

**FISCAL NOTE**  
**Requested by Legislative Council**  
**01/14/2015**

Amendment to: HB 1237

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2013-2015 Biennium		2015-2017 Biennium		2017-2019 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
<b>Revenues</b>	\$0	\$0	\$0	\$0	\$0	\$0
<b>Expenditures</b>	\$0	\$0	\$0	\$0	\$0	\$0
<b>Appropriations</b>	\$0	\$0	\$0	\$0	\$0	\$0

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2013-2015 Biennium	2015-2017 Biennium	2017-2019 Biennium
<b>Counties</b>	\$0	\$0	\$0
<b>Cities</b>	\$0	\$0	\$0
<b>School Districts</b>	\$0	\$0	\$0
<b>Townships</b>	\$0	\$0	\$0

- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

Establish Public Benefit Corporation - no fiscal impact

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

None

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

No change from current law

- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

No change from current law

- C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation or a part of the appropriation is included in the executive budget or relates to a continuing appropriation.*

No change from current law

**Name:** Al Jaeger

**Agency:** Secretary of State

**Telephone:** 701-328-2900

**Date Prepared:** 01/18/2015

**FISCAL NOTE**  
**Requested by Legislative Council**  
**01/14/2015**

Bill/Resolution No.: HB 1237

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Appropriations	\$0	\$0	\$0	\$0	\$0	\$0

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Establish Public Benefit Corporation - no fiscal impact

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No change from current law

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No change from current law

**Name:** Al Jaeger

**Agency:** Secretary of State

**Telephone:** 701-328-2900

**Date Prepared:** 01/18/2015

**2015 HOUSE INDUSTRY, BUSINESS AND LABOR**

**HB 1237**

# 2015 HOUSE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee  
Peace Garden Room, State Capitol

HB 1237  
1/20/2015  
22250

- Subcommittee  
 Conference Committee



**Explanation or reason for introduction of bill/resolution:**

North Dakota public benefit corporations.

**Minutes:**

Attachment 1-2

**Chairman Keiser:** Opens the hearing on HB 1237.

**Clara Jenkins~On behalf of Al Jeager, Secretary of State:** (Attachment 1).

**Representative M Nelson:** The company is giving their money to the poor but if they were a regular corporation, they would be in potential trouble with their shareholders. Is that what we are talking about?

**Jenkins:** This particular one is giving all their profits to their public benefit purpose, the board has the ability to make those decisions as to what percentage of their profits will be designated for the public benefit purpose. They are not all.

**Representative Ruby:** Last session, wasn't there a bill that was similar to this and what was the department's position?

**Jenkins:** That was for the low profit LLC. That organization hasn't quite matured to the level of what this one has nationwide. We asked the committee at that time not to pass it because there was not enough history to that organizational style.

**Representative Ruby:** What would be the benefit be between this type of structure and a 501C3?

**Jenkins:** This is typically a corporation that has a business purpose. Business purposes generally do not compete with non-profits. They allow them to do it under one.

**Representative Louser:** How would the Secretary of State determine whether or not something meets the threshold of the new standard?

**Jenkins:** The articles of incorporation are going to have to be specific, that they are organizing under this chapter and secondly, they are going to have to provide those specific purposes that are deemed to be a public benefit.

**Bill Guy III~Here on behalf of himself and the State Bar Association:** (Attachment 2).

**20:00**

**Representative Kasper:** I'm looking for the angle, why would a group of people want to become a public benefit corporation versus a corporation?

**Guy:** If it's just a business corporation, there can be a conflict with the shareholders. The owners and everybody involved with it, understands from day one, the mission of this corporation to do good and make money. Non-profit corporation can do good but they are not supposed to be in business to make money.

**Representative Kasper:** The corporation works and makes a profits as a public benefit, they could donate 50% to charity or cause and they could keep the other 50% as taxable income? The donation is that a total tax deduction for the corporation or is it limited to different types of rules or would it be totally deductible, so for tax purpose, generates a benefit as well?

**Guy:** Depends on how the benefit is delivered. If they simply write a check to an organization for their public benefit, then it would be deductible because they are a C business corporation.

**Representative Kasper:** Are there requirements that every year they must provide something for the public good? If they stop doing the benefit for the public for a period of time, is this revoked?

**Guy:** There is no burden on the Secretary of State's office or any other government operation to police this thing, unless it gets into court. The actions can be brought against the corporation is being limited to its shareholders. They are the ones to complain if this company is not doing what it said that it would do.

**Representative M Nelson:** I form a public benefit corporation and years go by and I don't make any charitable contribution and we are paying out profits to our shareholders. None of the charities has the status to complain; only the people of the company can complain?

**Guy:** The shareholders are the only ones that earned a position to complain. This is going to be a self-policing thing.

**Chairman Keiser:** Can an individual form one of these or does it require shares to be sold?

**Guy:** Yes and be the sole shareholder.

**Chairman Keiser:** When shares are issued, they must have a value placed on the shares so you can generate capital. It is a public offering for shares, how do they generate capital?

**Guy:** This corporation will be formed up like any other business corporation that will be closely held entity, but it could conceivably be public held entity that files with the security's commissioner.

**Chairman Keiser:** Is there any tax impact relative to owning shares in one of these? Is there a tax advantage that we know of?

**Guy:** No, there is no tax advantage.

**Chairman Keiser:** We struggle with the percent that goes to charity, they have to have a net material positive impact, is that 50%?

**Guy:** The general benefit corporation operates under a stricter standard than the specific corporation. The general benefit corporation would be operating much more for the public benefit.

**Chairman Keiser:** The purpose is in the bylaws to do good things. On the specific benefit, it could be 10% in the bylaws dedicated.

**Guy:** It could be a percentage. I would advise not to pick a percentage but to state that supporting that cause is part of their mission.

**Chairman Keiser:** The unique characteristic is it must be in the bylaws. If it's not in the bylaws you have to go C corporation or LLC.

**Guy:** Articles of corporation, yes it must specifically state with the Secretary of State.

**Chairman Keiser:** Anyone else here to testify in support of HB 1237, opposition, neutral? Closes the hearing. What are the wishes of the committee?

**Representative Kasper:** Moves to adopt the amendment submitted by the Secretary of State.

**Representative Boschee:** Second.

**Voice vote, motion carried to adopt the Secretary of State's amendments.**

**Representative Kasper:** Moves a Do Pass as Amended.

**Representative Boschee:** Second.

**Roll call was taken for a Do Pass as Amended on HB 1237 with 10 yes, 1 no, 4 absent and Representative Devlin is the carrier.**

January 20, 2015

8/1-2015

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1237

Page 3, line 24, replace "10-37.04" with "10-37-04"

Page 8, line 22, after "identification" insert " of"

Page 9, line 27, after "corporation" insert " - Authority to transact business"

Renumber accordingly

Date: Jan 20 - 2015

Roll Call Vote: 1

2015 HOUSE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. 1237

House Industry, Business & Labor Committee

- Subcommittee  Conference Committee

Amendment LC# or Description: Secretary of State's Amendment

- Recommendation:  Adopt Amendment  
 Do Pass  Do Not Pass  Without Committee Recommendation  
 As Amended  Rerefer to Appropriations  
Other Actions:  Reconsider

Motion Made By Rep Kasper Seconded By Rep Boschee

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser			Representative Lefor		
Vice Chairman Sukut			Representative Louser		
Representative Beadle			Representative Ruby		
Representative Becker			Representative Amerman		
Representative Devlin			Representative Boschee		
Representative Frantsvog			Representative Hanson		
Representative Kasper			Representative M Nelson		
Representative Laning					

Total (Yes) \_\_\_\_\_ No \_\_\_\_\_

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

voice vote, motion carries

Date: Jan 20-2015

Roll Call Vote: 2

2015 HOUSE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. 1237

House Industry, Business & Labor Committee

Subcommittee  Conference Committee

Amendment LC# or Description: \_\_\_\_\_

Recommendation:  Adopt Amendment  
 Do Pass  Do Not Pass  Without Committee Recommendation  
 As Amended  Rerefer to Appropriations  
Other Actions:  Reconsider  \_\_\_\_\_

Motion Made By Rep Kasper Seconded By Rep Boschee

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	x		Representative Lefor	x	
Vice Chairman Sukut	x		Representative Louser	x	
Representative Beadle	Ab		Representative Ruby		x
Representative Becker	Ab		Representative Amerman	x	
Representative Devlin	x		Representative Boschee	x	
Representative Frantsvog	Ab		Representative Hanson	Ab	
Representative Kasper	x		Representative M Nelson	x	
Representative Laning	x				

Total (Yes) 10 No 1

Absent 4

Floor Assignment Rep Devlin

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1237: Industry, Business and Labor Committee (Rep. Keiser, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (10 YEAS, 1 NAYS, 4 ABSENT AND NOT VOTING). HB 1237 was placed on the Sixth order on the calendar.

Page 3, line 24, replace "10-37.04" with "10-37-04"

Page 8, line 22, after "identification" insert " of"

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Renumber accordingly

**2015 SENATE JUDICIARY**

**HB 1237**

# 2015 SENATE STANDING COMMITTEE MINUTES

**Judiciary Committee**  
Fort Lincoln Room, State Capitol

HB 1237  
3/18/2015  
25064

- Subcommittee  
 Conference Committee

Committee Clerk Signature

*W Penrose*

**Minutes:**

1,2

Ch. Hogue: We will open the hearing on HB 1237.

William Guy, III, State Bar Association of ND: Support (see attached #1).

Ch. Hogue: So what would the advantage of this be over a non-profit that sets itself up this way? This one could raise more capital, why is this an advantage over a non-profit.

William Guy: This is a for-profit company. It seeks to pursue a social purpose. The company is in the business to make a profit. They are not a non-profit organization. You cannot obtain an income tax deduction by contributing capital to one of these companies. This is a business corporation with a special purpose.

Sen. Casper: I think there is a growing trend nationally for these types of corporations. Is there a minimum requirement for what that public service corporation benefit is?

William Guy: This is designed to be as flexible as possible. The corporation basically determines what its public benefit is going to be, whether it's a general one, specific, or combination of the two; how they are go about pursuing it.

Sen. Grabinger: How many other states have enacted similar legislation?

William Guy: So far it's 24 states that have enacted similar legislation or are considering it. When Minnesota enacted their law, on the first day it was available, they had over 100 companies applied for this status.

Ch. Hogue: You said 24 enacted or proposed.

William Guy: 24 companies have enacted and 4 have it under consideration.

Ch. Hogue: We've had the c-corporation for over 100 years; non-profits, LLC are recent iterations. I am still puzzled, what are the advantages that this offers over a non-profit or a c-corporation. I understand that Ben and Jerry's Ice Cream want to make money and do public good; so does a c-corporation because it makes good business sense. If I have a corporation and I'm going to give away a pair of shoes for every pair of shoes that I sell you, that's just a good business decision. That's a marketing mechanism. So what is it about this entity that offers advantages to either recipients of charitable donations or others?

William Guy: This is a business corporation that presumably is a c-corporation, most of them would be. The corporation has elected to pursue either a general or a specific public benefit and they have so stated in their articles of incorporation, they are holding themselves out to do this, they have committed themselves to doing what it is they have said they will do. People that invest money in this company are investing presumably because they want to see that public benefit outcome. The mechanism for enforcement is in here so that the shareholders can cause if the company fails to follow through on this they can take action to force management to do what they said they were going to do, or to cease being a public benefit corporation. If this was just a c-corp that decided there was a resolution in the board of directors that said we're going to give 5% of our profits to charity, that's fine and they might do it; but they don't have to and they could change at the next meeting, they could revoke that and people that invested in the company on the basis of that earlier resolution would have no recourse. There doesn't seem to be a downside to this.

Sen. Casper: Does the public benefit corporation get any special treatment as opposed to a C-corp; does the shareholder in a public benefit corporation get any special benefit as opposed to a shareholder in a c-corp.

William Guy: Any special tax benefit.

Sen. Casper: Is there a tax benefit, a business benefit. If I were a shareholder in Sen. Hogue's shoes based out of Minot, ND that was a public benefit corporation and I invested in that because I thought they had a good

business model and they are providing a public benefit and a profit, and I thought that was a good dual purpose for a company and something that I wanted to be a part of. Or I invest in Sen. Armstrong's shoes out of Dickinson which is a regular corporation that just sold shoes and made a profit that way. Would I as a shareholder in that company get any different treatment tax wise or as an owner based on the entity I was in. It doesn't open any other doors for me because I am a shareholder in Sen. Hogue's company.

William Guy: No, there is no other benefit other than the fact that this company is presumably following a course of action that you approve of.

Sen. Nelson: Is the main purpose of this to hang a carrot out there for investors.

William Guy: It would be to give potential investors an entity around which to coalesce. If there is a public benefit corporation that wanted to provide a specific benefit and that was known, people who thought this was a good idea, would be available to invest in that corporation and hopefully see whatever that public benefit was carried forward and hopefully still make some money in the process. It's not a non-profit.

Sen. Casper: Would this be, from a taxation standpoint, would this be taxable; would there be two levels of taxation at the corporate level and at the shareholder level.

William Guy: This would be taxed I believe as a c-corporation. They might make less money because they are expending some for this social benefit. On the other hand, they might make more money if a lot of people that do business with them because they also approve of that benefit.

Ch. Hogue: Thank you. Further testimony in support.

Clara Jenkins, Secretary of State's Office: Support (see attached #2).

Ch. Hogue: Do you have a list of entities that formed public benefit corporations in MN and the extent of their capitalization. What are we talking about here.

Clara Jenkins: I don't have that information; I might be able to get it from the corporate director in the state of MN. I did have a list of states that adopted.

The state of Nevada had reported over 600 of these types of entities by the end of December this last year.

Ch. Hogue: Thank you. Further testimony in support. Testimony in opposition. Neutral testimony. We will close the hearing.

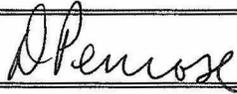
# 2015 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee  
Fort Lincoln Room, State Capitol

HB 1237  
3/23/2015  
25294

- Subcommittee  
 Conference Committee

Committee Clerk Signature



## Minutes:

Ch. Hogue: Let's take a look at HB 1237. This bill puzzles me. If you want to have some type of organization that fulfills some philanthropic purpose, why wouldn't you form a non-profit corporation where the people supporting your organization get the tax deductions? Here, you don't get them.

Sen. Casper: I asked a number of questions of the testifiers. This bill sort of surrounds the new buy one, give one idea of business. They want their business to be able to create a profit but have a charitable purpose. They mentioned Tom's shoes where you could buy one and they will give one away for free. I kept asking why they couldn't have a normal corporation and do this. You could be incorporated, have an LLC, LLP and do the same thing. I thought maybe there was some sort of tax benefit to this or a structure benefit, but the witnesses couldn't give us any benefits of it. I don't know what the purpose of it is, so I don't see what the use is.

Ch. Hogue: Or a not-for-profit, most people think that not-for-profits don't make profits. They do make profits.

Sen. Grabinger: This is intended to make money, too. It is a for-profit. That's a difference there. From what I gathered, I think the idea is that it will help get investors in the business, is the intent of it. Not necessarily for a tax savings standpoint or anything like that. The people would see the good in the corporation and they would want to invest. I know there are corporations out there that do this.

Sen. Casper: I think the only good that they see is in the name, it's a public benefit corporation and they are investing a benefit corporation. The conduct of the corporation and the actions they are taking are the same regardless.

Ch. Hogue: I would not be opposed to studying this. Basically what we had was the testimony of Mr. Guy for a paragraph and we're going to create an entirely new entity.

Sen. Casper: We do it in MN so we should do it in ND; that seems to be the thinking.

Ch. Hogue: So we have LLC's, partnerships, sole proprietorship, limited partnerships, professional corporations, so we're going to create an entirely new entity and I personally don't feel that we have adequate testimony to support the creation of this.

Sen. Luick: I move a Do Not Pass.

Sen. Casper: Second the motion.

**5 YES 0 NO 1 ABSENT**

**DO NOT PASS**

**CARRIER: Sen. Casper**

Date: 3/23/15

Roll Call Vote #: 1

2015 SENATE STANDING COMMITTEE  
ROLL CALL VOTE

BILL/RESOLUTION NO. 1237

Senate JUDICIARY Committee

Subcommittee

Amendment LC# or Description: \_\_\_\_\_

Recommendation:  Adopt Amendment  
 Do Pass  Do Not Pass  Without Committee Recommendation  
 As Amended  Rerefer to Appropriations  
 Place on Consent Calendar

Other Actions:  Reconsider  \_\_\_\_\_

Motion Made By Sen. Luick Seconded By Sen. Casper

Senators	Yes	No	Senators	Yes	No
Chairman Hogue	✓		Sen. Grabinger	✓	
Sen. Armstrong	✓		Sen. C. Nelson	<u>Absent</u>	
Sen. Casper	✓				
Sen. Luick	✓				

Total (Yes) 5 No 0

Absent 1

Floor Assignment Sen. Casper

**REPORT OF STANDING COMMITTEE**

**HB 1237, as engrossed: Judiciary Committee (Sen. Hogue, Chairman) recommends DO NOT PASS (5 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). Engrossed HB 1237 was placed on the Fourteenth order on the calendar.**

**2015 TESTIMONY**

**HB 1237**

ALVIN A. JAEGER  
SECRETARY OF STATE

HOME PAGE [www.nd.gov/sos](http://www.nd.gov/sos)



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**SECRETARY OF STATE**  
STATE OF NORTH DAKOTA  
600 EAST BOULEVARD AVENUE DEPT 108  
BISMARCK ND 58505-0500

January 20, 2015

TO: Representative Kaiser and Members of the House Industry, Business and Labor Committee

FR: Clara Jenkins on behalf of Al Jaeger, Secretary of State

RE: HB 1237 – Relating to Public Benefit Corporation

The Secretary of State thanks Representative Klemin for sponsoring HB 1237.

For over twenty-two years, on behalf of the Secretary of State, I have collaborated with Fargo attorney, William L. Guy, III, on drafting business related legislation for consideration by the legislature. It has resulted in legislative approval of new business entities, such as the Limited Liability Company Act, the Limited Liability Partnership Act, and others.

This bill would create Chapter 10-37 of the North Dakota Century Code, the Public Benefit Corporation Act. Mr. Guy will follow my testimony to explain the legal and practical aspects of the public benefit corporation.

The public benefit corporation provides businesses with a business structure that would provide a "general public benefit" (see definition on page 1, lines 13 through 15). The objectives of the corporation are to balance the interests of the stockholders with the interests of beneficiaries materially affected by the corporation's conduct and the specific public benefits identified by the corporation in its articles of incorporation. It is important to note that these corporations are subject to the same tax laws, etc. as are other business entities.

Twenty-three states have adopted the Public Benefit Corporation legislation and three states, Indiana, Kansas, and Michigan are considering adopting similar legislation. With its adoption in so many states, it is quite likely that a foreign (created in another state) public benefit corporation will soon seek to do business in North Dakota and will apply for a certificate of authority from the Secretary of State.

The states that have adopted the legislation are showing growing numbers. Minnesota adopted it in 2014, with an effective date of January 1, 2015. On January 2, 2015, a day after the law's effective date, Minnesota registered twenty-one public benefit corporations. Nevada has the largest number registered. The effective date of their law was January 1, 2014 and they had 652 public benefit corporations filed by mid-December 2014. It is impossible to predict how many North Dakota businesses might organize under this new law. Nevertheless, it is anticipated that similar interest will develop and the adoption of this bill will allow businesses, both domestic and foreign, to have that option in North Dakota.

Because the public benefit corporation is subject to many of the provisions of the Business Corporation Act, the filings associated with this type of business entity will be administered by the Secretary of State following the same administrative processes for filings of other business entities.

Attached to this testimony is an amendment to correct errors or omissions in the draft.

The Secretary of State recommends the adoption of House Bill 1237, as amended.

pg 1

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1237

Page 3, line 24, replace "10-37.04" with "10-37-04"

Page 8, line 22, insert "of" after "identification"

Page 9, line 27, remove the period and insert "-Authority to transact business." after "corporation"



**SECRETARY OF STATE**  
STATE OF NORTH DAKOTA  
600 EAST BOULEVARD AVENUE DEPT 108  
BISMARCK ND 58505-0500

**Minnesota's first public benefit corporations include Peace Coffee and Finnegans**

Jan 6, 2015, 2:43pm CST

Clare Kennedy Staff reporter- *Minneapolis / St. Paul Business Journal*

Peace Coffee and Finnegans Inc. brewing are among the Minnesota companies that became public benefit corporations in the past week.

The Minnesota Public Benefit Corporation Act was signed into law by Gov. Mark Dayton in April. The law took effect Jan. 1, establishing a new form of business incorporation aimed at for-profit and socially minded businesses.

The new corporate structure allows for more flexible use of profits generated by businesses with the designation, rather than limiting the business to paying dividends to shareholders.

However, the designation changes a company's operating structure very little, said Lee Wallace, CEO of fair trade coffee maker Peace Coffee. The benefits are mostly intangible, Wallace said, and come in the form of good public relations.

"This was an opportunity for us to stand up and point to the work we've been doing, and show people that we're able to run a business with eye to profitability and eye on to being a positive force in the community," Wallace said.

There is no tax advantage to becoming a public benefit corporation or investing in one.

Here's a complete list of the companies that were classified as public benefit corporations as of Jan. 2, courtesy of the Minnesota Secretary of State's Office:

- Advocacy Cycling Productions
- Apex Arena Solutions
- Apex Efficient Solutions
- Apex Facility Solutions
- Beyond Boardroom Doors
- Bir Mentor Network
- Can Can Wonderland
- Fair Anita (formerly True Trade Collective LLC)
- Finnegans
- LeapforPurpose
- MNPHARM
- My Sister
- Peace Coffee
- Software for Good
- Sunrise Banks
- Swim Possible
- thedatabank
- University Financial Corp
- WetheP
- Well Linker
- Zuri

Jan 20, 2015

2

TESTIMONY OF WILLIAM L. GUY III  
IN SUPPORT OF  
HOUSE BILL NO. 1237

Mr. Chairman and members of the Committee, I am here on my own behalf in support of the legislation before you as House Bill No. 1237. This legislation enacts a new chapter (Chapter 10-37) which will be entitled the "North Dakota Public Benefit Corporation Act."

- First, I believe some background information is in order:
  - A public benefit corporation is an entity which seeks not only shareholder value but to fulfill some stated social purpose. Examples of public benefit corporations include . . . Ben & Jerry's Ice Cream and Tom's Shoes.
  - At this time public benefit corporation statutes have been enacted in 24 states with legislation under consideration in 4 other states.
  - As is the case with all of the other business entity statutes in North Dakota, this legislation is modelled after its Minnesota counterpart which went into effect on January 1<sup>st</sup> of this year. The Minnesota statute was in turn modeled after those in Delaware and California.
  - Under our new statute, a company may incorporate as:
    - A **general benefit corporation**, which must have a "net material positive impact from business and operations of the corporation on society, the environment and the wellbeing of present and future generations" (*i.e.*, people, planet and profits);
    - A **specific benefit corporation** that elects to pursue a specific public benefit as spelled out in its articles of incorporation; or,
    - A **general benefit corporation** that **also elects** to pursue **a specific public benefit**.
  - Our statute allows a public benefit corporation to decide for itself which of the three alternative approaches it wishes to take in its structure and governance (*i.e.*, the more stringent statutory requirements of a general benefit corporation or the greater flexibility of a specific benefit corporation).
  - An existing entity may become a public benefit corporation either by conversion or merger. Conversely, a public benefit corporation may terminate that status and become a traditional business corporation. Both of these actions require two-thirds vote of the shareholders.
  - Our new statute will require the company to define:
    - The one or more social benefits that it intends to pursue;

- The factors that the board can or must consider in managing the business;
- The steps that the company must take to show that it has pursued its social benefit; and
- When the company can be called to account for failure to pursue its public benefit.
- With respect to governance:
  - A director may not give priority to the pecuniary interests of the shareholders in making decisions.
  - On the other hand, it is not a breach of a director's duty of loyalty to the corporation that the company failed to pursue a public benefit so long as this failure is not due to the director being an "interested person."
- Accountability and enforcement:
  - Shareholders can bring a derivative action on behalf of the corporation if the court finds a breach of director duty or a failure of the company to pursue the public benefit.
  - Three remedies are available:
    - first, the court may terminate the corporation's status as a public benefit corporation reverting it to that of a traditional business corporation;
    - second, the court may remove one or more of the directors and determine how they are to be replaced; and,
    - finally, the court can put the company into a receivership for the purpose of:
      - winding it up; or
      - forcing it to comply with the public benefit corporation statute.
- Accountability and reporting . . . the corporation needs to report its success in meeting its social objectives as part of its annual report.
- Our new statute is in line with the trend toward greater flexibility for entrepreneurs and social innovators.

- The highlights of this legislation include:
  - **10-37-01. Citation.** (p. 1) States that this chapter may be cited as the “North Dakota Public Benefit Corporation Act.”
  - **10-37-02. Definitions.** (pp. 1 and 2):
    - A *public benefit corporation* means a corporation formed under our Business Corporation Act (Chapter 10-19.1):
      - which has elected to become subject to chapter 10-37; and
      - whose status as a public benefit corporation has not been terminated or revoked.

*In this respect, Chapter 10-37 is an overlay chapter much like farm corporations, professional corporations and others which are formed under the Business Corporation Act and under the overlay chapter, but for a specific purpose.*

- A *general benefit corporation* is a public benefit corporation:
  - that elects in its articles to pursue a general public benefit; and,
  - that may (but need not) state in its articles a specific public benefit that it elects to pursue.
- A *general public benefit* is a net material positive impact from the operations of the corporation on society, the environment and the wellbeing of future generations.
- A *specific public benefit* is one or more positive impacts or negative impact reductions as set out in the articles of incorporation.
- A *specific benefit corporation* is a public benefit corporation that has stated in its articles one or more specific public benefits that it elects to pursue.
- Being *independent* means having no material relationship with the corporation or a parent, subsidiary or other affiliate of the corporation.
- A *minimum status vote* is the action by the affirmative vote of at least two-thirds of the voting power of the issued and outstanding shares.
- A *third-party standard* is a publicly available standard or guideline for defining and assessing the performance of a public benefit corporation.

- An *organization* is substantially similar in definition to its counterparts in our other business entity statutes.
- **10-37-03. Application and Effective Chapter.** (pp. 2 and 3) With respect to application and effect:
  - This chapter applies to all public benefit corporations.
  - Our Business Corporation Act (Chapter 10-19.1) also applies to public benefit corporations.
  - This Chapter, 10-37, prevails:
    - to the extent of any conflict between the two chapters; and
    - over any provision in the articles, shareholder agreement or bylaws of the public benefit corporation.
- **10-37-04. Incorporation of a Public Benefit Corporation.** (p. 3):
  - A public benefit corporation is incorporated in accordance with the requirements of Chapter 10-19.1 and must include in its articles a statement as to which of the three types of public benefit corporations it has chosen to be. *I.e.:*
    - a general benefit corporation;
    - a specific benefit corporation; or,
    - a general benefit corporation that also elects to pursue a specific public benefit.
  - The name of a public benefit corporation must comply with the requirements of Section 10-19.1-13 and must include either the words:
    - “general benefit corporation”; or
    - “specific benefit corporation.”
- **10-37-05. Election of Public Benefit Corporation Status.** (pp. 3 and 4) This section sets forth the procedures by which:
  - An existing business corporation may elect to become a public benefit corporation by amending its articles or how the surviving entity of a merger exchange or conversion may elect to be a public benefit corporation.

- 2. A shareholder in an existing entity who dissents from the entity converting to public benefit corporation status may obtain payment for the fair value of that shareholder's shares.
- **10-37-06. Termination of Public Benefit Corporation Status.** (p. 4) This section sets forth the procedure by which an existing public benefit corporation may terminate that status but still continue its status as a business corporation and is basically the reverse of the process by which the status can be elected by a business corporation.
- **10-37-07. Public Benefit Corporation Purposes.** (pp. 4 and 5):
  - A general benefit corporation has the purpose of pursuing a general public benefit as defined in this chapter and may also state one or more specific public benefits that it elects to pursue.
  - A specific benefit corporation will have the purpose of pursuing one or more specific public benefit purposes.
- **10-37-08. Standard of Conduct for Directors.** (pp. 5 and 6):
  - A director of a general benefit corporation:
    - must consider the effects of any conduct upon the ability of the corporation to pursue its general public benefit as well as any specific public benefit that it has elected to pursue and the interests of the various constituencies of the corporation including the pecuniary interests of the shareholders; but
    - may not give priority to the pecuniary interests of the shareholders or any other interest unless the articles identify that interest as having a priority.
  - A director of a specific benefit corporation is guided by similar rules only they are focused on the specific public benefit that the corporation has elected to pursue rather than a general public benefit.
- **10-37-09. Right of Action.** (pp. 6 and 7):
  - Only a shareholder can assert claims against a public benefit corporation and its management for their failure to pursue the public benefit that is its mission.
  - A public benefit corporations is not liable for monetary damages for failure to pursue or create a public benefit.
  - In addition, the court may grant relief when:

- the directors have breached their duties to a substantial extent and in a sustained manner; or
- the corporation has for an unreasonably long period of time failed to pursue its public benefit mission.
- The relief available to the court includes:
  - termination of its public benefit corporation status;
  - removal of directors and the appointment of successors; and
  - appointing a receiver to either:
    - wind up the activities of the corporation; or,
    - carry on its activities.
- **10-37-10. Annual Report.** (pp. 8 and 9) This section sets forth the criteria that are to be added to the annual report that the corporation files with the Secretary of State.
  - In addition to the items required of a business corporation under Chapter 10-19.1, a public benefit corporation needs to report on its success in pursuing its public benefit mission.
  - The public benefit aspects of the annual report need not be evaluated by any third party.
- **10-37-10. Foreign Public Benefit Corporation – Authority to Transact Business.** (p. 9) A foreign public benefit corporation may transact business in our state and is subject to all of the provisions of a foreign business corporation under Chapter 10-19.1.
- **10-37-11. Foreign Public Benefit Corporation – Name.** (p. 10) The same criteria applies to a foreign public benefit corporation with respect to its name as applies to a domestic public benefit corporation.

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TESTIMONY OF WILLIAM L. GUY III  
IN SUPPORT OF  
HOUSE BILL NO. 1237

Mr. Chairman and members of the Committee, I am here on my own behalf and on behalf of SBAND in support of House Bill No. 1237 which enacts a new chapter (Chapter 10-37) which will be entitled the "North Dakota Public Benefit Corporation Act."

- First, I believe some background information is in order:
  - A public benefit corporation is an entity which seeks not only shareholder value but to fulfill some stated social purpose. Examples of public benefit corporations include . . . Ben & Jerry's Ice Cream and Tom's Shoes.
  - At this time public benefit corporation statutes have been enacted in 24 states with legislation under consideration in 4 other states.
  - As is the case with all of the other business entity statutes in North Dakota, this legislation is modelled after its Minnesota counterpart which went into effect on January 1<sup>st</sup> of this year. The Minnesota statute was in turn modeled after those in Delaware and California.
  - Under our new statute, a company may incorporate as:
    - A *general benefit corporation*, which must have a "net material positive impact from business and operations of the corporation on society, the environment and the wellbeing of present and future generations" (*i.e.*, people, planet and profits);
    - A *specific benefit corporation* that elects to pursue a specific public benefit as spelled out in its articles of incorporation; or,
    - A *general benefit corporation* that *also elects* to pursue a *specific public benefit*.
  - Our statute allows a public benefit corporation to decide for itself which of the three alternative approaches it wishes to take in its structure and governance (*i.e.*, the more stringent statutory requirements of a general benefit corporation or the greater flexibility of a specific benefit corporation).
  - An existing entity may become a public benefit corporation either by conversion or merger. Conversely, a public benefit corporation may terminate that status and become a traditional business corporation. Both of these actions require two-thirds vote of the shareholders.
  - Our new statute will require the company to define:
    - The one or more social benefits that it intends to pursue;

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- The factors that the board can or must consider in managing the business;
- The steps that the company must take to show that it has pursued its social benefit; and
- When the company can be called to account for failure to pursue its public benefit.
- With respect to governance:
  - A director may not give priority to the pecuniary interests of the shareholders in making decisions.
  - On the other hand, it is not a breach of a director's duty of loyalty to the corporation that the company failed to pursue a public benefit so long as this failure is not due to the director being an "interested person."
- Accountability and enforcement:
  - Shareholders can bring a derivative action on behalf of the corporation if the court finds a breach of director duty or a failure of the company to pursue the public benefit.
  - Three remedies are available:
    - first, the court may terminate the corporation's status as a public benefit corporation reverting it to that of a traditional business corporation;
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    - finally, the court can put the company into a receivership for the purpose of:
      - winding it up; or
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- Our new statute is in line with the trend toward greater flexibility for entrepreneurs and social innovators.

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  - In addition, the court may grant relief when:

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- the directors have breached their duties to a substantial extent and in a sustained manner; or
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ALVIN A. JAEGER  
SECRETARY OF STATE

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600 EAST BOULEVARD AVENUE DEPT 108  
BISMARCK ND 58505-0500

March 18, 2015

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3/18/15  
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TO: Senator Hogue and Members of the Senate Judiciary Committee

FR: Al Jaeger, Secretary of State

RE: HB 1237 – Relating to Public Benefit Corporation

Representative Klemin introduced House Bill 1237 at the request of the Secretary of State.

Clara Jenkins, from my office, and William L. Guy, III, collaborated last year to draft House Bill 1237. It would create Chapter 10-37 of the North Dakota Century Code, the Public Benefit Corporation Act. Mr. Guy has worked with the Secretary of State's office on many business entity laws over the course of my tenure in office and is here this morning to offer testimony about the bill and explain the legal and practical aspects of a Public Benefit Corporation.

The public benefit corporation provides another business structure option for businesses. It is essentially a business corporation with a purpose to create a positive impact on society and the environment. The objectives of the corporation are to balance the interests of the stockholders with the best interests of those materially affected by the corporation's conduct and the specific public benefits identified by the corporation.

We know that at least 23 states have already adopted the Public Benefit Corporation legislation. Four other states are currently considering the legislation, i.e., Indiana, Kansas, Michigan, and Tennessee. Because of its wide spread adoption, my office anticipates that it will not be very long before a public benefit corporation created in another state applies to the Secretary of State for a certificate of authority to do business in North Dakota.

We cannot predict how many North Dakota businesses might organize under this new chapter of law. However, we can look at the states that have adopted the legislation and their experience. For example, Minnesota adopted the law in 2014, and it became effective on January 1, 2015. On January 2, 2015, twenty-one public benefit corporations were filed with the Secretary of State in that state. To date, Nevada has the most Public Benefit Corporations. Their law was effective on January 1, 2014 and they reported as having at least 652 on record in December 2014. Given the immediate surge of filings in Minnesota, it is anticipated that there would be interest in North Dakota as well, if the law is adopted. Or, at the very least, the new law would allow for the filing of "foreign" public benefit corporations that wish to conduct business in North Dakota.

The Public Benefit Corporation would be subject to many of the provisions of the Business Corporation Act. Therefore, the Public Benefit Corporation Act would be administered by the Secretary of State employing the same administrative processes used now for filing other business corporations.

We recommend that the committee pass House Bill 1237.