

CORPORATE COUNSEL

New Jersey Enacts B Corporation Law

By Steven M. Saraisky

On March 1, with little fanfare, New Jersey Gov. Christie signed into law legislation creating a new corporate form — the “benefit corporation” or “B corporation.” A benefit corporation is a corporation that performs a social or environmental mission in addition to its for-profit objectives. New Jersey was the third state in the nation to enact such legislation, after Maryland and Vermont. Virginia passed similar legislation in late March. A number of other states are considering similar bills.

In recent years there have been trends towards “green business,” “sustainable business models” or “social enterprise models” of conducting business. The New Jersey B corporation legislation picks up on these trends, allowing business to be structured in a way that demonstrates their owners’ commitment to such ideals.

Certified B Corporation

Prior to the recent state level legislation, a company could become a “Certified B Corporation” by applying and being approved as such by a nonprofit certifying entity known as B Lab. B Lab is “trying to

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use the power of business to solve social and environmental problems,” and to build a community of Certified B Corporations. See www.bcorporation.net.

B Lab has its own approval process, and to qualify as a Certified B Corporation, a company must (1) pass a B corporation impact rating system, (2) adopt changes to the company’s governing legal documents to incorporate its social and/or environmental mission, and (3) sign a term sheet to make its certification official. This process continues to be available through B Lab, but it does not offer the same protections as becoming a state-registered B corporation. One of the primary potential benefits of the New Jersey legislation is the protection of the directors and officers for making corporate decisions that take into account the social and other benefits that follow from the decision.

New Jersey Legislation

Under the New Jersey legislation, a new corporation can become a benefit corporation by filing a traditional certificate of incorporation and stating that it is a benefit corporation. N.J.S.A. 14A:18-2. An existing corporation can convert to a benefit corporation by filing an amendment to its certificate of incorporation. N.J.S.A. 14A:18-3.

A benefit corporation must have as its purpose the creation of a general public benefit. N.J.S.A. 14A:18-5. A “general public benefit” is defined as “a material positive impact on society and the envi-

ronment by the operations of a benefit corporation through activities that promote some combination of specific public benefits.” N.J.S.A. 14A:18-1. “Specific public benefits” include “(1) providing low-income individuals or communities with beneficial products or services; (2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal 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; and (7) the accomplishment of any other particular benefit for society or the environment.” A benefit corporation has a number of additional compliance requirements to demonstrate a public benefit. The benefit corporation must elect an independent director — the “benefit director” — whose job is to prepare an annual report as to whether the benefit corporation acted in accordance with its public benefit purposes and whether the directors and officers complied with their obligations. N.J.S.A. 14A:18-7. A benefit corporation also can designate a “benefit officer,” whose management duties must relate to the creation of general or specific public benefits. N.J.S.A. 14A:18-9.

The benefit corporation is required to deliver an annual “benefit report” describing, in accordance with a third-party standard, the ways in which the benefit corporation pursued general or specific public benefits, the extent to which such

public benefits were created, and any circumstances hindering the creation of such public benefits, as well as the statement of the benefit director. N.J.S.A. 14A:18-11.

Finally, the benefit corporation is required to list in the benefit report the names and contact address for the company's benefit director and benefit officer (if any), the compensation paid to each of its directors and the names of each person owning 5 percent or more of the outstanding shares of the benefit corporation. N.J.S.A. 14A:18-11. The annual benefit report is filed with the state (subject to a \$70 filing fee), must be provided to all shareholders within 120 days following the end of the fiscal year, and must be posted on the company's website (though that posting can omit financial and proprietary information). Clearly, the compliance requirements for a benefit corporation are greater than for a traditional business entity.

Pros and Cons

The question that clients certainly will have is: "To be a B, or not to be a B?" In other words, when should a client choose (and when should attorneys recommend) to structure a business as a B corporation? For certain businesses — such as environmental remediation firms, low-income housing developers or perhaps even law firms that serve B corporations — the "public benefit" might easily fit with the main product or service they already provide. Here are some of the pros and cons that will factor into the decision.

Possible advantages of being a B corporation include:

Exclusivity: Being a B corporation may provide a marketing or economic advantage due to the owners' commitment to providing social and environmental public benefits. B corporations may prefer to do business with other B corporations instead of traditional companies, or may be willing to pay a premium for their goods and services. Decisionmakers at non-B corporations may feel this way, too.

Reduced Exposure: As mentioned above, the language of the statute appears to reduce the exposure that a B corporation's directors and officers might face

for making decisions that favor social or environmental benefits over shareholder benefits. In fact, when taking a corporate action, the directors of a B corporation are required to consider the effects upon shareholders, employees, suppliers, customers, beneficiaries of the corporation's public benefit purpose, the community and the environment. N.J.S.A. 14A:18-5; 14A:18-6. Directors are not required to give priority to any one person or group over another. *Id.* For example, if the company took an action that benefitted the community but caused the company to lose significant sums of money, the directors' actions arguably would be justified under the statute, and the directors arguably would have protection from shareholder claims.

Tax Benefits or Other Incentives: It is possible that federal, state and/or local governments will pass tax incentives that benefit B corporations. The Philadelphia City Council, for example, passed a "sustainable business tax credit" for certified sustainable businesses located in the city of Philadelphia. For tax years 2012 through 2017, a maximum of 25 Certified B Corporations that are also classified as "certified sustainable businesses" can receive a tax credit of \$4,000 to be applied against the business privilege tax. This appears to be the only example of such tax incentives to date, but other jurisdictions could follow suit. It is also possible that governments could create set-asides for B corporations, in the same manner as they have for woman- and minority-owned businesses.

Some of the possible disadvantages of being a B corporation include:

Increased Compliance: For many business owners, the requirement to have a benefit director, file an annual benefit report, which includes compensation figures, and pay an additional annual fee to the state will be a strong disincentive to utilize the B corporation form.

No LLCs: The New Jersey legislation allows corporations to be B corporations, but does not apply to LLCs or other limited liability entities. LLCs are popular due to their flexibility and tax benefits, and business owners might well choose the LLC form over the B corporation form.

Although a B corporation also can be an S corporation for tax purposes, LLCs have certain benefits over S corporations.

Increased Exposure: The public benefit purpose of a benefit corporation and the directors' and officers' duties can be enforced in a "benefit enforcement proceeding," (see N.J.S.A. 14A:18-1; 14A:18-10), which is a risk not faced by directors and officers of non-B corporations. Such a proceeding can be brought by the B corporation itself, or derivatively by a shareholder, director, the holders of 10 percent or more of the equity of the benefit corporation's parent entity or any other person specified in the company's certificate of incorporation. N.J.S.A. 14A:18-10. Directors are protected from personal liability, absent self-dealing, willful misconduct or a knowing violation of law. N.J.S.A. 14A:18-7(e). Moreover, a director or officer is not personally liable for money damages if the corporation fails to create public benefits. N.J.S.A. 14A:18-6(e) and 14A:18-8(c). Yet despite these limitations, actions for injunctive relief or to force specific corporate actions seem possible.

This author would suggest that when the advantages above outweigh the disadvantages, a client could consider structuring as a B corporation. A Certified B Corporation (certified by B Lab) seems to offer only some of the advantages above (i.e., cachet and perhaps tax advantages), so in some respects it is a less desirable choice. However, it appears that an LLC can qualify as a Certified B Corporation, so this may be a way to structure the business as an LLC and also as a benefit company.

To date, there have been relatively few B corporation filings. It may be that the B corporation option becomes a niche choice of entity that is of interest only in selected circumstances, rather than an entity choice that will have widespread utility. On the other hand, if there are greater benefits associated with B corporations, for example, because governments offer greater tax incentives or set-asides, then business owners will have more compelling reasons to consider B corporations. For now, B corporations are an interesting new entity choice available in New Jersey. ■