



# **Becoming a Benefit Corporation**

The Maryland Benefit Corporation Law

**Client Advisory**

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## Introduction

This advisory focuses on two areas:

- Key provisions of Maryland's Benefit Corporation law;
- How businesses become Benefit Corporations in Maryland.

It references the Benefit Corporation law, codified in Maryland Code, Corp. and Assoc. §5-6C-01 et seq. (herein referred to as “the Statute”). See <http://goo.gl/cYNQ1>

## Background on Maryland’s Benefit Corporation Law

Maryland’s Benefit Corporation law took effect on October 1, 2010, the first of its type in the United States. As such, it reflects the interest, growth, and promise of sustainable social enterprise and socially-responsible business in Maryland.

The law authorizes corporations to elect to become benefit corporations, a unique designation allowing businesses to be officially formed, and recognized, for their commitment to a “triple bottom line” of “people, planet, and profit.”

The law is modeled on proposals by B Lab <http://www.bcorporation.net> , a nonprofit organization that certifies companies solving social and environmental concerns as “B Corporations.” At the time of this writing, Vermont recently enacted its own Benefit Corporation law, with several other states considering similar legislation.

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## Key Provisions of Maryland's Benefit Corporation Law

Major provisions in the Statute address four areas.

1. General and specific public benefits;
2. Responsibility of and protection for Directors;
3. Reporting requirements
4. Third party assessments

### *Public Benefits*

Benefit Corporations must create a “General Public Benefit,” defined according to the Statute as “a material, positive impact on society and the environment, as measured by a third-party standard, through activities that promote a combination of specific public benefits.” This can include:

- Providing individuals or communities with beneficial products or services;
- Promoting economic opportunity, beyond job creation, in the normal course of business;
- Preserving the environment;
- Improving human health;
- Advancing the arts, sciences, or knowledge;
- Increasing the flow of capital to entities with a public benefit purpose;
- Any specific additional benefit for society or the environment.

## *Responsibility of Directors*

Under the Statute, Benefit Corporations Directors must take into account a variety of specific “stakeholders” and factors when deciding the best interests of the corporation including:

- Stockholders of the Benefit Corporation;
- Employees and workforce of the Benefit Corporation, its subsidiaries;
- Vendors and suppliers of the Benefit Corporation and the areas in which they conduct business;
- Customers as beneficiaries of either the identified general or specific public benefit purposes of the Benefit Corporation;
- Community and societal considerations, including those of any community in which Benefit Corporation offices and facilities; subsidiaries; or suppliers are located or conduct business;
- Local and global environment interests;
- Additional pertinent factors the Directors deems relevant.

## *Protection from Shareholder Lawsuits*

Promoting the General Public Benefit, as well as any relevant Specific Public Benefits, is expressly recognized in the Statute as being in the “best interests of the Corporation. The responsibility under the Statute to take into account various stakeholders provides Directors of a Benefit Corporation protection from shareholder derivative lawsuits, raised by minority shareholders solely or primarily concerned with financial performance.

This protection does not remove the liability of Directors for poor and reckless business decisions, made in the name of social or environmental progress. Directors must follow the same standard of care as directors for other businesses, set forth in Maryland Code, Corp. and Assoc. §2-405.1. See <http://goo.gl/aNWDx>

This specifically means making decisions:

- In good faith;
- In a manner he/she reasonably believes to be in the best interests of the corporation; and
- With the care that an ordinarily prudent person in a like position would use under similar circumstances.

The Statute specifically states that a Director of a Benefit Corporation who (a) considers other stakeholders in addition to shareholders; and (b) who otherwise reasonably performs his duties, is immune from liability concerns.

## *Reporting*

The most significant new burden the Statute imposes is the production of an annual “benefits report” which must be made available to all shareholders and posted on the corporation’s website (or otherwise made publicly available free of charge).

This report must identify how the Benefit Corporation:

- Pursued a General Public Benefit during the year and the extent to which the General Public Benefit was created;
- Worked to create Specific Public Benefits stated in its charter as the purpose of the Benefit Corporation, and the extent to which that Specific Public Benefit was met;
- Addressed any circumstances that hindered the creation of the Public Benefit;
- Assessed and evaluated its societal and environmental performance, prepared in accordance with a third party standard. This reporting must be consistently weighed with the prior year’s benefit report, or accompanied by an explanation of the reasons for any inconsistent application.

## *Third Party Standard*

The final requirement for Benefit Corporations is an assessment prepared in accordance with a “third party standard.” Based on legislative history and expert consultation, this suggests that Benefit Corporations must submit to an annual quantified examination of its social and environmental impact by a third party organization offering certification.

The Statute, however, does not define or provide specific guidance on a third party standard, save for two elements:

- Independent of the Benefit Corporation, in terms of source, development, and application;
- Transparent in providing public available and accessible information about the standard. This includes criteria for measuring business performance; how these factors weigh in assessment and evaluation; and the entity or people responsible for developing, applying, and ensuring the quality of both the standard and the process by which it is applied and changed.

Many organizations provide industry certifications and standards for corporate social and/or environmental responsibility. Relevancy, quality, credibility depend, in large part, on why businesses require reporting (e.g. operations, products and services, consumers) and to what extent.

While it is unclear which specific “third party standards” meet the requirements under the Statute, or which (if any) standards will be modified to fit Maryland law, greater clarity is expected as Benefit Corporation filings and activity increase.

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## Filing as a Benefit Corporation in Maryland

The overall procedure, at present, largely follows the corporate filing process for charters and amendments with the Maryland State Department of Assessments and Taxation (SDAT). <http://www.dat.state.md.us>

For Benefit Corporations, the corporate charter (also known as Articles of Incorporation) must contain a statement indicating that the business elects to become a Benefit Corporation. Existing incorporated businesses need to file an amendment to their charters, as approved by stockholders, stating the corporation's intention to be a Benefit Corporation.

The Statute requires a "clear reference" to Benefit Corporation status to appear prominently at the head of the corporation's charter document, each subsequent charter document, and all outstanding stock certificates. The charter should also include provisions about the public benefits it seeks to fulfill.

Some ambiguity remains whether the Statute requires a Benefit Corporation to specifically list on its charter that one of its purposes is to create a General Public Benefit. We generally advise that our clients simply add this simple language to the original charter or amendment.

The Statute allows provisions in the Articles outlining specific ways in which the Benefit Corporation will promote its social or environmental goals. Third party certifying organizations may require organizations to incorporate specific language in their filings or subsequent documents.

SDAT officials have stated that their department will process filing or changing a charter to become a Benefit Corporation no differently from any other charter or amendment.

## Conclusion

Forming a new Benefit Corporation, or amending the existing charter and foundational documents, can profoundly impact legal rights and status of a business.

Firms and organization interested in exploring Benefit Corporation status are strongly advised to seek qualified board, legal, and/or accounting counsel before starting or changing any paperwork related to their business matters.

We anticipate ongoing clarification regarding Benefit Corporations over time—whether through the legislature, administrative bodies, courts, or simply through by “industry standards” developed through the sharing of information among social entrepreneurs.

Expert consultation with an attorney and business advisor will help determine the most effective and efficient manner for satisfying existing and forthcoming requirements, to aid your business in its social responsibility compliance.

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## About Jon Widrick / Ascensus Law Group

Jon Widrick is a founding partner in Ascensus Law Group. He represents green, sustainable, and social enterprises throughout the Washington DC region in all aspects of business law. Jon has served as primary corporate counsel to companies ranging from information technology to utilities. His legal experience also extends to tax-exempt organizations, including international nonprofits and local charities.

## About Amy Kincaid / ChangeMatters

Amy Kincaid is founder and principal of ChangeMatters, a consultancy for social purpose ventures and cultural entrepreneurs concerned with the greater creative economy and wellness of their communities. As a director, consultant, and trainer, she has guided nonprofit and for-profit organizations in the US and abroad through startup, turnaround, and major growth activities. With a particular record of service to overlooked market segments and underserved populations.