

ASSEMBLY, No. 3595

STATE OF NEW JERSEY 214th LEGISLATURE

INTRODUCED DECEMBER 6, 2010

Sponsored by:

Assemblywoman CONNIE WAGNER

District 38 (Bergen)

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District 22 (Middlesex, Somerset and Union)

Assemblyman JASON O'DONNELL

District 31 (Hudson)

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Assemblyman Coutinho, Assemblywoman Quigley, Assemblymen Fuentes, Mainor, Assemblywoman Watson Coleman, Assemblyman Conaway, Assemblywomen Riley, Pou, Assemblymen Chivukula, Giblin, Burzichelli and Ramos

SYNOPSIS

Concerns creation of benefit corporations.

CURRENT VERSION OF TEXT

As introduced.



(Sponsorship Updated As Of: 1/7/2011)

1 AN ACT concerning benefit corporations and supplementing Title
2 14A of the New Jersey Statutes.

3

4 **BE IT ENACTED** *by the Senate and General Assembly of the State*
5 *of New Jersey:*

6

7 1. For purposes of this act:

8 “Benefit corporation” means a corporation organized under
9 provisions of the New Jersey Business corporation Act,”
10 N.J.S.14A:1-1 et seq., that has elected to become subject to this act
11 and whose status as a benefit corporation has not been terminated as
12 provided in this act.

13 “Benefit director” means the director designated as the benefit
14 director of a benefit corporation as provided in section 7 of this act.

15 “Benefit enforcement proceeding” means a claim or action
16 brought directly by a benefit corporation, or derivatively on behalf
17 of a benefit corporation, against a director or officer for:

18 (1) Failure to pursue the general public benefit purpose of the
19 benefit corporation or any specific public benefit purpose set forth
20 in its certificate of incorporation; or

21 (2) Violation of a duty or standard of conduct under this act.

22 “Benefit officer” means the officer of a benefit corporation, if
23 any, designated as the benefit officer as provided in section 9 of this
24 act.

25 “General public benefit” means a material positive impact on
26 society and the environment by the operations of a benefit
27 corporation through activities that promote some combination of
28 specific public benefits.

29 “Independent” means that a person has no material relationship
30 with a benefit corporation or any of its subsidiaries (other than the
31 relationship of serving as the benefit director or benefit officer),
32 either directly or as a shareholder, partner, member or other owner
33 or a director, officer or other manager of an entity that has a
34 material relationship with the benefit corporation or any of its
35 subsidiaries. A material relationship between an individual and a
36 benefit corporation or any of its subsidiaries will be conclusively
37 presumed to exist if:

38 (1) The person is, or has been within the last three years, an
39 employee of the benefit corporation or any of its subsidiaries, other
40 than as a benefit officer;

41 (2) An immediate family member of the person is, or has been
42 within the last three years, an executive officer, other than a benefit
43 officer, of the benefit corporation or any of its subsidiaries; or

44 (3) The person, or an entity of which the person is a director,
45 officer or other manager or in which the person owns beneficially or
46 of record 5% or more of the outstanding equity interests, owns
47 beneficially or of record 5% or more of the outstanding shares of
48 the benefit corporation.

1 A percentage of ownership in an entity shall be calculated as if
2 all outstanding rights to acquire equity interests in the entity had
3 been exercised.

4 “Minimum status vote” means that, in addition to any other
5 approval or vote required by Title 14A of the New Jersey Statutes
6 or the certificate of incorporation:

7 (1) The holders of shares of every class or series shall be
8 entitled to vote on the corporate action regardless of any limitation
9 stated in the certificate of incorporation on the voting rights of any
10 class or series; and

11 (2) The corporate action must be approved by vote of the
12 shareholders of each class or series entitled to cast at least two-
13 thirds of the votes that all shareholders of the class or series are
14 entitled to cast thereon.

15 “Specific public benefit” includes:

16 (1) Providing low-income individuals or communities with
17 beneficial products or services;

18 (2) Promoting economic opportunity for individuals or
19 communities beyond the creation of jobs in the normal course of
20 business;

21 (3) Preserving the environment;

22 (4) Improving human health;

23 (5) Promoting the arts, sciences or advancement of knowledge;

24 (6) Increasing the flow of capital to entities with a public benefit
25 purpose; and

26 (7) The accomplishment of any other particular benefit for
27 society or the environment.

28 “Subsidiary” of a person means an entity in which the person
29 owns beneficially or of record 50% or more of the outstanding
30 equity interests. A percentage of ownership in an entity shall be
31 calculated as if all outstanding rights to acquire equity interests in
32 the entity had been exercised.

33 “Third-party standard” means a recognized standard for defining,
34 reporting and assessing corporate social and environmental
35 performance that is:

36 (1) Developed by a person that is independent of the benefit
37 corporation; and

38 (2) Transparent because the following information about the
39 standard is publicly available:

40 (a) the factors considered when measuring the performance of a
41 business;

42 (b) the relative weightings of those factors; and

43 (c) the identity of the persons who developed and control
44 changes to the standard and the process by which those changes are
45 made.

46

47 2. A benefit corporation shall be formed in accordance with
48 chapter 2 of Title 14A of the New Jersey Statutes, except that its

1 certificate of incorporation shall also state that it is a benefit
2 corporation.

3

4 3. a. A corporation organized under the provisions of the
5 “New Jersey Business Corporation Act,” N.J.S.14A:1-1 et seq., may
6 become a benefit corporation under this act by amending its
7 certificate of incorporation so that it contains a statement that the
8 corporation is a benefit corporation. The amendment shall not be
9 effective unless it is adopted by at least the minimum status vote.

10 b. If a corporation that is not a benefit corporation is a party to
11 a merger or consolidation or is the exchanging corporation in a
12 share exchange, and the surviving or new corporation in the merger,
13 consolidation, or share exchange is to be a benefit corporation, then
14 the plan of merger, consolidation, or share exchange shall not be
15 effective unless it is adopted by the corporation by at least the
16 minimum status vote.

17

18 4. a. A benefit corporation may terminate its status as a benefit
19 corporation and cease to be subject to this act by amending its
20 certificate of incorporation to delete the provision required by
21 section 2 or subsection a. of section 3 of this act. The amendment
22 shall not be effective unless it is adopted by at least the minimum
23 status vote.

24 b. If a plan of merger, consolidation or exchange would have
25 the effect of terminating the status of a corporation as a benefit
26 corporation, the plan shall not be effective unless it is adopted by at
27 least the minimum status vote.

28

29 5. a. Every benefit corporation shall have the purpose of
30 creating a general public benefit. This purpose is in addition to, and
31 may be a limitation on, its purpose under its certificate of
32 incorporation and any specific purpose set forth in its certificate of
33 incorporation.

34 b. The certificate of incorporation of a benefit corporation may
35 identify one or more specific public benefits that is the purpose of
36 the benefit corporation to create in addition to its purposes under its
37 certificate of incorporation and subsection a. of this section. The
38 identification of a specific public benefit under this subsection does
39 not limit the obligation of a benefit corporation to create general
40 public benefit.

41 c. The creation of general and specific public benefits, as
42 provided in subsections a. and b. of this section, shall be in the best
43 interests of the benefit corporation.

44 d. A benefit corporation may amend its certificate of
45 incorporation to add, amend or delete a specific public benefit that
46 is the purpose of the benefit corporation to create. The amendment
47 shall not be effective unless it is adopted by at least the minimum
48 status vote.

1 6. a. The board of directors, committees of the board and
2 individual directors of a benefit corporation, in considering the best
3 interests of the benefit corporation shall consider the effects of any
4 action upon:

- 5 (1) the shareholders of the benefit corporation;
- 6 (2) the employees and workforce of the benefit corporation and
7 its subsidiaries and suppliers;
- 8 (3) the interests of customers as beneficiaries of the general or
9 specific public benefit purposes of the benefit corporation;
- 10 (4) community and societal considerations, including those of
11 any community in which offices or facilities of the benefit
12 corporation or its subsidiaries or suppliers are located;
- 13 (5) the local and global environment; and
- 14 (6) the short-term and long-term interests of the benefit
15 corporation, including benefits that may accrue to the benefit
16 corporation from its long-term plans and the possibility that these
17 interests may be best served by the continued independence of the
18 benefit corporation;

19 b. The board of directors, committees of the board and
20 individual directors of a benefit corporation, in considering the best
21 interests of the benefit corporation may consider:

- 22 (1) matters listed in subsection (2) of N.J.S.14A:6-1; and
- 23 (2) any other pertinent factors or the interests of any other group
24 that they deem appropriate; and

25 c. The board of directors, committees of the board and
26 individual directors of a benefit corporation shall not be required to
27 give priority to the interests of any particular person or group
28 referred to in subsection a. or subsection b. of this section over the
29 interests of any other person or group unless the benefit corporation
30 has stated its intention to give priority to interests related to a
31 specific public benefit purpose identified in its certificate of
32 incorporation.

33 d. A director is not personally liable for monetary damages for
34 failure of the benefit corporation to create general or specific public
35 benefits.

36
37 7. a. The board of directors of a benefit corporation shall
38 include one director who shall be designated the “benefit director”
39 and shall have, in addition to all of the powers, duties, rights and
40 immunities of the other directors of the benefit corporation, the
41 powers, duties, rights and immunities provided in this act.

42 b. The benefit director shall be elected, and may be removed,
43 in the manner provided by chapter 6 of Title 14A of the New Jersey
44 Statutes, and shall be an individual who is independent. The benefit
45 director may serve as the benefit officer, designated pursuant to
46 section 9 of this act, at the same time as serving as the benefit
47 director. The certificate of incorporation or bylaws of a benefit

1 corporation may prescribe additional qualifications of the benefit
2 director not inconsistent with this subsection.

3 c. The benefit director shall prepare, and the benefit
4 corporation shall include in the annual benefit report to
5 shareholders required by section 11 of this act, a statement whether,
6 in the opinion of the benefit director, the benefit corporation acted
7 in accordance with its general, and any specific, public benefit
8 purpose in all material respects during the period covered by the
9 report and whether the directors and officers complied with
10 subsection a. of section 6 of this act and subsection a. of section 8
11 of this act. If in the opinion of the benefit director the benefit
12 corporation or its directors or officers failed to act in accordance
13 with its public benefit purpose, then the statement of the benefit
14 director shall include a description of the ways in which the benefit
15 corporation or its directors or officers failed to act.

16 d. If the by-laws of a benefit corporation provide that the
17 powers and duties conferred or imposed upon the board of directors
18 shall be exercised or performed by a person other than the directors
19 pursuant to N.J.S.14A:6-1, then the bylaws of the benefit
20 corporation must provide that the person or shareholders who
21 perform the duties of a board of directors shall include a person
22 with the powers, duties, rights and immunities of a benefit director.

23 e. Regardless of whether the certificate of incorporation of a
24 benefit corporation includes a provision eliminating or limiting the
25 personal liability of directors authorized by subsection (3) of
26 N.J.S.14A:2-7, a benefit director shall not be personally liable for
27 any act or omission in the capacity of a benefit director unless the
28 act or omission constitutes self-dealing, willful misconduct or a
29 knowing violation of law.

30

31 8. a. Each officer of a benefit corporation shall consider the
32 interests and factors described in subsection a. of section 6 of this
33 act when:

34 (1) The officer has discretion to act with respect to a matter; and

35 (2) It reasonably appears to the officer that the matter may have
36 a material effect on:

37 (a) the creation of general or specific public benefits by the
38 benefit corporation; or

39 (b) any of the interests or factors referred to in subsection a. of
40 section 6 of this act.

41 b. The consideration of interests and factors in the manner
42 described in subsection c. of section 6 of this act.

43 c. An officer is not personally liable for monetary damages for
44 failure of the benefit corporation to create general or specific public
45 benefit.

46

47 9. A benefit corporation may have an officer designated the
48 “benefit officer” who shall have authority and shall perform duties

1 in the management of the benefit corporation relating to the purpose
2 of the corporation to create general or specific public benefits as
3 may be provided by or pursuant to the by-laws or, in the absence of
4 controlling provisions in the by-laws, as may be determined by or
5 pursuant to resolutions or orders of the board of directors. If a
6 benefit corporation has a benefit officer, the duties of the benefit
7 officer shall include preparing the benefit report required by section
8 11 of this act.

9

10 10. a. The duties of directors and officers under this act, and the
11 general and any specific public benefit purpose of a benefit
12 corporation, may be enforced only in a benefit enforcement
13 proceeding. No person may bring an action or assert a claim against
14 a benefit corporation or its directors or officers with respect to the
15 duties of directors and officers under this act and the general and
16 any specific public benefit purpose of the benefit corporation except
17 in a benefit enforcement proceeding.

18 b. A benefit enforcement proceeding may be commenced or
19 maintained only:

20 (1) Directly by the benefit corporation; or

21 (2) Derivatively by:

22 (a) a shareholder;

23 (b) a director;

24 (c) a person or group of persons that owns beneficially or of
25 record 10% or more of the equity interests in an entity of which the
26 benefit corporation is a subsidiary; or

27 (d) such other persons as may be specified in the certificate of
28 incorporation or by-laws of the benefit corporation.

29

30 11. a. A benefit corporation shall deliver to each shareholder an
31 annual benefit report including:

32 (1) A narrative description of:

33 (a) The ways in which the benefit corporation pursued a general
34 public benefit during the year and the extent to which the general
35 public benefit was created;

36 (b) The ways in which the benefit corporation pursued any
37 specific public benefit that the certificate of incorporation states is
38 the purpose of the benefit corporation to create and the extent to
39 which that specific public benefit was created; and

40 (c) Any circumstances that have hindered the creation by the
41 benefit corporation of general or specific public benefits;

42 (2) An assessment of the social and environmental performance
43 of the benefit corporation, prepared in accordance with a third-party
44 standard applied consistently with any application of that standard
45 in prior benefit reports or accompanied by an explanation of the
46 reasons for any inconsistent application;

1 (3) The name of the benefit director and the benefit officer, if
2 any, and the address to which correspondence to each of them may
3 be directed;

4 (4) The compensation paid by the benefit corporation during the
5 year to each director in that capacity;

6 (5) The name of each person that owns 5% or more of the
7 outstanding shares of the benefit corporation either beneficially, to
8 the extent known to the benefit corporation without independent
9 investigation, or of record; and

10 (6) The statement of the benefit director described in section 7
11 of this act.

12 b. The benefit report must be sent annually to each shareholder
13 within 120 days following the end of the fiscal year of the benefit
14 corporation or at the same time that the benefit corporation delivers
15 any other annual report to its shareholders.

16 c. A benefit corporation must post its most recent benefit report
17 on the public portion of its website, if any, except that the
18 compensation paid to directors and any financial or proprietary
19 information included in the benefit report may be omitted from the
20 benefit report as posted.

21 d. (1) With the delivery of the benefit report to shareholders
22 pursuant to subsection b. of this section, the benefit corporation
23 must deliver a copy of the benefit report to the Department of
24 Treasury for filing, except that the compensation paid to directors
25 and any financial or proprietary information included in the benefit
26 report may be omitted from the benefit report as filed under this
27 section. The State Treasurer shall charge a fee of \$70 for filing a
28 benefit report.

29 (2) If a benefit corporation has not delivered a benefit report to
30 the department for a period of two years, the department may
31 prepare and file a statement that the corporation has forfeited its
32 status as a benefit corporation and is no longer subject to this act. If
33 the corporation subsequently delivers a benefit report to the
34 department for filing, the status of the corporation as a benefit
35 corporation shall be automatically reinstated upon the filing of the
36 benefit report by the department and the corporation shall again be
37 subject to this act.

38

39 12. This act shall take effect immediately.

40

41

42

STATEMENT

43

44 This bill provides for the creation of a benefit corporation. The
45 purpose of a benefit corporation is to create a general public
46 benefit, defined as a material positive impact on society and the
47 environment, through activities that promote some combination of
48 specific public benefits.

1 The bill states that a benefit corporation may identify one or
2 more specific public benefits in addition to its stated purpose of
3 creating a general public benefit. A specific public benefit includes:

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

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

9 (3) Preserving the environment;

10 (4) Improving human health;

11 (5) Promoting the arts, sciences or advancement of knowledge;

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

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

16 The bill provides for a benefit corporation to be formed in
17 accordance with all corporations subject to Title 14A of the New
18 Jersey Statutes. An existing corporation may become a benefit
19 corporation by amending its certificate of incorporation to state that
20 the corporation is a benefit corporation. The bill also provides for a
21 benefit corporation to terminate its status as a benefit corporation
22 by amending its certificate of incorporation to delete the statement
23 that the corporation is a benefit corporation.

24 At least the minimum status vote is needed in order for a
25 corporation to amend its certificate of incorporation to either
26 become a benefit corporation or terminate its status as a benefit
27 corporation. Minimum status vote means that, in addition to any
28 other approval or vote required by the “New Jersey Business
29 Corporation Act,” N.J.S.14A:1-1 et seq.. or the certificate of
30 incorporation:

31 (1) The holders of shares of every class or series shall be
32 entitled to vote on the corporate action regardless of any limitation
33 stated in the certificate of incorporation on the voting rights of any
34 class or series;

35 (2) The corporate action must be approved by vote of the
36 shareholders of each class or series entitled to cast at least two-
37 thirds of the votes that all shareholders of the class or series are
38 entitled to cast thereon.

39 The bill provides for a standard of conduct for a benefit
40 corporation’s board of directors and officers. The bill also provides
41 for a benefit corporation to designate a “benefit director” and a
42 “benefit officer.” It is the duty of the benefit director to determine
43 whether or not the benefit corporation has acted in accordance with
44 its general, and any specific, public benefit purpose. The benefit
45 officer will perform any duties in the management of the benefit
46 corporation relating to the purpose of the corporation to create a
47 general or specific public benefit.

1 A benefit corporation must deliver an annual benefit report
2 including the following information:

3 (1) The ways in which the corporation pursued any general and
4 specific public benefit during the year, the extent to which the
5 public benefit was created, and any circumstances that hindered the
6 creation of a public benefit;

7 (2) An assessment of the social and environmental performance
8 of the corporation;

9 (3) The name of the benefit director and the benefit officer;

10 (4) The compensation paid by the corporation during the year to
11 the benefit director;

12 (5) The name of each person that owns 5% or more of the
13 outstanding shares of the benefit corporation; and

14 (6) A statement detailing whether, in the opinion of the benefit
15 director, the benefit corporation acted in accordance with its
16 general, and any specific, public benefit purpose.

17 Finally, the annual benefit report must be sent to each
18 shareholder within 120 days following the end of the fiscal year of
19 the benefit corporation. The benefit corporation must also post its
20 most recent benefit report on the public portion of its website,
21 except that any proprietary information and the compensation paid
22 to directors may be omitted from the report. Benefit corporations
23 are also required to deliver a copy of the benefit report to the
24 Department of Treasury, and the State Treasurer will charge a fee of
25 \$70 for filing the benefit report.