Corporate and Business Law

Laurence V. Parker

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I. INTRODUCTION

In the 2011 session, the Virginia General Assembly passed House Bill 2358, Benefit Corporations, to be codified as article 22 (the "Benefit Corporations Article") of the Virginia Stock Corporation Act ("VSCA").[1] The Benefit Corporations Article is largely based on legislation prepared in other states[2] and allows a Virginia corporation to elect in its articles of incorporation to be treated as a "benefit corporation." These for-profit corporations are required to pursue not only profitability but also a general public benefit and, if one so elects, one or more specific public benefits. In Section II of this article, the author discusses the Benefit Corporations Article in detail. Section III examines some aspects of the Benefit Corporations Article for social entrepreneurs and practitioners to consider before making the benefit corporation election. In Section IV, the author asks whether practitioners and social entrepreneurs can achieve some of the same corporate governance objectives by private ordering without electing to be treated as benefit corporations. Finally, Section V concludes with some observations about the Benefit Corporations Article itself.

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1. Act of Mar. 26, 2011, ch. 698, 2011 Va. Acts ___ (codified at VA. CODE ANN. §§ 13.1-782 to -791 (Repl. Vol. 2011)).

2. *See Passed Benefit Corporation Legislation*, B LAB, http://www.bcorporation.net/publicpolicy (last visited Oct. 12, 2011); *see also* Bus. Ass'n Comm. of the Section of Bus. Law of the Pa. Bar Ass'n, *Amendments to the Pennsylvania Consolidated Statutes with Official Source Notes and Committee Comments: Adopting Provisions Relating to the Incorporation and Governance of Benefit Corporations as Chapter 33 of Title 15* § 3302 [hereinafter Proposed Pennsylvania Act], *available at* http://www.bcorporation.net/resources/bcorp/documents/Draft_Pennsylvania-Legislation.pdf; Jamie Raskin, *The Rise of Benefit Corporations*, THE NATION, June 27, 2011, www.thenation.com/article/161261/rise-benefit-corporations.

II. THE BENEFIT CORPORATIONS ARTICLE AMENDMENT TO THE VIRGINIA STOCK CORPORATION ACT

A. *Formation*

Under the newly enacted Benefit Corporations Article, a benefit corporation is "a corporation organized pursuant to the provisions of [VSCA]: (1) [t]hat has elected to become subject to [the Benefit Corporations Article]; and (2) [t]he status of which as a benefit corporation has not been terminated under § 13.1-786."[3] To organize itself as a benefit corporation, a Virginia corporation must state in its articles of incorporation, either at the time it is formed or by a subsequent amendment, that it is a benefit corporation.[4] In addition, the corporation must state in its articles of incorporation that it was organized for "the purpose of creating a general public benefit," and it may state one or more specific public benefits in either its articles of incorporation or bylaws.[5]

B. *Public Benefit*

The general public benefit that each Virginia benefit corporation must pursue is defined as "a material positive impact on society and the environment taken as a whole, *as measured by a third-party standard*, from the business and operations of a benefit corporation."[6] A specific public benefit means:

> [A] benefit that serves one or more public welfare, religious, charitable, scientific, literary, or educational purposes, or other purpose or benefit beyond the strict interest of the shareholders of the benefit corporation, including:
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> 1. Providing low-income or underserved individuals or communities with beneficial products or services;
> 2. Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;
> 3. Preserving or improving the environment;
> 4. Improving human health;
> 5. Promoting the arts, sciences, or advancement of knowledge;

3. VA. CODE ANN. § 13.1-782 (Repl. Vol. 2011).
4. *Id.* §§ 13.1-784 to -785 (Repl. Vol. 2011).
5. *Id.* § 13.1-787 (Repl. Vol. 2011).
6. *Id.* § 13.1-782 (Repl. Vol. 2011) (emphasis added).

> 6. Increasing the flow of capital to entities with a public benefit purpose; and
> 7. Conferring any other particular benefit on society or the environment.[7]

A benefit corporation's performance and discharge of its mandate must be measured by a third-party standard, defined as:

> [A] recognized standard for defining, reporting, and assessing corporate social and environmental performance that:
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> > 1. Is developed by a person that is independent of the benefit corporation; and
> > 2. Is transparent because the following information about the standard is publicly available:
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> > > a. The factors considered when measuring the performance of a business;
> > > b. The relative weightings of those factors; and
> > > c. The identity of the persons that develop and control changes to the standard and the process by which those changes are made.[8]

So far, Virginia, Maryland, New Jersey, and Vermont have passed similar benefit corporation statutes,[9] while Pennsylvania[10] and California have considered a variation of the statute.[11]

C. *Fiduciary Duties and Limitation of Liability*

Perhaps the most important changes under the Benefit Corporations Article are the changes to the standard of conduct for directors and the limitation of liability for officers. The standard of conduct for directors is codified at section 13.1-788 as follows:

> A. Subject to § 13.1-690, in discharging the duties of their respective positions and in considering the best interests of the benefit corporation, the board of directors, committees of the board, and individual directors of a benefit corporation:
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> > 1. Shall consider the effects of any corporate action upon:

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7. *Id.*
8. *Id.*
9. *See* Raskin, *supra* note 2.
10. *See generally* Proposed Pennsylvania Act, *supra* note 2.
11. John Tozzi, *Maryland Passes 'Benefit Corp.' Law for Social Entrepreneurs,* BLOOMBERG BUSINESSWEEK (Apr. 30, 2010), http://www.businessweek.com/smallbiz/running_small_business/archives/2010/04/benefit_crp_bi.html.

> a. The shareholders of the benefit corporation;
> b. The employees and workforce of the benefit corporation, its subsidiaries, and suppliers;
> c. The interests of customers as beneficiaries of the general or specific public benefit purposes of the benefit corporation;
> d. Community and societal considerations, including those of each community in which offices or facilities of the benefit corporation, its subsidiaries, or suppliers are located;
> e. The local and global environment;
> f. The short-term and long-term interests of the benefit corporation, including benefits that may accrue to the benefit corporation from its long-term plans and the possibility that these interests and the general and specific public benefit purposes of the benefit corporation may be best served by the continued independence of the benefit corporation; and
> g. The ability of the benefit corporation to accomplish its general and any specific public benefit purpose;
>
> 2. May consider:
>
> a. The resources; intent; and past, stated, and potential conduct of any person seeking to acquire control of the benefit corporation; and
> b. Other pertinent factors or the interests of any other person that they deem appropriate; and
>
> 3. Need not give priority to the interests of a particular person referred to in subdivisions 1 and 2 over the interests of any other person unless the benefit corporation has stated its intention to give priority to interests related to a specific public benefit purpose identified in its articles.
>
> B. The consideration of interests and factors in the manner required by subsection A shall not constitute a violation of § 13.1-690 or a director conflict of interests under § 13.1-691.[12]

These provisions are intended to allow a benefit corporation to pursue its general and specific public benefit purposes without the restrictions that the default standard of conduct under section 13.1-690 of the VSCA may impose.[13]

12. VA. CODE ANN. § 13.1-788(A)–(B) (Repl. Vol. 2011).
13. *See id.* § 13.1-788(B) (Repl. Vol. 2011).

D. *Limitation of Liability*

The liability of directors of a benefit corporation is limited as follows:

> C. In any proceeding brought by or in the right of a benefit corporation or brought by or on behalf of the shareholders of a benefit corporation, a director is not personally liable for monetary damages for:
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> > 1. Any action taken as a director if the director performed the duties of office in compliance with § 13.1-690 and this section; or
> > 2. Failure of the benefit corporation to create general public benefit or any specific public benefit specified in its articles of incorporation or bylaws or otherwise adopted by the board of directors.[14]

In addition, the liability of officers, but not directors, of a benefit corporation is limited by the following language of the Benefit Corporations Article codified at section 13.1-789 of the VSCA:

> An officer of a benefit corporation shall have no liability for actions taken that the officer believes, in his good faith business judgment, are consistent with (i) the general public benefit or specific public benefit specified in the articles of incorporation or bylaws or otherwise adopted by the board of directors and (ii) the requirements of any third-party standard then in effect for the corporation.[15]

E. *Right of Action*

The duties of directors and officers under the Benefit Corporations Article, the requirement to prepare and make available an annual benefit report, and the obligation to the general and specific public benefit may only be enforced in a benefit enforcement proceeding.[16] This proceeding is intended to displace the traditional direct action by the corporation or the traditional derivative proceeding as the right of action for offenses under the Benefit Corporations Article, but not under the rest of the VSCA.[17] Only the benefit or other persons specified in the benefit corpora-

14. *Id.* § 13.1-788(C) (Repl. Vol. 2011).
15. *Id.* § 13.1-789 (Repl. Vol. 2011).
16. *Id.* § 13.1-790(A) (Repl. Vol. 2011).
17. *See id.*

tion's articles or bylaws have standing to bring a benefit enforcement proceeding.[18]

F. *Benefit Report*

A Virginia benefit corporation must prepare an annual benefit report.[19] That report is a yearly obligation and must be made available to shareholders within 120 days of the end of the benefit corporation's fiscal year.[20] The annual benefit report must describe how, during the preceding fiscal year: (i) the benefit corporation created a general public benefit; (ii) how the benefit corporation pursued its specific public benefit, if any, and if any such specific public benefit was created; and (iii) any circumstances hindering the creation of a general public benefit or its specific public benefit.[21] In addition, the annual benefit report must include an assessment of the social and environmental performance of the benefit corporation prepared in accordance with the third-party standard identified in the benefit corporation's articles of incorporation, bylaws, or otherwise adopted by the board of directors, and the application of that standard should be consistent with prior annual reports.[22] The annual benefit report should include any other information required by the third-party standard and explain any inconsistent application of the third-party standard.[23]

G. *Effect on Other Virginia Corporations*

The Benefit Corporations Article is very clear that it is only intended to apply to corporations electing to be treated as benefit corporations and should not be read to impose the obligations of a benefit corporation on other Virginia corporations.[24]

18. *Id.* § 13.1-790(B) (Repl. Vol. 2011).
19. *Id.* § 13.1-791(A) (Repl. Vol. 2011).
20. *Id.* § 13.1-791(B)(1) (Repl. Vol. 2011).
21. *Id.* § 13.1-791(A) (Repl. Vol. 2011).
22. *Id.* § 13.1-791(A)(2) (Repl. Vol. 2011).
23. *Id.*
24. *Id.* § 13.1-783 (Repl. Vol. 2011).

III. CERTAIN CONSIDERATIONS FOR SOCIAL ENTREPRENEURS AND PRACTITIONERS UNDER THE BENEFIT CORPORATIONS ARTICLE

As discussed below, practitioners and social entrepreneurs considering forming a Virginia benefit corporation should consider the intended corporate purpose, the fiduciary duty issues that may arise, issues surrounding officer and director exculpation, issues in initiating a benefit enforcement proceeding, the third-party standard, and the annual benefit report.

A. *Purpose*

The specific public benefits enumerated in the Benefit Corporations Article overlap with the permissible purposes of § 501(c)(3) not-for-profit corporations.[25] For example, it is not difficult to think of not-for-profit enterprises that operate in Virginia that serve each of these purposes: housing authorities, environmental organizations like the nature conservancy, not-for-profit hospitals, educational institutions, and arts foundations, and economic development authorities. There are certainly organizations like the United Way that help increase the flow of capital to other worthy organizations that provide a public benefit. A benefit corporation, however, will presumably be taxed at the entity level as a subchapter C corporation under the Internal Revenue Code, unless it is eligible to make the election under subchapter S. The benefit corporation would also be able to make distributions to shareholders, unlike a § 501(c)(3) entity.[26] A party seeking to establish a corporation with a laudable public purpose in mind

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25. Under the Internal Revenue Code, a not-for-profit corporation may be organized for the following purposes:

> (3) [c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

26 U.S.C. § 501(c)(3) (2006).

26. *See* VA. CODE ANN. § 13.1-653 (Repl. Vol. 2011).

should carefully consider whether a § 501(c)(3) or a benefit corporation is the proper avenue to pursue.

Further, under section 13.1-671.1 of VSCA, private corporations may still adopt in their articles, bylaws, or in a shareholder agreement, privately ordered enhanced fiduciary duties and broader corporate purposes similar to those listed in the Benefit Corporations Article.[27] Similarly, as alluded to in the commentary to Pennsylvania's yet to be adopted benefit corporation statute, any corporation, public or private, can include these sorts of public purposes in its articles of incorporation or bylaws, and the directors would have a fiduciary duty to pursue those purposes.[28] Virginia courts have clearly stated that Virginia corporations may expand the fiduciary duties of directors beyond those required in the VSCA and the common law via contract or their governing documents.[29]

B. *Fiduciary Duties*

Corporations electing to be benefit corporations in Virginia significantly broaden the number of constituencies who are owed fiduciary duties by directors. In a typical solvent corporation, the board of directors owes fiduciary duties to the corporation and to the shareholders as a class, not to any individual shareholder or minority or majority shareholders.[30] The duty owed to shareholders as a class seems to be primarily a duty of honesty and disclosure.[31] So, for the most part, for a solvent Virginia corporation there is one constituency—the corporation itself. One of the attractive aspects of Virginia's corporate code and the surrounding body of case law is that this simplicity—taking into account the best interests of the corporation in its subjective good faith—enables a board to focus on putting the corporation's pooled capital to use by taking risks calculated to enhance the value of that capital. In contrast, the board of a benefit corporation will have to

27. *Id.* § 13.1-671.1 (Repl. Vol. 2011).

28. *Id.* § 13.1-626 (Repl. Vol. 2011).

29. Remora Invs., L.L.C. v. Orr, 277 Va. 316, 324, 673 S.E.2d 845, 848 (2009) (citing Simmons v. Miller, 544 S.E.2d 666 (Va. 2001)); *see also* Proposed Pennsylvania Act, *supra* note 2.

30. *Remora Invs.*, 277 Va. at 323–24, 673 S.E.2d at 848 (quoting Am. Gen. Ins. Co. v. Equitable Gen. Corp., 493 F. Supp. 721, 741 (E.D. Va. 1980)).

31. *See, e.g.*, Adelman v. Conotti Corp., 215 Va. 782, 789, 213 S.E.2d 774, 779 (1975).

consider, and presumably will have fiduciary duties to, shareholders, employees, suppliers, customers, the community and society, the local and global environment, the short-term and long-term interests of the benefit corporation, and the ability of the corporation to accomplish its general and specific public purposes.[32] It is important to note that while only the benefit corporation itself—the directors, the shareholders, and other persons named in the articles—will have a right to actually enforce these duties,[33] the broader set of duties still leaves many more ways to challenge any given corporate action. Even a benefit corporation that elects to include no specific public benefit in its articles of incorporation or bylaws must deliver "a material positive impact on society and the environment taken as a whole, as measured by a third-party standard."[34] B Lab is a not-for-profit organization that has positioned itself as a third party to certify compliance with a benefit corporation's general public benefit purposes.[35] As B Lab notes in its *Legal Provision and FAQ*s about benefit corporations, these concepts will remain undefined until courts begin interpreting exactly what is meant by general and specific duties.[36] At this juncture, it would be unwise for any practitioner to advise his or her client with any certainty on exactly what these sweeping duties require, or for any social entrepreneur adopting benefit corporation status to accept without question advice from legal counsel about what they must do to discharge their duties.

The virtue of a simple mission—the best interest of the corporation—is that it can be executed well. When given so many different objectives, the board of a benefit corporation may in fact have a difficult time accomplishing any of them well.

C. *Limitation of Liability*

The limitation of liability for directors in the Benefit Corporations Article is helpful because it makes clear that directors can-

32. VA. CODE ANN. § 13.1-788 (Repl. Vol. 2011).

33. *Id.* § 13.1-790 (Repl. Vol. 2011).

34. *Id.* §§ 13.1-782, 13.1-787 (Repl. Vol. 2011).

35. *See generally* B LAB, http://www.bcorporation.net/about (last visited Oct. 12, 2011); *see also* Tozzi, *supra* note 11.

36. *Benefit Corporation-Legal Provisions and FAQ*s, B LAB [hereinafter *Benefit Corp. FAQS*], http://www.bcorporation.net/resources/bcorp/documents/Benefit%20Corporation%20-%20Legal%20Provisions%20and%20FAQ.pdf (last visited Oct. 12, 2011).

not be held liable for failing to achieve any general or specific public benefit.[37] It would be quite daunting for directors to prove the benefit corporation had achieved a general public benefit as this could mean a sweeping set of duties difficult to quantify and measure. This limitation of liability may help benefit corporations find qualified persons to serve on their board.

However, it is not clear how new sections 13.1-788(C) and 13.1-789 of the Benefit Corporations Article are intended to interact with section 13.1-692.1 of the VSCA.[38] Are sections 13.1-788(C) and 13.1-789 the maximum elimination of liability for directors and officers, respectively? Can a benefit corporation eliminate all liability of directors or officers other than willful misconduct or a knowing violation of criminal law or of any federal or state securities law under section 13.1-692.1 of the VSCA? Do sections 13.1-788(C) and 13.1-789 of the Benefit Corporations Article only cover a benefit enforcement proceeding under the Benefit Corporations Article with an elimination of liability under section 13.1-692.1 of the VSCA applying in all other cases?

In addition, the separate limitation of liability for officers in the Benefit Corporations Article holds officers to a much higher standard than directors.[39] The officer limitation of liability seems to suffer from a misunderstanding of the board's role in corporate governance and setting policy, the officer's role in execution of those policies, and the board and officer's relative responsibilities for those policies, particularly in Virginia.[40] Without specifically calling it a standard of conduct, it imports a subjective good faith business judgment standard as a condition precedent to officer exculpation.[41] Of course, no statutory standard of conduct for officers of non-benefit corporations exists in Virginia. Under the

37. VA. CODE ANN. § 13.1-788(C) (Repl. Vol. 2011).

38. *See id.* §§ 13.1-692.1, -788(C), -789 (Repl. Vol. 2011).

39. *See id.* §§ 13.1-788 to -789 (Repl. Vol. 2011).

40. Even in Delaware following *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009), officers are only held to the same, not a greater standard, than directors. Yes, some commentators have suggested that the business judgment rule should not apply to officers. *See* Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW 439, 440 (2005). However, this is not the rule in Virginia. In addition, Virginia provides for more favorable indemnification for officers than Delaware. *Compare* VA. CODE ANN. §§ 13.1-698, -704(B), *with* DEL. CODE ANN. tit. 8, §145. Unlike Delaware, Virginia allows for exculpation of officers. *Compare* VA. CODE ANN. § 13.1-692.1, *with* DEL. CODE ANN. tit. 8, § 102(b)(7).

41. *See* VA. CODE ANN. § 13.1-789 (Repl. Vol. 2011).

Benefit Corporations Article, the board of a benefit corporation could not have liability for adopting policies that fail to achieve its purported general or specific public benefits.[42] Meanwhile, the officers could be held liable if they did not believe in their subjective good faith business judgment that executing the policies was consistent with the public benefit.[43] In addition, if the board of directors of a Virginia benefit corporation adopts a policy that is inconsistent with the third-party standard the board has adopted in a proceeding arising from that decision, the board of directors would seem to have no liability.[44] The officers, however, would have liability if, while executing the board's decision, they did not believe in the board's subjective good faith that the corporation's actions were consistent with the third-party standard.[45]

As a result, for each decision a prudent officer of a benefit corporation executes, he must make his own separate determination of whether he believes in his good faith business judgment that the decision will further the extremely broad general or specific public benefits and whether or not the decision complies with the applicable third-party standard. Presumably, if the officer disagrees with the board's decision and cannot change the board's mind, his only choice is to resign or face personal liability. Granted, boards rely on officers to inform their decisions, and officers often make routine decisions without consulting the board. However, it is the board, not the officers, that exercises its good faith business judgment and makes the ultimate strategic decisions in a Virginia corporation.[46] The Benefit Corporations Article has not transferred the board's authority to the officers, but it has created an odd separation with the board having the broad authority and officers having the broad accountability. While some degree of accountability for decisions made without consulting the board might be appropriate, the reformulation of the relationship between officers and directors in the Benefit Corporations Article is a significant departure from Virginia's approach to officer liability under section 13.1-692.1 of the VSCA, where the liability of both directors and officers can be eliminated to the same extent.[47] Per-

42. *Id.* § 13.1-788(C) (Repl. Vol. 2011).
43. *Id.* § 13.1-789 (Repl. Vol. 2011).
44. *Id.* § 13.1-788(C) (Repl. Vol. 2011).
45. *Id.* § 13.1-789 (Repl. Vol. 2011).
46. *Id.* § 13.1-673(B) (Repl. Vol. 2011).
47. *Id.* § 13.1-692.1 (Repl. Vol. 2011).

sons contemplating accepting a role as an officer in a benefit corporation, boards of directors, and even D&O insurers for benefits corporations should be mindful of these issues.

D. *Benefit Enforcement Proceedings*

Presumably for a derivative benefit enforcement proceeding, the process and procedures under the balance of the VSCA would apply.[48] However, that determination is not absolutely clear. Both provisions address standing to bring a derivative claim. The Benefit Corporations Article expands the list of persons who have standing to bring a derivative action,[49] but it does not make clear that a benefit enforcement proceeding is to be brought in the manner described in section 13.1-672.1(B) of the VSCA, which relates only to shareholder proceedings. It is also unclear that an enforcement proceeding may be dismissed following a review, evaluation, and vote by the disinterested directors as provided in sections 13.1-672.4(A) and 13.1-671.4(B) of the VSCA.[50]

E. *Third-Party Standard*

The benefit corporation's obligation to measure itself against a third-party standard may or may not be problematic. For example, in the accounting context, the United States Generally Accepted Accounting Principals ("GAAP") might be considered a standard developed by an independent party, and one that is sufficiently transparent because it is publicly available.[51] While no standard, including GAAP, is perfect, it goes without saying that GAAP has certainly helped corporations pool and deploy capital, because it provides financial statement users with a commonly understood and relatively uniform methodology for presenting financial information to investors.

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48. *Id.* §§ 13.1-672.1 to -672.6 (Repl. Vol. 2011).

49. *Compare id.* § 13.1-790(B) (Repl. Vol. 2011), *with id.* § 13.1-692.1(A) (Repl. Vol. 2011). This is true given that the articles of incorporation or bylaws may add non-shareholders or non-directors to the list of persons with standing. It is also not clear that an individual director has standing to bring a derivative action in Virginia. In fact, section 13.1-672.1 would appear to limit standing to bring a derivative action to shareholders.

50. *Compare id.* § 13.1-790 (Repl. Vol. 2011), *with id.* § 13.1-672.4(A)–(B) (Repl. Vol. 2011).

51. For the definition of "third-party standard," see *id.* § 13.1-782 (Repl. Vol. 2011).

Unlike GAAP, no clear third-party standard exists for measuring and reporting general or specific public benefits.[52] Because of this lack of definition, until a relatively uniform standard develops, a benefit corporation may have difficulty in benchmarking its progress toward general and specific public benefits. At least at this point, unlike certified public accountants, the persons who formulate these third-party standards are not necessarily subject to rigorous professional training and certification.[53] This is not a fatal flaw; it is more a function of the newness of the concept of a benefit corporation. Nevertheless, this increases the likelihood that these standards will evolve and vary between different third-party standard developers. The third-party standard developers also do not necessarily have the interests of individual benefit corporations in mind. As a benefit corporation sees its third-party standard evolve, it may feel pressure to conform to that standard even when conforming does not suit its particular mission. Further, officers who have to weigh the third-party standard against their decisions, as well as weigh potential liability for their decisions, will have an interest in adopting the least exacting third-party standard.[54] Both the officers and the corporation may have difficulty in adjusting to standards that change from year to year.

F. *Benefit Report*

As mentioned above, third-party standards are nascent and will evolve. Because the benefit report requires a benefit corporation to report on its progress as measured by such third-party standards,[55] it may be difficult for a benefit corporation to develop and implement proper metrics along with a reporting system to timely generate benefit reports. Finally, for any benefit corporations that happen to be public companies, the benefit report will presumably be material, and as such, to avoid securities fraud liability, the benefit report must not make any untrue or misleading statements of material fact.[56] Even though a benefit corporation will apply third-party standards, because these standards

52. *See Benefit Corp. FAQS*, *supra* note 36.

53. *See Who Certifies?*, B LAB, http://www.bcorporation.net/index.cfm/fuseaction/content.page/nodeID/08c9dc4d-6064-84cb-af04-4fd9d4ced055/externalURL// (last visited Oct. 12, 2011).

54. *See* VA. CODE ANN. § 13.1-789 (Repl. Vol. 2011).

55. *Id.* § 13.1-791(A)(2)(a) (Repl. Vol. 2011).

56. 17 C.F.R. § 240.10b-5 (2010).

are not yet uniform and the concepts of general public benefit and specific public benefit could be subjective and difficult to measure,[57] public benefit corporations will need to be exceedingly careful in avoiding potential securities fraud liability for disclosures in their benefit reports.

IV. DO BENEFIT CORPORATIONS ADD ANYTHING THAT CANNOT BE ACHIEVED VIA PRIVATE ORDERING IN VIRGINIA?

Many reasons exist to commend the benefit corporation concept and its brave attempt to help define the best interests of a corporation in a broader light. Any attempt to help business entities take into account social costs or internalize negative externalities is a noble endeavor.[58] The concept of harnessing the power of capitalism to achieve positive social objectives is also very appealing. However, social entrepreneurs and practitioners in Virginia who hope to form entities that take the society, the environment, and other public benefits into account, should carefully consider whether: (1) electing to be a benefit corporation under the Benefit Corporations Article, or (2) electing to privately order their corporation to pursue noble objectives is the better path.

Two aspects of the Benefit Corporations Article: (1) a broader fiduciary duty, and (2) the option to adopt, via the Benefit Corporations Article, broader public purposes, would seem to best capture the reason for creating the separate benefit corporation class.[59]

Maryland was the first state to pass a benefit corporation statute. Its sponsor, Maryland State Senator and American University Law Professor Jamie Raskin, authored an article on why benefit corporations are needed.[60] Professor Raskin cites two justifications for the need to specifically authorize directors to consider matters beyond profit maximization: (1) the duties in Delaware to maximize the purchase price paid to shareholders in the change of control context announced in *Revlon, Inc. v.*

57. *See supra* Part III.E.

58. *See generally* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 42–44 (1960).

59. VA. CODE ANN. §§ 13.1-787 to -788 (Repl. Vol. 2011).

60. Raskin, *supra* note 2.

MacAndrews & Forbes Holdings, Inc.;[61] and (2) the "enhanced scrutiny" applied to director decisions in the takeover context under *Unocal Corp. v. Mesa Petroleum Co.*[62] However, neither the *Revlon* nor the *Unocal* standards apply in Virginia.[63] No positive law exists in Virginia suggesting that a director need consider anything other than what he believes in his subjective good faith to be in the best interests of the corporation. That consideration most assuredly includes earning a profit, but it does not necessarily exclude other considerations that might also be in the best interests of the corporation. Further, under section 13.1-671.1 of the VSCA, private corporations could previously, and may still adopt in their articles, bylaws, or in a shareholder agreement, privately ordered enhanced fiduciary duties and broader corporate purposes.[64]

Similarly, as alluded to in the commentary to Pennsylvania's yet to be adopted benefit corporation statute, any corporation, public or private, can include general or specific public purposes in its articles of incorporation or bylaws, and the directors would have a fiduciary duty to pursue those purposes.[65] If a Virginia corporation so desires, it could accomplish results similar to those under the Benefit Corporations Article by including a privately ordered purpose in its articles of incorporation such as "improving human health in Richmond, Virginia by operating a for-profit hospital system." This provision alone would expand the director's fiduciary duties to include the pursuit of that purpose, but the corporation could also tailor those duties as it sees fit without incorporating the seemingly broad duties included in the Benefit Corporations Article.

In addition to limiting its ability to create only the intended public purposes and fiduciary duties via private ordering, a corporation that elects to be a benefit corporation also subjects itself to unclear exculpation provisions that, especially as it relates to

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61. 506 A.2d 173, 185 (Del. 1986).

62. 493 A.2d 946, 959 (Del. 1985).

63. *See* WLR Foods, Inc. v. Tyson Foods, Inc., 65 F.3d 1172, 1182–83 (4th Cir. 1995) (applying Virginia law and declining to adopt the *Unocal* standard in the takeover context); Willard v. Moneta Bldg. Supply, 258 Va. 140, 151, 515 S.E.2d 277, 284 (1999) (rejecting *Revlon* duties in Virginia).

64. VA. CODE ANN. § 13.1-671.1 (Repl. Vol. 2011).

65. *See* Proposed Pennsylvania Act, *supra* note 2, § 3311 cmt., at 11.

officers, could significantly increase their liability.[66] Further, officers will be subjected to an explicit good faith business judgment standard of conduct as a condition precedent to their exculpation.[67] In contrast, Virginia non-benefit corporations are free to craft privately ordered indemnification and exculpation provisions that take the achievement of any lawful business purpose into account, while avoiding the broader concept of creating "a material positive impact on society and the environment taken as a whole." This may be much more difficult to achieve, quantify, measure, and most importantly, defend in a derivative action.[68]

While each benefit corporation will be free to select its third-party standard for assessing its general public benefit and specific public benefits, each corporation is also free to do this without electing to be treated as a benefit corporation. While this outcome might be less than ideal, a corporation that privately orders its own public purpose and corresponding fiduciary duties could also achieve some of the marketing benefit of being designated a "benefit corporation" by voluntarily complying with a third-party standard, like that of B Lab, without actually electing to be treated as a benefit corporation under the Benefit Corporations Article.[69]

For any public corporation, privately ordered business purpose standards of conduct and exculpation provisions may be more appealing than electing to be treated as a benefit corporation and incurring the obligation to provide a benefit report that may subject the company to liability under securities laws.

V. CONCLUDING THOUGHTS AND OBSERVATIONS

Undoubtedly, for some social entrepreneurs, the benefit corporation created under the Benefit Corporations Article will be the right choice. However, this decision should be made with a full

66. *See supra* Part III.C.

67. *Id.*

68. *Benefit Corp. FAQS*, *supra* note 36.

69. Professor Raskin cites the marketing opportunities as a benefit of electing to be treated as a benefit corporation. Raskin, *supra* note 2. B LAB also cites concerns about so-called "green washing"—marketing products as green but not necessarily following green practices, but will certify companies to help bolster their green credentials. *See* Peter Van Allen, *Third-Party Certification Combats 'Greenwashing,'* PHILADELPHIA BUS. J., June 9, 2008, http://www.bizjournals.com/philadelphia/stories/2008/06/09/focus4.html.

understanding of the broader corporate purposes and fiduciary duties. Additionally, issues related to exculpation, the selection of third-party standards, unanswered questions with respect to derivative claims, and issues related to the preparation of benefit reports remain unclear. For some social entrepreneurs, and perhaps public companies especially, a privately ordered Virginia corporation that selects some of the concepts of the Benefit Corporations Article on an a-la-carte basis may be the preferred route.

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