

SENATE BILL 972

By Dickerson

AN ACT to amend Tennessee Code Annotated, Title 48,
relative to for-profit benefit corporations.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 48, is amended by adding the following language as a new chapter:

48-28-101. This chapter shall be known and may be cited as the “For-Profit Benefit Corporation Act.”

48-28-102.

(a) This chapter shall be applicable to all for-profit benefit corporations.

(b) The existence of a provision of this chapter shall not of itself create an implication that a contrary or different rule of law is applicable to a business corporation that is not a for-profit benefit corporation. This chapter shall not affect a statute or rule of law that is applicable to a business corporation that is not a for-profit benefit corporation.

(c) Except as otherwise provided in this chapter, the Tennessee Business Corporation Act, compiled in chapters 11—27 of this title, shall be generally applicable to all for-profit benefit corporations. A for-profit benefit corporation may be subject simultaneously to this chapter and the Tennessee Professional Corporation Act, compiled in chapter 101, part 6 of this title. This chapter shall control over the Tennessee Business Corporation Act and the Tennessee Professional Corporation Act.

(d) A provision of the articles of incorporation or bylaws of a for-profit benefit corporation may not limit, be inconsistent with, or supersede a provision of this chapter.

48-28-103. As used in this chapter:

(1) “Benefit director” means the director designated as the benefit director of a for-profit benefit corporation under § 48-28-302;

(2) “Benefit enforcement proceeding” means any claim, action, or proceeding for:

(A) Failure of a for-profit benefit corporation to pursue or create general public benefit or a specific public benefit purpose set forth in its articles of incorporation; or

(B) Violation of any obligation, duty, or standard of conduct under this chapter;

(3) “Benefit officer” means the individual designated as the benefit officer of a for-profit benefit corporation under § 48-28-304;

(4) “For-profit benefit corporation” means a business corporation:

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

(B) The status of which as a for-profit benefit corporation has not been terminated;

(5) “General public benefit” means a material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a for-profit benefit corporation;

(6) “Independent” means having no material relationship with a for-profit benefit corporation or a subsidiary of the for-profit benefit corporation. Serving as benefit director or benefit officer does not make an individual not independent. A material relationship between an individual and a for-profit benefit corporation or any of its subsidiaries shall be conclusively presumed to exist if any of the following apply:

(A) The individual is, or has been within the last three (3) years, an employee other than a benefit officer of the for-profit benefit corporation or a subsidiary of the for-profit benefit corporation;

(B) An immediate family member of the individual is, or has been within the last three (3) years, an executive officer other than a benefit officer of the for-profit benefit corporation or a subsidiary of the for-profit benefit corporation; or

(C) There is beneficial or record ownership of five percent (5%) or more of the outstanding shares of the for-profit benefit corporation, calculated as if all outstanding rights to acquire equity interests in the for-profit benefit corporation had been exercised, by:

(i) The individual; or

(ii) An entity:

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

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

(7) “Minimum status vote” means:

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

(i) The shareholders of every class or series being entitled to vote as a separate voting group on the corporate action regardless of a limitation stated in the articles of incorporation or bylaws on the voting rights of any class or series; and

(ii) The corporate action being approved by the affirmative vote of the shareholders of each class or series entitled to cast at least two-thirds

(2/3) of the votes that all shareholders of the class or series are entitled to cast on the action; and

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

(i) The holders of every class or series of equity interest in the entity that are entitled to receive a distribution of any kind from the entity being 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; and

(ii) The action being approved by the affirmative vote or consent of the holders described in subdivision (7)(B)(i) entitled to cast at least two-thirds (2/3) of the votes or consents that all of those holders are entitled to cast on the action;

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

(9) “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;

(10) “Subsidiary” means in relation to a person, an entity in which the person owns beneficially or of record fifty percent (50%) or more of the outstanding equity interests, calculated as if all outstanding rights to acquire equity interests in the entity had been exercised; and

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

(A) Comprehensive because the standard assesses the effects of the business and its operations upon the interests listed in § 48-28-301(a)(1)(B), (C), (D), and (E);

(B) Developed by an entity that is not controlled by the for-profit benefit corporation;

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

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

(ii) Uses a balanced, multi-stakeholder approach to develop the standard, including a reasonable public comment period; and

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

(i) About the standard:

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

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

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

(a) The identity of the directors, officers, material owners, and 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; and

(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.

48-28-104. A for-profit benefit corporation shall be incorporated in accordance with the Tennessee Business Corporation Act, compiled in chapters 11—27 of this title, but the for-profit benefit corporation's articles of incorporation shall also state that it is a for-profit benefit corporation.

48-28-105.

(a) An existing business corporation may become a for-profit benefit corporation under this chapter by amending its articles of incorporation so that the articles of incorporation contain, in addition to the requirements of § 48-12-102, a statement that the corporation is a for-profit benefit corporation. In order to be effective, the amendment shall be adopted by at least the minimum status vote.

(b)

(1) Except as provided in subdivision (b)(2), if a domestic entity that is not a for-profit 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 for-profit benefit

corporation, the plan of merger, conversion, or share exchange shall be approved by the domestic entity by at least the minimum status vote.

(2) Subdivision (b)(1) does 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 § 48-21-105.

48-28-106.

(a) A for-profit benefit corporation may terminate its for-profit benefit corporation status and cease to be subject to this chapter by amending its articles of incorporation to delete the provision required by § 48-28-104 or § 48-28-105 to be stated in the articles of incorporation of a for-profit benefit corporation. In order to be effective, the amendment shall be adopted by at least the minimum status vote.

(b)

(1) Except as provided in subdivision (b)(2), if a plan of merger, conversion, or share exchange would have the effect of terminating the status of a business corporation as a for-profit benefit corporation, the plan shall be adopted by at least the minimum status vote in order to be effective.

(2) Subdivision (b)(1) does 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 § 48-21-105.

(3) Any sale, lease, exchange, or other disposition of all or substantially all of the assets of a for-profit 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.

48-28-201.

(a) A for-profit benefit corporation shall have a purpose of creating general public benefit. This purpose is in addition to its purpose under § 48-13-101.

(b) The articles of incorporation of a for-profit benefit corporation may identify one (1) or more specific public benefits that it is the purpose of the for-profit benefit corporation to create in addition to its purposes under § 48-13-101 and subsection (a). The identification of a specific public benefit under this subsection (b) does not limit the purpose of a for-profit benefit corporation to create general public benefit under subsection (a).

(c) The creation of general public benefit and any specific public benefits under subsections (a) and (b) are in the best interests of the for-profit benefit corporation.

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

(e) A professional corporation that is a for-profit benefit corporation does not violate § 48-101-608 by having the purpose to create general public benefit or any specific public benefit.

48-28-301.

(a) In discharging the duties of their respective positions and in considering the best interests of the for-profit benefit corporation, the board of directors, committees of the board, and individual directors of a for-profit benefit corporation:

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

(A) The shareholders of the for-profit benefit corporation;

(B) The employees and work force of the for-profit benefit corporation, its subsidiaries, and its suppliers;

(C) The interests of customers as beneficiaries of the general public benefit or specific public benefit purposes of the for-profit benefit corporation;

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

(E) The local and global environment;

(F) The short-term and long-term interests of the for-profit benefit corporation, including benefits that may accrue to the for-profit benefit corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the for-profit benefit corporation; and

(G) The ability of the for-profit benefit corporation to accomplish its general public benefit purpose and any specific public benefit purpose;

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

(3) Need not give priority to a particular interest or factor referred to in subdivision (a)(1) or (a)(2) over any other interest or factor unless the for-profit benefit corporation has stated in its articles of incorporation its intention to give priority to certain interests or factors related to the accomplishment of its general public benefit purpose or of any specific public benefit purpose identified in its articles of incorporation.

(b) The consideration of interests and factors in the manner provided by subsection (a) does not constitute a violation of § 48-18-301.

(c) Except as provided in the articles of incorporation, a director is not personally liable for monetary damages for:

(1) Any action or inaction in the course of performing the duties of a director under subsection (a), if the director performed the duties of office in compliance with § 48-18-301 and this section; or

(2) Failure of the for-profit benefit corporation to pursue or create general public benefit or any specific public benefit.

(d) A director does not have a duty to a person that is a beneficiary of the general public benefit purpose or any specific public benefit purpose of a for-profit benefit corporation arising from the status of the person as a beneficiary.

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

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

(2) 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

(3) Rationally believes that the business judgment is in the best interests of the for-profit benefit corporation.

48-28-302.

(a) The board of directors of a for-profit benefit corporation that is a publicly traded corporation shall, and the board of any other for-profit benefit corporation may, include a director, who:

(1) Shall be designated the benefit director; and

(2) Shall have, in addition to the powers, duties, rights, and immunities of the other directors of the for-profit benefit corporation, the powers, duties, rights, and immunities provided in this chapter.

(b) The benefit director shall be elected, and may be removed, in the manner provided by chapter 18, part 1 of this title. Except as provided in subsection (f), 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 for-profit benefit corporation may prescribe additional qualifications of the benefit director not inconsistent with this subsection (b).

(c) The benefit director shall prepare, and the for-profit benefit corporation shall include in the annual benefit report to shareholders required by § 48-28-401, the opinion of the benefit director on the following:

(1) Whether the for-profit 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;

(2) Whether the directors and officers complied with §§ 48-28-301(a) and 48-28-303(a), respectively; and

(3) If, in the opinion of the benefit director, the for-profit benefit corporation, its directors, or its officers failed to act or comply in the manner described in subdivisions (c)(1) and (2), a description of the ways in which the for-profit benefit corporation, its directors, or its officers failed to act or comply.

(d) The action or inaction of an individual in the capacity of a benefit director shall constitute for all purposes an action or inaction of that individual in the capacity of a director of the for-profit benefit corporation.

(e) Regardless of whether the articles of incorporation or bylaws of a for-profit benefit corporation include a provision eliminating or limiting the personal liability of directors authorized by § 48-12-102(b)(3), 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.

(f) The benefit director of a professional corporation, as defined in § 48-101-603, does not need to be independent.

48-28-303.

(a) Each officer of a for-profit benefit corporation shall consider the interests and factors described in § 48-28-301(a)(1) in the manner provided in § 48-28-301(a)(3), if:

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

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

(b) The consideration of interests and factors in the manner provided in subsection (a) shall not constitute a violation of § 48-18-403.

(c) Except as provided in the articles of incorporation, an officer is not personally liable for monetary damages for:

(1) An action or inaction as an officer in the course of performing the duties of an officer under subsection (a), if the officer performed the duties of the position in compliance with § 48-18-403 and this section; or

(2) Failure of the for-profit benefit corporation to pursue or create general public benefit or any specific public benefit.

(d) An officer does not have a duty to a person that is a beneficiary of the general public benefit purpose or any specific public benefit purpose of a for-profit benefit corporation arising from the status of the person as a beneficiary.

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

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

(2) 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

(3) Rationally believes that the business judgment is in the best interests of the for-profit benefit corporation.

48-28-304.

(a) A for-profit benefit corporation may have an officer designated the benefit officer.

(b) A benefit officer shall have:

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

(i) By the bylaws; or

(ii) Absent controlling provisions in the bylaws, by resolution or order of the board of directors.

(2) The duty to prepare the annual benefit report required by § 48-28-401.

48-28-305.

(a) Except in a benefit enforcement proceeding, no person may bring an action or assert a claim against a for-profit benefit corporation, its directors, or its officers with respect to:

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

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

(b) A for-profit benefit corporation shall not be liable for monetary damages under this chapter for any failure of the for-profit benefit corporation to pursue or create general public benefit or any specific public benefit.

(c) A benefit enforcement proceeding may be commenced or maintained only:

(1) Directly by the for-profit benefit corporation; or

(2) Derivatively by:

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

(ii) A director;

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

(iv) Other persons as specified in the articles of incorporation or bylaws of the for-profit benefit corporation.

(d) 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.

48-28-401.

(a) A for-profit benefit corporation shall prepare an annual benefit report including the following:

(1) A narrative description of:

(A) The ways in which the for-profit benefit corporation pursued general public benefit during the year and the extent to which general public benefit was created;

(B)

(i) The ways in which the for-profit benefit corporation pursued a specific public benefit that the articles of incorporation state it is the purpose of the for-profit benefit corporation to create; and

(ii) The extent to which that specific public benefit was created;

(C) Any circumstances that have hindered the creation by the for-profit benefit corporation of general public benefit or any specific public benefit; and

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

(2) An assessment of the overall social and environmental performance of the for-profit benefit corporation against a third-party standard:

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

(B) Accompanied by an explanation of the reasons for:

(i) Any inconsistent application; or

(ii) The change to that standard from the standard used in the immediately prior annual benefit report;

(3) The name of the benefit director and the benefit officer, if any, and the address to which correspondence to each may be directed;

(4) The compensation paid by the for-profit benefit corporation during the year to each director in the capacity of a director;

(5) The opinion of the benefit director described in § 48-28-302(c); and

(6) A statement of any connection between the organization that established the third-party standard, or its directors, its officers, or any holder of five percent (5%) or more of the governance interests in the organization, and the for-profit benefit corporation or its directors, its officers, or any holder of five percent (5%) or more of the outstanding shares of the for-profit benefit corporation, including any financial or governance relationship that might materially affect the credibility of the use of the third-party standard.

(b) If, during the year covered by a benefit report, a benefit director resigned from or refused to stand for reelection to the position of benefit director, or was removed from the position of benefit director, and the benefit director furnished the for-profit benefit corporation with any written correspondence concerning the circumstances surrounding the resignation, refusal, or removal, the annual benefit report shall include that correspondence as an exhibit.

(c) Neither the benefit report nor the assessment of the performance of the for-profit benefit corporation in the benefit report required by subdivision (a)(2) needs to be audited or certified by a third party.

48-28-402.

(a) A for-profit benefit corporation shall send its annual benefit report to each shareholder on the earlier of:

(1) One hundred twenty (120) days following the end of the fiscal year of the for-profit benefit corporation; or

(2) The same time that the for-profit benefit corporation delivers any other annual report to its shareholders.

(b) A for-profit benefit corporation shall post all of its annual benefit reports on the public portion of its web site, if any, but the compensation paid to directors and financial or proprietary information included in the annual benefit reports may be omitted from the annual benefit reports as posted.

(c) If a for-profit benefit corporation does not have a web site, the for-profit benefit corporation shall provide a copy of its most recent annual 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 annual benefit report may be omitted from the copy of the annual benefit report provided.

(d) Concurrently with the delivery of the annual benefit report to shareholders under subsection (a), the for-profit benefit corporation shall deliver a copy of the annual benefit report to the secretary of state for filing, but the compensation paid to directors and financial or proprietary information included in the annual benefit report may be omitted from the annual benefit report delivered to the secretary of state. The secretary of state may charge a fee for filing an annual benefit report.

SECTION 2. This act shall take effect upon becoming a law, the public welfare requiring it.