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HOUSE BILL NO. 2358

AMENDMENT IN THE NATURE OF A SUBSTITUTE
(Proposed by the House Committee on Commerce and Labor
on January 27, 2011)

(Patron Prior to Substitute—Delegate McClellan)

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 13.1-791, relating to benefit corporations.

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 13.1-791, as follows:

Article 22.

Benefit Corporations.

§ 13.1-782. Definitions.

As used in this article:

"Benefit corporation" means a corporation organized pursuant to the provisions of this chapter:

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.

"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 of incorporation or bylaws or otherwise adopted by its board of directors or (ii) a violation of a duty or standard of conduct under this article.

"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, an owner, or a manager of an entity that has a material relationship with the benefit corporation or a subsidiary of the benefit corporation. 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 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 of the benefit corporation or its subsidiary; or

3. There is beneficial 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 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" means a benefit that serves one or more public welfare, religious, charitable, scientific, literary, or educational purposes, or other purpose or benefit beyond the strict interest of the shareholders of the benefit corporation, including:

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 or improving 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

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

"Subsidiary" means, in relation to an individual, an entity in which the individual either (i) owns directly or indirectly equity interests entitled to cast a majority of the votes entitled to be cast generally in an election of directors or members of the governing body of the entity or (ii) otherwise owns or controls voting or contractual power to exercise effective governing control of the entity. The percentage

60 of ownership of equity interests or ownership or control of power to exercise control shall be calculated
61 as if all outstanding rights to acquire equity interests in the entity had been exercised.

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

- 64 1. Is developed by a person that is independent of the benefit corporation; and
- 65 2. Is transparent because the following information about the standard is publicly available:
 - 66 a. The factors considered when measuring the performance of a business;
 - 67 b. The relative weightings of those factors; and
 - 68 c. The identity of the persons that develop and control changes to the standard and the process by
69 which those changes are made.

70 § 13.1-783. Application and effect of article.

71 A. This article shall apply to all benefit corporations.

72 B. The existence of a provision of this article shall not of itself create an implication that a contrary
73 or different rule of law applies to a corporation organized pursuant to the provisions of this chapter
74 that is not a benefit corporation. This article shall not affect a statute or rule of law that applies to a
75 corporation that is not a benefit corporation.

76 C. The specific provisions of this article shall control over the general provisions of other articles of
77 this chapter.

78 § 13.1-784. Formation of benefit corporations.

79 A benefit corporation shall be formed in accordance with Article 3 (§ 13.1-618 et seq.), and its
80 articles, as initially filed with the Commission or as amended, shall state that it is a benefit corporation.

81 § 13.1-785. Election of status after formation.

82 A corporation that was not formed as a benefit corporation may become a benefit corporation by
83 amending its articles so that they contain, in addition to matters required by § 13.1-619, a statement
84 that the corporation is a benefit corporation. Any such amendment to the articles of incorporation shall
85 be adopted in accordance with the procedures set forth in § 13.1-707; however, the amendment shall be
86 approved by all shareholders entitled to vote on the amendment, or if no shares have yet been issued, in
87 accordance with § 13.1-709.

88 § 13.1-786. Termination of status.

89 A benefit corporation may terminate its status as such and cease to be subject to this article by
90 amending its articles to delete the provision required by § 13.1-784 to be set forth in the articles of
91 incorporation, which amendment shall be adopted in accordance with the procedures set forth in
92 § 13.1-707, or if no shares have yet been issued, in accordance with § 13.1-709.

93 § 13.1-787. Corporate purposes.

94 A. A benefit corporation shall have as one of its purposes the purpose of creating a general public
95 benefit. The articles of incorporation of a benefit corporation may identify one or more specific public
96 benefits that it is the purpose of the benefit corporation to create. A specific public benefit may also be
97 specified in the bylaws or otherwise adopted by the board of directors. This purpose is in addition to its
98 purpose under § 13.1-626.

99 B. The creation of a general public benefit and one or more specific public benefits, if any, under
100 subsection A is in the best interests of the benefit corporation.

101 C. A benefit corporation may amend its articles of incorporation to add, amend, or delete the
102 identification of a specific public benefit that it is the purpose of the benefit corporation to create, which
103 amendment shall be adopted in accordance with the procedures set forth in § 13.1-707.

104 § 13.1-788. Standard of conduct for directors.

105 A. Subject to § 13.1-690, in discharging the duties of their respective positions and in considering
106 the best interests of the benefit corporation, the board of directors, committees of the board, and
107 individual directors of a benefit corporation:

108 1. Shall consider the effects of any corporate action upon:

- 109 a. The shareholders of the benefit corporation;
- 110 b. The employees and workforce of the benefit corporation, its subsidiaries, and suppliers;
- 111 c. The interests of customers as beneficiaries of the general or specific public benefit purposes of the
112 benefit corporation;
- 113 d. Community and societal considerations, including those of each community in which offices or
114 facilities of the benefit corporation, its subsidiaries, or suppliers are located;
- 115 e. The local and global environment;
- 116 f. The short-term and long-term interests of the benefit corporation, including benefits that may
117 accrue to the benefit corporation from its long-term plans and the possibility that these interests and the
118 general and specific public benefit purposes of the benefit corporation may be best served by the
119 continued independence of the benefit corporation; and
- 120 g. The ability of the benefit corporation to accomplish its general and any specific public benefit
121 purpose;

122 2. May consider:

123 a. The resources; intent; and past, stated, and potential conduct of any person seeking to acquire

124 control of the benefit corporation; and

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

126 3. Need not give priority to the interests of a particular person referred to in subdivisions 1 and 2

127 over the interests of any other person unless the benefit corporation has stated its intention to give

128 priority to interests related to a specific public benefit purpose identified in its articles.

129 B. The consideration of interests and factors in the manner required by subsection A shall not

130 constitute a violation of § 13.1-690 or a director conflict of interests under § 13.1-691.

131 C. In any proceeding brought by or in the right of a benefit corporation or brought by or on behalf

132 of the shareholders of a benefit corporation, a director is not personally liable for monetary damages

133 for:

134 1. Any action taken as a director if the director performed the duties of office in compliance with

135 § 13.1-690 and this section; or

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

137 specified in its articles of incorporation or bylaws or otherwise adopted by the board of directors.

138 § 13.1-789. Limitation upon liability of officers.

139 An officer of a benefit corporation shall have no liability for actions taken that the officer believes,

140 in his good faith business judgment, are consistent with (i) the general public benefit or specific public

141 benefit specified in the articles of incorporation or bylaws or otherwise adopted by the board of

142 directors and (ii) the requirements of any third-party standard then in effect for the corporation.

143 § 13.1-790. Right of action.

144 A. The duties of directors and officers under this article, the obligation of a benefit corporation to

145 prepare and make available the annual benefit report required under § 13.1-791, and the general and

146 any specific public benefit purpose of a benefit corporation may be enforced only in a benefit

147 enforcement proceeding. No person may bring an action or assert a claim against a benefit corporation

148 or its directors or officers with respect to the duties of directors and officers under this article and the

149 general and any specific public benefit purpose of the benefit corporation except in a benefit

150 enforcement proceeding.

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

152 1. Directly by the benefit corporation; or

153 2. Derivatively by:

154 a. A shareholder of the benefit corporation;

155 b. A director of the benefit corporation; or

156 c. Other persons as specified in the articles of incorporation or bylaws of the benefit corporation.

157 § 13.1-791. Annual benefit report.

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

159 1. A narrative description of:

160 a. The ways in which the benefit corporation pursued the general public benefit during the year and

161 the extent to which the general public benefit was created; and

162 b. Both:

163 (1) The ways in which the benefit corporation pursued any specific public benefit that the articles of

164 incorporation or bylaws, or other action taken by the board of directors, state it is the purpose of the

165 benefit corporation to create; and

166 (2) The extent to which that specific public benefit was created; and

167 c. Any circumstances that have hindered the creation by the benefit corporation of the general or

168 any specific public benefit;

169 2. An assessment of the social and environmental performance of the benefit corporation. The

170 assessment shall be:

171 a. Prepared in accordance with a third-party standard specified in the articles of incorporation, the

172 bylaws, or otherwise adopted by the board of directors and applied consistently with any application of

173 that standard in prior benefit reports; or

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

175 3. Any other information or disclosures that may be required under any third-party standard adopted

176 by the directors of the benefit corporation.

177 B. The benefit report shall be made available annually to each shareholder of the benefit

178 corporation:

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

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

181 C. A benefit corporation shall post its most recent benefit report on a publicly accessible portion of

182 its Internet website, if any. If a benefit corporation does not have an Internet website, it shall make a

183 *written or electronic copy of its most recent benefit report available upon written request from any*
184 *person. A benefit corporation shall not be required to publically disclose to persons other than its*
185 *shareholders any proprietary, confidential, or individual compensation information contained in its*
186 *benefit report to the extent that any third-party standard adopted by the directors of the benefit*
187 *corporation permits the omission of such information from public disclosure.*