Business Horizons (2015) 58, 243—252

Available online at www.sciencedirect.com

ScienceDirect

KELLEY SCHOOL OF BUSINESS
INDIANA UNIVERSITY

www.elsevier.com/locate/bushor

BUSINESS LAW & ETHICS CORNER

Benefit corporations at a crossroads: As lawyers weigh in, companies weigh their options

Rae André

D'Amore-McKim School of Business, Northeastern University, Boston, MA 02115, U.S.A.

KEYWORDS
Accountability;
Benefit corporation;
Corporate social responsibility;
Corporate governance;
Social enterprise

Abstract Should your company become a benefit corporation? In a comprehensive set of law review opinions, this installation of Business Law & Ethics Corner uncovers several fundamental issues to consider. First, the main premise for the benefit corporation—the legal preeminence of the shareholder primacy norm—may be unfounded. Second, benefit corporations may increase director liability and company costs. Third, contrary to the stated goal of such laws, benefit corporations do not empower stakeholders, and therefore are not substantially different from traditional corporations. Many legal analysts argue that, paradoxically, benefit corporations actually inhibit corporate social responsibility efforts by perpetuating the myth that business corporations do not have the flexibility to pursue social missions, and by claiming to, but failing to, empower stakeholders. They argue that the benefit corporation form is likely to increase corporate greenwashing, and that it enhances public cynicism about all corporations by creating competing sets of 'beneficial' and 'other' corporations. In the face of widespread acclaim for the benefit corporation, both corporate directors and researchers should take these significant concerns into account.

1. Welcome to the era of the social enterprise

Social enterprise is a relatively new concept that today is driving reconsideration of the legal structures for businesses. All enterprises can be conceptualized on a continuum of goals that ranges from purely social to purely economic, and a social enterprise—generally defined as an organization that seeks to do well by doing good—falls somewhere in the middle. Social enterprises exist in a universe of organizations that already includes entities that explicitly embody social values, such as governments and non-profit organizations. Their introduction is challenging policy makers, social entrepreneurs, and academics alike to assess their contribution to this evolving organizational universe (André, 2012; Galera & Borzaga, 2009; Perry & Rainey, 1988).

E-mail address: r.andre@neu.edu

0007-6813/$ — see front matter © 2014 Kelley School of Business, Indiana University. Published by Elsevier Inc. All rights reserved.
http://dx.doi.org/10.1016/j.bushor.2014.12.002

In the United States, the first laws that implemented the social enterprise concept were passed in 2008. By 2012, five different types of social enterprises—the low-profit limited liability company (L3C), the benefit corporation, the flexible purpose corporation (FPC), the social purpose corporation, and the benefit limited liability company—had been introduced in 19 states; subsequently, many other states have considered similar legislation (Frumpkin, 2013; Murray, 2012). Today the most widely implemented social enterprise form is the benefit corporation (Wilburn & Wilburn, 2014). According to its proponents, the benefit corporation (Clark & Vranka, 2013, p. 16):

> offers entrepreneurs and investors the option to build, and invest in, businesses that operate with a corporate purpose broader than maximizing shareholder value and a responsibility to consider the impact of its decisions on all stakeholders, not just shareholders. . . . Enforcement of those duties comes not from governmental oversight, but rather from new provisions on transparency and accountability.

The benefit corporation 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" (Benefit Corp Information Center, n.d.b).

Should your company become a benefit corporation? Recently, legal scholars have evaluated the benefit corporation and weighed in on the growing debate about it. To understand their views, I conducted an exhaustive search of a dozen databases to find all pertinent law review articles published before November 2013. Using legal conventions for logic and argument, I then summarized the key issues raised in more than 20 articles. As you read the results, keep in mind that the term *shareholder* refers only to owners; the term *stakeholder* refers only to nonshareholders. Also, some authors quoted here use the term *B Corp* as a synonym for benefit corporation.

2. New concerns about the benefit corporation

Among the legal analysts, the benefit corporation has both advocates and critics. On the one hand, some support the need for corporate reform because traditional companies are not equipped with accountability and transparency standards that are sufficient to evaluate corporate responsibility (Resor, 2012). Clark, a co-author of the benefit corporation model law (Benefit Corp Information Center, n.d.a), and Babson argue that benefit corporation legislation solves these problems because (Clark & Babson, 2012, p. 851):

> it creates a mandatory requirement for a corporation to pursue general public benefit. . . [and addresses,] in a meaningful way, the specific demands of shareholders and investors who desire transparency and accountability with respect to these businesses.

Other legal scholars also support the benefit corporation legislation as written (Esposito, 2013; Grant, 2013).

On the other hand, many lawyers express concerns. For example, Munch (2012, p. 171) writes that the form may be "subject to abuse by corporate directors, shareholders, stakeholders, or others, without adjustment to its current design." He adds (2012, p. 189): "The statutes, as now drafted, do little to ensure that a benefit corporation fulfills its social obligations and that its self-selection and identification as a dual-mission enterprise is more than mere puffery." Likewise, Blount and Offei-Danso (2013, p. 669) assert:

> The benefit corporation fails as a useful legal structure because it sets forth a general public benefit purpose, but provides the parties most affected by this purpose with *no corresponding effective method for enforcing it* [emphasis added]. Additionally, this general public benefit purpose is vague, unquantifiable, and does not serve as an adequate objective for purposeful corporate action.

Underberg (2012) opines:

> Viewed from a broader corporate governance perspective, the B Corp initiative—however well-intentioned—has troubling implications . . . .[It] undermines the very values that corporate governance advocates should seek to promote: responsible, sustainable corporate decision-making by companies of any stripe.

Why these concerns? The criticisms of benefit corporations fall into three areas. First, legal analysts question the shareholder primacy assumption that is a basic justification for the form. Second, they point out that becoming a benefit corporation increases director liabilities and company costs. Third, they argue that the benefit corporation mechanisms for enhancing corporate accountability have no teeth. The details of these concerns are presented next.

2.1. Traditional corporations are *not* limited to maximizing shareholder wealth

A key assumption driving benefit corporation legislation is that, when making decisions, traditional corporations must ignore the interests of stakeholders in order to maximize shareholder value. This assumption is often called the *shareholder wealth maximization norm* or *shareholder primacy*. Benefit corporation proponents assert that in traditional corporations, maximizing shareholder value must guide corporate decision making, and that becoming a benefit corporation protects companies that also want to consider the interests of other stakeholders, such as employees.

Although he disagrees with this assumption, Murray concurs that it is widely accepted. For example, Murray cites one study in which 31 of 34 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 (Murray, 2012, citing Rose, 2007). However, many legal analysts believe that the shareholder wealth assumption is false. Stout (2008, 2012) acknowledges that this myth is held by many in our culture but argues that it is just that: a myth. In Stout's (2012, pp. 3—4) view:

> United States corporate law does not, and never has, required directors of public corporations to maximize either share price or shareholder wealth. To the contrary, as long as boards do not use their power to enrich themselves, the law gives them a wide range of discretion to run public corporations with other goals in mind, including growing the firm, creating quality products, protecting employees, and serving the public interest.

Of course, there are sound business reasons for giving corporations wide discretion to consider both shareholders and stakeholders (Munch, 2012, p. 178):

> Some corporations have long supported social initiatives as a means of enhancing their own profits and long-term viability. Through charitable donations, community programs, or holistic decision-making, corporations have pursued intangible goals, such as improving workforce comfort or engendering customer goodwill, arguing that these actions align with the corporations' ultimate profit-making interests. There is some evidence that these strategies are successful. *Recognizing the potential benefits to shareholders, courts have upheld corporate social actions with even the most tenuous of supposed business purposes* [emphasis added].

Murray points out that the false assumption of shareholder primacy dates back to the old *Dodge v. Ford* case, in which Henry Ford explicitly stated that his company would pursue his own personal interest in helping workers and consumers rather than pursuing profit. The court denied his right to do this, and benefit corporation advocates cite this judgment as a demonstration of the shareholder primacy norm. A different interpretation is that by making such an explicit statement, Ford lost protection under what is known as the business judgment rule. Explains Murray (2012, p. 49): "Cases like *Dodge v. Ford* are rare because the business judgment rule is so powerful, and defendants are not generally so open about eschewing shareholder interests." Under the business judgment rule, courts do not "second-guess the decision of a well-motivated, non-conflicted fiduciary" to increase the value of the corporation for the benefit of the stockholders (2012, p. 34). The rule allows corporate directors' altruistic intentions to be construed as helping to maximize shareholder wealth over the long term. Many legal scholars confirm this interpretation (American Law Institute, 2005; Blount & Offei-Danso, 2013; Chu, 2012; Lacovara, 2011; Murray, 2012). In addition, some 30 states already have constituency statutes that deal with any ambiguity in existing law by explicitly allowing traditional corporations to take into account stakeholder interests (Lacovara, 2011). Underberg (2012) explains:

> As a practical matter. . .directors have close to a free hand when considering matters that are most likely to have broader social or environmental implications—how products are manufactured, marketed and sold, corporate investments, fair trade, employment and supplier issues. *I am not aware of a single case holding directors liable for a routine business decision because they considered nonshareholder interests or that imposes a general duty to maximize profits and short-term shareholder value* [emphasis added].

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. One can find additional evidence for this view in the management literature on stakeholder theory, which has also tackled and rejected the doctrine of shareholder primacy (Marens & Wicks, 1999), and which has pursued stakeholder research for many years.

The false assumption of shareholder primacy leads to the false dichotomy that benefit corporations are good while traditional corporations are something else, whether that be bad or merely not as good. Dichotomizing good versus other corporations (Chu, 2012, pp. 186—187):

> inadvertently create[s] a jointly exhaustive pair in which the very existence of benefit corporations requires that their counterpart, a shareholder wealth maximizing corporation, exist. In other words, benefit corporations further reinforce the assumption that corporations exist only to make money for their shareholders.

It follows, Chu (2012) notes, that benefit corporations alienate large corporations—which often represent the role of 'other' in such scenarios—by furthering the belief that they are not legally empowered to do social good.

2.2. Benefit corporation status is *not* necessary to protect stakeholder interests in a takeover

A related argument for benefit corporations is that they protect stakeholder interests during takeovers. Benefit corporation proponents argue that in the Unilever takeover of Ben & Jerry's ice cream company, the smaller company sold to the larger without feeling legally empowered to protect its storied social mission (Clark & Vranka). However, some legal scholars view this argument differently. Murray (2012, p. 16) describes the issue this way:

> Like *Dodge*. . . .the Ben & Jerry's takeover by Unilever in 2000. . .has been simplified and exaggerated by certain proponents of benefit corporations and social enterprises in general. Even given the enhanced scrutiny applied in the takeover context, there is serious doubt as to whether Ben & Jerry's *had* to sell to Unilever. The Ben & Jerry's situation was never tested by the courts. . . .If the situation had been brought to court, the case would have been virtually impossible for the plaintiffs to win. Even if the Ben & Jerry's founders decided not to sell, then openly admitted during a lawsuit to "eschewing shareholder wealth maximization". . .they would have had the added protection of Vermont's constituency statute.

In other words, as a traditional corporation, especially in a state with a constituency statute, Ben & Jerry's probably already enjoyed adequate protection to consider stakeholder interests during the takeover. Admittedly, corporate law and scholarship in this regard are not totally clear despite decades of debate (Murray, 2012), so the Ben & Jerry's board may simply have chosen the more conservative course to avoid a lawsuit from shareholders for eschewing their fiduciary duty rather than test Vermont's relatively new constituency statute (Page & Katz, 2010). 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 (Haymore, 2011).

3. Becoming a benefit corporation increases director liability and corporate costs

Incorporating as a benefit corporation can be impractical for a company, increasing director liability and driving up various costs. Some critics argue that the model benefit corporation legislation (MBCL) actually hampers benefit corporations from accomplishing their societal missions because it requires them "to dedicate themselves to this vague and unquantifiable general public benefit goal, and opens them up to suits for injunctive relief if a shareholder feels they are not reaching this goal" (Blount & Offei-Danso, 2013, p. 652).

3.1. Increased director liability

Lacovara argues that the benefit corporation confers on directors an additional fiduciary duty. When legislators in states with constituency statutes choose to add a benefit corporation statute, it is a clear indication that they intend to alter directors' duties. While constituency statutes are careful to avoid imposing new duties and liabilities, benefit corporation statutes clearly mandate directors' consideration of stakeholders' interests (Lacovara, 2011). Benefit corporation statutes also "give shareholders unprecedented power. . .to bring enforcement proceedings against the corporation," creating "too much potential liability and unneeded regulation to attract large and established companies" (Chu, 2012, pp. 186—187).

Unfortunately, directors' new duties are unclear under these laws. As Lacovara (2011, p. 815) explains:

> While these new statutes are well-intentioned, they create divided loyalties for corporate directors. B-corp statutes also appear to impose on B-corp directors a fiduciary duty in addition to the traditional duties of care and loyalty.

However, the statutes fail to identify this duty and provide little guidance to courts called on to adjudicate claims for breach.

At the same time, some argue that benefit corporation directors should be paid more because they are subject to higher levels of service, duty, and liability. Perhaps governments should give tax breaks, subsidies, or other special financial treatment to social enterprises, but such proposals have not been popular with state governments. For instance, Hawaii's governor vetoed a bill creating a benefit corporation-like form in part because the bill exempted it from the state corporate income tax (Munch, 2012).

3.2. Increased inflexibility during change

The dual mission of socially responsible companies makes them especially vulnerable to change. For one thing, they are more likely than traditional corporations to be takeover targets because their less socially oriented suitors often find them relatively easy to streamline for profit. In addition, as their business circumstances develop, they may need to alter their mission statements. But benefit corporation status is actually likely to increase their inflexibility.

One sort of corporate inflexibility occurs when companies want to change the benefit corporation status itself. A benefit corporation that wants to discard its benefit corporation status must obtain a supermajority vote of its shareholders (Clark & Vranka, 2013). One can imagine situations—such as business crises—in which managing such a vote would be inconvenient, and in any event would increase transaction costs.

Companies could encounter similar inflexibility in changing their benefit purpose. Some benefit corporations write into their charters a specific public benefit purpose, such as enhancing employee rights. Changing that purpose legally could prove challenging because there is little guidance in the law, and in the absence of such guidance, courts might consult legislation on nonprofit organizations as a model (Lacovara, 2011). To change a nonprofit organization's purpose, the trustees or directors, or the state attorney general, must apply to the court and meet several requirements, including proving the impossibility or impracticality of carrying out the corporation's particular charitable mission. Obviously, such procedures could be time-consuming and expensive.

3.3. Increased transaction and uncertainty costs

Benefit corporations incur additional expenses. To begin with, some statutes require them to appoint a benefit director to write an annual report on how well the benefit corporation has met its public benefit goals. These reports may be expensive and time-consuming for small businesses to prepare. Some statutes also require that the annual report be provided free to shareholders (Murray, 2012).

Hiring a third-party evaluator is yet another transaction cost. For example, one organization that evaluates benefit corporations charges them for certification on a sliding scale (B Corporation, n.d.). Furthermore, the specificity of the benchmarking requirements for benefit corporations may burden corporations as they try to find a suitable third-party evaluator and make sure that the evaluator remains within the statute's requirements. Some states require benefit corporations to ensure that not more than one-third of the directors of the third-party evaluator are active in an industry subject to the standard (Houlihan, 2013), a considerable research burden.

In addition to expenses, "[t]he legal changes introduced by social enterprise statutes may carry. . .large uncertainty costs" (Murray, 2012, p. 43). Companies incur costs when planning is required to reduce risk under conditions of uncertainty. For instance, benefit corporations experience uncertainty because the decision makers are unfamiliar with the laws surrounding this new corporate type, and because they may have doubts about how to interpret them. Currently this uncertainty is high because sufficient case law does not exist to clarify key issues. Ambiguity is present in determining the fiduciary duties of a benefit corporation director, what exactly must be included in the benefit report, and what third-party standards the courts are likely to accept. While uncertainty costs could be reduced by increasing the clarity of the benefit corporation statutes, the vague areas of the benefit corporation statutes—such as fiduciary duties—may be "purposefully vague" and may be "better addressed by case law that will develop over time" (Murray, 2012, p. 44). Thus, clarification is not likely to come soon.

The obvious implication of these increased liabilities and costs is that corporations will not adopt the new benefit corporation form. In the 4 years since the first legislation passed, only about 1,000 of the millions of eligible companies have adopted the form. Of course, the law might be revised to deal with these issues. Munch (2012) believes that benefit corporation statutes should require corporate bylaws to identify particular stakeholder groups that the corporation will serve. They should also give directors more explicit decision-making guidance to reduce their liability, including identifying how and to what extent social purpose should be considered in business decision making and exactly how diligent a company must be in pursuing that purpose.

4. Benefit corporations do not empower stakeholders

Benefit corporation legislation asserts that it empowers stakeholders. Yet, many legal experts argue the opposite, for several reasons.

4.1. Fiduciary responsibility to stakeholders is not established

In studying the first benefit corporation statute in the United States, which was enacted in Maryland in 2010 and is indicative of other statutes, Deskins (2012, pp. 1047—1048) found that the law fails to empower stakeholders because it "does not establish a fiduciary relationship between a board of directors and outside stakeholders." A *fiduciary relationship* is one in which an authorized entity acts solely, and in good faith, on behalf of an entity represented. Benefit corporation legislation does not create this relationship because, even though directors are told to consider stakeholders—which, as previously defined, refers exclusively to nonshareholders—stakeholders cannot punish directors who ignore them. Of course, stakeholders may bring a lawsuit against the corporation, as they may with traditional corporations. However, benefit corporation legislation merely alters the corporate mission without otherwise enhancing company accountability, offering stakeholders only the flimsiest grounds for such a suit. It follows that "[w]hile directors know they are required to serve the company's stakeholders, they may be inhibited in doing so if they are only legally accountable to shareholders" (Munch, 2012, p. 190). For example, "[c]orporate directors, faced with a decision to outsource a project to another country or incur short-term losses, may in the end be compelled to do the former if local community members or employees can in no way check their decision" (Munch, 2012, p. 190).

4.2. The mandated third-party standard is problematic

Benefit corporations rely for their certification as a beneficial entity on meeting a third-party (i.e., specifically nongovernmental) standard, and, often, on third-party auditors that apply that standard. Yet, some lawyers note that proper mechanisms for this sort of accountability are not in place, and no substantial third-party auditor exists (Deskins, 2012).

The model legislation requires benefit corporations to write an annual benefit report that describes how the company meets this unspecified third-party standard. Blount and Offei-Danso (2013, p. 650) argue that this reporting requirement does not enhance accountability beyond that of traditional corporations:

> The drafters of the Model Benefit Corporation point to the third-party standard against which the annual benefit report must be judged as adding a level of accountability to stakeholders through transparency. *However, this annual benefit report does not have to be audited, nor is there any adverse result associated with a negative report* [emphasis added]. The only measure of accountability this mechanism provides is to the shareholders who can vote to replace officers or directors based upon a negative report. This again provides no more accountability to stakeholders than they already have with a standard for-profit entity. Indeed, many large companies already provide public annual sustainability reports that stakeholders can access.

There are many independent standards and certifications available that help all types of companies and their customers evaluate corporate social responsibility claims. In addition, many traditional companies today publish, or are considering publishing, annual reports on corporate social responsibility. Thus, relying on the benefit corporation independent third-party standard setter is actually no advance over traditional corporation procedures.

4.3. The enforcement proceedings explicitly exclude stakeholders

The benefit corporation mechanism to enforce stakeholder interests is an enforcement proceeding, yet stakeholders are specifically excluded from bringing such an action. In the Vermont statute, for example, when a director or an officer of the benefit corporation "fails to pursue the general public benefit purpose of the benefit corporation or any specific public benefit purpose set forth in its articles of incorporation," that person can be subject to a benefit enforcement proceeding, but only a shareholder, a director, or certain specified owners may initiate such a proceeding (Deskins, 2012, pp. 1072—1073). Under most benefit corporation statutes, a benefit enforcement proceeding is the only way to enforce a directorial mandate, but such proceedings typically can only be brought by a shareholder, a director, or the holder of 5% or more of the benefit corporation's parent (Murray, 2012). Furthermore, the enforcement proceeding cannot result in monetary damages to the corporation. Thus, the benefit corporation enforcement structure is not too different from that of traditional corporations.

5. Weak accountability standards promote corporate greenwashing

Many legal scholars suggest that because of their weak accountability and enforcement mechanisms, benefit corporation statutes, paradoxically, encourage corporate greenwashing and further corporate corruption. For one thing, the benefit corporation third-party standard setter could be literally anyone, and standards may vary widely among benefit corporations depending on the standard setter chosen by the company. "If a standard-setter clearly and transparently sets low standards, it may qualify unrelated entities to form as benefit corporations just as would a standard-setter with higher standards, leaving the door open to greenwashing or even fraud" (Reiser, 2011, p. 611). The possibility of lax standards seriously undermines the public benefit purpose of the benefit corporation. Reiser (2011, pp. 616—617) concludes that "[t]he delegation to third-party standard-setters to vet this public benefit and the lack of a statutory floor for what counts as public benefit make low standards and greenwashing particular concerns for the benefit corporation." Although sympathetic to improving the benefit corporation form, Munch (2012, p. 194) also argues that it may lead to greenwashing because it lacks a truly independent audit:

> This approach, while one step toward increasing transparency and disclosure, still presents fundamental flaws. Most notably, it allows a benefit corporation's officers and directors to conduct all nonfinancial reporting, as long as they follow an outside standard in doing so. This presents a clear opportunity for selective reporting, if not outright misconduct.

Along the same lines, Franklin (2012) questions how the idea of delegating standard-setting to a private party came about:

> Given the recent failures of private third-party rating agencies to maintain independence and provide consumer protection, *the decision to leave such a fundamental determination to a non-government entity is curious, if not negligent* [emphasis added]. . . .Indeed, the Colorado Benefit Corporation Act fails to explicitly require *any* evaluation of the applicant's public benefit. Such an evaluation is presumably implied, but it does not take a great cynic to imagine the myriad of ways the unscrupulous might obviate the [law's] intent.

Murray (2012, p. 33) summarizes these accountability concerns:

> The benefit corporation statute is said to be an antidote to 'greenwashing' and faux corporate social responsibility ('faux CSR'). But without at least some minimal level of board accountability, the benefit corporation statute could be an avenue to greenwashing and faux CSR rather than an antidote to it. In fact, if an appropriate accountability framework is not erected, benefit corporations could allow an unprecedented amount of rent-seeking and could allow greater management entrenchment than permitted in other entity forms.

In support of his point, Murray (2012, p. 34) quotes a Delaware state court judge's (Berle, 1932) criticism of statutes similar to benefit corporation statues:

> In this fictional land, I suppose a fictional accountability mechanism will exist whereby the fiduciaries, if they are a controlling interest, will be held accountable for responsibly balancing all these interests. Of course, a very distinguished mind of the political left, Adolph Berle, believed that when corporate fiduciaries were allowed to consider all interests without legally binding constraints, they were freed of accountability to any.

Kanig (2013, p. 897) agrees:

> The substantive goal of the benefit corporation . . .is certainly admirable, but is subject to the same 'creative accounting' and lax oversight that plague traditional corporate entities—especially in a future, competitive marketplace of benefit corporations. Non-shareholders may be left with the same kind of 'greenwashing' that has plagued traditional notions of corporate social responsibility.

In sum, critics argue that benefit corporations add little to corporate accountability, and, in fact, open doors to corporate greenwashing and related problems.

6. Benefit corporation laws fail to improve upon existing corporate legal structures—and may undermine them

The introduction, legitimization, and adoption of a new corporate form represents an interesting development in the history of business and government. Yet, a variety of legal analysts argue that, in the end, the benefit corporation contributes little to, and may actually undermine, corporate law. Underberg (2012) writes:

> There's no legal reason that all companies can't consider a wide range of interests in order to make responsible corporate decisions. Nor is there reason B Corp advocates should provide them with excuses not to do so by overstating the limitations placed on directorial discretion by existing law. *It is also unfortunate that this rationale is now enshrined in the legislative histories of the B Corp laws, which could have unintended consequences in future court rulings* [emphasis added].

Similarly, Chu (2012, pp. 156, 187) argues the benefit corporation is "unnecessary and ineffective" and undermines current corporate law:

> Instead of complicating the law, legislators who seek to reform business practices should emphasize corporate clarification and simplification. . . .One way legislators can do this is through the promotion of constituency statutes. . . .*In contrast benefit corporations add another layer of complication onto an already complicated system* [emphasis added].

Blount and Offei-Danso (2013, p. 663) add:

> Society is better benefited by encouraging more companies to operate like those with strong CSR [corporate social responsibility] than it is by creating new hybrid entities. If social entrepreneurs feel constrained within the current legal framework, *the appropriate reaction is to better educate entrepreneurs about the flexibility they have within this framework to operate as a socially-minded company* [emphasis added].

Callison (2012, p. 113) also argues that the form is unworkable:

> In my view, rational shareholders will not adopt the benefit corporation form, thereby creating greater risk and cost when choosing to forego personal profit. The equation is wrong. Further, in my view, this is tragic, since there is presently a focus on legislative responses to the profit maximization norm and since creation of an unworkable statute is a wasted opportunity for corporate law reform.

To reject the form might mean that it will fade away relatively unused. Alternatively, rejection might entail proactive revocation of enacted legislation, as happened recently in one state's revocation of another major social enterprise form, the Low-Profit Limited Liability Company (or L3C), a type of limited liability company that is a hybrid nonprofit and for-profit organization with a primary charitable mission and a secondary profit motive (Batey, 2013). Like the benefit corporation, the L3C form has been under recent scrutiny (Cohen, 2014).

7. Should your company become a benefit corporation?

This article suggests that corporate directors and managers should carefully weigh whether the liabilities and costs of the benefit corporation outweigh its advantages, which are widely described elsewhere and include creating a favorable brand and joining a movement of like-minded directors. They should also weigh the strengths and weaknesses of all social enterprise forms against the traditional corporation, including how well a traditional corporation competes against a social enterprise brand. Ultimately, directors should consider the risks and rewards of being an early adopter of any new legal form.

From an ethical point of view, directors and managers should thoroughly evaluate whether benefit corporation legislation meets their standards as a socially responsible innovation. Such a discussion would address a variety of interesting questions: Is it right that the government should brand some corporations as beneficial, but not others? What might be the long-term trade-offs in their industry and in society? Do you believe stakeholders should be empowered? If so, how? Do you approve of using an unspecified third-party evaluator in lieu of other types of standard setters, such as industry groups? Concerned directors will consider that government itself is a third-party standard setter and evaluator, albeit one that is powerful and democratic, with its own strengths and weaknesses. In fact, the case of the benefit corporation is sparking renewed debate about the proper role of government, business, and the private sector as standard setters.

This study also has important implications for academia. In business and professional schools, the push for social entrepreneurship programs that are popular with students provides a welcoming space for business innovations that students can embrace. In this space, enhancing corporate social responsibility through improving corporate law should be studied and taught. It follows that when discussing benefit corporations, moving beyond uncritical media portrayals to develop an accurate understanding of their legal status is essential. The same can be said of studying and teaching about the new social enterprise movement as a whole.

In conclusion, the benefit corporation is at a crossroads. It may be that, in time, defenders of the form will account for the criticisms summarized here. In the meantime, many legal analysts present a cautionary tale for corporate directors, managers, and the wider business and academic communities.

Acknowledgment

The author wishes to thank Rosanne Palmatier, Assistant Head, Research and Instruction, Social Sciences and Government Documents, Northeastern University Library, for her assistance in this research.

References

American Law Institute. (2005). *Principles of corporate governance: Analysis and recommendations*. Philadelphia: ALI.

André, R. (2012). Assessing the accountability of the benefit corporation: Will this new gray sector organization enhance corporate social responsibility? *Journal of Business Ethics, 110*(1), 133–150.

B Corporation. (n.d.). *Make it official*. Retrieved September 9, 2014, from http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/make-it-official

Batey, D. (2013, July 9). North Carolina becomes the first state to drop L3Cs. *LLC Law Monitor*. Retrieved February 6, 2013, from http://www.llclawmonitor.com/2013/07/articles/low-profit-llcs/north-carolina-becomes-the-first-state-to-drop-l3cs/

Benefit Corp Information Center. (n.d.a). *Model legislation*. Retrieved February 5, 2014, from http://benefitcorp.net/attorneys/model-legislation

Benefit Corp Information Center. (n.d.b). *State by state analysis*. Retrieved February 5, 2014, from http://benefitcorp.net/state-by-state-legislative-status/analysis

Berle, A. A., Jr. (1932). For whom corporate managers are trustees: A note. *Harvard Law Review, 45*, 1365–1367.

Blount, J., & Offei-Danso, K. (2013). The benefit corporation: A questionable solution to a non-existent problem. *St. Mary's Law Journal, 44*, 617–670.

Callison, J. W. (2012). Putting new sheets on a Procrustean bed: How benefit corporations address fiduciary duties, the dangers created, and suggestions for change. *American University Business Law Review, 2*(1), 86–114.

Chu, J. (2012). Filling a non-existent gap: Benefit corporations and the myth of shareholder wealth maximization. *Southern California Interdisciplinary Law Journal, 22*, 155–192.

Clark, W. H., Jr., & Babson, E. K. (2012). How benefit corporations are redefining the purpose of business corporations. *William Mitchell Law Review, 38*, 817–851.

Clark, W. H., Jr., & Vranka, L. (2013, January 18). The need and rationale for the benefit corporation: Why it is the legal form that best addresses the needs of social entrepreneurs, investors and, ultimately, the public. *Benefit Corp Information Center*. Retrieved October 3, 2013, from http://www.benefitcorp.net/attorneys/benefit-corp-white-paper

Cohen, R. (2014). Social responsibility or marketing ploy? The branding of L3Cs. *The Nonprofit Quarterly, 21*(1), 62–75.

Deskins, M. R. (2012). Benefit corporation legislation, version 1.0—A breakthrough in stakeholder rights? *Lewis and Clark Law Review, 15*(4), 1047–1076.

Esposito, R. T. (2013). The social enterprise revolution in corporate law: A primer on emerging corporate entities in Europe and the United States and the case for the benefit corporation. *William and Mary Business Law Review, 4*(2), 639–714.

Franklin, E. H. (2012, March 27). The Colorado Benefit Corporation Act's missed opportunities. *DURL Online: The Online Supplement to the Denver University Law Review*. Retrieved October 17, 2013, from http://www.denverlawreview.org/online-articles/2012/3/27/the-colorado-benefit-corporation-acts-missed-opportunities.html

Frumpkin, P. (2013). Between nonprofit management and social entrepreneurship. *Public Administration Review, 73*(2), 372–376.

Galera, G., & Borzaga, C. (2009). Social enterprise: An international review of its conceptual evolution and legal implementation. *Social Enterprise Journal, 5*(3), 210–228.

Grant, J. K. (2013). When making money and making a sustainable and societal difference collide: Will benefit corporations succeed or fail? *Indiana Law Review, 46*, 581–602.

Haymore, S. J. (2011). Public(ly oriented) companies: B corporations and the Delaware stakeholder provision dilemma. *Vanderbilt Law Review, 64*, 1311–1346.

Houlihan, D. (2013, summer). Who benefits? Why the Massachusetts benefit corporation falls short. *Northeastern University Law Journal*. Retrieved October 17, 2013, from http://nulj.org/extralegal/summer2013/

Kanig, I. (2013). Sustainable capitalism through the benefit corporation: Enforcing the procedural duty of consideration to protect non-shareholder interests. *Hastings Law Journal, 64*, 863–904.

Lacovara, C. (2011). Strange creatures: A hybrid approach to fiduciary duty in benefit corporations. *Columbia Business Law Review, 3*, 815–880.

Marens, R., & Wicks, A. (1999). Getting real: Stakeholder theory, managerial practice, and the general irrelevance of fiduciary duties owed to shareholders. *Business Ethics Quarterly, 9*(2), 273–293.

Munch, S. (2012). Improving the benefit corporation: How traditional governance mechanisms can enhance the innovative new business form. *Northwestern Journal of Law and Social Policy, 7*(1), 170–195.

Murray, J. H. (2012). Choose your own master: Social enterprise, certifications, and benefit corporation statutes. *American University Business Law Review, 2*(1), 1–53.

Page, A., & Katz, R. A. (2010). Freezing out Ben & Jerry: Corporate law and the sale of a social enterprise icon. *Vermont Law Review, 35*, 211–250.

Perry, J., & Rainey, H. G. (1988). The public-private distinction in organizational theory. *Academy of Management Review, 13*(2), 182–201.

Reiser, D. B. (2011). Benefit corporations: A sustainable form of organization? *Wake Forest Law Review, 46*, 591–625.

Resor, F. R. (2012). Comment: Benefit corporation legislation. *Wyoming Law Review, 12*, 91–113.

Rose, J. M. (2007). Corporate directors and social responsibility: Ethics versus shareholder value. *The Journal of Business Ethics, 73*(3), 319–331.

Stout, L. A. (2008). Why we should stop teaching Dodge v. Ford. *Virginia Law and Business Review, 3*(1), 163–176.

Stout, L. A. (2012). *The shareholder value myth: How putting shareholders first harms investors, corporations, and the public*. San Francisco: Berrett-Koehler.

Underberg, M. A. (2012, May 13). Benefit corporations vs. 'regular' corporations: A harmful dichotomy. *The Harvard Law School Forum on Corporate Governance and Financial Regulation*. Retrieved October 3, 2013, from http://blogs.law.harvard.edu/corpgov/2012/05/13/benefit-corporations-vs-regular-corporations-a-harmful-dichotomy/

Wilburn, K., & Wilburn, R. (2014). The double bottom line: Profit and social benefit. *Business Horizons, 57*(1), 11–20.