

To: Corporations, Securities & Financial Institutions Committee

From: Subcommittee on Benefit Corporations:
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Re: Revision of the Subcommittee's Recommendation to Allow for Adoption of Legislation Creating Both (1) a Social Purpose Corporation and (2) a Benefit Corporation

Date: January 7, 2013

Preliminary Note

By Memorandum dated December 26, 2012 (the "December Memorandum") and accompanying materials, the Subcommittee recommended adoption of legislation allowing for the creation of a so-called "benefit" corporation. In the December Memorandum the Subcommittee explained that:

1. Senator Jeff Clemens had prepared and has a House sponsor for, a proposed "benefit corporation" bill that substantially followed a model act prepared under the auspices of B-Lab and Bill Clark, an attorney prominently active in this subject.
2. The Subcommittee retained most of the basic elements of Sen. Clemens proposal, with the principal change being made to the mandate to consider the "general public benefit" with regard to any corporate action or inaction by revising the "general public benefit" standard to a so-called "public benefit" standard.
3. The Subcommittee's reasons for revising the "general public benefit" standard to a so-called "public benefit" standard principally involved the desire to give directors and officers more flexibility in determining benefit goals and to protect management from claims that one or more broad, unspecified societal goals were not being pursued by the corporation.

As a result of the recommended revisions, the proposed legislation initially presented by the Subcommittee was more closely analogous to a so-called "Social Purpose Corporation," a term used in the State of Washington to describe its similar legislation, and to California's so-called Flexible Purpose Corporation. Nevertheless, the proposed legislation initially presented by the Subcommittee retained the nomenclature of "benefit corporation" for this new form of corporation.

After further recent discussions, the Subcommittee was persuaded that, because of the more limited standard of public benefit in the proposal, the proposal was really not analogous to the so-called "benefit corporation" model adopted in a number of other states and thus there might be confusion created between Florida's "benefit corporation" and "benefit corporations" in other states. Moreover, there is a belief that those investors who are promoting, and investing in, "benefit corporations" of the type keyed into the broader general public benefit purpose will tend to discredit a Florida entity designated as a "benefit corporation" but without the general public benefit mandate. The Subcommittee therefore has revised its initial proposal to rename the new entity a "Social Purpose Corporation." The Subcommittee's recommendation regarding this new form of entity remains as previously submitted except for the name change and certain clean up

changes and limited additional substantive changes noted below.

In addition, given the recent further discussions, the Subcommittee now understands that there may be entrepreneurial and investor interest in the alternative “benefit corporation” model as proposed by Sen. Clemens. Although the Subcommittee did not initially accept the benefit corporation model, we now believe that there is merit in providing an entity choice for entrepreneurs and investors. The choice would be to incorporate or otherwise form either (1) a Social Purpose Corporation as we have proposed with more limited benefit goals or (2) a Benefit Corporation which follows the mandated “general public benefit” model adopted in a number of states.

Consequently, we are now recommending legislative adoption of both a Social Purpose Corporation and a Benefit Corporation. The Social Purpose Corporation statutory provisions would be set forth in ss. 607.1701 ff.; the Benefit Corporation statutory provisions would be set forth in ss. 607.1801ff, both of which are characterized as supplements to Chapter 607, the Florida Business Corporation Act. The principal difference between the two entities would be the distinction between a more limited or focused “public benefit” standard for Social Purpose Corporations and the broader “general public benefit” standard for Benefit Corporations. Except for that fundamental distinction, the statutory provisions for both forms of entities would be substantially identical and consistent with the description in our December Memorandum.

Therefore, along with this supplemental Memorandum we are providing:

1. The revised proposal for a **Social Purpose Corporation** supplement to Ch. 607.
2. A new proposal for the adoption of a **Benefit Corporation** supplement to Ch. 607.
3. A red-lined mark-up of the Social Purpose Corporation supplement showing how it differs from the Benefit Corporation supplement.
4. A red-lined mark-up of Sen. Clemens’ proposed bill for a new Benefit Corporation Act showing changes made by the supplement referred to in 2 above.

The Social Purpose Corporation

The Subcommittee’s December Memorandum describes the background to this legislation, reasons for the recommendation to adopt this form of entity, and the substantive changes to Sen. Clemens proposed bill. Subsequent to distribution of the December Memorandum, the Subcommittee has made some additional changes to the proposal to provide clarity as to certain requirements and define more appropriately the standards for director and officers. Although some of the changes might be regarded as substantive, the fundamental elements of the proposal remain as provided in the December Memorandum. The additional changes that might be considered substantive are:

1. S. 1703(9): The definition of “specific public benefit” has been clarified to indicate that a Social Purpose Corporation can adopt a focused identified benefit that is within one or more listed general categories of specific benefits.

2. S. 1708(1): The mandate that directors consider various benefit objectives has been amended to read:

- (a) shall consider the effects of any action or inaction upon:
 - 1. the shareholders of the Social Purpose Corporation; and
 - 2. the ability of the Social Purpose Corporation to accomplish its public benefit and any specific public benefit purpose; and
- (b) may consider the effects of any action or inaction upon:
 - 1-5 (same as former items 2-6).

The reason for this change is to make it clear that directors must consider items (a)1-2 but are not mandated to consider any and all of the (b) items (in the initial draft, there was a mandate to consider both the (a) items and the (b) items, which was actually somewhat inconsistent with the deletion of the “general public benefit” definition). This change gives directors more flexibility and is designed to protect them from potential claims that they might not have considered the interests of other specified constituencies and/or other social purposes that were not directly related to the Social Purpose Corporation’s public benefit purpose or specific public benefit purpose. (Note that for the Benefit Corporation there is a mandate for the directors to consider all of the (a) and (b) items, thereby reflecting the principal distinction between the Social Purpose and the Benefit corporations.)

3. S. 1708(5): A “business judgment” protection provision included in Sen. Clemens’ proposal, but deleted in our Subcommittee’s markup, has been reinstated. Given the unique nature of a Social Purpose Corporation, it was felt that this additional emphasis on the protections given to directors who pursue benefit goals in carrying out their duties is appropriate even if it might be the case that the linkage with current 607 provisions addressing duties of directors and standards of care would already operate to take that into account.

4.S. 1710(5): Similarly, a “business judgment” protection provision for officers initially deleted from Sen. Clemens’ proposal has been reinstated.

5.S. 1713(2): We reinstated a provision from Sen. Clemens’ proposal requiring disclosure in the annual benefit report of any removal or resignation of the benefit director occurring during the year to which the report relates.

6.S. 1714(3): To provide a mechanism for enforcement of the requirement to deliver the annual benefit report, we added a provision, analogous to Section 607.1620(4), allowing for an application by a shareholder to be made in circuit court to order that the Social Purpose Corporation deliver the report if the corporation has failed to do so.

Items 3-6 are also reflected in the newly proposed Benefit Corporation legislation.

Open Item: 1712(2): Minimum shareholder percentage interest threshold for bringing a benefit enforcement proceeding.

In the draft circulated to you, there is no minimum share ownership percentage required for a shareholder to bring a benefit enforcement proceeding. Sen. Clemens' proposal had included a 2% minimum ownership requirement. Some members of the committee favor including such a minimum percentage threshold. It was decided to raise the issue directly with the Committee.

The Benefit Corporation

Although the Subcommittee's initial determination was to amend Sen. Clemens' proposal in the direction of what we now call the Social Purpose Corporation, Sen. Clemens' proposal, which is analogous to benefit corporation statutes in other states, might offer an attractive alternative for entrepreneurs and investors who want a corporation dedicated to broad public benefit goals as defined under the "general public benefit" standard. The Subcommittee has been advised by Bill Clark, who probably knows more about this movement than anyone in the United States, that there are a fair number of entrepreneurs and investors who prefer a corporation that is designed to pursue and create broad benefit policies.

An example will hopefully explain the difference between the Special Purpose Corporation and the Benefit Corporation. Suppose a for-profit corporation is formed to manufacture an anti-malarial drug and plans to distribute the drug at low or no cost in African countries. If that is the corporation's sole public benefit purpose, the corporation would appropriately be formed as a Special Purpose Corporation. However, if the corporation is also dedicated to creating favorable employee programs, running its operations pursuant to strict environmental and ecological policies, and undertaking activities to benefit the local community, in other words to pursue policies that have broad public and social welfare consequences, this corporation would qualify and should probably be formed as a Benefit Corporation.

The difference between the two corporations is basically one of degree. The Social Purpose Corporation is formed to pursue or create one or more fairly specific public benefits. The Benefit Corporation has a much broader purpose consistent with the definition of "general public benefit." A Benefit Corporation could also adopt a "specific public benefit" which has a focused purpose, but pursuit of that limited purpose would not relieve directors from the mandate to consider the "general public benefit" in each and every corporate action or inaction.

Therefore, the proposal set forth in our December Memorandum is now amended to recommend the adoption of two forms of corporate entities, the Social Purpose Corporation and the Benefit Corporation. This is the approach taken in California, which has adopted legislation allowing for both a Flexible Purpose Corporation (similar to what we have called a Social Purpose Corporation) and the standard form of Benefit Corporation.

The Benefit Corporation statute we are presenting is Sen. Clemens' proposal with substantive changes similar to those we have made in creating the Social Purpose Corporation. The principal difference between the two entities is that the Benefit Corporation must have, and the Social Purpose Corporation would generally not have, a "general public benefit" purpose.

For further discussion of changes to Sen. Clemens' proposal, and to other matters relative to the proposed legislation, please refer to the December Memorandum.