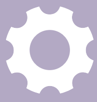


IS BENEFIT CORPORATION LEGISLATION REALLY NECESSARY?

BY JONATHAN STORPER

For some time now society has been debating what structural reforms are necessary to prevent another Great Recession, and whether and how to expand economic growth for all. While not a new idea, there has been increased interest in recent years in shifting the paradigm of the current economic reality to one of a more sustainable economy that works better for all people.

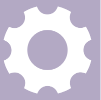
Part of this debate must focus on how business can be better used as a force for good and how laws can encourage and support such businesses. One primary purpose of laws is to protect and promote public health, safety, welfare, and the common good. There has been much discussion about the proper role of American corporate law in this regard, and whether corporations exist to promote the common good or something more narrow - namely, to benefit the owners. Arguments about the role of the American corporation go back to the early part of the 20th century, when business and legal scholars debated the role of companies in society. By the 1960s, it seemed settled that the role of the corporation was to promote the interests of shareholders only and there was not much discussion on this point for many decades.

The rise of more conscious companies, social entrepreneurship, and a new generation of Millennials interested in businesses being part of the solution to society's ills has reignited the debate about the role of the corporation in today's world and whether it's necessary to re-imagine the corporation so that directors are required to do the right thing.

Against this backdrop, the new, socially responsible, for-profit Benefit Corporation was born in 2010. In addition to providing shareholder value, Benefit Corporations are a new breed of company that are required to create a material positive impact on society and the environment from the entire operations of the company. Directors of Benefit Corporations must consider how the actions of the corporation affect all the stakeholders of the corporation, including its employees, creditors, the community, and the environment. Among other things, Benefit Corporation statutes are some of the first laws to recognize the environment as a stakeholder in a business. At the time of the printing of this article, Benefit Corporation status is available in 30 states and the District of Columbia, and 14 other states are considering making this type of corporation available.

But does this new type of company solve a real problem? After all, don't traditional corporations have the ability to do good by providing a living wage, employee benefits, donations to charity, and the development of less-toxic products, among other things?

Many argue that the concept of shareholder primacy requires that boards of directors maximize shareholder value such that any other positive effects on society must be incidental to efforts to increase returns to owners. All too often this maxim has led to corporate actions that are detrimental to the other stakeholders, including the employees, the community, the environment, and society. For example, we've seen the catastrophic consequences that occur when the



market focuses on narrow interests like the short-term price of stock, instead of creating long-term value that benefits all of a company's constituencies; the failure to take into account exigencies of business like pollution or climate change; or even the sale of less expensive but more toxic products.

Legal commentators have joined the fray in recent years, arguing about whether a more socially responsible corporate form is necessary or whether traditional for-profit companies can create the change necessary to truly shift the paradigm to a more sustainable economy.

Let's pull the curtain back and peek in at the debate.

Two of the best-known current writers in this area are Professors Lynn Stout of Cornell Law School and Stephen Bainbridge of UCLA School of Law. Stout argues in her book "The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public" that "the notion that corporate law requires directors, executives, and employees to maximize shareholder wealth simply isn't true. There is no solid legal support for the claim that directors and executives of US public corporations have an enforceable legal duty to maximize shareholder wealth."

Bainbridge, on the other hand, represents the opposite view - namely that corporations are required to maximize shareholder wealth. In his April 15, 2015 New York Times article "A Duty to Shareholder Value," he cites two important legal cases, Dodge v. Ford Motor Co. and eBay Domestic Holdings Inc. v. Newmark, for the principle that "corporate directors are bound by fiduciary duties and standards" requiring them to "promote the value of the corporation for the benefit of its stockholders."

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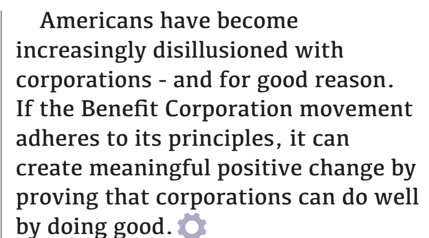
In his paper "The Dangers of Denial," Chief Justice Leo Strine of the Supreme Court of Delaware weighed in on this debate. He debunks as wishful thinking the views of commentators like Professor Stout who argue that directors can always balance the interests of stockholders and other stakeholders in a traditional corporation. As Chief Justice Strine wrote "Directors must make stockholder welfare their sole end, and ... other interests may be taken into consideration only as a means of promoting stockholder welfare." Justice Strine's opinion is quite important because he is the Chief Justice of the Supreme Court of Delaware, the most influential court on issues of corporate law in the United States.

Some have expressed concern that as the first major sustainable corporate form of its kind, the Benefit Corporation is both untested and risky for directors. To the contrary, rather than increase the risk to directors who balance stockholder interests with other stakeholders, it reduces the risk to directors by expressly requiring it. And the Benefit Corporation is integrated into the lengthy body of state corporate law except on the narrow issue of this balancing effect, which is expressly authorized. As a result, it does not relax traditional protections afforded to investors against directors involved in self-dealing transactions or other conflicts of interest. The Benefit Corporation model simply changes the type of accountability structure present in a more traditional corporation so that directors have room to resist demands for short-term profit over other relevant social and environmental interests. In this way, the Benefit Corporation has the potential to change the way business is done for the better.

As Justice Strine has aptly pointed out in his comments, however, the entrepreneurs who use this model "bear a special responsibility for the movement's ultimate fate. If their commitment to social responsibility is simply a green-washed cloak for a desire to squeeze out profits for themselves and stockholders by feigning but not actually having a sincere regard for other corporate constituencies, the Benefit Corporation movement will quickly lose credibility among socially responsible investors and policymakers." In addition, to be sustainable, companies that do the right thing must also generate returns to succeed with investors and in the marketplace.

Americans have become increasingly disillusioned with corporations - and for good reason. If the Benefit Corporation movement adheres to its principles, it can create meaningful positive change by proving that corporations can do well by doing good.



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