Nonprofit & Exempt Organizations

LAW GROUP

Social Enterprises:

California Benefit Corporation, & Flexible Purpose Corporation

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Flexible Purpose Corporation

SB 201: signed by the Governor (10/10/11)

- Special Purpose (Articles)
- Director protections
- Shareholder protections
- Transparency

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Special Purpose

- Charitable or public (like PBC)
- Promote positive effects of activities or minimize adverse effects of activities on:
  - Employees, suppliers, customers, creditors
  - Community & society
  - Environment

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Director Protections

- Directors may consider:
  - Shareholder economic interests
  - Other special purpose interests
- How to balance competing interests?
  - Reasonable
  - Material

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Shareholder Protections

- 2/3 supermajority vote
  - Conversion
  - Merger
  - Sale of substantially all assets
  - Change the Special Purpose

- Dissenters' rights (of appraisal)
  - Independent judicial determination of fair value

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Transparency - website

- Annual Report: Special Purpose MD&A
- Identification & discussion of:
  - Objectives relating to special purpose
  - Actions to achieve objectives
  - Future actions to achieve objectives
  - Evaluation measures
  - Operating & capital expenditures

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Why do we need the FPC?

- Business Judgment Rule
- Constituency Statutes (31 States, not incl. CA)

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Business Judgment Rule

- Operational
- Structural
  - *Revlon* duties

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Constituency Statutes

- Interests of shareholder ≠ Interests of corporation
- Mostly permissive authorization ("may" consider)
- Not in California (vetoed in 2007)
- Little guidance, unclear protections
  - To directors
  - To courts

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Remaining Issues

- New form – untested
- Greenwashing
- What weight to give special purpose
- How to enforce special purpose (BJR)

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Benefit Corporation

AB 361: signed by the Governor (10/10/11)

- General public benefit
- Optional specific public benefits
- Director protections
- Shareholder protections
- Transparency

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Not the same as Certified B Corporation!

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Not the same as For-Benefit Corporation!

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General Public Benefit

- Positive impact on society and the environment
  - Taken as a whole
  - From business and operations
- Assessed against third-party standard
  - Independent
  - Transparent

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Specific Public Benefits

- Beneficial products/services to low-income/underserved
- Economic opportunity
- Environment
- Human health
- Arts, sciences, or advancement of knowledge
- Flow of capital to public benefit-purposed entities
- Any other benefit for society or the environment

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Director Considerations

1. Shareholders;
2. Employees and workforce (incl. of subs and suppliers);
3. Customers;
4. Community and societal considerations;
5. Environment;
6. S/T and L/T interests of the corp (control); AND
7. Ability of corp to accomplish public benefit purposes

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Director Liability

- None for failure to create public benefit
- No fiduciary duty to beneficiary of public benefit
- Benefit enforcement proceeding – NEW C/A
  - To anyone specified in the Articles or Bylaws

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Shareholder Protections

- 2/3 supermajority vote
  - Conversion
  - Merger
  - Change any specific public benefit
- Dissenters' rights (of appraisal)
  - Independent judicial determination of fair value

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Transparency - website

- Annual Benefit Report
  - Ways corporation pursued public benefit purposes
  - Assessment of social and environmental performance (third-party standard)

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