

1 AN ACT relating to business corporations.

2 ***Be it enacted by the General Assembly of the Commonwealth of Kentucky:***

3 ➔Section 1. KRS 271B.8-300 is amended to read as follows:

- 4 (1) A director shall discharge his or her duties as a director, including his or her duties
5 as a member of a committee:
- 6 (a) In good faith;
- 7 (b) On an informed basis; and
- 8 (c) In a manner he or she honestly believes to be in the best interests of the
9 corporation.
- 10 (2) A director shall be considered to discharge his or her duties on an informed basis if
11 he or she makes, with the care an ordinarily prudent person in a like position would
12 exercise under similar circumstances, inquiry into the business and affairs of the
13 corporation, or into a particular action to be taken or decision to be made.
- 14 (3) In discharging his or her duties a director shall be entitled to rely on information,
15 opinions, reports, or statements, including financial statements and other financial
16 data, if prepared or presented by:
- 17 (a) One (1) or more officers or employees of the corporation whom the director
18 honestly believes to be reliable and competent in the matters presented;
- 19 (b) Legal counsel, public accountants, or other persons as to matters the director
20 honestly believes are within the person's professional or expert competence;
21 or
- 22 (c) A committee of the board of directors of which he or she is not a member, if
23 the director honestly believes the committee merits confidence.
- 24 (4) A director shall not be considered to be acting in good faith if he or she:
- 25 (a) Has knowledge concerning the matter in question that makes reliance
26 otherwise permitted by subsection (3) of this section unwarranted; or
- 27 (b) Takes any action to implement or maintain diversity, equity, and inclusion

1 *initiatives or environmental, social, and governance investing.*

2 (5) In addition to any other limitation on a director's liability for monetary damages
3 contained in any provision of the corporation's articles of incorporation adopted in
4 accordance with subsection (2)(d) of KRS 271B.2-020, any action taken as a
5 director, or any failure to take any action as a director, shall not be the basis for
6 monetary damages or injunctive relief unless:

7 (a) The director has breached or failed to perform the duties of the director's
8 office in compliance with this section; and

9 (b) In the case of an action for monetary damages, the breach or failure to
10 perform constitutes willful misconduct or wanton or reckless disregard for the
11 best interests of the corporation and its shareholders.

12 *(6) Subsection (5) of this section shall not apply to any action taken as a director, or*
13 *any failure to take any action as a director, regarding the implementation or*
14 *maintenance of diversity, equity, and inclusion initiatives or environmental,*
15 *social, and governance investing.*

16 ~~(7)(6)~~ A person bringing an action for monetary damages under this section shall
17 have the burden of proving by clear and convincing evidence the provisions of
18 subsection (5)(a) and (b) of this section, and the burden of proving that the breach
19 or failure to perform was the legal cause of damages suffered by the corporation.

20 ~~(8)(7)~~ Nothing in this section shall eliminate or limit the liability of any director for
21 any act or omission occurring prior to July 15, 1988.

22 *(9) In an action brought in the right of a domestic corporation under Section 2 of*
23 *this Act, neither the business judgment rule nor any other provision of this*
24 *chapter shall operate as an affirmative defense where the damages alleged to*
25 *have been suffered by the corporation are the result of diversity, equity, and*
26 *inclusion initiatives or environmental, social, and governance investing.*

27 *(10) As used in this section:*

1 (a) "Diversity, equity, and inclusion initiatives" means:

2 1. Policies, practices, or procedures designed or implemented to promote
3 or provide differential treatment or benefits to individuals on the basis
4 of religion, race, sex, color, or national origin, including but not
5 limited to any such policy, practice, or procedure related to
6 employment, employee recruitment, employee hiring, employee
7 promotion, contracts, or contract renewal; and

8 2. Does not include any policy, practice, procedure, office, employee,
9 training, program, or activity that is required pursuant to state or
10 federal antidiscrimination laws, or differential treatment or benefits
11 necessary to provide medical treatment; and

12 (b) "Environmental, social, and governance investing" means an investment
13 strategy that emphasizes a firm's governance structure or the environmental
14 or social impacts of the firm's products or practices, including but not
15 limited to using a set of standards to screen potential investments based
16 upon the perceived impact to the environment and the social relationships
17 between a firm's employees and the community.

18 (11)~~(8)~~ In a public benefit corporation:

19 (a) The board of directors shall manage or direct the business and affairs of the
20 public benefit corporation in a manner that balances the pecuniary interests of
21 the stockholders, the best interests of those materially affected by the
22 corporation's conduct, and the specific public benefit or public benefits
23 identified in its articles of incorporation;

24 (b) A director of the public benefit corporation shall not, by virtue of the public
25 benefit provisions set forth in the corporation's articles of incorporation, have
26 any duty to any person on account of any interest of the person in the public
27 benefit or public benefits identified in the articles of incorporation or on

1 account of any interest materially affected by the corporation's conduct;

2 (c) With respect to a decision implicating the balance requirement in paragraph
3 (a) of this subsection, a director shall act in conformity with subsection (1) of
4 this section; and

5 (d) The articles of incorporation of a public benefit corporation may include a
6 provision that any disinterested failure to satisfy this subsection shall not
7 constitute an act or omission not in good faith or a breach of the duty of
8 loyalty.

9 ➔Section 2. KRS 271B.7-400 is amended to read as follows:

10 (1) A person shall not commence a proceeding in the right of a domestic or foreign
11 corporation unless he or she was a shareholder of the corporation when the
12 transaction complained of occurred or unless he or she became a shareholder
13 through transfer by operation of law from one who was a shareholder at that time.
14 The derivative proceeding shall not be maintained if it appears that the person
15 commencing the proceeding does not fairly and adequately represent the interests of
16 the shareholders in enforcing the right of the corporation.

17 (2) A complaint in a proceeding brought in the right of a corporation shall be verified
18 and allege with particularity the demand made, if any, to obtain action by the board
19 of directors and either that the demand was refused or ignored or why he or she did
20 not make the demand. Whether or not a demand for action was made, if the
21 corporation commences an investigation of the charges made in the demand or
22 complaint, the court may stay any proceeding until the investigation is completed.

23 (3) A proceeding commenced under this section may not be discontinued or settled
24 without the court's approval. If the court determines that a proposed discontinuance
25 or settlement will substantially affect the interest of the corporation's shareholders
26 or a class of shareholders, the court shall direct that notice be given the shareholders
27 affected.

1 (4) On termination of the proceeding the court may require the plaintiff to pay any
2 defendant's reasonable expenses, including counsel fees, incurred in defending the
3 proceeding if it finds that the proceeding was commenced without reasonable cause.

4 **(5) The court shall award a plaintiff who prevails in a proceeding brought in the**
5 **right of a domestic corporation reasonable attorney's fees, costs, and expert**
6 **witness fees and expenses, and may award compensatory and punitive damages,**
7 **if the damages suffered by the corporation were the result of diversity, equity, and**
8 **inclusion initiatives or environmental, social, and governance investing, as those**
9 **terms are defined in Section 1 of this Act.**

10 ~~(6)~~~~(5)~~ For purposes of this section, "shareholder" includes a beneficial owner whose
11 shares are held in a voting trust or held by a nominee on his behalf.

12 ~~(7)~~~~(6)~~ In any derivative proceedings in the right of a foreign corporation, the matters
13 covered by this section shall be governed by the laws of the jurisdiction of
14 incorporation.

15 ~~(8)~~~~(7)~~ The articles of incorporation of the corporation may provide that proper venue
16 for a derivative action or an action to compel the production of books and records is
17 in or only is in the appropriate court.

18 ~~(9)~~~~(8)~~ Shareholders of a public benefit corporation owning individually or
19 collectively, as of the date of instituting a derivative proceeding, at least two
20 percent (2%) of the corporation's outstanding shares or, in the case of a corporation
21 with shares listed on a national securities exchange, the lesser of that percentage or
22 shares of at least two million dollars (\$2,000,000) in market value, may maintain a
23 derivative proceeding to enforce the requirements~~[- set forth]~~ in KRS 271B.8-
24 300~~(11)~~~~(8)~~.