

Senate Bill No. 374

(By Senator Unger)

[Introduced February 26, 2013; referred to the Committee on the
Judiciary.]

10 A BILL to amend the Code of West Virginia, 1931, as amended, by
11 adding thereto a new chapter, designated §31F-1-101,
12 §31F-1-102, §31F-1-103, §31F-2-201, §31F-2-202, §31F-2-203,
13 §31F-3-301, §31F-4-401, §31F-4-402, §31F-4-403 and §31F-5-501,
14 all relating to authorizing a corporation to elect to be a
15 benefit corporation; authorizing a corporation to amend its
16 articles of incorporation to include a statement that the
17 corporation is a benefit corporation; authorizing a
18 corporation to terminate status as a benefit corporation;
19 authorizing the articles of a benefit corporation to identify
20 as one of the purposes of the benefit corporation the creation
21 of specific public benefits; establishing that a director
22 shall not have a duty to a certain person; providing that a
23 director shall have immunity from liability under certain
24 circumstances; requiring a benefit corporation to deliver to

1 each stockholder an annual report; defining terms; and
2 generally relating to benefit corporations.

3 Be it enacted by the Legislature of West Virginia:

4 That the Code of West Virginia, 1931, as amended, be amended
5 by adding thereto a new chapter, designated §31F-1-101, §31F-1-102,
6 §31F-1-103, §31F-2-201, §31F-2-202, §31F-2-203, §31F-3-301,
7 §31F-4-401, §31F-4-402, §31F-4-403 and §31F-5-501, all to read as
8 follows:

9 **CHAPTER 31F. WEST VIRGINIA BENEFIT CORPORATION ACT.**

10 **ARTICLE 1. GENERAL PROVISIONS.**

11 **§31F-1-101. Short title.**

12 This chapter is and may be cited as the "West Virginia Benefit
13 Corporation Act".

14 **§31F-1-102. Definitions.**

15 As used in this article:

16 (a) "Benefit corporation" means a corporation organized
17 pursuant to the provisions of this chapter:

18 (1) That has elected to become subject to this article; and

19 (2) The status of which as a benefit corporation has not been
20 terminated under section two hundred three, article two of this
21 chapter.

22 (b) "Benefit enforcement proceeding" means any claim or action
23 brought directly by a benefit corporation, or derivatively on

1 behalf of a benefit corporation, against a director or officer for:
2 (i) Failure to pursue the general public benefit purpose of the
3 benefit corporation or any specific public benefit purpose set
4 forth in its articles of incorporation or bylaws or otherwise
5 adopted by its board of directors or (ii) a violation of a duty or
6 standard of conduct under this article.

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

11 (d) "Independent" means having no material relationship with
12 a benefit corporation or a subsidiary of the benefit corporation,
13 either directly as a shareholder of the benefit corporation or as
14 a partner, a member, or an owner of a subsidiary of the benefit
15 corporation or indirectly as a director, an officer, an owner, or
16 a manager of an entity that has a material relationship with the
17 benefit corporation or a subsidiary of the benefit corporation. A
18 material relationship between a person and a benefit corporation or
19 any of its subsidiaries will be conclusively presumed to exist if:

20 (1) The person is, or has been within the last three years, an
21 employee of the benefit corporation or a subsidiary of the benefit
22 corporation;

23 (2) An immediate family member of the person is, or has been
24 within the last three years, an executive officer of the benefit

1 corporation or its subsidiary; or

2 (3) There is beneficial ownership of five percent or more of
3 the outstanding shares of the benefit corporation by:

4 (A) The person; or

5 (B) An entity:

6 (i) Of which the person is a director, an officer, or a
7 manager; or

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

12 (e) "Specific public benefit" means a benefit that serves one
13 or more public welfare, religious, charitable, scientific,
14 literary, or educational purposes, or other purpose or benefit
15 beyond the strict interest of the shareholders of the benefit
16 corporation, including:

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

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

22 (3) Preserving or improving the environment;

23 (4) Improving human health;

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

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

3 (7) Conferring any other particular benefit on society or the
4 environment.

5 (f) "Subsidiary" means, in relation to an individual, an
6 entity in which the individual either: (i) Owns directly or
7 indirectly equity interests entitled to cast a majority of the
8 votes entitled to be cast generally in an election of directors or
9 members of the governing body of the entity; or (ii) otherwise owns
10 or controls voting or contractual power to exercise effective
11 governing control of the entity. The percentage of ownership of
12 equity interests or ownership or control of power to exercise
13 control shall be calculated as if all outstanding rights to acquire
14 equity interests in the entity had been exercised.

15 (g) "Third-party standard" means a recognized standard for
16 defining, reporting, and assessing corporate social and
17 environmental performance that:

18 (1) Is developed by a person that is independent of the
19 benefit corporation; and

20 (2) Is transparent because the following information about the
21 standard is publicly available:

22 (A) The factors considered when measuring the performance of
23 a business;

24 (B) The relative weightings of those factors; and

1 (C) The identity of the persons that develop and control
2 changes to the standard and the process by which those changes are
3 made.

4 **§31F-1-103. Construction of chapter.**

5 (a) This chapter shall apply to all benefit corporations.

6 (b) The existence of a provision of this chapter does not of
7 itself create an implication that a contrary or different rule of
8 law applies to a corporation organized pursuant to the provisions
9 of this code that is not a benefit corporation. This chapter does
10 not affect a statute or rule of law that applies to a corporation
11 that is not a benefit corporation.

12 (c) The specific provisions of this chapter control over the
13 general provisions of other chapters of this code.

14 **ARTICLE 2. INCORPORATION.**

15 **§31F-2-201. Formation of benefit corporations.**

16 A benefit corporation shall be formed in accordance with
17 article two, chapter thirty-one-d of this code, and its articles as
18 initially filed with the Secretary of State or as amended, shall
19 state that it is a benefit corporation.

20 **§31F-2-202. Election of status after formation.**

21 A corporation that was not formed as a benefit corporation may
22 become a benefit corporation by amending its articles so that they
23 contain, in addition to matters required by section two hundred

1 two, article two, chapter thirty-one-d of this code, a statement
2 that the corporation is a benefit corporation. Any such amendment
3 to the articles of incorporation shall be adopted in accordance
4 with the procedures set forth in article ten, chapter thirty-one-d
5 of this code.

6 **§31F-2-203. Termination of status.**

7 A benefit corporation may terminate its status as such and
8 cease to be subject to this chapter by amending its articles to
9 delete the provision required by section two hundred one of this
10 article to be set forth in the articles of incorporation, which
11 amendment shall be adopted in accordance with the procedures set
12 forth in article ten, chapter thirty-one-d of this code.

13 **ARTICLE 3. PURPOSES.**

14 **§31F-3-301. Corporate purposes.**

15 (a) A benefit corporation shall have as one of its purposes
16 the purpose of creating a general public benefit. The articles of
17 incorporation of a benefit corporation may identify one or more
18 specific public benefits that it is the purpose of the benefit
19 corporation to create. A specific public benefit may also be
20 specified in the bylaws or otherwise adopted by the board of
21 directors. This purpose is in addition to its purpose under section
22 three hundred two, article three, chapter thirty-one-d of this
23 code.

24 (b) The creation of a general public benefit and one or more

1 specific public benefits, if any, under subsection (a) is in the
2 best interests of the benefit corporation.

3 (c) A benefit corporation may amend its articles of
4 incorporation to add, amend, or delete the identification of a
5 specific public benefit that it is the purpose of the benefit
6 corporation to create, which amendment shall be adopted in
7 accordance with the procedures set forth in article ten, chapter
8 thirty-one-d of this code.

9 **ARTICLE 4. DIRECTORS AND OFFICERS.**

10 **§31F-4-401. Standard of conduct for directors.**

11 (a) Subject to article eight, chapter thirty-one-d of this
12 code, in discharging the duties of their respective positions and
13 in considering the best interests of the benefit corporation, the
14 board of directors, committees of the board, and individual
15 directors of a benefit corporation:

16 (1) Shall consider the effects of any corporate action upon:

17 (A) The shareholders of the benefit corporation;

18 (B) The employees and workforce of the benefit corporation,
19 its subsidiaries, and suppliers;

20 (C) The interests of customers as beneficiaries of the general
21 or specific public benefit purposes of the benefit corporation;

22 (D) Community and societal considerations, including those of
23 each community in which offices or facilities of the benefit
24 corporation, its subsidiaries, or suppliers are located;

1 (E) The local and global environment;

2 (F) The short-term and long-term interests of the benefit
3 corporation, including benefits that may accrue to the benefit
4 corporation from its long-term plans and the possibility that these
5 interests and the general and specific public benefit purposes of
6 the benefit corporation may be best served by the continued
7 independence of the benefit corporation; and

8 (G) The ability of the benefit corporation to accomplish its
9 general and any specific public benefit purpose;

10 (2) May consider:

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

14 (B) Other pertinent factors or the interests of any other
15 person that they deem appropriate; and

16 (3) Need not give priority to the interests of a particular
17 person referred to in subdivisions (1) and (2) of this section over
18 the interests of any other person unless the benefit corporation
19 has stated its intention to give priority to interests related to
20 a specific public benefit purpose identified in its articles.

21 (b) The consideration of interests and factors in the manner
22 required by subsection (a) does not constitute a violation of
23 section eight hundred thirty, article eight, chapter thirty-one-d
24 of this code or a director conflict of interests under section

1 eight hundred sixty, article eight, chapter thirty-one-d of this
2 code.

3 (c) In any proceeding brought by or in the right of a benefit
4 corporation or brought by or on behalf of the shareholders of a
5 benefit corporation, a director is not personally liable for
6 monetary damages for:

7 (1) Any action taken as a director if the director performed
8 the duties of office in compliance with section eight hundred
9 thirty, article eight, chapter thirty-one-d of this code and this
10 section; or

11 (2) Failure of the benefit corporation to create general
12 public benefit or any specific public benefit specified in its
13 articles of incorporation or bylaws or otherwise adopted by the
14 board of directors.

15 **§31F-4-402. Limitation upon liability of officers.**

16 An officer of a benefit corporation has no liability for
17 actions taken that the officer believes, in his good faith business
18 judgment, are consistent with: (i) The general public benefit or
19 specific public benefit specified in the articles of incorporation
20 or bylaws or otherwise adopted by the board of directors; and (ii)
21 the requirements of any third-party standard then in effect for the
22 corporation.

23 **§31F-4-403. Right of action.**

24 (a) The duties of directors and officers under this chapter,

1 the obligation of a benefit corporation to prepare and make
2 available the annual benefit report required under section five
3 hundred one, article five of this chapter, and the general and any
4 specific public benefit purpose of a benefit corporation may be
5 enforced only in a benefit enforcement proceeding. No person may
6 bring an action or assert a claim against a benefit corporation or
7 its directors or officers with respect to the duties of directors
8 and officers under this article and the general and any specific
9 public benefit purpose of the benefit corporation except in a
10 benefit enforcement proceeding.

11 (b) A benefit enforcement proceeding may be commenced or
12 maintained only:

13 (1) Directly by the benefit corporation; or

14 (2) Derivatively by:

15 (A) A shareholder of the benefit corporation;

16 (B) A director of the benefit corporation; or

17 (C) Other persons as specified in the articles of
18 incorporation or bylaws of the benefit corporation.

19 **ARTICLE 5. REPORT.**

20 **§31F-5-501. Annual benefit report.**

21 (a) A benefit corporation shall prepare an annual benefit
22 report that includes all of the following:

23 (1) A narrative description of:

24 (A) The ways in which the benefit corporation pursued the

1 general public benefit during the year and the extent to which the
2 general public benefit was created; and

3 (B) Both:

4 (i) The ways in which the benefit corporation pursued any
5 specific public benefit that the articles of incorporation or
6 bylaws, or other action taken by the board of directors, state it
7 is the purpose of the benefit corporation to create; and

8 (ii) The extent to which that specific public benefit was
9 created; and

10 (C) Any circumstances that have hindered the creation by the
11 benefit corporation of the general or any specific public benefit;

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

14 (A) Prepared in accordance with a third-party standard
15 specified in the articles of incorporation, the bylaws, or
16 otherwise adopted by the board of directors and applied
17 consistently with any application of that standard in prior benefit
18 reports; or

19 (B) Accompanied by an explanation of the reasons for any
20 inconsistent application; and

21 (3) Any other information or disclosures that may be required
22 under any third-party standard adopted by the directors of the
23 benefit corporation.

24 (b) The benefit report shall be made available annually to

1 each shareholder of the benefit corporation:

2 (1) Within one hundred twenty days following the end of the
3 fiscal year of the benefit corporation; or

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

6 (c) A benefit corporation shall post its most recent benefit
7 report on a publicly accessible portion of its Internet website, if
8 any. If a benefit corporation does not have an Internet website, it
9 shall make a written or electronic copy of its most recent benefit
10 report available upon written request from any person. A benefit
11 corporation is not required to publically disclose to persons other
12 than its shareholders any proprietary, confidential, or individual
13 compensation information contained in its benefit report to the
14 extent that any third-party standard adopted by the directors of
15 the benefit corporation permits the omission of such information
16 from public disclosure.

NOTE: The purpose of this bill is to authorize the creation
and recognition of benefit corporations in this state.

This chapter is new; therefore, strike-throughs and
underscoring have been omitted.