What the Heck Is a B Corp?

By David J. Willbrand and Dann Bruno

The terms "B corp" and "benefit corporation" get thrown around more and more these days as (1) consumers increasingly demand socially conscious products and services, (2) employees increasingly want to work at employers that promote a social mission, and (3) regulators and politicians increasingly worry that today's large corporations have the power to cause social harm (for example, think of the European Union implementing its new General Data Protection Regulation and Congress summoning Facebook to testify regarding the Cambridge Analytics data breach). Which begs the question, what the heck is a B corp? Is B corp certification similar to an organic food/women-owned business/fair trade certification, or is a B corp a unique legal entity different than a traditional corporation or limited liability company (LLC)?

The answer is … both. B Lab is a nonprofit organization "dedicated to using the power of business as a force for good" that provides B Corp certification to for-profit companies that "meet rigorous standards of social and environmental performance, accountability, and transparency." On the other hand, as of May 2018, 35 states (including Delaware) have adopted statutes recognizing benefit corporations as unique legal entities with provisions that require corporations to follow a broader fiduciary model. The discussion below will first focus on the B Corp certification and then turn to state statutes (primarily Delaware's) that have enacted some form of benefit corporation legislation.

B Lab and the B Corp Certification

The nonprofit B Lab was founded in July 2006 and granted its first B Corp certification in June 2007. The B Corp certification is granted to certify the company as a good public citizen with a purpose of creating value for stakeholders beyond just stockholders (e.g., customers, employees, suppliers, the environment). Over 2,400 companies in more than 50 countries, including notable companies such as Ben & Jerry's, Patagonia and Kickstarter, have obtained B Corp certification.

To become certified, first a company must complete the B Impact Assessment (which measures social and environmental impact) and earn a score of at least 80 out of 200 points. Next, the company must meet the B Lab's legal requirements, which require amending the company's existing governing documents or adopting benefit corporation status, depending on the company's state of incorporation and existing governance structure. Upon receiving board and shareholder approval, the amended charter must be filed with the secretary of state within one year. Finally, the company must sign the B Corp Declaration of Interdependence and the B Corp Agreement and pay annual fees between $500 and $50,000, depending on annual sales of the company.

B Lab purports that the benefits of meeting its legal requirements are to (1) give legal protection to directors and officers to consider the interests of all stakeholders, not just shareholders, when making decisions, (2) create additional rights for shareholders to hold directors and officers accountable to consider these interests, and (3) limit those expanded rights to shareholders exclusively. To that end, B Lab drafted the Model Benefit Corporation Law (MBCL) and lobbied state legislatures to adopt it.

History and Current Status of Benefit Corporations

Maryland adopted the first benefit corporation statute in April 2010. On August 1, 2013, Delaware adopted a new subchapter XV (Public Benefit Corporation Statute) of the Delaware General Corporation Law. As of May 2018, 35 states have adopted benefit corporation legislation and numerous states have legislation currently pending (e.g., Ohio's H.B. 545). On February 1, 2017, Laureate Education became the first benefit corporation to go public and on April 25, 2017, Danone North America, a $6 billion business and wholly owned subsidiary of French multinational Danone, announced it had become the largest benefit corporation. Additionally, on April 19, 2018, the Executive Committee of the Delaware State Bar Association approved proposed amendments to the Delaware Limited Liability Company Act to provide for the formation of statutory public benefit LLCs.

Legal Implications of Public Benefit Corporations

To discuss the legal implications of benefit corporations, it is necessary to first understand the current state of the law for traditional corporations. Since the 1919 Michigan Supreme Court case of *Dodge v. Ford Motor Co*., the idea that a corporation's purpose is to maximize value for its owners, the stockholders, has been a foundational principle of corporate law.

Recent Delaware Supreme Court cases have confirmed this "stockholder primacy" doctrine and required directors, as statutory managers of the corporation, to act to promote shareholder value (see *eBay Domestic Holdings, Inc. v. Newmark*). Similarly, the Delaware Supreme Court has held that directors have a fiduciary duty to common stockholders over creditors or stockholders with preferences (*In Re Trados Incorporated Shareholder Litigation*). However, in *Unocal v. Mesa Petroleum,* the Delaware Supreme Court recognized "the impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally)" may be considered when a corporate director faces a hostile takeover.

Under traditional corporate law (and presumably in benefit corporations), the basic duties directors have to stockholders are the duties of care and loyalty. The duty of care requires directors to act on an informed basis while the duty of loyalty requires directors to act in good faith and in the best interests of stockholders.

Delaware courts use three standards of review when reviewing the actions of the board of a traditional corporation (and presumably a benefit corporation): (1) the business judgement rule, (2) the entire fairness standard, and (3) intermediate scrutiny. Fortunately for directors, courts generally defer to the board absent unusual circumstances, such as a conflict of interest, bad faith or gross inattention. Thus, the business judgment rule gives directors a large amount of discretion in deciding how to create stockholder value, including potentially considering stakeholder interests. Delaware courts will apply the strictest entire fairness standard when the directors (or controlling stockholder) have an economic interest that materially conflicts with the interests of the minority stockholders. Finally, courts apply an intermediate standard of review when a board takes defensive actions or undergoes a change in control.

In response to concerns from investors and entrepreneurs about the stockholder primacy model, some states adopted "constituency statutes," which allow, but do not require, directors to consider the interests of non-shareholder stakeholders. Benefit corporation statutes go even farther, requiring a corporation to adopt a specific public benefit purpose and requiring directors to consider non-stockholder interests.

Under Delaware's Public Benefit Corporation (PBC) statute, a "public benefit corporation" is defined as "a for-profit corporation organized under and subject to the requirements of this chapter that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. To that end, a public benefit corporation shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation."

Additionally, each Delaware PBC must choose one or more specific public benefits. Such public benefit is defined as "a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than the financial interests of the stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific, or technological nature."

Benefit Corporation Mechanics and Practice Points

The Delaware Division of Corporations has provided instructions and a template to file a certificate of incorporation for a PBC. When choosing a specific purpose, a corporation should choose a purpose that is sufficiently specific to satisfy the statute but sufficiently general so as to limit the need for charter amendments.

PBCs must provide notice to the public of their PBC organizational status. While the statute no longer requires PBCs to include the designation in the corporation's name, unregistered private placements of stock of PBCs must include notice that the corporation is a PBC (unless the corporation's name provides such notice) and stock certificates of PBCs must indicate that the corporation is a PBC.

The board of directors of a PBC is responsible for managing the business and affairs of the PBC by balancing (1) stockholder interests, (2) stakeholder interests, and (3) the specific interest(s) listed in its certificate of incorporation. Although Delaware's PBC statute expressly provides that the business judgment rule applies to all disinterested balancing decisions, PBCs should consider adopting a charter provision protecting directors from liability for balancing decisions and should expressly address stakeholder concerns in board processes so as to preserve business judgment rule protections.

In Delaware, PBCs must provide stockholders a biennial report that includes (1) the objectives the board has established to promote the best interests of stakeholders and the public benefit(s) outlined in the certificate of incorporation, (2) the standards the board has adopted to measure the corporation's progress in promoting those interests and benefits, (3) objective factual information based on the standards the board has chosen regarding the corporation's success in meeting those objectives, and (4) an assessment of the corporation's success in meeting the objectives and in promoting those interests and the public benefit(s) the corporation seeks to achieve. Delaware's PBC statute is more lenient than the MBCL insofar as that Delaware statute (1) does not require the report be made public, (2) only requires a biennial report as opposed to annual, and (3) does not require that the report use a "third-party standard." However, if a Delaware PBC chooses, it may include provisions in its governing documents (charter or bylaws) that require it to meet the more stringent MBCL standards.

Summary and Approvals

To become a PBC, a traditional Delaware corporation must draft an amendment to its certificate of incorporation that states that the corporation is a PBC in its heading and identifies one or more specific public benefits to be promoted by the corporation. The board of directors must approve the amendment and recommend it be submitted to the stockholders for approval (look to charter and bylaws to determine the vote required). Delaware's PBC statute requires a two-thirds affirmative vote of the outstanding shares of the corporation (the charter and bylaws should be reviewed to determine whether any additional vote is required).

If the corporation is not publicly traded, stockholders who did not vote for an amendment are entitled to an appraisal by the Delaware Court of Chancery of the fair market value of the stockholder's share of stock, and the corporation must provide all stockholders with notice of their right to an appraisal. After the board and stockholders approve the amendment, it must be prepared and filed with the Delaware secretary of state. Delaware requires that a stock certificate issued by a PBC clearly note that the corporation is a PBC. Finally, if the PBC has adopted a new name, it should make necessary changes such as updating bank accounts, business cards and registrations.

Please contact David J. Willbrand or Dann Bruno with any questions.