STATE OF OKLAHOMA

1st Session of the 55th Legislature (2015)

HOUSE BILL 1039 By: Loring

AS INTRODUCED

An Act relating to corporations; enacting the Oklahoma Benefit Corporation Act; stating applicability; stating resolution for conflicting laws; prohibiting inconsistent provisions in the certificate or bylaws; defining terms; requiring benefit corporation to comply with the Oklahoma General Corporation Act; prescribing statement for certificate of incorporation; providing for certificate amendment to become benefit corporation; requiring minimum vote for amendment; mandating minimum vote for merger, consolidation, or conversion; providing exception; allowing certificate amendment to terminate status as benefit corporation; requiring minimum vote for amendment; providing exception; mandating minimum vote for sale or disposition of all assets; directing benefit corporation to have a purpose; authorizing certificate to identify purpose; permitting certificate amendment to change purpose; requiring minimum vote for amendment; construing provision; listing duties for benefit corporation directors; limiting personal liability for directors; exempting director duty to individual beneficiary; clarifying good-faith standard for benefit corporation director; listing board composition; outlining benefit director position and duties; directing election of benefit director in manner prescribed; requiring benefit director to be independent; providing exception; permitting dual service; allowing additional qualifications of benefit director; requiring benefit director to prepare annual benefit report; specifying contents of report; limiting liability of benefit director; providing exception; listing duties for benefit corporation officers; limiting personal liability of officers; exempting officer duty to

individual beneficiary; specifying good-faith standard for officers; authorizing designation of benefit officer; providing powers and duties of benefit officer; prohibiting actions against a benefit corporation or its directors or officers; providing exception; excluding money damages for failure to pursue or create benefit; specifying conditions for benefit enforcement proceeding; specifying contents of annual benefit report; providing for inclusion of certain correspondence; exempting audit requirement; directing report to be sent to each shareholder; prescribing timing for report; mandating report to be posted on website; allowing omission of proprietary information; clarifying procedure if there is not a website; directing delivery of report to Secretary of State for filing; permitting omission of information; providing for filing fee; providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1201 of Title 18, unless there is created a duplication in numbering, reads as follows:

A. This act shall be known and may be cited as the "Oklahoma Benefit Corporation Act". This act shall be applicable to all benefit corporations.

B. The existence of a provision of this act shall not of itself create an implication that a contrary or different statute or rule is applicable to a corporation that is not a benefit corporation. This act shall not affect a statute or rule that is applicable to a corporation that is not a benefit corporation.

C. Except as otherwise provided in this act, the Oklahoma General Corporation Act shall be generally applicable to all benefit corporations. A benefit corporation may be subject simultaneously to this act and the Oklahoma General Corporation Act, Professional Entity Act, and other applicable business formation statutes; however, the provisions of this act shall control over the provisions of the Oklahoma General Corporation Act, Professional Entity Act, and other applicable business formation statutes where there is a conflict.

D. A provision of the certificate of incorporation or bylaws of a benefit corporation shall not limit, be inconsistent with, or supersede a provision of this act.

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1202 of Title 18, unless there is created a duplication in numbering, reads as follows:

As used in the Oklahoma Benefit Corporation Act:

1. "Benefit corporation" means a corporation:

   a. that has elected to become subject to the Oklahoma Benefit Corporation Act, and

   b. the status of which as a benefit corporation has not been terminated;

2. "Benefit director" means the director designated as the benefit director of a benefit corporation under Section 8 of this act;

3. "Benefit enforcement proceeding" means any claim or action or proceeding for:

a. failure of a benefit corporation to pursue or create general public benefit or a specific public benefit purpose set forth in its certificate, or

b. violation of any obligation, duty, or standard of conduct under this act;

4. "Benefit officer" means the individual designated as the benefit officer of a benefit corporation under Section 10 of this act;

5. "General public benefit" means a material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation;

6. "Independent" means having no material relationship with a benefit corporation or a subsidiary of the benefit corporation. Serving as benefit director or benefit officer does not make an individual not independent. A material relationship between an individual and a benefit corporation or any of its subsidiaries will be conclusively presumed to exist if any of the following apply:

a. the individual is, or has been within the last three (3) years, an employee other than a benefit officer of the benefit corporation or a subsidiary,

b. an immediate family member of the individual is, or has been within the last three (3) years, an executive officer other than a benefit officer of the benefit corporation or a subsidiary, or

c. there is beneficial or record ownership of five percent (5%) or more of the outstanding shares of the benefit corporation, calculated as if all outstanding rights to acquire equity interests in the benefit corporation had been exercised, by:

(1) the individual, or

(2) an entity:

(a) of which the individual is a director, an officer, or a manager, or

(b) in which the individual owns beneficially or of record five percent (5%) or more of the outstanding equity interests, calculated as if all outstanding rights to acquire equity interests in the entity had been exercised;

7. "Minimum status vote" means:

a. in the case of a business corporation, in addition to any other required approval or vote, the satisfaction of the following conditions:

(1) the shareholders of every class or series shall be entitled to vote as a class on the corporate

action regardless of a limitation stated in the certificate of incorporation or bylaws on the voting rights of any class or series, and

(2) the corporate action shall be approved by the affirmative vote of the shareholders of each class or series entitled to cast at least two-thirds of the votes that all shareholders of the class or series are entitled to cast on the action,

b. in the case of a domestic entity other than a corporation, in addition to any other required approval, vote, or consent, the satisfaction of the following conditions:

(1) the holders of every class or series of equity interest in the entity that are entitled to receive a distribution of any kind from the entity shall be entitled to vote on or consent to the action regardless of any otherwise applicable limitation on the voting or consent rights of any class or series, and

(2) the action shall be approved by the affirmative vote or consent of the holders described in division (1) of this subparagraph entitled to cast at least two-thirds of the votes or consents

that all of those holders are entitled to cast on the action;

8. "Publicly traded corporation" means a corporation that has shares listed on a national securities exchange or traded in a market maintained by one or more members of a national securities association;

9. "Specific public benefit" includes:

a. providing low-income or underserved individuals or communities with beneficial products or services,

b. promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business,

c. protecting or restoring the environment,

d. improving human health,

e. promoting the arts, sciences, or advancement of knowledge,

f. increasing the flow of capital to entities with a purpose to benefit society or the environment, and

g. conferring any other particular benefit on society or the environment;

10. "Subsidiary" means in relation to a person, an entity in which the person owns beneficially or of record fifty percent (50%) or more of the outstanding equity interests, calculated as if all

outstanding rights to acquire equity interests in the entity had been exercised; and

11. "Third-party standard" means a recognized standard for defining, reporting, and assessing corporate social and environmental performance that is:

a. comprehensive because it assesses the effects of the business and its operations upon the interests listed in subparagraphs b, c, d, and e of paragraph 1 of subsection A of Section 7 of this act,

b. developed by an entity that is not controlled by the benefit corporation,

c. credible because it is developed by an entity that both:

(1) has access to necessary expertise to assess overall corporate social and environmental performance, and

(2) uses a balanced multi-stakeholder approach to develop the standard, including a reasonable public comment period,

d. transparent because the following information is publicly available:

(1) about the standard:

(a) the criteria considered when measuring the overall social and environmental performance of a business, and

(b) the relative weightings, if any, of those criteria, and

(2) about the development and revision of the standard:

(a) the identity of the directors, officers, material owners, and the governing body of the entity that developed and controls revisions to the standard,

(b) the process by which revisions to the standard and changes to the membership of the governing body are made, and

(c) an accounting of the revenue and sources of financial support for the entity, with sufficient detail to disclose any relationships that could reasonably be considered to present a potential conflict of interest.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1203 of Title 18, unless there is created a duplication in numbering, reads as follows:

A benefit corporation shall be incorporated in accordance with the Oklahoma General Corporation Act pursuant to Section 1005 of Title 18 of the Oklahoma Statutes, but its certificate of incorporation shall also state that it is a benefit corporation.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1204 of Title 18, unless there is created a duplication in numbering, reads as follows:

A. An existing business corporation may become a benefit corporation under the Oklahoma Benefit Corporation Act by amending its certificate of incorporation so that it contains, in addition to the requirements of Section 1006 of Title 18 of the Oklahoma Statutes, a statement that the corporation is a benefit corporation. In order to be effective, the amendment shall be adopted by at least the minimum status vote.

B. 1. Except as provided in paragraph 2 of this subsection, if a domestic entity that is not a benefit corporation is a party to a merger, consolidation, or conversion and the surviving, new, or resulting entity in the merger, consolidation, or conversion is to be a benefit corporation, the plan of merger, consolidation, or conversion shall be adopted or approved by the domestic entity by at least the minimum status vote.

2. Paragraph 1 of this subsection shall not apply in the case of a corporation that is a party to a merger, consolidation, or

conversion if the shareholders of the corporation are not entitled to vote on the merger, consolidation or conversion.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1205 of Title 18, unless there is created a duplication in numbering, reads as follows:

A. A benefit corporation may terminate its status and cease to be subject to the Oklahoma Benefit Corporation Act by amending its certificate of incorporation to delete the provision required by Sections 3 and 4 of this act to be stated in the certificate of a benefit corporation. In order to be effective, the amendment shall be adopted by at least the minimum status vote.

B. 1. Except as provided in paragraph 2 of this subsection, if a plan of merger, consolidation, or conversion would have the effect of terminating the status of a business corporation as a benefit corporation, the plan shall be adopted by at least the minimum status vote in order to be effective.

2. Paragraph 1 of this subsection shall not apply in the case of a corporation that is a party to a merger if the shareholders of the corporation are not entitled to vote on the merger.

3. Any sale, lease, exchange, or other disposition of all or substantially all of the assets of a benefit corporation, unless the transaction is in the usual and regular course of business, shall not be effective unless the transaction is approved by at least the minimum status vote.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1206 of Title 18, unless there is created a duplication in numbering, reads as follows:

A. A benefit corporation shall have a purpose of creating general public benefit. This purpose is in addition to its purpose under the Oklahoma General Corporation Act.

B. The certificate of incorporation of a benefit corporation may identify one or more specific public benefits that it is the purpose of the benefit corporation to create in addition to its purposes under the Oklahoma General Corporation Act and subsection A of this section. The identification of a specific public benefit under this subsection does not limit the purpose of a benefit corporation to create general public benefit under subsection A of this section.

C. The creation of general public benefit and specific public benefit under subsections A and B of this section shall be in the best interests of the benefit corporation.

D. A benefit corporation may amend its certificate of incorporation to add, amend, or delete the identification of a specific public benefit that it is the purpose of the benefit corporation to create. In order to be effective, the amendment shall be adopted by at least the minimum status vote.

E. A professional corporation that is a benefit corporation shall not violate the Professional Entity Act by having the purpose to create general public benefit or a specific public benefit.

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1207 of Title 18, unless there is created a duplication in numbering, reads as follows:

A. In discharging the duties of their respective positions and in considering the best interests of the benefit corporation, the board of directors, committees of the board, and individual directors of a benefit corporation:

1. Shall consider the effects of any action or inaction upon:

a. the shareholders of the benefit corporation,

b. the employees and work force of the benefit corporation, its subsidiaries, and its suppliers,

c. the interests of customers as beneficiaries of the general public benefit or specific public benefit purposes of the benefit corporation,

d. community and societal factors, including those of each community in which offices or facilities of the benefit corporation, its subsidiaries, or its suppliers are located,

e. the local and global environment,

f. the short-term and long-term interests of the benefit corporation, including benefits that may accrue to the

benefit corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the benefit corporation, and

g. the ability of the benefit corporation to accomplish its general public benefit purpose and any specific public benefit purpose; and

2. May consider other pertinent factors or the interests of any other group that they deem appropriate; but

3. Need not give priority to a particular interest or factor referred to in paragraphs 1 or 2 of this subsection over any other interest or factor unless the benefit corporation has stated in its certificate of incorporation its intention to give priority to certain interests or factors related to the accomplishment of its general public benefit purpose or of a specific public benefit purpose identified in its certificate.

B. The consideration of interests and factors in the manner provided by subsection A of this section:

1. Shall not constitute a violation of Section 1027 of Title 18 of the Oklahoma Statutes; and

2. Is in addition to the ability of directors to consider interests and factors as provided in the Oklahoma General Corporation Act.

C. Except as provided in the certificate of incorporation or bylaws, a director is not personally liable for monetary damages for:

1. Any action or inaction in the course of performing the duties of a director under subsection A of this section if the director performed the duties of office in compliance with Section 1027 of Title 18 of the Oklahoma Statutes and this section; or

2. Failure of the benefit corporation to pursue or create general public benefit or specific public benefit.

D. A director shall not have a duty to a person that is a beneficiary of the general public benefit purpose or a specific public benefit purpose of a benefit corporation arising from the status of the person as a beneficiary.

E. A director who makes a business judgment in good faith fulfills the duty under this section if the director:

1. Is not interested in the subject of the business judgment;

2. Is informed with respect to the subject of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances; and

3. Rationally believes that the business judgment is in the best interests of the benefit corporation.

SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1208 of Title 18, unless there is created a duplication in numbering, reads as follows:

A. The board of directors of a benefit corporation that is a publicly traded corporation shall, and the board of any other benefit corporation may, include a director, who:

1. Shall be designated the benefit director; and

2. Shall have, in addition to the powers, duties, rights, and immunities of the other directors of the benefit corporation, the powers, duties, rights, and immunities provided in the Oklahoma Benefit Corporation Act.

B. The benefit director shall be elected, and may be removed, in the manner provided by Section 1027 of Title 18 of the Oklahoma Statutes. Except as provided in subsection F of this section, the benefit director shall be an individual who is independent. The benefit director may serve as the benefit officer at the same time as serving as the benefit director. The certificate of incorporation or bylaws of a benefit corporation may prescribe additional qualifications of the benefit director not inconsistent with this subsection.

C. The benefit director shall prepare, and the benefit corporation shall include in the annual benefit report to shareholders required by Section 12 of this act, the opinion of the benefit director on all of the following:

1. Whether the benefit corporation acted in accordance with its general public benefit purpose and any specific public benefit

purpose in all material respects during the period covered by the report;

2. Whether the directors and officers complied with subsection A of Section 7 and subsection A of Section 9 of this act, respectively; and

3. If, in the opinion of the benefit director, the benefit corporation or its directors or officers failed to act or comply in the manner described in paragraphs 1 and 2 of this subsection, a description of the ways in which the benefit corporation or its directors or officers failed to act or comply.

D. The act or inaction of an individual in the capacity of a benefit director shall constitute for all purposes an act or inaction of that individual in the capacity of a director of the benefit corporation.

E. Regardless of whether the certificate of incorporation or bylaws of a benefit corporation include a provision eliminating or limiting the personal liability of directors, a benefit director shall not be personally liable for an act or omission in the capacity of a benefit director unless the act or omission constitutes self-dealing, willful misconduct, or a knowing violation of law.

F. The benefit director of a professional corporation organized under the Professional Entity Act does not need to be independent.

SECTION 9. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1209 of Title 18, unless there is created a duplication in numbering, reads as follows:

A. Each officer of a benefit corporation shall consider the interests and factors described in paragraph 1 of subsection A of Section 7 of this act in the manner provided in paragraph 3 of subsection A of Section 7 of this act if:

1. The officer has discretion to act with respect to a matter; and

2. It reasonably appears to the officer that the matter may have a material effect on the creation by the benefit corporation of general public benefit or a specific public benefit identified in the certificate of incorporation of the benefit corporation.

B. The consideration of interests and factors in the manner provided in subsection A of this section shall not constitute a violation of Section 1028 of Title 18 of the Oklahoma Statutes.

C. Except as provided in the certificate of incorporation or bylaws, an officer shall not be personally liable for monetary damages for:

1. An action or inaction as an officer in the course of performing the duties of an officer under subsection A of this section if the officer performed the duties of the position in compliance with Section 1028 of Title 18 of the Oklahoma Statutes and this section; or

2. Failure of the benefit corporation to pursue or create general public benefit or specific public benefit.

D. An officer shall not have a duty to a person that is a beneficiary of the general public benefit purpose or a specific public benefit purpose of a benefit corporation arising from the status of the person as a beneficiary.

E. An officer who makes a business judgment in good faith fulfills the duty under this section if the officer:

1. Is not interested in the subject of the business judgment;

2. Is informed with respect to the subject of the business judgment to the extent the officer reasonably believes to be appropriate under the circumstances; and

3. Rationally believes that the business judgment is in the best interests of the benefit corporation.

SECTION 10. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1210 of Title 18, unless there is created a duplication in numbering, reads as follows:

A. A benefit corporation may have an officer designated the benefit officer.

B. A benefit officer shall have:

1. The powers and duties relating to the purpose of the corporation to create general public benefit or specific public benefit provided:

a. by the bylaws, or

b. absent controlling provisions in the bylaws, by resolution or order of the board of directors; and

2. The duty to prepare the benefit report required by Section 12 of this act.

SECTION 11. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1211 of Title 18, unless there is created a duplication in numbering, reads as follows:

A. Except in a benefit enforcement proceeding, no person shall bring an action or assert a claim against a benefit corporation or its directors or officers with respect to:

1. Failure to pursue or create general public benefit or a specific public benefit set forth in its certificate of incorporation; or

2. Violation of an obligation, duty, or standard of conduct under the Oklahoma Benefit Corporation Act.

B. A benefit corporation shall not be liable for monetary damages under the Oklahoma Benefit Corporation Act for any failure of the benefit corporation to pursue or create general public benefit or a specific public benefit.

C. A benefit enforcement proceeding may be commenced or maintained only:

1. Directly by the benefit corporation; or

2. Derivatively in accordance with Section 1126 of Title 18 of the Oklahoma Statutes by:

a. a person or group of persons that owned beneficially or of record at least two percent (2%) of the total number of shares of a class or series outstanding at the time of the act or omission complained of,

b. a director,

c. a person or group of persons that owned beneficially or of record five percent (5%) or more of the outstanding equity interests in an entity of which the benefit corporation is a subsidiary at the time of the act or omission complained of, or

d. other persons as specified in the certificate of incorporation or bylaws of the benefit corporation.

D. For purposes of this section, a person is the beneficial owner of shares or equity interests if the shares or equity interests are held in a voting trust or by a nominee on behalf of the beneficial owner.

SECTION 12. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1212 of Title 18, unless there is created a duplication in numbering, reads as follows:

A. A benefit corporation shall prepare an annual benefit report including all of the following:

1. A narrative description of:

a. the ways in which the benefit corporation pursued general public benefit during the year and the extent to which general public benefit was created,

b. both:

(1) the ways in which the benefit corporation pursued a specific public benefit that the certificate of incorporation states it is the purpose of the benefit corporation to create, and

(2) the extent to which that specific public benefit was created,

c. any circumstances that have hindered the creation by the benefit corporation of general public benefit or specific public benefit, and

d. the process and rationale for selecting or changing the third-party standard used to prepare the benefit report;

2. An assessment of the overall social and environmental performance of the benefit corporation against a third-party standard:

a. applied consistently with any application of that standard in prior benefit reports, or

b. accompanied by an explanation of the reasons for:

(1) any inconsistent application, or

(2) the change to that standard from the one used in the immediately prior report;

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

4. The compensation paid by the benefit corporation during the year to each director in the capacity of a director;

5. The statement of the benefit director described in subsection C of Section 8 of this act; and

6. A statement of any connection between the organization that established the third-party standard, or its directors, officers or any holder of five percent (5%) or more of the governance interests in the organization, and the benefit corporation or its directors, officers or any holder of five percent (5%) or more of the outstanding shares of the benefit corporation, including any financial or governance relationship which might materially affect the credibility of the use of the third-party standard.

B. If, during the year covered by a benefit report, a benefit director resigned from or refused to stand for reelection to the position of benefit director, or was removed from the position of benefit director, and the benefit director furnished the benefit corporation with any written correspondence concerning the circumstances surrounding the resignation, refusal, or removal, the benefit report shall include that correspondence as an exhibit.

C. Neither the benefit report nor the assessment of the performance of the benefit corporation in the benefit report required by paragraph 2 of subsection A of this section needs to be audited or certified by a third party.

SECTION 13. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1213 of Title 18, unless there is created a duplication in numbering, reads as follows:

A. A benefit corporation shall send its annual benefit report to each shareholder on the earlier of:

1. One hundred twenty (120) days following the end of the fiscal year of the benefit corporation; or

2. The same time that the benefit corporation delivers any other annual report to its shareholders.

B. A benefit corporation shall post all of its benefit reports on the public portion of its website, if any; but the compensation paid to directors and financial or proprietary information included in the benefit reports may be omitted from the benefit reports as posted.

C. If a benefit corporation does not have a website, the benefit corporation shall provide a copy of its most recent benefit report, without charge, to any person that requests a copy, but the compensation paid to directors and financial or proprietary information included in the benefit report may be omitted from the copy of the benefit report provided.

D. Concurrently with the delivery of the benefit report to shareholders under subsection A of this section, the benefit corporation shall deliver a copy of the benefit report to the Secretary of State for filing, but the compensation paid to directors and financial or proprietary information included in the benefit report may be omitted from the benefit report as delivered to the Secretary of State. The Secretary of State shall charge a fee of One Hundred Dollars ($100.00) for filing a benefit report.

SECTION 14. This act shall become effective November 1, 2015.

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