

Draft (9/4/12)

## BENEFIT CORPORATION WHITE PAPER

In the last two years, a number of U.S. jurisdictions have adopted provisions allowing corporations to opt in to a legal structure that expressly expands the purpose of the corporation beyond advancing the pecuniary interests of its shareholders. These provisions allow or require directors to consider environmental, societal, or other impacts of corporate activity, even at the expense of shareholder value. Corporations adopting such expanded purposes are known as “benefit corporations.” These provisions raise similar issues to those raised by “other constituencies” statutes, which were addressed in a white paper drafted by the Committee in 1990. This white paper discusses (1) the background relevant to these provisions, (2) the Committee’s prior treatment of other constituencies statutes, (3) the content of the benefit corporation provisions, (4) a less rigorous alternative to the benefit corporation adopted in two states and (5) the Committee’s recommendation.

### I. Background.

Benefit corporations can be thought of as method of opting out of what Chancellor Allen has described as the “property” model of corporate law.<sup>1</sup> Under the property model, a solvent corporation is viewed as a vehicle with the sole purpose of maximizing the wealth of its owners, the shareholders.<sup>2</sup> *Dodge v. Ford Motor Co.* is often cited as the chief example of this view.<sup>3</sup> This property model is contrasted with the “entity model,” which views the corporation as a vehicle that can simultaneously serve the interests of multiple constituencies, and thus was “tinged with a public purpose.”<sup>4</sup> Both models of the corporation could generally have been seen as existing in equipoise until the 1980’s. To some extent, this equipoise was a result of the fuzzy border between the two theories—it is relatively easy to characterize actions that favor employees and other relevant communities as also being in the long-term interest of shareholders.<sup>5</sup>

<sup>1</sup> William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 *Cardozo L. Rev.* 261, 264-65 (1992) (hereinafter, “Schizophrenic”).

<sup>2</sup> *Id.* at 265.

<sup>3</sup> 170 N.W. 668 (Mich. 1919); but cf. Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 *Va. L. & Bus. Rev.* 163 (2008) (advancing the theory that the property-model-supporting statement in *Dodge v. Ford* is dicta and counter to a proper, nuanced understanding of the corporation).

<sup>4</sup> *Schizophrenic*, *supra*, at 265.

<sup>5</sup> See Jonathan R. Macey, *A Close Read of an Excellent Commentary on Dodge v. Ford*, 3 *Va. L. & Bus. Rev.* 177, 190 (2008) (“As long as corporate directors and CEOs claim to

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But the takeover boom of the 1980’s threw the distinction into sharp relief. In change of control transactions, it is clear where the economic interests of shareholders and other constituencies diverge: when it becomes inevitable that a target corporation will be sold for cash, the target’s shareholders’ sole economic interest is limited to maximizing the cash to be received, while constituencies such as management, employees and communities may prefer a transaction that pays shareholders less, while preserving jobs and facilities. Remarkable upon this conflict in the years immediately following that era, Chancellor Allen identified the entity model as having the upper hand.<sup>6</sup>

Since that time, however, it has become clear to most commentators that the property model is ascendant.<sup>7</sup> Delaware law also appears to have confirmed the property model.<sup>8</sup> However, despite this judicial and academic acceptance of the property model, the be maximizing profits for shareholders, they will be taken at their word, because it is impossible to refute these corporate officials' self-serving assertions about their motives.”).

6 See *Schizophrenic*, supra at 276 (“Nevertheless, ultimately both our courts and, more importantly, our legislatures have, in effect, endorsed the entity view.”). But see *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (emphasis added) (“[A] board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders.”).

7 See generally Henry Hansmann and Reinier Kraakman, *The End of History for Corporate Law*, 89 *Geo. L.J.* 439 (2001) (“There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.”); Leo E. Strine, Jr., *Lecture and Commentary on the Social Responsibility of Corporate Entities: the Social Responsibility of Boards of Directors and Stockholders in Change of Control Transactions: Is There Any “There” There?*, 75 *S. Cal. L. Rev.* 1169, 1170 (2002) (“The predominant academic answer is that corporations exist primarily to generate stockholder wealth, and that the interests of other constituencies are incidental and subordinate to that primary concern.”). But see Lynn A. Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (2012) (positing that neither corporate law, economic theory nor empirical evidence support the validity of the ownership model).

8 See *Mills Acq. Co. v. MacMillan, Inc.*, 449 A.2d 1261, 1282 n.29 (Del. 1989) (permitting a board to consider “the impact of both the bid and the potential acquisition on other constituencies, provided that it bears some reasonable relationship to general shareholder interests”) (emphasis added); *In re Toys “R” Us, Inc. S’holder Litig.*, 877 A.2d 975, 1000 n.23 (Del. Ch. 2005) (“Precisely how stockholder-focused directors must be is not entirely clear but the predominance of the stockholders’ interest in receiving the highest, practically available bid in our Supreme Court’s *Revlon* jurisprudence is undeniable.”); *Katz v. Oak Indus. Inc.*, 508 A.2d 873, 879 (Del. Ch. 1986) (“It is the obligation of

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actual effect of the concept is unclear outside the change in control context. When the corporation faces more general, day-to-day decisions, the conflict between shareholders and other constituencies is less pronounced, and directors might more easily be able to arrive at the conclusion that a decision that directly benefits a non-shareholder constituency also increases the long-term value of the corporation’s stock, even if, in the view of the short-term market, it appears to come at a cost to shareholders. Importantly, these operational decisions will likely enjoy the benefit of the business judgment rule, which makes it difficult to challenge business decisions that are rationally connected to benefitting shareholders. Nevertheless, the view that directors of a traditional corporation cannot take actions to benefit a constituency at the expense of its shareholders (even outside the sale context) has persisted, such that, in 2010, the Court of Chancery stated that “[p]romoting, protecting, or pursuing non-stockholder considerations must lead at

some point to value for stockholders” and held that directors who failed to establish how their actions would lead to shareholder value “failed to prove . . . that they acted in the good faith pursuit of a proper corporate purpose.”<sup>9</sup> Former Chancellor Chandler continued:

As an abstract matter, there is nothing inappropriate about an organization seeking to aid local, national and global communities . . . . Indeed, I personally appreciate and admire [the directors and majority stockholders’] desire to be of service to communities. The corporate form in which [the corporation] operates, however, is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment. [The directors and majority stockholders] opted to form [the corporation] as a for-profit Delaware corporation and voluntarily accepted millions of dollars . . . as part of a transaction whereby [the minority investor] became a stockholder. Having chosen a for-profit corporate form, the [corporation’s] directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its

directors to attempt, within the law, to maximize the long-run interests of the corporation’s stockholders . . . .”). Leo E. Strine, Jr. *Our Continuing Struggle With the Idea That For-Profit Corporations Seek Profit*, 47 *Wake Forest L. Rev.* 135, 153 (2012) (“The whole design of corporate law in the United States is built around the relationship between corporate managers and stockholders, not relationships with other constituencies.”).

<sup>9</sup> *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 33 (Del. Ch. 2010).

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stockholders. The “Inc.” after the company name has to mean at least that.<sup>10</sup> In the midst of the 1980’s takeover movement, and again more recently with the emergence of socially conscious entrepreneurs and investors, some groups have sought to reinvigorate the entity model through statutory changes. In the 1980’s, this effort came in the form of “other constituencies” statutes adopted in several states (but notably not in Delaware) that would permit, but not require, directors to consider the interests of corporate “stakeholders” other than just the shareholders.<sup>11</sup> More recently, some states have adopted “benefit corporation” or “flexible purpose corporation” statutes that would work in tandem with their general corporation law statutes, but would require (or, in the case of flexible purpose corporations, either require or permit) directors to consider some “public benefit” before acting. Presumably, these statutes would permit the board of directors of a benefit corporation to consider “people” and “planet” along with “profits.”<sup>12</sup> These three types of provisions (i.e., “other constituencies,” “flexible purpose corporations” and “benefit corporations” statutes) are discussed in the next three sections.

## II. Other Constituencies Provisions.

As mentioned above, some attempt was made to bolster the entity model through the adoption of other constituency statutes. Thirty states have adopted these today.<sup>13</sup> Neither the Model Business Corporation Act (the “MBCA”) nor the Delaware General Corporation Law (the “DGCL”) includes such a provision.

In 1983, Pennsylvania took the lead in codifying “other constituencies” language. In 1990, the Committee addressed these statutes in the Other Constituencies White Paper.

This paper addressed the variety of statutes then in existence. The paper noted that the statutes had different effects and that many could be read to simply affirm the concept described in Revlon, which permitted a board to take into account the interests of other constituencies to the extent they related to shareholder value. On the other hand, the paper also noted that some statutes,

10 *Id.* at 34. It should be noted that this discussion involved the use of a shareholder rights plan, and thus was decided under the heightened Unocal standard, not the straight business judgment rule. *Id.* at 28.

11 Committee on Corporate Laws, *Other Constituencies Statutes: Potential For Confusion*, 45 *Bus. Law.* 2253, 2261 (1990) (hereinafter, “Other Constituencies White Paper”).

12 Michael R. Deskins, *Benefit Corporation Legislation, Version 1.0—A Breakthrough in Stakeholder Rights?*, 15 *Lewis & Clark L. Rev.* 1047, 1063 (2011) (discussing the “triple bottom line” concept).

13 Leo E. Strine, Jr., *Our Continuing Struggle With the Idea That For-Profit Corporations Seek Profit*, 47 *Wake Forest L. Rev.* 135, 163 n.87 (2012) (citing William J. Carney & George B. Shepherd, *The Mystery of Delaware Law’s Continuing Success*, 2009 *U. Ill. L. Rev.* 1, 35-36 (2009)).

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such as the Indiana statute, quite specifically affirmed the ability of directors to favor a non-shareholder constituency over shareholders.<sup>14</sup> At the time, a majority of the Committee concluded that the Model Act should not adopt an “other constituencies” provision:

In conclusion, the Committee believes that other constituencies statutes are not an appropriate way to regulate corporate relationships or to respond to unwanted takeovers and that an expansive interpretation of the other constituencies statutes cast in the permissive mode is both unnecessary and unwise. Those statutes that merely empower directors to consider the interests of other constituencies are best taken as a legislative affirmation of what courts would be expected to hold in the absence of a statute. Interpreting the statutes to have the same force as the express Indiana provision would accomplish a change in traditional corporate law so radical that it should be undertaken only after there has been extensive and broad based deliberation on the effects of reshuffling of fundamental relationships among shareholders and other persons who may be affected by the affairs of an incorporated business.<sup>15</sup>

Thus, in 1990, a majority of the Committee felt that mandating that directors consider the interests of constituencies other than shareholders was “radical” and would have the effect of “reshuffling . . . fundamental relationships.” By considering the benefit corporation model, the Committee is to some extent re-examining the “radical” proposition of codifying some form of the entity model.

III. Benefit Corporations: Current Status.

More recently, benefit corporation legislation has been adopted in several states.<sup>16</sup> Several facets of the benefit corporation statutes that have been adopted in other jurisdictions merit specific discussion. Those provisions generally follow a model proposed by B Lab, a non-

<sup>14</sup> Indiana Code 23-1-35-1(d-f) (“A director may, in considering the best interests of a corporation, consider the effects of any action on shareholders, employees, suppliers, and

customers of the corporation, and communities in which offices or other facilities of the corporation are located, and any other factors the director considers pertinent . . . [and] . . . directors are not required to consider the effects of a proposed corporate action on any particular corporate constituent group or interest as a dominant or controlling factor.”); *id.* at (f) (“reaffirm[ing]” that business judgment review would apply to decisions made pursuant to subsection (d), even in the change-of-control context).

15 Other Constituencies White Paper, *supra*, at 2270-71.

16 In Hawaii, this form is called a “sustainable business corporation,” rather than a benefit corporation, but the statute generally tracks the benefit corporation model.

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profit entity promoting the adoption of those provisions. B Lab’s interpretation of these provisions is discussed in William H. Clark, Jr. and Elizabeth K. Babson’s article entitled “How Benefit Corporations are Redefining the Purpose of Business Corporations.”<sup>17</sup> Generally speaking, and though each state’s version of the benefit corporation statute is different, these provisions (1) require that a benefit corporation consider general public welfare before acting, (2) permit that more specific interests be considered as well, and (3) require that the firm’s compliance is measured against a standard imposed by an independent third party.

A detailed discussion of the specific provisions of the B Lab Model and how it has been varied in the legislation adopted in several states is found in Appendix A to this paper. In general, the legislation requires that a benefit corporation’s charter confirm that it is obligated to pursue a general public benefit, creating a positive impact on society and the environment as a whole, as assessed against a third party standard. The legislation also permits the creation of specific public benefits in addition to the general benefit requirement. In making decisions, directors must consider the constituencies relevant to the general public benefit. In addition, the model legislation allows charter provisions that permit consideration of additional constituencies; however, the model legislation allows the board to prioritize those constituencies’ interests, as long as it considers all of them. The model legislation also requires that the corporation publish a “benefit report” to be made available to its shareholders each year. The report must measure the corporation’s benefit performance against a third party standard. The definition of third party standard is very detailed. The B Lab Model also includes a specific rule for a “benefit director” who must opine as to the success of the corporation in acting in accordance with its general public purpose and specific public purposes. The legislation authorizes the shareholders to pursue “benefit enforcement proceedings,” which are suits over whether a corporation is pursuing or creating the intended general public or specific public benefits. The B Lab Model legislation does not permit charter provisions that are inconsistent with the B Lab provisions.

#### IV. Flexible Purpose Corporations: A Less Regulatory Alternative.

A slightly different take on the “benefit corporation” provides more flexibility for each individual corporation to decide what public interests it will consider. In the State of Washington, this alternative structure is called a “social purpose corporation.” In California, it is known as a “flexible purpose corporation.” California also simultaneously adopted a benefit corporation statute. Under both of the “flexible purpose” statutes adopted to date, a corporation must provide in its charter that it will engage in at least one

special purpose. In California, a flexible purpose corporation’s charter must enumerate the special purposes for which it was formed.

A significant difference from a benefit corporation, however, is that directors may, but need not, take these interests into consideration when making a decision. The California statute provides that directors must act “in a manner the director believes to be in the  
17 38 Wm. Mitchell L. Rev. 817 (2012).

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best interests of the flexible purpose corporation and its shareholders, and with that care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances,” but goes on to explain that directors “may consider those factors, and give weight to those factors, as the director deems relevant, including the short-term and long-term prospects of the flexible purpose corporation and its shareholders, and the purposes of the flexible purpose corporation as set forth in its articles.”<sup>18</sup> Under the Washington statute, the charter of the social purpose corporation determines whether consideration of the company’s stated specific social purposes will be mandatory or merely permissive. That is, the articles of incorporation of a social purpose corporation may, but need not, contain a provision “requiring the corporation’s directors or officers to consider the impacts of any corporate action or proposed corporate action upon one or more of the social purposes of the corporation.”<sup>19</sup> Unless this provision is included in the social purpose corporation’s charter, “in discharging his or her duties as a director, the director of a social purpose corporation may consider and give weight to one or more of the social purposes of the corporation as the director deems relevant.”<sup>20</sup>

Another important distinction is that, unlike benefit corporations, flexible purpose corporations are not required to measure performance against a third party standard. They must, however, report on their performance. New Section 16 of Washington’s social purpose corporation statute requires a “social purpose report” to be sent to its shareholders annually, and this requirement is discussed in a manner that appears similar to benefit corporations’ annual benefit report requirement. Similarly, Section 3500 of California’s flexible purpose statute requires submission of an annual report, along with other “special purpose current reports” upon the happening of certain events. However, there is no third-party standard specified under the California flexible purpose statute. Washington’s statute provides that a corporation may include a charter provision requiring delivery of a report “prepared in accordance with a third-party standard.”<sup>21</sup>

#### V. Committee Recommendation.

[In considering whether and how the Committee, the Model Act or Model Act states should address the benefit corporation concept, the Committee may wish to consider the following matters:]

##### A. Historic Context

1. The Committee’s conclusion in 1990 that mandatory consideration of non-shareholder constituencies would constitute a radical reshuffling of relationships.

18 Cal., § 2700(a), (c) (emphasis added).

19 Section 5(2)(a) of Washington’s new statute (emphasis added).

20 Section 6(2) of Washington’s new statute.

21 Section 5(2)(b) of Washington’s new statute.

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2. The continued ebb and flow of the entity concept and the owner concept of corporations. Chancellor Allen stated:

In this process, efficiency concerns, ideology, and interest group politics will comingle with history (including our semi-autonomous corporation law) to produce an answer that will hold for here and now, only to be torn by some future stress and to be reformulated once more. And so on, and so on, evermore.<sup>22</sup>

3. Current scholarship reacting to the current prevalence of the owner model. See for example, *The Shareholder Value Myth* by Lynn Stout.<sup>23</sup>

4. The growth in shareholder power in public companies, seen in the decrease in staggered boards, the implementation of majority voting, the implementation of shareholder-called special meeting provisions and the rise of proxy advisors' significance.

5. Reactions to the developments detailed in number 4 such as the search for alternatives to going public and the use of dual class stock in IPOs by companies such as Google, Facebook, Zynga and LinkedIn.

6. The fact that legislation allowing directors to consider the interests of constituencies other than shareholders does not, by itself, disempower shareholders. It only takes away one tool they have to force directors to act in their interest, i.e., litigation. The shareholders of a benefit corporation who feel that directors are not sufficiently attentive to the interests of shareholders would still have access to all of the traditional tools available to shareholders with respect to changing the management of the corporation.

#### B. The Current MBCA.

The relevant provision of the current Model Act, § 8.30(a), states that directors owe their duties to the corporation:

Each member of the board of directors, when discharging the duties of a director, shall act: (1) in good faith, and (2) in a manner the director reasonably believes to be in the best interests of the corporation.

In the official comment characterizing this duty, there is an apparent focus on shareholders, yet room, perhaps, for some interpretation:

<sup>22</sup> Schizophrenic, *supra*, at 281

<sup>23</sup> See, *supra*, n. \_\_\_\_.

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The phrase “best interests of the corporation” is key to an explication of a director’s duties. The term “corporation” is a surrogate for the business enterprise as well as a frame of reference encompassing the shareholder body. In determining the corporation’s “best interest” the director has wide discretion in deciding how to weigh near-term opportunities versus long-term benefits as well in making judgments where the interests of various groups within the shareholder body or having other cognizable interests in the enterprise may differ.<sup>24</sup>

This statement of surrogacy for shareholders with a nod to unnamed “cognizable” interests illustrates the continuing ambiguity surrounding these issues.

#### C. Need for Flexibility?

The fact that this issue continues to resurface, whether in *Dodge v. Ford* or the *Berle and Means* scholarship of the 1930s,<sup>25</sup> whether in the adoption of other constituencies statutes thirty years ago or in the current trend of adopting benefit corporation legislation, illustrates that this issue has not come to rest. Moreover, scholarship on both sides of the

issue seems thoughtful and well-reasoned. It is worth considering whether all of this points toward enabling legislation of some sort. That is, the question whether the owner concept or the equity concept is “superior” may be unanswerable. If this is the case, it may be best to offer two clear choices: a shareholder-focused owner model and a broader-constituency entity model. One of the most significant objections to the other constituency legislation was its attempt to impose the latter rule on all corporations. Enabling legislation, such as the benefit corporation and flexible purpose statutes, avoids this pitfall. And by making an entity model clearly available, the existence of such alternative legislation may also effectively clarify that corporations that do not opt in must follow the owner model.

#### D. Enabling Or Regulatory?

In considering whether to move forward with benefit corporation or similar provisions, the Committee should consider the fact that at least two states have adopted provisions that are less regulatory than the model benefit corporation legislation that has been followed to some degree by a number of states. While such “flexible” provisions should enable a corporation to choose to apply the full benefit corporation model through provisions in its articles of incorporation, it would also allow a dialed-back version, which, rather than mandating certain standards, would go to the heart of the issue: namely, permitting directors to prioritize other constituencies and interests—such as society or the environment—even when doing so

24 Model Business Corporation Act Annotated (4th ed., Vol. 2) at 8-193 (emphasis added).

25 Adolph Berle & Gardiner Means, *The Modern Corporation and Private Property* at 355 (1932) (shareholders “have surrendered the right that the corporation should be operated in their sole interest”).

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would reduce profits available to shareholders, but would permit such behavior without creating an increased layer of regulation.

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## Appendix A

### 1. Public Benefit.

The benefit corporation statutes that have been adopted divide the types of other stakeholder interests into a “general public benefit” and other more “specific public benefits.” The public benefit standards are generally uniform among the adopting states. That is, each benefit corporation must include a charter provision confirming that it is obligated to pursue a general public benefit of creating a positive impact on society and the environment as a whole, assessed against a third-party standard.

Specifically, B Lab’s model legislation defines “General public benefit” as “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.” Almost all of the states adopting benefit corporation statutes have adopted this definition nearly in haec verba. However, the variation applied in Maryland, New Jersey and Vermont appears to attempt to reconcile the adherence to “specific public benefits” with this general standard, in that their definitions of “general public benefit” explain that a general

public impact is obtained “through activities that promote some combination of specific public benefits.”<sup>26</sup>

Under every state’s benefit corporation statute, a benefit corporation “shall” have a purpose of “creating general public benefit.” A benefit corporation may also identify the pursuit of one or more “specific public benefits” in its governing documents as being additional purposes of the benefit corporation. However, the statutes provide that the listing of specific benefits cannot limit the corporation’s obligation to “create a general public benefit.” The statutes include a list of acceptable specific public benefits that could be inserted into a company’s charter, and the list is usually identified as being non-exhaustive.<sup>27</sup> This list tends to be very similar from one state to the next. The model “specific public benefit” options

include[]: (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) preserving the environment; (4) improving human health; (5) promoting the arts, sciences or advancement of knowledge; (6) increasing the

<sup>26</sup> See § 14A:18-1 of the New Jersey General Corporation Act; Section 21.03(4) of the Vermont Business Corporation Act. See also § 5-6C-01(c) of the Maryland Benefit Corporation statute (using the phrase “a combination of specific public benefits,” rather than “some combination of specific public benefits”).

<sup>27</sup> But see Louisiana § 1803(A)(10) (defining “specific public benefit” as “any of the following” and then including a list that tracks the B Lab model, absent the “any other particular benefit” provision, but also including “Historic preservation” and “Urban beautification”).

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flow of capital to entities with a public benefit purpose; and (7) conferring any other particular benefit on society or the environment.<sup>28</sup>

## 2. Obligation to Consider Public Benefits, Other Constituencies.

When a board of directors of a benefit corporation is faced with a decision, there is a set of interests that the statute provides that directors must consider, and a set of interests that they may consider.

The statutes provide that benefit corporation directors “shall consider the effects of any action or inaction” on (i) its stockholders; (ii) the employees and work force of the benefit corporation, its subsidiaries and its suppliers; (iii) the benefit corporation’s customers “as beneficiaries of the general public benefit or specific public benefit purposes”; (iv) community and societal factors—“including” the communities in which the offices or facilities of the benefit corporation, its subsidiaries and its suppliers are located; (v) the local and global environment; (vi) the short-term and long-term interests of the benefit corporation, and the effect of remaining independent (i.e., not acquired) on the benefit corporation’s ability to serve these interests; and (vii) the ability of the benefit corporation to accomplish its general and specific public benefit purposes.<sup>29</sup>

Beyond these considerations, directors may, but need not, consider the interests of certain other constituencies. The model legislation invites the states to add in a reference to any permissive “other constituencies” provisions that are found in other sections of that state’s corporation law.<sup>30</sup> It also includes a catch-all provision that permits directors to consider “other

28 B Lab Model Benefit Corporation Legislation, § 102(a). Hawaii’s statute adds an additional list of potential specific benefits. Specifically, it provides that a sustainable business corporation might use its patent rights in a way that would “(A) creat[e] and retain[] good jobs within the State as well as throughout the United States; (B) uphold[] fair labor standards nationally and internationally . . . ; and (C) enhanc[e] environmental protection nationally and internationally.” § 420D-5(b)(8).

29 See also B Lab Model Benefit Corporation Legislation, § 303(a) (explaining that an officer of a benefit corporation is also obligated to consider these mandatory interests if the officer has discretion to act with respect to a matter and it “reasonably appears to the officer” that the matter may have a “material effect” on the corporation’s creation of general or specific public benefits).

30 New Jersey is one example of a state that specifically references its “other constituencies” provision. See N.J.S. 14A:18-6(b)(1) (permitting benefit corporation directors to consider “matters listed in subsection (2) of N.J.S. 14A:6-1,” i.e., the permissive “other constituencies” provision). However, this reference could be seen to be duplicative of the wording that also appears in that state’s benefit corporation statute itself, as the benefit corporation statute includes a permissive catch-all “other pertinent factors or interests of any other group that [the directors] deem appropriate” provision. 2 pertinent factors or the interests of any other group that they deem appropriate.”

However, Hawaii shifted some of the interests listed as mandatory in the B Lab model legislation, and instead made consideration of these interests merely permissive.<sup>31</sup> Certain states have specified “permissive” consideration provisions that are very similar to the “other constituencies” statutes and appear to permit directors to resist corporate raiders. For example, even though California, New York, South Carolina and Virginia have adopted all of the mandatory considerations in the model benefit corporation legislation—including the obligation to consider the effect of remaining independent “rather than selling or transferring control to another entity”<sup>32</sup> on the ability to serve the corporation’s “short-term and long-term interests”—these states have also included language specifically permitting directors to consider “the resources, intent, and conduct, including past, stated, and potential conduct, of

Moreover, New Jersey’s “other constituencies” provision permits consideration of the interests of “(a) the effects of the action on the corporation’s employees, suppliers, creditors, and customers; (b) the effects of the action on the community in which the corporation operates; and (c) the long term as well as the short-term interests of the corporation and its shareholders, including the possibility that these interests may best be served by the continued independence of the corporation”: arguably, all of these permissive “other constituencies” interests are already made mandatory in the benefit corporation statute. The legislation being considered in Massachusetts, which has not yet been adopted, includes another arguable redundancy between its mandatory and permissive considerations. That is, while the proposed legislation includes the standard mandatory obligation to consider “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,” (§ 10(a)(1)(iv)), and the permissive catch-all to consider “other pertinent factors,” (§ 10(a)(2)(ii)), the proposed legislation also specifically provides that directors may consider “the interests of the economy of the state, the region

and the country” under Section 8.30 of the Massachusetts Business Corporation Act, its other constituencies provision.

31 Specifically, Hawaii’s sustainable business corporation statute references all of the interests listed in the model legislation—including consideration of “[t]he resources, intent, and conduct of any person seeking to acquire control of the corporation”—but the only interests that must be considered are those of the corporation’s stockholders and the accomplishment of general public benefits and the specific public benefits set forth in the corporation’s purposes. § 420D-6(a). Similarly, Maryland does not list “short-term and long-term interests” as an interest to be considered, but it does include the catch-all that directors “may consider any other pertinent factors or the interests of any other group that the director determines are appropriate to consider.” Maryland Benefit Corporations Statute, § 5-C-07.

32 California Corporations Code, §14620(b)(6)

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any person seeking to acquire control of the corporation.”<sup>33</sup> Apparently recognizing the provenance of these permissive considerations/“other constituencies” interests, Vermont clarifies that directors “shall not be subject to a different or higher standard of care when an action or inaction might affect control of the benefit corporation.”<sup>34</sup>

The model legislation recognizes that the interests of the various constituencies discussed above may be in conflict from time to time. The statute anticipates that a benefit corporation may wish to “give priority to certain interests related to its accomplishment of its general public benefit purpose or of a specific public benefit purpose,” and authorizes such prioritization to be stated in the benefit corporation’s articles of incorporation. However, if priority is not specified in the company’s charter, the directors “need not give priority to the interests of a particular person or group” that is listed in either the set of interests that the board must consider, or the list of interests that the board may consider.

### 3. Annual Benefit Report.

A benefit corporation must submit a “benefit report” either within 120 days following the end of its fiscal year or at the same time that it delivers any other annual report (e.g., a Form 10-K) to its stockholders.<sup>35</sup>

The purpose of the annual benefit report appears to be to provide a discussion and assessment of the corporation’s efforts to pursue and create general public benefit and any specific public benefits included in the company’s listed purposes, including any circumstances hindering the corporation’s ability to create these public benefits, and a statement whether the company complied with its obligations as a benefit corporation during that period. The benefit report must also include a description of any director compensation and the names of persons known by the company to own, beneficially or of record, 5% or more of the outstanding stock of the company.

The report is also to be made available to the public on the company’s website or, if it does not have a website, upon request from “any person that requests a copy,” and also to be filed with the Secretary of State of the state of incorporation; provided that this version of the report may exclude the portions discussing director compensation and the company’s financial or proprietary information.<sup>36</sup>

33 California Corporations Code, §14620(c)(1). See also § 1707(a)(2)(A) of the New York Business Corporation Law; § 33-38-400(B)(1) of the South Carolina Benefit

Corporation Act; § 13.1-788(A)(2)(a) of the Virginia Stock Corporation Act (including nearly identical language).

34 Vermont Benefit Corporations Act, § 21.09(a)(4).

35 Model Business Corporation Legislation, § 401(b).

36 Model Business Corporation Legislation, § 401(c)-(e).

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#### 4. “Third-Party Standard.”

A benefit corporation’s adherence to its public benefit goals, as disclosed in the annual benefit report, is measured against a “third-party standard.” The annual benefit report must explain the “process and rationale for selecting or changing the third-party standard used to prepare the benefit report” and must also disclose any “connection between the organization that established the third-party standard” and the benefit corporation, or their respective directors, officers or material owners, “including any financial or governance relationship which might materially affect the credibility of the use of the third-party standard.”<sup>37</sup> The third party standard itself is to be comprehensive (i.e., it must assess the effects of the business on employees, customers as beneficiaries of the general and any specific public benefit, community and society, and the local and global environment), developed by an organization with expertise to assess overall social and environmental performance but not closely tied to a specific industry, apparently in an effort to avoid “agency capture,” and transparent in the sense that the inputs for the standard, and potential conflicts of interests of the standard-setter, would be publicly disclosed.

The definition of “third party standard” provided in the Model B Lab legislation is very detailed and contains several qualifications. However, with the exception of South Carolina, the states that have adopted benefit corporation statutes appear to have taken a more flexible approach to this definition. The variations on the “third party standard” definition adopted in the several states appear to be slightly less prescriptive than the definition promoted in the Model B Lab legislation. Most notably, the Model B Lab legislation requires the “standard for defining, reporting and assessing corporate social and environmental performance” to be “developed by a person that both: (i) Has access to necessary expertise to assess overall corporate social and environmental performance [and] (ii) Uses a balanced multistakeholder approach, including a public comment period of at least 30 days to develop the standard.” Only South Carolina has adopted a statute that uses this 30-day notice and comment period provision. These requirements might dissuade a social justice organization from developing its own standard because it does not have environmental expertise, or vice versa. It also might mean that a benefit corporation that has a specific public benefit purpose will be prevented from measuring that purpose according to a standard developed by a more specifically-focused group, either because it does not include more general measures or simply because it has not met the more procedural requirements of the definition (e.g., the notice and comment period or the requirement to disclose the identity of the persons, processes, and sources of financial support for the organization developing the standard).

Accordingly, the “third party standard” definitions used in the states may be more likely to attract more parties to develop third party standards than that promoted as the model by B Lab, in that the states tended to have adopted standards including fewer barriers to entry for an organization considering developing their own standard. On the other hand, B Lab notes that these procedural requirements are an effort to promote the

“transparency” of the third party standard, in order to ensure that the standard has been vetted and is not developed by a party that

37 Model Business Corporation Legislation, § 401(a)(1)(iv); (a)(7).

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might have a conflict of interest—e.g., presumably to ensure that there is no “race to the bottom” in terms of low-threshold third-party standards that could support greenwashing. Clark refers to the involvement of a third-party standard-setter as being “in many ways . . . the heart of benefit corporation legislation,” but also “the most contentious and misunderstood provision.”<sup>38</sup> In effect, Clark’s view is that a third-party reviewer protects against “greenwashing,” i.e., that entrepreneurs might form nominal benefit corporations in an attempt to cash in on the cachet of being perceived as “green” if they were not going to be measured against a third party’s standard of compliance with public benefit goals, and forced each year to disclose this report to their investors and the public.

5. “Benefit Director” and “Benefit Officer.”

Some of the states adopting benefit corporation legislation follow the B Lab model to include a specific role for a “benefit director” and a “benefit officer.” When the state includes these specific roles, a specific director must be designated as the benefit director, and a specific officer may be named as a benefit officer, and their responsibilities will include preparing the annual benefit report. If, as is the case for California, Maryland, New York and Virginia, the state has not adopted “benefit director” or “benefit officer” provisions, presumably the entire board will be charged with these responsibilities, even though it is not necessarily the case that a majority of the directors would have met the standard for “independence” required of benefit directors in states that require one.<sup>39</sup> The role of the benefit director is to prepare an opinion, to be included in the annual benefit report, as to whether the benefit corporation acted in accordance with its general public purpose and any specific public benefit purpose and whether the directors and officers complied with their obligation to consider the interests listed as being mandatory. If the benefit director concludes that directors or officers failed to comply with their consideration of mandatory interests, the benefit director must also include a description of these failures. A benefit officer, if one is named by the corporation, will also be charged with the responsibility of preparing the benefit report, but the company could delegate other responsibilities to the benefit officer either in the bylaws of the company or via board resolution.<sup>40</sup>

38 Clark and Vranka, White Paper, The Need and Rationale for the Benefit Corporation: Why it is the Legal Form that Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public, at 18 (November 29, 2011).

39 As an alternative, the board of directors of a benefit corporation in a state without a benefit director requirement might delegate the responsibilities of a benefit director, i.e., to prepare the benefit report, to a committee of the board—and perhaps even a one-person committee if its particular governing documents would otherwise permit that delegation.

40 Model Benefit Corporation Legislation § 304.

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The benefit director is to be independent, i.e., she must not have a material relationship with the corporation by having been an employee of the benefit corporation or its subsidiary in the past three years, by an immediate family member having been an

executive officer (other than the benefit officer) in the past three years, or by owning, or being a 5% owner, director, officer or manager of an entity that owns, 5% or more of the outstanding shares of the benefit corporation.

The model B Lab legislation provides that benefit directors and benefit officers will have additional protections from liability. Specifically, this legislation appears to suggest that a benefit director shall not be personally liable for acts or omissions “in the capacity of a benefit director” unless the act or omission “constitutes self-dealing, willful misconduct or a knowing violation of law.” The provision appears to contemplate mandating by statute the full level of director exculpation that traditional corporation laws permit, but do not require, a corporation to grant to its directors in its governing documents.<sup>41</sup>

#### 6. Benefit Enforcement Proceedings.

The benefit corporation legislation introduces a new form of legal action, styled as a “benefit enforcement proceeding.” Such a proceeding may be initiated as a claim for the “(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 the statute. One of the “obligations” specifically enforceable in many versions of these benefit enforcement proceedings is the obligation to prepare and circulate the annual benefit report. The benefit enforcement proceeding is to be the exclusive form of action against a benefit corporation or its directors or officers regarding these matters. However, Maryland and New York’s versions of the legislation do not specify a benefit enforcement proceeding process.<sup>42</sup>

There appears to be variation among the benefit corporation states regarding who may sue and be sued in a benefit enforcement proceeding, i.e., who the proper plaintiffs and defendants may be:

41 Compare 8 Del. C. § 102(b)(7) (permitting, but not requiring, that the certificate of incorporation of a Delaware corporation include a provision exculpating directors from monetary liability for certain breaches of their fiduciary duties other than acts amounting to a breach of the duty of loyalty or acts involving intentional misconduct, a knowing violation of law, unlawful dividends or repurchases, or transactions in which the director derives an improper personal benefit).

42 New York’s statute explains that benefit corporation directors do not owe fiduciary duties “to a person that is a beneficiary of the general or specific public benefit purposes” in her capacity as such a beneficiary, “unless otherwise stated in the certificate of incorporation or the bylaws of the benefit corporation.” § 1701(c). Presumably this means that a New York benefit corporation could decide in its governing documents to provide the general public with an opportunity to initiate litigation to enforce public benefit purposes.

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Plaintiffs in a Benefit Enforcement Proceeding. Under the model B Lab legislation, a benefit enforcement proceeding may be in the form of a direct claim commenced or maintained by the benefit corporation itself, or it may be commenced or maintained derivatively. The model provides that a shareholder, a director or the holders of 5% or more of the equity interests of a 50%-or-greater stockholder of the benefit corporation may all pursue a benefit enforcement proceeding derivatively. It also provides that a benefit corporation may identify other acceptable derivative plaintiffs in its charter or bylaws.<sup>43</sup> But many of the states adopting benefit corporation legislation have not

provided that all directors or a 5% owner of a parent entity may pursue derivative benefit enforcement proceedings.<sup>44</sup> For example, Hawaii permits the “shareholders and directors” to bring direct or derivative claims to enforce the corporate purposes, but it does not specify that other persons could bring derivative litigation if provided in the bylaws.<sup>45</sup> Louisiana permits the shareholders or the benefit director to commence derivative benefit enforcement proceedings, and the corporation to initiate such a proceeding directly, but unless otherwise provided in a company’s governing documents, the other directors would not be permitted to sue derivatively.<sup>46</sup>

Defendants in a Benefit Enforcement Proceeding. The model B Lab legislation indicates that the benefit corporation itself, its directors and its officers could all be defendants in a benefit enforcement proceeding. However, the South Carolina statute might be read to imply that only directors are proper defendants in a benefit enforcement proceeding,<sup>47</sup> and New Jersey’s definition of a benefit enforcement proceeding states that the suit is “against a director

<sup>43</sup> Model Benefit Corporation Legislation, § 305(b). See also § 14623 of the California benefit corporation statute; § 33-38-440(C) of the South Carolina statute (applying the same standards).

<sup>44</sup> New Jersey and Vermont provide for a very similar set of potential derivative plaintiffs, but the threshold for an ownership group of a parent entity to pursue a benefit enforcement proceeding in these states is 10%, rather than 5%. N.J., § 14A:18-10(b); Vermont Business Corporation Act, § 21.13(b). Virginia and Louisiana do not include a reference to an ownership group of a majority stockholder, but they do provide the flexibility for a benefit corporation to identify other acceptable derivative plaintiffs in its governing documents. Virginia Stock Corporation Act, § 13.1-790(B); Louisiana, § 1825(B).

<sup>45</sup> § 420D-10.

<sup>46</sup> § 1825(B).

<sup>47</sup> See § 33-38-440(A) (“The duties of directors under this chapter may be enforced only in a benefit enforcement proceeding. A person may not 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 a duty or standard of conduct under this chapter.”).

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or officer,” rather than against a director, officer, or the corporation itself.<sup>48</sup> Vermont defines “benefit enforcement proceeding” as “a claim or action against a director or officer” for the matters discussed above, potentially suggesting that the benefit corporation itself is not a proper defendant in Vermont’s version of a benefit enforcement proceeding.<sup>49</sup>

#### 7. Limitations on Monetary Damages.

Many, but not all, of the states adopting benefit corporation legislation have provided that the corporation cannot be liable for monetary damages for failure to pursue or create a public benefit.<sup>50</sup> Hawaii, Maryland and New York do not explicitly prohibit monetary damages against the benefit corporation for the failure to pursue or create a public benefit, perhaps because they have not adopted the specific benefit enforcement proceeding concept itself.<sup>51</sup> Louisiana, Vermont and Virginia have specified benefit enforcement proceedings, but these states have not explicitly prohibited monetary

damages being imposed upon the benefit corporation for failure to pursue or create a public benefit. California's approach is a bit different, in that it makes the statement that monetary damages are eliminated,<sup>52</sup> but then

48 New Jersey, § 14A:18-1(1). The proposed legislation in Massachusetts, which has not yet been adopted, also uses this construction.

49 Vermont Business Corporation Act, § 21.13(c).

50 The commentary to B Lab's model legislation clarifies that this elimination of monetary liability, along with the restrictions of a benefit enforcement proceeding, "only applies to actions or claims relating to the duties of directors and officers under this chapter, and the general and specific public benefit purposes of a benefit corporation. Lawsuits for other breaches of duty, or for breach of contract by directors, officers, or the benefit corporation are not subject to this section." Comment to § 305.

51 New Jersey also does not explicitly prohibit monetary damages being imposed upon the benefit corporation for failure to pursue or create a public benefit, but, as discussed above, its definition of a benefit enforcement proceeding indicates that it is against a director or officer, not explicitly contemplating a benefit enforcement suit against the corporation itself. But, as is usual with benefit corporations, the benefit director and the corporation's officers are exculpated from monetary liability, and New Jersey generally permits its directors to be exculpated from monetary liability for certain fiduciary duty breaches if provided in the company's certificate of incorporation. See N.J.S. §§ 14A:18-7(e) (benefit director); 14A:18-8(c) (officers); 14A:2-7 (directors generally).

52 California § 14623(c) ("A benefit corporation shall not be liable for monetary damages under this part for any failure of the benefit corporation to create a general or specific public benefit.").

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provides that a plaintiff in a benefit enforcement proceeding can be reimbursed for his expenses, including attorneys' fees, if successful.<sup>53</sup>

#### 8. Modifications.

The B Lab model legislation includes a statement that "[a] provision of the articles or bylaws of a benefit corporation may not relax, be inconsistent with or supersede a provision of this [chapter]."<sup>54</sup> However, some of the states implementing a benefit corporation statute have not included this statement.<sup>55</sup> Accordingly, a benefit corporation incorporated in a state that has not adopted this "organic records" provision might consider attempting to opt out of some of the statutory provisions with explicit charter language, but it is unclear whether such an effort would be effective.

53 California § 14623(d) ("If the court in a benefit enforcement proceeding finds that a failure to comply with this part was without justification, the court may award an amount sufficient to reimburse the plaintiff for the reasonable expenses incurred by the plaintiff, including attorney's fees and expenses, in connection with the benefit enforcement proceeding.").

54 Model Benefit Corporation Legislation § 101(d).

55 For example, California, Hawaii, Maryland, New Jersey and Virginia do not include such a statement in their benefit corporation statutes.