MODEL BENEFIT CORPORATION LEGISLATION

With Explanatory Comments

[Chapter] __

Benefit Corporations

[Subchapter]

2. Corporate Purposes
3. Accountability
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[Subchapter] 1

Preliminary Provisions

Section

101. Application and effect of [chapter].
102. Definitions.
103. Incorporation of benefit corporation.
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§ 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

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[cite any statutes that provide for the incorporation of a specific type of business corporation, such as a professional corporation or for-profit cooperative corporation].

The provisions of this [chapter] shall control over the provisions of [cite the business corporation law] [and] [cite the professional corporation, cooperative corporation and other relevant laws].

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

Comment:

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

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

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

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

§ 102. Definitions.

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

“Benefit corporation.” A business corporation:

(1) that has elected to become subject to this [chapter]; and
the status of which as a benefit corporation has not been terminated.

“Benefit director.” the director designated as the benefit director of a benefit corporation under section 302.

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

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

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

“Benefit officer.” The individual designated as the benefit officer of a benefit corporation under section 304.

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

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

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

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

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

(i) the individual; or

(ii) an entity:

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

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

“Minimum status vote.”

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

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

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

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

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

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

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

“Specific public benefit.” Includes:

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

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

(3) protecting or restoring the environment;

(4) improving human health;
(5) promoting the arts, sciences, or advancement of knowledge;

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

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

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

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

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

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

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

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

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

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

   (i) About the standard:

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

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

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

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

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

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

Comment:

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

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

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

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

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

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

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

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

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

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

The financial support that must be disclosed by an organization if it wishes to make available a third party standard should include investment income, grants, and other types of support in addition to revenue it receives from its operations.
§ 103. **Incorporation of benefit corporation.**

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

**Comment:**

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

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

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

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

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

(b) **Fundamental transactions.** –

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

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

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

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

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

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

“benefit corporation”

“minimum status vote”

§ 105. Termination of benefit corporation status.

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

(b) Fundamental transactions. –

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

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

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

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

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

**Comment:**

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

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

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

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

“benefit corporation”
“general public benefit”
“minimum status vote”
“specific public benefit”
Subchapter 3
Accountability

§ 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 specific public benefit purposes 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.

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

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

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

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

(1) any action or inaction in the course of performing the duties of a director under subsection (a) if the director performed the duties of office in compliance with [cite provision of the business corporation law on the duties of directors generally] and this section; or

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

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

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

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

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

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

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.

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.

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.

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).

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

“benefit corporation”
“general public benefit”
“specific public benefit”
“subsidiary”

§ 302. Benefit director.

(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:

(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(f) Professional Corporations. – The benefit director of a professional corporation does not need to be independent.]
Comment:

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

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

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

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

“benefit corporation”
“benefit director”
“benefit officer”
“general public benefit”
“independent”
“publicly traded corporation”
“specific public benefit”

§ 303. Standard of conduct for officers.

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

(1) the officer has discretion to act with respect to a matter; and
(2) it reasonably appears to the officer that the matter may have a material effect on the creation by the benefit corporation of general public benefit or a specific public benefit identified in the articles of incorporation of the benefit corporation.

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

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

1. an action or inaction as an officer in the course of performing the duties of an officer under subsection (a) if the officer performed the duties of the position in compliance with [cite provision of the business corporation law on the duties of officers] [the duties of an officer] and this section; or

2. failure of the benefit corporation to pursue or create general public benefit or specific public benefit.

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

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

1. is not interested in the subject of the business judgment;

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

3. rationally believes that the business judgment is in the best interests of the benefit corporation.

Comment:

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

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

Subsection (c) provides an exoneration from personal liability for officers similar to the exoneration provided for directors. If the law of the enacting state is not clear that officers can be exonerated in the same manner as directors, consideration should be given to confirming that officers of business corporations that are not benefit corporations may be exonerated. See also the Comment to section 301(d) with respect to subsection (d).
Subsection (e) confirms that the business judgment rule applies to actions by officers 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 officers 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 under 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 section 301(a) (as provided by subsection (a)).

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

“benefit corporation”
“benefit officer”
“general public benefit”
“specific public benefit”

§ 304. Benefit officer.

(a) Designation. – A benefit corporation may have an officer designated the benefit officer.
(b) Functions. – A benefit officer shall have:

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

(i) by the bylaws; or

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

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

Comment:

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

The following terms used in this section are defined in section 102:
§ 305. Right of action.

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

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

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

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

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

(1) directly by the benefit corporation; or

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

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

(ii) a director;

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

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

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

**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.**

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

1. A narrative description of:
   1. The ways in which the benefit corporation pursued general public benefit during the year and the extent to which general public benefit was created.
   2. Both:
(A) the ways in which the benefit corporation pursued a specific public benefit that the articles of incorporation state it is the purpose of the benefit corporation to create; and

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

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

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

(2) An assessment of the overall social and environmental performance of the benefit corporation against a third-party standard:

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

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

(A) any inconsistent application; or

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

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

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

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

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

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

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

**Comment:**

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

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

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

“benefit corporation”

“benefit director”

“general public benefit”

“specific public benefit”

“third-party standard”

§ 402. Availability of annual benefit report.

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

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

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

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

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

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

Comment:

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

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