

A hand is shown dropping a coin into a slot on top of a globe. The globe is the base of a piggy bank, and the coin is falling into the slot. The background is a soft-focus image of the globe showing continents and oceans.

BENEFIT CORPORATION LEGISLATION: SAFEGUARDS FOR BUSINESSES GIVING BACK

All else being equal, would you rather buy shoes from a department store or a company that donates a pair of shoes to a child in need for every pair purchased? Would you rather buy office supplies from a big box store or a local company that donates 75 percent of its annual profits to local charities of its customer's choosing? An increasing number of businesses such as Tom's Shoes and Give Something Back are operating in just this way - as "social enterprises," which exist to solve environmental and social problems.

In the "for profit" context, social entrepreneurs run enterprises seeking to create both financial gain for their shareholders and material benefit for a broader category of stakeholders - including customers, employees, vendors, their respective industries and the communities in which they do business (among others). Corporate Social Responsibility (CSR) initiatives are beneficial practices instituted by social enterprises, although CSR initiatives can - and often do - involve environmental initiatives as well.

Purchasers, investors and employees increasingly seek out companies committed to CSR but it's not always easy to distinguish good companies from good marketing. Fortunately, various organizations offer independent third-party CSR certifications. Most are industry or product focused: LEED, for

green building; Energy Star, for electronic appliances; and USDA Organic, for food. Others, like B Lab's B Impact Assessment Ratings Survey take a more holistic approach.

B Lab is a nonprofit corporation organized in 2006 to leverage business to solve environmental and social problems.¹ This is accomplished through three related activities:

1. Building a community of Certified B Corporations;²
2. Accelerating "impact investing" through the GIIRS Ratings and Analytics platform;³ and
3. Promoting model benefit corporation legislation.⁴

Certified B Corporations

B Lab's Impact Assessment Survey enables organizations to analyze their environmental and social performance as a whole. The survey measures corporate governance, treatment of workers, and impact on community and the natural environment. Businesses must earn at least 80 of a possible 200 points. If they do, they may choose to become Certified B Corporations. Although survey answers are kept confidential, those interested may preview the survey and see B

Lab's own survey responses at:
www.bcorporation.net/storage/documents/b_lab_self_assessment.pdf.

The first B Corporation was certified in 2007 and, as of November 2012, there were more than 600 Certified B Corporations, two of them in Nevada.⁵ Nevada has a constituency statute that allows corporate directors to consider the interests of constituencies other than shareholders.⁶ However, there is very little law interpreting such statutes nationwide and their effectiveness in protecting directors who implement CSR initiatives remains uncertain. Thus, B Lab and its stakeholders are marshalling model benefit corporation legislation⁷.

Benefit Corporations

A benefit corporation is a new corporate form designed to serve the needs of social entrepreneurs, impact investors and the public interest. Corporations formed under this structure agree to meet higher standards of corporate purpose, accountability and transparency. The advantages of this corporate structure are clear market differentiation, broad legal protection for officers and directors, expanded shareholder rights and greater access to capital.

As of November 2012 11 states have enacted benefit corporation legislation:

	State	Effective Date
1	Maryland	10/01/2010
2	New Jersey	03/07/2011
3	Vermont	07/01/2011
4	Virginia	07/01/2011
5	Hawaii	07/08/2011
6	California	01/01/2012
7	New York	02/10/2012
8	South Carolina	06/14/2012
9	Louisiana	08/01/2012
10	Pennsylvania	01/22/2013
11	Massachusetts	01/01/2013
12	Illinois	01/01/2013

Under the model legislation, there are three primary characteristics of the benefit corporation corporate structure:

1. It must have a corporate purpose to create a material positive impact on society and the environment;
2. Its directors have a fiduciary duty to consider non-financial stakeholders; and
3. It must report publicly on its overall environmental and social performance, using comprehensive, credible, independent and transparent third party standards.

Benefit corporations do not need to be certified by a third party but must simply use these standards as a rubric for producing their annual benefit report.

The model legislation applies only to benefit corporations, affects no other type of businesses and preserves existing corporate code as it applies to benefit corporations in every respect, except those specifically stated in the model legislation. The most significant of the act's 11 definitions are that of *general public benefit*, "a material positive impact on society and the environment, taken as a whole, assessed against a third-party standard from the business and operations of a benefit corporation" and *third-party standard*, which must be comprehensive, independent, credible and transparent – each of which is specifically defined.

Corporate Purpose

An existing corporation must amend its articles of incorporation to state that it is a benefit corporation and, in order for this amendment to be effective, it must be adopted by at least the minimum status vote, as defined in the model legislation definitions. Similarly, benefit corporation status may be terminated and the language deleted from the articles of incorporation, so long as such amendment is approved by at least the minimum status vote.

The model legislation explicitly states that the creation of a general public benefit is in the best interest of the benefit corporation. This provision overrides the presumption that financial interests must always take precedence.

Fiduciary Duties

The model legislation provides that directors *shall consider* the effects of their action or inaction upon:

1. Shareholders;
2. Employees;
3. Customers;
4. Community and societal factors of each corporate location;
5. Local and global environment;
6. Short and long-term interests of the
7. benefit corporation; and
8. The ability of the benefit corporation to accomplish its general public benefit purpose and any specific benefit purpose.

Benefit corporations may consider interests referenced in the state's constituency statute and other factors, or the interests of other groups they deem appropriate. Further, benefit corporations need not give priority to any particular group or interest unless the corporation has stated its intention to do so in its articles of incorporation.

The model legislation requires the board of directors of publicly traded companies to formally elect a benefit director in the same manner that other directors are elected. Privately held benefit corporations may choose to elect such an officer as well. The benefit director shall report publicly each year on the benefit corporations success or failure in creating its public benefit. This reporting by the benefit director is an important part of the transparency requirement under the model legislation, as it indicates to stakeholders whether or not the directors have met their obligations. Any benefit corporation may also elect to have a benefit officer with the duty of preparing the annual benefit report and any powers and duties assigned to it in the benefit corporations' bylaws or by board order or resolution.

The model legislation specifically exonerates benefit corporation officers and directors, and the corporation itself, from liability for monetary damages for action or inaction relative to the corporation's creation of (or failure to create) public benefit. Further, the legislation makes clear that beneficiaries of the public benefit have no cause of action against the officers, directors or the benefit corporation.

The model legislation creates a limited cause of action called a *benefit enforcement proceeding* that may be brought directly by the benefit corporation or derivatively by shareholders under the applicable statute.⁸ This section of the model legislation broadens the category of persons who can bring a derivative suit, to include directors, 5 percent owners of a parent entity, and other persons to which a benefit corporation grants standing in its bylaws or articles of incorporation. It limits the possibility for nuisance suits by requiring that shareholders bringing such suits collectively own at least 2 percent of the outstanding shares of the benefit corporation. Such a suit is the sole cause of action available against a benefit corporation that fails to create or maintain a material benefit or to publicly post its annual benefit report. The remedies for such a suit are limited to injunctive rather than monetary relief.

Transparency

Benefit corporations are required to publish annual benefit reports on their websites, though compensation and other financial information, as well as proprietary information may be removed from the report prior to publication. The report must be posted within 120 days following the end of the fiscal year of the benefit corporation or at the same time the corporation delivers any other annual report to its shareholders. Concurrently with the delivery of the report to the benefit corporation's shareholders, the benefit corporation shall file a copy of the report with the Secretary of State, though compensation, financial information and proprietary information may also be redacted from the benefit report as filed. The Secretary of State may charge a fee for this annual filing, which shall be specified in the enabling statute.

Conclusion

Benefit corporation legislation provides the legal framework to support corporations whose environmental and social purpose is central to their existence. Accountability is ensured through its reporting requirements and the benefit enforcement proceedings, without the potential for litigation abuses, since litigants are narrowly defined and monetary damages unavailable. Ultimately, benefit corporation legislation is a win-win-win for the public, social entrepreneurs and the states hoping to attract them.