## Chapter 3: How Are PBCs Different?

When B Lab invented the benefit corporation ("BC"), it drafted a model statute states could pass as legislation, without having to come up with their own versions. B Lab calls its proposed legislation the Model Benefit Corporation Legislation. For brevity's sake, I refer to this draft statute as "the Model Act" or sometimes just "the Act." Most states that have authorized BCs have passed some version of the Model Act. A number of states have made some changes to the Model Act before passing it, and B Lab itself has changed the Model Act over time. All of this makes discussing the law a bit of a moving target, but I will refer here to the most recent version of the Model Act as of this writing (dated April 17, 2017).[1] The changes states have made are generally not critical, and my goal is not to turn my readers into lawyers but to give you a good grounding in the core concepts.

Rather than tweak the Model Act, Delaware decided to draft its own statute from scratch. Because Delaware law is so important to corporate governance, and because Delaware's statute is different from the Model Act in some significant ways, I will talk about Delaware public benefit corporations ("PBCs") separately below.

### A. How Do BCs Run?

#### 1. What Is A BC's Purpose?

The most important change the Model Act makes to traditional corporate governance rules is that it changes the purpose of the corporation. As I explained in Chapter 1, the traditional purpose of a corporation is to make money for the corporation's shareholders. We have already explored how that profit maximization goal has likely contributed to a host of problems, from income inequality to global warming. The whole point of the BC is to reverse

the shareholder primacy rule in an effort to harness capitalism to solve social problems, some of which capitalism helped create. So it should not surprise anyone that the Model Act adopts a different rationale for why BCs exist. The Model Act states, "A benefit corporation shall have a purpose of creating a general public benefit."[2]

The first part of the sentence is clear enough, but what in the world is a "general public benefit"? Fortunately, the Act tells us. The Act defines "general public benefit" as, "A material positive impact on society and the environment, taken as a whole, from the business and operations of a benefit corporation assessed taking into account the impacts of the benefit corporation as reported against a third-party standard."[3] There is a lot to unpack there, so we will take the key pieces one phrase at a time.

"Material Positive Impact." We should take the easiest word first. The word "material" is a term of art in the law, but its meaning is fairly intuitive. Essentially, the Act is saying here that the "positive impact" has to be meaningful, not trivial. This is the furthest thing from a precise standard, but the general intent should be reasonably clear. And because this is a term of art in the law, courts have interpreted it many times in reported cases, which makes it feasible for lawyers, who have read those cases (or can look them up), to make fairly good predictions about whether something is "material" or not. "Impact" should not give us much trouble; the Act wants BCs to have some effect.

"Positive" is the only word in this phrase that should give us serious pause. On first glance, you might have passed right over it; "positive" means the opposite of "negative," something that tends to be good rather than bad. This is where we get into a deep philosophical quagmire. What effects count as "positive"? Some uses of the term should be unambiguous. If the BC feeds the hungry, that should count. Cures terrible diseases? Check. Provides clean,

renewable energy? No question. But there is a lot that we disagree on in the United States, sometimes passionately. What if the BC provides abortions to women who want them and who lack health insurance or other means to pay for the procedure? Some people would likely call that a positive impact, providing free women's health care to those in need. Others might think it equivalent to murdering infants. Now we see the problem.

How does the Model Act solve this problem? By ducking it cleanly. The Act never defines "positive." We can gain some sense of the intended meaning from the definition of "specific public benefit," something we will get to a bit later in this chapter. That definition contains a list of actions that count as a "specific public benefit," things like "improving human health" and "promoting the arts."[4] Those things all look quite uncontroversial. But the final item on the list is a catch-all, "conferring any other particular benefit on society or the environment."[5] What counts as a "benefit" for society? "Benefit" sounds awfully similar to "positive" and opens the same can of worms. We will see shortly that there is some language in there about measuring the positive impact against a standard developed by a third party. But the rules for choosing a third-party standard do not say anything about what that standard is allowed to consider "positive" or a "benefit." In the end, then, the Act is carefully neutral as to what counts as positive.

Does this mean that the whole enterprise is pointless? After all, if *anything* can count as a positive impact, then what is the difference between a BC and a traditional corporation? Oil extraction companies provide an indisputably valuable commodity that most people still need. Could Chevron convert to a BC? We will discuss these questions when we cover permissible social purposes washing in Chapter 6.

For now, I will just say that BC status is not a guarantee that a company such as Chevron will meet any particular person's definition of a company that is good for the world. Nor could it be. There are too many different conceptions of what it means for a business to make the world a better place for any statute to capture them all, especially since many of them will conflict with one another. Imposing one narrow, particular view of what it means for a business to be good would be far too constraining for most companies and would needlessly limit entrepreneurs' creativity and autonomy. What counts as "good" is inherently contestable and contested and must always remain so in a free and democratic society. Strict conformity to a particular vision – no matter how initially appealing – leads us not to utopia but to Orwell.

The Model Act wisely avoids this risk and adopts a "big tent" definition of goodness. The Act requires that BCs self-consciously adopt a vision of what it means for a company to be good, pursue that mission even if it sometimes means sacrificing some amount of profits, assess the extent to which it is succeeding in its self-imposed goals, and then disclose its results to the public. The various constituencies of the corporation – customers, employees, communities, etc. – can then decide for themselves whether they agree with the BC's conception of goodness or not. Those who like what the BC is doing will buy its products and services or even go to work for it; those who dislike what the BC is doing will go to a competitor.

Cynical readers might point out that people might found BCs that behave no differently from traditional corporations. That is certainly possible. As we will discover below, the mechanisms the Model Act created to enforce its requirements are relatively weak. Plus, as we have just discussed, the definition of a general public benefit is sufficiently expansive to include, for example, the provision of energy resources to those who need them (Chevron again).

The fact that the form might *sometimes* be abused is not much of a criticism, though. Some traditional corporations improve the world in incredible ways even without the BC's protective rules. Moderna developed a vaccine that protected millions from dying from the COVID-19 virus, for example, despite its organization as a traditional corporation.[6] At the same time, some BCs might act badly despite having to obey those rules. Kickstarter has been criticized for opposing its employees' attempt to unionize, despite Kickstarter's status as a PBC.[7] The BC form is exciting and interesting because of its potential to make companies behave better *on average*; perfection is not a requirement. As we will see as we go through the various BC provisions, there are good reasons to think this will be true.

2. Can a BC Also Adopt a Specific Public Benefit?

We learned just above that a BC *must* have the purpose of providing a general public benefit. As we discussed, the definition of "general public benefit" is somewhat inchoate and leaves a lot of room for the board to shape the company's mission. We also discussed this flexibility as a possible criticism of the BC form: if a BC can stand for absolutely any value, some might argue that the form stands for nothing.

Perhaps for this reason, some companies may want to declare more clearly what their vision is. They may want to do this to communicate their mission to outside audiences, such as customers, employees, or communities. They may also want to adopt a specific mission to guide future directors and corporate officers as they decide how to run the business. The company founders may not be involved in active management forever, after all, and they may want to take steps to encourage the company to stay on the path they blazed.

The Model Act provides an optional mechanism for BCs to declare clearly that they plan to pursue not just general social goals, but a specific one. BCs must identify any "specific public benefit they embrace in the corporate charter, a document that is roughly analogous to the corporation's constitution and which, like a constitution, is relatively difficult to amend. (Amendments to the corporate charter generally require the approval of a majority of the directors as well as a majority of the voting shares.) Just as BCs have a great deal of flexibility in choosing how to pursue a general public benefit, they also have the discretion to choose from a wide range of possible specific public benefits. Authorized specific public benefits 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) 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.[8]

Again, BCs have no obligation to adopt a specific public benefit. The Model Act empowers them to do so if they want to distinguish themselves or express a more tailored vision of the good they do for society for internal or external audiences. Any specific benefit a BC adopts legally becomes part of the best interests of the BC, along with the general public benefit. The BC's board is then required to pursue that specific public benefit and, as we will now learn, balance that specific benefit against the BC's other goals, such as earning profits.[9]

3. Should BC Directors Pursue Profit or Purpose?

Hand in glove with the change in purpose of BCs is the directors' and officers' duty to consider that expanded purpose when running the business. Remember that fiduciaries of a traditional corporation must make business decisions with the intent of maximizing profits. That task can be incredibly complex, even though the goal is singular. For officers and directors of a BC, though, the task may be quite a bit more challenging. The Model Act requires them to consider the effect of any decision on the BC's shareholders; its employees, subsidiaries, and suppliers; its customers, to the extent they are beneficiaries of either the BC's general public benefit or specific public benefit; the welfare of every community in which the BC, its subsidiaries, or its suppliers have offices; the local and international environment; the BC's own interests, both immediately and over the longer term; and the BC's general public benefit purpose and any specific public benefit purpose the BC has adopted.[10] That is quite a juggling act!

As if that were not enough, the Model Act also gives directors and officers permission to consider "other pertinent factors or the interests of any other group that they deem appropriate."[11] While "pertinent" might be seen as some limit on the broad discretion the Act grants here, courts are unlikely to read it that way. The ending phrase "that they deem appropriate" likely applies to both the "other pertinent factors" and the "interests of any other group" and seems to grant essentially unfettered discretion to the board and the officers to consider anything they want.

BC directors and officers may choose which factors to prioritize. They may also decide to emphasize different factors at different times or in different contexts. The Model Act gives them a great deal of latitude, stating that they "need not give priority to a particular interest or

factor," unless the BC's corporate charter says that they will emphasize certain aspects of the general public benefit or some specific public benefit that the BC has adopted.[12]

With so many factors to consider, this balancing task may seem overwhelming at first. But when we look more closely, we can see that it is not really very different from what managers of a traditional corporation do. Traditional corporations need to care about their customers' well-being because dissatisfied customers will stop buying what the company is selling. Their concern for their customers may stem from a desire for profits, rather than a direct motivation to help, but the net effect is the same. Similarly, managers of traditional corporations must pay some attention to their employees' satisfaction. Unhappy employees tend to be less productive, which lowers the company's profits. They also sometimes leave, imposing large search and training costs on the firm trying to replace them.[13] Traditional corporations also have to think about their suppliers, because if their suppliers are losing money, they will go out of business and the company will need to find new sources.

Running a BC is not the same as running a traditional corporation. Managing a BC requires more purposeful thought about the well-being of customers, employees, and suppliers for their own sake and not just as profit-producing instruments. Plus, a BC must consider other factors as well, such as the environment and the communities in which it and its subsidiaries and suppliers operate. Again, those interests must be considered for their own sake and not as a means to maximize profits (such as by improving customer loyalty). My point is not that running a BC is the same, but that the difference in complexity from the task of running a traditional corporation is one of degree, not of kind. Running a traditional corporation is a complex task; running a BC is a more complex task. The increase in difficulty may be significant, but it should not prove overwhelming.

The increased complexity is also a change that should be seen as worthwhile. If we want to build an economy that produces good results for everyone who contributes to it instead of one that results in spiraling inequality; if we want an energy grid that is green and renewable instead of one that melts the ice caps; if we want companies that provide jobs that are reasonably stable instead of those that chase low labor costs from country to country; we may need to accept some increased managerial complexity. Nothing worthwhile is easy.

4. Who Can Sue to Enforce BC Directors' Duties?

The primary enforcement mechanism is a new type of lawsuit that shareholders can use against the BC's directors, called a "benefit enforcement proceeding." Shareholders who own at least 2% of a class of the BC's stock (or at least 5% of the equity of the BC's parent company, if there is one) may bring a benefit enforcement proceeding for any failure of the BC to create a general public benefit or any specific public benefit the BC has included in its corporate charter as part of its purpose. They may also bring a benefit enforcement proceeding for any violation of a duty established by the Model Act.[14]

The benefit enforcement proceeding only works for duties created by the Model Act; shareholders who want to bring other types of claims – such as breaches of the duties of care or loyalty, claims under *Unocal* or *Revlon*, or other civil actions such as claims for breach of contract or a tort like negligence – must follow a different procedure. (Claims for breaches of fiduciary duty outside the Model Act will often have to be brought as derivative claims, as we discussed in Chapter 2.) The benefit enforcement proceeding is also the *only* way anyone can sue to enforce the rights and duties created by the Model Act; the Model Act forbids any other type of suit.[15]

The Model Act states that benefit enforcement proceedings are brought "derivatively."[16] This statement might indicate that these cases are derivative suits and require plaintiffs to overcome all the hurdles that generally come with derivative suits that we covered in Chapter 2: the contemporaneous and continuous ownership rule, the demand futility requirement, and the possibility of dismissal after evaluation by an independent board committee. On the other hand, it is possible that the Act may have used that word only descriptively, indicating that the plaintiffs in these cases are suing for harm done to the corporation, rather than directly to individual shareholders. There are no reported cases that have tested this question yet. Courts could hold that benefit enforcement proceedings should not be subject to the usual obstacles imposed on derivative suits if they believe the incentives to bring these suits are lower than in a typical derivative claim. Remember that these obstacles are designed to strike a balance between providing too much incentive to lawyers to bring these actions – which could result in a lot of frivolous litigation – and providing too little incentive – which could result in directors and officers ignoring their fiduciary duties to balance and to produce social benefits.

To the extent that these suits are rooted in claims that the board is focusing too much on profits and neglecting the company's social goals, lawyers may not have a great deal of incentive to sue. The corporation is unlikely to suffer any pecuniary harm from underemphasizing social goals in order to maximize profits, and the attorneys' fees are commonly calculated as a percentage of the financial recovery garnered by the suit. It is possible for attorneys to persuade a court to award them hourly fees if the suit succeeds in conferring a material benefit on the company, but this is a riskier proposition than suing for a large damage pool. Courts could reasonably decide to forego some or all of the requirements for traditional derivative suits in order to encourage lawyers to sue directors of BCs that produce too little social benefit. The

statutory language leans against this, but it is sufficiently ambiguous to allow a court to find that the statute did not intend to import all of the features of a derivative suit into the benefit enforcement proceeding.

The point of the benefit enforcement proceeding is to ensure that BCs are achieving their missions. That is a worthy goal. We need some method of preventing BCs from becoming indistinguishable from traditional corporations. If the BC experiment is going to succeed, that will have to mean that BCs behave differently, better in some meaningful way than traditional corporations do. Suing directors and officers, as well as the BCs themselves, when the BCs fail to live up to what they say they will do feels very appealing. The looming threat of liability seems to work reasonably well in some other contexts to deter bad behavior and adds the benefit of compensating the victims. There are, though, significant limits to the benefit enforcement proceeding that may prevent it from serving this critical function very effectively, even without the barriers imposed in derivative suits. We will hold off on discussing those, though, until Chapter 8.[17]

5. Must BCs Disclose Their Social Performance?

The second way the Model Act tries to ensure that BCs behave meaningfully better than traditional corporations – in addition to the threat of director liability – is by requiring them to report on what they are doing for the world. The theory is that when a company has to tell the public about what it is doing, the company will be more likely to do the right thing. When a company reports bad conduct, it is likely to damage its reputation and suffer all sorts of setbacks, from declining sales to greater difficulty attracting and retaining its work force. In order to avoid those ill effects, BCs under a disclosure obligation – knowing that the public is watching – might choose to behave in a way they can be proud to reveal. As Justice Brandeis famously stated:

> Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.[18]

The Model Act's primary drafter was William H. Clark, Jr., a well-respected corporate lawyer who made a career of advising public companies on their corporate governance. The federal securities laws require public companies to disclose a lot of information about their financial results and business plans, with the goal of giving investors the information they need to make good decisions about which stocks to buy and sell. Corporate lawyers like Clark are therefore steeped in a culture of disclosure, so it is no surprise that Clark would have turned to disclosure as a tool to help shape BCs' behavior.

The Model Act requires BCs to prepare a "benefit report" every year. The benefit report must include a number of items. The two most important include (1) a narrative description of the general (and any specific) public benefit the BC provided and (2) an assessment of "the overall social and environmental performance" of the BC measured against a third-party standard.[19] The other items mostly pertain to the role of the benefit director, if the BC has one. I will talk about these in the next section.

The narrative description requirement is fairly straightforward. The Model Act requires a BC to discuss the ways the BC pursued a general public benefit and the extent to which the BC succeeded in producing one. As I explained above, the general public benefit can include a wide range of activities such as cleaning up the environment, progressive policies for employees, donating some profits to charity, or a host of other items. If a BC has adopted a specific public benefit, then the Act requires the BC to do the same for the specific public benefit – report on both efforts and achievements. If the BC has encountered obstacles in translating its efforts into

achievements, the BC must detail those as well. Finally, each BC must set forth the process it used to choose its third party standard by which it measures its social performance.

The assessment of the BC's social and environmental performance requires a little more explanation. In order to make the assessment meaningful, the Model Act requires BCs to apply a standard created by a third party, not by the BC itself. Otherwise, the assessment could easily become meaningless, with BCs setting the bar low then congratulating themselves for leaping over it. To avoid this, the Act sets up fairly rigorous criteria for third party assessments. A BC can choose any assessment that meets the criteria.

The standard must be "comprehensive," in that it includes measures of the company's impact on its workforce (and the workforce of its subsidiaries and suppliers), customers who are beneficiaries of its general or specific public benefit purpose, community and societal factors, and the local and global environment. The standard's author cannot be an entity that the BC controls. The standard must be "credible," meaning that the entity that drafted it must have the necessary expertise to evaluate a company's overall social and environmental performance. Credibility also speaks to the process with which the developer created the standard. The Act demands that the third party give voice to multiple stakeholders and provide a public comment period so that anyone the developer did not invite to participate in the drafting can provide criticisms and suggestions for changes. Finally, the third party standard must be "transparent" about both the way the standard works and how it was developed. In terms of the standard's substance, the public must have access to information about the criteria the standard uses to measure a company's social and environmental performance and the weight the standard gives to each of those criteria.

As for the process by which the standard was developed, the standard developer must disclose the identities of everyone who controls or influences the developing entity (such as its directors, officer, and owners). The developer must also disclose the process it uses to decide on changes to the standard's substance and how it chooses new members of its governing body. And the developer must reveal where it gets its money, so that the public can discern whether the developer's funding sources are related to the BC itself or the BC's industry.[20]

If the standard's authoring organization or anyone affiliated with the authoring organization (such as the author's directors, officers, or significant shareholders) has any connection with the BC or the people affiliated with the BC, the benefit report must disclose that connection.[21] The Act chose to require disclosure of this relationship. An alternative would have been to ban BCs with any such connections from using that third-party standard. That is likely the intent here – to discourage BCs from using standards written by organizations that have ties to the BC or its officers, directors, or significant shareholders by forcing them to make potentially embarrassing disclosures if they do use those standards – but disclosure is an indirect (and perhaps less effective) way of achieving that goal.

Once a BC has chosen a third-party standard that complies with these rules, the BC must continue to use that standard in subsequent years' benefit reports. If the BC does decide to change standards, the benefit report must explain why it switched.[22] The Act presumably wants to prevent BCs from strategically changing the measuring standards in order to inflate their results. Again, the Act chose the disclosure route rather than an outright ban on switching, perhaps out of concern that a ban would be overly rigid and unworkable.

Since B Lab wrote the Model Act, it should come as no surprise that B Lab's own measurement tool for socially conscious businesses – the "B Impact Assessment" ("BIA") –

meets the Model Act's requirements. The BIA has many strengths, and it is by far the most popular choice for BCs' third-party standard, but it is not necessarily the best standard for all BCs. The choice of a third-party standard is beyond the scope of this book, but I have written about the BIA's strengths and weaknesses elsewhere if you are interested in the topic.[23]

A benefit report that no one can access would be largely pointless, so the Model Act requires BCs to make their benefit reports available to the public. Each BC must provide a copy of each year's benefit report to their shareholders within four months of the end of its fiscal year. In addition, a BCs must post its benefit reports on its website, assuming it has one. If a BC does not have a website, it must send a copy of the benefit report to anyone who asks for one. BCs must also file a copy of each benefit report with the secretary of state's office of the state in which they registered.[24]

6. Can a BC Appoint a Director or Officer With Special Duties to Enforce Its Social Purpose?

BCs are for-profit businesses, and one can easily imagine a BC's directors and officers becoming so focused on maximizing profits that they neglect the BC's other social priorities. It might prove helpful to designate one or two directors and/or officers who "own" the company's social mission. If the social goals are these fiduciaries' primary focus, they are less likely to get lost in the day-to-day challenges of keeping the company afloat. Having someone whose job it is to remind the other people running the company that the BC is about more than earning a profit could prove quite helpful to sustaining the BC's social aspects.

The Model Act's authors recognized this possibility and provided BCs with two options: the benefit director and the benefit officer. The benefit director is indistinguishable from the other directors on a BC board: the shareholders elect her the same way and can remove her the

same way, as long as the benefit director is independent of the BC (meaning that the benefit director is not a full-time employee of the company). Other than this independence requirement, there are only two differences between the benefit director and the other directors.

The first difference is that the benefit director has the additional obligation of preparing an annual statement that reports on whether during that year the BC acted in compliance with its general public benefit purpose and any specific public benefit purpose the BC had adopted. The compliance report must include the benefit director's views on whether the board and the BC's officers obeyed their duty to consider the impact of the company's actions on the various corporate constituencies and the environment. (We covered this balancing duty earlier in this chapter.) The BC then includes this compliance report in its annual benefit report.[25]

The second difference is that the Model Act protects the benefit director from personal liability in regard to some of the benefit director's decisions. In many states, corporations have the option of protecting all of their directors from personal liability for violating the duty of care by including a provision in the corporate charter opting into that protection.[26] The Model Act goes a step further and extends this protection to *benefit* directors automatically whether or not the BC has protected the other directors.

The Act is not very clear on precisely how far this protection extends. The relevant provision states that "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."[27] The conditions excluding self-dealing, willful misconduct, and knowing violations of the law limit the protection to violations of the duty of care; benefit directors are still vulnerable to personal liability for violations of their duty of loyalty and for acts in bad faith.

The harder condition to understand is the one that limits the protection to acts or omissions "in the capacity of a benefit director." Since the Model Act says that benefit directors have the same powers and duties as other directors, that phrase could be read expansively to mean that benefit directors are protected from liability for violations of the duty of care for *any* act they perform in their capacity as a director. That reading would have the effect of automatically giving benefit directors the full scope of the protection that directors can receive when corporations opt into the protective provision in their corporate charters, even if the BC has not chosen to do that. That seems a strained reading to me. Why should benefit directors get this protection when the corporation has chosen not to give it to the other directors? The more likely interpretation is that benefit directors are protected when they act as *benefit* directors specifically, not for any act they take as a director. Since the only action benefit directors take that is unique to them is to provide the annual compliance statement, the better reading of this protection is that it is limited to that act. In other words, benefit directors cannot be held personally liable for violations of their duty of care for providing the annual compliance statement.

In addition to offering the option of creating a benefit director, the Model Act also includes the possibility of appointing a benefit officer. The benefit officer has the duty of preparing the BC's annual benefit report. Otherwise, the benefit officer is no different from any other corporate executive. The Act does not grant benefit officers any special protection from liability in connection with their role, the way it does for benefit directors. Benefit directors can also take on the task of benefit officer, if that seems advisable, but their dual role will not offer them any additional liability protection.[28] The Act only extends that protection to actions taken in the capacity of a benefit director.[29]

7. How Can a Traditional Corporation Convert to a BC?

Many of the existing BCs began life in that form. For them, the adoption of the BC legal form was simple. All that was required was that the founders obey the general rules for founding corporations in that state and that they put a provision in the corporate charter that stated that the company was a benefit corporation.[30]

There are many existing corporations, though, that might choose to convert to BC status now that the option is available. Patagonia and Kickstarter are two prominent examples of companies whose prosocial missions – respectively, protecting the environment and promoting the arts – long predated the availability of the BC form. Both companies converted after the legislatures in their states of incorporation (California and Delaware, respectively) passed authorizing legislation.

For companies like Patagonia that were originally formed as traditional corporations, the process requires a few extra steps. First, the company must amend its corporate charter to state that the company is a benefit corporation. Amending the charter requires the approval of the board of directors. Any vote by the board of directors requires that a quorum of the directors (usually a majority) attend the meeting and then that a majority of those directors present approve the resolution at issue.

Then the amendment must also be approved by the shareholders. A shareholder meeting also requires a quorum (again, usually a majority of the shares) to count as a valid meeting. For ordinary matters, once a quorum is present, all that is needed for a resolution's approval is a majority of the shares represented at the meeting (technically, the approval of a majority of the votes represented, which is not always the same as the number of shares). To convert to a BC,

though, the Model Act requires a higher threshold: two-thirds of the votes of each class of outstanding stock must approve the conversion for it to become effective.[31] Alternatively, a traditional corporation can become a BC by merging with an existing BC, with the existing BC as the surviving corporation. The merger also must then be approved by both the board and by a two-thirds vote of each class of outstanding stock.[32]

B. How Do PBCs Run?

When Delaware opted into the BC movement in 2013, it decided not simply to adopt the Model Act. Instead, the state drafted its own statute from scratch. Delaware refused even to keep the name of the new entity; in Delaware, these entities are called "public benefit corporations" (PBCs) rather than "benefit corporations." This change in nomenclature has actually caused some – in my view, entirely unnecessary – confusion. Many important commercial states such as California and New York already had a "public benefit corporation" form; that is the term those states use for a nonprofit corporation. While Delaware's drafting effort seems a bit overdone – Delaware could have just edited the portions of the Model Act it wanted to change – it is in keeping with Delaware's role as the leader in U.S. corporate law that it chose to write its own statute rather than follow B Lab's lead.

Despite that decision to change the form of the statute entirely, the Delaware PBC statute's substantive elements are often similar to the Model Act's BC form. Certainly the themes are overlapping. Like the BC, the PBC has a broader purpose than earning profits, and PBCs' boards of directors are required to balance those broader goals against the desire for earnings. The specifics of how Delaware defines and protects these broader purposes, though, are materially different in a Delaware PBC.

1. What Are PBCs' Purpose?

The Delaware statute defines PBCs as for-profit entities that are "intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner."[33] That raises the question of what counts as a "public benefit." Delaware defines "public benefit" as "a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature."[34] The Model Act defined "public benefit" for BCs as, "A material positive impact on society and the environment, taken as a whole, from the business and operations of a benefit corporation assessed taking into account the impacts of the benefit corporation as reported against a third-party standard."[35]

These definitions use different language, but to what extent do they mean the same thing? The intent seems to be broadly similar. The Model Act asks for a positive impact on society. That requirement closely tracks Delaware's mandate that PBCs have a positive effect (or reduce a negative effect) on "persons, entities, communities or interests" which sounds like a description of "society." But from there, the two definitions diverge. Delaware's statute goes on to list specific categories of public benefit and requires only that a PBC pursue at least one of those categories. In contrast, the Model Act requires BCs to produce a positive impact on society and the environment "taken as a whole." The Model Act's requirement, then, is more demanding than Delaware's. A Delaware PBC chooses a specific benefit that it will pursue, but a Model Act BC must create a broad positive impact on society generally. (The Model Act does have an analogous list of specific public benefits, but the Act places its list in the definition of "specific public benefit," something that is optional for BCs.[36])

The reason Delaware includes a list of specific social benefits in its definition of "public benefit" is that Delaware does not require PBCs to foster a general public benefit, in contrast to the Model Act's requirement of BCs. Instead, PBCs are required to adopt one or more specific public benefits.[37] Not only does Delaware law not require PBCs to pursue a general public benefit, it does not even offer that as an option. Instead, Delaware PBCs define for themselves what particular good causes they will pursue by listing those goals in their corporate charters.

Delaware's approach does avoid the difficult definitional questions the Model Act faced in trying to outline how a corporation can pursue a "general public benefit," but it does so at the cost of abandoning all attempts at any degree of standardization. With one exception, this is probably more a difference of style rather than substance. Remember that the Model Act's very broad definition of a "general public benefit" provides a great deal of freedom to BCs to choose how they will create a positive impact on society. Still, the goal of the Model Act is more ambitious, even if the practical impact of that ambition may be minimal. The exception where the differences may have some bite is the Model Act's mandate that the general public benefit include a positive impact on the environment. This is the one part of the Model Act's general public benefit requirement that seems clear. For Delaware PBCs, the environment is just one option among many on their menu of social impact choices. A Delaware PBC could choose to work to heal the environment, but it is not required to do so. Under the Model Act, helping the environment is mandatory.

An additional, probably less consequential, difference in the two statutes' definitions of corporate purpose is that the Model Act requires assessment against a third-party standard and reporting as part of the very definition of "public benefit." Delaware does not. In fact, as we

will see a bit later, Delaware makes the use of a third-party standard entirely optional for PBCs and contains a more lenient reporting requirement.

2. What is a PBC's Specific Public Benefit?

Delaware law requires each PBC to choose at least one specific public benefit it will pursue. This does not mean that Delaware PBCs are necessarily providing narrower public benefits than Model Act BCs are. PBCs are free to choose to adopt as many specific public benefits as they like. For example, a PBC might choose to create a positive workplace for its employees, enact green policies that reduce energy and plastic use, and donate a percentage of its profits to helping the homeless. There does not have to be any material difference between how a PBC functions and how that same company would operate if it instead organized as a BC, especially when we think about the very broad definition of a "general public benefit" the Model Act adopts for BCs. On the other hand, a PBC could elect to focus on only one or two causes, which might make it look quite different from a BC that takes its duty to create a general public benefit seriously.

The list of specific public benefits available to PBCs in Delaware is very broad, much like the comparable list in the Model Act. Both statutes essentially leave it up to the company's discretion to define for itself what it means to be a "good" company. Delaware's list includes benefits that are "artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or [of] technological nature."[38] Note that Delaware did specifically list religious benefits, even though the Model Act did not. (Though the Model Act's catch-all provision should probably be read as broad enough to include religious benefits.) Much of this list overlaps with the Model Act's list of specific public benefits, though the two statutes sometimes use different terminology. Both statutes include art, charity, the environment,

medicine, and science. They also both list economic benefits, though they describe them somewhat differently. Delaware adds cultural, educational, literary, religious, and technological benefits, but most of these could fit into a broad reading of the Model Act's categories ("advancement of knowledge" for example, could include education as well as scientific progress) or, if not, would be covered by the Model Act's catch-all provision. And like the Model Act, Delaware's statute permits companies to add other categories beyond those listed in the statute. The Model Act has a catch-all provision that covers "any other particular benefit on society or the environment," while Delaware simply says its list is "not limited to" the enumerated categories.[39]

3. Should PBC Directors Pursue Profit or Purpose?

The Delaware statute requires PBC boards to balance profit against other prosocial interests in much the same way that the Model Act requires BC boards to do so. The Model Act lists some of these other interests specifically, though not exclusively, but the Delaware statute is more general. Delaware requires PBC boards to manage the PBC "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 public benefits identified in its certificate of incorporation."[40] Both statutes require boards to pursue the stockholders' financial interests. Delaware's broad inclusion of "those materially affected" by the company's operations would include many of the specific categories of internal interest groups the Model Act lists, such as the company's employees (and the employees of its subsidiaries), communities where it or its subsidiaries have offices, and perhaps the environment.

Delaware's language could also be read to include some of the more distantly affected groups, such as the employees and communities of the company's suppliers, but these are more

uncertain. A lot hinges on courts' future interpretation of the word "materially" in Delaware's statute. "Material" in the law means "important." Not every impact will count as material, and courts will have considerable discretion in deciding how broad they want this requirement to be. The courts might choose to adopt a bright-line test that either includes suppliers' conduct or excludes it categorically, but it seems more likely that they will determine whether suppliers' treatment of their employees, their communities, and their local environments is the material result of the PBC's conduct on a case-by-case basis. A bright-line test would be easier to apply, but materiality is typically seen as a fact-specific inquiry, which would be more consistent with case-by-case treatment. Overall, then, Delaware's balancing requirement is likely to end up being somewhat narrower than the Model Act's, at least when it comes to PBCs' suppliers.

The same will likely be true of Delaware's treatment of the environment. The Delaware statute does not specifically mention the environment as one of the interests that PBC directors must balance. In some cases, a company's treatment of the environment might well result is a sufficiently material effect on identifiable individuals to trigger the "those materially affected by the corporation's conduct" test. This seems especially likely when the PBC is polluting the local environment, since those effects will often be easier to identify concretely. But as a PBC's environmental impact becomes more diffuse – as it becomes harder to identify specific people or groups who are directly and materially affected – Delaware courts are less and less likely to insist that PBC boards take that impact into account when contemplating corporate action.

This result will be different for PBCs that list the environment as one of the specific public benefits the company commits to pursue. Delaware law does require PBC boards to consider the specific public benefit(s) identified in the PBC's certificate of incorporation when making corporate decisions. If the corporate charter includes the environment (local or global)

as one of the company's specific public benefits, then, the board must consider the environment. Materiality will still matter here, even though the statute does not use the word when describing the board's consideration of the PBC's specific public benefit(s). Delaware law requires the board to balance different interests: profits, the company's material impact on others, and the company's specific public benefit(s). Balancing different interests necessarily requires the board to think about how important a given decision will be to each of those interests.

For example, suppose a PBC that manufactured heavy-duty farm equipment listed the reduction of greenhouse gases as its only specific public benefit. Because each of its products was very expensive, the company had long relied on in-person meetings with farmers as its core sales strategy. These meetings required a great deal of travel, often by plane, which produced a significant volume of greenhouse gases. One of the PBC's directors proposed switching to videoconferencing sales meetings rather than having these meetings in person. A pilot study revealed that videoconferencing was less effective than in-person meetings and resulted in a ten percent decline in sales. This decline in revenue swamped any positive impact on the PBC's bottom line from the cost savings that came from reduced travel and resulted in a fifteen percent decline in profits. On the other hand, videoconferencing was much easier on the sales staff, enabling them to spend much more time with their families. Videoconferencing cut down on the PBC's greenhouse gas emissions by five percent. (Most of the company's carbon emissions stemmed from its manufacturing process.)

In deciding whether to adopt the new policy, the board must consider all three of these factors: the reduction in sales and corresponding decline in profits, the positive effect on the lives of the employees, and the beneficial impact on the environment. For each of these factors, materiality is key. The hypothetical posited a fifteen percent reduction in profits, a significant

improvement in the sales staff's quality of life, and a five percent decrease in greenhouse gas emissions. However we might come out on the decision with those assumptions, our analysis would clearly change dramatically if the loss in profits was instead seventy-five percent, with the other factors holding constant. Similarly, if we could eliminate all the PBC's greenhouse gas emissions with this new policy, our decision might shift again. The materiality of each factor is critical to the balancing process, even without a statutory requirement that it be so.

4. Who Can Sue to Enforce PBC Directors' Duties?

Just like the Model Act, Delaware law permits shareholders who own at least 2% of a PBC's stock to bring a suit against the PBC's directors if the directors fail to promote the company's social purpose adequately.[41] Delaware law is somewhat more restrictive than the Model Act, though, in three ways.

First, under Delaware law, only shareholders who own 2% of the PBC's total outstanding equity may bring suit. The Model Act permits shareholders who own at least 2% of any *class* of stock to sue. For companies that have only one class of stock, these rules will have the identical result, but for corporations that have issued more than one class of stock, the Delaware rule will be more restrictive.

Second, there is no provision under Delaware law for shareholders of a PBC's parent company to sue the PBC's directors for failing to balance interests properly. The Model Act does permit shareholders who own at least 5% of a PBC's parent company to sue.

Finally, and perhaps most importantly, Delaware requires PBC shareholders to bring these suits as derivative actions. As we discussed in Chapter 2, a derivative action is much harder to launch successfully than the alternative, a direct action. To succeed in a derivative

action, the shareholder plaintiff must meet the contemporaneous and continuous ownership requirements and must demonstrate that demand was futile. In addition, the case may be dismissed if the corporation appoints an independent committee to evaluate whether the case is in the corporation's best interest, that committee determines in good faith and after a reasonable investigation that the corporation would be better off if the suit were dismissed, and the court rules that in its own business judgment the case is against the corporation's best interests.

The Model Act, in contrast, created a new type of lawsuit, the benefit enforcement proceeding, that shareholders may use to sue directors who the shareholders believe are violating their duty to balance the BC's various goals. As we discussed above, courts may incorporate the derivative suit features into benefit enforcement proceedings under the Model Act, but that outcome is far from certain. In Delaware, there is no new type of lawsuit to handle these claims. They must be brought with a traditional derivative action with all its accompanying obstacles.

5. Must PBCs Disclose Their Social Performance?

Like the Model Act, Delaware law requires some degree of disclosure as an enforcement tool, to help ensure the board remains accountable for its decisions. Delaware's disclosure requirement, though, is considerably narrower than the Model Act's in three significant ways. First, unlike the Model Act, which requires a benefit report annually, Delaware requires its equivalent disclosure only every other year. Second, Delaware requires PBCs to send its disclosure only to shareholders, whereas the Model Act mandates that BCs make benefit reports available to the public by posting them on the company's website or by making them available on request if the company has no website. Finally, although the content of the disclosure under the two statutes is broadly similar, there is one important difference: Delaware does not require PBC to measure their provision of a public benefit against a third-party standard, the way that the

Model Act does for BCs. Delaware does require PBCs to assess their success in furthering whatever specific public benefit they have adopted, but that assessment does not need to involve an independent, third-party standard. PBCs are free to assess their progress in any way the board deems fit.[42]

6. Can a PBC Appoint a Director or Officer With Special Duties to Enforce Its Social Purpose?

Delaware does not expressly provide for the option of appointing a benefit director or officer. Nevertheless, Delaware law is quite flexible. It is possible to create the position of a benefit director with the obligation to gather information on the company's progress in furthering its social mission and reporting back to the board. Delaware permits boards to form committees, even committees made up of a single director. Boards can then delegate almost any of their powers to that committee, as though the committee were the board. (There are some exceptions to this broad delegation authority, but they are not pertinent to our discussion.[43]) The benefit director would not automatically receive liability protection, as that person does under the Model Act, but a Delaware PBC could include a provision in its corporate charter that insulated all of the directors – including the benefit director – from personal liability for any violations of the duty of care.[44]

Delaware law also empowers the board to create officer positions and define officers' duties. A Delaware PBC could therefore create a position with the title of "benefit officer" and could assign that officer the duty of preparing the PBC's report on its social mission for the company's shareholders. In other words, although the Delaware PBC statute does not include any provisions that mention either a benefit director or a benefit officer, the general flexibility of Delaware corporate law allows a PBC to create these positions, just as the Model Act does.

7. How Can a Traditional Corporation Convert to a PBC?

A company that chooses to begin as a PBC has only two requirements to implement that choice. First, it must state in its corporate charter that it is a public benefit corporation. Second, its corporate charter must list one or more specific public benefits that it will pursue.[45] The company's name may reflect its PBC status such as by including the words "public benefit corporation" or the abbreviation "PBC," but this is not mandatory.[46] (Advertising PBC status in a company's name does have at least one advantage: nonpublic PBCs that do not indicate their status in the company's name must provide notice to shareholders of their PBC status before they issue stock. PBCs whose names do indicate their PBC status are exempt from this notice requirement.[47]) The first requirement – including a charter provision stating the company is organized as a PBC – also appears in the Model Act. The Model Act does not require a BC to adopt a specific public benefit, though. Instead, BCs must all pursue a general public benefit.

A traditional corporation that wants to convert to PBC status must amend its corporate charter to state that it is a PBC and adopt one or more specific public benefits. Alternatively, a traditional corporation can merge with an existing PBC, with the PBC as the surviving corporation. With either method, a conversion requires the approval of the board of directors. Approval also requires approval of a majority of the shareholders, a lower threshold than the Model Act imposes for conversion to a BC.[48]

* * * * *

In this chapter, we covered the differences between BCs, PBCs, and traditional corporations along seven different dimensions: (1) general public purpose; (2) specific public purpose; (3) directors' duty to balance purpose against profit; (4) suits to enforce directors'

balancing duty; (5) disclosure of the company's fulfillment of its social mission; (6) appointment of a benefit director or officer; and (7) the requirements to convert from a traditional corporation to a BC or PBC. As this chapter answered the "what" question – what must a company do to qualify as a BC or PBC – the next chapter will start on the "why" – why would an entrepreneur choose one of the new hybrid forms?

---

[1] B Lab, *Model Benefit Corporation Legislation* (April 17, 2017), available at https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf (last viewed December 3, 2019) (hereinafter "Model Act").
[2] *See id.*, §201(a).
[3] *See id.*, §102.
[4] *See id.*
[5] *See id.*
[6] *See* Centers for Disease Control and Prevention, "Comparative Effectiveness of Moderna, Pfizer-BioNTech, and Janssen (Johnson & Johnson) Vaccines in Preventing COVID-19 Hospitalizations Among Adults Without Immunocompromising Conditions – United States, March-August 2021," Sept. 24, 2021, https://www.cdc.gov/mmwr/volumes/70/wr/mm7038e1.htm (last viewed Sept. 24, 2021).
[7] *See* Jacob Rosenberg, "Kickstarter Was Supposed to Be About Conscious Capitalism. So Why Did It Oppose a Union Drive?" MotherJones, Feb. 21, 2020, https://www.motherjones.com/media/2020/02/kickstarter-was-supposed-to-be-about-conscious-capitalism-so-why-did-it-oppose-unionization/ (last viewed Sept. 24, 2021).
[8] Model Act, § 102.
[9] *See* Model Act, § 201(c) ("The creation of general public benefit and specific public benefit under subsections (a) and (b) is in the best interests of the benefit corporation.").
[10] *See* Model Act, §301(a)(1).
[11] *See id.*, § 301(a)(2).
[12] *See id.* § 301(a)(3).
[13] *See infra,* Chapter 10.
[14] *See id.* §305.
[15] *See id.* § 305(a) ("Except in a benefit enforcement proceeding, no person may bring an action or assert a claim with respect to: (1) failure of a benefit corporation 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*].").
[16] *Id.* at §305(c)(2).
[17] For example, the groups that are allowed to bring benefit enforcement proceedings are very limited and exclude the beneficiaries of the BC's general and specific public benefits. *See id.* §305(c) ("A benefit enforcement proceeding may be commenced or maintained only: (1) directly by the benefit corporation; (2) derivatively . . . 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; or (ii) 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.").
[18] Louis D. Brandeis, Other People's Money and How the Bankers Use It 92 (1914).
[19] *See* Model Act, § 401(a).
[20] *See id.* §102.
[21] *See id.* § 401(a)(6).
[22] *See id.* §401(a)(2).

[23] You can also read a detailed analysis of the BIA at Michael B. Dorff, *Why Public Benefit Corporations?*, 42 Delaware Journal of Corporate Law 77 (2017).
[24] *See* Model Act, § 402.
[25] *See id.* § 302.
[26] *See, e.g.* 8 Del. Gen. Corp. L. §102(b)(7).
[27] *See id.* § 302(e).
[28] *See id.* §§ 304 (authorizing the appointment of benefit officers), 302(b) ("A benefit director may serve as the benefit officer at the same time as serving as the benefit director.").
[29] *See id.* § 302(e) ("[A] benefit director shall not be personally liable for an act or omission in the capacity of a benefit director . . . .").
[30] *See id.* § 103.
[31] *See id.* §§ 104 (conversion rules), 102 (definition of "minimum status vote").
[32] *See id.* § 104(b).
[33] 8 Del. Gen. Corp. L. §362(a).
[34] *Id.* § 362(b).
[35] *See id.*, §102.
[36] *See* Model Act, § 102.
[37] *See* 8 Del. Gen. Corp. L. § 362(a)(1).
[38] *Id.* § 362(b).
[39] *See* Model Act, §102; 8 Del. Gen. Corp. L. § 362(b).
[40] 8 Del. Gen. Corp. L. § 362(a). *See also* 8 Del. Gen. Corp. L. § 365(a) (using almost identical language to describe the directors' duties).
[41] *See* 8 Del. Gen. Corp. L. § 367.
[42] *See id.*, § 366.
[43] For example, the board cannot delegate the authority to vote on any matter that requires a shareholder vote, such as a merger. *See* 8 Del. Gen. Corp. L. §§ 141(c)(2) ("[N]o such committee shall have the power or authority in reference to . . . approving or adopting, or recommending to the stockholders, any action or matter (other than the election or removal of directors) expressly required by this chapter to be submitted to stockholders for approval . . . ."); § 251(c) (board must submit merger agreement to the shareholders for their approval).
[44] *See* 8 Del. Gen. Corp. L. §102(b)(7).
[45] *See* 8 Del. Gen. Corp. L. § 362(a).
[46] *See* 8 Del. Gen. Corp. L. § 362(c).
[47] *See id.*
[48] *See* 8 Del. Gen. Corp. L. §§ 242(b)(1); 251.