

NONPROFIT ORGANIZATIONS

ALERT

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NEW YORK'S NEW BENEFIT CORPORATION LAW*By Cynthia G. Fischer*

On February 10, 2012, New York's new Benefit Corporation Law went into effect, making New York the seventh state to enact benefit corporation legislation. Laws are also in effect in Maryland (the first, effective October 1, 2010), neighboring New Jersey (effective March 1, 2011), Vermont (effective July 1, 2011), Virginia (effective July 1, 2011), Hawaii (effective July 8, 2011), and California (effective January 1, 2012).

Article 17, Benefit Corporations, has been added to the Business Corporation Law of New York. It provides for the constitution and operation of benefit corporations, certain requirements which are unique to this type of corporation, and a procedure for converting an existing business corporation into a benefit corporation.

Benefit corporations have the dual purpose of providing a public benefit while still operating an enterprise which has value for its shareholders. Benefit corporations have been described as a hybrid between profit and nonprofit corporations. Currently, the principal difference between a benefit corporation and a nonprofit is the significant tax advantage available to a nonprofit.

Section 1706 of the new law provides that "Every benefit corporation shall have a purpose of creating general public benefit." Further, "The purpose to create general public benefit shall be a limitation on the purposes of the benefit corporation, and shall control over any inconsistent purpose of the benefit corporation." General public benefit is defined in **Section 1702(b)** as "a material positive impact on society and the environment..."

Moreover, the Certificate of Incorporation may also identify one or more specific public benefit purposes. **Section 1702(e)** lists a number of purposes which would constitute specific public benefit, such as providing low income or underserved individuals or communities with beneficial products or services, improving public health, promoting the arts, sciences or advancement of knowledge, and the accomplishment of any other particular benefit for society or the environment.

The Benefit Corporation Law imposes three requirements that are unique to benefit corporations.

- 1) A benefit corporation is required to have its activities measured against a third party standard, which is defined in **Section 1702(g)** as "...a recognized standard for defining, reporting and assessing general public benefit..." The standard must be developed by a person that is independent of the benefit corporation and must be transparent.
- 2) **Section 1707** sets forth a standard of conduct for directors and officers. The standard sets forth certain factors that must be considered by directors and officers, such as community and societal considerations, local and global environment, and the ability of the benefit corporation to accomplish its general and specific public benefit purposes.
- 3) **Section 1708** provides that a benefit corporation must deliver to each shareholder an annual benefit report, which gives a narrative description of, among other things, the process and rationale for selection of the third party standard, assessment of performance, compensation paid to directors, and

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the name of each person that owns five percent or more of the outstanding shares of the corporation. This report must also be posted on the benefit corporation's website and delivered to the Department of State. The corporation may omit directors' compensation and other financial or proprietary information from the publicly posted and filed reports.

Investors and philanthropists have shown an increased interest in supporting companies that benefit society as well as operate successfully. While these laws are very new it seems likely that benefit corporations will ultimately attract investors and philanthropists who wish to combine good works with sound investments. ♦

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