

HB0186S01 compared with HB0186

~~{deleted text}~~ shows text that was in HB0186 but was deleted in HB0186S01.

Inserted text shows text that was not in HB0186 but was inserted into HB0186S01.

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Representative Keven J. Stratton proposes the following substitute bill:

LIMITED LIABILITY COMPANY AMENDMENTS

2018 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Keven J. Stratton

Senate Sponsor: _____

LONG TITLE

General Description:

This bill enacts the Benefit Limited Liability Company Act.

Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ provides for the formation of a benefit company;
- ▶ addresses termination of a benefit company;
- ▶ requires a benefit company to adopt a purpose of creating general public benefit~~{purpose}~~;
- ▶ establishes standards of conduct for a member, manager, or officer of a benefit company;
- ▶ creates a right of action; and

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- requires a benefit company to prepare, distribute, and make public an annual benefit report.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

ENACTS:

48-4-101, Utah Code Annotated 1953

48-4-102, Utah Code Annotated 1953

48-4-103, Utah Code Annotated 1953

48-4-104, Utah Code Annotated 1953

48-4-105, Utah Code Annotated 1953

48-4-201, Utah Code Annotated 1953

48-4-301, Utah Code Annotated 1953

48-4-302, Utah Code Annotated 1953

48-4-303, Utah Code Annotated 1953

48-4-401, Utah Code Annotated 1953

48-4-402, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **48-4-101** is enacted to read:

CHAPTER 4. BENEFIT LIMITED LIABILITY COMPANY ACT

Part 1. General Provisions

48-4-101. Title.

This chapter is known as the "Benefit Limited Liability Company Act."

Section 2. Section **48-4-102** is enacted to read:

48-4-102. Application and effect of chapter.

(1) This chapter applies to a benefit company organized under this chapter.

(2) (a) The existence of a provision in this chapter does not itself create an implication that a contrary or different rule of law is applicable to a limited liability company that is not a

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benefit company.

(b) This chapter does not affect a statute or rule of law that is applicable to a limited liability company that is not a benefit limited liability company.

(3) (a) Except as otherwise provided in this chapter, Title 48, Chapter 3a, Utah Revised Uniform Limited Liability Company Act, applies to a benefit company.

(b) The provisions of this chapter control over any inconsistent provision of Title 48, Chapter 3a, Utah Revised Uniform Limited Liability Company Act.

(4) The operating agreement of a benefit company may not limit, be inconsistent with, or supersede a provision of this chapter.

Section 3. Section **48-4-103** is enacted to read:

48-4-103. Definitions.

As used in this chapter:

(1) "Benefit company" means a limited liability company:

(a) that elects to become subject to this chapter; and

(b) the status of which as a benefit company has not been terminated.

(2) "Benefit enforcement proceeding" means a proceeding in a court of competent jurisdiction for:

(a) failure of a benefit company to pursue or create ~~fa~~ general public benefit or a specific public benefit described in the benefit company's certificate of organization; or

(b) a violation of an obligation, duty, or standard of conduct under this chapter.

(3) "General public benefit" means a material positive impact on society and the environment:

(a) taken as a whole;

(b) assessed against a third-party standard; and

(c) from the business of a benefit company.

(4) "Immediate family member" means a parent, spouse, surviving spouse, child, or sibling.

(5) (a) "Independent person" means a person who has no material relationship with a benefit company or a subsidiary of the benefit company.

(b) "Independent person" does not include a person:

(i) who is, or has been within the last three years, an employee of the benefit company

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or a subsidiary of the benefit company;

(ii) whose immediate family member is, or has been within the last three years, an executive officer of the benefit company or a subsidiary of the benefit company;

(iii) who owns 5% or more of the outstanding interests of the benefit company, calculated as if all outstanding rights to acquire interests in the benefit company have been exercised; or

(iv) who owns 5% or more of the outstanding interests in an entity, calculated as if all outstanding rights to acquire interests in the entity have been exercised, that owns 5% or more of the outstanding interests of the benefit company, calculated as if all outstanding rights to acquire interests in the benefit company have been exercised.

(6) "Minimum status vote" means:

(a) in the case of a limited liability company, in addition to any other required approval or vote, the satisfaction of the following conditions:

(i) the members of every class or series may vote as a separate voting group on an action of the limited liability company regardless of a limitation state in the certificate of organization or operating agreement on the voting rights of any class or series; and

(ii) the action of the limited liability company is required to be approved by vote of the members of each class or series entitled to cast at least two-thirds of the votes that all members of the class or series are entitled to cast on the action; or

(b) in the case of a domestic entity other than a limited liability company, in addition to any other required approval, vote, or consent, the satisfaction of the following conditions:

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

(ii) the action of the limited liability company is required to be approved by vote or consent of the holders described in Subsection (6)(b)(i) entitled to cast at least two-thirds of the votes or consents that all of those holders are entitled to cast on the action.

(7) "Owns" includes ownership as the owner of record or as a beneficial owner.

(8) "Specific public benefit" includes:

(a) providing low-income or underserved individuals or communities with beneficial products or services;

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(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.

(9) "Subsidiary" means, in relation to a person, an entity in which the person owns beneficially or of record, 50% or more of the outstanding equity interests, calculated as if all outstanding rights to acquire equity interests in the entity have been exercised.

(10) "Third-party standard" means a standard for defining, reporting, and assessing overall social and environmental performance that:

(a) assesses the effect of a business and a business's operations on the interests described in Subsections 48-4-301(1)(a)(ii) through (v);

(b) is developed by an entity:

(i) that is independent of the benefit company;

(ii) whose governing body is comprised of no more than one-third of members who are representatives of any of the following:

(A) an association of businesses that operate in a specific industry whose members are measured by the standard;

(B) businesses from a specific industry or an association of businesses in that industry;

or

(C) businesses whose performance is assessed against the standard;

(iii) that is not materially financed by an association or business described in Subsection (10)(b)(ii);

(iv) that has access to necessary expertise to assess overall social and environmental performance;

(v) uses a balanced multistakeholder approach to develop the standard, including a public comment period of at least 30 days; and

(vi) makes the following information publically available:

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

(B) the relative weightings, if any, of the criteria described in Subsection (10)(b)(vi)(A);

(C) the identity of each director, officer, material owner, and governing body of the entity that developed and controls revisions to the standard;

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

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

Section 4. Section **48-4-104** is enacted to read:

48-4-104. Benefit company status.

(1) A person may form a benefit company in accordance with Title 48, Chapter 3a, Utah Revised Uniform Limited Liability Company Act, except the certificate of organization shall state that the limited liability company is a benefit company.

(2) (a) A limited liability company may elect to become a benefit company by amending, in accordance with Section 48-3a-202, the limited liability company's certificate of organization to contain a statement that the limited liability company is a benefit company.

(b) An amendment described in Subsection (2)(a) is not effective unless the amendment is adopted by at least the minimum status vote.

(3) If an entity that is not a benefit company is a party to a merger or is the exchanging entity in an interest exchange, and the surviving entity in the merger or interest exchange is a benefit company, the merger or interest exchange is not effective unless the merger or interest exchange is adopted by the entity by at least the minimum status vote.

(4) (a) A benefit company may terminate the benefit company's status as a benefit company and cease to be subject to this chapter by amending the benefit company's certificate of organization in accordance with Section 48-3a-202 to delete the provision described in Subsection (1) or (2) that states that the limited liability company is a benefit company.

(b) An amendment described in Subsection (4)(a) is not effective unless the amendment is adopted by at least the minimum status vote.

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(5) (a) If a proposed merger or interest exchange would have the effect of terminating a benefit company's status as a benefit company, the merger or interest exchange is not effective unless the merger or interest exchange is adopted by at least the minimum status vote.

(b) Unless the transaction is in the usual and regular course of the benefit company's business, a sale, lease, exchange, or other disposition of all or substantially all of the assets of a benefit company is not effective unless the transaction is approved by at least the minimum status vote.

Section 5. Section ~~{48-4-201}~~48-4-105 is enacted to read:

48-4-105. Benefit company name.

(1) The name of a benefit company may contain the words "benefit limited liability company," "benefit limited company," or "benefit company" or the abbreviation "B.L.L.C.," "BLLC," "B.L.C.," or "BLC." "Limited" may be abbreviated as "Ltd.," and "company" may be abbreviated as "Co."

(2) A benefit company that complies with Subsection (1) satisfies the requirement described in Subsection 48-3a-108(1).

Section 6. Section 48-4-201 is enacted to read:

Part 2. Company Purposes

48-4-201. Company purpose.

(1) In addition to the benefit company's purpose under Section 48-3a-104, a benefit company shall have a purpose of creating general public benefit.

(2) (a) A benefit company's certificate of organization may identify one or more specific public benefits that are the purposes of the benefit company to create.

(b) Identifying a specific public benefit in accordance with Subsection (2)(a) does not affect a benefit company's obligation to create ~~{a}~~ general public benefit in accordance with Subsection (1).

(3) The creation of ~~{a}~~ general public benefit and one or more specific public benefits is in the best interests of the benefit company.

(4) (a) A benefit company may amend the benefit company's certificate or organization to add, amend, or delete a specific public benefit.

(b) An amendment described in Subsection (4)(a) is not effective unless adopted by at least the minimum status vote.

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Section ~~6~~7. Section **48-4-301** is enacted to read:

Part 3. Accountability

48-4-301. Standard of conduct for members.

(1) When discharging a duty under this chapter, each member of a member-managed benefit company:

(a) shall consider the effect of any action or inaction on:

(i) the members of the benefit company;

(ii) the employees and workforce of the benefit company;

(iii) the interests of customers as beneficiaries of the benefit company's general public benefit purpose or specific public benefit purpose of the benefit company;

(iv) community and societal considerations, including those of each community in which offices or facilities of the benefit company or the benefit company's subsidiaries or suppliers are located;

(v) the local and global environment;

(vi) the short-term and long-term interests of the benefit company, including benefits that may accrue to the benefit company from the benefit company's long-term plans and the possibility that the interests may be best served by the continued independence of the benefit company; and

(vii) the ability of the benefit company to accomplish the benefit company's general public benefit purpose and any specific public benefit purpose; and

(b) may consider other pertinent factors or the interests of any other group that the member considers appropriate.

(2) A member is not required to prioritize the interests of a person or factor described in Subsection (1)(a) or (b) over the interests of any other person or factor, unless the benefit company's certificate of organization states an intention to give priority to certain interests related to the benefit company's accomplishment of the benefit company's general public benefit purpose or a specific public benefit purpose identified in the benefit company's certificate of organization.

(3) A member's consideration of interests and factors in accordance with Subsections (1) and (2) does not constitute a violation of Section 48-3a-409.

~~{ (4) A member is not personally liable for monetary damages for:~~

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~~— (a) any action or inaction taken as a member of a member-managed limited liability company in the course of performing the duties described in Subsection (1) or (2), unless the action or inaction constitutes self-dealing, willful misconduct, or a knowing violation of law; or~~

~~— (b) the failure of the benefit company to pursue or create a general public benefit or a specific public benefit purpose.~~

‡ ~~(5)4~~ A member of a member-managed limited liability company that is a benefit company does not have a duty to a person who is a beneficiary of the benefit company's general public benefit purpose or specific public benefit purpose arising from the person's status as a beneficiary.

Section ~~(7)8~~. Section **48-4-302** is enacted to read:

48-4-302. Standard of conduct for managers and officers.

(1) Each manager of a manager-managed benefit company shall consider the interests and factors described in Subsections 48-4-301(1) and (2) when discharging the manager's duties under this chapter and the operating agreement.

(2) If a benefit company has a person serving as an officer, the person shall consider the interests and factors described in Subsections 48-4-301(1) and (2) when discharging the person's duties under this chapter and the operating agreement if:

(a) the officer has discretion to act with respect to the matter; and

(b) it reasonably appears to the officer that the matter may have a material affect on the benefit company's creation of a general public benefit or a specific public benefit identified in the benefit company's certificate of organization.

(3) A manager's consideration of the interests and factors described in Subsections 48-4-301(1) and (2) does not constitute a violation of Section 48-3a-409.

~~{ — (4) A manager or officer is not personally liable for monetary damages for:~~

~~— (a) any action or inaction taken as a manager or officer in the course of performing the duties described in Subsection 48-4-301(1) or (2), unless the action or inaction constitutes self-dealing, willful misconduct, or a knowing violation of law; or~~

~~— (b) the failure of the benefit company to pursue or create a general public benefit or a specific public benefit.~~

‡ ~~(5)4~~ A manager or officer does not have a duty to a person who is a beneficiary of the benefit company's general public benefit purpose or a specific public benefit purpose

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arising from the person's status as a beneficiary.

Section ~~{8}~~9. Section 48-4-303 is enacted to read:

48-4-303. Right of action.

(1) Except in a benefit enforcement proceeding, a person may not bring an action or assert a claim against a benefit company or a benefit company's member, manager, or officer with respect to:

(a) failure to pursue or create ~~{the}~~ general public benefit or a specific public benefit set forth in the benefit company's certificate of organization; or

(b) violation of a duty or standard of conduct under this chapter.

(2) A benefit company is not liable for monetary damages under this chapter for a failure of the benefit company to pursue or create ~~{a}~~ general public benefit or a specific public benefit.

(3) Only the following may commence or maintain a benefit enforcement proceeding:

(a) the benefit company, directly; or

(b) one or more of the following, derivatively:

(i) a member that owned at least 2% of the total number of interests of a class or series outstanding at the time of the act or omission complained of;

(ii) a manager of a manager-managed benefit company;

(iii) a person or group of persons who own beneficially or of record at least 5% of the interests in an association of which the benefit company is a subsidiary at the time of the act or omission complained of; or

(iv) any person or group of persons specified in the benefit company's certificate of organization or operating agreement.

Section ~~{9}~~10. Section 48-4-401 is enacted to read:

Part 4. Transparency

48-4-401. Annual benefit report.

(1) A benefit company shall prepare an annual benefit report that includes:

(a) a narrative description of:

(i) the ways in which the benefit company pursued the benefit company's general public benefit purpose during the year and the extent to which ~~{the}~~ general public benefit was created;

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(ii) the ways in which the benefit company pursued any specific public benefit that the benefit company's certificate of organization states is the purpose of the benefit company to create and the extent to which the specific public benefit was created;

(iii) any circumstances that have hindered the benefit company's creation of the general public benefit or any specific public benefit; and

(iv) the process and rationale for selecting or changing the third-party standard used to prepare the benefit report;

(b) an assessment of the overall social and environmental performance of the benefit company against a third-party standard:

(i) applied consistently with any application of the standard in prior benefit reports; or

(ii) accompanied by an explanation of the reasons for any inconsistent application; and

(c) any connection between the organization that established the third-party standard, or the organization's directors or officers, or a holder of 5% or more of the governance interests in the organization, and the benefit company or the benefit company's members, managers, or officers or any holder of 5% or more of the outstanding interests in the benefit company, including any financial or governance relationship that might materially affect the credibility of the use of the third-party standard.

(2) The assessment described in Subsection (1)(b) does not need to be audited or certified by a third party.

Section ~~{10}~~11. Section **48-4-402** is enacted to read:

48-4-402. Availability of annual benefit report.

(1) Each year, a benefit company shall send the benefit report described in Section 48-4-401 to each member:

(a) within 120 days after the day on which the benefit company's fiscal year ends; or

(b) the day on which the benefit company delivers any other annual report to the benefit company's members.

(2) (a) ~~{A}~~ Within five days after the day on which a benefit company sends a benefit report to each member in accordance with Subsection (1), the benefit company shall:

(i) subject to Subsection (2)(b), post ~~{each}~~a copy of the benefit ~~{company's benefit reports}~~report on a public portion of the benefit company's website~~{.}~~; and

~~{b}~~ A benefit company is not required to include any financial or proprietary

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information in ~~ii~~ deliver a copy of the benefit report ~~{that the benefit company posts }~~ to the ~~{benefit company's website}~~ division for filing.

~~(3)(a)~~ b If a benefit company does not have a website, the benefit company shall provide a copy of the ~~{benefit company's most recent}~~ benefit report, without charge, to any person who requests a copy.

~~(b)~~ c The benefit company may omit any financial or proprietary information from a copy of a benefit report described in Subsection ~~(3)(a)~~.

Legislative Review Note

Office of Legislative Research and General Counsel ~~2~~ (a) or (b).

(d) The division may charge a fee established by the division in accordance with Section 63J-1-504 for filing an annual benefit report in accordance with this section.