Benefitting business

How a benefit corporation can assist for-profit companies with sustainable values **Interviewed by Kristen Hampshire**

With the growth of the sustainable business model and conscientious companies' focus on the triple bottom line — people, planet, profit — a new corporate structure is emerging that speaks to these values.

The benefit corporation model allows sustainably minded companies to adopt a structure that frees them of the traditional corporation's requirement to maximize profit and shareholder returns. Benefit corporations can stay true to their socially responsible missions and still earn a profit, two things that used to be at odds, says Gabrielle Sellei, an attorney at Semanoff Ormsby Greenberg & Torchia, LLC.

"Unlike a nonprofit entity, a benefit corporation may issue stock to investors, offer stock option plans to employees and in all other respects operate as a traditional corporation," Sellei says. "The benefit corporation is a market-driven response to the recent and dramatic growth of the sustainable business enterprise, and legislation across the country is recognizing that companies no longer want to make the choice between doing well and doing good."

The opportunity to elect benefit corporation status gives companies the leverage to continue their mission to create a public benefit while capitalizing on a free market economy. At press time, seven states — including New Jersey and New York — had adopted laws creating benefit corporations, with legislation pending in Pennsylvania.

Smart Business spoke with Sellei about how a benefit corporation works and what considerations a business should review before moving toward this model.

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What is a benefit corporation?

A benefit corporation allows — and requires — its directors to take into account public benefits that include the environment, the community and other constituents, some of whom may not be directly connected to the entity. Under the proposed Pennsylvania law, any corporation that elects benefit corporation status must, in addition to its business purpose, also have a purpose of creating a 'public benefit.'

The public benefit can be either a 'general' public benefit, defined as bestowing a material positive impact on society and the environment, or it can be one of the specific benefits enumerated in the proposed statute. These include providing low-income individuals or communities with products or services; promoting economic opportunity beyond creating jobs in the ordinary course of a company's business; preserving the environment; improving human health; promoting the arts and sciences; increasing the flow of capital to public benefit entities; or conferring any other specific benefit on society or the environment. Under the proposed legislation, the definition of even a specific public benefit is quite broad and potentially applicable to many companies' missions.

What type of company is an ideal candidate for this structure?

As long as a company commits to being a corporation and creating either a general public benefit or one of the specific enumerated public benefits, that business can elect benefit corporation status. However, it's important to make this decision with the guidance of an attorney who is well versed in business law and familiar with benefit corporations, and who can provide sound advice based on the governance requirements for this type of entity.

What governance and accountability requirements must a benefit corporation comply with to uphold its status?

A benefit corporation is in some ways similar to a nonprofit entity in the sense that the entity gains relief from certain requirements in exchange for providing a public good, and must hold itself accountable to the public as long as it retains its special status. In the case of a nonprofit, that relief takes the form of tax relief, and in the case of a benefit corporation, the relief is from the fiduciary obligations of its directors to maximize profits and shareholder value. But there are requirements to comply with, one of which is to appoint an independent benefit director.

Under the proposed Pennsylvania statute, the benefit director is required to prepare an annual benefit report to the company's shareholders, the Commonwealth and the public. The report must detail the benefit corporation's compliance with its benefit mandates and include a description of the entity's efforts and success in pursuing a public benefit. The benefit director's name and business address must be included, along with the compensation paid to each director and the names of holders of 5 percent or more equity.

Finally, the benefit director must state his or her opinion as to whether the entity acted in accord with its stated public benefit. The report is sent to each shareholder, is publicly posted on the entity's website and must also be filed with the Commonwealth, although compensation information may be redacted from the web posting and state filing.

What should a company consider before deciding to become a benefit corporation?

The benefit corporation structure is not ideal for every company, and there are several issues a business should weigh before electing this status. For one, a business that will need to raise capital should consider whether it will be hampered in this effort by its explicitly stated intent not to focus primarily on maximizing returns. Another issue is the still-scant body of law that has yet to coalesce into a set of predictable and coherent conventions and practices that allow a business to govern itself with a high degree of confidence. Finally, there are the compliance issues that a public benefit company will need to manage.

On the other hand, a benefit corporation may be attractive to socially responsible investors. In addition, businesses may find that their status gives them an advantage with respect to attracting and retaining employees, marketing themselves to consumers and possibly even gaining price advantages over competitors. Careful consideration of these and other issues is critical for companies considering a benefit corporation model. <<

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