

LEGISLATURE OF NEBRASKA
ONE HUNDRED FOURTH LEGISLATURE
FIRST SESSION

LEGISLATIVE BILL 35

FINAL READING

Introduced by Howard, 9.

Read first time January 08, 2015

Committee: Banking, Commerce and Insurance

1 A BILL FOR AN ACT relating to corporations; to amend sections 21-402,
2 21-403, 21-404, 21-405, 21-407, 21-408, 21-409, 21-410, 21-412,
3 21-414, and 70-1903, Revised Statutes Cumulative Supplement, 2014;
4 to change Business Corporation Act references in the Nebraska
5 Benefit Corporation Act and the Rural Community-Based Energy
6 Development Act; to provide an operative date; and to repeal the
7 original sections.
8 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 21-402, Revised Statutes Cumulative Supplement,
2 2014, is amended to read:

3 21-402 (1) The Nebraska Benefit Corporation Act applies to all
4 benefit corporations.

5 (2) The existence of a provision of the Nebraska Benefit Corporation
6 Act does not of itself create an implication that a contrary or different
7 rule of law is applicable to a business corporation that is not a benefit
8 corporation. The act does not affect a statute or rule of law that is
9 applicable to a business corporation that is not a benefit corporation.

10 (3) Except as otherwise provided in the Nebraska Benefit Corporation
11 Act, the Nebraska Model Business Corporation Act is generally applicable
12 to all benefit corporations. The specific provisions of the Nebraska
13 Benefit Corporation Act control over the general provisions of the
14 Nebraska Model Business Corporation Act. A benefit corporation may be
15 subject simultaneously to the Nebraska Benefit Corporation Act and one or
16 more other statutes that provide for the incorporation of a specific type
17 of business corporation.

18 (4) A provision of the articles of incorporation or bylaws of a
19 benefit corporation may not limit, be inconsistent with, or supersede a
20 provision of the Nebraska Benefit Corporation Act.

21 Sec. 2. Section 21-403, Revised Statutes Cumulative Supplement,
22 2014, is amended to read:

23 21-403 The following words and phrases when used in the Nebraska
24 Benefit Corporation Act have the meanings given to them in this section
25 unless the context clearly indicates otherwise:

26 (1) Benefit corporation means a business corporation:

27 (a) Which has elected to become subject to the act; and

28 (b) The status of which as a benefit corporation has not been
29 terminated;

30 (2) Benefit director means the director designated as the benefit
31 director of a benefit corporation under section 21-409;

1 (3) Benefit enforcement proceeding means any claim or action or
2 proceeding for:

3 (a) Failure of a benefit corporation to pursue or create general
4 public benefit or a specific public benefit purpose set forth in its
5 articles of incorporation; or

6 (b) Violation of any obligation, duty, or standard of conduct under
7 the act;

8 (4) Benefit officer means the officer designated as the benefit
9 officer of a benefit corporation under section 21-411;

10 (5) Business corporation means a domestic corporation as defined in
11 section 21-214 ~~21-2014~~;

12 (6) General public benefit means a material positive impact on
13 society and the environment, taken as a whole, assessed against a third-
14 party standard, from the business and operations of a benefit
15 corporation;

16 (7) Independent means having no material relationship with a benefit
17 corporation or a subsidiary of the benefit corporation. Serving as
18 benefit director or benefit officer does not make an individual not
19 independent. A material relationship between an individual and a benefit
20 corporation or any of its subsidiaries will be conclusively presumed to
21 exist if:

22 (a) The individual is, or has been within the last three years, an
23 employee other than a benefit officer of the benefit corporation or a
24 subsidiary;

25 (b) An immediate family member of the individual is, or has been
26 within the last three years, an executive officer other than a benefit
27 officer of the benefit corporation or a subsidiary; or

28 (c) There is beneficial or record ownership of five percent or more
29 of the outstanding shares of the benefit corporation, calculated as if
30 all outstanding rights to acquire equity interests in the benefit
31 corporation had been exercised, by:

1 (i) The individual; or

2 (ii) An entity:

3 (A) Of which the individual is a director, an officer, or a manager;

4 or

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

9 (8) Minimum status vote means:

10 (a) In the case of a business corporation, in addition to any other
11 required approval or vote, the satisfaction of the following conditions:

12 (i) The shareholders of every class or series are entitled to vote
13 separately on a corporate action regardless of a limitation stated in the
14 articles of incorporation or bylaws on the voting rights of any class or
15 series; and

16 (ii) The corporate action must be approved by a vote of the
17 shareholders of each class or series entitled to cast at least two-thirds
18 of the votes that all shareholders of the class or series are entitled to
19 cast on the action; and

20 (b) In the case of a domestic entity other than a business
21 corporation, in addition to any other required approval, vote, or
22 consent, the satisfaction of the following conditions:

23 (i) The holders of every class or series of equity interests in the
24 entity that are entitled to receive a distribution of any kind from the
25 entity are entitled to vote separately on or consent to the action
26 regardless of any otherwise applicable limitation on the voting or
27 consent rights of any class or series; and

28 (ii) The action must be approved by a vote or consent of the holders
29 described in subdivision (i) of this subdivision entitled to cast at
30 least two-thirds of the votes or consents that all of those holders are
31 entitled to cast on the action;

1 (9) Publicly traded corporation means a business corporation that
2 has shares listed on a national securities exchange or traded in a market
3 maintained by one or more members of a national securities association;

4 (10) Specific public benefit includes:

5 (a) Providing low-income or underserved individuals or communities
6 with beneficial products or services;

7 (b) Promoting economic opportunity for individuals or communities
8 beyond the creation of jobs in the normal course of business;

9 (c) Protecting or restoring the environment;

10 (d) Improving human health;

11 (e) Promoting the arts, sciences, or advancement of knowledge;

12 (f) Increasing the flow of capital to entities with a purpose to
13 benefit society or the environment; and

14 (g) Conferring any other particular benefit on society or the
15 environment;

16 (11) Subsidiary means in relation to a person, an entity in which
17 the person owns beneficially or of record fifty percent or more of the
18 outstanding equity interests; and

19 (12) Third-party standard means a recognized standard for defining,
20 reporting, and assessing corporate social and environmental performance
21 that is:

22 (a) Comprehensive because it assesses the effect of the business and
23 its operations upon the interests listed in subdivisions (1)(a)(ii),
24 (iii), (iv), and (v) of section 21-408;

25 (b) Developed by an entity that is not controlled by the benefit
26 corporation;

27 (c) Credible because it is developed by an entity that both:

28 (i) Has access to necessary expertise to assess overall corporate
29 social and environmental performance; and

30 (ii) Uses a balanced multistakeholder approach to develop the
31 standard, including a reasonable public comment period; and

1 (d) Transparent because the following information is publicly
2 available:

3 (i) About the standard:

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

6 (B) The relative weightings, if any, of those criteria; and

7 (ii) About the development and revision of the standard:

8 (A) The identity of the directors, officers, material owners, and
9 governing body of the entity that developed and controls revisions to the
10 standard;

11 (B) The process by which revisions to the standard and changes to
12 the membership of the governing body are made; and

13 (C) An accounting of the revenue and sources of financial support
14 for the entity, with sufficient detail to disclose any relationships that
15 could reasonably be considered to present a potential conflict of
16 interest.

17 Sec. 3. Section 21-404, Revised Statutes Cumulative Supplement,
18 2014, is amended to read:

19 21-404 A benefit corporation shall be incorporated in accordance
20 with the Nebraska Model Business Corporation Act, but its articles of
21 incorporation must also state that it is a benefit corporation.

22 Sec. 4. Section 21-405, Revised Statutes Cumulative Supplement,
23 2014, is amended to read:

24 21-405 (1) An existing business corporation may become a benefit
25 corporation under the Nebraska Benefit Corporation Act by amending its
26 articles of incorporation so that they contain, in addition to the
27 requirements of section 21-220 ~~21-2018~~, a statement that the corporation
28 is a benefit corporation. In order to be effective, the amendment must be
29 adopted by at least the minimum status vote.

30 (2) An entity that is not a benefit corporation may become a benefit
31 corporation pursuant to subsection (1) of this section if the entity is

1 (a) a party to a merger or conversion or (b) an exchanging entity in a
2 share exchange, and the surviving, new, or resulting entity in the
3 merger, conversion, or share exchange is to be a benefit corporation. In
4 order to be effective, a plan of merger, conversion, or share exchange
5 subject to this subsection must be adopted by at least the minimum status
6 vote.

7 Sec. 5. Section 21-407, Revised Statutes Cumulative Supplement,
8 2014, is amended to read:

9 21-407 (1) A benefit corporation shall have a purpose of creating
10 general public benefit. This purpose is in addition to its purpose under
11 section 21-226 ~~21-2024~~.

12 (2) The articles of incorporation of a benefit corporation may
13 identify one or more specific public benefits that it is the purpose of
14 the benefit corporation to create in addition to its purposes under
15 section 21-226 ~~21-2024~~ and subsection (1) of this section. The
16 identification of a specific public benefit under this subsection does
17 not limit the purpose of a benefit corporation to create general public
18 benefit under subsection (1) of this section.

19 (3) The creation of general public benefit and specific public
20 benefit under subsections (1) and (2) of this section is in the best
21 interests of the benefit corporation.

22 (4) A benefit corporation may amend its articles of incorporation to
23 add, amend, or delete the identification of a specific public benefit
24 that it is the purpose of the benefit corporation to create. In order to
25 be effective, the amendment must be adopted by at least the minimum
26 status vote.

27 Sec. 6. Section 21-408, Revised Statutes Cumulative Supplement,
28 2014, is amended to read:

29 21-408 (1) In discharging the duties of their respective positions
30 and in considering the best interests of the benefit corporation, the
31 board of directors, committees of the board, and individual directors of

1 a benefit corporation:

2 (a) Shall consider the effects of any action or inaction upon:

3 (i) The shareholders of the benefit corporation;

4 (ii) The employees and work force of the benefit corporation, its
5 subsidiaries, and its suppliers;

6 (iii) The interests of customers as beneficiaries of the general
7 public benefit or specific public benefit purposes of the benefit
8 corporation;

9 (iv) Community and societal factors, including those of each
10 community in which offices or facilities of the benefit corporation, its
11 subsidiaries, or its suppliers are located;

12 (v) The local and global environment;

13 (vi) The short-term and long-term interests of the benefit
14 corporation, including benefits that may accrue to the benefit
15 corporation from its long-term plans and the possibility that these
16 interests may be best served by the continued independence of the benefit
17 corporation; and

18 (vii) The ability of the benefit corporation to accomplish its
19 general public benefit purpose and any specific public benefit purpose;

20 (b) May consider other pertinent factors or the interests of any
21 other group that they deem appropriate; and

22 (c) Need not give priority to the interests of a particular person
23 or group referred to in subdivision (a) or (b) of this subsection over
24 the interests of any other person or group unless the benefit corporation
25 has stated in its articles of incorporation its intention to give
26 priority to certain interests related to its accomplishment of its
27 general public benefit purpose or of a specific public benefit purpose
28 identified in its articles of incorporation.

29 (2) The consideration of interests and factors in the manner
30 required by subsection (1) of this section does not constitute a
31 violation of section 21-2,102 ~~21-2095~~.

1 (3) Except as provided in the articles of incorporation or bylaws, a
2 director is not personally liable for monetary damages for:

3 (a) Any action or inaction in the course of performing the duties of
4 a director under subsection (1) of this section if the director performed
5 the duties of office in compliance with section 21-2,102 ~~21-2095~~ and this
6 section; or

7 (b) Failure of the benefit corporation to pursue or create general
8 public benefit or specific public benefit.

9 (4) A director does not have a duty to a person that is a
10 beneficiary of the general public benefit purpose or a specific public
11 benefit purpose of a benefit corporation arising from the status of the
12 person as a beneficiary.

13 (5) A director who makes a business judgment in good faith fulfills
14 the duty under this section if the director:

15 (a) Is not interested in the subject of the business judgment;

16 (b) Is informed with respect to the subject of the business judgment
17 to the extent the director reasonably believes to be appropriate under
18 the circumstances; and

19 (c) Rationally believes that the business judgment is in the best
20 interests of the benefit corporation.

21 Sec. 7. Section 21-409, Revised Statutes Cumulative Supplement,
22 2014, is amended to read:

23 21-409 (1) The board of directors of a benefit corporation that is a
24 publicly traded corporation shall, and the board of any other benefit
25 corporation may, include a director, who:

26 (a) Shall be designated the benefit director; and

27 (b) Shall have, in addition to the powers, duties, rights, and
28 immunities of the other directors of the benefit corporation, the powers,
29 duties, rights, and immunities provided in this section.

30 (2) The benefit director shall be elected and may be removed in the
31 manner provided by the Nebraska Model Business Corporation Act. The

1 benefit director shall be an individual who is independent. The benefit
2 director may serve as the benefit officer at the same time as serving as
3 the benefit director. The articles of incorporation or bylaws of a
4 benefit corporation may prescribe additional qualifications of the
5 benefit director not inconsistent with this subsection.

6 (3) The benefit director shall prepare, and the benefit corporation
7 shall include in the annual benefit report to shareholders required by
8 section 21-413, the opinion of the benefit director on all of the
9 following:

10 (a) Whether the benefit corporation acted in accordance with its
11 general public benefit purpose and any specific public benefit purpose in
12 all material respects during the period covered by the benefit report;

13 (b) Whether the directors and officers complied with subsection (1)
14 of section 21-408 and subsection (1) of section 21-410, respectively; and

15 (c) If, in the opinion of the benefit director, the benefit
16 corporation or its directors or officers failed to act or comply in the
17 manner described in subdivisions (3)(a) and (b) of this subsection, a
18 description of the ways in which the benefit corporation or its directors
19 or officers failed to act or comply.

20 (4) The action or inaction of an individual in the capacity of a
21 benefit director constitutes for all purposes an action or inaction of
22 that individual in the capacity of a director of the benefit corporation.

23 (5) Regardless of whether the articles of incorporation or bylaws of
24 a benefit corporation include a provision eliminating or limiting the
25 personal liability of directors authorized by section 21-220 ~~21-2018~~, a
26 benefit director is not personally liable for an act or omission in the
27 capacity of a benefit director unless the act or omission constitutes
28 self-dealing, willful misconduct, or a knowing violation of law.

29 Sec. 8. Section 21-410, Revised Statutes Cumulative Supplement,
30 2014, is amended to read:

31 21-410 (1) Each officer of a benefit corporation shall consider the

1 interests and factors described in subsection (1) of section 21-408 in
2 the manner provided in that subsection if:

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

4 (b) It reasonably appears to the officer that the matter may have a
5 material effect on the creation by the benefit corporation of general
6 public benefit or a specific public benefit identified in the articles of
7 incorporation of the benefit corporation.

8 (2) The consideration of interests and factors in the manner
9 described in subsection (1) of this section does not constitute a
10 violation of section 21-2,107 ~~21-2099~~.

11 (3) Except as provided in the articles of incorporation or bylaws,
12 an officer is not personally liable for monetary damages for:

13 (a) An action or inaction as an officer in the course of performing
14 the duties of an officer under subsection (1) of this section if the
15 officer performed the duties of the position in compliance with section
16 21-2,107 ~~21-2099~~ and this section; or

17 (b) Failure of the benefit corporation to pursue or create general
18 public benefit or specific public benefit.

19 (4) An officer does not have a duty to a person that is a
20 beneficiary of the general public benefit purpose or a specific public
21 benefit purpose of a benefit corporation arising from the status of the
22 person as a beneficiary.

23 (5) An officer who makes a business judgment in good faith fulfills
24 the duty under this section if the officer:

25 (a) Is not interested in the subject of the business judgment;

26 (b) Is informed with respect to the subject of the business judgment
27 to the extent the officer reasonably believes to be appropriate under the
28 circumstances; and

29 (c) Rationally believes that the business judgment is in the best
30 interests of the benefit corporation.

31 Sec. 9. Section 21-412, Revised Statutes Cumulative Supplement,

1 2014, is amended to read:

2 21-412 (1)(a) Except in a benefit enforcement proceeding, no person
3 may bring an action or assert a claim against a benefit corporation or
4 its directors or officers with respect to:

5 (i) Failure to pursue or create general public benefit or a specific
6 public benefit set forth in its articles of incorporation; or

7 (ii) Violation of an obligation, duty, or standard of conduct under
8 the Nebraska Benefit Corporation Act.

9 (b) A benefit corporation is not liable for monetary damages under
10 the act for any failure of the benefit corporation to pursue or create
11 general public benefit or a specific public benefit.

12 (2) A benefit enforcement proceeding may be commenced or maintained
13 only:

14 (a) Directly by the benefit corporation; or

15 (b) Derivatively in accordance with the Nebraska Model Business
16 Corporation Act by:

17 (i) A person or group of persons that owned beneficially or of
18 record at least two percent of the total number of shares of a class or
19 series outstanding at the time of the act or omission complained of;

20 (ii) A director;

21 (iii) A person or group of persons that owned beneficially or of
22 record five percent or more of the outstanding equity interests in an
23 entity of which the benefit corporation is a subsidiary at the time of
24 the act or omission complained of; or

25 (iv) Other persons as specified in the articles of incorporation or
26 bylaws of the benefit corporation.

27 (3) For purposes of this section, a person is the beneficial owner
28 of shares or equity interests if the shares or equity interests are held
29 in a voting trust or by a nominee on behalf of the beneficial owner.

30 Sec. 10. Section 21-414, Revised Statutes Cumulative Supplement,
31 2014, is amended to read:

1 21-414 (1) A benefit corporation shall send its annual benefit
2 report to each shareholder:

3 (a) Within one hundred twenty days following the end of the fiscal
4 year of the benefit corporation; or

5 (b) At the same time that the benefit corporation delivers any other
6 annual report to its shareholders.

7 (2) A benefit corporation shall post all of its benefit reports on
8 the public portion of its Internet web site, if any, except that the
9 compensation paid to directors and financial or proprietary information
10 included in the benefit reports may be omitted from the benefit reports
11 as posted.

12 (3) If a benefit corporation does not have an Internet web site, the
13 benefit corporation shall provide a copy of its most recent benefit
14 report, without charge, to any person that requests a copy, except that
15 the compensation paid to directors and financial or proprietary
16 information included in the benefit report may be omitted from the copy
17 of the benefit report provided.

18 (4)(a) Concurrently with the delivery of the benefit report to
19 shareholders under subsection (1) of this section, the benefit
20 corporation shall deliver a copy of the benefit report to the Secretary
21 of State for filing, except that the compensation paid to directors and
22 financial or proprietary information included in the benefit report may
23 be omitted from the benefit report as delivered to the Secretary of
24 State.

25 (b) The Secretary of State shall charge a fee in the amount
26 prescribed in subdivision (a)(30) of section 21-205 ~~(1)(y) of section~~
27 ~~21-2005~~ for filing a benefit report. The fee shall be remitted to the
28 State Treasurer for credit to the Corporation Cash Fund.

29 Sec. 11. Section 70-1903, Revised Statutes Cumulative Supplement,
30 2014, is amended to read:

31 70-1903 For purposes of the Rural Community-Based Energy Development

1 Act:

2 (1) C-BED project or community-based energy development project
3 means a new energy generation project using wind, solar, biomass, or
4 landfill gas as the fuel source that:

5 (a) Has at least twenty-five percent of the gross power purchase
6 agreement payments flowing to the qualified owner or owners or as
7 payments to the local community; and

8 (b) Has a resolution of support adopted:

9 (i) By the county board of each county in which the C-BED project is
10 to be located; or

11 (ii) By the tribal council for a C-BED project located within the
12 boundaries of an Indian reservation;

13 (2) Electric utility means an electric supplier that:

14 (a) Owns more than one hundred miles of one-hundred-fifteen-kilovolt
15 or larger transmission lines in the State of Nebraska;

16 (b) Owns more than two hundred megawatts of electric generating
17 facilities; and

18 (c) Has the obligation to directly serve more than two hundred
19 megawatts of wholesale or retail electric load in the State of Nebraska;

20 (3) Gross power purchase agreement payments means the total amount
21 of payments during the first twenty years of the agreement;

22 (4) Payments to the local community include, but are not limited to:

23 (a) Lease and easement payments to property owners made as part of a
24 C-BED project;

25 (b) Contract payments for concrete, steel, gravel, towers, turbines,
26 blades, wire, or engineering, procurement, construction, geotechnical,
27 environmental, meteorological, or legal services or payments for other
28 components, equipment, materials, or services that are necessary to
29 permit or construct the C-BED project and that are provided by a company
30 that has been organized or incorporated in Nebraska under Nebraska law
31 and has employed at least five Nebraska residents for at least eighteen

1 months prior to the date of the project application for certification as
2 a C-BED project; and

3 (c) Payments that are for physical parts, materials, or components
4 that are manufactured, assembled, or fabricated in Nebraska and that are
5 not described in subdivision (a) or (b) of this subdivision.

6 Such payments need not be made directly from power purchase
7 agreement revenue and may be made from other funds in advance of
8 receiving power purchase agreement revenue; and

9 (5) Qualified owner means:

10 (a) A Nebraska resident;

11 (b) A limited liability company that is organized under the Nebraska
12 Uniform Limited Liability Company Act and that is made up of members who
13 are Nebraska residents;

14 (c) A Nebraska nonprofit corporation organized under the Nebraska
15 Nonprofit Corporation Act;

16 (d) An electric supplier as defined in section 70-1001.01, except
17 that ownership in a single C-BED project is limited to no more than:

18 (i) Fifteen percent either directly or indirectly by a single
19 electric supplier; and

20 (ii) A combined total of twenty-five percent ownership either
21 directly or indirectly by multiple electric suppliers;

22 (e) A tribal council;

23 (f) A domestic corporation organized in Nebraska under the Nebraska
24 Model Business Corporation Act and domiciled in Nebraska; or

25 (g) A cooperative corporation organized under sections 21-1301 to
26 21-1306 and domiciled in Nebraska.

27 Sec. 12. This act becomes operative on January 1, 2017.

28 Sec. 13. Original sections 21-402, 21-403, 21-404, 21-405, 21-407,
29 21-408, 21-409, 21-410, 21-412, 21-414, and 70-1903, Revised Statutes
30 Cumulative Supplement, 2014, are repealed.