

The State of South Carolina



Office of the Attorney General

Opinion No 88-8

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November 3, 1988

The Honorable John T. Campbell
Secretary of State of the State
of South Carolina
P. O. Box 11350
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Dear Secretary Campbell:

As you are aware, your letter of October 18, 1988, to Attorney General Medlock has been referred to me for response. In that letter, you indicate that, presently, the procedure for the dissolution of a corporation by administrative action is governed by 1976 S. C. CODE, Section 33-21-110. That section requires the Secretary of State to give written notice to a corporation of its impending dissolution. That section also requires the corporation to remove the default which is the cause of the dissolution action within ninety (90) days of the date of the notice issued by the Secretary of State.

You also state that, in 1988, the Legislature revised the corporate code. As a part of this revision, the Legislature amended the administrative dissolution procedure by enacting Section 33-14-210. Section 33-14-210, which will take effect on January 1, 1989, will operate to repeal Section 33-21-110.

You also mention in your letter Section 33-20-105(a)(4) and the South Carolina Reporters Comments appended to the 1988 revision. Section 33-20-105(a)(4) is a subsection of the saving provision which states that the repeal of a statute by the revisions "does not affect....":

(4) any proceeding, reorganization, or dissolution

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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proceeding, reorganization or dissolution may be completed in accordance with the statute as if it had (not) ⁽¹⁾ been repealed."

The pertinent portion of the Reporters' Comments which you mention generally discusses the effect of new provisions of the corporate code on matters which arose under the previous law. The Comments specifically discuss the 1963-64 Opinion of the Attorney General 114 (1672), (April, 1964). That opinion considered the procedure for reinstatement of a corporate charter in light of the fact that the 1962 CODE provision governing reinstatement had been revised and superseded by a 1963 Act. In determining which provision should control reinstatement applications filed after January 1, 1964, the effective date of the 1963 Act, this Office stated that:

"...reinstatement of a domestic corporation whose charter was cancelled and forfeited in 1963 for nonpayment of capital stock and license taxes, and which applies for reinstatement after January 1, 1964, may be handled in accordance with....the 1963 Code Supplement."

With all of this as background, you pose the following fact situation and question: In late 1988, you begin proceedings for administrative dissolution of a corporate charter. You give the 90-day notice required by Section 33-21-110. However, by the time the 90-day period expires, Section 33-21-110 will have been repealed by Section 33-14-210. Thus, your question is whether administrative dissolution proceedings begun in 1988, but which carry over to and beyond January 1, 1989, are to be governed by Section 33-21-110 or Section 33-14-210.

A close reading of the 1964 opinion indicates that, despite extensive discussion of principles of statutory construction regarding the retroactive operation of repealing statutes, the crux of the opinion is its determination that the saving provision contained in the 1963 Act did not operate to prevent the application of the 1963 Act. The 1963 Act included a saving provision which stated that the provisions of the 1963 Act did not "affect any cause of action, liability, penalty or action which on January 1, 1964 is accrued, existing, incurred or pending...." 1963 CODE Supplement, Section 12-11.3(e).

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The 1964 opinion held that corporations whose charters were dissolved in 1963, but who did not apply for reinstatement until after January 1, 1964, did not have any accrued, existing, incurred or pending action as of January 1, 1964. For that reason, this Office determined that the saving provision was inapplicable and the reinstatement provisions of the 1963 Act could be applied. (2)

The scenario which you have raised is factually distinguishable from that which was considered by this Office in 1964 in that you presuppose dissolution proceedings which are pending as of January 1, 1989, the effective date of Section 33-14-210. Assuming, without deciding, that statutes concerning administrative dissolution, like those concerning reinstatement, are remedial in nature and, thus, may be applied retroactively, it would seem that, in the absence of any saving provision, Section 33-14-210 should be applied to the dissolution proceedings to which you refer.

However, as you have pointed out, the corporate code revisions do contain a saving provision. As set forth hereinabove, the pertinent portion of the saving provision clearly states that dissolutions commenced under a statute repealed by the revisions are not affected and such dissolutions may be completed in accordance with the statute as if it had (not) (3) been repealed.

This provision seems to clearly state that dissolutions begun under Section 33-21-110 are not affected by the revisions and may be completed in accordance with the requirements of Section 33-21-110. Thus, it is the opinion of this Office that administrative dissolution proceedings, begun by you under Section 33-21-110, and which are still pending as of January 1, 1989, the effective date of Section 33-14-210, may be completed pursuant to the requirements of Section 33-21-110.

I trust that you will find this information to be responsive to your inquiry. Please advise me if I can be of further assistance.

Very truly yours,



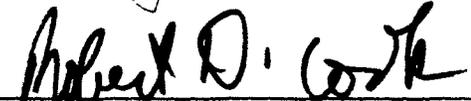
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APPROVED BY:



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Opinions

(1) In this writer's copy of Acts and Joint Resolutions of the General Assembly, dated July 26, 1988, the word "not" is not included in the language of Section 33-20-105(a)(4). However, this writer has assumed this omission to be the result of a typographical error. Otherwise, the language of the subsection, without the inclusion of the word "not", would not make sense in view of the obvious intent and function of the saving provision.

(2) Here, this writer differs somewhat with the characterization of the 1964 opinion set forth in the Reporters' Comments. The Reporters assert that the opinion "got around the savings statute by only viewing the operative act as "reinstatement" rather than penalty....". However, it appears to this writer that the opinion reached by this Office in 1964 did not require a "neat trick of interpretation". The pertinent portion of the 1963 Act considered by this Office clearly involved procedures for reinstatement, rather than a penalty.

The decisive fact in the 1964 opinion appears to be that the application for reinstatement was not filed until after January 1, 1964. This raises the interesting question of whether the issue would have been decided differently if, for example, the application for reinstatement had been filed before January 1, 1964.

(3) See Note (1) above.