Benefit Corporations:
A New Model for Sustainable Capitalism

Presented by:
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I. What is a Benefit Corporation?

• New class of for-profit general California corporation
• Create traditional economic value, PLUS...
  ▪ Purpose: creates a material positive impact on society and environment, taken as a whole
  ▪ Accountability: In addition to profits, must consider environmental and social factors in actions and operations
  ▪ Transparency: reports annually on environmental and social performance using independent standards
• Flexible: can revert to general corporation or other entity
• No independent certification requirements
• Taxes: Subchapter C or S
• Preferential government contracting in San Francisco
• 73 formed as of October 2, 2012
II. Why Become a Benefit Corporation?

Legal Protection for Stated Values
- Safe harbor for directors for multi-stakeholder approach
- Flexibility to prioritize among profits, environment and social concerns

Exit Strategies and Succession Planning
- Stated values unchanged by sale of minority/majority of stock
- Greater flexibility to identify the "right" buyer and succession planning
II. Why Become a Benefit Corporation?

Socially Responsible Brands are a Better Business Model

- "Firms of Endearment" beat S&P 500 peer firms return 9x over a 10 year period
- 60 million Americans are "conscious consumers"
- "Socially responsible" investors manage $3.07 trillion (2010)
- 100,000 sustainable businesses adopting a better model
- Aligned strategic partners, vendors, suppliers and stockholders
III. What Makes a Benefit Corporation Different?

Purpose

Traditional Corporations
• Engage in any lawful business activity
• May identify narrower purpose in Articles of Incorporation

Benefit Corporations
• ADDITIONAL purpose to create "general public benefit"
  ▪ Definition: A material positive impact on society and the environment taken as a whole, from the business and operations of a benefit corporation (§14601(c))
  ▪ Adds to and/or limits other corporate purposes
III. What Makes a Benefit Corporation Different?

Purpose

Option to include 1+ "specific public benefit" purposes

"Specific public benefits" (defined in §14601(e)):

- Providing low-income or underserved individuals or communities:
  - beneficial products or services
  - economic opportunity beyond creating jobs in ordinary course of the business
- Preserving the environment
- Improving human health
- Promoting the arts, sciences, or advancement of knowledge
- Increasing flow of capital to entities with public benefit purpose
- Accomplishing any other particular environmental/social benefit
III. What Makes a Benefit Corporation Different?

Accountability

Mandatory: Board of Directors and Officers must consider impact on ALL of the following (§14620):

• Shareholders
• Customers
• Employees/workforce
• Environment (local and global)
• Community and society, including any local community where company, its subsidiaries or suppliers are located
• Short and long-term interests, including:
  – benefits that may arise from its long-term plans; and
  – possibility that interests may be best served by retaining control
• Ability to accomplish general, and any specific, public benefit purpose
III. What Makes a Benefit Corporation Different?

Accountability

OPTIONAL: to consider the following in decision-making:

• Resources, intent, and conduct (actual and potential) of person seeking to acquire control of the corporation
• Any other pertinent factors or the interests of any other person or group
• May rely on information from board committees, officers, employees, attorneys, accountants and other professionals directors believe reliable and competent

TIP: Document that the Board considered the above factors by noting in meeting minutes
III. What Makes a Benefit Corporation Different?

Transparency

Annual Benefit Report (§14630)

• Explanation of how company pursued general/specific public benefit, the extent to which it was achieved, and circumstances that hindered achievement
• Process and rationale for selecting the third party standard used to prepare report
• Any connection between the company and creators of the third party standard used that might affect credibility
III. What Makes a Benefit Corporation Different?

Transparency

• The Board of Directors must state an opinion in writing on (§14621):
  – Whether the benefit corporation acted in accordance with its general, and any specific, public benefit purpose
  – Whether directors/officers considered the required environmental and social impacts referenced
  – Description of ways the benefit corporation, directors and/or officers fell short
• Names of people owning 5% or more of the company's stock
Transparency

How does the Assessment work?

• Annually assess triple bottom line performance using an independent, third-party standard (§14600(g))
• Standard must be comprehensive, credible, independent and transparent
• Must apply the standard consistently from one year to the next or explain reasons for inconsistencies
• No auditing or certification required
III. What Makes a Benefit Corporation Different?

Transparency

Third Party Standard Requirements

- Independent third party standard
- Uses a balanced multi-stakeholder approach
- Developed by a company with no material financial relationship with the benefit corporation (= or > 5% ownership/income stream)
- No more than 1/3 of the benefit corporation directors represent an association from a specific industry or a business which is assessed against the same standard
- The benefit corporation is not materially financed by an association or business which is assessed by the same standard
III. What Makes a Benefit Corporation Different?

Transparency

Third Party Standard Requirements

• Certain information about the standard must be publicly available:
  – The criteria
  – Relative weight assigned to criteria
  – Process to revise the standard
  – Identity of the governing board members who developed standard
  – Process to change the membership of the governing board
  – Amount and sources of financing for the entity developing the standard
  – Any other relationships posing an actual or potential conflict-of-interest
III. What Makes a Benefit Corporation Different?

Transparency

Sample of Qualifying Standards*

- B Impact Assessment (www.bcorporation.net)
- Global Reporting Initiative (www.globalreporting.org)
- Green Seal (www.greenseal.org)
- People4Earth Business Framework (www.people4earth.org)
- Food Alliance (www.foodalliance.org)
- ISO 26000 (www.iso.org/iso/social_responsibility)
- UL Environment – ULE 880 (www.ulenvironment.com)

* New standards are being developed and existing standards being tailored to meeting Benefit Corporation criteria
III. What Makes a Benefit Corporation Different?

Transparency

Disclosure of Annual Benefit Report

• Send to all shareholders within 120 days after fiscal year end
• Post on benefit corporation's website
• Website version may exclude any financial or proprietary info
• If no website, then provide free copy to anyone upon request
IV. Benefit Enforcement Proceeding
(§14623)

What can be enforced?

• Company's failure to pursue general and any specific public benefits
• Director's failure to perform benefit corporation obligations
• Failure to deliver/post Annual Benefit Report

Who has the power to enforce?

• Benefit corporation, Directors and Shareholders

What outcomes?

• Court order mandating compliance
• No recovery of money damages
• Plaintiff's attorneys' fees reimbursed if court decides company's actions were not justified
• No personal liability of directors or officers
## V. Comparison with B Corp

<table>
<thead>
<tr>
<th>Benefit Corporation</th>
<th>&quot;B Corp&quot;</th>
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<tbody>
<tr>
<td>-Legal corporate form</td>
<td>-Certification as sustainable business</td>
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<tr>
<td>-A for profit corporation Mandatory:</td>
<td>-Any type of for profit business</td>
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<td></td>
<td>-Voluntary: multi-stakeholders</td>
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<td></td>
<td>-Benefit corp within 2 years if law available in State</td>
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<td>-Legal protection to consider the interests of all stakeholders, not just shareholders</td>
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<td>-Shareholders hold directors and officers accountable</td>
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<td>-Limits rights to shareholders and directors</td>
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<td>-Builds sustainability into framework</td>
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<td>-Assures certainty and protection for sustainable mission and succession planning</td>
<td>Access to member benefits: discounts, access capital, peer-to-peer networking, etc.</td>
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<tr>
<td>-No Score Required</td>
<td>-Assessment score 80-200</td>
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<td>-No membership dues</td>
<td>-Membership dues based on Revenue:</td>
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<td></td>
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<tr>
<td></td>
<td></td>
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<tr>
<td>-No branding</td>
<td>-B corp logo and advertising</td>
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VI. Alternate Structures

1. **Limited Liability Company** (limited liability and pass-through taxation; but doesn’t scale and no branding)

2. **Non-Profit** (charitable – no ROI; tax deductible donations; restricted funds – no private inurement or benefit)

3. **For-Profit with non-profit subsidiary** (good opportunity to accomplish different missions with retained control, but must separate activities)

4. **Flexible Purpose Corporation** (California only)
   - Special purpose only
   - No shareholder enforcement
   - Report only on special purpose activities
   - No requirement of the FPC to undertake special purpose
   - No third party independent assessment
   - 17 formed as of October 2012
VII. Steps for Becoming a Benefit Corporation

**Vote:** 2/3 Shareholder vote and resolution to
- approve becoming a benefit corporation
- adopt any specific public benefit purpose
- add/remove/amend any specific public benefit purpose

**Prepare:** Articles of Incorporation or Amendment
- Include: "This corporation is a benefit corporation." (§14610)
- Describe any specific public benefit purpose(s) adopted
- File with Secretary of State
VII. Steps for Becoming a Benefit Corporation

Stock Certificates: Prepare/revise stock certificates to include required terms on front "This entity is a benefit corporation organized under Part 13 (commencing with Section 14600) of the California Corporations Code."

Bylaws (Optional): Prepare or amend Bylaws to add greater specificity
- No specific changes required
- Recommend adding provisions that further detail how company will pursue general and any specific public benefits

Policy (Optional): Create board and officer instructions/policy for operating as a benefit corporation
VII. Steps for Becoming a Benefit Corporation

Converting Existing Businesses: Shareholder approval and dissenters' rights

• Owners among dissenting 1/3 opposing conversion can require the benefit corporation to purchase their shares at fair market value
• Same protection to dissenters if majority owners decide to abandon benefit corporation status or subsequent adoption/termination of specific public benefits

Different and additional steps if the business is not a California corporation
Resources

- Benefit Corporation Information Center hosted by B Lab: www.benefitcorp.net
- Great from the Start by John Montgomery, 2012
Questions?

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Jonathan is the co-chair of the legal working group which drafted the benefit corporation legislation in California, and a partner at the law firm of Hanson Bridgett LLP in San Francisco, California where he chairs the firm's corporate and sustainable business practice groups. He has been selected as the California Lawyer Attorney of the Year for 2012 for his work on this legislation.

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