

**Questions Linger about Public Benefit Corporations**  
**Author: Daniel W. Jones, Esq.**  
**Coan, Payton & Payne, LLC**

*This article was originally published in the August 9, 2013, Guest column Section of BizWest*

Barring a petition action to stop HB 13-1138 from taking effect, Colorado will have a new type of business entity available for use as of April 1: the Public Benefit Corporation (“PBC”). Approved May 15, the bill established the Public Benefit Corporation Act of Colorado. The act, found in a new Part 5 of Article 101 of Title 7 in the Colorado Revised Statutes, creates a form of business entity that emphasizes corporate social responsibility as part of its stated business purpose.

The act defines a PBC as a for-profit corporation, organized under and subject to the Colorado Business Corporation Act, that also “is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. To that end, a public benefit corporation shall be managed in a manner that balances the shareholders’ pecuniary interests, the best interest of those materially affected by the corporation’s conduct, and the public benefit identified in its articles of incorporation.”

The act provides a broad definition of “public benefit.” The term means that the PBC seeks to provide “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.”

In a typical for-profit corporation, the directors must act in the best interest of the corporation and its shareholders. That usually means directors aim to maximize corporate profits and the associated return on shareholder investments. Diverting corporate funds to public projects or causes not intended to enhance the corporation’s bottom line can subject directors in a standard for-profit corporation to allegations that they have breached their duties.

A PBC broadens the corporation’s mission, changes the obligations of its directors and requires a different approach to corporate governance. Under the act, instead of having fiduciary duties primarily to the corporation and its shareholders, the directors have the duty to manage or direct the PBC “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 its articles of incorporation.”

For those interested in forming a new PBC or in converting an existing for-profit corporation to a PBC, several essential steps must be followed. For new PBCs, the first step is to identify, in its articles of incorporation, one or more specific public benefits to be promoted by the PBC. Further, the PBC must state that it is a PBC. It is important that those forming PBCs define the intended public benefits clearly, for reasons that will be explained further below.

The entity name of the PBC must, without exception and in addition to otherwise satisfying the name requirements for a corporation under the Colorado Business Corporation

Act, include the words “Public Benefit Corporation,” the abbreviation “P.B.C.,” or the designation “PBC.” For obvious reasons of providing adequate notice to potential shareholders of the nature of such a corporation, this entity name requirement must be followed. Further, any stock certificates issued for shares in the PBC and any notices sent regarding uncertificated shares “must note conspicuously that the corporation is a public benefit corporation formed pursuant to this part 5.”

Section 7-101-507 of the Act sets forth perhaps the most challenging of the requirements for a PBC, and makes clear the reason why the public benefits purpose set forth in a PBC’s articles of incorporation should be carefully defined. That section requires every PBC to prepare a report that provides a description of the following:

How the PBC promoted its identified public benefit and the best interests of those materially affected by the corporation’s conduct;

Circumstances that have hindered the PBC’s goals;

The process and rationale for selecting or changing the third-party standard used to prepare the benefit report; and

An accompanying assessment of the social and environmental performance of the PBC against the selected third-party standard.

The Act provides further details about the methods by which the “third-party standard” of performance is to be identified.

All such reports must be sent to the shareholders of the PBC, must be posted (with some limitations) on the website of the PBC (if any), and must, if no website is available, be provided (with some limitations) to anyone who requests a copy. Interestingly – hint to the Colorado Legislature – while the implication is that the reports must be prepared annually, the act fails to specify this detail.

Existing for-profit corporations may convert to or merge into PBCs, but the act requires that any such conversion or merger be approved by a vote or consent of not less than two-thirds of the outstanding shares of each class of stock issued by the corporation. Similarly, a PBC that later wishes to withdraw its PBC status or merge into a corporation that is not a PBC can do so only with the vote or consent of two-thirds of the outstanding share classes.

There are other important factors, such as the anticipated tax treatment of for-profit PBCs, that must be considered before forming a PBC. PBCs are for-profit corporations, and are taxed as such. The degree to which the public benefit actions of a PBC may be tax deductible should be considered, and donations to or investments in PBCs are not deductible as donations to tax-exempt charitable organizations may be.

There certainly will be gray areas in the operation of PBCs for several years to come. Questions regarding the degree of specificity that must be provided in the statement of public

benefit, how the directors should balance the interests of the shareholders with those of the other intended beneficiaries, and how to attract investments are just a few of the questions that trial and error will answer over the coming years.

Now that PBCs have become an option, it will be interesting to observe the level of interest in PBCs within the Colorado business community starting in 2014 and the role PBCs will play in Colorado's future corporate landscape.

Barring a petition action to stop HB 13-1138 from taking effect, Colorado will have a new type of business entity available for use as of April 1: the Public Benefit Corporation ("PBC"). Approved May 15, the bill established the Public Benefit Corporation Act of Colorado. The act, found in a new Part 5 of Article 101 of Title 7 in the Colorado Revised Statutes, creates a form of business entity that emphasizes corporate social responsibility as part of its stated business purpose.

The act defines a PBC as a for-profit corporation, organized under and subject to the Colorado Business Corporation Act, that also "is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. To that end, a public benefit corporation shall be managed in a manner that balances the shareholders' pecuniary interests, the best interest of those materially affected by the corporation's conduct, and the public benefit identified in its articles of incorporation."

The act provides a broad definition of "public benefit." The term means that the PBC seeks to provide "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."

In a typical for-profit corporation, the directors must act in the best interest of the corporation and its shareholders. That usually means directors aim to maximize corporate profits and the associated return on shareholder investments. Diverting corporate funds to public projects or causes not intended to enhance the corporation's bottom line can subject directors in a standard for-profit corporation to allegations that they have breached their duties.

A PBC broadens the corporation's mission, changes the obligations of its directors and requires a different approach to corporate governance. Under the act, instead of having fiduciary duties primarily to the corporation and its shareholders, the directors have the duty to manage or direct the PBC "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 its articles of incorporation."

For those interested in forming a new PBC or in converting an existing for-profit corporation to a PBC, several essential steps must be followed. For new PBCs, the first step is to identify, in its articles of incorporation, one or more specific public benefits to be promoted by the PBC. Further, the PBC must state that it is a PBC. It is important that those forming PBCs define the intended public benefits clearly, for reasons that will be explained further below.

The entity name of the PBC must, without exception and in addition to otherwise satisfying the name requirements for a corporation under the Colorado Business Corporation Act, include the words “Public Benefit Corporation,” the abbreviation “P.B.C.,” or the designation “PBC.” For obvious reasons of providing adequate notice to potential shareholders of the nature of such a corporation, this entity name requirement must be followed. Further, any stock certificates issued for shares in the PBC and any notices sent regarding uncertificated shares “must note conspicuously that the corporation is a public benefit corporation formed pursuant to this part 5.”

Section 7-101-507 of the Act sets forth perhaps the most challenging of the requirements for a PBC, and makes clear the reason why the public benefits purpose set forth in a PBC’s articles of incorporation should be carefully defined. That section requires every PBC to prepare a report that provides a description of the following:

How the PBC promoted its identified public benefit and the best interests of those materially affected by the corporation’s conduct;

Circumstances that have hindered the PBC’s goals;

The process and rationale for selecting or changing the third-party standard used to prepare the benefit report; and

An accompanying assessment of the social and environmental performance of the PBC against the selected third-party standard.

The Act provides further details about the methods by which the “third-party standard” of performance is to be identified.

All such reports must be sent to the shareholders of the PBC, must be posted (with some limitations) on the website of the PBC (if any), and must, if no website is available, be provided (with some limitations) to anyone who requests a copy. Interestingly – hint to the Colorado Legislature – while the implication is that the reports must be prepared annually, the act fails to specify this detail.

Existing for-profit corporations may convert to or merge into PBCs, but the act requires that any such conversion or merger be approved by a vote or consent of not less than two-thirds of the outstanding shares of each class of stock issued by the corporation. Similarly, a PBC that later wishes to withdraw its PBC status or merge into a corporation that is not a PBC can do so only with the vote or consent of two-thirds of the outstanding share classes.

There are other important factors, such as the anticipated tax treatment of for-profit PBCs, that must be considered before forming a PBC. PBCs are for-profit corporations, and are taxed as such. The degree to which the public benefit actions of a PBC may be tax deductible should be considered, and donations to or investments in PBCs are not deductible as donations to tax-exempt charitable organizations may be.

There certainly will be gray areas in the operation of PBCs for several years to come. Questions regarding the degree of specificity that must be provided in the statement of public benefit, how the directors should balance the interests of the shareholders with those of the other intended beneficiaries, and how to attract investments are just a few of the questions that trial and error will answer over the coming years.

Now that PBCs have become an option, it will be interesting to observe the level of interest in PBCs within the Colorado business community starting in 2014 and the role PBCs will play in Colorado's future corporate landscape.

Daniel W. Jones, Esq. is an attorney at Coan, Payton and Payne, LLC. He can be reached at 970-339-3500 or [djones@cp2law.com](mailto:djones@cp2law.com).