

1 SB569
2 141571-1
3 By Senator Ward
4 RFD: Judiciary
5 First Read: 26-APR-12

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8 SYNOPSIS: Under existing law, the Alabama Business
9 Corporation Law authorizes and regulates the
10 formation and governance of general corporations.
11 The Alabama Nonprofit Corporation Law authorizes
12 the formation and governs the nonprofit
13 corporation.

14 This bill would authorize and regulate the
15 formation of a benefit corporation.

16 This bill would define terms.

17 This bill would permit an existing
18 corporation to become a benefit corporation.

19 This bill would provide standards of conduct
20 for directors and officers.

21
22 A BILL

23 TO BE ENTITLED

24 AN ACT
25

1 Relating to corporations; to authorize and regulate
2 the formation of a benefit corporation; to define terms; to
3 permit an existing corporation to become a benefit
4 corporation; and to provide standards of conduct for directors
5 and officers.

6 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

7 Section 1. (a) The provisions of this act shall be
8 applicable to all benefit corporations.

9 (b) The existence of a provision of this act shall
10 not of itself create any implication that a contrary or
11 different rule of law is or would be applicable to a business
12 corporation that is not a benefit corporation. This act shall
13 not affect any statute or rule of law that is or would be
14 applicable to a business corporation that is not a benefit
15 corporation.

16 (c) The provisions of the Alabama Business
17 Corporation Law shall apply to benefit corporations, except
18 where these provisions are in conflict with or inconsistent
19 with the provisions of this act. Except as otherwise provided
20 in this act, this section shall be generally applicable to all
21 benefit corporations. The specific provisions of this act
22 shall control over the general provisions of this section. A
23 benefit corporation may be simultaneously subject to this act
24 and one or more other acts of the Code of Alabama.

25 Section 2. (a) The following terms shall have the
26 following meanings:

1 (1) BENEFIT CORPORATION. A business corporation that
2 has elected to become subject to this act and whose status as
3 a benefit corporation has not been terminated as provided in
4 this act.

5 (2) BENEFIT DIRECTOR. The director designated as the
6 benefit director of a benefit corporation as provided in this
7 act.

8 (3) BENEFIT ENFORCEMENT PROCEEDING. A claim or
9 action brought directly by a benefit corporation, or
10 derivatively on behalf of a benefit corporation, against a
11 director or officer for:

12 a. Failure to pursue the general public benefit
13 purpose of the benefit corporation or any specific public
14 benefit purpose set forth in its articles.

15 b. Violation of a duty or standard of conduct under
16 this act.

17 (4) BENEFIT OFFICER. The officer of a benefit
18 corporation.

19 (5) GENERAL PUBLIC BENEFIT. A material positive
20 impact on society and the environment by the operations of a
21 benefit corporation taken as a whole, as measured by a
22 third-party standard, through activities that promote some
23 combination of specific public benefits.

24 (6) INDEPENDENT. A person has no relationship with a
25 benefit corporation or any of its subsidiaries, other than the
26 relationship of serving as the benefit director or benefit

1 officer, either directly or as a shareholder, partner, member,
2 or other owner or a director, officer, or other manager of an
3 association that has a material relationship with the benefit
4 corporation or any of its subsidiaries. A material
5 relationship between an individual and a benefit corporation
6 or any of its subsidiaries will be conclusively presumed to
7 exist if:

8 a. The person is, or has been within the last three
9 years, an employee of the benefit corporation or any of its
10 subsidiaries, other than as a benefit officer.

11 b. An immediate family member of the person is, or
12 has been within the last three years, an executive officer,
13 other than a benefit officer, of the benefit corporation or
14 any of its subsidiaries.

15 c. The person, or an association of which the person
16 is a director, officer, or other manager or in which the
17 person owns beneficially or of record five percent or more of
18 the outstanding equity interests, owns beneficially or of
19 record five percent or more of the outstanding shares of the
20 benefit corporation.

21 (7) MINIMUM STATUS VOTE. In addition to any other
22 approval or vote required by this act or a bylaw adopted by
23 the shareholders:

24 a. The holders of shares of every class or series
25 shall be entitled to vote in the corporate action regardless

1 of any limitation stated in the articles of incorporation or
2 bylaws on the voting rights of any class or series.

3 b. The corporate action must be approved by vote of
4 the shareholders of each class or series entitled to cast at
5 least two-thirds of the votes that all shareholders of the
6 class or series are entitled to cast thereon.

7 (8) SPECIFIC PUBLIC BENEFIT includes:

8 a. Providing low-income or underserved individuals
9 or communities with beneficial products or services.

10 b. Promoting economic opportunity for individuals or
11 communities beyond the creation of jobs in the normal course
12 of business.

13 c. Preserving the environment.

14 d. Improving human health.

15 e. Promoting the arts, sciences, faith, or
16 advancement of knowledge.

17 f. Increasing the flow of capital to entities with a
18 public benefit purpose.

19 g. The accomplishment of any other particular
20 benefit for society or the environment.

21 (9) SUBSIDIARY. An association in which the person
22 owns beneficially or of record 50 percent or more of the
23 outstanding equity interests.

24 (10) THIRD-PARTY STANDARD. A recognized standard for
25 defining, reporting, and assessing corporate social and
26 environmental performance that is:

1 a. Developed by a person that is independent of the
2 benefit corporation.

3 b. Transparent because the following information
4 about the standard is publicly available:

5 1. The factors considered when measuring the
6 performance of a business.

7 2. The relative weightings of those factors.

8 3. The identity of the persons who developed and
9 control changes to the standard and the process by which those
10 changes are made.

11 (b) For purposes of the definitions of "independent"
12 and "subsidiary" in this section, a percentage of ownership in
13 an association shall be calculated as if all outstanding
14 rights to acquire equity interests in the association had been
15 exercised.

16 Section 3. (a) A business corporation may become a
17 benefit corporation under this act by amending its certificate
18 of formation so that it contains a statement that the
19 corporation is a benefit corporation. The amendment shall not
20 be effective unless it is adopted by at least the minimum
21 status vote.

22 (b) If a corporation that is not a benefit
23 corporation is a party to a merger, consolidation, or division
24 or is the exchanging corporation in a share exchange, and the
25 surviving, new, or any resulting corporation in the merger,
26 consolidation, division, or share exchange is to be a benefit

1 corporation, then the plan of merger, consolidation, division,
2 or share exchange shall not be effective unless it is adopted
3 by the corporation by at least the minimum status vote.

4 Section 4. (a) A benefit corporation may terminate
5 its status as such and cease to be subject to this act by
6 amending its articles to delete the provision required by
7 Section 2 to be stated in the articles of a benefit
8 corporation. The amendment shall not be effective unless it is
9 adopted by at least the minimum status vote.

10 (b) If a plan would have the effect of terminating
11 the status of a business corporation as a benefit corporation,
12 the plan shall be effective unless it is adopted by at least
13 the minimum status vote.

14 Section 5. (a) Every benefit corporation shall have
15 the purpose of creating general public benefit. This purpose
16 is in addition to, and may be a limitation on, its purpose
17 under Section 10A-2-3.01, Code of Alabama 1975.

18 (b) The articles of a benefit corporation may
19 identify one or more specific public benefits that it is the
20 purpose of the benefit corporation to create in addition to
21 its purposes under Section 10A-2-3.01, Code of Alabama 1975.

22 (c) The identification of a specific public benefit
23 under this section does not limit the obligation of a benefit
24 corporation to create general public benefit. The creation of
25 general and specific public benefit as provided in this
26 section is in the best interests of the benefit corporation.

1 (d) A benefit corporation may amend its articles to
2 add, amend, or delete the identification of a specific public
3 benefit that it is the purpose of the benefit corporation to
4 create. The amendment shall not be effective unless it is
5 adopted by at least the minimum status vote.

6 Section 6. (a) In discharging the duties of their
7 respective positions, the board of directors, committees of
8 the board, and individual directors of a benefit corporation,
9 in considering the best interest of the benefit corporation,

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

11 a. The shareholders of the benefit corporation;

12 b. The employees and workforce of the benefit
13 corporation and its subsidiaries and suppliers;

14 c. The interests of customers as beneficiaries of
15 the general or specific public benefit purposes of the benefit
16 corporation;

17 d. Community and societal considerations, including
18 those of any community in which offices or facilities of the
19 benefit corporation or its subsidiaries or suppliers are
20 located;

21 e. The local and global environments; and

22 f. The short-term and long-term interests of the
23 benefit corporation, including benefits that may accrue to the
24 benefit corporation from its long-term plans and the
25 possibility that these interests may be best served by the
26 continued independence of the benefit corporation.

1 (2) May consider:

2 a. The resources, intent and conduct, past, stated
3 and potential, of any person seeking to acquire control of the
4 corporation; and

5 b. Any other pertinent factors or the interests of
6 any other group that they deem appropriate.

7 (3) Shall not be required to give priority to the
8 interests of any particular person or group referred to in
9 subdivisions (1) and (2) over the interests of any other
10 person or group unless the benefit corporation has stated its
11 intention to give priority to interests related to a specific
12 public benefit purpose identified in its articles.

13 (b) The consideration of interests and factors in
14 the manner required by subsection (a):

15 (1) Shall not constitute a violation of Section
16 10A-2-8.30, Code of Alabama 1975; and

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

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

21 (1) Any action taken as a director if the director
22 performed the duties of office in compliance with Section
23 10A-2-8.30, Code of Alabama 1975; or

24 (2) Failure of the benefit corporation to pursue or
25 create general public benefit or specific public benefit.

1 Section 7. (a) The governing persons of a benefit
2 corporation shall include one director who shall be designated
3 the "benefit director" and shall have, in addition to all of
4 the powers, duties, rights, and immunities of the other
5 directors of the benefit corporation, the powers, duties,
6 rights, and immunities provided in this act.

7 (b) The benefit director shall be elected, and may
8 be removed, in the manner provided by Section 3 and shall be
9 an individual who is independent. The benefit director may
10 serve as the benefit officer at the same time as serving as
11 the benefit director. The governing documents of a benefit
12 corporation may prescribe additional qualifications of the
13 benefit director not inconsistent with this act.

14 (c) The benefit director shall prepare, and the
15 benefit corporation shall include in the annual benefit report
16 to shareholders required by Section 10, a statement whether,
17 in the opinion of the benefit director, the benefit
18 corporation acted in accordance with its general, and any
19 specific, public benefit purpose in all material respects
20 during the period covered by the report and whether the
21 governing officers complied with Sections 5 and 7,
22 respectively. If, in the opinion of the benefit director the
23 benefit corporation or its directors or officers failed so to
24 act, then the statement of the benefit director shall include
25 a description of the ways in which the benefit corporation or
26 its directors or officers failed so to act.

1 (d) The acts of an individual in the capacity of a
2 benefit director shall constitute for all purposes acts of
3 that individual in the capacity of a director of the benefit
4 corporation.

5 (e) (1) The bylaws of a benefit corporation must
6 provide that the persons or shareholders who perform the
7 duties of the board of directors include a person with the
8 powers, duties, rights, and immunities of a benefit director
9 if either of the following applies:

10 a. The bylaws of a benefit corporation provide that
11 the powers and duties conferred or imposed upon the board of
12 directors shall be exercised or performed by a person other
13 than the directors.

14 b. The bylaws of a statutory close corporation that
15 is a benefit corporation provide that the business and affairs
16 of the corporation shall be managed by or under the direction
17 of the shareholders.

18 (2) A person that exercises one or more of the
19 powers, duties, or rights of a benefit director under this
20 subsection:

21 a. Does not need to be independent of the benefit
22 corporation;

23 b. Shall have the immunities of a benefit director;

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

1 d. Shall not be subject to the procedures for
2 election or removal of directors in this act unless:

3 1. The person is also a director of the benefit
4 corporation; or

5 2. The bylaws make those procedures applicable.

6 (f) Regardless of whether the bylaws of a benefit
7 corporation include a provision eliminating or limiting the
8 personal liability of directors authorized, a benefit director
9 shall not be personally liable for any act or omission in the
10 capacity of a benefit director unless the act or omission
11 constitutes self-dealing, willful misconduct, or a knowing
12 violation of law.

13 Section 8. (a) Each officer of a benefit corporation
14 shall consider the interests and factors described in
15 subsection (a) of Section 5 when:

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

18 (2) It reasonably appears to the officer that the
19 matter may have a material effect on:

20 a. The creation of general or specific public
21 benefit by the benefit corporation; or

22 b. Any of the interests or factors referred to in
23 subsection (a) of Section 5.

24 (b) The consideration of interests and factors in
25 the manner described in subsection (a) shall not constitute a
26 violation of Section 10A-2-8.42, Code of Alabama 1975.

1 (c) An officer is not personally liable, as such,
2 for monetary damages for any action taken as an officer if the
3 officer performed the duties of the position in compliance
4 with Section 10A-2-8.42, Code of Alabama 1975, and this
5 section.

6 Section 9. A benefit corporation may have an officer
7 designated the "benefit officer" who shall have such authority
8 and shall perform such duties in the management of the benefit
9 corporation relating to the purpose of the corporation to
10 create general or specific public benefit as may be provided
11 by or pursuant to the bylaws or, in the absence of controlling
12 provisions in the bylaws, as may be determined by or pursuant
13 to resolutions or orders of the board of directors. If a
14 benefit corporation has a benefit officer, the duties of the
15 benefit officer shall include preparing the benefit report
16 required by Section 10.

17 Section 10. (a) The duties of directors and officers
18 under this act, and the general and any specific public
19 benefit purpose of a benefit corporation, may be enforced only
20 in a benefit enforcement proceeding. No person may bring an
21 action or assert a claim against a benefit corporation or its
22 directors or officers with respect to the duties of directors
23 and officers under this act and the general and any specific
24 public benefit purpose of the benefit corporation except in a
25 benefit enforcement proceeding.

1 (b) A benefit enforcement proceeding may be
2 commenced or maintained only:

3 (1) Directly by the benefit corporation; or

4 (2) Derivatively by:

5 a. A shareholder;

6 b. A director;

7 c. A person or group of persons that owns
8 beneficially or of record 10 percent or more of the equity
9 interests in an association of which the benefit corporation
10 is a subsidiary; or

11 d. Such other persons as may be specified in the
12 articles or bylaws of the benefit corporation.

13 Section 11. (a) A benefit corporation must deliver
14 to each shareholder an annual benefit report including:

15 (1) A narrative description of:

16 a. The ways in which the benefit corporation pursued
17 general public benefit during the year and the extent to which
18 general public benefit was created;

19 b. The ways in which the benefit corporation pursued
20 any specific public benefit that the articles state it is the
21 purpose of the benefit corporation to create and the extent to
22 which that specific public benefit was created; and

23 c. Any circumstances that have hindered the creation
24 by the benefit corporation of general or specific public
25 benefit;

1 (2) An assessment of the social and environmental
2 performance of the benefit corporation, prepared in accordance
3 with a third-party standard applied consistently with any
4 application of that standard in prior benefit reports or
5 accompanied by an explanation of the reasons for any
6 inconsistent application;

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

10 (4) The compensation paid by the benefit corporation
11 during the year to each director in that capacity;

12 (5) The name of each person that owns five percent
13 or more of the outstanding shares of the benefit corporation
14 either beneficially, to the extent known to the benefit
15 corporation without independent investigation, or of record;
16 and

17 (6) The statement of the benefit director described
18 in Section 6.

19 (b) The benefit report must be sent annually to each
20 shareholder within 120 days following the end of the fiscal
21 year of the benefit corporation or at the same time that the
22 benefit corporation delivers any other annual report to its
23 shareholders.

24 (c) A benefit corporation must post its most recent
25 benefit report on the public portion of its website, if any,
26 except that the compensation paid to directors and any

1 financial or proprietary information included in the benefit
2 report may be omitted from the benefit report as posted.

3 (d) Concurrently with the delivery of the benefit
4 report to shareholders pursuant to subsection (b), the benefit
5 corporation must deliver a copy of the benefit report to the
6 Secretary of State for filing, except that the compensation
7 paid to directors and any financial or proprietary information
8 included in the benefit report may be omitted from the benefit
9 report as filed under this section. The Secretary of State
10 shall charge a fee of seventy dollars (\$70) for filing a
11 benefit report.

12 (e) If a benefit corporation has not delivered a
13 benefit report to the Secretary of State for a period of two
14 years, the Secretary of State may prepare and file a statement
15 that the corporation has forfeited its status as a benefit
16 corporation and is no longer subject to this act. If the
17 corporation subsequently delivers a benefit report to the
18 Secretary of State for filing, the status of the corporation
19 as a benefit corporation shall be automatically reinstated
20 upon the filing of the benefit report by the Secretary of
21 State and the corporation shall again be subject to this act.

22 Section 12. This act shall become effective on the
23 first day of the third month following its passage and
24 approval by the Governor, or its otherwise becoming law.