

NONPROFIT ORGANIZATIONS

ALERT

JANUARY
2013FOR PROFIT CORPORATIONS WITH A SOCIAL MISSION —
PENNSYLVANIA'S NEW BENEFIT CORPORATION ACT*By Cynthia G. Fischer and Sekou Q. Lewis*

A new Pennsylvania Benefit Corporation Act (the "Act") becomes effective on January 23, 2013. The Act authorizes a new type of corporation known as a Benefit Corporation. The Act is intended to provide entrepreneurs and investors who want to build and invest in businesses that operate in a socially and environmentally responsible manner with a vehicle that meets these objectives. While Benefit Corporations operate on a for-profit basis and pay income taxes, they are unique in that their directors must take into account social issues (e.g., employees, community, and environment) along with the bottom line when making corporate decisions. Pennsylvania is one of 12 states that has adopted similar legislation.

A Corporation with a Social Mission

Benefit Corporations are based upon traditional Pennsylvania business corporations. However, Benefit Corporations impose three additional unique requirements with respect to purpose, accountability and transparency:

1. *Purpose.* In addition to the traditional corporate purposes, the Benefit Corporation must have a purpose of creating a material positive impact on society and the environment.
2. *Accountability.* Directors and officers have redefined fiduciary duties that require consideration of non-financial interests, such as environment and community, when making decisions.
3. *Transparency.* The Benefit Corporation must report to the public the company's social and environmental performance assessed against a third-party standard that is comprehensive, independent, credible and transparent.

These three requirements allow Benefit Corporations to differentiate themselves from other types of entities in the market, and to provide clarity and legal protection to directors and officers.

**Benefit Corporations' Additional
Public Benefit Purpose**

Every Benefit Corporation must have a purpose of creating a "general public benefit." A general public benefit is "a material positive impact on society and the environment, as a whole, assessed against a third-party standard, from the business and operations of a Benefit Corporation."

Benefit Corporations may also elect to pursue one or more "specific public benefit" purposes. Examples of specific public benefits are serving underserved individuals or communities, promoting economic opportunity, preserving the environment, improving human health, promoting the arts and sciences, and any other particular benefit on society or the environment.

**Accountability — Extended Standards and
Duties of Directors and Officers**

The Act mandates that directors and officers consider other non-financial interests, such as employees, customers, community, environment, the company's short-term and long-term interest, and the company's ability to accomplish its public benefit purpose(s).

In addition, Benefit Corporations must elect a benefit director, who is responsible for evaluating the company and preparing the annual benefit report to the shareholders.

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Under the Act, actions against Benefit Corporations and directors and officers are limited to claims for failure to pursue or create the general or specific benefit purposes, or for a violation of a duty under the Act. Only shareholders and directors can bring these types of claims, and monetary damages are barred.

Transparency

Benefit Corporations are required to deliver to each shareholder an annual benefit report that describes whether the Benefit Corporation met the overall social and environmental goals as stated in its articles.

Each report must contain, amongst other information, the following:

- How the Benefit Corporation pursued its public benefit goal, whether the public benefit was created, and any circumstances that hindered the creation;
- An assessment of its overall social and environmental performance against a third-party standard;
- A statement of the benefit director describing whether the Benefit Corporation acted in accordance with its general or specific benefit purpose.

Benefit Corporations are required to deliver the benefit report to the Pennsylvania Department of State, and to post all benefit reports on the public portion of its website. If the Benefit Corporation does not have a website it must provide a copy, at no cost, to any person making a request.

Becoming a Benefit Corporation

A new corporation can become a Benefit Corporation by stating in its articles of incorporation that the corporation is a Benefit Corporation. An existing corpo-

ration can become a Benefit Corporation by either (i) amending its articles of incorporation to include a statement that the corporation is a benefit corporation, or (ii) undertaking a fundamental transaction (e.g., merger, consolidation, division, or share exchange). Either action typically requires at least a two-thirds vote of the shareholders. An unincorporated entity (such as a limited liability company or a limited partnership) may also become a Benefit Corporation, but such an entity must first convert to a corporation, which may trigger income tax consequences. ♦

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