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HOUSE BILL NO. 2358

Offered January 12, 2011

Prefiled January 12, 2011

A *BILL to amend the Code of Virginia by adding in Chapter 9 of Title 13.1 an article numbered 22, consisting of sections numbered 13.1-782 through 13.1-793, relating to benefit corporations.*

Patrons—McClellan, Brink, Cline, Dance, Herring, Kory and Lingamfelter

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Chapter 9 of Title 13.1 an article numbered 22, consisting of sections numbered 13.1-782 through 13.1-793, as follows:

*Article 22.**Benefit Corporations.**§ 13.1-782. Definitions.*

As used in this article:

"Benefit corporation" means a corporation:

1. That has elected to become subject to this article; and

2. The status of which as a benefit corporation has not been terminated under § 13.1-786 or subsection E of § 13.1-793.

"Benefit director" means the director designated as such pursuant to § 13.1-789.

"Benefit enforcement proceeding" means any claim or action brought directly by a benefit corporation, or derivatively on behalf of a benefit corporation, against a director or officer for (i) failure to pursue the general public benefit purpose of the benefit corporation or any specific public benefit purpose set forth in its articles; or (ii) violation of a duty or standard of conduct under this article.

"Benefit officer" means the individual designated as such pursuant to § 13.1-791.

"General public benefit" means a material positive impact on society and the environment taken as a whole, as measured by a third-party standard, from the business and operations of a benefit corporation.

"Independent" means having no material relationship with a benefit corporation or a subsidiary of the benefit corporation, either directly as a shareholder of the benefit corporation or as a partner, a member, or an owner of a subsidiary of the benefit corporation or indirectly as a director, an officer, or a manager of an association that has a material relationship with the benefit corporation or a subsidiary of the benefit corporation. Serving as benefit director or benefit officer does not make an individual not independent. A material relationship between a person and a benefit corporation or any of its subsidiaries will be conclusively presumed to exist if:

1. The person is, or has been within the last three years, an employee, other than as a benefit officer, of the benefit corporation or a subsidiary of the benefit corporation;

2. An immediate family member of the person is, or has been within the last three years, an executive officer, other than a benefit officer, of the benefit corporation or its subsidiary; or

3. There is beneficial or record ownership of five percent or more of the outstanding shares of the benefit corporation by:

a. The person; or

b. An entity:

(1) Of which the person is a director, an officer or a manager; or

(2) In which the person owns beneficially or of record five percent or more of the outstanding equity interests, which percentage shall be calculated as if all outstanding rights to acquire equity interests in the entity had been exercised.

"Specific public benefit" includes:

1. Providing low-income or underserved individuals or communities with beneficial products or services;

2. Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;

3. Preserving the environment;

4. Improving human health;

5. Promoting the arts, sciences, or advancement of knowledge;

6. Increasing the flow of capital to entities with a public benefit purpose; and

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7. *Conferring any other particular benefit on society or the environment.*

"Subsidiary" means, in relation to an individual, an entity in which the individual owns beneficially or of record 50 percent or more of the outstanding equity interests, which percentage shall be calculated as if all outstanding rights to acquire equity interests in the entity had been exercised.

"Third-party standard" means a recognized standard for defining, reporting, and assessing corporate social and environmental performance that:

1. Is developed by a person that is independent of the benefit corporation; and

2. Is transparent because the following information about the standard is publicly available:

a. The factors considered when measuring the performance of a business;

b. The relative weightings of those factors; and

c. The identity of the persons that develop and control changes to the standard and the process by which those changes are made.

§ 13.1-783. Application and effect of article.

A. This article shall apply to all benefit corporations.

B. The existence of a provision of this article shall not of itself mean that a contrary or different rule of law applies to a corporation organized pursuant to the provisions of this chapter that is not a benefit corporation. This article shall not affect any law that applies to a corporation that is not a benefit corporation.

C. Except as otherwise provided in this article, the other articles of this chapter shall apply generally to all benefit corporations. The specific provisions of this article shall control over the general provisions of other articles of this chapter. A benefit corporation may be simultaneously subject to this article and one or more other articles of this chapter.

§ 13.1-784. Formation of benefit corporations.

A benefit corporation shall be formed in accordance with Article 3 (§ 13.1-618 et seq.) of this chapter provided its articles state that it is a benefit corporation.

§ 13.1-785. Election of status.

A corporation that was not formed as a benefit corporation may become a benefit corporation by amending its articles so that they contain, in addition to matters required by § 13.1-619, a statement that the corporation is a benefit corporation.

§ 13.1-786. Termination of status.

A benefit corporation may terminate its status as such and cease to be subject to this article by amending its articles to delete the provision all statements that the corporation is a benefit corporation.

§ 13.1-787. Corporate purposes.

A. In addition to any purpose set forth pursuant to § 13.1-626, a benefit corporation shall have the purpose of creating general public benefit.

B. In addition to any purpose set forth pursuant to § 13.1-626 and the purpose of creating general public benefit, a benefit corporation shall have the purpose of creating one or more specific public benefits if the articles of the benefit corporation identify the specific public benefit or benefits as the purpose of the benefit corporation. The identification of a specific public benefit in the benefit corporation's articles shall not limit the purpose of a benefit corporation to create general public benefit as provided in subsection A.

C. The creation of general and specific public benefits under subsections A and B is in the best interests of the benefit corporation.

D. A benefit corporation may amend its articles to add, amend, or delete the identification of a specific public benefit that it is the purpose of the benefit corporation to create.

§ 13.1-788. Standard of conduct for directors.

A. In discharging the duties of their respective positions and in considering the best interests of the benefit corporation, the board of directors, committees of the board, and individual directors of a benefit corporation:

1. Shall consider the effects of any action upon:

a. The shareholders of the benefit corporation;

b. The employees and work force of the benefit corporation, its subsidiaries, and suppliers;

c. The interests of customers as beneficiaries of the general or specific public benefit purposes of the benefit corporation;

d. Community and societal considerations, including those of each community in which offices or facilities of the benefit corporation, its subsidiaries, or suppliers are located;

e. The local and global environment;

f. The short-term and long-term interests of the benefit corporation, including benefits that may accrue to the benefit corporation from its long-term plans and the possibility that these interests and the general and specific public benefit purposes of the benefit corporation may be best served by the continued independence of the benefit corporation; and

g. The ability of the benefit corporation to accomplish its general, and any specific, public benefit

purpose;

2. May consider:

a. With regard to any person seeking to acquire control of the benefit corporation, the person's (i) resources, (ii) intent, and (iii) past, stated, and potential conduct; and

b. Other pertinent factors or the interests of any other group that they deem appropriate; and

3. Need not give priority to the interests of a particular person referred to in subdivisions 1 and 2 over the interests of any other person unless the benefit corporation has stated its intention to give priority to interests related to a specific public benefit purpose identified in its articles.

B. The consideration of interests and factors in the manner required by subsection A shall not constitute a violation of § 13.1-690.

C. A director is not personally liable for monetary damages for:

1. Any action taken as a director if the director performed the duties of office in compliance with § 13.1-690 and this section; or

2. Failure of the benefit corporation to create general or specific public benefit.

§ 13.1-789. Benefit director.

A. The board of directors of a benefit corporation shall include one director who:

1. Shall be designated the benefit director; and

2. Shall have, in addition to the powers, duties, rights, and immunities of the other directors of the benefit corporation, the powers, duties, rights, and immunities provided in this section.

B. The benefit director shall be elected, and may be removed, in the manner provided by Article 9 (§ 13.1-673 et seq.) of this chapter and shall be an individual who is independent. The benefit director may serve as the benefit officer at the same time as serving as the benefit director. The articles or bylaws of a benefit corporation may prescribe additional qualifications of the benefit director not inconsistent with this subsection.

C. The benefit director shall prepare, and the benefit corporation shall include in the annual benefit report to shareholders required by § 13.1-793, the opinion of the benefit director on all of the following:

1. Whether the benefit corporation acted in accordance with its general, and any specific, public benefit purpose in all material respects during the period covered by the report;

2. Whether the directors and officers complied with §§ 13.1-788 and 13.1-790; and

3. If, in the opinion of the benefit director, the benefit corporation or its directors or officers failed to comply with subdivision 2, a description of the ways in which the benefit corporation or its directors or officers failed to comply.

D. The acts of an individual in the capacity of a benefit director shall constitute for all purposes acts of that individual in the capacity of a director of the benefit corporation.

E. If an agreement among the shareholders authorized by § 13.1-671.1 eliminates the board of directors, the bylaws of a benefit corporation shall provide that the persons or shareholders who perform the duties of the eliminated board of directors include a person with the powers, duties, rights, and immunities of a benefit director.

F. Regardless of whether the articles or bylaws of a benefit corporation include a provision limiting the liability of directors authorized by § 13.1-692.1, a benefit director shall not be personally liable for an act or omission in the capacity of a benefit director unless the act or omission constitutes self-dealing, willful misconduct, or a knowing violation of law.

§ 13.1-790. Standard of conduct for officers.

A. Each officer of a benefit corporation shall consider the interests and factors described in subsection A of § 13.1-788 in the manner provided in that subsection if:

1. The officer has discretion to act with respect to a matter; and

2. It reasonably appears to the officer that the matter may have a material effect on the creation of general or specific public benefit by the benefit corporation.

B. The consideration of interests and factors in the manner described in subsection A shall not constitute a violation of the duties of an officer.

C. An officer is not personally liable for monetary damages for:

1. Action taken as an officer if the officer performed the duties of the position and acted in compliance with this section; or

2. Failure of the benefit corporation to create general or specific public benefit.

§ 13.1-791. Benefit officer.

A. A benefit corporation may have an officer designated as the benefit officer.

B. A benefit officer shall have:

1. The powers and duties relating to the purpose of the benefit corporation to create general or specific public benefit provided by the bylaws or, in the absence of controlling provisions in the bylaws, by resolutions or orders of the board of directors; and

2. The duty to prepare the benefit report required by § 13.1-793.

§ 13.1-792. Benefit enforcement proceedings; right of action.

A. The duties of directors and officers under this article, and the general and any specific public benefit purpose of a benefit corporation, may be enforced only in a benefit enforcement proceeding. No person may bring an action or assert a claim against a benefit corporation or its directors or officers with respect to the duties of directors and officers under this article and the general and any specific public benefit purpose of the benefit corporation except in a benefit enforcement proceeding.

B. A benefit enforcement proceeding may be commenced or maintained only:

1. Directly by the benefit corporation; or

2. Derivatively by:

a. A shareholder;

b. A director;

c. A person or group of persons that owns beneficially or of record 10 percent or more of the equity interests in an entity of which the benefit corporation is a subsidiary; or

d. Other persons as specified in the articles or bylaws of the benefit corporation.

§ 13.1-793. Annual benefit report.

A. A benefit corporation shall prepare an annual benefit report that includes all of the following:

1. A narrative description of:

a. The ways in which the benefit corporation pursued general public benefit during the year and the extent to which general public benefit was created;

b. Both (i) the ways in which the benefit corporation pursued a specific public benefit that the articles state it is the purpose of the benefit corporation to create and (ii) the extent to which that specific public benefit was created; and

c. Any circumstances that have hindered the creation by the benefit corporation of general or specific public benefit;

2. An assessment of the social and environmental performance of the benefit corporation. The assessment shall be:

a. Prepared in accordance with a third-party standard applied consistently with any application of that standard in prior benefit reports; or

b. Accompanied by an explanation of the reasons for any inconsistent application;

3. The name of the benefit director and the benefit officer and the address to which correspondence to each of them may be directed;

4. The compensation paid by the benefit corporation during the year to each director in the capacity of a director;

5. The name of each person that owns five percent or more of the outstanding shares of the benefit corporation either (i) beneficially, to the extent known to the benefit corporation without independent investigation or (ii) of record; and

6. The statement of the benefit director described in subsection C of § 13.1-789.

B. The benefit report shall be sent annually to each shareholder:

1. Within 120 days following the end of the fiscal year of the benefit corporation; or

2. At the same time that the benefit corporation delivers any other annual report to its shareholders.

C. A benefit corporation shall post its most recent benefit report on the public portion of its Internet website, if any. Compensation paid to directors and financial or proprietary information included in the benefit report may be omitted from the benefit report that is posted on the benefit corporation's Internet website.

D. Concurrently with the delivery of the benefit report to shareholders under subsection B, the benefit corporation shall file a copy of the benefit report with the Commission. The compensation paid to directors and financial or proprietary information included in the benefit report may be omitted from the benefit report as filed with the Commission. The Commission shall charge a fee of \$10 for filing a benefit report.

E. If a benefit corporation does not comply with subsection D for a period of two years, the Commission shall prepare and file a statement that the corporation has forfeited its status as a benefit corporation and is no longer subject to this article.

F. If, after the Commission has filed a statement that the corporation has forfeited its status as a benefit corporation pursuant to subsection E, the corporation subsequently delivers a benefit report to the Commission for filing, then upon filing of the report:

1. The status of the corporation as a benefit corporation shall be automatically reinstated; and

2. The corporation shall again be subject to this article.