



CT Benefit Corporations

Effective October 1, 2014, Connecticut implemented a statutory framework for Benefit Corporations, enacted as an alternative to conventional business corporations. Benefit Corporations offer most of the features of a traditional corporation, with certain distinct characteristics.

Overview

- Benefit Corps can be created de novo, or
- An existing corporation can elect to convert to a Benefit Corp.
- Requirements for merger of existing Benefit Corp. with non-Benefit Corp.

Benefit Corporations must have a Specific Public Benefit

Benefit Corporations may adopt a “Legacy Preservation Provision”

Directors of Benefit Corporations have an additional consideration in their responsibilities by evaluating actions based on their Benefit Corp status in addition to the financial return to shareholders

Public companies must include a “Benefit Director” on their board responsible for compliance with their Benefit Corp. requirements.

Shareholders may bring a benefit enforcement proceeding against the corporation or its officers or directors to remedy a failure by the company to pursue or create a public benefit.

Each Benefit Corp must adopt a third-party standard by which to assess the company’s pursuit of a public benefit, and then prepare an annual report to the company and its shareholders that must be posted on its website.

Creation or Conversion of Benefit Corp.

For de novo creation, the Certificate of Incorporation should state that it is a Benefit Corp. CGS Section 33-1353. To convert from a business corporation to Benefit Corp, the company must amend its certificate of incorporation to state that it is a Benefit Corp. CGS Section 33-1354(a). The existing corporation must obtain prior approval of shareholders and

directors per the existing Certificate and bylaws of the company and, in addition, obtain a “Minimum Status Vote” as defined in CGS Section 13-1351(11).

Specific Public Benefit

A primary objective and responsibility of a Benefit Corporation is to provide a “general public benefit”—as opposed to a traditional corporation, for which the principal purpose is to enhance shareholder value. CGS Section 33-1357. “General public benefit” is statutorily defined as “a material positive impact on both society and the environment, taken as a whole, as assessed against a third-party standard, from the business and operations of a benefit corporation.” CGS Section 33-1351(7). Additionally, the Company may elect (but is not obligated) to identify “specific public benefits” in its certificate of incorporation. CGS Section 33-1351(13). Some of the “specific public benefits” include: “(a) [p]roviding low-income or underserved individuals or communities with beneficial products or services, (b) promoting economic opportunity for individuals or communities... (c) protecting or restoring the environment, (d) improving human health, € promoting the arts, sciences or advancement of knowledge; (f) increasing the flow of capital to other benefit corporations or similar entities whose purpose is to benefit society or the environment, and (g) conferring any other particular benefit on society or the environment.”

If the Company elects to identify a specific public benefit in its certificate of incorporation, the Board of Directors will have an obligation to consider the effects of corporate action on the ability of the Benefit Corporation to accomplish said specific public benefit(s).

For special rules for mergers between a Benefit Corp and a non-benefit Corp see CGS Section 33-1354(b).

Legacy Provisions

Connecticut is the only state to adopt a “legacy preservation” provision with respect to Benefit Corporations. CGS Section 33-1355. The Company can elect to be subject to the legacy preservation provision after two (2) years of existence, as long as there is a unanimous vote of all shareholders. If the legacy provision is approved, the Company will remain a benefit corporation in perpetuity. Essentially, this is a mechanism to ensure that the Company continues to provide social and environmental benefits into the future, regardless of any changes in management or ownership. If the Company does not elect the legacy preservation provision, it can revert to a standard business corporation at any time after approval by its shareholders and board per its bylaws and Certificate of Incorporation and a Minimum Status Vote. CGS Section 33-1356(a) If the legacy preservation provision is adopted, mergers or share exchanges will only be permitted if the surviving entity is a Benefit Corporation. CGS Section 33-1356(c). Even more restrictive—if the legacy preservation provision is in place, the Benefit Corporation will be prohibited from selling or disposing its assets to a traditional business entity. CGS Section 33-1356(d).

Benefit Directors

The Benefit Corporation statutes provide for the designation of a “Benefit Director” of the corporation, which is mandatory for a publicly traded Benefit Corporation, but optional for a non-publicly traded Benefit Corporation. CGS Section 33-1359. If the board of directors of the Company decides to create the position of Benefit Director, the director will be elected and can be removed in the same manner as directors under general corporate statutes. The Benefit Director must be “independent”—meaning there shall be no material relationship between the director and The Company or one of its subsidiaries. A Benefit Director will not be personally liable for any act or omission in his or her capacity as Benefit Director, unless the act or omission constitutes self-dealing, willful misconduct or knowing violation of the law.

If appointed, the Benefit Director will be obligated to prepare an annual benefit report for the shareholders of the corporation. Even in situations where a non-publicly traded Benefit Corporation chooses not to appoint a Benefit Director, the annual report will still be required. The Company can, instead, create a position called a “benefit officer” who will be responsible for (i) overseeing the Company’s pursuit of its public benefit and (ii) preparing the annual report. CGS Section 3301361. The annual benefit report shall include an opinion of the Benefit Director as to (a) whether the Benefit Corporation acted in accordance with its general and/or specific benefit purpose(s) during the preceding year, (b) whether the directors and officers complied with their obligations to the Benefit Corporation, and (c) if the Benefit Director concludes that the corporation or directors failed to comply with (a) and (b), a description of the ways in which they failed to comply. CGS Section 33-1359(c).

Enforcement Actions

The statutes provide a distinct cause of action against a Benefit Corporation or individual directors and officers for failure to pursue the general and/or specific public benefits of the corporation. A “benefit enforcement proceeding” can be brought by the Company itself, or derivatively by a shareholder holding at least 5% of the shares of a particular class. The Company can elect to include in its certificate of incorporation or bylaws other individuals who would be authorized to bring a benefit enforcement proceeding. It appears that a benefit enforcement proceeding is limited to seeking injunctive relief, as the corporation and its officers/directors cannot be held personally liable for monetary damages.

Annual Benefit Report

All Benefit Corporations are required to prepare an Annual Benefit Report which details the company’s performance as assessed against a third-party standard adopted by its directors and shareholders¹. The third-party standard can be selected or changed at any time by the greater of (A) a majority of the Company’s directors in office or (B) the number of directors designated

¹ The statutes do not provide much insight on the selection of an appropriate “third-party standard” other than specifying that it be developed by an “independent” entity. Additionally, the Report is not required to be certified or audited by a third party. There are several organizations that provide Benefit Corporation standards free of charge (<http://benefitcorp.net/third-party-standards/list-of-standards>).

to vote on such election in the certificate or bylaws.² The Report is designed to track the progress of the corporation's pursuit of its general and specific public benefits. The Report must be provided to each shareholder and posted and maintained on the company's website. The requirement of publishing the Report provides transparency to the shareholders and the public the Company's actions.

A sample Annual Benefit Report is included in these materials.

The "B Impact Assessment" appears to be the most popular third-party standard currently available to Benefit Corporations. The standard can be accessed at www.bimpactassessment.net. The B Impact website allows companies to take a full assessment (which takes approximately 90 minutes), wherein the company provides pertinent information and B Impact produces a "report" and score on a scale from 0 – 200. The B Impact "report" is not the same as the Annual Benefit Report required pursuant to the statute. However, it appears that Benefit Corporations reference and incorporate the B Impact Assessment results into their annual reports. Examples of Benefit Corporation Annual Benefit Reports are available to review at www.benefitcorp.net/reporting-requirements.

If selected and approved by the Company, the initial B Impact Assessment would become the Company's third-party standard—it is basically a baseline test, that would show the Company's current performance. Once established, the Company's B Impact Assessment baseline impact can be compared to other companies, and the Company can strive to improve its impact over time. Each successive Annual Report would contain an analysis of how the Company enhanced its public impact versus the initial baseline, and strategies for further improving performance into the future. If the Company decides to become a Benefit Corporation, it is recommended that someone familiar with the company's structure and business operations partake in the 90 minute evaluation to determine if the B Impact Assessment is appropriate for the Company, and if so, then to create the initial baseline standard.

A list of other third party standards is also enclosed in these materials.

The B Impact Assessment is related to www.bcorporation.net ("BC"). BC is a marketing service and online community, designed to bring Benefit Corporations together and promote them to the public. BC designates certain Corporations as "Certified B Corps" under their evaluations system (this is a private designation, with no impact on legally registered Benefit Corporations). There are three requirements in order for BC to certify that a particular Corporation is a Certified B Corp: (i) it must earn a minimum score of 80 on the B Impact Assessment, (ii) it must adopt the legal requirements for benefit corporation status in the state in which the B Corp is located, and (iii) it must pay the required annual fee, which is based on a scale of the B Corp's annual sales. The fee ranges from \$500 per year for a company reporting less than \$1,000,000 annual sales to \$50,000 per year for a company reporting over \$1,000,000,000 in annual sales. The BC website currently includes approximately 1,200 "Certified B Corps." BC touts the value of becoming a B Corp for reasons such as (i) differentiating B Corporations from other businesses that simply claim to provide public

² Alternatively, the Company could delegate this power to shareholders, if that authority is provided in its amended certificate of incorporation or bylaws.

benefits, (ii) informing investors who are searching for B Corporations, (iii) attracting certain employees—particularly millennials—who are interested in working for companies that promote the greater good, and (iv) the ability to partner with other B Corps.

Affiliates/Subsidiaries

The Connecticut statutes are silent on any potential restrictions on the structure and/or activities of subsidiaries of a Benefit Corporation. The statutes do not require the Company's subsidiaries to also become Benefit Corporations if the Company elects to do so. However, the statutory mandate that the Company would have to provide a "general public benefit" would arguably trickle down to its subsidiaries. This could prove to be a controversial issue when analyzing the Company's obligations to its subsidiaries, specifically in the context of a potential benefit enforcement proceeding, in which the Company's obligations to its shareholder are weighed against its responsibilities to its subsidiaries.

Why Choose Benefit Corp Status?

There are certain advantages that a Company might realize if it elects Benefit Corporation status. The particularly fine-tuned mission statement and mandate of a Benefit Corporation to provide for the public good will necessarily create a focused approach to the Company's business dealings. The Annual Benefit Report requirement will provide the public with transparency concerning its actions, and will hold the officers and directors accountable for how they run the company.

The Company's shareholders will be provided with a level of certainty with respect to the company's beneficial objectives and practices. This is particularly applicable with the availability of the benefit enforcement proceedings, which can be brought by the shareholder if they perceive that the Company and its directors are not properly pursuing their stated objectives. The directors of the Company should be aware that they could potentially be sued by the shareholders for failing to abide by the specified objectives (although personal liability is very limited). While the Benefit Corporation statutes limit personal liability of directors, the aggravation and expense of possible litigation against directors are nonetheless necessary considerations.

The legacy preservation provision may be the most noteworthy feature of the Benefit Corporation framework. If the Company were to enact this provision, it will ensure that the company continues to pursue beneficial social and environmental objectives regardless of the board or officer composition. The statutory restrictions with respect to the legacy provision will guarantee that the Company's assets will continue to be used for socially beneficial purposes by limiting the sale, lease, exchange or other disposition of those assets exclusively to charitable organizations or other benefit corporations. This is important for socially conscious investors who want to make sure that their investments in the Company will be used in the long term, perhaps even after the investor no longer has an interest in the Company. However, the limitations on asset transfers that accompany enacting the legacy preservation provision could be unduly burdensome.

The Company may also realize certain marketing and investment advantages as a result of the Benefit Corporation structure. The classification of a company as a Benefit Corporation should make that organization easily identifiable to government agencies, joint venture partners, and others who are determined to support socially aware companies. This could be magnified if the Company chooses to register with bcorporation.net. Doing so might increase its market presence, provide opportunities for collaboration with other B Corps, and attract potential employees.

The transparency of the Annual Benefit Report could also help in this regard; as could the availability of benefit enforcement proceedings, which could attract investors with the mechanism to compel the Company to follow through on its stated goals. Ultimately, the classification as a Benefit Corporation could allow the Company to distinguish itself from certain traditional for-profit companies that claim to have the same vision. As more companies structure themselves as Benefit Corporations, the Company might encounter significant networking opportunities with likeminded entities.

The Company must also consider certain potential shortcomings of Benefit Corporations before moving forward. For instance, there will be additional expenses associated with running a company as a Benefit Corporation instead of a traditionally incorporated company. Preparation of the Annual Benefit Report, as well as implementing and/or modifying the “third-party standard” by which to assess the company’s pursuit of public benefits will necessarily be an added expense. The Company will also need to decide whether to pay for the B Corp registration through www.bcorporation.net. The decision to appoint and employ a Benefit Director or Benefit Officer could be another possible expense. Operating as a Benefit Corporation could potentially restrict productivity. Adherence to the general and specific public benefits must be a consideration in business decisions and the day-to-day operations of the company.

The Company’s organizers or board must evaluate the pros and cons of the Benefit Corporation structure. One consideration might be whether the Company can realize the favorable aspects of a Benefit Corporation under its current organization. Many of the advantages of the Benefit Corporation scheme are aimed towards widely-held companies that want to ensure that its business dealings are consistent and focused well into the future, perhaps after the original organizers have stepped aside. In the case of closely held companies, it may be possible for those in charge to achieve the same results by making socially and environmentally conscious decisions outside the scope of the statutory framework. However, there are legitimate marketing and business advantages of a Benefit Corporation that could outweigh the costs and restrictions contained in the statutes—this would be particularly true if the Company rejected the legacy preservation provision, which would allow the company to revert to a standard corporation if the benefits are not realized. As the number of Benefit Corporations increase world-wide and more jurisdictions enact the corporate framework, the advantages and awareness of the corporate structure are bound to expand as well.

The true benefits and deficiencies of Benefit Corporations are not yet firmly established. This analysis is based on a review of the statutes as enacted in October 2014. Case law in

Connecticut and other jurisdictions is extremely limited, and was not taken into consideration in the preparation of this analysis.

Other Resources

Social Enterprise Trust, an organization in downtown Hartford, was one of the original proponents of the Benefit Corp statutes. They have staff and office space for startups, and can act as a resource for companies interested in Benefit Corp status, or for existing Benefit Corps who need assistance with their annual reporting requirements. www.socialenterprisetrust.org

Their affiliated website www.ctbenefitcorp.com also has additional information and brief summaries of the statutes.