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HOUSE BILL NO. 354

Offered January 11, 2012

Prefiled January 10, 2012

A *BILL to amend the Code of Virginia by adding in Chapter 12 of Title 13.1 an article numbered 15, consisting of sections numbered 13.1-1081 through 13.1-1090, relating to benefit limited liability companies.*

Patron—McClellan

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 12 of Title 13.1 an article numbered 15, consisting of sections numbered 13.1-1081 through 13.1-1090, as follows:

*Article 15.**Benefit Limited Liability Companies.**§ 13.1-1081. Definitions.*

As used in this article:

"Benefit enforcement proceeding" means any claim or action brought directly by a benefit limited liability company, or derivatively on behalf of a benefit limited liability company, against a member or manager for (i) failure to pursue the general public benefit purpose of the benefit limited liability company or any specific public benefit purpose set forth in its articles of organization or operating agreement or (ii) a violation of a duty or standard of conduct under this article.

"Benefit limited liability company" means a limited liability company 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 limited liability company has not been terminated under § 13.1-1085.

"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 limited liability company.

"Independent" means having no material relationship with a benefit limited liability company or a subsidiary of the benefit limited liability company, either directly as a member of the benefit limited liability company or as a manager or a member of a subsidiary of the benefit limited liability company or indirectly as a director, an officer, an owner, or a manager of an entity that has a material relationship with the benefit limited liability company or a subsidiary of the benefit limited liability company. A material relationship between a person and a benefit limited liability company 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 limited liability company or a subsidiary of the benefit limited liability company;

2. An immediate family member of the person is, or has been within the last three years, a manager of the benefit limited liability company or its subsidiary; or

3. There is beneficial ownership of five percent or more of the outstanding membership interests of the benefit limited liability company 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 members of the benefit limited liability company, 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;

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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 managers 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 of ownership of equity interests or ownership or control of power to exercise control 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 limited liability company; 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.

§ 13.1-1082. Application and effect of article.

A. This article shall apply to all benefit limited liability companies.

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

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

§ 13.1-1083. Formation of benefit limited liability companies.

A benefit limited liability company shall be formed in accordance with Article 2 (§ 13.1-1008 et seq.), and its articles of organization, as initially filed with the Commission or as amended, shall state that it is a benefit limited liability company.

§ 13.1-1084. Election of status after formation.

A limited liability company that was not formed as a benefit limited liability company may become a benefit limited liability company by amending its articles of organization so that they contain, in addition to matters required by § 13.1-1011, a statement that the limited liability company is a benefit limited liability company. Any such amendment to the articles of organization shall be adopted in accordance with the procedures set forth in § 13.1-1014; however, the amendment shall be approved by all members entitled to vote on the amendment, or if the limited liability company has been formed without any members and no members have been admitted, an amendment may be adopted by a majority of the persons named as a manager in the articles of organization or, if there are no members or managers, by a majority of the organizers of the limited liability company.

§ 13.1-1085. Termination of status.

A benefit limited liability company may terminate its status as such and cease to be subject to this article by amending its articles of organization to delete the provision required by § 13.1-1084 to be set forth in the articles of organization, which amendment shall be adopted in accordance with the procedures set forth in § 13.1-1014.

§ 13.1-1086. Purposes.

A. A benefit limited liability company shall have as one of its purposes the purpose of creating a general public benefit. The articles of organization of a benefit limited liability company may identify one or more specific public benefits that it is the purpose of the benefit limited liability company to create. A specific public benefit may also be specified in the operating agreement. This purpose is in addition to its purpose under § 13.1-1008.

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

C. A benefit limited liability company may amend its articles of organization to add, amend, or delete the identification of a specific public benefit that it is the purpose of the benefit limited liability company to create, which amendment shall be adopted in accordance with the procedures set forth in § 13.1-1014.

§ 13.1-1087. Standard of conduct for managers.

A. Subject to § 13.1-1024.1, in discharging the duties of their respective positions and in considering the best interests of the benefit limited liability company, a person managing the business and affairs of a benefit limited liability company:

1. Shall consider the effects of any corporate action upon:
 - a. The members of the benefit limited liability company;

b. The employees and workforce of the benefit limited liability company and the subsidiaries and suppliers of the benefit limited liability company;

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

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

e. The local and global environment;

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

g. The ability of the benefit limited liability company to accomplish its general and any specific public benefit purpose;

2. May consider:

a. The resources; intent; and past, stated, and potential conduct of any person seeking to acquire control of the benefit limited liability company; and

b. Other pertinent factors or the interests of any other person that he deems 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 limited liability company has stated its intention to give priority to interests related to a specific public benefit purpose identified in its articles of organization.

B. The consideration of interests and factors in the manner required by subsection A shall not constitute a violation of § 13.1-1024.1.

C. In any proceeding brought by or in the right of a benefit limited liability company or brought by or on behalf of the members of a benefit limited liability company, a person managing the business and affairs of a benefit limited liability company is not personally liable for monetary damages for:

1. Any action taken as a manager if the manager performed the duties of office in compliance with § 13.1-1024.1 and this section; or

2. Failure of the benefit limited liability company to create general public benefit or any specific public benefit specified in its articles of organization or operating agreement.

§ 13.1-1088. Limitation upon liability of managers.

A person managing the business and affairs of a benefit limited liability company shall have no liability for actions taken that he believes, in his good faith business judgment, are consistent with (i) the general public benefit or specific public benefit specified in the articles of organization or operating agreement and (ii) the requirements of any third-party standard then in effect for the benefit limited liability company.

§ 13.1-1089. Right of action.

A. The duties of persons managing the business and affairs of a benefit limited liability company under this article, the obligation of a benefit limited liability company to prepare and make available the annual benefit report required under § 13.1-1090, and the general and any specific public benefit purpose of a benefit limited liability company may be enforced only in a benefit enforcement proceeding. No person may bring an action or assert a claim against a benefit limited liability company or a person managing the business and affairs of a benefit limited liability company with respect to the duties of such person under this article and the general and any specific public benefit purpose of the benefit limited liability company except in a benefit enforcement proceeding.

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

1. Directly by the benefit limited liability company; or

2. Derivatively by:

a. A member of the benefit limited liability company;

b. A manager of the benefit limited liability company; or

c. Other persons as specified in the articles of organization or operating agreement of the benefit limited liability company.

§ 13.1-1090. Annual benefit report.

A. A benefit limited liability company shall prepare an annual benefit report that includes all of the following:

1. A narrative description of:

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

b. Both:

(1) The ways in which the benefit limited liability company pursued any specific public benefit that

182 *the articles of organization or operating agreement state it is the purpose of the benefit limited liability*
183 *company to create; and*

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

185 *c. Any circumstances that have hindered the creation by the benefit limited liability company of the*
186 *general or any specific public benefit;*

187 *2. An assessment of the social and environmental performance of the benefit limited liability*
188 *company. The assessment shall be:*

189 *a. Prepared in accordance with a third-party standard specified in the articles of organization or*
190 *operating agreement and applied consistently with any application of that standard in prior benefit*
191 *reports; or*

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

193 *3. Any other information or disclosures that may be required under any third-party standard adopted*
194 *by the managers of the benefit limited liability company.*

195 *B. The benefit report shall be made available annually to each member of the benefit limited liability*
196 *company within 120 days following the end of the fiscal year of the benefit limited liability company.*

197 *C. A benefit limited liability company shall post its most recent benefit report on a publicly*
198 *accessible portion of its website, if any. If a benefit limited liability company does not have a website, it*
199 *shall make a written or electronic copy of its most recent benefit report available upon written request*
200 *from any person. A benefit limited liability company shall not be required to publicly disclose to persons*
201 *other than its members any proprietary, confidential, or individual compensation information contained*
202 *in its benefit report to the extent that any third-party standard adopted by the managers of the benefit*
203 *limited liability company permits the omission of such information from public disclosure.*