

## Benefit Corporation Legislation in New York: What's the Benefit?

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### What is a Benefit Corporation?

A benefit corporation is a new type of corporation, currently authorized in seven states, that is chartered to be socially and environmentally conscious as well as to make a profit.<sup>1</sup> A benefit corporation has a corporate responsibility to create a positive impact on society and the environment and a fiduciary duty to consider more than just profit when making decisions. Benefit corporations must report on the public benefits they create as well as their financial performance.<sup>2</sup>

### What States Have Passed Benefit Corporation Legislation?

As of October 2011, seven states have passed benefit corporation legislation: California, Hawaii, Virginia, Maryland, Vermont, New Jersey, and New York.<sup>3</sup> New York's law, however, still awaits the signature of Governor Cuomo to take effect.

### What Does New York's Benefit Corporation Law Require from Businesses?

New York's law, passed in 2011, requires three things of a benefit corporation<sup>4</sup>:

- (1) Corporate Purpose: A benefit corporation must have a corporate purpose that includes creating general public benefit. This is defined in the legislation as "a material, positive impact

on society and the environment.”<sup>5</sup> The corporate purpose is the main focus of the company. It may limit some of the corporation’s other purposes, such as profit-making, and takes priority over any inconsistent purpose.<sup>6</sup>

- (2) Considering More Than Profits: The Board of Directors of a benefit corporation must consider the effects of its actions on the corporation’s public benefit purpose, its shareholders, its employees, subsidiaries and suppliers, the interests of its customers and beneficiaries, community and societal considerations, the local and global environment, and the short and long term interests of the benefit corporation.<sup>7</sup>



- (3) Annual Benefit Report: Lastly, a benefit corporation is required to deliver an annual report to its stockholders. In this report, corporations must include: how the benefit corporation pursued general public benefit during the preceding year and how much public benefit was created, how the corporation pursued the specific public benefit in its charter and how much benefit was created, and any circumstances that hindered the corporation’s ability to enhance public benefit.<sup>8</sup> The report must also assess the corporation’s overall social and environmental performance.<sup>9</sup>

### **How Does Incorporation Work in New York State?**

Formerly in New York State, businesses could operate as one of six different types: a business corporation, not-for-profit corporation, limited liability company, general partnership, limited partnership, or sole proprietorship.<sup>10</sup> If Governor Cuomo signs the bill, businesses will be given a seventh option – the benefit corporation.

A business corporation can incorporate under New York State law by filing a Certificate of Incorporation under Section 402 of the Business Corporation Law.<sup>11</sup> Businesses must pay a filing fee of \$125 as well as the additional tax on shares.<sup>12</sup> Corporations may amend their Certificate of Incorporation under Section 805 of the Business Corporation Law by filing a Certificate of Amendment and paying a \$60 filing fee.<sup>13</sup> The Certificate of Amendment can amend any of the information found in the Certificate of Incorporation including name change and revision of the purpose clause.<sup>14</sup>

### **How Can a Business Incorporate as a Benefit Corporation?**

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A business incorporating for the first time can simply elect to incorporate as a benefit corporation, instead of another type of business.<sup>15</sup> The procedure is the same as incorporation for any other type of corporate structure.<sup>16</sup> An existing business can elect to become a benefit corporation by amending its Certification of Incorporation and passing the amendment by the minimum state vote<sup>17</sup> (usually a two-thirds majority vote of shareholders<sup>18</sup>).

### **Can a Business in New York State Incorporate as a Benefit Corporation Today?**



No. Even though the S-79 Benefit Corporation Bill passed both the New York State Senate and House, it still sits on Governor Andrew Cuomo's desk.<sup>19</sup> The benefit corporation legislation needs the signature of the governor before it can take full effect.<sup>20</sup>

### **What is the Idea behind the Legislation?**

As Heather Van Dusen from B Lab states, "the current corporate structures in America don't work for the kind of economy that we need to move towards."<sup>21</sup> The new benefit corporation legislation allows businesses to move away from current corporate structures and toward a structure that allows companies to be more focused on public benefits and less focused on the bottom line.<sup>22</sup> Benefit corporation laws remove a key barrier: the legal duty of a corporation to maximize shareholder returns, even at the expense of the public good.<sup>23</sup> With a typical corporation, a shareholder can sue a company for reducing its profit margin to promote the public good. With a benefit corporation, the company is free to pursue the public good as well as private profits.<sup>24</sup>

### **Why Would a Business Want to Become a Benefit Corporation?**



Benefit corporation legislation makes it possible for an environmentally or socially conscious business to merge its beliefs with the company's business model. As discussed above, companies incorporated as a benefit corporation have a legal duty to consider other factors besides profit when making business

decisions.<sup>25</sup> This provides clarity to the company's Board of Directors and other officers that their fiduciary duty includes pursuing the corporation's public benefit purpose. Even when companies

experience liquidation – when the company is terminated and its assets and property are redistributed – decisions must be focused on the company’s stated public benefit. This also gives benefit corporations legal protection when promoting the non-financial interests of its employees, the community, and the environment.<sup>26</sup>

Additionally, businesses may want to become benefit corporations to increase accountability to their investors.<sup>27</sup> Benefit corporations expand shareholder rights by giving them the right to enforce the new definition of fiduciary duty and to hold the company to its new set of standards.<sup>28</sup>

Lastly, benefit corporations can use their classification as a competitive advantage. It differentiates the company from others in the marketplace in a way that the “organic” label does. Where many companies claim to be environmentally and socially responsible, benefit corporations can prove it.<sup>29</sup>

### **Why Are Benefit Corporations Important?**

Benefit corporation legislation is a huge step forward in the sustainable business movement.<sup>30</sup> Benefit corporations can shape their business model to serve both shareholders and society, and can consider the impact of their decisions on multiple stakeholders including employees and the local community.<sup>31</sup> Additionally, benefit corporation legislation shows that company profit and public benefit are not mutually exclusive.<sup>32</sup> Benefit corporations can show other companies that socially and environmentally friendly business practices can actually improve a company’s profitability.<sup>33</sup>



Benefit corporations ‘legitimize [the]...development of the sustainable business movement by providing legal recognition for businesses that adopt higher standards of corporate purpose’ to promote public benefit.<sup>34</sup> Additionally, they promote trust in business by showing the public that businesses are willing to be held accountable for their actions and want to work to promote environmental and societal benefits as a part of their business practice.<sup>35</sup> Lastly, benefit corporations further the development of standards for determining the overall social and environmental performance of a business.<sup>36</sup>

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<sup>1</sup>Buffalo First, Benefit Corporations (2011), <http://www.buffalofirst.org/bcorps>.

<sup>2</sup> William H. Clark Jr., *Benefit Corporation – Business FAQs*, <http://www.bcorporation.net/resources/bcorp/documents/Benefit%20Corporation%20-%20Business%20FAQs-1.pdf>.

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<sup>3</sup> *Passed B Corp Legislation*, B Lab (2011), <http://www.bcorporation.net/publicpolicy>.

<sup>4</sup> New York State Senate, S79-2011: Authorizes the incorporation of benefit corporations, §§1706-08, (Jan. 5, 2011) *available at* <http://open.nysenate.gov/legislation/bill/S79-2011>.

<sup>5</sup> *Id.* at *Summary of Provisions*.

<sup>6</sup> *Id.* at §1706.

<sup>7</sup> *Id.* at §1707.

<sup>8</sup> *Id.* at *Summary of Provisions*.

<sup>9</sup> *Id.*

<sup>10</sup> Department of State, NYS Division of Corporations, State Records and UCC, *Business Corporations FAQs* (last visited Oct. 20, 2011), <http://www.dos.ny.gov/corps/bcfaq.asp#busoper>.

<sup>11</sup> Department of State, NYS Division of Corporations, State Records and UCC, *Business Corporations Filings* (last visited Oct. 20, 2011), <http://www.dos.ny.gov/corps/buscorp.html#certinc>.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> New York State Senate, S79-2011: Authorizes the incorporation of benefit corporations, §1703, (Jan. 5, 2011) *available at* <http://open.nysenate.gov/legislation/bill/S79-2011>.

<sup>16</sup> William H. Clark Jr., *Benefit Corporation – Business FAQs*, <http://www.bcorporation.net/resources/bcorp/documents/Benefit%20Corporation%20-%20Business%20FAQs-1.pdf>.

<sup>17</sup> New York State Senate, S79-2011 at §1704.

<sup>18</sup> *Benefit Corporation – Business FAQs*, *supra* note 16.

<sup>19</sup> Jay Coen Gilbert, *Clinton and Cuomo Make History*, B Lab Blog (Sept. 20, 2011), <http://blog.bcorporation.net/2011/09/clinton-and-cuomo-make-history/>.

<sup>20</sup> *Id.*

<sup>21</sup> *New Legislation Opens State to Benefit Corporations*, *supra* note 21.

<sup>22</sup> *Id.*

<sup>23</sup> New York State Senate, S79-2011 at *Justification*.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at §1707.

<sup>26</sup> *Id.* See also New York State Senate, S79-2011 at §1707.

<sup>27</sup> *Benefit Corporation – Business FAQs*, *supra* note 28.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Sheldon Silver, *Assembly Passes Legislation to Allow Benefit Corporations in New York*, New York State Assembly News Release, June 17, 2011, *available at* <http://www.assembly.state.ny.us/Press/20110617a/>.

<sup>33</sup> *Id.*

<sup>34</sup> *Benefit Corporation – Business FAQs*, *supra* note 28.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*