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

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

1. **Summary.** In order to become a public benefit corporation (a “PBC”), a traditional Delaware corporation must draft an amendment to its certificate of incorporation (an “Amendment”). The amendment must be approved by the board of directors, and then by the stockholders. Once approved, the amendment must be filed with the Secretary of State of Delaware. Under certain circumstances, the corporation must provide its stockholders who do not approve the amendment with the right to cash out their stock for fair value (“appraisal rights”). Once the amendment is filed, the corporation should include a legend on its stock certificates, stating that the corporation is a PBC.
2. **Contents of Amendment.** A sample form of Amendment is attached as Appendix A. The following provisions are either required or should be considered:
  - 2.1. The heading of the certificate must state that the corporation is a public benefit corporation.
  - 2.2. The name of the corporation may be changed to add the words “public benefit corporation,” the abbreviation “P.B.C.,” or the designation “PBC.” If the name is not changed, then if the PBC is not publicly traded, the PBC must notify anyone who purchases stock that the corporation is a PBC.
  - 2.3. The certificate must identify one or more specific public benefits to be promoted by the corporation.
  - 2.4. Delaware gives public benefit corporations the option of committing to make its statement about its efforts to create public benefit: 1) available to the public (as opposed to its stockholders only); 2) annually (as opposed to biennially); and 3) in accordance with a third party standard (as opposed to using its own methodology). If a corporation is already a Certified B Corporation or is thinking of becoming one, B Lab recommends that it make each of those commitments in its certificate. See the sample language on Appendix A at the end of this document.
  - 2.5. Delaware permits a public benefit corporation to include in its certificate a provision that a disinterested failure by a director to satisfy the requirements applicable to directors of a public benefit corporation will not constitute an act or omission not in good faith or a breach of the duty of loyalty. The purpose of such a provision is to protect directors and should be considered by any corporation

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

considering an election to be a public benefit corporation. See the sample language on Appendix A at the end of this document.

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

3. **Board approval.** The board of directors must approve the Amendment and recommend that the amendment be submitted to the stockholders for approval. The certificate of incorporation and bylaws should be reviewed to determine the vote required.
4. **Stockholder approval.** The stockholders must approve the Amendment. The statute requires a 2/3's affirmative vote of the outstanding shares of of the corporation. The certificate of incorporation and bylaws should be reviewed to determine the vote required whether any additional vote is required.
5. **Appraisal rights.** If the corporation is not publicly traded, , stockholders who did not vote for the Amendment are entitled to an appraisal by the Delaware Court of Chancery of the fair market value of the stockholder's share of stock. The corporation is required to provide its stockholders with notice of their right to an appraisal. See Appendix B for details regarding the process and requirements for appraisal rights in Delaware.
6. **File amendment.** After the board and stockholders approve the amendment, the Amendment must be prepared and filed with the Secretary of State.
7. **Print and issue new stock certificates.** The Delaware law requires that a stock certificate issued by a public benefit corporation note conspicuously that the corporation is a public benefit corporation. It is unclear whether that requirement applies to stock certificates issued before a corporation becomes a public benefit corporation. To avoid a later challenge by a person that acquires shares represented by a stock certificate without that notation, the corporation should consider printing new stock certificates with the required notation and issuing the new stock certificates to its existing stockholders.
8. **Name change.** If the PBC has adopted a new name, it should make the necessary changes to reflect the new name. The corporation should update, for example, bank accounts, business cards, intellectual property registrations, etc. There is no set timing for completion of these changes; however, a corporation should aim to complete them within a commercially reasonable time following the public benefit corporation election.

## Appendix A

### Sample language for certificates of incorporation

#### Purpose clause:

1. *Purpose.* The purpose of the Corporation is to engage in any lawful act or activity for which a corporation may be organized under the Delaware General Corporation Law.
2. *Benefit Corporation.* The Corporation shall be a public benefit corporation as contemplated by subchapter XV of the Delaware General Corporation Law (the “DGCL”), or any successor provisions, that it is intended to operate in a responsible and sustainable manner and to produce a public benefit or benefit, and is to be managed in a manner that balances the stockholders pecuniary interests, the best interests of those materially affected by the corporation’s conduct and the public benefit or benefits identified in this certificate of incorporation. Accordingly, it is intended that the business and operations of the Corporation create a material positive impact on society and the environment, taken as a whole. If the DGCL is amended to alter or further define the management and operation of public benefit corporations, then the corporation shall be managed and operated in accordance with the DGCL, as so amended.
3. *Purposes.* *As its specific purpose,* the corporation shall promote a positive effect (or reduce negative effects **[state affected persons, entities, communities or interests and effects constituting the corporation’s specific public benefit(s), which may include (without limitation) effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature]**); furthermore, in order to advance the best interests of those materially affected by the corporation’s conduct, it is intended that the business and operations of the Corporation create a material positive impact on society and the environment, taken as a whole.
4. *Third Party Standard.* The Corporation shall deliver its public benefit statement annually, make it available to the public on its website, or if it does not have a website, upon request, and prepare it in accordance with a third party standard applied consistently with any application of that standard in prior statements or accompanied by an explanation of the reasons for any inconsistent application. A third party standard means a credible standard for defining, reporting, and assessing a corporation’s social and environmental performance that:
  - a. Assesses the effect of the business and its operations on all of the interests materially affected by the corporation’s conduct;
  - b. Is developed by an organization that is not under the control of the corporation or its affiliates; and
  - c. Has information publicly available concerning:
    - i. The criteria and relative weighting the standard uses to assess the corporation’s overall social and environmental performance;

- ii. The process by which the standard is developed and revised; and
- iii. The independence of the organization that developed the standard, including:
  - A. The material owners;
  - B. The members of the organization's governing body and how they are selected; and
  - C. The organization's material sources of financial support.

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

- a. A narrative description of the process and rationale for selecting the third-party standard used to prepare the statement; and
  - b. A statement of any connection between the entity that established the third-party standard, or its directors, officers, or material owners, and the Corporation, or its directors, officers, and material owners, including any financial or governance relationship that might materially affect the credibility of the objective assessment of the third-party standard;
  - c. The assessment shall include an assessment of the corporation's creation of a material positive impact on society and the environment, taken as a whole, from the business and operations of the Corporation.
5. **Severability:** To the extent that any provision of this ARTICLE \_\_\_\_\_ is found to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of any other provision of this ARTICLE \_\_\_\_\_.

Liability Limitation:

To the fullest extent permitted by law, a director of the Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director. If the Delaware General Corporation Law is amended to authorize corporate action further eliminating or limiting the personal liability of directors, then the liability of a director of the Corporation shall be eliminated or limited to the fullest extent permitted by the Delaware General Corporation Law, as so amended.

Any disinterested failure to satisfy DGCL § 365 shall not, for the purposes of Sections 102(b)(7) or 145 of the DGCL, or for the purposes of any use of the term "good faith" in this certificate of incorporation or the bylaws in regard to the indemnification or advancement of expenses of officers, directors employees and agents, constitute an act or omission not in good faith, or a breach of the duty of loyalty. Any repeal or modification of this ARTICLE \_\_\_\_\_ shall not adversely affect any right or protection of a director of the Corporation existing at the time of such repeal or modification.

## Appendix B

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

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

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

### How a Stockholder Perfects Appraisal Rights

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

- Demand appraisal. The stockholder must file a written demand for appraisal with the corporation before the stockholder vote on the charter amendment to become a public benefit corporation (or, if the merger is approved by written consent, within 20 days of the appraisal notice).
- Not vote in favor of or consent to the charter amendment to become a public benefit corporation. The stockholder may either vote against the charter amendment or abstain from the vote.
- Maintain continuous record ownership. The stockholder making the demand must be the record (registered) holder of the stock from the date of the demand for appraisal through the effective date of the charter amendment.
- File a petition with the Delaware Court of Chancery and serve a copy of the petition on the corporation. Within 120 days after the effective date of the charter amendment, the

stockholder must file a petition with the Court of Chancery and demand that it determine the value of the stock of all stockholders. It is not necessary for all dissenting stockholders to file the petition, but one stockholder must file to start the proceeding to determine the fair value of the corporation's stock (DGCL § 262(e)). All dissenting stockholders share in the cost of the proceeding.

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

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

- Providing a statement stating the aggregate number of shares for which demands for appraisal have been received if requested by a stockholder who has perfected the right to an appraisal. This statement must be provided within ten days of the request ((DGCL § 262(e)).
- Filing a verified list of stockholders who have demanded appraisal with the office of the Register in Chancery within 20 days from receiving service of the appraisal petition (DGCL § 262(f)).