

Client Advisory | August 2012

Benefits Corporations: Entrepreneurship with a Conscience?

On August 7, 2012, Gov. Deval Patrick signed into law legislation authorizing “benefit corporations,” a new form of corporate entity. Massachusetts becomes the eleventh state to allow for benefit corporations, joining states including New York, New Jersey, Vermont and California.¹

A benefit corporation is a unique, hybrid corporate form that combines characteristics of both for-profit and non-profit corporations. Unlike their traditional for-profit counterparts, benefit corporations allow directors to consider societal impact, in addition to profits and shareholder benefit, when making corporate decisions. These considerations may include a wide array of interests such as employee, community, societal and environmental impact. In addition to providing additional flexibility for the corporation’s business and its directors, a potential advantage for benefit corporations may be the ability to garner philanthropic investment, including foundation grants, as well as raising capital from socially-conscious investors.

To become a benefit corporation, a company must be incorporated under either Chapter 156D (business corporations) or Chapter 156A (professional corporations) of the General Laws of Massachusetts, and meet all of the legal obligations under those chapters. A benefit corporation must include a statement in its articles of organization that it is a benefit corporation. Existing Chapter 156D or 156A corporations may elect to become a benefit corporation by amending its articles of organization to include a statement that it

is a benefit corporation, provided such amendment is adopted by at least two-thirds of the corporation’s shareholders (a corporation may also elect to no longer be classified as a benefit corporation by obtaining a two-thirds vote of its shareholders).

In addition to the statement in its articles of organization, a benefit corporation also must show that it creates a “general public benefit,” as measured by a third-party standard. The Massachusetts legislation does not specify a third-party standard, but the Global Impact Investing Rating System (GIIRS), powered by the non-profit B-Lab, has become the standard bearer for certifying benefit corporations in other states. This highlights one potential weakness of the legislation, as the reliance on third-party evaluation opens benefit corporations up to subjective measures and costly annual fees to third-party entities.

Benefit corporations must meet several additional legal requirements, including appointing one independent director to their board, who is designated as the “benefit director.” The benefit director is responsible for preparing an annual opinion detailing how well the corporation met its goals of impacting the general public benefit, as well as any specific benefits it may have

identified. Benefit corporations are also required under the new law to issue an annual benefit report to its shareholders containing significant disclosures about the operations of the business, including the following:

- The ways in which the corporation pursued a general public benefit
- An assessment of the overall social and environmental performance of the benefit corporation against a third-party standard
- The name(s) of the benefit director and benefit officers (if any)
- The compensation paid to each director
- The names of holders owning 5% or more of the outstanding shares of the corporation

In addition to making the annual benefit report available to the corporation’s shareholders, a benefit corporation must post the report on its public website and deliver a copy to the Secretary of State (though certain confidential information, including the compensation paid to the directors, may be omitted from the report posted on the website and delivered to the Secretary of State).

¹ States that have previously passed benefit corporations legislation: CA, HI, IL, MD, LA, NJ, NY, SC, VT, VA. States that have pending benefit corporations legislation: CO, PA, DC.

The benefit corporation legislation goes into effect on December 1, 2012. Edwards Wildman's Business Law Department will continue to monitor the development of this law, including any implementing regulations or guidance. Clients considering a benefit corporation or transitioning to benefit corporation status are encouraged to confer with counsel.

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