



BUSINESS LAW & ETHICS CORNER

# Benefit corporations at a crossroads: As lawyers weigh in, companies weigh their options



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**Abstract** Should your company become a benefit corporation? In a comprehensive set of law review opinions, this installation of Business Law & Ethics Corner uncovers several fundamental issues to consider. First, the main premise for the benefit corporation—the legal preeminence of the shareholder primacy norm—may be unfounded. Second, benefit corporations may increase director liability and company costs. Third, contrary to the stated goal of such laws, benefit corporations do not empower stakeholders, and therefore are not substantially different from traditional corporations. Many legal analysts argue that, paradoxically, benefit corporations actually inhibit corporate social responsibility efforts by perpetuating the myth that business corporations do not have the flexibility to pursue social missions, and by claiming to, but failing to, empower stakeholders. They argue that the benefit corporation form is likely to increase corporate greenwashing, and that it enhances public cynicism about all corporations by creating competing sets of ‘beneficial’ and ‘other’ corporations. In the face of widespread acclaim for the benefit corporation, both corporate directors and researchers should take these significant concerns into account.

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## 1. Welcome to the era of the social enterprise

Social enterprise is a relatively new concept that today is driving reconsideration of the legal structures for businesses. All enterprises can be conceptualized on a continuum of goals that ranges from purely social to purely economic, and a social

enterprise—generally defined as an organization that seeks to do well by doing good—falls somewhere in the middle. Social enterprises exist in a universe of organizations that already includes entities that explicitly embody social values, such as governments and non-profit organizations. Their introduction is challenging policy makers, social entrepreneurs, and academics alike to assess their contribution to this evolving organizational universe (André, 2012; Galera & Borzaga, 2009; Perry & Rainey, 1988).

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In the United States, the first laws that implemented the social enterprise concept were passed in 2008. By 2012, five different types of social enterprises—the low-profit limited liability company (L3C), the benefit corporation, the flexible purpose corporation (FPC), the social purpose corporation, and the benefit limited liability company—had been introduced in 19 states; subsequently, many other states have considered similar legislation (Frumpkin, 2013; Murray, 2012). Today the most widely implemented social enterprise form is the benefit corporation (Wilburn & Wilburn, 2014). According to its proponents, the benefit corporation (Clark & Vranka, 2013, p. 16):

offers entrepreneurs and investors the option to build, and invest in, businesses that operate with a corporate purpose broader than maximizing shareholder value and a responsibility to consider the impact of its decisions on all stakeholders, not just shareholders. . . . Enforcement of those duties comes not from governmental oversight, but rather from new provisions on transparency and accountability.

The benefit corporation explicitly removes the implementation of social goals from public, government control, and vests it instead in an unspecified organization that applies “a comprehensive, credible, independent and transparent third-party standard” (Benefit Corp Information Center, n.d.b).

Should your company become a benefit corporation? Recently, legal scholars have evaluated the benefit corporation and weighed in on the growing debate about it. To understand their views, I conducted an exhaustive search of a dozen databases to find all pertinent law review articles published before November 2013. Using legal conventions for logic and argument, I then summarized the key issues raised in more than 20 articles. As you read the results, keep in mind that the term *shareholder* refers only to owners; the term *stakeholder* refers only to nonshareholders. Also, some authors quoted here use the term *B Corp* as a synonym for benefit corporation.

## 2. New concerns about the benefit corporation

Among the legal analysts, the benefit corporation has both advocates and critics. On the one hand, some support the need for corporate reform because traditional companies are not equipped with accountability and transparency standards that are sufficient to evaluate corporate responsibility (Resor, 2012). Clark, a co-author of the benefit

corporation model law (Benefit Corp Information Center, n.d.a), and Babson argue that benefit corporation legislation solves these problems because (Clark & Babson, 2012, p. 851):

it creates a mandatory requirement for a corporation to pursue general public benefit. . . [and addresses,] in a meaningful way, the specific demands of shareholders and investors who desire transparency and accountability with respect to these businesses.

Other legal scholars also support the benefit corporation legislation as written (Esposito, 2013; Grant, 2013).

On the other hand, many lawyers express concerns. For example, Munch (2012, p. 171) writes that the form may be “subject to abuse by corporate directors, shareholders, stakeholders, or others, without adjustment to its current design.” He adds (2012, p. 189): “The statutes, as now drafted, do little to ensure that a benefit corporation fulfills its social obligations and that its self-selection and identification as a dual-mission enterprise is more than mere puffery.” Likewise, Blount and Offei-Danso (2013, p. 669) assert:

The benefit corporation fails as a useful legal structure because it sets forth a general public benefit purpose, but provides the parties most affected by this purpose with *no corresponding effective method for enforcing it* [emphasis added]. Additionally, this general public benefit purpose is vague, unquantifiable, and does not serve as an adequate objective for purposeful corporate action.

Underberg (2012) opines:

Viewed from a broader corporate governance perspective, the B Corp initiative—however well-intentioned—has troubling implications . . . [It] undermines the very values that corporate governance advocates should seek to promote: responsible, sustainable corporate decision-making by companies of any stripe.

Why these concerns? The criticisms of benefit corporations fall into three areas. First, legal analysts question the shareholder primacy assumption that is a basic justification for the form. Second, they point out that becoming a benefit corporation increases director liabilities and company costs. Third, they argue that the benefit corporation mechanisms for enhancing corporate accountability have no teeth. The details of these concerns are presented next.

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