

WHEN MAKING MONEY AND MAKING A SUSTAINABLE AND SOCIETAL DIFFERENCE COLLIDE: WILL BENEFIT CORPORATIONS SUCCEED OR FAIL?

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INTRODUCTION

A quiet, but important, corporate revolution is afoot in the United States. Many of us, laypersons and corporate scholars alike, have not even noticed. Recently, Arizona, Arkansas, California, Colorado, Hawaii, Illinois, Maryland, Massachusetts, Louisiana, Nevada, New Jersey, New York, Oregon, Pennsylvania, South Carolina, Vermont, Virginia, and Washington, D.C. became the first states in this country to pass legislation for the creation of a new type of corporation—the benefit corporation.¹ Benefit corporations are “a new class of corporation[s]” and are “required to consider the impact of their decisions” on society as well as shareholders.² As proponents of benefit corporations argue, benefit corporations are “[a] [n]ew [k]ind of [c]orporation for a [n]ew [e]conomy.”³

As the Occupy Wall Street Movement has demonstrated, up close and personally, corporations have been maligned in this country for quite some time⁴ and particularly in recent years as we continue to emerge from the Financial

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1. *State by State Legislative Status*, BENEFIT CORP INFO. CTR., <http://www.benefitcorp.net/state-by-state-legislative-status> (last visited July 6, 2013) [hereinafter *Legislative Status*].

2. *Quick FAQ’s*, BENEFIT CORP INFO. CTR., <http://www.benefitcorp.net/quick-faqs> (last visited July 6, 2013).

3. CERTIFIED B CORP., <http://www.bcorporation.net> (last visited July 6, 2013).

4. See Andrew Kasso, *Occupy Wall Street: A Powerful Demand for Something New—Like This*, FORBES (Oct. 20, 2011, 4:35 PM), <http://www.forbes.com/sites/cst/2011/10/20/occupy-wall-street-a-powerful-demand-for-something-new-like-this/> (discussing the discontent of the Occupy Wall Street Movement with the quest for profit maximization).

Crisis.⁵ For those who hate corporations because of their perceived unholy quest to make a profit at all costs (known as maximization of shareholder value), benefit corporations hold a great deal of appeal due to their ability to perhaps rewrite the corporate landscape.⁶ For proponents and opponents of corporations in our society, a force of interest convergence may be percolating beneath the surface.⁷ Corporations can direct and channel this pursuit of profit. Perhaps the pursuit of profit can be directed and channeled to achieve societally optimal and positive goals. Making money or profit and leaving a positive footprint on the environment or society might not be mutually exclusive and competitive goals. Benefit corporations hold promise, and competing interests may converge.

This Article explores benefit corporations as a tool entrepreneurs can use to make money, foster environmental sustainability, and create societal improvement. Part I briefly examines who has been advocating for the creation and passage of benefit corporation legislation in the United States. Part II analyzes the statutory requirements to form a benefit corporation. Specifically, Part II discusses the issues of purpose, accountability, transparency, rights of action, and enforcement of those rights in connection with the creation and operation of a benefit corporation. Part III highlights the states that have passed benefit corporation statutes and highlights those considering similar legislation. Part IV examines the pre-existing use of benefit entities, in unincorporated form, through exploration of the benefit certification process. Finally, Part V offers a future prognosis and debates whether benefit corporations will succeed or fail.

I. THE ARCHITECTS OF THE BENEFIT CORPORATION MOVEMENT

A number of organizations that support sustainable businesses have been integral to supporting the benefit corporation movement.⁸ However, three parties rise to the forefront. Most notably, the American Sustainable Business Council has been the national sponsor of benefit corporation legislation in states adopting or considering benefit corporation legislation.⁹ B Lab, a non-profit corporation,

5. See Birju Pandya, *'Benefit' Corporations: The Future of Business*, HUFFINGTON POST (May 20, 2010, 7:39 PM), http://www.huffingtonpost.com/birju-pandya/benefit-corporations-the_b_583824.html (describing unfavorable perception of capitalism and the quest to balance out the desire to make profits and obtaining socially desirable results).

6. *Id.*

7. The late Professor Derrick A. Bell, Jr. perhaps best defined and articulated interest convergence theory in his seminal article, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980), arguing that the *Brown* decision came about when the interests of controlling groups and dominated groups converged. Michael E. Porter & Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, HARV. BUS. REV. (Dec. 2006).

8. See *Community Partners*, CERTIFIED B CORP., <http://www.bcorporation.net/community/community-partners> (last visited July 6, 2013).

9. See *Promote Corporate Responsibility Through Benefit Corporation Statutes*, AM. SUSTAINABLE BUS. COUNCIL, <http://asbcouncil.org/campaigns/promote-corporate-responsibility->

has also been a key player in the movement to get states to adopt benefit corporation legislation.¹⁰ William H. Clark, Jr., a prominent corporate attorney and Partner at Drinker Biddle & Reath LLP in Philadelphia, served as the primary drafter of model benefit corporation legislation.¹¹ Clark gained a great deal of attention in 2007 when he drafted North Dakota's progressive and forward-thinking Publicly Traded Corporations Act.¹²

II. BENEFIT CORPORATIONS: THE MODEL STATUTORY LANDSCAPE

Benefit corporations are very similar to standard corporations, but they differ from their traditional cousins in four main ways. First, the purpose section of the Articles of Incorporation requires specific items not found in traditional purpose sections.¹³ Second, the Articles of Incorporation for benefit corporations are statutorily mandated to provide a specific level of accountability to certain stakeholders not found in most traditional corporate codes.¹⁴ Third, benefit corporations have unique transparency requirements unheard of in traditional corporate codes.¹⁵ Finally, specific rights of action are granted to particular stakeholders based on breach of the benefit corporation charter.¹⁶

Newly formed corporations may elect to be recognized as benefit corporations.¹⁷ Existing corporations may become benefit corporations under

through-benefit-corporation-statutes (last visited July 6, 2013).

10. *The Non-Profit Behind B Corps*, CERTIFIED B CORP., <http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps> (last visited July 6, 2013).

11. *Model Legislation*, BENEFIT CORP INFO. CTR., <http://www.benefitcorp.net/for-attorneys/model-legislation> (last visited July 6, 2013).

12. *See William H. Clark, Jr.*, DRINKERBIDDLE, <http://www.drinkerbiddle.com/wclark/> (last visited July 6, 2013). For further discussion of North Dakota's Publicly Traded Corporations Act, see Joshua P. Fershee, *The North Dakota Publicly Traded Corporations Act: A Branding Initiative Without a (North Dakota) Brand*, 84 N.D. L. REV. 1085 (2008); Stephen M. Bainbridge, *Why the North Dakota Publicly Traded Corporations Act Will Fail*, 84 N.D. L. REV. 1043 (2008).

13. *What Are the Requirements*, BENEFIT CORP INFO. CTR., <http://www.benefitcorp.net/for-business/what-are-the-requirements> (last visited July 6, 2013) [hereinafter *Requirements*]; see MODEL BENEFIT CORP. LEGISLATION § 201(a)-(b) (William Clark, Jr. 2012), available at http://benefitcorp.net/storage/documents/Model_Benefit_Corporation_Legislation.pdf (requiring that “[a] benefit corporation shall have a purpose of creating general public benefit,” while permitting the adoption of a “specific public benefit purpose”).

14. *See* MODEL BENEFIT CORP. LEGISLATION, *supra* note 13, §§ 301-02 (requiring officers and directors to consider how their actions impact the specific and general public benefit purposes, along with environment and local community); *Requirements*, *supra* note 13.

15. *See* MODEL BENEFIT CORP. LEGISLATION, *supra* note 13, §§ 401-02 (requiring, among other things, filing with the Secretary of State “an annual benefit report” for public viewing); *Requirements*, *supra* note 13.

16. *See* MODEL BENEFIT CORP. LEGISLATION, *supra* note 13, § 305.

17. *See How to Become a Benefit Corp.*, BENEFIT CORP INFO. CTR., <http://www.benefitcorp.net/for-business/how-to-become-a-benefit-corp> (last visited July 6, 2013).

prescribed procedures: amendment of their articles of incorporation by a two-thirds shareholder vote.¹⁸

A. Purpose

Pennsylvania provides a good example of a state's recent legislative adoption of the Model Benefit Corporation Legislation. In order to create a benefit corporation in Pennsylvania, the incorporators are required to mandate the following in the Articles of Incorporation:¹⁹

- (a) The "corporation shall have [the] purpose of creating [a] general public benefit;"²⁰
- (b) The corporation shall have the right to name "one or more specific public benefit[]" purposes;²¹ and
- (c) "The creation of [a] general public benefit and specific public benefit . . . [must be] in the best interests of the benefit corporation."²²

At a minimum, a benefit corporation must have a "general public benefit."²³ "General public benefit" means the corporation must have "[a] material positive impact on society and the environment, taken as a whole" by "operations of [the] benefit corporation"²⁴ as measured using "a third-party standard,"²⁵ through activities that promote some combination of specific public benefits.²⁶ Additionally, and at the benefit corporation's option, the corporation could pursue a "specific public benefit purpose[.]"²⁷ which could include the following:

- (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;

18. *Id.*

19. Pennsylvania's benefit corporation statute is viewed as the model statute for the creation and incorporation of benefit corporations. Much of the material, *infra*, discussing benefit corporation purpose, accountability, transparency, and rights of action is drawn from the Pennsylvania statutory model. *See* 15 PA. CONS. STAT. §§ 3301-31 (2013); MODEL BENEFIT CORP. LEGISLATION, *supra* note 13, §§ 103-04.

20. MODEL BENEFIT CORP. LEGISLATION, *supra* note 13, § 201(a).

21. *Id.* § 201(b).

22. *Id.* § 201(c).

23. *Id.* § 201(a).

24. *Id.* § 102.

25. *Id.* A "third-party standard" is "a recognized standard for defining, reporting, and assessing corporate social and environmental performance is: (1) [c]omprehensive"; (2) independently developed; (3) "[c]redible"; and (4) "[t]ransparent." *Id.*

26. *Id.*

27. *See id.* § 201(b).

- (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; and
- (7) conferring any other particular benefit on society or the environment.²⁸

B. Accountability

The accountability standards that directors of benefit corporations must meet include the following:

In discharging the duties of their respective positions and in considering the best interests of the benefit corporation, the board of directors, committees of the board, and individual directors of a benefit corporation, in considering the interests of the benefit corporation:

- (1) shall consider the effects of any action upon:
 - (i) the shareholders of the benefit corporation;
 - (ii) the employees and work force of the benefit corporation, its subsidiaries, and its suppliers;
 - (iii) the interests of customers as beneficiaries of the general public benefit or specific public benefit purposes of the benefit corporation;
 - (iv) community and societal factors, including those of each community in which offices or facilities of the benefit corporation, its subsidiaries, or its suppliers are located;
 - (v) the local and global environment;
 - (vi) the short-term and long-term interests of the benefit corporation, including benefits that may accrue to the benefit corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the benefit corporation; and
 - (vii) the ability of the benefit corporation to accomplish its general public benefit purpose and any specific public benefit purpose; and
- (2) may consider:
 - [(i) *the interests referred to in [cite constituencies provision of the business corporation law if it refers to constituencies not listed above]; and*
 - (ii)] other pertinent factors or the interests of any other group that they deem appropriate; but
- (3) need not give priority to the interests of a particular person or group referred to [above] over the interests of any other person or group unless the benefit corporation has stated in its articles of incorporation its intention to give priority to certain interests related

28. *Id.* § 102.

to its accomplishment of its general public benefit purpose or of a specific public benefit purpose identified in its articles.²⁹

Generally, standards of accountability are identical for operating and liquidity/change of control decisions.³⁰ A director is not personally liable, as such, for monetary damages for any action taken as a director if the director performed the duties of his or her office under the applicable duty of care.³¹

C. Transparency

Benefit corporations are required to publish an annual benefit report prepared in accordance with recognized “third-party standard[s]” “for defining, reporting, and assessing corporate social and environmental performance.”³² Additionally, the Benefit Report must assess the successes and failures of the corporation in achieving the general and specific public benefit purposes of the corporation, and consider the effects of decisions on stakeholders.³³ The benefit report must contain the following information:

- (1) A narrative description of:
 - (i) [t]he ways in which the benefit corporation pursued general public benefit during the year and the extent to which general public benefit was created[;]
 - (ii) [b]oth:
 - (A) the ways in which the benefit corporation pursued a specific public benefit that the articles of incorporation state it is the purpose of the benefit corporation to create; and
 - (B) the extent to which that specific public benefit was created[;]
 - (iii) [a]ny circumstances that have hindered the creation by the benefit corporation of general public benefit or specific public benefit[;]
 - (iv) [t]he process and rationale for selecting or changing the third-party standard used to prepare the benefit report.
- (2) An assessment of the overall social and environmental performance of the benefit corporation against a third-party standard:
 - (i) applied consistently with any application of that standard in

29. *Id.* § 301(a) (first and second alterations in original).

30. *See id.* § 301; 15 PA. CONS. STAT. ANN. § 3321 cmt. (West 2013) (“[T]he provisions of 15 [PA. CONS. STAT.] § 1715(b)-(e) apply to a benefit corporation. Those provisions, among other things, make inapplicable to Pennsylvania corporations the holdings in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), and *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).”).

31. MODEL BENEFIT CORP. LEGISLATION, *supra* note 13, § 301(c).

32. *Id.* § 102, § 401(a)(2).

33. *Id.* § 302(b).

- prior benefit reports; or
- (ii) accompanied by an explanation of the reasons for:
 - (A) any inconsistent application; or
 - (B) the change to that standard from the one used in the immediately prior report.
 - (3) The name of the benefit director and the benefit officer, if any, and the address to which correspondence to each of them may be directed.
 - (4) The compensation paid by the benefit corporation during the year to each director in the capacity of a director.
 - (5) The statement of the benefit director described in [the annual compliance statement provision].
 - (6) A statement of any connection between the organization that established the third-party standard, or its directors, officers or any holder of 5[%] or more of the governance interests in the organization, and the benefit corporation or its directors, officers or any holder of 5[%] or more of the outstanding shares of the benefit corporation, including any financial or governance relationship which might materially affect the credibility of the use of the third-party standard.³⁴

A statement by the benefit director whether, in “the opinion of the benefit director[,]” “the benefit corporation acted in accordance with its general public benefit purpose and any specific public benefit purpose in all material respects during the period covered by the report” and “[w]hether the directors and officers complied with [standards of conduct for directors and officers of benefit corporations], respectively.”³⁵ “If, in the opinion of the benefit director, the benefit corporation or its directors or officers failed to act or comply . . .,” then the statement of the benefit director must include “a description of the ways in which the benefit corporation or its directors or officers failed to act or comply.”³⁶

The benefit corporation must deliver the report to all shareholders³⁷ “(1) within 120 days following the end of the fiscal year of the benefit corporation; or (2) at the same time that the benefit corporation delivers any other annual report to its shareholders.”³⁸ Also, in an effort to foster transparency, the benefit report must be posted “on the public portion of its Internet website, if any; but the compensation paid to directors and financial or proprietary information . . . may be omitted from the benefit reports as posted.”³⁹

34. *Id.* § 401(a).

35. *Id.* § 302(c).

36. *Id.* § 302(c)(3).

37. *Id.* § 402(a).

38. *Id.*

39. *Id.* § 402(b).

D. Rights of Action: Benefit Enforcement Proceedings

Benefit corporations offer entrepreneurs and investors the option to create, invest in, and operate businesses in a socially responsible manner. “Enforcement of those duties comes not from governmental oversight, but rather from new provisions on transparency and accountability included in [the legislation].”⁴⁰ The duties of directors and officers, and the general and specific public benefit purposes of a benefit corporation, may be enforced only “in a benefit enforcement proceeding.”⁴¹ “[N]o person may bring an action or assert a claim against a benefit corporation or its directors or officers with respect to” breach of a duty or enforcing general or specific purposes “[e]xcept in a benefit enforcement proceeding[.]”⁴²

To commence and maintain “[a] benefit enforcement proceeding[.]” standing may be established:

- (1) directly by the benefit corporation; or
- (2) derivatively by:
 - (i) a person or group of persons that owned beneficially or of record at least 2% of the total number of shares of a class or series outstanding at the time of the act or omission complained of;
 - (ii) a director;
 - (iii) a person or group of persons that owned beneficially or of record 5% or more of the outstanding equity interests in an entity of which the benefit corporation is a subsidiary at the time of the act or omission complained of; or
 - (iv) other persons as specified in the articles of incorporation or bylaws of the benefit corporation.⁴³

III. STATES ADOPTING OR CONSIDERING BENEFIT CORPORATION LEGISLATION

Thus far, benefit corporation legislation has been passed in the following states and territories: Arizona, Arkansas, California, Colorado, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Nevada, New Jersey, New York, Oregon, Pennsylvania, South Carolina, Vermont, Virginia, and Washington, D.C.⁴⁴

It appears that benefit corporation legislation is gaining some traction nationwide. The following states have introduced model benefit corporation legislation: Alabama, Connecticut, Delaware, Florida, Iowa, Montana, North Carolina, Rhode Island, Texas, and West Virginia.⁴⁵ Indeed, with some deviation from the model legislation, the corporate bell weather state of Delaware recently

40. *Id.* § 101 cmt.

41. *Id.* § 305(a).

42. *Id.*

43. *Id.* § 305(b).

44. *Legislative Status, supra* note 1.

45. *Id.*

put forth legislation to allow for the creation of “public benefit corporations.”⁴⁶

Finally, a movement to support sustainable business currently is underway at the local and municipal level as well. In December 2009, the City of Philadelphia passed an ordinance that included tax and investment incentives and government purchasing preferences to facilitate the growth of sustainable businesses.⁴⁷ A number of municipalities have considered tax and investment incentives to foster sustainable business growth, including Portland, Oregon.⁴⁸

IV. NOTES FROM THE FIELD: ARE BUSINESS PEOPLE USING BENEFIT CORPORATIONS IN ONE FORM OR ANOTHER ALREADY?

Albeit not in legal or incorporated form, certified benefit entities have been around for some time. In addition to supporting legislative initiatives to adopt benefit corporation statutes, B Lab has been one of the most active certifiers of benefit corporations. Certified benefit corporations are not always legally recognized benefit corporations. In order to become a certified benefit corporation, B Lab examines the company’s operations based on an extensive set of details and criteria. In order to become certified, a company must meet three requirements established by B Lab:

- (1) The company must earn a “minimum score of 80 out of 200 points” on B Lab’s “B Impact Assessment;”⁴⁹
- (2) The company must adopt a benefit corporation legal framework, which “bakes sustainability into the DNA of your company as it grows, brings in outside capital, or plans succession, ensuring that your mission can better survive new management, new investors, or even new ownership[;]”⁵⁰ and
- (3) The company must sign a “Term Sheet” and “Declaration of

46. S.B. 47, 147th Gen. Assemb. (Del. 2013), *available at* <http://www.legis.delaware.gov/LIS/LIS147.NSF/vwLegislation/SB+47?Opendocument>. Delaware’s legislation differs in four (4) ways from other states: (1) A higher threshold of shareholders (90% versus 2/3) have to approve the switch from a traditional corporate format to the benefit format; (2) directors have a different mix of priorities to consider; (3) there is a requirement of greater clarity and specificity regarding intended public benefit; and (4) public reporting requirements are relaxed. Michelle Baker, *All Eyes on Delaware’s Public Benefit Corporation Legislation*, NONPROFIT L. BLOG (May 20, 2013), <http://www.nonprofitlawblog.com/home/2013/05/all-eyes-on-delawares-public-benefit-corporation-legislation.html>. See Sophie Menin, *Benefit-Corporations on the Rise*, BARRON’S (Apr. 29, 2013, 11:46 AM), <http://blogs.barrons.com/penta/2013/04/29/benefit-corporations-on-the-rise/>.

47. PHILA. PA. CODE § 19-2604(10) (2013); *see also* *B Corporations Gain Tax Advantage in Philly*, ENVTL. LEADER (Dec. 4, 2009), <http://www.environmentalleader.com/2009/12/04/b-corporations-gain-tax-advantage-in-philly/>.

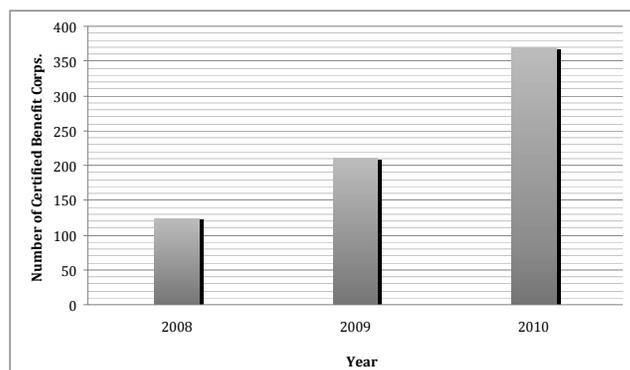
48. *Financing and Incentives for an Expanding Business*, BUS. PORTLAND, <http://www.pdx4biz.org/expanding-your-business/financing-and-incentives> (last visited July 7, 2013).

49. *How to Become a B Corp*, CERTIFIED B CORP., <http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp> (last visited July 7, 2013).

50. *Protect Your Mission*, CERTIFIED B CORP., <http://www.bcorporation.net/become-a-b-corp/why-become-a-b-corp/protect-your-mission> (last visited July 8, 2013).

Interdependence” to make the certification official.⁵¹

Once certified, “B Lab randomly conducts on-site reviews for 10% of B Corporations each year.”⁵² According to B Lab, there are currently 782 benefit corporations operating across 60 industries.⁵³ According to the B Lab’s 2012 Annual Report, the number of certified benefit corporations increased over 75% from 2009 to 2010 and 74% from 2010 to 2011; Chart 1, below represents the number of certified benefit corporations from 2008 to 2010:⁵⁴



Indeed, though not in a formal or legal sense, benefit corporations have been around for a number of years. B Lab maintains an extensive directory of certified benefit corporations.⁵⁵

If formal benefit corporation legislation is any barometer, business owners seem to be warming up to the idea of creating legally recognized benefit corporations. In Maryland alone, the first state to adopt formal benefit corporation legislation, during the first three months that the statute was on the books, at least fifteen businesses formally organized as benefit corporations.⁵⁶ Indeed, twelve businesses signed up for benefit corporation recognition on the

51. *How to Become a B Corp*, *supra* note 49.

52. TERM SHEET FOR B CORPORATIONS, CERTIFIED B CORP. 1 (2012), *available at* http://www.bcorporation.net/sites/all/themes/adaptivetheme/bcorp/pdfs/term_sheet_constituency_states_llcs_llps_3.pdf.

53. CERTIFIED B CORP., <http://www.bcorporation.net> (last visited July 7, 2013).

54. CERTIFIED B CORP., B CORPS REDEFINE SUCCESS IN BUSINESS 8 (2012), *available at* http://www.bcorporation.net/sites/all/themes/adaptivetheme/bcorp/pdfs/BcorpAP2012_Web-Version.pdf.

55. It appears that at least 782 companies are members of B Lab’s directory. *Find a B Corp*, CERTIFIED B CORP., <http://www.bcorporation.net/community/find-a-b-corp> (last visited July 9, 2013).

56. Danielle Douglas, *15 Firms Take Advantage of New Maryland Law Establishing ‘Benefit’ Corporations*, WASH. POST (Jan. 23, 2011, 6:59 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/23/AR2011012303556.html>.

first day the Maryland legislation went into effect.⁵⁷

V. A FUTURE PROGNOSIS: WILL BENEFIT CORPORATIONS SUCCEED OR FAIL?

If early success is any indicator, it looks like benefit corporations will succeed. “Benefit corporations offer clear market differentiation, broad legal protection to directors and officers, expanded shareholder rights, and greater access to capital than current alternative approaches.”⁵⁸ Additionally, “the benefit corporation is also attracting broad support from entrepreneurs, investors, legal experts, citizens, and policy makers interested in new corporate form legislation.”⁵⁹ “Accelerating consumer and investor demand has resulted in the formation of a substantial marketplace for companies that put purpose, not profit, at the center of [their] business.”⁶⁰ In order to look into the future and predict whether benefit corporations will succeed or fail, the impact of social cause business practices must be examined through the eyes of four important and relevant constituencies: consumers, employees, social investors, and social entrepreneurs.

A. American Consumers

In the past decade, the role and perception of business in American society has been tumultuous. American consumers have weathered the storm of a near-Depression like collapse of the American banking system and housing market,⁶¹ topped off by the largest and most impactful environmental accident in our nation’s history—the 2010 BP oil spill in the Gulf of Mexico.⁶² American consumers are seeking products, services, and retailers that support causes such as sustainability and the environment. In a 2010 survey, “83[%] of Americans” indicated that they “wish[ed] more of the products, services and retailers they use would support causes.”⁶³ Indeed, 85% of those surveyed indicated that they “have a more positive image of a product or company when it supports a cause

57. *Id.*

58. WILLIAM H. CLARK, JR. & LARRY VRANKA, THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION 1 (Jan. 26, 2012), available at http://benefitcorp.net/storage/documents/The_Need_and_Rationale_for_Benefit_Corporations_April_2012.pdf.

59. *Id.*

60. *Id.* at 2.

61. See generally Joseph Karl Grant, *What the Financial Services Industry Puts Together Let No Person Put Asunder: How the Gramm-Leach-Bliley Act Contributed to the 2008-2009 American Capital Markets Crisis*, 73 ALB. L. REV. 371 (2010); andrè douglas pond cummings [sic], *Racial Coding and the Financial Market Crisis*, 2011 UTAH L. REV. 141, available at <http://epubs.utah.edu/index.php/ulr/article/view/547/408>; and STEVEN A. RAMIREZ, LAWLESS CAPITALISM: THE SUBPRIME CRISIS AND THE CASE FOR AN ECONOMIC RULE OF LAW (2013).

62. See Joseph Karl Grant, *What Can We Learn from the 2010 BP Oil Spill?: Five Important Corporate Law and Life Lessons*, 42 MCGEORGE L. REV. 809, 809-10 (2011).

63. CONE, 2010 CONE CAUSE EVOLUTION STUDY 5 (2010), available at http://ppqty.com/2010_Cone_Study.pdf.

they care about.”⁶⁴ “More than 278 million people in the [United States,]” or “90% of consumers[,] want companies to tell them the ways they are supporting causes.”⁶⁵ “Forty-one percent of Americans say they have brought a product because it was associated with a cause or issue in the last year. . . .”⁶⁶ “[C]ause branding not only drives purchase[s], but it also serves as a powerful differentiator.”⁶⁷ “Eighty percent of Americans are likely to switch brands, about equal in price and quality, to one that supports a cause.”⁶⁸

A company’s commitment to social and environmental issues has undeniable weight in the marketplace, but today it is slightly less influential on other decisions than it has been in the past, including which companies consumers want to see doing business in their communities (79%), where to work (69%) and which stocks or mutual funds to invest in (59%).⁶⁹

“Support of social and environmental issues makes a marked difference on the store shelf, but it’s really just the jewel in the citizenship crown.”⁷⁰ Table 1 below exhibits the amount of influence that a company’s connection with a particular cause has on consumers:⁷¹

Table 1

	2010	2007	2004
Which companies you want to see doing business in your community	79%	86%	85%
Which products and services to recommend to other people	76%	79%	74%
What to buy or where to shop	75%	80%	63%
Where to work	69%	77%	81%
Which stocks or mutual funds to invest in	59%	66%	70%

Cause branding is growing across wide and divergent industry segments. “Consumers are looking beyond the usual suspects (the products on store shelves; those with a recognized environmental footprint) and holding all industries accountable.”⁷² When surveyed and asked if they believe it is important for the following industries to support social or environmental causes, American consumers registered their responses in the following manner:

64. *Id.*

65. *Id.*

66. *Id.* at 6.

67. *Id.*

68. *Id.*

69. *Id.* at 8.

70. *Id.*

71. *Id.*

72. *Id.* at 10.

Table 2

Americans believe it's important for the following industries to support social or environmental causes: ⁷³	
Food and beverage	82%
Automotive and transportation	81%
Manufacturing	81%
Electronics and household appliances	80%
Sports, media and entertainment	80%
Retail (stores and online)	79%
Financial services (e.g., banking, insurance, investing)	79%
Health and beauty	78%
Telecommunications	78%
Household goods and furniture	77%
Footwear and apparel	77%
Professional services (e.g., law firms)	76%

In terms of marketing, mothers “and Millennials⁷⁴ are the two most sought-after consumer marketing segments.”⁷⁵ “Moms control about 80[%] of the household shopping, and college-aged Millennials have near \$40 billion in discretionary income to spend.”⁷⁶ “Still, each wants to shop wisely, and more than any other demographic groups . . . tested, they buy with an eye toward the greater good.”⁷⁷ On a host of issues, it is interesting to see how Moms and Millennials compare to one another and to others in society. Table 3 below illustrates how the two groups compare:

73. *Id.*

74. Millennials are defined as the purchasing demographic between the ages of eighteen and twenty-four years of age. *Id.* at 12 n.3.

75. *Id.* at 12 (footnote added).

76. *Id.* (footnotes omitted).

77. *Id.*

Table 3

How moms and Millennials compare: ⁷⁸			
Shopping attitudes and behaviors:	Total	Millennials	Moms
Believe cause marketing is acceptable	88%	94%	95%
Bought a cause product/service in past 12 months	41%	53%	61%
Likely to switch brands	80%	85%	93%
Willing to try a NEW brand or one they've never heard of	61%	73%	73%
Willing to buy a more expensive brand	19%	26%	27%
Cause branding is important when they decide:			
Which companies they want to see doing business in their communities	Total 79%	Millennials 88%	Moms 90%
Which products and services to recommend to other people	76%	86%	88%
What to buy and where to shop	75%	84%	88%
Where to work	69%	87%	79%
Which stocks or mutual funds to invest in	59%	79%	74%
They want opportunities to support causes, such as:			
Buy a product in which a portion of the sales goes to the support of the cause or issue	81%	85%	92%
Learn about a social or environmental issue	80%	86%	91%
Make changes to their own behavior, such as get more physical activity, eat healthier or reduce their impact on the environment	78%	84%	88%
Offer their ideas and feedback on the company's cause-related efforts and programs	75%	83%	89%
Donate money to a nonprofit the company has identified	75%	84%	88%
Serve as an advocate for an issue they care about, such as signing a petition or engaging their community	72%	82%	81%
Volunteer for the cause or issue	72%	81%	85%

In surveys over the years, American consumers have remained largely steadfast in their expectations of what issues companies should support. What issues matter to consumers? What issues do consumers expect companies to address? Table 4 below provides these answers:

78. *Id.* at 13.

Table 4

Leading issues consumers think companies should address: ⁷⁹		
	2010	2008
Economic Development (job creation, income generation, wealth accumulation)	77%	80%
Health and Disease	77%	79%
Hunger	76%	77%
Education	75%	80%
Access to Clean Water	74%	79%
Disaster Relief	73%	77%
Environment	73%	77%
Homelessness/Housing	70%	71%
Crime/Violence Prevention	69%	73%
Equal Rights/Diversity	66%	63%

American consumers are a demanding lot, as survey data indicates. “They want companies to tackle most major issues around the world and in their backyards. They want companies to support issues aligned with their businesses (for greatest impact), but they also want issues to be relevant to them and other key stakeholders.”⁸⁰ When choosing an issue to support, what are consumer’s expectations? Table 5 below examines what consumers expect from companies:

Table 5

When choosing an issue to support, consumers believe companies should consider: ⁸¹	
One that is important in the communities where they do business	91%
One that is consistent with their responsible business practices or the way they make and distribute their products (e.g., impact on the environment, treatment of employees, financial transparency)	91%
One that is important to their consumers	89%
One where their business can have the most social and/or environmental impact	88%
One that is important to their employees	85%

Consumers are personally invested in corporate, social, environmental, and other cause issues.⁸² Consumers care about the footprint and impact that companies they patronize have on society.⁸³ “They hope to make a difference by lending their time, money and brainpower.”⁸⁴ Just how personally involved are American consumers? How willing are they to roll-up their sleeves? Table 6

79. *Id.* at 14.80. *Id.* at 16.81. *Id.*82. *Id.*83. *Id.*84. *Id.* at 18.

below provides some insight, when asked what opportunities American consumers want companies to provide, the consumers responded in the following manner:

Table 6

Americans want companies to give them the opportunity to: ⁸⁵		
	2010	2008
Buy a cause-related product	81%	75%
Learn about a social or environmental issue	80%	74%
Change their behavior	78%	72%
Offer ideas/feedback on company efforts	75%	—
Donate to company-identified nonprofit	75%	66%
Advocate for an issue	72%	64%
Volunteer	72%	61%

Today, we live a society where no company seeks to end up in the news as the company that hires underage workers or the company that pollutes the environment. Consumers are demanding more social responsibility and accountability from the companies that offer them goods and services.⁸⁶ Corporate marketers have become very adept at using all the terms and buzzwords they think will peak consumers interest⁸⁷—i.e., “green,” “socially responsible,” “low-impact,” “sustainable,” “earth-friendly,” and “environmentally-friendly” get bantered about constantly in print and digital media advertisements. Companies tout their product’s certification or endorsement as a “LEED,” “Energy Star,” “Organic,” or “Fair Trade.”⁸⁸ In many regards, American consumers have become somewhat skeptical of corporate “green” claims.⁸⁹ With no reliable mechanism of third-party verification or standard to test claims and assertions, consumers have become subjects of “greenwashing,”⁹⁰ and are therefore dubious of these claims made by many

85. *Id.*

86. *See id.* at 14 (table).

87. *See About Greenwashing*, GREENWASHING INDEX, <http://www.greenwashingindex.com/about-greenwashing/> (last visited July 9, 2013).

88. *See* Blythe Copeland, *Energy Star, Organic, and More: Understanding Eco-Friendly Certifications*, TLC, <http://tlc.howstuffworks.com/home/understanding-eco-friendly-certifications.htm> (last visited July 10, 2013).

89. *See, e.g., About Greenwashing*, *supra* note 87.

90. *See* Robert Lamb, *How Greenwashing Works*, HOWSTUFFWORKS, <http://www.howstuffworks.com/greenwashing.htm> (last visited July 9, 2013) (“The term greenwashing is an environmental take on **whitewashing**—the attempt to cover up or excuse wrongdoing through false statements or the biased presentation of data. While the term greenwashing first emerged around 1990, the practice itself dates back to the mid-1960s, when corporations were already making an effort to improve their public image in light of the emerging modern environmental movement.”). *See also* William S. Laufer, *Social Accountability and Corporate Greenwashing*, 43 J. BUS. ETHICS 253, 253-61 (2003); Jacob Vos, Note, *Actions Speak Louder Than Words: Greenwashing in*

corporate actors. “As consumer demand for socially responsible products and companies is increasing, consumer trust in corporations is decreasing.”⁹¹ “Consumers are less likely to trust a company’s claims versus consumer reports or third party certifications.”⁹² “As cause branding explodes, transparent communication continues to be a key challenge for marketers, and consumers agree: Nearly two-thirds (61%) don’t think companies are giving them enough details about their efforts, including the amounts donated and the length of the promotions.”⁹³ Finally, “[t]his disconnect may also explain why more than half (53%) of all Americans believe corporate cause marketing should be regulated.”⁹⁴

As survey data demonstrates, cause-related marketing is important—consumers really do want to have an impact in terms of sustainability.⁹⁵ As a result of greenwashing and other deceptive marketing practices, consumers are somewhat mistrustful of sustainability claims that companies make.⁹⁶ Indeed, consumers clamor for regulation of cause-marketing initiatives.⁹⁷ In a cluttered marketing landscape, where corporations can easily make unsupported and unsubstantiated sustainability claims, consumers seem to be asking for a mechanism to sift the wheat from the chaff.⁹⁸ Benefit corporations, due to their mandate of a general public benefit, accountability, and transparency, now offer a formal, tangible, and verifiable base for consumers to judge and reward corporations that are truly committed to sustainability.⁹⁹ Over time, benefit corporations will succeed because consumers will have a yardstick by which to measure the claims and successes of corporations that say they are committed to achieving sustainability. As benefit corporations take hold, flashy and sometimes deceptive marketing will no longer work. Corporations will have to back up their claims with results and clearly demonstrate the areas in which they are having an impact. Because consumer demand is driving the need for the benefit corporation, benefit corporations likely will succeed.

Corporate America, 23 NOTRE DAME J.L. ETHICS & PUB. POL’Y 673, 673-74 (2009). To explore false and spurious green marketing claims that have been debunked, see *Greenwash: Exposing False Environmental Claims*, GUARDIAN, <http://www.guardian.co.uk/environment/series/greenwash> (last visited July 9, 2013).

91. CLARK & VRANKA, *supra* note 58, at 2.

92. *Id.* at 3.

93. CONE, *supra* note 63, at 24.

94. *Id.*

95. *Id.* at 18.

96. *See About Greenwashing*, *supra* note 87.

97. *See generally* CAUSE MARKETING F., <http://www.causemarketingforum.com> (last visited July 8, 2013) (search Vermont regulating “cause marketing”).

98. *See About Greenwashing*, *supra* note 87.

99. *See Why B Corps Matter*, CERTIFIED B CORP., <http://www.bcorporation.net/what-are-b-corps/why-b-corps-matter> (last visited July 8, 2013).

B. Employees

Cause-related business practices are impacting and influencing the behavior and choices made by employees.¹⁰⁰ Survey data indicates that employees are heavily invested in their company's support of critical cause related business practices.¹⁰¹ Employees hunger to work for companies that embrace causes and direct their business efforts toward identified causes.¹⁰² Table 7 below demonstrates the multitude of ways that employees are willing to engage in cause-related efforts in the workplace:

Table 7

Employees want to get involved in their company's cause-related efforts through: ¹⁰³	
Matching grants	81%
Dollars for doers	77%
Paid time off to volunteer	76%
Information about volunteer opportunities outside of work	76%
Company-sponsored volunteer days	75%
Skills based volunteer opportunities	75%
A forum or opportunity for feedback and ideas	72%
Paid sabbaticals/extended time off	70%

“Just like consumers, employees want to feel vested in their employers’ programs and are willing to roll up their sleeves to have an impact.”¹⁰⁴ Cause-related business efforts pay dividends for companies—i.e., by improving employee morale. “Employees who are very involved in their company’s cause program are 28[%] more likely to be proud of their company’s values and 36[%] more likely to feel a strong sense of loyalty than those who are not involved.”¹⁰⁵ “Companies who are not fully engaging their employees are clearly leaving equity on the table.”¹⁰⁶

Employees want to work for corporations that have an impact and that are positively changing lives.¹⁰⁷ Perceptive corporate leaders will want to tap into this impetus and desire in order to have a sustainability impact in order to build equity in employee morale, engagement, loyalty, and general job satisfaction. For these reasons, benefit corporations have a unique advantage in recruiting employees who will make a conscious choice and decision to work for a corporation with an egalitarian mission, as opposed to a statutory duty to return

100. See CONE, *supra* note 63, at 19.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 21.

107. *Id.*

maximum profits to one constituency—shareholders. Furthermore, benefit corporations will succeed because employees will have increased pride and utility from a corporation that provides a positive public benefit to society.

C. Investors

“Consumers aren’t the only ones who pay attention to environmental ethics before they decide when to pull out their wallets. Some investors also pay attention to the environmental [and social] ethics of the companies they support.”¹⁰⁸ In recent decades, the sustainable/socially responsible investing (“SRI”) movement in the United States has blossomed and expanded dramatically. According to US SIF—the Forum for Sustainable and Responsible Investment—in 2010, there were “\$3.74 trillion in total assets under management using one or more sustainable and responsible investing strategies[,]” including screening, shareholder advocacy, and community investing.¹⁰⁹ Interestingly,

[f]rom 2010 to 2012, sustainable and responsible investing enjoyed a growth rate of more than 22[%], increasing from \$3.07 trillion in 2010. More than one out of every nine dollars under professional management in the United States today—11% of the \$33.3 trillion in total assets under management tracked by Thomson Reuters Nelson—is involved in sustainable and responsible investing.¹¹⁰

“As of 2012, there were 333 mutual fund products in the United States . . . with assets of \$640.5 billion. By contrast, there were just 55 SRI funds in 1995 with \$12 billion in assets.”¹¹¹ In addition, “SRI mutual funds span a range of investments, including domestic and international investments, and a growing range of products are available, including hedge funds and ETFs (exchange traded funds).”¹¹²

“SRI has evolved in both the public and private markets, becoming an institutionalized sector of the professional asset management market and giving rise to a distinct venture capital and private equity industry of funds and individual investors seeking values-aligned investment opportunities.”¹¹³ In many regards, greenwashing is impacting SRI investors like consumers. “Like consumers, investors lack the comprehensive tools to understand the complete picture of a company’s performance across the full range of social and environmental measures. Likewise, businesses may have a hard time attracting investors by distinguishing themselves among the sea of companies that claim to

108. Vos, *supra* note 90, at 682.

109. *SRI Basics*, US SIF, <http://www.ussif.org/sribasics> (last visited July 7, 2013).

110. *Id.*

111. *Id.*

112. *Socially Responsible Investing Facts*, MYSENIORPORTAL, http://www.myseniorportal.com/app/webroot/arthurdocs/socially_responsible_investing.php (last visited July 8, 2013).

113. CLARK & VRANKA, *supra* note 58, at 3.

be ‘socially responsible.’”¹¹⁴ With regard to greenwashing and dubious social and environmental claims, one commentator has observed the following:

Unfortunately, despite their best intentions, green investors are often suckered into investing in polluting corporations through greenwashing. Without verifiable information it is difficult for investors to make informed decisions about environmentally responsible practices and companies. The investors have little more to rely on aside from corporate representations—representations which, as we have already seen, are often major mischaracterizations of corporations’ actual activities. With nothing to rely upon besides the corporations’ own information, green investors end up investing in many corporations with unsavory environmental practices. Many corporations creatively manage their environmental reputations for this very reason.”¹¹⁵

“Companies which do not project a green image are avoided by green investors”¹¹⁶ “Individual investors aren’t the only ones paying attention.”¹¹⁷ Other key players are taking note as well. “Over the last few years, banks have been waking up to the fact that the environmental and social risks on projects they lend money to, while hard to quantify, can be very damaging to . . . business.”¹¹⁸

The numbers don’t lie: SRI investing has a huge footprint on the financial landscape and is continuing to grow at a staggering rate.¹¹⁹ Benefit corporations promise to have a big impact on the burgeoning SRI investment community. With the promised accountability and transparency that benefit corporations provide, they are an attractive vehicle for members of the SRI communal to invest capital and earn a return on their investment.¹²⁰ The SRI investors’ ever-increasing role in the financial marketplace is one more indication that benefit corporations will succeed.

D. Social Entrepreneurs

“For-profit social entrepreneurs have gained increasing prominence on the business landscape.”¹²¹ Social entrepreneurship rocketed to the spotlight in 2006 when Muhammad Yunus, of Bangladesh, won the Nobel Peace Prize for his pioneering work in microlending.¹²² “Although there is no reliable data on ‘social

114. *Id.* at 4.

115. Vos, *supra* note 90, at 683 (footnotes omitted).

116. *Id.* at 682.

117. *Id.*

118. *Id.* at 682-83 (alteration in original) (quoting DANIEL C. ESTY & ANDREW S. WINSTON, GREEN TO GOLD: HOW SMART COMPANIES USE ENVIRONMENTAL STRATEGY TO INNOVATE, CREATE VALUE, AND BUILD COMPETITIVE ADVANTAGE 95 (2006)).

119. See CLARK & VRANKA, *supra* note 58, at 3-4.

120. *Id.* at 28.

121. *Id.* at 4.

122. *Id.* To view Dr. Yunus’s biography, visit *Muhammad Yunus—Facts*, NOBELPRIZE.ORG,

enterprise' company revenues, an aggregation of businesses belonging to membership associations generally identified with the sustainable business movement reveals a marketplace of over 65,000 businesses with over \$40 billion in revenues."¹²³

American business schools are taking note of this social entrepreneurship movement. The premier business schools in America are taking social impact very seriously in their educational models and programs.¹²⁴ "The pipeline of future for-profit social entrepreneurs is filling rapidly as most top business schools offer a program in Social Entrepreneurship."¹²⁵

The rising profile of social entrepreneurship, coupled with the increasing topical focus on social responsibility at American business schools, promises to foster a rising generation of dynamic socially-minded business leaders and innovators. As new business opportunities and ideas emerge, social entrepreneurs will need a reliable legal entity within which to form their fledgling business enterprises. As benefit corporations become more established and recognizable, social entrepreneurs will gravitate toward benefit corporations as the legal entity of choice for structuring and operating their socially focused businesses. Demand will drive the success of benefit corporations. Social responsibility has proven to be good business and will only become more impactful. Benefit corporations will certainly aid social entrepreneurs in meeting the demands of customers, employees, and investors for a chance to participate in a corporation that holistically focuses on being a positive steward in the community and the environment.

CONCLUSION

"For-profit social entrepreneurship, social investing and the sustainable business movement have reached critical mass and are now at an inflection point."¹²⁶ Four main constituencies—consumers, employees, investors, and social entrepreneurs—are driving the social business revolution.¹²⁷ "Accelerating consumer and investor demand has resulted in the formation of a substantial

http://www.nobelprize.org/nobel_prizes/peace/laureates/2006/yunus.html (last visited July 7, 2013). See generally MUHAMMAD YUNUS WITH KARL WEBER, BUILDING SOCIAL BUSINESS: THE NEW KIND OF CAPITALISM THAT SERVES HUMANITY'S MOST PRESSING NEEDS (2010).

123. CLARK & VRANKA, *supra* note 58, at 4-5.

124. For instance, the University of Pennsylvania's Wharton School of Business has a Social Impact Initiative. See *Social Impact Initiative*, WHARTON, <http://www.wharton.upenn.edu/socialimpact/index.cfm> (last visited July 7, 2013). See also, e.g., *Social Enterprise*, HARV. BUS. SCH., <http://www.hbs.edu/socialenterprise/> (last visited July 7, 2013); *Center for the Advancement of Social Entrepreneurship*, DUKE FUQUA SCH. BUS., <http://www.caseatduke.org/> (last visited July 7, 2013); *Social Enterprise at Kellogg (SEEK)*, KELLOGG SCH. MGMT., <http://www.kellogg.northwestern.edu/Departments/seek.aspx> (last visited July 7, 2013).

125. CLARK & VRANKA, *supra* note 58, at 5.

126. *Id.* at 2.

127. See *id.* at 2-6.

marketplace for companies that put purpose, not profit, at the center of the business.”¹²⁸

By enacting legislation to create benefit corporations, visionary states like Arizona, Arkansas, California, Colorado, Hawaii, Illinois, Maryland, Massachusetts, Louisiana, Nevada, New Jersey, New York, Oregon, Pennsylvania, South Carolina, Vermont, Virginia, and the District of Columbia have answered the call of consumers and investors who have long fueled the social responsibility movement.¹²⁹ “The benefit corporation is the most comprehensive yet flexible legal entity devised to address the needs of entrepreneurs and investors and, ultimately, the general public.”¹³⁰

The benefit corporation is distinct in three ways: (1) a benefit corporation must have the purpose of making a positive, substantial “impact on society and the environment;” (2) the directors’ duties include “consideration of non-financial stakeholders,” along with shareholders’ financial interests; and (3) a duty “to report on its overall social and environmental performance using a” third-party standard that is “comprehensive, credible, independent and transparent.”¹³¹ Market demands and pressures have necessitated the creation of the benefit corporation. Only time will tell how successful they will be, but the early prognosis suggests that benefit corporations have an important role to play in the marketplace, and they will ultimately succeed as entities of choice for social investors and entrepreneurs.

128. *Id.* at 2.

129. *See id.* at 1-4.

130. *Id.* at 1.

131. *Id.*