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## **OLR Bill Analysis**

### **sHB 6356**

#### ***AN ACT CONCERNING BENEFIT CORPORATIONS AND ENCOURAGING SOCIAL ENTERPRISE.***

#### **SUMMARY:**

This bill establishes, defines, and governs a new and specialized type of business corporation, named a benefit corporation (b-corp), intended to benefit society and the environment.

Under the bill, a b-corp is a for-profit business organization operating under the same laws that govern traditional business corporations (business corporation law, "BCL"), but:

1. whose corporate purpose must be to make a material positive impact on society and the environment, taken as a whole and assessed against a third party standard, as a result of its business and operations (i.e., "general public benefit") and may be to promote any specific public benefits the organization chooses to pursue (i.e., "specific public benefit");
2. whose directors and officers must consider certain interests and constituencies in addition to the financial interest of its shareholders when making corporate decisions; and
3. report on its overall social and environmental performance against an independent and transparent third-party standard each year, (i.e., "benefit report").

Under BCL, generally, a traditional business corporation can operate towards any legal purpose; its directors and officers must work toward the financial interests of its shareholders, and it is not required to evaluate or report on its social or environmental performance.

Under the bill, a b-corp is simultaneously subject to BCL and the provisions of the bill, with the specific provisions of the bill controlling over the general provisions of BCL.

Under the bill, b-corps undergo formation, mergers, consolidations, dissolution, and other fundamental corporate changes as provided for by BCL, but such actions generally also require approval by two-thirds of the shareholders in each and every class of shareholders (i.e., “minimum status vote”). With unanimous shareholder approval, a b-corp can implement a “legacy preservation provision” in its certificate of incorporation that generally (1) blocks the b-corp from engaging in certain corporate transactions and (2) requires the b-corp to distribute its assets to another b-corp that has enacted such a provision or charitable organization when it dissolves.

Under the bill, b-corp directors have the additional duty to consider a broader set of interests when making a corporate decision, above and beyond the board duties required by BCL. The bill affords b-corp directors the protections afforded to directors under the BCL and additional protections to cover the directors’ additional duties. The bill generally (1) requires a b-corp board to have a member, called the benefit director, responsible for assessing and annually reporting the b-corp’s performance in pursuit of its general and specific publically beneficial purposes and (2) allows for an officer, called the benefit officer, to be responsible for pursuing those purposes on an operational level and preparing the annual benefit report. The benefit director and officer can be the same person.

Under the bill, only a limited set of people are empowered to bring suit against the b-corp for failure to pursue or create a general or specific public benefit (i.e., a “benefit enforcement proceeding”), and they cannot sue for money damages. Generally, they can seek an order for specific performance or an injunction to change the b-corp’s behavior.

Lastly, the bill makes conforming and technical changes.

EFFECTIVE DATE: October 1, 2013

## **§ 2 — BENEFIT CORPORATION AS A SPECIALIZED FOR-PROFIT BUSINESS CORPORATION**

The bill establishes b-corps as a special type of business corporation subject to (1) the BCL and (2) the provisions of the bill, with the bill's specific provisions controlling over the general provisions of the BCL. In establishing the b-corp, the bill does not create the implication that business corporations are governed by law that is contrary or different to that governing the b-corp.

The bill does not impact or change current BCL, except to extend appraisal rights available to business corporation shareholders who oppose fundamental changes to a corporation (essentially the right to be bought out of their holdings at a fair value before a change occurs) to cover corporate changes that would result in a b-corp being formed or surviving in place of non-b-corp organization.

The bill does not (1) give mere beneficiaries of the b-corp's operations any legal claim on or right to its assets, income, or ongoing operations; (2) require that the b-corp's assets or property be put to a charitable use; or (3) deprive the attorney general of jurisdiction over the b-corp under business corporation or any other law.

None of the b-corp's certificate of incorporation or bylaws can limit, conflict with, or supersede the provisions of the bill.

## **§§ 1 & 3 — PURPOSE OF THE BENEFIT CORPORATION**

Under the bill, a b-corp, simultaneously, (1) must have the purpose of creating a material positive impact on society and the environment, taken as a whole and assessed against a third-party standard, and (2) may have the specific purpose of serving one or more public welfare, religious, charitable, scientific, literary, or educational purposes, or other purpose or benefit beyond the strict interest of the b-corp shareholders, including:

1. providing low-income or underserved individuals or communities with beneficial products or services;
2. promoting economic opportunity for individuals or

communities beyond creating jobs in the normal course of business;

3. preserving or improving the environment;
4. improving human health;
5. promoting the arts, sciences, or advancement of knowledge;
6. increasing the flow of capital to entities with a public benefit purpose; and
7. conferring any other particular benefit on society or the environment.

Under the bill, corporate action pursuing any of these purposes is in the best interests of the b-corp. A b-corp's choice to pursue a specific public benefit does not limit its obligation to pursue general public benefit.

Also, the b-corp may have any legal purpose allowed under BCL.

### **§§ 3 & 4 — CREATING OR CHANGING A BENEFIT CORPORATION**

Under the bill, a b-corp is incorporated by filing or amending a certificate of incorporation with the secretary of the state in accordance with BCL and indicating in the certificate (1) that the organization is a b-corp, (2) the b-corp's general public benefit purpose, and (3) any specific public benefit purpose the b-corp chooses to include.

Amending a business corporation's certificate of incorporation to become a b-corp requires approval by the board and a "minimum status vote." A minimum status vote is a vote, in addition to any other approvals, votes, or consents required by the organization's originating documents, bylaws, board resolutions or orders, or BCL, (1) of all the shareholders in each class or series of shares, regardless of any limitations on shareholders' voting or consent rights noted in the organizations' certificate of incorporation or bylaws, and (2) indicating approval by at least two-thirds of the shareholders in each class, series, or voting group as defined by the b-corp's certificate of incorporation,

the BCL, or the bill.

A b-corp may amend its certificate of incorporation to add, change, or delete any specific purpose with approval by the board and a minimum status vote.

**§ 4 — Mergers or Consolidations Resulting in a Benefit Corporation**

Under the bill, in order for a corporation that is not a b-corp to enter into a merger or consolidation agreement with a b-corp that would (1) result in the b-corp being the surviving entity after the transaction or (2) exchange shares in the corporation for shares in the b-corp, the merger or consolidation plan must be approved by a minimum status vote by the corporation's shareholders.

In such transactions, shareholders of a corporation that is becoming a b-corp and those who will receive shares in a current or future b-corp are entitled to appraisal rights, under the bill and BCL, by following the procedures stipulated in the BCL to secure those rights.

**§§ 5 & 6 — PRESERVING, DISSOLVING, TERMINATING, OR TRANSFORMING A BENEFIT CORPORATION**

**§ 5 — Legacy Preservation Provision**

The bill allows a b-corp, at least two years after it is incorporated, to amend its certificate to enact a "legacy preservation provision." This provision (1) requires the b-corp to, upon dissolution, distribute its assets to one or more charitable organizations or b-corps that have enacted such a provision and (2) bars the b-corp from otherwise terminating its status as a b-corp. Such an amendment requires board approval and unanimous approval from all shareholders, for all shares, in all classes or series, regardless of any limitations on any shareholders' voting or consent powers stated in the b-corp certificate of incorporation or bylaws.

**§ 5 — Dissolving a Benefit Corporation Pursuant to a Legacy Preservation Provision**

The bill requires a dissolving b-corp that has enacted a legacy preservation provision to distribute its assets as follows:

1. all of the b-corp's liabilities and obligations must be paid, satisfied and discharged, or otherwise addressed and
2. all of the b-corp's remaining assets must be transferred to one or more charitable organizations or b-corps that have enacted legacy preservation provisions.

**§ 6 — Termination**

Under the bill, a b-corp that has not enacted a legacy preservation provision is terminated and stops being governed by the bill's provisions by amending its certificate of incorporation to delete any indication of the organization being a b-corp. Such an amendment must be conducted in compliance with BCL and be approved by the board and a minimum status vote.

**§ 6 — Transformation**

The bill prohibits a b-corp that has enacted a legacy preservation provision from entering into a merger, share exchange, or business combination that would result in the b-corp not surviving or, generally, selling or disposing of all or substantially all of its assets. A b-corp that has not enacted a legacy preservation provision can engage in such a transaction with approval by a minimum status vote, and any other vote or consent required by BCL or the b-corp's certificate of incorporation or bylaws.

**§§ 7 & 9 — DUTIES AND IMMUNITIES OF BENEFIT CORPORATION DIRECTORS AND OFFICERS**

**§ 7 — Directors**

Under the bill, when discharging their respective duties and considering the b-corp's best interests, the board of directors, board committees, and individual directors must consider the effect of any corporate action upon the following:

1. the b-corp shareholders;
2. the employees and workforce of the b-corp and its subsidiaries and suppliers;

3. the interests of the b-corp's customers as beneficiaries of the general or specific public benefits promoted by the b-corp;
4. community and societal factors, including those of each community in which offices or facilities of the b-corp or its subsidiaries or suppliers are located;
5. the local and global environment;
6. the short- and long-term interests of the b-corp, including benefits that may accrue to it from its long-term plans and the possibility that these interests may be best served by its continued independence; and
7. the b-corp's ability to accomplish its general and specific public benefit purposes.

Similarly, directors, individually and collectively, may also consider (1) the resources, intent, and past stated and potential conduct of any person seeking to acquire control of the b-corp and (2) other pertinent factors or the interests of any other group, as they deem appropriate.

No particular person's or group's interests must have priority in the b-corp directors' individual or collective deliberations, unless the b-corp's certificate of incorporation states the b-corp's intent to prioritize certain interests related to its specific public benefit purpose.

The bill specifies that b-corp directors who, individually or collectively, consider the various interests as required or allowed by the bill are not violating their duties under BCL by doing so. These directors may also act under any power authorized by the BCL to fulfill their duties.

B-corp directors have no duty to a person whose only connection to the b-corp is that he or she benefits from the b-corp's activities pursuing or creating general or specific public benefit.

The directors are not personally liable for money damages to the corporation in a direct or derivative suit for (1) any act taken as a

director in compliance with both the bill and BCL or (2) the b-corp's failure to create general or any chosen specific public benefit.

### **§ 9 — Officers**

The bill requires a b-corp officer to consider the interests and factors that a director must consider if (1) the officer has discretion to act on the matter in consideration and (2) it reasonably appears to the officer that the matter may have a material effect on the b-corp's ability to create its general or chosen specific public benefit. It specifies that in considering these interests and factors, a b-corp officer is not violating BCL.

The bill generally affords b-corp officers the same immunities from personal liability as b-corp directors, and, like directors, they have no duty to mere beneficiaries of the b-corp's publically beneficial activities.

## **§§ 8 & 10 — BENEFIT DIRECTOR AND OFFICER**

### **§ 8 — Benefit Director**

Under the bill, publically traded b-corps must, and all other b-corps may, have a director, or properly authorized managing shareholder or shareholders, designated as the "benefit director." In addition to powers, duties, rights, and immunities afforded to a b-corp's directors, the benefit director (1) must prepare the b-corp's annual benefit report, and (2) bear those powers, duties, rights, and immunities provided for the benefit director in the b-corp bylaws, resolutions, or orders. The benefit director is elected and removed according to the respective provisions for electing and removing a director under BCL.

The benefit director must not have a "material relationship" with the b-corp or its subsidiaries. Under the bill, this generally means the benefit director may not (1) presently be or have been an employee of the b-corp or a subsidiary within three years of serving as benefit director; (2) be immediately related to any current or recent executive officer of the b-corp or a subsidiary; or (3) generally (a) own 5% or more of the b-corp, (b) own 5% or more of an entity that owns 5% or more of the b-corp, or (c) hold a controlling position in such an entity.

A benefit director's current or previous service as the b-corp's or a subsidiary's benefit director or benefit officer (see below) does not constitute a material relationship to the b-corp or its subsidiary. The b-corp's certificate of incorporation or bylaws may require additional, consistent qualifications of the benefit director.

The bill protects acts and omissions by the benefit director to the same extent as acts and omissions by b-corp directors in general, but the benefit director is immune from personal liability to a greater extent; he or she may be liable only for self-dealing, willful misconduct, or a knowing violation of the law.

#### **§ 10 — Benefit Officer**

The bill allows a b-corp to have a benefit officer who has (1) all the powers and duties authorized by the bylaws or the board's orders or resolutions to create the b-corp's general and chosen specific public benefit and (2) the duty to prepare the annual benefit report. The benefit director may simultaneously be the benefit officer without forming a material relationship with the b-corp. The benefit officer has the same duties and immunities afforded to b-corp officers.

#### **§ 11 — ENFORCING THE BENEFIT CORPORATION'S PURPOSE**

The bill allows only a limited set of parties to bring a benefit enforcement proceeding against the b-corp, the directors, or officers for (1) failure to pursue or create general or specific public benefit or (2) violation of shareholders' appraisal rights (see below). These parties cannot sue for money damages. Generally, they can seek an order for specific performance or an injunction to change the b-corp's behavior.

The b-corp itself can take action directly against directors or officers. The following parties can bring or maintain benefit enforcement proceeding in accordance with BCL regarding derivative suits:

1. generally, a person or group of people that owns at least 5% of the b-corp's shares upon bringing the suit;
2. generally, a person or group of people that owns at least 10% of an entity that owns and controls the b-corp as a subsidiary; or

3. other people specified in the b-corp's certificate of incorporation or bylaws.

Beneficial owners of shares held in a voting trust or by a nominee are considered owners for the purposes of bringing a benefit enforcement proceeding.

## **§1 & 12 — ANNUAL BENEFIT REPORT**

### **§ 12 — Content**

The bill requires a b-corp to prepare an annual benefit report and present it to its shareholders and the public. The report must contain:

1. a narrative description of:
  - a. how the b-corp pursued its general public benefit purpose during the year and the extent to which general public benefit was created;
  - b. how the b-corp pursued its chosen specific public benefit purposes, if any, and the extent to which any specific public benefit was created;
  - c. any circumstances that have hindered the b-corp's creation of general public benefit or any chosen 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 b-corp's overall social and environmental performance against a third-party standard, either (a) applied consistently with any application of that standard in prior benefit reports, or (b) accompanied by an explanation of the reasons for any inconsistent application or the change to that standard from the one used in the most recent prior report;
3. the benefit director's and the benefit officer's, if any, names and mailing addresses;

4. each director's respective annual compensation as a director;
5. the opinion of the benefit director, the board of directors, or the shareholder party acting as benefit director (as designated by a shareholder agreement on the matter) on the following:
  - a. whether the b-corp acted in accordance with its general public benefit purpose and any chosen specific public benefit purposes in all material respects during the period covered by the report,
  - b. whether the directors and officers complied with their duties under the bill, and
  - c. whether and how the directors and officers failed to comply with their duties under the bill,
6. a statement of any connection between (a) the organization that established the third-party standard, its directors, officers, or any holder of 5% or more of the voting power or capital interests in the organization, and (b) the b-corp, its directors, officers, or any holder of 5% or more of the outstanding shares of the b-corp, including any financial or governance relationship that might materially affect the third-party standard's credibility;
7. for shareholder-managed b-corps, a description of those shareholders who act as the b-corp board and the name of shareholder who acts as the benefit director; and
8. if the benefit director or officer resigned, was removed, or refused to be reelected, any written statement or correspondence from that director or officer concerning the circumstances of his or her departure.

Neither the report nor the performance assessment it contains needs to be audited or certified by the third-party standard provider (see below).

**§ 12 — Distribution**

The bill requires the b-corp to send a copy of the report to each shareholder within 120 days of the fiscal year's end or together with any other annual report it provides to shareholders, whichever is earlier. The b-corp must post and maintain each annual report publically on its website, but may omit its directors' compensation or any financial, confidential, or proprietary information. If the b-corp does not have a website, it must provide a copy of its most recent report, with allowed omissions redacted, to anyone who requests a copy, at no charge.

**§ 1 & 12 — Third-Party Standard**

Under the bill, the b-corp's performance is annually assessed against a recognized third-party standard for defining, reporting, and assessing corporate social and environmental performance that is (1) developed by an entity that is independent of the b-corp and (2) easily understood because the following information about the standard is publicly available:

1. the factors considered in measuring the business's performance,
2. the relative weightings of these factors,
3. the identity of the people who develop and control changes to the standard, and
4. how changes to the process are made.

Selecting or changing the b-corp's third-party standard requires either approval by at least a majority of the b-corp's directors or approval or written consent of that portion of directors or shareholders required by the b-corp's certificate of incorporation or bylaws for such an action.

**COMMITTEE ACTION**

Commerce Committee

Joint Favorable Substitute Change of Reference

Yea 17 Nay 0 (03/07/2013)

Judiciary Committee

Joint Favorable

Yea 40 Nay 1 (04/12/2013)