

Illinois Authorizes the Creation of Benefit Corporations

By William H. Clark, Jr. and Elizabeth K. Babson

On August 2, 2012, Illinois Governor Pat Quinn signed into law the Illinois Benefit Corporation Act (the "Act"), making Illinois one of eleven states¹ that have authorized the creation of a new form of corporation known as a "benefit corporation."

Our Role in Benefit Corporation Legislation

Drinker Biddle has provided hundreds of pro bono hours to B Lab, a non-profit organization dedicated to using the power of business to solve social and environmental problems through the advancement of Benefit Corporation legislation. Partner William Clark and associate Elizabeth Babson, specifically, have drafted model legislation and worked to get that legislation passed throughout the United States. Both Bill and Lizzie have been recognized with awards for their efforts. To read an article they authored for the William Mitchell Law Review, titled "How Benefit Corporations are Redefining the Purpose of Business Corporations," please click here.

A growing sector of the economy, led by "social entrepreneurs," is endorsing a new understanding of a corporation's responsibility to focus on more than just bottom-line earnings. These businesses are committed instead to pursuing a "triple bottom line" that includes people, planet, and profits.

While corporations generally have the ability to pursue sustainability, these corporate decisions are usually justified in terms of creating long-term shareholder value. A commitment to pursuing social and/or environmental goals as an end unto itself may be viewed in many states as inconsistent with the traditional perspective that a corporation's purpose is to maximize its profits for the benefit of its shareholders. In the ordinary course of business, decisions by a corporation's directors that benefit social or environmental interests are generally protected by the business judgment rule, under which courts are reluctant to second-guess operating decisions by the directors. But a fundamental transaction, such as a merger involving a

change in control of a corporation, may interfere with a corporation's ability to maintain its focus on social and/or environmental factors because of the pressure to maximize the price to be received by the shareholders.

The Act provides the growing community of mission-driven businesses in Illinois with a new form of corporation designed to support the pursuit of a "triple bottom line" business model.

What is Different About Benefit Corporations?

Benefit corporations are a new variation on a familiar form; they have most of the characteristics of a traditional business corporation, but are subject to new requirements

¹ The other ten states are California, Hawaii, Louisiana, Maryland, Massachusetts, New Jersey, New York, South Carolina, Vermont, and Virginia.

with respect to purpose, accountability, and transparency:

- 1) they must have a corporate purpose to create a material, positive impact on society and the environment;
- 2) the fiduciary duties of directors are expanded to require consideration of non-financial interests; and
- 3) they must report on their overall social and environmental performance as assessed against a comprehensive, credible, independent, and transparent third-party standard.

How to Become a Benefit Corporation

Under the Act, there are three ways to become a benefit corporation:

- 1) **New Business.** A new business can form as a benefit corporation under the Business Corporation Act of 1983 by stating that it is a benefit corporation in its articles of incorporation.
- 2) **Existing Business.** An existing corporation may amend its articles of incorporation to include a statement that it is a benefit corporation after a two-thirds vote of the shareholders. The Act also enables close corporations and professional corporations to elect benefit corporation status.
- 3) **Fundamental Transaction.** A business that wants to become a benefit corporation through a fundamental transaction (e.g. a merger or consolidation) must approve the transaction by a two-thirds shareholder vote.

The Additional Purpose

A benefit corporation must have a purpose to create “general public benefit” in addition to any other lawful purpose. The Act defines a general public benefit as a material, positive impact on society and the environment, taken as a whole, as assessed against a third-party standard.

A benefit corporation may also have a “specific public benefit” purpose. The Act includes the following non-exclusive list of specific public benefit purposes:

- 1) providing low-income or underserved individuals or communities with beneficial products or services;
- 2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the ordinary course of business;
- 3) preserving the environment;
- 4) improving human health;
- 5) promoting the arts, sciences or advancement of knowledge;
- 6) increasing the flow of capital to entities with a public benefit purpose; or
- 7) the accomplishment of any other particular benefit for society or the environment.

Changes in the Duties of Directors and Officers

The Act expands the duties of directors and officers from the traditional shareholder focused approach by requiring them to consider the long- and short-term effects of their decisions and resulting actions on the corporation’s various stakeholders. The interests

that must be considered are:

- (1) the shareholders of the benefit corporation;
- (2) the employees and work force of the benefit corporation, its subsidiaries, and its suppliers;
- (3) the interests of customers as beneficiaries of the general public benefit or specific public benefit purposes of the benefit corporation;
- (4) community and societal considerations, including those of each community in which offices or facilities of the benefit corporation, its subsidiaries or its suppliers are located;
- (5) the local and global environment;
- (6) the short-term and long-term interests of the benefit corporation, including benefits that may accrue to the benefit corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the benefit corporation; and
- (7) the ability of the benefit corporation to accomplish its general public benefit purpose and any specific public benefit purpose.

The Act provides clarity for directors with respect to their required considerations, but does not prescribe how the directors and officers should balance these interests in any particular instance. The decisions that the directors of a benefit corporation will face during the course of its business will be varied. The Act does not attempt the impossible task of prescribing the results of those decisions but focuses instead on ensuring that the interests of all of the corporation's constituencies are considered during the decision-making process.

A benefit corporation must have a designated benefit director who, in addition to the powers, duties, rights, and immunities of the other directors, is responsible for issuing his opinion on the company's performance and compliance with the Act and its public benefit purposes. A benefit corporation may also elect a benefit officer who is responsible for preparing the annual benefit report.

The shareholders and directors of a benefit corporation have the exclusive right to bring an action called a "benefit enforcement proceeding" against the corporation or its directors for failing to create general or specific public benefit, a violation of duty or standard of conduct under the Act, or a failure to meet the transparency requirements. Although subject to greater accountability, directors, officers and the corporation are not liable for monetary damages for any of the above actions, and instead, injunctive relief or similar equitable remedies are available.

Increased Transparency

Each year, an Illinois benefit corporation must publish a benefit report to inform both its shareholders and the public about its success in meeting its general and specific public benefit purposes.

To provide an objective basis for evaluating its social and environmental performance, the benefit corporation must select a comprehensive, credible, independent, and transparent third-party standard against which it can assess and measure how successfully it achieved its goals. There are numerous third party standards the

corporation may choose from such as B Impact Assessment, GRI, Green Seal, Underwriters Laboratories (UL), ISO2600 and Green America.

The report must include:

- > the opinion statement of the benefit director;
- > how it pursued and created a general public benefit that year;
- > if and how it pursued and created a specific public benefit;
- > any circumstances that hindered the pursuit of any benefit purpose;
- > the name and address of the benefit director and officer, if one exists;
- > the compensation of all directors during the year;
- > the name of each person who owns 5% or more of the outstanding shares of the benefit corporation;
- > a narrative description of how it chose its third party standard; and
- > a statement describing the connection between the organization behind the third-party standard and the benefit corporation.

If the benefit corporation is a close corporation, the Act also requires that the report describe any elected variance in the governance of the corporation.

The Act requires that the benefit corporation send the annual benefit report to each shareholder following the end of the fiscal year or at the same time it delivers any other annual reports to shareholders. The benefit corporation must also post all benefit reports to the public portion of its website; or if no website exists, it must provide a copy without charge to anyone who so requests.

Just as investors look to a company's financial statements to evaluate its financial performance, the annual benefit report provides consumers and investors with the information they need to evaluate a benefit corporation's social and environmental performance. This transparency helps to combat "greenwashing," which occurs when an organization portrays itself as "green," "responsible," or "sustainable" to attract socially and environmentally conscious consumers without following through on its commitment to sustainable business practices. A business organized as a benefit corporation is designed to be accountable to its public benefit purposes and therefore puts consumers and investors on notice that it will work toward achieving those purposes.

Conclusion

The Illinois Benefit Corporation Act enables socially responsible and mission-driven businesses in Illinois to elect a corporate form that addresses additional and specific needs to achieve greater social and environmental impact. New benefit corporations will have the advantages of increased clarity and legal protection for directors, maintenance of the corporate mission over time, attraction of capital and new investors and increased transparency for their shareholders and customers.

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