Be good

The benefit corporation structure provides protection for boards to think and act beyond simply profit maximization.

BY DOUG RAYMOND

THE CORPORATE FORM was originally developed, in part, to encourage risk taking and entrepreneurship by shielding investors from personal liability for losses incurred by their new ventures. However, beyond this, it has for almost 100 years been generally accepted that the primary purpose and role of corporations is to create shareholder value. For example, in *Dodge* v. *Ford* (1919), the court stated: "A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."

Today, this view of the role of a corporation is engrained both in popular culture and corporate law. Although there has been some debate in recent years regarding conflicts between the interests of short-term holders (e.g. day traders) and long-term investors, the discussion is still framed around shareholders and profits.

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While many corporations take on charitable or other socially conscious projects, corporate decisions are nonetheless framed in the context of maximization of shareholder value. For example, making a significant charitable donation is justified as creating good will among customers and other important constituencies. Directors and their advisors are generally wary of straying too far from wealth maximization principles.

In recent years, this narrow focus has been questioned by companies, investors and others. While the financial "bottom line" obviously is essential to the survival of any business, the focus on this as the principal driver for corporate activity, at least for some, does not accommodate the broadening view that business has a responsibility to people and to the environment, as well as to profits — a "triple bottom line." This reflects the desire of shareholders and other stakeholders to use the power of business to positively impact their communities and environment, in ways that the more traditional model has not had the flexibility to achieve.

In 2005, a nonprofit called B Lab proposed legislation to provide for a triple bottom line-focused business entity, known as a "benefit corporation." To date, the legislation has been adopted in seven states, including New York and California. This approach maintains most of the familiar characteristics of a traditional corporation, including the liability shield, while providing new flexibility and meaningful requirements with respect to purpose, accountability and transparency.

Unlike a traditional corporation, which can be created for any lawful purpose, a benefit corporation must have as one of its purposes to create a material positive impact on society and the environment. A benefit corporation may also have any additional "specific public benefit purpose" (e.g., improving human health, protecting the environment, or promoting the arts).

Directors of a benefit corporation have expanded duties from those applicable in a traditional corporation. In addition to the interests of shareholders, directors of benefit corporations must consider the effects of their actions on (1) other "stakeholders," such as employees, suppliers, customers and the community, (2) the environment, (3) the short- and long-term interests of the benefit corporation, and (4) the ability of the benefit corporation to accomplish its general, and any specific, public benefit purpose. Directors of a benefit corporation must act in the best interests of the corporation, but are not required to give priority to the interests of one constituency — even shareholders — over another. These expanded duties represent a fundamental change from the current legal duties of corporate directors. Although about two-thirds of states have statutes that expressly allow directors to consider interests other than those of the shareholders, these "constituency statutes" are only permissive and are intended to protect directors in takeover scenarios; the other states, including Delaware, do not have such statutes. In general, even these constituency statutes do not permit a board to elevate such other interests over shareholder returns, which the board of a benefit corporation may do.

The benefit corporation structure is not a replacement for a traditional business corporation; however, for the growing community of socially and environmentally conscious businesses that embrace a broader perspective than profit maximization (many of which are family businesses or are privately held), the benefit corporation legislation creates a needed framework that provides protection for directors and gives investors and shareholders tools to measure a business's success beyond financial performance. When Google went public in 2004, its prospectus proudly proclaimed: "Don't be evil." With the new focus on using the power of business to tackle social and environmental challenges in society, the benefit corporation provides a structure for businesses that aim to "Be good." ■

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