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S.B. 21

133rd General Assembly

## Bill Analysis

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**Version:** As Reported by Senate Judiciary

**Primary Sponsor:** Sen. Dolan

Andrew Little, Attorney

### Summary

#### Benefit corporations

- Allows a corporation to become a benefit corporation – a corporation whose purposes include a purpose to have a bona fide positive effect or to reduce one or more bona fide negative effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific, or technological nature for the benefit of persons, entities, communities, or interests aside from shareholders.
- Requires the beneficial purpose to be expressly stated in the benefit corporation's articles of incorporation.
- Prohibits a corporation from using "benefit" or "b-" as a prefix to the corporate designation in its name unless the corporation is a benefit corporation.
- Allows a benefit corporation's articles, regulations, or agreement to require that a report detailing the activities of the corporation toward the corporation's beneficial purposes be presented to the corporation's shareholders at the corporation's annual meeting and permits shareholders to request a copy of that report.
- Specifies that a benefit corporation and its directors owe no duty to a beneficiary of the corporation's beneficial purpose solely because of that person's status as a beneficiary.
- Requires a benefit corporation director, in determining what is in the best interests of the corporation, to consider any beneficial purpose and related provisions set forth in the corporation's articles and any priority among the purposes set forth in the articles.
- Allows a benefit corporation, its directors, certain shareholders, or certain other persons to seek equitable relief to advance the corporation's beneficial purposes when the corporation fails to pursue it.

#### Corporations generally

- Allows a corporation to prioritize among any of the purposes listed in its articles.

- Specifies that a corporation that is not a benefit corporation is not required to operate exclusively for profit or distribution of net earnings in all instances.

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## Detailed Analysis

### Formation and purpose of benefit corporations

The bill allows the formation of benefit corporations under Ohio's General Corporation Law. Under continuing law, a corporation can be formed for any purpose that individuals may lawfully associate. Under the bill, a corporation's purpose may also be, or include, a beneficial purpose. "Beneficial purpose" means seeking to have a bona fide positive effect or to reduce one or more bona fide negative effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific, or technological nature for the benefit of persons, entities, communities, or interests other than shareholders in their capacity as shareholders.

The bill requires, for the formation of a benefit corporation, that a beneficial purpose be expressly stated in the articles of incorporation. Generally, the inclusion of a beneficial purpose does not prevent a corporation from pursuing the other purposes for which it was formed, including pecuniary gain, and no particular purpose has priority over another. Beyond that general rule, though, the bill does allow the articles of incorporation to set a priority or method for balancing the corporation's purposes. This new provision regarding priority of purposes is not limited to benefit corporations, however; it applies to all corporations generally.<sup>1</sup>

For corporations without a beneficial purpose, the bill establishes that they are not required to operate exclusively for profit or distribution of net earnings in all instances.<sup>2</sup>

### Benefit corporation name

The bill expands continuing law's provisions regulating corporate names. Continuing law requires a corporation to designate its incorporated status by including a corporate designation in its name. Some examples of this include "company," "co.," "corporation," "corp.," "incorporated," and "inc." As it relates to benefit corporations, a corporate designation can only include "benefit" or "b-" as a prefix if it is in fact a benefit corporation. This requirement does not apply to a corporation that had "benefit" or "b-" in its name prior to the bill's effective date.<sup>3</sup>

### Benefit corporation reports

Corporations, including benefit corporations under the bill, are generally required to have an annual meeting of shareholders for the election of directors and the consideration of reports.<sup>4</sup> Under continuing law, financial statements with specific sets of information must be laid before shareholders at that meeting. If a corporation becomes a benefit corporation, under

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<sup>1</sup> R.C. 1701.01(FF) and (GG), 1701.03(A)(1), (2), and (4), and 1701.04(B)(3).

<sup>2</sup> R.C. 1701.03(A)(3).

<sup>3</sup> R.C. 1701.05(A)(1) and (2).

<sup>4</sup> R.C. 1701.39, not in the bill.

the bill, the corporation may require, in its articles, regulations, or a written agreement, that a written statement or report concerning its beneficial purposes and its activities toward those purposes be presented at its annual meeting.<sup>5</sup>

The bill also extends the existing distribution requirements for financial statements to beneficial purpose statements or reports.

If a benefit corporation's shareholder meeting is held only through communications equipment, the corporation must make the statement or report regarding its beneficial purposes, if one is prepared, open to examination by any shareholder or proxyholder during the whole time of the meeting on a reasonably accessible network. A corporation or responsible corporate officer that fails to comply with this requirement is subject to a \$100 forfeiture.<sup>6</sup>

The statement or report must also be sent to shareholders who timely request it. Under continuing law and the bill, respectively, a corporation or responsible corporate officer that fails to timely present its shareholders with a properly requested financial statement or report regarding beneficial purposes is subject to a \$100 forfeiture and an additional \$10 forfeiture for each day the failure persists (see **COMMENT**).<sup>7</sup>

Also under continuing law, a close corporation may dispense with an annual meeting through its close corporation agreement. In such a case, the bill demands that any required statement or report regarding beneficial purposes be delivered to each shareholder on or before the last date the annual meeting could have been held.<sup>8</sup>

## **Duties relating to the beneficial purpose**

### **A benefit corporation's duties to beneficiaries**

The bill provides that no duty is owed by a benefit corporation to a beneficiary of its beneficial purpose based solely on the beneficiary's status as a beneficiary.<sup>9</sup>

### **A benefit corporation director's duty to beneficiaries**

The bill limits the duties a benefit corporation director owes to a beneficiary of the corporation's beneficial purpose. Continuing law requires that a director of a corporation perform the director's duties in good faith, in a manner that the director reasonably believes is in, or not opposed to, the corporation's best interests. It also requires the director to use the care that an ordinarily prudent person in a like position would exercise under similar circumstances.

Under the bill, the director does not owe those duties to a beneficiary of the beneficial purpose of the benefit corporation, solely on the basis of that person's status as a beneficiary. In determining what the director reasonably believes to be in the best interests of the corporation, continuing law requires that the director consider the interests of the

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<sup>5</sup> R.C. 1701.38(A).

<sup>6</sup> R.C. 1701.38(D) and 1701.94(A)(5).

<sup>7</sup> R.C. 1701.38(C) and 1701.94(A)(4).

<sup>8</sup> R.C. 1701.591.

<sup>9</sup> R.C. 1701.96(A).

corporation's shareholders, and the bill requires that the director consider any beneficial purpose and related provisions set forth in the corporation's articles. The director also must consider any priority among purposes provided in the articles. Finally, under continuing law, the director may consider several factors, including the long- and short-term interests of the corporation and its shareholders, including the possibility that those interests may be best served by the corporation's continued independence. The bill adds the corporation's beneficial purposes as a permissible consideration with regard to the long- and short-term interests of the corporation and its shareholders.<sup>10</sup>

## **Obtaining relief from a benefit corporation**

The bill establishes that benefit corporations are not liable for damages for failure to seek, achieve, or comply with the beneficial purpose or any related provisions set forth in their articles. Rather, they may be subject only to equitable remedies, such as injunction or specific performance, for failure to seek, achieve, or comply with a beneficial purpose.

An action for equitable relief can only be brought by the benefit corporation itself or in a derivative action on behalf of the benefit corporation. Derivative suits may only be brought by certain people:

- A director of the corporation;
- Persons who in the aggregate hold 25% of all outstanding shares with voting power, unless the articles or regulations set a smaller proportion;
- Persons who in the aggregate hold shares of at least \$2 million in market value, if the benefit corporation has issued and has outstanding shares listed on a national securities exchange or regularly quoted in an over-the-counter market by one or more members of a national or affiliated securities association;
- Any person granted that authority by the corporation's articles or regulations.

The bill also establishes that its new provisions do not alter a benefit corporation's obligation to comply with its contracts or other laws that are generally applicable to domestic corporations. Nor do those provisions limit or restrict the imposition of any remedy granted under contract or generally applicable laws.<sup>11</sup>

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## **Comment**

Existing law requires a corporation to send a shareholder, upon proper request, a copy of the financial statement laid, or to be laid, before the shareholders at an annual meeting. The report must be sent by the later of two dates, the first being the fifth day after the written request is received, and the second being the earlier of the fifth day before the annual meeting or four months and five days after the date of the balance sheet in the financial statement. The bill adds written statements or reports regarding a benefit corporation's beneficial purposes to the documents a shareholder may request but does not change the provisions regarding when

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<sup>10</sup> R.C. 1701.59.

<sup>11</sup> R.C. 1701.96(B) to (D).

they must be provided.<sup>12</sup> As a result, the bill uses a date in the financial statements to determine the delivery deadline for reports regarding beneficial purposes.

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## History

Action	Date
Introduced	02-12-19
Reported, S. Judiciary	02-28-19

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S0021-RS-133/ts

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<sup>12</sup> R.C. 1701.38(C).