

## Legal FAQ's

For a more thorough discussion of the below and other questions regarding the need and rationale for benefit corporation legislation, please read *Clark, Vranka, et al*, [Benefit Corporation White Paper](#) . For additional summary information, please see the [For Directors](#) section of the site.

### Why would a company want to become a benefit corporation?

- Provide clarity to its directors and officers that their fiduciary duty includes creation of public benefit and consideration of non-financial interests, even in liquidity/sale scenarios;
- Offer legal protection to its directors and officers to consider the interests of its workforce, its community, and the environment when making decisions, even in liquidity/sale scenarios;
- Help maintain the company's mission over time by 1) expanding shareholder rights to enforce this expanded definition of fiduciary duty and standard of consideration; and 2) requiring a 2/3 super-majority vote of shareholders to remove these higher standards; and 3) providing the opportunity to name and enforce pursuit of one or more specific public benefit purposes;
- Differentiate the company in a confusing marketplace in which everyone is claiming to be a responsible or green business;
- Demonstrate leadership by voluntarily electing to hold itself accountable to higher standards of corporate purpose, accountability, and transparency.

### What are the legal impediments preventing businesses from operating this way?

The greatest impediments exist in liquidity scenarios.

- In any of the 19 states without a constituency statute, when a company is 'in play,' directors' discretion under the business judgment rule is narrowed as a result of the *Revlon* ruling in Delaware, requiring them to 'take the highest offer' regardless of the impact of that decision on non-financial interests.
- In any of the 31 states with a constituency statute, the lack of case law regarding those statutes leaves lawyers and the directors and officers they counsel with a lack of clarity about how a court would rule if directors made a decision based on broader considerations than just the highest offer.

Impediments also exist in operating scenarios.

- The best interests of the corporation are commonly equated with the financial interests of shareholders. Any decision by directors must be tied back to serving the financial interests of shareholders. This prevents directors from making decisions that consider both financial and non-financial interests.
- Despite the existence of the business judgment rule governing operating decisions, most directors and officers and many attorneys believe that their options are constrained to acting only in the financial interests of shareholders. The belief that 'the social responsibility of business is to increase profits' has been absorbed into U.S. corporate culture and impacts how decisions are made. What is perceived as a legal impediment is often just a cultural impediment. This impediment can be removed by creating a new corporate form explicitly required to take multiple interests into consideration when making decisions.

### In states with a constituency statute, can't companies already do this?

- Constituency statutes are permissive and as a result directors 'may' consider non-financial interests. This also means that they 'may not'. The objective of benefit corporation legislation is to give shareholders the option to choose to require directors to consider non-financial interests.
- Constituency statutes have not achieved the other objectives of this legislation cited above.

### Why not simply use LLCs to achieve these objectives?

- An LLC could currently amend its membership agreement to incorporate any of the benefit corporation provisions. However, because institutional investors prefer corporate structures over LLC's, any company with plans to raise outside capital or go public is better off with a corporate rather than an LLC structure.
- Incorporating benefit corporation provisions into an LLC operating agreement would not achieve the market differentiation or leadership objectives cited above.

### Why require the creation of 'general public benefit' rather than simply require the creation of one or more 'specific public benefits'?

- Most importantly, the primary objective of this legislation is to create a new corporate form and through that a new class of corporations whose corporate purpose requires it to create benefit for society generally as well as shareholders.
- The 'general public benefit' purpose helps prevent abuse of this legislation by corporations interested in green-washing. Without the 'general public benefit' purpose, a corporation could name a single, narrow 'specific public benefit' purpose (e.g. keeping the river in back of the factory clean from toxic effluents) and then 'consider' and dismiss all other non-financial interests when making decisions, which would not meet the primary objective of this legislation to create a new corporate form whose corporate purpose requires it to create benefit for society generally.

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*Legal Disclaimer: The information on this site does not constitute legal advice and is provided solely as a reference. Those interested in electing benefit corporation status should discuss with their legal advisors the potential risks and liabilities and specific processes associated with this for the company's circumstances and state of incorporation.*

Source: <http://benefitcorp.net/legislators/legal-faqs>