

Summary of Tennessee’s For-Profit Benefit Corporation Statute¹

1. What is a For-Profit Benefit Corporation?

A For-Profit Benefit Corporation is defined under Tennessee law as: “a domestic business corporation . . . that intends to pursue a public benefit or public benefits.”²

2. What’s the difference between a For-Profit Benefit Corporation and a “traditional” corporation?

By law, “officers and directors of a [“traditional”] for profit corporation are to be guided by their duty to maximize long term profit for the benefit of the corporation and the shareholders.”³

In contrast, “[a] for-profit benefit corporation shall be managed in a manner that considers the best interests of those materially affected by the corporation’s conduct, including the pecuniary interests of shareholders, and the public benefit or public benefits identified in its charter.”⁴ Thus, by law, directors of for-profit benefit corporations are obligated to take the interests of both shareholders and the corporation’s publicly beneficial purpose into account when discharging their duties.⁵

3. What counts as a “public benefit”?

A “public benefit” is a positive effect (or a reduction of a negative effect) on one or more people, entities, communities, or interests other than the corporation’s shareholders. This includes, but is not limited to: artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific, or technological benefits.⁶

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² Tenn. Code Ann. § 48-28-103(1).

³ *Summers v. Cherokee Children & Family Servs., Inc.*, 112 S.W.3d 486, 504 (Tenn. Ct. App. 2002) (emphasis added). Cf. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 35 (Del. Ch. 2010) (“Directors of a for-profit [] corporation cannot . . . [legally] defend a business strategy that openly eschews stockholder wealth maximization[.]”).

⁴ Tenn. Code Ann. § 48-28-104(d) (emphasis added).

⁵ Tenn. Code Ann. § 48-28-106(a).

⁶ Tenn. Code Ann. § 48-28-103(3).

4. Does the “public benefit” have to be specified in any formal way?

Yes. Under Tennessee law, the charter of a For-Profit Benefit Corporation must “include a statement regarding the purpose or purposes for which the corporation is organized including one (1) or more public benefits to be pursued by the corporation[.]”⁷

5. How is a For-Profit Benefit Corporation held accountable for its publicly beneficial purpose?

In three ways: (1) annual benefit reports; (2) voluntary third party certification; and (3) shareholder enforcement.

1. Annual Benefit Reports: No later than four months after the close of a For-Profit Benefit Corporation's fiscal year, it must deliver to its shareholders an annual benefit report covering the preceding year. The annual benefit report must contain a description of:

- (1) The ways in which the corporation pursued the public benefit or public benefits stated in its charter;
- (2) The extent to which that public benefit purpose or purposes were pursued and achieved; and
- (3) Any material circumstances that hindered efforts to pursue or achieve the public benefit or public benefits.⁸

A For-Profit Benefit Corporation is also required to post its annual benefit report on the public portion of its website.⁹

2. Voluntary Third-Party Certification: Unlike several other states' for-profit benefit corporation statutes, under current Tennessee law, “[a] for-profit benefit corporation is not required to have its annual benefit report audited, certified, or otherwise evaluated by a third party.”¹⁰ However, the charter or bylaws of a for-profit benefit corporation may (but need not) require that the corporation use a third-party standard or attain a periodic third-party certification addressing the corporation's promotion of the public benefit(s) specified in its charter.¹¹

⁷ Tenn. Code Ann. § 48-28-104(e)(1).

⁸ Tenn. Code Ann. § 48-28-107(b)(1)-(3).

⁹ Tenn. Code Ann. § 48-28-107(d). If the corporation does not have a web site, then it must provide a copy of its most recent annual benefit report, without charge, to any person who requests a copy. See Tenn. Code Ann. § 48-28-107(e). The compensation paid to directors, as well as financial or proprietary information, may be omitted from any annual benefit report. Tenn. Code Ann. § 48-28-107(d)-(e).

¹⁰ Tenn. Code Ann. § 48-28-107(c) (emphasis added).

¹¹ Tenn. Code Ann. § 48-28-107(f).

3. Shareholder enforcement: Any shareholder who owns at least 2% of a for-profit benefit corporation's outstanding shares¹² has the right to file a lawsuit to enforce a director's duties to consider the interests of both shareholder value and the corporation's publicly beneficial purpose. However, a shareholder cannot seek monetary damages (meaning cash) against a for-profit benefit corporation because it failed to consider public benefits.

6. Is a For-Profit Benefit Corporation the same thing as a “B-Corp”?

No, although the terms are often (incorrectly) used interchangeably.

A “B-Corporation” – frequently called a “B-Corp” for short – is a designation that is given to certain socially-conscious businesses by the private entity “B-Lab.” “B-Lab” is a 501(c)(3) nonprofit organization that provides third-party certification to for-profit benefit corporations (see #5, above). “B-Lab” also lobbies nationwide for the implementation of For-Profit Benefit Corporation statutes similar to Tennessee's.

In contrast, a “For-Profit Benefit Corporation” is a legal designation that confers an entirely different kind of corporate status and carries the responsibilities and obligations discussed throughout this summary.

7. Do I really need to form a For-Profit Benefit Corporation if I want to consider public benefits and “do the right thing”?

Some say yes, some say no. But the single most important judge of this controversy—the Chief Justice of the Delaware Supreme Court, which is the nation's most important business court—says yes.¹³

8. Why else might I want to form a For-Profit Benefit Corporation?

Recent growth in social enterprise has been driven by the nearly 80 million socially conscious consumers nationwide who seek products and services from companies that also make a point of giving back to society. Young people in particular—whose purchasing power and personal wealth is rapidly increasing—have expressed significant willingness to purchase and invest in businesses that adhere to a broader social purpose. As a result, a For-Profit Benefit Corporation is not only an alternative business structure: it's a brand. Displaying this brand will make your business more attractive to socially conscious consumers,

¹² If the corporation is listed on a national securities exchange, then either 2% or two million dollars' worth of shares will suffice to provide standing to file a shareholder derivative action under this provision. See Tenn. Code Ann. § 48-28-108.

¹³ See Leo E. Strine, Jr., *Making It Easier for Directors to “Do the Right Thing”*, 4 Harv. Bus. L. Rev. 235, 241 (2014) (“American corporate law makes corporate managers accountable to only one constituency—stockholders. . . . That is what is refreshing about the benefit corporation movement. . . . [T]he benefit corporation model puts some actual power behind the idea that corporations should be governed not simply for the best interests of stockholders, but also for the best interests of the corporation's employees, consumers, and communities, and society generally.”).

entrepreneurs and investors who wish to spend their money on and invest in companies that are not only committed to generating shareholder value, but are also committed to providing a public benefit.

9. What is the process for establishing a For-Profit Benefit Corporation?

Tennessee law provides that companies will be able to form For-Profit Benefit Corporations beginning on January 1, 2016. However, because January 1st is a state holiday and state offices will be closed, the first opportunity to file a For-Profit Benefit Corporation Charter will be 8:00AM on Monday, January 4, 2016. At this point, the Secretary of State's office does not expect to allow people to submit their charters early and to file them with delayed, post-January 1st effective dates.

Those interested in forming a For-Profit Benefit Corporation should mail their Charter and filing fee (\$100 for a domestic entity) to:

Business Services Division
ATTN: Corporate Filing
6th FL – Snodgrass Tower
312 Rosa L. Parks AVE
Nashville, TN 37243

Checks should be made payable to "TN SOS."

The For-Profit Benefit Corporation Charter form has not yet been prepared or uploaded by the Secretary of State's office. Online information regarding Benefit Corporations will be made available this fall. Please note that the Secretary of State will not activate the link to the new form until mid-December in order to avoid having people send in their forms too early and see them rejected.

