The Year in Social Enterprise: 2016 Legislative and Policy Review

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Read last year’s Social Enterprise Legislative and Policy Review

While the past year saw legislators in the United States continue their efforts to pass social enterprise enabling statutes and contemplate new policy incentives for social enterprises, 2016 may be best remembered as the year the benefit corporation went global. Following Italy’s adoption of the benefit corporation form in December 2015, several more foreign jurisdictions either introduced or began drafting similar legislation with some expected to come up for a vote in 2017. We are once again pleased to provide the following retrospective social enterprise year in review for 2016.

Legislative Developments in the United States

Ten U.S. jurisdictions introduced or re-introduced social enterprise legislation in 2016, but the only bill to become law was the Pennsylvania Uniform Limited Liability Company Act of 2016 which authorized the benefit limited liability company form. This marks the first year since Maryland enacted benefit corporation legislation in 2010 that no U.S. jurisdiction has authorized the benefit corporation form. Nevertheless, the overwhelming majority of social enterprise bills introduced in 2016 were benefit corporation bills, although three states considered low-profit limited liability company (L3C) legislation. The year’s legislative activity is summarized below:

Benefit Corporation Legislation

Eight benefit corporation bills were introduced in 2016:

- Bills in Georgia (H.B. 1052), Iowa (H.F. 2063), Kansas (H.B. 2697) and Oklahoma (S.B. 1121) did not come to their respective floors for a vote and died in committee.
- The Wisconsin benefit corporation bill (A.B. 59), which was reintroduced in 2015 and was carried over to the 2016 Regular Session, failed to pass on April 13, 2016, pursuant to Senate Joint Resolution 1.
- The Michigan benefit corporation bill (H.B. 5710) was tie-barred with three other bills, none of which emerged from the House Committee on Commerce and Trade.
- Kentucky’s benefit corporation bill (H.B. 50), which was pre-filed by Rep. Kelly Flood in September 2015, passed the House by a vote of 59-32 on February 1, 2016, but died in the Senate Judiciary Committee.
- The Ohio Legislature considered a unique benefit corporation bill (H.B. 545) which departs from both the Model Benefit Corporation Legislation (drafted by Drinker Biddle partner William H. Clark, Jr.) and the Delaware Model in many respects. The bill was referred to the House Commerce and Labor Committee on November 10, 2016 and will carry over to the 2017 legislative session.

Renewed Interest in the L3C

In 2015, Puerto Rico became the first jurisdiction in four years to authorize the L3C form, and 2016 saw three more jurisdictions introduce L3C legislation. Despite the renewed interest among state legislators in the L3C form, no votes were held on any of these bills during the year:

- The Massachusetts L3C bill (S. 111) was introduced on April 5, 2015 and was eventually discharged to the Senate Committee on Rules on March 21, 2016. The bill died in committee, but L3C legislation is expected to be reintroduced in 2017.
- In New York, companion L3C bills in the state Assembly and Senate (A. 1209 and S. 3550) were carried over from the 2015 Regular Session and were referred to the House and Senate Committees on Corporations, Authorities and Commissions, respectively. Neither of the New York bills emerged from committee during the 2016 Regular Session.
- In Wisconsin, the only jurisdiction that saw the introduction of both benefit corporation and L3C legislation in 2016, the L3C bill (A.B. 60) suffered the same fate as its benefit corporation counterpart and died pursuant to Senate Joint Resolution 1 on April 13, 2016.
Pennsylvania Becomes the Third State to Authorize the Benefit Limited Liability Company

In October, the Pennsylvania legislature passed H.B. 1398 which, among other things, revised Pennsylvania’s limited liability company act. The Pennsylvania Uniform Limited Liability Company Act of 2016 was signed into law by Governor Tom Wolf on November 21, 2016 and adds new Subchapter I authorizing the benefit company form. In so doing, Pennsylvania became the third state to authorize the benefit limited liability company, joining Maryland and Oregon which passed similar legislation in 2012 and 2013, respectively.

The language of Pennsylvania’s benefit company law tracks the Model Benefit Corporation Legislation, with conforming changes to accommodate LLC versus corporation distinctions (i.e., managers versus directors). As a result, the law contains key elements of the benefit corporation, including: (i) the requirement to pursue a “general public benefit”; (ii) the option to select one or more specific public benefits; (iii) exoneration from personal liability for managers or officers for monetary damages; (iv) the benefit enforcement proceeding right of action; and (v) the requirement to produce an annual benefit report, deliver such report to each member of the company and file such report with the Pennsylvania Department of State. While some commentators have argued that the benefit company form is unnecessary because all of the distinguishing characteristics are achievable through a well-drafted LLC operating agreement, the existence of a statutory “off-the-shelf” LLC form that preserves the key elements of the benefit corporation form was deemed worthy of passage by the Pennsylvania legislature.

In addition, in June 2016, the Hartford Business Journal reported that legislators in Connecticut were preparing draft legislation authorizing the creation of the benefit limited liability company form. No such legislation was introduced in 2016, but on January 4, 2017, benefit company legislation (Proposed S.B. 12) was introduced and referred to the Joint Committee on Judiciary.

Amendments to Existing Social Enterprise Laws

The Pennsylvania legislation that authorized benefit LLCs discussed above also made minor technical amendments to the Pennsylvania provisions on benefit corporations.

The only other state to consider an amendment to an existing social enterprise statute in 2016 was Hawaii, where a proposed amendment to the state’s Sustainable Business Corporation Law1 was carried over to the 2016 Regular Session but did not emerge from the House Committee on Labor & Public Employment. The amendment sought to expand a specific public benefit purpose unique to the Hawaiian law that relates to intellectual property rights; namely, to expand the specific public benefit definition to include the use of a copyright or trademark for the purpose of job creation or upholding fair labor standards.

Legislative Developments in Foreign Jurisdictions

Benefit Corporation Legislation

In 2015, Italy became the first non-U.S. jurisdiction to authorize the benefit corporation form and the data illustrates that interest in the benefit corporation went global in 2016, with several jurisdictions across three continents having introduced, drafted, or discussed benefit corporation legislation. On February 17, 2016, benefit corporation legislation (ley de Sociedades de Beneficio e Interes Colectivo) was introduced in the Argentinian Congress. Similar legislation was also introduced in Columbia. Benefit corporation legislation has been drafted in Australia, Brazil, the United Kingdom and Taiwan, and draft bills are anticipated to be introduced in Canada, Chile, Ireland, and Portugal.

Other European Social Enterprise Legislation

In addition to the new wave of benefit corporation legislation discussed above, European jurisdictions have also continued to introduce other social enterprise laws. For example, on October 20, 2016, the Greek parliament passed a law creating a new Social & Solidarity Economy Actor status available to all Greek legal forms. Similarly, on November 23, 2016, the Luxembourg parliament adopted the société d’impact sociétal, a new legal framework for social enterprise. Lastly, according to the European Social Enterprise Law Association, there are at least six more European jurisdictions, including Bulgaria, Estonia, Malta and Slovakia, in the process of enacting laws to promote the social enterprise sector.

Policy Developments

California Bill to Create the First Statewide Government Procurement Preference for Social Enterprise is Vetoed

In August 2016, both houses of the California legislature overwhelmingly passed S.B. 1219, a bill that would create the first statewide procurement preference for social enterprise in the United States. Specifically, the bill would create procurement preferences for a subset of social enterprises, so-called “employment social enterprises" (ESEs), defined as California-based social purpose corporations, benefit corporations or nonprofit corporations that (i) earn greater than 51 percent of their revenue from the sale of goods or services and (ii) include in their organizational documents a mission to hiring and assisting people who face multiple barriers to employment (i.e., individuals who are or have been...

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1 Hawaii uses the term “sustainable business corporation” in lieu of “benefit corporation”, but this is a distinction without a difference, as the Hawaii law adopts the Model Legislation’s language in all other material respects.
homeless, or “out-of-school-youth”).

Under the bill, ESEs would be granted a preference of up to 5 percent of the lowest bidder for awards to be made to the lowest bidder, and a preference of up to 5 percent of the highest bidder for awards to be made to the highest bidder. Despite legislative support, S.B. 1219 was vetoed by Governor Jerry Brown on September 25, 2016. In his veto message, the governor stated that while he thought the bill was “well-intentioned,” it would require expensive modifications to FI$Cal (a statewide integrated financial management system) “at a time when the state must focus its resources on the project’s successful deployment.”

Nevertheless, the California bill marks a significant departure from the social enterprise enabling statutes that have thus far been passed in a majority of U.S. jurisdictions, and represents the first time procurement preferences for social enterprises have been considered on a statewide level. Despite Gov. Brown’s veto, the California bill may signal a new direction in social enterprise policy, one that other jurisdictions may find useful in fostering the continued development of local social enterprises.

New Impact SBIC Designation Proposed by the SBA

In a Proposed Rule published on February 3, 2016, the Small Business Administration (SBA) proposed the creation of a new “Impact Small Business Investment Company” (Impact SBIC) designation for qualifying investment funds. In so doing, the SBA sought to create a new class of SBICs that are committed to generating positive, measurable social impact in addition to financial returns and to “expand the pool of investment capital available primarily to underserved communities and innovative sectors as well as support the development of America’s growing impact investing industry.”

Under the proposed rule, a fund seeking the Impact SBIC designation would be required to (i) be organized as a limited partnership, (ii) invest at least 50 percent of its assets in small businesses that are either SBA-Identified Impact Investments, Fund-Identified Impact Investments or some combination thereof, and (iii) measure impact using one of the following pre-approved measurement standards: (1) the Global Impact Investment Network’s Impact Reporting and Investment Standards, (2) the Global Reporting Initiative’s G4 Sustainability Reporting Standards or (3) the standards produced by the Sustainability Accounting Standards Board. The SBA received five public comments to the Proposed Rule, which is expected to be finalized in 2017.

Benefit Company Bar Association Launches

On October 21, 2016, the newly formed Benefit Company Bar Association (BCBA) held its first annual meeting at the Philadelphia office of Drinker Biddle & Reath LLP.

Inaugural President William H. Clark, Jr., delivered an introductory presentation setting forth the purpose of the BCBA as follows: To bring together lawyers who represent clients that are committed to having a positive impact on society and the environment and to promote the idea that business can have a more positive impact on society and environment than it does today. To that end, the BCBA seeks to share the knowledge and experience of its members, to educate other lawyers and the public, and to promote the concept of doing business in a responsible and sustainable manner.

Other speakers at the first annual meeting included Jay Coen Gilbert, Co-founder of B Lab, Frederick H. “Rick” Alexander, Head of Legal Policy at B Lab, Holly Ensign-Barstow, Manager of Mission Alignment at B Lab and David Musto, the Ronald O. Perelman Professor in Finance at The Wharton School.

The BCBA invites all practicing attorneys, academics, judges and law students to join the bar association and join one or more of its committees.

Other Noteworthy Developments

Conversions

There were two notable conversions to benefit corporation status in the journalism and banking sectors, respectively, in 2016. First, Philadelphia Media Network, LLC, the holding company of The Philadelphia Inquirer, Daily News and philly.com, announced on January 12, 2016 that the news organizations had been donated to the newly created, tax-exempt Institute for Journalism in New Media (IJNM). Philadelphia Media Network, LLC converted to a Delaware public benefit corporation (Philadelphia Media Network, PBC) that operates independently as a taxable subsidiary of IJNM. The press release explains:

To protect the editorial independence of The Philadelphia Inquirer, Daily News and philly.com, Philadelphia Media Network, PBC, will continue to operate under its current management team and its current Board of Directors as a taxable subsidiary of the Institute. While still running the news organizations as a for-profit business, the new ownership structure under the Institute allows journalism at The Philadelphia Inquirer, Daily News and philly.com to benefit more readily from philanthropic dollars, yet still be governed by those best equipped to manage and operate these news outlets.

Second, Virginia Community Capital, already a B Corp certified bank, announced on April 3, 2016 that it had converted its wholly-owned, FDIC-insured, for-profit bank into a benefit corporation, making it the first regulated bank in the United States to do so.

Mergers and Acquisitions

In a July 7, 2016 press release, Danone and The...
WhiteWave Foods Company (WhiteWave) announced that they had entered into a definitive merger agreement whereby Danone would acquire WhiteWave in an all-cash stock purchase at $56.25 per share. After the transaction closes, Danone and WhiteWave announced their intention to combine their U.S. activities into a newly formed Delaware public benefit corporation, explaining that “[t]his commitment is in line with Danone’s long term mission for building economic and social value.” If successful, the new entity would be among the largest Delaware public benefit corporations to date.

Additionally, on October 21, 2016, Eaton Vance announced that it would acquire the assets of Calvert Investment Management Inc., a subsidiary of Ameritas Holding Company, one of the oldest and most well-established responsible investing managers with $12.3 billion of fund and account assets. Terms of the acquisition were not disclosed, but Eaton Vance will reportedly pay between $53 and $75 million for Calvert’s assets in a move designed to “[m]ake Calvert the centerpiece of [Eaton Vance’s] expansion in responsible investing.” This is not the first time an established asset manager has bought into the responsible investing space. As we noted in last year’s *Year in Social Enterprise* review, Goldman Sachs acquired impact investment firm Imprint Capital in July 2015. As impact investing continues to gain momentum, we expect that more acquisitions of impact firms like Imprint and Calvert will follow.

If you have any questions about this alert, please do not hesitate to contact the authors or your usual Drinker Biddle contact.

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