

FOCUS

President's Message

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Be Aware Of The "B" Corporation

In reading the business press and scanning websites of leading companies over the last few years, I have noted with interest the increasing number of organizations touting their commitment to Corporate Social Responsibility (CSR) as a core value. In fact, CSR is now part of the strategic framework guiding the behavior of many Fortune 500 companies, and with good reason. Investors, including private equity firms, are increasingly putting their money into organizations that promote environmental stewardship, consumer protection, human rights, diversity and other societal improvements. And studies show that 70 percent of consumers are willing to pay a premium for products from socially responsible companies.

CSR has, in fact, recently moved from being a good advertising slogan or business goal to the "big time" of being an authorized corporate form called the "Benefit Corporation," more commonly known as the B Corporation. This corporate animal is quite real, with the Maryland legislature this year becoming the first to pass legislation recognizing the B Corporation. Given the potential for this movement, in-house counsel should actively monitor legislative and other developments in this emerging area.

The B Corporation is intended to use the power of business to address social and environmental problems. Traditionally,

companies have the fundamental purpose of serving the interests of their shareholders. Company directors are responsible for safeguarding shareholder interests and ensuring that other activities or potential interests do not adversely affect the sanctity of shareholder interests. The rules for B Corporations, meanwhile, enable and protect their directors to also take employee, community, and environmental interests into consideration when making decisions.

Becoming a "Certified" B Corporation and B Lab's Mission

The principal proponent of the B Corporation is B Lab, a 501(c)(3) non-profit governed by an independent board of directors. The organization's website (bcorporation.net) states that there are more than 300 B corporations nationwide representing 54 industries and sales of \$1.1 billion. Notably for WMACCA members, there are eight certified B Corporations in D.C., two in Maryland, and four in Virginia. B Lab's mission includes the certification and support of B Corporations that achieve a minimum score on the B Ratings System, which is governed by an independent standards board.

The non-profit organization's website explains that B Corporations address two critical problems which hinder the



creation of positive social and environmental impact through business. One issue is the existence of shareholder primacy which makes it difficult for corporations to take employee, community, and environmental interests into consideration when making decisions. The second problem B Corporations

claim to address is the absence of transparent standards which makes it difficult to tell the difference between a "good company" and just good marketing.

The standards established by B Lab for obtaining a B Corporation certificate vary depending on whether a state has a constituency statute (a corporate statute that explicitly allows directors to consider the interests of stakeholders). Many states have such a statute, however, 20 states (including Virginia and Delaware) do not. If your organization's state of incorporation has a constituency statute, the B Corporation certification process requires modification of the company's charter documents to include consideration of employees, consumers, the community and the environment. The modified charter documents must be approved by the company's board of directors and the requisite number of shareholders, and then filed with the Secretary of State, if applicable.

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For states without a constituency statute, B Lab's standards for B Corporation certification require the company to (i) consider the impact of its decisions not only on shareholders, but also on its employees, customers, suppliers, community and the environment; and (ii) support B Lab's objectives of passing legislation to create a new corporate form with higher standards of corporate purpose, accountability and transparency.

Regardless of whether your organization's state of incorporation has a constituency statute, B Lab certification requires that a company complete the B Impact Assessment, receive a passing score, and comply with certain intellectual property requirements including use of the name "B Corporation." Companies are also required to pay B Lab an annual certification fee based on a tiered structure ranging from \$500 to \$25,000 depending on annual sales.

Maryland is First State to Pass B Corp Legislation

Notably, Maryland became the first state to adopt legislation recognizing a Benefit Corporation as a distinct corporate form. The new state law (adopted on April 13, 2010 and effective on October 1, 2010) provides that a director of a Benefit Corporation, "in determining what the director reasonably believes to be in the best interests of the Benefit Corporation,

shall consider the effects of any action or decision not to act on":

1. the stockholders;
2. the employees and workforce of the Benefit Corporation, its subsidiaries and suppliers;
3. the interests of customers as beneficiaries of the general or specific public benefit purposes of the Benefit Corporation;
4. community and societal considerations, including those communities where offices or facilities of the Benefit Corporation are located; and
5. the local and global environment.

Importantly, Maryland's law accords the same immunity from liability to directors of Benefit Corporations as it extends to directors of other corporate entities. Additionally, the Maryland statute requires the Benefit Corporation to deliver to each stockholder an annual benefit report describing how the corporation pursued a "general public benefit," any "specific public benefit," and the extent to which such public benefits were created. The annual report is required to be posted on the Benefit Corporation's website and include an assessment of the societal and environmental performance of the corporation prepared in accordance with a third party standard.

Vermont recently became the second state to enact legislation authorizing businesses

to establish themselves as benefit corporations. Such laws are also under consideration in New York, Pennsylvania, New Jersey, Oregon, Washington and Colorado.

What Lies Ahead for B Corporations

The future of B Corporations is difficult to predict, but there are some encouraging factors to consider. B Corporations may command higher valuations if they have established a trusting, transparent relationship with their customers, employees, suppliers and other stakeholders. Such loyalty may translate into substantial goodwill for which buyers may be prepared to pay. In addition, private equity and venture capital firms are paying increasing attention to and funding B Corporations according to information provided by B Lab. Social investors wanting to invest in companies whose missions are aligned with their values are another fertile source of capital. While there are currently no public B Corporations, the B Corporation legal framework does not preclude the company from going public.

We may be seeing the leading edge of a wave of B Corporation legislation. In-house counsel are well advised to become knowledgeable about B Corporations and educate their management and boards. You may even find your company taking a position on Benefit Corporation legislation proposed for your state of incorporation.

The Emerging Role and Responsibilities of Corporate Counsel and CCOs

Susan Hackett, senior vice president and general counsel, Association of Corporate Counsel, Association of Corporate Counsel (ACC)

I remember when I arrived at ACC in 1989 and was learning the ropes of in-house counseling and how fascinated I was, as an outsider then, to see how ACC members were defining and re-defining the role of the law department in the company. In my early years at ACC, I used to tell people who didn't know much about corporate counsel that what made in-house counsel's role unique was their focus on how to keep the milk in the glass, rather than doing

what outside firms usually did, which was to respond and defend once the milk was spilt. In-house counsel were all about compliance and preventive law, which was still an emerging theory in the pre-Enron world: one that in-house counsel understood and embraced, but one that most other lawyers or observers did not.

Events in the intervening years, along with the continuing development of the in-

house legal department's role, have led to a much stronger concern about (and fight over) the evolving role of compliance in the modern corporation. In recent years, regulators and commentators — such as those who proclaim to set the standards for what constitutes good corporate governance — seem to be most interested in physically moving the compliance function into the core of the business, with both

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good and bad effect for the role of in-house lawyers as compliance leaders. Many folks now suggest that the right way to structure corporate compliance is to give it a separate and independent home in the company's management structure (or even house it in each of the company's many lines of business), through the appointment of a Chief Compliance Officer (CCO) and her reports, all of whom occupy a separate (and sometimes somewhat independent) office in the corporate hierarchy.

Everyone agrees that "the business" needs to own compliance, just like they need to own the decision to promote and live in an ethical culture. Tone starts at the top, and execution is the responsibility of each person in the company. Got it — I don't think anyone is arguing over that. And for that exact reason, is compliance (or for that matter, ethics?) really a separable silo? And for purposes of this issue, are law and compliance really severable "functions"?

Post-Sarbox, when the movement to appoint a separate position as Chief Compliance Officer gathered wide-spread popularity, the first CCOs appointed were usually part of the law department's staff, and even the office was housed within the legal department: either the CLO or a deputy GC or someone similar was awarded the title, and the function remained a largely "legal" one, directed and implemented by lawyers with a legal focus. Now, CCOs span a much wider universe of credentials and responsibilities, and management or the board often appoints a CCO who may not be a lawyer, nonetheless someone drawn from the corporate legal staff. Today's CCO is very often an independent silo of authority in the corporate entity (intentionally so!). Sometimes the CCO function operates as a compliance czar who does not have staff, but has oversight for measuring and reporting to the board on how or whether each business function has fulfilled compliance directives; sometimes the CCO is a senior manager with a large staff, bureaucracy, and defined responsibilities to execute. But whatever their resume or operational mandate, today's CCO may or may not think about the relationship of compliance to the legal function, or even understand

how to coordinate the role closely with the company's lawyers.

What does this mean to the role of in-house lawyers and the structure and responsibilities of legal departments? Did the company create a CCO position because management or the board wanted to be able to conduct training and investigations in concert with, but separate from, lawyers who carry privilege and defense responsibilities? Did the company create this role in response to perceived "best practice" requirements imposed by groups such as shareholder lobbies or consultants, such as ISS or The Corporate Library or the Ethics Officer associations? Did the role emerge while we weren't looking because management was concerned that lawyers didn't have the compliance skill sets or operational authority that is needed? Was the appointment awarded to a great achiever in the company title in order to allow that person to exercise vision and strategic re-direction in the aftermath of a failure the company hoped to recover from?

However the CCO office gets started, it is precisely because an embedded culture of compliance is indispensable to today's businesses that in-house counsel should want to either own or better understand how to coordinate the compliance officer function with the legal department's role and responsibilities.

ACC recently hosted a meeting with an astute group of CLOs who work in heavily regulated industries; the topic of conversation was the shifting focus of the CLO from what is strictly "legal" work to better managing risk, and especially entity-threatening risk. There was a significant conversation on whether the issue in most companies was even one of "legal" standards any longer: legal compliance has become the floor, and public expectations often stretch far higher than "did you comply?"

There is almost universal agreement that risk issues are far more likely to dominate board and executive management agendas today. The concern expressed was whether there was a misplaced presumption that "independent" compliance offices were consistent with the role of the CLO

who is grappling with how to help the company assess, prepare for, and manage risk. Where separate compliance offices exist, there was a general concern over whether the company's focus on compliance becomes one designed to train and measure, rather than one that seeks to help companies navigate far more complex waters, where judgment, risk, reputation, media, regulation, and legal requirements all interact. Everyone agreed that when the perfect storm combines all these elements under the umbrella of a potential disaster, the resulting challenges require a response and the ability to demonstrate corporate character that baseline compliance programs don't afford. How will law departments address these concerns if compliance is no longer their job — when some other corporate function is technically charged with "keeping the milk in the glass," to go back to my easy descriptor from days gone by.

Personally, I think this issue will be a dominant challenge to departments in the coming years as thoughtful leaders in companies struggle with increasing scrutiny from regulators, investors, commentators, and the media to manage risk and assure company compliance. And our concerns are augmented by the suspicion shared by many in the in-house world that the focus of many regulators on embedding compliance functions outside the legal department is partly designed to "remove" lawyers from the investigation process or prevent management from "hiding" from direct responsibility and liability for corporate failures. (After all, it is easier to show "compliance failed" (a strict standard) than whether management assessed and managed legal risk and developed appropriate and sufficient responses (a negligence or criminal standard that requires proof of mal-intent or misconduct, and allows for defenses).

ACC is not only watching the trends and trying to assemble knowledge and best thinking, but is considering what our role should be in helping CLOs better shape the role and responsibilities of both compliance and legal departments (whether married or separated in the corporate hierarchy). Our goal, as always, is to find the best ways to help corporate clients both

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Sixth Annual Corporate Counsel Awards

WMACCA is proud and pleased to present the **6th Annual Corporate Counsel Awards** on Thursday, October 14.

The Awards are the top honor in this region for in-house counsel. Please join us as we recognize the accomplishments of in-house lawyers with presentation of the Corporate Counsel Awards for Outstanding Chief Legal Officer, Outstanding In-House Counsel, Outstanding Law Department, and Community Service.

The reception is an evening of great networking, renewing old acquaintances and making new ones, and celebrating the contributions that in-house counsel make to our organizations.

The Awards Reception will take place from 6 to 10 p.m. at The Ritz-Carlton Tysons Corner. For more details and registration, please visit our web site at <http://www.acc.com/chapters/wmacca/awards.cfm>.

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stay out of trouble, and successfully operate their businesses in a forward-thinking fashion.

What are you doing or thinking about in your company and as you develop your role as an in-house counsel. Is this a “false” discussion? Is it one that will drive the perceived value of legal departments in the future? Should CCOs be independent from or part of the legal function? How will the CCO’s role, as it continues to emerge, be best coordinated with Legal?

We’re interested in your opinions and experience. What do you think? Contact me at hackett@acc.com, or comment on this article as it appears on our blog post, Inhouse ACCess at www.inhouseaccess.com/.

Want More Info?

To follow and engage on topics of particular concern to law department leadership, please see any of our CLO ThinkTank reports, briefing materials and resource listings, which include several sessions on this and related topics, all available at: <http://www.acc.com/community/clo/thinktanks/CLO-ThinkTank.cfm>

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