

What NY's new benefit corporation law means for businesses and CPAs

By DOUGLAS E. SINGER, ESQ.

Move over C and S corporations: Gov. Andrew Cuomo recently signed into law a bill that allows for New York B corporations, a for-profit corporation that is required to make decisions based on the business' impact on the community, employees and the environment.

A new Article 17 of the Business Corporation Law, which authorizes benefit corporations, became effective Feb. 10. Companies that become benefit corporations are required to create a general public benefit—that is, benefit corporations must have a material positive impact on society and the environment as assessed against a third-party standard. The corporation may also have specific public benefit purposes, such as preserving the environment, promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business, or improving human health.

A company that becomes a benefit corporation should not be confused with a Certified B Corporation, which is promulgated by a nonprofit organization. Although both require corporations to meet certain comprehensive and transparent social and environmental performance and other standards, a corporation can be a benefit corporation without having been certified as a B Corporation, and vice versa.

Why become a benefit corporation?

A benefit corporation provides a way for a corporation that places a premium on social or environmental responsibility to formalize those values. Being a benefit corporation also connects that company to a community of like-minded companies, and may provide marketing and public perception benefits as well.

A benefit corporation may be able to attract customers or investors for whom supporting companies with a social commitment is a priority. Employees of a benefit corporation may provide a higher standard of performance or loyalty to the corporation when they identify with the corporation's benefit purposes, and a benefit corporation can provide protections to a corporation's directors and officers in their decision making.

A benefit corporation provides a way for a corporation that places a premium on social or environmental responsibility to formalize those values. Being a benefit corporation also connects that company to a community of like-minded companies, and may provide marketing and public perception benefits as well.

The new state law requires a benefit corporation to pursue and take into consideration goals and values beyond raising revenue or creating value for shareholders. The intent is to provide protection for directors and officers of a benefit corporation who, in a typical for-profit corporation could be liable for pursuing such other values at the expense of profit. In a benefit corporation, however, directors and officers could have liability to its shareholders for failing to properly take into account the corporation's stated goals and values.

In making decisions, benefit corporation directors and officers are required to consider the effects any action may have on—

- the corporation's ability to accomplish its general and specific public benefit purposes;
- the corporation's shareholders;
- the employees and workforce of the corporation and suppliers;
- the interests of customers as beneficiaries of the corporation's public benefit purposes;
- community and societal considerations, including the communities in which offices or facilities of the corporation and its suppliers are located;
- the local and global environment; and
- the short- and long-term interests of the corporation.

How does a corporation become a benefit corporation?

A new corporation can be a benefit corporation from the time of its formation by stating in its Certificate of Incorporation that it

is a benefit corporation and that it has a purpose of creating a general public benefit. It may also include specific public benefit purposes.

An existing for-profit corporation in New York can become a benefit corporation by amending its Certificate of Incorporation with similar provisions. An amendment to become or cease being a benefit corporation requires approval by at least 75 percent of the votes that shareholders are entitled to cast.

Reporting and transparency

The benefit corporation statute introduces a key concept called a third-party standard—a recognized standard for defining, reporting and assessing general public benefit, which must be developed by a person independent of the corporation. It must also be transparent, which means that the identity of the persons who developed and control changes to the standard and the process by which those changes are made, the factors considered when measuring the performance of the business and the relative weightings of those factors, must all be made publicly available.

A benefit corporation is required to prepare an annual benefit report which it must deliver to shareholders, post on its website and file with the New York Department of State. The annual report must include, among other things, a narrative description of the process and rationale for selecting the third-party standard used to prepare the annual report, an assessment of the corporation's performance relative to its general public benefit purpose against the third-

party standard, the compensation the corporation paid to each director, and the name of each person who owns 5 percent or more of the corporation's stock.

However, the report filed with the state and posted on the corporation's website may omit the compensation paid to directors and any financial or proprietary information otherwise included in the report.

The law does not prescribe who creates the third-party standard or performs the assessment, but it does amend Section 720 of the Business Corporation Law to provide that directors and officers may be held accountable for failing to pursue the corporation's public benefit purposes or failing to deliver or post the annual report.

What it means for CPAs

A direct result of the new Benefit Corporation Law is that CPAs—when advising clients about choosing among different forms of entities—should add benefit corporations to that discussion in appropriate cases. For those corporations that go the benefit corporation route, CPAs will need to be able to advise the corporation's directors and officers about their decision-making duties and the corporation's annual reporting requirements.

Benefit corporations may present new opportunities for CPAs. For example, CPAs might become involved in developing third-party standards for benefit corporations, perform assessments for benefit corporations to measure their performance against third-party standards or assist in preparing annual benefit reports. CPAs' experience in formulating third-party standards for reviews and audits, in consistently applying those standards in auditing, and in preparing and analyzing financial statements could become very relevant in developing processes and procedures for performing assessments.

Douglas E. Singer, Esq., is a principal in the law firm of Falcon & Singer P.C., with offices in Scarsdale, New York and Montvale, N.J. He has been practicing corporate law for nearly 35 years and can be reached at (914) 723-3919 or dsinger@falconsinger.com.

Look for **The Trusted Professional** on the Web

A new online edition of *The Trusted Professional*

Visit www.trustedprofessional.com