

4692

2011-2012 Regular Sessions

I N A S S E M B L Y

February 4, 2011

Introduced by M. of A. SILVER, BRENNAN, KAVANAGH, ROSENTHAL, GALEF, LIFTON, NOLAN, CORWIN -- read once and referred to the Committee on Corporations, Authorities and Commissions

AN ACT to amend the general construction law and the business corporation law, in relation to authorizing the incorporation of benefit corporations, providing for the public benefit to be created by benefit corporations, for the election and termination of the status of a benefit corporation, for the standards of conduct for directors of a benefit corporation, and for the preparation and distribution of an annual benefit report by a benefit corporation

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. Paragraphs 3 and 4 of subdivision d of section 65 of the
2 general construction law, as added by chapter 451 of the laws of 1973
3 are amended and a new paragraph 5 is added to read as follows:

- 4 3. A railroad corporation, [or]
5 4. A transportation corporation[.], OR
6 5. A BENEFIT CORPORATION.

7 S 2. Section 66 of the general construction law is amended by adding a
8 new subdivision 4-a to read as follows:

9 4-A. A "BENEFIT CORPORATION" MEANS A BUSINESS CORPORATION THAT HAS
10 ELECTED TO BECOME SUBJECT TO ARTICLE SEVENTEEN OF THE BUSINESS CORPO-
11 RATION LAW AND WHOSE STATUS AS A BENEFIT CORPORATION HAS NOT BEEN TERMI-
12 NATED AS PROVIDED IN ARTICLE SEVENTEEN OF THE BUSINESS CORPORATION LAW.

13 S 3. The business corporation law is amended by adding a new article
14 17 to read as follows:

15 ARTICLE 17

16 BENEFIT CORPORATIONS

17 SECTION 1701. APPLICATION AND EFFECT OF ARTICLE.

18 1702. DEFINITIONS.

19 1703. FORMATION OF BENEFIT CORPORATIONS.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [] is old law to be omitted.

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1 1704. ELECTION OF AN EXISTING BUSINESS CORPORATION TO BECOME A
2 BENEFIT CORPORATION.

3 1705. TERMINATION OF BENEFIT CORPORATION STATUS.

4 1706. CORPORATE PURPOSES.

5 1707. STANDARD OF CONDUCT FOR DIRECTORS.

6 1708. ANNUAL BENEFIT REPORT.

7 S 1701. APPLICATION AND EFFECT OF ARTICLE.

8 (A) THIS ARTICLE SHALL BE APPLICABLE TO ALL BENEFIT CORPORATIONS.

9 (B) THE EXISTENCE OF A PROVISION OF THIS ARTICLE SHALL NOT OF ITSELF
10 CREATE ANY IMPLICATION THAT A CONTRARY OR DIFFERENT RULE OF LAW IS OR
11 WOULD BE APPLICABLE TO A BUSINESS CORPORATION THAT IS NOT A BENEFIT
12 CORPORATION. THIS ARTICLE SHALL NOT AFFECT ANY STATUTE OR RULE OF LAW
13 THAT IS OR WOULD BE APPLICABLE TO A BUSINESS CORPORATION THAT IS NOT A
14 BENEFIT CORPORATION.

15 (C) EXCEPT AS OTHERWISE PROVIDED IN THIS ARTICLE, THIS CHAPTER SHALL
16 BE GENERALLY APPLICABLE TO ALL BENEFIT CORPORATIONS.

17 (D) A PROVISION OF THE CERTIFICATE OF INCORPORATION OR BYLAWS OF A
18 BENEFIT CORPORATION MAY NOT RELAX, BE INCONSISTENT WITH OR SUPERSEDE ANY
19 PROVISION OF THIS ARTICLE.

20 S 1702. DEFINITIONS.

21 AS USED IN THIS ARTICLE, UNLESS THE CONTEXT OTHERWISE REQUIRES, THE
22 TERM:

23 (A) "BENEFIT CORPORATION" MEANS A BUSINESS CORPORATION THAT HAS
24 ELECTED TO BECOME SUBJECT TO THIS ARTICLE AND WHOSE STATUS AS A BENEFIT
25 CORPORATION HAS NOT BEEN TERMINATED AS PROVIDED IN THIS ARTICLE.

26 (B) "GENERAL PUBLIC BENEFIT" MEANS A MATERIAL POSITIVE IMPACT ON SOCI-
27 ETY AND THE ENVIRONMENT, AS MEASURED BY A THIRD-PARTY STANDARD.

28 (C) "INDEPENDENT" MEANS THAT A PERSON HAS NO MATERIAL RELATIONSHIP
29 WITH A BENEFIT CORPORATION OR ANY OF ITS SUBSIDIARIES (OTHER THAN THE
30 RELATIONSHIP OF SERVING AS THE BENEFIT DIRECTOR OR BENEFIT OFFICER),
31 EITHER DIRECTLY OR AS A SHAREHOLDER, PARTNER, MEMBER OR OTHER OWNER OR A
32 DIRECTOR, OFFICER OR OTHER MANAGER OF AN ENTITY THAT HAS A MATERIAL
33 RELATIONSHIP WITH THE BENEFIT CORPORATION OR ANY OF ITS SUBSIDIARIES. A
34 MATERIAL RELATIONSHIP BETWEEN AN INDIVIDUAL AND A BENEFIT CORPORATION OR
35 ANY OF ITS SUBSIDIARIES WILL BE CONCLUSIVELY PRESUMED TO EXIST IF:

36 (1) THE PERSON IS, OR HAS BEEN WITHIN THE LAST THREE YEARS, AN EMPLOY-
37 EE OF THE BENEFIT CORPORATION OR ANY OF ITS SUBSIDIARIES;

38 (2) AN IMMEDIATE FAMILY MEMBER OF THE PERSON IS, OR HAS BEEN WITHIN
39 THE LAST THREE YEARS, AN EXECUTIVE OFFICER OF THE BENEFIT CORPORATION OR
40 ANY OF ITS SUBSIDIARIES; OR

41 (3) THE PERSON, OR AN ENTITY OF WHICH THE PERSON IS A DIRECTOR, OFFI-
42 CER OR OTHER MANAGER OR IN WHICH THE PERSON OWNS BENEFICIALLY OR OF
43 RECORD FIVE PERCENT OR MORE OF THE EQUITY INTERESTS, OWNS BENEFICIALLY
44 OR OF RECORD FIVE PERCENT OR MORE OF THE SHARES OF THE BENEFIT CORPO-
45 RATION.

46 (D) "MINIMUM STATUS VOTE" MEANS THAT, IN ADDITION TO ANY OTHER
47 APPROVAL OR VOTE REQUIRED BY THIS CHAPTER, THE CERTIFICATE OF INCORPO-
48 RATION OR A BYLAW ADOPTED BY THE SHAREHOLDERS:

49 (1) THE HOLDERS OF SHARES OF EVERY CLASS OR SERIES SHALL BE ENTITLED
50 TO VOTE ON THE CORPORATE ACTION REGARDLESS OF ANY LIMITATION STATED IN
51 THE CERTIFICATE OF INCORPORATION OR BYLAWS ON THE VOTING RIGHTS OF ANY
52 CLASS OR SERIES.

53 (2) THE CORPORATE ACTION MUST BE APPROVED BY VOTE OF THE SHAREHOLDERS
54 OF EACH CLASS OR SERIES ENTITLED TO CAST AT LEAST THREE-QUARTERS OF THE
55 VOTES THAT ALL SHAREHOLDERS OF THE CLASS OR SERIES ARE ENTITLED TO CAST
56 THEREON.

1 (E) "SPECIFIC PUBLIC BENEFIT," AS MEASURED BY A THIRD-PARTY STANDARD,
2 INCLUDES:
3 (1) PROVIDING LOW-INCOME OR UNDERSERVED INDIVIDUALS OR COMMUNITIES
4 WITH BENEFICIAL PRODUCTS OR SERVICES;
5 (2) PROMOTING ECONOMIC OPPORTUNITY FOR INDIVIDUALS OR COMMUNITIES
6 BEYOND THE CREATION OF JOBS IN THE NORMAL COURSE OF BUSINESS;
7 (3) PRESERVING THE ENVIRONMENT;
8 (4) IMPROVING HUMAN HEALTH;
9 (5) PROMOTING THE ARTS, SCIENCES OR ADVANCEMENT OF KNOWLEDGE;
10 (6) INCREASING THE FLOW OF CAPITAL TO ENTITIES WITH A PUBLIC BENEFIT
11 PURPOSE; AND
12 (7) THE ACCOMPLISHMENT OF ANY OTHER PARTICULAR BENEFIT FOR SOCIETY OR
13 THE ENVIRONMENT.
14 (F) "SUBSIDIARY" MEANS AN ENTITY IN WHICH A PERSON OWNS BENEFICIALLY
15 OR OF RECORD FIFTY PERCENT OR MORE OF THE EQUITY INTERESTS.
16 (G) "THIRD-PARTY STANDARD" MEANS A STANDARD RECOGNIZED BY THE SECRE-
17 TARY OF STATE OR ITS DESIGNEE OR DESIGNEES FOR DEFINING, REPORTING AND
18 ASSESSING CORPORATE SOCIAL AND ENVIRONMENTAL PERFORMANCE THAT IS:
19 (1) DEVELOPED BY A PERSON THAT IS INDEPENDENT OF THE BENEFIT CORPO-
20 RATION; AND
21 (2) TRANSPARENT BECAUSE THE FOLLOWING INFORMATION ABOUT THE STANDARD
22 IS PUBLICLY AVAILABLE:
23 (A) THE FACTORS CONSIDERED WHEN MEASURING THE PERFORMANCE OF A BUSI-
24 NESS;
25 (B) THE RELATIVE WEIGHTINGS OF THOSE FACTORS; AND
26 (C) THE IDENTITY OF THE PERSONS WHO DEVELOPED AND CONTROL CHANGES TO
27 THE STANDARD AND THE PROCESS BY WHICH THOSE CHANGES ARE MADE.
28 S 1703. FORMATION OF BENEFIT CORPORATIONS.
29 A BENEFIT CORPORATION SHALL BE FORMED IN ACCORDANCE WITH THIS CHAPTER
30 EXCEPT THAT ITS CERTIFICATE OF INCORPORATION SHALL ALSO STATE THAT IT IS
31 A BENEFIT CORPORATION.
32 S 1704. ELECTION OF AN EXISTING BUSINESS CORPORATION TO BECOME A BENEFIT
33 CORPORATION.
34 (A) A BUSINESS CORPORATION MAY BECOME A BENEFIT CORPORATION UNDER THIS
35 ARTICLE BY AMENDING ITS CERTIFICATE OF INCORPORATION SO THAT IT CONTAINS
36 A STATEMENT THAT THE CORPORATION IS A BENEFIT CORPORATION. THE AMENDMENT
37 SHALL NOT BE EFFECTIVE UNLESS IT IS ADOPTED BY AT LEAST THE MINIMUM
38 STATUS VOTE.
39 (B) ANY CORPORATION THAT IS NOT A BENEFIT CORPORATION THAT IS A PARTY
40 TO A MERGER OR CONSOLIDATION IN WHICH THE SURVIVING OR CONSOLIDATED
41 CORPORATION WILL BE A BENEFIT CORPORATION MUST APPROVE THE PLAN OF MERG-
42 ER OR CONSOLIDATION BY AT LEAST THE MINIMUM STATUS VOTE IN ADDITION TO
43 ANY OTHER VOTE REQUIRED BY THIS CHAPTER, THE CERTIFICATE OF INCORPO-
44 RATION OR THE BYLAWS.
45 S 1705. TERMINATION OF BENEFIT CORPORATION STATUS.
46 (A) A BENEFIT CORPORATION MAY TERMINATE ITS STATUS AS SUCH AND CEASE
47 TO BE SUBJECT TO THIS ARTICLE BY AMENDING ITS CERTIFICATE OF INCORPO-
48 RATION TO DELETE THE STATEMENT THAT THE CORPORATION IS A BENEFIT CORPO-
49 RATION. THE AMENDMENT SHALL NOT BE EFFECTIVE UNLESS IT IS ADOPTED BY AT
50 LEAST THE MINIMUM STATUS VOTE.
51 (B) IF A PLAN OR MERGER OR CONSOLIDATION WOULD HAVE THE EFFECT OF
52 TERMINATING THE STATUS OF A BUSINESS CORPORATION AS A BENEFIT CORPO-
53 RATION, THE PLAN SHALL NOT BE EFFECTIVE UNLESS IT IS ADOPTED BY AT LEAST
54 THE MINIMUM STATUS VOTE.
55 S 1706. CORPORATE PURPOSES.

1 (A) EVERY BENEFIT CORPORATION SHALL HAVE A PURPOSE OF CREATING GENERAL
2 PUBLIC BENEFIT. THIS PURPOSE IS IN ADDITION TO ITS PURPOSES UNDER
3 SECTION TWO HUNDRED ONE OF THIS CHAPTER AND ANY SPECIFIC PURPOSE SET
4 FORTH IN ITS ARTICLES UNDER PARAGRAPH (B) OF THIS SECTION. THE PURPOSE
5 TO CREATE GENERAL PUBLIC BENEFIT MAY BE A LIMITATION ON THE OTHER
6 PURPOSES OF THE BENEFIT CORPORATION, AND SHALL CONTROL OVER ANY INCON-
7 SISTENT PURPOSE OF THE BENEFIT CORPORATION.

8 (B) THE ARTICLES OF A BENEFIT CORPORATION MAY IDENTIFY ONE OR MORE
9 SPECIFIC PUBLIC BENEFITS THAT IT IS THE PURPOSE OF THE BENEFIT CORPO-
10 RATION TO CREATE IN ADDITION TO ITS PURPOSES UNDER SECTION TWO HUNDRED
11 ONE OF THIS CHAPTER AND PARAGRAPH (A) OF THIS SECTION.

12 (C) THE CREATION OF GENERAL AND SPECIFIC PUBLIC BENEFITS AS PROVIDED
13 IN PARAGRAPHS (A) AND (B) OF THIS SECTION IS IN THE BEST INTERESTS OF
14 THE BENEFIT CORPORATION.

15 (D) A BENEFIT CORPORATION MAY AMEND ITS CERTIFICATE OF INCORPORATION
16 TO ADD, AMEND OR DELETE THE IDENTIFICATION OF A SPECIFIC PUBLIC BENEFIT
17 THAT IT IS THE PURPOSE OF THE BENEFIT CORPORATION TO CREATE. THE AMEND-
18 MENT SHALL NOT BE EFFECTIVE UNLESS IT IS ADOPTED BY AT LEAST THE MINIMUM
19 STATUS VOTE.

20 S 1707. STANDARD OF CONDUCT FOR DIRECTORS.

21 (A) IN DISCHARGING THE DUTIES OF THEIR RESPECTIVE POSITIONS, THE BOARD
22 OF DIRECTORS, COMMITTEES OF THE BOARD AND INDIVIDUAL DIRECTORS OF A
23 BENEFIT CORPORATION:

24 (1) SHALL CONSIDER THE EFFECTS OF ANY ACTION UPON:

25 (A) THE ABILITY FOR THE BENEFIT CORPORATION TO ACCOMPLISH ITS PUBLIC
26 BENEFIT PURPOSE;

27 (B) THE SHAREHOLDERS OF THE BENEFIT CORPORATION;

28 (C) THE EMPLOYEES AND WORKFORCE OF THE BENEFIT CORPORATION AND ITS
29 SUBSIDIARIES AND SUPPLIERS;

30 (D) THE INTERESTS OF CUSTOMERS AS BENEFICIARIES OF THE GENERAL OR
31 SPECIFIC PUBLIC BENEFIT PURPOSES OF THE BENEFIT CORPORATION;

32 (E) COMMUNITY AND SOCIETAL CONSIDERATIONS, INCLUDING THOSE OF ANY
33 COMMUNITY IN WHICH OFFICES OR FACILITIES OF THE BENEFIT CORPORATION OR
34 ITS SUBSIDIARIES OR SUPPLIERS ARE LOCATED;

35 (F) THE LOCAL AND GLOBAL ENVIRONMENT; AND

36 (G) THE SHORT-TERM AND LONG-TERM INTERESTS OF THE BENEFIT CORPORATION,
37 INCLUDING BENEFITS THAT MAY ACCRUE TO THE BENEFIT CORPORATION FROM ITS
38 LONG-TERM PLANS AND THE POSSIBILITY THAT THESE INTERESTS MAY BE BEST
39 SERVED BY THE CONTINUED INDEPENDENCE OF THE BENEFIT CORPORATION;

40 (2) MAY CONSIDER:

41 (A) THE RESOURCES, INTENT AND CONDUCT (PAST, STATED AND POTENTIAL) OF
42 ANY PERSON SEEKING TO ACQUIRE CONTROL OF THE CORPORATION; AND

43 (B) ANY OTHER PERTINENT FACTORS OR THE INTERESTS OF ANY OTHER GROUP
44 THAT THEY DEEM APPROPRIATE; AND

45 (3) SHALL NOT BE REQUIRED TO GIVE PRIORITY TO THE INTERESTS OF ANY
46 PARTICULAR PERSON OR GROUP REFERRED TO IN SUBPARAGRAPHS ONE AND TWO OF
47 THIS PARAGRAPH OVER THE INTERESTS OF ANY OTHER PERSON OR GROUP UNLESS
48 THE BENEFIT CORPORATION HAS STATED ITS INTENTION TO GIVE PRIORITY TO
49 INTERESTS RELATED TO A SPECIFIC PUBLIC BENEFIT PURPOSE IDENTIFIED IN ITS
50 CERTIFICATE OF INCORPORATION.

51 (B) THE CONSIDERATION OF INTERESTS AND FACTORS IN THE MANNER REQUIRED
52 BY PARAGRAPH (A) OF THIS SECTION:

53 (1) SHALL NOT CONSTITUTE A VIOLATION OF THE PROVISIONS OF SECTION
54 SEVEN HUNDRED SEVENTEEN OF THIS CHAPTER; AND

1 (2) IS IN ADDITION TO THE ABILITY OF DIRECTORS TO CONSIDER INTERESTS
2 AND FACTORS AS PROVIDED IN SECTION SEVEN HUNDRED SEVENTEEN OF THIS CHAP-
3 TER.

4 (C) NOTWITHSTANDING THE PROVISIONS OF PARAGRAPH (B) OF THIS SECTION, A
5 DIRECTOR OF A BENEFIT CORPORATION HAS THE FIDUCIARY DUTIES OF A DIRECTOR
6 OF A BUSINESS CORPORATION THAT IS NOT A BENEFIT CORPORATION EXCEPT TO
7 THE EXTENT THOSE DUTIES ARE INCONSISTENT WITH THE PROVISIONS OF THIS
8 ARTICLE.

9 S 1708. ANNUAL BENEFIT REPORT.

10 (A) A BENEFIT CORPORATION MUST DELIVER TO EACH SHAREHOLDER AN ANNUAL
11 BENEFIT REPORT INCLUDING:

12 (1) A NARRATIVE DESCRIPTION OF:

13 (A) THE WAYS IN WHICH THE BENEFIT CORPORATION PURSUED GENERAL PUBLIC
14 BENEFIT DURING THE YEAR AND THE EXTENT TO WHICH GENERAL PUBLIC BENEFIT
15 WAS CREATED;

16 (B) THE WAYS IN WHICH THE BENEFIT CORPORATION PURSUED ANY SPECIFIC
17 PUBLIC BENEFIT THAT THE CERTIFICATE OF INCORPORATION STATES IT IS THE
18 PURPOSE OF THE BENEFIT CORPORATION TO CREATE AND THE EXTENT TO WHICH
19 THAT SPECIFIC PUBLIC BENEFIT WAS CREATED; AND

20 (C) ANY CIRCUMSTANCES THAT HAVE HINDERED THE CREATION BY THE BENEFIT
21 CORPORATION OF GENERAL OR SPECIFIC PUBLIC BENEFIT;

22 (2) AN ASSESSMENT OF THE PERFORMANCE OF THE BENEFIT CORPORATION, RELA-
23 TIVE TO ITS GENERAL PUBLIC BENEFIT PURPOSE AND, IF APPLICABLE, ITS
24 SPECIFIC PUBLIC BENEFIT PURPOSE OR PURPOSES, PREPARED IN ACCORDANCE WITH
25 A THIRD-PARTY STANDARD APPLIED CONSISTENTLY WITH ANY APPLICATION OF THAT
26 STANDARD IN PRIOR BENEFIT REPORTS OR ACCOMPANIED BY AN EXPLANATION OF
27 THE REASONS FOR ANY INCONSISTENT APPLICATION;

28 (3) THE COMPENSATION PAID BY THE BENEFIT CORPORATION DURING THE YEAR
29 TO EACH DIRECTOR IN THAT CAPACITY; AND

30 (4) THE NAME OF EACH PERSON THAT OWNS BENEFICIALLY OR OF RECORD FIVE
31 PERCENT OR MORE OF THE OUTSTANDING SHARES OF THE BENEFIT CORPORATION.

32 (B) THE BENEFIT REPORT MUST BE SENT ANNUALLY TO EACH SHAREHOLDER WITH-
33 IN ONE HUNDRED TWENTY DAYS FOLLOWING THE END OF THE FISCAL YEAR OF THE
34 BENEFIT CORPORATION OR AT THE SAME TIME THAT THE BENEFIT CORPORATION
35 DELIVERS ANY OTHER ANNUAL REPORT TO ITS SHAREHOLDERS. DELIVERY OF A
36 BENEFIT REPORT TO SHAREHOLDERS IS IN ADDITION TO ANY OTHER REQUIREMENT
37 TO DELIVER AN ANNUAL REPORT TO SHAREHOLDERS.

38 (C) A BENEFIT CORPORATION MUST POST ITS MOST RECENT BENEFIT REPORT ON
39 THE PUBLIC PORTION OF ITS WEBSITE, IF ANY, EXCEPT THAT THE COMPENSATION
40 PAID TO DIRECTORS AND ANY FINANCIAL OR PROPRIETARY INFORMATION INCLUDED
41 IN THE BENEFIT REPORT MAY BE OMITTED FROM THE BENEFIT REPORT AS POSTED.

42 (D) CONCURRENTLY WITH THE DELIVERY OF THE BENEFIT REPORT TO SHAREHOLD-
43 ERS PURSUANT TO PARAGRAPH (B) OF THIS SECTION, THE BENEFIT CORPORATION
44 MUST DELIVER A COPY OF THE BENEFIT REPORT TO THE DEPARTMENT FOR FILING,
45 EXCEPT THAT THE COMPENSATION PAID TO DIRECTORS AND ANY FINANCIAL OR
46 PROPRIETARY INFORMATION INCLUDED IN THE BENEFIT REPORT MAY BE OMITTED
47 FROM THE BENEFIT REPORT AS FILED UNDER THIS SECTION.

48 (E) IF A BENEFIT CORPORATION HAS NOT DELIVERED A BENEFIT REPORT TO THE
49 SECRETARY OF STATE FOR A PERIOD OF TWO YEARS, THE SECRETARY OF STATE MAY
50 PREPARE AND FILE A STATEMENT THAT THE CORPORATION HAS FORFEITED ITS
51 STATUS AS A BENEFIT CORPORATION AND IS NO LONGER SUBJECT TO THIS ARTI-
52 CLE. IF THE CORPORATION SUBSEQUENTLY DELIVERS A BENEFIT REPORT TO THE
53 SECRETARY OF STATE FOR FILING, THE STATUS OF THE CORPORATION AS A BENE-
54 FIT CORPORATION SHALL BE AUTOMATICALLY REINSTATED UPON THE FILING OF THE
55 BENEFIT REPORT BY THE SECRETARY OF STATE AND THE CORPORATION SHALL AGAIN
56 BE SUBJECT TO THIS ARTICLE.

1 (F) THE ANNUAL BENEFIT REPORT SHALL BE IN ADDITION TO ALL OTHER
2 REPORTING REQUIREMENTS UNDER THIS CHAPTER.
3 S 4. This act shall take effect on the sixtieth day after it shall
4 have become a law.