

*Reprinted with permission from the May 23, 2019 edition of the New York Law Journal© 2019 ALM Media Properties, LLC. All rights reserved.*

## **CORPORATE GOVERNANCE**

### **The Corporate Form for Social Good**

*David A. Katz and Laura A. McIntosh, New York Law Journal*

*May 23, 2019*



*David A. Katz and Laura A. McIntosh*

State legislation allowing the establishment of benefit corporations—for-profit companies with a stated public purpose—has become widespread over the past decade. This increasingly available corporate form provides a mandate, and a safe harbor, for corporate leaders to pursue societal good along with shareholder profits. Directors are required to consider the impact of their decisions not only on the company’s shareholders, but on the entity’s larger social purpose. Investors who wish to support a company’s mission can be confident that it is an integral part of the company’s purpose and a consistent goal of its governance.

The popularity of these legislative efforts reflects the current cultural momentum behind the idea that corporations should be engines of good as well as profit. As BlackRock CEO Larry Fink wrote in his [2019 letter](#) to the chief executives of companies in which BlackRock invests: “[S]ociety is increasingly looking to companies, both public and private, to address pressing social issues. These issues range from protecting the environment to retirement to gender and racial inequality, among others. Fueled in part by social media, public pressures on corporations build faster and reach further than ever before.”

The goal of conventional corporations is to maximize shareholder returns over a strategic time horizon. Corporate leadership, strategy, and governance have been designed and implemented to this end. Broadening this goal to include an express public benefit mission is the right path for some companies. Many founders, leaders, and investors believe strongly that corporations should address current social issues in the course of pursuing their business purpose. The benefit corporation structure provides a form in which profit and social purpose can be combined, and business conducted, in a transparent and integrated way.

## Benefit Corporation Statutes

The first state to establish a benefit corporation in its corporate code was Maryland in 2010. Similar legislation has been enacted in over 30 states, plus the District of Columbia and Puerto Rico. While the statutory details vary among jurisdictions, [Delaware's statute](#) is an excellent example of the genre. A benefit corporation incorporated in Delaware has the same structure and form as a conventional corporation. Unless otherwise specified, it is subject to all the general corporation laws of Delaware. The essential difference is that a benefit corporation has an expanded corporate purpose: It must be “intended to produce a public benefit ... and to operate in a responsible and sustainable manner.” The certificate of incorporation must specify that it is a public benefit corporation and must identify within its statement of purpose “one or more specific public benefits to be promoted by the corporation.” Public benefit is defined in the statute very broadly as a positive effect—or reduction of negative effects—on the world (not including financial benefits to shareholders in their capacity as company shareholders). In Delaware, a two-thirds vote of shareholders is required to add or remove the designation of a company as a public benefit corporation.

Public benefit corporation directors in Delaware have a duty to act in a manner that balances the financial interests of stockholders, the best interests of “those materially affected by the corporation’s conduct,” and the public benefit(s) identified in its certificate of incorporation. Directors are not deemed to have any duties to people who have specific interests in those public benefits, and directors satisfy their duties by making decisions that are informed, disinterested, and reasonable. A public benefit corporation is permitted to state in its certificate of incorporation that disinterested directors’ failure to satisfy this requirement will not constitute an act or omission that is not in good faith or that is a breach of the duty of loyalty. This protects disinterested directors of a public benefit corporation from being sued for damages as a result of decisions that others may view as improperly balancing the competing interests at stake. The only enforcement mechanism as to the directors’ duty toward the public interest is that stockholders owning 2% of the outstanding shares (or, for companies listed on a national exchange, the lesser of 2% of shares or shares worth at least two million dollars) have a derivative enforcement right of action.

Every other year at a minimum, a Delaware benefit corporation must provide its stockholders with a statement as to the corporation’s fulfillment of its public purpose. The statement is required to include the objectives established by the board of directors to promote the public benefit, the standards adopted by the board to measure the company’s progress, factual information regarding the company’s success in meeting its objectives, and an assessment of its success. Unless otherwise provided in its certificate of incorporation, a benefit corporation is not required to use a third-party standard to certify that it is fulfilling its stated public purpose.

There is a growing industry of organizations that provide third-party certification as to whether a corporation is fulfilling its public purpose. The best known is [B Lab](#), an organization that will evaluate and certify a company—regardless of whether it is a benefit corporation or a traditional corporation—as one that meets a certain standard of social and environmental performance. B Lab’s “[B Impact Assessment](#)” evaluates corporate impact on a wide range of stakeholders. Confusingly, companies that are certified by B Lab are known as “[Certified B Corporations](#),” while public benefit corporations—whether or not certified by a third party such as B Lab—are commonly known as “B corps.”

Some states require a public benefit corporation to publish an annual assessment of its social and environmental performance, measured against a third-party standard. The state does not evaluate the

published assessment, nor does it determine whether any particular third-party standard is a useful metric. For Delaware benefit corporations, this may be considered a best practice, but it is not a requirement. B Lab offers an impact assessment tool that some benefit corporations utilize for their reporting.

Model legislation exists for benefit corporation statutes, developed by B Lab in conjunction with other governmental, non-profit, and corporate participants. The model legislation has extensive requirements for third-party standards to ensure that they are “comprehensive, independent, credible, and transparent.” An array of organizations currently offers third-party certification as to different types of public benefit, including those related to agriculture, health, environmental, and social benefits, sustainable business, and overall social and environmental impact.

## **The Purpose-Driven Corporation**

Benefit corporation legislation is currently pending in six more states. Incorporating as a benefit corporation is an excellent way for company founders to ensure that their enterprise remains steadfast in its public purpose as it grows. As Mr. Fink wrote in his [2019 letter](#), “Purpose guides culture, provides a framework for consistent decision-making, and ultimately, helps sustain long-term financial returns for the shareholders.” This corporate form ensures that the founding values of a company will endure through changes of leadership or ownership.

The benefit corporation has relevance today in light of institutional investors’ focus on environmental, social and governance (ESG) issues and their ongoing efforts to incentivize boards and management teams to promote social good as well as shareholder profits over the long term. It is worth noting that if the benefit corporation form becomes more widely adopted, many questions will arise. For example, when benefit corporations engage in merger and acquisition transactions, boards will need to give careful consideration to whether the transactions further the benefit corporation’s stated social purpose.

That the benefit corporation structure is increasingly a viable option for public-minded founders, investors, and workers does not mean that traditional corporations are free from responsibilities as corporate citizens, but it is a reminder that one size does not fit all for companies when it comes to either form or founding principles. Shareholders who wish to support companies with public benefit purposes can choose to invest in corporations that explicitly embrace this goal. For companies that use the benefit corporation form, the public purpose is transparent and clearly stated. This clarity allows socially conscious shareholders and companies to be better matched at the point of investment. This would mitigate problems inherent in the fact that social issues are often politically charged and hopefully minimize the instances in which companies are pushed by their myriad investors to take public (and often contradictory) positions on issues that are wholly unrelated to the business itself.

Many traditional corporations can and do successfully pursue their purpose and profits while at the same time being responsible and committed citizens of their communities. That said, efforts by activists and stakeholders to compel traditional corporations to further public benefits in ways that do not fit their strategic plans can be counterproductive, reducing the ability of a company to focus on its business purpose and thereby harming the shareholders and stakeholders in the process. It is to be hoped that the investment option of benefit corporations (and certified B corporations) will help create cultural space for conventional corporations to pursue business-oriented strategies without expressly addressing social issues. As Mr. Fink wrote in his [2019 letter](#), “profits are essential if a company is to effectively serve all of its stakeholders over time.” The pursuit of profits is the reason

shareholders invest their money in companies in the first place. Indeed, without its solid and longstanding foundation of successful corporations, the United States would not have the wherewithal to invest in benefit corporations at all. Both conventional corporations and benefit corporations are for-profit entities, and they can be complementary options for investors.

**David A. Katz** is a partner at Wachtell, Lipton, Rosen & Katz. **Laura A. McIntosh** is a consulting attorney for the firm. *The views expressed are the authors' and do not necessarily represent the views of the partners of Wachtell, Lipton, Rosen & Katz or the firm as a whole.*