

CHAPTER 216
SB 215-FN – FINAL VERSION

02/19/14 0563s
05/01/14 1628EBA

2014 SESSION

14-2620
03/04

SENATE BILL ***215-FN***

AN ACT authorizing benefit corporations.

SPONSORS: Sen. Kelly, Dist 10; Sen. Bradley, Dist 3; Sen. Hosmer, Dist 7; Sen. Larsen,
 Dist 15

COMMITTEE: Commerce

ANALYSIS

This bill authorizes benefit corporations.

Explanation: Matter added to current law appears in ***bold italics***.
 Matter removed from current law appears [~~in brackets and struck through~~].
 Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

CHAPTER 216
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STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Fourteen

AN ACT authorizing benefit corporations.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 216:1 New Chapter; Benefit Corporations. Amend RSA by inserting after chapter 293-B the
2 following new chapter:

3 CHAPTER 293-C
4 BENEFIT CORPORATIONS

5 Preliminary Provisions

6 293-C:1 Short Title, Application, and Effect of Chapter.

7 I. This chapter shall be known and may be cited as the “New Hampshire Benefit Corporation
8 Act.”

9 II. This chapter shall be applicable to all benefit corporations.

10 III. The existence of a provision of this chapter shall not itself create an implication that a
11 contrary or different rule of law is applicable to a business corporation that is not a benefit
12 corporation. This chapter shall not affect a statute or rule of law that is applicable to a business
13 corporation that is not a benefit corporation.

14 IV. Except as otherwise provided in this chapter, RSA 293-A shall be generally applicable to
15 all benefit corporations. A benefit corporation may be subject simultaneously to this chapter and one
16 or more other chapters of this title, including RSA 294-A. The provisions of this chapter shall control
17 over the provisions of RSA 293-A and RSA 294-A.

18 V. A provision of the articles of incorporation or bylaws of a benefit corporation may not
19 limit, be inconsistent with, or supersede a provision of this chapter.

20 293-C:2 Definitions. In this chapter:

21 I. “Benefit corporation” means a business corporation:

22 (a) That has elected to become subject to this chapter; and

23 (b) The status of which as a benefit corporation has not been terminated.

24 II. “Benefit director” means either:

25 (a) The director designated as the benefit director of a benefit corporation under
26 RSA 293-C:8; or

27 (b) A person with one or more of the powers, duties, or rights of a benefit director to the
28 extent provided in the bylaws under RSA 293-C:8, VI.

CHAPTER 216
SB 215-FN – FINAL VERSION
- Page 2 -

1 III. “Benefit enforcement proceeding” means any claim or action or proceeding for:

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

4 (b) Violation of any obligation, duty, or standard of conduct under this chapter.

5 IV. “Benefit officer” means the individual designated as the benefit officer of a benefit
6 corporation under RSA 293-C:10.

7 V. “General public benefit” means a material positive effect on society and the environment,
8 taken as a whole, assessed against a third-party standard, from the business and operations of a
9 benefit corporation.

10 VI. “Independent” means having no material relationship with a benefit corporation or a
11 subsidiary of the benefit corporation. Serving as benefit director or benefit officer does not make an
12 individual not independent. A material relationship between an individual and a benefit corporation
13 or any of its subsidiaries shall be conclusively presumed to exist if any of the following apply:

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

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

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

21 (1) The individual; or

22 (2) An entity:

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

24 (B) In which the individual owns beneficially or of record 5 percent or more of the
25 outstanding equity interests, calculated as if all outstanding rights to acquire equity interests in the
26 entity had been exercised.

27 VII. “Minimum status vote” means:

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

30 (1) The shareholders of every class or series shall be entitled to vote as a separate
31 voting group on the corporate action regardless of a limitation stated in the articles of incorporation
32 or bylaws on the voting rights of any class or series.

33 (2) The corporate action shall be approved by vote of the shareholders of each class or
34 series entitled to cast at least 2/3 of the votes that all shareholders of the class or series are entitled
35 to cast on the action.

36 (b) In the case of a domestic entity other than a business corporation, in addition to any

CHAPTER 216
SB 215-FN – FINAL VERSION
- Page 3 -

other required approval, vote, or consent, the satisfaction of the following conditions:

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

(2) The action shall be approved by vote or consent of the holders described in subparagraph (b)(1) entitled to cast at least 2/3 of the votes or consents that all of those holders are entitled to cast on the action.

VIII. “Publicly-traded corporation” means a business corporation that has shares listed on a national securities exchange or traded in a market maintained by one or more members of a national securities association.

IX. “Specific public benefit” includes:

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

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

(c) Protecting or restoring the environment;

(d) Improving human health;

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

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

(g) Conferring any other particular benefit on society or the environment.

X. “Subsidiary” means, in relation to a person, an entity in which the person owns beneficially or of record 50 percent or more of the outstanding equity interests, calculated as if all outstanding rights to acquire equity interests in the entity had been exercised.

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

(a) Comprehensive because it assesses the effect of the business and its operations upon the interests listed in RSA 293-C:7, I(a).

(b) Developed by an entity that is not controlled by the benefit corporation.

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

(1) Has access to necessary expertise to assess overall corporate social and environmental performance; and

(2) Uses a balanced approach to develop the standard, including a reasonable public comment period.

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

(1) About the standard:

(A) The criteria considered when measuring the overall social and environmental

CHAPTER 216
SB 215-FN – FINAL VERSION
- Page 4 -

performance of a business.

(B) The relative weightings, if any, of those criteria.

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

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

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

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

293-C:3 Incorporation of Benefit Corporation. A benefit corporation shall be incorporated in accordance with RSA 293-A:2.01 through RSA 293-A:2.07, but its articles of incorporation shall also state that it is a benefit corporation.

293-C:4 Election of Benefit Corporation Status.

I. An existing business corporation may become a benefit corporation under this chapter by amending its articles of incorporation so that they contain, in addition to the requirements of RSA 293-A:2.02, a statement that the corporation is a benefit corporation. In order to be effective, the amendment shall be adopted by at least the minimum status vote.

II. The following rules apply to a merger, interest exchange, or conversion:

(a) Except as provided in subparagraph (b), if a domestic entity that is not a benefit corporation is a party to a merger or conversion or is the exchanging entity in a share exchange and the surviving, new, or resulting entity in the merger, conversion, or share exchange is to be a benefit corporation, the plan of merger, conversion, or share exchange shall be approved by the domestic entity by at least the minimum status vote.

(b) Subparagraph (a) shall not apply in the case of a corporation that is a party to a merger if the shareholders of the corporation are not entitled to vote on the merger pursuant to RSA 293-A:11.05.

293-C:5 Termination of Benefit Corporation Status.

I. A benefit corporation may terminate its status as such and cease to be subject to this chapter by amending its articles of incorporation to delete the provision required by RSA 293-C:3 or RSA 293-C:4, I to be stated in the articles of a benefit corporation. In order to be effective, the amendment shall be adopted by at least the minimum status vote.

II. The following rules apply to a merger, interest exchange, or conversion:

(a) Except as provided in subparagraph (b), if a plan of merger, conversion, or share exchange would have the effect of terminating the status of a business corporation as a benefit corporation, the plan shall be adopted by at least the minimum status vote in order to be effective.

(b) Subparagraph (a) shall not apply in the case of a corporation that is a party to a

CHAPTER 216
SB 215-FN – FINAL VERSION
- Page 5 -

merger if the shareholders of the corporation are not entitled to vote on the merger pursuant to RSA 293-A:11.05.

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

Corporate Purposes

293-C:6 Corporate Purposes.

I. A benefit corporation shall have a purpose of creating general public benefit. This purpose is in addition to its purpose under RSA 293-A:7.

II. The articles of incorporation of a benefit corporation may identify one or more specific public benefits that it is the purpose of the benefit corporation to create in addition to its purposes under paragraph I and RSA 293-A:7. The identification of a specific public benefit under this paragraph shall not limit the purpose of a benefit corporation to create general public benefit under paragraph I.

III. The creation of general public benefit and specific public benefit under paragraphs I and II is in the best interests of the benefit corporation.

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

V. A professional corporation that is a benefit corporation does not violate RSA 294-A:2 by having the purpose to create general public benefit or a specific public benefit.

Accountability

293-C:7 Standard of Conduct for Directors.

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

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

(1) The shareholders of the benefit corporation;

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

(3) The interests of customers as beneficiaries of the general public benefit or specific public benefit purposes of the benefit corporation;

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

(5) The local and global environment;

(6) The short-term and long-term interests of the benefit corporation, including

CHAPTER 216
SB 215-FN – FINAL VERSION
- Page 6 -

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

(7) The ability of the benefit corporation to accomplish its 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 they deem appropriate; but

(c) Need not give priority to a particular interest or factor referred to in subparagraph (a) or (b) over any other interest or factor unless the benefit corporation has stated in its articles of incorporation its intention to give priority to certain interests or factors related to its accomplishment of its general public benefit purpose or of a specific public benefit purpose identified in its articles.

II. The consideration of interests and factors in the manner required by paragraph I shall not constitute a violation of RSA 293-A:8.30.

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

(a) Any action or inaction in the course of performing the duties of a director under this chapter if the director performed the duties of office in compliance with RSA 293-A:8.30 and this section; or

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

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

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

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

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

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

293-C:8 Benefit Director.

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

(a) Shall be designated the benefit director; and

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

CHAPTER 216
SB 215-FN – FINAL VERSION
- Page 7 -

chapter.

II. The benefit director shall be elected, and may be removed, in the manner provided by RSA 293-A:8.01 through RSA 293-A:8.11. Except as provided in paragraphs VI and VII, the benefit director shall be an individual who is independent. The benefit director may serve as the benefit officer at the same time as serving as the benefit director. The articles of incorporation or bylaws of a benefit corporation may prescribe additional qualifications of the benefit director not inconsistent with this paragraph.

III. The benefit director shall prepare, and the benefit corporation shall include in the annual benefit report to shareholders required by section RSA 293-C:12, the opinion of the benefit director on all of the following:

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

(b) Whether the directors and officers complied with RSA 293-C:7 and RSA 293-C:9.

(c) If, in the opinion of the benefit director, the benefit corporation or its directors or officers failed to act or comply in the manner described in paragraphs I and II, a description of the ways in which the benefit corporation or its directors or officers failed to act or comply.

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

V. Regardless of whether the articles of incorporation or bylaws of a benefit corporation include a provision eliminating or limiting the personal liability of directors authorized by RSA 293-A:2.02(b)(4), a benefit director shall not be personally liable for an act or omission in the capacity of a benefit director unless the act or omission constitutes self-dealing, willful misconduct, or a knowing violation of law.

VI. The articles of incorporation or bylaws of a benefit corporation shall provide that the persons or shareholders who perform the duties of the board of directors include a person with the powers, duties, rights, and immunities of a benefit director if the articles of incorporation or bylaws of the benefit corporation or a shareholder agreement provide that the powers and duties conferred or imposed upon the board of directors shall be exercised or performed by a person other than the directors under RSA 293-A:7.32. A person that exercises one or more of the powers, duties, or rights of a benefit director under this paragraph:

(a) Does not need to be independent of the benefit corporation;

(b) Shall have the immunities of a benefit director;

(c) May share the powers, duties, and rights of a benefit director with one or more other persons; and

CHAPTER 216
SB 215-FN – FINAL VERSION
- Page 8 -

(d) Shall not be subject to the procedures for election or removal of directors in RSA 293-A:8.01 through RSA 293-A:8.11 unless:

(1) The person is also a director of the benefit corporation; or

(2) The articles, bylaws, or shareholder agreement make those procedures applicable.

VII. The benefit director of a professional corporation does not need to be independent.
293-C:9 Standard of Conduct for Officers.

I. Each officer of a benefit corporation shall consider the interests and factors described in RSA 293-C:7 in the manner provided in that section if:

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

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

II. The consideration of interests and factors in the manner required by paragraph I shall not constitute a violation of RSA 293-A:8.42.

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

(a) An action or inaction as an officer in the course of performing the duties of an officer under this section if the officer performed the duties of the position in compliance with RSA 293-A:8.42 and this section; or

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

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

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

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

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

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

293-C:10 Designation of Benefit Officer.

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

II. A benefit officer shall have:

(a) The powers and duties relating to the purpose of the corporation to create general public benefit or specific public benefit provided:

CHAPTER 216
SB 215-FN – FINAL VERSION
- Page 9 -

(1) By the bylaws; or

(2) Absent controlling provisions in the bylaws, by resolutions or orders of the board of directors.

(b) The duty to prepare the benefit report required by RSA 293-C:12.

293-C:11 Right of Action.

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

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

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

II. A benefit corporation shall not be liable for monetary damages under this chapter for any failure of the benefit corporation to pursue or create general public benefit or a specific public benefit.

III. A benefit enforcement proceeding shall be commenced or maintained only:

(a) Directly by the benefit corporation; or

(b) Derivatively in accordance with RSA 293-A:7.40 through RSA 293-A:7.48 by:

(1) A person or group of persons that owned beneficially or of record at least 2 percent of the total number of shares of a class or series outstanding at the time of the act or omission complained of;

(2) A director;

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

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

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

V. In an action commenced under this section, if it is determined that a corporation established pursuant to this chapter has failed to pursue a general public benefit or a specific public benefit set forth in its articles of incorporation, the secretary of state may revoke the corporation's status as a benefit corporation under this chapter.

Transparency

293-C:12 Preparation of Annual Benefit Report.

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

(a) A narrative description of:

(1) The ways in which the benefit corporation pursued general public benefit during

CHAPTER 216
SB 215-FN – FINAL VERSION
- Page 10 -

1 the year and the extent to which general public benefit was created.

2 (2) Both:

3 (A) The ways in which the benefit corporation pursued a specific public benefit
4 that the articles of incorporation state it is the purpose of the benefit corporation to create; and

5 (B) The extent to which that specific public benefit was created.

6 (3) Any circumstances that have hindered the creation by the benefit corporation of
7 general public benefit or specific public benefit.

8 (4) The process and rationale for selecting or changing the third-party standard used
9 to prepare the benefit report.

10 (b) An assessment of the overall social and environmental performance of the benefit
11 corporation against a third-party standard:

12 (1) Applied consistently with any application of that standard in prior benefit
13 reports; or

14 (2) Accompanied by an explanation of the reasons for:

15 (A) Any inconsistent application; or

16 (B) The change to that standard from the one used in the immediately prior
17 report.

18 (c) The name of the benefit director and the benefit officer, if any, and the address to
19 which correspondence to each of them may be directed.

20 (d) The compensation paid by the benefit corporation during the year to each director in
21 the capacity of a director.

22 (e) The statement of the benefit director described in RSA 293-C:8, III.

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

29 (g) If the benefit corporation has dispensed with, or restricted the discretion or powers of,
30 the board of directors, a description of:

31 (1) The persons that exercise the powers, duties, and rights and who have the
32 immunities of the board of directors; and

33 (2) The benefit director, as required by RSA 293-C:8, VI.

34 II. If, during the year covered by a benefit report, a benefit director resigned from or refused
35 to stand for reelection to the position of benefit director, or was removed from the position of benefit
36 director, and the benefit director furnished the benefit corporation with any written correspondence

CHAPTER 216
SB 215-FN – FINAL VERSION
- Page 11 -

concerning the circumstances surrounding the resignation, refusal, or removal, the benefit report shall include that correspondence as an exhibit.

III. Neither the benefit report nor the assessment of the performance of the benefit corporation required by subparagraph I(b) shall be audited or certified by a third party.

293-C:13 Availability of Annual Benefit Report.

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

(a) 120 days following the end of the fiscal year of the benefit corporation; or

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

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

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

IV. Concurrently with the delivery of the benefit report to shareholders under paragraph I, the benefit corporation shall deliver a copy of the benefit report to the secretary of state for filing, but the compensation paid to directors and financial or proprietary information included in the benefit report may be omitted from the benefit report as delivered to the secretary of state. The secretary of state shall charge a fee of \$35 for filing a benefit report.

V. If the secretary of state determines that a benefit corporation established pursuant to this chapter fails to make available its annual benefit report pursuant to RSA 293-C:12 and RSA 293-C:13, the secretary of state shall administratively dissolve the corporation in accordance with the procedures in RSA 293-A:14.21.

216:2 Effective Date. This act shall take effect January 1, 2015.

Approved: July 11, 2014

Effective Date: January 1, 2015