

BENEFIT CORPORATIONS

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House Bill 5387 (proposed substitute H-1)
Sponsor: Rep. Kelly Breen

Analysis available at
<http://www.legislature.mi.gov>

House Bill 5388 (proposed substitute H-1)
Sponsor: Rep. Matt Koleszar

Committee: Judiciary
Complete to 2-13-24

SUMMARY:

House Bill 5387 would add Chapter 9A (Benefit Corporations) to the Business Corporation Act. The bill would provide that a domestic corporation formed¹ under the Business Corporation Act is a benefit corporation and subject to the new chapter if its articles of incorporation state that it is a benefit corporation. An amendment to the articles to include such a statement would have to be adopted by a *minimum status vote*.

Minimum status vote would mean an authorization or approval of a corporate action that meets all of the following:

- The shareholder approval or vote requirements of the act.
- Any shareholder approval or vote requirement in the articles of incorporation.
- Approval by at least two thirds of the votes entitled to be cast on the corporate action.
- Approval by at least two thirds of any class or series of shares entitled to a vote as a separate group on the corporate action.

In addition to the purposes for which the corporation is formed,² the purposes of a benefit corporation would have to include one or more *public benefits*, and these would have to be identified in the articles of incorporation. An amendment to a benefit corporation's articles of incorporation to add, amend, or delete one or more *public benefits* would have to be adopted by a minimum status vote.

Public benefit would include either of the following purposes for which the corporation is formed, as identified in its articles of incorporation:

- Creating a positive (or reducing a negative) *effect*, either on the environment or for at least one community or category of persons other than shareholders solely in their capacity as shareholders. (*Effect* would include an artistic, charitable, economic, educational, cultural, literary, medical, religious, social, ecological, or scientific effect.)
- Acting in a *responsible and sustainable manner*, which would mean that the corporation does both of the following:
 - Pursues through its business the creation of a positive (or reduction of a negative) effect on society and the environment that, when taken as a

¹ This would appear to exclude corporations that were formed under another law before the Business Corporation Act took effect but that are otherwise treated as domestic corporations under the act.

² As described in section 202(b) of the act: <http://legislature.mi.gov/doc.aspx?mcl-450-1202>

whole, is material in light of the corporation's size and the nature of its business.

- Considers, in addition to the interests of the shareholders, the separate interests of stakeholders known to be affected by the conduct of its business.

A benefit corporation could terminate its status as a benefit corporation by amending its articles of incorporation to remove its public benefits. An amendment to do so would have to be adopted by a minimum status vote.

Mergers, share exchanges, conversions

The provisions described below would be in addition to the requirements of Chapter 7 (Corporate Combinations and Dispositions) of the act.³

If a domestic corporation that is *not* a benefit corporation is a constituent corporation in a merger or an exchanging corporation in a share exchange and the surviving or acquiring corporation will 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.

If the conversion of a domestic corporation that is not a benefit corporation into a **business organization** would result in the shares of any voting group becoming (or being converted into or exchanged for the right to receive) shares or interests in a business organization that is subject to law that governs the internal affairs of the business organization that is analogous to the provisions in the new chapter, the conversion would have to be approved by a minimum status vote of the domestic corporation. However, if the conversion would affect the shares of at least one of the voting groups, but not all of the voting groups, a minimum status vote would be required only with respect to the shares in the voting group affected by the conversion.

Business organization means a domestic or foreign limited liability company, limited partnership, general partnership, or any other type of domestic or foreign business enterprise, incorporated or unincorporated, except for a domestic corporation.

If the conversion of a benefit corporation into a business organization would result in the shares of a voting group of the benefit corporation becoming (or being converted into or exchanged for the right to receive) shares or interests in a business organization that is not subject to law that governs the internal affairs of the business organization that is analogous to the provisions in the new chapter, the conversion would have to be approved by a minimum status vote of the domestic corporation. However, if the conversion would affect the shares of at least one of the voting groups, but not all of the voting groups, a minimum status vote would be required only with respect to the shares in the voting group affected by the conversion.

If the conversion of a benefit corporation into a business organization would result in the shares of a voting group of the benefit corporation becoming (or being converted into or exchanged for the right to receive) shares or interests in a business organization that is subject to law that governs the internal affairs of the business organization that is analogous to the provisions in the new chapter, the conversion would not require a minimum status vote.

³ <https://www.legislature.mi.gov/documents/mcl/pdf/mcl-284-1972-7.pdf>

Consideration, liability, duty

The board would have to consider all of the following:

- The interests of the shareholders.
- The separate interest of stakeholders known to be affected by the conduct of the business of the corporation.
- Each public benefit.

A consideration made as described above by a director of a benefit corporation in the discharge of their duties would not constitute a violation of section 541a of the act.⁴

A director who makes a business judgment in good faith fulfills the director's duties under these provisions if the director is not interested in the subject of the business judgment and is informed with respect to the subject of the business judgment to the extent that the director reasonably believes appropriate under the circumstances.

A director of a benefit corporation would not be liable for monetary damages to the corporation, the shareholders, or any person that claims to be a beneficiary of a public benefit for a failure to fulfill a duty arising under the new chapter or solely because the director performed duties in compliance with these provisions.

A director of a benefit corporation would not have a duty to a person that is a beneficiary of a public benefit arising from the status of the person as a beneficiary.

Benefit enforcement proceeding

The duties of a director of a benefit corporation arising under the new chapter or any public benefit could be enforced only in a **benefit enforcement proceeding**. A person could not bring an action or assert a claim against a benefit corporation or its directors with respect to the duties under the new chapter of any directors of the benefit corporation or any public benefit except in a benefit enforcement proceeding.

Benefit enforcement proceeding would mean a claim asserted or action brought against a director directly by a benefit corporation, or derivatively on behalf of a benefit corporation, for either of the following:

- A failure to pursue a public benefit.
- A violation of a duty or standard of conduct under the new chapter.

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

- Directly, by the benefit corporation.
- Derivatively, by any of the following:
 - A shareholder of the benefit corporation that owns beneficially or of record, individually or collectively, as of the date the benefit enforcement proceeding is instituted, either of the following:
 - At least 5% of the corporation's outstanding shares.
 - If the shares of the benefit corporation are listed on a national securities exchange, 5% of the corporation's outstanding shares, or shares that have a market value of \$5.0 million, whichever is less.

⁴ <http://legislature.mi.gov/doc.aspx?mcl-450-1541a>

- Any other person specified in the articles of incorporation or bylaws of the benefit corporation.

A benefit corporation and its directors would not be liable for monetary damages under the new chapter for any failure of the benefit corporation to pursue or create a public benefit.

An action against a director for failure to perform a duty imposed under the new chapter would have to be commenced within three years after the cause of action has accrued, or within two years after the time when the cause of action is discovered or should reasonably have been discovered by the complainant, whichever occurs first.

Annual benefit report

A benefit corporation would have to prepare an annual benefit report that includes a summary addressing the efforts of the benefit corporation during the preceding year to pursue its public benefits, as well as all of the following:

- The objectives the board has established for the corporation to pursue its public benefits.
- The standards the board has adopted to measure the corporation's progress in pursuing its public benefits.
- If the articles of incorporation or bylaws require the corporation to use an independent third-party standard in reporting on the corporation's progress in pursuing its public benefits, or if the board has chosen to use a third-party standard, a summary of the third-party standard.
- An assessment of the corporation's success in meeting the applicable objectives and standards described above and the basis of the assessment.

Not later than four months after the end of a benefit corporation's fiscal year, the benefit corporation would have to deliver the annual benefit report to each shareholder or make it available with written notice of its availability.

The benefit corporation could distribute the annual benefit report by electronic transmission or by making it available for electronic transmission. The corporation would still have to provide the annual benefit report in written form if requested by a shareholder.

A shareholder that has not received or been given access to an annual benefit report in the time described above could make a written request that the corporation deliver or make the annual benefit report available to them. If the benefit corporation does not deliver or make the annual benefit report available to the shareholder within five business days after receiving the request, the requesting shareholder could petition the circuit court of the county where the corporation's principal place of business or registered office is located for an order requiring the delivery of, or access to, the annual benefit report.

A benefit corporation would have to post its three most recent annual benefit reports on the public portion of its website. If a benefit corporation does not have a website, it would have to provide a copy of its most recent annual benefit report, without charge, to any person that submits a written request.

A benefit corporation would have to include a copy of its annual benefit report with the report it must file with the administrator under section 911 of the act. A benefit corporation would have to pay a fee of \$25 when the annual benefit report is delivered to the administrator. The

administrator's filing of a benefit report would not relate to the validity or invalidity of the information contained in the annual benefit report.

Applicability

Finally, the bill provides that, if there is a conflict between a specific provision of the new chapter and a general provision of the act, the provision of the chapter would apply with respect to a benefit corporation.

Proposed MCL 450.1951 et seq.

House Bill 5388 would amend existing provisions of the Business Corporation Act to make changes complementary to those proposed by HB 5387, including requirements to file an annual benefit report, a new requirement that the corporate name of a benefit corporation must contain the words *benefit corporation* or *benefit company* or the initials *BC* or *B.C.*, and inclusion of benefit corporations in the definition of the terms *corporation* and *domestic corporation* for purposes of the act.

MCL 450.1105 et seq.

FISCAL IMPACT:

House Bills 5387 and 5388 would create additional costs for the Department of Licensing and Regulatory Affairs (LARA), namely for upgrades, revisions, and the creation of new documents for benefit corporations. An initial estimate from LARA indicated that \$500,000 would likely be required for IT enhancements and the creation of forms for these entities. There may also be indirect costs associated with LARA's regulation of benefit corporations (such as administrative enforcement proceedings), but these costs may or may not arise. Under HB 5387, benefit corporations would be required to file an annual benefit report with LARA and this filing would be subject to a \$25 fee. The revenue from this fee would depend on the number of benefit corporations, and is thus currently indeterminate.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.