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Journal Title: Business & professional ethics journal

Volume: 35 Issue: 2/3
Month/Year: 06/01 2016 Pages: 109-

Article Title: How Benefit Corporations Effectively Enhance Corporate Responsibility.

Article Author: Miesing, Paul,

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How Benefit Corporations Effectively Enhance Corporate Responsibility

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Abstract: Corporations evolved from serving a public purpose at the beginning of the seventeenth century to, legally and culturally, primarily maximizing profit for shareholders which continues at the beginning of this twenty-first century. Government and civil society have largely continued serving the public interest over time, but have struggled to keep pace with increasing and rapidly evolving challenges in recent decades. While social entrepreneurs and the corporate sector have stepped in to help address these challenges, through the practice of corporate responsibility, they have faced unnecessary hurdles in doing so. The benefit corporation was established in 2010 both to remove these hurdles and also help further unleash the power of business to address society’s most pressing problems. Despite various criticisms, benefit corporations are doing just that—enhancing the practice of corporate responsibility in the process—and will continue to improve over time. This paper summarizes the advantages of benefit corporations, points out some shortcomings which serve as areas for improvement, and addresses some of these criticisms.

Key Words: benefit corporations, b corporations, corporate responsibility, sustainability, corporate social responsibility

Benefit Corporations: Why Now?

To understand why the benefit corporation is now emerging as a new corporate form, we review the history of U.S. corporate charters, corporate law and how corporate structures are evolving.
A Brief History and Evolution of the Corporate Form

Because a business corporation is a legal fiction created by law, it can be modified to meet the needs of society. Both legal and management scholarship are therefore relevant to the debate of how the social responsibility and ethical considerations of a business relate to corporate purpose and duties. In fact, European countries first chartered corporations for specific public missions, the first ones being the British East India Company (1600) and Dutch East India Company (1602), both creating colonies that served as sources of raw materials and markets. Soon afterward, the Virginia Company (1606) and the Massachusetts Bay Company (1628) were chartered to colonize the New World (Arner 2002).

In the early U.S., incorporation was granted solely to enable activities that benefited the public, such as infrastructure and public works projects. The states limited business activities of these monopolies in the late eighteenth and early nineteenth centuries, and granted them existence as a result of a legislative act to perform a stated public function such as building roads and providing water (Hiller 2013). At that time, every business was required to individually petition the legislature for approval to act as a corporation. Based on these petitions, state legislatures approved independent corporate status only if there was a close connection between corporate purpose and the public good since the corporation was performing a quasi-governmental role. Limited liability was important since businesses needed to raise capital for these costly projects.

During the era of industrialization which soon followed, the number of incorporation petitions became unmanageable. The process for incorporating became far more "automated" following the first general incorporation statute passed in New York State in 1811. Other states followed suit and, eventually, also began liberalizing the incorporation purpose requirement until the statement of "any lawful business or purpose" was sufficient to describe the relationship between the nascent corporate form and society. While the administrative approval of corporate charters increased efficiency and was no longer subject to the decision of an elected legislature, the more uniform incorporation and approval process weakened the corporate-society link.

Regulatory and case history refines and hones the practical significance of corporate law over decades. A century after that first state incorporation statute, the Delaware court's Dodge v. Ford decision provided the legal basis for a corporate metamorphosis and "race to the bottom" as shareholder profit maximization became an explicitly recognized legal doctrine (Hiller 2013). Case law and commentary since then have at least somewhat limited the absoluteness of fiduciary responsibilities, giving corporate leaders some latitude with
a "business judgment rule" that protects directors and officers from judicial second-guessing about how to best serve their companies and shareholders, and most states have passed "constituency statutes" that permit directors and officers to consider all stakeholders (Stecker 2016). More recently, the U.S. Supreme Court's "Hobby Lobby" case ruled that "Modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not" (Burwell v. Hobby Lobby Stores n.d.). Nor are public companies any longer required to pursue the public interest. Benefit corporations are entering into this vacuum as they pursue broad stakeholder interests over narrow shareholder interests.

The Rise of Corporate Responsibility and Benefit Corporations

Corporate responsibility (also called corporate social responsibility and commonly abbreviated as CSR, corporate citizenship, and sustainability) refers to corporations' efforts to assess and take responsibility for their effects on environmental and social wellbeing. The term generally applies to efforts that go beyond what may be required by regulators or non-governmental organizations. (See Investopedia, http://www.investopedia.com/terms/c/corp-social-responsibility.asp, as accessed on October 8, 2016.)

The aim of corporate responsibility, beyond the ethical, is to reduce risks and increase stakeholder trust and long-term profits. Corporate responsibility strategies encourage corporations to positively impact the environment and their stakeholders, including consumers, employees, investors, communities, and others. It can incur short-term costs that do not provide sufficient immediate financial benefits to the company (e.g., tangible tax breaks and legal protection) but instead promote positive social and environmental change with incentives (e.g., intangible reputation and good will that attracts various stakeholders).

Corporate philanthropy, community involvement, and environmental health and safety functions were precursors to corporate responsibility, which arose in its modern form in the 1990s. At that time, journalists and non-governmental organizations exposed the practices of successful textile and clothing companies, like Nike, of sourcing their products from sweatshops in developing countries. Protests soon followed, along with continuing negative media coverage, which quickly damaged Nike's reputation and profits. Nike responded with substantive efforts to correct its suppliers' labor and environmental abuses, helping to usher in modern corporate responsibility. Recently, Wang, Dou, and Jia (2016) found that responsible corporate actions enhance financial performance, supporting the instrumental stakeholder theory. Similarly, Easterly and Miesing
(2009) found nonprofit social ventures that engaged in "community citizenship behavior" tended to be financially sufficient while meeting their social missions. Meanwhile, the growth of social entrepreneurship, the modern form of which started in the 1970s with the founding of companies like Ben & Jerry's (discussed below) has paralleled the growth of corporate responsibility. The rise of benefit corporations can be viewed as a natural evolution of social entrepreneurship and corporate responsibility. They are exceptionally new, with Maryland being the first to allow them in 2010 (Edmondson 2016). They were created to reconcile the corporate form with the evolving needs of society and the tension between them resulting from the short-termism of traditional investors. The unifying theme for their purpose is to unleash the power of business—arguably the most powerful force in society today—to help solve the increasingly complex web of environmental and social problems we face. A benefit corporation includes positive impact on society and the environment, in addition to profit, as its legally defined goals, the well-known "triple bottom line." While benefit corporations are subject to standard corporation laws, they differ from them in purpose, accountability, and transparency.

As of this writing, thirty-one U.S. states, the District of Columbia, and Italy have passed benefit corporation statutes with another five states and Australia considering it (Benefit Corporation n.d.-b). Delaware, whose corporate law applies to more than half of all U.S. corporations and over two-thirds of the Fortune 500, enacted benefit corporation legislation in 2013 with leadership from some of the most credible figures in U.S. corporate law. There are already more than 1,000 registered benefit corporations in the U.S. with more continuing to form (Houlanhan, Gilbert, and Kassoy 2014), ranging from companies with mainstream venture capital backing such as Farmigo (backed by Benchmark Capital) and Cotopaxi (backed by NEA) to subsidiaries of major multinational corporations such as Plum Organics (owned by Campbell Soup Company) and New Chapter (owned by Procter & Gamble). Other registered benefit corporations include high-profile, family-owned businesses such as Patagonia and Method (Houlanhan, Gilbert, and Kassoy 2014).

Why this recent revolution of the corporate form? The main concern and driver that early benefit corporation proponents and established social entrepreneurs have cited in developing and pushing for benefit corporation legislation in the states was the doctrine of shareholder profit maximization. They believed and were primarily concerned that for-profit companies pursuing a social mission face increasing difficulty as they scale; as officers and directors of these entities consider investments, mergers, or liquidity events, they feel under
increasing pressure to favor the traditional fiduciary responsibility to maximize returns to shareholders over their company’s social mission (Clark and Vranka 2013). Many leaders of early and growth-stage mission-driven businesses fear investors, whose financial interests will diverge over time from the social mission of the company, will force them to change business practices or pursue strategic alternatives to independent growth.

How Benefit Corporations Benefit Entrepreneurs and Society

Benefit Corporations are gaining favor because of their promise to fulfill Adam Smith’s observation in The Wealth of Nations (1776) that capitalism promotes the public good, albeit intentionally rather than unwittingly. The notion of the invisible hand is that markets work in providing benefits to society when individuals and companies seek to further their own interests.¹ This coincidence is a by-product of human selfishness and not the organization’s explicit purpose. On the other hand, social enterprises have an objective to mitigate social problems where markets and governments have failed, hence their explicit mission is to further the social good. Of course, they are not the only institutions that benefit the public, but others do not set out to do so as part of their mission or expressly use markets for that end.

Market Demand Meets Society’s Demands

At the same time benefit corporation proponents and pioneering social entrepreneurs were giving birth to benefit corporations, market and social forces had already been evolving to demand more from the corporate world than since the earliest time of the industrial revolution when corporations were formed explicitly for public purposes. Interestingly, it has been the information revolution, which has created far greater corporate transparency, that has been largely responsible for civil society, governments, consumers, employees, and investors—along with entrepreneurs—creating a substantial marketplace for companies that add societal and environmental purpose to profit as the center of business. These forces have both required existing corporations to operate more ethically and provided incentives and rewards for the establishment of new businesses that have done so from the start.

Consumers

A significant and growing population of consumers already align their purchases with their values, and many more have become conscious of the issue. According to B Lab (2013), approximately sixty-eight million U.S. consumers have
stated a preference for making purchasing decisions based upon their sense of social and environmental responsibility. Some consumers use their purchasing power to punish companies for negative corporate behavior while many others use their purchasing power to reward companies that positively address a social or environmental issue. For example, surveys have shown that nearly half of Americans would boycott companies whose behavior they perceive is not in the best interest of society (O’Donnell 2013). Meanwhile, recent research has also indicated that where price and quality are equal, 86 percent of consumers would switch from their current brand to a brand that is socially responsible (BCorporation 2013).

**Employees**

The general public preference for supporting “good companies” is not limited to purchases. People also prefer to work for companies that are committed to social and environmental issues. More than two-thirds of employees (69 percent) consider the social and environmental track record of a company in deciding where to work. This preference is especially strong among MBA graduates, who overwhelmingly (88 percent) have said that they would be comfortable taking a pay cut to work for a company that has ethical businesses practices over one that does not (Clark and Vranka 2013).

**Investors**

The socially responsible investing (SRI) movement has grown over the past thirty years to represent nearly ten percent of U.S. assets under management, or roughly $2.3 trillion (http://www.ussif.org/). 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. Like consumers, investors lack comprehensive tools to understand the complete picture of a company’s performance across the full range of social and environmental measures (Clark and Vranka 2013). Especially for this reason, businesses may have a hard time attracting investors by distinguishing themselves among the sea of companies that claim to be “socially responsible.”

**Entrepreneurs**

For-profit social entrepreneurs have gained increasing prominence on the business landscape. Probably the highest profile example of this phenomenon has been 2006 Nobel Peace Prize recipient Muhammad Yunus for his pioneering
work in microfinance, but there are many other examples. A new legal hybrid form offers additional options beyond solutions such as creating cross-sector partnerships or forming a non-profit organization with a for-profit subsidiary (which binds the firm in its pursuit of charitable goals while allowing it to seek income without putting the parent organization’s reputation and tax status at risk). In fact, this latter option is outside the expertise, ability, and/or financial reach of many entrepreneurs. The pipeline of future for-profit social entrepreneurs is filling rapidly as most top business schools offer a program in Social Entrepreneurship. For instance, there are more than 10,000 members of Net Impact (a network of business school students and young professionals using business as a tool for social change) in more than 300 chapters globally (https://www.netimpact.org/).

**Beyond Permission: Legally Requiring What Social Entrepreneurs Need**

Regardless of differences in interpretation of the law, fears of investor retaliation combined with both prevailing business culture and legal advice about the risk of litigation if one fails to maximize shareholder value have a chilling effect on corporate behavior as it relates to public benefit. Such fears are only exacerbated by cautionary tales of investor-led board takeovers of private companies such as the iconic forced sale of Ben & Jerry’s to Unilever. Nonetheless, social entrepreneurs recognize the limitations of the not-for-profit form and the potential power of business as they increasingly decide to organize and operate as for-profit entities. This decision gives rise to a complex set of legal issues at the state level, which in turn leads to uncertainty and impairs the growth of these types of entities and this new sector of the economy (Clark and Vranka 2013).

These legal uncertainties and the need for greater clarity have led to calls for new legal solutions that address the unique needs of for-profit, mission-driven businesses. However, none of the alternatives to benefit corporations devised to date meet the needs of the consumers, employees, investors, and entrepreneurs described above; and all have significant technical and policy issues associated with their approach that make them relatively ineffective in serving the public interest (Clark and Vranka 2013). These are among the reasons these alternatives have not taken root in state enabling laws nearly as quickly or uniformly as have benefit corporation statutes. In practice, benefit corporations improve upon existing legal, theoretical, and organizational forms of businesses that desire to integrate profits and principles. Moreover, they help facilitate a more permanent integration into the “DNA” and culture of the organization.
The benefit corporation must be founded as a corporation under established state law and voluntarily adopt a statement in its articles of incorporation that it is a benefit corporation. The enacting state’s benefit corporation statutes are placed within existing state corporation codes so that the corporation code applies to benefit corporations in every respect except those explicit provisions unique in the benefit corporation form (Clark and Vranka 2013). Moreover, the benefit corporation must follow all incorporation steps and is subject to all other relevant statutes that relate to the formation and governance of a for-profit corporation. The primary aspects of the statute, which may also be considered its primary benefits, may be divided into five areas:

(1) the purpose of the corporation to provide a public benefit,
(2) the duties of directors to consider a broader spectrum of interests beyond shareholder profit,
(3) the independent third-party standard to annually review corporate public benefit,
(4) transparency, and
(5) enforceability by means of a benefit enforcement proceeding (BEP) (Hiller 2013).

Not surprisingly, the vast majority of businesses incorporating as benefit corporations are small and mid-size enterprises (SMEs) given that small businesses make up 99.7 percent of U.S. employer firms and 49.2 percent of private-sector employment (Small Business Administration Office of Advocacy 2012).

**Further Empowering Social Entrepreneurs Helps Enhance Corporate Responsibility**

Corporate considerations of all stakeholders have increased exponentially over the last decade among the largest companies in the world. More companies, boards, and executive teams are realizing that the world has become far more transparent, that resources are diminishing rapidly (e.g., water, rare earth elements) in the face of a rapidly growing global population and a rising middle class, and that they must meet greater expectations from governments, the public, their supply chain, their customers, and their employees. In the face of these megatrends, entrepreneurs desiring to be proactively socially responsible and ensure their company continues along those lines have had to find a new paradigm within which to operate and new strategies for the mid- and long-term future of their organizations.
Immoral and self-interested managers and directors have made decisions that hurt the very shareholders they claim to be responsible for. In the wake of the collapse and scandals of such corporations as Enron and WorldCom because of insufficient governance, the U.S. Congress enacted the Sarbanes-Oxley Act of 2002 (SOX). SOX attempts to reassert board independence from corporate management by placing greater responsibility on senior management and directors, particularly independent directors. Yet systemic and organizational ethical failures still abound in spite of this trend toward greater corporate responsibility. Some of the most visible examples in recent years include companies’ reckless disregard for environmental and safety regulations (BP’s oil spill in the Gulf, Toyota’s brakes) or even actually defrauding regulators and the public (VW’s emissions scandal, Wells Fargo’s unethical opening of bank accounts). There was also Wall Street’s various systemic lapses many accuse of creating the last financial crisis.

Amid these ongoing ethical lapses, social entrepreneurs looking to exit their businesses but ensure that their beneficial practices continue have few options. As Patagonia founder Yvon Chouinard stated on re-registering as a Benefit Corporation in 2012: “Benefit corporation legislation creates the legal framework to enable mission-driven companies like Patagonia to stay mission-driven through succession, capital raises, and even changes in ownership, by institutionalizing the values, culture, processes, and high standards put in place by founding entrepreneurs” (Rawhouser, Cummings, and Crane 2015 citing “B Lab” at Patagonia, www.patagonia.com/us/patagonia.go?assetid=68413, italics added).

The empowerment of social entrepreneurs and enterprises through benefit corporations can only enhance corporate responsibility in an environment where corporate ethical lapses seem never to end. Stakeholders and society continue to increasingly demand such responsibility and rightfully so. While benefit corporation status cannot guarantee such ethical lapses never happen, it puts real legal teeth into substantially reducing them, as discussed above.

Example: The New York State Perspective on Benefit Corporations

New York State’s experience serves as an example. It was the seventh state to enact benefit corporation legislation. At this time, there are no federal or state tax provisions that give special treatment to benefit corporations. As of the date of the authors’ research, New York had approximately forty-eight benefit corporations (Benefit Corporation n.d.-a). In addition, the state of New York had 110
companies certified by B Lab, some of which were also benefit corporations (BCorporation n.d.)

The first and largest New York benefit corporation, Greyston Bakery, reported revenues of approximately ten million dollars per year. It employs more than seventy “hard-to-employ” workers who might otherwise have difficulty finding jobs, such as those who have been incarcerated, referred from the Department of Social Services, or otherwise chronically unemployed. The bakery supplies ingredients for Ben & Jerry’s chocolate fudge brownie ice cream while also striving to provide low-income housing, community gardens, an HIV/AIDS treatment center, and child care services for the surrounding community.

Singer and Day (2014) interviewed twelve of New York’s benefit corporations, all of which were active and operational. Although fiduciary duty liability protection is one of the original reasons for the creation of this corporate form, none of these benefit corporations had many shareholders and none mentioned this protection as a primary concern that motivated their choice to become a benefit corporation. Instead, most of the founders and leaders of these businesses said they chose to become benefit corporations because that form most closely matched the values and mission of their organization. Image, reputation, “brand equity,” or other possible economic advantages were generally a secondary concern or not a concern at all. In other words, entrepreneurs in most instances chose to become benefit corporations because of the opportunity to choose a legal form that aligned with their organization’s broader social purpose and values rather than as a marketing ploy or for any specific set of legal protections.

Because of its new form, it may take time for larger firms to have more of an interest in benefit corporations, and for the ones that incorporate as benefit corporations now to grow large enough for many shareholders. Also, benefit corporations can be expected to attract additional and different types of investors, including those interested in making an impact as much or more than maximizing returns—this is a growing trend, especially among the rising millennial generation. Several companies specifically mentioned that being a benefit corporation—alone or coupled with being a certified B Corp by the nonprofit B Lab—has helped or would help them attract and retain employees. In addition, many leaders of benefit corporations (particularly those that chose to become certified) reported that there are advantages from being connected to a community of like-minded social entrepreneurs, such as the opportunity to discuss best practices (Singer and Day 2014). But only one benefit corporation had posted its annual assessment report on its Website, although several had posted an “impact report” on the B Lab website. Several had not yet filed their annual reports.
Some Criticisms and Concerns regarding Benefit Corporations’ Efficacy

Criticism and skepticism exist about whether the benefit corporation can deliver on its potential for socially responsible behavior and public benefit, despite the newness of this legal form and the enthusiasm of the dozens of enacting states. Some of this criticism was voiced during legislative testimony, debate and dialogue by benefit corporation opponents and others, as captured, aggregated and summarized by Rawhouser, Cummings, and Crane (2015). Other criticism has been made primarily in academic commentary, and André (2012, 2015) appears to be responsible for some of the most vocal of such criticism.

Some of the criticism represents legitimate concerns that we will address or otherwise highlight for future analysis. Some criticism should be no surprise given how new benefit corporation laws are and how it will take time to fully flesh out and address pitfalls of statutes as they currently stand (modern corporate laws have evolved over many decades, as indicated above). The remainder of the criticism reveals an apparent misunderstanding of how corporate law works in practice, confusing it with theoretical, academic legal arguments for better application or improvement of the law (lawyers practice law as it is to protect their client’s interests, not society’s); or otherwise seem to miss the point of the benefit corporation altogether (benefit corporation statutes were not designed to be easier for entrepreneurs, shareholders, executives or boards but rather to help increase certain positive results or otherwise avoid negative results). We address some of the more predominant of these arguments here.

Duty to Traditional Corporate Shareholders Is Not a Barrier

According to André (2015: 244), some “legal analysts question the shareholder primacy assumption that is a basic justification for the [benefit corporation corporate] form.” It makes sense that some legal analysts, who themselves might be concerned with ethics and how corporate law is currently applied, might argue that the law allows corporate boards greater discretion to make decisions taking into account factors other than wealth maximization as well as stakeholders other than investors.

Yet, some of the arguments André cites in this regard (e.g., Stout 2008) predate benefit corporations while others may have been made outside of the benefit corporation context. More importantly, the reality and application of relevant corporate law is far from clear as André herself admits. So much so, that she refers to one study in which thirty-one of thirty-four experienced board directors said they would release a dangerous, unregulated toxin into the environment in
order to increase profits because they believed their duty was to maximize shareholder wealth (André 2015).

André (2015: 245) states: “Directors can reasonably conclude that a fundamental argument for the benefit corporation is incorrect, and that even traditional corporations may consider the interests of stakeholders.” Despite the recent changes in the corporate world, that is simply not true—directors do not reach such conclusions by themselves; rather, they generally rely on the way the law has been applied and interpreted by a majority of the lawyers who advise them. These lawyers will not change their advice and the directors will not take different actions simply because an argument to the contrary can be made—that is the reality of corporate law practice today and a risk they will not take. For instance, the future contribution of benefit corporation status to protecting boards during takeovers may depend on whether a state has a constituency statute and how it is interpreted and applied (André 2015, citing Haymore 2011).

**Constituency Statutes Already Address Relevant Concerns**

Some have argued that existing corporate categories are sufficient to address the needs of social entrepreneurs and enterprises (Rawhouser, Cummings, and Crane 2015). Constituency statutes grant a board of directors the authority to consider the best interests of other corporate constituencies when making their decisions. These statutes generally provide that, in fulfilling their fiduciary duties, directors may consider the effects of a decision not only on shareholders but also on a list of other “constituency” groups. However, these statutes generally do not require boards to give weight to stakeholder interests but simply permit them to do so. And more importantly, none of those statutes affords any other constituency the right to vote on these decisions or sue to enforce the permissive terms of the statute (Strine 2014). On the other hand, the directors of companies incorporated in constituency states are expressly permitted by statute to consider persons other than shareholders in the discharge of their fiduciary duties.

These permissible constituency groups vary by state but usually include employees, creditors, suppliers, consumers, and the community at large. Thirty-three states now have some version of a constituency statute. Conspicuously absent from the list of states adopting constituency statutes is Delaware, the state of choice for incorporation for a long time because of the greater flexibility and protections it offers businesses and their owners and directors. As a result, Delaware corporate codes and case law is considered stronger, more credible, and influential than other states. Therefore, the fact that Delaware hasn’t enacted constituency statutes is an indicator they will continue to have little impact, as discussed below.
The lack of case law interpreting constituency statutes, coupled with the context in which many of these statutes were enacted, makes it difficult for directors to know exactly how, when, and to what extent they can consider those interests. Courts seem reluctant to wade into these issues and often fall back on shareholder primacy. Further, permissive constituency statutes create only the option (and not the requirement, as with benefit corporations) for directors to consider interests of constituencies other than shareholders. Thus, directors have permission to consider interests other than to maximize shareholder value. In non-constituency states, including Delaware, consideration of a public mission is even more problematic because under the corporate laws of those states the directors are not expressly permitted to consider the interests of stakeholders or constituents other than shareholders in discharging their duties (Clark and Vranka 2013).

Third-Party Verification

In addressing the concept of the benefit corporation receiving third-party verification of its efforts, André (2015: 244) argues that the benefit corporation statute “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’.” The third-party standard is part of the heart of benefit corporation legislation (and for many other observers as well, the most contentious and least understood provision).

This argument, consistent with some other, similar criticism, reveals a basic misunderstanding of the purpose of the benefit corporation statute. Without the benefit corporation laws, the practice of corporate responsibility itself is completely voluntary beyond what is legally required or otherwise government mandated. In fact, in many areas today where society faces serious problems, governments do not have the resources or expertise to respond quickly enough. By assessing and disclosing the benefit corporation’s overall social and environmental performance against an independent third-party standard, shareholders and the public are provided an easy way to evaluate the company on these criteria which, for typical companies, is otherwise almost impossible to determine.

State legislatures are trying to allow well-meaning business owners, management teams, and directors the ability to operate in a fully responsible manner, and have the business continue to be able to do so after they are no longer with the company, or after the company has been acquired or gone public. The statutes actually require these outcomes. Therefore, states are not removing social
goals from public, government control but instead allowing business to supplement such efforts. The fact that the state does not have to add to its burden in overseeing the minute details of how benefit corporations go about providing public benefits actually helps avoid additional, unpopular taxes in an era when many are loathe to see government grow larger.

The field of corporate social responsibility deals with a huge array of complex issues for which the expertise to properly assess and hold accountable those who practice it can get time-consuming and expensive. There have been a variety of very capable civil society organizations that have developed such expertise and credible processes and criteria over many years, in conjunction with stakeholders in many specialties including governments, to do just that. It makes sense to require the benefit corporations to work with such organizations for their requirements of transparency and accountability. For example, the Global Reporting Initiative (https://www.globalreporting.org/) has developed over many years with input from thousands of stakeholders from around the world to create standards for companies to report their nonfinancial (socially responsible) efforts. Similarly, the Global Impact Investing Network’s IRIS (https://iris.thegin.org/) offers a set of standardized metrics that can be used to describe an organization’s social, environmental, and financial performance.

In each of the areas related to the third-party standard, the Model Act (see Model Benefit Corporation Legislation at http://benefitcorp.net/attorneys/model-legislation; accessed August 9, 2016) contains further detail that serves to increase the objectivity of the process, procedure, and outcome (Hiller 2013). The benefit corporation may choose any third-party standard that meets the requirements. In the white paper accompanying the model legislation, there is a list containing over 100 rating standards from which a business is free to choose and that GRI, Green-Seal, Underwriters Laboratories, ISO2600, and Green-America would fit the third-party standard requirement (Benefit Corporation 2016).

**Enforcement**

André cites Hiller’s (2013) argument that “the benefit corporation mechanisms for enhancing corporate accountability have no teeth.” André (2015) also cites Blount and Offei-Danso (2013: 669) asserting that “the benefit corporation . . . sets forth a general public benefit purpose, but provides the parties most affected by this purpose with no corresponding effective method for enforcing it.”

This argument is based on the fact that only shareholders or directors have the ability to file suit to require enforcement of the statutory provisions (Model
Act, §305 available at Benefit Corporation 2016: 18). Yet, it overlooks three other simple facts: (1) a similar argument can be made of tax-exempt nonprofit organizations; (2) the benefit corporation statutes are corporate enabling and requirements laws, not social welfare laws outside of a business context, that are designed to benefit any specific “parties most affected”; and (3) the government (as well as shareholders and directors) may still enforce the statute regardless of being prompted by outside lawsuits.

In the simplest terms, all that the statutes are designed to do is permit companies and their originators to “do more good” and continue doing so through various corporate changes (in some ways actually requiring it) where they would not otherwise be required to do so. The companies stand little to gain financially as a direct result of such statutes (e.g., no tax benefits, at least not yet) and, as some critics point out, are actually subject to potentially more expensive and burdensome requirements. There are already many laws to which corporations are subject that require specific social and environmental efforts to benefit “parties most affected” from non-discrimination laws to corporate environmental laws, where such affected parties may bring suit for enforcement.

**Displacing Nonprofits**

Benefit corporations can also be viewed as a potential encroachment on the space of nonprofits. That is, a high number of shared properties between nonprofits and benefit corporations could cause benefit corporations to be viewed as substitutes to nonprofits. Because it is legally difficult to transition away from a nonprofit legal form and many nonprofits rely heavily on donations, benefit corporation legislation can be seen as a threat to nonprofit organizations and the resource base on which they depend. Indeed, several nonprofit managers and industry representatives have publicly opposed the Benefit Corporation movement (Rawhouser, Cummings, and Crane 2015).

This concern is legitimate and a potential challenge that may be addressed in different ways over time. While the authors are not aware of any in-depth or empirical studies regarding the impact of benefit corporations on existing nonprofit organizations, there has been anecdotal evidence that they could have some impact. This evidence also includes positive impact through partnering efforts.

This topic is an area for further research and discussion. In the meantime, any overlap of activities and impact can be viewed in the context of meeting the challenge of permitting the corporate form to most efficiently provide the greatest environmental, social, and governance benefits through its activities. Both
nonprofits and benefit corporations are part of the category of laws permitting creation of corporate entities.

**Lack Flexibility and Legislating Morality**

Some have expressed concern that the definition of general public benefit is prescriptive, lacks flexibility, and legislates morality (Clark and Vranka 2013). In fact, the legislation does the opposite specifically through the general public benefit provision that recognizes that different companies will pursue the creation of a material positive impact on society and the environment in a variety of ways. A general public benefit provision encourages flexibility and enables innovation by simply setting a “directional” performance requirement such as “material positive impact on society and the environment” without creating unnecessarily prescriptive performance requirements such as achieve zero waste or be carbon neutral (see http://benefitcorp.net/businesses/how-do-i-create-general-public-benefit). Legislation cannot substitute for an executive’s moral compass to consider decision impacts on all stakeholders, and there is nothing we have proposed that attempts to legally mandate they do so. Legislation enacted democratically ideally reflects the will of the populace, and it does seem that Benefit Corporations are an idea whose time has come.

**The Future of Benefit Corporations**

By assisting today’s emerging breed of social entrepreneurs and corporate intrapreneurs, benefit corporations afford federal and state governments a greater opportunity to harness the power of business and markets to address a wide variety of constantly-changing and rapidly-evolving social and environmental challenges. In this regard, benefit corporations best meet the needs of entrepreneurs, investors, employees, consumers, communities, and policy makers.

Although the corporate responsibility movement is developing rapidly, without benefit corporation statutes it would nonetheless be constrained by an outdated legal framework that is not equipped to accommodate for-profit entities whose social benefit purpose is central to their existence. The benefit corporate form offers clear market differentiation, specific legal protection to directors and officers where it is most needed, expands shareholder rights, and potentially offers greater access to capital than do other corporate forms. While other, newer corporate forms such as flexible purpose corporations, L3Cs, and benefit LLCs have also recently arisen to address similar needs (Field 2012), the benefit corporation is the most comprehensive yet flexible legal entity devised to address the needs of all stakeholders and, ultimately, the general public. Major criticisms
of benefit corporation statutes that attack the need for, or basic efficacy of, benefit corporation laws are based on a misunderstanding of the policies behind them and how corporate law operates, so they are not well-supported. In sum, these include:

- the argument that the traditional legal duty to corporate shareholders is not a barrier for businesses in pursuing public benefit—although according to case law that has evolved over decades, and well-documented perception, this argument is simply not true;
- constituency statutes already address the relevant concerns benefit corporations are meant to address—although these statutes were created to address a narrow problem, even for that purpose they remain unused and/or ineffective; and
- benefit corporations undermine public functions without accountability although they actually supplement public functions/purposes where government struggles to keep pace, and remain as accountable for their existence as any other corporate form, arguably even more so.

Some of the other criticisms of benefit corporation statutes are valid, which is no surprise given the form is still new and can be addressed over time as they gain real-world experience and the law evolves. For example, some express concern that benefit corporations displace nonprofits. There are legitimate concerns regarding benefit corporation impact on other, beneficial organizational forms that should be studied; however, the end goal of positive impact is likely accomplished most effectively and efficiently through the differing options that benefit corporations and nonprofits offer. Moreover, the field of corporate responsibility has seen a large increase of cooperation between the for-profit and nonprofit sectors to great, positive effect.

As part of the ongoing process of improving benefit corporation laws, some initial challenges can be immediately addressed. For one, a lack of awareness of benefit corporations and how they work seems to be one of the primary factors limiting the appeal of this corporate form. For example, several New York State companies in the Singer and Day (2014) survey specifically mentioned a desire to see government programs designed to raise public perception of benefit corporations. In addition, benefit corporation legislation applies only to corporations and not limited liability companies (although some states, such as Illinois, have introduced or are considering legislation that would make available to limited liability companies the same opportunities afforded to corporations under the state’s benefit corporation law).
There also remain cultural and legal impediments for investors in both the private and public markets to invest in benefit corporations that must be removed. Entrepreneurs, lawyers, and investors are not as familiar with them and existing corporations have little incentive to convert. However, given the growth of impact investing (see https://thegiin.org/impact-investing/need-to-know/) these socially responsible financiers might look to benefit corporations. In addition, corporate directors are impacted by the shareholder wealth maximization principle and may be unwilling to consider wider social impacts in their decisions because of their perceptions of the potential legal liability of meeting this standard; they need clarity and tools about how to balance the interests of stakeholders and shareholders. Similarly, investors and companies must also have the tools to measure, benchmark, improve, and report on their positive impact as well as third-party verification. Finally, states should amend benefit corporation statutes to address the evolving needs of the market (Houlahan, Gilbert, and Kassoy 2014).

As the benefit corporate form continues to emerge, scholars are just beginning the time-consuming process of identifying the trials and tribulations of the 1,000 plus early adopters within states that have passed benefit corporation laws. Hiller (2013) never claims that the BC form will result in CSR, acknowledging that this form needs further study. The number of benefit corporations remains limited, and there is much still to be learned in the coming years. What we can be certain of at this time, however, is that entrepreneurs and established companies opting for this new structural form have been able to pursue both social and financial missions. While we do not advocate legislating morality, benefit corporations to date have demonstrated their success in meeting society’s social and environmental demands.

Notes

1. The precise passage is: “As every individual, therefore, . . . intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. . . . By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it” (Par. IV.2.9).

2. For example, in testimony in support of CT HB 5466, one such entrepreneur explained: “When I wanted to create a social enterprise, there was no [reasonable] ability to do that through the [existing] legislation. . . . [I]t was a very expensive, timely process, and this [Benefit Corporation] bill would make it easier for other people to [form social enterprises]” (Rawhouser, Cummings, and Crane, 2015).
References


