

1 **MODEL BENEFIT CORPORATION LEGISLATION**
2 **With Explanatory Comments¹**

3
4 **[Chapter] __**
5 **Benefit Corporations**

6
7 [Subchapter]

- 8 1. Preliminary Provisions
9 2. Corporate Purposes
10 3. Accountability
11 4. Transparency

12
13 **[Subchapter] 1**
14 **Preliminary Provisions**

15
16 Section

- 17 101. Application and effect of [chapter].
18 102. Definitions.
19 103. Incorporation of benefit corporation.
20 104. Election of benefit corporation status.
21 105. Termination of benefit corporation status.

22
23 **§ 101. Application and effect of [chapter].**

24
25 **(a) General rule.** – This [chapter] shall be applicable to all benefit corporations.

26
27 **(b) Application of business corporation law generally.** – The existence of a
28 provision of this [chapter] shall not of itself create an implication that a contrary or
29 different rule of law is applicable to a business corporation that is not a benefit corporation.
30 This [chapter] shall not affect a statute or rule of law that is applicable to a business
31 corporation that is not a benefit corporation.

32
33 **(c) Laws applicable.** – Except as otherwise provided in this [chapter], [the
34 *enacting state's business corporation law*] shall be generally applicable to all benefit
35 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).

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

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

46 **Comment:**
47

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

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

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

69 The term “benefit corporation” used in this section is defined in section 102.
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71

72 **§ 102. Definitions.**
73

74 The following words and phrases when used in this [chapter] shall have the
75 meanings given to them in this section unless the context clearly indicates otherwise:
76

77 **“Benefit corporation.”** A business corporation:
78

- 79 (1) that has elected to become subject to this [chapter]; and
80

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

82
83 **“Benefit director.”** The director, if any, designated as the benefit director of a
84 benefit corporation under section 302.

85
86 **“Benefit enforcement proceeding.”** A claim, action, or proceeding for:

87
88 (1) failure of a benefit corporation to pursue or create general public benefit
89 or a specific public benefit purpose set forth in its articles; or

90
91 (2) violation of any obligation, duty, or standard of conduct under this
92 [chapter].

93
94 **“Benefit officer.”** The individual, if any, designated as the benefit officer of a
95 benefit corporation under section 304.

96
97 **“General public benefit.”** A material positive impact on society and the
98 environment, taken as a whole, from the business and operations of a benefit corporation
99 assessed taking into account the impacts of the benefit corporation as reported against a
100 third-party standard.

101
102 **“Independent.”** Having no material relationship with a benefit corporation or a
103 subsidiary of the benefit corporation. Serving as a benefit director or benefit officer does
104 not make an individual not independent. A material relationship between an individual and
105 a benefit corporation or any of its subsidiaries will be conclusively presumed to exist if any
106 of the following apply:

107
108 (1) The individual is, or has been within the last three years, an employee
109 other than a benefit officer of the benefit corporation or a subsidiary.

110
111 (2) An immediate family member of the individual is, or has been within the
112 last three years, an executive officer other than a benefit officer of the benefit corporation
113 or a subsidiary.

114
115 (3) There is beneficial or record ownership of 5% or more of the outstanding
116 shares of the benefit corporation, calculated as if all outstanding rights to acquire equity
117 interests in the benefit corporation had been exercised, by:

118
119 (i) the individual; or

120
121 (ii) an entity:

122
123 (A) of which the individual is a director, an officer, or a manager;

124 or

125

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

130 **“Minimum status vote.”**

131
132 (1) In the case of a business corporation, in addition to any other required
133 approval or vote, the satisfaction of the following conditions:
134

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

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

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

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

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

156 **“Specific public benefit.”** Includes:
157

158 (1) providing low-income or underserved individuals or communities with
159 beneficial products or services;
160

161 (2) promoting economic opportunity for individuals or communities beyond
162 the creation of jobs in the normal course of business;
163

164 (3) protecting or restoring the environment;

165 (4) improving human health;

166 (5) promoting the arts, sciences, or advancement of knowledge;

167 (6) increasing the flow of capital to entities with a purpose to benefit society
168
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171 or the environment; and

172

173 (7) conferring any other particular benefit on society or the environment.

174

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

178

179 **“Third-party standard.”** A recognized standard for reporting overall social and
180 environmental performance of a business that is:

181

182 (1) Comprehensive because it assesses the effects of the business and its
183 operations upon the interests listed in section 301(a)(1)(ii), (iii), (iv) and (v).

184

185 (2) Developed by an entity that is not controlled by the benefit corporation.

186

187 (3) Credible because it is developed by an entity that both:

188

189 (i) has access to necessary expertise to assess overall corporate social
190 and environmental performance; and

191

192 (ii) uses a balanced multistakeholder approach to develop the standard,
193 including a reasonable public comment period.

194

195 (4) Transparent because the following information is publicly available:

196

197 (i) About the standard:

198

199 (A) The criteria considered when measuring the overall social and
200 environmental performance of a business.

201

202 (B) The relative weightings, if any, of those criteria.

203

204 (ii) About the development and revision of the standard:

205

206 (A) The identity of the directors, officers, material owners, and the
207 governing body of the entity that developed and controls revisions to the standard.

208

209 (B) The process by which revisions to the standard and changes to
210 the membership of the governing body are made.

211

212 (C) An accounting of the revenue and sources of financial support
213 for the entity, with sufficient detail to disclose any relationships that could reasonably be
214 considered to present a potential conflict of interest.

215

216 **Comment:**

217

218 **“Benefit corporation.”** The provisions of this chapter apply to a business
219 corporation while it has the status of a benefit corporation because its articles contain a
220 statement that it is a benefit corporation. If that statement is deleted as provided in section
221 105, the corporation will cease to be a benefit corporation immediately upon the
222 effectiveness of the deletion.

223

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

229

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

237

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

244

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

252

253 The second paragraph of the definition extends its policy to other forms of entities so
254 that, for example, a merger of a limited liability company into a benefit corporation must
255 be approved by the members of the limited liability company by at least a two-thirds vote.
256 The second paragraph should be omitted by those states that require a supermajority vote
257 of two-thirds or more by the owners of an unincorporated entity to approve a fundamental
258 change. *See, e.g.*, Uniform Limited Liability Company Act (2006) (Last Amended 2013) §
259 1023, which requires a unanimous vote by the members of a limited liability company to
260 approve a merger.

261
262 The two-thirds vote required by the definition is in addition to any other vote
263 required in the case of any particular corporation or other form of entity. If the articles of a
264 corporation were to require, for example, an 80% supermajority vote to approve a merger,
265 a 70% vote to approve a merger of the corporation into a benefit corporation would be
266 sufficient to satisfy the requirement that the merger be approved by the minimum status
267 vote but would not be sufficient for valid approval of the merger.
268

269 **“Specific public benefit.”** Every benefit corporation has the purpose under section
270 201(a) of creating general public benefit. A benefit corporation may also elect to pursue
271 one or more specific public benefit purposes. Since the creation of specific public benefit
272 is optional, paragraph (7) of this definition permits a benefit corporation to identify a
273 specific public benefit that is different from those listed in paragraphs (1) through (6).
274

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

291 The financial support that must be disclosed by an organization if it wishes to make
292 available a third party standard should include investment income, grants, and other types
293 of support in addition to revenue it receives from its operations.
294
295

296 **§ 103. Incorporation of benefit corporation.**

297

298 A benefit corporation shall be incorporated in accordance with [*cite incorporation*
299 *provisions of the business corporation law*], but its articles of incorporation must also state
300 that it is a benefit corporation.
301

302 **Comment:**

303

304 This section provides for how a corporation that is being newly formed may elect to
305 be a benefit corporation. Existing corporations may become benefit corporations in the

306 manner provided in section 104.
307

308 This chapter only applies to domestic business corporations. A foreign business
309 corporation that has a status in its home jurisdiction similar to the status of a benefit
310 corporation under this chapter is not subject to this chapter and has the status simply of a
311 foreign business corporation for purposes of the state’s business corporation law.
312

313 The term “benefit corporation” used in this section is defined in section 102.
314
315

316 § 104. Election of benefit corporation status. 317

318 (a) **Amendment.** – An existing business corporation may become a benefit
319 corporation under this [*chapter*] by amending its articles of incorporation so that they
320 contain, in addition to the requirements of [*cite section of the business corporation law on*
321 *the required contents of articles of incorporation*], a statement that the corporation is a
322 benefit corporation. In order to be effective, the amendment must be adopted by at least
323 the minimum status vote.
324

325 (b) **Fundamental transactions.** – 326

327 (1) Except as provided in paragraph (2), if a domestic entity that is not a
328 benefit corporation is a party to a merger[, *consolidation, or conversion*] [*or the*
329 *exchanging entity in a share exchange*] and the surviving[, *new, or resulting*] entity in the
330 merger, [*consolidation, conversion, or share exchange*] is to be a benefit corporation, the
331 [*plan of*] merger[, *consolidation, conversion, or share exchange*] must be [*adopted*]
332 [*approved*] by the domestic entity by at least the minimum status vote.
333

334 (2) Paragraph (1) does not apply in the case of a corporation that is a party to
335 a merger if the shareholders of the corporation are not entitled to vote on the merger
336 pursuant to [*cite section of the business corporation law authorizing “short form”*
337 *mergers*].
338

339 **Comment:** 340

341 This section provides the procedures for an existing corporation to become a benefit
342 corporation. A corporation that is being newly formed may become a benefit corporation
343 in the manner provided in section 103. Subsection (a) applies to a business corporation
344 that is directly electing to be a benefit corporation by amending its articles of
345 incorporation. Subsection (b) applies when a corporation is becoming a benefit
346 corporation indirectly in the context of a fundamental transaction. In both cases, the
347 change to benefit corporation status must be approved by at least the minimum status vote.
348

349 Subsection (b) also applies to a domestic entity that is not a corporation when the
350 entity is a party to a transaction that will result in a benefit corporation. In those situations,

351 a supermajority vote of the owners of the entity is required by subsection (b).
352

353 *See* section 201(d) with respect to changing the identification of a specific public
354 benefit that it is the purpose of a benefit corporation to pursue.
355

356 The following terms used in this section are defined in section 102:
357

358 “benefit corporation”

359 “minimum status vote”
360
361

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

363
364 **(a) Amendment.** – A benefit corporation may terminate its status as such and
365 cease to be subject to this [*chapter*] by amending its articles of incorporation to delete the
366 provision required by section 103 or 104 to be stated in the articles of a benefit
367 corporation. In order to be effective, the amendment must be adopted by at least the
368 minimum status vote.
369

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

371
372 (1) Except as provided in paragraph (2), if a [*plan of*] merger[, *consolidation,*
373 *conversion, or share exchange*] would have the effect of terminating the status of a
374 business corporation as a benefit corporation, the [*plan*] [*transaction*] must be adopted by
375 at least the minimum status vote in order to be effective.
376

377 (2) Paragraph (1) does not apply in the case of a corporation that is a party to
378 a merger if the shareholders of the corporation are not entitled to vote on the merger
379 pursuant to [*cite section of the business corporation law authorizing “short form”*
380 *mergers*].
381

382 (3) Any sale, lease, exchange, or other disposition of all or substantially all of
383 the assets of a benefit corporation, unless the transaction is in the usual and regular course
384 of business, shall not be effective unless the transaction is approved by at least the
385 minimum status vote.
386

387 **Comment:**

388
389 This section provides the procedures for a benefit corporation to terminate
390 voluntarily its status as a benefit corporation. As with an election of benefit corporation
391 status under section 104, the termination may be accomplished either directly by an
392 amendment of the articles or indirectly through a fundamental transaction.
393

394 Subsection (b)(3) provides a special rule for a sale of all or substantially all of the
395 assets of a benefit corporation. Such a transaction will not result in a termination of the

396 status of the corporation as a benefit corporation, but will have effectively the same result
397 since it will terminate the operations of the business. Thus it was considered appropriate to
398 require approval of a sale of assets by the minimum status vote. Whether a sale of assets is
399 in the usual and regular course will be determined under the same standards as apply to
400 that question under the state’s business corporation law. *See, e.g., Model Business*
401 *Corporation Act* §§ 12.01 and 12.02.

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

403 “benefit corporation”

404 “minimum status vote”

405 **Subchapter 2**

406 **Corporate Purposes**

407 Section

408 201. Corporate purposes.

409 **§ 201. Corporate purposes.**

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

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

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

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

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

441 **Comment:**

442

443 Every benefit corporation has the corporate purpose of creating general public
444 benefit. A benefit corporation may also elect to pursue specific public benefits under
445 subsection (b).

446

447 Subsection (c) confirms that pursuing general and specific public benefit is in the
448 best interests of the benefit corporation. Because the basic duty of a director is to act in a
449 manner that the director reasonably believes to be in the best interests of the corporation,
450 decisions by the board of directors that promote the creation of general or specific public
451 benefit will satisfy the requirement to act in the best interests of the corporation. If an
452 ordinary business corporation includes in its articles of incorporation a statement of a
453 specific purpose, it is by definition in the best interests of the corporation for the directors
454 to pursue that purpose. Thus the rule in subsection (c) would be the case in any event with
455 respect to specific public benefit purposes, but specific public benefits have been referred
456 to expressly in subsection (c) to avoid the confusion that might result if subsection (c) only
457 referred to the creation of general public benefit.

458

459 Some professional corporation statutes provide that a professional corporation may
460 not engage in any business other than rendering the professional service for which it was
461 specifically incorporated. Subsection (e) makes clear that such a limitation will not
462 interfere with a professional corporation electing to be a benefit corporation. In such a
463 case, the professional corporation (such as a law firm, accounting firm, or medical
464 practice) will be limited to providing the professional services for which it was
465 incorporated, but it will be able to provide those services in a manner that creates general
466 public benefit or a specific public benefit (for example, a medical practice that focuses on
467 providing care for low-income individuals).

468

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

470

471 “benefit corporation”

472 “general public benefit”

473 “minimum status vote”

474 “specific public benefit”

475

476

477 **Subchapter 3**
478 **Accountability**

479

480 Section

481 301. Standard of conduct for directors.

482 302. Benefit director.

483 303. Standard of conduct for officers.

484 304. Benefit officer.

485 305. Right of action.

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§ 301. Standard of conduct for directors.

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

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

(i) the shareholders of the benefit corporation;

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

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

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

(v) the local and global environment;

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

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

(2) may consider:

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

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

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

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

533
534 (1) does not constitute a violation of [*cite provision of the business*
535 *corporation law on the duties of directors generally*] [; and

536
537 (2) *is in addition to the ability of directors to consider interests and factors as*
538 *provided in [cite constituencies provision of the business corporation law]*].

539
540 **(c) Exoneration from personal liability.** – Except as provided in the [*articles of*
541 *incorporation*] [*bylaws*], a director is not personally liable for monetary damages for:

542
543 (1) any action or inaction in the course of performing the duties of a director
544 under subsection (a) if the director was not interested with respect to the action or inaction;
545 or

546
547 (2) failure of the benefit corporation to pursue or create general public benefit
548 or specific public benefit.

549
550 **(d) Limitation on standing.** – A director does not have a duty to a person that is a
551 beneficiary of the general public benefit purpose or a specific public benefit purpose of a
552 benefit corporation arising from the status of the person as a beneficiary.

553
554 **(e) Business judgments.** – A director who makes a business judgment in good
555 faith fulfills the duty under this section if the director:

556
557 (1) is not interested in the subject of the business judgment;

558
559 (2) is informed with respect to the subject of the business judgment to the
560 extent the director reasonably believes to be appropriate under the circumstances; and

561
562 (3) rationally believes that the business judgment is in the best interests of the
563 benefit corporation.

564
565 **Comment:**

566
567 This section is at the heart of what it means to be a benefit corporation. By requiring
568 the consideration of interests of constituencies other than the shareholders, the section
569 rejects the holdings in *Dodge v. Ford*, 170 N.W. 668 (Mich. 1919), and *eBay Domestic*
570 *Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010), that directors must maximize the
571 financial value of a corporation.

572
573 In a state that has adopted a “constituency statute,” directors are authorized to
574 consider the interests of corporate constituencies other than the shareholders, but the
575 directors are not *required* to do so. Subsection (a) makes it mandatory for the directors of

576 a benefit corporation to consider the interests and factors that they would otherwise simply
577 be permitted to consider in their discretion under the typical constituency statute.

578

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

586

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

597

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

599

600 “benefit corporation”
601 “general public benefit”
602 “specific public benefit”
603 “subsidiary”

604

605

606 § 302. Benefit director.

607

608 (a) **General rule.** – The board of directors of a benefit corporation may include a
609 director who:

610

611 (1) is designated the benefit director; and

612

613 (2) has, in addition to the powers, duties, rights, and immunities of the other
614 directors of the benefit corporation, the powers, duties, rights, and immunities provided in
615 this [*chapter*].

616

617 (b) **Election, removal, and qualifications.** – A benefit director shall be elected,
618 and may be removed, in the manner provided by [*cite provisions of the business*
619 *corporation law on the election and removal of directors generally*]. [*Except as provided*
620 *in subsection (f),*] a benefit director shall be an individual who is independent. A benefit

621 director may serve as the benefit officer at the same time as serving as the benefit director.
622 The articles of incorporation or bylaws of a benefit corporation may prescribe additional
623 qualifications of a benefit director not inconsistent with this subsection.
624

625 **(c) Annual compliance statement.** – The benefit director shall prepare, and the
626 benefit corporation shall include in the annual benefit report to shareholders required by
627 section 401, a report from the benefit director on all of the following:
628

629 (1) Whether the benefit corporation acted in accordance with its general
630 public benefit purpose and any specific public benefit purpose in all material respects
631 during the period covered by the report.
632

633 (2) Whether the directors and officers complied with sections 301(a) and
634 303(a), respectively.
635

636 (3) If the benefit director believes that the benefit corporation or its directors
637 or officers failed to act or comply in the manner described in paragraphs (1) and (2), a
638 description of the ways in which the benefit corporation or its directors or officers failed to
639 act or comply.
640

641 **(d) Status of actions.** – The act or inaction of an individual in the capacity of a
642 benefit director shall constitute for all purposes an act or inaction of that individual in the
643 capacity of a director of the benefit corporation.
644

645 **(e) Exoneration from personal liability.** – Regardless of whether the articles of
646 incorporation or bylaws of a benefit corporation include a provision eliminating or limiting
647 the personal liability of directors authorized by [*cite section of the business corporation*
648 *law permitting exoneration of directors*], a benefit director shall not be personally liable
649 for an act or omission in the capacity of a benefit director unless the act or omission
650 constitutes self-dealing, willful misconduct, or a knowing violation of law.
651

652 **[(f) Professional Corporations.** – *The benefit director of a professional corporation*
653 *does not need to be independent.*]
654

655 **Comment:**
656

657 The designation of a benefit director is optional. But if a benefit director is
658 designated, one of the duties of that director will be to prepare the annual compliance
659 statement required by subsection (c).
660

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

666 corporation and its resources.

667

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

671

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

678

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

680

681 “benefit corporation”

682 “benefit director”

683 “benefit officer”

684 “general public benefit”

685 “independent”

686 “publicly traded corporation”

687 “specific public benefit”

688

689

690 § 303. Standard of conduct for officers.

691

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

694

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

696

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

700

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

705

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

708

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

711 inaction; or

712

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

715

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

719

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

722

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

724

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

727

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

730

731 **Comment:**

732

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

738

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

741

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

747

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

756 the benefit corporation requires consideration of the interests and factors listed in section
757 301(a) (as provided by subsection (a)).

758

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

760

761 “benefit corporation”

762 “benefit officer”

763 “general public benefit”

764 “specific public benefit”

765

766

767 **§ 304. Benefit officer.**

768

769 **(a) Designation.** – A benefit corporation may have an officer designated the
770 benefit officer.

771

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

773

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

776

777 (i) by the bylaws; or

778

779 (ii) absent controlling provisions in the bylaws, by resolution or order of
780 the board of directors.

781

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

783

784 **Comment:**

785

786 The designation of a benefit officer is optional. But if a benefit officer is designated,
787 one of the duties of that officer will be to prepare the annual benefit report required by
788 section 401.

789

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

791

792 “benefit corporation”

793 “benefit officer”

794 “general public benefit”

795 “specific public benefit”

796

797

798 **§ 305. Right of action.**

799

800 **(a) General rule.** – Except in a benefit enforcement proceeding, no person may

801 bring an action or assert a claim with respect to:

802

803 (1) failure of a benefit corporation to pursue or create general public benefit
804 or a specific public benefit set forth in its articles of incorporation; or

805

806 (2) violation of an obligation, duty, or standard of conduct under this
807 [*chapter*].

808

809 **(b) Standing.** – A benefit enforcement proceeding may be commenced or
810 maintained only:

811

812 (1) directly by the benefit corporation; or

813

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

816

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

820

821 (ii) a person or group of persons that owned beneficially or of record
822 5% or more of the outstanding equity interests in an entity of which the benefit corporation
823 is a subsidiary at the time of the act or omission complained of.

824

825 **(c) Beneficial ownership.** – For purposes of this section, a person is the beneficial
826 owner of shares or equity interests if the shares or equity interests are held in a voting trust
827 or by a nominee on behalf of the beneficial owner.

828

829 **Comment:**

830

831 This section limits actions to enforce this chapter just to suits against the directors,
832 but it broadens the categories of persons that can bring a derivative suit to include 5%
833 owners of a parent entity of a benefit corporation. To reduce the possibility of nuisance
834 suits, a shareholder or group of shareholders bringing a derivative suit must own at least
835 2% of the outstanding shares of the benefit corporation.

836

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

840

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

842

843 “benefit corporation”

844 “benefit enforcement proceeding”

845 “general public benefit”

846 “specific public benefit”
847 “subsidiary”

848
849

850 **Subchapter 4** 851 **Transparency**

852
853

Section

854 401. Preparation of annual benefit report.

855 402. Availability of annual benefit report.

856

857 **§ 401. Preparation of annual benefit report.**

858

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

861

(1) A narrative description of:

862

863

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

866

(ii) Both:

867

868

869 (A) the ways in which the benefit corporation pursued a specific
870 public benefit that the articles of incorporation state it is the purpose of the benefit
871 corporation to create; and

872

(B) the extent to which that specific public benefit was created.

873

874

875 (iii) Any circumstances that have hindered the creation by the benefit
876 corporation of general public benefit or specific public benefit.

877

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

880

881 (2) An assessment of the overall social and environmental performance of the
882 benefit corporation determined taking into account the impacts of the benefit corporation
883 reported against a third-party standard:

884

885 (i) applied consistently with any application of that standard in prior
886 benefit reports; or

887

888

(ii) accompanied by an explanation of the reasons for:

889

890

(A) any inconsistent application; or

891
892 (B) the change to that standard from the one used in the
893 immediately prior report.
894

895 (3) The name of the benefit director and the benefit officer, if any, and the
896 address to which correspondence to each of them may be directed.
897

898 (4) The compensation paid by the benefit corporation during the year to each
899 director in the capacity of a director.
900

901 (5) The statement of the benefit director described in section 302(c).
902

903 (6) A statement of any connection between the organization that established
904 the third-party standard, or its directors, officers or any holder of 5% or more of the
905 governance interests in the organization, and the benefit corporation or its directors,
906 officers or any holder of 5% or more of the outstanding shares of the benefit corporation,
907 including any financial or governance relationship which might materially affect the
908 credibility of the use of the third-party standard.
909

910 **(b) Change of benefit director.** – If, during the year covered by a benefit report, a
911 benefit director resigned from or refused to stand for reelection to the position of benefit
912 director, or was removed from the position of benefit director, and the benefit director
913 furnished the benefit corporation with any written correspondence concerning the
914 circumstances surrounding the resignation, refusal, or removal, the benefit report shall
915 include that correspondence as an exhibit.
916

917 **(c) Audit not required.** – Neither the benefit report nor the assessment of the
918 performance of the benefit corporation in the benefit report required by subsection (a)(2)
919 needs to be audited or certified by a third party.
920

921 **Comment:**
922

923 A benefit corporation may change from year to year the standard it uses under
924 subsection (a)(2) for assessing its performance. But if a benefit corporation uses the same
925 standard for assessing its performance in more than one year, the standard must either be
926 applied consistently or the benefit corporation must provide an explanation of the reasons
927 for any inconsistent use of the standard.
928

929 Subsection (b) is patterned after Item 5.02(a)(2) of Form 8-K under the Securities
930 Exchange Act of 1934.
931

932 The following terms used in this section are defined in section 102:
933

934 “benefit corporation”
935

“benefit director”

936 “general public benefit”
937 “specific public benefit”
938 “third-party standard”
939

940

941 **§ 402. Availability of annual benefit report.**
942

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

945
946 (1) 120 days following the end of the fiscal year of the benefit corporation; or
947

948 (2) the same time that the benefit corporation delivers any other annual report
949 to its shareholders.
950

951 **(b) Internet website posting.** – A benefit corporation shall post all of its benefit
952 reports on the public portion of its Internet website, if any; but the compensation paid to
953 directors and financial or proprietary information included in the benefit reports may be
954 omitted from the benefit reports as posted.
955

956 **(c) Availability of copies.** – If a benefit corporation does not have an Internet
957 website, the benefit corporation shall provide a copy of its most recent benefit report,
958 without charge, to any person that requests a copy, but the compensation paid to directors
959 and financial or proprietary information included in the benefit report may be omitted from
960 the copy of the benefit report provided.
961

962 **(d) Filing of report.** – Concurrently with the delivery of the benefit report to
963 shareholders under subsection (a), the benefit corporation shall deliver a copy of the
964 benefit report to the [*Secretary of State*] for filing, but the compensation paid to directors
965 and financial or proprietary information included in the benefit report may be omitted from
966 the benefit report as delivered to the [*Secretary of State*]. The [*Secretary of State*] shall
967 charge a fee of \$__ for filing a benefit report.
968

969 **Comment:**
970

971 Subsection (b) requires a benefit corporation to post all of its annual benefit reports
972 on its website, but subsection (c) only requires that the most recent benefit report be
973 supplied if the benefit corporation does not have a website.
974

975 The term “benefit corporation” used in this section is defined in section 102.
976

977 “benefit corporation”
978 “benefit director”