

MODEL BENEFIT CORPORATION LEGISLATION
With Explanatory Comments¹

[Chapter] __
Benefit Corporations

[Subchapter]

1. Preliminary Provisions
2. Corporate Purposes
3. Accountability
4. Transparency

[Subchapter] 1
Preliminary Provisions

Section

101. Application and effect of [chapter].
102. Definitions.
103. Incorporation of benefit corporation.
104. Election of benefit corporation status.
105. Termination of benefit corporation status.

§ 101. Application and effect of [chapter].

(a) General rule. – This [chapter] shall be applicable to all benefit corporations.

(b) Application of business corporation law generally. – 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 benefit corporation. This [chapter] shall not affect a statute or rule of law that is applicable to a business corporation that is not a benefit corporation.

(c) Laws applicable. – Except as otherwise provided in this [chapter], [the enacting state’s business corporation law] shall be generally applicable to all benefit corporations. A benefit corporation may be subject simultaneously to this [chapter] and

¹ For a detailed discussion of the issues to be considered when preparing legislation for introduction in a state see Clark et al, *The Need and Rationale for the Benefit Corporation* (2011), available at www.benefitcorp.org. See generally, William H. Clark, Jr. and Elizabeth K. Babson, “How Benefit Corporations are Redefining the Purpose of Business Corporations,” 38 WM. MITCHELL L. REV. 817 (2012).

39 [cite any statutes that provide for the incorporation of a specific type of business
40 corporation, such as a professional corporation or for-profit cooperative corporation].
41 The provisions of this [chapter] shall control over the provisions of [cite the business
42 corporation law] [and] [cite the professional corporation, cooperative corporation and
43 other relevant laws].
44

45 **(d) Organic records.** – A provision of the articles of incorporation or bylaws of a
46 benefit corporation may not limit, be inconsistent with, or supersede a provision of this
47 [chapter].
48

49 **Comment:**
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51 This chapter authorizes the organization of a form of business corporation that offers
52 entrepreneurs and investors the option to build, and invest in, a business that operates with
53 a corporate purpose broader than maximizing shareholder value and that consciously
54 undertakes a responsibility to maximize the benefits of its operations for all stakeholders,
55 not just shareholders. Enforcement of that purpose and responsibility comes not from
56 governmental oversight, but rather from new provisions on transparency and accountability
57 included in this chapter.
58

59 The second sentence of subsection (c) makes clear that if a state provides for the
60 incorporation of specialized types of business corporations, such as statutory close
61 corporations, insurance corporations, for-profit cooperative corporations, or professional
62 corporations, those corporations may also be benefit corporations. In the case of a
63 professional corporation, section 201(e) provides a special rule that eliminates any conflict
64 between this chapter and the requirement found in many professional corporation laws that
65 limits the purposes or business of a professional corporation to providing a particular type
66 of professional service.
67

68 As a result of subsection (d), a corporation that elects to be subject to this chapter
69 will be subject to all of the provisions of the chapter and will not be able to vary their
70 application to the corporation.
71

72 The term “benefit corporation” used in this section is defined in section 102.
73
74

75 **§ 102. Definitions.**
76

77 The following words and phrases when used in this [chapter] shall have the
78 meanings given to them in this section unless the context clearly indicates otherwise:
79

80 **“Benefit corporation.”** A business corporation:
81

- 82 (1) that has elected to become subject to this [chapter]; and
83

84 (2) the status of which as a benefit corporation has not been terminated.

85
86 **“Benefit director.”** The director designated as the benefit director of a benefit
87 corporation under section 302.

88
89 **“Benefit enforcement proceeding.”** Any claim or action or proceeding for:

90 (1) failure of a benefit corporation to pursue or create general public benefit
91 or a specific public benefit purpose set forth in its articles; or

92
93 (2) violation of any obligation, duty, or standard of conduct under this
94 [chapter].

95
96
97 **“Benefit officer.”** The individual designated as the benefit officer of a benefit
98 corporation under section 304.

99
100 **“General public benefit.”** A material positive impact on society and the
101 environment, taken as a whole, assessed against a third-party standard, from the business
102 and operations of a benefit corporation.

103
104 **“Independent.”** Having no material relationship with a benefit corporation or a
105 subsidiary of the benefit corporation. Serving as benefit director or benefit officer does not
106 make an individual not independent. A material relationship between an individual and a
107 benefit corporation or any of its subsidiaries will be conclusively presumed to exist if any
108 of the following apply:

109 (1) The individual is, or has been within the last three years, an employee
110 other than a benefit officer of the benefit corporation or a subsidiary.

111
112 (2) An immediate family member of the individual is, or has been within the
113 last three years, an executive officer other than a benefit officer of the benefit corporation
114 or a subsidiary.

115
116 (3) There is beneficial or record ownership of 5% or more of the outstanding
117 shares of the benefit corporation, calculated as if all outstanding rights to acquire equity
118 interests in the benefit corporation had been exercised, by:

119 (i) the individual; or

120 (ii) an entity:

121 (A) of which the individual is a director, an officer, or a manager;

122 or

123 (B) in which the individual owns beneficially or of record 5% or
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129 more of the outstanding equity interests, calculated as if all outstanding rights to acquire
130 equity interests in the entity had been exercised.

131
132 **“Minimum status vote.”**

133
134 (1) In the case of a business corporation, in addition to any other required
135 approval or vote, the satisfaction of the following conditions:

136
137 (i) The shareholders of every class or series shall be entitled to vote as a
138 [*separate voting group*] [*class*] on the corporate action regardless of a limitation stated in
139 the articles of incorporation or bylaws on the voting rights of any class or series.

140
141 (ii) The corporate action must be approved by the affirmative vote of the
142 shareholders of each class or series entitled to cast at least two-thirds of the votes that all
143 shareholders of the class or series are entitled to cast on the action.

144
145 [(2) *In the case of a domestic entity other than a business corporation, in*
146 *addition to any other required approval, vote, or consent, the satisfaction of the following*
147 *conditions:*

148
149 (i) *The holders of every class or series of equity interest in the entity*
150 *that are entitled to receive a distribution of any kind from the entity shall be entitled to vote*
151 *on or consent to the action regardless of any otherwise applicable limitation on the voting*
152 *or consent rights of any class or series.*

153
154 (ii) *The action must be approved by the affirmative vote or consent of*
155 *the holders described in subparagraph (i) entitled to cast at least two-thirds of the votes or*
156 *consents that all of those holders are entitled to cast on the action.]*

157
158 **“Publicly traded corporation.”** A business corporation that has shares listed on a
159 national securities exchange or traded in a market maintained by one or more members of a
160 national securities association.

161
162 **“Specific public benefit.”** Includes:

163
164 (1) providing low-income or underserved individuals or communities with
165 beneficial products or services;

166
167 (2) promoting economic opportunity for individuals or communities beyond
168 the creation of jobs in the normal course of business;

169
170 (3) protecting or restoring the environment;

171
172 (4) improving human health;

173

- 174 (5) promoting the arts, sciences, or advancement of knowledge;
175
176 (6) increasing the flow of capital to entities with a purpose to benefit society
177 or the environment; and
178
179 (7) conferring any other particular benefit on society or the environment.
180

181 **“Subsidiary.”** In relation to a person, an entity in which the person owns
182 beneficially or of record 50% or more of the outstanding equity interests, calculated as if
183 all outstanding rights to acquire equity interests in the entity had been exercised.
184

185 **“Third-party standard.”** A recognized standard for defining, reporting, and
186 assessing corporate social and environmental performance that is:
187

- 188 (1) Comprehensive because it assesses the effects of the business and its
189 operations upon the interests listed in section 301(a)(1)(ii), (iii), (iv) and (v).
190
191 (2) Developed by an entity that is not controlled by the benefit corporation.
192
193 (3) Credible because it is developed by an entity that both:
194
195 (i) has access to necessary expertise to assess overall corporate social
196 and environmental performance; and
197
198 (ii) uses a balanced multistakeholder approach to develop the standard,
199 including a reasonable public comment period.
200
201 (4) Transparent because the following information is publicly available:
202
203 (i) About the standard:
204
205 (A) The criteria considered when measuring the overall social and
206 environmental performance of a business.
207
208 (B) The relative weightings, if any, of those criteria.
209
210 (ii) About the development and revision of the standard:
211
212 (A) The identity of the directors, officers, material owners, and the
213 governing body of the entity that developed and controls revisions to the standard.
214
215 (B) The process by which revisions to the standard and changes to
216 the membership of the governing body are made.
217
218 (C) An accounting of the revenue and sources of financial support

219 for the entity, with sufficient detail to disclose any relationships that could reasonably be
220 considered to present a potential conflict of interest.

221
222 **Comment:**

223
224 **“Benefit corporation.”** The provisions of this chapter apply to a business
225 corporation while it has the status of a benefit corporation because its articles contain a
226 statement that it is a benefit corporation. If that statement is deleted as provided in section
227 105, the corporation will cease to be a benefit corporation immediately upon the
228 effectiveness of the deletion.

229
230 **“Benefit enforcement proceeding.”** This definition not only describes the action
231 that may be brought under section 305, but it also has the effect of excluding other actions
232 against a benefit corporation and its directors and officers because section 305(a) provides
233 that “no person may bring an action or assert a claim against a benefit corporation or its
234 directors or officers” with respect to violation of the provisions of this chapter except in a
235 benefit enforcement proceeding.

236
237 The obligations that may be enforced through a benefit enforcement proceeding
238 include the obligations of a benefit corporation under section 402(b) to post its benefit
239 reports on its Internet website and to supply copies of its benefit report if it does not have
240 an Internet website. In the case of a failure to provide a copy of a benefit report, a benefit
241 enforcement proceeding to enforce that obligation may only be brought by the persons
242 listed in section 305 and not by the person requesting the copy of the report unless the
243 person otherwise has standing under section 305.

244
245 **“General public benefit.”** By requiring that the impact of a business on society and
246 the environment be looked at “as a whole,” the concept of general public benefit requires
247 consideration of all of the effects of the business on society and the environment. What is
248 involved in creating general public benefit is informed by section 301(a) which lists the
249 specific interests and factors that the directors of a benefit corporation are required to
250 consider.

251
252 **“Minimum status vote.”** An amendment of the articles or a fundamental change
253 that has the effect of changing the status of a corporation so that it either becomes a benefit
254 corporation or ceases to be a benefit corporation must be approved by the minimum status
255 vote. *See* sections 104 and 105. The purpose of requiring a two-thirds vote under this
256 chapter is to ensure that there is broad shareholder support for an action. This definition
257 will not be needed in states that require a supermajority vote of two-thirds or more for
258 amendments of the articles or fundamental changes.

259
260 The second paragraph of the definition extends its policy to other forms of entities so
261 that, for example, a merger of a limited liability company into a benefit corporation must
262 be approved by the members of the limited liability company by at least a two-thirds vote.
263 The second paragraph should be omitted by those states that require a supermajority vote

264 of two-thirds or more by the owners of an unincorporated entity to approve a fundamental
265 change. *See, e.g.*, Uniform Limited Liability Company Act (2006) (Last Amended 2013) §
266 1023, which requires a unanimous vote by the members of a limited liability company to
267 approve a merger.
268

269 The two-thirds vote required by the definition is in addition to any other vote
270 required in the case of any particular corporation or other form of entity. If the articles of a
271 corporation were to require, for example, an 80% supermajority vote to approve a merger,
272 a 70% vote to approve a merger of the corporation into a benefit corporation would be
273 sufficient to satisfy the requirement that the merger be approved by the minimum status
274 vote but would not be sufficient for valid approval of the merger.
275

276 **“Publicly traded corporation.”** This definition is used in section 302, which makes
277 the requirement of a benefit director mandatory for publicly traded corporations. The
278 definition is patterned after Model Business Corporation Act § 1.40(18A) (2010). This
279 definition will not be necessary if the enacting state’s business corporation law includes a
280 similar definition.
281

282 **“Specific public benefit.”** Every benefit corporation has the purpose under section
283 201(a) of creating general public benefit. A benefit corporation may also elect to pursue
284 one or more specific public benefit purposes. Since the creation of specific public benefit
285 is optional, paragraph (7) of this definition permits a benefit corporation to identify a
286 specific public benefit that is different from those listed in paragraphs (1) through (6).
287

288 **“Third-party standard.”** The requirement in section 401 that a benefit corporation
289 prepare an annual benefit report that assesses its performance in creating general public
290 benefit against a third-party standard provides an important protection against the abuse of
291 benefit corporation status. The performance of a regular business corporation is measured
292 by the financial statements that the corporation prepares. But the performance of a benefit
293 corporation in creating general or specific public benefit will not be readily apparent from
294 those financial statements. The annual benefit report is intended to permit an evaluation of
295 that performance so that the shareholders can judge how the directors have discharged their
296 responsibility to manage the corporation and thus whether the directors should be retained
297 in office or the shareholders should take other action to change the way the corporation is
298 managed. The annual benefit report is also intended to reduce “greenwashing” (the
299 phenomenon of businesses seeking to portray themselves as being more environmentally
300 and socially responsible than they actually are) by giving consumers and the general public
301 a means of judging whether a business is living up to its claimed status as a benefit
302 corporation.
303

304 The financial support that must be disclosed by an organization if it wishes to make
305 available a third party standard should include investment income, grants, and other types
306 of support in addition to revenue it receives from its operations.
307
308

309 **§ 103. Incorporation of benefit corporation.**
310

311 A benefit corporation shall be incorporated in accordance with [*cite incorporation*
312 *provisions of the business corporation law*], but its articles of incorporation must also state
313 that it is a benefit corporation.
314

315 **Comment:**
316

317 This section provides for how a corporation that is being newly formed may elect to
318 be a benefit corporation. Existing corporations may become benefit corporations in the
319 manner provided in section 104.
320

321 This chapter only applies to domestic business corporations. A foreign business
322 corporation that has a status in its home jurisdiction similar to the status of a benefit
323 corporation under this chapter is not subject to this chapter and has the status simply of a
324 foreign business corporation for purposes of the state’s business corporation law.
325

326 The term “benefit corporation” used in this section is defined in section 102.
327
328

329 **§ 104. Election of benefit corporation status.**
330

331 **(a) Amendment.** – An existing business corporation may become a benefit
332 corporation under this [*chapter*] by amending its articles of incorporation so that they
333 contain, in addition to the requirements of [*cite section of the business corporation law on*
334 *the required contents of articles of incorporation*], a statement that the corporation is a
335 benefit corporation. In order to be effective, the amendment must be adopted by at least
336 the minimum status vote.
337

338 **(b) Fundamental transactions.** –
339

340 (1) Except as provided in paragraph (2), if a domestic entity that is not a
341 benefit corporation is a party to a merger[, *consolidation, or conversion*] [*or the*
342 *exchanging entity in a share exchange*] and the surviving[, *new, or resulting*] entity in the
343 merger, [*consolidation, conversion, or share exchange*] is to be a benefit corporation, the
344 [*plan of*] merger[, *consolidation, conversion, or share exchange*] must be [*adopted*]
345 [*approved*] by the domestic entity by at least the minimum status vote.
346

347 (2) Paragraph (1) does not apply in the case of a corporation that is a party to
348 a merger if the shareholders of the corporation are not entitled to vote on the merger
349 pursuant to [*cite section of the business corporation law authorizing “short form”*
350 *mergers*].
351

352 **Comment:**
353

354 This section provides the procedures for an existing corporation to become a benefit
355 corporation. A corporation that is being newly formed may become a benefit corporation
356 in the manner provided in section 103. Subsection (a) applies to a business corporation
357 that is directly electing to be a benefit corporation by amending its articles of
358 incorporation. Subsection (b) applies when a corporation is becoming a benefit
359 corporation indirectly in the context of a fundamental transaction. In both cases, the
360 change to benefit corporation status must be approved by at least the minimum status vote.
361

362 Subsection (b) also applies to a domestic entity that is not a corporation when the
363 entity is a party to a transaction that will result in a benefit corporation. In those situations,
364 a supermajority vote of the owners of the entity is required by subsection (b).
365

366 See section 201(d) with respect to changing the identification of a specific public
367 benefit that it is the purpose of a benefit corporation to pursue.
368

369 The following terms used in this section are defined in section 102:

370 “benefit corporation”

371 “minimum status vote”
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374

375 **§ 105. Termination of benefit corporation status.**

376
377 **(a) Amendment.** – A benefit corporation may terminate its status as such and
378 cease to be subject to this [*chapter*] by amending its articles of incorporation to delete the
379 provision required by section 103 or 104 to be stated in the articles of a benefit
380 corporation. In order to be effective, the amendment must be adopted by at least the
381 minimum status vote.
382

383 **(b) Fundamental transactions.** –

384
385 (1) Except as provided in paragraph (2), if a [*plan of*] merger[, *consolidation,*
386 *conversion, or share exchange*] would have the effect of terminating the status of a
387 business corporation as a benefit corporation, the [*plan*] [*transaction*] must be adopted by
388 at least the minimum status vote in order to be effective.
389

390 (2) Paragraph (1) does not apply in the case of a corporation that is a party to
391 a merger if the shareholders of the corporation are not entitled to vote on the merger
392 pursuant to [*cite section of the business corporation law authorizing “short form”*
393 *mergers*].
394

395 (3) Any sale, lease, exchange, or other disposition of all or substantially all of
396 the assets of a benefit corporation, unless the transaction is in the usual and regular course
397 of business, shall not be effective unless the transaction is approved by at least the
398 minimum status vote.

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Comment:

This section provides the procedures for a benefit corporation to terminate voluntarily its status as a benefit corporation. As with an election of benefit corporation status under section 104, the termination may be accomplished either directly by an amendment of the articles or indirectly through a fundamental transaction.

Subsection (b)(3) provides a special rule for a sale of all or substantially all of the assets of a benefit corporation. Such a transaction will not result in a termination of the status of the corporation as a benefit corporation, but will have effectively the same result since it will terminate the operations of the business. Thus it was considered appropriate to require approval of a sale of assets by the minimum status vote. Whether a sale of assets is in the usual and regular course will be determined under the same standards as apply to that question under the state’s business corporation law. *See, e.g., Model Business Corporation Act §§ 12.01 and 12.02.*

The following terms used in this section are defined in section 102:

- “benefit corporation”
- “minimum status vote”

Subchapter 2 Corporate Purposes

Section
201. Corporate purposes.

§ 201. Corporate purposes.

(a) General public benefit purpose. – A benefit corporation shall have a purpose of creating general public benefit. This purpose is in addition to its purpose under [*cite section of the business corporation law on the purpose of business corporations*].

(b) Optional specific public benefit purpose. – The articles of incorporation of a benefit corporation may identify one or more specific public benefits that it is the purpose of the benefit corporation to create in addition to its purposes under [*cite section of the business corporation law on the purpose of business corporations*] and subsection (a). The identification of a specific public benefit under this subsection does not limit the purpose of a benefit corporation to create general public benefit under subsection (a).

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

444 (d) **Amendment.** – A benefit corporation may amend its articles of incorporation
445 to add, amend, or delete the identification of a specific public benefit that it is the purpose
446 of the benefit corporation to create. In order to be effective, the amendment must be
447 adopted by at least the minimum status vote.
448

449 (e) **Professional corporations.** – A professional corporation that is a benefit
450 corporation does not violate [*cite section of professional corporation law, if any, that*
451 *restricts the business in which a professional corporation may engage*] by having the
452 purpose to create general public benefit or a specific public benefit.
453

454 **Comment:**
455

456 Every benefit corporation has the corporate purpose of creating general public
457 benefit. A benefit corporation may also elect to pursue specific public benefits under
458 subsection (b).
459

460 Subsection (c) confirms that pursuing general and specific public benefit is in the
461 best interests of the benefit corporation. Because the basic duty of a director is to act in a
462 manner that the director reasonably believes to be in the best interests of the corporation,
463 decisions by the board of directors that promote the creation of general or specific public
464 benefit will satisfy the requirement to act in the best interests of the corporation. If an
465 ordinary business corporation includes in its articles of incorporation a statement of a
466 specific purpose, it is by definition in the best interests of the corporation for the directors
467 to pursue that purpose. Thus the rule in subsection (c) would be the case in any event with
468 respect to specific public benefit purposes, but specific public benefits have been referred
469 to expressly in subsection (c) to avoid the confusion that might result if subsection (c) only
470 referred to the creation of general public benefit.
471

472 Some professional corporation statutes provide that a professional corporation may
473 not engage in any business other than rendering the professional service for which it was
474 specifically incorporated. Subsection (e) makes clear that such a limitation will not
475 interfere with a professional corporation electing to be a benefit corporation. In such a
476 case, the professional corporation (such as a law firm, accounting firm, or medical
477 practice) will be limited to providing the professional services for which it was
478 incorporated, but it will be able to provide those services in a manner that creates general
479 public benefit or a specific public benefit (for example, a medical practice that focuses on
480 providing care for low-income individuals).
481

482 The following terms used in this section are defined in section 102:
483

484 “benefit corporation”

485 “general public benefit”

486 “minimum status vote”

487 “specific public benefit”
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489
490 **Subchapter 3**
491 **Accountability**
492

493 Section

494 301. Standard of conduct for directors.

495 302. Benefit director.

496 303. Standard of conduct for officers.

497 304. Benefit officer.

498 305. Right of action.
499

500 **§ 301. Standard of conduct for directors.**
501

502 **(a) Consideration of interests.** – In discharging the duties of their respective
503 positions and in considering the best interests of the benefit corporation, the board of
504 directors, committees of the board, and individual directors of a benefit corporation:
505

506 (1) shall consider the effects of any action or inaction upon:
507

508 (i) the shareholders of the benefit corporation;
509

510 (ii) the employees and work force of the benefit corporation, its
511 subsidiaries, and its suppliers;
512

513 (iii) the interests of customers as beneficiaries of the general public
514 benefit or a specific public benefit purpose of the benefit corporation;
515

516 (iv) community and societal factors, including those of each community
517 in which offices or facilities of the benefit corporation, its subsidiaries, or its suppliers are
518 located;
519

520 (v) the local and global environment;
521

522 (vi) the short-term and long-term interests of the benefit corporation,
523 including benefits that may accrue to the benefit corporation from its long-term plans and
524 the possibility that these interests may be best served by the continued independence of the
525 benefit corporation; and
526

527 (vii) the ability of the benefit corporation to accomplish its general public
528 benefit purpose and any specific public benefit purpose; and
529

530 (2) may consider:
531

532 [(i) *the interests referred to in [cite constituencies provision of the*
533 *business corporation law if it refers to constituencies not listed above]; and*

534
535 (ii) other pertinent factors or the interests of any other group that they
536 deem appropriate; but

537
538 (3) need not give priority to a particular interest or factor referred to in
539 paragraph (1) or (2) over any other interest or factor unless the benefit corporation has
540 stated in its articles of incorporation its intention to give priority to certain interests or
541 factors related to the accomplishment of its general public benefit purpose or of a specific
542 public benefit purpose identified in its articles.

543
544 **(b) Coordination with other provisions of law.** –The consideration of interests
545 and factors in the manner provided by subsection (a)[:

546
547 (1) does not constitute a violation of [*cite provision of the business*
548 *corporation law on the duties of directors generally*] [; and

549
550 (2) is in addition to the ability of directors to consider interests and factors as
551 provided in [*cite constituencies provision of the business corporation law*]].

552
553 **(c) Exoneration from personal liability.** – Except as provided in the [*articles of*
554 *incorporation*] [*bylaws*], a director is not personally liable for monetary damages for:

555
556 (1) any action or inaction in the course of performing the duties of a director
557 under subsection (a) if the director was not interested with respect to the action or inaction;
558 or

559
560 (2) failure of the benefit corporation to pursue or create general public benefit
561 or specific public benefit.

562
563 **(d) Limitation on standing.** – A director does not have a duty to a person that is a
564 beneficiary of the general public benefit purpose or a specific public benefit purpose of a
565 benefit corporation arising from the status of the person as a beneficiary.

566
567 **(e) Business judgments.** – A director who makes a business judgment in good
568 faith fulfills the duty under this section if the director:

569
570 (1) is not interested in the subject of the business judgment;

571
572 (2) is informed with respect to the subject of the business judgment to the
573 extent the director reasonably believes to be appropriate under the circumstances; and

574
575 (3) rationally believes that the business judgment is in the best interests of the
576 benefit corporation.

577
578 **Comment:**

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This section is at the heart of what it means to be a benefit corporation. By requiring the consideration of interests of constituencies other than the shareholders, the section rejects the holdings in *Dodge v. Ford*, 170 N.W. 668 (Mich. 1919), and *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010), that directors must maximize the financial value of a corporation.

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In a state that has adopted a “constituency statute,” directors are authorized to consider the interests of corporate constituencies other than the shareholders, but the directors are not *required* to do so. Subsection (a) makes it mandatory for the directors of a benefit corporation to consider the interests and factors that they would otherwise simply be permitted to consider in their discretion under the typical constituency statute.

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Subsection (d) negates any enforceable duty of directors to non-shareholder constituents. *But see* section 305(b) which permits a benefit corporation to provide in its articles that an identified category of persons may bring a benefit enforcement proceeding. If a benefit corporation were to do so, the identified non-shareholder constituents would be able to allege a breach of duty by the directors under this chapter for failing to pursue or create general or specific public benefit, but subsection (d) would prevent those constituents from alleging a breach of duty to them.

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Subsection (e) confirms that the business judgment rule applies to actions by directors under this section. The formulation of the rule is patterned after American Law Institute, Principles of Corporate Governance: Analysis and Recommendations § 4.01(c). If the law of the enacting state is not clear that the business judgment rule applies generally to actions by directors of corporations that are not business corporations, consideration should be given to confirming that the rule applies more broadly than just under this chapter. The best interests of the corporation referred to in subsection (e)(3) include the creation of general public benefit and specific public benefit as provided in section 201(c) and the determination of what is in the best interests of the benefit corporation requires consideration of the interests and factors listed in subsection (a).

611

The following terms used in this section are defined in section 102:

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“benefit corporation”

“general public benefit”

“specific public benefit”

“subsidiary”

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§ 302. Benefit director.

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(a) **General rule.** – The board of directors of a benefit corporation that is a publicly traded corporation shall, and the board of any other benefit corporation may, include a director, who:

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(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 benefit corporation, the powers, duties, rights, and immunities provided in this *[chapter]*.

(b) Election, removal, and qualifications. – The benefit director shall be elected, and may be removed, in the manner provided by *[cite provisions of the business corporation law on the election and removal of directors generally]*. *[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 benefit corporation may prescribe additional qualifications of the benefit director not inconsistent with this subsection.

(c) Annual compliance statement. – The benefit director shall prepare, and the benefit corporation shall include in the annual benefit report to shareholders required by section 401, the opinion of the benefit director on all of the following:

(1) Whether the 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 sections 301(a) and 303(a), respectively.

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

(d) Status of actions. – The act or inaction of an individual in the capacity of a benefit director shall constitute for all purposes an act or inaction of that individual in the capacity of a director of the benefit corporation.

(e) Exoneration from personal liability. – Regardless of whether the articles of incorporation or bylaws of a benefit corporation include a provision eliminating or limiting the personal liability of directors authorized by *[cite section of the business corporation law permitting exoneration of directors]*, 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) Professional Corporations. – *The benefit director of a professional corporation does not need to be independent.]*

669 **Comment:**

670

671 The statement of the benefit director required by subsection (c) is an important part
672 of the transparency required under this chapter. The perspective of the benefit director on
673 whether the corporation has been successful in pursuing its general and any named specific
674 public benefit purpose will be an important source of information for the shareholders as to
675 whether the directors have adequately discharged their stewardship of the benefit
676 corporation and its resources.

677

678 Subsection (d) makes clear that the actions of a benefit director are actions of a
679 director of the benefit corporation and are subject to the same standards as actions of
680 directors generally.

681

682 The wording of subsection (e) should be conformed to the provision of the state’s
683 business corporation law that permits the shareholders to adopt a provision of the articles
684 of incorporation or bylaws exonerating directors from liability for breach of duty. But
685 unlike existing exoneration provisions, subsection (e) does not require the benefit
686 corporation to adopt an implementing provision in the articles or bylaws. Instead the
687 liability shield provided by subsection (e) automatically applies to all benefit directors.

688

689 The following terms used in this section are defined in section 102:

690

691 “benefit corporation”

692 “benefit director”

693 “benefit officer”

694 “general public benefit”

695 “independent”

696 “publicly traded corporation”

697 “specific public benefit”

698

699

700 **§ 303. Standard of conduct for officers.**

701

702 **(a) General rule.** – Each officer of a benefit corporation shall consider the interests
703 and factors described in section 301(a)(1) in the manner provided in section 301(a)(3) if:

704

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

706

707 (2) it reasonably appears to the officer that the matter may have a material
708 effect on the creation by the benefit corporation of general public benefit or a specific
709 public benefit identified in the articles of incorporation of the benefit corporation.

710

711 **(b) Coordination with other provisions of law.** – The consideration of interests
712 and factors in the manner provided in subsection (a) shall not constitute a violation of [*cite*
713 *provision, if any, of the business corporation law on the duties of officers*] [*the duties of an*

714 *officer*].

715

716 **(c) Exoneration from personal liability.** – Except as provided in the [*articles of*
717 *incorporation*] [*bylaws*], an officer is not personally liable for monetary damages for:

718

719 (1) an action or inaction as an officer in the course of performing the duties of
720 an officer under subsection (a) if the officer was not interested with respect to the action or
721 inaction; or

722

723 (2) failure of the benefit corporation to pursue or create general public benefit
724 or specific public benefit.

725

726 **(d) Limitation on standing.** – An officer does not have a duty to a person that is a
727 beneficiary of the general public benefit purpose or a specific public benefit purpose of a
728 benefit corporation arising from the status of the person as a beneficiary.

729

730 **(e) Business judgments.** – An officer who makes a business judgment in good
731 faith fulfills the duty under this section if the officer:

732

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

734

735 (2) is informed with respect to the subject of the business judgment to the
736 extent the officer reasonably believes to be appropriate under the circumstances; and

737

738 (3) rationally believes that the business judgment is in the best interests of the
739 benefit corporation.

740

741 **Comment:**

742

743 As an agent of the corporation, an officer is generally required to follow the
744 instructions of his or her principal. But in those instances where an officer has discretion
745 to act with a respect to a matter, subsection (a) requires the officer to consider the interests
746 of the benefit corporation’s constituencies in the same manner as required of the directors
747 by section 301.

748

749 This section applies to all of the officers of a benefit corporation and is not limited
750 just to the benefit officer, if any, of the benefit corporation.

751

752 Subsection (c) provides an exoneration from personal liability for officers similar to
753 the exoneration provided for directors. If the law of the enacting state is not clear that
754 officers can be exonerated in the same manner as directors, consideration should be given
755 to confirming that officers of business corporations that are not benefit corporations may
756 be exonerated. *See also* the Comment to section 301(d) with respect to subsection (d).

757

758 Subsection (e) confirms that the business judgment rule applies to actions by officers

759 under this section. The formulation of the rule is patterned after American Law Institute,
760 Principles of Corporate Governance: Analysis and Recommendations § 4.01(c). If the law
761 of the enacting state is not clear that the business judgment rule applies generally to actions
762 by officers of corporations that are not business corporations, consideration should be
763 given to confirming that the rule applies more broadly than just under this chapter. The
764 best interests of the corporation referred to in subsection (e)(3) include the creation of
765 general public benefit and specific public benefit under section 201(c) and the
766 determination of what is in the best interests of the benefit corporation requires
767 consideration of the interests and factors listed in section 301(a) (as provided by subsection
768 (a)).

769
770 The following terms used in this section are defined in section 102:

771 “benefit corporation”

772 “benefit officer”

773 “general public benefit”

774 “specific public benefit”

775
776
777
778 **§ 304. Benefit officer.**

779
780 **(a) Designation.** – A benefit corporation may have an officer designated the
781 benefit officer.

782
783 **(b) Functions.** – A benefit officer shall have:

784
785 (1) the powers and duties relating to the purpose of the corporation to create
786 general public benefit or specific public benefit provided:

787
788 (i) by the bylaws; or

789
790 (ii) absent controlling provisions in the bylaws, by resolution or order of
791 the board of directors.

792
793 (2) the duty to prepare the benefit report required by section 401.

794
795 **Comment:**

796
797 The designation of a benefit officer is optional. But if a benefit officer is designated,
798 one of the duties of that officer will be to prepare the annual benefit report required by
799 section 401.

800
801 The following terms used in this section are defined in section 102:

802
803 “benefit corporation”

804 “benefit officer”
805 “general public benefit”
806 “specific public benefit”
807
808

809 **§ 305. Right of action.**

810
811 **(a) General rule.** – Except in a benefit enforcement proceeding, no person may
812 bring an action or assert a claim against a benefit corporation or its directors or officers
813 with respect to:

814
815 (1) failure to pursue or create general public benefit or a specific public
816 benefit set forth in its articles of incorporation; or

817
818 (2) violation of an obligation, duty, or standard of conduct under this
819 [*chapter*].

820
821 **(b) Limitation on liability of corporation.** – A benefit corporation shall not be
822 liable for monetary damages under this [*chapter*] for any failure of the benefit corporation
823 to pursue or create general public benefit or a specific public benefit.

824
825 **(c) Standing.** – A benefit enforcement proceeding may be commenced or
826 maintained only:

827
828 (1) directly by the benefit corporation; or

829
830 (2) derivatively [*in accordance with [cite sections of business corporation*
831 *law on derivative suits]*] by:

832
833 (i) a person or group of persons that owned beneficially or of record at
834 least 2% of the total number of shares of a class or series outstanding at the time of the act
835 or omission complained of;

836
837 (ii) a director;

838
839 (iii) a person or group of persons that owned beneficially or of record
840 5% or more of the outstanding equity interests in an entity of which the benefit corporation
841 is a subsidiary at the time of the act or omission complained of; or

842
843 (iv) other persons as specified in the articles of incorporation or bylaws
844 of the benefit corporation.

845
846 **(d) Beneficial ownership.** – For purposes of this section, a person is the beneficial
847 owner of shares or equity interests if the shares or equity interests are held in a voting trust
848 or by a nominee on behalf of the beneficial owner.

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Comment:

Standing in an action against the directors or officers of a business corporation that is not a benefit corporation for breach of duty is limited in most states just to the corporation or shareholders bringing a derivative suit. This section broadens the categories of persons that can bring a derivative suit to include directors, 5% owners of a parent entity, and other persons to which a benefit corporation grants standing in its articles of incorporation or bylaws. To reduce the possibility of nuisance suits, a shareholder or group of shareholders bringing a derivative suit must own at least 2% of the outstanding shares of the benefit corporation.

This section only applies to actions or claims arising under this chapter. Lawsuits for breaches of duty arising outside of this chapter, or for breach of contract by directors, officers, or the benefit corporation are not subject to this section.

The following terms used in this section are defined in section 102:

- “benefit corporation”
- “benefit enforcement proceeding”
- “general public benefit”
- “specific public benefit”
- “subsidiary”

Subchapter 4 Transparency

Section

- 401. Preparation of annual benefit report.
- 402. Availability of annual benefit report.

§ 401. Preparation of annual benefit report.

(a) Contents. – A benefit corporation shall prepare an annual benefit report including all of the following:

(1) A narrative description of:

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

(ii) Both:

(A) the ways in which the benefit corporation pursued a specific

894 public benefit that the articles of incorporation state it is the purpose of the benefit
895 corporation to create; and
896
897 (B) the extent to which that specific public benefit was created.
898
899 (iii) Any circumstances that have hindered the creation by the benefit
900 corporation of general public benefit or specific public benefit.
901
902 (iv) The process and rationale for selecting or changing the third-party
903 standard used to prepare the benefit report.
904
905 (2) An assessment of the overall social and environmental performance of the
906 benefit corporation against a third-party standard:
907
908 (i) applied consistently with any application of that standard in prior
909 benefit reports; or
910
911 (ii) accompanied by an explanation of the reasons for:
912
913 (A) any inconsistent application; or
914
915 (B) the change to that standard from the one used in the
916 immediately prior report.
917
918 (3) The name of the benefit director and the benefit officer, if any, and the
919 address to which correspondence to each of them may be directed.
920
921 (4) The compensation paid by the benefit corporation during the year to each
922 director in the capacity of a director.
923
924 (5) The statement of the benefit director described in section 302(c).
925
926 (6) A statement of any connection between the organization that established
927 the third-party standard, or its directors, officers or any holder of 5% or more of the
928 governance interests in the organization, and the benefit corporation or its directors,
929 officers or any holder of 5% or more of the outstanding shares of the benefit corporation,
930 including any financial or governance relationship which might materially affect the
931 credibility of the use of the third-party standard.
932
933 **(b) Change of benefit director.** – If, during the year covered by a benefit report, a
934 benefit director resigned from or refused to stand for reelection to the position of benefit
935 director, or was removed from the position of benefit director, and the benefit director
936 furnished the benefit corporation with any written correspondence concerning the
937 circumstances surrounding the resignation, refusal, or removal, the benefit report shall
938 include that correspondence as an exhibit.

939
940 (c) **Audit not required.** – Neither the benefit report nor the assessment of the
941 performance of the benefit corporation in the benefit report required by subsection (a)(2)
942 needs to be audited or certified by a third party.

943
944 **Comment:**

945
946 A benefit corporation may change from year to year the standard it uses under
947 subsection (a)(2) for assessing its performance. But if a benefit corporation uses the same
948 standard for assessing its performance in more than one year, the standard must either be
949 applied consistently or the benefit corporation must provide an explanation of the reasons
950 for any inconsistent use of the standard.

951
952 Subsection (b) is patterned after Item 5.02(a)(2) of Form 8-K under the Securities
953 Exchange Act of 1934.

954
955 The following terms used in this section are defined in section 102:

956
957 “benefit corporation”

958 “benefit director”

959 “general public benefit”

960 “specific public benefit”

961 “third-party standard”

962
963
964 **§ 402. Availability of annual benefit report.**

965
966 (a) **Timing of report.** – A benefit corporation shall send its annual benefit report to
967 each shareholder on the earlier of:

968
969 (1) 120 days following the end of the fiscal year of the benefit corporation; or

970
971 (2) the same time that the benefit corporation delivers any other annual report
972 to its shareholders.

973
974 (b) **Internet website posting.** – A benefit corporation shall post all of its benefit
975 reports on the public portion of its Internet website, if any; but the compensation paid to
976 directors and financial or proprietary information included in the benefit reports may be
977 omitted from the benefit reports as posted.

978
979 (c) **Availability of copies.** – If a benefit corporation does not have an Internet
980 website, the benefit corporation shall provide a copy of its most recent benefit report,
981 without charge, to any person that requests a copy, but the compensation paid to directors
982 and financial or proprietary information included in the benefit report may be omitted from
983 the copy of the benefit report provided.

984
985 **(d) Filing of report.** – Concurrently with the delivery of the benefit report to
986 shareholders under subsection (a), the benefit corporation shall deliver a copy of the
987 benefit report to the [*Secretary of State*] for filing, but the compensation paid to directors
988 and financial or proprietary information included in the benefit report may be omitted from
989 the benefit report as delivered to the [*Secretary of State*]. The [*Secretary of State*] shall
990 charge a fee of \$__ for filing a benefit report.

991
992 **Comment:**

993
994 Subsection (b) requires a benefit corporation to post all of its annual benefit reports
995 on its website, but subsection (c) only requires that the most recent benefit report be
996 supplied if the benefit corporation does not have a website.

997
998 The term “benefit corporation” used in this section is defined in section 102.

999
1000 “benefit corporation”
1001 “benefit director”