To: Corporations, Securities & Financial Institutions Committee

From: Subcommittee on Benefit Corporations:
Stuart Cohn, Stuart Ames, James Glover

Re: Report and Recommendation Regarding Adoption of Benefit Corporation Legislation

Date: December 26, 2012

Background

During the 2012 legislative session, Representative (now Senator) Jeff Clemens introduced a bill to create a so-called "Benefit Corporation." Bill Wiley brought the bill to our Committee's attention and, after some discussion, the Committee requested Rep. Clemens to withdraw his bill until the Committee had an opportunity to examine the issue and determine whether and what type of legislation would be appropriate. Rep. Clemens agreed and the Committee appointed Stuart Cohn to consider the "Benefit Corporation" issue and report back to it. Stuart Ames and James Glover (a 3L at the Levin College of Law, University of Florida) have composed the additional members of the subcommittee examining this subject.

Subsequent to his initially proposed bill, Senator Clemens and his staff have been in contact with Bill Clark, Jr., a partner at the Drinker, Biddle & Reath firm in Philadelphia and the leading private attorney proponent for Benefit Corporations. Bill Clark has written extensively on this issue and, through his association with B-Lab,[1] has developed a "Model Benefit Corporation Act." In October, 2012, Bill Wiley forwarded a copy of a revised proposed bill that (then) Rep. Clemens' staff put together using Clark's model act. The revised bill has not as yet been filed although Sen. Clemens has secured a House sponsor, Rep. Patrick Rooney, Jr. Through Bill Wiley and Aimee Diaz Lyon we have requested that our Committee have time to consider the more recent proposal and possible alternatives. Sen. Clemens and his staff are aware of our efforts and hopefully will work favorably with us.

[1] According to its website, "B Lab is a nonprofit organization dedicated to using the power of business to solve social and environmental problems. B Lab drives systemic change through three interrelated initiatives: 1) building a community of Certified B Corporations to make it easier for all of us to tell the difference between 'good companies' and just good marketing; 2) accelerating the growth of impact investing through use of B Lab's GIIRS Ratings and Analytics platform; and 3) promoting legislation creating a new corporate form -- the benefit corporation -- that meets higher standards of corporate purpose, accountability, and transparency." http://benefitcorporation.net.

The subcommittee has undertaken extensive review of this new form of entity, including analysis of numerous commentaries and the legislation adopted in other states. We have also engaged in an extensive discussion with Bill Clark on a number of legislative and interpretive issues. Through his work with the American Bar Association, Stuart Ames has also been involved in detailed analysis and discussion of these subjects.

Recommendation

Based on our review and analysis, the subcommittee recommends adoption of legislation creating a Benefit Corporation. The proposed legislation is set forth in Appendix A. In our judgment, this new form of entity does not affect existing corporate law for standard corporations (to emphasize that point there is a specific statutory provision stating such) and offers an opportunity for socially-conscious entrepreneurs and their investors to pursue public benefit goals without the real or supposed constraints of standard corporate law. We do not know whether such enterprises will be numerous, will prosper or will be able to attract investors. Yet, we do not see a downside in permitting for-profit entities to operate principally or substantially in an alternative manner if that is the shared desire of management and shareholders.

In short, in this age of growing concern regarding social responsibility, the Benefit Corporation is an option that allows some segment of the business community, including entrepreneurs and investors, to pursue goals outside of standard corporate norms. We regard this opportunity as a positive and see no negative impact upon corporate laws and norms as they exist for standard corporations.

The Purpose of a Benefit Corporation

The primary purpose of a Benefit Corporation is to allow directors and officers to cause the corporation to pursue in a significant manner public benefit goals in addition to, or even as a priority over, the generally accepted corporate goal of profit maximization. The principal objects of this new form of entity are so-called "green corporations" that wish to pursue socially beneficial goals yet also have profit-making capacities. It may be argued that such a new form of entity is not necessary given stakeholder provisions such as s. **607.0830(3)**, the recognized power of corporations to make donations for the public welfare and for charitable, scientific, or educational purposes (s. **607.0302(12)),** and the protections accorded to directors by the business judgment rule. However, despite these factors, there is a perceived concern that traditional corporate law raises substantial liability risks for directors and officers who cause the corporation to pursue social goals at the undue expense of the corporation's bottom line.

Bill Clark stated the rationale for this alternative form as follows:[2]

> "The sustainable business movement, impact investing and social enterprise sectors are developing rapidly but are constrained by an outdated legal framework that is not equipped to accommodate for-profit entities whose social benefit purpose is central to their existence. The Benefit Corporation is the most comprehensive yet flexible legal entity devised to address the needs of entrepreneurs and investors and, ultimately, the general public. Benefit Corporations offer clear market differentiation, broad legal protection to directors and officers, expanded shareholder rights, and greater access to capital than current alternative approaches."

As stated by another commentator:[3]

> "Social enterprises are entities dedicated to a blended mission of earning profits for owners and promoting social good. They are neither typical businesses, concentrated on the bottom line of profit, nor traditional charities....Their founders instead see value in blending both goals....Yet, these social entrepreneurs worry traditional organizational forms designed for either businesses or charities will constrain their ability to achieve the gains they see in blended mission enterprises."

Advocates of this new entity recognize that there is a risk of "green-washing," i.e. corporations using the Benefit Corporation mantle to wrap themselves in a cloak of social integrity while failing to meaningfully pursue any socially beneficial goals. "Green-washing" is a potential risk because directors are only mandated to consider benefit goals, not implement them. While there are accountability provisions related to reporting along with a derivative-like enforcement action, there is no personal monetary liability upon directors or officers who fail to pursue benefit goals. Ultimately it would be up to the corporation's shareholders to determine whether a change in management or direction is necessary. Although there is a risk of "green-washing" as well as misleading investors whose expectations are not met, in our judgment these

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[2] William H. Clark, Jr. & Larry Vranka, *White Paper: The Need and Rationale for the Benefit Corporation* (January 26, 2012). This is the most comprehensive discussion of benefit corporations and specific recommended statutory provisions. A copy of the paper accompanies this report.

[3] Dana Brakman Reiser, *The Next Big Thing: Flexible-Purpose Corporations*, Brooklyn Law School Legal Studies Research Papers (Oct. 2012), available at http://ssrn.com/abstract=2166474.

risk elements are not sufficient to preclude adoption of this entity form. They are matters that over time will need examination as this entity grows and evolves and, in any event, are risks that may be mitigated by false advertising and securities disclosure laws.

Principal Elements of a Benefit Corporation

The basic attributes and elements of a Benefit Corporation are:

1. The corporation is formed (or converts to such by amending its existing Articles) under the regular corporation statute (Ch. 607);
2. Except for the provisions specifically applicable to Benefit Corporations, all provisions of the regular corporate statute apply.
3. The corporation's Articles state that it is a Benefit Corporation;
4. The corporation has the statutory purpose of creating a public benefit;
5. The corporation's Articles may include one or more specific public benefit purposes in addition to the statutory public benefit purpose.
6. Directors are mandated to consider the effects of any corporate action or inaction upon, *inter alia*, shareholders, employees, community and societal factors and the ability of the corporation to achieve public benefit and any specific benefit purposes.
7. Directors are not personally liable for monetary damages to the corporation, shareholders or any potential beneficiaries for failure to pursue or create a public benefit, nor are directors who cause the corporation to pursue benefit goals liable to the corporation, shareholders or others for failure to achieve profit-oriented results.
8. A so-called Annual Benefit Report must be prepared and distributed to shareholders each year assessing the extent to which the corporation pursued and achieved benefit goals.
9. A "benefit enforcement proceeding" may be brought against a director or officer directly by the corporation or derivatively by a shareholder or other authorized person for failure to pursue or create a public benefit, although no personal monetary liability can be assessed.

In brief, the fundamental elements of the Benefit Corporation are (1) its benefit goals, (2) protection of directors and officers from liability for pursuing such goals, and (3) accountability standards though annual reports and a benefit enforcement proceeding. While variations exist among the states that have adopted this type of legislation, the fundamental elements are constant.

A Benefit Corporation is not to be confused with the recent development of "B Corporation Certifications" issued by private companies such as B-Lab to corporations that meet privately developed standards of social accountability. Ben & Jerrys, for example, has a "B Certification" but is not a Benefit Corporation. There is therefore some confusion between the terms Benefit Corporation and B Corporation, the latter not being formed as or under the requirements of Benefit Corporation legislation.

State Adoptions

To date, Benefit Corporation legislation has been adopted in:

California	New Jersey
Hawaii	New York
Illinois	Pennsylvania
Louisiana	South Carolina
Maryland (the first)	Vermont
Massachusetts	Virginia

Approximately 10-15 other states are considering potential Benefit Corporation legislation. Information regarding Benefit Corporations and potential state adoptions can be found on the web site http://www.bcorporations.net. Delaware is presently considering adoption of benefit corporation legislation, and we are in contact with the proponents in that state and have agreed to keep each other abreast of developments in our respective states.

The number of Benefit Corporations formed to date in the various states has not been ascertained. Based on one report, 60 Benefit Corporations were formed in California from January-August, 2012.[4]

It is possible that within the near future the ABA's Committee on Corporate Laws will consider a supplement to the Model Business Corporation Act in this area. The subcommittee considered suspending action awaiting the ABA. However, given the uncertainties in ABA action and timing, we believe it appropriate to move forward with a legislative proposal at this time.

Proposed Legislation

The subcommittee used Sen. Clemens most recent proposed bill as the basis for

[4] Eric l. Talley, *Corporate Form and Social Entrepreneurship: A Status Report from California and Beyond* (Draft Version 1.2, September 2012, prepared for the Association for Corporation Counsel 2012 Annual Meeting).

legislative provisions. The proposed bill was a good working model for our subcommittee's considerations. The proposed bill's provisions are analogous to legislation adopted in various states, although there are numerous variations among states. The subcommittee's proposal and a red-lined version showing the subcommittee's proposed changes to the Sen. Clemens' proposed bill accompany this report.

The basic attributes of a Benefit Corporation as set forth in Sen. Clemens' proposed bill were preserved. These include (a) formation and termination provisions, (b) a mandated public benefit purpose, (c) specially designated benefit directors and officers if desired, (d) an annual benefit report measured against a third party assessment standard (e) benefit enforcement proceeding, (f) exculpatory provisions for directors and officers, and (g) linkage to Ch. 607 as to all matters not covered by this legislation.

The principal changes made by the subcommittee to Sen Clemens' proposal are:

1. **Change from "general benefit" to "public benefit" purpose**.

This is the most significant change. Sen. Clemens proposal, similar to legislation in a number of states, mandates **(s. 611.02(5)**) that the Benefit Corporation create or pursue a "general public benefit," defined as "a material positive impact on society and the environment, taken as a whole, assessed against a third party standard." In addition, a corporation may adopt in its Articles one or more "specific public benefit purposes" of a particular nature (s. **611.02(9)**). For example, a corporation could adopt a specific purpose to improve the public park facilities in northeast Tampa. Our concerns were twofold: (i) the legal effect of mandating a broad and amorphously stated "general public benefit" and (ii) whether and to what extent a corporation's pursuit of a specific benefit would satisfy the statutory "general public benefit" mandate. These concerns were heightened by the provision that "The identification of a specific public benefit...does not limit the obligation of the corporation..." to pursue or create a general public benefit. (s. **611.06(2)**). Thus, a corporation that selects a narrow but meritorious specific benefit purpose, such as the example noted above, would nevertheless continue to have an overriding obligation with regard to a "general public benefit."

The subcommittee was troubled by the overriding "general public benefit" mandate. In our judgment, a corporation that pursues a specific, albeit somewhat narrow, public benefit provides a public service and should not be criticized or challenged for not also pursuing a broader, mandated "general" benefit. One solution would be to deem the pursuit of a specific public benefit as satisfaction of

the general benefit standard, but this approach basically emasculates the "general" standard. Another solution would be to eliminate the statutory mandate and leave it up to each corporation to state a specific benefit goal in its Articles. However, a statutory benefit mandate is a fundamental element of the Benefit Corporation. Moreover, some corporations may prefer an open-ended statutory mandate that allows for one or more socially-oriented activities rather than having to define a specific goal in the Articles.

We concluded that the best course was to maintain a statutory benefit mandate but redefine the mandate to eliminate the "general public benefit" concept. We therefore replaced the "general public benefit" term with "public benefit," defined in **s. 1703(6)** in a way that permits a choice among a number of stated public benefit potentialities. As a result, each benefit Corporation has a "public benefit" mandate that can be satisfied in multiple ways or by satisfying a single purpose within the definition. If a corporation wishes to set forth a specific benefit purpose in its Articles, it may do so as long as that benefit goal is within any of the categories set forth in the broad definition of "public benefit." Pursuit of a specific public benefit will satisfy the corporation's statutory "benefit" mandate without concern for an overriding "general public benefit" standard.

2. **Creation of appraisal rights**

We added provisions allowing for appraisal rights when corporations convert from a business corporation to a Benefit Corporation or when a Benefit Corporation status is terminated by amendment, merger or other structural transaction. The added provisions (**1705(4)** and **1706(3**)) cross-reference s. **607.1302** and the proposed legislation will include a new subsection in s. **607.1302** providing appraisal rights for Benefit Corporation shareholders in the event of a conversion or other change in status.

3. **Elimination of mandated position and role for Benefit Director**

A so-called "benefit director" is a specially designated director whose sole statutory function is to prepare a written opinion each year assessing the corporation's success or failure in pursuing benefit goals. Sen. Clemens' proposal mandates a benefit director for publicly-traded corporations and is optional for all other corporations. We eliminated the mandate of a benefit director for publicly-traded corporations. In addition, if a corporation chooses to have a benefit director, the mandated opinion by the benefit director may be eliminated if the Articles so provide.

4. **Elimination of mandated role for Benefit Officer**

A corporation may have an officer designated as the "benefit officer." Sen. Clemens' proposal provides that if there is such an officer, that officer shall prepare the annual benefit report. We eliminated this statutory mandate as to preparation of the annual benefit report. The preparation of the report will be determined by the bylaws or board of directors.

5. **Elimination of state filing of Annual Benefit Report**

The annual report must be prepared pursuant to an identified third-party standard, defined in **s. 1703(11)**, to assess the overall social and environmental performance of the corporation. The report is distributed to each shareholder and posted on the corporation's website (if it has one). Sen. Clemens proposal included a required filing with the Department of State and filing fee. We eliminated the filing and fee requirements. There is no provision for state review or analysis of any such report and therefore we regarded a state filing as unnecessary, as well as potentially burdensome for the Department of State.

Section-by–Section Review of Subcommittee's Legislative Proposal (Appendix A)

1701: Short Title

In keeping with many other states, we have added the Benefit Corporation provisions to existing Ch. 607, in contrast to Sen. Clemens' proposal that created a new Ch. 611. The most logical placement of the provisions, in our judgment, is as a subpart beginning with 607.1701. This will involve amending the numbering of current ss. 607.1701-193, but we believe that inserting the provisions as a new 607.1701 ff. is preferable to putting them at the end of the statute. We envision the Section 17 subpart as a unit and entitle it the "Benefit Corporation Supplement" and reference the term "supplement" through the subpart.

1702 Application and effect of supplement

No changes to Sen. Clemens proposal except stylistic. Subsection **1702(3)** is the linkage provision to Ch. 607 provisions. The reference in **1702(4)** to Chapter 621 is to the PSC and PLLC statute, as it is possible that professional entities may want to act as Benefit Corporations.

1703 Definitions

The only changes other than stylistic are:

(A) **1703(5):** Addition of a "Business corporation" definition, a term used elsewhere in this subpart to refer to the non-Benefit Corporation.
(B) **1703(6)**: Change in definition from "General public benefit" to "Public benefit." This change, which resulted in dropping the term "general" throughout the proposed statute, is discussed above.
(C) Deletion of former **1703(8)** definition of "Publicly-traded corporation." Sen. Clemens proposal requires all publicly-traded corporations to have a so-called "benefit director." Our proposal makes having such a director optional for all corporations. Therefore the definition of a publicly-traded corporation is no longer necessary.

1704 Incorporation of Benefit Corporation

Only stylistic changes. Benefit Corporations will be incorporated in the same manner as all other corporations except for the mandated articles of incorporation language.

1705 Election of Benefit Corporation status

(A) **1705(1)-(3)**: Only stylistic changes. Existing corporations may become Benefit Corporations by amending their articles. They may also become Benefit Corporations through merger, conversion or share exchange. The "minimum status vote" by shareholders necessary for such changes is defined in **1703(8)** and is generally a two-thirds vote requirement on a class-by-class basis.
(B) **1705(4)**: We added an appraisal rights provision in the event of election or change to a Benefit Corporation, cross-referencing a new provision to be added to s. **607.1302**.

1706 Termination of Benefit Corporation status

(A) Termination also requires the so-called "minimum status vote." In addition to stylistic changes to **1706(1)-(2)**, we deleted reference in Sen. Clemens proposal to a sale of all or substantially all of the corporation's assets as an act of termination, as we do not regard such a transaction as necessarily involving a change in status.
(B) We added **1706(3)** providing appraisal rights in the event of a status termination, again cross-referencing a new provision to be added to s. **607.1302**.

1707 Corporate Purposes

1707(1) mandates that the Benefit Corporation "shall have a purpose of creating public benefit." Note the discussion above regarding change of the term from "general public

benefit" to "public benefit." Public benefit is defined in **1703(6)**. Benefit Corporations are free to pursue any goals within that definition. In addition, **1707(2)** permits the corporation's articles to "identify one or more specific public benefits" as the corporate purpose. **1707(3)** states that creation of a public or specific public benefit "is deemed to be in the best interest of the corporation," a provision intended to protect directors and officers from claims that their pursuit of benefit goals is not in the best interests of the corporation.

1708 Standard of conduct for directors

(A) **1708(1)(a)**: This is the fundamental provision mandating directors to consider the effects of any corporate action or inaction upon the stated list of interested persons and institutions, including the ability to accomplish a public or specific benefit purpose. The mandate marks a major differentiation from stakeholder provisions in standard corporate statutes, such as our **607.0831(3),** and from traditional notions of the director's primary obligation to the corporation and shareholders. Our only changes are stylistic except for the insertion of "suppliers" in **1708(1)(a)(3)**, in keeping with the language of s. **607.0830(3)**.

(B) **1708(1)(c)**: We inserted "or equal weight" to make it clear that a director does not need to give either priority or even equal weight to any of the societal or other factors listed in **1708(1)(a)**. The term priority standing alone was ambiguous as to the weighing of the various factors.

(C) We eliminated the provision in Sen. Clemens proposed bill **(s.611.07(2)**) that consideration of the various factors is not a violation of **607.0830**. We considered that provision unnecessary in light of the express mandate for directors. We also eliminated a provision regarding elements of and protection for a director's business judgment, a subject that is not addressed and may cause interpretive problems in Ch. 607 and, we believe, is best left for case-by-case judicial analysis.

1709 Benefit director

(A) **1709(1)**: We eliminated the requirement that all publicly-traded corporations have a "benefit director." It is optional for all corporations.

(B) A benefit director is defined in **1703(2)**, is elected like any other director of the corporation, and is required to be "independent," a defined term in **1703(7)**.

(C) **1709(3)**: The only statutory role for the benefit director is to prepare an opinion in the corporation's annual benefit report as to whether the corporation and directors have acted

in accordance with benefit goals. We amended that provision to allow the articles or bylaws to opt out of the requirement if an opinion by the benefit director is not desired. (D) Because benefit directors and their roles are optional for all corporations and directors have liability protections set forth in the supplement and Ch. 607, we eliminated sections **611.08(5)-(7)** setting forth certain protections and attributes of benefit directors.

1710 Standard of conduct for officers

Officers who have discretion to act are mandated, as with directors, to consider the various public factors set forth in **1708(1**). We eliminated the "business judgment" provision for officers **(611.09(5))** for the same reason it was eliminated for directors.

1711 Benefit Officer

A corporation may choose to designate an officer as a benefit officer. Under Sen. Clemens proposed bill, such an officer prepares the annual benefit report. We altered the language so that, if such an officer is designated, the officer's duties are set forth in the bylaws and may but need not include preparation of the annual benefit report.

1712 Right of action

The legislation contains two primary accountability provisions for the purposes of avoiding "green-washing" and meeting the expectations of investors. One is the annual benefit report, described in the next section, the other is the so-called "benefit enforcement proceeding" set forth in this section. The proceeding applies only to alleged failures or violations under the Benefit Corporation subpart. The actions cannot result in any personal monetary liability for a director or officer nor any monetary damages against or for the corporation. Except for stylistic changes, the only alterations we made were (a) we deleted a minimum threshold of shareholding to bring a derivative action (the Clemens Bill requires a 2% threshold; however, there is no minimum holding requirement in Ch. **607.07401(1))** and (b) we deleted a provision regarding beneficial ownership of shares as being unnecessary because of the existing analogous provision in **607.07401(7)**. If a derivative benefit enforcement proceeding is brought, the procedural provisions of Ch. **607.07401** will apply as a result of linkage to Ch. 607.

1713 Preparation of annual benefit report

This is perhaps the most important accountability measure. The annual report must set forth a narrative analysis of the extent to which public benefit or specific public benefit

goals were pursued. In order to measure such performance, the report is required to assess performance against a "third-party standard," which is comprehensively defined in **1703(11)** in terms of independence, credibility and transparency, including the process and rationale for selecting a particular third-party standard. There are currently several organizations that have developed standards of accountability and it may be expected that with the growth of Benefit Corporations additional standards will evolve.

Changes to Sen Clemens proposal, other than stylistic, are:

(A) **1713(1)**: The report will be prepared by the board of directors unless the corporation's constituent documents or the board provides for the report to be prepared by a benefit director or officer.

(B) Several items, mostly regarding mandatory disclosures, were eliminated from the proposal as either inconsistent with Ch. 607 or, in our judgment, unnecessary requirements for these entities. Items we eliminated were:

(1) **611(1)(d**): compensation paid to each director.

(2) **611(1)(e)**: holder of 5% of more of the shares of the corporation.

(3) **611(1)(h)**: persons exercising powers in the event the corporation has limited or dispensed with the board of directors.

(4) **611(2)**: the annual benefit report must include any correspondence relevant to the resignation or removal of a benefit director.

Under our proposal, any of the deleted provisions may be included in the articles of incorporation if desired.

1714 Availability of annual report

The annual benefit report is to be distributed to each shareholder and posted on the corporation's website, if any. If not so posted, a copy must be provided to any person upon request.

We eliminated the requirement in **s. 611.13(4)** that the report be filed with the Department of State and payment of a filing fee. Inasmuch as there is no provision for administrative review or action on the annual benefit report, we regarded the filing requirement as unnecessary and burdensome. There is no filing requirement in most, if not all, other states that have adopted Benefit Corporation legislation.

Scholarly Review and Critique

Most commentary has focused on the perceived need for such an entity for socially-conscious yet profit-oriented entrepreneurs. The most critical commentary we have seen to date is by a Colorado attorney who, while noting that "we have arrived at the starting point to

consider entities like the benefit corporation," constructively critiques some elements of the current model.[5] His principal criticisms dealt with the mandate for a "general public benefit." Not only did he regard the term as ill-defined, he believed that it creates potential adherence problems for corporations that pursue specific goals and ambiguity as to a director's fiduciary duties. The subcommittee was also concerned with the "general public benefit" mandate and, as discussed above, we altered the proposal to eliminate the "general" concept and replaced it with a definition of "public benefit" that makes it clear that pursuit of a specific goal can be within the "public benefit" concept. A second expressed concern was that creation of a special corporation entity to pursue socially beneficial goals might have the unintended consequence of diminishing the ability of management of a business corporation to engage in socially-beneficial activities, the theory being that courts will divide the corporate world between "green" and "non-green" corporations and apply rigid profit-maximization standards to the "non-green" entities. While such a judicial reaction is conceivable, we regard it as unlikely given how far corporate law has progressed with regard to allowing social and charitable activities. We also note that s. **1702(2)** expressly states that the supplement "shall not of itself create an implication that a contrary or different rule of law is applicable to a business corporation....", so that any "backflow" to the existing corporate statute is avoided.

An Alternative: The Flexible Purpose Corporation

California and Washington have adopted an entity form analogous to but different from the Benefit Corporation. In California (which also adopted a standard Benefit Corporation form) it is called the Flexible Purpose Corporation (FPC). In Washington it is called a Social Purpose Corporation.

Similar to the Benefit Corporation, the FPC allows for a corporation to pursue general and specific public benefit purposes and shields directors and officers from personal monetary liability for pursuing such goals. The principal differences with the Benefit Corporation model are:

(1) Directors are not mandated to consider public or specific benefit goals;

(2) The annual benefit report has no third-party standards;

(3) There is no benefit enforcement proceeding provision.

Although such an entity provides greater flexibility for directors than the Benefit

[5] J. William Callison, *Putting New Sheets on a Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, the Dangers Created, and Suggestions for Change*, available at http://ssrn.com/abstract=2102655..

Corporation, in our judgment the lack of any mandated standards and accountability provisions create an unwarranted risk of "green-washing" and misleading potential investors. In light of Florida's stakeholder provisions (which California does not have), and the business judgment rule protection afforded to directors, we are not convinced that this more open-ended, private-ordering model is necessary. Since the adoption in California of both the Benefit and the Flexible Purpose forms, corporate formations in California have been mostly on the benefit side although numbers are fairly small for each.[6] In our judgment, the version of the Benefit Corporation we propose provides directors and officers with substantial flexibility and liability shields while preserving important accountability standards in the interests of investors and public image concerns.

Administrative and Revenue Considerations

Formation and filing requirement for Benefit Corporations will be governed by the same administrative provisions as regular corporations. Therefore, adoption of this legislation will not create a cost burden to the Division of Corporations. On the other hand, adoption of the new entity will be revenue positive for the State, including initial filing fees, fees applicable to amendments to Articles for existing corporations converting to Benefit Corporations, annual reports and other administrative fees for the new entity.

The Benefit Corporation does not appear to be a fad or short-term phenomenon. If Florida does not adopt such legislation, socially-conscious entrepreneurs who want to form a Benefit Corporation will incorporate in other states and Florida will lose potential administrative revenues. It should also be noted that there does not appear to be any leading state with regard to the formation of Benefit Corporations and therefore Florida entrepreneurs would have no reason to incorporate elsewhere if the legislation is passed.

Timing and Procedure

The latest date for filing bills in the forthcoming legislative session is March 1, 2013. Given Sen. Clemens and Rep. Rooney's interest in this matter and the merits of adopting such

[6] During the period January-August, 2012, there were 60 companies incorporated in California as Benefit Corporations compared to 15 companies incorporated as FPCs. Eric l. Talley, *Corporate Form and Social Entrepreneurship: A Status Report from California and Beyond* (Draft Version 1.2, September 2012, prepared for the Association for Corporation Counsel 2012 Annual Meeting).

legislation, we recommend that the Committee move as rapidly as possible in considering this proposed legislation and placing it before the Executive Council.