

Legislative Analysis



BENEFIT CORPORATIONS

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House Bill 4526

Sponsor: Rep. Vicki Barnett

House Bill 4527

Sponsor: Rep. Wayne Schmidt

Committee: Commerce

Complete to 2-18-14

A SUMMARY OF HOUSE BILLS 4526 & 4527 AS INTRODUCED 4-10-13

House Bill 4526 would add a new Chapter 9A to the Business Corporation Act to address the formation of benefit corporations. House Bill 4527 would make complementary amendments to existing sections of the same act to include new references to benefit corporations.

Under the bills, a benefit corporation is, among other things, a corporation that creates a "general public benefit," where that term means to create a material positive impact on society and the environment, taken as a whole, measured by a third-party standard.

The purposes of such a corporation could also include one or more "specific public benefits," such as those relating to providing low-income or underserved individuals with beneficial products or services, promoting economic opportunity beyond the creation of jobs in the normal course of business, preserving the environment, improving human health, and promoting the arts and sciences, among others.

Such a corporation would be formed under the Business Corporation Act and its articles of incorporation would have to state that it is a benefit corporation, and its statement of purposes could include any specific public benefits it intends to create. (However, under House Bill 4527, the corporation would not be required to state its general public benefit purpose in the articles it submits.)

Following are some key concepts in the bill.

Responsibilities of Directors, Committees, and Officers

As described later, in the description of Section 956, directors and officers of a public benefit corporation must take into account the interests of constituencies other than the shareholders of the corporation. They must consider, among other things, the employees and workforce of the corporation and its subsidiaries and suppliers; the interests of customers as beneficiaries of the public benefit(s); the community and societal considerations; and the local and global environment.

Benefit Enforcement Proceeding

The Business Corporation Act is administered by the Department of Licensing and Regulatory Affairs, which contains the Corporations, Securities and Commercial Licensing Bureau. However, under the new chapter being created, the duties of directors and officers of a benefit corporation could be enforced only in a *benefit enforcement proceeding*. Actions could only be brought and claims asserted against a benefit corporation or its directors and officers with respect to its duties to create public benefits in such a proceeding. These proceedings address claims or actions asserting either (1) a failure to pursue the general public benefit purpose or any specific public benefit purpose or (2) a violation of a duty or standard of conduct under the new chapter.

A benefit enforcement proceeding could only be begun or maintained by (1) the corporation, directly; or (2) derivatively, by a shareholder, a director, a person or group that owns beneficially or of record five percent or more of the equity interests in an entity of which the benefit corporation is a subsidiary, or another person specified in the corporation's articles or bylaws.

Benefit Director as Independent Person. The board of directors would designate one director as a "benefit director." The benefit director would have to be an "independent person," meaning that the person does not have a material relationship with a benefit corporation or a subsidiary. A material relationship would be conclusively presumed to exist if any of the following applied: (1) the person has within the previous three years been an employee of the corporation, other than a benefit officer; (2) an immediate family member of the person is, or has been within the previous three years, an executive officer other than a benefit officer; (3) the person is a beneficial or record owner of five percent or more of the outstanding shares of the benefit corporation; (4) the entity of which the person is a director, officer, or manager, or owns beneficially or of record more than five percent of the shares is itself such a beneficial or record owner.

If the benefit corporation does not have a board (under an agreement of shareholders), the bylaws would have to provide that the persons or shareholders who perform the duties of a board must include a person with the powers, duties, rights, and immunities of a benefit director.

Duties of Benefit Director. One of the responsibilities of the benefit director is to prepare an opinion (to be included in the corporation's annual benefit report) on whether the corporation has acted in accordance with its purpose to create general public benefit and any specific benefit during the period covered by the report; whether the directors had complied with the sections requiring the designation of a benefit director and benefit officer; and, if they had failed to comply, a description of the ways that the corporation failed to comply.

A benefit director is not personally liable for an act or omission in his or her capacity as a benefit director unless the act or omission constitutes self-dealing, willful misconduct, or a knowing violation of law.

Third-Party Standard. The term "third-party standard" refers to a standard for defining, reporting, and assessing overall corporate social and environmental performance that is all of the following, briefly put: comprehensive; developed by an organization that is independent of the benefit corporation; credible; and transparent. Each of those terms are further delineated in the bill.

The following is a brief section-by-section description of House Bill 4526.

Section 951 contains *definitions* of key terms.

Section 952 describes *how corporations qualify as benefit corporations* and how they can terminate such status. Generally speaking, a corporation must be formed under the Business Corporation Act and must include *creating general public benefit* among its purposes in its articles of incorporation. The articles could also include one or more specific public benefits.

Section 953 addresses *mergers and share exchanges*. Under this section, if a surviving or acquiring corporation will be a benefit corporation under the plan of merger or share exchange, the plan must be approved by a minimum status vote of that corporation. A "minimum status vote" is one that meets the shareholder approval or vote requirements of the act and of the articles of incorporation or bylaws of the benefit corporation; where the shareholders of every class or series are entitled to vote on the corporate action regardless of limitations in the articles or bylaws; and where the corporate action is approved by vote of the shareholders of each class or series entitled to cast at least two-thirds of the votes that all shareholders of the class or series are entitled to cast on the action.

Sections 954 and 955 apply to *the designation of "benefit director" (as described earlier) and a "benefit officer."* The corporation must designate a benefit director and may designate a benefit officer. The benefit director could serve as the benefit officer at the same time he or she was serving as the benefit director. Among other things, the benefit officer prepares the annual benefit report, as described later (Section 958).

Section 956 contains provisions regarding *the board of directors, committees, individual directors, and officers of the benefit corporation*. Under this section, whenever any of those has discretion to act on a matter that may have a material effect on the creation of a general public benefit or a specific public benefit, they must consider the following in discharging the duties of their respective positions and in considering the best interests of the benefit corporation: the shareholders; the employees and workforce of the corporation and its subsidiaries and suppliers; the interests of customers as beneficiaries of the public benefit(s); the community and societal considerations; the local and global environment; the short-term and long-term interests of the corporation; and the ability of the corporation to accomplish public benefits.

Further, they may consider any other pertinent factors or the interests of any other group they consider appropriate. The section also specifies that when those persons are

evaluating a person's proposed acquisition of control of the benefit corporation, they may consider the resources, intent, and conduct of the person seeking to acquire control.

Directors, committees, and officers are not required to give priority to the interests of a particular person or group described above over the interest of any other person or group unless the benefit corporation has stated its intention to give priority to interests related to a specific public benefit purpose identified in its articles.

A director or officer would not be personally liable for monetary damages (1) for any action taken as a director or officer if the director or officer performed duties in compliance with the bill or (2) for the failure of the benefit corporation to create general public benefit or specific public benefit.

A director or officer would not have a fiduciary duty to a person that is a beneficiary of the general or any specific public benefit purposes of the corporation arising from the status of the person as beneficiary. Any corporate action to advance benefits included in the purpose of the corporation is presumed to be in the best interests of the benefit corporation.

Section 957 deals with enforcement and enforcement proceedings, which are described earlier in the summary.

Section 958 requires a benefit corporation to prepare an *annual benefit report*. The benefit officer prepares this report. This report is to include a narrative description of the ways in which the benefit corporation pursued its general public benefit purpose during the year and the extent to which general public benefit was created, and a similar narrative description for any specific public benefit.

The report would also have to contain any circumstances that have hindered the creation of public benefits; an assessment of the overall social and environmental performance of the corporation that is either (1) prepared in accordance with a third-party standard applied consistently with any application of that standard in previous benefit reports or (2) if not so prepared, then accompanied by an explanation of the reasons for the inconsistent application of the standard applied; the name of the benefit director and benefit officer and their addresses; the compensation paid to each director; the name of each person that owns five percent or more of the outstanding shares of the corporation; the opinion of the benefit director, as described earlier; and a statement of any connection between the organization that developed the third-part standard and the benefit corporation, including any financial or governance relationship that might materially affect the credibility of the objective assessment of the third-party standard.

The corporation must send each shareholder a copy of the annual benefit report, either within 120 days following the end of the fiscal year or at the same time that the corporation delivers any other annual report to shareholders. The most recent annual report must be posted on the corporation's website, but may omit from the website the compensation paid to directors and financial or proprietary information included in the

benefit report. The corporation must file the report with the Department of Licensing and Regulatory Affairs but, again, could omit compensation and other financial and proprietary information.

FISCAL IMPACT:

A fiscal analysis is in process.

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.