SPONSOR: Sen. Sokola & Rep. B. Short
Sens. Henry, Lavelle, Townsend; Reps. M. Smith, Walker, Baumbach, Q. Johnson, Bennett, Peterman

DELAWARE STATE SENATE
147th GENERAL ASSEMBLY

SENATE BILL NO. 47

AN ACT TO AMEND TITLE 8 OF THE DELAWARE CODE RELATING TO THE GENERAL CORPORATION LAW.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend § 103(c)(6) Title 8 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

(6) The assessment fee to the counties shall be $24 for each 1-page instrument filed with the Secretary of State in accordance with this section and $9.00 for each additional page for instruments with more than 1 page. The recorder's office to receive the assessment fee shall be the recorder's office in the county in which the corporation's registered office in this State is, or is to be, located, except that an assessment fee shall not be charged for either a certificate of dissolution qualifying for treatment under § 391(a)(5)b. of this title or a document filed in accordance with subchapter XVI of this chapter.

Section 2. Amend § 103(c)(7), Title 8 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

(7) The Secretary of State, acting as agent, shall collect and deposit in a separate account established exclusively for that purpose a courthouse municipality fee with respect to each filed instrument and shall thereafter monthly remit funds from such account to the treasuries of the municipalities designated in § 301 of Title 10. Said fees shall be for the purposes of defraying certain costs incurred by such municipalities in hosting the primary locations for the Delaware courts. The fee to such municipalities shall be $20 for each instrument filed with the Secretary of State in accordance with this section. The municipality to receive the fee shall be the municipality designated in § 301 of Title 10 in the county in which the corporation's registered office in this State is, or is to be, located, except that a fee shall not be charged for a certificate of dissolution qualifying for treatment under § 391(a)(5)b. of this title, a resignation of agent without appointment of a successor under § 136 of this title, or a document filed in accordance with subchapter XVI of this chapter.

Section 3. Amend § 114(b)(2), Title 8 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

(2) Sections 151, 152, 153, 155, 156, 157(d), 158, 161, 162, 163, 164, 165, 166, 167, 168, 203, 211, 212, 213, 214, 216, 219, 222, 231, 243, 244, 251, 252, 267, 274, 275, 324, 364, 366(a), and 391 of this title; and

Section 4. Amend § 114(b)(3), Title 8 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

(3) Subchapter XIV and subchapter XVI of this chapter.

Section 5. Amend § 114(c)(3), Title 8 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

(3) Subchapter V ~~and~~, subchapter VI and subchapter XV of this chapter.

Section 6. Amend § 262(b)(1), Title 8 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

(1) Provided, however, that, except as expressly provided in § 363(b) of this title, no appraisal rights under this section shall be available for the shares of any class or series of stock, which stock, or depository receipts in respect thereof, at the record date fixed to determine the stockholders entitled to receive notice of the meeting of stockholders to act upon the agreement of merger or consolidation, were either (i) listed on a national securities exchange or (ii) held of record by more than 2,000 holders; and further provided that no appraisal rights shall be available for any shares of stock of the constituent corporation surviving a merger if the merger did not require for its approval the vote of the stockholders of the surviving corporation as provided in § 251(f) of this title.

Section 7. Amend § 262(b), Title 8 of the Delaware Code by adding a new section, § 262(b)(4), shown by underlining as follows:

(4) In the event of an amendment to a corporation's certificate of incorporation contemplated by § 363(a) of this title, appraisal rights shall be available as contemplated by § 363(b) of this title, and the procedures of this section, including those set forth in subsections (d) and (e), shall apply as nearly as practicable, with the word "amendment" substituted for the words "merger or consolidation", and the word "corporation" substituted for the words "constituent corporation" and/or "surviving or resulting corporation".

Section 8. Amend Title 8 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows.

SUBCHAPTER XV

PUBLIC BENEFIT CORPORATIONS

§ 361. Law applicable to public benefit corporations; how formed.

This subchapter applies to all public benefit corporations, as defined in § 362 of this title. If a corporation elects to become a public benefit corporation under this subchapter in the manner prescribed in this subchapter, it shall be subject in all respects to the provisions of this chapter, except to the extent this subchapter imposes additional or different requirements, in which case such requirements shall apply.

§ 362. Public benefit corporation defined; contents of certificate of incorporation.

(a) A public benefit corporation is a for-profit corporation organized under and subject to the requirements of this chapter that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. To that end, a public benefit corporation shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation. In the certificate of incorporation, a public benefit corporation shall (i) identify within its statement of business or purpose pursuant to§ 102(a)(3) of this title one or more specific public benefits to be promoted by the corporation, and (ii) state within its heading that it is a public benefit corporation.

(b) "Public benefit" means a positive effect (or reduction of negative effects) on one or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature. "Public benefit provisions" means the provisions of a certificate of incorporation contemplated by this subchapter.

(c) The name of the public benefit corporation shall, without exception, contain the words "public benefit corporation", or the abbreviation "P.B.C.", or the designation "PBC", which shall be deemed to satisfy the requirements of § 102(a)(l)(i) of this title.

§ 363. Certain amendments and mergers; votes required; appraisal rights.

(a) Notwithstanding any other provisions of this chapter, a corporation that is not a public benefit corporation, may not, without the approval of ninety percent of the outstanding shares of each class of the stock of the corporation of which there are outstanding shares, whether voting or non-voting, (i) amend its certificate of incorporation to include a provision authorized by § 362(a)(i) of this title or (ii) merge or consolidate with or into another entity if, as a result of such merger or consolidation, the shares in such corporation would become, or be converted into or exchanged for the right to receive, shares or other equity interests in a domestic or foreign public benefit corporation or similar entity. The restrictions of this § 363 shall not apply prior to the time that the corporation has received payment for any of its capital stock, or in the case of a nonstock corporation, prior to the time that it has members.

(b) Any stockholder of a corporation that is not a public benefit corporation that holds shares of stock of such corporation immediately prior to the effective time of (1) an amendment to the corporation's certificate of incorporation to include a provision authorized by § 362(a)(i) of this title, or (2) a merger or consolidation that would result in the conversion of the corporation's stock into or exchange of the corporation's stock for the right to receive shares or other equity interests in a domestic or foreign public benefit corporation or similar entity, and has neither voted in favor of such amendment or such merger or consolidation nor consented thereto in writing pursuant to § 228 of this title, shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock.

(c) Notwithstanding any other provisions of this chapter, a corporation that is a public benefit corporation may not, without the approval of two-thirds of the outstanding shares of each class of the stock of the corporation of which there are outstanding shares, whether voting or non-voting, (i) amend its certificate of incorporation to delete or amend a provision authorized by § 362(a)(i) or § 366(c) of this title or (ii) merge or consolidate with or into another entity if, as a result of such merger or consolidation, the shares in such corporation would become, or be converted into or exchanged for the right to receive, shares or other equity interests in a domestic or foreign corporation that is not a public benefit corporation or similar entity and the certificate of incorporation (or similar governing instrument) of which does not contain the identical provisions identifying the public benefit or public benefits pursuant to § 362(a) or imposing requirements pursuant to § 366(c) of this title.

(d) Notwithstanding the foregoing, a nonprofit nonstock corporation may not be a constituent corporation to any merger or consolidation governed by this section.

§ 364. Stock certificates; notices regarding uncertificated stock.

Any stock certificate issued by a public benefit corporation shall note conspicuously that the corporation is a public benefit corporation formed pursuant to this subchapter. Any notice sent by a public benefit corporation pursuant to § 151(f) of this title shall state conspicuously that the corporation is a public benefit corporation formed pursuant to this subchapter.

§ 365. Duties of directors.

(a) The board of directors shall manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation.

(b) A director of a public benefit corporation shall not, by virtue of the public benefit provisions or § 362(a) of this title, have any duty to any person on account of any interest of such person in the public benefit or public

benefits identified in the certificate of incorporation or on account of any interest materially affected by the corporation's conduct and, with respect to a decision implicating the balance requirement in subsection (a) of this section, will be deemed to satisfy such director's fiduciary duties to stockholders and the corporation if such director's decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve.

(c) The certificate of incorporation of a public benefit corporation may include a provision that any disinterested failure to satisfy this section shall not, for the purposes of § 102(b)(7) or § 145 of this title, constitute an act or omission not in good faith, or a breach of the duty of loyalty.

§ 366. Periodic statements and third party certification.

(a) A public benefit corporation shall include in every notice of a meeting of stockholders a statement to the effect that it is a public benefit corporation formed pursuant to this subchapter.

(b) A public benefit corporation shall no less than biennially provide its stockholders with a statement as to the corporation's promotion of the public benefit or public benefits identified in the certificate of incorporation and of the best interests of those materially affected by the corporation's conduct. The statement shall include: (i) the objectives the board of directors has established to promote such public benefit or public benefits and interests; (ii) the standards the board of directors has adopted to measure the corporation's progress in promoting such public benefit or public benefits and interests; (iii) objective factual information based on those standards regarding the corporation's success in meeting the objectives for promoting such public benefit or public benefits and interests; and (iv) an assessment of the corporation's success in meeting the objectives and promoting such public benefit or public benefits and interests.

(c) The certificate of incorporation or bylaws of a public benefit corporation may require that the corporation (i) provide the statement described in subsection (b) more frequently than biennially, (ii) make the statement described in subsection (b) available to the public, and/or (iii) use a third party standard in connection with and/or attain a periodic third party certification addressing the corporation's promotion of the public benefit or public benefits identified in the certificate of incorporation and/or the best interests of those materially affected by the corporation's conduct.

§ 367. Derivative suits.

Stockholders of a public benefit corporation owning individually or collectively, as of the date of instituting such derivative suit, at least two percent of the corporation's outstanding shares or, in the case of a corporation with shares listed on a national securities exchange, the lesser of such percentage or shares of at least two million dollars in market value, may maintain a derivative lawsuit to enforce the requirements set forth in§ 365(a) of this title.

§ 368. No effect on other corporations.

This subchapter shall not affect a statute or rule of law that is applicable to a corporation that is not a public benefit corporation, except as provided in § 363 of this title.

Section 9. Amend Subchapter XV, Title 8 of the Delaware Code by redesignating present Subchapter XV as Subchapter XVI.

Section 10. Amend Subchapter XVI, Title 8 of the Delaware Code by redesignating present Subchapter XVI as Subchapter XVII.

Section 11. Amend Subchapter XVII, Title 8 of the Delaware Code by redesignating present Subchapter XVII as Subchapter XVII.

Section 12. Sections 1 through 5 and 8 through 11 shall be effective on August 1, 2013. Sections 6 and 7 shall be effective only with respect to transactions consummated pursuant to agreements entered into after August 1, 2013 (or, in the case of mergers pursuant to Section 253, resolutions of the board of directors adopted after August 1, 2013), and appraisal proceedings arising out of such transactions.

SYNOPSIS

New Subchapter XV, for which Sections 8 and 9 of this legislation provide, authorizes the creation of public benefit corporations. A public benefit corporation is a for-profit entity which is managed not only for the pecuniary interests of its stockholders but also for the benefit of other persons, entities, communities or interests. Delaware General Corporation Law Sections 362(a) and 365(a) create and impose on directors of public benefit corporations a tri-partite balancing requirement. Public benefit corporations must be managed in a manner that balances (i) the stockholders' pecuniary interests, (ii) the interests of those materially affected by the corporation's conduct, and (iii) a public benefit or public benefits identified in the corporation's certificate of incorporation.

Section 362(a) requires a public benefit corporation to identify in its certificate of incorporation the specific public benefit or public benefits the corporation will promote. Section 366(b) requires public benefit corporations, at least every two years, to issue to stockholders statements that contain certain prescribed information. Section 366(c) permits the corporation in its certificate of incorporation or bylaws to impose additional specified requirements to facilitate stockholders' ability to evaluate the public benefit corporation's achievement of its purposes.

Sections 362(a) and (c) require that both the certificate of incorporation and the name of the corporation clearly indicate that a corporation is a public benefit corporation. Section 364 and 366(a) require that all stock certificates and notices of meetings contain statements acknowledging that the corporation is a public benefit corporation. Section 363 requires a ninety percent vote of stockholders for an existing corporation to become a public benefit corporation and grants appraisal rights to any dissenting stockholder of a corporation that is not a public benefit corporation and becomes a public benefit corporation. Sections 6 and 7 of this legislation are amendments to DGCL Sections 262(b)(1) and 262(b)(4) to implement this appraisal right. The amendments to Section 262 shall be effective only with respect to transactions consummated pursuant to agreements entered into after August 1, 2013 (or, in the case of mergers pursuant to Section 253, resolutions of the board of directors adopted after August 1, 2013), and appraisal proceedings arising out of such transactions.

Section 363(c) imposes a two-thirds vote requirement for actions that would terminate the public benefit status of the corporation.

Sections 365 (b) and (c) provide broad protection to directors of public benefit corporations against claims based on interests other than those of stockholders. Directors are not liable as to claims asserted on account of any claimed interest (i) in the public benefits identified in the certificate of incorporation, or (ii) of those materially affected by the corporation's conduct.

Directors also receive significant protections against claims by stockholders challenging disinterested decisions. Section 365(b) deems directors of public benefit corporations to have satisfied their fiduciary duties to balance the tripartite purposes if the director's decision is informed and disinterested and not such that no person of ordinary sound judgment would approve. Public benefit corporations may include a provision in their certificates of incorporation that any disinterested decision by directors shall not constitute an act or omission not in good faith, or breach of the duty of loyalty for purposes of imposing monetary liability pursuant to any provision adopted pursuant to § 102(b)(7) or determining indemnification rights pursuant to § 145.

Section 367 authorizes stockholders of public benefit corporations to sue derivatively to enforce the directors' duties under § 365 but only if at the time suit is filed those stockholders individually or collectively own (i) at least two percent of the corporation's outstanding shares, or (ii) as to corporations with shares listed on a national securities exchange, the lesser of two percent of the outstanding shares or shares with a market value of at least two million dollars.

Section 368 makes clear that the rules applicable to public benefit corporations do not and will not impact or alter any laws that are applicable to corporations that are not public benefit corporations. The only exceptions are the provisions of § 363 which govern transactions in which a corporation converts either to or from a public benefit corporation.

Sections 3, 4 and 5 of this legislation are amendments to DGCL Sections 114(b)(2), 114(b)(3) and 114(c)(3) to correspond DGCL provisions regarding nonstock corporations to the benefit corporation provisions in this legislation.

Sections 1, 2, 9, 10 and 11 of this legislation redesignate existing DGCL Subchapters XV, XVI and XVII as Subchapters XVI, XVII and XVIII and correspondingly change cross references to permit proper placement of the benefit corporation provisions in the DGCL.

Section 12 provides that Sections 1 through 5 and 8 through 11 shall be effective on August 1, 2013; and that Sections 6 and 7 shall be effective only with respect to transactions consummated pursuant to agreements entered into after August 1, 2013 (or, in the case of mergers pursuant to Section 253, resolutions of the board of directors adopted after August 1, 2013), and appraisal proceedings arising out of such transactions.

Author: Sen. Sokola