CHAPTER 16

Records and Reports

ARTICLE 1

Records

**SECTION 33‑16‑101.** Corporate records.

 (a) A corporation shall keep as permanent records minutes of all meetings of its shareholders and board of directors, a record of all actions taken by the shareholders or board of directors without a meeting, and a record of all actions taken by a committee of the board of directors in place of the board of directors on behalf of the corporation.

 (b) A corporation shall maintain appropriate accounting records.

 (c) A corporation or its agent shall maintain a record of its shareholders, in a form that permits preparation of a list of the names and addresses of all shareholders, in alphabetical order by class of shares showing the number and class of shares held by each.

 (d) A corporation shall maintain its records in written form or in another form capable of conversion into written form within a reasonable time.

 (e) A corporation shall keep a copy of the following records at its principal office:

 (1) its articles or restated articles of incorporation and all amendments to them currently in effect;

 (2) its bylaws or restated bylaws and all amendments to them currently in effect;

 (3) resolutions adopted by its board of directors creating one or more classes or series of shares, and fixing their relative rights, preferences, and limitations, if shares issued pursuant to those resolutions are outstanding;

 (4) the minutes of all shareholders’ meetings, and records of all action taken by shareholders without a meeting, for the past ten years;

 (5) all written communications to shareholders as a group within the past three years, including the financial statements furnished for the past three years under Section 33‑16‑200;

 (6) a list of the names and business addresses of its current directors and officers;

 (7) its most recent annual report delivered to the Department of Revenue under Section 12‑19‑20;

 (8) its federal and state income tax returns for the last ten years.

HISTORY: Derived from 1976 Code Section 33‑11‑250 [1962 Code Section 12‑16.25; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2; 1993 Act No. 181, Section 519.

OFFICIAL COMMENT

Section 16.01 (Section 33‑16‑101) describes in general terms the records every corporation must keep or maintain, the form in which they may be maintained, and, to a limited extent, where the records must be kept.

1. Minutes And Related Documents.

Section 16.01(a) (Section 33‑16‑101(a)) requires a corporation to “keep” as permanent records the minutes of meetings of its shareholders and board of directors, and a record of actions taken by unanimous consent by its shareholders or board of directors. In addition, each corporation must “keep” a record of all actions taken by a committee of the board of directors, when acting on behalf of the board of directors for the corporation; this includes, for example, action taken by an executive committee between meetings of the board and final action of a special litigation committee authorized to act on behalf of the board. Section 16.01(a) (Section 33‑16‑101(a)) does not require a record of actions taken by a committee when the committee is not acting in place of the board of directors, e.g., when the committee is discussing policy and formulating recommendations for action by the board of directors. Also, it does not require either minutes or a record of committee deliberations under any circumstances. Committee meetings are preserved as forums for open and frank discussion and discussion of sensitive corporate data without fear of recordation or disclosure.

Section 16.01 (Section 33‑16‑101) also does not address the amount of detail that should appear in the minutes of meeting of shareholders or the board of directors—the content of minutes is largely fixed by tradition and no inference about their content should be drawn from the section’s treatment of the records of committee deliberation and action.

2. Shareholders’ Lists and Accounting Records.

Sections 16.01(b) and (c) (Sections 33‑16‑101(b) and (c)) require the corporation to “maintain” appropriate accounting and shareholder records. The word “maintain” is used to denote current records only and does not require the corporation to keep on hand as permanent records, data, or information of historical interest only; the periods for which these records, data, or information should be kept is not addressed by the Model Act.

Section 16.01(b) (Section 33‑16‑101(b)) relates to accounting records. The word “appropriate” is used to indicate that the nature of the financial records to be kept is dependent to some extent on the nature of the corporation’s business; the phrase “adequate records” is used in some state statutes to convey essentially the same meaning. “Appropriate” records are generally records that permit financial statements to be prepared which fairly present the financial position and transactions of the corporation. In some very small businesses operating on a cash basis, however, “appropriate” accounting records may consist only of a check register, vouchers, and receipts.

Section 16.01(c) (Section 33‑16‑101(c)) requires the corporation to maintain such records of its shareholders as will permit it to compile a list of shareholders when required. These records may consist of stubs from which certificates have been detached in the case of corporations with a few shareholders or of elaborate electronic data retrievable only by modern technology in the case of large, publicly held corporations. The record may be retained by the corporation or an agent, who traditionally is the transfer agent but may be another agent.

3. Form of Records.

Section 16.01(d) (Section 33‑16‑101(d)) generally authorizes corporations to retain records on microfilm, microfiche, computer memory or disc, or any other method that is convenient or appropriate under the circumstances. The basic requirement is that the method chosen must be capable of reduction to written form within a reasonable time. In addition, in the case of the record of shareholders, the method must permit the development of an alphabetical list of shareholders, of record as required by section 16.01(c) (Section 33‑16‑101(c)).

4. Keeping Records At Principal Office.

Section 16.01(e) (Section 33‑16‑101(e)) requires certain basic records to be kept at the principal office of the corporation, including minutes of shareholders’ meetings for the preceding three years and records of shareholder action taken without a meeting during the same period. This requirement is imposed because these records must be available for inspection by any shareholder at that office. See section 16.02(a) (Section 33‑16‑102(a)). The “principal office” of the corporation is defined in section 1.40 (Section 33‑1‑400) to be the location of the executive offices of the corporation and its address must be sent forth by the corporation in its annual report required by section 16.22 (Section 33‑16‑220). The Model Act does not generally specify where records other than those described in section 16.01(e) (Section 33‑16‑101(e)) must be kept. They may be kept in one or more offices within or without the state; indeed, in the case of records kept in non‑written form, it may be impossible to determine “where” they are located.

SOUTH CAROLINA REPORTERS’ COMMENTS

Section 33‑16‑101(e) is important because shareholders under Section 33‑16‑102(a) have an absolute right to inspect and copy the information referred to in that section. Section 33‑16‑101, as adopted, differs from the Official Text of the Model Act by requiring: (1) the keeping of financial data for ten years (the Model Act had a three‑year requirement); (2) access to tax returns in certain cases. The requirement that shareholders have access to the names and addresses of directors is new.

Although neither the 1981 South Carolina Business Corporation Act nor the Model Act call for the corporation’s tax returns to be kept and made available, Internal Revenue Code Section 6103(e)(1)(D)(iii) provides that a corporation’s return is, upon written request, open to inspection by: “any bona fide shareholder of record owning one percent or more of the outstanding stock of such corporation.” Additionally, any shareholder of a subchapter S corporation has a right to inspect the corporation’s return. Id. Section 6103(e)(1)(D)(v). The concept that a one percent shareholder has a right to inspect the corporate tax returns is embraced by Section 33‑16‑102(a) of this act.

DERIVATION: 1984 Model Act Section 16.01.

CROSS REFERENCES

Annual Report, see Sections 12‑20‑30 and 33‑16‑220.

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

Board of directors meeting, see Section 33‑8‑200.

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

Committees, see Section 33‑8‑250.

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

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

Inspection of corporate records, see Sections 33‑16‑102 and 33‑16‑104.

Officers, see Section 33‑8‑400.

“Principal office”: defined, see Section 33‑1‑400.

Reports of corporation, see Sections 33‑16‑200 through 33‑16‑220.

Restatement of articles of incorporation, see Section 33‑10‑107.

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

Shareholders’ action without meeting, see Section 33‑7‑104.

Shareholders’ list, see Section 33‑7‑200.

Shareholders’ meeting, see Sections 33‑7‑101 through 33‑7‑103.

Library References

Corporations 181.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 331 to 339.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Banks and Banking Section 66, Inspection of Records by Shareholders.

**SECTION 33‑16‑102.** Inspection of records by shareholders.

 (a) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at the corporation’s principal office, any of the records of the corporation described in Section 33‑16‑101(e) if he gives the corporation written notice of his demand at least five business days before the date on which he wishes to inspect and copy. Shareholders holding at least one percent of any class of shares are entitled to conduct an inspection of the tax returns described in Section 33‑16‑101(e)(8) under the same conditions.

 (b) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at a reasonable location specified by the corporation, any of the following records of the corporation if the shareholder meets the requirements of subsection (c) and gives the corporation written notice of his demand at least five business days before the date on which he wishes to inspect and copy:

 (1) excerpts from minutes of any meeting of the board of directors, records of any action of a committee of the board of directors while acting in place of the board of directors on behalf of the corporation, minutes of any meeting of the shareholders, and records of action taken by the shareholders or board of directors without a meeting, to the extent not subject to inspection under Section 33‑16‑102(a);

 (2) accounting records of the corporation; and

 (3) the record of shareholders.

 (c) A shareholder may inspect and copy the records described in subsection (b) only if:

 (1) his demand is made in good faith and for a proper purpose;

 (2) he describes with reasonable particularity his purpose and the records he desires to inspect; and

 (3) the records are directly connected with his purpose.

 (d) The right of inspection granted by this section may not be abolished or limited by a corporation’s articles of incorporation or bylaws.

 (e) This section does not affect:

 (1) the right of a shareholder to inspect records under Section 33‑7‑200 or, if the shareholder is in litigation with the corporation, to the same extent as any other litigant;

 (2) the power of a court, independently of Chapters 1 through 20 of this Title, to compel the production of corporate records for examination.

HISTORY: Derived from 1976 Code Section 33‑11‑250 [1962 Code Section 12‑16.25; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2], and Section 33‑11‑260 [1962 Code Section 12‑16.26; 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. Section 16.02(a) (Section 33‑16‑102(a)).

Section 16.02(a) (Section 33‑16‑102(a)) provides that every shareholder is entitled to examine upon written request at the principal office of the corporation all documents described in section 16.01(e) (Section 33‑16‑101(e)). These documents all deal with the shareholder’s interest as such in the corporation. While some of these documents may also be a matter of public record in the office of secretary of state, a shareholder should not be compelled to go to a public office that may be physically distant to examine the basic documents relating to the corporation of which he is a shareholder.

2. Section 16.02(b) (Section 33‑16‑102(b)).

Section 16.02(b) (Section 33‑16‑102(b)) grants a shareholder who meets the requirements of section 16.02(c) (Section 33‑16‑102(c)) the right to inspect three classes of corporate records:

(1) Excerpts from minutes of meetings of the board of directors, records of action of committees of the board of directors when acting in place of the board on behalf of the corporation, and minutes of meetings of shareholders (to the extent they do not fall within section 16.02(a) (Section 33‑16‑102(a)). The corporation is required to make available only relevant excerpts of minutes and need not make available minutes of entire meetings merely because a portion of the minutes is directly connected with the shareholder’s purpose.

(2) The accounting records of the corporation. The Act does not attempt to define what accounting records must be kept. See the Official Comment to section 16.01 (Section 33‑16‑101).

(3) The record of shareholders, subject to section 16.03(d) (Section 33‑16‑103(d)). If a shareholder makes his demand in good faith and with a proper purpose under section 16.02(c) (Section 33‑16‑102(c)), he is entitled to inspect the shareholders’ list under section 16.02(b) (Section 33‑16‑102(b)) without regard to the size or value of his holding. This right is independent of the right to inspect a shareholders’ list immediately before a meeting under section 7.20 (Section 33‑7‑200). See section 16.02(e) (Section 33‑16‑102(e)).

3. Section 16.02(c) (Section 33‑16‑102(c)).

Section 16.02(c) (Section 33‑16‑102(c)) follows earlier versions of the Model Act and permits inspection of the records described in section 16.02(b) (Section 33‑16‑102(b)) by a shareholder only if his demand is made in good faith and for a “proper purpose.” A “proper purpose” means a purpose that is reasonably relevant to the demanding shareholder’s interest as a shareholder. Some statutes do not use the phrase “proper purpose;” the Model Act continues to use it because it is traditional and well understood language defining the scope of the shareholder’s right of inspection and its use ensures that the very substantial case law that was developed under it will continue to be applicable under the revised Act.

As a practical matter, a shareholder who alleges a purpose in general terms, such as a desire to determine the value of his shares, to communicate with fellow shareholders, or to determine whether improper transactions have occurred, has been held to allege a “proper purpose.” Section 16.02(c) (Section 33‑16‑102(c)) thus attempts to require more meaningful statements of purpose, if feasible, by requiring that a shareholder designate “with reasonable particularity” his purpose and the records he desires to inspect; the records demanded must also be “directly connected” with that purpose. If disputed by the corporation, the “connection” of the records to the shareholder’s purpose may be determined by a court’s in camera examination of the records.

4. Sections 16.02(d) and (e) (Sections 33‑16‑102(d) and (e)).

Section 16.02(d) (Section 33‑16‑102(d)) states that the inspection rights granted by this chapter are inherent rights of shareholders and may not be abolished or limited by the articles of incorporation or bylaws; the subsection is based on CAL. CORP. CODE ANN. Section 1600(d) (West 1977). No inference of any kind should be drawn from this subsection as to whether other, unrelated sections of the Model Act may be modified by provisions in the articles of incorporation or bylaws.

Section 16.02(e) (Section 33‑16‑102(e)) provides that the right of inspection granted by section 16.02 (Section 33‑16‑102) is an independent right of inspection that is not a substitute for or in derogation of rights of inspection that may exist (1) under section 7.20 (Section 33‑7‑200), to inspect the shareholders’ list following the establishment of a record date for a meeting; (2) as part of a right of discovery that exists in connection with litigation; and (3) as a “common law” right of inspection, if any is found to exist by a court, to examine corporate records. Section 16.02(e) (Section 33‑16‑102(e)) simply preserves whatever independent right of inspection exists under these sources and does not create or recognize any rights, either expressly or by implication.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section liberalizes certain aspects of shareholder inspection rights. First, it does away with the unqualified right of a corporation to deny inspection under Section 33‑11‑260(c) of the 1981 South Carolina Business Corporation Act. Secondly, it allows for an absolute right of inspection as to certain documents (Section 33‑16‑102(a)). Third, it recognizes a right to access to minutes of directors’ meetings and other records of board action (Section 33‑16‑102(b)(1)). Fourth, it does away with the requirement that the shareholder seeking inspection generally must have been a shareholder for at least six months or hold at least five percent of the outstanding shares of class. A four percent shareholder had only limited inspection rights under 1981 South Carolina Business Corporation Act Section 33‑11‑250(c) and (e) (access to financial statements) and (d) (access to bylaws). Finally, like the Internal Revenue Code, it allows shareholders owning one percent or more of the company’s stock access to its tax returns. See the South Carolina Reporters’ Comments to Section 33‑16‑101.

DERIVATION: 1984 Model Act Section 16.02.

CROSS REFERENCES

Board of directors’ meeting, see Section 33‑8‑200.

Committees, see Section 33‑8‑250.

Corporate records required, see Section 33‑16‑101.

Court‑ordered inspection, see Section 33‑16‑104.

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

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

“Effective date of notice” defined, see Section 33‑1‑410.

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

Notice to corporation, see Section 33‑1‑410.

“Principal office”: defined, see Section 33‑1‑400.

Scope of inspection right of shareholder, see Section 33‑16‑103.

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

Shareholders’ action without meeting, see Section 33‑7‑104.

Shareholders’ list inspection, see Sections 33‑7‑200 and 33‑16‑103.

Shareholders’ meeting, see Sections 33‑7‑101 through 33‑7‑103.

Library References

Corporations 181.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 331 to 339.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Banks and Banking Section 66, Inspection of Records by Shareholders.

**SECTION 33‑16‑103.** Scope of inspection right.

 (a) A shareholder’s agent or attorney has the same inspection and copying rights as the shareholder he represents.

 (b) The right to copy records under Section 33‑16‑102 includes, if reasonable, the right to receive copies made by photographic, xerographic, or other means.

 (c) The corporation may impose a reasonable charge, covering the costs of labor and material, for copies of any documents provided to the shareholder. The charge may not exceed the estimated cost of production or reproduction of the records.

 (d) The corporation may comply with a shareholder’s demand to inspect the record of shareholders under Section 33‑16‑102(b)(3) by providing him with a list of its shareholders that was compiled no earlier than the date of the shareholder’s demand.

HISTORY: Derived from 1976 Code Section 33‑11‑260 [1962 Code Section 12‑16.26; 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 right of inspection set forth in section 16.02 (Section 33‑16‑102) includes the general right to copy the documents inspected. Section 16.03 (Section 33‑16‑103) follows precedent established under earlier statutes and extends the right of inspection to an agent or attorney of a shareholder as well as the shareholder himself. Further, the section now recognizes that a right to copy means more than a right to copy by longhand and extends the right to receive, if reasonable, copies made by the modern technology of copying machines with the cost of reproduction being paid by the shareholder.

Many corporations make available to shareholders without charge some or all of the basic documents described in section 16.01(e) (Section 33‑16‑101(e)). Section 16.03(c) (Section 33‑16‑103(c)) authorizes the corporation to charge a reasonable fee based on reproduction costs (including labor and materials) for providing a copy of any document.

Section 16.03(d) (Section 33‑16‑103(d)) is designed to give the corporation the option of providing a reasonably current list of its shareholders instead of granting the right of inspection; a “reasonably current” list is defined in section 16.03(d) (Section 33‑16‑103(d)) as one compiled no earlier than the date of the written demand, which under section 16.02(b) (Section 33‑16‑102(b)) must provide at least five days’ notice.

The phrase “estimated cost of production or reproduction of the records” in section 16.03(c) (Section 33‑16‑103(c)) refers to the cost of assembling information and data to meet a demand as well as the cost of reproducing documents that are already in existence.

SOUTH CAROLINA REPORTERS’ COMMENTS

No significant change in the prior law is made by this section.

DERIVATION: 1984 Model Act Section 16.03.

CROSS REFERENCES

Corporate records, see Section 33‑16‑101.

Court‑ordered inspection, see Section 33‑16‑104.

Inspection right generally, see Section 33‑16‑102.

Shareholders’ list inspection, see Section 33‑7‑200.

Library References

Corporations 181.

Westlaw Topic No. 101.

C.J.S. Corporations Sections 331 to 339.

**SECTION 33‑16‑104.** Court‑ordered inspection.

 (a) If a corporation does not allow a shareholder who complies with Section 33‑16‑102(a) to inspect and copy any records required by that subsection to be available for inspection, the circuit court of the county where the corporation’s principal office (or, if none in this State, its registered office) is located summarily may order inspection and copying of the records demanded at the corporation’s expense upon application of the shareholder.

 (b) If a corporation, within a reasonable time, does not allow a shareholder to inspect and copy any other record, the shareholder who complies with Section 33‑16‑102(b) and (c) may apply to the circuit court in the county where the corporation’s principal office (or, if none in this State, its registered office) is located for an order to permit inspection and copying of the records demanded. The court shall dispose of an application under this subsection on an expedited basis.

 (c) If the court orders inspection and copying of the records demanded, it also shall order the corporation to pay the shareholder’s costs (including reasonable counsel fees) incurred to obtain the order unless the corporation proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the demanded records.

 (d) If the court orders inspection and copying of the records demanded, it may impose reasonable restrictions on the use or distribution of the records by the demanding shareholder.

HISTORY: Derived from 1976 Code Section 33‑11‑260 [1962 Code Section 12‑16.26; 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 16.04 (Section 33‑16‑104) provides a judicial remedy if a corporation refuses to grant the right of inspection provided by section 16.02 (Section 33‑16‑102).

If the right of inspection under section 16.02(a) (Section 33‑16‑102(a)) is invoked and the corporation refuses to grant inspection, the shareholder may seek a summary order compelling inspection. A summary order is appropriate since the right of inspection under this subsection is either automatic or subject only to a determination that the person is in fact a shareholder of the corporation; by contrast, if inspection is demanded under section 16.02(b) (Section 33‑16‑102(b)), the shareholder’s good faith and purpose may be in issue; in this situation section 16.04(b) (Section 33‑16‑104(b)) directs the court to handle the proceeding “on an expedited basis.” The purpose of this phrase is to discourage dilatory tactics to avoid or delay inspection without requiring the court to resolve these issues on a summary basis. This language does not mandate any specific procedure by which these issues are to be resolved.

If a court enters a summary order directing inspection under section 16.02(a) (Section 33‑16‑102(a)), the cost of reproducing the records, if any, is placed on the corporation. Section 16.04 (Section 33‑16‑104) does not address who should bear the cost of reproducing other records ordered by the court; this is a matter for the courts to decide in light of the policy of the Model Act that costs of reproduction are generally the responsibility of the requesting shareholder and should be assessed against him.

The principal sanction against unreasonable delay or refusal to grant inspection is provided by section 16.04(c) (Section 33‑16‑104(c)), which imposes on the corporation the plaintiff’s costs, including attorneys’ fees, unless the corporation can establish that it acted reasonably. The corporation may avoid these costs by showing that the corporation refused inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded. This normally will involve reasonable doubt whether the shareholder had the necessary good faith and proper purpose or whether the records demanded are directly connected to the shareholder’s purpose. The phrase “in good faith because it had a reasonable basis for doubt” establishes a partially objective standard, in that the corporation must be able to point to some objective basis for its doubt that the shareholder was acting in good faith or had a purpose that was proper. For example a corporation may point to earlier conduct of the shareholder involving improper use of information obtained from the corporation in the past as indicating that reasonable doubt existed as to his present purpose. A corporation may not avoid the imposition of costs under this section merely by showing it had no information one way or the other about the issues in controversy.

Earlier versions of the Model Act and the statutes of many states imposed a penalty upon the corporation or its officers for refusal to permit inspection of books and records by shareholders who (1) had been shareholders for at least six months or (2) owned five percent or more of the outstanding shares. This provision has been omitted. A penalty unrelated to the costs of securing inspection was arbitrary and, as a result, was seldom actually enforced; further, a qualification based on the size or duration of the shareholder’s holding unrelated to his actual purpose was subject to the criticism that it constituted unreasonable discrimination against small shareholders.

SOUTH CAROLINA REPORTERS’ COMMENTS

Section 33‑11‑260(d) of the 1981 South Carolina Business Corporation Act allowed a shareholder to file an action seeking basically a rule to show cause why inspection should not proceed. The revision allows for a summary order where inspection sought under Section 33‑16‑102(a) is denied. Where inspection is sought under Section 33‑16‑102(b), a shareholder denied inspection is entitled to judicial resolution “on an expedited basis.”

The provision requiring payment of the shareholder’s costs is new. There is no liability for costs if the inspection right was denied in good faith and with a reasonable basis for doubt as to the validity of the request.

DERIVATION: 1984 Model Act Section 16.04.

CROSS REFERENCES

Corporate records, see Section 33‑16‑101.

“Principal office”: defined, see Section 33‑1‑400.

Registered office: required, see Sections 33‑2‑102 and 33‑5‑101.

Service on corporation, see Section 15‑9‑210 and Section 33‑5‑104.

Shareholder list inspection, see Section 33‑7‑200.

Voluntary inspection, see Section 33‑16‑102.

Library References

Corporations 181(8).

Westlaw Topic No. 101.

C.J.S. Corporations Sections 331 to 332.

RESEARCH REFERENCES

Encyclopedias

S.C. Jur. Attorney Fees Section 40, Court Ordered Inspection of Corporate Records.

ARTICLE 2

Reports

**SECTION 33‑16‑200.** Financial statements for shareholders.

 (a) A corporation shall furnish its shareholders annual financial statements, which may be consolidated or combined statements of the corporation and one or more of its subsidiaries, as appropriate, that include a balance sheet as of the end of the fiscal year, an income statement for that year, and a statement of changes in shareholders’ equity for the year unless that information appears elsewhere in the financial statements. If financial statements are prepared for the corporation on the basis of generally accepted accounting principles, the annual financial statements also must be prepared on that basis.

 (b) If the annual financial statements are reported upon by a public accountant, his report must accompany them. If not, the statements must be accompanied by a statement of the president or the person responsible for the corporation’s accounting records:

 (1) stating his reasonable belief whether the statements were prepared on the basis of generally accepted accounting principles and, if not, describing the basis of preparation; and

 (2) describing any respects in which the statements were not prepared on a basis of accounting consistent with the statements prepared for the preceding year.

 (c) A corporation shall mail the annual financial statements to each shareholder within one hundred twenty days after the close of each fiscal year. Thereafter, on written request from a shareholder who was not mailed the statements, the corporation shall mail him the last financial statements.

HISTORY: Derived from 1976 Code Section 33‑11‑250 [1962 Code Section 12‑16.26; 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 requirement that a corporation regularly submit some financial information to shareholders is appropriate considering the relationship between corporate management and the shareholders as the ultimate owners of the enterprise. This requirement was first added as an amendment in 1979 to the 1969 Model Act.

Section 16.20 (Section 33‑16‑200) has its principal impact on small, closely held corporations, since enterprises whose securities are registered under federal statutes are required to supply audited financial statements to shareholders. The securities of the vast majority of corporations in the United States are not registered under federal law. It is these corporations that section 16.20 (Section 33‑16‑200) principally affects.

Section 16.20 (Section 33‑16‑200) requires every corporation to prepare and submit to shareholders annual financial statements consisting of a balance sheet as of the end of the fiscal year, an income statement for the year, and a statement of changes in shareholders’ equity for the year. The last statement may be omitted if the data that normally appears in that statement appears in the other financial statements or in the notes thereto. Consolidated statements of the corporation and any subsidiary, or subsidiaries, or combined statements for corporations under common control, may be used. But section 16.20 (Section 33‑16‑200) does not require financial statements to be prepared on the basis of generally accepted accounting principles (“GAAP”). Many small corporations have never prepared financial statements on the basis of GAAP. “Cash basis” financial statements (often used in preparing the tax returns of small corporations) do not comply with GAAP. Even closely held corporations that keep accrual basis records, and file their federal income tax returns on that basis, frequently do not make the adjustments that may be required to present their financial statements on a GAAP basis. In light of these considerations, it would be too burdensome on some small and closely held corporations to require GAAP statements. If a corporation does prepare financial statements on a GAAP basis for any purpose for the particular year, however, it must send those statements to the shareholders as provided by the last sentence of section 16.20(a) (Section 33‑16‑200(a)).

Section 16.20(b) (Section 33‑16‑220(b)) requires an accompanying report or statement in one of two forms: (1) if the financial statements have been reported upon by a public accountant, his report must be furnished; or (2) in other cases, a statement of the president or the person responsible for the corporation’s accounting records must be furnished (i) stating his reasonable belief as to whether the financial statements were prepared on the basis of generally accepted accounting principles, and, if not, describing the basis on which they were prepared, and (ii) describing any respects in which the financial statements were not prepared on a basis of accounting consistent with those prepared for the previous year.

Section 16.20 (Section 33‑16‑200) refers to a “public accountant.” The same terminology is used in section 8.30 (Section 33‑8‑300) (standards of conduct for directors) of the Model Act. In various states different terms are employed to identify those persons who are permitted under the state licensing requirements to act as professional accountants. Phrases like “independent public accountant”, “certified public accountant”, “public accountant”, the Model Act uses the words in a general sense to refer to any class or classes of persons who, under the applicable requirements of a particular jurisdiction, are professionally entitled to practice accountancy.

In requiring a statement by the president or person responsible for the corporation’s financial affairs, it is recognized that in many cases this person will not be a professionally trained accountant and that he should not be held to the standard required of a professional. To emphasize this difference, section 16.20 (Section 33‑16‑200) requires a “statement” (rather than a “report” or “certificate”) and calls for the person to express his “reasonable belief” rather than “opinion”) about whether or not the statements are prepared on the basis of GAAP or, if not, to describe the basis of presentation and any inconsistencies in the basis of the presentation as compared with the previous year. He is not required to describe any inconsistencies between the basis of presentation and GAAP. If the statements are not prepared on a GAAP basis, the description would normally follow guidelines of the accounting profession as to the reporting format considered appropriate for a presentation which departs from GAAP (See e.g., “Statement on Auditing Standards No. 14” of the American Institute of Certified Public Accountants.) For example, the description might state, with respect to a cash basis statement of receipts and disbursements, that the statement was prepared on that basis and that it presents the cash receipts and disbursements of the entity for the period but does not purport to present the results of operations on the accrual basis of accounting.

Section 16.20(c) (Section 33‑16‑200(c)) specifies that annual financial statements are to be mailed to each shareholder within 120 days after the close of each fiscal year, further emphasizing that the statements required to be delivered are annual statements and not interim statements. In addition, if a shareholder was not mailed the corporation’s latest annual financial statements, he may obtain them on written request. See also section 16.01(e)(5) (Section 33‑16‑101(e)(5)).

Failure to comply with the requirements of section 16.20 (Section 33‑16‑200) does not adversely affect the existence or good standing of the corporation. Rather, failure to comply gives an aggrieved shareholder rights to compel compliance or to obtain damages, if they can be established, under general principles of law.

SOUTH CAROLINA REPORTERS’ COMMENTS

Section 33‑16‑200 improves dissemination of information to shareholders in the following respects: (1) it affirmatively requires a mailing of financial information to shareholders, as opposed to mailing “on written request”; (2) financial statements are to be disseminated within one hundred twenty days instead of being available after five months; (3) information about changes in shareholders’ equity is required; and (4) the nature of the accounting principles applied, if not GAAP, must be stated by the president.

DERIVATION: 1984 Model Act Section 16.20.

CROSS REFERENCES

Corporate records to include financial statements, see Section 33‑16‑101.

Inspection of records, see Section 33‑16‑102.

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

Library References

Corporations 181(7).

Westlaw Topic No. 101.

C.J.S. Corporations Sections 331 to 339.

RESEARCH REFERENCES

Treatises and Practice Aids

Fletcher Cyclopedia Law of Private Corporations Section 2272.10, Financial Statements for Shareholders.

**SECTION 33‑16‑210.** Other reports to shareholders.

 (a) If a corporation indemnifies or advances expenses to a director under Section 33‑8‑510, 33‑8‑520, 33‑8‑530, or 33‑8‑540 in connection with a proceeding by or in the right of the corporation, the corporation shall report the indemnification or advance in writing to the shareholders with or before the notice of the next shareholders’ meeting.

 (b) If a corporation issues or authorizes the issuance of shares for promissory notes or for promises to render services in the future, the corporation shall report in writing to the shareholders the number of shares authorized or issued, and the consideration received by the corporation, with or before the notice of the next shareholders’ meeting. However, this report is not required for a corporation subject to the registration requirements of Section 12 of the Securities Exchange Act of 1934, if the shares are issued or authorized pursuant to a plan that has been approved by the shareholders of the corporation.

HISTORY: Derived from 1976 Code Section 33‑11‑250 [1962 Code Section 12‑16.26; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2; 1992 Act No. 420, Section 1.

OFFICIAL COMMENT

Section 16.21 (Section 33‑16‑210) requires two types of financial transactions to be reported to the shareholders with or before the notice of the next meeting of shareholders:

(1) decisions to grant indemnification under chapter 8, Article 5;.

(2) decisions to issue shares to persons for promissory notes or for promises for future services under section 6.21 (Section 33‑6‑210).

These types of transactions are likely to be viewed as sensitive by shareholders. The conclusion that shareholders should be notified of these transactions was reached as part of the substantive decisions authorizing and regulating these transactions in chapters 6 and 8, Article 5. They are codified in section 16.21 (Section 33‑16‑210), rather than in the substantive chapters, because they deal with reports to shareholders.

1. Indemnification.

Section 16.21(a) (Section 33‑16‑210(a)) requires reporting to shareholders of payments made to directors or officers either for indemnification under sections 8.51, 8.52, and 8.54 (Section 33‑8‑510, 33‑8‑520 or 33‑8‑540) or for advances for expenses under section 8.53 (Section 33‑8‑530). Some academic criticism of earlier versions of the Model Act pointed out the possible evil of secret payments of indemnification which may or may not be consistent with the standards set forth in the Act. In addition, the use of corporate funds for this purpose is a legitimate matter of interest to shareholders.

Section 16.21(a) (Section 33‑16‑210(a)) requires the report to be made no later than the time notice is given for the next meeting of shareholders. Disclosure is required only of payments made in connection with suits by or in the name of the corporation; payments and advances arising out of third‑party suits are not required to be reported, although proxy rules may require reporting and corporations, of course, may choose to report even if not legally required to do so. This subsection does not require reporting of indemnification payments or advances to any individual who is not a director. The required reporting covers payments and advances to directors in derivative suits made not only under chapter 8, Article 5 but also pursuant to a charter, bylaw or other provision.

2. Shares Issued For Future Services or Promissory Notes.

Section 16.21(b) (Section 33‑16‑210(b)) requires reporting to shareholders of transactions in which the corporation issues shares for promissory notes or promises for future services. These transactions may involve dilution of the interests of shareholders and it was therefore concluded that disclosure of these transactions to the shareholder was appropriate as part of the decision (reflected in chapter 6) to broaden the permissible consideration for shares.

Disclosure is required only if the consideration for the issuance of shares consists in whole or in part of promissory notes or promises of future services; if the consideration consists solely of tangible or intangible property or benefits, or of services already performed, the transactions need not be reported. Proxy rules, however, may require reporting these transactions in some circumstances and corporations may choose to report them even through not legally required to do so.

SOUTH CAROLINA REPORTERS’ COMMENTS

This section contains two novel requirements which will provide useful information to shareholders at modest cost.

DERIVATION: 1984 Model Act Section 16.21.

CROSS REFERENCES

Consideration for shares, see Section 33‑6‑210.

Indemnification of directors, see Sections 33‑8‑500 et seq.

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

“Proceeding” defined, see Section 33‑8‑500.

Library References

Corporations 181(7).

Westlaw Topic No. 101.

C.J.S. Corporations Sections 331 to 339.

**SECTION 33‑16‑220.** Annual report.

 Every corporation organized under the laws of this State and every corporation qualified to do business in this State shall file an annual report as provided in Title 12.

HISTORY: Derived from 1976 Code Section 33‑11‑250 [1962 Code Section 12‑16.26; 1962 (52) 1996; 1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

[Note: Under this Act, the Annual Report is filed with the South Carolina Tax Commission and not with the Secretary of State as recommended by Section 16.22 of the 1984 Model Act Official Text. See the South Carolina Reporters’ Comments to this section. This Official Comment is nevertheless relevant since the substance of Section 16.22 is incorporated into revised Section 12‑19‑20.].

The requirement relating to the annual report that each corporation must submit to the secretary of state has been modified in section 16.22 (see Section 12‑19‑20) in an effort to make it a limited information document for use by the secretary of state, members of the general public, and shareholders. The purpose of the annual report is to show the location of the principal office of the corporation, the names and business addresses of its directors and principal officers, the general nature of the corporation’s business, and its capital structure. It permits members of the general public to ascertain the identity of the corporation and communicate directly with it. It also establishes the alternative to the registered office for service of process and related matters. The “principal office” of the corporation is defined as the location of its executive office in section 1.40 (Section 33‑1‑400).

The reference to “principal officers” in section 16.22(a)(4) (Section 12‑19‑20(b)(4)) is intended to simplify reporting requirements of corporations with very large numbers of employees who have some managerial responsibility and who, for business reasons, are designated as officers. The “principal officers” of a corporation include at least the chairman of the board of directors, the chief executive officer, and the officers performing the traditional functions performed by the corporate secretary and treasurer, no matter what their designation.

The annual report is required of both domestic corporations and foreign corporations qualified to transact business in the state. The failure to file the annual report, like the failure to satisfy other mandatory requirements of the Act, is a ground for administrative dissolution or revocation of the certificate of authority to transact business.

SOUTH CAROLINA REPORTERS’ COMMENTS

The annual report, which is an integral part of the 1984 Model Act scheme, was not included as part of the Corporate Code because the Secretary of State’s office currently has no mechanism for monitoring and appropriately maintaining these reports as part of its records. On the other hand, the Tax Commission has an interest in much of the financial information contained in the annual report. Pursuant to Section 12‑19‑20 of the 1976 Code, every corporation must file an annual report with the Tax Commission. During those periods when South Carolina law required each corporation to file an annual report with the Secretary of State, the company really was being asked only to file a duplicate of its tax report with the Secretary of State. Even when duplicate reports were required, it was common practice for the Secretary of State’s office to refer all inquiries directly to the Tax Commission since the Secretary of State was not equipped to retrieve these reports.

Although various versions of the prior corporate codes in South Carolina have required filing an annual report with the Secretary of State, this filing requirement often was deleted later, because it was merely duplicative of the information readily available from the Tax Commission.

Therefore, in adopting this act, it was agreed that it would be simpler to continue existing policy of only one report. It was logical to have this report filed with the Tax Commission since it has the capability of monitoring and maintaining these reports and, for most corporations, has a more substantial interest in the information contained in the reports. For most companies, the filed information is never used for anything other than tax purposes.

As previously worded, Section 12‑19‑20 authorized the Tax Commission to obtain any information it desired as part of the tax return filed with the Tax Commission. Section 12‑19‑130 also required a corporation to file an initial annual report at the time it filed its articles of incorporation or, in the case of a foreign corporation, its application for authority to transact business in South Carolina. Section 12‑19‑20 has been revised to combine the former language, most of the provisions in Section 16.22 of the 1984 Model Act, and the initial annual report requirement in former Section 12‑19‑130.

Although the provisions of Section 12‑19‑20 generally mirror Section 16.22 of the Model Act Official Text, there are modest differences. The Model Act specifies that the first report is due by April first of the year following incorporation, whereas Section 12‑19‑20 requires the report to be filed as part of the corporation’s tax return. Subsection (e) of revised Section 12‑19‑20 continues the requirements in former Section 12‑19‑130 that an initial annual report be filed with the articles of incorporation and, in the case of a foreign corporation, at the time it files its application to transact business in South Carolina. Section 16.22 of the Model Act has no similar provision.

In filing the initial annual report with the articles of incorporation, it should be noted that Section 12‑19‑20(b)(4) requires the disclosure of the “names and business addresses of its directors and principal officers”. Often the actual directors and officers will not be elected and appointed at the time of the filing of the initial annual report. In such a circumstance, if desired, it is permissible to designate those persons (if they are known) who will be elected or appointed once the corporation is formed, with, if desired, the notation “to be elected/appointed after formation”.

Moreover, Section 16.22(d) of the Model Act, which requires the reviewing agency to send back for correction any report that does not meet statutory and regulatory requirements, was not included in revised Section 12‑19‑20 because it is an inappropriate requirement since the required information is included on the corporation’s tax return. Although the Tax Commission may establish procedures for amending an annual report, the burden is on the corporation to meet any requirements, and failure to do so may result in the Secretary of State taking action to cause a domestic corporation to face administrative dissolution (Section 33‑14‑200) or a foreign corporation to become disqualified (Section 33‑15‑300).

Subsection (d) of revised Section 12‑19‑20 insures that the information required to be included in the annual report will be open to public inspection. For example, in order to serve summons on a corporation, attorneys may want to know who the officers are. Likewise, lawyers may want to know that the annual report, properly completed, has been filed. Shareholders and the mere curious may have an interest in inspecting and receiving a copy of any annual report. However, only the annual report portion of the corporation’s tax return will be available for public inspection. The other information on the return is confidential, nonpublic information.

Because the annual report is primarily of interest to the Tax Commission, there are obvious additional provisions in revised Section 12‑19‑20 which are not part of the 1984 Model Act Section 16.22, namely, the inclusion of the cross reference to Section 12‑7‑230, the filing with the Tax Commission, the form prescribed by the Tax Commission, and allowing either the Tax Commission or Secretary of State to require information in addition to the basic information required in Section 12‑19‑20(b).

DERIVATION: 1984 Model Act Section 16.22—but see the South Carolina Reporters’ Comments.

CROSS REFERENCES

Annual report form prescribed by Secretary of State, see Sections 12‑20‑30 and 33‑1‑210.

Application for certificate of authority by foreign corporation to include initial annual report, see Section 33‑15‑103.

Authorized shares, see Section 33‑2‑102.

Corporate records, see Section 33‑16‑101.

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

Effective date of notice, see Section 33‑1‑410.

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

Filing fees, see Section 33‑1‑220.

Filing of articles of incorporation to include initial annual report, see Section 33‑2‑102.

Filing requirements, generally, see Section 33‑1‑200.

Involuntary dissolution for failure to file annual report, see Section 33‑14‑200.

Issuance of shares, see Sections 33‑6‑101 through 33‑6‑103.

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

Notice to the corporation, see Section 33‑1‑410.

Officers, see Section 33‑8‑400 et seq.

“Principal office” defined, see Section 33‑1‑400.

Registered agent, see Sections 33‑5‑101 and 33‑15‑107.

Registered office, see Sections 33‑5‑101 and 33‑15‑107.

Revocation of certificate of authority for failure to file annual report, see Section 33‑15‑300.

Library References

Corporations 181(7).

Westlaw Topic No. 101.

C.J.S. Corporations Sections 331 to 339.

RESEARCH REFERENCES

Forms

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