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**Legal Risk Management Tip**
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## BENEFIT CORPORATIONS – A NEW AVENUE AVAILABLE FOR MISSION-DRIVEN CORPORATIONS

Under immense pressure from shareholders, in 2000, the famous ice cream company Ben & Jerry's Homemade Inc. ("Ben & Jerry's") was sold to Unilever PLC[1] ("Unilever"), one of the world's largest consumer goods companies. At the time, co-founder Ben Cohen and other directors of Ben & Jerry's were wary of the purchase as they did not know whether Unilever would adhere to, or be compatible with, the social missions and business objectives through which Ben & Jerry's was founded[2]. Concerns such as these did not ultimately sway Ben & Jerry's to sell to smaller, and perhaps more socially responsible companies. Unilever's bid was the largest submitted, and as such, stood to create the most wealth for Ben & Jerry's shareholders. Bound by a fiduciary duty[3] to its shareholders, Ben & Jerry's accepted the offer presented by Unilever. The two sides were able to work out a deal whereby Unilever allowed Ben & Jerry's to create a separate Board of Directors to manage the company's social objectives. Additionally, twelve years later, Ben & Jerry's became the first wholly owned subsidiary to achieve a "Certified B-Corp" status (a description of what this means can be found below) with the blessing and encouragement of Unilever[4]. However, the limitations faced by Ben & Jerry's in 2000 make it the poster-child for recent benefit corporation legislation which allows companies to focus not only on shareholder wealth, but also socially responsible mission statements when making decisions.

### A New Corporate Entity

In April 2010, the State of Maryland became the first U.S. state to pass "Benefit Corporation" legislation[5] permitting a new entity structure in that state. Since then, several other states, including Arizona, Arkansas, California, Colorado, Delaware, Hawaii, Illinois, Louisiana, Massachusetts, Nevada, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, and Washington D.C. have all passed similar legislation. These

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[1] Unilever N.V. (ADR)(NYSE: UN).
[2] For more information, *see* https://extranet.kenan-flagler.unc.edu/kicse/ORIG%20Shared%20Documents/Unilever's%20Acquisition%20of%20Ben%20and%20Jerry's.pdf.
[3] The law's basic position on corporate social responsibility, and the fiduciary duty of a corporation to its shareholders, was famously articulated in *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) where the Michigan Supreme Court held that a business corporation is organized primarily for the profit of the stockholders, as opposed to the community or its employees. While this ruling does not set a legal precedent that all decisions of officers and directors must be made with the goal of maximizing shareholder value, its premise is widely accepted and its ruling has not been overturned.
[4] *See* https://extranet.kenan-flagler.unc.edu/kicse/ORIG%20Shared%20Documents/Unilever's%20Acquisition%20of%20Ben%20and%20Jerry's.pdf
[5] Maryland's legislation was signed into law on April 13, 2010 and became effective on October 1, 2010.

laws help provide an alternative to traditional corporations and expand the fiduciary duty owed by the corporation to its shareholders to now include a clearly defined a general public benefit[6]. As each state has its own legislation regarding Benefit Corporations, the characteristics and requirements for such corporate structures may vary slightly from state-to-state. This article will discuss the general characteristics of the benefit corporation structure common to all states, help decipher related terminology that is often confusing and incorrectly used and discuss some of the benefits and considerations of using this new corporate structure.

## Characteristics of Benefit Corporations

Offered as a new class of corporate entity, a Benefit Corporation allows "for-profit" companies to consider socially beneficial objectives (such as the environment or society) in conjunction with opportunities to maximize shareholder wealth, in the decision making process. While Benefit Corporations share many of the same characteristics of traditional "C" and/or "S" corporations (*i.e.*, general formation process, fees, corporate governance and taxes --- such as selecting to be taxed either as a "C" or "S" corporation), there are several stark differences to this new entity type. These differences are most readily apparent when discussing the purpose, accountability and transparency of Benefit Corporations.

### A. Purpose

As stated previously, the purpose of the Benefit Corporation is not only to maximize profits, but also to create and further a general public benefit. In addition to providing a general public purpose, benefit corporations can also pursue a particular public purpose, such as providing low-income or underserved individuals or communities with beneficial products or services, improving human health or promoting the arts, sciences or advancement of knowledge[7]. In most states, a Benefit Corporation is required to designate at least one of its directors as a "benefit director" who, in addition to having the same duties and rights of other directors, is also responsible for overseeing the purpose of the company and reporting as to the company's adherence to said purpose[8].

### B. Transparency

Benefit corporations provide transparency to shareholders by assessing their overall social and environmental performance using a comprehensive, credible, independent and transparent third-party standard, or by being certified or audited by a third-party who uses such a standard for its audit. The results of this assessment must be reported annually to the public (not just shareholders) by posting it on the public portion of the company's website.

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[6] "Public Benefit" has been defined in the State of California to mean a material positive impact on society and the environment. This definition may differ slightly according to state laws.

[7] For more information, see "http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0351-0400/ab_361_bill_20111009_chaptered.html"

[8] For more information, *See* "http://legiscan.com/PA/text/HB1616/2011"

C. Accountability

Benefit Corporations are arguably more accountable to shareholders than other types of corporations. For instance, not only are such corporations required to consider the wealth of its shareholders, it must also weigh how such decisions may impact workers, the community, the environment and the corporation's corporate purpose as a whole.

Additionally, Benefit Corporations allow shareholders and directors (as well as anyone identified in the bylaws as having standing) to sue to compel the corporation to provide a public benefit if it fails to do so, without also forcing shareholders to sue for monetary damages[9]. This type of action is deemed a "benefit enforcement proceeding" and provides injunctive relief or similar equitable remedies for those bringing suit.

## Distinctions Between a B-Corporation vs. a Benefit Corporation

Often times the term "B – Corp" is misleading in that it is used interchangeably when discussing both a Benefit Corporation and a Certified B-Corporation ("Certified B-Corp"). While similar in their goals, Benefit Corporations and Certified B-Corps are created in two separate and distinct ways. Benefit Corporations, as mentioned above, are a form of corporate entity recognized in those states where legislation has been passed. Conversely, Certified B-Corps may be companies of any structure (*e.g.*, a corporation, LLC, LLP, etc.) that have been deemed to have achieved a certain level of social and/or environmental performance, and thus conferred the title of "Certified B-Corporations" by an independent, non-profit company called "B-Lab.[10]"

In order to receive verification as a Certified B-Corp, a company must demonstrate, through the use of an "Impact Assessment" tool, the organization's commitment to multiple stakeholders including its workers, customers, suppliers, community, and the environment. The company must also be reviewed by a B-Lab staff member, pay a fee (typically ranging from $500-$25,000) and amend its bylaws/operating agreement/etc. to include stakeholder interests[11]. The end result of this process is a company that looks and acts like a Benefit Corporation, but is not actually recognized as such by the state.

## Benefits of New Structure

Benefit Corporation laws address concerns held by businesspersons who not only wish to raise capital, but also maintain control of the social or environmental mission of their business. These laws provide companies the ability to consider factors other than the highest purchase offer at the time of sale, so as to avoid finding themselves in the position that Ben & Jerry's did during their merger. In addition, a benefit corporation structure may allow companies to distinguish and market themselves as businesses with a social conscience.

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[9] *See* http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0351-0400/ab_361_bill_20111009_chaptered.html.
[10] B Lab is a 501(c)3 nonprofit organization which was founded in 2006. For more information, please refer to the company's website at http://www.bcorporation.net.
[11] *See* http://www.bcorporation.net.

## Conclusion

Whether or not a Benefit Corporation is suitable for an aspiring entrepreneur will depend on the facts and circumstances surrounding the business. There is no question that this entity is gaining momentum in today's marketplace, as evidenced by the number of states passing legislation allowing for such entities, and the number of new companies employing this structure for its business purposes; (notably, California alone is estimated to already have 85 such Benefit Corporations[12]). However, the additional reporting requirements and increased liability considerations, as discussed above, should be weighed prior to deciding on this type of corporate structure. Be sure to consult with an attorney familiar with the Benefit Corporation structure and compare this to other entity forms prior to configuring the corporate structure and engaging in a new business activity.

For more information on these and other considerations, please contact us at info@jackolg.com, or (619) 298-2880. Also, please visit our website at www.jackolg.com.

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[12] *See* http://socentlaw.com/2013/07/how-many-benefit-corporations-have-been-formed/.