



“Do Benefit Corporations Respect Human Rights?”, SSIR Fall 2017: B Lab Response

In their recent article “Do Benefit Corporations Respect Human Rights?”, Joanne Bauer and Elizabeth Umlas raise concerns about the value of the benefit corporation legal structure and the rigor of the B Corporation certification, particularly as it pertains to protecting and promoting human rights. While the below points are intended to provide clarity about the benefit corporation legal structure and the current process and requirements for B Corp certification, we agree that B Lab would benefit from increased dialogue with the Business and Human Rights (BHR) movement to ensure that B Lab continues to improve its ability to accurately assess a company’s impact on human rights, particularly as an increasing number of multinational and public companies seek to engage with the B Corp movement.

Human rights has been a central topic of discussion in B Lab’s Multinational Public Markets Advisory Council ([MPMAC](#))--tasked with advising B Lab on creating a meaningful and manageable path for B Corp certification for multinationals-- whose initial proposals will be available for feedback and comment by the end of 2017. While Bauer and Umlas ask a provocative and useful question, which we will not attempt to address here, about whether any company can simply become too large to respect human rights adequately regardless of their good intentions or legal form, the work of B Lab and the MPMAC has generally been focused on creating higher standards and supplemental requirements for these companies to join the global community of Certified B Corporations. More broadly, the B Impact Assessment as a whole is in a process of continuous improvement, updating on three year cycles to incorporate the feedback of users, stakeholders, and experts, with the next version scheduled for launch in January 2019. Anyone interested can contribute [broad or line-item feedback](#).

Regarding the benefit corporation legal structure, Bauer and Umlas correctly point out that there is not yet any case law about benefit corporations. However, they may underestimate the potential power of this new corporate governance tool to enable more impactful and ethical decision making and to hold corporations accountable to respect human rights. Court judgments are only one way that corporate law drives corporate decision making; more often, boards of directors and the risk managers who advise them make decisions based upon how, in their typically risk-averse judgement, a *potential* litigation is likely to play out based upon their specific facts and circumstances and the relevant corporate law.

Since the relevant corporate law for a benefit corporation expands the fiduciary duty of directors to consider the impact of their decisions on all stakeholders, including decisions that might infringe upon human rights, shareholders of benefit corporations have unprecedented power to hold benefit corporations accountable through the credible *threat* of litigation in addition to the litigation itself. And, as Bauer and Umlas point out, the possible outcomes of such benefit corporation litigation will not be determined by whether an infringement of human rights is legal in whatever race-to-the-bottom jurisdiction the alleged infringement took place or will result in greater return for shareholders; instead, the outcome will be determined by whether the directors have failed to exercise their expanded fiduciary duty and to their obligation to ‘operate in a responsible and sustainable manner’. That could be a game-changer for human rights advocates, and is one reason why corporate law experts like Chief Justice of the Supreme Court of Delaware Leo E. Strine, Jr. says in a [Harvard Business Law Review article](#) that the benefit corporation “puts actual power behind the idea that corporations should ‘do the right thing’” and in a [paper for the University of Pennsylvania Law School Institute for Law and Economics](#) that the benefit corporation represents a step forward for those who believe that other constituencies than shareholders should be given more protection under corporation law.

Regarding the process and requirements for B Corp certification, as Bauer and Umlas correctly point out, B Corp certification rests on three fundamental pillars: higher standards of performance, accountability, and transparency towards their stakeholders. The performance requirement is applied through the [B Impact Assessment](#), an impact management tool curated by the non-profit organization B Lab and overseen by an independent [Standards Advisory Council](#).

The B Impact Assessment is comprised of two main parts:

The first is a scored portion of the Assessment that measures the positive and aspirational practices of a company with questions that are designed to extend beyond current legal and market norms. It rewards companies for practices like going beyond paying a legal minimum wage to an actual living wage; going beyond the evaluation of performance of your own operations to screening your supply chain for their social and environmental practices; and having specific business models designed for positive impact, such as developing renewable energy products for bottom of the pyramid customers, or creating in depth hiring programs for returning citizens or refugees.

The second part of the Assessment, the Disclosure Questionnaire, is unscored and is focused on the sensitive, controversial, and potentially negative impacts of a business’s performance and impact, such as tax avoidance, large scale land acquisition or “land grabbing,” discrimination, and child labor. The way that these two sections function, and how they are designed to complement one another, is unfortunately not adequately conveyed in Bauer and Umlas’s article and thus creates potentially faulty conclusions.

Bauer and Umlas state that the required score for certification of 80 out of 200 available points sets a “low bar” because a “company could just as easily qualify by achieving a relatively poor score of 16 or 17 out of 40 points in each of the five areas.” For quick context, the median score of the roughly 15,000 businesses that have completed the B Impact Assessment is in the mid-50s, so a verified score of 80 may not be as low a bar as the authors believe. One reason there is so much ‘headroom’ above the minimum score of 80 required for certification is that the score is focused on positive impact that extends beyond current norms; points are difficult to earn, and many of the aspirational and positive practices are out of reach even for leading high impact companies. While one could certainly debate whether the required score should be an 80 or some other level, the overall intent is as follows: the nature of the score is not about compliance, and while a company need not be “perfect” to achieve B Corp certification, they do need to demonstrate a sufficient level of performance on these aspirational metrics across all aspects of a company’s social and environmental practices.

But, then, why are the topics of the Disclosure Questionnaire, which are so important to understanding a company’s impact, unscored? While Bauer and Umlas describe this as “the trouble with the DQ” because to them it suggests potential negative impacts are not sufficiently factored into the requirements for certification, B Lab believes the opposite is true. Separating the DQ and keeping it unscored is not only appropriate for an important conceptual reason, but also because it elevates these issues from a mere aspiration to one necessitating investigation and review prior to a company earning B Corp Certification at all, and independent of whether the company’s verified B Score is above the 80 minimum.

B Lab believes that positive, aspirational practices and negative practices or rights violations cannot and should not be equated; to try to do so presumes that it is possible to “offset” things like human rights violations with other good practices. But donating to charity, or paying employees a living wage, cannot negate the potential harms posed elsewhere from negative practices like human rights violations. The two types of impacts are unique and incommensurable, and combining them would “hide” those negative impacts in an overall score and provide an incomplete or unclear picture of a company’s performance.

Instead of scoring issues related to negative impact included in the DQ, they are reviewed individually for their materiality by B Lab and its Standards Advisory Council to determine whether a company is eligible for certification or whether incremental actions need to be taken, including incremental transparency of the issue, remediation, or denial / revocation of the Certification, *regardless* of the company’s score. These issues therefore become a baseline of the certification; while a company is not required to do any individual practice featured in the scored portion of the assessment, the DQ could be considered more critical and central to any individual company’s eligibility for certification because each question on the DQ is reviewed individually, and could disqualify a company from certification or a B Corp from recertification. This review is also bolstered by background checks and a public complaint process by which B Lab independently reviews a company for any sensitive issues identified during the certification or biennial recertification process or by concerned stakeholders at any time.

Highlighting a few examples of B Corps who have faced negative press or allegations of negative impact (without prejudging the merits of those reports or allegations) to draw conclusions about the more than 2,000 B Corps as a whole, as Bauer and Umlas do, is painting with too broad a brush. With the processes above, all Certified B Corps have had their negative impacts reviewed and all of them are subject to an ongoing process by which they can continue to be reviewed through recertification and the public complaint mechanism.

One thing seems clear. Just as much as the world needs thoughtful conversations and advocacy on the topic of business and human rights, the world also needs corporate governance tools like the benefit corporation, management tools like the B Impact Assessment, and business leaders like Certified B Corporations willing to subject themselves to rigorous third party standards of verified performance and transparency. Benefit corporations provide the enabling legal infrastructure, as Bauer and Umlas point out, to consider stakeholder impact -- including respect for human rights -- beyond what can be contained within a business case, where traditional corporate forms do not. The B Impact Assessment provides a free roadmap and a toolkit for all companies to put these principles into practice. And Certified B Corps, though they are not "perfect" companies, serve as leaders of a broader movement to build an inclusive economy that can create a shared and durable prosperity for all. That is the shared vision of the BHR and B Corp movements, and one we agree is more likely to be achieved by working more closely together and with others.