

An Entrepreneur's Guide to Certified B Corporations and Benefit Corporations



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About Patagonia, Inc

Founded by Yvon Chouinard in 1973, Patagonia is an outdoor apparel company based in Ventura, California. A Certified B Corporation, Patagonia's mission is to build the best product, cause no unnecessary harm, and use business to inspire and implement solutions to the environmental crisis. Since 1985, Patagonia has dedicated 1 percent of sales each year to environmental causes.

Cover image: Tuckerman & Co creates classic workwear that is made to last and better for people and the planet. Wherever possible, Tuckerman & Co. uses less harmful materials over their conventional counterparts. Tuckerman & Co. is a Certified B Corporation. Photo credit Stephen Faust.

“B certification and/or incorporation gives us the common tools we need to assess the positive and negative impacts of our practices, make and measure improvements, and share what we learn.”

—Vincent Stanley
Director of Philosophy, Patagonia

FOREWORD



We live in a time of social and environmental crisis, with a disturbing—and destabilizing—degree of income inequality that creates anxiety for all but the most economically secure. Even the affluent cannot be spared anxiety about the planet. According to E. O. Wilson, we have a 35-year window to learn how to adapt to climate change and prevent the conversion of nature into universal desert. To put things right will require an unprecedented level of cooperation and civic engagement on the part of human beings. We will need responsive government; strong, engaged NGOs and nonprofits; and socially and environmentally responsible businesses to produce our goods and services.

More than ever we need more Certified B Corps and Benefit Corporations—and, at the very least, companies that hold to similar principles.

It is not enough for business to simply make incremental improvements and use resources more efficiently. In these times, every business should have a legitimate, clearly defined purpose. Each business must justify to its stakeholders the legitimacy of its products or services through the lens of their social and environmental costs. Every business should actively benefit its employees, customers and communities—and work effectively to minimize its adverse impact on nature. B certification and/or incorporation gives us the common tools we need to assess the positive and negative impacts of our practices, make and measure improvements, and share what we learn.

This guide serves as a comprehensive tool for those deciding whether (or how and when) to become a Certified B Corp and/or Benefit Corporation. It is telling that the author, Abigail Barnes, first undertook this project while thinking through these questions for her own start-up. Now she shares with other entrepreneurs the clarity she initially sought for herself.

The challenge I would pose to the reader is to get past as quickly as possible the question of whether to become a B Corp and on to the how and when. This guide maps the way.

Vincent Stanley

DIRECTOR OF PHILOSOPHY, PATAGONIA



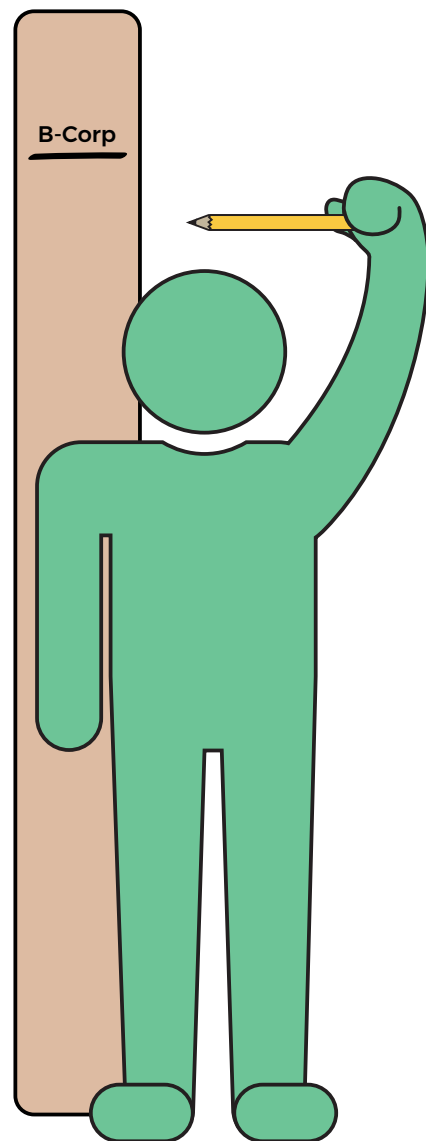
So you've decided you want to be more than just a company. You want to have a positive impact on society, promote corporate social responsibility, and use the power of business for higher purposes of social good. Now you're wondering how this whole process works. Don't worry, we've got you covered.

The information in this article does not constitute legal advice and is offered for informational purposes only.

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Is B Certification or Benefit Incorporation the Right Decision for Your Company?



This guide will help you navigate whether going “B” is a good fit for your business and how to go about securing the designation.

To start, you’ll want to answer four questions:

- 1** Do you want to be a Benefit Corporation, a Certified B Corporation, or both?
- 2** Do you qualify as a Certified B Corporation or a Benefit Corporation?
- 3** Do you have sufficient resources and manpower?
- 4** Is your board on board?

1 DO YOU WANT TO BE A BENEFIT CORPORATION, A CERTIFIED B CORPORATION, OR BOTH?

There are two types of “B” entities, and they are often (mistakenly) used interchangeably. The first is the Benefit Corporation. The second is the Certified B Corporation.¹ You can be either or both.

Benefit Corporation

A Benefit Corporation is an incorporating structure similar to a C-Corp, sole proprietorship, partnership, or LLC. Unlike these other entities, however, a Benefit Corporation must consider the impact of its business decisions on all stakeholders—not just shareholders or members²—while creating a material positive impact on society and the environment.

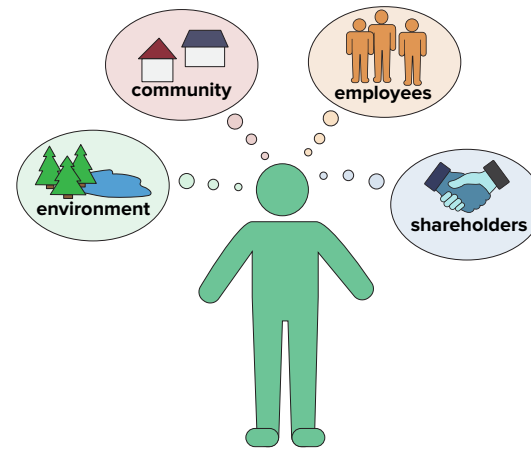
It is well accepted that corporate directors have a fiduciary obligation to their shareholders. Over the past few decades, corporate America has interpreted this obligation to mean profit maximization. Known as the doctrine of shareholder primacy, this ideology has become a pillar of modern business practice. Under this theory, shareholder interests stand superior to those of other stakeholders—a view that stems mostly from a few seminal lower court decisions and economists like Milton Friedman, whose [famous article](#) on this topic in the 1970s heavily influenced corporate America.³ Many scholars disagree with this theory, saying that it is more of a trend than a legal doctrine.⁴ They

A Benefit Corporation is an incorporating structure similar to a C-Corp, sole proprietorship, partnership, or LLC.

would argue that case law does not necessarily support shareholder primacy, and that emphasizing short-term profit and prioritizing shareholder value undermines the long-term health of the business and erodes the social and environmental health of the communities in which they operate. Still others believe that the theory only extends insofar as it involves the sale or hostile takeover of public corporations—in other words, a publicly traded company must sell to the highest bidder and cannot cite social mission or the environment as a defensive strategy for taking a lower bid.

While the answers to these questions remain unclear, Benefit Corporations have emerged largely in response to the doctrine of shareholder primacy, affording legal protection to companies that esteem social and environmental values over shareholder returns.⁵ The trend has taken off since the first states passed Benefit Corporation legislation in 2010, and [31 states](#) have since followed suit.⁶

To become a Benefit Corporation, a company must add language to its charter and articles of incorporation requiring consideration of all shareholders and non-financial interests—e.g., community, environment, employees and customers—when making business decisions. Most states require only that the company provide a “general public benefit,” which is broadly defined as a “material positive impact on society and the environment, taken as a whole, as assessed against a third-party standard, from the business and operations of a benefit corporation.” Other states require that the company create a specific benefit—e.g., improve the local education system—although this latter requirement is optional in most states.⁸ Because these definitions are rather vague, it is often the third-party standard-setter (usually B Lab’s Impact Assessment) that determines whether a company has satisfied either a general or specific benefit—although notably there is no minimum performance requirement to incorporate as a Benefit Corporation (unlike with certification).⁹



In theory, adding this benefit language to a company’s incorporating documents should afford the company greater legal protection when making decisions consistent with its social mission—even when those decisions undermine shareholder profits. For example, if a company were to reject an unsolicited tender offer for reasons related to the company’s social mission, or forfeit short-term profit gains in exchange for long-term value, the company should theoretically be immunized from a shareholder suit or other legal repercussions.

But things get fuzzy when examining *how much* legal protection this language provides.

First, not all states recognize Benefit Corporations, and the incorporating statutes for states that recognize Benefit Corporations vary. This is important. If you’re wondering whether your state recognizes these designations, charts summarizing the statutes and policies for each state are available [here](#) and [here](#).¹⁰ Second, states that do not recognize Benefit Corporations may have constituency statutes. These *permit* consideration of other stakeholders, whereas Benefit Corporations *require* consideration. In effect, the Benefit Corporation took constituency statutes to the next level, breathing new life, legitimacy, and form into the values espoused under the constituency statute.

But in states that neither recognize Benefit Corporations nor have constituency statutes, the

case is tougher.¹¹ Ultimately, the extent to which the “B” structure affords a company legal protection remains unclear. For a more detailed legal discussion, see Section IV.

Certified B Corporation

The second form of “B” designation is the Certified B Corporation. B certification is the functional equivalent of Rainforest Alliance, LEED, or Fair Trade labels. Notably, you do not need to be a Benefit Corporation to become a Certified B Corporation, although you may need to become a Benefit Corporation to *remain* a Certified B Corporation.



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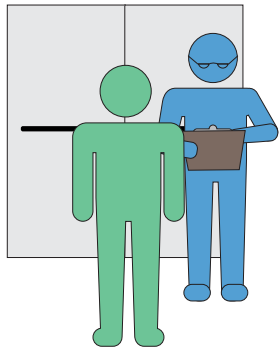
To become certified, a company must apply to B Lab—the nonprofit organization that created the designation. B Lab independently evaluates all applicant companies through the B Impact Assessment. This survey looks at a range of metrics in the following four categories to benchmark a company’s social and environmental impact compared to other businesses:

- Measurable Social Performance
- Accountability
- Transparency
- Measurable Environmental Performance

Across these criteria, companies are rated on a scale of 0 to 200 based on factors like energy efficiency, employee benefits, and corporate transparency. A company’s score determines whether it qualifies for Certified B Corporation. Only companies with a score of 80 or higher are eligible. Once approved, companies must recertify every two years. B Lab also requires that Certified B Corporations modify their governing documents to

allow directors to consider stakeholders besides shareholders in company decision-making. In states that recognize Benefit Corporations, companies must incorporate as one within two years of becoming a Certified B Corporation to retain certification. For states that newly recognize Benefit Corporations, a Certified B Corporation is generally given four years from the effective date of the legislation to incorporate. Check [here](#) to see what your state requires.¹²

In states without a constituency statute, or formal recognition of Benefit Corporations, the company need not amend its incorporating materials; instead, the company must enter into an agreement with B Lab to consider all stakeholders to the maximum extent permissible by law.¹³ Whether this act has any legal reach remains to be seen, and so this agreement appears largely symbolic.



2 DO YOU QUALIFY AS A CERTIFIED B CORPORATION OR A BENEFIT CORPORATION?

To become a Certified B Corporation, the company must be for-profit (non-profits and government agencies do not qualify).¹⁴ The company must also have been in operation for at least 12 months to

acquire full certification status, although no revenue is required.¹⁵ B Lab has introduced a temporary certification track for “start-ups,” defined as a company that has been in operation for less than 12 months. This temporary track allows “start-ups” to have “pending” certification status.¹⁶ Geography is also immaterial - any private business anywhere in the world can become certified.¹⁷ And to be clear, a company may be incorporated as a C-Corp in Delaware *and* be a Certified B Corporation—just as any C-Corp can also be Rainforest Alliance Certified.

The process of incorporating—or reincorporating—as a Benefit Corporation is effectively the same as it would be for most other corporate legal structures (e.g., C-Corps or LLC). But, again, you must incorporate in a state that recognizes the Benefit Corporation.¹⁸

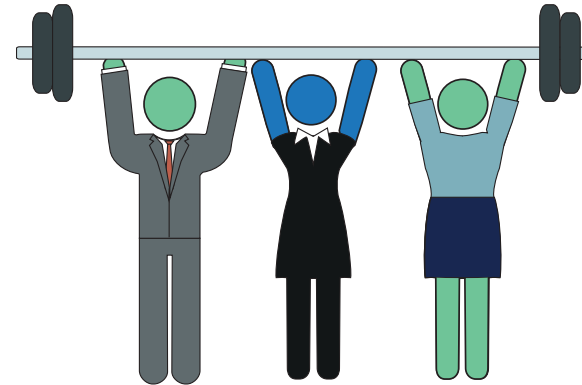
3 DO YOU HAVE SUFFICIENT RESOURCES AND MANPOWER?

It's important to consider the resources and financial investment associated with a B designation.

Certified B Corporation

Fees: Annual payments range from \$500 to \$50,000, depending on the company's earnings.¹⁹ If the company's revenue is below \$2m, the annual fee is \$500. Fees increase commensurate with revenue.²⁰

Actions Required: To successfully complete the B Impact Assessment requires paperwork and staff-time—and a score of 80 or higher out of 200 on the B Impact Assessment. Companies must also complete a Disclosure Questionnaire that considers information involving “any sensitive practices,



and sanctions related to the company or its partners.”²¹ To remain a Certified B Corporation, a company must recertify every two years.²²

Benefit Corporation (Incorporating or Reincorporating)

Fees: One-time payment between \$70 and \$200.²³ An attorney should be involved in this process, and so legal costs may be incurred. Benefit Corporations must also compile an annual report that discloses the company's environmental and social impact. This process will require additional resources.²⁴

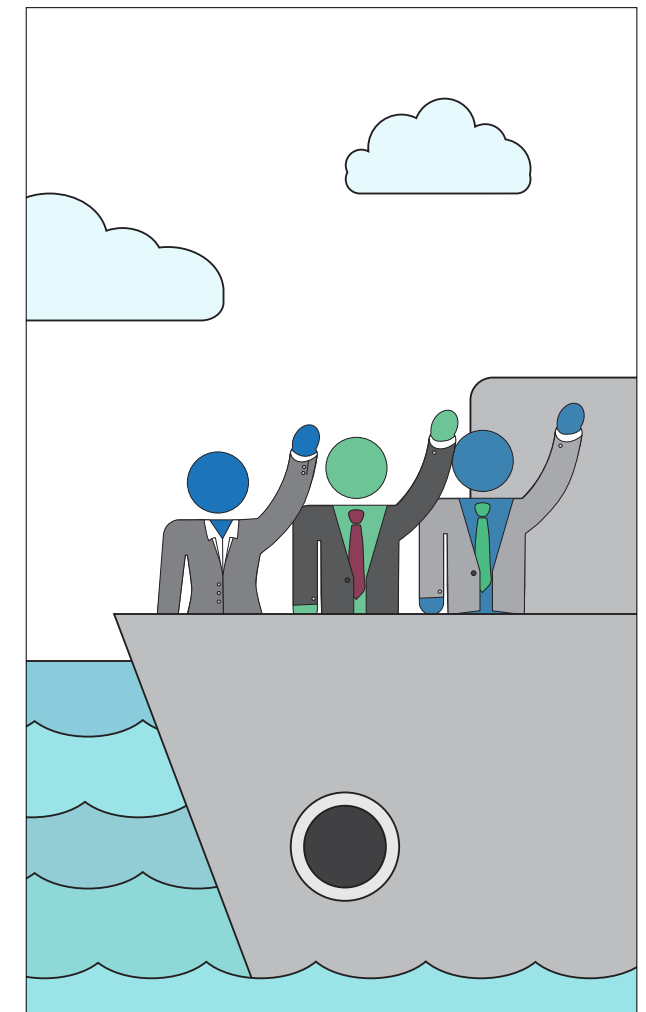
Actions Required: The company must modify its governing paperwork (e.g., articles of incorporation, bylaws) to comply with their state's Benefit Corporation statute. Companies must also submit an annual report.

4 IS YOUR BOARD ON BOARD?

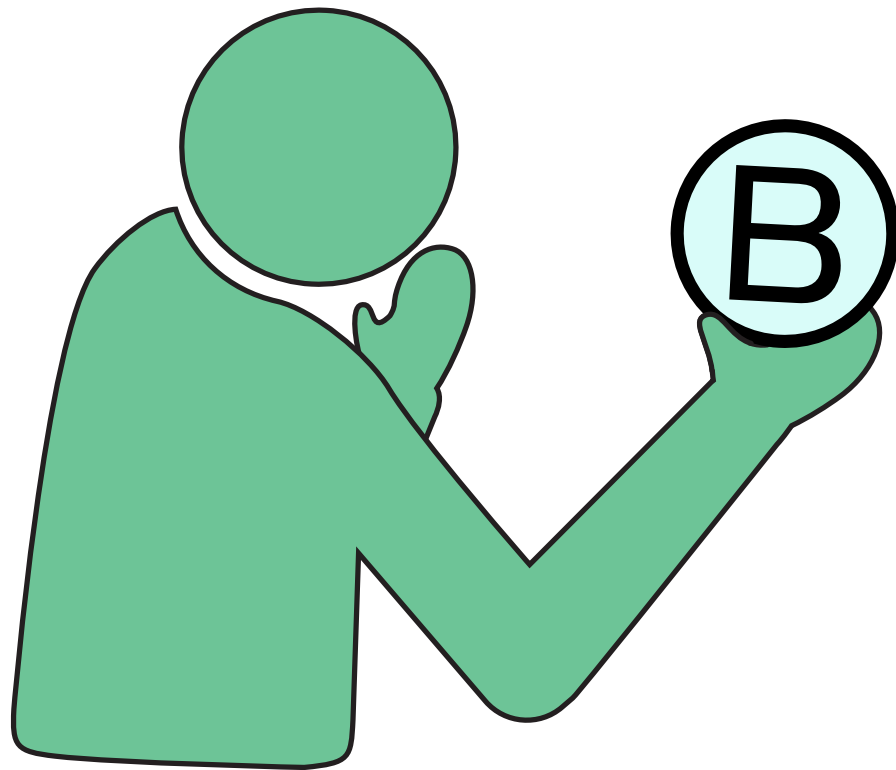
The easiest time to carry out this process is when you—the entrepreneur—are the sole board member.²⁵ However, this likely means your business is very young, and probably pre-revenue. But assuming you qualify and choose to pursue either designation, you will want to consider the

perspectives of the current (or future) board on a mission-driven company. Don't forget, they are your current (or future) bosses.

Take Etsy, for example. Etsy is a rare breed in that it is one of the few publicly traded Certified B Corporations. And because it is incorporated in Delaware, a state that recognizes Benefit Corporations, Etsy is required under its certification status to incorporate as a Benefit Corporation within a set timeframe. It hasn't yet. Etsy has until August 2017 to make that decision—or four years since the date Delaware began recognizing Benefit Corporations—and it remains to be seen whether its board will agree to the switch.



To B or Not to B: The Pros and Cons of Becoming a Certified B Corporation or Benefit Corporation

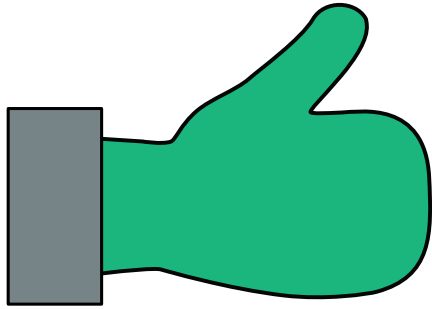


Before we outline the pros and cons, it helps to have some historical context. Broadly stated, the B designation seeks to patch a market failure. Specifically, the status quo of profit maximization isn't working for employee welfare, wages, the environment, or the overall health of the US economy. Short-term profit maximization ("Short-Termism") is currently the name of the game, and many are skeptical as to whether this is the appropriate measure of success.

The reason for skepticism? This so-called success often comes at a cost. Prioritizing short-term shareholder profit can compromise a company's long-term value, as measured by profits, employee and customer loyalty, and positive social impact.

How does the "B" designation change that? Well, there's a difference between Nike using recycled materials to create its attire and Nike becoming a Certified B Corporation or Benefit Corporation. Namely, in the second case the company is held to higher standards of accountability and transparency.

But as we'll discuss, there are pros and cons, and entrepreneurs should weigh both sides before becoming part of this market fix. You can't be a "good" company if you're not a company at all.



PROS

Resiliency

One benefit of B certification is the resiliency of the company's corporate structure in the wake of economic instability. B Lab reported that Certified B Corporations were 63 percent more likely to survive the 2008 recession than were companies without the B designation.²⁶ Since then, Certified B Corporations have demonstrated an annual survival rate of 90-99 percent compared to the 69 percent average among small businesses in the United States.²⁷ Benefit Corporations and Certified B Corporations also tend to perform better in the long term. Studies show that corporate social responsibility (CSR) is linked to financial success, and that mission-driven companies foster employee job satisfaction.²⁸

Brand Identification

In an era of "greenwashing" and misleading labels, Certified B Corporations and Benefit Corporations help consumers identify trustworthy companies. The certification process and impact assessments for B certification are highly standardized, thereby holding companies to a high level of scrutiny and ensuring accountability and transparency. For Benefit Corporations, most states require that they file and make public an annual benefit report.²⁹

These transparency requirements help separate the "good" companies from those that merely have good marketing departments.

Networking & Strategic Partnerships

If you become a Benefit Corporation or B certified, you join the ranks of companies like Patagonia, Etsy, Warby Parker, and New Belgium Brewing. To date, there are nearly 4,000 Benefit Corporations and 2,000 Certified B Corporations in existence.³⁰ Of the latter group, 130 industries and 50 countries are represented.³¹ According to CEOs of these companies, one of the leading benefits of becoming a Certified B Corporation is the network and strategic business partnerships that stem from becoming part of the B corporate tribe.³² Generally, Benefit Corporations are also regarded as part of the B tribe, although they are not held to the same social and environmental performance standards as their certified counterparts.

Capital Attraction

The "B" designation attracts capital. Indeed, some investors and groups are explicitly partial to socially responsible businesses, with ever-greater numbers of investors putting money in such companies.³³ Investors are watching the B trend closely, aware of the market potential. According to JP Morgan, the market for socially responsible investing is currently estimated between \$400bn and \$1tn dollars, with the Millennial Generation unquestionably helping drive this growth.³⁴ In a recent international survey, 67 percent of respondents said they preferred to work for socially responsible companies, and 55 percent were willing to pay premium for products and services from companies that committed to having a positive social and environmental impact.³⁵ Companies are accordingly aligning their values with those of the Millennial Generation—the fastest growing demographic group—to attract and retain talent.³⁶ And as the purchase power of the Millennial generation grows, the value of the "B Corps" designation is only expected to increase.

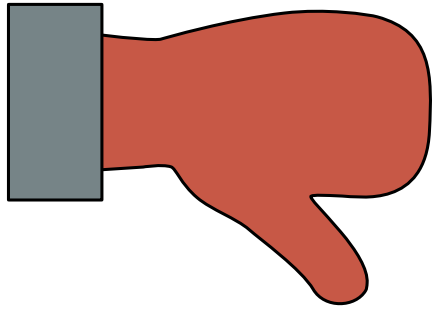
Quality of Workforce

Engaged employees are 3.5 times more likely than their unengaged counterparts to invest personal time in innovation and company problem solving.³⁷ It may seem obvious, but employees work harder if they care about their company's work. It's well accepted that having low employee turnover saves money and promotes a more skilled workforce. On this front, B Lab lists employee engagement as a metric on its Impact Assessment. Other metrics include salary above minimum wage, wellness initiatives, workforce diversity and benefits, to name a few. By publishing these metrics, the company opens itself up to scrutiny, but in so doing incentivizes strong performance in these fields.

Certified B Corporations and Benefit Corporations also attract talent. By 2025, Millennials will represent 75 percent of the workforce, and studies show that a company's purpose and mission play a significant role in how Millennials choose employers.³⁸ Additionally, schools are creating incentives to encourage graduates to work for mission-driven companies. For example, the Yale School of Management, NYU Stern School of Business, and Columbia Business School all offer loan forgiveness programs for students who work for Certified B Corporations after graduation.³⁹

APPLY IT!

What would be the most important benefits for my company?



CONS

Heightened Level of Scrutiny

One drawback of the B designation—which could also be construed as a positive—is heightened public scrutiny. Some studies have shown that social activists are more likely to target mission-driven companies as bad actors than their mission-less counterparts⁴⁰—the rationale being that these companies are holding themselves out as ethical and moral pioneers, thereby inviting greater scrutiny. Efforts to enhance a company's reputation in corporate social responsibility (CSR) can ironically lead to hostility from its biggest proponents. For example, you may have read recently about the accusations that Etsy is using a “Double Irish” corporate tax structure to dodge US taxes.⁴¹ The accusations, which appear to be without merit, have nonetheless created a PR headache at Etsy headquarters, a Certified B Corporation and business leader in CSR.

Additional scrutiny can also come from within. A shareholder of a Benefit Corporation owning 2 percent of the company can bring what's called a benefit enforcement proceeding if the company, its directors, and/or its officers fail to follow the general public benefit requirement.⁴² This proceeding can be used to compel a Benefit Corporation to take specific action in furtherance of its general or specific public benefit, and potentially force

the creation and/or publication of the company's benefit report.⁴³ While in theory these proceedings ensure that company directors and officers adhere to the benefit corporation statute's standard of conduct, to date no Benefit Corporation has been involved in a benefit enforcement proceeding. Additionally, perhaps in response to concerns of added scrutiny, annual reporting compliance stands at below 10 percent.⁴⁴ Further, unless the company's bylaws state otherwise, neither the board nor the corporation is liable for monetary damages if a company fails to carry out its requirements under the benefit corporation statute.⁴⁵

Additional Resource Commitment

The amount of time and resources spent on certification and/or incorporation depends on several factors.

It can take months—and in some cases years—to become a Certified B Corporation, and the amount of time hinges heavily on whether a company already had a system in place to measure its social and environmental impact. If the company has been in operation for a relatively long period of time, it will have to spend more time gathering and compiling documentation to corroborate responses in the B Lab Impact Assessment. Regardless of the stage of the company, certification will invariably add some level of administrative work. It is important for a company to assess whether it has sufficient bandwidth to take on the additional work. On the financial side, the fee directly corresponds with a company's annual revenue.

For Benefit Corporations, the process is relatively straightforward: either file as a new entity, which would require the same amount of time and resources as filing for any other legal structure, or the company must reincorporate as a Benefit Corporation. The latter will likely take longer, and will largely turn on how long the company has existed and the legal costs associated with corporate restructuring.

Potential Threat to Near-Term Shareholder Profit

If someone promised you either \$1 million tomorrow or \$10 million in five years, which would you choose? As an entrepreneur, your success is constantly measured by how quickly you can turn a profit and by the amount of profit you generate. Investors care about exit strategy, timeline, financial projections and, ultimately, getting their money (and then some) back.

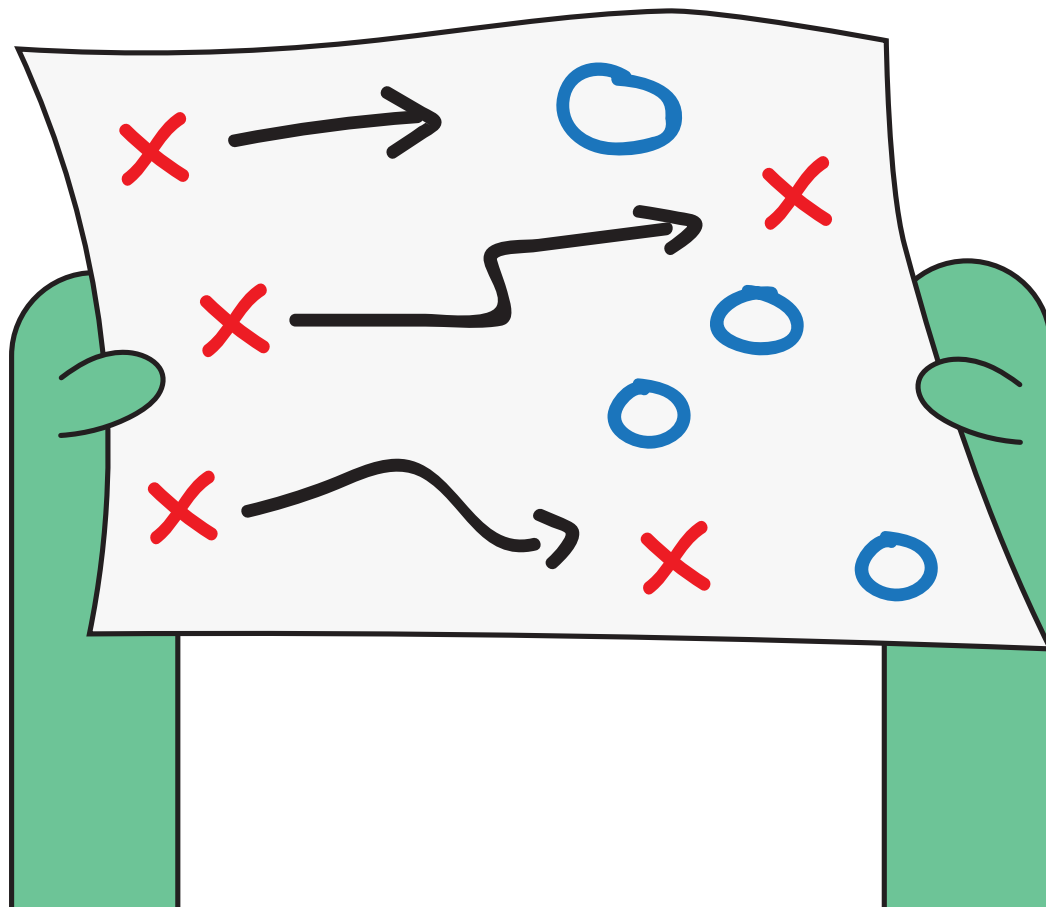
Venture firms know that only about one in ten of their investments—after vetting hundreds—will actually realize returns. For the gamble to work, they're generally looking for a quick exit and big multiples. If only this math worked out for the American economy, the environment, and social good. It turns out that this approach doesn't translate into corporate social responsibility. In fact, it promotes the opposite behavior—think outsourcing jobs, lower wages, and lower quality goods.

Say you decide that your cost of goods needs to be higher in order to afford paying your employees a living wage, and you know your product will still thrive, but the increase may cut into investor margins. Will your investors support this decision? Maybe you decide that foregoing higher margins will result in a better product, happier workers, and the company's long-term success. These are important questions for entrepreneurs to consider, as they involve managing investor expectations and communicating why thinner margins in certain cases are a smarter business decision.

APPLY IT!

What potential challenges could my company face?

You're Past Debating: Tell Me How the Process Works



B Corp Certification

STEP 1: B Lab Impact Assessment

STEP 2: Assessment Review Call

STEP 3: Supporting Documentation

STEP 4: Amend Articles of Incorporation

STEP 5: Sign Declaration of Interdependence

STEP 6: Ongoing Requirements

Benefit Corporation

STEP 1: Make Sure Your State Recognizes Benefit Corporations

STEP 2: Articles of Incorporation & Accompanying Paperwork

STEP 3: Annual Reporting Requirements

B CORP CERTIFICATION

Any private company can become B Corporation certified, anywhere in the world. To date, there are Certified B Corporations in 50 countries worldwide.⁴⁶ The B trend has been catching on quickly, both domestically and abroad.

Below is a general overview of how the certification process works.

STEP 1: B Lab Impact Assessment

An evaluation comprised of 180 – 200 questions—with some questions weighted more heavily than others—is administered to determine the company's social and environmental impact. You will need to score 80 out of a possible 200 points to become certified.

STEP 2: Assessment Review Call

A B Lab staffer will get in touch with your company to verify the accuracy of your responses on the assessment.

STEP 3: Supporting Documentation

The company will be asked to provide supporting documentation for 8 to 10 randomly selected responses on heavily weighted questions. Companies are also asked to fill out the Disclosure Questionnaire which examines the company's litigation history among other areas of potential concern.⁴⁷

STEP 4: Amend Articles of Incorporation

The company must then amend its articles of incorporation with language that allows the company's directors to consider the impacts of any business decision on all stakeholders and reflect the company's mission-driven commitment. In most states, companies have one year following certification to amend their articles of incorporation.⁴⁸ For this

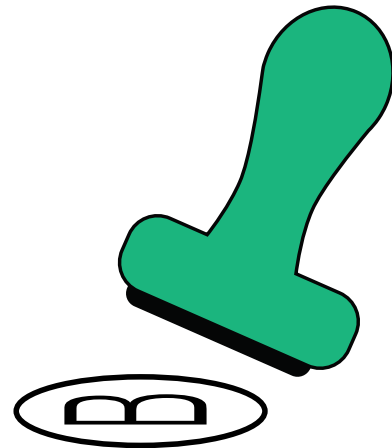
language to have any legal significance, the incorporating state must either recognize the Benefit Corporation or have a constituency statute—ideally both. In states without either, this language is largely symbolic.

STEP 5: Sign Declaration of Interdependence

The final step in becoming a Certified B Corporation is signing a three-page pro forma document that consists of a Term Sheet and the Declaration of Interdependence. This document details the conditions and expectations of certification, with an emphasis on the underlying purpose of becoming certified. For a copy of the document, click [here](#).

STEP 6: Ongoing Requirements

The company must pay the annual certification fee—based on annual revenue—and recertify every two years. Additionally, companies must maintain and update the company's supporting documentation, as B Lab randomly selects 10 percent of Certified B Corporations for an annual on-site annual inspection.⁴⁹ Certified B Corporations must maintain a public profile on B Lab's website, but need not submit an annual report—unlike Benefit Corporations.



BENEFIT CORPORATION

B Lab offers guidance on how to incorporate for each state [here](#). Because the process varies depending on the state you file in, the three-step process outlined below should be used as a supplemental guide and overview of how the process generally works.

STEP 1: Make Sure Your State Recognizes Benefit Corporations

Click [here](#) to find out.

STEP 2: Articles of Incorporation & Accompanying Paperwork

If you are creating a new entity, you are going to approach this process in the same way you would any other entity. However, you would need to include language stating that the purpose of the corporation is to create a general public benefit, and/or a specific public benefit, depending on the state in which you're incorporating. Some states, like Connecticut and Oregon, have made the process incredibly easy, and allow entrepreneurs to simply check a box on the incorporation forms to elect Benefit Corporation status. If you are an existing entity, you would amend your governing documents (e.g., articles of incorporation and bylaws) accordingly. To see what the model Benefit Corporation language looks like, click [here](#).

STEP 3: Annual Reporting Requirements

In most states, Benefit Corporations are required to publish an annual Benefit Report, which provides information about the company's social and environmental impact. This report must include the results of a third-party assessment of the company's social and environmental impact, though not necessarily the B Lab standard. Unlike the reports of Certified B Corporations, Benefit Corporation reports do not require that a *specific* third-party

standard be applied, and Benefit Corporations are also not subject to third-party audit or review.⁵⁰ This distinction in reporting requirements is one of the leading distinctions between *certification* and *incorporation*. Certified B Corporations, alternatively, must comply with the B Lab Impact Assessment. With the exception of Delaware, Benefit Corporations must make these reports publicly available.⁵¹ And as previously noted, annual reporting compliance of Benefit Corporations is below 10 percent.⁵²

APPLY IT!

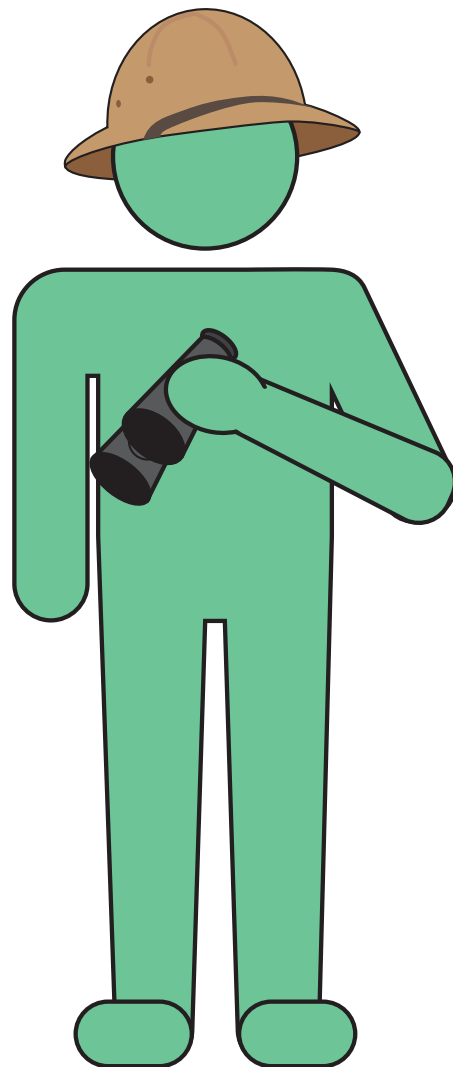
Steps for B Corp Certification

1. B Lab Impact Assessment
2. Assessment Review Call
3. Supporting Documentation
4. Amend Articles of Incorporation
5. Sign Declaration of Interdependence
6. Ongoing Requirements

Steps for Benefit Corporation

1. Make Sure Your State Recognizes Benefit Corporations
2. Articles of Incorporation & Accompanying Paperwork
3. Annual Reporting Requirements

The Uncharted Legal Landscape of the Benefit Corporation

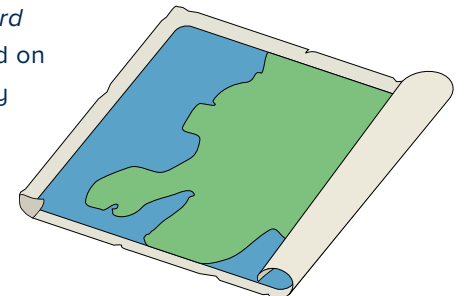


Unlike most business entities, the Benefit Corporation is relatively new, and so the law surrounding these nascent structures is not well established. As a result, the extent to which the B designation and constituency statutes can preserve a company's social mission is unclear. This section summarizes the current state of the law to better present the legal landscape when it comes to running a Certified B Corporation or Benefit Corporation.

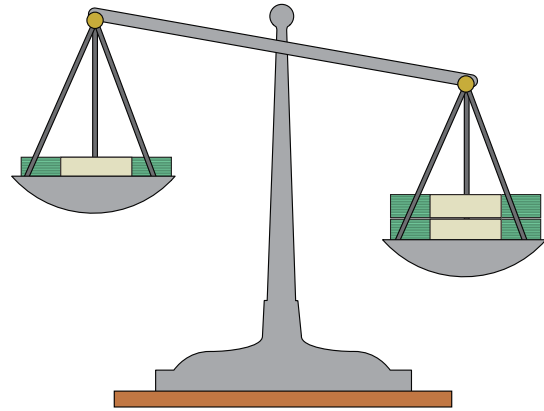
To start, let's first discuss the Business Judgment Rule. Every entrepreneur should know this rule, as it is a well-established legal standard in corporate law. This rule affords corporate directors protection against liability if they make an informed decision in good faith that they believe is in the best interest of the company. That's it, plain and simple.

Now the case law. Don't start skimming—this is the good stuff.

How much legal protection do constituency and benefit corporation statutes really afford? The four most instructive cases on this point are *Unocal Corp. v. Mesa Petroleum Co.* (1985),⁵³ involving a hostile corporate takeover, *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* (1986),⁵⁴ involving a corporate sale, and *eBay Domestic Holdings, Inc. v. Newmark* (2010),⁵⁵ rejecting corporate culture as a defense in refusing a company's sale.⁵⁶ Finally there's *Dodge v. Ford* (1919),⁵⁷ which held that a "business corporation is organized and carried on primarily for the profit of the stockholders." But don't get discouraged by that language, or by the holdings in these cases, because this is how the legal system works. Cases start in the lower courts and work their way up through the higher state courts, then to the federal courts, and finally Supreme Court. The law changes over time and Benefit Corporations are very young.



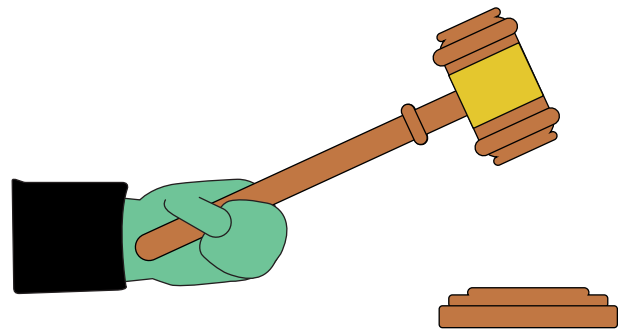
First, all but one of these cases—*Dodge v. Ford*, a Michigan case - came out of Delaware, a state recognized as a leader in corporate law. As a result, the Delaware decisions arguably have more corporate legal clout than *Dodge*; but they're all still state courts decisions. And for those who need a quick refresher, the case law of one state is not binding in another state. It is also worth noting that corporate law is largely a creature of the state, and so the cases that will matter the most will likely come out of state supreme courts.



LEADING CASE LAW

Unocal Corp. v. Mesa Petroleum Co.

In *Unocal*, Mesa tried to purchase Unocal through a hostile takeover, and Unocal said, Yeah no thanks, we'd rather go with someone else. Mesa sued. No shock there. From this case, the court created a two-part test for hostile takeovers, which is relevant for Benefit Corporations. Under the *Unocal* test, a board must 1) have reasonable grounds to believe that a danger to its corporate policy and effectiveness exists; and 2) that any defense measure adopted is proportionate to the threat posed. The court further added that during hostile takeovers, corporate directors have an "enhanced duty" under the business judgment rule to show that a company's actions are in furtherance of the company's welfare. That's the *Unocal* test.



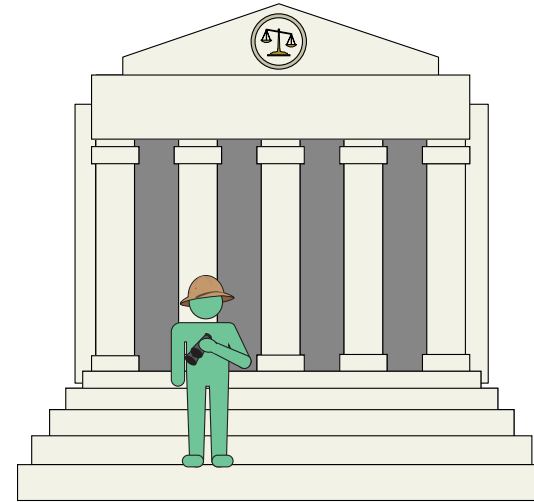
Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc

In *Revlon*, the courts basically said, Once the company is for sale, take the highest bid. In this case, the court accused the seller of "playing favorites," holding that "market forces must be allowed to operate freely to bring the shareholders the best price available for their equity." You're probably thinking, Benefit Corporations are doomed. Not so fast. When *Revlon* was decided in Delaware, the state had neither a constituency statute *nor* a benefit corporation statute in place. If they had, the outcome may have been different.

eBay Domestic Holdings, Inc. v. Newmark

Both *Revlon* and *Unocal* are relatively old cases, and new case law is generally more representative of the legal landscape, so let's talk about a more recent one. This case comes out of a lower Delaware court (Court of Chancery) than the prior two, and so it doesn't carry as much legal weight, but it's out of a Delaware court nonetheless. In *eBay Domestic Holdings, Inc. v. Newmark* (Del 2010), eBay sued craigslist. eBay, a minority shareholder, wanted to acquire greater control of craigslist. Craigslist blocked the tackle. In its defense, craigslist said that eBay's additional control "would fundamentally alter craigslist's values, culture, and business model, including departing from [craigslist's] public-service mission in favor of increased monetization of craigslist." The court

applied the *Unocal* standard and concluded that a company's unique corporate culture, by itself, fails the test. However, they kept the door ajar, noting that there may be "instances in which the law might recognize as valid a perceived threat to a 'corporate culture' that is shown to be palpable (for lack of a better word), distinctive and advantageous." No court decisions have further defined protected corporate cultures or what this threat to corporate culture would look like.



Unilever and Ben & Jerry's

Finally, back in 2000 Unilever sought to acquire Ben & Jerry's. Unilever was the highest bidder, and ultimately acquired Ben & Jerry's in that year for \$326 million. Had Ben & Jerry's decided to instead sell to a lower bidder whose interests and corporate values perhaps better aligned theirs, a protracted legal battle would have likely ensued. Given the choice between spending your first years of retirement in a courtroom, versus kicking it back in the foothills of Vermont eating Chunky Monkey, you'd probably take the latter option too. And despite Vermont having a constituency statute at the time, the decisions in *Unocal* and *Revlon* were not favorable to Ben & Jerry's case. Their lawyers likely advised them to take the highest bid. It's

certainly possible, however, that Ben & Jerry's could have won the case on other legal arguments and invoked Vermont's constituency statute. Notably, after Unilever's acquisition, Ben & Jerry's became a Certified B Corporation.⁵⁸

Now, had Ben & Jerry's rejected Unilever's offer and gone to court, the outcome of the case would have shed more light on the question of how far companies can go to protect their social mission. It's worth pointing out that in this corporate bid a Goliath was trying to buy a Goliath. But what about the Davids of the world? They likely wouldn't have the option of fighting Unilever in court. And so the real legal questions will likely follow from behemoths like Walmart trying to purchase B-hemoths like Etsy. Stay tuned.

ADDITIONAL RESOURCES

There is a considerable amount of misinformation out there on Benefit Corporations and Certified B Corporations. For this reason, we've put together a curated list of reading materials (in no particular order) for those that want to dig deeper. Many of these materials were used to complete this guide.

- Elizabeth Schmidt, *Nonprofit Law: The Life Cycle of the Charitable Corporation*, 2nd Edition (Wolters Kluwer 2016).
- J. Haskell Murray, Social Enterprise Innovation Delaware's Public Benefit Corporate Law, *Harvard Business Law Review*, available at <http://www.hblr.org/wp-content/uploads/2014/10/4.2-3.-Murray-Social-Enterprise-Innovation.pdf> (2014).
- Benefitcorp.net
- [Model Benefit Corporation Act \(June 2014\)](http://www.fda.gov/oc/2014/06/04-model-benefit-corporation-act-june-2014).
- Lynn Stout, The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public (Berrett Keohler 2012).
- Ryan Honeyman, The B Corp Handbook: How to Use Business as a Force for Good, (Berrett Keohler 2014).
- [Milton Friedman, The Social Responsibility of Business is to Increase its Profits, NY Times \(Sept. 13, 1970\)](http://www.nytimes.com/1970/09/13/archives/milton-friedman-the-social-responsibility-of-business-is-to-increase-its-profits.html).
- [Leon Neyfakh, Is 'Shareholder Value' Bad for Business?, Boston Globe \(Aug. 3, 2014\)](http://www.bostonglobe.com/2014/08/03/business/03shareholder-value-bad-for-business/).
- [Michael Porter and Mark Kramer, Creating Shared Value, How to Reinvent Capitalism and Unleash a Wave of Innovation and Growth, Harvard Business Review \(Jan-Feb 2011\)](http://www.hbs.edu/pressroom/2011/01/11/michael-porter-mark-kramer-creating-shared-value-how-to-reinvent-capitalism-and-unleash-a-wave-of-innovation-and-growth/).
- [Courtney Emerson, Delaware's Public Benefit Corporations: Comparative Analysis and Fiduciary Duties, SSRN \(December 2013\)](http://www.ssrn.com/abstract=2411111).
- [J. Haskell Murray, An Early Report on Benefit Reports, SSRN \(October 2015\)](http://www.ssrn.com/abstract=2681111).
- [eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 \(Del. Ch. 2010\)](http://www.courts.delaware.gov/opinions/2010/04/16/10-0101-ebay-domestic-holdings-inc-v-newmark).
- [Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc. 506 A.2d 173 \(Del. 1986\)](http://www.courts.delaware.gov/opinions/1986/05/05/506-a-2d-173-revlon-inc-v-macandrews-forbes-holdings-inc)
- [Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 \(Del. 1985\)](http://www.courts.delaware.gov/opinions/1985/04/04/493-a-2d-946-unocal-corp-v-mesa-petroleum-co).
- [Dodge v. Ford Motor Company, 170NM 668 \(Mich. 1919\)](http://www.courts.michigan.gov/opinions/1919/01/01/170nm-668-dodge-v-ford-motor-company).



About the author

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Photo taken in front of the Chouinard Equipment blacksmith shop, where Patagonia first took root.

Acknowledgements

A special thanks to Patagonia, the Yale Center for Business and the Environment, Vincent Stanley, Stuart DeCew, Cassandra Walker Harvey, Joshua Galperin, Todd Cort, Betsy Schmidt, and James Woulfe.

The graphic design was created by Henk van Assen, Senior Critic at Yale University School of Art, together with Kelly Bryan and Igor Korenfeld, Designers at HvADesign.

ENDNOTES

1. There are various derivatives of the Benefit Corporation, although they are sometimes used interchangeably, including: Public Benefit Corporation (Delaware, Colorado), Social Purpose Corporation (Washington, Florida, California), and Benefit LLC (Maryland).
2. Owners of corporations are called shareholders, whereas owners of LLCs are called members.
3. Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. Times (Sept. 13, 1970). Friedman's work also contributed heavily to the "Chicago School of Economics" movement, which rejected Keynesian economic thought and emphasized free market principles.
4. For a more in-depth discussion on this countervailing position, see Lynn Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (2012).
5. The legal predecessor to the Benefit Corporation is the constituency statute, which has been around for decades. Most constituency statutes were introduced into law in the 1980s in response to the corporate merger and acquisition craze. Constituency statutes, while varying in scope, state that corporations may consider stakeholders' interests other than shareholders in company decision-making. Notably, such decision-making was arguably permissible under a separate legal the Business Judgment Rule before constituency statutes emerged. The Business Judgment Rule is a long-standing legal standard where courts will make the presumption that corporate directors have acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interest of the company. Constituency statutes took this rule to the next level, affording corporations greater legal protection when considering stakeholders' interests before shareholder profit in corporate decisions.
6. The country of Italy also recognizes Benefit Corporations. *State by State Status of Legislation*, BenefitCorp.Net, <http://benefitcorp.net/policymakers/state-by-state-status> (last visited Oct. 23, 2016); *Italian Parliament Approves Benefit Corporation Legal Status*, BCorporation.EU, <http://bcorporation.eu/blog/italian-parliament-approves-benefit-corporation-legal-status> (last visited January 26, 2017).
7. *How Do I Create General Public Benefit*, BenefitCorp.Net, <http://benefitcorp.net/businesses/how-do-i-create-general-public-benefit> (last visited June 18, 2016).
8. Only Delaware and Colorado require that a company identify a "specific benefit." In Minnesota, companies have the option of electing to be a General Public Benefit Corporation or a Specific Benefit Corporation—and the trend appears to be towards the latter.
9. Certified B Corporations must satisfy B Lab's third-party standard, whereas Benefit Corporations can satisfy any third-party standard, but it is not required—this requirement varies by state. It is worth noting that with respect to Benefit Corporations, B Lab's model legislation states as follows: "Government has no role in determining whether a selected third party standard is acceptable or whether the benefit corporation has met its benefit corporation purpose to create a material positive impact; Benefit [C]orporations are not required to adopt a specific third party standard; and Benefit [C]orporations are not required to be audited or certified by any third-party standards organization." *How Do I Pick a Third-Party Standard?* BenefitCorp.Net, <http://benefitcorp.net/businesses/how-do-i-pick-third-party-standard> (last visited June 29, 2016).
10. J. Haskell Murray, *Corporate Forms of Social Enterprise: Comparing the State Statutes*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988556 (Jan. 15, 2015); Christopher Wirth, *Benefit Corporation Reporting Requirements*, Drinker, Biddle & Reath, LLP, <http://benefitcorp.net/sites/default/files/Benefit%20Corporations%20Chart.pdf> (June 10, 2015).
11. *Corporation Legal Roadmap*, BCorporation.Net, <https://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/legal-roadmap/corporation-legal-roadmap> (last visited June 23, 2016) (noting that in states where there is no constituency statute or benefit corporation statute, "the best [B Lab] can do [] is [] build the language of the [Benefit Corp] legal framework into your Term Sheet for B Corp certification.").
12. "[C]ompanies must elect benefit corporation status within four years of the first effective date of the legislation or two years [] [after] initial certification, whichever is later." *Id.*
13. *Id.*
14. *What are B Corps*, BCorporation.Net, <https://www.bcorporation.net/what-are-b-corps> (last visited Nov. 21, 2016).
15. *Steps for Start Ups*, BCorporation.Net, <https://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/steps-start-ups> (last visited Nov. 21, 2016).
16. *Id.*
17. *Id.*
18. Notably, if a company incorporates in a state that recognizes Benefit Corporations or has a constituency statute, but primarily carries out business in another state and is subsequently sued in that other state, the court would likely follow the law of the state in which the company incorporated, citing the "internal affairs" doctrine.
19. *Benefit Corporations & Certified B Corps*, BenefitCorp.Net, <http://benefitcorp.net/businesses/benefit-corporations-and-certified-b-corps> (last visited Nov. 19, 2016); *Certified B Corps & Benefit Corporations*, BCorporation.Net, <https://www.bcorporation.net/what-are-b-corps/certified-b-corps-and-benefit-corporations> (last visited Nov. 19, 2016).
20. *Id.*; *Term Sheet for B Corporations*, BCorporation.Net, available at https://www.bcorporation.net/sites/all/themes/adaptivetheme/bcorp/pdfs/2012_term_sheet_non-constituencynon-benefitsub.pdf (last visited Nov. 19, 2016).
21. *Performance Requirements*, BCorporation.Net, <https://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/performance-requirements> (last visited January 30, 2017).
22. *Id.*
23. *Benefit Corporations & Certified B Corps*, *supra* note 19.
24. Notably, the compliance rate on Benefit Corporation submitting this annual report is less than ten percent. See generally J. Haskell Murray, *An Early Report on Benefit Reports*, SSRN (2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2682709.
25. LLCs, unlike C-Corps, are not required to have a board of directors and its management structure varies.
26. Ryan Honeyman, *The B Corp Handbook: How to Use Business as a Force for Good*, 16 (2014).
27. Dermot Hikisch, *Values-based Businesses Demonstrating Resilience*, TriplePundit.com, <http://www.triplepundit.com/podium/values-based-businesses-demonstrating-resilience/> (Aug. 24 2013).
28. Cliff Zukin & Mark Szeltner, *Net Impact and Rutgers University, Talent Report: What Workers Want in 2012*; Net Impact, available at <https://www.netimpact.org/sites/default/files/documents/what-workers-want-2012.pdf> (May 2012); Eccles, Robert G. Ioannis Ioannou & George Serafeim, *The Impact of a Corporate Culture of Sustainability on Corporate Behavior and Performance*, Harvard Business School, available at <https://hbr.org/2016/03/founder-led-companies-outperform-the-rest-heres-why> (2011).
29. Most states require that companies make these reports publicly available—only Delaware and Minnesota do not. However, there is no penalty currently for a company that fails to make its report publicly available.
30. *Find a Benefit Corporation*, BenefitCorp.Org, <http://benefitcorp.org/businesses/find-a-benefit-corp> (last visited June 26, 2016); BCorporation.Net, <https://www.bcorporation.net> (last visited Dec. 19, 2016).
31. *Id.*
32. Honeyman, *supra* note 25.
33. *Benefit Corporations Raising Capital*, BenefitCorp.Net, <http://benefitcorp.net/benefit-corporations-raising-capital> (last visited June 18, 2016).
34. JP Morgan & Rockefeller Foundation, *Impact Investments: An Emerging Asset Class*, <https://www.rockefellerfoundation.org/report/> <https://www.rockefellerfoundation.org/report/>
35. James Woulfe & Emma Sifre, *Social Enterprise Law Working Group Policy Recommendations & Explanations*, <https://www.cga.ct.gov/ba/CTLCBL/docs/Soc.%20Ent.%20Law%20Report.pdf>
36. Goldman Sachs, Report, available at http://www.natcapsolutions.org/business-case/GoldmanSachsReport_v2007.pdf (2007).
37. Chris Zook, *Founder-Led Companies Outperform the Rest—Here's Why*, Harvard Business Review, <https://hbr.org/2016/03/founder-led-companies-outperform-the-rest-heres-why> (March 24, 2016).
38. *Big Demands and High Expectations: The Deloitte Millennial Survey*, Deloitte, <http://www2.deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/gx-dtl-2014-millennial-survey-report.pdf> (January 2014).
39. Loan Forgiveness Program, Yale School of Management, <http://som.yale.edu/programs/mba/admissions/financing-your-mba/loan-forgiveness>; Loan Assistance Program, NYU Stern School of Business, <http://www.stern.nyu.edu/sites/default/files/assets/documents/2015%20LAP%20Application%20FINAL.pdf>; Loan Assistance Program, Columbia Business School, <http://www8.gsb.columbia.edu/socialenterprise/careers/loanassistance> (it is unclear why Benefit Corporation is also not listed as a qualifying entity for Yale or NYU—Columbia's loan forgiveness program, alternatively, includes "social purpose for-profit ventures or businesses.").

40. Jeff John Roberts, *Nice Firms Finish Last? Etsy Tax Woes Shows Why Doing Good is a Drag*, <http://fortune.com/2015/09/29/etsy-tax-woes/> (Sep. 29, 2016); *Good Firms, Good Targets: The Relationship Between Corporate Social Responsibility, Reputation, and Activist Targeting*, SSRN, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2079227 (June 1, 2012).

41. Alex Barinka & Jesse Drucker, *Etsy Taps Secret Irish Tax Haven and Brags About Transparency at Home*, Bloomberg, <http://www.bloomberg.com/news/articles/2015-08-14/etsy-taps-secret-irish-tax-haven-and-touts-transparency-at-home> (Aug. 12, 2015).

42. Elizabeth Schmidt, *Nonprofit Law: The Life Cycle of the Charitable Corporation*, 2nd Edition (Wolters Kluwer 2016).

43. *Id.* See generally J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, Harvard Business Law Review, available at <http://www.hblr.org/wp-content/uploads/2014/10/4.2-3.-Murray-Social-Enterprise-Innovation.pdf> (2014).

44. J. Haskell Murray, *Understanding and Improving Benefit Corporation Reporting*, http://www.americanbar.org/publications/blt/2016/07/04_murray.html (July 2016).

45. Murray *supra* note 43 at 362.

46. See generally *Business as a Force for Good*, BCorporation.Net, <https://www.bcorporation.net> (last visited June 29, 2016).

47. *Performance Requirements*, *supra* note 21.

48. *Corporation Legal Roadmap*, *supra* note 11.

49. *Performance Requirements*, *supra* note 21.

50. *How Do I Pick a Third Party Standard? BenefitCorp.Net*, <http://benefitcorp.net/businesses/how-do-i-pick-third-party-standard> (last visited Dec. 16, 2016); *Frequently Asked Questions*, BenefitCorp.Net, <http://benefitcorp.net/faq> (last visited June 27, 2016).

51. *Id.*

52. Murray *supra* note 43.

53. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

54. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* 506 A.2d 173 (Del. 1986).

55. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 30 (Del. Ch. 2010).

56. Technically, this case involved blocking a minority shareholder in an effort to prevent them from ever becoming a majority shareholder and thereby controlling corporate culture.

57. *Dodge v. Ford Motor Company*, 170NM 668 (Mich. 1919).

58. *Ben & Jerry's Joins the B Corp Movement*, <http://www.benjerry.com/about-us/b-corp> (last visited Oct. 23, 2016).

Notes