COMMITTEE AMENDMENT AMENDED AND ADOPTED

May 31, 2012

**H. 4766**

Introduced by Reps. Stringer, Weeks and Funderburk

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Read the first time May 1, 2012.

**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 referred to and cited as the ‘South Carolina Benefit Corporation Act’.

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

(B) The provisions contained in Chapters 1‑19 of this title apply to benefit corporations except where those provisions conflict with provisions contained in this chapter, in which case the provisions contained in this chapter control.

(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. A benefit corporation may be simultaneously subject to this chapter and one or more other statutes that provide for the incorporation of a specific type of business corporation, including, but not limited to, a statutory close corporation or a professional corporation.

(D) A provision of the articles of incorporation or bylaws of a benefit corporation may not be inconsistent with a provision of this chapter.

(E) The formation of a business entity pursuant to provisions other than Title 33, Chapter 38 does not prohibit the business entity from including in its general powers consideration or donations for the public welfare, or for charitable, scientific, or education purposes, as provided in the South Carolina Business Corporation Act.

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 and that has not terminated its status as a benefit corporation pursuant to Section 33‑38‑220.

(2) ‘Benefit director’ means either:

(a) the director of the benefit corporation as designated pursuant to Section 33‑38‑410; or

(b) a person with one or more powers, duties, or rights of a benefit director to the extent provided in the articles of incorporation pursuant to Section 33‑38‑410(D).

(3) ‘Benefit enforcement proceeding’ means any claim or action for any of the following:

(a) failing to pursue or create the general public benefit or a specific public benefit purpose pursuant to 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 assessed against 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 does not have a material relationship solely 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 is 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, or 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;

(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 and the environment.

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

(9) ‘Third‑party standard’ means a standard for defining, reporting, and assessing 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 an association of businesses operating in a specific industry the performance of whose members is measured by the standard, businesses from a specific industry or an association of businesses in that industry, or businesses whose performance is assessed against 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 a person 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 original articles of incorporation a provision stating that the corporation is a benefit corporation governed by this chapter. The articles of incorporation also must include an identification of a specific public benefit purpose as required by Section 33‑38‑300.

Section 33‑38‑210. (A) An existing domestic corporation shall become a benefit corporation on the effective date of the amendment to its articles of incorporation to include a provision providing that the corporation is a benefit corporation governed by this chapter. As amended, the articles of incorporation also must include an identification of any specific public benefit purpose as required by Section 33‑38‑300. An amendment under this section must be approved in the manner required by Section 33‑38‑230.

(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 resulting entity 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. Upon the completion of the transaction, in order for the surviving or resulting entity to be a benefit corporation it must include a provision in its articles of incorporation providing that the corporation is a benefit corporation governed by this chapter and identify any specific public benefit purpose 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 remove the provision that the corporation is a benefit corporation governed by this chapter. The amendment must be approved in the manner required by Section 33‑38‑230. Any sale, lease, exchange, or other disposition of all, or substantially all, of the property of a benefit corporation, unless the transaction is in the usual and regular course of business, shall not be effective unless it is approved in the manner required by Section 33‑38‑20.

(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, the matter must be approved by the affirmative vote of sixty‑six and two‑thirds percent of the outstanding shares of 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.

(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 the entity, unless otherwise provided in the entity’s organizational documents, operating agreement, or partnership agreement of the entity.

Article 3

Corporate Purposes

Section 33‑38‑300. (A) In addition to corporate purposes provided in Section 33‑3‑101, a benefit corporation shall have as one of its corporate purposes the creation of a general public benefit.

(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. The identification of a specific public benefit purpose pursuant to this subsection does not limit the obligation of a benefit corporation pursuant to subsection (A).

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

(D) The creation of general public benefit and specific public benefit pursuant to subsections (A) and (B) is in the best interests of a benefit corporation.

(E) A professional corporation that is a benefit corporation does not violate Section 33‑19‑110.

Article 4

Accountability

Section 33‑38‑400. (A) In discharging the duties of their respective positions and in considering the best interests of the benefit corporation, the board of directors, committees of the board of directors, and individual directors of a benefit corporation, 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) community and societal factors, 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), a director of a benefit corporation may consider the following:

(1) the resources, intent, and past, stated, and potential conduct 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 its intention to give priority to certain interests related to its accomplishment of its general public benefit purpose or of a specific public benefit purpose.

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

(E) A director is not personally liable for monetary damages for:

(1) any act taken as a director, or any omission to act as a director, if the director performed the duties of office in compliance with Sections 33‑8‑300, 33-8-310, 33-8-320, or 33-8-330; or

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

(F) A director does not have a duty to a person that is a beneficiary of the general public benefit purpose or a specific public benefit purpose of a benefit corporation arising from the status of the person as a beneficiary.

Section 33‑38‑410. (A) The board of directors of a benefit corporation 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. The benefit director shall be elected, and may be removed, in the manner provided in Article 1, Chapter 8 of Title 33.

(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)(1) 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 concerning the following matters:

(a) 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;

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

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

(2) If the benefit director finds a failure under item (a), (b), or (c) 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 a person who exercises one or more of the powers, duties, rights, or obligations of a benefit director under this subsection shall have the powers, duties, rights, and obligations of a benefit director or may share the powers duties, rights, and obligations of a benefit director with one or more other persons. A person who has the powers, duties, rights, and obligations of a benefit director pursuant to this subsection:

(1) does not need to be independent of the benefit corporation;

(2) shall have the immunities of a benefit director; and

(3) shall not be subject to the procedures for election or removal of directors pursuant to Article 1, Chapter 8 of Title 33 unless the bylaws make those procedures applicable.

(E) The benefit director of a professional corporation does not need to be independent.

(F) 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 is not personally liable for monetary damages for any act or omission taken in that 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) Each officer of a benefit corporation shall consider the interests and factors described in Section 33‑48‑400 in the manner provided in that section if:

(1) the officer has discretion to act with respect to a matter; and

(2) it reasonably appears to the officer that the matter may have a material effect on the creation by the benefit corporation of a general public benefit or a specific public benefit identified in the public benefit corporation’s articles of incorporation.

(B) The consideration of interests and factors in the manner described in subsection (A) shall not constitute a violation of Section 33‑8‑420.

(C) An officer is not personally liable for monetary damages for:

(1) any act taken as an officer, or any omission to act as an officer, if the officer performed the duties of office in compliance with Section 33‑8‑410; or

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

(D) An officer does not have a duty to any specific person that is a beneficiary of the general public benefit purpose or a specific public benefit purpose of a public benefit corporation arising from the status of the person as a beneficiary.

Section 33‑38‑430. (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 33‑38‑440. (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 or officers with respect to:

(1) failure to pursue or create general public benefit or a specific public benefit set forth in its articles of incorporation; or

(2) violation of a duty or standard of conduct under this chapter.

(B) A benefit corporation shall not be liable for monetary damages under this chapter for any failure of the benefit corporation to pursue or create general public benefit or a specific public benefit.

(C) 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;

(b) a director;

(c) a person or group of persons that owns, beneficially or of record, five percent or more of the outstanding equity 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.

(D) A benefit enforcement proceeding commenced or maintained derivatively under item (2) of subsection (C) 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:

(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;

(c) circumstances that have hindered the creation by the benefit corporation of a general or specific public benefit; and

(d) the process and rationale for selecting or changing the third‑party standard used to prepare the benefit report;

(2) an assessment of the overall social or environmental, or social and environmental, performance of the benefit corporation against 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. The assessment does not need to be performed, audited, or certified by a third-party standards provider;

(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 their 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 beneficially 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 connection between the organization that established the third‑party standard, or its directors, officers, or any holder of five percent or more of the governance interests in the organization, and the benefit corporation or its directors, officers, or any holder of five percent or more of the outstanding shares of the benefit corporation, including any financial or governance relationship which might materially affect the credibility of the use of the third‑party standard; and

(8) if the benefit corporation has dispensed with, or restricted the discretion or powers of, the board of directors, a description of:

(a) the persons that exercise the powers, duties, and rights and who have the immunities of the board of directors; and

(b) the benefit director, as required by Section 33‑38‑410(D).

(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.

(C) A benefit corporation shall post all of its annual benefit reports on the publicly accessible portion of its Internet website, if it maintains a website. The compensation paid to directors and any financial or proprietary information included in the benefit reports may be omitted from the benefit reports as posted.

(D) If a benefit corporation does not have an Internet website, the benefit corporation shall provide a copy of its most recent annual benefit report, without charge, to any person that requests a copy, but the compensation paid to directors and financial or proprietary information included in the benefit report may be omitted from the copy of the benefit report provided.

(E) 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 other 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 Section 33‑38‑210(A).”

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

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