareholder approval of such transactions.

The Model Act provision that a corporation may mortgage or grant another security interest in any or all of its property without shareholder approval is the same as prior South Carolina law, which accomplished this result by defining a “sale” as excluding a mortgage or other security interest. See Section 33‑19‑10 of the 1981 South Carolina Business Corporation Act which has been continued in Section 33‑12‑103 of this act. The new provision modifies the Model Act section by substituting the standard language “all, or substantially all,” for the Model Act’s atypical “any or all” to clarify the meaning. This was done to avoid the unintended implication of the Model Act language that all mortgages or other security interests require board approval.

DERIVATION: 1984 Model Act Section 12.01.

CROSS REFERENCES

Articles of incorporation, see Sections 33‑2‑102 and 33‑10‑101 et seq.

“Sale”, definition, see Section 33‑12‑103.

Sale of assets not in the usual and regular course of business, see Section 33‑12‑102.

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

Library References

Corporations 434 to 446.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 644 to 653, 655, 672.

C.J.S. Wills Sections 93 to 94.

RESEARCH REFERENCES

Encyclopedias

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

Forms

South Carolina Legal and Business Forms Section 1:156 , Board of Directors‑Sale, Lease or Exchange of All Assets.

Treatises and Practice Aids

Fletcher Cyclopedia Law of Private Corporations Section 2949.30, Sales Within or Without Regular Course of Business.

**SECTION 33‑12‑102.** Sale of assets other than in regular course of business.

(a) A corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property (with or without the good will), otherwise than in the usual and regular course of business, on the terms and conditions and for the consideration determined by the corporation’s board of directors, if the board of directors proposes and its shareholders approve the proposed transaction.

(b) For a transaction to be authorized, the:

(1) board of directors must recommend the proposed transaction 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 submission of the proposed transaction; and

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

(c) The board of directors may condition its submission of the proposed transaction 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 sale, lease, exchange, or other disposition of all, or substantially all, the property of the corporation and contain or be accompanied by a description of the transaction.

(e) Unless 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 or a vote by voting groups, the transaction to be authorized must be approved by two‑thirds of all the votes entitled to be cast on the transaction.

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

(g) After a sale, lease, exchange, or other disposition of property is authorized, the transaction may be abandoned (subject to any contractual rights) without further shareholder action.

(h) A transaction that constitutes a distribution is governed by Section 33‑6‑400 and not by this section.

HISTORY: Derived from 1976 Code Section 33‑19‑30 [1962 Code Section 12‑21.3; 1952 Code Sections 12‑631, 12‑632; 1942 Code Section 7705; 1932 Code Section 7705; 1926 (34) 1052; 1962 (52) 1996; 1963 (53) 327; 1964 (53) 1910; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

The scope of the phrase “all or substantially all” is discussed in the Official Comment to section 12.01 (Section 33‑12‑101). All transactions that involve the sale or transfer of “all or substantially all” the corporate property must be approved by the shareholders unless they fall within one of the exceptions of section 12.01 (Section 33‑12‑101).

Section 12.02 (Section 33‑12‑102) requires the board of directors to propose the sale and then submit the proposal to the shareholders. The board of directors must make a recommendation to the shareholders that the transaction be approved, unless the board determines that because of conflict of interest or other special circumstances it should make no recommendation. If the board so determines, it must describe the conflict of circumstances, and communicate the basis for its determination, to the shareholders when it presents the proposed sale.

The proposed sale, to be approved, must receive the vote of a majority of the outstanding votes entitled by the articles of incorporation to be cast on the proposal. This is a greater vote than that required for ordinary matters under section 7.25 (Section 33‑7‑250). Nonvoting classes of shares are not given a statutory right to vote on proposed sales (either as separate voting groups or together with voting shares) by the revised Model Act on the theory that classes or series of shares that are made nonvoting by the articles of incorporation generally did not retain a voice in the areas of business the corporation may engage in the future. The articles of incorporation, however, may stipulate that specified classes or series of shares are entitled to vote by separate voting groups. Thus, in the absence of special provision in the articles of incorporation, only the shares of the corporation entitled to vote generally by the articles of incorporation are entitled to vote on sales of substantially all the assets of the corporation. The articles of incorporation may also specify that a greater percentage of votes is required to approve the proposal than specified in section 12.02 (Section 33‑12‑102).

The board of directors may condition its submission of a proposal to the shareholders under subsection (c) on any basis—for example, on its receiving a certain percentage of shareholders’ affirmative votes or that specified classes or series of shares, voting by separate voting groups, must approve the transaction or on some other basis; see the discussion of conditional submissions in the Official Comment to section 10.03 (Section 33‑10‑103).

The approval of most sales of “all or substantially all” of the corporation’s assets gives rise to dissenters’ rights under chapter 13 to shareholders who are entitled to vote on the transaction and avail themselves of the procedures described in that chapter. Sales subject to section 12.02 (Section 33‑12‑102) that do not give rise to dissenters’ rights even for voting shares include (1) sales pursuant to a court order and (2) sales that require all or substantially all of the net proceeds to be distributed to the shareholders in accordance with their respective interests within one year after the date of sale. See section 13.02 (Section 33‑13‑102). Shares not entitled to vote on the transaction do not have dissenters’ rights by statute; the articles of incorporation may grant those rights or the board of directors may elect to make them available.

Section 12.02(f) (Section 33‑12‑102(f)) authorizes a board of directors to abandon a proposed sale without shareholder approval after it has been previously approved by the shareholders. An abandonment does not affect contractual rights that third persons may have against the corporation.

Certain corporate divisions, often called “spin offs,” “split offs,” or “split ups,” sometimes involve transactions that may be formally characterized as sales of “all or substantially all” the corporate assets when in fact they are only a step in a corporate division that does not give rise to the problem of a major change in corporate direction and therefore does not need shareholder approval. Section 12.02(g) (Section 33‑12‑102(g)) is designed to make clear that transactions like this, which actually constitute a distribution, are not subject to section 12.02 (Section 33‑12‑102). See Siegal, “When Corporations Divide: A Statutory and Financial Analysis,” 79 HARV. L. REV. 534 (1966).

SOUTH CAROLINA REPORTERS’ COMMENTS

The 1984 Model Act provision (Section 12.02) is substantively similar to the 1981 South Carolina Business Corporation Act except for the vote required and has been adopted with changes to conform the voting pattern to that of Section 33‑10‑103 for amendment of the articles of incorporation and Section 33‑11‑103 for mergers or share exchanges.

DERIVATION: 1984 Model Act Section 12.02.

CROSS REFERENCES

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

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

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

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

Quorum at shareholders’ meeting, see Section 33‑7‑250.

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

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

Voting by voting group, 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 182.4, 439, 441.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 340, 344, 651 to 653, 655.

RESEARCH REFERENCES

Treatises and Practice Aids

Fletcher Cyclopedia Law of Private Corporations Section 2949.21, Consent of Shareholders.

NOTES OF DECISIONS

In general 1

1. In general

A shareholder who conceded knowing that the corporation’s lease would be assigned, and who attended meetings concerning the assignment, could not attack the assignment in a shareholder derivative action on the ground that the assignment was made other than in the regular course of business, at a meeting called with improper notice, in violation of former Section 33‑19‑30(a). A shareholder cannot protest action on the ground that it was taken at an improperly called meeting when he has already acquiesced in the action. Miller on Behalf of Grand Strand Diversified, Inc. v. Gandee (S.C.App. 1985) 285 S.C. 174, 328 S.E.2d 482.

In Johnson v Spartanburg County Fair Ass’n (1947) 210 SC 56, 41 SE2d 599, the court said, “Similar statutes have been uniformly construed as giving the holders of two thirds of the outstanding stock the right to determine the price at which such assets are to be sold and, in the absence of bad faith or fraud, their decision is final. The dissenting stockholder has a plain and adequate remedy at law in the appraisal proceedings to secure the fair value of his stock. The only grounds upon which the minority stockholders can maintain an action to enjoin the sale are that the proceedings are ultra vires, illegal or fraudulent.” Johnson v. Spartanburg County Fair Ass’n (S.C. 1947) 210 S.C. 56, 41 S.E.2d 599. Corporations And Business Organizations 2719

At any time before the assent of the stockholders, a purchaser has the legal right to withdraw his offer by properly notifying the corporation of his intention to do so, since this section is not for the benefit of stockholders only. Masonic Temple v. Ebert (S.C. 1942) 199 S.C. 5, 18 S.E.2d 584.

**SECTION 33‑12‑103.** “Sale” defined.

Whenever used in this chapter, “sale” includes a sale, lease, exchange, or other disposition of property and assets of the corporation except a mortgage of or other security interest in the property and assets.

HISTORY: Derived from 1976 Code Section 33‑19‑10 [1962 Code Section 12‑21.1; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

None. This section has no 1984 Model Act counterpart.

SOUTH CAROLINA REPORTERS’ COMMENTS

There is no similar Model Act provision. This section is based directly upon Section 33‑19‑10 of the 1981 South Carolina Business Corporation Act. Although the substance of this definition is covered also by new Section 33‑12‑101(a)(2), this section makes it perfectly clear that a corporation may grant a mortgage or other security interest without shareholder approval.

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

Library References

Corporations 439.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 651 to 653.

RESEARCH REFERENCES

Forms

South Carolina Legal and Business Forms Section 1:156 , Board of Directors‑Sale, Lease or Exchange of All Assets.