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South Carolina House of Representatives

# Legislative Update & Research Reports

Robert J. Sheheen, Speaker of the House

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### House Week in Review

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This was a week for joint assemblies for the South Carolina House. It met in joint session with the Senate to elect a new chief justice of the South Carolina Supreme Court and to select new members of the Employment Security Commission and the Legislative Audit Council. The General Assembly also gathered in an evening joint assembly to hear Gov. Carroll Campbell deliver his second State of the State address.

Associate Supreme Court Justice George T. Gregory Jr. of Chester was elected by acclamation to the position of Chief Justice of the State Supreme Court last week. In his nominating remarks, House District 43 Rep. Paul Short said that during Judge Gregory's tenure on the Supreme Court, "he has become known for well-reasoned and succinct written legal opinions. He is held in high regard by his brethren on the court who realize that we are entrusting the state's judicial system to a man who is eminently qualified."

In other elections, the General Assembly also elected by acclamation three members to the state Employment Security Commission. Cecil T. Sandifer of Westminster and C. Lem Harper of Columbia were re-elected to the commission. Rep. J. William McLeod of Florence, who for the past seven years has represented House District 59 encompassing parts of Dillon, Marion and Florence counties, was elected to his first term on the three-member commission.

In the Legislative Audit Council elections, Robert L. Thompson of Rock Hill was elected by acclamation to the council. The Legislature also elected Columbia CPA Sherri D. Mathews to the Legislative Audit Council. Ms. Mathews received 107 votes to the 46 votes received by Jerry D. Gambrell, a CPA from Charleston, who was seeking re-election to the council.

The House also gave final reading to H.2862, which would change the State Constitution to allow the General Assembly to provide by law for the qualifications of sheriffs. This joint resolution went to the Senate where it was read for the first time and referred to the Senate Judiciary Committee.

## Update on Revisions to the Business Corporation Act

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*The following information on proposed changes to the South Carolina Business Corporation Act is condensed in part from the report of the Business Corporation Code Revision Study Committee. The report is included in full in S.415. Thanks to the House Judiciary Committee staff for information on the committee's amendment to the bill.*

### Introduction

S.415, the "South Carolina Business Corporation Act of 1988," is a hefty 901-page bill that will substantially revise state laws regarding business and professional corporations. Work on the bill began in the Senate in November 1985 when a special study committee, composed of legislators, business leaders, lawyers and law professors, was formed.

The mission of the Business Corporation Code Revision Study Committee was to review the 1984 Model Business Corporation Act in the hope of incorporating its provisions, with amendments, into the state's Business Corporation Act, last amended in 1981.

### The 1984 Model Business Corporation Act

The 1984 Model Business Corporation Act represents the first revision of the original Model Act, which over the past 30 years, has been adopted with amendments in 35 states. The study committee report describes the 1984 Model Act as a "state-of-the-art document reflecting many years of work by the members of the prestigious American Bar Association Committee on Corporate Law." The committee noted that the 1984 Model Act, which includes official comments and other annotations, would be of particular use to South Carolina lawyers since the state has had few major corporate law cases.

### The South Carolina Business Corporation Act

In 1981, when the South Carolina Business Corporation Act was last amended, the General Assembly added a number of Model Act provisions. However, there remained many areas where the two laws differed. According to the study committee, "These differences have

caused practical problems for practitioners because of the absence of a large body of case law in South Carolina."

The committee report notes that because the state's Business Corporation Act includes much of the original Model Act, the changes proposed in S.415 are not a "major change in substantive law." Rather, it asserts that adoption of provisions of the 1984 Model Act with amendments will modernize, clarify and simplify current state law.

According to the report, adoption of provisions in the 1984 Model Act will give South Carolina "a statute that will place its corporate law in the mainstream of American corporate law." This would benefit new and existing businesses here, create an "attractive legal climate to attract new businesses" and simplify the task of corporate and legal advisors.

#### Five Study Areas

The Business Corporate Code Revision Study Committee looked at five areas:

- 1) Administrative issues, incorporation and the rights and obligations of foreign corporations operating in the state.
- 2) Corporate finance issues, including authorization and issuance of stocks, dividends, redemption and recapitalization.
- 3) Shareholder and director management functions, including voting rights, shareholder and director meetings, director responsibilities and liabilities for mismanagement and improper distributions, derivation suits and the right of indemnification.
- 4) Mergers, consolidations, share exchanges, major sale of assets, amendments to the articles of incorporation, dissolution and other fundamental structural changes.
- 5) Special provisions relating to close corporations and professional corporations involving doctors, engineers, lawyers and other professionals. Close corporations are defined as corporations in which all or most of the shareholders are actively engaged in the management of the business.

#### Summary of Changes

Here is a brief summary of the most significant changes proposed in S.415. A more detailed account of these changes can be found on pages 7-12 of the bill.

- 1) The articles of incorporation, which is a basic corporate constituent document, have been simplified and significantly shortened.
- 2) The provisions regulating corporate names have been liberalized. For example, a corporation will be able to use "company" or "Co." as part of its name.
- 3) When a corporation changes its name, it no longer will be necessary to file an affidavit in the RMC or clerk of court's offices in every county where it owns real property. The change would be filed with the Secretary of State.
- 4) If a corporation's registered agent cannot be located, service of process can be made on the corporate secretary.
- 5) The proposed venue statute would clarify the law with respect to the proper county in which suits against domestic and foreign corporations must be filed.
- 6) The requirements for foreign corporations to register in South Carolina have been simplified.
- 7) The bill would eliminate the outdated concepts of stated capital, paid in capital, capital surplus, earned surplus, par value and treasury shares.
- 8) A corporation could issues shares of stock that could be convertible into debt.
- 9) A corporation could issues shares for future services and notes. This change will be helpful particularly to close corporations.
- 10) A provision specifically authorizing the most common types of share transfer restrictions used by corporations is included in the proposed act. There is no statute on this issue in the existing state Business Corporation Act.
- 11) A new provision authorizing a corporation, some of whose shares are held by a nominee -- for example a brokerage firm or bank trust department -- to communicate directly with the beneficial owners of the shares is proposed. This provision mainly would benefit public companies.
- 12) Under the new act, a resolution that requires a majority vote would pass if the shares voting in favor of the resolution outnumber the shares voting against the resolution. Under this proposal, absentions would not affect the outcome as under the current act.
- 13) The new act contains specific limitations on the power of a board of directors to increase or decrease the size of the board.
- 14) Supermajority voting rights would be permitted without limitations, but in the case of supermajority shareholder voting rights, the right must be disclosed in the articles of incorporation.

- 15) The 10-year limitation on voting agreements is eliminated. If they wish, shareholders could include a time limitation in a voting agreement.
- 16) Derivative suits would be governed exclusively by Rule 23(b)(1) of the South Carolina Supreme Court Rules of Civil Procedure, eliminating the need for a separate derivative statute.
- 17) A new provision is included that specifically would allow a corporation to include in the articles of incorporation a provision preventing removal of directors except for cause as included in the act.
- 18) The procedure for approval of loans to directors would be changed and clarified.
- 19) A corporation would have any officers it wants. Under the current law, a corporation must have a president, vice president, secretary and treasurer.
- 20) Shareholder inspection rights and rights to information about the corporation are broadened and strengthened. For example, every shareholder would receive an annual balance sheet and income statement, rather than just those who asked for them.
- 21) Several changes would be made in the procedures and authority of the board of directors to make amendments to the bylaws without shareholders approval.
- 22) There are several proposed changes in the provisions regulating mergers and related transactions.
- 23) Many significant changes would be made in the dissenter's rights provisions.
- 24) Several changes are proposed in the dissolution provisions, including new provisions strengthening the power of the Secretary of State to dissolve a corporation for failure to pay taxes or to file annual reports.
- 25) A new form of corporation called a statutory close corporation would be authorized.
- 26) The statutory provisions regulating professional corporations would be completely revised.
- 27) The filing and license fee structure would be revised. Under the Senate proposal, filing and license fees would be uniform and would not be dependent on the size of the corporation.

The Senate approved S.415 in March 1987, sending it to the House where it was referred to the House Judiciary Committee.

#### House Judiciary Committee Amendment

The House Judiciary Committee spent much of the interim reviewing this lengthy proposal. Numerous lawyers, law professors

and many interested parties were involved in this process.

The House adjourned debate on S. 415 until Thursday, Jan. 28, when it will be up for second reading. Here is a summary of the amendment to S.415 as proposed by the House Judiciary Committee.

- a) Change of Corporate Name: Under the Senate version, corporation name changes would have to be filed only with the Secretary of State. The Judiciary Committee amendment would require the corporation to file record notice in all counties where it owns real property. This is to simplify title-checking.
- b) Anti-Takeover and Business Combinations Statutes: This is one of the most significant portions of the amendment proposed by the Judiciary Committee. It would add an Anti-Takeover statute and a Business Combinations Act to the bill.

The Anti-Takeover provisions being proposed are identical to those contained in the Indiana act, which has been upheld as constitutional by the U.S. Supreme Court. The only change in the proposed South Carolina statute is that the Anti-Takeover statute would also apply to closely-held South Carolina corporations which have assets of \$25 million or more.

Essentially, the Anti-Takeover statute is designed to give notice and disclosure of tender offers to shareholders so that corporate takeovers are rendered more difficult. Corporate "raiders" outside South Carolina would face stricter disclosure requirements. Shareholders of a public corporation hold a special meeting within 50 days of the tender offer to decide whether the "control shares" will be accorded voting rights. Dissenters would be guaranteed the fair value of their shares.

The Business Combinations Statute, which is being proposed as an integral part of the Anti-Takeover provisions, also is based on the Indiana statute. This portion of the amendment would provide more protection for the minority shareholders of a corporation. Corporate mergers and other types of business combinations would be prohibited for two years after an "interested shareholder" acquires 10 percent or more of the voting power of the outstanding shares of the resident domestic corporation, unless a majority of the disinterested members of the Board of Directors approves the merger or other combination.

However, corporations can "opt out" of the application of the Business Combinations statute if their Articles of Incorporation so provide and in certain other situations.

Unlike the Indiana law, South Carolina also would apply the Business Combinations statute to foreign corporations which meet certain prerequisites demonstrating that they are headquartered in South Carolina, or that they have substantial contacts with the state.

- c) Articles of Incorporation: This provision would restore to S.415 the Articles of Incorporation requirements in substantially identical form to the requirements currently in the Code.. Under this proposal, the concept of par value would be eliminated, but attorney certification, verification, purpose clause, the names of directors and the classes of shares would be required.
- d) Limitation on Director's Liability: This provision in the amendment would permit corporations to provide in their Articles of Incorporation for the limitation or elimination of a director's personal liability to the corporation or shareholders for breach of fiduciary duty. However, a corporation may not limit a director's liability for a number of other reasons, including intentional misconduct or any action which results in improper personal benefit to the director.  
According to the Judiciary Committee, about 25 states have enacted similar limitations of director's liability. The limitation does not apply to third-party actions.
- e) Issuance of Shares for Future Services: S.415 would allow corporations to issue shares for future services. The Judiciary Committee amendment would require a written contract when a corporation agrees to issue such shares.
- f) Action without Directors' Meeting: This proposed change simplifies that section of S.415 relating to directors' meetings. The amendment would still provide that boards of directors may take action without a meeting if that action receives the unanimous consent of the directors.
- g) Directors' Liability for Unlawful Distributions: This is a technical change to S.415 which would bring it into conformity with amendments to the 1984 Model Act since S.415 was drafted.
- h) Certificate of Authority for Foreign Corporations: This provision would revise the requirements for foreign corporations filing certificates of Authority to retain current South Carolina law. In addition to the requirements already spelled out in S.415, this proposal would add a statement of purpose, types and classes of shares, and attorney certification.

- i) Annual Reports to the Tax Commission: This is a technical change requiring that the annual reports of corporations be delivered to the state Tax Commission rather than the Secretary of State.
- j) Corporate License Fees: This is another technical change adding a reference to the bill regarding corporate license fees and a \$25 minimum fee.
- k) License Fees for Bank Holding Companies: This proposal ensures that the annual license fee for corporations, such as bank holding companies, are not based on the total capitalization of the company.
- l) Service of Process: These proposed changes simply clarify that service of process may be made on the office of the corporate secretary of a domestic or a foreign corporation. In both cases, the Senate version simply says that service must be made on the corporate secretary.
- m) Venue in Suits Against Corporation: The House Judiciary Committee proposes amending S.415 by eliminating the section that allows a plaintiff to bring suit against a corporation in any county that the plaintiff chooses. This amendment would eliminate the possibility of "forum shopping."
- n) Corporate Dissolution: This proposed change would simplify the process for corporate dissolution. It would allow the state Tax Commission to provide the name of the corporation to the Secretary of State once the commission fails to get a response from the corporate taxpayer for failing to file a return. This would help prevent the commission from erroneously issuing assessments and warrants and would minimize the time it takes to dissolve a corporation.  
In addition, this proposal would allow the commission to withdraw outstanding warrants against dissolved corporations, and allows for an administrative dissolution if a corporation fails to pay corporate income or franchise taxes.
- o) Effective Date of the Act: Under this provision, the bill would go into effect on January 1, 1989. Only the Anti-Takeover statute would go into effect with the governor's signature.

Bills Introduced

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Here is a sampling of the bills introduced in the House during the previous week. Not all House bills introduced last week are featured here. The bills are organized by the standing committees to which they were referred.

*Education and Public Works Committee*

School Make Up Days (H.3559, Rep. Winstead). This joint resolution would allow school board trustees to waive up to three days of required school attendance in connection with school closings due to bad weather during the current school year. In addition, teachers and employees would not be required to make up any of the bad weather days with their vacation, annual or sick leave.

More School Make Up Days (H.3583, Rep. Sharpe). This joint resolution would allow only two school days to be waived from the time students must make up due to bad weather closings. Teachers' compensation could not be reduced if school authorities decided to exempt the two days allowed under this bill.

And Even More School Make Up Days (H.3593, Rep. Harvin). Here is another joint resolution dealing with school make up days due to bad weather. In this bill, no more than three days of the missed school time could be exempted. And again, teacher compensation could not be reduced if the days are waived.

55 mph Speed Limit (H.3595, Rep. Rudnick). This legislation would put the speed limits on the interstate highways in South Carolina back at 55 mph. It would eliminate the language in the law allowing the state to raise the limit above 55 mph on the interstates as federal law permits.

State of Grace (H.3599, Rep. Faber) If the day to renew your driver's license falls on a weekend, state holiday or a day the state Highway Department is closed because of bad weather, this bill would give you a five day grace period to renew the license.

*Labor Commerce and Industry Committee*

Failing to Maintain Auto Insurance (H.3572, Rep. T.C. Alexander). If this bill is enacted, it would cost \$100, not the current \$25, to reinstate a vehicle's registration after it has been suspended for failing to keep it insured.

*Medical, Military, Public and Municipal Affairs*

Location of Abortions (H.3557, Rep. Hearn). This bill, if enacted, would provide for legal abortions in the first or second trimester of pregnancy to be performed in a DHEC-certified doctor's office, in addition to a certified hospital or clinic. The bill also would require DHEC to report any abortion violations to the county solicitor.

Clerical and Administrative Consolidation (H.3581, Rep. Gregory) This legislation proposes consolidating the administrative and clerical duties of nine boards into a proposed Office of Licensing, Regulation and Certification.

The boards using this administrative support office would be the boards of examiners in psychology, optometry, opticianry, speech pathology and audiology; the Board of Examination and Registration of Physical Therapists; the Boards of Occupational Therapy and Podiatry Examiners, the State Board of Social Work Registration and the State Board of Veterinary Medical Examiners.

The bill states that the administrative office is being proposed to help these agencies carry out their duties in the "most economical and efficient manner."

*Ways and Means Committee*

Trucking Industry (H.3546, Rep. J. Rogers). This lengthy bill, designed to make improvements in the way the state regulates and governs the trucking industry, would create the Trucking Industry Safety, Education and Economic Development (SEED) Research Act.

If enacted, this legislation would establish a self-funding committee by the same name. The main purpose of the committee would be to increase South Carolina's presence as a regional transportation center and to develop the highest standards of safety and quality for transportation services.

This committee would be made up of legislators, consumer and private industry members, along with representatives from the state Highway Department, the Tax Commission, the state Development Board, Ports Authority and Public Service Commission. Financing of committee projects would come from portions of revenues derived from truck and trailer registrations.

To enhance safety and to increase the PSC's policing of illegal transportation, this legislation would, in part, increase fines for out-of-service violations and increase insurance minimums.

In part, this bill also would:

- establish permanent trailer and semi-trailer registration with a one-time registration fee of \$75.
- require that no personal property tax be assessed on non-domiciled trailers.
- allow International Registration Plan (IRP) fees to be paid by company check instead of certified check or money order.
- provide a single facility at which all forms could be obtained and fees paid -- a "one stop shopping" concept.
- prohibit local governments from levying local registration fees or license taxes on vehicles registered with the PSC.
- lower the assessment on all private and for-hire transportation vehicles from 10.5 percent to 9.5 percent.
- provide that property tax due on state domiciled equipment would be based on a percentage of the mileage run within South Carolina.
- allow annual permits for oversize and overweight vehicles as opposed to single trip permitting.

Gas Tax Repealed (H.3558, Rep. McLeod). This bill proposes repealing all the provisions in last year's gasoline tax bill, except the goals and set asides for the business enterprises owned by disadvantaged women or social and economically disadvantaged individuals and the reduction to \$12 of the annual vehicle registration fee.

More "C" Funds (H.3584, Rep. Davenport). This bill proposes setting aside 20 percent of the new gas tax revenues going into the Strategic Highway Plan and Economic Development account for distribution back to the counties as "C" funds. This distribution would be based on the point of sale. The only counties ineligible for these new "C" funds would be those that already have more than \$25 million in highway projects scheduled under the Strategic Highway Plan.

Paying the Piper (H.3603, Rep. Clyborne). This brief legislation simply states that when the General Assembly mandates a program to be carried out by local governments, the Legislature also must designate where the money will come from to carry out the program.

Art for State Buildings (H.3602, Rep. Keyserling). This legislation would set up the "Art in State Building Program." Briefly, this program would acquire quality art work for new or renovated state buildings. Under this proposal, one-half of 1 percent of the building's appropriation would be allocated for the acquisition of art works for the building. This program would exclude such state construction as prisons, motor pool buildings and the like, or projects costing less than \$100,000.

An Art Selection Committee, made up of legislators, a consumer member, an architect and three art-related professionals, will be established. For each project undertaken, representatives from the agency and the project will also sit as voting members on the committee. South Carolina artists and their works would be give "special attention" by the acquisition committee.

The state will have sole ownership and rights to display any work acquired. If enacted, this bill would go into effect in July and would apply to any state-owned or leased building being constructed or renovated.

## State Bugs and Other Critters

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### Introduction

As every school child and trivia buff knows, the last section of the *Legislative Manual* displays color pictures of all the state emblems from the state seal and flag to the most recent addition to this prestigious group, the state dog.

This session, proposals are pending before the House and Senate to add two more state emblems: a state reptile, the Loggerhead sea turtle, and a state insect, the praying mantis. Rep. J.C. Johnson and Sen. John Drummond have introduced state reptile bills (H. 3522, S.1006). Sen. Nell Smith is sponsoring the praying mantis as the state insect in S.947. As of this printing, all bills were still in committee.

The 1985 session was the last time the General Assembly added a new category to the state emblems. That's when the state-bred Boykin Spaniel was designated South Carolina's top dog. With that designation, South Carolina joined two other states with state dogs: Maryland and the Chesapeake Bay Retriever, and the Commonwealth of Massachusetts with the Boston Terrier.

### Mocking the Carolina Wren

It has not always been smooth sailing for all South Carolina emblems. Take the well known Carolina Wren, for instance. The *Legislative Manual* notes that prior to 1939, the Carolina Wren, known by its *tea-ket-tle, tea-ket-tle, tea-ket-tle* song, was only recognized unofficially as the state bird.

The 1939 the General Assembly, no doubt under heavy pressure from the Mockingbird lobby, selected that bird as the official South Carolina bird. In 1948, however, the General Assembly recognized the oversight, repealed the Mockingbird and officially designated the Carolina Wren as the bird of preference in the Palmetto State.

### What other states do

As the General Assembly considers adding a state reptile and insect to the list of emblems, it is pertinent to note that many states have selected official state reptiles, bugs and a whole

bunch of other stuff. In fact, an informal survey of state emblems reveals that South Carolina is about average in the number of state emblems it has designated. It certainly doesn't have as long a list as Florida which has designated a saltwater mammal (dolphin), a marine mammal (porpoise), a saltwater fish (Atlantic Sailfish) and a freshwater fish (Florida Large Mouth Bass), among other categories.

### State bug

Of the 50 states, 23 states have designated state insects, with the honeybee and the ladybug the most popular choices. If South Carolina were to designate the praying mantis as the state insect, it would join Connecticut in selecting that insect.

Here is a list of insects and the states that selected them:

#### Praying Mantis

Connecticut.

#### Honeybee

Kansas, Louisiana, Maine, Mississippi, Missouri, Nebraska, New Jersey, North Carolina, South Dakota, Vermont, Wisconsin.

#### Ladybug

Delaware, Massachusetts, New Hampshire, Ohio, Tennessee.

#### Firefly

Pennsylvania, Tennessee.

#### California Dogface Butterfly

California.

#### Monarch Butterfly

Illinois.

#### Baltimore Checkerspot Butterfly

Maryland.

#### Swallowtail Butterfly

Oregon.

#### Dragonfly

Michigan.

### State Reptiles

Only four states have designated a state reptile, and turtles were chosen by half. California has selected the California Desert Tortoise; North Carolina, the Eastern Box Turtle; Louisiana, the alligator, and Oklahoma, the Mountain Boomer Lizzard.

### Fossils and other alternatives

But if bugs and reptiles don't suit your tastes, there are plenty of other state emblems to choose from. For example, eight states have selected a state fossil (and this has nothing to do with geriatrics). New York's official fossil is the sea scorpion; Nebraska's, the mammoth. California selected the saber-toothed cat; Mississippi, the prehistoric whale, and New Mexico, the *Ceolophysis*. And for some real tongue-twisters, try these state fossils: Nevada, *Ichthyosaurus*; Alabama, "*Species Basilosaurus Cetoides*," and Maryland, *Ecphora Quadricostata* (trying saying that five times fast).

Massachusetts not only has a state dog, but a state horse, too -- the Morgan. Idaho has the Appaloosa. Two other states besides South Carolina have state dances: Oregon and Washington, which both chose the square dance. Tennessee could not be contented with one or two state songs, so it has five, the latest being "Rocky Top." (South Carolina has two: "Carolina" adopted in 1911 and the more contemporary "South Carolina On My Mind.") Oklahoma really went whole hog and designated a state waltz ("Oklahoma Wind"), a state poem (entitled "Howdy Folks"), and even state colors (green and white).

### Crawfish, Mushrooms and Other Delicacies

Only Louisiana has an official state crustacean, the crawfish. And Minnesota has the only state mushroom, the Morel. Texas lawmakers have decreed chili to be the official state dish, and New Mexico's state veggies are chili and frijoles. Alaska picked a state sport, "dog mushing." And in Arizona, there is an official neckwear, the Bola tie. Only Alabama has a state nut. No, not "who" but "what" -- the pecan.

So as South Carolina legislators consider granting official status to the Loggerhead turtle and praying mantis, they can proceed in the knowledge that they are not alone in their deliberations. And if other states are any indication, these may not be the last emblems proposed for color picture status in the back of the *Legislative Manual*.

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Information obtained from *The Book of the States* 1986-1987 edition.