

1 **Senate Bill No. 202**

2 (By Senator Unger)

3 _____
4 [Introduced January 8, 2014; referred to the Committee on the
5 Judiciary.]
6 _____

7
8
9
10 A BILL to amend the Code of West Virginia, 1931, as amended, by
11 adding thereto a new chapter, designated §31F-1-101, §31F-1-
12 102, §31F-1-103, §31F-2-201, §31F-2-202, §31F-2-203, §31F-3-
13 301, §31F-4-401, §31F-4-402, §31F-4-403 and §31F-5-501, all
14 relating to authorizing a corporation to elect to be a benefit
15 corporation; authorizing a corporation to amend its articles
16 of incorporation to include a statement that the corporation
17 is a benefit corporation; authorizing a corporation to
18 terminate status as a benefit corporation; authorizing the
19 articles of a benefit corporation to identify as one of the
20 purposes of the benefit corporation the creation of specific
21 public benefits; establishing that a director shall not have
22 a duty to a certain person; providing that a director shall
23 have immunity from liability under certain circumstances;

1 requiring a benefit corporation to deliver to each stockholder
2 an annual report; defining terms; and generally relating to
3 benefit corporations.

4 *Be it enacted by the Legislature of West Virginia:*

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

1 within the last three years, an executive officer of the benefit
2 corporation or its subsidiary; or

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

5 (A) The person; or

6 (B) An entity:

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

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

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

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

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

23 (3) Preserving or improving the environment;

1 (4) Improving human health;

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

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

5 (7) Conferring any other particular benefit on society or the
6 environment.

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

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

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

22 (2) Is transparent because the following information about the
23 standard is publicly available:

1 (A) The factors considered when measuring the performance of
2 a business;

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

4 (C) The identity of the persons that develop and control
5 changes to the standard and the process by which those changes are
6 made.

7 **§31F-1-103. Construction of chapter.**

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

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

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

17 **ARTICLE 2. INCORPORATION.**

18 **§31F-2-201. Formation of benefit corporations.**

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

23 **§31F-2-202. Election of status after formation.**

1 A corporation that was not formed as a benefit corporation may
2 become a benefit corporation by amending its articles so that they
3 contain, in addition to matters required by section two hundred
4 two, article two, chapter thirty-one-d of this code, a statement
5 that the corporation is a benefit corporation. Any such amendment
6 to the articles of incorporation shall be adopted in accordance
7 with the procedures set forth in article ten, chapter thirty-one-d
8 of this code.

9 **§31F-2-203. Termination of status.**

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

16 **ARTICLE 3. PURPOSES.**

17 **§31F-3-301. Corporate purposes.**

18 (a) A benefit corporation shall have as one of its purposes
19 the purpose of creating a general public benefit. The articles of
20 incorporation of a benefit corporation may identify one or more
21 specific public benefits that it is the purpose of the benefit
22 corporation to create. A specific public benefit may also be
23 specified in the bylaws or otherwise adopted by the board of

1 directors. This purpose is in addition to its purpose under section
2 three hundred two, article three, chapter thirty-one-d of this
3 code.

4 (b) The creation of a general public benefit and one or more
5 specific public benefits, if any, under subsection (a) of this
6 section is in the best interests of the benefit corporation.

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

13 **ARTICLE 4. DIRECTORS AND OFFICERS.**

14 **§31F-4-401. Standard of conduct for directors.**

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

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

21 (A) The shareholders of the benefit corporation;

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

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

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

6 (E) The local and global environment;

7 (F) The short-term and long-term interests of the benefit
8 corporation, including benefits that may accrue to the benefit
9 corporation from its long-term plans and the possibility that these
10 interests and the general and specific public benefit purposes of
11 the benefit corporation may be best served by the continued
12 independence of the benefit corporation; and

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

15 (2) May consider:

16 (A) The resources; intent; and past, stated and potential
17 conduct of any person seeking to acquire control of the benefit
18 corporation; and

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

21 (3) Need not give priority to the interests of a particular
22 person referred to in subdivisions (1) and (2) of this section over
23 the interests of any other person unless the benefit corporation

1 has stated its intention to give priority to interests related to
2 a specific public benefit purpose identified in its articles.

3 (b) The consideration of interests and factors in the manner
4 required by subsection (a) of this section does not constitute a
5 violation of section eight hundred thirty, article eight, chapter
6 thirty-one-d of this code or a director conflict of interests under
7 section eight hundred sixty, article eight, chapter thirty-one-d of
8 this code.

9 (c) In any proceeding brought by or in the right of a benefit
10 corporation or brought by or on behalf of the shareholders of a
11 benefit corporation, a director is not personally liable for
12 monetary damages for:

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

17 (2) Failure of the benefit corporation to create general
18 public benefit or any specific public benefit specified in its
19 articles of incorporation or bylaws or otherwise adopted by the
20 board of directors.

21 **§31F-4-402. Limitation upon liability of officers.**

22 An officer of a benefit corporation has no liability for
23 actions taken that the officer believes, in his or her good faith

1 business judgment, are consistent with: (i) The general public
2 benefit or specific public benefit specified in the articles of
3 incorporation or bylaws or otherwise adopted by the board of
4 directors; and (ii) the requirements of any third-party standard
5 then in effect for the corporation.

6 **§31F-4-403. Right of action.**

7 (a) The duties of directors and officers under this chapter,
8 the obligation of a benefit corporation to prepare and make
9 available the annual benefit report required under section five
10 hundred one, article five of this chapter and the general and any
11 specific public benefit purpose of a benefit corporation may be
12 enforced only in a benefit enforcement proceeding. No person may
13 bring an action or assert a claim against a benefit corporation or
14 its directors or officers with respect to the duties of directors
15 and officers under this article and the general and any specific
16 public benefit purpose of the benefit corporation except in a
17 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 of the benefit corporation;

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

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

3 **ARTICLE 5. REPORT.**

4 **§31F-5-501. Annual benefit report.**

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

7 (1) A narrative description of:

8 (A) The ways in which the benefit corporation pursued the
9 general public benefit during the year and the extent to which the
10 general public benefit was created; and

11 (B) Both:

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

16 (ii) The extent to which that specific public benefit was
17 created; and

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

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

22 (A) Prepared in accordance with a third-party standard
23 specified in the articles of incorporation, the bylaws, or

1 otherwise adopted by the board of directors and applied
2 consistently with any application of that standard in prior benefit
3 reports; or

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

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

9 (b) The benefit report shall be made available annually to
10 each shareholder of the benefit corporation:

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

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

15 (c) A benefit corporation shall post its most recent benefit
16 report on a publicly accessible portion of its Internet website, if
17 any. If a benefit corporation does not have an Internet website, it
18 shall make a written or electronic copy of its most recent benefit
19 report available upon written request from any person. A benefit
20 corporation is not required to publically disclose to persons other
21 than its shareholders any proprietary, confidential, or individual
22 compensation information contained in its benefit report to the
23 extent that any third-party standard adopted by the directors of

1 the benefit corporation permits the omission of such information
2 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.)