



Senate Bills 359 and 360 (as introduced 5-4-11)
Sponsor: Senator Mark C. Jansen
Committee: Reforms, Restructuring and Reinventing

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CONTENT

Senate Bill 359 would add Chapter 9A (Benefit Corporations) to the Business Corporation Act to do the following:

- Provide for the formation of benefit corporations whose purposes would have to include the creation of general public benefit (a material positive impact on society and the environment).
- Allow the articles of a benefit corporation to include additional specific public benefits.
- Require the board of a benefit corporation to designate a benefit director, and allow the board to appoint a benefit officer.
- Require the benefit director to prepare an opinion as to whether the corporation acted in accordance with its purpose to create general public benefit and any specific public benefit in all material respects.
- Require certain actions to be approved or authorized by a "minimum status vote" of the shareholders.
- Require the board, individual directors, and officers of a benefit corporation to consider the effects of an action on shareholders, employees, customers, the community, and the environment.
- Specify that a director or officer would not have a fiduciary duty to anyone who was a beneficiary of the general public benefit purpose or any specific public benefit purpose of the benefit corporation.
- Provide that an action could not be brought against a benefit

corporation or its directors or officers except in a benefit enforcement proceeding.

- Require a benefit corporation to prepare an annual benefit report, including a description of the extent to which the general public benefit purpose and any specific public benefit purpose were created.

Senate Bill 360 would amend the Business Corporation Act to:

- Define "benefit corporation".
- Require the purposes of a benefit corporation to comply with Chapter 9A.
- Allow the corporate name of a benefit corporation to contain the words "benefit corporation" or the initials "B.C."
- Require the report that every corporation must file each year to include the annual benefit report required under Chapter 9A, if the corporation were a benefit corporation.

The bills are tie-barred. Below is a detailed description of Senate Bill 359.

General & Specific Public Benefit

"General public benefit" would mean a material positive impact on society and the environment, taken as a whole, from the business and operations of a benefit corporation, as measured by a "third-party standard" (a term defined in the bill).

"Specific public benefit" would include, but not be limited to, any of the following:

- 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 normal course of business.
- Preserving the environment.
- Improving human health.
- Promoting the arts, sciences, or advancement of knowledge.
- Increasing the flow of capital to entities that have a public benefit purpose.
- Conferring any other particular benefit on society or the environment.

Formation of a Benefit Corporation

A domestic corporation that met the requirements described below would be a benefit corporation and subject to proposed Chapter 9A.

The corporation would have to be formed under the Business Corporation Act.

The articles of the corporation would have to state that it was a benefit corporation. An amendment to a corporation's articles to include this statement would not be effective unless it were adopted by a minimum status vote.

The purposes included in the articles would have to include creating general public benefit. The purposes also could include one or more specific public benefits identified in the articles, but the identification of a specific benefit would not limit the obligation to create general public benefit.

An amendment to the articles to change the purposes of the corporation by adding, amending, or deleting one or more specific public benefits would not be effective unless it were adopted by a minimum status vote.

A corporation could terminate its status as a benefit corporation by amending its articles to remove the provisions described above, but the amendment would have to be adopted by a minimum status vote.

"Minimum status vote" would mean an authorization or approval of a corporate

action by the shareholders of a benefit corporation that satisfies all of the following:

- It meets the shareholder approval or vote requirements of the Act.
- It meets any shareholder approval or vote requirements included in the articles of incorporation or the bylaws of the benefit corporation adopted by the shareholders.
- The shareholders of every class or series are entitled to vote on the corporate action regardless of a limitation stated in the articles or bylaws on the voting rights of any class or series.
- The corporate action is approved by vote of the shareholders of each class or series entitled to cast at least two-thirds of the votes that all shareholders of the class or series are entitled to cast on the action.

Merger or Share Exchange

If a domestic corporation that was not a benefit corporation were a constituent corporation in a merger or an exchanging corporation in a share exchange, and the surviving or acquiring corporation would be a benefit corporation under the plan of merger or share exchange, the plan would have to be approved by a minimum status vote of the constituent or exchanging corporation.

A plan of merger or share exchange that would have the effect of terminating the status of a domestic corporation as a benefit corporation would have to be approved by a minimum status vote of that corporation.

Benefit Director

The board of directors of a benefit corporation would have to designate one director as a benefit director, who would have to be an "independent person" (someone who did not have a material relationship with a benefit corporation or a subsidiary of a benefit corporation).

The benefit director could serve simultaneously as the benefit officer of the corporation. An action of an individual in his or her capacity of a benefit director would be considered an action of that individual in his or her capacity of a director of the benefit corporation.

The benefit director would have to prepare, and the corporation would have to include in its annual benefit report to shareholders, an opinion of the benefit director on all of the following:

- Whether the benefit corporation acted in accordance with its purpose to create general public benefit and any specific public benefit included in its purposes in all material respects during the period covered by the report.
- Whether the directors and officers complied with sections of Chapter 9A concerning the benefit director and benefit officer.
- A description of the ways in which the benefit corporation or its directors or officers failed to comply, if applicable.

A benefit director would not be personally liable for an act or omission in that capacity unless the act or omission constituted self-dealing, willful misconduct, or a knowing violation of law.

If a benefit corporation did not have a board under an agreement of its shareholders, the corporation's bylaws would have to provide that the people or shareholders who performed the duties of the board would include a person with the powers, duties, rights, and immunities of a benefit director.

Benefit Officer

A benefit corporation could appoint a benefit officer. In the management of the corporation, the benefit officer would have the powers and duties relating to the corporation's purpose to create general public benefit or any specific public benefit provided by the bylaws or by resolution or orders of the board of directors.

The benefit officer would have to prepare the required benefit report.

Impact of Actions; Standard of Conduct

The following provisions would apply to the board, committees of the board, and individual directors of a benefit corporation, and to any officer who had discretion to act with respect to any matter if it reasonably appeared to him or her that the matter could have a material effect on the creation of general public benefit or a specific public benefit by the corporation, in discharging

the duties of their positions and in considering the best interests of the corporation.

They would be required to consider the effects of any action on all of the following:

- The shareholders of the benefit corporation.
- The employees and work force of the corporation and its subsidiaries and suppliers.
- The interests of customers as beneficiaries of the general public benefit and any specific public benefit included in the purpose of the corporation.
- Community and societal considerations, including those of each community in which offices or facilities of the corporation and its subsidiaries or suppliers were located.
- The local and global environment.
- The ability of the corporation to accomplish general public benefit and any specific public benefit included in its purpose.

They also would have to consider the effects of any action on the short-term and long-term interests of the benefit corporation, including benefits that could accrue to the corporation from its long-term plans and the possibility that these interests and the general public benefit and any specific public benefit included in the corporation's purpose could be best served by the continued independence of the benefit corporation.

In evaluating a person's proposed acquisition of control of the benefit corporation, the board, committees, directors, and officers could consider the resources, intent, and conduct of the person seeking to acquire control.

They also could consider any other pertinent factors or the interests of any other group they believed appropriate, and would not be required to give priority to the interests of a particular person or group described above unless the corporation had stated its intention to give priority to interests related to a specific public benefit purpose identified in its articles.

A director or officer of a benefit corporation would not be personally liable for monetary damages for any of the following:

- Any action taken as a director or officer if the individual performed his or her duties in compliance with Section 541a of the Act and the section of Chapter 9A containing these provisions.
- The failure of the benefit corporation to create general public benefit or any specific public benefit.

(Section 541a establishes standards, including a prudent person standard, by which a director or officer must discharge his or her duties.)

A director or officer would not have a fiduciary duty to a person who was a beneficiary of the general or any specific public benefit purposes of the benefit corporation arising from the status of the person as a beneficiary.

Any corporate action taken by a benefit corporation to advance general public benefit or any specific public benefit included in the purpose of the corporation would be presumed to be in the best interests of the corporation.

Benefit Enforcement

The duties of any directors or officers of a benefit corporation, or the general public benefit purpose or any specific public benefit purpose of the corporation, could be enforced only in a benefit enforcement proceeding. A person could not otherwise bring an action or assert a claim against a benefit corporation or its director or officers with respect to their duties or the general public benefit purpose or any specific public benefit purpose.

A benefit enforcement proceeding would be a claim asserted or action brought for any of the following:

- A failure to pursue the general public benefit purpose of a benefit corporation or any specific public benefit purpose set forth in its articles.
- A violation of a duty or standard of conduct under Chapter 9A.

A benefit enforcement proceeding could be commenced or maintained only by one of the following:

- Directly, by the benefit corporation.

- Derivatively, by a shareholder or director of the corporation.
- Derivatively, by a person or group that owned beneficially or of record 5% or more of the equity interests in an entity of which the benefit corporation was a subsidiary.
- Derivatively, by any other person specified in the articles or bylaws of the benefit corporation.

Annual Benefit Report

A benefit corporation would have to prepare an annual benefit report, which would have to include all of the following:

- A narrative description of the ways in which the corporation pursued its general public benefit purpose during the year and the extent to which that benefit was created.
- A narrative description of the ways in which the corporation pursued any specific public benefit included in its purposes and the extent to which that benefit was created.
- A narrative description of any circumstances that hindered the creation of general public benefit or a specific public benefit.
- An assessment of the overall social and environmental performance of the benefit corporation, prepared in accordance with a third-party standard as described in the bill.
- The name of the benefit director, the name of the benefit officer if one had been designated, and an address to which correspondence to each could be directed.
- The compensation paid by the corporation during the year to each director in that capacity.
- The name of each person who owned 5% or more of the outstanding shares of the corporation, either beneficially, to the extent known without independent investigation, or of record.
- The opinion of the benefit director.
- A statement of any connection between the organization that developed the third-party standard, or its directors, officers, or material owners, and the benefit corporation, or its directors, officers, or material owners.

The benefit corporation would have to send a copy of the report to each shareholder,

either within 120 days after the end of the corporation's fiscal year or at the same time as the corporation delivered any other annual report to its shareholders.

The benefit corporation also would have to post its most recent annual benefit report on the public portion of its internet website, if any, and file the report with the administrator (the Director of the Department of Licensing and Regulatory Affairs or his or her designated representative). The posted and filed reports could omit the compensation paid to directors and financial or proprietary information.

MCL 450.1105 et al. (S.B. 360)

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FISCAL IMPACT

The bills would have no fiscal impact on State or local government.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.