Younger companies increasingly seek clarity into their corporate social responsibilities by adopting a public benefit corporation structure and opting to be designated as a certified B corporation.

Quite a bit has been written recently about the proper purpose of corporations and, in particular, public companies. Prominent corporate lawyers like Martin Lipton and law professors such as Adam Winkler of UCLA Law School have expressed their views as to whether the purpose of a corporation is to generate profits for its shareholders or to operate in the interests of all of its stakeholders, including employees, customers and local communities.

What is generally not known on the “street,” however, is how a particular company’s leadership lines up on this ideological divide. In other words, does the company’s board of directors follow the “Chicago School,” in which the social responsibility of a corporation is to increase its profits as the basis for its governance, or the broader stakeholder theory that integrates social, environmental and other sustainability considerations into its corporate governance? Despite state laws and court decisions on the fiduciary duties of directors (including in the case of being the target of a takeover) to shareholders, a corporation’s leadership still maintains significant discretion with regard to business judgments in these corporate social responsibility areas.

To clarify this apparent lack of transparency into a corporation’s boardroom, a number of younger companies are specifically aligning themselves with the ESG (environment, social and governance) movement and adopting the legal status of a “public benefit corporation.”

A public benefit corporation is a relatively new type of for-profit corporation with an expressed commitment to abide by high standards of corporate purpose, accountability and transparency in order to make a positive impact on society. According to various websites, 35 states including New York and Delaware, and the District of Columbia, have enacted public benefit corporation provisions in their corporate statutes to allow for this class of corporation. There are several publicly traded public benefit corporations, including Laureate Education Inc. and, until recently, Etsy Inc. Additionally, there are numerous public benefit corporation subsidiaries of public companies like Athleta, a subsidiary of The Gap, Inc., as well as subsidiaries of Campbell Soup Company, Chegg, Inc., Overstock.com, Inc., Salesforce.com, Inc. and United Therapeutics Corp.

Independent of a company’s status as a public benefit corporation under state law, a corporation may also elect to have its social and environmental performance, accountability and transparency assessed against proprietary criteria established by an independent organization such as B Lab. After a successful review and assessment, B Lab designates a corporation as a “Certified B Corporation” under its standards, which refers to companies that are certified by B Lab as meeting certain high levels of social and environmental performance, accountability and transparency.
Under state public benefit corporation laws, public benefit corporations are required to identify in their certificate of incorporation the public benefit or benefits they will promote, and their directors have a duty to manage the affairs of the corporation in a manner that balances the pecuniary interests of the shareholders, the best interests of those materially affected by the corporation’s conduct, and the specific public benefit or public benefits identified in the public benefit corporation’s certificate of incorporation. Representative examples of public benefits provided in a certificate of incorporation include providing low income housing, promoting economic opportunities for individuals and communities beyond job creation, protecting the environment, operating recycling rewards programs in local communities, promoting the arts and sciences, funding companies with a purpose to benefit society, promoting innovation in and access to education, and improving human health and nutrition. The corporation’s stated public benefit is typically rooted in a company’s “mission,” which is a common disclosure in an IPO registration statement.

Although there may be ideological differences, holders of shares of public benefit corporations have voting, dividend and other economic rights that are the same as the rights of shareholders of a corporation that is not designated as a public benefit corporation. An investment in a public benefit corporation does not differ from an investment in an entity that does not have that status. In its certificate of incorporation, a public benefit corporation may limit the liability of its directors for breaching their duty of care like any other corporation, and may even extend that exculpation by including a provision that any disinterested failure by a director to satisfy the shareholder/public benefit balancing requirements will not constitute an act or omission not in good faith, or a breach of the duty of loyalty.

Public benefit corporations are required by state law to publicly disclose a report at least biennially on its overall public benefit performance and on the corporation’s assessment of its success in achieving the corporation’s public benefit purpose. Some states such as Delaware permit a corporation’s board of directors to measure the corporation’s public benefit performance against the objectives and standards the company sets for itself, while other states require an objective third-party standard such as that established by B Lab.

Becoming a certified B corporation involves taking and passing a B Impact Assessment, a comprehensive and objective measure of a business’ positive impact on society and the environment. The assessment varies depending on a company’s size (number of employees), sector and location. The standards in the assessment are created and revised by the Standards Advisory Council, an independent governing body that determines eligibility to be a certified B corporation. By completing a set of over 200 questions, which are customized for the company being assessed, that reflect impact indicators, best practices and outcomes, a company receives a composite score on a 200-point scale representative of its overall impact on its employees, customers, communities and the environment. Representative indicators in the assessment range from payment above a living wage, employee benefits, charitable giving/community service and use of renewable energy. Certification as a certified B corporation requires that a company achieve a reviewed score of at least an 80 on the B Impact Assessment. The review process includes a phone review with B Lab staff, a random selection of indicators for verifying documentation and a random selection of company locations for onsite reviews, including employee interviews and facility tours. Limited liability companies can also be certified by B Lab as long as the company’s operating agreement includes the required level of social responsibility.

The creation and expansion of the public benefit corporation structure and certified B corporation designation represents an evolving counterbalance to the traditional notions about corporations and shareholder primacy. This progress, supported by momentum towards social impact investing among the millennial generation, may ultimately lead the SEC to consider a more comprehensive approach to non-financial reporting of material information. For publicly traded public benefit corporations, where the two aspects of performance, financial and benefit, define the company’s mission, integrated (financial and benefit) reporting with respect to the achievement of its stated benefit might include the percentage of revenue derived from the stated benefit activities, percentage of stakeholders receiving a stated benefit and percentage of expenses spent towards achieving the benefit. Other information might include the geographic coverage and duration of its benefit activities and the impact of the company’s activities on its targeted stakeholders. Absent a check-the-box shareholders vs. stakeholders statement on the cover page of SEC periodic reports, the foregoing disclosure would add transparency into a corporation’s ideological view on its role in society.
Tags: Certified B corporation, Corporate social responsibility, CSR, environment, social and governance, ESG, Public benefit corporation, Purpose of the corporation