



BOISE STATE UNIVERSITY

Idaho Benefit Corporations & B Corps

**Idaho State Bar
Business and Corporate Law Section**

Mark A Buchanan

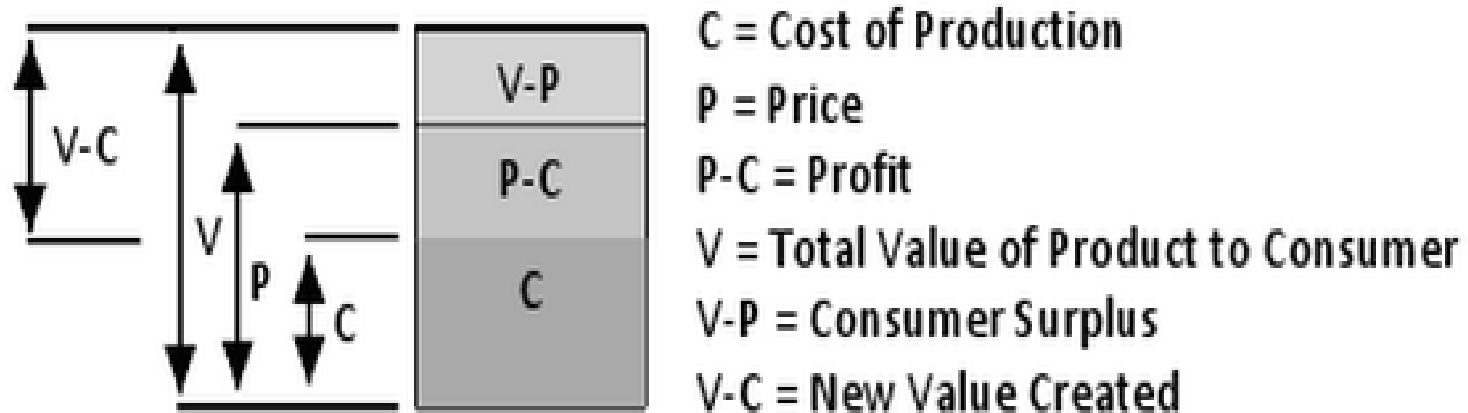
College of Business & Economics

Boise State University

Supported by:



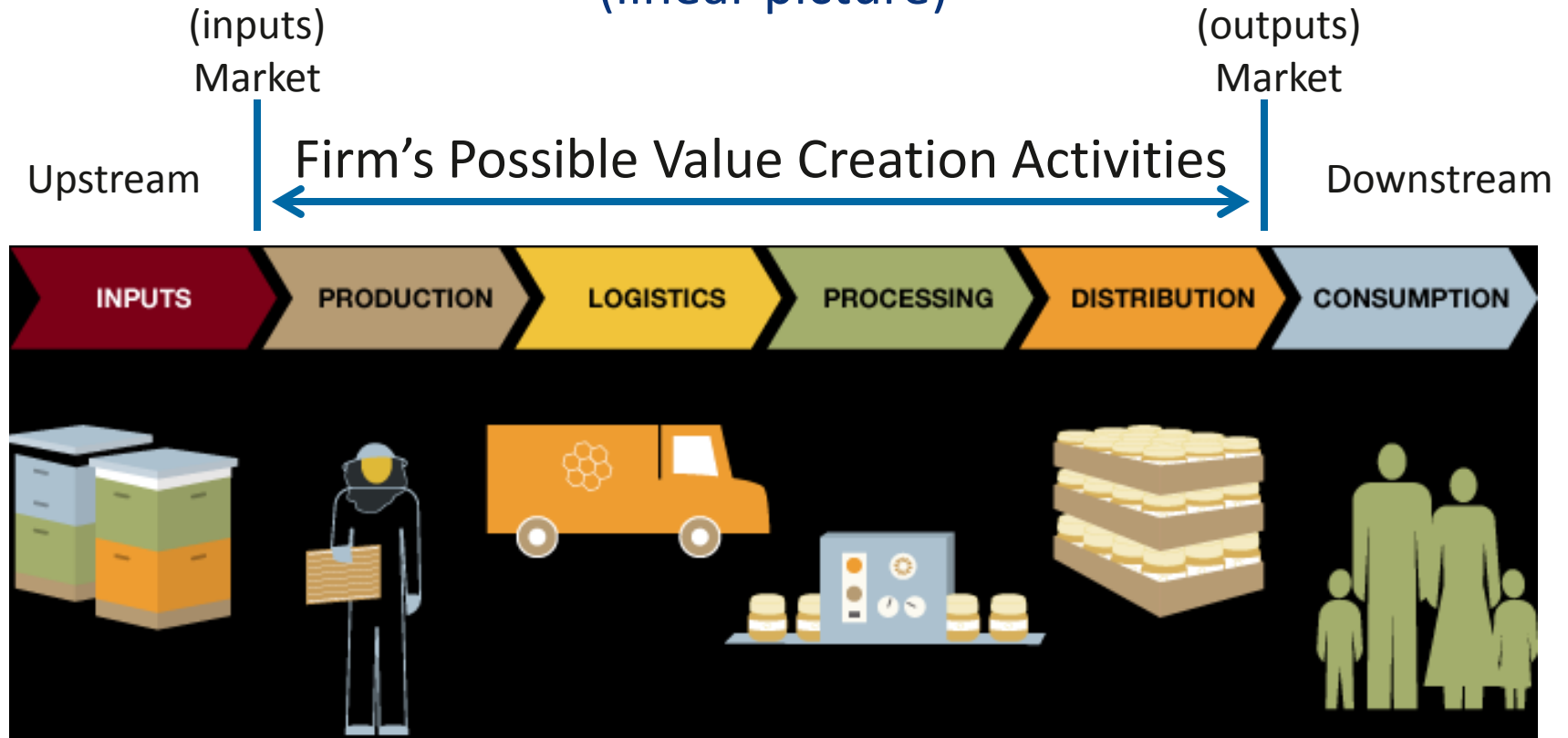
Value Creation (market perspective)





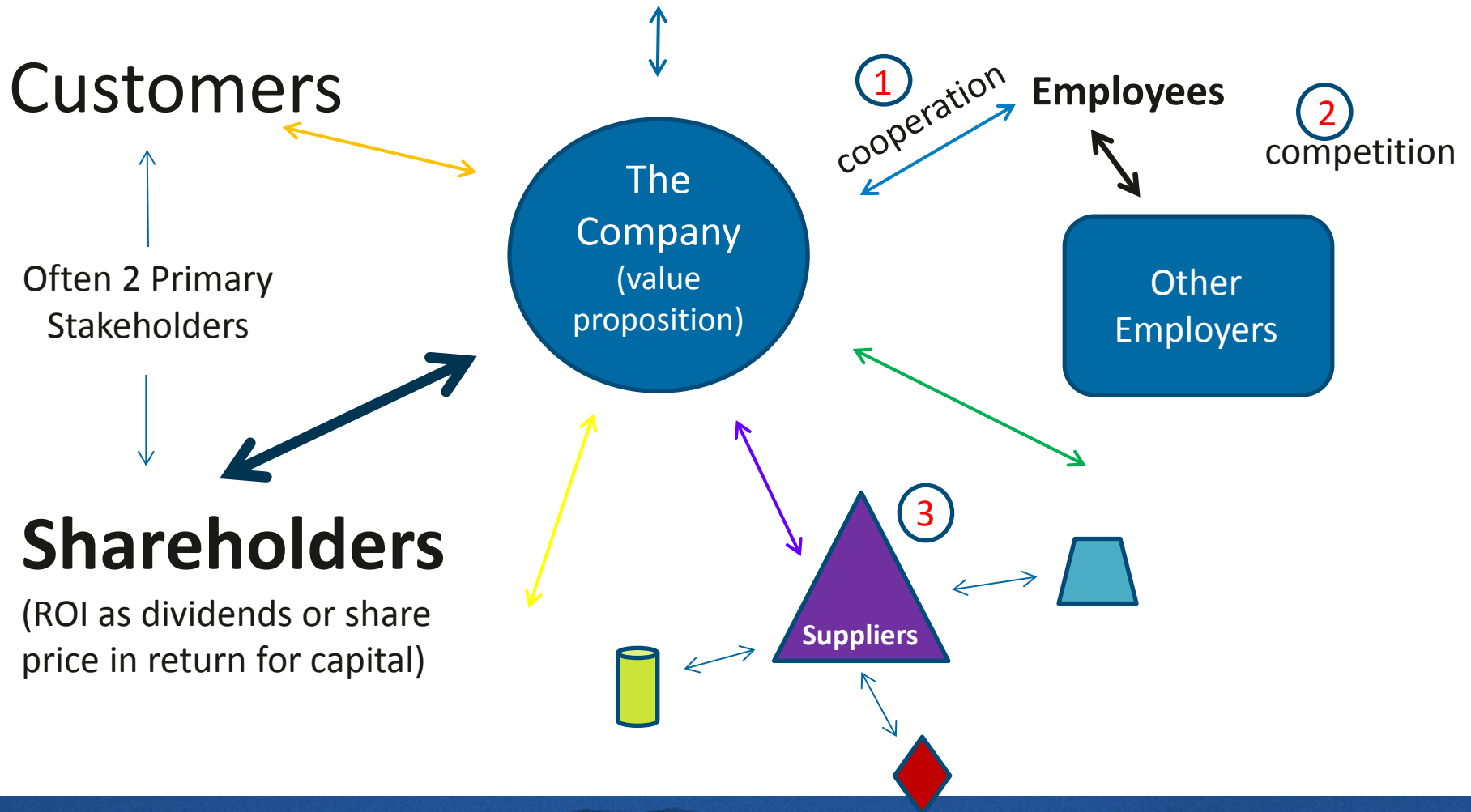
Value Chain (or value proposition) (linear picture)

A focus on one value transaction



The For Profit Firm (non-linear)

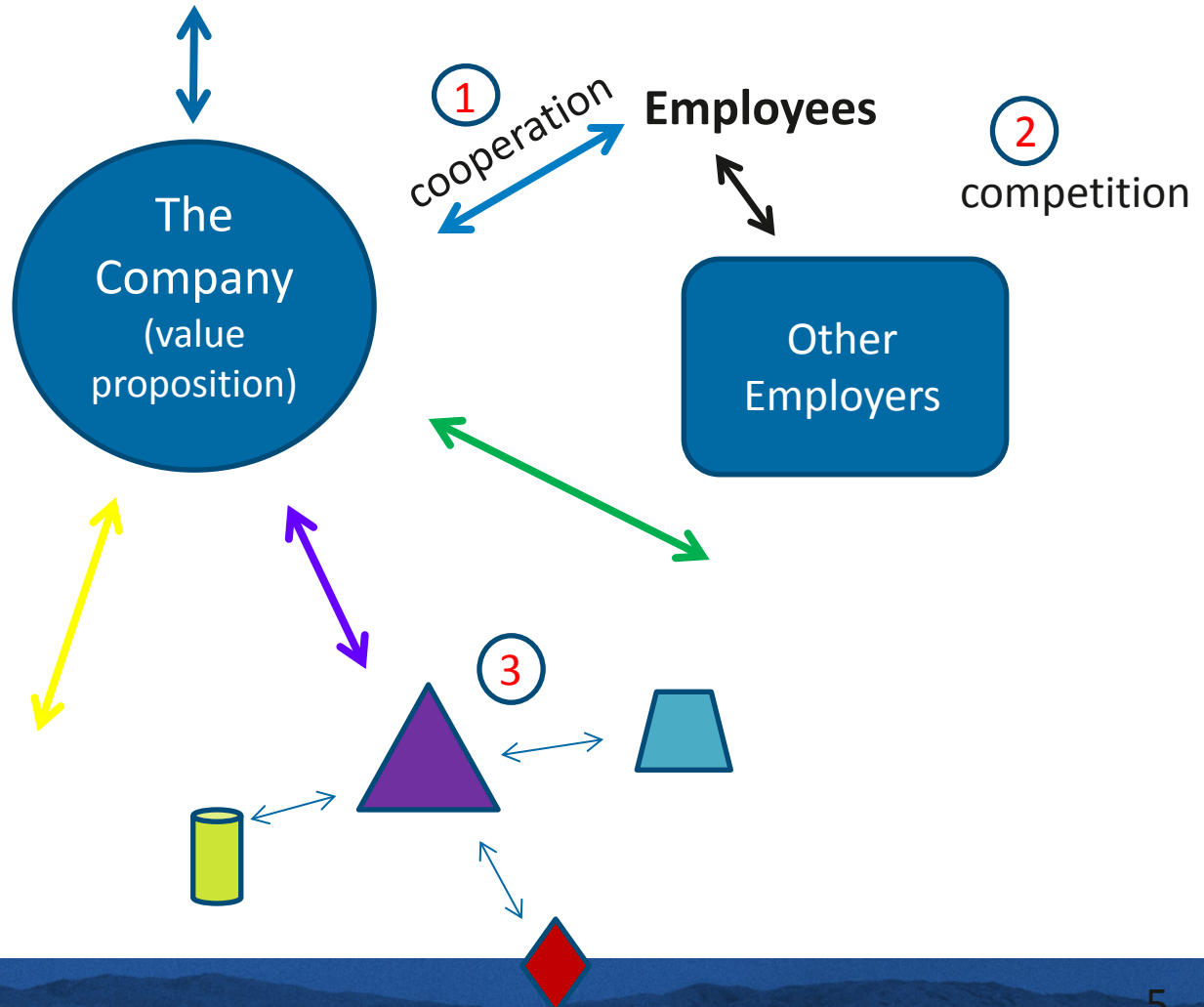
Multiple value transactions



The Social Enterprise (for profit)

Any one or more other stakeholders also favored (e.g. Ben & Jerry's)

Shareholders
(modified Direct ROI as dividends or share price in return for capital and Indirect ROI effective use of resources to accomplish mission)





Why a B Corp or Benefit Corp?

[Note: Both are *FOR*-Profit identities]

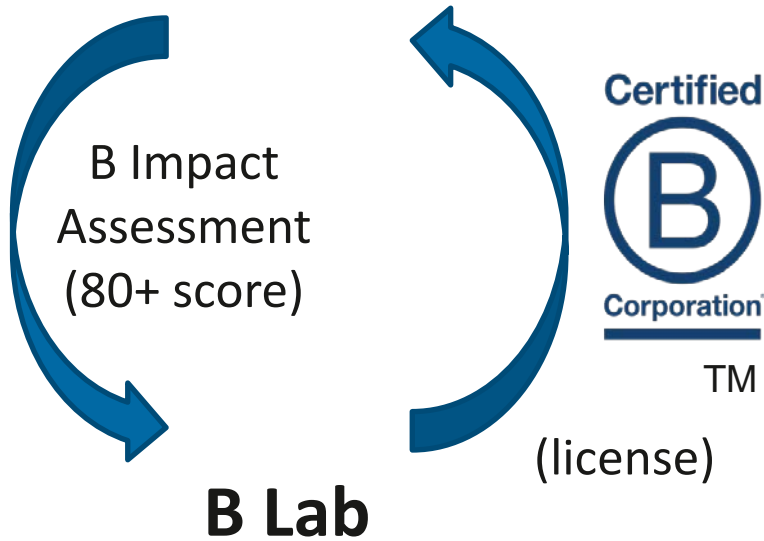
Motives

1. Brand / Purpose / Social Message
2. Legal Issues as to Shareholder ROI expectations

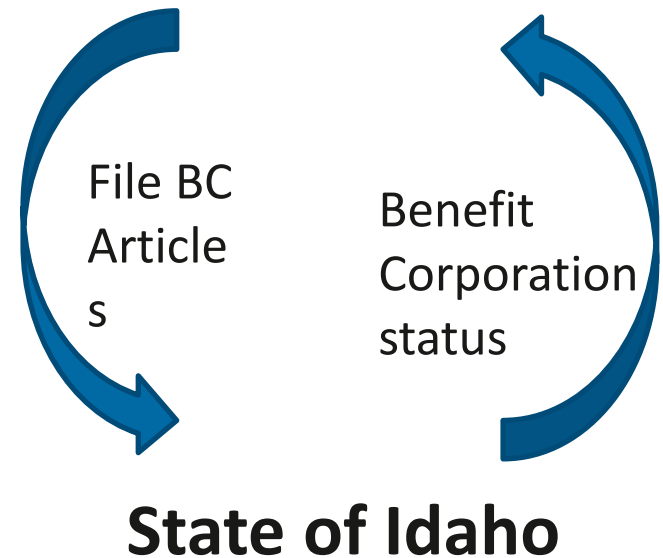
I will address primarily the latter.

Basic Difference

The Company



Incorporators



Note: Neither status has any tax consequences in and of itself.



How did we get here?

- The changing nature of what academics call the Business & Society Social Contract
- We are effectively faced with a **legal question: What are the allowed purposes of business forms and who can hold the firm** accountable to those purposes?
- B Corps and Benefit Corporations **relate to** alternative declarations as to **purpose, accountability and transparency.**

A little **history** lesson on **corporate charters**:

- Once there were only **special charters with defined economic and social purposes and with government (executive or legislative) oversight.**
- During the **19th Century** that **evolved** into **general purpose charters** with **shareholder oversight** and with **economic purposes** becoming paramount
 - That means **profit**, and for **shareholders**.
 - And more recently, that means **NOW!**
 - Though perhaps not by legal standards



- **Recent shifts** in social expectations of business have led to **ambiguities** between **legal obligations to shareholders and ethical responsibilities to social and environmental stakeholders**.
- **This ambiguity in legal obligations is especially relevant at points of crisis** in purpose, such as critical changes in expectations, leadership succession and control, and mergers and acquisitions (when someone is more likely to complain).
- **Ambiguity opens the door to potential litigation at these times** (e.g. shareholders might sue for failure to put their interests first).



Here's where B Corps and Benefit Corporations come in:

- **B Corp status** (certification) **helps** to clear up ambiguities by garnering the consent (to new/altered expectations) of those involved (especially shareholders).
- **Benefit corporations resolve** the question even **more clearly**.
- We will later compare/contrast the two.



Perspective on Benefit Corporations

The approach taken in this presentation is from the legal position that the primary issue leading to this legislation is an interpretation of general corporation law that creates an ambiguity in the definition and scope of directors' and officers' fiduciary duties (and therefore standards of liability) and whether a Board or an Officer is free in their decision-making to consider as within the **“best interests of the corporation”** **interests beyond the maximization of shareholder value**, i.e., those interests that might be listed as related to the impacts of the corporation upon society and the environment.



“Ben C” General Principles

- The provisions in the legislation have no implied impact upon the general provisions of Chapter 30 as applied to non-benefit corporations. [101(3)]*
- The general provisions of Chapter 30 shall apply to benefit corporations to the extent not modified by the provisions of the legislation [101(4)].
- The articles or bylaws of a benefit corporation may not limit, be inconsistent or supersede provisions of the legislation.
- The intent is that this legislation be uniform with that enacted in other States, e.g. Utah, to increase the attraction of this business form and to reduce perceived risks and costs that would arise from local differences.

* Throughout this document, all bracketed numbers refer to sections of the amendments to Title 30, Chapter 20 of the Idaho Statutes.



Benefit Enforcement Proceeding

(Right of Action - Substantive provisions)

- The only action allowed for asserting a claim against a benefit corporation*, its directors or officers with respect to failure to pursue or create [305(1)]
 - General Public Benefit (mandatory)
 - Specific Public Benefit (optional, as specified in the articles of incorporation)
- The creation of such “public benefit(s)” are deemed to be in the “best interests” of the corporation.” [201(3)]
- Remedies are limited to non-monetary damages [305(2), 301(5), 303(3)]

* Any further reference to the “corporation” shall refer to a “benefit corporation unless otherwise stated.”



Benefit Enforcement Proceeding

(Right of Action - Procedural provisions)

- May be commenced by [305 (3)]
 - The corporation (direct action)
 - Derivatively by
 - Beneficial owner(s) of 2% of a class of shares outstanding
 - A director of the corporation
 - Beneficial owner(s) of 5% of outstanding equity interest in a parent company of the corporation
 - Others as specified in the articles of incorporation
- No action by other persons who are beneficiaries of the corporation's general or specific public benefit purposes [301(6), 303(4)]

General Public Benefit [102(5)]

- Definition:
 - A material positive impact on society and the environment resulting from the business operations of a corporation
 - As assessed [by the Corporation] under a third-party standard (TPS), which is [102(11)]:
 - 1) Comprehensive: assesses affects on the interests listed in **301(1)** (regarding impacts which shall be considered)
 - 2) Developed by an entity not controlled by the corporation
 - 3) Credible: that entity has the necessary expertise to assess overall corporate social and environmental performance and uses a balanced multi-stakeholder approach to develop such standard.
 - 4) Transparent: information about the standard is publicly available, including listed information
- **Mandatory** [201(1)]
 - Then definition of GPB (above) requires TPS which includes list in 301(1)



Potential Third Party Standards

- Accountability (AA1000)
- International Standards Organization (ISO 26000)
- Global Reporting Initiative (GRI)
- United Nations Global Compact (10 Principles) [?]
- OECD Risk Awareness Tool [?]
- Carbon Disclosure Project (CDP) [?]
- International Integrated Reporting Council (IIRC)
- Sustainability Accounting Standards Board (SASB)

Note: this does not require the involvement of these organizations.

Specific Public Benefit [102(9)]

- Defined:
 - Specific benefits listed [102 (9)(a)]
 - Any other particular benefit on society or the environment [102 (9)(g)]
- **Optional** [201(2)]
- To be identified in articles of incorporation and does not limit purposes for any benefits listed under 201(1)
- May be amended by “minimum status vote”



Corporate Governance: [301]

Board of Directors, Committees, Directors

- “in considering **the best interests of the benefit corporation**” (the above) “**shall** consider the effects of any action or inaction on:” [301(1)(a-h)] [also part of “comprehensive” TPS]
 - shareholders
 - employees
 - subsidiaries and suppliers
 - customers
 - community and social factors
 - local and global environment
 - short and long term interests of the corporation
 - the ability of the corporation to accomplish its general and any specific public benefit purposes
 - any other pertinent factors deemed appropriate [301(2)]



Corporate Governance [301]

(Board of Directors, Committees, Directors), continued

- (the above) need not give priority to any of the listed interests or factors unless such intent is stated in the articles
- The consideration of these interests shall be deemed to be in the best interests of the corporation and consistent with the general standards for directors as provided in Idaho Statutes 30-1-830 (Standards for Directors of general purpose corporations)
- Directors are not liable for monetary damages for
 - action or inaction concerning these duties if performed in good faith and in the best interest of the corporation [301(5)(a) and 3-1-830]
 - the failure of the corporation to pursue or create general or specific public benefit. [301(5)(b)]



Corporate Governance: Benefit Director [302]

- Position **required** for publicly traded corporations; **optional** for others [302(1)]
- Shall be “independent” [302(2)]: having no material relationship (other than being a director or benefit officer) with the corporation or a subsidiary [102(6)].
- May also serve as the “benefit officer”
- Shall prepare, for inclusion in the “annual benefit report” an opinion on compliance issues listed [302(3)]
- Liability limitations as a director [302(4)]



Corporate Governance: Officers [303]

- Shall consider the interests and factors listed in section 301 if having discretion regarding such matters (see prior slide regarding Board, Committees, Directors) and being aware that the matter will have a material effect on the creation of a general or specific public benefit. [303(1)]
- Consideration of such interests shall be deemed consistent with the duties and standards applied to officers generally. [303(2)]
- Shall not be liable for monetary damages (similar to provisions for directors) [303(3)]



Corporate Governance: Benefit Officer [304]

- **Optional [304]**
- Shall have the powers and duties as provided by bylaws or Board resolution [304(1)]
- Shall prepare the annual benefit report [304(2)]

Summary of Board, Director, Officer fiduciary duties

- (interpreted by way of right of action) must “pursue or create” general (and any named specific) public benefits
 - as assessed under a Third Party Standard (TPS)
 - that is “comprehensive”
 - including interests listed in 301 (1) a-h)
- “shall consider” 301 (1) a-h



Annual Benefit Report [401]

- Prepared by the Benefit Officer (if any. If not, the corporation is still generally responsible).
- Shall include [401(1)]
 - Specified narrative descriptions [401(1)(a)]
 - Assessment of overall social and environmental performance
 - Names of benefit director and officer, if any
 - Compensation of directors
 - Opinion of benefit director [302(3)] [if any]
 - Statement of any conflicts of interest regarding the organization behind the third party standard used for assessment.
 - Relevant (incriminating?) evidence regarding the departure of a benefit director during the reporting period
- **Not required to be audited or certified by a third party**
- Shall be provided to
 - Shareholders
 - Secretary of State (director compensation, financial or proprietary information may be omitted)
 - Posted on public portion of web site (or if none, then provided to any party requesting a copy in which director compensation, financial or proprietary information may be omitted)

The Process to become a Benefit Corporation

- Existing corporations
 - Amendment of articles adopted by a minimum status vote
 - If in a merger or conversion (i.e. from a non-corporate entity), the surviving entity is to be a benefit corporation, then a minimum status vote is required for any non-benefit corporation so merged or converted
- New corporations
 - Incorporation process same as for non-benefit corporations except that articles must state that it is a benefit corporation [[form](#)]

Minimum Status Vote [102(7)]

In addition to any other required approval or vote:

- The shareholders of every separate class are entitled to vote separately
- The action must be approved by a vote of the shareholders of each class by two-thirds of the votes being entitled to cast
- [dissenter's rights are likely to be implied from general corporation provisions]
- Regarding non-corporate entities, see 102(7)(b)



Termination of Status

- By amending articles with a minimum status vote
- By merger, conversion or share exchange with a minimum status vote (unless shareholders are not entitled to vote pursuant to general corporation statutes)
- By sale, lease, exchange or other disposition of all or substantially all assets (unless in regular course of business) with a minimum status vote.
- **Power of Secretary of State to terminate due to non-filing of annual report likely to be implied from general statutes**



Basic differences: B Corp “certification” vs. Benefit Corporations

	B Corp Certification	Benefit Corporations (Idaho)
Availability	Globally and for all forms of (for profit) businesses	Only in states with legislation ; only for corporate form
Status acquisition	By Certification with B Lab via Impact Assessment (entity already exists)	By Filing of appropriate Articles ; creating or converting a legal “entity” for doing business
Purpose: Similar	Economic, Environmental & Social impacts	“Public Benefit” (general/specific)
Accountability (legal)	Board (Governance), B Lab , (Shareholders?)	Board, Shareholders , Secretary of State (failure to file annual report)
Transparency & Reporting	Recertification with B Lab (stakeholder engagement encouraged)	published Annual Benefit Report , in accordance with third party standard of choice
Continuity	If Recertified every 2 years	Indefinite , annual report
Fees/cost	Based on annual revenues: \$500-25,000	Filing fee: \$100 (est.)
Litigation Avoidance	Anticipated	More assured



Thank you!