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The Reporting Requirements for California and Delaware For-Profit Benefit Corporations

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Benefit corporation legislation created a new kind of corporation that is required to pursue a social and environmental mission in addition to creating economic benefits for its shareholders. California pioneered the model benefit corporation legislation with its passage in 2011, and Delaware passed its own form of benefit corporation legislation in 2013. A benefit corporation differs from traditional corporations in its purpose, which includes a public purpose in addition to making profit, along with accountability and transparency requirements. Every benefit corporation must include a purpose statement in its articles to provide a general public benefit. However, specific requirements for assessing and reporting on pursuing the purpose vary from state to state.

In California, the general public purpose is defined as creating a material positive impact on society and the environment taken as a whole. In Delaware, this means producing a positive effect or reducing a negative effect on one or more stakeholders. Delaware also requires stating a specific public purpose. The adoption of a specific public purpose is optional in California

Each year the board of directors of a benefit corporation must benchmark the corporation’s performance by determining how it pursued its benefit purpose in that year and its overall social and environmental impact. In California, this requirement must be assessed using an independent third-party standard. Many of the eligible standards may be used free of charge

By contrast, in Delaware, the board of directors is not required to evaluate the corporation’s performance against a third-party standard unless the certificate of incorporation requires it to do so. However, note that all other states with benefit corporation legislation require an assessment of the overall social and environmental performance using a third-party standard. As a best practice, we recommend that all corporations consider benchmarking the corporation's performance against an independent third-party standard even if not required by law.

Both California and Delaware require the benefit corporation to provide shareholders with a report assessing its performance. In California, after the board determines which third-party standard to adopt, it must assess the corporation’s overall social and environmental performance against the standard and prepare an annual benefit report. The report must describe, among other things, the board's process and rationale for selecting the third-party standard, the ways in which the benefit corporation pursued a public benefit and any specific public benefit during the year, and the circumstances, if any, hindering the creation of those benefits. The benefit report must also include a statement by the board of directors indicating whether, in its opinion, the corporation failed to pursue its public benefit purpose in all material respects. If the board determines that the benefit corporation failed to pursue its public benefit purpose, it should include a description of the ways in which the corporation failed.

The Delaware benefit corporation report must provide the shareholders with a statement of the corporation's overall social and environmental performance and of the best interests of those materially affected by the corporation's conduct. The statement should include the objectives established by the board to promote the public benefits and interests, the standards adopted by the board to measure the benefit corporation's progress, objective factual information based on those standards regarding the benefit corporation's success in achieving the objectives for promoting the public benefits and interests, and an assessment of the benefit corporation's success in meeting the objectives and promoting the public benefits and interests.

No benefit corporation is required to have the benefit report certified by a third-party unless stipulated in the benefit corporation's certificate of incorporation or mandated in its bylaws. Although not required by law, the corporation may wish to consider obtaining third-party certification, like financial auditing customarily conducted by responsible corporate citizens, to improve transparency, accountability, and increase the public's trust in the corporation. Often a third-party certification process can improve strategic planning, corporate processes and ultimately corporate performance, adding to the "bottom line."

The California corporation must send the annual benefit report to its shareholders within 120 days following the end of the fiscal year and post the report on its website. If it does not have a website, it should provide a copy of its most recent benefit report, without charge, to any person that requests a copy. Delaware does not impose a requirement that the report be provided to the public or post the report on its website. Nonetheless, it is best practice to do so. The report need not contain any confidential or proprietary information.

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