Legislative Analysis

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BENEFIT CORPORATIONS

House Bill 5710 as introduced
Sponsor: Rep. Christine Greig

House Bill 5711 as introduced
Sponsor: Rep. Hank Vaupel

House Bill 5712 as introduced
Sponsor: Rep. David LaGrand

House Bill 5713 as introduced
Sponsor: Rep. Joseph Graves

Committee: Commerce and Trade
Complete to 9-19-16

SUMMARY:

House Bill 5710 and 5711 would add a new Chapter 9A to the Business Corporation Act to address the formation of benefit corporations. House Bills 5712 and 5713 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, promoting the arts and sciences, and increasing the flow of capital to entities that have a public benefit purpose.

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 5712, the corporation would not be required to state its general public benefit purpose in the articles it submits to the Department of Licensing and Regulatory Affairs.)

Following are some key concepts in **House Bill 5710**.

Responsibilities of Directors, Committees, and Officers
As described later, in the description of Section 957, 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 any of the following:

- A shareholder of the benefit corporation that owns, individually or collectively, either (a) at least two percent of the corporation's outstanding shares; or (b) if the shares are listed on a national securities exchange, two percent of the outstanding shares or shares with a market value of $2 million, whichever is less.
- A director of the benefit corporation.
- A person or group of persons 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.
- Another person specified in the corporation's articles or bylaws.

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 <u>House Bill 5710</u>.

<u>Section 951</u> contains ***definitions*** of key terms.

<u>Section 953</u> 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.

<u>Section 955</u> 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.

<u>Section 957</u> 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.

<u>Section 959</u> deals with enforcement and enforcement proceedings, which were described earlier in the summary.

<u>House Bill 5711</u>, which adds additional provisions to the new Chapter 9A. Specifically, the bill requires a benefit corporation to prepare an ***annual benefit 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 have to include the process and rationale for selecting or changing the third-party standard used to prepare the report.

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 compensation paid to each director; the name of each person that owns five percent or more of the outstanding shares of the corporation;; 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 benefit corporation would not be required to use a third party to perform, audit, or certify an assessment of its overall social and environmental performance.

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. If the corporation does not have a website, it would have to provide a copy of the most recent annual report without charge to anyone who requests it.

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.

House Bill 5712 and 5713, as noted earlier, add the concept of the "benefit corporations in numerous existing sections of the Business Corporation Act. House Bill 5712 addresses corporate articles of incorporation. House Bill 5713 addresses the filing with the state of annual reports.

FISCAL IMPACT:

The bills would not have a significant fiscal impact on the state or local units of government.

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