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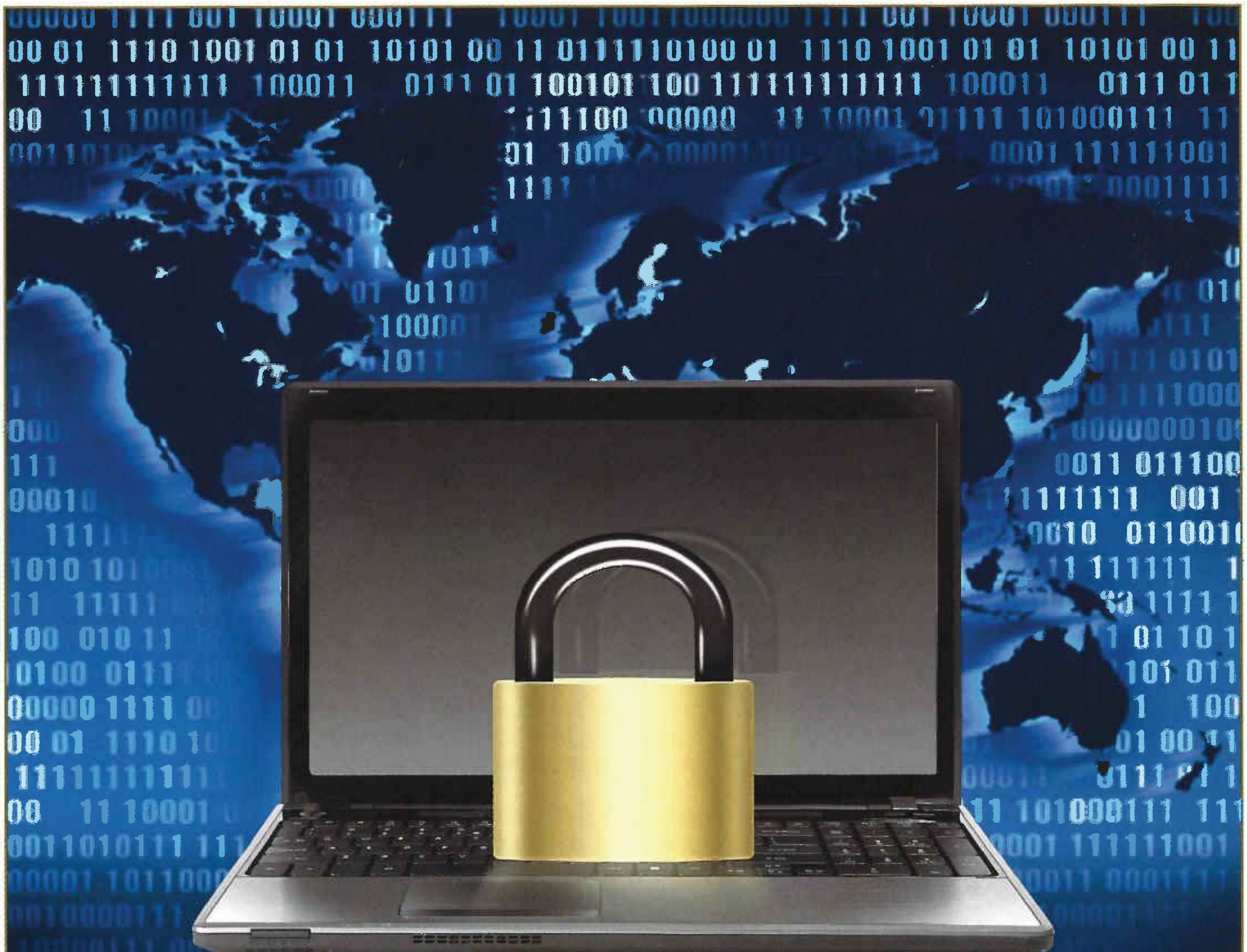

Inside

Benefit Corporations and Certified B Corporations: Hybrid Corporate Options for Entrepreneurs and Socially Enterprising Business Owners Forming For-Profit Companies

By Aaron Boyajian

Benefit Corporations

In recent years, entrepreneurs and business owners are taking corporate responsibility and social enterprise into consideration more than ever when forming new companies. Until recently, in New York,[1] when determining which corporate structure to utilize when forming socially conscious entities, these entrepreneurs would be pigeonholed into using the standard corporate forms of corporations and limited liability companies. However, the use of the standard corporate form did not ultimately mesh with the purposes proffered by these emerging companies because there is an inherent tension created between a socially responsible mission and the rigid strictures of corporate law, which require officers and directors to maximize profits for shareholders above and beyond any other goal. This tension has traditionally forced socially enterprising companies to eschew their original purposes in order to adhere to the bottom-line profit margin which is a guiding principle of corporate law. One of the oft-cited examples of this is the sale of Ben & Jerry's ice cream to Unilever in 2000.[2]

However, on February 10, 2012, a new era for entrepreneurs and business owners dawned in New York when the Benefit Corporation Law[3] was enacted, which bridged the gap to allow corporations[4] to both focus on profit maximization while at the same time allowing them to operate with social and economic benefits and goals in mind. The Benefit Corporation Law offers a new, hybrid form of corporation to be formed, known as Benefit Corporations ("B-Corp").[5]

A B-Corp, unlike standard S-Corporations or C-Corporations, combines the features of for-profit and non-profit corporations by allowing management to consider the corporation's impact on the environment, community and its employees, in addition to considering the profit returned to shareholders. Therefore, since the purpose of a B-Corp is to create a positive impact on society and the environment, the likelihood of claims being brought by investors and shareholders for failure to maximize profit will be greatly decreased when directors seek to uphold the stated corporate mission over generating profit.

While New York was not the first state in the country to adopt this new corporate form, it was in the forefront of the initiative and is now one of only 23 states which allow the formation of Benefit Corporations,[6] including, New Jersey, Pennsylvania, Massachusetts and Delaware.

B-Corps are formed in the same way as traditional New York corporations. However, there are two main differences of note. Specifically, B-Corps are formed for a public benefit purpose, and they must be accountable and transparent with respect to such benefit purpose.

Purpose

All Benefit Corporations are formed for the purpose of creating "general public benefit." As defined in Section 1702 of the BCL, a general public benefit is one that provides a material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation.

A Benefit Corporation can go one step further and identify one or more "specific public benefits" for which it intends to operate. Examples of specific public benefits are (a) providing low-income or underserved individuals or communities with beneficial products or services; (b) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business; (c) preserving the environment; (d) improving human health; (e) promoting the arts, sciences or advancement of knowledge; (e) increasing the flow of capital to entities with a public benefit purpose; and (f) the accomplishment of any other particular benefit for society or the environment.

While there are many obvious types of products and services which fit nicely under the auspice of what a Benefit Corporation should be (e.g., eco-friendly cleaning products, organic and raw sourced foods and solar energy firms), there are other businesses, like law firms, architecture firms and investment firms, which, while not traditionally thought of as socially responsible, make very good candidates to be formed as B-Corps.

Transparency

After a B-Corp is formed, in addition to the usual corporate filing requirements, it will have to file an annual report showing how its performance benefited social and environmental goals. This benefit report must contain, among other things, (1) a narrative description of the ways in which the benefit corporation pursued the general public benefit during the year and the extent to which that general public benefit was created; (2) the ways in which the benefit corporation pursued any specific public benefit that the certificate of incorporation states is the purpose of the benefit corporation to create, and the extent to which that specific public benefit was created; and (3) any circumstances that have hindered the creation by the benefit corporation of general or specific public benefit; (4) an assessment of the performance of the Benefit Corporation, relative to its general public benefit purpose assessed against a third-party standard applied consistently with any application of that standard in prior benefit reports, or accompanied by an explanation of the reasons for any inconsistent application and, if applicable, assessment of the performance of the benefit corporation, relative to its specific public benefit purpose or purposes; (5) the compensation paid by the benefit corporation during the year to each director in that capacity; and (6) the name of each person who owns beneficially or of record five (5%) percent or more of the outstanding shares of the benefit corporation.

The benefit report must be sent annually to each shareholder within one hundred twenty (120) days following the end of the B-Corp's fiscal year. Additionally, the benefit report must be posted on the public portion of the B-Corp's website and delivered to the New York State Department of State for filing. The exception to this requirement is that compensation paid to directors and any financial or proprietary information which is included in the shareholder benefit report may be omitted from what is shown to the public. As of now, in New York, the annual benefit reports are not required to be verified, certified, or audited by a third-party standard organization.

Accountability

New York's Benefit Corporation Law statute sets forth that "the purpose to create general public benefit shall be a *limitation* on the other purposes of the benefit corporation, and *shall control* over any inconsistent purpose of the benefit corporation." Therefore, wherever there is a tradeoff between seeking profits and creating general public benefit, there is a legal mandate which demands that the B-Corp pursue the latter.

To accomplish the stated goals of the B-Corp, directors are given an expanded fiduciary duty which requires them to take into consideration various other factors over and above the financial benefits of the shareholders. To that end, directors must not only consider the effects of any corporate action on whether such action or inaction will accomplish the general and any specific public benefit purposes of the B-Corp, but they must also consider how the corporate action will impact (a) its shareholders; (b) its employees and workforce (and those of the its suppliers); (c) its customers; (d) the community and society, including any community in which offices or facilities of the benefit corporation or its subsidiaries or suppliers are located; (e) the local and global environment; and (f) its short-term and long-term interests, including benefits which may accrue from its long-term plans and the possibility that these interests may be best served by the continued independence of the benefit corporation. The statute does not provide any order or priority by which the directors must consider the interests of the B-Corp.

Additionally, when determining if a proposed purchase of the business is in the B-Corp's best interest, the directors may consider the (a) resources, intent and conduct (past, stated and potential) of any person or entity seeking to acquire control of the corporation; and (b) any other pertinent factor or the interest of any other group that they deem appropriate.

The ability for directors to focus on sustaining the purposes of the corporation while not being required to maximize shareholder profit makes B-Corps, in essence, double-bottom line businesses, whereby they can seek to treat both their purpose and their capital in a sustainable manner.[7]

Certified B Corporations

A B-Corp is not the same as a "Certified B Corporation." A Certified B Corporation status is a certification, which companies with an operating history apply to attain. This certification is conferred by the nonprofit known as B Lab,[8] which charges annual fees of $500-$25,000 for companies to keep the Certified B Corporation status current. B-Corps and Certified B Corporations are often confused, and while primarily similar, they have a few important differences which are discussed below.

B-Corps are legal entities which are administered by individual states, like New York. A company may choose to incorporate as a benefit corporation in a state which recognizes it as a legal entity and may also seek to become certified as a "Certified B Corporation." In the alternative, a corporation which has not been formed under a statutory benefit corporation law may seek to obtain Certified B Corporation status while retaining the customary corporate form.

There is no requirement that B-Corps obtain certification as a Certified B Corporation. However, certification as a Certified B Corporation means that a company has met a high overall standard of social and environmental performance, accountability and transparency, and as a result, has access to a portfolio of services and support from B Lab that non-certified companies and B-Corps do not. As of the date of this article, there are 999 Certified B Corporations, including well-known brands such as Warby Parker (warbyparker.com), Greystone Bakery (New York's first Certified B Corporation) (greystonbakery.com), Etsy (etsy.com) and Uncommon Goods (uncommongoods.com).

Certification

Each Certified B Corporation must achieve a verified minimum score of 80 points out of a possible 200 points from B Lab on the B Impact Assessment.[9] This assessment is tailored to a company's size, sector and geography and takes around 1-3 hours to complete. The assessment seeks to determine a multitude of information relating to realigning the social and economic performance by the company, including its corporate governance, accountability and transparency, compensation, benefits and training, community practices, and environmental practices.

Since the B Impact Assessment asks about what a company has done in the past, a newly formed company will find it difficult to answer the questions unless it has an operating history. Therefore, B Lab suggest that companies wait to seek certification until after the first 6 months of full operations and revenue generation.

Once certified as a Certified B Corporation, a company can attract investors, generate press, and allow like-minded companies to partner with it. Members of the public will have confidence that they are purchasing from companies which are seeking to address social challenges.

Conclusion

The movement to increase corporate responsibility quickly, and all entrepreneurs and business owners should give consideration to whether a B-Corp would be the proper form of entity for their new ventures. We anticipate that B-Corp formations will dramatically increase over the next few years as business owners will want to show investors and consumers that they intend to be, and will be held to be, good corporate citizens. Therefore, any for-profit business which is or intends to provide a benefit to the public through charitable activities, sustainable operations practices or by promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business, should consider utilizing this new form of entity offered by New York State, and should also consider seeking certification as a Certified B Corporation.

Endnotes

1. This article will focus on New York law. However, it should be noted that most states have general corporate laws similar to New York, which makes much of this discussion germane relating to the implementation of statutes akin to the New York Benefit Corporation Law.
2. In its official announcement with respect to the deal, Ben & Jerry's noted that it would keep the firm's "social mission" intact. However, at the end of the day, the determining factor which overrode all others was that Ben & Jerry's simply could not pass on the deal because of the financial windfall which its shareholders stood to gain, http://www.slate.com/articles/business/moneybox/2000/04/the_scoop_on_ben_jerrys_sellout.html.
3. McKinney's Business Corporation Law §§ 1701 *et seq*.
4. New York does not allow for the formation of a low-profit limited liability company (LLC), which is the LLC variant of the Benefit Corporation.
5. The formation of a benefit corporation is not limited to new entities. If an existing corporation believes that it may be able to operate as a Benefit Corporation, it can elect to do so under Section 1704 of the new BCL. In order for an existing corporation to make this election, in addition to complying with the Benefit Corporation law, it must: (a) amend its certificate of incorporation so that it contains a statement that the corporation is a benefit corporation; and (b) adopt the amendment by a least a 75% vote of all shareholders.
6. In addition to New York, the following states provide for the use of benefit corporations: Arizona (effective December 31, 2014), Arkansas, California, Colorado, Delaware, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Nebraska (effective July 17, 2014), Nevada, New Jersey, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah (effective May 13, 2014), Vermont, Virginia, and West Virginia (effective July 1, 2014). The District of Columbia also allows for the formation of benefit corporations.
7. Ben & Jerry's famously called this double bottom line of profits and people the "double dip."
8. B Lab is a 501(c)3 nonprofit whose stated mission is to serve a global movement of entrepreneurs using the power of business to solve social and environmental problems. B Lab envisions that all businesses in the world will measure and manage their impact as readily as they do profitability. bcorporation.net.
9. bimpactassessment.net.

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