

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

HOUSE BILL 40

51ST LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2013

INTRODUCED BY

Zachary J. Cook and Timothy M. Keller

AN ACT

RELATING TO CORPORATIONS; PROVIDING FOR A VOLUNTARY DESIGNATION
AS A BENEFIT CORPORATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. A new section of the Business Corporation Act
is enacted to read:

"~~[NEW MATERIAL]~~ DESIGNATION AS A BENEFIT CORPORATION--
REQUIREMENTS--STANDARD OF CONDUCT.--

A. A corporation, including a professional
corporation, may elect to be designated as a benefit
corporation. A professional corporation that elects a
designation as a benefit corporation does not violate the
provisions of Section 53-6-5 NMSA 1978. A provision of the
articles of incorporation or bylaws of a benefit corporation
shall not limit, conflict with or supersede the provisions of

.190219.4

underscored material = new
[bracketed material] = delete

underscoring material = new
~~[bracketed material] = delete~~

1 this section. A corporation that elects the designation of a
2 benefit corporation shall:

3 (1) include a statement in the corporation's
4 articles of incorporation that the corporation is a benefit
5 corporation;

6 (2) in addition to the purpose for which the
7 corporation is organized pursuant to Paragraph (3) of
8 Subsection A of Section 53-12-2 NMSA 1978, have the purpose to
9 create the general public benefit of achieving a material
10 positive impact on society and the environment as assessed
11 against a third-party standard and may identify a specific
12 public benefit in the corporation's articles of incorporation;

13 (3) prepare a benefit report that:

14 (a) describes the progress or lack of
15 progress in achieving the general public benefit or specific
16 public benefit stated in the articles of incorporation;

17 (b) describes the process and rationale
18 for selecting or changing the third-party standard used to
19 measure achieving the general public benefit or a specific
20 public benefit;

21 (c) assesses the overall social and
22 environmental performance of the benefit corporation against a
23 third-party standard;

24 (d) identifies each member of the board
25 of directors and the duties and compensation as a director;

.190219.4

underscoring material = new
~~[bracketed material] = delete~~

1 provided, however, that the benefit corporation may omit
2 information regarding director compensation and financial or
3 proprietary information from the benefit report that is made
4 public; and

5 (e) discloses any connection with the
6 entity that established the third-party standard used to assess
7 the general public benefit or a specific public benefit;

8 (4) provide the benefit report to each
9 shareholder at the time the annual report is due; and

10 (5) publish the benefit report on the public
11 portion of its internet web site, if any, or provide a copy
12 free of charge to any person that requests the benefit report.

13 B. In addition to performing and discharging duties
14 in good faith, in a manner that the board of directors believes
15 to be in, or not opposed to, the best interests of the
16 corporation, and with such care as an ordinarily prudent person
17 would use under similar circumstances in a like position
18 pursuant to Section 53-11-35 NMSA 1978, the director of a
19 benefit corporation, in determining what that director
20 reasonably believes to be in, or not opposed to, the best
21 interests of the benefit corporation, shall take into
22 consideration the:

23 (1) interests of the benefit corporation's
24 shareholders, employees, work force and customers, as
25 beneficiaries of the general public benefit or a specific

.190219.4

underscoring material = new
~~[bracketed material] = delete~~

1 public benefit;

2 (2) community and societal factors;

3 (3) local and global environment;

4 (4) short-term and long-term interests of the
5 benefit corporation, including benefits that may accrue to the
6 benefit corporation from its long-term plans and the
7 possibility that these interests may be best served by the
8 continued independence of the benefit corporation; and

9 (5) ability of the benefit corporation to
10 accomplish the general public benefit and a specific public
11 benefit stated in the benefit corporation's articles of
12 incorporation.

13 C. A director of a benefit corporation is not
14 required to give priority to the interests of a particular
15 person or group referred to in Subsection B of this section
16 over the interests of any other person or group unless the
17 benefit corporation has stated in its articles of incorporation
18 the intention to give priority to certain interests related to
19 its accomplishment of the general public benefit or a specific
20 public benefit.

21 D. An officer of a benefit corporation shall
22 consider the interests and factors pursuant to Subsection B of
23 this section if the officer:

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

.190219.4

underscoring material = new
~~[bracketed material] = delete~~

1 (2) reasonably believes that the matter may
2 have a material effect in achieving the general public benefit
3 or a specific public benefit identified in the articles of
4 incorporation.

5 E. The board of directors of a publicly traded
6 corporation designated as a benefit corporation shall elect an
7 independent director who shall prepare the benefit report. Any
8 other corporation may designate a director or officer who shall
9 prepare the benefit report.

10 F. A benefit corporation shall not be liable for
11 monetary damages pursuant to this section for any failure to
12 pursue or create the general public benefit or a specific
13 public benefit. A claim or action against a benefit
14 corporation for failure to pursue or create the general public
15 benefit or a specific public benefit purpose as set forth in
16 the articles of incorporation, or a violation of any
17 obligation, duty or standard of conduct pursuant to this
18 section, may only be commenced or maintained by the benefit
19 corporation or on behalf of the corporation in a derivative
20 lawsuit by:

21 (1) a person or group of persons that, at the
22 time of the action or inaction that gave rise to the complaint,
23 owned beneficially or of record at least two percent of the
24 total number of shares or of a class of shares;

25 (2) a director;

.190219.4

underscoring material = new
~~[bracketed material] = delete~~

1 (3) a person or group of persons that, at the
2 time of the action or inaction that gave rise to the complaint,
3 owned beneficially or of record five percent or more of the
4 outstanding equity interests in an entity of which the benefit
5 corporation is a subsidiary of; or

6 (4) other persons as specified in the articles
7 of incorporation or bylaws of the benefit corporation.

8 G. The amendments to the articles of incorporation
9 that relate to the designation or termination of the
10 designation of the benefit corporation or the general public
11 benefit or a specific public benefit of the corporation shall
12 only be adopted upon receiving the affirmative vote of the
13 holders of a two-thirds' majority of the shares entitled to
14 vote, unless any class of shares is entitled to vote as a
15 class, in which event, the proposed amendment shall be adopted
16 upon receiving the affirmative vote of the holders of a two-
17 thirds' majority of the shares of each class of shares entitled
18 to vote as a class and of the total shares entitled to vote.

19 H. A benefit corporation may terminate its
20 designation as a benefit corporation by amending its articles
21 of incorporation to delete the requirements of Paragraphs (1)
22 and (2) of Subsection A of this section. The termination of
23 the designation shall be effective upon the adoption of the
24 amendment.

25 I. Nothing in this section shall be construed to

.190219.4

underscoring material = new
~~[bracketed material] = delete~~

1 apply to a corporation that does not elect the designation of a
2 benefit corporation."

3 SECTION 2. Section 53-15-3 NMSA 1978 (being Laws 1967,
4 Chapter 81, Section 77, as amended) is amended to read:

5 "53-15-3. RIGHT OF SHAREHOLDERS TO DISSENT AND OBTAIN
6 PAYMENT FOR SHARES.--

7 A. Any shareholder of a corporation may dissent
8 from, and obtain payment for the shareholder's shares in the
9 event of, any of the following corporate actions:

10 (1) any plan of merger or consolidation to
11 which the corporation is a party, except as provided in
12 Subsection C of this section;

13 (2) any sale or exchange of all or
14 substantially all of the property and assets of the corporation
15 not made in the usual and regular course of its business,
16 including a sale in dissolution, but not including a sale
17 pursuant to an order of a court having jurisdiction in the
18 premises or a sale for cash on terms requiring that all or
19 substantially all of the net proceeds of sale be distributed to
20 the shareholders in accordance with their respective interests
21 within one year after the date of sale;

22 (3) any plan of exchange to which the
23 corporation is a party as the corporation the shares of which
24 are to be acquired;

25 (4) any amendment of the articles of

.190219.4

underscored material = new
[bracketed material] = delete

1 incorporation [~~which~~] that materially and adversely affects the
2 rights appurtenant to the shares of the dissenting shareholder
3 in that it:

4 (a) alters or abolishes a preferential
5 right of such shares;

6 (b) creates, alters or abolishes a
7 right in respect of the redemption of such shares, including
8 a provision respecting a sinking fund for the redemption or
9 repurchase of such shares;

10 (c) alters or abolishes an existing
11 preemptive right of the holder of such shares to acquire
12 shares or other securities; [~~or~~]

13 (d) designates as a benefit
14 corporation; or

15 [~~(d)~~] (e) excludes or limits the
16 right of the holder of such shares to vote on any matter, or
17 to cumulate [~~his~~] the holder's votes, except as such right
18 may be limited by dilution through the issuance of shares or
19 other securities with similar voting rights; or

20 (5) any other corporate action taken
21 pursuant to a shareholder vote with respect to which the
22 articles of incorporation, the bylaws or a resolution of the
23 board of directors directs that dissenting shareholders
24 shall have a right to obtain payment for their shares.

25 B. [~~(1)~~] A record holder of shares may assert

.190219.4

underscoring material = new
[bracketed material] = delete

1 dissenters' rights as to less than all of the shares
2 registered in [~~his~~] the holder's name only if the holder
3 dissents with respect to all the shares beneficially owned
4 by any one person and discloses the name and address of the
5 person or persons on whose behalf the holder dissents. In
6 that event, [~~his~~] the holder's rights shall be determined as
7 if the shares as to which [~~he~~] the holder has dissented and
8 [~~his~~] the holder's other shares were registered in the names
9 of different shareholders. [~~(2)~~] A beneficial owner of
10 shares who is not the record holder may assert dissenters'
11 rights with respect to shares held on [~~his~~] the beneficial
12 owner's behalf and shall be treated as a dissenting
13 shareholder under the terms of this section and Section
14 53-15-4 NMSA 1978 if [~~he~~] the beneficial owner submits to
15 the corporation at the time of or before the assertion of
16 these rights a written consent of the record holder.

17 C. The right to obtain payment under this section
18 shall not apply to the shareholders of the surviving
19 corporation in a merger if a vote of the shareholders of
20 such corporation is not necessary to authorize such merger.

21 D. A shareholder of a corporation who has a right
22 under this section to obtain payment for [~~his~~] shares shall
23 have no right at law or in equity to attack the validity of
24 the corporate action that gives rise to [~~his~~] the
25 shareholder's right to obtain payment nor to have the action

underscoring material = new
~~[bracketed material] = delete~~

1 set aside or rescinded, except when the corporate action is
2 unlawful or fraudulent with regard to the complaining
3 shareholder or to the corporation."

4 - 10 -
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25