

Stricken language would be deleted from and underlined language would be added to present law.
Act 1388 of the Regular Session

State of Arkansas *As Engrossed: H3/11/13 H3/18/13 S4/5/13*
89th General Assembly
Regular Session, 2013

A Bill

HOUSE BILL 1510

By: Representatives D. Whitaker, Ferguson, *Copenhaver, Jett, Leding, Magie, Richey, Sabin, Wardlaw, Williams*

By: Senator D. Johnson

For An Act To Be Entitled

AN ACT TO ESTABLISH THE ARKANSAS BENEFIT CORPORATION
ACT; AND FOR OTHER PURPOSES.

Subtitle

TO ESTABLISH THE ARKANSAS BENEFIT
CORPORATION ACT.

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

SECTION 1. Arkansas Code Title 4, is amended to add an additional chapter to read as follows:

CHAPTER 36

ARKANSAS BENEFIT CORPORATION ACT

Subchapter 1 – Preliminary Provisions

4-36-101. Title.

This chapter shall be known and may be cited as the "Arkansas Benefit Corporation Act".

4-36-102. Application of chapter.

(a) This chapter shall apply to all benefit corporations.

(b) This chapter does not imply that a contrary statute or rule of law applies to a business corporation that is not a benefit corporation.

(c)(1) Except as otherwise provided in this chapter, the Arkansas



Business Corporation Act, § 4-27-101 et seq., is generally applicable to a benefit corporation.

(2) Specific provisions of this chapter shall control over the general provisions of the Arkansas Business Corporation Act, § 4-27-101 et seq.

(3) A benefit corporation may be simultaneously subject to this chapter and other statutes that provide for the incorporation of a specific type of business corporation.

(d) The articles of incorporation or bylaws of a benefit corporation shall not limit, relax, be inconsistent with, or supersede this chapter.

4-36-103. Definitions.

(a) As used in this chapter:

(1) "Benefit corporation" means a business corporation that is subject to this chapter;

(2) "Benefit director" means the director designated as the benefit director of a benefit corporation under § 4-36-302;

(3) "Benefit enforcement proceeding" means a claim or action for:

(A) Failure of a benefit corporation to pursue or create a general public benefit or a specific public benefit purpose as stated in its articles of incorporation; or

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

(4) "Benefit officer" means the individual designated as the benefit officer of a benefit corporation under § 4-36-304;

(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 benefit corporation;

(6)(A) "Independent" means having no material relationship with a benefit corporation or a subsidiary of the benefit corporation.

(B) A person shall be independent even if serving as benefit director or benefit officer.

(C) A material relationship between a person and a benefit corporation or its subsidiaries is conclusively presumed to exist if:

(i) The person is, or has been in the last three (3)

years, an employee other than a benefit officer of the benefit corporation or a subsidiary of the benefit corporation;

(ii) An immediate family member of the person is, or has been in the last three (3) years, an executive officer other than a benefit officer of the benefit corporation or its subsidiary; or

(iii) There is beneficial or record ownership of five percent (5%) or more of the outstanding shares of the benefit corporation by the person or an association:

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

(b) In which the person owns beneficially or of record five percent (5%) or more of the outstanding equity interests;

(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 a class or series may vote as a class on the corporate action regardless of a limitation stated in the articles of incorporation or bylaws on the voting rights of the class or series; and

(ii) The corporate action shall be approved by 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.

(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 a class or series of equity interest in the entity that are entitled to receive a distribution from the entity may vote on or consent to the action regardless of an otherwise applicable limitation on the voting or consent rights of the class or series; and

(ii) The action shall be approved by vote or consent of the holders described in subdivision (7)(B)(i) of this section 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) "Specific public benefit" means:

(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) Preserving 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 public benefit purpose; and

(G) *Conferring any other particular benefit on society or the environment;*

(9) "Subsidiary" means in relation to a person, an association in which the person owns beneficially or of record fifty percent (50%) or more of the outstanding equity interests; and

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

(A) Comprehensive in that it assesses the effect of the business and its operations on the interests listed in § 4-36-301(a)(1)(B) – (E);

(B) Developed by an organization that is independent of the benefit corporation and satisfies the following:

(i) Not more than one-third (1/3) of the members of the governing body of the organization are representatives of:

(a) An association of businesses operating in a specific industry, the performance of whose members is measured by the standard;

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

(c) A business whose performance is assessed against the standard; and

(ii) The organization is not materially financed by an association or business described in subdivision (10)(B)(i) of this section;

(C) Credible because the standard is developed by a person that both:

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

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

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

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

(ii) The relative weighting factor of those criteria;

(iii) The development and revision of the *standard*, including:

(a) The identity of the directors, officers, material owners, and the governing body of the organization that developed and controls revisions to the standard; and

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

(iv) An accounting of the sources of financial support for the organization, with sufficient detail to disclose a relationship that could reasonably be considered to present a potential conflict of interest.

(b) For purposes of the definitions of “independent” and “subsidiary” in subsection (a) of this section, a percentage of ownership in an entity is computed as if all outstanding rights to acquire equity interests in the association had been exercised.

4-36-104. Formation – Fees.

(a) A benefit corporation shall be formed under the Arkansas Business Corporation Act, § 4-27-101 et seq., and its articles of incorporation shall state that it is a benefit corporation.

(b) The Secretary of State shall collect filing fees, service fees, and fees for copying when documents are delivered to him or her to be filed under this subchapter and under § 4-27-122.

4-36-105. Election of status.

(a) 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 § 4-27-202, a statement that the corporation is a benefit corporation.

(b) To be effective, an amendment shall be adopted by at least the minimum status vote.

(c) If an entity is not a benefit corporation but is a constituent corporation or organization in a merger or conversion with a benefit corporation, the merger or conversion shall be approved by at least the minimum status vote.

4-36-106. Termination of status.

(a) A benefit corporation may end its benefit corporation status and not be subject to this chapter by amending its articles of incorporation to delete the statement in the articles of incorporation required by § 4-36-104 or § 4-36-105 to be stated in the articles of incorporation of a benefit corporation.

(b) To be effective, the amendment shall be adopted by at least the minimum status vote.

(c) If a merger or conversion would have the effect of terminating the status of a business corporation as a benefit corporation, to be effective, the merger or conversion shall be approved by at least the minimum status vote.

(d) A sale, lease, exchange, or other disposition of all or a substantial part 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.

Subchapter 2 – Corporate Purposes4-36-201. Corporate purposes.

(a) A benefit corporation shall have a purpose of creating a general public benefit and it is in addition to its purpose under § 4-36-103(a)(5).

(b)(1) The articles of incorporation of a benefit corporation may identify one (1) or more specific public benefits that it is the purpose of

the benefit corporation to pursue in addition to its purposes under § 4-36-103(a)(5) and subsection (a) of this section.

(2) The identification of a specific public benefit under this subsection does not limit the obligation of a benefit corporation under subsection (a) of this section.

(c) The creation of a general public benefit and a specific public benefit under subsections (a) and (b) of this section is in the best interests of the benefit corporation.

(d)(1) 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 pursue.

(2) To be effective, the amendment shall be adopted by at least the minimum status vote.

(e) A professional corporation that is a benefit corporation does not violate the Arkansas Professional Corporation Act, § 4-29-201 et seq., by having the purpose to pursue a general public benefit or a specific public benefit.

Subchapter 3 – Accountability

4-36-301. Standard of conduct for directors.

(a) 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:

(1) Shall consider the effects of an action or inaction on:

(A) The shareholders of the benefit corporation;

(B) The employees and work force of the 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 benefit corporation;

(D) 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;

(E) The local and global environment;

(F) The short-term and long-term interests of the benefit

corporation, including 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

(G) The ability of the benefit corporation to accomplish its general public benefit purpose and a specific public benefit purpose;

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

(3) Need not give priority to the interests of a particular person or group referred to in subsection (a)(1) or (a)(2) of this section over the interests of *another person* or group unless the benefit corporation has stated in its articles of incorporation its intention to give priority to certain interests related to its accomplishment of its general public benefit purpose or of a specific public benefit purpose identified in its articles of incorporation.

(b) The consideration of interests and factors required by subsection (a) of this section does not constitute a violation of § 4-27-801.

(c) A director is not personally liable for monetary damages for:

(1) Action taken as a director if the director performed the duties of office in compliance with § 4-27-801; or

(2) Failure of the benefit corporation to pursue a general public benefit or a specific public benefit.

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

4-36-302. Benefit director.

(a) The board of directors of a benefit corporation *may* include a director who:

(1) Is designated the benefit director; and

(2) Has the powers, duties, rights, and immunities provided in this subchapter in addition to the powers, duties, rights, and immunities of the other directors of the benefit corporation.

(b)(1) The benefit director is elected and may be removed under § 4-27-803.

(2) The benefit director shall be an independent individual.

(c) The benefit director may serve concurrently as the benefit officer

and the benefit director.

(d) The articles of incorporation or bylaws of a benefit corporation may prescribe additional qualifications of the benefit director not inconsistent with this section.

(e) The benefit director shall prepare and the benefit corporation shall include in the annual benefit report to shareholders as required by § 4-36-401 the opinion of the benefit director on:

(1) Whether the benefit corporation acted under its general public benefit purpose and a specific public benefit purpose in all material respects during the period covered by the report;

(2) Whether the directors complied with § 4-36-301(a) and the officers complied with § 4-36-303(a); and

(3) Whether the benefit corporation or its directors or officers failed to comply with this section, including a description of the ways in which the benefit corporation or its directors or officers failed to comply.

(f) The action or inaction of an individual in the capacity of a benefit director is an action or inaction of that individual in the capacity of a director of the benefit corporation.

(g) Regardless of whether the bylaws of a benefit corporation include a provision eliminating or limiting the personal liability of directors authorized by § 4-26-811, 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.

(h) The benefit director of a professional corporation does not need to be independent.

4-36-303. Standard of conduct for officers.

(a) An officer of a benefit corporation shall consider the interests and factors described in § 4-36-301 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 benefit corporation of a general public benefit or a specific public benefit identified in the articles of incorporation of the benefit corporation.

(b) The consideration of interests and factors described in subsection (a) of this section shall not constitute a violation of § 4-27-841.

(c) An officer is not personally liable for monetary damages for:

(1) An action or omission as an officer if the officer performed the duties of the position in compliance with § 4-27-841 and this section; or

(2) Failure of the benefit corporation to pursue a general public benefit or a specific public benefit.

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

4-36-304. Benefit officer.

(a) A benefit corporation may have an officer designated as the benefit officer.

(b) A benefit officer shall have:

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

(A) By the bylaws; or

(B) Absent controlling provisions in the bylaws, by resolutions or orders of the board of directors; and

(2) The duty to prepare the benefit report required by § 4-36-401.

4-36-305. Right of action.

(a) Except in a benefit enforcement proceeding, a person may not bring an action or assert a claim against a benefit corporation or its directors or officers with respect to:

(1) Failure to *pursue or create* a general public benefit or a specific public benefit stated in its articles of incorporation; or

(2) Violation of a duty or standard of conduct under this chapter.

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

(c) A benefit enforcement proceeding may begin and be maintained only:

- (1) Directly by the benefit corporation; or
- (2) Derivatively by:
 - (A) A shareholder;
 - (B) A director;
 - (C) A person or group of persons that owns beneficially or of record five percent (5%) or more of the equity interest in an entity of which the benefit corporation is a subsidiary at the time of the action or inaction complained of; or
 - (D) Other persons as named in the articles of incorporation or bylaws of the benefit corporation.

Subchapter 4 – Transparency

4-36-401. Annual reports.

(a)(1) A benefit corporation shall prepare an annual benefit report and an annual franchise tax report under § 26-54-104.

(2) An annual benefit report shall include:

(A) A narrative description of:

(i) The ways in which the benefit corporation pursued the general public benefit during the year and the extent to which the general public benefit was pursued;

(ii) Both:

(a) The ways in which the benefit corporation pursued a specific public benefit that the articles of incorporation state is the purpose of the benefit corporation to pursue; and

(b) The extent to which that specific public benefit was pursued;

(iii) Circumstances that have hindered the creation by the benefit corporation of a general public benefit or a specific public benefit; and

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

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

(a) Applied consistently with an application of that standard in earlier benefit reports; or

(b) Accompanied by an explanation of the reasons for

an inconsistent application.

(ii) The assessment does not need to be performed, audited, or certified by a third-party standards provider;

(C) The name of the benefit director and the benefit officer and the address to which correspondence to each of them may be directed;

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

(E) The statement of the benefit director described in § 4-36-302; and

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

(b) A benefit corporation shall send a benefit report to each shareholder annually:

(1) Before the stated due date of an annual franchise tax under § 26-54-104; or

(2) When the benefit corporation delivers an annual financial report to its shareholders.

(c)(1) A benefit corporation shall post all of its benefit reports on the public part of its Internet website.

(2) The compensation paid to a director and a financial or proprietary informationist included in the benefit reports may be omitted from the benefit reports as posted.

(d)(1) If a benefit corporation does not have a website, the benefit corporation shall provide a copy of its most recent benefit report, without charge, to a person who requests a copy.

(2) The compensation paid to directors and the financial or proprietary informationist included in the benefit report may be omitted from the copy of the benefit report provided.

(e)(1) Concurrently with the delivery of the benefit report to shareholders under subsection (b) of this section, the benefit corporation shall deliver a copy of the benefit report to the Secretary of State for

filing.

(2) The compensation paid to directors and the financial or proprietary informationist included in the benefit report may be omitted from the benefit report as delivered to the Secretary of State.

(3) The Secretary of State shall charge a fee of seventy dollars (\$70.00) for filing a benefit report.

/s/D. Whitaker

APPROVED: 04/19/2013