CHAPTER 20

Transition Provisions

**SECTION 33‑20‑101.** Application to existing domestic corporations.

 This title applies to all domestic corporations in existence on its effective date that were incorporated under any general statute of this State providing for incorporation of corporations for profit if power to amend or repeal the statute under which the corporation was incorporated was reserved.

HISTORY: Derived from 1976 Code Section 33‑1‑110 [1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

[Note: For technical reasons, this Chapter was enacted as Chapter 20 of the South Carolina Business Corporation Act rather than as Chapter 17, which is the designation given it in the 1984 Model Act and specified in the Official Comment.].

The fundamental principle underlying section 17.01 ( Section 33‑20‑101) is that the revised Model Act should ultimately be made fully applicable to all existing business corporations as well as to all new business corporations formed after the effective date of the new statute. It is undesirable to “grandfather” existing corporations under earlier statutes since that results in the permanent coexistence of two different and overlapping systems of corporation law, with resulting confusion. This is particularly true of the revised Model Act, which builds directly on the experience of many years with existing corporation statutes and contains few major substantive changes.

Section 17.01 (Section 33‑20‑101) applies this basic principle in its broadest sense by making the revised act applicable as of its “effective date” (prescribed in section 17.06 (January 1, 1986) to all domestic corporations formed under general statutes for corporations for profit. This includes all prior general business corporation acts, but not statutes providing for not‑for‑profit corporations or associations, or corporations formed for the purpose of engaging in business for which the state has provided a separate incorporation procedure. [Note: but see Section 37‑20‑103].

Section 17.01 (Section 33‑20‑101) applies the revised Model Act to all corporations to which that application is constitutionally permissible. In view of the universal adoption of “reservation of power” clauses in all states for more than a century, there are very few active business corporations to which this Act will not be applicable under this section.

SOUTH CAROLINA REPORTERS’ COMMENTS

1. New Law Applies to Existing Corporations.

As noted in the Official Comment, this act will apply to all South Carolina for‑profit corporations since the corporate statutes of this State, from earliest times, have included the powers to amend or repeal. By virtue of Section 33‑20‑103, this act may apply also to various aspects of the operation or formation of a nonprofit corporation operating in South Carolina. Making this act universally applicable to all existing corporations is in keeping with the prior major revisions of the South Carolina law, which likewise applied the revisions to existing corporations.

As noted in the South Carolina Reporters’ Comments to Section 33‑1‑102, the right of the Legislature to adopt new provisions which are binding on existing corporations has been a constitutional provision since the Constitution of 1868 (statutes reciting this right have existed since 1841).

Even though in 1971 the Constitution was amended, deleting a specific reference to the power to amend, the purpose of this amendment was likely purely stylistic. There was no intent to eliminate the Legislature’s power to make changes.

2. Certain Grandfathered Provisions—In Other Sections.

Certain provisions of the 1981 South Carolina Business Corporation Act continue to apply to corporations already in existence on January 1, 1989, the effective date of the Act. See the South Carolina Reporters’ Comments to Section 33‑20‑105 for a discussion of these provisions, most of which expire after a certain date.

DERIVATION: 1984 Model Act Section 17.01.

**SECTION 33‑20‑102.** Application to qualified existing foreign corporations.

 A foreign corporation authorized to transact business in this State on the effective date of Chapters 1 thru 20 of this title is subject to Chapters 1 thru 20 of this title but is not required to obtain a new certificate of authority to transact business under Chapters 1 thru 20 of this title.

HISTORY: Derived from 1976 Code Section 33‑1‑110 [1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2.

OFFICIAL COMMENT

Section 17.02 (Section 33‑20‑102) makes the revised Model Act applicable on its effective date to all foreign corporations that are qualified to transact business in the state on that date. But these corporations need not refile and obtain new certificates of authority under this Act. While chapter 15 of the revised Model Act (chapter 15 of this Act) may change the rules applicable to foreign corporations in some states, these changes are not to a type that require a transition period. It is therefore recommended that only a single effective date be provided for the application of the Act to foreign corporations and that delayed effective dates for specific provisions in this regard are unnecessary.

SOUTH CAROLINA REPORTERS’ COMMENTS

Applying the new act to existing qualified foreign corporations, and not requiring a reregistration, is in keeping with prior South Carolina practice.

DERIVATION: 1984 Model Act Section 17.02.

**SECTION 33‑20‑103.** Application to nonprofit corporations.

 Except for corporations organized under or transacting business pursuant to the provisions of Chapter 49 of this title, except for corporations organized under or transacting business pursuant to Chapter 45 of this title or any other provision of law in this title relating to telephone cooperatives, except for corporations not‑for‑profit organized or operating pursuant to Chapter 36 of this title, and except for those nonprofit corporations which are governed exclusively by the provisions of Chapter 31 of this title, Chapters 1 through 20 of this title apply to every domestic nonprofit corporation and to any other foreign nonprofit corporation which is authorized to or transacts business in this State except as otherwise provided in Chapters 1 through 20 of this title or by the law regulating the organization, qualification, or governance of the nonprofit corporation.

HISTORY: Derived from 1976 Code Section 33‑1‑110 [1981 Act No. 146, Section 2; Repealed, 1988 Act No. 444, Section 2]; 1988 Act No. 444, Section 2; 1994 Act No. 384, Section 8; 2000 Act No. 404, Section 3.

OFFICIAL COMMENT

None. This section has no 1984 Model Act counterpart.

SOUTH CAROLINA REPORTERS’ COMMENTS

There is no comparable Model Act provision to this section.

This provision is intended to make the South Carolina Business Corporation Act of 1988 applicable to nonprofit corporations to the extent it is not inconsistent with specific provisions in the nonprofit statutes. This provision is desirable because the existing South Carolina nonprofit statutes are very incomplete.

DERIVATION: This section has no 1984 Model Act counterpart.

CROSS REFERENCES

Definition of “corporation” or “domestic corporation” may include nonprofit corporation, see Section 33‑1‑400.

**SECTION 33‑20‑104.** Application of Chapters 18 and 19.

 The provisions of Chapters 18 and 19 of this title only apply to those corporations that elect to be governed by those chapters.

HISTORY: Derived from 1976 Code Section 33‑1‑110 [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

This section insures that there is no implication that any provision governing only professional corporations or statutory close corporations affects, or in any manner regulates the operation, rights, or provisions of a corporation not formed under these very specific provisions. For example, new Section 33‑18‑210(b) provides that an amendment to the articles eliminating the board of directors must be adopted by a unanimous vote of all shareholders. The provisions of Section 33‑8‑101(c) also permit dispensing with the board of directors under certain circumstances. However, the vote to dispense with the board pursuant to Section 33‑8‑101, in some instances, may require only a vote of a majority of these shareholders (see Section 33‑10‑103(e)). Therefore, subsection (b) insures that the unanimous vote requirement of Section 33‑18‑210(b) could not be imposed on the action taken pursuant to Section 33‑8‑101.

DERIVATION: This section has no 1984 Model Act counterpart.

**SECTION 33‑20‑105.** Saving provisions.

 (a) Except as provided in subsection (b), the repeal of a statute by Chapters 1 thru 20 of this title does not affect:

 (1) the operation of the statute or any action taken under it before its repeal;

 (2) any ratification, right, remedy, privilege, obligation, or liability acquired, accrued, or incurred under the statute before its repeal, including, without limitation, any right acquired pursuant to Sections 33‑11‑220 and 33‑21‑130 in Section 2 of Act 146 of 1981;

 (3) any violation of the statute, or any penalty, forfeiture, or punishment incurred because of the violation, before its repeal;

 (4) any proceeding, reorganization, or dissolution commenced under the statute before its repeal and the proceeding, reorganization, or dissolution may be completed in accordance with the statute as if it had not been repealed.

 (b) If a penalty or punishment imposed for violation of a statute repealed by Chapters 1 thru 20 of this title is reduced by Chapters 1 thru 20 of this title, the penalty or punishment, if not already imposed, must be imposed in accordance with Chapters 1 thru 20 of this title.

HISTORY: 1988 Act No. 444, Section 2; 1990 Act No. 446, Section 8.

OFFICIAL COMMENT

The saving provisions of section 17.03 (Section 33‑20‑105) are derived from section 25 of the UNIFORM STATUTORY CONSTRUCTION ACT, which was promulgated by the National Conference of Commissioners on Uniform State Laws in 1965.

SOUTH CAROLINA REPORTERS’ COMMENTS

1. Certain Grandfathered Provisions Provided for in this Section.

Under Section 33‑11‑220 of the 1981 South Carolina Business Corporation Act, a corporation was entitled to adopt a shareholder management agreement which effectively allowed the corporation to be managed by the shareholders rather than through a formal board of directors. All of these agreements were limited to a period of no more than ten years. Pursuant to subsection (a)(2), any such agreement, validly adopted, prior to the effective date shall remain in full force and effect according to and for the duration specified in the agreement (not to exceed ten years from the effective date of this act).

Second, under Section 33‑21‑130 of the 1981 South Carolina Business Corporation Act, the articles of incorporation could provide for a special right of dissolution. Pursuant to subsection (a)(2), any such provision in effect prior to the effective date of this act shall remain in full force and effect until the articles of incorporation of the corporation are specifically amended to delete this special right.

2. Certain Grandfathered Provisions Found in Other Sections.

Although this act applies to all existing corporations (see Sections 33‑20‑101 and 33‑20‑102), there are various other sections of the South Carolina Business Corporation Act of 1988 which make special provisions for the rights of existing corporations and their members. These include:

(1) Certain Existing Names Permitted.

Section 33‑4‑101(f) permits banks, savings and loans, utilities, insurance companies, and railroads, which since 1964 have used a corporate name which does not include a word designating the business as a corporation, to continue to use this nonconforming name.

(2) Assumed Names Permitted Until December 31, 1994.

Certain domestic and foreign corporations adopted “assumed names” pursuant to repealed Section 33‑5‑35 of the 1981 South Carolina Business Corporation Act. Many of these “assumed names” will not meet the new requirements for proper corporate names. These assumed names have to be renewed every five years. Pursuant to Section 33‑4‑101(g) of this act, all of them shall continue to be valid names until December 31, 1994. At that time, if the “assumed name” meets the requirements of Section 33‑4‑101 for domestic corporations, and Section 33‑15‑106 for foreign corporations, the company can elect to continue using that name as its South Carolina name. Companies and their advisors are cautioned that domestic companies likely will be required to amend their articles in order to continue to use the prior name.

(3) Supermajority Voting Rights in Bylaws Valid until January 1, 1991.

Under Section 33‑11‑100 of the 1981 South Carolina Business Corporation Act, supermajority voting by shareholders could be imposed by bylaw provision. Section 33‑7‑270 of this act provides that such provision may be included or authorized only in the articles of incorporation. However, Section 33‑7‑270 also provides that, for corporations which previously had a supermajority right specified only in the bylaws, these rights shall continue to be valid until January 1, 1991, and thereafter only if an appropriate amendment to the articles is made. See the South Carolina Reporters’ Comments to Section 33‑7‑270.

(4) Articles’ Amendments by Professional Corporations.

Because of changes in the provisions that govern professional corporations made by Chapter 19, professional corporations that were formed before the effective date of this act have to file their articles of association with the Secretary of State and may have to file amendments to their articles. Under Section 33‑19‑700, professional corporations have until January 1, 1991, to comply with these requirements.

3. Effect of this Act on Existing Causes of Action.

The Attorney General of South Carolina has recognized that, when the corporate code is amended, the new provisions may be applicable to a situation which arose, in part, under the prior law. Interpreting prior revisions of the corporate code, the Attorney General in 1964 determined that the reinstatement procedures of the newer law should apply where a corporation’s charter was forfeited because of failure to pay taxes under the old law. The Attorney General noted that, generally, statutes are prospective, but an exception exists as to curative, remedial, or validating statutes. Since the rights of third parties could not be injured by applying the new statute, it being remedial in nature, it should be applied. This was true even though the new law also had a savings clause which stated that the new law would not affect any cause of action, liability, penalty, or action pending, existing, or incurred prior to the effective date of the new statute. The Attorney General got around the “savings clause” by concluding that the corporation whose charter had been forfeited for failure to pay taxes had no accrued, existing, incurred, or pending action for reinstatement until it applied for reinstatement. In essence, the Attorney General got around the savings statute by only viewing the operative act as “reinstatement” rather than penalty for failure to pay taxes, a rather neat trick of interpretation. See, 1963‑64 Op. S.C. Att’y Gen. 114 (#1672) (April, 1964).

New Section 33‑20‑105(b) adopts this same philosophy. The Attorney General’s conclusion is strengthened by this new terminology.

DERIVATION: 1984 Model Act Section 17.03.

CROSS REFERENCES

Operation by shareholders of statutory close corporation without board of directors, see Section 33‑18‑210.

Shareholders’ agreement to manage affairs of statutory close corporation, see Section 33‑18‑200.

Special right of dissolution of shareholder of statutory close corporation, see Section 33‑18‑330.