

A Legislative Guide to Benefit Corporations:

Create Jobs, Drive Social Impact,
and Promote the Economic Health
of Your State



This report is brought to you by:

Patagonia, Inc., Vermont Law School, and The Yale Environmental Law Association

The information in this article does not constitute legal advice and is offered for informational purposes only.

patagonia

About Patagonia, Inc.

Founded by Yvon Chouinard in 1973, Patagonia is an outdoor apparel company based in Ventura, California. A Certified B Corporation, Patagonia’s mission is to build the best product, cause no unnecessary harm, and use business to inspire and implement solutions to the environmental crisis. Since 1985, Patagonia has dedicated 1 percent of sales each year to environmental causes.



About Vermont Law School

Vermont Law School is a private, independent institution and home to the nation’s leading environmental law program. Degrees conferred include a Juris Doctor, four master’s degrees—Master of Environmental Law and Policy, Master of Energy Regulation and Law, Master of Food and Agriculture Law and Policy, and Master of Arts in Restorative Justice—and four LLM degrees—LLM in American Legal Studies (for foreign-trained lawyers), LLM in Energy Law, LLM in Environmental Law, and LLM in Food and Agriculture Law. The school is also home to nationally-ranked clinical programs including the Environmental Law Center, South Royalton Legal Clinic, Environmental and Natural Resources Law Clinic, Energy Clinic, Food and Agriculture Clinic, Center for Applied Human Rights, and Center for Justice Reform.

Yale Environmental Law Association A Student Organization

About The Yale Environmental Law Association

Throughout its history, Yale Law School has served as a center for groundbreaking environmental thinking. The Yale Environmental Law Association (YELA) aims to build on this legacy by drawing attention to all aspects of environmental law and related fields through collaborative opportunities and events. YELA places special emphasis on the interdisciplinary, multifaceted character of environmental law and its relevance to a wide range of legal and policy issues.

Acknowledgments

Special thanks to the careful edits and contributions from Vincent Stanley (Patagonia), Cindi Bigelow (Bigelow Tea), Holly Ensign-Barstow (B Lab), Joshua Galperin (Yale University), Tony Binder (Yale University), Nico Lustig (Vermont Law), William Clark, and Nicholas Herdrich.

This booklet design and layout were created by Jeanette Numbers and Rance Pritchard from the Loft design team.

Cover photo credit: Tyler Roemer

Foreword

As of July 2017, I am proud to share that Bigelow Tea joined the thousands of other companies that have elected to become benefit corporations. Our decision was inspired by our company's longstanding commitment to ethical business practices and by our belief that becoming a benefit corporation is a smart business decision. The practices that benefit corporations promote help companies attract and retain talent, as well as build trust and loyalty with all stakeholders: customers, vendors, employees and the community.

Becoming a benefit corporation is within the reach of virtually any organization. Many companies are already "doing the right thing" in the normal course of business. They're taking care of their employees, giving back to their communities, and holding their organizations to high standards of transparency and accountability. By becoming a benefit corporation, however, a company formalizes these commitments. In doing so, it sends a clear message to all stakeholders that these values are part of the company's legal DNA.

This was an empowering choice, and one that has made it easier for our company to leave a positive impact on society. We consider it an investment, and one that will require sustained engagement from all stakeholders. To me, achieving this designation means asking ourselves every day how we can be a better company for all of our stakeholders. And it requires us to seek answers not just from our directors, but from the entire organization and the communities in which we work.

For these reasons, I look at becoming a benefit corporation as a way to ensure that our company is staying on the right path. A path that champions community health and employee welfare, and hopefully leaves the world a better place for future generations.

And shouldn't that be something we all aspire to do?



– **Cindi Bigelow, President & CEO**

Bigelow Tea

About the Authors

Abigail Barnes, J.D., M.E.M.



Abi Barnes is an entrepreneur, author, and attorney. She is the Co-Founder & CEO of Allergy Amulet, Inc., a venture-backed start-up committed to creating greater food transparency. She is also the author of *An Entrepreneur's Guide to Certified B Corporations and Benefit Corporations*, and has been published in several well-known periodicals and academic journals, including *The Atlantic* and *Forbes*. She holds a J.D. from Vermont Law School, an M.E.M. from Yale School of Forestry & Environmental Studies, and a B.A. from Kenyon College.

James Woulfe, J.D.



James is the Director of Government Affairs at the Connecticut Group, LLC, a government affairs and public relations firm. He writes about social entrepreneurship and public policy at www.socentpolicy.com. In 2014, James led a successful effort to pass benefit corporation legislation in Connecticut. In 2015, he was appointed to the Commission on Connecticut's Leadership in Corporation and Business Law, and drafted a plan to make Connecticut a national leader in social entrepreneurship. James holds two B.S. degrees from Eastern Connecticut State University and a J.D. from Quinnipiac University. He lives in Hartford, CT with his wife and son.

Marshall Worsham



Marshall is an M.S. candidate at the University of California, Berkeley. Before graduate school, he worked as a freelance writer and oversaw content for Taiwan's first Certified B Corporation: DOMI Earth. Marshall has worked with the B Corp movement in Asia to strengthen relationships between academia and social enterprise. Marshall holds an MPhil from Oxford and a B.A. from Davidson College.

Contents

- 1 | Break This B Stuff Down for Me**
- 6 | A Short History of the Benefit Corporation**
- 9 | The Business Case: Why States Are Interested in Benefit Corporations**
- 13 | Myths & Misconceptions**
- 18 | Legal Relatives of Benefit Corporations: Benefit LLCs, L3Cs, SPCs/FPCs**
- 23 | You've Decided You Want to Pass Benefit Corporation Legislation, Now What?**
- 28 | Conclusion**
- 32 | Appendix**

Break This B Stuff Down for Me

1

What's a benefit corporation? What's the difference between a benefit corporation and a B Corp? How do benefit corporations differ from traditional corporations? In this section, we'll cover the basics, so everyone's working with the same vocabulary.



Photo credit: Tim Davis

Break this B Stuff Down for Me

Over the past decade, benefit corporations¹ and Certified B Corporations have taken the country by storm. Since 2010, 34 states,² Washington, D.C., and Puerto Rico, have passed legislation allowing companies to organize as benefit corporations.³ In this guide, we provide legislators and legislative advocates with a brief overview of benefit corporations and related entities, as well as the necessary information to evaluate whether your state should join the majority in passing benefit corporation legislation.

Let's start with defining benefit corporations.

Benefit corporations are just like regular corporations with one important exception: they are explicitly beholden to a diverse set of stakeholders (shareholders, employees, community, and the environment), not just shareholders. Officers of a benefit corporation are afforded greater legal protection to pursue a business model that places social and environmental values on equal footing with profits.⁴ This allows a company's directors and officers to better protect broader corporate values in the face of leadership changes, tender offers, and liquidity events.⁵ The benefit corporation form is ideal for any for-profit company with a social bent, or for an entrepreneur seeking to hold their company to higher standards of accountability and transparency.⁶

Take care not to confuse benefit corporations with Certified B Corporations—or “B Corps,” as they're commonly called. A benefit corporation is a legal business entity, whereas B certification is a standards-based designation similar to “organic” or “fair trade.” Any company can become a Certified B Corporation through the

nonprofit B Lab's third-party certification process, whereas only companies incorporated in states that have passed benefit corporation legislation can become benefit corporations. Notably, you do not need to be a benefit corporation to become a Certified B Corporation, although you may need to become a benefit corporation to *remain* a Certified B Corporation.

Here's a chart to help explain the distinction:

Designation	Certified B Corp	Benefit Corporation
Who Has Control?	B Lab	Secretary of State (Typically)
How Do I Become One?	Complete B Lab's certification process	File articles of incorporation in a state that allows benefit corporations and amend bylaws

Benefit corporations differ from traditional corporations in four main ways.

1. General Public Benefit Requirement

Benefit corporations must pursue a “general public benefit,” defined in the model benefit corporation legislation⁷ as “a material positive impact on society and the environment, taken as a whole, assessed against a third-party standard.”⁸ The model legislation is currently effective in 28 states and Washington D.C.⁹ In most states where the legislation is in effect, benefit corporations also

have the added option of pursuing a “specific public benefit,” which can include any of the following:

- **Providing low-income or underserved individuals or communities with beneficial products or services;**
- **Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;**
- **Protecting or restoring the environment;**
- **Improving human health;**
- **Promoting the arts, sciences, or advancement of knowledge;**
- **Increasing the flow of capital to entities with a purpose to benefit society or the environment; and**
- **Conferring any other particular benefit on society or the environment.¹⁰**

In Delaware, and a handful of other states that used Delaware’s statute as a model, a benefit corporation must identify a specific public benefit and explicitly state this specific benefit in the company’s charter.¹¹ In states that have adopted the model benefit corporation statute, a benefit corporation must pursue a broader general public benefit to society, and may also choose to identify a specific public benefit, although the latter is optional.¹² If the company elects to identify a specific public benefit, the corporation must include it in its charter.

2. Stakeholder-Centric Business Model

The second way benefit corporations differ is in their approach to corporate decision-making. Under the model legislation, directors and officers of a benefit corporation must consider the effects of any action or inaction on:

- **Shareholders;**
- **Employees, workforce, subsidiaries, and suppliers;**
- **Customers as beneficiaries of the general public benefit or specific public benefit;**

- **Community and societal factors;**
- **Local and global environment;**
- **Short-term and long-term interests of the benefit corporation; and**
- **The corporation’s ability to achieve its general public benefit as well as any specific public benefit, if elected.¹³**

3. Reporting Requirements

The third distinguishing characteristic of a benefit corporation is the transparency and reporting requirement. All benefit corporations (with the exception of those incorporated in Delaware),¹⁴ must produce an annual benefit report that evaluates company performance with respect to its general public benefit (and specific public benefit, if applicable), based on an independent third-party standard.¹⁵ Some states require that the report be filed with the Secretary of the State, which typically includes the following:

- **A description of the ways in which the corporation pursued its general public benefit and/or any specific public benefit(s);**
- **The extent to which the company produced a public benefit;**
- **Any circumstances that hindered the creation of a general or specific public benefit;**
- **The process and rationale behind choosing the independent third-party standard used to prepare the report;**
- **An assessment of the corporation’s social and environmental performance against the third-party standard; and**
- **The name, address, and compensation of the benefit director (see below).**

Under the model benefit corporation statute, annual benefit reports must be sent to each shareholder within 120 days after the end of the fiscal year, or otherwise accompany other annual

reports sent to shareholders. In addition, the annual benefit report must be made available to the public on the company's website. If no website exists, the corporation must provide a physical copy of the report upon request.¹⁶

4. Benefit Director

In some states, benefit corporations have a fourth differentiating characteristic: a designated benefit director. This individual may occupy a board position or remain outside the board structure. Importantly, the benefit director must be independent from the corporation in three specific ways. The designee may not:

- **Be (or ever have been) an employee of the corporation;**¹⁷
- **Be a family member of any of the company's executive officers; or**
- **Own five percent or more of the outstanding shares of the company;**¹⁸

The benefit director is responsible for preparing the compliance portions of the annual benefit report and providing a good-faith evaluation of whether the company sufficiently achieved its objectives to pursue a general and (if applicable) specific public benefit.

It is worth noting that some states have implemented versions of benefit corporation legislation that deviate from the model legislation. For a comprehensive breakdown of the differences among state benefit corporation statutes, see Appendix A.¹⁹

Chapter Notes

- 1 In the first edition of this guidebook series, *An Entrepreneur's Guide to Certified B Corporations and Benefit Corporations*, the term “benefit corporation” was capitalized for clarity and emphasis. In the interest of consistency, and to conform with legislation and the lowercase spelling of comparable legal structures like the limited liability corporation, we have decided not to capitalize this term in this edition.
- 2 See *State by State Status of Legislation, BENEFIT CORPORATION*, <http://benefitcorp.net/policymakers/state-by-state-status> (last visited Apr. 17, 2018) (identifying 34 states with benefit corporation laws passed and 6 states with pending legislation) [Hereinafter *State by State Status*]; see also *Status Tool, Social Enterprise Law Tracker*, soentlawtracker.org (last visited Apr. 17, 2018) (providing a visual representation of state legislation passed and pending with benefit corporation and other hybrid entity classifications).
- 3 Delaware, Kansas, and Colorado refer to benefit corporations as public benefit corporations." However, a public benefit corporation is a substantively different entity in NY and CA.
- 4 *Why is Benefit Corp Right for Me?, BENEFIT CORPORATION*, <http://benefitcorp.net/businesses/why-become-benefit-corp> (last visited Apr. 18, 2018).
- 5 *What is a Benefit Corporation, BENEFIT CORPORATION*, <http://benefitcorp.net> (last visited Apr. 18, 2018).
- 6 Doug Bend and Alex King, *Why Consider a Benefit Corporation?*, *FORBES*, (May 30, 2014), <http://www.forbes.com/sites/theyec/2014/05/30/why-consider-a-benefit-corporation>.
- 7 The model legislation drafted by attorney Bill Clark is consistent with the majority of legislation passed by states and recommended by B Lab. *The Model Legislation, BENEFIT CORPORATION*, <http://benefitcorp.net/attorneys/model-legislation> (last visited Apr. 18, 2018). *MODEL BENEFIT CORPORATION LEGIS.* (Apr. 17, 2017) http://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf. Some states have implemented versions of benefit corporation legislation that deviate from the model legislation. For a comprehensive breakdown of the differences among state benefit corporation statutes, see Appendix A. J. Haskell Murray, *Corporate Forms of Social Enterprise: Comparing the State Statutes* (Jan. 15, 2015) (unpublished chart), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988556.
- 8 *Id.* at § 102.
- 9 Email Correspondence with Holly Ensign-Barstow, B LAB, (May 29, 2018). *MODEL BENEFIT CORP. LEGIS.*, *supra* note 7, at § 102.
- 10 *Model Benefit Corp. Legis.*, *supra* note 7, at § 102.
- 11 *Id.*
- 12 *Id.*
- 13 *Id.* at § 301.
- 14 "[Public Benefit Corporations] are required to issue a biennial statement to stockholders describing the entity's efforts to promote its stated public benefit. Unlike most other benefit corporation statutes, Delaware PBCs need not publish this report publicly, nor do Delaware PBCs need to, as a matter of law, evaluate their pursuit of creating public benefit according to a third-party standard. While the Delaware statute allows PBCs to use a third-party standard, DGCL §366B simply requires that PBCs state the standards by which the board has decided to evaluate the PBC's performance with regard to creating its public benefit." Dirk Sampsele, *An Examination of the Delaware Public Benefit Corporation Legislation*, *STOUT* (Sept. 1, 2014) <https://www.stoutadvisory.com/insights/article/examination-delaware-public-benefit-corporation-legislation>; *DEL. CODE ANN. tit. 8 § 366* (2018).
- 15 Notably, a 2014 study found that annual reporting compliance of benefit corporations was below ten percent. See generally J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, *HARV. BUS. L. R.*, <http://www.hblr.org/wp-content/uploads/2014/10/4.2-3.-Murray-Social-Enterprise-Innovation.pdf> (last visited May 19, 2019).
- 16 *MODEL BENEFIT CORP. LEGIS.*, *supra* note 7, at § 402. See J. Haskell Murray, *An Early Report on Benefit Reports*, 118 *W. Va. L. Rev.* 25, 26 (2015).
- 17 A time period usually applies to this restriction (e.g., must not have been an employee within the past three years).
- 18 See generally *MODEL BENEFIT CORP. LEGIS.*, *supra* note 6, at § 302 (outlining the rights and responsibilities for the benefit director).
- 19 J. Haskell Murray, *Corporate Forms of Social Enterprise: Comparing the State Statutes* (Jan. 15, 2015) (unpublished chart), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988556.

2 | A Short History of the Benefit Corporation

In 2010, in response to market demand and the rising societal costs of short-termism, states started passing legislation to create a new legal entity that reconciles profit and social good. The benefit corporation was born.



Photo credit: Victoria Heath

A Short History of the Benefit Corporation

Before benefit corporations and Certified B Corporations existed, entrepreneurs seeking to build social and/or environmental values into their bottom lines stood on shaky legal ground. No legal structure existed for corporations seeking to balance their social and environmental responsibility goals with the company's profitability.¹ While LLCs had the option of building this language into their operating agreement, corporations did not. Companies that chose to prioritize purpose over short-term profit—either because they did not believe short-termism was a smart business model, or because they preferred to advance an explicit social mission—became vulnerable to sanction or suit from their board or shareholders. Unless a company could afford to hire attorneys to develop complex legal solutions to reduce exposure (an option typically reserved for mature companies), they were generally out of luck.

Traditionally, entrepreneurs had to choose between for-profit entities and 501(c)3 designated non-profit entities. Each path has its pros and cons, but neither is ideal for entrepreneurs aiming to reconcile financial, social, and environmental goals.

Why? Courts are currently divided on the extent to which a for-profit entity can prioritize stakeholder values (e.g., social and environmental good) over profit maximization and shareholder wealth.²

At the same time, 501(c)3 nonprofit organizations are not structured to sell a product or service.³ Their intended purpose is to instead fill a gap in government services—not turn a profit—and accordingly depend on funding from endowments and donations.

LLCs also aren't typically a viable alternative for most entrepreneurs seeking venture capital or who plan to eventually go public. There are certainly exceptions to this rule, but because of the tax implications and capital restrictions, C corps tend to be the preferred corporate structure for investors. As a result, LLCs have historically been more popular with companies not seeking institutional investments or an eventual public offering.

In response to market demand and short-termism, states started passing benefit corporation legislation to create a new legal entity that reconciles profit with social and environmental good. The first benefit corporation statute passed in Maryland in 2010, followed shortly by passage in Vermont.⁴ In 2011, five states passed benefit corporation statutes (California, Hawaii, New Jersey, New York, Virginia); five in 2012 (Illinois, Louisiana, Massachusetts, Pennsylvania, South Carolina); seven in 2013 (Arizona, Arkansas, Colorado, Delaware, Nevada, Oregon, Rhode Island); six in 2014 (Connecticut, Florida, Minnesota, New Hampshire, Utah, West Virginia) four in 2015 (Idaho, Indiana, Montana, Tennessee); and four in 2017 (Kansas, Kentucky, Texas, Wisconsin). As of April 2018, benefit corporation legislation has been enacted in 34 states, Washington D.C., and Puerto Rico, and is under consideration in six more states.⁵

Chapter Notes

- 1 The concept underpinning benefit corporations was not new; it had a legal predecessor in the constituency statute. See generally Eric Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 *Geo. Wash. L. Rev.* 14, 20-22 (1992) (introducing the origin and function of the corporate constituency statutes as legal tools to protect directors decisions to act in the best interest of all stakeholders).
- 2 For an overview of current case law, please refer to *An Entrepreneur's Guide to Benefit Corporations and Certified B Corporations*. ABIGAIL BARNES, *AN ENTREPRENEUR'S GUIDE TO CERTIFIED B CORPORATIONS AND BENEFIT CORPORATIONS* 22-25 (2017), http://cbey.yale.edu/sites/default/files/CBEY_BCORP_Print.pdf, [hereinafter *ENTREPRENEUR'S GUIDE*].
- 3 For an overview of current case law, please refer to *An Entrepreneur's Guide to Benefit Corporations and Certified B Corporations*. ABIGAIL BARNES, *AN ENTREPRENEUR'S GUIDE TO CERTIFIED B CORPORATIONS AND BENEFIT CORPORATIONS* 22-25 (2017), http://cbey.yale.edu/sites/default/files/CBEY_BCORP_Print.pdf, [hereinafter *ENTREPRENEUR'S GUIDE*]. See I.R.C. § 501(c)(3) (2018) (listing the categories of tax-exempt eligible organizations and the rules they must follow to maintain the tax-free benefits; including a clause that prohibits a substantial part of the organization's activities from operating to provide benefits for any private shareholder or individual).
- 4 *Benefit Corporation*, S.B. 690, 2010 Leg., 427th Sess. (Md. 2010), <http://mgaleg.maryland.gov/webmga/frmMain.aspx?tab=subject3&ys=2010rs/billfile/sb0690.htm>; *Vermont Benefit Corporations Act*, S. 263, 2009-2010 Leg. Gen. Assemb., Reg Sess. (Vt. 2010), <http://www.leg.state.vt.us/docs/2010/Acts/ACT113.pdf>.
- 5 *State by State Status*, *supra* note 2, ch. 1.

The Business Case: Why States Are Interested in Benefit Corporations

3

The benefit corporation option gives business leaders flexibility to create value for a broader range of stakeholders. This flexibility can help their organizations boost productivity, attract and retain great employees, and meet shifting consumer expectations.



Photo credit: Justin Dion

The Business Case: Why States Are Interested in Benefit Corporations

Why would our state pass this legislation?
What's the business case?

Over the past half-century, companies have increasingly prioritized shareholder interests and short-term profit maximization at the expense of their employees, local communities, and the environment. Globalization has increased trade and communication among countries, but has also fueled income inequality and transferred millions of jobs overseas.¹ Putting profits first has led to industry consolidation, layoffs, pollution, and job outsourcing; and although short-termism generally translates into higher quarterly shareholder profits, the costs of razor-thin margins are largely passed on to consumers, the environment, and the long-term health and resilience of both the individual company and the nation's economy.²

In the past decade there has been a well-documented trend away from this approach and towards aligning corporate conduct with social and environmental values. Surprisingly, the trend isn't limited to self-described "social businesses." Many Fortune 500 corporations, banks, and energy companies are challenging the short-termist model.³

For example, the investment community appears to be warming up to the idea of a stakeholder-centric approach to business. The CEO of BlackRock Capital, the world's largest investment firm, recently wrote in his annual newsletter that companies must begin serving a social purpose, and that in order to prosper, "every company must not only

deliver financial performance, but also show how it makes a positive contribution to society."⁴ He went one step further and specifically called for a benefit corporation approach to capitalism: "Companies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate."⁵

The rise and popularity of Certified B Corporations and benefit corporations is evidence of a growing trend towards using business as a force for good. Indeed, nine out of ten consumers "expect companies to do more than make a profit, but also operate responsibly to address social and environmental issues."⁶

Consumers are also using their purchasing power to "vote" for brands and products that they have reason to believe are socially and environmentally responsible. Approximately 70 percent of millennials—who hold an estimated \$600 billion in annual spending power—say they're willing to pay more for products sold by socially responsible brands.⁷ Organizations are also discovering that employee and community engagement are strongly correlated with profitability. According to a recent Harvard Business Review study, employees who derive a sense of purpose and inspiration from their work are three times more productive than their counterparts.⁸ Disengaged employees cost companies \$450 billion to \$550 billion annually in lost productivity, representing vast unlocked potential in our nation's workforce.⁹

What's more, the labor market is showing a growing preference for a work culture that values social impact. Executives are realizing that in order to attract and retain talented employees, they must create a professional environment that satisfies prospective employees' high expectations and standards.¹⁰

The benefit corporation structure offers a clear path towards this aligned approach to business. It gives company directors solid legal footing to consider all stakeholder interests in decision-making as well as the flexibility to pursue a broader agenda.

Lawmakers across the country are realizing that if they want to attract these types of businesses to their states, they need to create a business environment that can accommodate for these new business models.

Benefit corporation legislation is the logical next step.



Photo credit: Jeff Johnson

Chapter Notes

- 1 See generally U.N. Dep't of Int'l Econ. & Soc. Affairs, World Economic & Social Survey 2017, at 74, 86-87, U.N. Doc. ST/ESA/365, U.N. Sales No. E.17.II.C.1 (2017), https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/WESS_2017-FullReport.pdf (describing globalization's surge of economic imbalance).
- 2 For an in-depth discussion on this point, see John Mackey & Raj Sisodia, CONSCIOUS CAPITALISM: LIBERATING THE HEROIC SPIRIT OF BUSINESS 16-20 (2013).
- 3 Jay Coen Gilbert, Panera Bread CEO and Co-founder Ron Shaich Resigns to Join the Conscious Capitalism Movement, FORBES, <https://www.forbes.com/forbes/welcome/?toURL=https://www.forbes.com/sites/jaycoengilbert/2017/12/13/boy-oh-boy-oh-boy-another-conscious-capitalist-joins-the-fight-against-short-termism> (last visited Apr. 25, 2018).
- 4 Larry Fink, A Sense of Purpose, 2017 ANNUAL LETTER TO CEOS (BlackRock), <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter> (last visited Apr. 22, 2018).
- 5 *Id.*
- 6 2015 CONE COMMUNICATIONS/EBIQUITY GLOBAL CSR STUDY, CONE, <http://www.conecomm.com/research-blog/2015-cone-communications-ebiquity-global-csr-study#download-research>; see also Sarah Landrum, Millennials Driving Brands to Practice Responsible Marketing, FORBES (Mar. 17, 2017), <https://www.forbes.com/sites/sarahlandrum/2017/03/17/millennials-driving-brands-to-practice-socially-responsible-marketing/> ("Millennials prefer to do business with corporations and brands with pro-social messages, sustainable manufacturing methods and ethical business standards.").
- 7 Brian H. Potts, Wisconsin Republicans Just Passed a Law Encouraging Sustainable Business Practices, FORBES (DEC. 21, 2017, 9:30 AM), <https://www.forbes.com/sites/brianpotts/2017/12/21/wisconsin-republicans-just-passed-a-law-encouraging-sustainable-business-practices/2>.
- 8 David C. McClelland & David H. Burnham, Power is the Great Motivator, HARV. BUS. REV. (Jan. 2003), <https://hbr.org/2003/01/power-is-the-great-motivator>.
- 9 Abigail Barnes, Joining Trend, WI Creates New Business Entity: Benefit Corporations, XCONOMY (NOV. 29, 2017), <https://www.xconomy.com/wisconsin/2017/11/29/joining-trend-wi-creates-new-business-entity-benefit-corporations/>.
- 10 *Id.*

Myths and Misconceptions

4

This section is all about clarifying the most common misunderstandings about benefit corporations and their legal requirements.



Photo credit: Andrej Lisakov

Myths and Misconceptions

Although the majority of states now recognize benefit corporations, misconceptions about these entities abound, creating confusion for entrepreneurs, investors, lawyers, and lawmakers about the nature and purpose of benefit corporations.



1. A Benefit Corporation must become a Certified B Corporation.

First is the misconception that a benefit corporation must become a Certified B Corporation.¹ While a benefit corporation may choose to use the B Impact Assessment—the standard that B Lab uses to administer B certification—as the third-party standard for its annual report,² the company is not required to go through the full certification process.



2. Benefit corporations must be certified or audited by an external arbiter.

The second common misconception is that benefit corporations must be certified or audited by an external arbiter. While it is true that benefit corporations must use a credible and independent third-party evaluation standard in producing their annual benefit reports, these reports need not be certified or audited by a third party.



3. There is a special tax treatment for benefit corporations.

Contrary to popular belief, there is currently no special tax treatment for benefit corporations. Executives of these entities

can elect to have the company taxed as either a Subchapter C or Subchapter S entity, just like a traditional corporation.³



4. Benefit corporation status will prevent a company from raising capital.

The fourth myth is that benefit corporation status will prevent a company from raising capital. Indeed, investors (and their attorneys) are generally less familiar with benefit corporations than their traditional counterparts—after all, benefit corporations are a relatively new corporate form. However, in recent years there has been a notable increase in the number of venture-backed benefit corporations.⁴ Among start-ups, benefit corporations and Certified B Corps saw over \$1.4bn in deal flow since May 2017.⁵ Venture capital firms are starting to taking things one step further: In 2016, Foundry Group, an early-stage venture firm, announced it had become a Certified B Corp.⁶



5. Corporate law requires shareholder interests to supersede those of other stakeholders.

Another widely held misconception is that corporate law requires shareholder interests to supersede those of other stakeholders.⁷ This is sometimes referred to as the doctrine of shareholder primacy.

In 1962, Nobel Prize-winning economist Milton Friedman, a champion of free-market economics, famously stated: “There is one and only one social responsibility of business[:] to increase its profits.”⁸ The implication of Friedman’s dictum is that companies are not bound by any obligation to the communities and people they employ and serve. The flaw in this approach to business is that profits often

fail to account for negative externalities—costs that aren’t borne by the company, but are instead passed on to workers, communities, and the environment.

The shareholder primacy doctrine is often misinterpreted to mean that companies are bound, in a strict legal sense, to pursue profit before all other sources of value. However, this is something of a distortion.

Generally, under corporate law, directors are entitled to the protection of what’s called the business judgment rule, which affords corporate directors a shield against liability if they make an informed decision, in good faith, that they believe is in the best interest of the company. So long as directors can point to some shareholder value resulting from their decisions—financial or otherwise—the business judgment rule provides wide latitude for directors to run the affairs of the corporation. On these grounds, some scholars contend that the benefit corporation structure is not technically necessary, and may create a false dichotomy between “good and “bad” companies based on legal structure, rather than on the soundness of director decisions.⁹ Along the same lines, some analysts maintain that “maximizing shareholder value is not a managerial obligation, it’s a managerial choice” under corporate law, and that the legal standard looks to the best interest of the company—not the best interest of the shareholder.¹⁰

Even so, some lower court rulings have interpreted business judgment rule in ways that appear to favor shareholder profitability over other values.¹¹ An overview of these court decisions and accompanying legal analysis can be found in the last chapter of *An Entrepreneur’s Guide to Certified B Corporations and Benefit Corporations*. Of course, there is no question that the corporate finance and private equity sectors exercise considerable influence over whether corporations, in practice, maximize shareholder wealth over the well-being of other

stakeholders. This pressure can make it difficult for corporate directors to hold C-suite executives accountable for myopic decision-making focused on short-term profitability—even when that myopia compromises the company’s long-term health and prosperity, to say nothing of the impact on other stakeholders. The benefit corporation changes that paradigm by requiring directors—by statute—to consider factors other than short-term profitability in corporate decision making.¹²



6. Shareholders have fewer rights under the benefit corporation structure.

There is also a misconception about shareholders’ rights under the benefit corporation structure. In fact, the model benefit corporation legislation preserves almost all of the rights that shareholders would enjoy under a traditional corporate model. These include governance and voting rights, as well as the right to bring suits against the corporation to review accounting, record-keeping, election procedures, and officers’ adherence to fiduciary responsibilities. The only substantive change is that fiduciary responsibility explicitly extends to all stakeholders: employees, customers, and—more generally—to the communities and natural environments that the company’s operations impact.¹³



7. A Benefit corporation's focus is incompatible with strong financial performance.

A seventh and final misconception is that a benefit corporation's focus on social and environmental impact is incompatible with strong financial performance and robust returns. A company that builds social values into its bottom line (often called a "triple-bottom-line company")—so the

argument goes—cannot be profitable or grow into a large-scale business. This is misguided and untrue. There are numerous examples of well-known and highly profitable benefit corporations, including DanoneWave, Patagonia, Bigelow Tea, Kickstarter, Method (recently acquired by SC Johnson),¹⁴ Eileen Fisher, and King Arthur Flour.¹⁵ Each of these companies has used its benefit corporation status to generate long-term value and establish itself as an industry leader.¹⁶



Photo credit: Tim Davis

Chapter Notes

- 1 Certified B Corps and Benefit Corporations, BCORPORATION.NET, <https://www.bcorporation.net/what-are-b-corps/certified-b-corps-and-benefit-corporations> (last visited Apr. 22, 2018).
- 2 Frequently Asked Questions, B IMPACT ASSESSMENT, <http://bimpactassessment.net/how-it-works/frequently-asked-questions/the-basics> (last visited Apr. 23, 2018).
- 3 Due to the significant changes made in the federal tax reform legislation passed in 2017, certain businesses may find it more advantageous to incorporate as C Corps or switch status from S to C corps. The C Corp status comes with a reduced corporate tax rate of 21 percent that went into effect for the 2018 taxable year. I.R.C. § 11(b) (2018). There's no one-size fits all tax plan for a business, and "C" vs "S" Corp filing decisions are made on a case-by-case basis.
- 4 Benefit Corporations Raising Capital, BENEFIT CORPORATION, <http://benefitcorp.net/benefit-corporations-raising-capital> (last visited May 20, 2018).
- 5 Alex Buerkle, Kylee Chang, Max Storto, JUST GOOD BUSINESS: AN INVESTOR'S GUIDE TO B CORPS (2018), <https://cbey.yale.edu/programs-research/just-good-business-an-investor%E2%80%99s-guide-to-b-corps>; B Lab, List of Investors That Have Invested in Benefit Corporations, DATA.WORLD, <https://data.world/blab/investors-in-benefit-corporation> (last visited May 29, 2018).
- 6 Foundry Group is Now a Certified B Corp!, FOUNDRY GROUP, <https://foundrygroup.com/blog/2016/05/foundry-group-is-now-b-certified/> (last visited May 20, 2018).
- 7 See Mark A. Underberg, Benefit Corporations vs. "Regular" Corporations: A Harmful Dichotomy, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (May 13, 2012), <https://corpgov.law.harvard.edu/2012/05/13/benefit-corporations-vs-regular-corporations-a-harmful-dichotomy/> ("there is no legal restriction on directors' ability to consider the interests of other stakeholders. . .").
- 8 MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (40th anniversary ed., Univ. of Chi. Press 2002).
- 9 Underberg, *supra* note 7.
- 10 LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 32 (Berrett Keohler 2012).
- 11 ENTREPRENEUR'S GUIDE, *supra* note 2, ch. 2.
- 12 See MODEL BENEFIT CORP. LEGIS., *supra* note 7, at § 301 (listing the standard of conduct for directors).
- 13 General Questions, BENEFIT CORPORATION, <http://benefitcorp.net/faq> (last visited Apr. 23, 2018).
- 14 Press Release, SC Johnson (Sep. 14, 2017), <http://www.scjohnson.com/en/press-room/press-releases/09-14-2017/SC-Johnson-Signs-Agreement-to-Acquire-Method-and-Ecover.aspx>.
- 15 *Id.*
- 16 See B Corp Analysis Reveals Purpose-Led Businesses Grow 28 Times Faster Than National Average, SUSTAINABLE BRANDS (Mar. 1, 2018), http://www.sustainablebrands.com/news_and_views/business_models/sustainable_brands/b_corp_analysis_reveals_purpose-led_businesses_gro (reporting rapid growth for purpose-driven businesses from data collected in a 2017 survey of certified B Corp businesses).

5

Legal Relatives of Benefit Corporations: Benefit LLC, L3C, SPC/FPC

Benefit corporations aren't the only business structures that operate with social or environmental missions. There are three additional hybrid legal structures available in select states that promote both profitability and social and/or environmental good.



Photo credit: Green Chameleon

Although none of these entities has been as widely adopted as the benefit corporation, they are all important to understand for anyone working on introducing benefit corporation legislation.

Benefit LLC

The benefit LLC is the statutory cousin of the benefit corporation. It is nearly identical to the standard limited liability company, except that it is subject to the same accountability and transparency requirements of a benefit corporation.¹ Like a benefit corporation, a benefit LLC must pursue a general public benefit and has the option of identifying one or more specific public benefits to pursue. A benefit LLC's transparency requirements are also virtually identical to those of a benefit corporation.² Benefit LLC legislation has been passed in four states (UT, PA, MD, OR) and is being considered in DE and CT.

The benefit LLC can be viewed as redundant, since the legal framework of the traditional LLC already allows directors to modify the operating agreement and include benefit corporation language effectively creating a benefit LLC. Modifying an LLC's operating agreement to add benefit corporation language, however, will likely require hiring an attorney. For cash-strapped startups, the benefit LLC offers an "off the shelf" option that allows company founders to more easily organize their business as an LLC with benefit corporation principles built in.

Benefit LLCs, like benefit corporations, do not receive special tax treatment. LLCs are also generally easier to establish than other corporate entities and can often be created without legal assistance. Typically, organizing as an LLC is a matter of filling out a handful of forms available on the Secretary of State's website; this is also true for benefit LLCs.

Low-Profit Limited Liability Company (L3C).

The low-profit limited liability company (L3C) is a derivative of the limited liability company. Legislation creating this entity was first signed into law in Vermont on April 30, 2008,³ and has since passed in eight other states.⁴

The L3C structure is, for the most part, identical to that of the typical LLC. It receives no favorable tax treatment from federal or state governments and is generally flexible in terms of requirements for bylaws and articles of organization.

The primary difference between an L3C and a standard LLC is that the company's primary objective must be to advance a social purpose. To this end, the L3C must satisfy four criteria:

- 1. The company significantly furthers the accomplishment of one or more charitable or educational purposes within the meaning of Section 170(c)(2)(B) of the Internal Revenue Code;**
- 2. The company would not have been formed but for the company's relationship to the accomplishment of charitable or educational purposes;**
- 3. No significant purpose of the company is the production of income or the appreciation of property; provided, however, that the fact that a person produces significant income or capital appreciation shall not, in the absence of other factors, be conclusive evidence of a significant purpose involving the production of income or the appreciation of property; and**
- 4. No purpose of the company is to accomplish one or more political or legislative purposes within the meaning of Section 170(c)(2)(D) of the Internal Revenue Code.⁵**

By meeting these criteria, an L3C (theoretically) becomes eligible to receive program-related investments from foundations⁶ – a funding stream that is typically reserved for nonprofits.⁷ This allows a foundation to make a program-related tranch

investment in an L3C⁸ Tranching investing enables companies to sell different asset classes of the same investment opportunity, thereby helping secure different forms of equity. Accordingly, a foundation would likely take a high-risk first-loss position in a L3C investment, incentivizing traditional investors to take a lower-risk tranche.

Critics of the L3C model have called the entity “redundant”⁹ and “fundamentally flawed.”¹⁰ Some worry that including the moniker “low-profit” in an entity’s name discourages traditional investors that typically look to generate high profits.¹¹

Notably, a foundation that invests in an L3C is responsible for ensuring that the recipient’s use of the funds is in line with the foundation’s stated purpose. Although the L3C is required by state law to adhere to IRS regulations governing program-related investments, the additional due diligence that often accompanies investing in an L3C can disincentivize foundations from making such an investment.

When the L3C first appeared on the national stage, there was hope that the IRS would eventually give L3Cs special treatment and facilitate a less restricted flow of capital into these entities. The IRS, however, has not taken such action, and legislation requiring it to do so has so far failed to gain traction in Congress since L3C’s introduction in 2013.¹²

Social/Flexible Purpose Corporation (SPC/FPC)

A social purpose corporation (SPC), formerly known as a “flexible purpose corporation” (FPC) in California,¹³ is a for-profit corporation that provides a legal framework “allow[ing] companies to maximize financial returns and to promote positive impact on the company’s employees, community and/or the environment.”^{14 15}

A company organizing as an SPC must satisfy the following criteria:

- 1. Organized under a general social purpose and acts in a manner intended to promote positive short-term or long-term effects of, or minimize adverse short-term or long-term effects of, the corporation’s activities upon any or all of:**
 - The corporation’s employees, suppliers, or customers;
 - The local, state, national, or world community; or
 - The environment;
- 2. Identifies any specific social purpose(s) for which it is organized (a specific social purpose is not required, however);**
- 3. Directors and officers consider the impact of any action or decision regarding one or more of the corporation’s social purposes;**
- 4. The board of directors produce an annual social purpose report for the shareholders and make the report available on the corporation’s primary website no later than four months following the close of the corporation’s fiscal year.¹⁶**

Unlike most benefit corporations, an SPC is not legally required to pursue a general public benefit. Instead, it need only consider the effects of its business on certain stakeholders of its choosing. Additionally, an SPC does not need to use an independent third-party standard to produce an annual report on its social and environmental

impact.¹⁷ These lower standards may appeal to some companies, especially startups, which need to be versatile and prioritize survival in the early days. Critics of the SPC, however, believe that these leaner requirements defeat the purposes of creating hybrid entities, and could lead to greenwashing.¹⁸



Photo credit: Jeff Johnson

Chapter Notes

- 1 See, e.g., MD. CODE ANN., CORPS. & ASS'NS § 4A-1201 (2015).
- 2 Not surprisingly, benefit LLCs typically receive similar criticism to the benefit corporation and L3C – namely, that the new legal entity is unnecessary. While a strong case can be made for the need for benefit corporations in light of the "Revlon Rule" (See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* 506 A.2d 173 (Del. 1986)), critics argue that the benefit LLC does nothing that a traditional LLC couldn't do, and like the L3C, is redundant and unnecessary. For an overview of the Revlon decision and implications, see Barnes, *supra* note 20, at 24.
- 3 H.B. 775, 2007-2008 Leg. Gen. Assemb., Reg. Sess. (Vt. 2008) <http://www.leg.state.vt.us/database/status/summary.cfm?Bill=H.0775&Session=2008>;
- 4 Jurisdictions that have passed legislation enabling the L3C entity include the states of Michigan, Wyoming, Utah, Illinois, North Carolina (later repealed), Louisiana, Maine, and Rhode Island as well as the federal jurisdictions of the Oglala Sioux and the Crow Indian Nation of Montana. What is an L3C?, INTERSECTOR PARTNERS, L3C (Apr. 1, 2018), <https://www.intersectorl3c.com/l3c>.
- 5 See, e.g., 11 V.S.A. § 3001(23) (2012) (detailing the requirements of the L3C company as codified in the Vermont Statutes).
- 6 According to the IRS, "Program-related investments" (PRIs) are those in which: 1. The primary purpose is to accomplish one or more of the foundation's exempt purposes; 2. Production of income or appreciation of property is not a significant purpose; and 3. Influencing legislation or taking part in political campaigns on behalf of candidates is not a purpose." I.R.S. Program-Related Investments, <https://www.irs.gov/charities-non-profits/private-foundations/program-related-investments> (last updated Apr. 2, 2018).
- 7 Traditional for-profits can also receive PRIs if they meet strict standards.
- 8 What is a Tranche?, INVESTOPEDIA, Nov. 3, 2017, <http://www.investopedia.com/ask/answers/04/081304.asp>.
- 9 Kelly Kleiman, "L3C" Spells "Caveat Emptor", STAN. SOC. INNOVATION REV. (Mar. 18, 2011), http://ssir.org/articles/entry/l3c_spells_caveat_emptor.
- 10 Daniel Kleinberger & J. William Callison, When the Law is Understood-L3C No. at 1 (Wm. Mitchell C.L., Working Paper No. 2010-07, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1568373.
- 11 In January 2014, North Carolina became the first state to repeal authorization of the entity, driven by concerns that the legal form failed to provide an effective mechanism for combining a charitable purpose with a profit-making motive. The legislation's opponents further argued that the L3C was redundant, since any LLC could insert language relating to a charitable purpose inserted into its articles of organization, and from a governance perspective, operate in exactly the same manner as an L3C. Anne Field, North Carolina Officially Abolishes the L3C, FORBES (Jan. 11, 2014), <http://www.forbes.com/sites/annefield/2014/01/11/north-carolina-officially-abolishes-the-l3c>.
- 12 Robert Land, The L3C-Background & Legislative Issues, AMERICANS FOR COMMUNITY DEVELOPMENT, 18-19 (2013), <https://www.americansforcommunitydevelopment.org/downloads/The%20PFA%20of%202013%20.pdf>.
- 13 The FPC became available in California in January of 2012, but the legislature passed an amendment to the act in September 2014 renaming the "flexible purpose corporation" as the "social purpose corporation" to emphasize the social purpose of the FPC. S.B. 1463, 2010 Leg., Reg. Sess. (Cal. 2010) (amended), amended by S.B. 1301, 2014 Leg., Reg. Sess. (Cal. 2014) (changing the name of the act). Legislation enabling the SPC entity was first signed into law in Washington on June 7, 2012. In July 2014, Florida followed Washington's lead and became the secondnd state to enact SPC legislation and by July 2016, legislation enabling SPCs had passed in California and Texas as well. See Status Tool, *v* note 1, at socentlawtracker.org/#/spcs (identifying four states with active SPC legislation).
- 14 E.g., WASH. REV. CODE § 23B.25.040(1)(e) (2012) (requiring language in the articles of incorporation of an SPC to state that the entity allows directors the freedom to maximize financial returns and social purposes beyond profits).
- 15 The initial creation and passage of SPC/FPC legislation was due, in large part, to the law firm Morrison & Foerster (MoFo), whose corporate department spent several hundred pro bono hours developing and supporting this corporate form. According to Susan Mac Cormac, a partner in MoFo's Corporate Department, the SPC was specifically designed "to provide [management with] an extra 'safe harbor' protection in addition to the business judgment rule." Corporate Structures for Mission Driven Companies, HIRE AN ESQUIRE, <https://hireanesquire.com/magazine/corporate-structures-mission-driven-companies/> (last visited Apr. 23, 2018).
- 16 WASH. REV. CODE §§ 23B.25.005 et seq. (2012).
- 17 Jeremy Chen, Accountability: How Benefit Corporations and Social Purpose Corporations Differ, JEREMY CHEN LAW, <http://jeremychenlaw.com/benefit-corporation-accountability-enforcement/> (last visited Apr. 23, 2018).
- 18 William Clark, an attorney and one of the authors of the Model Benefit Corporation legislation, has been critical of the social purpose corporation, predicting that it could result in greenwashing as it does not require its directors to commit to the triple bottom line: people, planet, and profit. Steve Piersanti, president of benefit corporation Berrett-Koehler, echoes Clark's criticism, arguing that because an SPC is not required to pursue a triple bottom line, it could theoretically devote itself to any activity, including "dump[ing] toxic waste while serving society by giving away free handguns." Brad Edmondson, Benefit vs. Social Purpose: Small Distinction, Big Difference, BENEFIT CORP REPORTER (Feb. 29, 2016), <https://benefitcorpreporter.com/2016/02/29/benefit-vs-social-purpose-small-distinction-big-difference/>.

You've Decided You Want to Pass Benefit Corporation Legislation, Now What?

6

It takes tenacity, teamwork, and time to pass legislation that substantially alters the corporate and legal landscape in your state. Here are some recommendations for assembling the right people and resources to get it done.



Photo credit: Jeff Johnson

You've Decided You Want to Pass Benefit Corporation Legislation, Now What?

Below is a general overview of the steps you'll need to take to pass a bill in your state legislature to create this new legal entity.

Step 1: Create a Legislative Working Group

Creating a new legal entity that significantly alters the legal landscape for every business law attorney in your state can be incredibly difficult. So it's important to put together a working group of passionate and diverse individuals to help move the legislation forward.

Below is a list of the ideal membership for a legislative working group:



Business law attorney(s): Attorneys can provide assistance with early drafting guidance, and advocate for the legislation within the state's bar association. Earning the bar association's support—or at least their neutrality—can make life much easier.



Passionate entrepreneurs: entrepreneurs can help make the business case for the benefit corporation statute. These entrepreneurs should be comfortable stating that their company plans to incorporate as a benefit corporation when the entity is available.



Current or former lawmaker(s), and/or lobbyist(s): These individuals will have years of political relationships and institutional knowledge under their belts. They will be your sherpas as you navigate the process of getting the legislation passed, which tends to have more to do with politics and personalities than it will with policy. Notably, many law firms and the Bar associations have in-house lobbyists.



A benevolent benefactor/client: A business or foundation may be willing to retain a law firm and/or lobbying group to help get the legislation passed in order to secure benefit corporation status.



Graduate students (preferably J.D. or MPA/MPP candidates): There will no doubt be a significant amount of research, report/legislative drafting, and administrative labor required to keep the working group's efforts moving forward efficiently. Students assisting the working group as interns/externs can be invaluable to its efforts.

Between regular meetings, stakeholder engagement, and coalition building, the responsibilities of leading the working group can be significant. Before engaging with outside groups or individuals, the task force should come to an early consensus on the legislation's framework. Although tweaks and changes to new legislation are inevitable, using model language—be it from B Lab or from another state that has enacted benefit corporation legislation—can be extremely helpful as a starting point.

Step 2: Engage Businesses, Entrepreneurs, and Other Interested Stakeholders

Getting support and signatures from both start-ups and established businesses in the state helps. The network of Certified B Corporations in your state is a helpful starting point for early business partners, as there is considerable overlap between benefit corporations and B Corps, and the latter tend to want to see the legislation pass. Support from state and local nonprofits, as well as chamber of commerce associations, is also critical.

Over the past decade, several “blended-value” business models and other market-based approaches have emerged to advance social and environmental impact in the business community. Accordingly, state interest groups that have advocated for incentives in adjacent ideas social enterprise, corporate social responsibility, and impact investing—often make good partners. Traditional business groups with deep relationships in the state, including trade organizations, bar associations, and chambers of commerce, can also be ready allies. It’s a good idea to identify the drivers of these initiatives, as there may be opportunities to consolidate and streamline efforts to achieve similar objectives.

To the extent possible, you should ensure that none of the aforementioned groups is blindsided when the benefit corporation bill is introduced. While getting the support of these groups is ideal, a neutral position is generally sufficient.

Step 3: Identify “Legislative Champions”

Identify a legislative champion in each of the four caucuses in your state’s legislature.¹ This step is vital to getting the bill through the committee process and passed in each chamber. These champions will lobby their fellow members behind closed doors and act as issue experts in caucus meetings. Briefing the leadership in each caucus is also crucial. Caucus leaders will have significant (if not final) say in whether the bill moves forward or dies. Although this legislation has seen strong bipartisan appeal in many states, effective messaging and education are essential—remember, this is a relatively new corporate structure.

Equally important is the governor’s office. Getting your bill through both chambers only to have it vetoed by the governor is a nightmare scenario that has already played out in Maine and New Mexico.² Ensuring that the governor supports the legislation and is privy to negotiations on language could prove necessary to the bill’s passage.

Finally, as the principal advocate for benefit corporation legislation, B Lab also routinely assists states with drafting legislation. Minor changes in a bill can have significant implications, and some modifications to the model legislation language may also result in the legislation’s failing to satisfy B Lab’s requirement for B Corp certification. It can be useful to get B Lab involved early on in the drafting process.

Step 4: Mobilize the Troops

Getting a bill passed can be difficult. Lean on your legislative champions, lobbyists, and former legislators who can guide you through the legislative process, and make sure to leverage the relationships you've built with stakeholders from the business, legal, and nonprofit sectors. Remember that passing legislation often requires a multi-year effort.



Photo credit: Jeff Johnson

Chapter Notes

- 1 Nebraska, the only state with a unicameral legislature, has already passed benefit corporation legislation. See On Unicameralism, NEBRASKA LEGISLATURE, https://nebraskalegislature.gov/about/ou_facts.php, (last visited Apr. 23, 2018) (identifying Nebraska as "the only state in the country that has implemented a unicameral system").
- 2 In Maine, Governor Paul LePage vetoed benefit corporation legislation and in New Mexico Governor Susana Martinez vetoed the bill. Letter from Paul R. LePage, Me. Gov., to 127th Legislature, vetoing Me. LD 1154, "An Act to Provide for the Establishment of Benefit Corporations" (June 22, 2015), http://www.maine.gov/tools/whatsnew/index.php?topic=Gov_Bills&id=650897&v=article2013; Dennis Domrzalski, Martinez Uses Pocket Veto on "B-Corp" Social Responsibility Bill, Albuquerque Business First, Apr. 8, 2013, <https://www.bizjournals.com/albuquerque/news/2013/04/08/martinez-pocket-veto-b-corp-bill.html>.

7 | Conclusion

To wrap things up, here's a brief summary of the potential advantages of passing benefit corporation legislation.



Photo credit: Jeff Johnson

Conclusion

In the last decade, over 5,000 U.S. companies have incorporated or re-incorporated as benefit corporations, and more than 2,500 companies around the world have become Certified B Corps.

Of the 36 states and territories (including D.C. and Puerto Rico) that have passed benefit corporation statutes, 12 passed their bills unanimously, and 30 with unanimous floor votes.¹ Legislative initiatives for benefit corporations have enjoyed unusually high levels of bipartisan support—in part because the category offers an unusual combination of free-market opportunity and positive social impact.

One qualifier to these successes is that the courts have yet to define the scope of legal protection afforded benefit corporations. Indeed, no court has yet weighed in on these legal structures. And while a handful of lower courts have addressed the issue of shareholder primacy in several relevant decisions, as discussed in the last section *An Entrepreneur's Guide to Certified B Corporations and Benefit Corporations*, it remains to be seen how much legal protection benefit corporation legislation will afford, and how this new legal entity will impact the private sector over time. The legal decisions that follow

from rocky leadership transitions, hostile takeovers, or stakeholder challenges to breaches of social or environmental obligations, will inform how much legal muscle benefit corporations can ultimately flex.

We lost a potential opportunity for greater legal clarity this past year with the hostile sale of Whole Foods. After some sluggish quarterly earnings, activist investors took control and forced a sale to Amazon against the wishes of then-CEO John Mackey.² Had Whole Foods been a benefit corporation, Mackey and the board may have been inclined to defend the decision in court. In Mackey's words: "Boy oh boy.... did I wish we were a [benefit corporation]. I would have loved to have tested the idea of shareholder activists versus the legal form of a [benefit corporation]."³ While Whole Foods still could have gone to court, it would have been a tougher legal sell—especially considering that Delaware does not have a constituency statute, the benefit corporation legislation's legal predecessor. Case law is currently divided on the extent to which a company can justify a decision that prioritizes stakeholder values and corporate culture over shareholder profits.

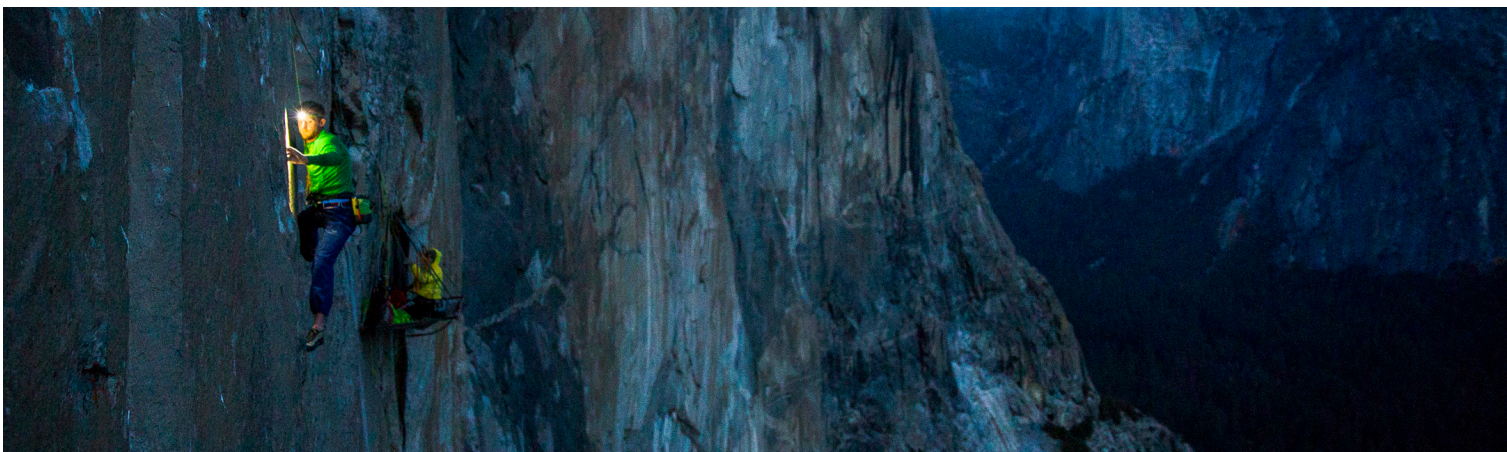


Photo credit: Jeff Johnson

These caveats aside, there are numerous reasons why passing benefit corporation legislation is good for your state. We've summarized the leading reasons below:

Value to entrepreneurs	Value to the state	Value to the market
<ul style="list-style-type: none"> • Benefit corporation legislation helps protect and preserve a corporation's culture and values, thereby providing entrepreneurs with greater flexibility in weighing stakeholder interests in business decisions.⁴ • Millennial entrepreneurs and customers also find the corporate form attractive because these entities further social and environmental initiatives.⁵ • Finally, benefit corporations help companies retain employees and attract talent, thereby allowing companies to grow quickly and sustainably. 	<ul style="list-style-type: none"> • Benefit corporation legislation is an investment in the state's economic development by attracting new businesses with high growth potential.⁶ The existence of benefit corporations does not impact existing corporations or other corporate forms. • Benefit corporation legislation does not require changes to the state's tax laws.⁷ • The legislation has the potential to increase state revenues by creating a more favorable climate for business.⁸ • The legislation reduces the regulatory burdens on states by requiring public disclosures about business practices, as well as social and environmental impact. • The legislation allows states to compete with the 36 other jurisdictions that already offer this corporate form. • Benefit corporations can help mitigate and solve social and environmental problems in their local communities.⁹ 	<ul style="list-style-type: none"> • States with benefit corporation legislation are accelerating the development of a new economic sector.¹⁰ • Benefit corporations appeal to millennials, who now comprise nearly 50 percent of the workforce.¹¹ • The new class of company also appeals to millennials as consumers, who are more likely to make purchasing decisions based on judgments of a company's environmental and social value. • Benefit corporations appeal to the large and growing population of socially responsible investors that represent \$8.7T of capital.¹²

Perhaps the clearest argument in favor of enacting benefit corporation legislation is that it broadens the scope of entrepreneurial freedom. This is an idea that lawmakers of any persuasion have found easy to get behind. For those who are keen to deploy the power of the market to grow the state economy and improve relationships between businesses and local communities, the benefit corporation is a clear path forward.

Chapter Notes

- 1 Social Enterprise Law Tracker, Status Tool, <https://www.socentlawtracker.org/#/map> (last visited June 18, 2018).
- 2 Gilbert, *supra* note 3, ch. 3.
- 3 In Mackey's original quote he said "B Corp." He clearly meant benefit corporation, as B Corps are a certification, and not a legal entity. We modified the quote accordingly. Original quote as follows: "Boy oh boy oh boy, did I wish we were a B Corp. I would have loved to have tested the idea of shareholder activists versus the legal form of a B Corp." *Id.*
- 4 William H. Clark, Jr. & Larry Vranka, The Need and Rationale for the Benefit Corporation: Why it is the Legal Form That Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public, BENEFIT CORPORATION WHITE PAPER 17 (Jan. 18, 2013), http://benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf; David Adelman, Just What California Needs: A New Corporate Form, CLOSING ARGUMENT (Apr. 2011), <http://gb.dsdproweservices.com/wp-content/uploads/2011/04/DA-LACBA-Article-4-11.pdf>.
- 5 Barnes, *supra* note 9, ch. 3.
- 6 Felicia R. Resor, Benefit Corporation Legislation, 12 WYO. L. REV. 91, 111 (2012), <http://repository.uwyo.edu/cgi/viewcontent.cgi?article=1066&context=wlr>.
- 7 The City of Philadelphia voluntarily elected to offer a \$4,000 tax credit to Certified B Corps. Sustainable Business Tax Credit, City of Phila., <https://beta.phila.gov/services/payments-assistance-taxes/tax-credits/sustainable-business-tax-credit/>, (last updated Apr. 2, 2018). San Francisco provides benefit corporations a contract bidding preference of 4 percent. California Benefit Corporation Discount, S.F. Admin. Code § 14C (June 3, 2012) (Added by Ord. 76-12), <http://sfgov.org/cmd/sites/default/files/FileCenter/Documents/12124-Chapter%2014C%20-%20California%20Benefit%20Corporation%20Discount.pdf>.
- 8 Resor, *supra* note 6, at 111.
- 9 Tommy Stringer, The SC Benefit Corporation Act, (Feb. 10, 2012), <http://www.tommystringer.com/2012/02/10/the-sc-benefit-corporation-act/>
- 10 Kyle Westaway & Dirk Sampselle, An Economic Analysis with Recommendations to Courts, Boards, and Legislatures, EMORY. L.J. 62, 999 (2013), http://law.emory.edu/elj/_documents/volumes/62/4/contents/westaway-sampselle.pdf
- 11 Cone, *supra* note 6, Ch. 3.
- 12 The Forum for Sustainable and Responsible Investing, <https://www.ussif.org/files/Infographics/Overview%20Infographic.pdf> (last visited May 28, 2018).

Appendix A

State	Entity Type	Effective Date	Notice of Entity Type	Min. Status Vote	Express Dissent Rights	General Public Purpose	Specific Public Purpose	Benefit Director Required	Third-Party Standard	Benefit Enforcement Processing	Benefit Report ("BR")	Publicly Post BR	Benefit Report to SH	File BR with State	Express Penalty for Not Posting BR	Interests and Liability	Standing
Model	BC	N/A	A	2/3	No	Yes	No	YesP	Yes	Yes	Annual	Yes	Yes	Yes	No	Model	Model2
AR	BC	8/16/13	A	2/3	No	Yes	No	No	Yes	Yes	Annual	Yes	Yes	Yes	No	Model	Model
AZ	BC	1/1/15	A	2/3, 3/4	No	Yes	No	No	Yes	Yes	Annual	Yes	Yes	Yes	No	Model	Model2
CA	BC	1/1/12	A, SC	2/3	Yes	Yes	No	No	Yes	Yes	Annual	Yes	Yes	No	No	Model	Model
CA	SPC*	1/1/12	A, N, SC	2/3	Yes	No	Yes	No	No	No	Annual	Yes	Yes	No	Yes	SPC	Unclear
CO	PBC	4/1/14	A, N, SC	2/3	Adopt	Yes	Yes	No	Yes	No	Unclear	Yes	Yes	No	No	PBC	25H
CT	BC	10/1/14	A	2/3	Adopt	Yes	No	YesP	Yes	Yes	Annual	Yes	Yes	No	No	Model*	5SH, 10P, O
DE	PBC	8/1/13	A, N, SC	2/3, 90%	Adopt	Yes	Yes	No	No	No	Biennial	No	Yes	No	No	PBC	25H
DC	BC	5/1/13	A	2/3	No	Yes	No	Yes	Yes	Yes	Annual	Yes	Yes	Yes	No	Model	Model
FL	BC	7/1/14	A	2/3	Yes	Yes	No	No	Yes	Yes	Annual	Yes	Yes	No	Yes	Model	Model
HI	SBC*	7/8/11	A	2/3	No	Yes	No	Yes	Yes	No	Annual	Yes	Yes	No	No	SBC-H	SH, D
IL	BC	1/1/13	A	2/3	No	Yes	No	Yes	Yes	Yes	Annual	Yes	Yes	No	No	Model	Model
LA	BC	8/1/12	A, N, SC	2/3	No	Yes	No	Yes	Yes	Yes	Annual	Yes	Yes	No	No	Model	Model
MD	BC	10/1/10	A, SC	2/3	No	Yes	No	No	Yes	No	Annual	Yes	Yes	No	No	Model	Unclear
MA	BC	12/1/12	A	2/3	Adopt	Yes	No	Yes	Yes	Yes	Annual	Yes	Yes	Yes	Yes	Model	Model
MN	GBC	1/1/15	A, N	Yes	Yes	Yes	No	Yes	Yes	No	Annual	No	No	Yes	Yes	PBC	5H
MN	SBC*	1/1/15	A, N	Yes	Yes	No	Yes	Yes	Yes	No	Annual	No	No	Yes	Yes	PBC	SH
NE	BC	7/18/14	A	2/3	No	Yes	No	YesP	Yes	Yes	Annual	Yes	Yes	Yes	No	Model	Model2
NV	BC	1/1/14	A, SC	2/3	Adopt	Yes	No	No	Yes	Yes	Annual	Yes	Yes	No	Yes	Model	Model2
NH	BC	1/1/15	A	2/3	No	Yes	No	YesP	Yes	Yes	Annual	Yes	Yes	Yes	Yes	Model	Model2
NJ	BC	3/1/11	A	2/3	No	Yes	No	Yes	Yes	Yes	Annual	Yes	Yes	Yes	Yes	Model	Model
NY	BC	2/10/12	A, SC	3/4	No	Yes	No	No	Yes	No	Annual	Yes	Yes	No	No	Model	Unclear
OR	BC	1/1/14	A	Majority	No	Yes	No	Yes	Yes	No	Annual	Yes	Yes	No	No	Model	Model
PA	BC	1/22/13	A	2/3	No	Yes	No	YesR	Yes	Yes	Annual	Yes	Yes	Yes	No	Model	Model2

State	Entity Type	Effective Date	Notice of Entity Type	Min. Status Vote	Express Dissent Rights	General Public Purpose	Specific Public Purpose	Benefit Director Required	Third-Party Standard	Benefit Enforcement Processing	Benefit Report ("BR")	Publicly Post BR	Benefit Report to SH	File BR with State	Express Penalty for Not Posting BR	Interests and Liability	Standing
RI	BC	1/1/14	A	2/3	No	Yes	No	YesP	Yes	Yes	Annual	Yes	Yes	Yes	No	Model	Model2
SC	BC	6/14/12	A	2/3	Adopt	Yes	No	Yes	Yes	Yes	Annual	Yes	Yes	Yes	No	Model	Model
UT	BC	5/13/14	A	2/3	No	Yes	No	YesP	Yes	Yes	Annual	Yes	Yes	Yes	No	Model	SH, D, O
VA	BC	7/1/11	A	100%, 2/3	No	Yes	No	No	Yes	Yes	Annual	Yes	Yes	No	No	Model	Model
VT	BC	7/1/11	A	2/3	No	Yes	No	Yes	Yes	Yes	Annual	Yes	Yes	No	No	Model	Model
WA	SPC	6/7/12	A, N, SC	2/3	Yes	No	Yes	No	No	No	Annual	Yes	No	No	Yes	SBC-W	SH
WV	BC	7/1/14	A	Majority	No	Yes	No	No	Yes	Yes	Annual	Yes	Yes	No	No	Model*	SH, D, O

Source: Corporate Forms of Social Enterprise: Comparing the State Statutes Professor J. Haskell Murray, Belmont University, Nashville, TN