COMMITTEE REPORT

April 18, 2012

**H. 4766**

Introduced by Rep. Stringer

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**THE COMMITTEE ON JUDICIARY**

To whom was referred a Bill (H. 4766) to amend the Code of Laws of South Carolina, 1976, by adding Chapter 38 to Title 33 so as to enact the “South Carolina Benefit Corporation Act” which permits, etc., respectfully

**REPORT:**

That they have duly and carefully considered the same and recommend that the same do pass:

JAMES H. HARRISON for Committee.

**A** **BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING CHAPTER 38 TO TITLE 33 SO AS TO ENACT THE “SOUTH CAROLINA BENEFIT CORPORATION ACT” WHICH PERMITS A CORPORATION TO ELECT AS A CORPORATE PURPOSE THE PROVIDING OF CERTAIN PUBLIC BENEFITS WITHOUT SUBJECTING THE CORPORATION OR ITS DIRECTORS TO LIABILITY OR DERIVATIVE SUIT EXCEPT FOR SPECIFIED REASONS.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Title 33 of the 1976 Code is amended by adding:

“CHAPTER 38

South Carolina Benefit Corporation Act

Article 1

Preliminary Provisions

Section 33‑38‑110. This chapter may be cited as the ‘South Carolina Benefit Corporation Act’.

Section 33‑38‑120. (A) This chapter applies to all benefit corporations.

(B) The provisions of the other chapters in this title apply to benefit corporations, mutatis mutandis. If any provision of this chapter conflicts with any provision of the other chapters of this title, the provision of this chapter is controlling.

(C) Other than as provided in Section 33‑38‑210, corporations that are not benefit corporations are not subject to this chapter, and this chapter does not otherwise affect a statute or rule of law that is applicable to a corporation that is not a benefit corporation.

(D) A provision of the articles of incorporation or bylaws of a benefit corporation may not be inconsistent with or supersede a provision of this chapter, except to the extent expressly permitted in this chapter.

Section 33‑38‑130. (A) The following definitions apply to this chapter:

(1) ‘Benefit corporation’ means a domestic corporation that has elected to become subject to this chapter by including a provision in its articles of incorporation providing that it is a benefit corporation governed by this chapter and that has not terminated its status as a benefit corporation pursuant to Section 33‑38‑220.

(2) ‘Benefit director’ means the director of the benefit corporation designated as such pursuant to Section 33‑38‑410.

(3) ‘Benefit enforcement proceeding’ means any claim or action brought under Section 33‑38‑430 against a director of a benefit corporation for any of the following:

(a) failing to pursue the general public benefit purpose or any specific public benefit purpose set forth in its articles of incorporation; or

(b) violating a duty or standard of conduct under this chapter.

(4) ‘Benefit officer’ means the officer of the benefit corporation designated as such pursuant to Section 33‑38‑420.

(5) ‘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.

(6) ‘Independent person’ means, with respect to a benefit corporation, a person who does not have any material relationship with the 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, a general partner, or a manager of an entity that has a material relationship with the benefit corporation or a subsidiary of the benefit corporation. A person is not deemed to have such a material relationship only by virtue of serving as the benefit director or the benefit officer of the benefit corporation or of any subsidiary of the benefit corporation that is itself a benefit corporation. A material relationship between a person and the benefit corporation or any of its subsidiaries conclusively must be presumed to exist if any of the following apply:

(a) the person is, or has been within the last three years, an employee, other than the benefit officer, of the benefit corporation or a subsidiary of the benefit corporation;

(b) an immediate family member of the person is, or has been within the last three years, an officer, other than the benefit officer, of the benefit corporation or a subsidiary of the benefit corporation; or

(c) the person, or an entity in which the person is a director, an officer, a general partner, or a manager or owns, directly or indirectly, five percent or more of the outstanding equity interests, owns, directly or indirectly, five percent or more of the outstanding shares of any series or class of stock of the benefit corporation.

(7) ‘Specific public benefit purpose’ means a benefit that serves one or more public welfare, religious, charitable, scientific, literary, or educational purposes, or other purposes or benefits beyond the strict interest of the shareholders of the benefit corporation, including:

(a) providing low-income or underserved individuals, families, or communities with beneficial products, services, or educational opportunities;

(b) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;

(c) preserving or improving the environment;

(d) improving human health for all people, both born and unborn;

(e) promoting the arts, sciences, or advancement of knowledge;

(f) increasing the flow of capital to entities with a public benefit purpose; or

(g) conferring any other particular benefit on society or the environment.

(8) ‘Subsidiary of a person’ means an entity in which the person owns, directly or indirectly, fifty percent or more of the outstanding voting equity interests.

(9) ‘Third‑party standard’ means a standard for defining, reporting, and assessing overall corporate, social, and environmental performance that meets all of the following requirements:

(a) the standard assesses the effect of the business and its operations upon the interests listed in items (2) through (5) of Section 33‑38‑400(A);

(b) the standard is developed by an entity that is independent of the benefit corporation and satisfies the following:

(i) not more than one‑third of the members of the governing body of the entity are representatives of either an association of businesses operating in a specific industry the performance of whose members is measured by the standard or businesses whose performance is measured by the standard; or

(ii) the entity is not materially financed by an association or business described in subitem (i) of this item;

(c) the standard is developed by an entity that satisfies the following:

(i) has access to necessary expertise to assess overall corporate, social, and environmental performance; and

(ii) uses a balanced multistakeholder approach including a public comment period of at least thirty days to develop the standard;

(d) the standard is transparent because the following information about the standard is publicly available:

(i) the criteria considered when measuring the overall social and environmental performance of a business, as well as the relative weightings of those criteria; and

(ii) the process for the development and revision of the standard, including:

A. the identity of the directors, officers, any material owners, and the governing body of the entity that developed and controls revisions to the standard;

B. the process by which revisions to the standard and changes to the membership of the governing body are made; and

C. an accounting of the sources of financial support for the entity, with sufficient detail to disclose any relationships that could reasonably be considered to present a potential conflict of interest.

(B) For purposes of the definitions of ‘independent person’ and ‘subsidiary of a person’ in subsection (A) of this section, a percentage of ownership in an entity must be calculated as if all outstanding rights to acquire equity interests in the entity had been exercised.

Section 33‑38‑140. A benefit corporation is not entitled to claim an exemption from any property tax imposed by law.

Article 2

Adoption and Change of Status

Section 33‑38‑200. A domestic corporation, including a domestic corporation incorporated upon a conversion, may be incorporated as a benefit corporation by including in its initial articles of incorporation a provision providing that the corporation is a benefit corporation governed by this chapter. The articles of incorporation also must include an identification of any specific public benefit purpose or purposes as required by Section 33‑38‑300.

Section 33‑38‑210. (A) An existing domestic corporation shall become a benefit corporation upon the effectiveness of an amendment to its articles of incorporation to include a provision providing that the corporation is a benefit corporation governed by this chapter. As amended, such articles of incorporation also must include an identification of any specific public benefit purpose or purposes as required by Section 33‑38‑300. An amendment under this section must be approved in the manner required by Section 33‑38‑230. In addition to other requirements of applicable law, the notice of the meeting of shareholders to approve the amendment must include a statement by the board of directors of the reasons why the board is proposing the amendment and a discussion of the anticipated effect on the shareholders of becoming a benefit corporation.

(B) If a corporation or other entity that is not a benefit corporation is a party to a merger, conversion, or share exchange, and the surviving or acquiring corporation in the merger, conversion, or share exchange is, or is to be as a result of such transaction, a benefit corporation, the plan of merger, conversion, or share exchange must be approved in the manner required by Section 33‑38‑230. In addition to other requirements of applicable law, the notice of the meeting of shareholders to approve the plan of merger, conversion, or share exchange must include a discussion of the anticipated effect on the shareholders resulting from the surviving or acquiring corporation being a benefit corporation. Upon the completion of such transaction, the surviving or acquiring corporation to be a benefit corporation shall include a provision in its articles of incorporation providing that the corporation is a benefit corporation governed by this chapter and an identification of any specific public benefit purpose or purposes as required by Section 33‑38‑300.

Section 33‑38‑220. (A) A benefit corporation may terminate its status and cease to be subject to this chapter by amending its articles of incorporation to delete the provision that the corporation is a benefit corporation governed by this chapter. Such an amendment must be approved in the manner required by Section 33‑38‑230. The notice of the meeting of shareholders to approve the amendment must include a statement by the board of directors of the reasons why the board is proposing the amendment and a discussion of the anticipated effect on the shareholders of terminating the status of the corporation as a benefit corporation.

(B) If a plan of merger, conversion, or share exchange would have the effect of terminating the status of a benefit corporation as a benefit corporation, the plan must be approved in the manner required by Section 33‑38‑230.

Section 33‑38‑230. In addition to any other requirements of applicable law, where specified in this chapter that approval of a matter must be in the manner required by this section, the following requirements apply:

(1) With respect to a corporation, including a benefit corporation, such matter must be approved by the affirmative vote of sixty‑six and two‑thirds percent of the outstanding shares or each class and series of stock of the corporation, voting as separate voting groups, regardless of any limitation in the corporation’s articles of incorporation or bylaws of the voting rights of such class or series.

(2) With respect to any entity incorporated as a nonprofit corporation, the matter must be approved by the affirmative vote of sixty‑six and two‑thirds percent of the votes cast by the members entitled to vote thereon.

(3) With respect to an entity organized as a limited liability corporation or partnership, the matter must be approved in the same manner as would be required for the approval of a merger of such entity, unless otherwise provided in the articles of entity, operating agreement, or partnership agreement of the entity.

Article 3

Corporate Purposes

Section 33‑38‑300. (A) A benefit corporation shall have as one of its corporate purposes the creation of a general public benefit. A benefit corporation may include in its articles of incorporation other corporate purposes, including the purpose of engaging in any lawful business.

(B) A benefit corporation may include as a corporate purpose in its articles of incorporation one or more specific public benefit purposes in addition to its purposes under subsection (A) of this section.

(C) A benefit corporation may amend its articles of incorporation to add, amend, or delete the identification of a specific public benefit purpose. Such an amendment must be approved by the shareholders of the benefit corporation in the manner required by Section 33‑38‑230.

Article 4

Accountability

Section 33‑38‑400. (A) In discharging their duties as directors of a benefit corporation, directors shall consider the effects of any action or decision not to act upon the following:

(1) the shareholders of the benefit corporation;

(2) the employees and workforce of the benefit corporation, its subsidiaries, and suppliers;

(3) the interests of customers to the extent they are beneficiaries of the general or specific public benefit purposes of the benefit corporation;

(4) the local community and society, including the interests of each community in which offices or facilities of the benefit corporation, its subsidiaries, or suppliers are located;

(5) the local and global environment;

(6) the short‑term and long‑term interests of the benefit corporation, including benefits that may accrue to the benefit corporation from its long‑term plans and the possibility that these interests may be best served by the continued independence of the benefit corporation; and

(7) the ability of the benefit corporation to accomplish its general and any specific public benefit purpose.

(B) In addition to the required considerations in subsection (A) of this section, a director of a benefit corporation may consider the effects of any action or decision not to act upon the following:

(1) the resources, intent, and conduct (past, stated, and potential) of any person seeking to acquire control of the benefit corporation; and

(2) other pertinent factors or the interests of any other group that the director in good faith considers to be appropriate.

(C) A director of a benefit corporation need not give priority to the interests of a particular person or group referred to in subsections (A) and (B) of this section over the interests of any other person or group unless the benefit corporation’s articles of incorporation explicitly specify a priority of interests.

(D) The consideration of interests and factors in the manner required by this section is not deemed to be inconsistent with the requirements of Section 33‑38‑300.

(E) A director is not liable for monetary damages arising out of an action under this chapter with respect to any of the following:

(1) any act taken as a director, or any omission to act as a director, other than any act or omission that the director at the time of such act or omission knew or believed to be clearly in conflict with the benefit corporation’s general public benefit purpose and any specific public benefit purpose stated in its articles of incorporation; or

(2) failure of the benefit corporation to create a general or specific public benefit.

Section 33‑38‑410. (A) The board of directors of a benefit corporation, by resolution, shall designate one director who is an independent person to be the benefit director. The benefit director, in addition to the powers, duties, rights, and immunities of the other directors of the benefit corporation, shall have the powers, duties, rights, and immunities provided in this section.

(B) The benefit director may serve as the benefit officer at the same time as serving as the benefit director. The articles of incorporation or bylaws of a benefit corporation may prescribe additional qualifications of the benefit director not inconsistent with this section.

(C) The benefit director shall prepare, and the benefit corporation shall include in the annual benefit report to shareholders required by Section 33‑38‑500, the opinion of the benefit director on the following:

(1) whether the benefit corporation acted in accordance with its general and any specific public benefit purpose in all material respects during the period covered by the report;

(2) whether the benefit corporation conferred a general public benefit and any specific public benefit during the period covered by the report; and

(3) whether the directors complied with Section 33‑38‑400.

If the benefit director finds a failure under item (1), (2), or (3) of this subsection, the benefit director shall include in the annual benefit report a description, to the extent relevant, of the ways in which the benefit corporation or its directors failed to act or comply.

(D) If a benefit corporation dispenses with a board of directors as provided by law, the articles of incorporation of the benefit corporation must provide that the persons who perform the duties of the board of directors designate an independent person with the powers, duties, rights, and immunities of a benefit director.

(E) Regardless of whether the articles of incorporation or the bylaws of a benefit corporation include a provision limiting or eliminating the personal liability of directors, a benefit director personally is not liable for monetary damages for any act or omission taken in such capacity unless the act or omission constitutes a transaction from which the director derived an improper personal benefit, willful misconduct, or a knowing violation of law.

Section 33‑38‑420. (A) A benefit corporation may have an officer designated as the benefit officer.

(B) The duties of the benefit officer include the following:

(1) monitoring the benefit corporation’s pursuit of the general and any specific public benefits purpose of the benefit corporation and the general and any specific public benefit created by the benefit corporation;

(2) performing such other duties to the extent provided in either the bylaws of the benefit corporation or a resolution adopted by the board of directors of the benefit corporation that is not in conflict with the bylaws; and

(3) preparing the annual benefit report required by Section 33‑38‑500.

Section 33‑38‑430. (A) The duties of directors under this chapter may be enforced only in a benefit enforcement proceeding. A person may not bring an action or assert a claim against a benefit corporation or its directors with respect to the duties of directors under this chapter, except in a benefit enforcement proceeding.

(B) A benefit enforcement proceeding may be commenced or maintained by only the following:

(1) directly, by the benefit corporation; or

(2) derivatively, by any of the following:

(a) a shareholder that owns five percent or more of the shares in the benefit corporation;

(b) a director;

(c) a person or group of persons that owns, directly or indirectly, five percent or more of the outstanding equity voting interests in an entity of which the benefit corporation is a subsidiary; or

(d) other persons specified in the articles of incorporation or bylaws of the benefit corporation.

(C) A benefit enforcement proceeding commenced or maintained derivatively under item (2) of subsection (B) of this section as provided by law is subject to the requirements applicable to derivative proceedings, except that such requirements may be interpreted to reflect that a benefit enforcement proceeding may be commenced and maintained by those persons listed in item (2) of subsection (B) of this section.

Article 5

Annual Reporting

Section 33‑38‑500. (A) A benefit corporation shall prepare an annual benefit report that includes all of the following:

(1) A narrative description of all of the following:

(a) the manner in which the benefit corporation has pursued its general public benefit purposes during the year and the extent to which a general public benefit was created;

(b) the manner in which the benefit corporation has pursued any specific public benefit purposes during the year and the extent to which a specific public benefit was created; and

(c) circumstances that have materially hindered the pursuit by the benefit corporation of its general and any specific public benefit purposes or the creation by the benefit corporation of a general or specific public benefit.

(2) An assessment of the social and environmental performance of the benefit corporation prepared in accordance with a third‑party standard applied consistently with any application of that standard in prior benefit reports or accompanied by an explanation of the reasons for any inconsistent application.

(3) The name of the benefit director and the benefit officer and the address to which correspondence to each of them may be directed.

(4) The compensation paid by the benefit corporation during the year to each director in the capacity as a director.

(5) The name of each person that owns five percent or more of the outstanding shares of the benefit corporation either indirectly to the extent known to the benefit corporation without independent investigation, or of record.

(6) The statement of the benefit director described in Section 33‑38‑410(C).

(7) A statement of any relationship, including a financial or governance relationship, between the benefit corporation and the entity that developed the third‑party standard that might affect the credibility of the objective assessment of the third‑party standard, including any relationships between the directors, officers, or material owners of the benefit corporation and the directors, officers, or material owners of the entity that developed the third‑party standard.

(B) The benefit report must be sent annually to each shareholder within one hundred twenty days following the end of the fiscal year of the benefit corporation or at the same time that the benefit corporation delivers any other annual report to its shareholders, whichever occurs first.

(C) A benefit corporation shall post each annual benefit report on the publicly accessible portion of its Internet website, if it maintains such a website, for a period of five years from the date the annual benefit report is first sent to shareholders. The compensation paid to directors and any financial or proprietary information included in the benefit report may be omitted from the benefit report as posted.

(D) The annual report that a benefit corporation is required to deliver to the Secretary of State must include the most recent benefit report delivered to shareholders pursuant to subsection (B), except that the compensation paid to directors and any financial or proprietary information included in the benefit report may be omitted from the benefit report delivered to the Secretary of State under this section.

Article 6

Shareholder Dissent

Section 33‑38‑600. In addition to any rights granted by law, a shareholder is entitled to dissent from and obtain payment of the fair value of his shares in the event of the consummation of a designation of a corporation as a benefit corporation pursuant to the provisions of this chapter.”

SECTION 2. This act takes effect upon approval by the Governor.

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