

Presents
Utah Purpose Driven-Business Legal Seminar Series

Benefit LLCs, Benefit Corporations, L3Cs and MORE

May 21-23, 2018 Lehi, Ogden, Park City, Salt Lake City



Agenda

Introduction - *Keven Stratton Jr.*

Content credit for slides 9-12

Benefit corporations and benefit LLCs - *Bill Clark*

Content credit for slides 14-24

L3Cs, impact investments and program-related investments - *Keven Stratton Jr.*

Content credit for slides 25-27

Tax considerations and new opportunity zones - *Kirton McConkie*

Content credit for slides 28-36

Questions and Answers



Introduction

From 1600 and the beginning of modern corporations, everybody has known that business is about profits: maximizing the financial return to owners.

For 400 years, we have lived in the so-called "Fortune Economy." Now, we are witnessing the dawn of the "Purpose Economy."



Introduction *(cont.)*

Purpose-Driven Business

Business managed to improve community well-being with decisions continually considering the generation of positive impacts for society and the environment alongside financial return to owners.

Equivalent terms also used include: triple bottom line, sustainable, aligned, resilient or conscious business.



Introduction *(cont.)*

Purpose-Driven Activity in Traditional Business

Add-on programs, such as: community service, charitable giving, workplace wellness, corporate social responsibility (CSR), responsible purchasing (supply chain), environmental, productivity/lean/quality/green teams

Certifications: product, industry or overall (B Corp)

Employee/member ownership, such as coops, credit unions and employee stock ownership plans (ESOP)



Introduction (cont.) New Purpose-Driven Business Structures

| | Benefit LLCs | Benefit Corporations | L3Cs | Employee/Member-Owned | Social Enterprise |
|--|--------------|----------------------|----------|-----------------------|-------------------|
| State Registration | X | X | X | Depends | |
| Social Focus | X | X | X | X | X |
| Environment Focus | X | X | Possible | Possible | Possible |
| Multiple Classes of Ownership Possible | | X | | | Possible |
| Can Receive Impact Investment | X | X | X | X | X |
| Can Provide Tax Benefit to Investors | | | X | | If NPO |
| Can be a Certified B Corp | X | X | X | X | X |
| Can be a Nonprofit | | | | Depends | X |
| # in Utah 2/1/18 | 23 | 37 | 100 | ? | ? |

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Purpose Driven Entities Where Mission and Money Meet



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WITH EVERY PRODUCT YOU PURCHASE,
TOMS WILL HELP A PERSON IN NEED. ONE FOR ONE.

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Purpose Driven Business

75%

of millennials believe

"Businesses are too fixated on their own agendas and not focused enough on helping to improve society."

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Social Entrepreneur – Triple Bottom Line



People



Planet



Profit

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Entities available for Social Entrepreneurs

- 70,000 social enterprises in the UK
- 20,000 social enterprises in Australia
- ?? In the United States
 - Non-profits (501(c)(3))
 - Benefit LLCs (BLLCs)
 - Benefit Corporations
 - Low Profit Limited Liability Companies (L3Cs)

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What is P3 Utah Doing?

- Aligning commerce with community well-being
- Expanding purpose-driven business
- Connecting like-minded businesses
- Promoting knowledge sharing



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Benefit Corporations and Benefit LLCs

I'm confused about the differences among "Certified B Corporations," "benefit corporations," and "benefit LLCs"!



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Certified B Corporation



- A **certification** conferred by the U.S. nonprofit corporation B Lab.
- A company that meets a high level of social and environmental performance AND makes a legal commitment to consider all stakeholders.
- Any for-profit company organized in any legal form in any country can pursue certification.

Benefit Corporation and Benefit LLC



- Both are **legal forms** authorized by state law. 34 states authorize benefit corporations, and four states authorize benefit LLCs.
- Both forms have a higher level of transparency, accountability, and purpose.
- They give directors and officers (or members and managers of an LLC) protection and permission to consider the impact of the business and its operations on all stakeholders, not just the owners.



How does a business become certified?

Step 1: Meet Performance Requirement

complete the B Impact Assessment and earn a reviewed minimum score of 80 out of 200 points

Step 2: Meet Legal Requirement

determine the appropriate path for the business's legal structure

Step 3: Make it Official

sign the Declaration of Interdependence

Declaration of Interdependence

We recognize as a core virtue of the economy, and the source of the power of private enterprise, is our ability to act with one another in the name of the common good. We recognize, and we affirm, that our success is linked to the success of the community in which we live and work. We recognize, and we affirm, that our success is linked to the success of the society in which we live and work. We recognize, and we affirm, that our success is linked to the success of the world in which we live and work.

We hold these truths to be self-evident, that all business ought to be conducted as if people and planet mattered. That through their purpose, passion, and people, businesses do not exist in a vacuum, but rather as part of a larger community. That we are required to act with all the understanding that we can, and to be held accountable for the choices we make.



Characteristics of Benefit Corporations

1. The **purpose** of the corporation is redefined.
2. The **duties** of the directors are redefined.
3. The corporation is subject to a new requirement to **report** on its pursuit of its expanded purpose.



Characteristics of Benefit LLCs

Benefit LLCs share the same characteristics with benefit corporations of:

- Redefined **purpose**
- Redefined **duties**
- The **reporting** requirement



First Characteristic:

Purpose

The purpose of a benefit corporation is redefined to include having a material positive impact on **society** and the **environment** in addition to being financially successful.



Benefit Corporations

(Section 16-10b-103(9))

"General public benefit" means a material positive impact on society and the environment:

- (a) taken as a whole;
- (b) assessed against a third-party standard;
- and
- (c) from the business of a benefit corporation.

Benefit LLCs

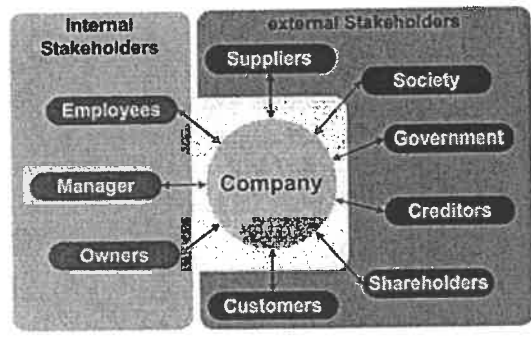
(Section 48-4-103(3))

"General public benefit" means a material positive impact on society and the environment:

- (a) taken as a whole;
- (b) assessed against a third-party standard;
- and
- (c) from the business of a benefit company.

**Second Characteristic:
Duties**

The duties of the directors of a benefit corporation are redefined to require them to consider the interests of the corporation's stakeholders in addition to the interests of the shareholders.



Benefit Corporations
(Section 16-10b-301(1)(a))

[directors] shall consider the effects of an action or inaction upon:

- (i) the shareholders of the benefit corporation;
- (ii) the employees and workforce of the benefit corporation, its subsidiaries, and its suppliers;
- (iii) the interests of customers as beneficiaries of the general public benefit or specific public benefit purposes of the benefit corporation;
- (iv) community and societal factors, including those of each community in which offices or facilities of the benefit corporation, its subsidiaries, or its suppliers are located;
- (v) the local and global environment;
- (vi) the short-term and long-term interests of the benefit corporation, including benefits that may accrue to the benefit corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the benefit corporation; and
- (vii) the ability of the benefit corporation to accomplish its general public benefit purpose and a specific public benefit purpose;

Benefit LLCs
(Section 48-4-301(1)(a))

[members of a member-managed company] shall consider the effect of any action or inaction on:

- (i) the members of the benefit company;
- (ii) the employees and workforce of the benefit company;
- (iii) the interests of customers as beneficiaries of the benefit company's general public benefit purpose or specific public benefit purpose of the benefit company;
- (iv) community and societal considerations, including those of each community in which offices or facilities of the benefit company or the benefit company's subsidiaries or suppliers are located;
- (v) the local and global environment;
- (vi) the short-term and long-term interests of the benefit company, including benefits that may accrue to the benefit company from the benefit company's long-term plans and the possibility that the interests may be best served by the continued independence of the benefit company; and
- (vii) the ability of the benefit company to accomplish the benefit company's general public benefit purpose and any specific public benefit purpose;

Third Characteristic: *Reporting*

A benefit corporation must report annually on its pursuit of its expanded purpose.

- Report is intended to supplement the corporation's financial report so that the shareholders have an understanding of the corporation's full triple bottom line performance.
- The report must be based on an independent third party standard so that it presents an objective picture.
- A specific reporting system is not mandated.

The reporting obligation for benefit LLCs parallels that for benefit corporations.



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Important note with respect to Benefit LLCs

Although Section 48-3a-112 provides generally that freedom of contract applies to the operating agreement of a Utah LLC, Section 48-4-102(4) provides that:

The operating agreement of a benefit company may not limit, be inconsistent with, or supersede a provision of this chapter.



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Low Profit LLC (L3C)

Utah Code Ann. § 48-3a-1302

- Shall significantly further the accomplishment of one or more charitable or educational purposes within the meaning of Section 170(c)(2)(B), Internal Revenue Code;
- Shall demonstrate that it would not be formed but for the company's relationship to the accomplishment of a charitable or educational purpose;
- May not have as a significant purpose the production of income or the appreciation of property; and
- May not have as a purpose to accomplish one or more political or legislative purposes within the meaning of Section 170(c)(2)(D), Internal Revenue Code.



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Program Related Investments (PRIs)

- Private charities are required to spend at least 5% of their endowment on grants and expenses related to charitable activity
- 26 U.S. Code § 4944 carves out an exception for Program Related Investments
- PRI's are defined by the IRS as programs as those in which:
 - The primary purpose is to accomplish one or more of the foundation's exempt purposes,
 - Production of income or appreciation of property is not a significant purpose, and
 - Influencing legislation or taking part in political campaigns on behalf of candidates is not a purpose.



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Program Related Investments (PRIs)

Examples

- Low-interest or interest-free loans to needy students,
- High-risk investments in nonprofit low-income housing projects,
- Low-interest loans to small businesses owned by members of economically disadvantaged groups, where commercial funds at reasonable interest rates are not readily available,
- Investments in businesses in low-income areas (both domestic and foreign) under a plan to improve the economy of the area by providing employment or training for unemployed residents, and
- Investments in nonprofit organizations combating community deterioration.



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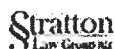
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Tax Considerations

Three Basic Tax Regimes:

- Entity Level Taxation (so-called double taxation)
 - Tax also imposed upon profit distribution to equity owners
- Pass-through Taxation
 - Tax characteristics pass through to equity owners
- Tax Exempt
 - Income generally not taxable
- Note: Unrelated Business Income Tax (UBIT)
 - No equity owners to receive profits subject to tax



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Entity Level Tax/Double Taxation

"C" Corporations

- Taxation occurs at entity level (profits and losses)
- Distributions of profit/income also taxable to equity owners (unless exempt)
- Certain fringe benefits available as deductible expenses to the corporation
- Flat rate now 21%
- Charitable deductions limited to 10% of Net Income



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Pass-Through Entities

"S" Corporations

- Tax items pass through to owners at owner's tax rates
- Most fringe benefits for owners not deductible
- Only 100 owners allowed and only a single class of stock
- Charities may be shareholder

-But income, and gain from sale of shares, subject to UBIT



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Pass-Through Entities

Partnership Entities

- General Partnerships
- Limited Partnerships
- Limited Liability Companies

-LLC's may choose to be taxed as a corporation ("C" or "S")

Tax items pass through to owners at owner's tax rates

- Income for tax-exempt owners likely subject to UBIT
- On sale, tax-exempt owners may also recognize some UBIT
- New 20% reduction for qualified business income

Some fringe benefits provided to partners not deductible

Unlimited owners, multiple classes permitted



| | Corporate ("C" or "S") | Partnership |
|------------------------|---|-------------|
| "Low-profit" standards | Utah L3C ("check the box") | Utah L3C |
| "Benefit" Standards | Utah B Corp Utah BLLC ("check the box") | Utah BLLC |



Choice of Entity

Who are or who will be the investors?

- Private investors may prefer single level of tax
- If nonprofit/tax-exempt investors, pass-through activity attributed to them.
 - UBIT considerations must be considered
 - Will activity qualify as tax-exempt activity under IRS rules?
- Private foundations have additional considerations
 - »See prior discussion of L3Cs

Where will the entity operate?

Will it have subsidiaries?



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Nonprofit-owned Businesses

- Corporate taxation may be better than pass-through if business income subject to UBIT
- PFs, DAFs, some other charities and their insiders/substantial contributors can't own more than 20% (sometimes 35%), unless:
 - Program-related investments and functionally related businesses
 - NEW "Newman's Own" exception: businesses acquired other than by purchase 100% owned by PF if PF is independent of business and donors and all profits to charity (after taxes and reasonable business reserves).
- Benefit or Low-Profit Form?



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Investment Opportunity Act

- Added to the tax code by the Tax Cuts and Jobs Act on December 22, 2017
- Created new incentive to invest in certain low-income communities called Qualified Opportunity Zones ("QOZs")
- QOZs designated by governors
- Utah and many other states received 30-day extension.
- Designations submitted but and should be approved shortly.
- Provides investors with tax benefits if they re-invest the gain from the sale of an asset in Qualified Opportunity Funds ("QOFs") within 180 days
 - Gain is *excluded* from the investor's taxable income in the year of the asset sale
 - Gain is *included* in taxable income either when the QOF interest is sold or on 12/31/26
 - Additional tax benefits if QOF investment is held longer



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Investment Opportunity Act (cont.)

QOFs

- To become a QOF, an eligible taxpayer self certifies. (Thus, no approval or action by the IRS is required.) To self-certify, a taxpayer merely completes a form (which will be released in the summer of 2018) and attaches that form to the taxpayer's federal income tax return for the taxable year.
- Must make qualifying investments in QOZs.



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