

# SENATE, No. 2170

## STATE OF NEW JERSEY 214th LEGISLATURE

INTRODUCED JULY 1, 2010

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**SYNOPSIS**

Concerns creation of benefit corporations.

**CURRENT VERSION OF TEXT**

As introduced.



(Sponsorship Updated As Of: 1/11/2011)

1 AN ACT concerning benefit corporations and supplementing Title  
2 14A of the New Jersey Statutes.

3

4 **BE IT ENACTED** by the Senate and General Assembly of the State  
5 of New Jersey:

6

7 1. For purposes of this act:

8 “Benefit corporation” means a corporation organized under  
9 provisions of the New Jersey Business corporation Act,”  
10 N.J.S.14A:1-1 et seq., that has elected to become subject to this act  
11 and whose status as a benefit corporation has not been terminated as  
12 provided in this act.

13 “Benefit director” means the director designated as the benefit  
14 director of a benefit corporation as provided in section 7 of this act.

15 “Benefit enforcement proceeding” means a claim or action  
16 brought directly by a benefit corporation, or derivatively on behalf  
17 of a benefit corporation, against a director or officer for:

18 (1) Failure to pursue the general public benefit purpose of the  
19 benefit corporation or any specific public benefit purpose set forth  
20 in its certificate of incorporation; or

21 (2) Violation of a duty or standard of conduct under this act.

22 “Benefit officer” means the officer of a benefit corporation, if  
23 any, designated as the benefit officer as provided in section 9 of this  
24 act.

25 “General public benefit” means a material positive impact on  
26 society and the environment by the operations of a benefit  
27 corporation through activities that promote some combination of  
28 specific public benefits.

29 “Independent” means that a person has no material relationship  
30 with a benefit corporation or any of its subsidiaries (other than the  
31 relationship of serving as the benefit director or benefit officer),  
32 either directly or as a shareholder, partner, member or other owner  
33 or a director, officer or other manager of an entity that has a  
34 material relationship with the benefit corporation or any of its  
35 subsidiaries. A material relationship between an individual and a  
36 benefit corporation or any of its subsidiaries will be conclusively  
37 presumed to exist if:

38 (1) The person is, or has been within the last three years, an  
39 employee of the benefit corporation or any of its subsidiaries, other  
40 than as a benefit officer;

41 (2) An immediate family member of the person is, or has been  
42 within the last three years, an executive officer, other than a benefit  
43 officer, of the benefit corporation or any of its subsidiaries; or

44 (3) The person, or an entity of which the person is a director,  
45 officer or other manager or in which the person owns beneficially or  
46 of record 5% or more of the outstanding equity interests, owns  
47 beneficially or of record 5% or more of the outstanding shares of  
48 the benefit corporation.

1 A percentage of ownership in an entity shall be calculated as if  
2 all outstanding rights to acquire equity interests in the entity had  
3 been exercised.

4 “Minimum status vote” means that, in addition to any other  
5 approval or vote required by Title 14A of the New Jersey Statutes  
6 or the certificate of incorporation:

7 (1) The holders of shares of every class or series shall be  
8 entitled to vote on the corporate action regardless of any limitation  
9 stated in the certificate of incorporation on the voting rights of any  
10 class or series; and

11 (2) The corporate action must be approved by vote of the  
12 shareholders of each class or series entitled to cast at least two-  
13 thirds of the votes that all shareholders of the class or series are  
14 entitled to cast thereon.

15 “Specific public benefit” includes:

16 (1) Providing low-income individuals or communities with  
17 beneficial products or services;

18 (2) Promoting economic opportunity for individuals or  
19 communities beyond the creation of jobs in the normal course of  
20 business;

21 (3) Preserving the environment;

22 (4) Improving human health;

23 (5) Promoting the arts, sciences or advancement of knowledge;

24 (6) Increasing the flow of capital to entities with a public benefit  
25 purpose; and

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

28 “Subsidiary” of a person means an entity in which the person  
29 owns beneficially or of record 50% or more of the outstanding  
30 equity interests. A percentage of ownership in an entity shall be  
31 calculated as if all outstanding rights to acquire equity interests in  
32 the entity had been exercised.

33 “Third-party standard” means a recognized standard for defining,  
34 reporting and assessing corporate social and environmental  
35 performance that is:

36 (1) Developed by a person that is independent of the benefit  
37 corporation; and

38 (2) Transparent because the following information about the  
39 standard is publicly available:

40 (a) the factors considered when measuring the performance of a  
41 business;

42 (b) the relative weightings of those factors; and

43 (c) the identity of the persons who developed and control  
44 changes to the standard and the process by which those changes are  
45 made.

46

47 2. A benefit corporation shall be formed in accordance with  
48 chapter 2 of Title 14A of the New Jersey Statutes, except that its

1 certificate of incorporation shall also state that it is a benefit  
2 corporation.

3

4 3. a. A corporation organized under the provisions of the  
5 “New Jersey Business Corporation Act,” N.J.S.14A:1-1 et seq., may  
6 become a benefit corporation under this act by amending its  
7 certificate of incorporation so that it contains a statement that the  
8 corporation is a benefit corporation. The amendment shall not be  
9 effective unless it is adopted by at least the minimum status vote.

10 b. If a corporation that is not a benefit corporation is a party to  
11 a merger or consolidation or is the exchanging corporation in a  
12 share exchange, and the surviving or new corporation in the merger,  
13 consolidation, or share exchange is to be a benefit corporation, then  
14 the plan of merger, consolidation, or share exchange shall not be  
15 effective unless it is adopted by the corporation by at least the  
16 minimum status vote.

17

18 4. a. A benefit corporation may terminate its status as a benefit  
19 corporation and cease to be subject to this act by amending its  
20 certificate of incorporation to delete the provision required by  
21 section 2 or subsection a. of section 3 of this act. The amendment  
22 shall not be effective unless it is adopted by at least the minimum  
23 status vote.

24 b. If a plan of merger, consolidation or exchange would have  
25 the effect of terminating the status of a corporation as a benefit  
26 corporation, the plan shall not be effective unless it is adopted by at  
27 least the minimum status vote.

28

29 5. a. Every benefit corporation shall have the purpose of  
30 creating a general public benefit. This purpose is in addition to, and  
31 may be a limitation on, its purpose under its certificate of  
32 incorporation and any specific purpose set forth in its certificate of  
33 incorporation.

34 b. The certificate of incorporation of a benefit corporation may  
35 identify one or more specific public benefits that is the purpose of  
36 the benefit corporation to create in addition to its purposes under its  
37 certificate of incorporation and subsection a. of this section. The  
38 identification of a specific public benefit under this subsection does  
39 not limit the obligation of a benefit corporation to create general  
40 public benefit.

41 c. The creation of general and specific public benefits, as  
42 provided in subsections a. and b. of this section, shall be in the best  
43 interests of the benefit corporation.

44 d. A benefit corporation may amend its certificate of  
45 incorporation to add, amend or delete a specific public benefit that  
46 is the purpose of the benefit corporation to create. The amendment  
47 shall not be effective unless it is adopted by at least the minimum  
48 status vote.

1       6. a. The board of directors, committees of the board and  
2 individual directors of a benefit corporation, in considering the best  
3 interests of the benefit corporation shall consider the effects of any  
4 action upon:

5       (1) the shareholders of the benefit corporation;

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

8       (3) the interests of customers as beneficiaries of the general or  
9 specific public benefit purposes of the benefit corporation;

10       (4) community and societal considerations, including those of  
11 any community in which offices or facilities of the benefit  
12 corporation or its subsidiaries or suppliers are located;

13       (5) the local and global environment; and

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

19       b. The board of directors, committees of the board and  
20 individual directors of a benefit corporation, in considering the best  
21 interests of the benefit corporation may consider:

22       (1) matters listed in subsection (2) of N.J.S.14A:6-1; and

23       (2) any other pertinent factors or the interests of any other group  
24 that they deem appropriate; and

25       c. The board of directors, committees of the board and  
26 individual directors of a benefit corporation shall not be required to  
27 give priority to the interests of any particular person or group  
28 referred to in subsection a. or subsection b. of this section over the  
29 interests of any other person or group unless the benefit corporation  
30 has stated its intention to give priority to interests related to a  
31 specific public benefit purpose identified in its certificate of  
32 incorporation.

33       d. A director is not personally liable for monetary damages for  
34 failure of the benefit corporation to create general or specific public  
35 benefits.

36

37       7. a. The board of directors of a benefit corporation shall  
38 include one director who shall be designated the “benefit director”  
39 and shall have, in addition to all of the powers, duties, rights and  
40 immunities of the other directors of the benefit corporation, the  
41 powers, duties, rights and immunities provided in this act.

42       b. The benefit director shall be elected, and may be removed,  
43 in the manner provided by chapter 6 of Title 14A of the New Jersey  
44 Statutes, and shall be an individual who is independent. The benefit  
45 director may serve as the benefit officer, designated pursuant to  
46 section 9 of this act, at the same time as serving as the benefit  
47 director. The certificate of incorporation or bylaws of a benefit

1 corporation may prescribe additional qualifications of the benefit  
2 director not inconsistent with this subsection.

3 c. The benefit director shall prepare, and the benefit  
4 corporation shall include in the annual benefit report to  
5 shareholders required by section 11 of this act, a statement whether,  
6 in the opinion of the benefit director, the benefit corporation acted  
7 in accordance with its general, and any specific, public benefit  
8 purpose in all material respects during the period covered by the  
9 report and whether the directors and officers complied with  
10 subsection a. of section 6 of this act and subsection a. of section 8  
11 of this act. If in the opinion of the benefit director the benefit  
12 corporation or its directors or officers failed to act in accordance  
13 with its public benefit purpose, then the statement of the benefit  
14 director shall include a description of the ways in which the benefit  
15 corporation or its directors or officers failed to act.

16 d. If the by-laws of a benefit corporation provide that the  
17 powers and duties conferred or imposed upon the board of directors  
18 shall be exercised or performed by a person other than the directors  
19 pursuant to N.J.S.14A:6-1, then the bylaws of the benefit  
20 corporation must provide that the person or shareholders who  
21 perform the duties of a board of directors shall include a person  
22 with the powers, duties, rights and immunities of a benefit director.

23 e. Regardless of whether the certificate of incorporation of a  
24 benefit corporation includes a provision eliminating or limiting the  
25 personal liability of directors authorized by subsection (3) of  
26 N.J.S.14A:2-7, a benefit director shall not be personally liable for  
27 any act or omission in the capacity of a benefit director unless the  
28 act or omission constitutes self-dealing, willful misconduct or a  
29 knowing violation of law.

30

31 8. a. Each officer of a benefit corporation shall consider the  
32 interests and factors described in subsection a. of section 6 of this  
33 act when:

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

35 (2) It reasonably appears to the officer that the matter may have  
36 a material effect on:

37 (a) the creation of general or specific public benefits by the  
38 benefit corporation; or

39 (b) any of the interests or factors referred to in subsection a. of  
40 section 6 of this act.

41 b. The consideration of interests and factors in the manner  
42 described in subsection c. of section 6 of this act.

43 c. An officer is not personally liable for monetary damages for  
44 failure of the benefit corporation to create general or specific public  
45 benefit.

46

47 9. A benefit corporation may have an officer designated the  
48 "benefit officer" who shall have authority and shall perform duties

1 in the management of the benefit corporation relating to the purpose  
2 of the corporation to create general or specific public benefits as  
3 may be provided by or pursuant to the by-laws or, in the absence of  
4 controlling provisions in the by-laws, as may be determined by or  
5 pursuant to resolutions or orders of the board of directors. If a  
6 benefit corporation has a benefit officer, the duties of the benefit  
7 officer shall include preparing the benefit report required by section  
8 11 of this act.

9  
10 10. a. The duties of directors and officers under this act, and the  
11 general and any specific public benefit purpose of a benefit  
12 corporation, may be enforced only in a benefit enforcement  
13 proceeding. No person may bring an action or assert a claim against  
14 a benefit corporation or its directors or officers with respect to the  
15 duties of directors and officers under this act and the general and  
16 any specific public benefit purpose of the benefit corporation except  
17 in a benefit enforcement proceeding.

18 b. A benefit enforcement proceeding may be commenced or  
19 maintained only:

20 (1) Directly by the benefit corporation; or

21 (2) Derivatively by:

22 (a) a shareholder;

23 (b) a director;

24 (c) a person or group of persons that owns beneficially or of  
25 record 10% or more of the equity interests in an entity of which the  
26 benefit corporation is a subsidiary; or

27 (d) such other persons as may be specified in the certificate of  
28 incorporation or by-laws of the benefit corporation.

29  
30 11. a. A benefit corporation shall deliver to each shareholder an  
31 annual benefit report including:

32 (1) A narrative description of:

33 (a) The ways in which the benefit corporation pursued a general  
34 public benefit during the year and the extent to which the general  
35 public benefit was created;

36 (b) The ways in which the benefit corporation pursued any  
37 specific public benefit that the certificate of incorporation states is  
38 the purpose of the benefit corporation to create and the extent to  
39 which that specific public benefit was created; and

40 (c) Any circumstances that have hindered the creation by the  
41 benefit corporation of general or specific public benefits;

42 (2) An assessment of the social and environmental performance  
43 of the benefit corporation, prepared in accordance with a third-party  
44 standard applied consistently with any application of that standard  
45 in prior benefit reports or accompanied by an explanation of the  
46 reasons for any inconsistent application;

1 (3) The name of the benefit director and the benefit officer, if  
2 any, and the address to which correspondence to each of them may  
3 be directed;

4 (4) The compensation paid by the benefit corporation during the  
5 year to each director in that capacity;

6 (5) The name of each person that owns 5% or more of the  
7 outstanding shares of the benefit corporation either beneficially, to  
8 the extent known to the benefit corporation without independent  
9 investigation, or of record; and

10 (6) The statement of the benefit director described in section 7  
11 of this act.

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

16 c. A benefit corporation must post its most recent benefit report  
17 on the public portion of its website, if any, except that the  
18 compensation paid to directors and any financial or proprietary  
19 information included in the benefit report may be omitted from the  
20 benefit report as posted.

21 d. (1) With the delivery of the benefit report to shareholders  
22 pursuant to subsection b. of this section, the benefit corporation  
23 must deliver a copy of the benefit report to the Department of  
24 Treasury for filing, except that the compensation paid to directors  
25 and any financial or proprietary information included in the benefit  
26 report may be omitted from the benefit report as filed under this  
27 section. The State Treasurer shall charge a fee of \$70 for filing a  
28 benefit report.

29 (2) If a benefit corporation has not delivered a benefit report to  
30 the department for a period of two years, the department may  
31 prepare and file a statement that the corporation has forfeited its  
32 status as a benefit corporation and is no longer subject to this act. If  
33 the corporation subsequently delivers a benefit report to the  
34 department for filing, the status of the corporation as a benefit  
35 corporation shall be automatically reinstated upon the filing of the  
36 benefit report by the department and the corporation shall again be  
37 subject to this act.

38

39 12. This act shall take effect immediately.

40

41

42

#### STATEMENT

43

44 This bill provides for the creation of a benefit corporation. The  
45 purpose of a benefit corporation is to create a general public  
46 benefit, defined as a material positive impact on society and the  
47 environment, through activities that promote some combination of  
48 specific public benefits.

1 The bill states that a benefit corporation may identify one or  
2 more specific public benefits in addition to its stated purpose of  
3 creating a general public benefit. A specific public benefit includes:

4 (1) Providing low-income or underserved individuals or  
5 communities with beneficial products or services;

6 (2) Promoting economic opportunity for individuals or  
7 communities beyond the creation of jobs in the normal course of  
8 business;

9 (3) Preserving the environment;

10 (4) Improving human health;

11 (5) Promoting the arts, sciences or advancement of knowledge;

12 (6) Increasing the flow of capital to entities with a public benefit  
13 purpose; and

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

16 The bill provides for a benefit corporation to be formed in  
17 accordance with all corporations subject to Title 14A of the New  
18 Jersey Statutes. An existing corporation may become a benefit  
19 corporation by amending its certificate of incorporation to state that  
20 the corporation is a benefit corporation. The bill also provides for a  
21 benefit corporation to terminate its status as a benefit corporation  
22 by amending its certificate of incorporation to delete the statement  
23 that the corporation is a benefit corporation.

24 At least the minimum status vote is needed in order for a  
25 corporation to amend its certificate of incorporation to either  
26 become a benefit corporation or terminate its status as a benefit  
27 corporation. Minimum status vote means that, in addition to any  
28 other approval or vote required by the “New Jersey Business  
29 Corporation Act,” N.J.S.14A:1-1 et seq.. or the certificate of  
30 incorporation:

31 (1) The holders of shares of every class or series shall be  
32 entitled to vote on the corporate action regardless of any limitation  
33 stated in the certificate of incorporation on the voting rights of any  
34 class or series;

35 (2) The corporate action must be approved by vote of the  
36 shareholders of each class or series entitled to cast at least two-  
37 thirds of the votes that all shareholders of the class or series are  
38 entitled to cast thereon.

39 The bill provides for a standard of conduct for a benefit  
40 corporation’s board of directors and officers. The bill also provides  
41 for a benefit corporation to designate a “benefit director” and a  
42 “benefit officer.” It is the duty of the benefit director to determine  
43 whether or not the benefit corporation has acted in accordance with  
44 its general, and any specific, public benefit purpose. The benefit  
45 officer will perform any duties in the management of the benefit  
46 corporation relating to the purpose of the corporation to create a  
47 general or specific public benefit.

1 A benefit corporation must deliver an annual benefit report  
2 including the following information:

3 (1) The ways in which the corporation pursued any general and  
4 specific public benefit during the year, the extent to which the  
5 public benefit was created, and any circumstances that hindered the  
6 creation of a public benefit;

7 (2) An assessment of the social and environmental performance  
8 of the corporation;

9 (3) The name of the benefit director and the benefit officer;

10 (4) The compensation paid by the corporation during the year to  
11 the benefit director;

12 (5) The name of each person that owns 5% or more of the  
13 outstanding shares of the benefit corporation; and

14 (6) A statement detailing whether, in the opinion of the benefit  
15 director, the benefit corporation acted in accordance with its  
16 general, and any specific, public benefit purpose.

17 Finally, the annual benefit report must be sent to each  
18 shareholder within 120 days following the end of the fiscal year of  
19 the benefit corporation. The benefit corporation must also post its  
20 most recent benefit report on the public portion of its website,  
21 except that any proprietary information and the compensation paid  
22 to directors may be omitted from the report. Benefit corporations  
23 are also required to deliver a copy of the benefit report to the  
24 Department of Treasury, and the State Treasurer will charge a fee of  
25 \$70 for filing the benefit report.