

## **How to Become a Delaware Public Benefit Corporation**

Note: This outline is not intended to provide legal advice to any specific business. Businesses should obtain competent legal and accounting advice before taking any steps to become a public benefit corporation.

This outline describes the major steps required for an existing Delaware corporation to become a Delaware public benefit corporation.

1. **Due diligence.** Becoming a public benefit corporation requires that a corporation's certificate of incorporation (the "certificate") be amended to elect public benefit corporation status and to include the words "public benefit corporation," "P.B.C." or "PBC" in its name. Before taking any formal steps to amend its certificate, a corporation should review its contracts to determine if they require any consents, notices or other actions in order for an amendment of the certificate and name change not to constitute a default under the contract. This is particularly important with respect to bank or other loan documents because they often require the consent of the lender, or at least notice to the lender, before the borrower may amend its certificate or change its name. The corporation should also review its intellectual property filings and consider whether any action or consent will be required with respect to the corporation's intellectual property. For example, if the corporation has registered its corporate name, e.g., "XYZ, Inc.," an amendment of the registration will need to be filed with the Patent and Trademark Office.
2. **Prepare certificate amendment.** Prepare an amendment to the corporation's certificate. The following provisions are either required or should be considered:
  - 2.1. The heading of the certificate must state that the corporation is a public benefit corporation.
  - 2.2. The name of the corporation must be changed to add the words "public benefit corporation," the abbreviation "P.B.C.," or the designation "PBC."
  - 2.3. The certificate must identify one or more specific public benefits to be promoted by the corporation.

If a corporation is already a Certified B Corporation or is thinking of becoming one, B Lab recommends that the statement of purpose track the definition of "general public benefit" found in the benefit corporation statutes of those states that authorize the creation of benefit corporations. See the sample language on Appendix A at the end of this document. In addition, a corporation that is already a Certified B Corporation or is thinking of becoming one, may wish to identify one or more additional specific public benefits. This may be useful to provide focus to the directors as they meet the 'balance' requirement in the statute, and to give stockholders notice of, and some control over, any specific public benefit purposes the corporation serves.

If a corporation is not a Certified B Corporation and is not planning to become one, its board of directors must decide what specific public benefit purpose should be included in its certificate.

- 2.4. Delaware gives public benefit corporations the option of committing to make its statement about its efforts to create public benefit: 1) available to the public (as opposed to its stockholders only); 2) annually (as opposed to biennially); and 3) in accordance with a third party standard (as opposed to using its own methodology). If a corporation is already a Certified B Corporation or is thinking of becoming one, B Lab recommends that it make each of those commitments in its certificate. See the sample language on Appendix A at the end of this document.
- 2.5. Delaware permits a public benefit corporation to include in its certificate a provision that a disinterested failure by a director to satisfy the requirements applicable to directors of a public benefit corporation will not constitute an act or omission not in good faith or a breach of the duty of loyalty. The purpose of such a provision is to protect directors and should be considered by any corporation considering an election to be a public benefit corporation. See the sample language on Appendix A at the end of this document.

[Note: The Delaware statute will permit the provisions described in 2.3 and 2.4 to be placed in the bylaws instead of the certificate. B Lab recommends that Certified B Corporations place the statements in the certificate of incorporation to make them more difficult to change.]

3. **Board approval.** The board of directors approves the amendment to the certificate and directs that the amendment be submitted to the stockholders for approval.
4. **Stockholder approval.** The stockholders approve the amendment to the certificate of incorporation. This will require a 90% affirmative vote of the outstanding shares of each class of stock of the corporation.
5. **Appraisal rights.** Even if the stockholders approve the amendment to the certificate by the required 90% affirmative vote, dissenting stockholders are entitled to an appraisal by the Delaware Court of Chancery of the fair market value of the stockholder's share of stock. The corporation is required to provide its stockholders with notice of their right to an appraisal. See Appendix B for details regarding the process and requirements for appraisal rights in Delaware.
6. **File amendment.** After the board and stockholders approve the amendment, a certificate of amendment must be prepared and filed with the Secretary of State.
7. **Print and issue new stock certificates.** The Delaware law requires that a stock certificate issued by a public benefit corporation note conspicuously that the corporation is a public benefit corporation. It is unclear whether that requirement applies to stock

certificates issued before a corporation becomes a public benefit corporation. To avoid a later challenge by a person that acquires shares represented by a stock certificate without that notation, the corporation should consider printing new stock certificates with the required notation and issuing the new stock certificates to its existing stockholders.

8. **Name change.** Make the necessary changes to reflect the corporation's new name. The corporation should update, for example, bank accounts, business cards, intellectual property registrations, etc. There is no set timing for completion of these changes, however, a corporation should aim to complete them within a commercially reasonable time following the public benefit corporation election.

## Appendix A

### **Sample language for best practice certificates of incorporation**

#### For specific public benefit:

The Corporation shall have a specific public benefit purpose of creating a material positive impact on society and the environment, taken as a whole, as assessed against a third party standard, from the business and operations of the Corporation.

#### For third party standard:

The Corporation shall deliver its public benefit statement annually, make it available to the public on its website, or if it does not have a website, upon request, and prepare it in accordance with a third party standard applied consistently with any application of that standard in prior statements or accompanied by an explanation of the reasons for any inconsistent application.

A third party standard means a credible standard for defining, reporting, and assessing a corporation's social and environmental performance that:

- 1) Assesses the effect of the business and its operations on all of the interests materially affected by the corporation's conduct;
- 2) Is developed by an organization that is not under the control of the corporation or its affiliates; and
- 3) Has information publicly available concerning:
  - (A) The criteria and relative weighting the standard uses to assess the corporation's overall social and environmental performance;
  - (B) The process by which the standard is developed and revised; and
  - (C) The independence of the organization that developed the standard, including:
    - (i) The material owners;
    - (ii) The members of the organization's governing body and how they are selected; and
    - (iii) The organization's material sources of financial support.

In addition to the requirements under Section 366(b) of the DGCL, the statement shall including all of the following:

- (1) A narrative description of the process and rationale for selecting the third-party standard used to prepare the statement; and
- (2) A statement of any connection between the entity that established the third-party standard, or its directors, officers, or material owners, and the Corporation, or its directors, officers, and material owners, including any financial or governance relationship that might materially affect the credibility of the objective assessment of the third-party standard.

For Liability Limitation:

Any disinterested failure to satisfy DGCL § 365 shall not, for the purposes of DGCL § 102(b)(7) or DGCL § 145, constitute an act or omission not in good faith, or a breach of the duty of loyalty.

## Appendix B

“Appraisal rights” (also sometimes referred to as “dissenters’ rights”) are a statutory remedy available to stockholders who object to certain extraordinary actions taken by a corporation (such as mergers, and now, under the public benefit corporation statute, charter amendments to elect public benefit corporation status). This remedy allows stockholders to require the corporation to buy their stock at a price equal to its fair market value immediately before the extraordinary corporate action is taken.

### The Corporation’s Obligations Relating to Appraisal Rights

The corporation must take certain actions prior to amending its charter to elect public benefit corporation status. The requirements include:

- Obtaining approval by at least 90% of its stockholders.
  - Vote at a stockholder meeting. If the charter amendment is to be submitted to approval at a meeting of the stockholder, the corporation must:
    - notify all of the stockholders (as of the record date for notice) at least 20 days prior to the meeting that appraisal rights are available; and
    - include in the notice a copy of Section 262 of the DGCL.
  - Approval by written consent. If the charter amendment is approved by written consent of the stockholders (in accordance with [DGCL § 228](#)), the corporation must:
    - before the effective date of the amendment or within 10 days thereafter, notify each stockholder of the approval of the amendment and that appraisal rights are available;
    - include in the notice a copy of [Section 262 of the DGCL](#);
    - the notice may, and, if given on or after the effective date of the amendment, must, also notify such stockholders of the effective date of the amendment.

### How a Stockholder Perfects Appraisal Rights

To perfect appraisal rights in Delaware, a dissenting stockholder must comply with all of the following procedures:

- Demand appraisal. The stockholder must file a written demand for appraisal with the corporation before the stockholder vote on the charter amendment to become a public benefit corporation. The demand must:
  - include the identity of the stockholder; and
  - inform the corporation that the stockholder plans to seek an appraisal of the corporation shares.
- Not vote in favor of or consent to the charter amendment to become a public benefit corporation. The stockholder may either vote against the charter amendment or abstain from the vote.

- Maintain continuous record ownership. The stockholder making the demand must be the record (registered) holder of the stock from the date of the demand for appraisal through the effective date of the charter amendment. If a broker holds stock in street name and the beneficial owner objects to the transaction and wishes to demand appraisal, the broker can usually:
  - exercise the appraisal remedy on behalf of its client (the beneficial owner); and
  - vote shares in favor of the charter amendment for another client.
- File a petition with the Delaware Court of Chancery and serve a copy of the petition on the corporation. Within 120 days after the effective date of the charter amendment, the stockholder must file a petition with the Court of Chancery and demand that it determine the value of the stock of all stockholders. It is not necessary for all dissenting stockholders to file the petition, but one stockholder must file to start the proceeding to determine the fair value of the corporation's stock (DGCL § 262(e)). All dissenting stockholders share in the cost of the proceeding.

#### How a Corporation's Must Respond to a Demand for Appraisal Rights

The corporation must follow certain procedures set out in the statute when responding to a demand for appraisal. These requirements include:

- Providing a statement stating the aggregate number of shares for which demands for appraisal have been received if requested by a stockholder who has perfected the right to an appraisal. This statement must be provided within ten days of the request ((DGCL § 262(e)).
- Filing a verified list of stockholders who have demanded appraisal with the office of the Register in Chancery within 20 days from receiving service of the appraisal petition (DGCL § 262(f)).
- The Court of Chancery will schedule the hearing if all of the procedural conditions are followed. The Register in Chancery will give notice to the corporation and to all of the dissenting stockholders on the verified list.
- The corporation is responsible for the cost of the notice.