Certificate of Incorporation (DE): Public Benefit Corporation Provisions

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A Standard Clause for a certificate of incorporation creating a public benefit corporation in Delaware. This Standard Clause has integrated notes with important explanations and drafting tips.

DRAFTING NOTE: READ THIS BEFORE USING DOCUMENT

The Delaware General Corporation Law (DGCL) was amended on August 1, 2013 to create a new form of entity known as the public benefit corporation (PBC) by adding a new subchapter XV (the PBC statutes) (DGCL §§ 361 to 368). A PBC is similar to a traditional corporation but has more requirements, including obligations to:

- Pursue one or more public benefits.
- Operate in a manner that considers the interests of those materially affected by its conduct.

The PBC governance structure replaces the traditional model of stockholder primacy with a model that obligates the board of directors to consider interests other than those of its stockholders. The board must balance:

- The pecuniary interests of the stockholders.
- The best interests of those materially affected by the corporation's conduct (stakeholders such as employees, creditors, customers, and suppliers).
- The specific public benefits identified in the corporation's certificate of incorporation.

For more information on PBCs, see Practice Note, Public Benefit Corporations (DE) (w-004-4738).

The certificate of incorporation of a PBC is substantially similar to the certificate of incorporation of a traditional corporation (for an example of a Delaware certificate of incorporation, see Standard Document, Certificate of Incorporation (Short-Form DE) (4-381-6417)). However, a PBC's certificate of incorporation generally includes additional provisions, some of which are optional. This Standard Clause includes those provisions to be added to the certificate of incorporation of a PBC.

In addition to adding the provisions in this Standard Clause, the heading of the certificate of incorporation must state that the corporation is a PBC.

Certain terms are capitalized but not defined here because they are defined elsewhere in the certificate of incorporation (for example, Corporation). Counsel should tailor these provisions (including the defined terms) for the certificate of incorporation.

1. 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 benefits, 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. 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.

DRAFTING NOTE: PUBLIC BENEFIT CORPORATION: OPT-IN PROVISION

This provision must be included to opt into governance by the PBC statutes.

2. As its specific purpose, the Corporation shall [DESCRIPTION OF SPECIFIC PUBLIC BENEFIT OR BENEFITS].

DRAFTING NOTE: SPECIFIC PUBLIC BENEFIT

This provision sets out the PBC's specific public benefit. Unlike most jurisdictions that authorize benefit corporations, Delaware requires PBCs to choose one or more specific public benefits in addition to serving a general public benefit purpose. Public benefit is defined as:

> "A positive effect (or reduction of negative effects) on one or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, the effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature."

(DGCL § 362(b).)

Although the PBC statutes do not state how specific the public benefit needs to be, a PBC should pick a public benefit that is more narrowly defined than a restatement of the general benefit that the statute requires. However, the purpose should be stated broadly enough to limit the need for future amendments to its certificate of incorporation. For example, if the specific public benefit involves ensuring school children receive nutritious meals, the PBC should refer to that generic but specific purpose, rather than articulating the specific means by which the company currently achieves that purpose. If the PBC changes its method of providing nutritious meals, it then does not need to amend its certificate of incorporation.

Examples of specific benefits chosen by Delaware PBCs include:

- **Nutrition.** The delivery of nourishing organic food to the nation's little ones and raising awareness and advancing solutions for childhood hunger and malnutrition in the United States.
- **Unemployment.** Build healthy communities, create jobs, and combat the social and economic ill effects of chronic joblessness in communities across America.
- **Education.** The corporation also has a specific public benefit purpose to promote innovation in education and improved access to quality schooling.
- **Breast milk.** The specific public benefits of increasing access to safe high-quality human donor milk adapted for neonatal clinical and post-discharge settings, increasing breastfeeding rates and the economic empowerment of women, and supporting related research.

- **Developing countries.** Benefit international community development in developing countries.
- **Environmental sustainability.** Increasing environmental sustainability by fostering and facilitating the reuse of durable goods.

3. [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 the interests of those 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 including all of the following:

(a) A narrative description of the process and rationale for selecting the third-party standard used to prepare the statement;

(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; and

(c) 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.]

DRAFTING NOTE: PUBLIC BENEFIT REPORTS

Section 366 of the DGCL requires PBCs to provide stockholders a report assessing the corporation's promotion of its stated public benefit or benefits. This report must describe the board's goals and standards regarding stakeholders and must be delivered to stockholders every other year.

This optional provision increases the level of transparency so that it is equivalent to the standard provided for in the Model Benefit Corporation Law, which has been adopted in many other US jurisdictions. It requires the PBC to:

- Prepare its public benefit report annually (instead of biennially).
- Make the public benefit report public.
- Use a third party standard.

4. 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 DGCL 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 DGCL, 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 Section [4] shall not adversely affect any right or protection of a director of the Corporation existing at the time of such repeal or modification.

DRAFTING NOTE: LIMITATION OF LIABILITY

This provision extends the exculpation available under Section 102(b)(7) of the DGCL, which permits any corporation to eliminate liability of directors for breaching their duty of care. However, Section 102(b)(7) does not allow exculpation of a director's actions or omissions that:

- Breach the director's duty of loyalty to the corporation or its stockholders.
- Are not in good faith or involve intentional misconduct or a knowing violation of the law.
- Include the declaration of an unlawful dividend or stock repurchase or redemption.
- Result in a transaction from which the director receives an improper personal benefit.

Section 365(c) of the DGCL extends the authority for exculpation to include disinterested directors making balancing decisions under Section 365(b).

When adding this provision, indemnification contracts with directors and officers should be reviewed to ensure that any use of the term "good faith" is appropriately modified to include the broadened concept of Section 365 of the DGCL.

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