BENEFIT CORPORATION 101

A guide for purpose-driven businesses

BEST FOR COLORADO

What is the difference between a Certified B Corporation and a Public Benefit Corporation (PBC)?

This is a common point of confusion for companies wanting to adopt a more formal way to legitimize their commitment as a purpose-driven business.

B Corps take a voluntary pledge to operate as a socially and environmentally conscious business. To receive the certification, companies must score a minimum of 80 out of 200 on the B Impact Assessment, pass an audit and pay an annual fee to B Lab, the nonprofit leading the B Corp movement. In addition, companies must commit to incorporating as a public benefit corporation before re-certification.

A public benefit corporation is a new type of legal incorporation (corporate) status holding companies accountable to act in a socially and environmentally responsible manner and generate one or more public benefits while balancing the financial interests of shareholders. Their bottom line is more than just profits, rather it's three-fold and aims to measure the financial, social and environmental performance of the company over time. Incorporating as a benefit corporation ingrains having a positive social impact into companies' DNA. In the case of a merger, acquisition or change of ownership, a super-majority vote of the shareholders would be required in order to change the company's triple bottom line.

**Public benefits are defined in Section 7-101-503(2), C.R.S. as, "one or more positive effects or reduction of negative effects on one or more categories of persons, entities, communities, or interests other than shareholders in their capacities as shareholders, including effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific, or technological nature."*

Important Note
This article includes preliminary information and general instructions for Public Benefit Corporations in the state of Colorado. Be sure to consult with an attorney and tax consultant before making any changes to your corporate company status.

WHAT DOES IT MEAN TO OPERATE AS A COLORADO PUBLIC BENEFIT CORPORATION?

A public benefit corporation (PBC) is a legal entity formally organized and taxed as a Corporation (C Corp or S Corp) or Co-Op with added responsibilities and social considerations. PBCs are unique because of their legal obligation to act with purpose, accountability and transparency.

1. **PURPOSE**
   PBCs commit themselves to a purpose beyond profits by promoting general and specific public benefit. This mission statement is embedded into their articles of incorporation.
2. **ACCOUNTABILITY**
   Unlike traditional corporations with obligations to maximize shareholder value above all else, the director(s) of a PBC have a fiduciary duty to consider the interests of shareholders, stakeholders and the company's public benefit purpose when making decisions.

   The PBC Act in Colorado expands the responsibilities of directors in the following ways:
   - *The board of directors shall manage or direct the business and affairs of a public benefit corporation in a manner that balances the pecuniary interests of the shareholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit identified in the articles of incorporation.*
   - Director(s) and officers have a fiduciary duty to balance purpose and profit. Only shareholders owning 2 percent or more of the company's stock can hold responsible persons legally accountable to this obligation. If a company fails to pursue their stated public benefit mission, director(s) may be protected from personal financial liability if such language is included into the articles of incorporation.

   An example of liability limiting language may read something like the following;
   - *A disinterested director's failure to satisfy Section 7-101-506 of the Act shall not, for purposes of Section 7-108-401, Section 7-108-402, or Article 109 of the Act, or for purposes of any use of the term "good faith" in these Amended and Restated Articles of Incorporation or the bylaws in regard to the indemnification of or advancement of expenses of any person, constitute an act or omission not in good faith or a breach of the duty of loyalty.*

3. TRANSPARENCY

On a yearly basis, PBCs are required to report their performance in two ways:

1) How their work promotes the public benefit purpose and the interests of their stakeholders
2) A summary of their social and environmental performance against a third party standard (such as the B Impact Assessment through B Lab).
   - Detailed information on Benefit Reporting best practices can be found here.
   - Information and guidance on selecting a third party-reporting tool can be found here.
   - Benefit reporting summary guide can be found here (scroll down to Colorado).

WHY CONSIDER THIS?

Transitioning to a public benefit corporation gives directors and entrepreneurs the legal flexibility to make decisions in pursuit of a public benefit without opening themselves to a lawsuit based on shareholder primacy. Companies that make this transition may experience a competitive advantage in attracting and retaining talent, increased customer loyalty and a reputation for leadership in the public benefit sphere among other benefits.

HOW TO TRANSITION

First, consider how your company is organized. Incorporating as a public benefit corporation can impact your company's tax status if you are not currently organized as a corporation. PBCs are taxed as a corporation (C Corp or S Corp) or cooperative and must meet the following requirements:

- The Articles of Incorporation must identify one or more specific public benefits that the entity will promote
- The articles of incorporation must state at the beginning that the entity is a PBC
- The entity's name can include the words "public benefit corporation" or the abbreviations "Pub. Ben. Corp.", "P.B.C." or "PBC"
- Share certificates issued for a PBC must clearly indicate that the entity is a PBC

Corporations must take this amendment to a shareholder vote including non-voting shares. This vote must pass with at least two thirds in favor. Shareholders must be given advance notice that dissenters' rights apply. This means that those who vote against the amendment, and meet certain other requirements, can require the company to buy out their shares at fair value before proceeding with the change.

Before completing the transition to a PBC, you will need to carry out a "due diligence review" of your business's signed contracts, business affairs and legal status to avoid any unintended consequences of changing your form of entity.

EXISITNG CORPORATIONS IN THE STATE OF COLORADO can make this transition with following steps:

1. Prepare amended articles of incorporation meeting the above requirements
2. Prepare amended bylaws to address responsibilities of director(s)
3. Approval of amendments by board of directors (vote approval depends upon existing governing documents)
4. Approval of amendments by shareholders
5. File amended articles of incorporation with the Secretary of State here

IF YOUR COMPANY IS AN LLC OR A PARTNERSHIP, it will need to undergo a conversion to become a public benefit corporation, or set up a new PBC and merge into it. This conversion will probably change your company's tax status.
The following steps apply for a conversion:

1. Prepare a plan of conversion. This includes the full text of the articles of incorporation and bylaws for the converted corporation
2. Approval of the plan of conversion by the law applicable to your existing entity and your company's charter documents
3. Prepare and file a statement of conversion with Secretary of State

HELPFUL LINKS:

- PBC Articles of Incorporation Example
- PBC Articles of Amendment Form
- Colorado Conversion Information

TAX IMPLICATIONS TO CONSIDER

C Corporations often incur higher tax costs because the business is taxed as a separate taxpayer. As a result, C Corps experience a "double tax," one based on profits earned by the company and another when shareholders are paid dividends from profits. S Corps on the other hand, avoid this double taxation because the company's profits are taxed on a flow-through model meaning that business owners or shareholders are directly responsible for paying taxes on their personal share of profits. If your company is currently a C Corp or an S Corp, your tax status will not change as a PBC. Cooperatives' tax status will also remain if elected to organize as a PBC.

If your company is taxed as a partnership (which includes most LLCs), converting to a PBC will change your tax status. Consult your tax advisor before proceeding.

LLCs and partnerships may want to consider changing the way the company operates by amending the charter documents to mimic a PBC structure without formally converting to a corporation. To learn more about this approach, consult a lawyer familiar with B Corp certification.

WHAT DOES THE TIMELINE LOOK LIKE?

The timeline for this process is variable depending on how the company is structured. Preexisting corporations with minimal third party contracts and simple ownership structures could complete this process in a few days. Companies with investors, loans, and additional third parties involved will need to seek consent before moving forward, which will extend the timeline of the transition.

Written by Lauren Farkas, with special thanks to Seth Henry with Blue Dot Law for sharing his time and expertise to review this article.

HELPFUL LINKS AND IMPORTANT ARTICLES TO REFERENCE

- *How to Become a Colorado Public Benefit Corporation* by Seth Henry
- *How to Switch to Being a Benefit Corporation* by William H. Clark, Jr.
- Colorado Secretary of State link to file a form online
- B Lab Benefit Corporation FAQ
- B Lab Benefit Corporation Information Page

Best for Colorado, a program of The Alliance Center, was created to inspire, equip and celebrate businesses that create higher quality jobs, build stronger communities and preserve a healthier environment through their business operations, products and/or services. Come and join a community of like-minded individuals at all stages of corporate social responsibility who are willing to share lessons learned and best practice information. Learn more at thealliancecenter.org/b4co.