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CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 361

Introduced by Assembly Member Huffman
(Principal coauthor: Assembly Member Blumenfield)
(Coauthor: Assembly Member Dickinson)
(Coauthors: Senators Hancock and Leno)

February 14, 2011

An act to add Part 13 (commencing with Section 14600) to Division 3 of Title 1 of the Corporations Code, relating to benefit corporations.

LEGISLATIVE COUNSEL'S DIGEST

AB 361, as amended, Huffman. Benefit corporations.

Existing law, the General Corporation Law, authorizes and regulates the formation and governance of general corporations. The Nonprofit Corporation Law authorizes the formation and governance of nonprofit public benefit corporations, nonprofit mutual benefit corporations, and nonprofit religious corporations, and specifies the respective purposes for which those corporations may lawfully be formed. Existing law specifies the duties of corporate directors and the rights of shareholders. Existing law does not provide for the formation and governance of benefit corporations.

This bill would authorize and regulate the formation and governance of a new form of corporate entity known as a benefit corporation. The bill would also permit an existing corporation to become a benefit corporation by amendment to its articles of incorporation, as specified, adopted by at least a minimum status vote, as defined, and would permit a corporation to become a benefit corporation through a merger, reorganization, or conversion, or domestic other business entity, as specified.

This bill would define “benefit corporation” to mean a corporation that has been organized under the General Corporation Law and has elected to become subject to the provisions of the bill, as specified. The bill would provide that a benefit corporation may be formed for the purpose of creating a general public benefit, defined as a material positive impact on society and the environment, taken as a whole, as assessed against a 3rd-party standard, as defined, that satisfies certain requirements. The bill would also provide that a benefit corporation may identify one or more specific public benefits, as defined, as an additional purpose of the corporation, including, without limitation, providing low-income or underserved individuals or communities with beneficial products or services, promoting economic opportunity for individuals or communities beyond the creation of jobs in the ordinary course of business, preserving the environment, and improving human health.

This bill would require directors to consider the impacts of any action or proposed action upon specified considerations, including, among others, the shareholders and employees, and of customers who are beneficiaries of the general or specific public benefit purposes, and the environment, and would allow directors to consider the impacts of those actions on, among other things, the resources, intent, and conduct of any person seeking to acquire control of the benefit corporation.

This bill would require the board of directors to prepare a specified statement relating to the public benefit purposes of the corporation. The bill would require the benefit corporation to prepare an annual benefit report to include, among other things, a statement indicating whether, in the board’s opinion, the benefit corporation failed to pursue its general public benefit and any specific public benefit, a description of the ways in which the benefit corporation pursued those benefits, the extent to which those benefits were created, and the process and rationale for selecting the 3rd-party standard used to prepare the benefit reports, and would require the benefit corporation to file with the Secretary of State

a copy of the benefit report together with a filing fee in a specified amount to cover the reasonable regulatory costs associated with maintaining those filings.

This bill would include provisions governing the fiduciary duty and liability of an officer or director of a benefit corporation. The bill would provide that the duties of a director or officer, and the general, and any specific, public benefit purpose of a benefit corporation, may be enforced only in a benefit enforcement proceeding, as defined, that would be permitted to be commenced or maintained only as specified.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Part 13 (commencing with Section 14600) is
2 added to Division 3 of Title 1 of the Corporations Code, to read:

3

4 PART 13. BENEFIT CORPORATIONS

5

6 CHAPTER 1. PRELIMINARY PROVISIONS

7

8 14600. (a) This part shall be applicable to all benefit
9 corporations.

10 (b) The existence of a provision of this part shall not of itself
11 create any implication that a contrary or different rule of law is or
12 would be applicable to a business corporation that is not a benefit
13 corporation. This part shall not affect any statute or rule of law
14 that is or would be applicable to a corporation that is not a benefit
15 corporation.

16 (c) The provisions of the General Corporation Law (Division
17 1 (commencing with Section 100)) shall apply to benefit
18 corporations, except where those provisions are in conflict with
19 or inconsistent with the provisions of this part.

20 14601. As used in this part:

21 (a) "Benefit corporation" means a corporation organized under
22 the General Corporation Law that has elected to become subject
23 to this part and whose status as a benefit corporation has not been
24 terminated as provided in this part.

25 (b) "Benefit enforcement proceeding" means a claim or action
26 relating to any of the following:

1 (1) Failure to pursue the general public benefit purpose of the
2 benefit corporation or any specific public benefit purpose set forth
3 in its articles.

4 (2) Violation of a duty or standard of conduct imposed on a
5 director pursuant to this part.

6 (3) Failure of the benefit corporation to deliver or post an annual
7 benefit report as required by Section 14630.

8 (c) “General public benefit” means a material positive impact
9 on society and the environment, taken as a whole, as assessed
10 against a third-party standard, from the business and operations
11 of a benefit corporation.

12 (d) “Minimum status vote” means that:

13 (1) In the case of a corporation, in addition to any other approval
14 or vote required by Division 1 (commencing with Section 100) or
15 the articles of incorporation, both of the following shall apply:

16 (A) The shareholders of every class or series shall be entitled
17 to vote on the corporate action regardless of any limitation stated
18 in the articles or bylaws on the voting rights of any class or series.

19 (B) The corporate action shall be approved by the outstanding
20 shares of each class or series by at least two-thirds of the votes, *or*
21 *greater vote if required in the articles of incorporation*, that all
22 shareholders of the class or series are entitled to cast on that action.

23 (2) In the case of a domestic other business entity (Section
24 167.7), both of the following shall apply in addition to any other
25 approval, vote, or consent required by the statutory law, if any,
26 that principally governs the internal affairs of the entity or any
27 provision of the publicly filed record or document required to form
28 the entity, if any, or of any agreement binding some or all of the
29 holders of equity interests in the entity:

30 (A) The holders of every class or series of interest in the entity
31 that are entitled to receive a distribution of any kind from the entity
32 regardless of any otherwise applicable limitation on the voting
33 rights of the interest.

34 (B) The action shall be approved by the vote or consent of the
35 holders described in subparagraph (A) by at least two-thirds of the
36 votes or consents, *or greater vote or consent if required in the*
37 *articles of incorporation*, of those holders.

38 (e) “Specific public benefit” includes all of the following:

39 (1) Providing low-income or underserved individuals or
40 communities with beneficial products or services.

1 (2) Promoting economic opportunity for individuals or
2 communities beyond the creation of jobs in the ordinary course of
3 business.

4 (3) Preserving the environment.

5 (4) Improving human health.

6 (5) Promoting the arts, sciences, or advancement of knowledge.

7 (6) Increasing the flow of capital to entities with a public benefit
8 purpose.

9 (7) The accomplishment of any other particular benefit for
10 society or the environment.

11 (f) “Subsidiary” of a person means an entity in which the person
12 owns beneficially or of record 50 percent or more of the
13 outstanding equity interests. For purposes of this definition, a
14 percentage of ownership in an entity shall be calculated as if all
15 outstanding rights to acquire equity interests in the entity had been
16 exercised.

17 (g) “Third-party standard” means a standard for defining,
18 reporting, and assessing overall corporate social and environmental
19 performance to which all of the following apply:

20 (1) The standard is a comprehensive assessment of the impact
21 of the business and the business’s operations upon the
22 considerations listed in paragraphs (2) to (5), inclusive, of
23 subdivision (b) of Section 14620.

24 (2) The standard is developed by an entity that has no material
25 financial relationship with the benefit corporation or any of its
26 subsidiaries and that satisfies both of the following requirements:

27 (A) Not more than one-third of the members of the governing
28 body of the entity are representatives of any of the following:

29 (i) Associations of businesses operating in a specific industry,
30 the performance of whose members is measured by the standard.

31 (ii) Businesses from a specific industry or an association of
32 businesses in that industry.

33 (iii) Businesses whose performance is assessed against the
34 standard.

35 (B) The entity is not materially financed by an association or
36 business described in subparagraph (A).

37 (3) The standard is developed by an entity that does both of the
38 following:

39 (A) Accesses necessary and appropriate expertise to assess
40 overall corporate social and environmental performance.

1 (B) Uses a balanced multistakeholder approach, including a
2 public comment period of at least 30 days to develop the standard.

3 (4) All of the following information regarding the standard is
4 publicly available:

5 (A) The criteria considered when measuring the overall social
6 and environmental performance of a business.

7 (B) The relative weightings assigned to the criteria described
8 in subparagraph (A).

9 (C) The identity of the directors, officers, any material owners,
10 and the governing body of the entity that developed, and controls
11 revisions to, the standard.

12 (D) The process by which revisions to the standard and changes
13 to the membership of the governing body described in
14 subparagraph (C) are made.

15 (E) An accounting of the sources of financial support for the
16 entity, with sufficient detail to disclose any relationships that could
17 reasonably be considered to present a potential conflict of interest.

18 14602. A benefit corporation shall be formed in accordance
19 with Chapter 2 (commencing with Section 200) of Division 1
20 except that the articles shall also state that the corporation is a
21 benefit corporation *and shall identify any specific public benefit*
22 *adopted pursuant to Section 14610.*

23 14603. (a) A corporation may become a benefit corporation
24 under this part by amending the corporation's articles so that the
25 articles contain a statement that the corporation is a benefit
26 corporation. The amendment shall not be effective unless it is
27 adopted by at least the minimum status vote. If the amendment is
28 adopted, a shareholder of the corporation may, by complying with
29 Chapter 13 (commencing with Section 1300) of Division 1, require
30 the corporation to purchase at their fair market value the shares
31 owned by the shareholder which are dissenting shares as defined
32 in subdivision (b) of Section 1300 in accordance with the
33 procedures in that chapter, as if the adoption of the amendment
34 were a reorganization to which that chapter applies.

35 (b) If a corporation that is not a benefit corporation is a
36 constituent corporation in a merger reorganization or is the acquired
37 corporation in an exchange reorganization, and the surviving
38 corporation in the merger reorganization is to be a benefit
39 corporation or the articles of the acquired corporation are to be
40 amended in the exchange reorganization to provide that it will be

1 a benefit corporation, then the reorganization shall not be effective
2 unless the reorganization is approved by the corporation or
3 domestic other business entity by at least the minimum status vote.

4 (c) If a domestic other business entity is a party to a merger
5 reorganization and the surviving corporation in the reorganization
6 is to be a benefit corporation, then the reorganization shall not be
7 effective unless the reorganization is approved by the domestic
8 other business entity by at least the minimum status vote.

9 (d) If a domestic other business entity is the converting entity
10 (subdivision (d) of Section 1150) in a conversion in which the
11 converted corporation (subdivision (a) of Section 1150) is a benefit
12 corporation, the conversion shall not be effective unless the
13 conversion is approved by the domestic other business entity by
14 at least the minimum status vote.

15 14604. (a) A benefit corporation may terminate its status as a
16 benefit corporation and cease to be subject to this part by amending
17 the corporation's articles to delete the provision required by Section
18 14602. The amendment shall not be effective unless the amendment
19 is adopted by at least the minimum status vote. If the amendment
20 is adopted, a shareholder of the corporation may, by complying
21 with Chapter 13 (commencing with Section 1300) of Division 1,
22 require the corporation to purchase at their fair market value the
23 shares owned by the shareholder which are dissenting shares as
24 defined in subdivision (b) of Section 1300 in accordance with the
25 procedures in that chapter.

26 (b) If a reorganization (Section 181) would have the effect of
27 terminating the status of a corporation as a benefit corporation,
28 the reorganization shall not be effective unless the reorganization
29 is approved by at least the minimum status vote.

30 (c) If a benefit corporation is the converting corporation (Section
31 1150) in a conversion (Section 161.9), the conversion shall not be
32 effective unless the conversion is approved by at least the minimum
33 status vote.

34 (d) A sale, lease, conveyance, exchange, transfer, or other
35 disposition of all or substantially all of the assets of a benefit
36 corporation, unless the transaction is in the usual and ordinary
37 course of business of the benefit corporation, shall not be effective
38 unless the transaction is approved by at least the minimum status
39 vote. If the transaction is approved, a shareholder of the corporation
40 may, by complying with Chapter 13 (commencing with Section

1 1300) of Division 1, require the corporation to purchase at their
2 fair market value the shares owned by the shareholder which are
3 dissenting shares as defined in subdivision (b) of Section 1300 in
4 accordance with the procedures in that chapter, as if the transaction
5 were a reorganization to which that chapter applies.

6
7 CHAPTER 2. CORPORATE PURPOSES
8

9 14610. (a) A benefit corporation shall have the purpose of
10 creating a general public benefit. This purpose is in addition to,
11 and may be a limitation on, the corporation's purpose under Section
12 206 and any specific purpose set forth in its articles in accordance
13 with subdivision (b).

14 (b) ~~The~~ *In addition to the provisions required by Section 202,*
15 *the articles of incorporation of a benefit corporation shall contain*
16 *the following statement: "This corporation is a benefit*
17 *corporation." Notwithstanding subdivision (b) of Section 202, the*
18 *articles of a benefit corporation may identify one or more specific*
19 *public benefits that shall be the purpose or purposes of the benefit*
20 *corporation to create in addition to its purposes under Section 206*
21 *and subdivision (a). The identification of a specific public benefit*
22 *under this subdivision does not limit the obligation of a benefit*
23 *corporation to create any other general public benefit.*

24 (c) The creation of general and specific public benefit as
25 provided in subdivisions (a) and (b) shall be deemed to be in the
26 best interests of the benefit corporation.

27 (d) A benefit corporation may amend its articles to add, amend,
28 or delete the identification of a specific public benefit that shall
29 be the purpose of the benefit corporation to create. The amendment
30 shall not be effective unless the amendment is adopted by at least
31 the minimum status vote.

32
33 CHAPTER 3. ACCOUNTABILITY
34

35 14620. (a) A director shall perform the duties of a director
36 including duties as a member of any committee of the board upon
37 which the director may serve, in good faith, in a manner the director
38 believes to be in the best interests of the benefit corporation and
39 with that care, including reasonable inquiry, as an ordinarily

1 prudent person in a like position would use under similar
2 circumstances.

3 (b) In discharging their respective duties, and in considering
4 the best interests of the benefit corporation, the board of directors,
5 committees of the board, and individual directors of a benefit
6 corporation shall consider the impacts of any action or proposed
7 action upon all of the following:

8 (1) The shareholders of the benefit corporation.

9 (2) The employees and workforce of the benefit corporation
10 and its subsidiaries and suppliers.

11 (3) The interests of customers of the benefit corporation as
12 beneficiaries of the general or specific public benefit purposes of
13 the benefit corporation.

14 (4) Community and societal considerations, including those of
15 any community in which offices or facilities of the benefit
16 corporation or its subsidiaries or suppliers are located.

17 (5) The local and global environment.

18 (6) The short-term and long-term interests of the benefit
19 corporation, including benefits that may accrue to the benefit
20 corporation from its long-term plans and the possibility that these
21 interests may be best served by retaining control of the benefit
22 corporation rather than selling or transferring control to another
23 entity.

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

26 (c) In discharging their respective duties, the persons described
27 in subdivision (b) may consider any of the following:

28 (1) The resources, intent, and conduct, including past, stated,
29 and potential conduct, of any person seeking to acquire control of
30 the corporation.

31 (2) Any other pertinent factors or the interests of any other
32 person or group.

33 (d) In discharging their respective duties, the persons described
34 in subdivision (a) shall not be required to give priority to any
35 particular factor or the interests of any particular person or group
36 referred to in subdivision (b) or (c) over any other factor or the
37 interests of any other person or group unless the benefit corporation
38 has stated its intention to give priority to a specific public benefit
39 purpose identified in the articles.

1 (e) In performing the duties of a director, a director shall be
2 entitled to rely on information, opinions, reports, or statements,
3 including financial statements and other financial data, in each
4 case prepared or presented by any of the following:

5 (1) One or more officers or employees of the benefit corporation
6 whom the director believes to be reliable and competent in the
7 matters presented.

8 (2) Counsel, independent accountants, or other persons as to
9 matters that the director believes to be within those persons'
10 professional or expert competence.

11 (3) A committee of the board upon which the director does not
12 serve, as to matters within its designated authority, which
13 committee the director believes to merit confidence, so long as, in
14 any of those cases, the director acts in good faith, after reasonable
15 inquiry when the need therefor is indicated by the circumstances
16 and without knowledge that would cause that reliance to be
17 unwarranted.

18 (f) A director shall not be liable for monetary damages under
19 this part for any failure of the benefit corporation to create a general
20 or specific public benefit.

21 (g) A person who performs the duties of a director in accordance
22 with this part shall not be liable for monetary damages for any
23 alleged failure to discharge the person's obligations as a director.

24 (h) In addition to the limitations provided in subdivisions (f)
25 and (g), the liability of a director for monetary damages may be
26 eliminated or limited in a benefit corporation's articles to the extent
27 provided in paragraph (10) of subdivision (a) of Section 204.

28 (i) A director shall not have a fiduciary duty to a person that is
29 a beneficiary of the general or specific public benefit purposes of
30 a benefit corporation arising from the status of the person as a
31 beneficiary.

32 (j) A director of a foreign corporation that is subject to Section
33 2115 shall not be subject to Section 309 and shall be subject instead
34 to this section if the director of the foreign corporation is subject
35 to duties under its articles of incorporation, bylaws, or the law of
36 its jurisdiction of incorporation similar to the duties of directors
37 under this section.

38 14621. (a) The board of directors of a benefit corporation shall
39 prepare for inclusion in the annual benefit report to shareholders
40 required by Section 14630, a statement indicating whether, in the

1 opinion of the board of directors, the benefit corporation failed to
2 pursue its general, and any specific, public benefit purpose in all
3 material respects during the period covered by the report.

4 (b) If, in the opinion of the board of directors, the benefit
5 corporation failed to pursue its general, and any specific, public
6 benefit purpose, the statement required by subdivision (a) shall
7 include a description of the ways in which the benefit corporation
8 failed to pursue its general, and any specific, public benefit
9 purpose.

10 14622. (a) Each officer of a benefit corporation shall consider
11 the interests and factors described in Section 14620 in the manner
12 provided in that section when either of the following applies:

13 (1) The officer has discretion to act with respect to a matter.

14 (2) It reasonably appears to the officer that the matter may have
15 a material effect on any of the following:

16 (A) The creation of a general or specific public benefit by the
17 benefit corporation.

18 (B) Any of the interests or factors referred to in subdivision (b)
19 of Section 14620.

20 (b) The consideration by an officer of interests and factors in
21 the manner described in subdivision (a) shall not constitute a
22 violation of the duties of the officer.

23 (c) An officer shall not be liable for monetary damages under
24 this part for any of the following:

25 (1) Any action taken as an officer if the officer performed the
26 duties of the position in compliance with this section.

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

29 (d) An officer shall not have a fiduciary duty to a person that is
30 a beneficiary of the general or specific public benefit purposes of
31 a benefit corporation arising from the status of the person as a
32 beneficiary.

33 14623. (a) No person may bring an action or assert a claim
34 against a benefit corporation or its directors or officers under this
35 chapter except in a benefit enforcement proceeding.

36 (b) A benefit enforcement proceeding may be commenced or
37 maintained only as follows:

38 (1) Directly by the benefit corporation.

39 (2) Derivatively by any of the following:

40 (A) A shareholder.

1 (B) A director.

2 (C) A person or group of persons that owns beneficially or of
3 record 5 percent or more of the equity interests in an entity of
4 which the benefit corporation is a subsidiary.

5 (D) Other persons as have been specified in the articles or
6 bylaws of the benefit corporation.

7 (c) A benefit corporation shall not be liable for monetary
8 damages under this part for any failure of the benefit corporation
9 to create a general or specific public benefit.

10 (d) If the court in a benefit enforcement proceeding finds that
11 a failure to comply with this part was without justification, the
12 court may award an amount sufficient to reimburse the plaintiff
13 for the reasonable expenses incurred by the plaintiff, including
14 attorney’s fees and expenses, in connection with the benefit
15 enforcement proceeding.

16

17

CHAPTER 4. TRANSPARENCY

18

19 14630. (a) A benefit corporation shall deliver to each
20 shareholder an annual benefit report including all of the following:

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

22 (A) The process and rationale for selecting the third-party
23 standard used to prepare the benefit report.

24 (B) The ways in which the benefit corporation pursued a general
25 public benefit during the applicable year and the extent to which
26 that general public benefit was created.

27 (C) The ways in which the benefit corporation pursued any
28 specific public benefit that the articles state it is the purpose of the
29 benefit corporation to create and the extent to which that specific
30 public benefit was created.

31 (D) Any circumstances that have hindered the creation by the
32 benefit corporation of a general or specific public benefit.

33 (2) An assessment of the overall social and environmental
34 performance of the benefit corporation, prepared in accordance
35 with a third-party standard applied consistently with any application
36 of that standard in prior benefit reports or accompanied by an
37 explanation of the reasons for any inconsistent application. The
38 assessment does not need to be audited or certified by a third party.

39 (3) The name of each person that owns 5 percent or more of the
40 outstanding shares of the benefit corporation, either beneficially,

1 to the extent known to the benefit corporation without independent
2 investigation, or of record.

3 (4) The statement required by Section 14621.

4 (5) A statement of any connection between the entity that
5 established the third-party standard, or its directors, officers, or
6 material owners, and the benefit corporation, or its directors,
7 officers, and material owners, including any financial or
8 governance relationship that might materially affect the credibility
9 of the objective assessment of the third-party standard.

10 (b) The benefit report shall be sent annually to each shareholder
11 within 120 days following the end of the fiscal year of the benefit
12 corporation or at the same time that the benefit corporation delivers
13 any other annual report to its shareholders.

14 (c) A benefit corporation shall post all of its benefit reports on
15 the public portion of its Internet Web site, if any, except that the
16 compensation paid to directors and any financial or proprietary
17 information included in the benefit report may be omitted from
18 the benefit report as posted on the Internet Web site.

19 (d) (1) If a benefit corporation does not have an Internet Web
20 site, the benefit corporation shall provide a copy of its most recent
21 benefit report, without charge, to any person that requests a copy.

22 (2) The benefit corporation may omit any proprietary or financial
23 information, including, but not limited to, compensation paid to
24 directors, from the copy of a benefit report that the benefit
25 corporation provides pursuant to paragraph (1).

26 14631. All certificates representing shares of a benefit
27 corporation shall contain, in addition to any other statements
28 required by the General Corporation Law (Division 1 (commencing
29 with Section 100)), the following conspicuous language on the
30 face of the certificate:

31 “This entity is a benefit corporation organized under Part 13
32 (commencing with Section 14600) of Division 3 of Title 1 of the
33 California Corporations Code.”