BENEFIT CORPORATIONS: A NEWER LEGAL OPTION FOR STRUCTURING SOCIALLY RESPONSIBLE FOR-PROFIT ENTERPRISES IN THE U.S.

Elisabeth J. Teal, University of North Georgia
A. Rebekah Teal, Attorney at Law

ABSTRACT

The Benefit Corporation is a newer legal form of organization that is available in over thirty U.S. states. In the states where it is approved, a firm may elect to incorporate as a traditional corporation or they may elect to form as a Benefit Corporation. Firms incorporating under Benefit Corporation status seek to pursue profits while protecting the interests of society as a whole and while also protecting the environment. Thus, Benefit Corporations seek to operate under a "triple bottom line" model, which is described as including the considerations of profit, people and planet in corporate decision making.

In this paper we provide a brief literature review of the issues surrounding this type of legislation followed by a description of what a Benefit Corporation is and how it fits within the existing frameworks for legal forms of organization available to businesses in the United States. We discuss the status of existing Benefit Corporation laws and describe what is different about Benefit Corporations in terms of corporate purpose, corporate governance, and corporate transparency and accountability. With this paper we seek to inform and provide clarity so that new theories may be developed and new research studies established to determine whether this new corporate form of organization is beneficial, both for those who wish to establish socially responsible for-profit enterprises and also the stakeholders of such enterprises.

Keywords: Benefit Corporations, Legal Forms of Business Organization, Social Entrepreneurship, Shared Value, Triple Bottom Line, Double Bottom Line, B Lab.

INTRODUCTION

The Benefit Corporation is a relatively new legal form of corporate organization in the United States that allows a corporation to pursue the goal of positively impacting society and the environment while also seeking financial success. Prior to the Benefit Corporation legislation, maximizing shareholder profit was generally recognized as the sole purpose of a for-profit corporation. A Benefit Corporation legally requires the directors of a business to consider the interests of all stakeholders when managing the company. Benefit Corporations may be attractive to founders of new ventures, especially those pursuing social entrepreneurship, who focus their businesses on being profitable while at the same time "*doing good*." While legal forms of corporate organization similar to the Benefit Corporation have been established in some other countries, in this paper we focus on U.S. law (Benefit Corporation, 2018).

LITERATURE REVIEW

Although the traditional view of maximizing shareholder profit has been generally recognized as the sole purpose of a for-profit corporation[1] (Friedman, 1962), an expanded view also calls for the corporation to make decisions for the benefit of stakeholders (Freeman, 1984, 2009). Carroll's Pyramid of Corporate Social Responsibility (Carroll, 1991, 2016) identified four separate purposes, or responsibilities, of a business and ranked them in order of priority. The first priority and the foundation of the pyramid is economic responsibilities, which is the need for the businesses to "*be profitable*," followed by the firm's responsibility to "*obey laws and regulations,*" the legal responsibility, with the third category the ethical responsibilities of a business, to "*do what is just and fair*" and to "*avoid harm*." The top component, thereby the smallest priority, is philanthropic responsibilities which means to "*be a good corporate citizen*." Carroll noted that societies require the economic and legal responsibilities, expect the ethical responsibilities, and desire the philanthropic responsibilities. The phrase "*triple bottom line*" (Elkington, 1994) refers to a firm's performance in the three areas of financial profitability, social responsibility, and environmental responsibility. This is referred to as the three Ps of profit, people and planet. Wilburn and Wilburn (2014) refer to a double bottom line which includes both profit and social benefit.

Porter and Kramer (2011), emphasize shared value, saying that: *"the purpose of the corporation must be redefined as creating shared value"* which they define as:

> *"creating economic value in a way that also creates value for society by addressing its needs and challenges…Shared value is not social responsibility, philanthropy, or even sustainability, but a new way to achieve economic success. It is not on the margin of what companies do but at the center" (Page: 64)*

Their view of shared value also focuses on how corporate profits are earned, claiming that:

> *"Not all profit is equal-an idea that has been lost in the narrow, short-term focus of financial markets and in much management thinking. Profits involving a social purpose represent a higher form of capitalism-one that will enable society to advance more rapidly while allowing companies to grow even more. The result is a positive cycle of company and community prosperity, which leads to profits that endure" (Page: 75)*

As this brief literature review indicates, businesses today are expected to earn profits while at the same time caring for society overall. As this view has become more established a new legal form of business incorporation has emerged to support companies in their quest to do exactly that: to earn profits while also caring for society. The Benefit Corporation is designed for this purpose.

The Benefit Corporation

The Benefit Corporation enables a corporation to legally adopt the dual purposes of earning profits while also caring for society. The Benefit Corporation is not the same as a non-profit corporation which may be the preferred legal form of organization for not-for-profit (also called non-profit) organizations such as a charities, hospitals, or clubs. The forms of legal organization available to for-profit businesses that do not wish to incorporate are sole

proprietorship, partnership which may be either general or limited, and Limited Liability Company, often referred to as LLC.

In the United States, each state passes its own corporate laws and therefore the laws may vary from state to state. B Lab, a non-profit organization that promotes Benefit Corporations, developed the Model Benefit Corporation Legislation guide (MBCL, 2013) to provide suggestions to states in developing Benefit Corporation legislation (MBCL, §102). The guide, referred to as MBCL, has been updated based upon input from various legal authorities and businesses and has been used by most states in considering and drafting legislation.

Maryland, in 2010, became the first U.S. state to pass legislation authorizing the Benefit Corporation. Since then 29 other states and Washington, D.C. have passed their own version of Benefit Corporation legislation. The name of the Benefit Corporation may vary across states with Tennessee, for example, using the name "*For Profit Benefit Corporation*." Delaware passed "*Public Benefit Corporation"* legislation in 2013 which was significant because it is the leading jurisdiction for incorporation in the U.S. with over one million corporations that include more than 60 percent of the Fortune 500. New Mexico passed Benefit Corporation law but it did not go into effect because the governor did not act on it. Seven states have Benefit Corporation bills in process but not yet passed and 12 states have taken no action.

If a state has not passed Benefit Corporation legislation then a business owner may choose to incorporate in another other state. A business does not have to conduct business or have an office in its state of incorporation but it must have a resident registered agent to receive any service of process on its behalf in the state of incorporation.

There are no tax advantages to becoming a Benefit Corporation. All corporations, whether benefit or traditional, will elect either C or S status with the IRS. Since Benefit Corporations are not non-profit corporations they are not eligible for the non-profit exemption from Federal taxation which is known as 501(c) (3). Benefit Corporation status is the legal architecture used for incorporation and not an IRS designation, thus Benefit Corporations pay taxes in the same manner as any other for-profit corporation with the same status, either C or S.

Benefit Corporations differ from traditional corporations in the areas of corporate purpose, corporate governance, and corporate transparency and accountability. A company organizing as a Benefit Corporation is legally required to adopt two purposes which are the traditional purpose of "*maximizing shareholder value*," legally required of all for-profit corporations and an additional "*general public benefit,"* defined as:

> *"A material positive impact on society and the environment, taken as a whole, from the business and operations of a Benefit Corporation."*

Thus, a Benefit Corporation is legally required to have a positive impact on society and the environment while also pursuing traditional profit goals. Per the MBCL, Benefit Corporations must take on the purpose of a "*general public benefit*" although the type or extent of the benefit is not further specified or defined by state law. Thus Benefit Corporations have broad discretion in determining the types of societal and environmental impacts they wish to pursue. The MBCL encourages flexibility in assessing whether the public benefits have been met and suggests measurement against some third party standard, although a specific third party standard is not identified.

A Benefit Corporation may also choose to further identify certain "*specific public benefits"* that it will pursue, and in Delaware and Colorado they are required to do so. Seven specific public benefits are listed in the MBCL which are: (1) providing low-income or underserved individuals or communities with beneficial products or services; (2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business; (3) protecting or restoring the environment; (4) improving human health; (5) promoting the arts, sciences, or advancement of knowledge; (6) increasing the flow of capital to entities with a purpose to benefit society or the environment; (7) conferring any other particular benefit on society or the environment (MBCL, §102).

By passing Benefit Corporation legislation, states offer a legal framework for incorporation for firms that wish to have a positive impact on society and the environment in addition to earning profits for shareholders. However, as the laws indicate, Benefit Corporations must also recognize that earning profits for shareholders is an important part of the business. The Benefit Corporation must be profitable so that it can also fulfill its social and environmental purposes.

Benefit Corporations face an expanded set of requirements concerning corporate governance. In general, members of the board of directors for any corporate entity, whether for-profit (traditional or benefit) or non-profit, take on the three duties of care, loyalty and good faith. The duty of care requires directors to become fully and completely informed about the business of the corporation. The duty of loyalty requires directors to put the interests of the corporation before all other interests. The duty of good faith has existed implicitly in corporate law, but is now recognized as a separate duty by some courts and legal scholars. The duty of good faith requires board members to be honest, not to violate any generally accepted standards of decency applicable to businesses, not to violate any generally accepted basic corporate norms, and fidelity to the position as director (Eisenberg, 2006).

Benefit Corporation statutes specifically expand the fiduciary duty of director loyalty by requiring them to consider all the stakeholders, and unless the Articles of Incorporation declare otherwise no particular stakeholder has priority. Directors may consider any

> "Other pertinent factors or the interests of any other group that they deem appropriate"

And thus have wide latitude in making decisions. A director of a Benefit Corporation is required by law to consider the effects of any board action on: (1) the shareholders of the Benefit Corporation; (2) the employees and workforce of not only the Benefit Corporation, but also its subsidiaries and suppliers; (3) the interests of customers as beneficiaries of the general public benefit or specific public benefit purposes; (4) community and society factors, including those of each community in which offices or facilities of corporation, subsidiaries, or suppliers are located; (5) the local and global environment; (6) the short-term and long-term interests of the Benefit Corporation; (7) the ability of the Benefit Corporation to accomplish its general public benefit purpose and any specific public benefit purpose (Washington D.C. Benefit Corporation statute used as a typical example, see D.C. Law § 29–1303.01.).

By law a director is not liable for any failure of the Benefit Corporation to create a general public benefit or specific public benefit, and most states specifically limit director liability by establishing that a director is not personally liable for monetary damages for any action taken if the director performed the duties of office in good faith and in a manner the

director reasonably believed to be in the best interests of the corporation (see, for example D.C. Law §29–306.30.).

To support corporate transparency and accountability, most states require that a Benefit Corporation annually disseminate a report to shareholders, stakeholders, and the entire world (McDonnell, 2014). Washington, D.C. requires that the annual report include: (1) The third-party standard the corporation selected; (2) How the corporation pursued and met its general and any specific public benefits; (3) Any circumstances that hindered its pursuit of those benefits; (4) An assessment of the corporation's performance against the third-party standard; (5) Any connection between the corporation and the entity that created the third-party standard; (6) The name, contact information and compensation of its benefit director and any benefit officer; (7) Compensation paid to the directors (which can be redacted from public copies); (8) The name of shareholders owning 5 percent or more of the corporation's shares; (9) A statement from the "*Benefit Director*," if one is required (The appointment of a designated "*Benefit Director*" is another mechanism to assure corporate accountability.) (See D.C. Law § 29–1304.01).

One way for a Benefit Corporation to meet the annual reporting requirement described above is to attain Certified B Corporation status. Just because a firm is incorporated as a Benefit Corporation does not mean it is a Certified B Corporation or the nicknames that are sometimes used for Certified B Corporations, such as B Corporation and B Corp. A Certified B Corporation is one that has been certified by B Lab. As previously discussed in this paper, B Lab is a non-profit organization pursuing multiple objectives such as promoting Benefit Corporation legislation in the U.S. as well as providing an assessment of corporate performance based on a third-party standard. A firms' designation as a Certified B Corporation could be compared to a product attaining "*USDA Organic*" certification or coffee being certified "*Fair Trade*." Achieving Certified B Corporation status means that the firm has met strict standards of social and environmental performance, accountability, and transparency. Recertification is required every three years against an evolving standard and certification fees range from $500.00 to $50,000.00 based on firm revenues. A business does not have to be a Benefit Corporation to apply for Certified B Corporation status. Any business may apply to become a Certified B Corporation regardless of corporate structure, state, or country of incorporation[2] (Certified B Corporation, 2018).

DISCUSSION AND CONCLUSION

With legislation currently passed by a majority of the U.S. states and Washington, D.C. and with a non-profit organization actively working for the passage and use of Benefit Corporation laws, it is likely that more states will pass Benefit Corporation legislation and more business owners will consider the Benefit Corporation form of organization for their business. This may ultimately be good for businesses and for stakeholders. However, because this is a relatively new form of organization it is too early to reach this conclusion. This paper demonstrates the difficulty inherent in operating a business for the benefit of shareholders while also fulfilling the legal obligation of having a positive impact on society and the environment. The challenges these companies are likely to face in fulfilling these dual purposes are currently unknown and this is compounded by the lack of existing case law for guidance. However, barring social or environmental changes or legal challenges to this form of organization, it is anticipated that the number of Benefit Corporations in the U.S. will continue to increase.

ENDNOTE

1. Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919)
2. CodeCitation:D.C.Law§29–306.30;D.C.Law§29–1303.01;D.C.Law§29–1304.01

REFERENCES

Benefit Corporation. (2018). Retrieved from https://benefitcorp.net/

Carroll, A.B. (1991). The pyramid of corporate social responsibility: Toward the moral management of organizational stakeholders. *Business Horizons*, *34*(4), 39-48.

Carroll, A.B. (2016). Carroll's pyramid of CSR: Taking another look. *International Journal of Corporate Social Responsibility*, *1*(3), 12-38.

Certified B Corporation. (2018). Retrieved from https://bcorporation.net/

Eisenberg, M.A. (2006). The duty of good faith in corporate law. *The Delaware Journal of Corporate Law, 31*(4), 45-69.

Elkington, J. (1994). Towards the sustainable corporation: Win-win-win business strategies for sustainable development. *California Management Review*, *36*(2), 90-100.

Freeman, R.E. (1984). *Strategic management: A stakeholder approach*. Pitman Publishing Inc. Marshfield, MA: Pitman Publishing Inc.

Freeman, R.E. (2009). *Managing for stakeholders*. Ethical theory and business.

Friedman, M. (1962). *Capitalism and freedom*. Chicago: University of Chicago Press.

McDonnell, B.H. (2014). Committing to doing good and doing well: Fiduciary duty in benefit corporations. *Fordham Journal of Corporate and Financial Law*, *23*(2), 32-33.

Model Benefit Corporation Legislation (MBCL). (2013). *MBCL § 102*. Retrieved from http://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf

Porter, M.E., & Kramer, M.R. (2011). Creating shared value. *Harvard Business Review*, *89*(1-2), 62-77.

Wilburn, K., & Wilburn, R. (2014). The double bottom line: Profit and social benefit. *Business Horizons, 57*(2), 11-20.