

BILL TEXT:

STATE OF NEW YORK

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2011-2012 Regular Sessions

IN SENATE

(Prefiled)

January 5, 2011

Introduced by Sens. SQUADRON, BRESLIN, LARKIN, PARKER, SAMPSON, SERRANO
 -- read twice and ordered printed, and when printed to be committed to
 the Committee on Judiciary -- committee discharged, bill amended,
 ordered reprinted as amended and recommitted to said committee

AN ACT to amend the general construction law and the business corpo-
 ration law, in relation to authorizing the incorporation of benefit
 corporations, providing for the public benefit to be created by bene-
 fit corporations, for the election and termination of the status of a
 benefit corporation, for the standards of conduct for directors of a
 benefit corporation, and for the preparation and distribution of an
 annual benefit report by a benefit corporation

The People of the State of New York, represented in Senate and Assem-
 bly, do enact as follows:

1 Section 1. Paragraphs 3 and 4 of subdivision d of section 65 of the
 2 general construction law, as added by chapter 451 of the laws of 1973
 3 are amended and a new paragraph 5 is added to read as follows:

4 3. A railroad corporation, [~~or~~]

5 4. A transportation corporation[~~-~~], or

6 5. A benefit corporation.

7 § 2. Section 66 of the general construction law is amended by adding a
 8 new subdivision 4-a to read as follows:

9 4-a. A "benefit corporation" means a business corporation incorporated
 10 under article seventeen of the business corporation law and whose status
 11 as a benefit corporation has not been terminated as provided in article
 12 seventeen of the business corporation law.

13 § 3. The business corporation law is amended by adding a new article
 14 17 to read as follows:

ARTICLE 17

BENEFIT CORPORATIONS

15
 16
 17 Section 1701. Application and effect of article.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
 [-] is old law to be omitted.

LBD01470-02-1

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- 1 1702. Definitions.
2 1703. Formation of benefit corporations.
3 1704. Election of an existing business corporation to become a
4 benefit corporation.
5 1705. Termination of benefit corporation status.
6 1706. Corporate purposes.
7 1707. Standard of conduct for directors and officers.
8 1708. Annual benefit report.
9 1709. Conspicuous language on the face of certificates.
10 § 1701. Application and effect of article.
11 (a) This article shall be applicable to all benefit corporations.
12 (b) The existence of a provision of this article shall not of itself
13 create any implication that a contrary or different rule of law is or
14 would be applicable to a business corporation that is not a benefit
15 corporation. This article shall not affect any statute or rule of law
16 that is or would be applicable to a business corporation that is not a
17 benefit corporation.
18 (c) Except as otherwise provided in this article, this chapter shall
19 be applicable to all benefit corporations. The specific provisions of
20 this article shall control over the general provisions of this chapter.
21 (d) A provision of the certificate of incorporation or bylaws of a
22 benefit corporation may not relax, be inconsistent with or supersede any
23 provision of this article.
24 § 1702. Definitions.
25 As used in this article, unless the context otherwise requires, the
26 term:
27 (a) "Benefit corporation" means a business corporation incorporated
28 under this article and whose status as a benefit corporation has not
29 been terminated as provided in this article.
30 (b) "General public benefit" means a material positive impact on soci-
31 ety and the environment, taken as a whole, assessed against a third-par-
32 ty standard, from the business and operations of a benefit corporation.
33 (c) "Independent" means that a person has no material relationship
34 with a benefit corporation or any of its subsidiaries. A material
35 relationship between a person and a benefit corporation or any of its
36 subsidiaries will be conclusively presumed to exist if:
37 (1) the person is, or has been within the last three years, an employ-
38 ee of the benefit corporation or any of its subsidiaries;
39 (2) an immediate family member of the person is, or has been within
40 the last three years, an executive officer of the benefit corporation or
41 any of its subsidiaries; or
42 (3) the person, or an entity of which the person is a director, offi-
43 cer or other manager or in which the person owns beneficially or of
44 record five percent or more of the equity interests, owns beneficially
45 or of record five percent or more of the shares of the benefit corpo-
46 ration. A percentage of ownership in an entity shall be calculated as
47 if all outstanding rights to acquire equity interests in the entity had
48 been exercised.
49 (d) "Minimum status vote" means that, in addition to any other
50 approval or vote required by this chapter, the certificate of incorpo-
51 ration or a bylaw adopted by the shareholders:
52 (1) The holders of shares of every class or series that are entitled
53 to vote on the corporate action shall be entitled to vote as a class on
54 the corporate action; and
55 (2) The corporate action must be approved by vote of the shareholders
56 of each class or series entitled to cast at least three-quarters of the

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1 votes that all shareholders of the class or series are entitled to cast
2 thereon.

3 (e) "Specific public benefit," includes:

4 (1) providing low-income or underserved individuals or communities
5 with beneficial products or services;

6 (2) promoting economic opportunity for individuals or communities
7 beyond the creation of jobs in the normal course of business;

8 (3) preserving the environment;

9 (4) improving human health;

10 (5) promoting the arts, sciences or advancement of knowledge;

11 (6) increasing the flow of capital to entities with a public benefit
12 purpose; and

13 (7) the accomplishment of any other particular benefit for society or
14 the environment.

15 (f) "Subsidiary" means an entity in which a person owns beneficially
16 or of record fifty percent or more of the equity interests. A percent-
17 age of ownership in an entity shall be calculated as if all outstanding
18 rights to acquire equity interests in the entity had been exercised.

19 (g) "Third-party standard" means a recognized standard for defining,
20 reporting and assessing general public benefit that is:

21 (1) developed by a person that is independent of the benefit corpo-
22 ration; and

23 (2) transparent because the following information about the standard
24 is publicly available:

25 (A) the factors considered when measuring the performance of a busi-
26 ness;

27 (B) the relative weightings of those factors; and

28 (C) the identity of the persons who developed and control changes to
29 the standard and the process by which those changes are made.

30 § 1703. Formation of benefit corporations.

31 A benefit corporation shall be formed in accordance with this chapter
32 except that its certificate of incorporation shall also state that it is
33 a benefit corporation.

34 § 1704. Election of an existing business corporation to become a benefit
35 corporation.

36 (a) A business corporation may become a benefit corporation under this
37 article by amending its certificate of incorporation so that it contains
38 a statement that the corporation is a benefit corporation. The amendment
39 shall not be effective unless it is adopted by at least the minimum
40 status vote.

41 (b) Any corporation that is not a benefit corporation that is a party
42 to a merger or consolidation in which the surviving or consolidated
43 corporation will be a benefit corporation must approve the plan of merg-
44 er or consolidation by at least the minimum status vote in addition to
45 any other vote required by this chapter, the certificate of incorpo-
46 ration or the bylaws.

47 (c) Any corporation that is not a benefit corporation that is party to
48 a merger or consolidation in which shares of stock of such corporation
49 will be converted into a right to receive shares of stock of a benefit
50 corporation must approve the plan of merger or consolidation by at least
51 the minimum status vote in addition to any other vote required by this
52 chapter, the certificate of incorporation or the bylaws.

53 § 1705. Termination of benefit corporation status.

54 (a) A benefit corporation may terminate its status as such and cease
55 to be subject to this article by amending its certificate of incorpo-
56 ration to delete the statement that the corporation is a benefit corpo-

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1 ration. The amendment shall not be effective unless it is adopted by at
2 least the minimum status vote.

3 (b) If a benefit corporation is a party to a merger or consolidation
4 in which the surviving or new corporation will not be a benefit corpo-
5 ration, the plan of merger or consolidation shall not be effective
6 unless it is adopted by at least the minimum status vote in addition to
7 any other vote required by this chapter, the certificate of incorpo-
8 ration or the bylaws.

9 (c) Any benefit corporation that is party to a merger or consolidation
10 in which shares of stock of such benefit corporation will be converted
11 into a right to receive shares of stock of a corporation that is not a
12 benefit corporation must approve the plan of merger or consolidation by
13 at least the minimum status vote in addition to any other vote required
14 by this chapter, the certificate of incorporation or the bylaws.

15 (d) A sale, lease, conveyance, exchange, transfer, or other disposi-
16 tion of all or substantially all of the assets of a benefit corporation,
17 unless the transaction is in the usual and regular course of business of
18 the benefit corporation, shall not be effective unless the transaction
19 is approved by at least the minimum status vote in addition to any other
20 vote required by this chapter, the certificate of incorporation or the
21 bylaws.

22 § 1706. Corporate purposes.

23 (a) Every benefit corporation shall have a purpose of creating general
24 public benefit. This purpose is in addition to its purposes under
25 section two hundred one of this chapter and any specific purpose set
26 forth in its certificate of incorporation under paragraph (b) of this
27 section. The purpose to create general public benefit shall be a limi-
28 tation on the other purposes of the benefit corporation, and shall
29 control over any inconsistent purpose of the benefit corporation.

30 (b) The certificate of incorporation of a benefit corporation may
31 identify one or more specific public benefits that it is the purpose of
32 the benefit corporation to create in addition to its purposes under
33 section two hundred one of this chapter and paragraph (a) of this
34 section. The identification of a specific public benefit under this
35 paragraph does not limit the obligation of a benefit corporation to
36 create general public benefit.

37 (c) The creation of general and specific public benefits as provided
38 in paragraphs (a) and (b) of this section is in the best interests of
39 the benefit corporation.

40 (d) A benefit corporation may amend its certificate of incorporation
41 to add, amend or delete the identification of a specific public benefit
42 that it is the purpose of the benefit corporation to create. The amend-
43 ment shall not be effective unless it is adopted by at least the minimum
44 status vote.

45 § 1707. Standard of conduct for directors and officers.

46 (a) In discharging the duties of their respective positions, the board
47 of directors, committees of the board and individual directors and offi-
48 cers of a benefit corporation:

49 (1) shall consider the effects of any action upon:

50 (A) the ability for the benefit corporation to accomplish its general
51 and any specific public benefit purpose;

52 (B) the shareholders of the benefit corporation;

53 (C) the employees and workforce of the benefit corporation and its
54 subsidiaries and suppliers;

55 (D) the interests of customers as beneficiaries of the general or
56 specific public benefit purposes of the benefit corporation;

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1 (E) community and societal considerations, including those of any
2 community in which offices or facilities of the benefit corporation or
3 its subsidiaries or suppliers are located;

4 (F) the local and global environment; and

5 (G) the short-term and long-term interests of the benefit corporation,
6 including benefits that may accrue to the benefit corporation from its
7 long-term plans and the possibility that these interests may be best
8 served by the continued independence of the benefit corporation;

9 (2) may consider:

10 (A) the resources, intent and conduct (past, stated and potential) of
11 any person seeking to acquire control of the corporation; and

12 (B) any other pertinent factors or the interests of any other group
13 that they deem appropriate; and

14 (3) shall not be required to give priority to the interests of any
15 particular person or group referred to in subparagraphs one and two of
16 this paragraph over the interests of any other person or group unless
17 the benefit corporation has stated its intention to give priority to
18 interests related to a specific public benefit purpose identified in its
19 certificate of incorporation.

20 (b) The consideration of interests and factors in the manner required
21 by paragraph (a) of this section:

22 (1) shall not constitute a violation of the provisions of sections
23 seven hundred fifteen or seven hundred seventeen of this chapter; and

24 (2) is in addition to the ability of directors to consider interests
25 and factors as provided in section seven hundred seventeen of this chap-
26 ter.

27 (c) A director does not have a fiduciary duty to a person that is a
28 beneficiary of the general or specific public benefit purposes of a
29 benefit corporation arising from the status of the person as a benefici-
30 ary, unless otherwise stated in the certificate of incorporation or the
31 bylaws of the benefit corporation.

32 § 1708. Annual benefit report.

33 (a) A benefit corporation must deliver to each shareholder an annual
34 benefit report including:

35 (1) a narrative description of:

36 (A) the process and rationale for selecting the third party standard
37 used to prepare the benefit report;

38 (B) the ways in which the benefit corporation pursued general public
39 benefit during the year and the extent to which general public benefit
40 was created;

41 (C) the ways in which the benefit corporation pursued any specific
42 public benefit that the certificate of incorporation states it is the
43 purpose of the benefit corporation to create and the extent to which
44 that specific public benefit was created; and

45 (D) any circumstances that have hindered the creation by the benefit
46 corporation of general or specific public benefit;

47 (2) an assessment of the performance of the benefit corporation, rela-
48 tive to its general public benefit purpose assessed against a third-par-
49 ty standard applied consistently with any application of that standard
50 in prior benefit reports or accompanied by an explanation of the reasons
51 for any inconsistent application and, if applicable, assessment of the
52 performance of the benefit corporation, relative to its specific public
53 benefit purpose or purposes;

54 (3) the compensation paid by the benefit corporation during the year
55 to each director in that capacity; and

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1 (4) the name of each person that owns beneficially or of record five
2 percent or more of the outstanding shares of the benefit corporation.

3 (b) The benefit report must be sent annually to each shareholder with-
4 in one hundred twenty days following the end of the fiscal year of the
5 benefit corporation. Delivery of a benefit report to shareholders is in
6 addition to any other requirement to deliver an annual report to share-
7 holders.

8 (c) A benefit corporation must post its most recent benefit report on
9 the public portion of its website, if any, except that the compensation
10 paid to directors and any financial or proprietary information included
11 in the benefit report may be omitted from the benefit report as posted.

12 (d) Concurrently with the delivery of the benefit report to sharehold-
13 ers pursuant to paragraph (b) of this section, the benefit corporation
14 must deliver a copy of the benefit report to the department for filing,
15 except that the compensation paid to directors and any financial or
16 proprietary information included in the benefit report may be omitted
17 from the benefit report as filed under this section.

18 (e) The annual benefit report shall be in addition to all other
19 reporting requirements under this chapter.

20 § 1709. Conspicuous language on the face of certificates.

21 All certificates representing shares of a benefit corporation shall
22 contain, in addition to any other statements required by the business
23 corporation law, the following conspicuous language on the face of the
24 certificate:

25 "This entity is a benefit corporation organized under article seven-
26 teen of the New York business corporation law."

27 § 4. Subparagraph 1 of paragraph (a) of section 720 of the business
28 corporation law is amended by adding a new clause (C) to read as
29 follows:

30 (C) In the case of directors or officers of a benefit corporation
31 organized under article seventeen of this chapter: (i) the failure to
32 pursue the general public benefit purpose of a benefit corporation or
33 any specific public benefit set forth in its certificate of incorpo-
34 ration; (ii) the failure by a benefit corporation to deliver or post an
35 annual report as required by section seventeen hundred eight of article
36 seventeen of this chapter; or (iii) the neglect of, or failure to
37 perform, or other violation of his or her duties or standard of conduct
38 under article seventeen of this chapter.

39 § 5. This act shall take effect on the sixtieth day after it shall
40 have become a law.