

Public Benefit Corporations: An Overview of the Delaware Benefit Corporation Statute

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What is a Benefit Corporation?

- A unique, hybrid corporate form that combines characteristics of both for-profit and non-profit corporations
- In addition to profits and shareholder benefit, benefit corporations empower directors to consider societal impact when making corporate decisions
 - Considerations may include a wide array of interests such as employees, the community, societal and environmental impact

- On July 17, 2013, Delaware Governor Jack Markell signed into law legislation enabling the formation of public benefit corporations in Delaware (effective August 1, 2013). The statute was amended in 2015.
- The DE benefit corporations statute is contained in new Subchapter XV of Title 8 of the DE General Corporation Law
- ***The DE statute does not include many of the requirements imposed on Benefit Corporations formed in other jurisdictions***

- Certificate of Incorporation must identify specific “public benefit(s).”
- State that the corporation is a public benefit corporation.
- “Public benefit” means a positive effect (or a reduction of negative effects) on one more categories of persons, entities, communities or interests including effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature.
- Stock certificates and notices to shareholders must conspicuously state that the corporation is a public benefit corporation.

- A 2/3 affirmative vote of the outstanding shares of each class of a corporation's stock (voting and non-voting) is required to:
 - Amend certificate of incorporation to become a public benefit corporation;
 - Merge or consolidate with or into another entity, if as a result, the corporation would become a domestic or foreign public benefit corporation or similar entity; or
 - Terminate the public benefit status of a public benefit corporation.
- Appraisal rights for dissenting stockholders

- Directors must manage public benefit corporations in a way that balances:
 - The stockholders' pecuniary interests;
 - The interests of those materially affected by the corporation's conduct; and
 - The public benefit or public benefits identified in the corporation's certificate of incorporation.
- Directors are deemed to have satisfied their duties if a corporate decision is both informed and disinterested and, "not such that no person of ordinary, sound judgment would approve."

- Directors are not liable for claims asserted on account of:
 - Any claimed interest in the public benefits identified in the certificate of incorporation; or
 - Any claimed interest of those materially affected by the corporation's conduct.
- The certificate of incorporation may also include a provision which states that any disinterested decision by directors shall not constitute an act or omission not in good faith or breach of the duty of loyalty for purposes of imposing monetary liability pursuant to Section 102(b)(7) or determining indemnification rights pursuant to Section 145 of the DGCL.

- Stockholders of public benefit corporations may sue derivatively to enforce the directors' duty to balance the interests/benefits described above, but only if at the time the law suit is filed those stockholders individually or collectively own:
 - At least 2% of the corporation's outstanding shares; or
 - With respect to corporations with shares listed on a national securities exchange, the lesser of:
 - 2% of the outstanding shares; or
 - Shares with a market value of at least \$2 million.

- At least once every two years (unless otherwise provided by charter or bylaws), a DE public benefit corporation must issue a statement regarding the corporation's promotion of the public benefits identified in its charter and of the best interests of those materially affected by the corporation's conduct which includes:
 - Objectives established by Board to promote public benefits and interests;
 - Standards adopted by Board to measure progress;
 - Factual information regarding the corporation's success in meeting standards; and
 - Assessment of the corporation's success in meeting objectives and promoting public benefits and interests.

Questions?

- Certified B-Corps (which need not initially be benefit corporations) have been certified by B Lab as having met a high standard of overall social and environmental performance as determined by a third-party standard
- B-Corps must elect benefit corporation status within four years of the first effective date of benefit corporation legislation in their state of incorporation or two years of initial certification, whichever is later
- Although there are other third-party standards for certifying social benefit/environmental stewardship, the non-profit B-Lab currently leads the market
 - Pro: B-Lab clients join a growing network of collaborative businesses that often provide cost-saving services to one another
 - Con: Unclear criteria for certification, annual fees and lack of competition in the third-party certification marketplace