

**THE FLORIDA BAR BUSINESS LAW SECTION  
EXECUTIVE COUNCIL MEETING AGENDA**

Monday, September 2, 2013  
9:30 a.m. - 12:30 p.m.  
Boca Raton Resort and Club  
Boca Raton, Florida  
Venetian

- I. Call to Order, and Introductions by Council Members – Steph Nagin, Chair
  
- II. Approval of Minutes – Alan Howard, Secretary-Treasurer
  - A. Minutes from June 27, 2013 Annual Meeting of the Section (EXHIBIT “A”)
  - B. Minutes from June 27, 2013 Executive Council Meeting (EXHIBIT “B”)
  
- III. **Budget Committee Report** - Alan Howard, Secretary-Treasurer (EXHIBIT “C”)
  
- IV. **Reports of Special Committees and Task Forces**
  - A. Third Party Opinion Standards Sub-Committee – Robert Barron, Chair
  - B. Social Media Sub-Committee – Paige Greenlee, Chair
  - D. eDiscovery Task Force – Doug Cherry, Chair; Steve Tepler, Vice-Chair
  - E. Chapter 607 Sub-Committee- Alan Aronson, Chair
  - F. Employee- Hacker Legis. Task Force- Robert Kain, Chair
  - G. Proceedings Supplementary Task Force- Barbara Riesberg, Chair  
[Co-Chairs: Don Kirk/Ivan Reich/Michel Weisz]
  - H. By-Law Revisions Task Force – Phil Schwartz, Chair
  
- V. **Committee Reports:**
  - A. Bankruptcy / UCC - Robert P. Charbonneau, Chair/Hon. Cathy McEwen, Jud. Chair
  - B. Bankruptcy / Judicial Liaison – Jay Brown, Chair / Hon. Paul Hyman, Judicial Chair
  - C. Business Litigation - Russ Landy, Chair / Hon. Ed LaRose, Judicial Chair
  - D. Communications - Lynn Sherman, Chair
  - E. Computer & Technology Law – Larry Kunin, Chair
  - F. Continuing Legal Education –Ryon McCabe, Chair
  - G. Corporations, Securities & Financial Services - Stefan Rubin, Chair (EXHIBIT “D”)
  - H. Inclusion/Mentoring/Fellowships - Leyza Blanco, Chair  
/Hon. John Olson/Hon. Gill Freeman, Co-Judicial Chairs
  - I. Intellectual Property - Ury Fischer, Chair
  - J. Legislation - Jon Polenber, Chair / Bill Wiley / Aimee Diaz Lyon / Greg Black

- K. Long Range Planning – Greg Yadley, Chair / Hon. Michael G. Williamson, Jud. Chair
- L. Membership & Law School Relations - Phil Kabler, Chair (*unable to attend*)
- M. Pro Bono - Mark Stein, Chair / Hon. Laurel Isicoff, Judicial Chair
- N. Labor Day Weekend Retreat & Sponsorships – Michael Chesal/Mark Stein
- O. State/Federal Courts Liaison – Barbara Riesberg, Chair / Hon. Gill Freeman, Jud. Chair

**VI. Other Reports:**

- A. Historian / Parliamentarian Report- Phil Schwartz
- B. Council of Sections Report – Hon. William Van Nortwick, Jr.
- C. TFB CLE Committee Report – Alan Aronson/Manny Farach
- C. Board of Governors – Michael Higer
- D. RPPTL Liaison Report – Jamie Marx/Marsha Rydberg
- E. Tax Liaison Report – Nick Lioce
- F. Liaison to Out-of-State Practitioners Report – Donald Workman (*unable to attend*)
- G. Young Lawyers Division Liaison Report – Andrew Jenkins/Christian George
- H. Chair – Steph Nagin
- I. Chair-Elect – Bill Van Nortwick, Jr.

**VII. Future Meeting Dates**

- A. Mid –Year Meeting - January 2014 (Location : TBD in Orlando area)
- B. Executive Committee Spring Retreat

**VIII. Motion to Adjourn**

# EXHIBIT “A”

**DRAFT MINUTES OF ANNUAL MEETING  
OF THE BUSINESS LAW SECTION OF THE FLORIDA BAR**

**Thursday, June 27, 2013 – 3:30 to 3:35 PM**

The annual meeting of the Business Law Section (“BLS” or “Section”) of The Florida Bar was called to order by **Brian Gart**, *BLS Chair*, at 3:30 PM on Thursday, June 25, 2013 in the Addison ballroom of the Boca Raton Resort & Club in Boca Raton, Florida, during the Annual Meeting of The Florida Bar. The Chair called upon **Greg Yadley**, a former Chair of the Section, as Chair of the Nominating Committee, to present the recommendations by the Nominating Committee for the BLS officers to serve for the 2013-2014 Bar Year, from July 1, 2013 until June 30, 2014, or until such later date as their respective successors have been elected and qualified.

Mr. Yadley advised that, pursuant to Article I, Section 3 of the BLS By-Laws, the Nominating Committee had met, considered potential candidates from among the BLS membership, and recommended the following slate of Officers for the 2012-2013 Bar Year: **Stephen Nagin**, previously nominated as Chair-Elect automatically would serve as *BLS Chair*, Judge **William A. Van Nortwick**, was recommended for election as *Chair-Elect*, and **Alan Howard** for *Secretary/Treasurer*.

The BLS Chair thanked Mr. Yadley for presenting the Nominating Committee’s recommendations. The Chair then sought further nominations, if any, from the Executive Council of other potential candidates to serve. Hearing none and no other nominations having been received, Judge **John Olson** moved, and **Mark Stein** seconded, the election by acclamation of the proposed slate of officers recommended by the Nominating Committee. Mr. Nagin automatically became Chair, effective as of July 1, 2013, and **by a unanimous voice vote, the above-stated nominees, Judge Van Nortwick and Mr. Howard, were elected.**

The Chair then announced that the Annual BLS Meeting was adjourned.

William A. Van Nortwick  
BLS Secretary/Treasurer

***DRAFT***

Minutes Approved on: September \_\_\_\_, 2013

# EXHIBIT “B”

**DRAFT MINUTES OF THE MEETING  
OF THE EXECUTIVE COUNCIL OF THE BUSINESS LAW SECTION  
OF THE FLORIDA BAR DURING THE ANNUAL MEETING OF THE  
FLORIDA BAR**

**June 27, 2013 – 3:35 PM to 6:10 PM**

The meeting of the Executive Council [“EC”] of the Business Law Section [“BLS” or “Section”] of The Florida Bar during the Annual Meeting of the Florida Bar continued, immediately following the annual meeting of the BLS to elect officers for the 2013-2014 Bar Year. BLS *Chair*, **Brian Gart**, called the meeting to order at 3:35 PM.

**I. DETERMINATION OF ATTENDANCE AND OF A QUORUM;  
REMINDER OF STANDING *PRO BONO* RESOLUTION;  
AND INTRODUCTION OF SPECIAL GUESTS**

A. As the first order of business, as is the Section’s tradition and regular practice, the Chair requested that everyone present take a moment to introduce themselves. In addition, a sign-in “Attendance List” was distributed to formally confirm that a quorum was present for the transaction of business.

B. As the next order of business the Chair recited the following standing Resolution of the BLS to remind all in attendance of the Section’s continuing commitment to Pro Bono Service:

Be it further resolved that as part of its efforts to further and support pro bono service, the Business Law Section supports the Pro Bono committee partnering with the CLE Committee and other committees of the Business Law Section to include a brief (3 to 5 minutes) presentation re-affirming the Business Law Section’s support of and commitment to pro bono service at CLE programming and other appropriate Section events.

C. The Chair announced that four of the Section's nominees had been accepted as fellows in the inaugural class of The Florida Bar Leadership Academy. **Doug Bates, Alvin Benton, Jodi Cooke, and Kelly Schwartz.** The Chair recognized Mr. Bates, Mr. Benton and Ms. Cooke, who were present, and each gave short remarks to the EC. The Chair noted that an email from Terry Hill, director of the Program Division of TFB, to the Chair and Chair-Elect was attached to the agenda as Exhibit "A." In the email, Mr. Hill notifies the Section of TFB's transfer of the \$14,000 of scholarship funds for the four fellows.

D. The Chair called the EC's attention to the annual report of the Section attached to the agenda as Exhibit B.

Next, the Chair recognized Michael Higer, the BOG's liaison to the BLS who introduced **Greg Coleman**, the president-elect designate of The Florida Bar. Mr. Coleman introduced **Ray Abadin**, a lawyer practicing in Miami, who is exploring candidacy for president of The Florida Bar. Mr. **Abadin** explained his interest in the possible candidacy, and asked the members of the EC for their support if he decides to seek the candidacy. The Chair welcomed Mr. Coleman and Mr. Abadin to the meeting on behalf of the Section.

## **II. APPROVAL OF MINUTES FROM EC MEETINGS**

As the next item of business the Chair called on the secretary-treasurer, Judge **William A. Van Nortwick**, to seek approval of minutes from several EC meetings.

Judge Van Nortwick advised the EC that four sets of minutes have been made available to all BLS members on the BLS Web site. The minutes were for the following four EC meetings:

- (1) the EC meeting at the BLS Midyear meeting on January 10, 2013, attached to agenda as Exhibit C;
- (2) the special telephonic EC meeting on January 24, 2013 called to approve the LLC Act legislation, attached to agenda as Exhibit D;

(3) the special telephonic EC meeting on April 3, 2013, called to approve the Section's position to oppose certain amendments to sections 48.031 and 56.27, Florida Statutes, attached to the agenda as Exhibit E; and

(4) the EC meeting on April 19, 2013 at the Rutherford Hill Winery, Rutherford, CA, attached to agenda as Exhibit F.

Each set of minutes were considered separately. As for the minutes of the meeting on January 10, 2013, Judge **Gil Freeman** moved approval of the minutes and **Rick Gross** seconded. The EC approved the minutes unanimously.

As for the minutes of the telephonic meeting on January 24, 2013, Mr. **Howard** moved approval and Mr. **Gross** seconded. The EC approved the minutes unanimously.

As for the minutes of the telephonic meeting on April 3, 2013, Mr. **Howard** moved approval and Mr. **Gross** seconded. The EC approved the minutes unanimously.

As for the minutes of the meeting on April 19, 2013, Mr. **Howard** moved approval and Mr. **Gross** seconded. The EC approved the minutes unanimously.

### **III. TREASURER'S REPORT AND APPROVAL OF FINANCIAL STATEMENT**

As the next item on the meeting agenda, the Chair requested the Treasurer to present a report on the status of finances of the Section.

Judge **Van Nortwick**, *BLS Secretary/Treasurer*, advised that the Section's "Fund Balance" in June 2012 was \$517,051 and that in June 2013 it had grown to \$571,649. Based on his review of the financial statements prepared by The Florida Bar and provided to the Section, he was pleased to report that the BLS was in excellent financial condition.

The Chair then sought approval of the Treasurer's Report, pursuant to which, based on a motion by Mr. **Howard** seconded by Mr. **Gross**, the Treasurer's report was approved unanimously by a voice vote.

The Chair noted that it was necessary for the EC to formerly approve the Section's policy and form for reimbursement of judges and law professors, a copy of which was attached as Exhibit H to the agenda. Following a motion by **Mike Higer**, seconded by **Hal Litchford**, the policy was approved by a unanimous vote.

#### **IV. REPORTS of the SPECIAL COMMITTEES AND TASK FORCES**

##### **A. REPORT OF THE BLS LLC DRAFTING TASK FORCE**

**Lou Conti**, *Chair*; **Gary Teblum** and **Greg Marks**, Vice-Chairs

The Chair announced that the report of the LLC Drafting Task Force will be given at a later time in the meeting.

##### **B. THIRD PARTY OPINIONS TASK FORCE**

The Chair announced that there would be no report from the Task Force at this meeting.

##### **C. COVENANTS NOT TO COMPETE TASK FORCE CONCERNING AMENDMENTS TO FLORIDA STATUTES SECTION 542.335**

**Hal Litchford**, *Chair*

Mr. Litchford reported that this Task Force will give a complete report at the meeting of the BLS in September.

##### **D. SOCIAL MEDIA TASK FORCE**

The Chair announced that he had appointed a new Social Media Task Force and a report of that Task Force will be given as a part of the Communication Committee's report.

#### **E. JOINT TASK FORCE ON PROCEEDINGS SUPPLEMENTARY**

The Chair noted that an article in the December 2012 issue of The Florida Bar Journal had raised various procedural and constitutional issues relating to Florida's Statutory Proceedings Supplementary. Benjamin H. Brodsky, *Caught in the Web of Florida's Statutory Proceedings Supplementary: Procedural and Constitutional Problems Facing Impleaded Third Parties*, 86 Fla. Bar J. 28 (2012). The Chair announced that he was forming a Task Force on the Proceedings Supplementary Statute, section 56.29, Florida Statutes, to address whether any legislation should be proposed to address these issues. The Chairs of the Business Litigation and Bankruptcy/UCC Committees will appoint members of this Task Force. Each will also appoint a co-chair of the Task Force. The Task Force will have its organizational meeting at the September Retreat of the BLS in Boca Raton.

#### **F. BLS SERVICE HISTORY PROJECT**

The Chair called upon **Greg Yadley** to report on behalf of the Long Range Planning Committee. Mr. Yadley discussed the tradition of continuity, individual initiative, and collegiality in the Section. He stated that the meetings of the Section are important on building relationships, especially the Fall and Spring Retreats. In this project, the Task Force will ask EC members about their service and its impact on their practice and will ask for input from all members of the EC.

The Chair emphasized that the request for information should not require much time of the EC members and it is hope that the new Web site can be used as a vehicle to obtain information.

#### **V. STANDING COMMITTEE REPORTS**

## **A. ANTITRUST, FRANCHISE AND TRADE REGULATION COMMITTEE**

The Chair called upon Mr. **Nagin** to present a special report concerning this Committee. Mr. Nagin discussed the Committee's long-term difficulty in maintaining membership and attendance. He stated that he had discussed the situation with Jude Cooper, the Committee Chair, Ava Doppelt, past Committee Chair, and Barbara Riesberg, Chair of Business Litigation Committee. He believed that the best course of action would be to disband the Committee and create an Antitrust, Franchise and Trade Regulation Subcommittee of the Business Litigation Committee. He stated that Mr. Cooper, Ms. Doppelt and Ms. Riesberg all supported this action.

Accordingly, Mr. **Nagin** moved that the Antitrust, Franchise and Trade Regulation Committee be disbanded and an Antitrust, Franchise and Trade Regulation Subcommittee be created within the Business Litigation Committee. **Lou Conti** seconded Mr. Nagin's motion.

In further discussion, Mr. **Cooper** and **Hal Litchford**, former Chair of the Committee and former Chair of the BLS, emphasized that the membership and attendance problem with the Committee had existed for many years despite efforts to improve both.

Following further discussion, the EC unanimously approved the motion.

## **B. REPORT BY THE BANKRUPTCY/UCC COMMITTEE**

**Jacob Brown**, *Chair*

**Robert Charbonneau**, *Vice-Chair*

**Jay Brown**, Chair of the Committee, presented the Committee's report. He stated that in excess of 50 members attended today's meeting of the Committee with excellent participation by all those in attendance. He noted that the Committee was in the preliminary stages of developing a group to discuss the various mortgage modification programs throughout the State. In addition, Committee member **Tom Messana** is heading a Receiver Study Group, in a joint

effort with the Real Estate, Probate and Trust Law Section. A report of this Study Group is anticipated by the September Retreat of the Section. In addition, Mr. Brown indicated that he intends to appoint a study group to address Chapter 9 bankruptcy proceedings.

He announced that there would be two CLE programs sponsored by the Committee at the September Retreat:

- E-discovery
- Bankruptcy issues impacting the general practice of law

Mr. Brown noted that the EC had approved the filing of an amicus brief in a case before the Ninth U.S. Circuit Court of Appeal, In re Bellingham Insurance Agency, that was considering the application of the United States Supreme Court's 2011 decision in Stern v. Marshall, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2594 (2011), to a Trustee's fraudulent transfer claim. In Stern, the Court held that only an Article III court, such as a Federal District Court, and not a Bankruptcy Court, can render a final judgment in a state law tortious interference action against a defendant who has not filed a claim against the bankrupt estate. Mr. Brown stated that Berger Singerman and Trenam Kemker had jointly prepared the excellent brief filed with the Ninth Circuit.

In Bellingham, 702 F.3d 553 (9th Cir. 2012), the Ninth Circuit held that, under Stern, Bankruptcy Courts do not have the constitutional authority to decide the state – law fraudulent transfer claim against a noncreditor. The Court also held that defendants in a fraudulent transfer action may waive the right to a hearing in an Article III court and that the defendant in Bellingham did waive such right.

Mr. Brown noted that the defendants' petition for writ of certiorari seeking review of the Ninth Circuit's decision had been granted by the U.S. Supreme Court. Thus, he moved for the EC to approve the filing of an amicus brief in the Supreme Court. **Bob Charbonneau** seconded the motion. Following a brief decision, the EC unanimously approved the motion.

Mr. Brown thanked Berger Singerman and Trenam Kemker for their work in preparing the amicus brief. The Chair thanked Mr. Brown and the Committee for their work throughout the year.

### **C. BANKRUPTCY JUDICIAL LIAISON COMMITTEE**

**Doug Bates** and **Judge Paul Hyman**, *Chairs*

Mr. **Bates** reported on behalf of the Committee. The Committee had a successful meeting on Wednesday followed by a successful dinner at Restaurant Cielo.

The Chair thanked Mr. Bates and the Committee for their work during the year.

### **D. BUSINESS LITIGATION COMMITTEE**

**Barbara Riesberg**, *Chair*

**Russell Landy**, *Vice-Chair*

Ms. **Riesberg** stated that the E-discovery CLE program at the Annual Meeting was sold out. She reported that the Committee meeting earlier in the day was well-attended with excellent participation at the meeting. At the meeting, Committee member **Manny Farach** reported on the adoption of the Standard Jury Instructions for Commercial Cases by the Florida Supreme Court. In addition, the Committee discussed Tiara Condominium Ass'n v. Marsh & McLennan Cos., 110 So. 3d 399 (Fla. 2013), in which the Florida Supreme Court held that the application of the Economic Loss Rule is limited to products liability cases. The Committee will continue to follow the developments in this area of the law.

Further, the Committee discussed the passage of Chapter 2013-107, Laws of Florida by the 2013 Florida Legislature. In Chapter 2013-107, the Legislature amended section 90.702, Florida Statutes, to pattern it after Rule 702 of the Federal Rules of Evidence; to adopt the standards for expert testimony in Florida courts as provided in Daubert v. Merrill Dow Pharm., Inc., 509 U.S. 137 (1999); to no longer apply the standard in Frye v. U.S., 293 F.2d 1013 (D.C. Cir. 1923) in Florida courts; and to prohibit “pure opinion” testimony in Florida courts. At the

Committee's meeting, Committee member **Stephen Mahle** summarized the new statute and its impact on Florida law.

The Chair then requested Mr. Farach to summarize the status of the Standard Jury Instructions in Commercial Cases for the EC. Following Mr. Farach's presentation, the Chair thanked Mr. Farach. He also thanked Ms. Reisberg and the Committee for its work during the year.

#### **E. COMMUNICATIONS COMMITTEE**

**Lynn Sherman**, *Chair*

**Kacy Donlon** and **Sam Lewis**, *Vice-Chairs*

Ms. **Sherman** reported on behalf of both the Communications Committee and the Social Media Task Force. Ms. Sherman reported that the Committee and Task Force have been working to develop an RFP to develop a new web site with mobile applications for the Section. At its meeting, the Committee reviewed the results of the Social Media survey of members of the Section and reviewed research on other similar web sites and available software. She stated that there were many different opinions as to what features are most important in a new web site.

After a great deal of research and discussion, the Committee recommended an RFP for a web site with the necessary "bells and whistles". Under the Committee's opinion, the new web site can be created using the existing site as a "skeleton" for the new site.

She noted that, for a successful web site, however, the site must contain content. "Content drives traffic." Thus, she stated that it will be important for the substantive Committees to submit regularly content to be included on the web site.

Ms. Sherman thanked the members of the EC for submitting articles for the Florida Bar Journal and materials for the web site.

The Chair thanked Ms. Sherman and the members of the Committee and Task Force for their work during the year.

**F. COMPUTER AND TECHNOLOGY LAW COMMITTEE**

**Kevin Levy, *Chair***

**Lawrence Kunin, *Vice-Chair***

Mr. **Levy** reported on behalf of the Committee. Mr. Levy reported that the Committee's meeting was well-attended. At the meeting, the Committee discussed the importance of obtaining more articles for publication by the Bar or by the Section. In addition, a CLE was presented by two United States attorneys concerning prosecutions for hacking and theft of intellectual property under the Computer, Fraud and Abuse Act. (CFAA). He announced that the Committee has appointed a Subcommittee that is working on drafting a statute, the Computer, Abuse and Data Recovery Act (CADRA), which the Committee hopes to be in a position to bring to a vote to the EC during the September Retreat.

The Chair thanked Mr. Levy and the members of the Committee for their work during the year.

**G. CONTINUING LEGAL EDUCATION COMMITTEE**

**Michael Chesal, *Chair***

**Ryon McCabe and Lori Vaughan, *Vice-Chairs***

Mr. **Chesal** reported that the CLE and Retreat Committees had met jointly to address issues common to both. He reviewed the outstanding CLE programs that had been sponsored during the year and thanked Alan Aronson for organizing the Lunch and Learn CLE programs.

The Chair thanked Mr. Chesal, Mr. Aronson and the members of the Committee for their work during the year.

**H. CORPORATIONS, SECURITIES AND FINANCIAL SERVICES COMMITTEE**

**Laurie Green, *Chair***

**Stefan Rubin, *Vice-Chair***

Ms. **Green** reported that the Committee had a successful, well-attended meeting at which they discussed commencing work on improvements on Chapter 607, Florida Statutes, now that the Limited Liability Company Act had been enacted. In addition, during the upcoming year the Committee will consider whether revisions are necessary to Florida's Blue Sky Law and will address the Public Benefit Corporations Act and compare the proposed Florida Act with the statutes being adopted in other states.

The Chair thanked Ms. Green and members of the Committee for their work during the year.

## **I. DIVERSITY COMMITTEE**

**Leyza Blanco**, *Chair*

**Detra Shaw-Wilder**, *Vice-Chair*

**Leyza Blanco** reported on behalf of the Committee. She stated that the Committee had its best attendance ever at its meeting earlier in the day. She reviewed for the EC the various diversity initiatives adopted by the Committee throughout the year. She advised the EC that the Committee had been awarded a \$3,000 Section grant for sponsoring a litigation skills course jointly with the Cuban American Bar Association. Judge Freeman will Chair the effort on behalf of the Committee.

In addition, she reported that the Cuban American Bar Association has approached the Committee to sponsor breakfast CLE programs concerning the working and, procedures of the Business Courts. Two Dade County Business Court judges will participate in the CLE program.

Ms. Blanco announced that the applications for the Fellows Program has been posted on the BLS web site and ask the EC members to encourage applications. Under the program, the Section will pay expenses for attendance at Section meetings by the fellows. Ms. Blanco announced that on November 9, the Committee will participate in the Kozyak Minority Mentoring Picnic in Miami.

The Chair thanked Ms. Blanco and the members of the Committee for their work during the year.

**J. INTELLECTUAL PROPERTY COMMITTEE**

**Leora Herrmann**, *Chair*

**Ury Fischer** and **Dineen Wasylc**, *Vice-Chairs*

Mr. **Fisher** presented the report on behalf of the Committee. He stated that the Committee had a well-attended and useful meeting. A CLE program was presented at the Committee's meeting. In addition, the Committee discussed the legislation proposed by member **Robert Kain**, which would address the problems of employee hacking into the employer's computer system, the Computer Abuse and Data Recovery Act (CADRA). Mr. Fisher reported that the Committee will present the fifth IT symposium in Tampa in the fall of 2013. At the meeting, he said that there was extensive discussion of recent patent cases of interest to the Committee.

The Chair thanked the Committee for the work done on behalf of the Section during the year.

**K. LEGISLATION COMMITTEE**

**Alan Howard**, *Chair*

Mr. **Howard** reported that the 2013 legislative session featured the most bills ever filed on behalf of the Business Law Section. He stated that, especially given the number of bills sponsored by the Section, the Section had an incredibly successful year which included enactment of an amended Limited Liability Company Act, amendments to the Florida Arbitration Act, and amendments to Chapter 727 concerning assignments for the benefit of creditors ("ABC"). Mr. Howard thanked the entire Committee and he particularly thanked **Bill Wiley**, **Aimee Diaz Lyon** and **Greg Black** for their work as the Section's lobbyists. In addition, he thanked the following Section members who played key roles in the success of the Section's legislative efforts:

For the LLC Act, **Lou Conti** and his entire team;

For the Arbitration Act, **Jerry Cope** and **Jon Polenberg**; and

For the ABC Act, **Jodi Cooke**.

He then said that, for next year's legislative effort, it would be advisable to have any proposed legislation approved by the EC at the Labor Day Retreat.

He said that the Committee had several action items to bring to the EC. He asked the EC to consider whether, when there is a mid-session amendment to proposed legislation with respect to which the Section had adopted a position, the EC should separately consider the legislation as amended. After further discussion within the EC, no motion was presented.

Mr. Howard then requested the EC's approval of the reimbursement of Section members who are called to Tallahassee to assist the Section's lobbyists. He moved that the Section reimburse reasonable travel and lodging expenses for Section representatives to travel to Tallahassee in support of Section-approved legislation, if requested by the Section lobbyist and approved by the Chair. Mr. **Yadley** seconded Mr. Howard's motion. After further discussion, the EC unanimously approved the motion.

The Chair asked Mr. Wiley and Ms. Lyon to leave the room so that the EC could discuss approval of a new contract for Bill Wiley the Section lobbyist. Mr. Howard moved that the Section approve the proposed contract, which is identical to the past contracts with Mr. Wiley except that it increases the compensation from \$75,000 to \$80,000 and provides for reimbursement of members of the Metz law firm who travel to Section meetings in connection with the work of the Legislation Committee. Mr. **Higer** seconded Mr. Howard's motion. After further discussion, the EC unanimously approved the new contract with the lobbyist.

Mr. Howard then advised that this year will be the last year **Bill Wiley** will serve as the Section lobbyist. Mr. Howard and the Chair thanked Mr. Wiley for his long service and long friendship with the Section. The Chair presented Mr. Wiley

with a plaque recognizing his long service as a part of the Section. The EC gave him a standing ovation.

The Chair then announced that, he was using this particular time within the Legislative Committee's place on the agenda, to announce his selection as "member of the year." He said that he has selected **Lou Conti** as member of the year because of his many years of work leading to the adoption by the Florida Legislature of the amended LLC Act. The Chair further recognized the entire LLC Task Force, and announced that each member of the Task Force will receive a copy of the LLC bill in Lucite.

The Chair then introduced Mr. **Conti** to report on the LLC Task Force work. Mr. Conti briefly summarized the proceedings before the legislature and thanked all members of the LLC Task Force and the lobbyist for their work.

The Chair and Mr. **Howard** and Mr. **Wiley** then recognized Mr. **Polenberg** for his work on the Arbitration bill and his skill in negotiating with various parties interested in the bill.

#### **L. LONG-RANGE PLANNING COMMITTEE**

Mr. **Yadley** stated that there was no further report by the Long-Range Planning Committee.

#### **M. MEMBERSHIP AND LAW SCHOOL RELATIONS COMMITTEE**

**Jodi Cooke**, *Chair*

**Phil Kabler** and **Peter Valorie**, *Vice-Chairs*

**Jodie Cooke** gave the report on behalf of the Committee. She stated that the Committee had an excellent meeting. At the meeting, Mr. **Kabler** reported on his research of other Sections to determine their benefits to the Section's members and to compare their benefits with that of the Section. The Committee will continue to expand on Mr. Kabler's research at the September Retreat. The Committee will report back to the EC with respect to any recommendations.

Ms. **Cooke** reported that the Committee had undertaken various diversity and mentoring programs during the year. The Committee is preparing a mentoring handbook and, when it is complete, will present it to the EC for approval. In addition, the Committee is appointing law school liaisons at each Florida law school. They currently have liaisons at the University of Florida and want to expand the liaison program to other law schools.

As a part of the Committee's diversity efforts, it is meeting with representatives of the minority bar associations. The Committee has reached out to the Asian Pacific Bar Association of South Florida and has invited the leadership of that bar association to the Section's September Retreat and plans to host those individuals for lunch and for the attendance at Committee meetings. The Committee requested up to \$200 to host up to 10 members for lunch. The Chair advised that no approval of the EC is necessary, because those funds are already in the Committee's budget.

The Chair thanked Ms. Cooke and the members of the Committee for their work during the year.

**N. PRO BONO COMMITTEE**

**Mark Stein**, *Chair*

**Jennifer Morando** and Judge **Laurel Isicoff**, *Vice-Chairs*

Mr. **Stein** reported on behalf of the Committee that the Committee now has been in operation for three years. He discussed that it has accomplished a lot in a short period of time. The Committee is in its second year of sponsoring clinics for nonprofit pro bono organizations. The second year clinics saw large increases in the number of nonprofit organizations served. The Committee will sponsor clinics in Jacksonville, Miami and Tampa for the second year and is working to expand the clinic efforts in Pensacola, Orlando and Tallahassee. In addition, Mr. Stein reported that Judge **Isicoff** is working on a draft of a model pro bono policy for use by law firms and the Committee anticipates having the law firm pro bono plan model to present to the EC at the Retreat in September.

**O. RETREAT AND SPONSORSHIPS COMMITTEE**

**Michael Chesal**, *Chair*

**Lori Vaughan**, *Vice-Chair*

Mr. **Chesal** thanked the Committee members for their hard work and said that the Retreat is going to be an exciting weekend for all members. He advised all of the EC members to make reservations at the hotel (the Boca Raton Resort) and request rooms in the Yacht Club area of the hotel. He discussed the various activities that are planned for the Retreat including a 5K run on Sunday morning for the benefit of the Florida Bar Foundation's Children's Legal Services Fund, and a cruise on the 180 ft. Lady Windridge on Sunday night.

The Chair thanked Mr. **Chesal** and the Committee for their work in connection with the upcoming Retreat.

**P. STATE/FEDERAL COURTS JUDICIAL LIAISON COMMITTEE**

**Mark Nichols**, *Chair*

Judge **Mary Scriven** and Judge **Jill Freeman**, *Vice-Chairs*

Mr. **Nichols** reported that the Committee will sponsor a Business Court Round Table at the Retreat in September.

The Chair thanked Mr. **Nichols** and Judges **Scriven** and **Freeman** and all members of the Committee for their work during the year.

**VI. OTHER REPORTS**

**A. HISTORIAN/PARLIAMENTARIAN**

Mr. **Schwartz** reported that there is no report from the Historian/Parliamentarian.

**B. COUNCIL OF SECTIONS**

Judge **Van Nortwick** reported that there is no report in connection with the meeting of the Council of Sections because the meeting is scheduled in two days.

**C. BOARD OF GOVERNORS REPORT**

The Board of Governors Report had been presented out of order by Mr. **Higer** in order to accommodate the schedules of the guests of the Section.

**D. RPPTL LIAISON REPORT**

**Jamie Marx**, *Liaison*

Mr. **Marx** reported on RPPTL legislation, including efforts to speed up foreclosure proceedings, updating title standards, and extending the bulk sales law.

**E. TAX LIAISON REPORT**

No report.

**F. OUT-OF-STATE PRACTITIONERS**

**Donald Workman** thanked the Section for its support of the Sections Out-of-State Practitioners and had no further report.

**G. YOUNG LAWYERS REPORT**

**Paige Greenlee** reported on the increased connections between the Section and the Young Lawyers Division.

**H. CHAIR'S REPORT**

The Chair thanked all members of the EC for their support of his year and then showed slides of photos from the Spring Retreat in Napa.

**I. CHAIR-ELECT REPORT**

Mr. **Nagin** presented a plaque and painting to the Chair to recognize his excellent service as Chair during the past year. Mr. Nagin then introduced **Joan Bulloch**, an FSU law professor who will be a liaison to the Section. Mr. Nagin announced that immediately following the meeting of the EC there will be an organizational meeting for new Section Committee Chairs and Vice-Chairs and that he will institute a review of the Section's By-Laws, with **Phil Schwartz** chairing a Task Force and that a set of the existing By-Laws of the Section are attached to the agenda as Exhibit L.

There being no further business to come before the EC, the Chair adjourned the meeting at 6:10 p.m.

William A. Van Nortwick  
BLS Secretary/Treasurer

***DRAFT***

Minutes Approved on: September \_\_\_\_, 2013

# EXHIBIT “C”

# EXHIBIT “D”

To: Stefan Rubin, Chair, Corporations, Securities & Financial Institutions Committee

From: Stuart Cohn

Re: Benefit Corporation/Social Purpose Corporation Legislation

Date: August 20~~-~~, 2013

The Subcommittee on Benefit Corporations requests that the Corporations, Securities & Financial Institutions Committee (the “Committee”) approve as a Business Law Section legislative recommendation the attached benefit corporation/social purpose corporation legislative package. If Committee approval is obtained, the Committee would present the proposed legislation as a triple motion to the Executive Council.

#### Background

Business Law Section Position – 2013 Legislative Session. On January 7, 2013, the Committee unanimously approved a motion to support a legislative proposal by Senator Jeff Clemens to adopt benefit corporation legislation in the State of Florida. The approval was based upon the condition that Senator Clemens’ bill would substantially conform to the legislative proposal approved by the Committee. Later that day the Business Law Section’s Executive Council unanimously approved the Committee’s action.

Clemens Sponsored Bill – What Happened in 2013. The legislative proposal approved by the Committee and Executive Council became the bill sponsored by Senator Clemens. Although there were some changes made by staff members in the Senate drafting process, the bill remained in all material aspects the same as approved. Unfortunately, because Senator Clemens’ intended House sponsor withdrew for reasons independent of the legislation, Senator Clemens was unable to move the bill in a timely manner and the bill died in the legislative session. Senator Clemens has indicated that he will renew the proposal in the forthcoming legislative session and his initial House sponsor has indicated a firm commitment to join as a sponsor.

Positive Reception for Clemens Bill. During its brief legislative career, the bill proposed by

Senator Clemens received very favorable review from various persons and entities associated with benefit corporation/social purpose corporation efforts in Florida and elsewhere. It appears quite likely that the legislation will be favorably received, as there does not appear to be any material opposition. Several additional states have adopted benefit corporation legislation since our January approval, including Delaware.

Why to Make The Business Law Section the Initiator of the Bill in 2014. When Senator Clemens' bill ran into difficulties for lack of a House sponsor, the legislative lobbyists for the Business Law Section (Bill Wiley and Aimee Diaz in particular) provided some assistance to Senator Clemens in an attempt to resuscitate the bill. However, inasmuch as the Business Law Section was not the nominal one to initiate the proposed legislation, they were somewhat limited in lobbying efforts they could take to promote the bill. The purpose, therefore, of the current motion is to position the legislative package as a Business Law Section legislative proposal, thereby allowing our legislative team the full capacity to act on our behalf while in conjunction with the Senator Clemens and other sponsors and staff members.

### The Legislative Proposal

The legislative proposal was set forth in two attached memoranda to the Corporations, Securities & Financial Institutions Committee dated December 26, 2012, and January 7, 2013. In essence, the proposal calls for the creation of two new forms of corporations under Chapter 607:

- (1) A so-called "Social Purpose Corporation" that may adopt a focused identified public benefit within the proposed statutory definition of "public benefit" and
- (2) A so-called "Benefit Corporation" dedicated to broad public benefit goals pursuant to the statute's "general public benefit" standard.

The Subcommittee believed that offering to promoters and potential investors a choice as to the form and scope of a particular benefit-oriented corporation was preferable to benefit corporation legislation existing in most other states that either had only one or the other of these forms of enterprise (California has adopted both forms) or sought, through asserted flexibility, to meld the types into one type of entity. The basis for this conclusion and the distinction between the two forms of enterprise are described in the foregoing mentioned memoranda.

### Subsequent Developments

At the Committee's June, 2013, meeting, I advised the Committee on the status of the proposed legislation and recommended that the Subcommittee (a) analyze the Delaware legislation that had been enacted in the interim and the White Paper model legislation prepared by an ABA Task Force (b) determine whether any changes should be made to our legislative proposal, and (c) recommend adoption at the Retreat of the legislative package (with any recommended revisions) as a Florida Bar Business Law Section proposal. The recommendations were approved by the Committee.

#### Delaware and ABA Task Force Adoptions

The Delaware Approach. The benefit corporation legislation adopted in Delaware is substantially different from legislation adopted in most other states (with the exception of Colorado, which recently followed the Delaware model) and the proposals adopted by our Committee. Attached is my memorandum dated July 8, 2013, discussing the Delaware legislation.

Among the principal differences is that directors are required to "balance" stockholder, corporate and public benefit interests, a concept that is at odds with the essential premise of benefit corporations that allows directors considerable discretion in how much focus to put on the pursuit of benefit goals. Directors can of course choose to consider all interests, and in fact remain subject to basic duty of care concepts, but the notion of "balance" is likely to be interpreted as a clear restraint on directors' discretion. The attached memorandum points out other substantive differences between Delaware and our proposal, as well as Delaware and other states.

The ABA Model Approach. The Model provisions recommended by an ABA Task Force, not surprisingly, are based on Delaware as the chair of the Task Force was the principal drafter of the Delaware legislation. Consequently, the attached critique of the Delaware legislation applies as well to the ABA Task Force Model.

Analysis of Whether Changes Are Advisable. The Subcommittee was in agreement that the Delaware model was not preferable to our previously adopted proposed benefit corporation/social purpose corporation legislation. The only major change we considered was whether the formal name of a benefit corporation should include initials, such as SPC or BC. Bill Clark, the lawyer who represents B-Labs and is somewhat of a national expert on benefit

corporations, advised that this requirement in Delaware to add initials to the corporate name is creating challenges for many existing corporations proposing to become benefit corporations, particularly with regard to name changes, trademarks, etc. Accordingly, the Subcommittee decided that our proposal should not be changed to include a requirement of adding the SPC or BC initials in the corporate name.

### Recommendation

The Subcommittee recommends that the Committee adopt and propose as a triple motion the benefit corporation/social purpose corporation legislative package as set forth in the attachment. The legislative package is in all material aspects the same legislative proposal that was approved for support in January 2013 by the Committee and, by way of triple motion, by the Executive Council.

3/7/13  
UNTRACKED w/  
ALL REVISIONS

By Senator Clemens

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1                                   A bill to be entitled

2           An act relating to corporations; providing a directive

3           to the Division of Law Revision and Information;

4           amending s. 607.1302, F.S.; providing that the

5           amendment of articles of incorporation or the merger,

6           conversion, or share exchange of a social purpose or

7           benefit corporation entitles the shareholders to

8           appraisal rights; providing a directive to the

9           Division of Law Revision and Information; creating s.

10          607.501, F.S.; providing application and effect;

11          creating s. 607.502, F.S.; providing definitions;

12          creating s. 607.503, F.S.; establishing requirements

13          for the formation of a social purpose corporation;

14          creating s. 607.504, F.S.; providing procedures for an

15          existing corporation to become a social purpose

16          corporation; creating s. 607.505, F.S.; providing

17          procedures for the termination of a social purpose

18          corporation; creating s. 607.506, F.S.; requiring that

19          the corporate purpose must be to create a public

20          benefit; providing criteria; creating s. 607.507,

21          F.S.; requiring that the directors of a social purpose

22          corporation meet a standard of conduct; providing

23          criteria for the standards; creating s. 607.508, F.S.;

24          authorizing the articles of incorporation of a social

25          purpose corporation to provide for a benefit director;

26          providing powers and duties of a benefit director;

27          creating s. 607.509, F.S.; requiring that the officers

28          of a social purpose corporation meet a standard of

29          conduct; providing criteria for the standards of

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30 conduct; creating s. 607.510, F.S.; authorizing a  
31 social purpose corporation to designate an officer as  
32 a benefit officer; providing for the powers and duties  
33 of a benefit officer; creating s. 607.511, F.S.;

34 authorizing certain legal actions to be brought  
35 against a social purpose corporation, its officers, or  
36 its directors; creating s. 607.512, F.S.; requiring  
37 the board of directors to prepare an annual benefit  
38 report; providing criteria for the preparation of the  
39 report; creating s. 607.513, F.S.; establishing  
40 requirements for the availability and dissemination of  
41 the annual report; authorizing a court to order  
42 dissemination of the report; providing criteria;

43 providing a directive to the Division of Law Revision  
44 and Information; creating s. 607.601, F.S.; providing  
45 for application and effect; creating s. 607.602, F.S.;

46 providing definitions; creating s. 607.603, F.S.;

47 establishing requirements for the formation of a  
48 benefit corporation; creating s. 607.604, F.S.;

49 providing procedures for an existing corporation to  
50 become a benefit corporation; creating s. 607.605,  
51 F.S.; providing procedures for the termination of a  
52 benefit corporation; creating s. 607.606, F.S.;

53 requiring that the corporate purpose be to create a  
54 public benefit; providing criteria; creating s.  
55 607.607, F.S.; requiring the directors of a benefit  
56 corporation to meet a standard of conduct; providing  
57 criteria for the standards; creating s. 607.608, F.S.;

58 authorizing the articles of incorporation of a benefit

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59 corporation to provide for a benefit director;  
60 providing powers and duties of the benefit director;  
61 creating s. 607.609, F.S.; requiring the officers of a  
62 benefit corporation to meet a standard of conduct;  
63 providing criteria for the standards of conduct;  
64 creating s. 607.610, F.S.; authorizing a benefit  
65 corporation to designate an officer as a benefit  
66 officer; providing for the powers and duties of the  
67 benefit officer; creating s. 607.611, F.S.;  
68 authorizing certain legal actions to be brought  
69 against a benefit corporation, its officers, or its  
70 directors; creating s. 607.612, F.S.; requiring the  
71 board of directors to prepare an annual benefit  
72 report; providing criteria for the preparation of the  
73 report; creating s. 607.613, F.S.; establishing  
74 requirements for the availability and dissemination of  
75 the annual report; authorizing a court to order  
76 dissemination of the report; providing criteria;  
77 providing an effective date.

78  
79 Be It Enacted by the Legislature of the State of Florida:

80  
81 Section 1. The Division of Law Revision and Information is  
82 requested to create part I of chapter 607, Florida Statutes,  
83 consisting of ss. 607.0101-607.193, entitled "CORPORATIONS."

84 Section 2. Subsection (1) of section 607.1302, Florida  
85 Statutes, is amended to read:

86 607.1302 Right of shareholders to appraisal.—

87 (1) A shareholder of a domestic corporation is entitled to

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88 appraisal rights, and to obtain payment of the fair value of  
89 that shareholder's shares, in the event of any of the following  
90 corporate actions:

91 (a) Consummation of a conversion of such corporation  
92 pursuant to s. 607.1112 if shareholder approval is required for  
93 the conversion and the shareholder is entitled to vote on the  
94 conversion under ss. 607.1103 and 607.1112(6), or the  
95 consummation of a merger to which such corporation is a party if  
96 shareholder approval is required for the merger under s.  
97 607.1103 and the shareholder is entitled to vote on the merger  
98 or if such corporation is a subsidiary and the merger is  
99 governed by s. 607.1104;

100 (b) Consummation of a share exchange to which the  
101 corporation is a party as the corporation whose shares will be  
102 acquired if the shareholder is entitled to vote on the exchange,  
103 except that appraisal rights shall ~~shall~~ not be available to  
104 any shareholder of the corporation with respect to any class or  
105 series of shares of the corporation that is not exchanged;

106 (c) Consummation of a disposition of assets pursuant to s.  
107 607.1202 if the shareholder is entitled to vote on the  
108 disposition, including a sale in dissolution but not including a  
109 sale pursuant to court order or a sale for cash pursuant to a  
110 plan by which all or substantially all of the net proceeds of  
111 the sale will be distributed to the shareholders within 1 year  
112 after the date of sale;

113 (d) An amendment of the articles of incorporation with  
114 respect to the class or series of shares which reduces the  
115 number of shares of a class or series owned by the shareholder  
116 to a fraction of a share if the corporation has the obligation

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117 or right to repurchase the fractional share so created;

118 (e) Any other amendment to the articles of incorporation,  
119 merger, share exchange, or disposition of assets to the extent  
120 provided by the articles of incorporation, bylaws, or a  
121 resolution of the board of directors, except that no bylaw or  
122 board resolution providing for appraisal rights may be amended  
123 or otherwise altered except by shareholder approval; ~~or~~

124 (f) With regard to a class of shares prescribed in the  
125 articles of incorporation prior to October 1, 2003, including  
126 any shares within that class subsequently authorized by  
127 amendment, any amendment of the articles of incorporation if the  
128 shareholder is entitled to vote on the amendment and if such  
129 amendment would adversely affect such shareholder by:

130 1. Altering or abolishing any preemptive rights attached to  
131 any of his or her shares;

132 2. Altering or abolishing the voting rights pertaining to  
133 any of his or her shares, except as such rights may be affected  
134 by the voting rights of new shares then being authorized of any  
135 existing or new class or series of shares;

136 3. Effecting an exchange, cancellation, or reclassification  
137 of any of his or her shares, when such exchange, cancellation,  
138 or reclassification would alter or abolish the shareholder's  
139 voting rights or alter his or her percentage of equity in the  
140 corporation, or effecting a reduction or cancellation of accrued  
141 dividends or other arrearages in respect to such shares;

142 4. Reducing the stated redemption price of any of the  
143 shareholder's redeemable shares, altering or abolishing any  
144 provision relating to any sinking fund for the redemption or  
145 purchase of any of his or her shares, or making any of his or

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146 her shares subject to redemption when they are not otherwise  
147 redeemable;

148 5. Making noncumulative, in whole or in part, dividends of  
149 any of the shareholder's preferred shares which had theretofore  
150 been cumulative;

151 6. Reducing the stated dividend preference of any of the  
152 shareholder's preferred shares; or

153 7. Reducing any stated preferential amount payable on any  
154 of the shareholder's preferred shares upon voluntary or  
155 involuntary liquidation;—

156 (g) An amendment of the articles of incorporation of a  
157 social purpose corporation to which s. 607.504 or s. 607.505  
158 applies;

159 (h) An amendment of the articles of incorporation of a  
160 benefit corporation to which s. 607.604 or s. 607.605 applies;

161 (i) A merger, conversion, or share exchange of a social  
162 purpose corporation to which s. 607.504 applies; or

163 (j) A merger, conversion, or share exchange of a benefit  
164 corporation to which s. 607.604 applies.

165 Section 3. The Division of Law Revision and Information is  
166 requested to create part II of chapter 607, Florida Statutes,  
167 consisting of ss. 607.501-607.513, entitled "SOCIAL PURPOSE  
168 CORPORATIONS."

169 Section 4. Section 607.501, Florida Statutes, is created to  
170 read:

171 607.501 Application and effect.—

172 (1) This part shall be applicable to all social purpose  
173 corporations.

174 (2) The existence of a provision of this part may not in

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175 itself create an implication that a contrary or different rule  
176 of law is applicable to a corporation that is not a social  
177 purpose corporation. This part may not affect a statute or rule  
178 that is applicable to a corporation that is not a social purpose  
179 corporation.

180 (3) Except as otherwise provided in this part, all other  
181 provisions of this chapter shall be generally applicable to all  
182 social purpose corporations. The specific provisions of this  
183 part shall control over the general provisions of this chapter.

184 (4) A social purpose corporation may be simultaneously  
185 subject to this part and to one or more other chapters,  
186 including chapter 621. In such event, the provisions and  
187 sections of this part shall take precedence with respect to a  
188 social purpose corporation.

189 (5) Except as permitted by this part, a provision of the  
190 articles of incorporation or bylaws, or a shareholders agreement  
191 among shareholders of a social purpose corporation, may not  
192 limit, be inconsistent with, or supersede a provision of this  
193 part.

194 Section 5. Section 607.502, Florida Statutes, is created to  
195 read:

196 607.502 Definitions.—As used in this part, unless the  
197 context otherwise requires, the term:

198 (1) "Benefit director" means:

199 (a) The director designated as the benefit director of a  
200 social purpose corporation under s. 607.508; or

201 (b) A person with one or more of the powers, duties, or  
202 rights of a benefit director to the extent provided in the  
203 articles of incorporation or bylaws under s. 607.508.

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204       (2) "Benefit enforcement proceeding" means a claim or  
205 action for:

206       (a) The failure of a social purpose corporation to pursue  
207 or create a public benefit or a specific public benefit  
208 established in its articles of incorporation; or

209       (b) A violation of any obligation, duty, or standard of  
210 conduct under this part.

211       (3) "Benefit officer" means the individual designated as  
212 the benefit officer of a social purpose corporation under s.  
213 607.510.

214       (4) "Independent" means not having a material relationship  
215 with the social purpose corporation or a subsidiary of the  
216 social purpose corporation. A person does not have a material  
217 relationship solely by virtue of serving as the benefit director  
218 or benefit officer of the social purpose corporation or a  
219 subsidiary of the social purpose corporation. In determining  
220 whether a director or officer is independent, a material  
221 relationship between an individual and a social purpose  
222 corporation or any of its subsidiaries will be conclusively  
223 presumed to exist, at the time independence is to be determined,  
224 if any of the following apply:

225       (a) The individual is or was within the prior 3 years an  
226 employee, other than a benefit officer, of the social purpose  
227 corporation or a subsidiary.

228       (b) An immediate family member of the individual is or was  
229 within the prior 3 years an executive officer, other than a  
230 benefit officer, of the social purpose corporation or a  
231 subsidiary.

232       (c) When ownership is calculated as if all outstanding

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233 rights to acquire equity interests in the social purpose  
234 corporation had been exercised, there is beneficial or record  
235 ownership of 5 percent or more of the outstanding shares of the  
236 social purpose corporation by:

- 237 1. The individual; or
- 238 2. An entity:
  - 239 a. Of which the individual is a director, an officer, or a  
240 manager; or
  - 241 b. In which, when ownership is calculated as if all  
242 outstanding rights to acquire equity interests in the entity had  
243 been exercised, the individual owns beneficially or of record 5  
244 percent or more of the outstanding equity interests.

245 (5) "Minimum status vote" means:

- 246 (a) In the case of a corporation that is to become a social  
247 purpose corporation, whether by amendment of the articles of  
248 incorporation or by way of or pursuant to a merger, conversion,  
249 or share exchange, a social purpose corporation whose articles  
250 of incorporation are to be amended pursuant to s. 607.506(4), or  
251 a social purpose corporation that is to cease being a social  
252 purpose corporation, in addition to any other required approval  
253 or vote, the satisfaction of the following conditions:
  - 254 1. The shareholders of each class or series shall be  
255 entitled to vote as a separate voting group on the corporate  
256 action regardless of any limitation on the voting rights of any  
257 class or series stated in the articles of incorporation or  
258 bylaws.
  - 259 2. The corporate action is approved by vote of each class  
260 or series of equity interest entitled to vote by at least two-  
261 thirds of the total votes of the class or series.

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262       (b) In the case of a domestic entity, other than a  
263 corporation, which is to be simultaneously converted to a social  
264 purpose corporation or merged into a social purpose corporation,  
265 in addition to any other required approval, vote, or consent,  
266 the satisfaction of the following conditions:

267       1. The holders of each class or series of equity interest  
268 in the entity who are entitled to receive a distribution of any  
269 kind are entitled, as a separate voting group, to vote on or  
270 consent to the action regardless of any applicable limitation on  
271 the voting or consent rights of any class or series.

272       2. The action is approved by vote or consent of the holders  
273 of each class and each series described in subparagraph 1. who  
274 are entitled to cast at least two-thirds of the total votes or  
275 consent of the class or series which all of those holders are  
276 entitled to cast on the action.

277       (6) "Public benefit" means a positive effect, or the  
278 minimization of negative effects, taken as a whole, on the  
279 environment or on one or more categories of persons or entities  
280 other than shareholders in their capacity as shareholders, of an  
281 artistic, charitable, economic, educational, cultural, literary,  
282 religious, social, ecological, or scientific nature, from the  
283 business and operations of a social purpose corporation,  
284 including, but not limited to:

285       (a) Providing low-income or underserved individuals or  
286 communities with beneficial products or services;

287       (b) Promoting economic opportunity for individuals or  
288 communities beyond the creation of jobs in the normal course of  
289 business;

290       (c) Protecting or restoring the environment;

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291 (d) Improving human health;

292 (e) Promoting the arts, sciences, or advancement of  
293 knowledge; and

294 (f) Increasing the flow of capital to entities that have as  
295 their stated purpose the provision of a benefit to society or  
296 the environment.

297 (7) "Social purpose corporation" means a corporation that  
298 has elected to become subject to this part and the status of  
299 which as a social purpose corporation has not been terminated.

300 (8) "Specific public benefit" means a benefit identified as  
301 a purpose of the social purpose corporation which is set forth  
302 in the articles of incorporation and is consistent with a public  
303 benefit as that term is defined in this section.

304 (9) "Subsidiary" means, in relation to a person other than  
305 an individual, an entity in which a person owns beneficially or  
306 of record 50 percent or more of the outstanding equity  
307 interests.

308 (10) "Third-party standard" means a recognized standard for  
309 defining, reporting, and assessing the societal and  
310 environmental performance of a business which is:

311 (a) Comprehensive because it assesses the effect of the  
312 business and its operations upon the interests listed in s.  
313 607.507(1)(a).

314 (b) Developed by an entity that is not controlled by the  
315 social purpose corporation.

316 (c) Credible because it is developed by an entity that has  
317 access to necessary expertise to assess the overall effect of  
318 the business and uses a balanced, collaborative approach to  
319 develop the standard, including a period for public comment.

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320 (d) Transparent because the following information is  
321 publicly available:

322 1. The criteria considered under the standard when  
323 measuring the overall effect of the business and its operations  
324 upon the interests provided in s. 607.507(1) and the relative  
325 weights, if any, of those criteria; and

326 2. The process used in the development and revision of the  
327 third-party standard regarding the identity of the directors,  
328 officers, material owners, and governing body of the entity that  
329 developed and controls revisions to the standard; the process by  
330 which revisions are made to the standard and changes are made to  
331 the membership of the governing body; and an accounting of the  
332 revenue and sources of financial support for the entity with  
333 sufficient detail to disclose any relationships that could  
334 reasonably be considered to present a potential conflict of  
335 interest.

336 Section 6. Section 607.503, Florida Statutes, is created to  
337 read:

338 607.503 Incorporation of social purpose corporation.—A  
339 corporation to be formed as a social purpose corporation shall  
340 be incorporated in accordance with this chapter. The articles of  
341 incorporation filed must state that the corporation is a social  
342 purpose corporation under this part.

343 Section 7. Section 607.504, Florida Statutes, is created to  
344 read:

345 607.504 Election of social purpose corporation status.—

346 (1) An existing corporation may become a social purpose  
347 corporation under this part by amending its articles of  
348 incorporation to include, in addition to the requirements of s.

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349 607.0202, a statement that the corporation is a social purpose  
350 corporation under this part. The amendment must be adopted by  
351 the minimum status vote.

352 (2) A plan of merger, conversion, or share exchange must be  
353 adopted by the minimum status vote if an entity that is not a  
354 social purpose corporation is a party to the merger or  
355 conversion or if the exchanging entity in a share exchange and  
356 the surviving, new, or resulting entity is, or will be, a social  
357 purpose corporation.

358 (3) If an entity elects to become a social purpose  
359 corporation by amendment of the articles of incorporation or by  
360 a merger, conversion, or share exchange, the shareholders of the  
361 entity are entitled to appraisal rights under ss. 607.1301-  
362 607.1333 to the extent of, and in accordance with, such  
363 appraisal rights provisions.

364 Section 8. Section 607.505, Florida Statutes, is created to  
365 read:

366 607.505 Termination of social purpose corporation status.-

367 (1) A social purpose corporation may terminate its status  
368 as such and cease to be subject to this part by amending its  
369 articles of incorporation to delete the provision required under  
370 s. 607.503 or s. 607.504. The amendment must be adopted by the  
371 minimum status vote.

372 (2) A plan of merger, conversion, or share exchange which  
373 has the effect of terminating the status of a corporation as a  
374 social purpose corporation must be adopted by the minimum status  
375 vote. A sale, lease, exchange, or other disposition of all or  
376 substantially all of the  
377 assets of a social purpose corporation is not effective unless  
the transaction is approved by the minimum status vote. However,

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378 a minimum status vote is not required if the transaction is in  
379 the usual and regular course of business, is pursuant to court  
380 order, or is a sale pursuant to which all or substantially  
381 all of the net proceeds of the sale will be distributed to  
382 the shareholders within 1 year after the date of the sale.

383 (3) If a corporation's status as a social purpose  
384 corporation is terminated pursuant to subsections (1) or (2),  
385 shareholders of the corporation are entitled to appraisal rights  
386 under ss. 607.1301-607.1333 to the extent of, and in accordance  
387 with, such appraisal rights provisions.

388 Section 9. Section 607.506, Florida Statutes, is created to  
389 read:

390 607.506 Corporate purpose.-

391 (1) A social purpose corporation shall have a purpose of  
392 creating a public benefit. This purpose is in addition to its  
393 purpose under s. 607.0301.

394 (2) The articles of incorporation of a social purpose  
395 corporation may identify the creation of one or more specific  
396 public benefits as its purpose in addition to its purposes under  
397 s. 607.0301 and subsection (1).

398 (3) The creation of a public benefit and a specific public  
399 benefit under subsections (1) and (2) is deemed to be in the  
400 best interest of the social purpose corporation.

401 (4) A social purpose corporation may amend its articles of  
402 incorporation to add, amend, or delete the identification of a  
403 specific public benefit purpose; however, the amendment must be  
404 adopted by the minimum status vote.

405 (5) A professional corporation that is a social purpose  
406 corporation does not violate s. 621.08 by having the purpose to

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407 create a public benefit or a specific public benefit.

408 Section 10. Section 607.507, Florida Statutes, is created  
409 to read:

410 607.507 Standard of conduct for directors.-

411 (1) In discharging their duties and in considering the best  
412 interests of the social purpose corporation, the directors:

413 (a) Shall consider the effects of any action or inaction  
414 upon:

415 1. The shareholders of the social purpose corporation;

416 2. The ability of the social purpose corporation to  
417 accomplish its public benefit or any specific public benefit  
418 purpose; and

419 (b) May consider the effects of any action or inaction upon  
420 any of the following:

421 1. The employees and work force of the social purpose  
422 corporation, its subsidiaries, and its suppliers;

423 2. The interests of customers and suppliers as  
424 beneficiaries of the general public benefit or specific public  
425 benefit purposes of the social purpose corporation;

426 3. Community and societal factors, including those of each  
427 community in which offices or facilities of the social purpose  
428 corporation, its subsidiaries, or its suppliers are located;

429 4. The local and global environment; and

430 5. The short-term and long-term interests of the social  
431 purpose corporation, including benefits that may accrue to the  
432 social purpose corporation from its long-term plans and the  
433 possibility that these interests may be best served by the  
434 continued independence of the social purpose corporation; and

435 (c) May consider other pertinent factors or the interests

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436 of any other group that they deem appropriate.

437 (d) Are not required to give priority to the interests of  
438 any particular person or group referred to in paragraphs (a),  
439 (b),

440 or (c) unless the social purpose corporation states in its  
441 articles of incorporation its intention to give such priority;  
442 and

443 (e) Are not required to give equal weight to the interests  
444 of any particular person or group referred to in paragraphs (a),  
445 (b), or (c) unless the social purpose corporation has stated in  
446 its articles of incorporation its intention to give such equal  
447 weight.

448 (2) Except as provided in the articles of incorporation, a  
449 director is not personally liable for monetary damages to the  
450 corporation, or to any other person, for the failure of the  
451 social purpose corporation to pursue or create a public benefit  
452 or a specific public benefit. A director is subject to the  
453 duties established in s. 607.0830.

454 (3) Except as otherwise provided in the articles of  
455 incorporation, a director does not have a duty to a person who  
456 is a beneficiary of the public benefit purpose or any one or  
457 more specific public benefit purposes of a social purpose  
458 corporation.

459 Section 11. Section 607.508, Florida Statutes, is created  
460 to read:

461 607.508 Benefit director.—

462 (1) If the articles of incorporation so provide, the board  
463 of directors of a social purpose corporation may include a  
464 director who is designated as the benefit director and, in  
addition to the powers, duties, rights, and immunities of the

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465 other directors of the social purpose corporation, has the  
466 powers, duties, rights, and immunities provided in this part.

467 (2) The benefit director shall be elected, and may be  
468 removed, in the manner provided by this chapter. The benefit  
469 director must be independent and may also serve as a benefit  
470 officer. The articles of incorporation or bylaws may prescribe  
471 additional qualifications of the benefit director.

472 (3) Unless the articles of incorporation or bylaws provide  
473 otherwise, the benefit director shall prepare, and the social  
474 purpose corporation shall include in the annual benefit report  
475 to shareholders required under s. 607.512, the opinion of the  
476 benefit director on the following:

477 (a) Whether the social purpose corporation in all material  
478 respects acted in accordance with its public benefit purpose and  
479 any specific public benefit purpose during the period covered by  
480 the report.

481 (b) Whether the directors and officers complied with ss.  
482 607.507(1) and 607.509(1).

483 (c) If, in the opinion of the benefit director, the social  
484 purpose corporation or its directors or officers failed to  
485 comply with paragraph (a) or s. 607.507(1) or s. 607.509(1), a  
486 description of the ways in which the social purpose corporation  
487 or its directors or officers failed to comply.

488 (4) The action or inaction of an individual in his or her  
489 capacity as a benefit director shall constitute for all purposes  
490 an action or inaction of that individual in his or her capacity  
491 as a director of the social purpose corporation.

492 (5) The benefit director of a corporation formed under  
493 chapter 621 does not need to be independent.

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494 Section 12. Section 607.509, Florida Statutes, is created  
495 to read:

496 607.509 Standard of conduct for officers.-

497 (1) If an officer of a social purpose corporation  
498 reasonably believes that a matter may have a material effect on  
499 the ability of the corporation to pursue or create a public  
500 benefit or a specific public benefit identified in the articles  
501 of incorporation and the officer has discretion to act on the  
502 matter, the officer shall consider the interests and factors  
503 provided in s. 607.507(1).

504 (2) The officer's consideration of interests and factors  
505 under subsection (1) does not constitute a violation of s.  
506 607.0841.

507 (3) Except as provided in the articles of incorporation, an  
508 officer is not personally liable for monetary damages to the  
509 corporation or any other person for the failure of the social  
510 purpose corporation to pursue or create a public benefit or a  
511 specific public benefit; however, he or she is subject to s.  
512 607.0841.

513 (4) Except as provided in the articles of incorporation, an  
514 officer does not have any duty to a person who is a beneficiary  
515 of the public benefit purpose or any specific public benefit  
516 purpose of a social purpose corporation arising from the status  
517 of the person as a beneficiary.

518 Section 13. Section 607.510, Florida Statutes, is created  
519 to read:

520 607.510 Benefit officer.-

521 (1) A social purpose corporation may designate an officer  
522 as the benefit officer.

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523 (2) The benefit officer has the powers and duties set forth  
524 in the bylaws or determined by the board of directors, which may  
525 include, but are not limited to:

526 (a) Powers and duties relating to the public benefit or a  
527 specific public benefit purpose of the corporation; and

528 (b) The duty to prepare the annual benefit report required  
529 by s. 607.512.

530 Section 14. Section 607.511, Florida Statutes, is created  
531 to read:

532 607.511 Right of action.—

533 (1)(a) Except in a benefit enforcement proceeding, no  
534 person may bring an action or assert a claim against a social  
535 purpose corporation or its directors or officers with respect  
536 to:

537 1. A failure to pursue or create a public benefit or a  
538 specific public benefit set forth in its articles of  
539 incorporation; or

540 2. A violation of an obligation, duty, or standard of  
541 conduct under this part.

542 (b) A social purpose corporation is not liable for monetary  
543 damages under this part for the failure of the social purpose  
544 corporation to pursue or create a public benefit or a specific  
545 public benefit.

546 (2) A benefit enforcement proceeding may be commenced or  
547 maintained only:

548 (a) Directly by the social purpose corporation; or

549 (b) Derivatively by:

550 1. A shareholder of record on the date of the action or  
551 inaction complained of in the benefit enforcement proceeding;

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552       2. A director;

553       3. A person or group of persons that owns beneficially or  
554 of record 5 percent or more of the outstanding equity interests  
555 in an entity of which the social purpose corporation is a  
556 subsidiary on the date of the action or inaction complained of  
557 in the benefit enforcement proceeding; or

558       4. Any other person who is specified in the articles of  
559 incorporation or bylaws of the social purpose corporation.

560       Section 15. Section 607.512, Florida Statutes, is created  
561 to read:

562       607.512 Preparation of annual benefit report.-

563       (1) Unless it is prepared by a benefit director or benefit  
564 officer, the board of directors shall prepare an annual benefit  
565 report that must include all of the following:

566       (a) A narrative description of:

567       1. The ways in which the social purpose corporation pursued  
568 a public benefit and, if any, a specific public benefit during  
569 the year and the extent to which a  
570 public benefit or a specific public benefit was created.

571       2. Any circumstance that has hindered the pursuit or  
572 creation of a public benefit or a specific public benefit by  
573 the social purpose corporation.

574       3. The process and rationale for selecting or changing the  
575 third-party standard used to prepare the benefit report, if the  
576 articles of incorporation of the social purpose corporation  
577 require, or the board of directors determines, that the annual  
578 benefit report must be prepared in accordance with a third-party  
579 standard.

580       (b) If the articles of incorporation of the social purpose  
corporation require, or the board of directors determines, that

pared in accordance with a

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581 third-party standard, an assessment of the public benefit or  
582 specific public benefit performance of the social purpose  
583 corporation

584 using a third-party standard that is:

585 1. Applied consistently with any previous application in  
586 prior annual benefit reports; or

587 2. Accompanied by an explanation of the reasons for  
588 inconsistent application or any change in the standard from the  
589 immediate prior report.

590 (c) The name of the benefit director and the benefit  
591 officer, if those positions exist, and the respective addresses  
592 to which correspondence may be directed.

593 (d) If the corporation has a benefit director, his or her  
594 statement as provided in s. 607.508(3).

595 (e) If the articles of incorporation of the social purpose  
596 corporation require, or the board of directors determines, that  
597 the annual benefit report must be prepared in accordance with a  
598 third-party standard, a statement of any connection between the  
599 organization that established the third-party standard, or its  
600 directors, officers, or any holder of 5 percent or more of the  
601 governance interests in the organization, and the social purpose  
602 corporation or its directors, officers, or any holder of 5  
603 percent or more of the outstanding shares of the social purpose  
604 corporation, including any financial or governance relationship  
605 which might materially affect the credibility of the use of the  
606 third-party standard.

607 (2) If, during the year covered by an annual benefit  
608 report, a benefit director resigned from, or refused to stand  
609 for reelection to, his or her position, or was removed from his  
or her position, and he or she furnished written correspondence

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610 to the social purpose corporation concerning the circumstances  
611 surrounding his or her departure, that correspondence must be  
612 included as an exhibit in the annual benefit report.

613 (3) The annual benefit report or the assessment of the  
614 performance of the social purpose corporation in the annual  
615 benefit report required under paragraph (1)(b) do not need to be  
616 audited or certified by a third-party standard provider.

617 Section 16. Section 607.513, Florida Statutes, is created  
618 to read:

619 607.513 Availability of annual benefit report.—

620 (1) Each social purpose corporation shall send its annual  
621 benefit report to each shareholder:

622 (a) Within 120 days after the end of the fiscal year of the  
623 social purpose corporation; or

624 (b) At the same time that the social purpose corporation  
625 delivers any other annual report to its shareholders.

626 (2) A social purpose corporation shall post each annual  
627 benefit report on the public portion of its Internet website, if  
628 any, and it shall remain posted for at least 3 years.

629 (3) If a social purpose corporation does not have an  
630 Internet website, the corporation shall provide a copy of its  
631 most recent annual benefit report, without charge, to any person  
632 who requests a copy.

633 (4) If a social purpose corporation does not comply with  
634 the annual benefit report delivery requirement, the circuit  
635 court in the county in which the principal office of the social  
636 purpose corporation is located or, if no office is located in  
637 this state, the county in which its registered office is  
638 located, may, after a shareholder of the social purpose

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639 corporation requests a copy, summarily order the corporation to  
640 furnish the annual benefit report. If the court orders the  
641 annual benefit report to be furnished, the court may also order  
642 the social purpose corporation to pay the shareholder's costs,  
643 including reasonable attorney fees, which were incurred in  
644 obtaining the order and otherwise enforce their rights under  
645 this section.

646 Section 17. The Division of Law Revision and Information is  
647 requested to create part III of chapter 607, Florida Statutes,  
648 consisting of ss. 607.601-607.613, entitled "BENEFIT  
649 CORPORATIONS."

650 Section 18. Section 607.601, Florida Statutes, is created  
651 to read:

652 607.601 Application and effect.--

653 (1) This part shall be applicable to all benefit  
654 corporations.

655 (2) The existence of a provision of this part shall not of  
656 itself create an implication that a contrary or different rule  
657 of law is applicable to a corporation that is not a benefit  
658 corporation. This part may not affect a statute or rule that is  
659 applicable to a corporation that is not a benefit corporation.

660 (3) Except as otherwise provided in this part, all other  
661 provisions of this chapter shall be generally applicable to all  
662 benefit corporations. The specific provisions of this part shall  
663 control over the general provisions of this chapter.

664 (4) A benefit corporation may be simultaneously subject to  
665 this part and to one or more other chapters, including chapter  
666 621. In such event, the provisions and sections of this part  
667 shall take precedence with respect to a benefit corporation.

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668           (5) Except as permitted by this part, a provision of the  
669 articles of incorporation or bylaws, or a shareholders agreement  
670 among shareholders of a benefit corporation, may not limit, be  
671 inconsistent with, or supersede a provision of this part.

672           Section 19. Section 607.602, Florida Statutes, is created  
673 to read:

674           607.602 Definitions.—As used in this part, unless the  
675 context otherwise requires, the term:

676           (1) "Benefit corporation" means a corporation that has  
677 elected to become subject to this part and the status of  
678 which as a benefit corporation has not been terminated.

679           (2) "Benefit director" means:

680           (a) The director designated as the benefit director of a  
681 benefit corporation under s. 607.608; or

682           (b) A person with one or more of the powers, duties, or  
683 rights of a benefit director to the extent provided in the  
684 articles of incorporation or bylaws under s. 607.608.

685           (3) "Benefit enforcement proceeding" means any claim or  
686 action for:

687           (a) The failure of a benefit corporation to pursue or  
688 create general public benefit or a specific public benefit  
689 purpose set forth in its articles of incorporation; or

690           (b) A violation of any obligation, duty, or standard of  
691 conduct under this part.

692           (4) "Benefit officer" means the individual designated as  
693 the benefit officer of a benefit corporation under s. 607.610.

694           (5) "General public benefit" means a material positive  
695 effect on society and the environment, taken as a whole, as assessed  
696 using a third party standard, which  
is attributable to the business and operations of a benefit

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697 corporation.

698 (6) "Independent" means not having a material relationship  
699 with the benefit corporation or a subsidiary of the benefit  
700 corporation. A person does not have a material relationship  
701 solely by virtue of serving as the benefit director or benefit  
702 officer of the benefit corporation or a subsidiary of the  
703 benefit corporation. In determining whether a director or  
704 officer is independent, a material relationship between an  
705 individual and a benefit corporation or any of its subsidiaries  
706 will be conclusively presumed to exist, at the time independence  
707 is to be determined, if any of the following apply:

708 (a) The individual is or has been within the prior 3 years  
709 an employee, other than a benefit officer, of the benefit  
710 corporation or a subsidiary.

711 (b) An immediate family member of the individual is or was  
712 within the prior 3 years, an executive officer, other than a  
713 benefit officer, of the benefit corporation or a subsidiary.

714 (c) When ownership is calculated as if all outstanding  
715 rights to acquire equity interests in the benefit corporation  
716 had been exercised, there is beneficial or record ownership of 5  
717 percent or more of the outstanding shares of the benefit  
718 corporation by:

719 1. The individual; or

720 2. An entity:

721 a. Of which the individual is a director, an officer, or a  
722 manager; or

723 b. In which, when ownership is calculated as if all  
724 outstanding rights to acquire equity interests in the entity had  
725 been exercised, the individual owns beneficially or of record 5

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726 percent or more of the outstanding equity interests.

727 (7) "Minimum status vote" means:

728 (a) In the case of a corporation that is to become a  
729 benefit corporation, whether by amendment of the articles of  
730 incorporation or by way of or pursuant to a merger, conversion,  
731 or share exchange, a benefit corporation whose articles of  
732 incorporation are to be amended pursuant to s. 607.606(4), or a  
733 benefit corporation that is to cease being a benefit  
734 corporation, in addition to any other required approval or vote,  
735 the satisfaction of the following conditions:

736 1. The shareholders of each class or series shall be  
737 entitled to vote as a separate voting group on the corporate  
738 action regardless of any limitation on the voting rights of any  
739 class or series stated in the articles of incorporation or  
740 bylaws.

741 2. The corporate action is approved by vote of the  
742 shareholders of each class or series entitled to cast at least  
743 two-thirds of the votes that all shareholders of the class or  
744 series are entitled to cast on the action.

745 (b) In the case of a domestic entity, other than a  
746 corporation, which is to be simultaneously converted to a  
747 benefit corporation or merged into a benefit corporation, in  
748 addition to any other required approval, vote, or consent, the  
749 satisfaction of the following conditions:

750 1. The holders of each class or series of equity interest  
751 in the entity who are entitled to receive a distribution of any  
752 kind are entitled, as a separate voting group, to vote on or  
753 consent to the action regardless of any applicable limitation on  
754 the voting or consent rights of any class or series.

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755 2. The action is approved by vote or consent of each class  
756 or series of equity interest described in subparagraph 1. who  
757 are entitled to vote by at least two-thirds of the votes or  
758 consent of the class or series.

759 (8) "Specific public benefit" includes, but is not limited  
760 to:

761 (a) Providing low-income or underserved individuals or  
762 communities with beneficial products or services;

763 (b) Promoting economic opportunity for individuals or  
764 communities beyond the creation of jobs in the normal course of  
765 business;

766 (c) Protecting or restoring the environment;

767 (d) Improving human health;

768 (e) Promoting the arts, sciences, or advancement of  
769 knowledge;

770 (f) Increasing the flow of capital to entities that have as  
771 their stated purpose the provision of a benefit to society or  
772 the environment; and

773 (g) Any other public benefit consistent with the purposes  
774 of the benefit corporation.

775 (9) "Subsidiary" means, in relation to a person other than  
776 an individual, an entity in which a person owns beneficially or  
777 of record 50 percent or more of the outstanding equity  
778 interests.

779 (10) "Third-party standard" means a recognized standard for  
780 defining, reporting, and assessing the societal and  
781 environmental performance of a business which is:

782 (a) Comprehensive because it assesses the effect of the  
783 business and its operations upon the interests provided in s.

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784 607.607(1)(a)2.-5.

785 (b) Developed by an entity that is not controlled by the  
786 benefit corporation.

787 (c) Credible because it is developed by an entity that has  
788 access to necessary expertise to assess the overall societal and  
789 environmental performance of a business and uses a balanced,  
790 collaborative approach to develop the standard, including a  
791 reasonable public comment period.

792 (d) Transparent because the following information is  
793 publicly available:

794 1. The criteria considered under the standard when  
795 measuring the overall societal and environmental performance of  
796 a business and the relative weights, if any, of those criteria.

797 2. The identity of the directors, officers, material  
798 owners, and the governing body of the entity that developed and  
799 control revisions; the process by which revisions to the  
800 standard and changes to the membership of the governing body are  
801 made; and an accounting of the revenue and sources of financial  
802 support for the entity, with sufficient detail to disclose any  
803 relationships that could reasonably be considered to present a  
804 potential conflict of interest.

805 Section 20. Section 607.603, Florida Statutes, is created  
806 to read:

807 607.603 Incorporation of benefit corporation.—A corporation  
808 to be formed as a benefit corporation shall be incorporated in  
809 accordance with this chapter. The articles of incorporation  
810 filed must state that the corporation is a benefit corporation  
811 under this part.

812 Section 21. Section 607.604, Florida Statutes, is created

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813 to read:

814 607.604 Election of benefit corporation status.-

815 (1) An existing corporation may become a benefit  
816 corporation under this part by amending its articles of  
817 incorporation to contain, in addition to the requirements of s.  
818 607.0202, a statement that the corporation is a benefit  
819 corporation under this part. The amendment must be adopted by  
820 the minimum status vote.

821 (2) A plan of merger, conversion, or share exchange must be  
822 adopted by the minimum status vote if an entity that is not a  
823 benefit corporation is a party to a merger or conversion or if  
824 the exchanging entity in a share exchange and the surviving,  
825 new, or resulting entity is, or will be, a benefit corporation.

826 (3) If an entity elects to become a benefit corporation by  
827 amendment of the articles of incorporation or by a merger,  
828 conversion, or share exchange, the shareholders of the entity  
829 are entitled to appraisal rights under ss. 607.1301-607.1333 to  
830 the extent of, and in accordance with, such appraisal rights  
831 provisions.

832 Section 22. Section 607.605, Florida Statutes, is created  
833 to read:

834 607.605 Termination of benefit corporation status.-

835 (1) A benefit corporation may terminate its status as such  
836 and cease to be subject to this part by amending its articles of  
837 incorporation to delete the provision required under s. 607.603  
838 or s. 607.604. The amendment must be adopted by the minimum  
839 status vote.

840 (2) A plan of merger, conversion, or share exchange which  
841 has the effect of terminating the status of a corporation as a

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842 benefit corporation must be adopted by the minimum status vote.  
843 A sale, lease, exchange, or other disposition of all or  
844 substantially all of the assets of a benefit corporation is not  
845 effective unless the transaction is approved by the minimum  
846 status vote. However, a minimum status vote is not required if  
847 the transaction is in the usual and regular course of business  
848 or is pursuant to court order, or is  
849 a sale pursuant to which all or substantially all of the net  
850 proceeds of the sale will be distributed to the shareholders  
851 within 1 year after the date of the sale.

852 (3) If a corporation's status as a benefit corporation is  
853 terminated pursuant to subsections (1) or (2), shareholders of  
854 the corporation are entitled to appraisal rights under ss.  
855 607.1301-607.1333 to the extent of, and in accordance with, such  
856 appraisal rights provisions.

857 Section 23. Section 607.606, Florida Statutes, is created  
858 to read:

859 607.606 Corporate purpose.-

860 (1) A benefit corporation shall have the purpose of  
861 creating general public benefit. This purpose is in addition to  
862 its purposes under s. 607.0301.

863 (2) The articles of incorporation of a benefit corporation  
864 may identify one or more specific public benefits as its purpose  
865 in addition to its purposes under s. 607.0301 and subsection  
866 (1). The identification of a specific public benefit under this  
867 subsection does not limit the obligation of a benefit  
868 corporation under subsection (1).

869 (3) The creation of general public benefit and a specific  
870 public benefit under subsections (1) and (2) is deemed to be in  
the best interest of the benefit corporation.

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871 (4) A benefit corporation may amend its articles of  
872 incorporation to add, amend, or delete the identification of a  
873 specific public benefit purpose; however, the amendment must be  
874 adopted by the minimum status vote.

875 (5) A professional corporation that is a benefit  
876 corporation does not violate s. 621.08 by having the purpose to  
877 create general public benefit or a specific public benefit.

878 Section 24. Section 607.607, Florida Statutes, is created  
879 to read:

880 607.607 Standard of conduct for directors.-

881 (1) In discharging their duties and in considering the best  
882 interests of the benefit corporation, the directors:

883 (a) Shall consider the effects of any action or inaction  
884 upon:

885 1. The shareholders of the benefit corporation;

886 2. The employees and work force of the benefit corporation,  
887 its subsidiaries, and its suppliers;

888 3. The interests of customers and suppliers as  
889 beneficiaries of the general public benefit and any specific  
890 public benefit purposes of the benefit corporation;

891 4. Community and societal factors, including those of each  
892 community in which offices or facilities of the benefit  
893 corporation, its subsidiaries, or its suppliers are located;

894 5. The local and global environment;

895 6. The short-term and long-term interests of the benefit  
896 corporation, including benefits that may accrue to the benefit  
897 corporation from its long-term plans and the possibility that  
898 these interests may be best served by the continued independence  
899 of the benefit corporation; and

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900       7. The ability of the benefit corporation to accomplish its  
901 general public benefit purpose and each of its specific public  
902 benefit purposes, if any; and

903       (b) May consider other pertinent factors or the interests  
904 of any other group that they deem appropriate.

905       (c) Are not required to give priority to the interests of a  
906 particular person or group referred to in paragraphs (a) or (b)  
907 over the interests of any other person or group, unless the  
908 benefit corporation has stated in its articles of incorporation  
909 its intention to give priority to certain interests; and

910       (d) Are not required to give equal weight to the interests  
911 of a particular person or group referred to in paragraphs (a) or  
912 (b), unless the benefit corporation has stated in its articles  
913 of incorporation its intention to give such equal weight.

914       (2) Except as otherwise provided in the articles of  
915 incorporation, a director is not personally liable for monetary  
916 damages for the failure of the benefit corporation to pursue or  
917 create general public benefit or a specific public benefit  
918 identified in its articles of incorporation. A director is  
919 subject to the duties established in s. 607.0830.

920       (3) Except as otherwise provided in the articles of  
921 incorporation, a director does not have a duty to a person who  
922 is a beneficiary of the general public benefit purpose or any  
923 one or more specific public benefit purposes of the benefit  
924 corporation arising from the status of the person as a  
925 beneficiary.

926       Section 25. Section 607.608, Florida Statutes, is created  
927 to read:

928       607.608 Benefit director.--

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929           (1) If the articles of incorporation so provide, the board  
930 of directors of a benefit corporation may include a director who  
931 is designated as the benefit director and, in addition to the  
932 powers, duties, rights, and immunities of the other directors of  
933 the benefit corporation, has the powers, duties, rights, and  
934 immunities provided in this part.

935           (2) The benefit director shall be elected, and may be  
936 removed, in the manner provided by this chapter. The benefit  
937 director shall be an individual who is independent. The benefit  
938 director may also serve as a benefit officer. The articles of  
939 incorporation or bylaws may prescribe additional qualifications  
940 of the benefit director.

941           (3) Unless the articles of incorporation or bylaws provide  
942 otherwise, the benefit director shall prepare, and the benefit  
943 corporation shall include in the annual benefit report to  
944 shareholders required by s. 607.612, the opinion of the benefit  
945 director on the following:

946           (a) Whether the benefit corporation in all material  
947 respects acted in accordance with its general public benefit  
948 purpose and any specific public benefit purpose during the  
949 period covered by the report.

950           (b) Whether the directors and officers complied with ss.  
951 607.607(1) and 607.609(1).

952           (c) If, in the opinion of the benefit director, the benefit  
953 corporation or its directors or officers failed to comply with  
954 paragraph (a) or s. 607.607(1) or s. 607.609(1), a written  
955 description of the ways in which the benefit corporation or its  
956 directors failed to comply.

957           (4) The action or inaction of an individual in his or her

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958 capacity as a benefit director shall constitute for all purposes  
 959 an action or inaction of that individual in his or her capacity  
 960 as a director of the benefit corporation.

961 (5) The benefit director of a corporation formed under  
 962 chapter 621 does not need to be independent.

963 Section 26. Section 607.609, Florida Statutes, is created  
 964 to read:

965 607.609 Standard of conduct for officers.-

966 (1) If an officer of a benefit corporation reasonably  
 967 believes that a matter may have a material effect on the ability  
 968 of the corporation to pursue or create, or the creation by the  
 969 corporation of, general public benefit or a specific public  
 970 benefit identified in the articles of incorporation and the  
 971 officer has discretion to act on the matter, the officer shall  
 972 consider the interests and factors provided in s. 607.607(1).

973 (2) The officer's consideration of interests and factors  
 974 under subsection (1) does not constitute a violation of s.  
 975 607.0841.

976 (3) Except as provided in the articles of incorporation, an  
 977 officer is not personally liable for monetary damages to the  
 978 corporation or to any other person for the failure of the  
 979 benefit corporation to pursue or create general public benefit  
 980 or a specific public benefit; however, he or she is subject to  
 981 s. 607.0841.

982 (4) Except as otherwise provided in the articles of  
 983 incorporation, an officer does not have a duty to a person who  
 984 is a beneficiary of the general public benefit purpose or any  
 985 specific public benefit purpose of the benefit corporation  
 986 arising from the status of the person as a beneficiary.

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987 Section 27. Section 607.610, Florida Statutes, is created  
 988 to read:

989 607.610 Benefit officer.—

990 (1) A benefit corporation may designate an officer as the  
 991 benefit officer.

992 (2) The benefit officer has the powers and duties set forth  
 993 in the bylaws or determined by the board of directors, which may  
 994 include, but are not limited to:

995 (a) Powers and duties relating to the general public  
 996 benefit or a specific public benefit purpose of the corporation;  
 997 and

998 (b) The duty to prepare the annual benefit report required  
 999 under s. 607.612.

1000 Section 28. Section 607.611, Florida Statutes, is created  
 1001 to read:

1002 607.611 Right of action.—

1003 (1) (a) Except in a benefit enforcement proceeding, no  
 1004 person may bring an action or assert a claim against a benefit  
 1005 corporation or its directors or officers with respect to:

1006 1. A failure to pursue or create general public benefit or  
 1007 a specific public benefit set forth in its articles of  
 1008 incorporation; or

1009 2. A violation of an obligation, duty, or standard of  
 1010 conduct under this part.

1011 (b) A benefit corporation is not liable for monetary  
 1012 damages under this part for the failure of the benefit  
 1013 corporation to pursue or create general public benefit or a  
 1014 specific public benefit.

1015 (2) A benefit enforcement proceeding may be commenced or

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- 1016 maintained only:
- 1017       (a) Directly by the benefit corporation; or
- 1018       (b) Derivatively by:
- 1019           1. A shareholder of record on the date of the action or
- 1020 inaction complained of in the benefit enforcement proceeding;
- 1021           2. A director;
- 1022           3. A person or group of persons that owns beneficially or
- 1023 of record 5 percent or more of the outstanding equity interests
- 1024 in an entity of which the benefit corporation is a subsidiary on
- 1025 the date of the action or inaction complained of in the
- 1026 proceeding; or
- 1027           4. Any other person who is specified in the articles of
- 1028 incorporation or bylaws of the benefit corporation.
- 1029       Section 29. Section 607.612, Florida Statutes, is created
- 1030 to read:
- 1031       607.612 Preparation of annual benefit report.—
- 1032           (1) Unless it is prepared by a benefit director or a
- 1033 benefit officer, the board of directors shall prepare an annual
- 1034 benefit report which includes all of the following:
- 1035           (a) A narrative description of:
- 1036               1. The ways in which the benefit corporation pursued
- 1037 general public benefit and, if any, a specific public benefit,
- 1038 during the year and the extent to which general public benefit
- 1039 and a specific public benefit was created.
- 1040               2. Any circumstance that has hindered the pursuit or
- 1041 creation of general public benefit or a specific public benefit
- 1042 by the benefit corporation.
- 1043               3. The process and rationale for selecting or changing the
- 1044 third-party standard used to prepare the benefit report.
- (b) The annual benefit report must be prepared in

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1045 accordance with a third-party standard that is:

1046 1. Applied consistently with any previous application in  
1047 prior annual benefit reports; or

1048 2. Accompanied by an explanation of the reasons for any  
1049 inconsistent application or any change in the standard from the  
1050 immediate prior report.

1051 (c) The name of the benefit director and the benefit  
1052 officer, if those positions exist, and the respective business  
1053 addresses to which correspondence may be directed.

1054 (d) If the corporation has a benefit director, the  
1055 statement as provided in s. 607.608(3).

1056 (e) A statement of any connection between the organization  
1057 that established the third-party standard, or its directors,  
1058 officers, or any holder of 5 percent or more of the governance  
1059 interests in the organization, and the benefit corporation or  
1060 its directors, officers, or any holder of 5 percent or more of  
1061 the outstanding shares of the benefit corporation, including any  
1062 financial or governance relationship which might materially  
1063 affect the credibility of the use of the third-party standard.

1064 (2) If, during the year covered by an annual benefit  
1065 report, a benefit director resigned from, or refused to stand  
1066 for reelection to, his or her position, or was removed from his  
1067 or her position, and he or she furnished written correspondence  
1068 to the benefit corporation concerning the circumstances  
1069 surrounding his or her departure, that correspondence must be  
1070 included as an exhibit in the annual benefit report.

1071 (3) The annual benefit report or the assessment of the  
1072 performance of the benefit corporation in the annual benefit  
1073 report required under paragraph (1)(b) does not need to be

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1074 audited or certified by a third-party standards provider.

1075 Section 30. Section 607.613, Florida Statutes, is created  
1076 to read:

1077 607.613 Availability of annual benefit report.-

1078 (1) Each benefit corporation shall send its annual benefit  
1079 report to each shareholder:

1080 (a) Within 120 days after the end of the fiscal year of the  
1081 benefit corporation; or

1082 (b) At the same time that the benefit corporation delivers  
1083 any other annual report to its shareholders.

1084 (2) A benefit corporation shall post each annual benefit  
1085 report on the public portion of its Internet website, if any,  
1086 and it shall remain posted for at least 3 years.

1087 (3) If a benefit corporation does not have an Internet  
1088 website, the benefit corporation shall provide a copy of its  
1089 most recent annual benefit report, without charge, to any person  
1090 who requests a copy.

1091 (4) If a benefit corporation does not comply with the  
1092 annual benefit report delivery requirement, the circuit court in  
1093 the county in which the principal office of the benefit  
1094 corporation or, if no office is located in this state, the  
1095 county in which its registered office is located, may, after a  
1096 shareholder of the benefit corporation requests a copy,  
1097 summarily order the corporation to furnish the report. If the  
1098 court orders the report to be furnished, the court may also  
1099 order the benefit corporation to pay the shareholder's costs,  
1100 including reasonable attorney fees, which were incurred in  
1101 obtaining the order and otherwise enforce its rights under this  
1102 section.

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Section 31. This act shall take effect July 1, 2013.

To: Corporations, Securities & Financial Institutions Committee

From: Subcommittee on Benefit Corporations:  
Stuart Cohn, Stuart Ames, James Glover

Re: Report and Recommendation Regarding Adoption of Benefit Corporation Legislation

Date: December 26, 2012

### **Background**

During the 2012 legislative session, Representative (now Senator) Jeff Clemens introduced a bill to create a so-called “Benefit Corporation.” Bill Wiley brought the bill to our Committee’s attention and, after some discussion, the Committee requested Rep. Clemens to withdraw his bill until the Committee had an opportunity to examine the issue and determine whether and what type of legislation would be appropriate. Rep. Clemens agreed and the Committee appointed Stuart Cohn to consider the “Benefit Corporation” issue and report back to it. Stuart Ames and James Glover (a 3L at the Levin College of Law, University of Florida) have composed the additional members of the subcommittee examining this subject.

Subsequent to his initially proposed bill, Senator Clemens and his staff have been in contact with Bill Clark, Jr., a partner at the Drinker, Biddle & Reath firm in Philadelphia and the leading private attorney proponent for Benefit Corporations. Bill Clark has written extensively on this issue and, through his association with B-Lab,<sup>1</sup> has developed a “Model Benefit Corporation Act.” In October, 2012, Bill Wiley forwarded a copy of a revised proposed bill that (then) Rep. Clemens’ staff put together using Clark’s model act. The revised bill has not as yet been filed although Sen. Clemens has secured a House sponsor, Rep. Patrick Rooney, Jr. Through Bill Wiley and Aimee Diaz Lyon we have requested that our Committee have time to consider the more recent proposal and possible alternatives. Sen. Clemens and his staff are aware of our efforts and hopefully will work favorably with us.

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<sup>1</sup> According to its website, “B Lab is a nonprofit organization dedicated to using the power of business to solve social and environmental problems. B Lab drives systemic change through three interrelated initiatives: 1) building a community of Certified B Corporations to make it easier for all of us to tell the difference between ‘good companies’ and just good marketing; 2) accelerating the growth of impact investing through use of B Lab’s GIIRS Ratings and Analytics platform; and 3) promoting legislation creating a new corporate form -- the benefit corporation -- that meets higher standards of corporate purpose, accountability, and transparency.”

<http://benefitcorporation.net>.

The subcommittee has undertaken extensive review of this new form of entity, including analysis of numerous commentaries and the legislation adopted in other states. We have also engaged in an extensive discussion with Bill Clark on a number of legislative and interpretive issues. Through his work with the American Bar Association, Stuart Ames has also been involved in detailed analysis and discussion of these subjects.

### **Recommendation**

Based on our review and analysis, the subcommittee recommends adoption of legislation creating a Benefit Corporation. The proposed legislation is set forth in Appendix A. In our judgment, this new form of entity does not affect existing corporate law for standard corporations (to emphasize that point there is a specific statutory provision stating such) and offers an opportunity for socially-conscious entrepreneurs and their investors to pursue public benefit goals without the real or supposed constraints of standard corporate law. We do not know whether such enterprises will be numerous, will prosper or will be able to attract investors. Yet, we do not see a downside in permitting for-profit entities to operate principally or substantially in an alternative manner if that is the shared desire of management and shareholders.

In short, in this age of growing concern regarding social responsibility, the Benefit Corporation is an option that allows some segment of the business community, including entrepreneurs and investors, to pursue goals outside of standard corporate norms. We regard this opportunity as a positive and see no negative impact upon corporate laws and norms as they exist for standard corporations.

### **The Purpose of a Benefit Corporation**

The primary purpose of a Benefit Corporation is to allow directors and officers to cause the corporation to pursue in a significant manner public benefit goals in addition to, or even as a priority over, the generally accepted corporate goal of profit maximization. The principal objects of this new form of entity are so-called “green corporations” that wish to pursue socially beneficial goals yet also have profit-making capacities. It may be argued that such a new form of entity is not necessary given stakeholder provisions such as s. **607.0830(3)**, the recognized power of corporations to make donations for the public welfare and for charitable, scientific, or educational purposes (s. **607.0302(12)**), and the protections accorded to directors by the business judgment rule. However, despite these factors, there is a perceived concern that traditional corporate law raises substantial liability risks for directors and officers who cause the corporation to pursue social goals at the undue expense of the corporation’s bottom line.

Bill Clark stated the rationale for this alternative form as follows:<sup>2</sup>

“The sustainable business movement, impact investing and social enterprise sectors are developing rapidly but are constrained by an outdated legal framework that is not equipped to accommodate for-profit entities whose social benefit purpose is central to their existence. The Benefit Corporation is the most comprehensive yet flexible legal entity devised to address the needs of entrepreneurs and investors and, ultimately, the general public. Benefit Corporations offer clear market differentiation, broad legal protection to directors and officers, expanded shareholder rights, and greater access to capital than current alternative approaches.”

As stated by another commentator:<sup>3</sup>

“Social enterprises are entities dedicated to a blended mission of earning profits for owners and promoting social good. They are neither typical businesses, concentrated on the bottom line of profit, nor traditional charities....Their founders instead see value in blending both goals....Yet, these social entrepreneurs worry traditional organizational forms designed for either businesses or charities will constrain their ability to achieve the gains they see in blended mission enterprises.”

Advocates of this new entity recognize that there is a risk of “green-washing,” i.e. corporations using the Benefit Corporation mantle to wrap themselves in a cloak of social integrity while failing to meaningfully pursue any socially beneficial goals. “Green-washing” is a potential risk because directors are only mandated to consider benefit goals, not implement them. While there are accountability provisions related to reporting along with a derivative-like enforcement action, there is no personal monetary liability upon directors or officers who fail to pursue benefit goals. Ultimately it would be up to the corporation’s shareholders to determine whether a change in management or direction is necessary. Although there is a risk of “green-washing” as well as misleading investors whose expectations are not met, in our judgment these

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<sup>2</sup> William H. Clark, Jr. & Larry Vranka, *White Paper: The Need and Rationale for the Benefit Corporation* (January 26, 2012). This is the most comprehensive discussion of benefit corporations and specific recommended statutory provisions. A copy of the paper accompanies this report.

<sup>3</sup> Dana Brakman Reiser, *The Next Big Thing: Flexible-Purpose Corporations*, Brooklyn Law School Legal Studies Research Papers (Oct. 2012), available at <http://ssrn.com/abstract=2166474>.

risk elements are not sufficient to preclude adoption of this entity form. They are matters that over time will need examination as this entity grows and evolves and, in any event, are risks that may be mitigated by false advertising and securities disclosure laws.

### **Principal Elements of a Benefit Corporation**

The basic attributes and elements of a Benefit Corporation are:

1. The corporation is formed (or converts to such by amending its existing Articles) under the regular corporation statute (Ch. 607);
2. Except for the provisions specifically applicable to Benefit Corporations, all provisions of the regular corporate statute apply.
3. The corporation's Articles state that it is a Benefit Corporation;
4. The corporation has the statutory purpose of creating a public benefit;
5. The corporation's Articles may include one or more specific public benefit purposes in addition to the statutory public benefit purpose.
6. Directors are mandated to consider the effects of any corporate action or inaction upon, *inter alia*, shareholders, employees, community and societal factors and the ability of the corporation to achieve public benefit and any specific benefit purposes.
7. Directors are not personally liable for monetary damages to the corporation, shareholders or any potential beneficiaries for failure to pursue or create a public benefit, nor are directors who cause the corporation to pursue benefit goals liable to the corporation, shareholders or others for failure to achieve profit-oriented results.
8. A so-called Annual Benefit Report must be prepared and distributed to shareholders each year assessing the extent to which the corporation pursued and achieved benefit goals.
9. A "benefit enforcement proceeding" may be brought against a director or officer directly by the corporation or derivatively by a shareholder or other authorized person for failure to pursue or create a public benefit, although no personal monetary liability can be assessed.

In brief, the fundamental elements of the Benefit Corporation are (1) its benefit goals, (2) protection of directors and officers from liability for pursuing such goals, and (3) accountability standards through annual reports and a benefit enforcement proceeding. While variations exist among the states that have adopted this type of legislation, the fundamental elements are constant.

A Benefit Corporation is not to be confused with the recent development of “B Corporation Certifications” issued by private companies such as B-Lab to corporations that meet privately developed standards of social accountability. Ben & Jerrys, for example, has a “B Certification” but is not a Benefit Corporation. There is therefore some confusion between the terms Benefit Corporation and B Corporation, the latter not being formed as or under the requirements of Benefit Corporation legislation.

### State Adoptions

To date, Benefit Corporation legislation has been adopted in:

California	New Jersey
Hawaii	New York
Illinois	Pennsylvania
Louisiana	South Carolina
Maryland (the first)	Vermont
Massachusetts	Virginia

Approximately 10-15 other states are considering potential Benefit Corporation legislation. Information regarding Benefit Corporations and potential state adoptions can be found on the web site <http://www.bcorporations.net>. Delaware is presently considering adoption of benefit corporation legislation, and we are in contact with the proponents in that state and have agreed to keep each other abreast of developments in our respective states.

The number of Benefit Corporations formed to date in the various states has not been ascertained. Based on one report, 60 Benefit Corporations were formed in California from January-August, 2012.<sup>4</sup>

It is possible that within the near future the ABA’s Committee on Corporate Laws will consider a supplement to the Model Business Corporation Act in this area. The subcommittee considered suspending action awaiting the ABA. However, given the uncertainties in ABA action and timing, we believe it appropriate to move forward with a legislative proposal at this time.

### Proposed Legislation

The subcommittee used Sen. Clemens most recent proposed bill as the basis for

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<sup>4</sup> Eric I. Talley, *Corporate Form and Social Entrepreneurship: A Status Report from California and Beyond* (Draft Version 1.2, September 2012, prepared for the Association for Corporation Counsel 2012 Annual Meeting).

legislative provisions. The proposed bill was a good working model for our subcommittee's considerations. The proposed bill's provisions are analogous to legislation adopted in various states, although there are numerous variations among states. The subcommittee's proposal and a red-lined version showing the subcommittee's proposed changes to the Sen. Clemens' proposed bill accompany this report.

The basic attributes of a Benefit Corporation as set forth in Sen. Clemens' proposed bill were preserved. These include (a) formation and termination provisions, (b) a mandated public benefit purpose, (c) specially designated benefit directors and officers if desired, (d) an annual benefit report measured against a third party assessment standard (e) benefit enforcement proceeding, (f) exculpatory provisions for directors and officers, and (g) linkage to Ch. 607 as to all matters not covered by this legislation.

The principal changes made by the subcommittee to Sen Clemens' proposal are:

**1. Change from "general benefit" to "public benefit" purpose.**

This is the most significant change. Sen. Clemens proposal, similar to legislation in a number of states, mandates (s. **611.02(5)**) that the Benefit Corporation create or pursue a "general public benefit," defined as "a material positive impact on society and the environment, taken as a whole, assessed against a third party standard." In addition, a corporation may adopt in its Articles one or more "specific public benefit purposes" of a particular nature (s. **611.02(9)**). For example, a corporation could adopt a specific purpose to improve the public park facilities in northeast Tampa. Our concerns were twofold: (i) the legal effect of mandating a broad and amorphously stated "general public benefit" and (ii) whether and to what extent a corporation's pursuit of a specific benefit would satisfy the statutory "general public benefit" mandate. These concerns were heightened by the provision that "The identification of a specific public benefit...does not limit the obligation of the corporation..." to pursue or create a general public benefit. (s. **611.06(2)**). Thus, a corporation that selects a narrow but meritorious specific benefit purpose, such as the example noted above, would nevertheless continue to have an overriding obligation with regard to a "general public benefit."

The subcommittee was troubled by the overriding "general public benefit" mandate. In our judgment, a corporation that pursues a specific, albeit somewhat narrow, public benefit provides a public service and should not be criticized or challenged for not also pursuing a broader, mandated "general" benefit. One solution would be to deem the pursuit of a specific public benefit as satisfaction of

the general benefit standard, but this approach basically emasculates the “general” standard. Another solution would be to eliminate the statutory mandate and leave it up to each corporation to state a specific benefit goal in its Articles. However, a statutory benefit mandate is a fundamental element of the Benefit Corporation. Moreover, some corporations may prefer an open-ended statutory mandate that allows for one or more socially-oriented activities rather than having to define a specific goal in the Articles.

We concluded that the best course was to maintain a statutory benefit mandate but redefine the mandate to eliminate the “general public benefit” concept. We therefore replaced the “general public benefit” term with “public benefit,” defined in s. **1703(6)** in a way that permits a choice among a number of stated public benefit potentialities. As a result, each benefit Corporation has a “public benefit” mandate that can be satisfied in multiple ways or by satisfying a single purpose within the definition. If a corporation wishes to set forth a specific benefit purpose in its Articles, it may do so as long as that benefit goal is within any of the categories set forth in the broad definition of “public benefit.” Pursuit of a specific public benefit will satisfy the corporation’s statutory “benefit” mandate without concern for an overriding “general public benefit” standard.

## **2. Creation of appraisal rights**

We added provisions allowing for appraisal rights when corporations convert from a business corporation to a Benefit Corporation or when a Benefit Corporation status is terminated by amendment, merger or other structural transaction. The added provisions (**1705(4)** and **1706(3)**) cross-reference s. **607.1302** and the proposed legislation will include a new subsection in s. **607.1302** providing appraisal rights for Benefit Corporation shareholders in the event of a conversion or other change in status.

## **3. Elimination of mandated position and role for Benefit Director**

A so-called “benefit director” is a specially designated director whose sole statutory function is to prepare a written opinion each year assessing the corporation’s success or failure in pursuing benefit goals. Sen. Clemens’ proposal mandates a benefit director for publicly-traded corporations and is optional for all other corporations. We eliminated the mandate of a benefit director for publicly-traded corporations. In addition, if a corporation chooses to have a benefit director, the mandated opinion by the benefit director may be eliminated if the Articles so provide.

#### **4. Elimination of mandated role for Benefit Officer**

A corporation may have an officer designated as the “benefit officer.” Sen. Clemens’ proposal provides that if there is such an officer, that officer shall prepare the annual benefit report. We eliminated this statutory mandate as to preparation of the annual benefit report. The preparation of the report will be determined by the bylaws or board of directors.

#### **5. Elimination of state filing of Annual Benefit Report**

The annual report must be prepared pursuant to an identified third-party standard, defined in s. 1703(11), to assess the overall social and environmental performance of the corporation. The report is distributed to each shareholder and posted on the corporation’s website (if it has one). Sen. Clemens proposal included a required filing with the Department of State and filing fee. We eliminated the filing and fee requirements. There is no provision for state review or analysis of any such report and therefore we regarded a state filing as unnecessary, as well as potentially burdensome for the Department of State.

### **Section-by-Section Review of Subcommittee’s Legislative Proposal (Appendix A)**

#### **1701: Short Title**

In keeping with many other states, we have added the Benefit Corporation provisions to existing Ch. 607, in contrast to Sen. Clemens’ proposal that created a new Ch. 611. The most logical placement of the provisions, in our judgment, is as a subpart beginning with 607.1701. This will involve amending the numbering of current ss. 607.1701-193, but we believe that inserting the provisions as a new 607.1701 ff. is preferable to putting them at the end of the statute. We envision the Section 17 subpart as a unit and entitle it the “Benefit Corporation Supplement” and reference the term “supplement” through the subpart.

#### **1702 Application and effect of supplement**

No changes to Sen. Clemens proposal except stylistic. Subsection **1702(3)** is the linkage provision to Ch. 607 provisions. The reference in **1702(4)** to Chapter 621 is to the PSC and PLLC statute, as it is possible that professional entities may want to act as Benefit Corporations.

#### **1703 Definitions**

The only changes other than stylistic are:

(A) **1703(5)**: Addition of a “Business corporation” definition, a term used elsewhere in this subpart to refer to the non-Benefit Corporation.

(B) **1703(6)**: Change in definition from “General public benefit” to “Public benefit.” This change, which resulted in dropping the term “general” throughout the proposed statute, is discussed above.

(C) Deletion of former **1703(8)** definition of “Publicly-traded corporation.” Sen. Clemens proposal requires all publicly-traded corporations to have a so-called “benefit director.” Our proposal makes having such a director optional for all corporations. Therefore the definition of a publicly-traded corporation is no longer necessary.

#### **1704 Incorporation of Benefit Corporation**

Only stylistic changes. Benefit Corporations will be incorporated in the same manner as all other corporations except for the mandated articles of incorporation language.

#### **1705 Election of Benefit Corporation status**

(A) **1705(1)-(3)**: Only stylistic changes. Existing corporations may become Benefit Corporations by amending their articles. They may also become Benefit Corporations through merger, conversion or share exchange. The “minimum status vote” by shareholders necessary for such changes is defined in **1703(8)** and is generally a two-thirds vote requirement on a class-by-class basis.

(B) **1705(4)**: We added an appraisal rights provision in the event of election or change to a Benefit Corporation, cross-referencing a new provision to be added to s. **607.1302**.

#### **1706 Termination of Benefit Corporation status**

(A) Termination also requires the so-called “minimum status vote.” In addition to stylistic changes to **1706(1)-(2)**, we deleted reference in Sen. Clemens proposal to a sale of all or substantially all of the corporation’s assets as an act of termination, as we do not regard such a transaction as necessarily involving a change in status.

(B) We added **1706(3)** providing appraisal rights in the event of a status termination, again cross-referencing a new provision to be added to s. **607.1302**.

#### **1707 Corporate Purposes**

**1707(1)** mandates that the Benefit Corporation “shall have a purpose of creating public benefit.” Note the discussion above regarding change of the term from “general public

benefit” to “public benefit.” Public benefit is defined in **1703(6)**. Benefit Corporations are free to pursue any goals within that definition. In addition, **1707(2)** permits the corporation’s articles to “identify one or more specific public benefits” as the corporate purpose. **1707(3)** states that creation of a public or specific public benefit “is deemed to be in the best interest of the corporation,” a provision intended to protect directors and officers from claims that their pursuit of benefit goals is not in the best interests of the corporation.

### **1708 Standard of conduct for directors**

(A) **1708(1)(a)**: This is the fundamental provision mandating directors to consider the effects of any corporate action or inaction upon the stated list of interested persons and institutions, including the ability to accomplish a public or specific benefit purpose. The mandate marks a major differentiation from stakeholder provisions in standard corporate statutes, such as our **607.0831(3)**, and from traditional notions of the director’s primary obligation to the corporation and shareholders. Our only changes are stylistic except for the insertion of “suppliers” in **1708(1)(a)(3)**, in keeping with the language of s. **607.0830(3)**.

(B) **1708(1)(c)**: We inserted “or equal weight” to make it clear that a director does not need to give either priority or even equal weight to any of the societal or other factors listed in **1708(1)(a)**. The term priority standing alone was ambiguous as to the weighing of the various factors.

(C) We eliminated the provision in Sen. Clemens proposed bill (**s.611.07(2)**) that consideration of the various factors is not a violation of **607.0830**. We considered that provision unnecessary in light of the express mandate for directors. We also eliminated a provision regarding elements of and protection for a director’s business judgment, a subject that is not addressed and may cause interpretive problems in Ch. 607 and, we believe, is best left for case-by-case judicial analysis.

### **1709 Benefit director**

(A) **1709(1)**: We eliminated the requirement that all publicly-traded corporations have a “benefit director.” It is optional for all corporations.

(B) A benefit director is defined in **1703(2)**, is elected like any other director of the corporation, and is required to be “independent,” a defined term in **1703(7)**.

(C) **1709(3)**: The only statutory role for the benefit director is to prepare an opinion in the corporation’s annual benefit report as to whether the corporation and directors have acted

in accordance with benefit goals. We amended that provision to allow the articles or bylaws to opt out of the requirement if an opinion by the benefit director is not desired. (D) Because benefit directors and their roles are optional for all corporations and directors have liability protections set forth in the supplement and Ch. 607, we eliminated sections **611.08(5)-(7)** setting forth certain protections and attributes of benefit directors.

#### **1710 Standard of conduct for officers**

Officers who have discretion to act are mandated, as with directors, to consider the various public factors set forth in **1708(1)**. We eliminated the “business judgment” provision for officers (**611.09(5)**) for the same reason it was eliminated for directors.

#### **1711 Benefit Officer**

A corporation may choose to designate an officer as a benefit officer. Under Sen. Clemens proposed bill, such an officer prepares the annual benefit report. We altered the language so that, if such an officer is designated, the officer’s duties are set forth in the bylaws and may but need not include preparation of the annual benefit report.

#### **1712 Right of action**

The legislation contains two primary accountability provisions for the purposes of avoiding “green-washing” and meeting the expectations of investors. One is the annual benefit report, described in the next section, the other is the so-called “benefit enforcement proceeding” set forth in this section. The proceeding applies only to alleged failures or violations under the Benefit Corporation subpart. The actions cannot result in any personal monetary liability for a director or officer nor any monetary damages against or for the corporation. Except for stylistic changes, the only alterations we made were (a) we deleted a minimum threshold of shareholding to bring a derivative action (the Clemens Bill requires a 2% threshold; however, there is no minimum holding requirement in Ch. **607.07401(1)**) and (b) we deleted a provision regarding beneficial ownership of shares as being unnecessary because of the existing analogous provision in **607.07401(7)**. If a derivative benefit enforcement proceeding is brought, the procedural provisions of Ch. **607.07401** will apply as a result of linkage to Ch. 607.

#### **1713 Preparation of annual benefit report**

This is perhaps the most important accountability measure. The annual report must set forth a narrative analysis of the extent to which public benefit or specific public benefit

goals were pursued. In order to measure such performance, the report is required to assess performance against a “third-party standard,” which is comprehensively defined in **1703(11)** in terms of independence, credibility and transparency, including the process and rationale for selecting a particular third-party standard. There are currently several organizations that have developed standards of accountability and it may be expected that with the growth of Benefit Corporations additional standards will evolve.

Changes to Sen Clemens proposal, other than stylistic, are:

(A) **1713(1)**: The report will be prepared by the board of directors unless the corporation’s constituent documents or the board provides for the report to be prepared by a benefit director or officer.

(B) Several items, mostly regarding mandatory disclosures, were eliminated from the proposal as either inconsistent with Ch. 607 or, in our judgment, unnecessary requirements for these entities. Items we eliminated were:

(1) **611(1)(d)**: compensation paid to each director.

(2) **611(1)(e)**: holder of 5% of more of the shares of the corporation.

(3) **611(1)(h)**: persons exercising powers in the event the corporation has limited or dispensed with the board of directors.

(4) **611(2)**: the annual benefit report must include any correspondence relevant to the resignation or removal of a benefit director.

Under our proposal, any of the deleted provisions may be included in the articles of incorporation if desired.

#### **1714 Availability of annual report**

The annual benefit report is to be distributed to each shareholder and posted on the corporation’s website, if any. If not so posted, a copy must be provided to any person upon request.

We eliminated the requirement in **s. 611.13(4)** that the report be filed with the Department of State and payment of a filing fee. Inasmuch as there is no provision for administrative review or action on the annual benefit report, we regarded the filing requirement as unnecessary and burdensome. There is no filing requirement in most, if not all, other states that have adopted Benefit Corporation legislation.

#### **Scholarly Review and Critique**

Most commentary has focused on the perceived need for such an entity for socially-conscious yet profit-oriented entrepreneurs. The most critical commentary we have seen to date is by a Colorado attorney who, while noting that “we have arrived at the starting point to

consider entities like the benefit corporation,” constructively critiques some elements of the current model.<sup>5</sup> His principal criticisms dealt with the mandate for a “general public benefit.” Not only did he regard the term as ill-defined, he believed that it creates potential adherence problems for corporations that pursue specific goals and ambiguity as to a director’s fiduciary duties. The subcommittee was also concerned with the “general public benefit” mandate and, as discussed above, we altered the proposal to eliminate the “general” concept and replaced it with a definition of “public benefit” that makes it clear that pursuit of a specific goal can be within the “public benefit” concept. A second expressed concern was that creation of a special corporation entity to pursue socially beneficial goals might have the unintended consequence of diminishing the ability of management of a business corporation to engage in socially-beneficial activities, the theory being that courts will divide the corporate world between “green” and “non-green” corporations and apply rigid profit-maximization standards to the “non-green” entities. While such a judicial reaction is conceivable, we regard it as unlikely given how far corporate law has progressed with regard to allowing social and charitable activities. We also note that s. **1702(2)** expressly states that the supplement “shall not of itself create an implication that a contrary or different rule of law is applicable to a business corporation....”, so that any “backflow” to the existing corporate statute is avoided.

### **An Alternative: The Flexible Purpose Corporation**

California and Washington have adopted an entity form analogous to but different from the Benefit Corporation. In California (which also adopted a standard Benefit Corporation form) it is called the Flexible Purpose Corporation (FPC). In Washington it is called a Social Purpose Corporation.

Similar to the Benefit Corporation, the FPC allows for a corporation to pursue general and specific public benefit purposes and shields directors and officers from personal monetary liability for pursuing such goals. The principal differences with the Benefit Corporation model are:

- (1) Directors are not mandated to consider public or specific benefit goals;
- (2) The annual benefit report has no third-party standards;
- (3) There is no benefit enforcement proceeding provision.

Although such an entity provides greater flexibility for directors than the Benefit

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<sup>5</sup> J. William Callison, *Putting New Sheets on a Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, the Dangers Created, and Suggestions for Change*, available at <http://ssrn.com/abstract=2102655>.

Corporation, in our judgment the lack of any mandated standards and accountability provisions create an unwarranted risk of “green-washing” and misleading potential investors. In light of Florida’s stakeholder provisions (which California does not have), and the business judgment rule protection afforded to directors, we are not convinced that this more open-ended, private-ordering model is necessary. Since the adoption in California of both the Benefit and the Flexible Purpose forms, corporate formations in California have been mostly on the benefit side although numbers are fairly small for each.<sup>6</sup> In our judgment, the version of the Benefit Corporation we propose provides directors and officers with substantial flexibility and liability shields while preserving important accountability standards in the interests of investors and public image concerns.

### **Administrative and Revenue Considerations**

Formation and filing requirement for Benefit Corporations will be governed by the same administrative provisions as regular corporations. Therefore, adoption of this legislation will not create a cost burden to the Division of Corporations. On the other hand, adoption of the new entity will be revenue positive for the State, including initial filing fees, fees applicable to amendments to Articles for existing corporations converting to Benefit Corporations, annual reports and other administrative fees for the new entity.

The Benefit Corporation does not appear to be a fad or short-term phenomenon. If Florida does not adopt such legislation, socially-conscious entrepreneurs who want to form a Benefit Corporation will incorporate in other states and Florida will lose potential administrative revenues. It should also be noted that there does not appear to be any leading state with regard to the formation of Benefit Corporations and therefore Florida entrepreneurs would have no reason to incorporate elsewhere if the legislation is passed.

### **Timing and Procedure**

The latest date for filing bills in the forthcoming legislative session is March 1, 2013. Given Sen. Clemens and Rep. Rooney’s interest in this matter and the merits of adopting such

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<sup>6</sup> During the period January-August, 2012, there were 60 companies incorporated in California as Benefit Corporations compared to 15 companies incorporated as FPCs. Eric I. Talley, *Corporate Form and Social Entrepreneurship: A Status Report from California and Beyond* (Draft Version 1.2, September 2012, prepared for the Association for Corporation Counsel 2012 Annual Meeting).

legislation, we recommend that the Committee move as rapidly as possible in considering this proposed legislation and placing it before the Executive Council.

To: Subcommittee on Benefit Corporations

From: Stuart Cohn

Re: Comparison to ABA Model Provisions

Date: July 9, 2013

When I drafted my July 8 memo analyzing the Delaware provisions, I had not realized that the ABA Model provisions are essentially identical to Delaware. This is no coincidence. Bill Clark advises that Rick Alexander, who prepared the ABA Task Force White Paper, is the principal drafter of the Delaware provisions. Having now reviewed the ABA Model provisions (which have not been formally adopted by the ABA but have been adopted by the ABA Task Force for guidance purposes), my comments re Delaware apply equally to the Task Force's Model provisions.

The ABA Task Force report is, I believe, an inadequate analysis of the benefit corporation purpose and its development. The Task Force had before it the statutes of other states and the B Lab Model provisions. Delaware's statute is an outlier. It fits none of the existing statutes other than Colorado's which appears to have been taken from Delaware's pending legislation with some slight differences.<sup>1</sup> Being significantly different from nearly all other state statutes, one would expect that the Delaware statute would not become the ABA Task Force's Model without substantial discussion explaining why the Delaware provisions are superior, which does not exist. The discussion, for example, of the "balance" requirement (p. 11) simply restates it and notes that this balancing provision is in both the Delaware and Colorado statutes.

There is an additional disturbing aspect of the Task Force White Paper. The Paper opens by distinguishing between a so-called "property model" of corporations and an "entity model." The former is defined (p. 1) "as a vehicle with the sole purpose of maximizing the wealth of its owners, the shareholders." The entity model is defined (p. 1) as one that "views the corporation as a vehicle that can simultaneously serve the interests of multiple constituencies, and thus is tinged with a public purpose." This dichotomy is taken from a 1992 article by Chancellor Allen. The Paper concludes (p. 2) that, although both models were "in equipoise" until the 1980's, the takeover boom of the 1980's focused on shareholder interests and the property model became and has remained "ascendant." Personally, I do not believe that there is as strong a dichotomy as noted. While shareholder interests are paramount, corporations consistently engage in charitable and community endeavors that do not necessarily maximize shareholder value. In any event, having set forth the dichotomy, the Paper regards the benefit corporation as creating an entity model. I am less troubled by the semantic dichotomy as I am by the statement (p. 10) that "...by making an entity model clearly available, the existence of such alternative legislation may also effectively clarify that corporations that do not opt in must follow the property model." This is a troublesome conclusion, I believe, as it suggests a rejection of corporate activity that does not necessarily maximize shareholder value. We discussed this in our subcommittee and came to the conclusion that our SPC and BC did not affect an ordinary corporation's ability to engage to some extent in non-profit maximizing acts. That is reflected in our 607.501(2) and 607.601(2) which negates "an implication that a contrary or different rule of law is applicable to a corporation that is not" an SPC

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<sup>1</sup> The Colorado legislature initially considered and rejected benefit corporation legislation, which was opposed by the Colorado Bar Association. The subsequent move towards legislation was the clear result of a compromise fashioned, it appears, along Delaware lines. There are some minor differences with Delaware (e.g. 2/3 vote for existing corporation to adopt rather than 90%). The most significant difference is that Colorado requires the benefit report to be assessed against a third party standard.

or BC. In my judgment this is a better and more accurate legal conclusion than that found in the Task Force report.

Stu Ames has agreed with my recommendation that we adopt none of Delaware's provisions that differ from ours, and by extension I assume that this would include the ABA provisions. I believe from his response that Bill Clark believes the same. If any of you have any other suggestion, please let me know. I plan to draft the report for the Florida Bar in early August.

**To: Subcommittee on Benefit Corporations**  
**cc: Gary Teblum, Bill Clark**

**From: Stuart Cohn**

**Re: Comparison of Delaware to Florida**

**Date: July 8, 2013**

Attached is Delaware SB 47 which passed both the Senate and House by unanimous votes and, I believe, is awaiting (or has received) the Governor's expected approval (the Delaware legislative information web site does not indicate Governor approval). The effective date is August 1, 2013. The legislation inserts a new Subchapter XV to Title 8 of the Delaware Code (the General Corporation Law), ss. 361-368. Existing Subchapters XV-XVII are renumbered accordingly.

Although titled "Public Benefit Corporation," the Delaware legislation is not consistent with the form of general benefit corporation adopted in many other states. There is no mandate to pursue a general public benefit. Instead, the corporation is mandated to identify in its certificate of incorporation "one or more specific public benefits to be promoted by the corporation..." S. 363(a). In this regard, the legislation is analogous to the Social Purpose Corporation that we have recommended as one of two corporate alternatives and is not at all consistent with the general public benefit corporation adopted in many states and recommended by us as an alternative.

Although the Delaware entity is similar in purpose to our Social Purpose Corporation, there are both significant semantic and substantive differences. I will use the abbreviations PBC to refer to Delaware's public benefit corporation, SPC to refer to our proposed Social Purpose Corporation and BC to refer to our proposed Benefit Corporation. The statutory references to our legislation follow the most recent draft bill presented by Senator Clemens.

The relevant differences I have noted are:

1. **Definition:** S. 362(a): The definition of a public benefit corporation ("PBC") includes reference to it as a "for-profit corporation organized under and subject to the requirements of this

chapter....” We do not include the “for-profit” reference in the definition of either the SPC or BC. I think I understand why Delaware has done this, but I do not think it necessary to include that phrase in our circumstances. Our legislation is part of Ch. 607, which defines corporation to mean “for profit” (607.01401(5)). Further, not-for-profit corporations are distinctly formed under Ch. 617. I do not believe that there can be any confusion as to the for profit purpose of our SPC or BC. I do not feel strongly about this if insertion of that term is considered appropriate for “gilding the lily” purposes.

2. **Scope:** As noted, the PBC will have a limited benefit purpose as set forth in its certificate. We do not mandate any specific benefit be put into the Articles of Incorporation. The SPC “may identify” one or more specific benefits in its articles (s. 607.506(a)). If a specific benefit is not identified, the SPC may pursue any public benefit as defined in s. 607.502(6), which is written in a manner that allows for one or more benefits to be pursued (unlike the BC that mandates a broader public goal). I believe that our approach provides greater flexibility to the SPC.

3. **Director Obligation to “Balance” Interests:** Delaware’s S. 362(a) require that the PBC be:  
“managed in a manner that balances the stockholders’ pecuniary interests, the best interests of those materially affected by the corporation’s conduct, and the public benefit or public benefits defined in its certificate of incorporation.”

The “balance” requirement is repeated in similar terms in s. 365(a) under “Duties of Directors.” The “balance” mandate is a major contrast to our proposed legislation and, as far as I know, to legislation in most other states. The notion of “balance” is not in our proposal. On the contrary, we provide that creation of a public benefit “is deemed to be in the best interests of the corporation.” S. 607.506(3), 607.606(3). Moreover, although directors are mandated in our proposal to consider the effects of any action on shareholders (s. 607.507(b), 607.607(b)), we provide that directors are “not required” to give priority to shareholder interests. S. 607.507(d), 607.607(d).

In my judgment, the “balance” mandate in Delaware may be a very serious drawback to the purpose of Delaware’s benefit corporation. Given the historical dominance of stockholders’ economic interests, the concept of “balance” leaves the directors in a precarious situation should

they decide to pursue benefit goals that may be at the expense of economic rewards.

To be sure, S. 365(b) does contain a protective provision regarding the “balance” requirement:

“...with respect to a decision implicating the balance requirement...will be deemed to satisfy such director’s duties to stockholders and the corporation if such director’s decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve.”

If I was a Delaware director, I would be concerned with this language. It is hardly a ringing endorsement of a decision that affects stockholder pecuniary interests, and what the last clause means is quite uncertain (I can imagine the drafting committee struggling with that language).

4. **Name:** Delaware requires that a PBC contain the name “public benefit corporation” or the initials P.B.C. or PBC. S. 362(c). We do not require such designation. The principal reason for such designation, I believe, is to alert creditors and potential investors that the corporation is not formed to maximize profits in the same way as other corporations. I do not feel strongly about this if it is felt appropriate to have such a designation. I begin with a sense that such designation is not necessary. Creditors should be capable of protecting themselves and are no more protected vis-a-vis ordinary corporations than SPCs or BCs, as all Florida corporations are subject to limitations on distributions, fraudulent conveyance laws, and insolvency remedies. Potential investors should have disclosure as to the nature of the corporation. If that is not done, the securities laws provide remedies. But, as noted, this is not an issue that I feel strongly about.

5. **Adoption of Status:** Delaware requires a 90% stockholder vote to move from ordinary to PBC status. S. 363(a). We require a 2/3 vote. (Delaware only requires 2/3 on the termination end, same as us.) Although I think that most SPCs and BCs will be newly formed, rather than altered into benefit status, in my judgment 90% is too high. We allow, as does Delaware, for appraisal rights, which I believe is sufficient allowance for objecting minority shareholders.

6. **Stock Certificate and Notices:** Delaware requires that the stock certificate of a PBC (or notices in lieu of certificates) “note conspicuously” that it is a PBC. S. 364. The same disclosure must be made in all meeting notices sent to PBC stockholders. S. 366(a). We have no such

provision. Again, this provision is intended to provide disclosure to investors. I have no strong feelings on this one either, although again I begin with a sense that this need not be adopted. By the time a shareholder receives a certificate or notice in lieu, he/she has already invested and the securities laws should be the remedy for any misrepresentations or omissions. If a secondary transaction occurs with a certificate, disclosure of the corporate's purpose is a matter between the transacting parties. In addition, for corporations with a fair number of shareholders, the certificate requirement may be costly when corporations move into or out of benefit status.

**7. Director Immunity from Liability:** S. 365(c) provides that the certificate of incorporation may include a provision that a disinterested failure shall not constitute an omission not in good faith under s. 102(b)(7) or a violation of the duty of loyalty. We do not cross-reference our immunity provision in 607.0831. Instead, we have specific provisions that protect directors and officers from claims, 607.507(e)(2) & 607.607(e)(2) (directors), 607.509(3) & 607.609(3) (officers), our general 607 incorporation provision(607.501(3) & 607.601(3)) includes 607.0831, and the benefit enforcement proceeding has a very limited purpose. In my judgment, Delaware is not sufficiently specific and may go too far in providing a blanket immunity for directors.

**8. Benefit Report:** Delaware requires a benefit report to stockholders “no less than biennially...” S. 366(b). We require an annual report. Delaware provides for use of a third-party standard or certification if required in the certificate of incorporation. Our SPC also has an optional third party standard but our BC mandates such a standard. Delaware has opted for the convenience of less frequent reports and cost savings. In my judgment, the benefit report is a major, perhaps the most important, accountability standard and therefore I would not favor moving to a two-year mandate or altering our third party standard for BCs.

**9. Derivative Action:** Delaware has not adopted the usual terminology or provisions of the benefit enforcement proceeding. Instead, s. 367 refers only to a derivative suit to enforce the “balance” requirement in s. 365(a). In my judgment this is a very inadequate provision in terms of both the scope of the action and the limitations on remedy compared to our SPC and BC proposal. In addition, the Delaware suit can only be brought by a 2% shareholder or, if the PBC

is on a national securities exchange, one owning \$2 million in market value. We have no minimum, in keeping with our current 607.07401. A minimum holding requirement was a matter of debate in our drafting process but the eventual conclusion was to stay consistent with Ch. 607.

There are other differences not noted, mainly because Delaware's statute does not contain the scope of provisions contained in our proposal. For example, there are no Delaware provisions regarding a benefit director or benefit officer, what happens if there is a substantial sale of assets, the effect of any shareholder agreement, and guidance as to what may constitute a specific public benefit is much less than our's.

On the whole, I find the Delaware statute to be surprising given what I believe are its shortcomings and lack of clear standards. Delaware drafters usually do a much better job. This statute seems to be the result of some major opposing forces and a conclusion to join the benefit corporation bandwagon without going too far. I would be surprised if Delaware's statute becomes a major model for other states.

Given all that, in my judgment Delaware's provisions raise the following questions for us:

1. **Definition:** Should we insert the term "for profit" in the definition of an SPC or BC?
2. **Name:** Should we require that the SPC or BC have a specific name designation?
3. **Stock Certificate and Notices:** Should we require specific name designations on these?
4. **Director Immunity:** Should we specifically cross-reference s. 607.0832?
5. **Benefit Report:** Should we allow biennial as an alternative for SPC or BC?
6. **Benefit Enforcement Proceeding:** Should we create a minimum shareholder status?

My feeling at this time is "no" to all of these, although as noted I do not feel strongly about a couple. If there are other Delaware contrasts that I might have overlooked, your noting those will be appreciated.

Next up is to look at the ABA Model provisions, which are also attached. I hope to do that soon.

Best regards,

Stu

To: Corporations, Securities & Financial Institutions Committee

From: Subcommittee on Benefit Corporations:  
Stuart Cohn, Stuart Ames, James Glover

Re: Revision of the Subcommittee's Recommendation to Allow for Adoption of Legislation Creating Both (1) a Social Purpose Corporation and (2) a Benefit Corporation

Date: January 7, 2013

Preliminary Note

By Memorandum dated December 26, 2012 (the "December Memorandum") and accompanying materials, the Subcommittee recommended adoption of legislation allowing for the creation of a so-called "benefit" corporation. In the December Memorandum the Subcommittee explained that:

1. Senator Jeff Clemens had prepared and has a House sponsor for, a proposed "benefit corporation" bill that substantially followed a model act prepared under the auspices of B-Lab and Bill Clark, an attorney prominently active in this subject.
2. The Subcommittee retained most of the basic elements of Sen. Clemens proposal, with the principal change being made to the mandate to consider the "general public benefit" with regard to any corporate action or inaction by revising the "general public benefit" standard to a so-called "public benefit" standard.
3. The Subcommittee's reasons for revising the "general public benefit" standard to a so-called "public benefit" standard principally involved the desire to give directors and officers more flexibility in determining benefit goals and to protect management from claims that one or more broad, unspecified societal goals were not being pursued by the corporation.

As a result of the recommended revisions, the proposed legislation initially presented by the Subcommittee was more closely analogous to a so-called "Social Purpose Corporation," a term used in the State of Washington to describe its similar legislation, and to California's so-called Flexible Purpose Corporation. Nevertheless, the proposed legislation initially presented by the Subcommittee retained the nomenclature of "benefit corporation" for this new form of corporation.

After further recent discussions, the Subcommittee was persuaded that, because of the more limited standard of public benefit in the proposal, the proposal was really not analogous to the so-called "benefit corporation" model adopted in a number of other states and thus there might be confusion created between Florida's "benefit corporation" and "benefit corporations" in other states. Moreover, there is a belief that those investors who are promoting, and investing in, "benefit corporations" of the type keyed into the broader general public benefit purpose will tend to discredit a Florida entity designated as a "benefit corporation" but without the general public benefit mandate. The Subcommittee therefore has revised its initial proposal to rename the new entity a "Social Purpose Corporation." The Subcommittee's recommendation regarding this new form of entity remains as previously submitted except for the name change and certain clean up

changes and limited additional substantive changes noted below.

In addition, given the recent further discussions, the Subcommittee now understands that there may be entrepreneurial and investor interest in the alternative “benefit corporation” model as proposed by Sen. Clemens. Although the Subcommittee did not initially accept the benefit corporation model, we now believe that there is merit in providing an entity choice for entrepreneurs and investors. The choice would be to incorporate or otherwise form either (1) a Social Purpose Corporation as we have proposed with more limited benefit goals or (2) a Benefit Corporation which follows the mandated “general public benefit” model adopted in a number of states.

Consequently, we are now recommending legislative adoption of both a Social Purpose Corporation and a Benefit Corporation. The Social Purpose Corporation statutory provisions would be set forth in ss. 607.1701 ff.; the Benefit Corporation statutory provisions would be set forth in ss. 607.1801ff, both of which are characterized as supplements to Chapter 607, the Florida Business Corporation Act. The principal difference between the two entities would be the distinction between a more limited or focused “public benefit” standard for Social Purpose Corporations and the broader “general public benefit” standard for Benefit Corporations. Except for that fundamental distinction, the statutory provisions for both forms of entities would be substantially identical and consistent with the description in our December Memorandum.

Therefore, along with this supplemental Memorandum we are providing:

1. The revised proposal for a **Social Purpose Corporation** supplement to Ch. 607.
2. A new proposal for the adoption of a **Benefit Corporation** supplement to Ch. 607.
3. A red-lined mark-up of the Social Purpose Corporation supplement showing how it differs from the Benefit Corporation supplement.
4. A red-lined mark-up of Sen. Clemens’ proposed bill for a new Benefit Corporation Act showing changes made by the supplement referred to in 2 above.

### The Social Purpose Corporation

The Subcommittee’s December Memorandum describes the background to this legislation, reasons for the recommendation to adopt this form of entity, and the substantive changes to Sen. Clemens proposed bill. Subsequent to distribution of the December Memorandum, the Subcommittee has made some additional changes to the proposal to provide clarity as to certain requirements and define more appropriately the standards for director and officers. Although some of the changes might be regarded as substantive, the fundamental elements of the proposal remain as provided in the December Memorandum. The additional changes that might be considered substantive are:

1. S. 1703(9): The definition of “specific public benefit” has been clarified to indicate that a Social Purpose Corporation can adopt a focused identified benefit that is within one or more listed general categories of specific benefits.

2. S. 1708(1): The mandate that directors consider various benefit objectives has been amended to read:

- (a) shall consider the effects of any action or inaction upon:
  - 1. the shareholders of the Social Purpose Corporation; and
  - 2. the ability of the Social Purpose Corporation to accomplish its public benefit and any specific public benefit purpose; and
- (b) may consider the effects of any action or inaction upon:
  - 1-5 (same as former items 2-6).

The reason for this change is to make it clear that directors must consider items (a)1-2 but are not mandated to consider any and all of the (b) items (in the initial draft, there was a mandate to consider both the (a) items and the (b) items, which was actually somewhat inconsistent with the deletion of the “general public benefit” definition). This change gives directors more flexibility and is designed to protect them from potential claims that they might not have considered the interests of other specified constituencies and/or other social purposes that were not directly related to the Social Purpose Corporation’s public benefit purpose or specific public benefit purpose. (Note that for the Benefit Corporation there is a mandate for the directors to consider all of the (a) and (b) items, thereby reflecting the principal distinction between the Social Purpose and the Benefit corporations.)

3. S. 1708(5): A “business judgment” protection provision included in Sen. Clemens’ proposal, but deleted in our Subcommittee’s markup, has been reinstated. Given the unique nature of a Social Purpose Corporation, it was felt that this additional emphasis on the protections given to directors who pursue benefit goals in carrying out their duties is appropriate even if it might be the case that the linkage with current 607 provisions addressing duties of directors and standards of care would already operate to take that into account.

4.S. 1710(5): Similarly, a “business judgment” protection provision for officers initially deleted from Sen. Clemens’ proposal has been reinstated.

5.S. 1713(2): We reinstated a provision from Sen. Clemens’ proposal requiring disclosure in the annual benefit report of any removal or resignation of the benefit director occurring during the year to which the report relates.

6.S. 1714(3): To provide a mechanism for enforcement of the requirement to deliver the annual benefit report, we added a provision, analogous to Section 607.1620(4), allowing for an application by a shareholder to be made in circuit court to order that the Social Purpose Corporation deliver the report if the corporation has failed to do so.

Items 3-6 are also reflected in the newly proposed Benefit Corporation legislation.

Open Item: 1712(2): Minimum shareholder percentage interest threshold for bringing a benefit enforcement proceeding.

In the draft circulated to you, there is no minimum share ownership percentage required for a shareholder to bring a benefit enforcement proceeding. Sen. Clemens' proposal had included a 2% minimum ownership requirement. Some members of the committee favor including such a minimum percentage threshold. It was decided to raise the issue directly with the Committee.

### The Benefit Corporation

Although the Subcommittee's initial determination was to amend Sen. Clemens' proposal in the direction of what we now call the Social Purpose Corporation, Sen. Clemens' proposal, which is analogous to benefit corporation statutes in other states, might offer an attractive alternative for entrepreneurs and investors who want a corporation dedicated to broad public benefit goals as defined under the "general public benefit" standard. The Subcommittee has been advised by Bill Clark, who probably knows more about this movement than anyone in the United States, that there are a fair number of entrepreneurs and investors who prefer a corporation that is designed to pursue and create broad benefit policies.

An example will hopefully explain the difference between the Special Purpose Corporation and the Benefit Corporation. Suppose a for-profit corporation is formed to manufacture an anti-malarial drug and plans to distribute the drug at low or no cost in African countries. If that is the corporation's sole public benefit purpose, the corporation would appropriately be formed as a Special Purpose Corporation. However, if the corporation is also dedicated to creating favorable employee programs, running its operations pursuant to strict environmental and ecological policies, and undertaking activities to benefit the local community, in other words to pursue policies that have broad public and social welfare consequences, this corporation would qualify and should probably be formed as a Benefit Corporation.

The difference between the two corporations is basically one of degree. The Social Purpose Corporation is formed to pursue or create one or more fairly specific public benefits. The Benefit Corporation has a much broader purpose consistent with the definition of "general public benefit." A Benefit Corporation could also adopt a "specific public benefit" which has a focused purpose, but pursuit of that limited purpose would not relieve directors from the mandate to consider the "general public benefit" in each and every corporate action or inaction.

Therefore, the proposal set forth in our December Memorandum is now amended to recommend the adoption of two forms of corporate entities, the Social Purpose Corporation and the Benefit Corporation. This is the approach taken in California, which has adopted legislation allowing for both a Flexible Purpose Corporation (similar to what we have called a Social Purpose Corporation) and the standard form of Benefit Corporation.

The Benefit Corporation statute we are presenting is Sen. Clemens' proposal with substantive changes similar to those we have made in creating the Social Purpose Corporation. The principal difference between the two entities is that the Benefit Corporation must have, and the Social Purpose Corporation would generally not have, a "general public benefit" purpose.

For further discussion of changes to Sen. Clemens' proposal, and to other matters relative to the proposed legislation, please refer to the December Memorandum.