

## Massachusetts Passes Legislation Recognizing Benefit Corporations

August 17, 2012

Socially minded entrepreneurs and businesses in the Commonwealth now have the option to more securely advance the public-benefit focus of their activities by using a new form of corporate entity: the benefit corporation.

On August 7, 2012, Governor Deval Patrick signed H. 4352 into law, thereby adding chapter 156E to the General Laws. This new statute governs the establishment and operation of benefit corporations. With the introduction of chapter 156E, Massachusetts became the eleventh state to permit the establishment of this socially minded form of corporate entity. Maryland and Vermont were the first two states to do so, in 2010.

Benefit corporations are similar to traditional for-profit corporations but they differ in one important respect. While directors and officers of traditional for-profit corporations must focus primarily on maximizing financial returns to investors, *the directors and officers of benefit corporations are expressly permitted to consider and prioritize the social and environmental impacts of their corporate decision-making.* As a result, benefit corporations may be an appealing choice of entity to members of the business community who seek to make corporations more “socially responsible.”

For example, the directors of a traditional corporation faced with financial hard times may opt to build up cash reserves by laying off employees, in order to fulfill their fiduciary duty to prioritize the financial returns to investors. A benefit corporation’s directors faced with similar economic circumstances could prioritize retaining the corporation’s workforce through the hard times, and opt to dip into cash reserves to do so, in order to continue to fully pursue the corporation’s public benefit goals.

Under the newly-adopted legislation, the boards of directors and officers of benefit corporations are required to consider the effects of their corporate decision-making on the following:

- The shareholders of the benefit corporation;
- The employees and workforce of the benefit corporation;
- The interest of clients;
- Community and societal factors, including those of each community in which offices or facilities of the benefit corporation are located;
- The local, regional and global environment;
- The short-term and long-term interests of the benefit corporation; and
- The ability of the benefit corporation to accomplish its general and specific public benefit purposes.

Benefit corporations should not be confused with “B Corps” which are for-profit corporations, LLCs, partnerships and other business entities (including benefit corporations) that have been certified as B (for Beneficial) Corps by B Lab, an independent nonprofit. B Corp status is conferred by B Lab on business entities that meet certain criteria. The B Corp designation is a branding tool and has no legal significance.

Benefit corporations should also not be confused with nonprofit corporations even though both types of organizations may have similar public benefit purposes. The assets and earnings of nonprofit organizations must generally be used for the benefit of the public whereas a benefit corporation operates as a for-profit entity and may distribute earnings to shareholders and otherwise operate for the benefit of its investors.

Chapter 156E allows for the establishment of new benefit corporations, as well as for the conversion of existing corporations to benefit corporation status. In order to commence such a conversion, most existing corporations will need to obtain the approval of two-thirds of each outstanding class of their securities.

The new statute sets forth specific requirements for benefit corporations, including the appointment of a so-called benefits director to oversee and report on implementation of the corporation's public benefit aims.

Benefit corporations are also required to prepare annual benefit reports detailing their activities and their progress implementing their public benefit initiative. Such reports must also include an assessment of the overall social and environmental performance of the benefit corporation against a third party standard. Benefit corporation statutes in other states have been criticized for leaving open the possibility that directors and officers could be attacked by shareholders for not doing enough to benefit the public. The new Massachusetts law provides specific protection for officers and directors from this kind of attack by specifying that directors and officers of benefit corporations organized under chapter 156E are not personally liable for monetary damages for any "failure of the benefit corporation to pursue or create general public benefit or a specific public benefit."

Even though directors and officers of a benefit corporation are not personally liable for a failure of the corporation to pursue or create public benefit, the new statute does include procedures by which directors or shareholders may initiate so-called benefit enforcement proceedings against a benefit corporation that fails to pursue its public benefit purposes.

The effective date for Chapter 156E is **December 1, 2012**. On that date, companies may begin incorporating as benefit corporations, or may convert to benefit corporation status.

#### RELATED PRACTICES

- [Corporate Social Responsibility](#)
  - [Business Counseling](#)
  - [Nonprofit and Tax-Exempt Organizations](#)
- 

This communication is intended for general information purposes and as a service to clients and friends of Foley Hoag LLP. This communication should not be construed as legal advice or a legal opinion on any specific facts or circumstances, and does not create an attorney-client relationship.

United States Treasury Regulations require us to disclose the following: Any tax advice included in this document was not intended or written to be used, and it cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code.

Attorney advertising. Prior results do not guarantee a similar outcome. © 2017 Foley Hoag LLP. All rights reserved.