

New York Benefit Corporations

Bringing Social Responsibility to Business

By Douglas E. Singer and James Day

In February 2012, the New York Benefit Corporation Law went into effect. It allows for a new form of corporation that operates for profit while also providing a public benefit. In April 2012, Douglas E. Singer, one of this article's authors, reported on the law in the *Trusted Professional* ("What NY's Benefit Corporation Law Means for Businesses and CPAs"). It is helpful to take a retrospective look at the impact that the law has had in the roughly two years since it took effect.

An Increase in Corporate Social Responsibility

A benefit corporation can be thought of as a hybrid corporate entity that, similar to a nonprofit, is required by law to have a material positive impact on society; however, it is otherwise permitted to earn and distribute profits to shareholders. Unlike a traditional for-profit entity, the directors and officers of a benefit corporation are required to consider the impact of their decisions—not just on the financial well-being of shareholders, but also on employees, customers, the community, and the local and global environment. Benefit corporations are required to publish an annual benefit report evaluating the company's performance in achieving its specific and general public benefits, as measured against an independent third-party standard.

This movement dovetails with consumers' increasing awareness of socially irresponsible corporate business practices and a desire to support entities whose behavior works in favor of society's best interests. Although consumer activism is nothing new, the Internet has brought a level of transparency that makes it increasingly difficult for corporations to hide the full impact of their actions from the public eye. Smartphone applications—including GoodGuide,

Free2Work, and Social Impact—allow consumers to instantly see which nearby businesses operate for the greater good, which brands use child labor in their supply chains, and whether any one of about 100,000 products is damaging the environment.



Investors and financial markets have taken notice. "Impact investors" have begun promoting the creation of specialized stock exchanges that require companies to disclose sustainability data in order to be listed. A 2012 report issued by the Forum for Sustainable and Responsible Investment identified \$3.31 trillion in U.S.-domiciled assets held by institutional investors, money managers, and community investment institutions that apply environmental, social, and governance criteria in their investment analysis and portfolio selection (representing a two-year increase of more than 20%). Informally, lawyers and accountants are beginning to hear more talk about social entrepreneurship, social investing, and double and triple bottom lines.

Prior to the enactment of benefit corporation laws, legal restrictions presented a barrier to effective social entrepreneur-

ship—particularly in the 19 states that do not have "constituency statutes" written into their corporate codes to allow for consideration of nonshareholder interests. Officers and directors of traditional for-profit corporations are generally required

by law to act in a way that maximizes profits for shareholders. These officers and directors are only permitted to take into account the impact of their actions on a broader constituency of stakeholders (such as the environment, employees, or the surrounding community) when doing so can be rationally related to the financial interests of shareholders. This emphasis on the primacy of shareholder financial interests can produce unintended results:

■ In 2000, ice cream company Ben & Jerry's was unable to resist an acquisition by corporate behemoth Unilever, despite questions about the degree to which Unilever comported with Ben & Jerry's broader social mission.

■ In 2010, the Delaware Chancery Court held that Craigslist cofounders Craig Newmark and Jim Buckmaster breached their fiduciary duty to a minority share-

holder by implementing a stockholder rights plan intended to preserve Craigslist's practice of prioritizing the provision of free online advertising above profit maximization.

■ On January 7, 2013, a public uproar erupted when the *New York Times* reported that American International Group's (AIG) directors were meeting to consider joining a lawsuit against the same federal agencies that had previously rescued the company with a \$182 billion financial crisis bailout. Although the board ultimately decided not to pursue the lawsuit, AIG's directors had a fiduciary duty to the company's shareholders to maximize the economic value of their investment, irrespective of the consequences that such a suit might have on the public at large. Refusing to even consider joining the suit could have exposed the directors to legal liability.

Benefit corporation laws address these problems by requiring—as opposed to merely permitting, such as in constituency statutes—officers and directors to make decisions based upon the company's effect on the community, employees, environment, and other stakeholders. In addition, the law requires companies to report on and assess their impact in providing public benefits.

A company that becomes a benefit corporation should not be confused with a certified B Corporation, which relates to a test and certification promulgated by B Lab, a nonprofit organization. Although both require corporations to meet certain comprehensive social, environmental, and other standards, a company can be a benefit corporation without having been certified as a B Corporation, and vice versa.

Benefit Corporations in New York

New York was the seventh state to enact benefit corporation legislation. As of this writing, 20 states have passed such legislation and 17 additional states have introduced it (<http://benefitcorp.net/state-by-state-legislative-status>). At this time, there are no federal or New York State tax provisions that give special treatment to benefit corporations.

As of the date of the authors' research, New York had approximately 20 benefit corporations; about 12 of these appeared to be active operating companies. (In addition, New York had 84 certified B Corporations, some of which were also benefit corporations.) These benefit corporations operate in a range

of different industries, including consulting, baked goods, agricultural production, food distribution, technology, waste disposal, tourism, solar energy, and media. In writing this article, the authors endeavored to reach all of these New York benefit corporations; approximately half of them were interviewed and confirmed to be active and operational. (The *Exhibit* presents these results.)

The first and largest New York benefit corporation, Greyston Bakery, reported revenues of approximately \$10 million per year. It employs more than 70 “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. Greyston's president and CEO, Mike Brady, has stated that “thirty years from now, we hope there will be no need for such a [benefit corporation] classification, as all businesses will operate with social justice and environmental impact on equal footing with financial gain” (Benefit Corporation Report for Greyston Bakery, 2012, p. 2).

The majority of the businesses interviewed were in existence at least six months prior to the passage of New York's benefit corporation law, and they brought themselves under its rubric. The general public benefits pursued by these benefit corporations included a cleaner environment; eradicating “energy poverty” in areas of the world without ready access to electricity; advancing public knowledge of the arts, sciences, and the surrounding community; providing economic opportunities for woman- and minority-owned businesses; utilizing technology to achieve social and environmental benefits; using waste products for improved agricultural production; and providing job training opportunities for individuals who would otherwise have difficulty finding employment.

Because none of the businesses interviewed had many shareholders, none mentioned fiduciary duty liability protections as a primary concern that motivated their choice to become a benefit corporation, even though this protection is one of the original reasons for the creation of this corporate form.

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 the organization. Marketing 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 what these legal attributes represented in the minds of the entrepreneurs (that is, the opportunity to choose a legal form that aligned with the organization's broader social purpose and values), rather than in the minds of consumers or for any specific set of legal protections.

Two of the businesses interviewed by the authors stated that a focus on the needs of their stakeholders—particularly employees, suppliers, and the community—was especially important in their decision to become a benefit corporation. Mike Brady told the authors, “It's about considering the needs of employees and the values of our suppliers as much as the bottom line.” Elisa Miller-Out of Singlebrook Technologies said, “It's about moving from shareholder value to shared value by incorporating our stakeholders.”

Several companies specifically mentioned that being a benefit corporation—alone or coupled with B Corporation status—has helped or would help them attract and retain employees. In addition, many leaders of benefit corporations (particularly those that chose to become certified B Corporations) reported that there are advantages from being connected to a community of like-minded social entrepreneurs, such as the opportunity to discuss best practices. 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. The authors also found that several had not yet filed their annual reports.

Several companies specifically mentioned that they would like to see benefits afforded to benefit corporations, although this was not a unanimous sentiment. Examples included tax incentives or credits, economic incentives, wage enhancements, procurement benefits (similar to diversity requirements in government and certain corporate purchasing), and preferred loan and grant opportunities. Jacques-Philippe Piverger of Mpowerd suggested a student loan forgiveness program for employees, similar to

EXHIBIT

Profiles of New York Benefit Corporations

Name	Corporate Form	Industry/Product	Purpose/General Social Benefit	Reason for Becoming a Benefit or B Corporation
4thBin	Benefit Corporation	Environmentally conscious electronic waste disposal	Dispose of electronic waste (televisions, computer monitors, cell phones) with the least possible impact on the environment by auditing vendors and recycling chain	Provide differentiator from others who dispose of electronic waste
Eco Bags	B Corporation	Reusable, environmentally friendly shopping bags; third parties are used to certify that all elements of supply chain and manufacturing meet or exceed international standards for materials and social conduct	To teach people to waste less and choose quality products that last, to encourage environmentally conscious packaging, and to discourage utilization of single-use plastics	"To be part of a like-minded group pursuing something bigger than business as usual"
Finger Lakes Biochar	Benefit Corporation	Convert agricultural waste into biochar for farms, thereby improving plant yield and water management, and reducing the need for fertilizer	Provide waste optimization, reduce greenhouse gas emissions, and make farms more productive and sustainable	Desire to associate and be associated with like-minded social entrepreneurs
Green Rabbits Projects Inc.	Benefit Corporation	Food distribution	Improve integrity of food supply chain	Wanted to select a corporate form most consistent with company mission; desire for marketing advantage
Greyston Bakery Inc.	Benefit Corporation and B Corporation	Baked goods; supplier of ingredients used by Ben & Jerry's; solar panels recently installed at bakery to reduce greenhouse gas emissions	Improve community health by lowering unemployment and homelessness; provide job training programs, low-income housing, community gardens, an HIV/AIDS treatment center, and childcare services for the surrounding community	Desire to be recognized as and to easily recognize a socially responsible business; to set an example for like-minded businesses
Mpowerd Inc.	Benefit Corporation	Solar-powered light/lantern	Eradicate energy poverty by providing lighting solutions for those living without electricity	Desire to attract socially conscious investors and be at the forefront of the corporate social responsibility movement
MWBE Connect	Benefit Corporation	Consulting services for minority- and woman-owned business enterprises (MWBE)	MWBEs employ more than 60% of the elderly, disabled, uneducated, and MWBE Connect seeks to help these businesses succeed in order to help otherwise unemployable people get jobs.	Good hybrid for partnering with local and state governments
Sahara Reporters Media Group	Benefit Corporation	Website dedicated to exposing corruption in African governments (focusing on Nigeria)	Integrity in African government	Looking for a corporate structure not entirely focused on profit maximization, because mission of business is not profit-focused, but did not want to exclude possibility of making a profit
Singlebrook Technology	Benefit Corporation and B Corporation	Web and mobile software development for clients "who are using technology in innovative ways to make a positive social and environmental impact in the world"	Design digital products that enable and empower people to make a difference for society; "Technology for Change" (use web and mobile technology to drive positive social and environmental change)	"We share the social and environmental values defined by B Lab and we want to demonstrate our commitment to those ideals by writing them into our corporate structure. We also want to participate in the B Corporation community and are eager to partner with other companies that wish to improve our society and environment, while creating successful businesses."
Turnstile Tours	Benefit Corporation	Community-based tours (Brooklyn Navy Yard, Food Card, Immigrant Foodways)	Tours that engage the community and share the stories of people that live there; push new knowledge into the world	Wanted the flexibility to do things that might not be profitable and not be judged solely on the basis of profit

loan forgiveness offered for government service. The presidents of other benefit corporations expressed concern, however, that the inclusion of incentives and benefits would slow down the movement and make it more difficult to enact benefit corporation legislation. For example, Cindy Vandenbosch of Turnstile Tours said, “I don’t operate like this to get a tax break”—a sentiment echoed by other benefit corporations.

Several mentioned that being a benefit corporation had created new opportunities that might not otherwise have been as readily available, such as press coverage, because of their form of organization or the impression that a benefit corporation is more attractive to consumers. Wiley Harrison of MWBE Connect commented that being a benefit corporation “has allowed me to partner with people I would not have otherwise in furtherance of the mission because the mission is not solely a profit.”

What’s Next?

Since the benefit corporation law’s passage, the number of benefit corporations in New York remains limited. 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. Several companies specifically mentioned this awareness and a desire to see government programs designed to raise public perception of benefit corporations. In addition, benefit corporation legislation applies only to corporations, 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). The addition of tax, economic, and other incentives could also help to foster the creation of new benefit corporations and improve the experience of those that are already in existence.

The New York benefit corporation law imposes stricter reporting and other requirements than the recently enacted Delaware law. Looking ahead, it will be interesting to see if Delaware’s more relaxed standards encourage entities that would otherwise become or remain New York benefit corporations to organize in Delaware or become Delaware benefit corporations. Alternatively, if benefit corporations are eventually given their own treatment under

the federal tax code, Delaware benefit corporations will be incentivized to conform to whatever federal standard is enacted.

It should be noted that when Wyoming became the first state to form limited liability companies in 1977, most states (and corporate lawyers) took little notice. It was not until 1988, when the IRS published Revenue Ruling 88-76 in classifying LLCs as partnerships for tax purposes, that this type of corporate form became well known and popular. By assisting today’s emerging breed

of “social entrepreneurs,” benefit corporations afford federal and state governments a much greater opportunity to harness the power of business to address a wide variety of social and environmental challenges. □

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