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Should You Consider Becoming a Benefit Corporation?

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Effective as of February 10, 2012, corporations in New York will have the option of choosing to be designated as a “benefit corporation.” A benefit corporation is a company with a purpose that includes “creating general public benefit,” which the New York legislature has defined as a “material positive impact on society and the environment, taken as a whole, assessed against a third party standard.” What this means is that directors of benefit corporations are permitted to consider social and environmental goals and the effects of any decision on these goals as well as traditional objectives such as maximizing profits when making decisions. It should be noted that officers will also be able to take these goals into account when acting on behalf of a benefit corporation. This new class of corporation may be of particular interest to companies in the cleantech and environmental industries as it gives their boards of directors more latitude to consider both social and financial goals. New York joins California, Hawaii, Maryland, Vermont, New Jersey, and Virginia in enacting this type of “benefit corporation” legislation.

So why would a business want to become a benefit corporation? Directors’ traditional fiduciary duties require them to act in the best interests of the shareholders, and emphasis on ulterior interests poses a risk of shareholder lawsuits. Electing to become a benefit corporation provides additional protection to officers and directors by allowing them to consider objectives that may be at odds with financial profits. The new law allows officers and directors to consider the effects of their actions on various stakeholders, including shareholders, employees, suppliers, customers, the community, and the environment, and the short and long term interests of the corporation with regard thereto. Directors are not required to place any one interest above another when making decisions. In addition to the protections afforded directors by this new type of corporation, a company with this designation may attract investors that value a commitment to social and environmental objectives as well as financial returns.

To become a benefit corporation in New York, a corporation must specify in its certificate of incorporation that it is a benefit corporation and include an identifying legend on any issued stock certificates. An existing New York corporation may amend its certificate of incorporation to reflect such designation by a vote of at least 75% of each class or series of stock entitled to vote thereon. Benefit corporations are obligated to file with the Secretary of State, post on their website, and deliver to their shareholders an annual report detailing, among other things, the ways in which the corporation pursued its goals and an assessment of the performance of the corporation in accomplishing such goals measured against an “independent third party standard.” The New York legislature has stated that the third party standard must be a “recognized standard for defining, reporting and assessing general public benefit” that is publicly available.

Please let us know if you would like additional information on becoming a benefit

corporation.

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