

Benefit corporations come to Iowa

By Willard L. Boyd III¹

This year, Iowa enacted legislation (HF 844) based on the 2016 Model Business Corporation Act (“MBCA”) developed by the Corporate Laws Committee of the Business Law Section of the American Bar Association. Effective Jan. 1, 2022, the new Iowa Business Corporation Act will replace the current Act, which itself is based on a previous version of the MBCA. There are several important subjects addressed in the new Act that are not addressed in the current Act. One of these relates to benefit corporations.

With the enactment of HF 844, Iowa joins the majority of states that have enabling statutes allowing for benefit corporations. This type of corporate entity is becoming more popular around the United States as a means to allow for profit-generating corporations to elect a structure that requires them to pursue activities that have a positive effect on society and the environment. Below is a summary of the benefit corporation provisions in the new Act.

The provisions are based in part on a model developed by B-Labs, a nonprofit that promotes these types of corporate entities, as well as the benefit corporation statute adopted in Delaware.

Distinguishing benefit corporations from regular business corporations

A benefit corporation is a business corporation that elects to become a benefit corporation under Subchapter 17 of the Iowa Business Corporation Act. Unlike a regular business corporation, which can be viewed as having shareholder primacy as a focus, a benefit corporation must consider the interests of other stakeholders in addition to shareholders. Those who manage a benefit corporation are required to pursue the creation of a positive effect on society and the environment, taken as a whole, that is material considering the corporation’s size and the nature of its business and that considers

stakeholder interests separately from the interests of shareholders.² Important in the analysis is not just what the corporation does but how it conducts its business and operations.³

A benefit corporation may also include as one of its purposes a specific public benefit. “Public benefit” is defined as a positive effect, or reduction of a negative effect, on one or more communities or categories of persons or entities, other than shareholders solely in their capacity as shareholders, or on the environment, including effects of an artistic, charitable, economic, educational, cultural, literacy, medical, religious, social, ecological, or scientific nature.⁴ One or more specific public benefits may be set forth in the corporation’s articles of incorporation.⁵ The official comment provides that pursuit of a public benefit specified in the articles may contribute to fulfillment of the benefit corporation directors’ obligation to act in a responsible and sustainable manner when carrying out their duties, but, depending on the materiality to the corporation of the public benefit chosen, such pursuit may or may not be sufficient by itself to satisfy that obligation.⁶

Although benefit corporations are distinguishable from other business corporations, many of the important

attributes of a business corporation still apply to a benefit corporation. These include having the same decision-making authority in terms of a board of directors, not changing the basic duties of directors and not changing the standards of review.

In addition, the idea that interests other than shareholder primacy can appropriately influence a director’s decision-making is not new to the Iowa Business Corporation Act. Iowa Code section 490.1108A, for example, expressly allows a director of a business corporation, in determining the best interest of the corporation when evaluating a tender offer, merger, or similar proposal, to consider various community interest factors in addition to consideration of the effects the proposal will have on shareholders. These factors include: (1) the effects of the action on the corporation’s employees, suppliers, creditors and customers; (2) the effects of the action on the communities in which the corporation operates; and (3) the long-term as well as short-term interests of the corporation and its shareholders, including the possibility that these interests may be best served by the continued independence of the corporation.⁷ As described in more detail below, a director of a benefit corporation is



HANSEN, MCCLINTOCK & RILEY
LAWYERS

*All Types Civil Litigation
Mediation & Arbitration Services, including
commercial and employment disputes*

Chester C. “Trip” Woodburn, III
Fifth floor, U.S. Bank Building

520 Walnut Street
Des Moines, Iowa 50309

515-244-2141

515-244-2931 (Fax)

hmrlawfirm.com

mandated to consider similar community interest factors on all matters.

It is important to note that the existence of benefit corporations does not imply that a contrary or different rule of law applies to a corporation that is not a benefit corporation. The new Act expressly states that it “does not affect a statute or rule of law that applies to a corporation that is not a benefit corporation.”⁸

Distinguishing benefit corporations from nonprofit corporations

A benefit corporation is not a nonprofit corporation. As noted above, a benefit corporation is a business corporation and has owners (shareholders), whereas a nonprofit corporation has no owners. In addition, a benefit corporation is taxed like any other “C” corporation or “S” corporation, whereas most nonprofits are eligible for tax-exempt status. Also, while the new Act uses the terms “benefit corporation” and “public benefit,” such terms should not be confused with the term “public benefit corporation” used in the Revised Iowa Nonprofit Corporation Act to describe a charitable nonprofit

corporation that is tax-exempt under Section 501(c)(3) of the Internal Revenue Code.⁹

Duties imposed on directors of benefit corporations and protections for directors

The new Act requires that, in addition to the duties imposed on directors of business corporations under Section 490.830 of the Iowa Business Corporation Act, each member of the board of directors of a benefit corporation, when discharging the duties of a director, is to act in a “responsible and sustainable manner,” and in a manner that pursues the public benefit or benefits identified in any public benefit provision in the articles of incorporation. The term “responsible and sustainable manner” is defined to mean a manner that (1) pursues through the business of the corporation the creation of a positive effect on society and the environment, taken as a whole, that is material taking into consideration the corporation’s size and the nature of its business, and (2) considers, in addition to the interests of the shareholders, the interests of stakeholders known to be affected by the conduct of the business of the corporation.¹⁰

Stakeholders include (1) employees and workforces of the corporation, its subsidiaries, and its suppliers; (2) customers; and (3) communities or society, including those of each community in which offices or facilities of the corporation, its subsidiaries, or its suppliers are located.¹¹ The official comment to the MBCA indicates that the foregoing list is not exclusive and that stakeholders not specifically named but known to be affected by the corporation’s business also must be considered.¹²

The new Act makes clear that a director of a benefit corporation does not, by virtue of the duties imposed on benefit corporation directors, owe any duty to a person other than the benefit corporation arising only from an interest of the person in the status of the corporation as a benefit corporation or in any public benefit provision.¹³ In addition, the new Act provides that, unless the articles of incorporation state otherwise, any failure by disinterested directors to otherwise meet the standards for a benefit corporation’s directors will not be considered an intentional infliction of harm on the corporation or its shareholders.¹⁴ Such a provision ensures that if a corporation has adopted a broad liability shield provision in its articles of incorporation (as authorized by Iowa Code section

490.202(2)(d)), a claim that a director failed to consider the interests of those materially affected by the conduct of the corporation, the public benefit or benefits, or the pecuniary interests of the shareholders should not, by themselves, subject the director to personal liability in terms of violating the “intentional infliction” standard. Similarly, the provision ensures that such a claim would not be barred from indemnification protection also available under the Iowa Business Corporation Act.¹⁵

The official comment to the MBCA provides that the standards for director conduct and liability in Sections 8.30 and 8.31 (Iowa Code sections 490.830 and 490.831) apply to actions of directors of benefit corporations. Likewise, the presumptions and standards of judicial review, including those related to the common law business judgment rule, apply to director decisions including, as part of such decisions, the weighing and reconciliation of competing or inconsistent shareholder and stakeholder interests.¹⁶

Unlike other states’ benefit corporation statutes that are based on a model developed by B-Labs, there is no requirement for including on the board of directors a “benefit director” vested with special duties. Instead, all directors of a benefit corporation have the duty to act in accordance with the standards set forth above. The official comment to the MBCA provides, however, that a benefit corporation may choose to assign oversight of responsibility and sustainability to a board committee and further notes that many benefit corporations will have a chief sustainability officer or other officer with a similar role.¹⁷

Benefit corporation election and identification

In order to become a benefit corporation, a corporation’s articles of incorporation must state that the corporation elects to be subject to the Subchapter 17 of the Iowa Business Corporation Act.¹⁸ Any share certificate issued must indicate conspicuously that the entity is a benefit corporation. For shares without certificates, written statements of information required under Iowa Code section 490.626(2) need to note conspicuously the benefit corporation status.¹⁹ The name of the public benefit corporation may identify it as such. This can be done through the designation of “benefit corporation” or the abbreviation “B.C.” or “BC.”²⁰

SECTION 1031 EXCHANGE






**QUALIFIED
INTERMEDIARY
SERVICES**

THE PREMIER SPECIALIST
FOR
SECTION 1031 EXCHANGES

EXPERTISE
From a Respected Industry Leader

IPE 1031
888.226.0400 | WWW.IPE1031.COM
INFO@IPE1031.COM

Annual benefit report

Unlike some states' benefit corporation statutes, the new Act permits, but does not require, that a benefit corporation obtain a third-party certification as to its sustainability efforts and to report its sustainability efforts against a third-party standard.²¹ Still, under the new Act, a benefit corporation is required, at least annually, to prepare a benefit report addressing the efforts of the benefit corporation during the preceding year to operate in a responsible and sustainable manner, to pursue any public benefit or benefits identified in its articles, and to consider the community interests described above.²² It must include (1) the objectives the board of directors established to meet these requirements; (2) the standards the board adopted to measure the benefit corporation's progress in meeting these standards; (3) the application of any third-party standard to the extent adopted by the corporation; and (4) an assessment of whether the corporation met its objectives and satisfied the stated standards.²³

The report is to be delivered to each shareholder or otherwise made available within 120 days following the end of the fiscal year or the time the benefit corporation delivers any other annual reports or annual financial statements to shareholders if earlier.²⁴ To the extent the benefit corporation has a website, it is to post the report. To the extent it does not have a website, it is to provide its most recent benefit report, without charge, to any person requesting a copy.²⁵

A shareholder that has not received or been given access to an annual report may request that the report be made available or delivered. If the benefit corporation fails to comply with such request, the requesting shareholder may apply to the district court for an order requiring the report be made available or delivered.²⁶

Rights of action

A proceeding by a shareholder of a benefit corporation claiming violation of any duty applicable to a benefit corporation or any of its directors must be brought in a derivative proceeding pursuant to the Iowa Business Corporation Act. In addition, such a proceeding may be brought only by a shareholder of the corporation that at the time of the act or omission complained of either individually, or together with other shareholders bringing such action collectively, owned directly or indirectly at least five percent of a class of the corporation's outstanding shares or, if

publicly traded, either five percent of a class of the corporation's outstanding shares or shares with a market value of at least \$5 million at the time the proceeding is commenced.

Election to be a benefit corporation or to cease being a benefit corporation

A "regular" Iowa business corporation may become a benefit corporation through an amendment to its articles of incorporation. In order for this to occur, an affirmative vote of two-thirds of each class or series of shares of outstanding stock is required unless the articles of incorporation or bylaws require a greater vote. In addition, a two-thirds affirmative vote of the shareholders is needed when, through a merger or share exchange involving a regular business corporation, the resulting entity will be a benefit corporation.

The new Act requires a similar two-thirds vote of each class or series of shares entitled to vote in order to opt out of the benefit corporation provisions or to merge a benefit corporation or enter into a share exchange where the surviving entity is not a benefit corporation.

Conclusion

Iowa is joining a majority of the states that have enabling statutes for benefit corporations. As investors continue to seek opportunities in companies based on environmental, social and governance ("ESG") factors, the benefit corporation alternative available under the Iowa Business Corporation Act may prove to be an attractive option.

¹ The views expressed in this article are solely those of the author and not his law firm or clients. No legal advice is being given in this article.

² Iowa Code sections 490.1701(2)(d) and 490.1704(1). All Iowa Code citations are to the citations in the new Act, which does not become effective until January 1, 2022.

³ MBCA, Section 17.04, Official Comment.

⁴ Iowa Code section 490.1702(2)(b).

⁵ Iowa Code section 490.1701(c).

⁶ MBCA, Section 17.01, Official Comment, cmt. 2.

⁷ Iowa Code section 490.1108A(1).

⁸ Iowa Code section 490.1701(1).

⁹ Iowa Code section 504.1705.

¹⁰ Iowa Code sections 490.1701(2)(d), 490.1704(1).

¹¹ Iowa Code section 490.1704(2).

¹² MBCA section 17.04, Official Comment.

¹³ Iowa Code section 490.1704(3).

¹⁴ Iowa Code section 490.1704(4).

¹⁵ MBCA section 17.04, Official Comment.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Iowa Code section 490.1701(1).

¹⁹ Iowa Code section 490.1702(2).

²⁰ Iowa Code section 490.1702(1).

²¹ MBCA section 17.05, Official Comment.

²² Iowa Code section 490.1705(1).

²³ *Id.*

²⁴ Iowa Code section 490.1705(2).

²⁵ Iowa Code section 490.1705(4).

²⁶ Iowa Code section 490.1705(3).



Willard (Bill) Boyd III is chair of the ISBA Business Law Section and a past-president of the association. He practices at Nyemaster Goode, P.C. in

Des Moines. He can be reached at: wlb@nyemaster.com.



HOPKINS & HUEBNER, P.C.
ATTORNEYS AT LAW

MEDIATION AND ARBITRATION SERVICES
For workers' compensation, civil litigation, and family law cases

Virtual mediations available via telephone and video conference
Call to Schedule: (515) 244-0111
www.hhlawpc.com/mediation