New York Introduces Benefit Corporations

On December 12, 2011, New York State adopted new legislation authorizing the incorporation of "benefit" corporations in New York. Simply put, a benefit corporation is a hybrid form of a for-profit and a not-for-profit corporation with a dual mission of creating economic value for its shareholders while simultaneously providing a public benefit. New York is the seventh state to pass benefit corporation legislation, joining Maryland, New Jersey, Vermont, Virginia, Hawaii, and most recently, California. New York's law will become effective on February 10, 2012.

Any corporation formed as a New York benefit corporation is required to pursue a general public benefit, which is defined as "*a material positive impact on society and the environment, taken as a whole, assessed against a third-party standard*".[1] In addition to this general public benefit, a benefit corporation may elect to pursue a specific public benefit, such as providing low-income or underserved individuals or communities with beneficial products or services; promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business; preserving the environment; improving human health; promoting the arts, sciences or advancement of knowledge; increasing the flow of capital to entities with a public benefit purpose; or the accomplishment of any other particular benefit for society or the environment.

Unlike a traditional for-profit corporation, under the new law the directors and officers of a benefit corporation <u>are required</u> to consider, in addition to the interests of the benefit corporation's shareholders, the benefit corporation's ability to accomplish its general and specific public benefit purposes, the welfare of its and its suppliers' workforces, the interests of its customers as beneficiaries of the benefit corporation's purposes, community and societal considerations and the local and global environment.[2]

The new law allows shareholders of a benefit corporation to hold its officers and directors accountable for failure to pursue the public benefits mandated under the law and the benefit corporation's charter by providing for a shareholder right to bring an action against officers and directors for such failure, as well as a failure to deliver the required annual benefit reports or to observe the standards of conduct applicable to officers and directors of a corporation under the Business Corporation Law. The law, however, specifically eliminates any fiduciary duties of a director to beneficiaries of the benefit corporation's general or specific public benefit, unless otherwise provided for in the benefit corporation's Certificate of Incorporation or bylaws.

A New York benefit corporation is required to deliver an annual benefit report to its shareholders within 120 days after the end of each fiscal year, which is used to assess the benefit corporation's successes and failures in achieving its stated public benefit purpose and in considering effects of decisions on shareholders. The annual report must contain an assessment of the benefit corporation's performance of its general and specific public benefit goals, as measured against the third party standard selected by the benefit corporation (and a description of the rationale for selecting such standard), and must also disclose all compensation to directors and the name of each person that owns beneficially or of record five percent or more of the outstanding shares of the benefit corporation. The annual benefit report must also be posted on the benefit corporation's website and delivered to the Department of State. However, the benefit corporation may omit from the publically posted and filed annual benefit reports directors' compensation and other financial and proprietary information.

A benefit corporation is established by the filing of a Certificate of Incorporation that includes a specific statement that it is a New York benefit corporation and includes in its statement of its corporate purpose the benefit corporation's general public benefit and any specific public benefits. An existing New York for-profit corporation may convert into a benefit corporation by amending its Certificate of Incorporation to include such provisions, or by merging into a New York benefit corporation.

Companies wishing to expand or enhance their social footprint may want to consider the advantages that the benefit corporation form provides, including clarity that directors' and officers' obligations to shareholders include pursuing a material positive impact on society and/or the environment and possibly greater access to venture capital and marketing opportunities. It remains to be seen whether the new legal entities will also receive preferential treatment for tax purposes, government contracts, and/or environmental regulation.

Please use this link to view an expanded version of this article which was published in the February 8, 2012 edition of the ***New York Law Journal***.

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[1] The new law defines third party standard as "a recognized standard for defining, reporting and assessing general public benefit that is: (1) developed by a person that is independent of the benefit corporation; and (2) transparent because the following information about the standard is publicly available: (a) the factors considered when measuring the performance of a business; (b) the relative weightings of those factors; and (c) the identity of the persons who developed and control changes to the standard and the process by which those changes are made." It is unclear what standards will meet these requirements. B Lab, which supports benefit corporation legislation, has compiled a list of possible third party standards at http://benefitcorp.net/selecting-a-third-party-standard/list-of-standards

[2] Under §717(b) of the New York Business Corporation Law directors are entitled (not required) to consider similar factors in taking action.

- Asset Protection
- Banking and Finance
- Business Reorganization, Bankruptcy and Creditors' Rights
- Corporate/M&A
- Employment and Labor
- Global Outsourcing and Procurement
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