



NYLPI NONPROFIT TOOLKIT



SO YOU WANT TO START A SOCIAL ENTERPRISE?

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INTRODUCTION

Recently, there has been increased interest in “social enterprises,” or ventures that seek to both return a profit to their owners while also providing social or environmental benefits to the community. This concept is inherently at odds with the traditional nonprofit/for-profit split between entity structures that has historically existed. As a result, social enterprises are confronted with the choice of a traditional entity form, such as a C Corp or LLC, or one of the new, relatively untested entity forms, discussed in this guide in more detail, that can be used in many states, including California, Delaware and New York.

Social enterprises are confronted with the choice of selecting new entity forms that have been passed by many states, including but not limited to, California, Delaware and New York. In addition, social enterprises may also adopt traditional entity forms, such as the C Corp or the LLC. Indeed, in our experience, the majority of social enterprise clients that are not nonprofit organizations

are either in a tandem structure or are a traditional entity form. It is also important to note that traditional entities may seek to obtain third-party certification confirming their social enterprise status without having to select a non-traditional entity form. A prominent example is the “B Corp” certification offered by B Lab, a Pennsylvania-based nonprofit organization seeking to harness the power of business to solve social and environmental problems. B Corp certification is distinct from the new entity forms, such as the benefit corporation form discussed in this Guide; the former is a third-party certification available to a wide range of entity forms while the latter is a new corporate form authorized under state law. The choice of entity form is an important one for all businesses, including social enterprises. This Guide seeks to provide a general overview of the decision making points that should guide your choices.



WHAT IS A “SOCIAL ENTERPRISE”?

There is no universally accepted definition of “social enterprise.” Among other organizations, Ashoka, a leader in the social entrepreneurship movement, defines social enterprise as “any for-profit business venture that seeks to produce both financial as well as positive social and/or environmental returns.”

Entity forms generally fall into two categories: Nonprofit and For-Profit. The emergence of social enterprises and the rise of impact investing have disrupted this binary framework, resulting in the creation of new entity forms and the expansion of the concept of “corporate purpose.”

The legal frustrations of social entrepreneurs who seek to simultaneously pursue profits and social or environmental benefits has resulted in a new body of entity forms being

created at the state level. These frustrations stem from the fact that nonprofits are required to pursue their charitable purpose but are prohibited from distributing profits, while traditional for profit entities are required to maximize profit at the expense of social or environmental goals. Therefore, a business that seeks to provide financial return to investors or owners, or both, may choose one of the new entity forms to allow for this traditional activity while simultaneously allowing the business to unambiguously pursue social or environmental benefits. A social enterprise that does not have a profit making purpose, however, would likely choose a nonprofit entity form.



HOW DO I START A SOCIAL ENTERPRISE?

Given the wide range of options and the impact that an entity's legal structure will have on what it can legally do, it is crucial that key decisions regarding the entity's goals, purposes, funding, management and operations be made before any decision is made as to legal structure. Ideally, formation should occur after you have completed your initial planning stage, but well before you need to have a legal entity capable of taking action, such as opening a bank account, accepting a loan, or entering into a contract.

Once you have made these key decisions, a lawyer can help you select the best structure for your entity. The process to form a legal entity is relatively

straightforward — your lawyer will draft Articles of Incorporation and file them with the Secretary of State. If you form an entity in a state other than your home state, you may need to file additional paperwork to qualify to do business in your home state.

Depending on the state, this process can take anywhere from a few days to several weeks, so be sure to allow ample time.



HOW DO I CHOOSE AN ENTITY FORM?

Social enterprises are confronted with the choice of selecting new entity forms that have been passed by many states, including but not limited to, California, Delaware and New York. In addition, social enterprises may also adopt traditional entity forms, such as the C Corp or the LLC.

Indeed, in our experience, the majority of social enterprise clients that are for-profit organizations are either in a tandem structure or are in a traditional entity form. The different types of entity forms now available, including advantages and disadvantages for each, are described below.

TRADITIONAL ENTITY FORMS

Sole Proprietorship

A sole proprietorship is the simplest and most common structure chosen to start a business. It is an unincorporated business owned and run by one individual with no distinction between the business and you, the owner. You are entitled to all profits and are responsible for all your business's debts, losses and liabilities.

Advantages of the sole proprietorship include pass-through taxation and the ability to use d/b/a ("doing business as").

Sole proprietorships are easy to start, with low start-up costs.

Disadvantages include unlimited liability for the sole proprietor and an inability to access outside capital. Sole proprietorships are limited to a single owner and are limited in life to the life of the owner.



Partnership

A partnership is a type of unincorporated business organization in which multiple individuals, called general partners, manage the business and are equally liable for its debts; other individuals called limited partners may invest but not be directly involved in management and are liable only to the extent of their investments.

Partnerships can take many forms, including the General Partnership (GP), Limited Partnership (LP), Limited Liability

Partnership (LLP), and Limited Liability Limited Partnership (LLLLP). Partnerships are simple and inexpensive to establish and maintain. They have the same advantages of sole proprietorships, but also permit two or more owners.

Disadvantages include unlimited liability for general partners and difficulty in raising capital. Partnerships are also subject to default rules.

Limited Liability Company

The LLC combines the advantages of a corporation (minimum personal liability, selling stock, etc.) with those of a sole proprietorship and partnership (sharing management decisions, profit, etc.). The LLC is an increasingly popular form of organization.

LLCs offer the protection of a corporation and the flexibility of a partnership. The LLC can be managed by their owners/members, or by a third party. The LLC typically does not have a Board of Directors. It is a creature of contract — all decisions are governed by the Operating Agreement.

Advantages of the LLC form include low start-up costs and fewer formalities in formation and governance, unlimited owners, limited liability for all owners, flexible taxation, and flexible purpose.

Disadvantages include formation and governance formalities required by law, such as mandatory state filings. The LLC may have difficulty raising capital, and also face potential management, ownership, and governance complexities.



Corporation

A corporation is a form of business operation that declares the business as a separate, legal entity guided by a group of officers known as the board of directors. A corporation offers limited liability of shareholders for the debts of the corporation. It is subject to the corporate code of the state of incorporation. A corporation has built-in roles for daily management, ownership and oversight:

- Employees engage in daily management
- Shareholders engage in ownership
- Directors engage in oversight

A corporation is designed to easily hold assets, undertake debt obligations, and provide equity purchase opportunities. State law generally requires that corporations adhere to the

principle of shareholder wealth maximization, especially in the context of a change of control situation.

A corporation is the ideal legal structure for raising capital. Its advantages include limited liability for founders/ shareholders, possibility of equity incentives, facilitation of multiple co-founders, the benefit of the “business judgment rule,” and perpetual existence.

However, a corporation is often complicated and costly to structure. It is subject to licensing and filing requirements, entity-level taxation, compliance and governance requirements, and a lack of flexibility to prioritize social or environmental goals.

NEW ENTITY FORMS FOR SOCIAL ENTERPRISES

When choosing one of these newly-established entity forms, it is important to consider not only corporate purpose, but the ongoing compliance responsibilities associated with each entity. This guide seeks to provide a general overview

of each type of entity, as well as the key decision-making points that should guide your choices.



Benefit Corporations (Model)

Benefit corporations are for-profit organizations that are a subcategory of a state’s traditional business corporation, and accordingly, are subject to a state’s corporate code. Benefit corporations are subject to special rules and fiduciary duties that are designed to lock in the organization’s stated public benefit purpose that is focused on workers, the community and/or the environment. Specifically, a benefit corporation must state in its articles of incorporation that it is organized for a “general public benefit,” which is defined as “a material positive impact on society and the environment, taken as a whole, assessed against third-party standards, from the business and operations of a benefit corporation.” In addition, a benefit corporation may elect to identify one or more “specific public benefit” purposes in its articles of incorporation, described below. All benefit corporation statutes require the production of a benefit report, which assesses the benefit corporation’s social and environmental performance against a comprehensive, independent third-party standard. In most jurisdictions, the benefit report must be published annually, delivered to the shareholders, and made publicly available on the benefit corporation’s website.

Currently, you can form a benefit corporation in the following states: Arizona, Arkansas, California, Colorado, Delaware, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Nevada, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, plus the District of Columbia.

A benefit corporation has the same benefits as the traditional corporation, including its ability to brand itself, market itself, and signal to impact investors, strategic partners and employees.

However, it also faces the same disadvantages as the traditional corporation. Moreover, it faces additional disadvantages as an untested corporation form, such as variation among different states’ enabling statutes, the imposition of additional fiduciary duties on directors, the requirement of a Benefit Director in most states, additional reporting requirements, and increased complexity and voting thresholds in the mergers and acquisitions context.



Key considerations include: (i) Corporate Purpose, (ii) Duty to Consider Stakeholders, (iii) Right of Action, and (iv) Reporting Requirements.

Corporate Purpose

- Mandatory General Public Benefit

A benefit corporation must state in its articles of incorporation that it is organized for a “general public benefit,” which is defined as “a material positive impact on society and the environment, taken as a whole, assessed against third-party standards, from the business and operations of a benefit corporation.”

- Optional Specific Public Benefit

A benefit corporation may also include one or more “specific public benefit” purposes in its articles of incorporation. If it selects a special public benefit, any change to its corporate purpose requires the approval of a two-thirds majority (or a greater amount if required by the articles of incorporation) of the outstanding shares of the benefit corporation. Examples of special public benefits include, but are not limited to, the following:

- Providing low income or underserved individuals or communities with beneficial products or services;
- Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;
- Preserving or improving the environment;
- Improving human health;
- Promoting the arts or sciences or the advancement of knowledge;
- Increasing the flow of capital to entities with a public benefit purpose; and
- Conferring any other particular benefit on society or the environment.



Duty to Consider Stakeholders

In addition to the traditional duty of loyalty and duty of care, benefit corporation legislation imposes on directors an additional “duty to consider” the impact of any proposed action or inaction upon the following:

- The shareholders of the benefit corporation;
- The employees and workforce of the benefit corporation and its subsidiaries and suppliers;
- The interests of customers as beneficiaries of the general or specific public benefit purposes of the benefit corporation;
- Community and societal considerations, including those of any community in which offices or facilities of the benefit corporation or its subsidiaries or suppliers are located;
- The local and global environment;

Right of Action

Most benefit corporation statutes provide for a special right of action — a benefit enforcement proceeding (BEP) — which ensures that directors of a benefit corporation take non-shareholder interests into account when making business decisions.

- The short-term and long-term interests of the benefit corporation; and
- The ability of the benefit corporation to accomplish its general, and any specific, public benefit purpose.

The “duty to consider” prescribes a process, not results. It does not require any particular outcome. Directors are not required to give priority to the interests of the aforementioned groups, unless the articles of incorporation provides otherwise. Directors owe no duty to non-shareholder groups that are beneficiaries of the benefit corporation’s general or specific public benefit purpose. Finally, directors are shielded from monetary liability in the event the benefit corporation fails to accomplish a general or specific public benefit.

The following persons generally have standing to bring a BEP:

- Directly by the benefit corporation itself;
- Derivatively by:



- A director;
- Any person or group of persons that own at least 2% of the total number of outstanding shares of the benefit corporation;
- Any person or group of persons that own 5% or more of outstanding shares of a benefit corporation's parent company; and

- Any other persons granted standing in the articles of incorporation or bylaws.

A BEP may be brought for an alleged failure to pursue a general or specific public benefit, or a statutory violation of any benefit corporation-specific obligation, special duty or standard of conduct, such as the requirement to produce and disclose an annual benefit report.

Reporting Requirements

In addition to financial reports, all benefit corporation statutes require the production of an Annual Benefit Report (ABR) which assesses the benefit corporation's social and environmental performance against a comprehensive, independent third-party standard. Examples of third-party certifications include IRIS, the Global Reporting Initiative, Green America Certified Business, Green Seal Certification, and the ISO 26000. In most jurisdictions, the benefit report must be published annually, delivered to the shareholders, and made publicly available on the benefit corporation's website.

The report must include a narrative description of the following:

- The ways in which the benefit corporation pursued both its general and any specific public benefits during the preceding year;
- Any circumstances that have hindered the creation of general or specific public benefits;
- An assessment of the social and environmental performance of the benefit corporation; and
- An Annual Compliance Statement of the Benefit Director.



Delaware Public Benefit Corporation

As the most common jurisdiction for entity formation, it is of note that Delaware has adopted the benefit corporation but with some important distinctions outlined below.

Delaware Public Benefit Corporations (“DE PBCs”) are a relatively new corporate form in Delaware. As DE PBCs have only been in existence since 2013, only a few hundred have been formed to-date, and only one has become a public company, there is not enough data to determine market acceptance. In addition, the provisions related to fiduciary obligations, particularly in the context of the expanded scope of stakeholder rights, as well as the determination

Corporate Purpose

DE PBCs must operate in a manner intended to (a) produce a public benefit or public benefits and (b) operate in a responsible and sustainable manner. In practice, this requires that the DE PBC identify at least one “specific public benefit” which the DE PBC will pursue. This is unlike the model benefit corporation which allows but does not require a “specific public benefit”. The DGCL provides significant flexibility in identifying a specific public benefit, only requiring that this public benefit is intended to create:

of “fair value” in the context of appraisal rights, remain untested in the courts. Similar to a model benefit corporation, outside of the specific provisions included in the relevant section of the Delaware General Corporation Law (the “DGCL”), DE PBCs remain subject to the same Delaware corporate law requirements, tax considerations, and regulatory oversight as other for-profit corporations in Delaware.

Key differences for DE PBCs include: (i) Corporate Purpose, (ii) Duty to Consider Stakeholders vs. Balancing Test, (iii) Right of Action, and (iv) Reporting Requirements:

“a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, or communities or interests (other than stockholders in their capacities as stockholders), including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature.” 8 Del. C. §362(b)



The specific public benefit(s) identified by the DE PBC must be identified in the DE PBC’s charter. In accordance with the requirements above, the specific public benefit(s) may be very narrow or rather broad. As it requires a 2/3

approval of the outstanding stock to change the specific public benefit(s), these provisions should be crafted in a manner that aligns with the DE PBC’s goals but also provide flexibility for growth and development.

Duty to Consider Stakeholders vs. Balancing Test

Like model benefit corporations, in addition to the traditional duty of loyalty and duty of care, DE PBCs are subject to an additional duty when managing or directing the business affairs of the corporation. However, unlike the seven pronged model benefit corporation “duty to consider”, DE PBCs must instead engage in a three-part balancing test when making decisions for the DE PBC, balancing (a) stockholders’ pecuniary interests; (b) the best interests of those materially affected by the DE PBC’s conduct; and (c)

the public benefit or public benefits identified in the charter. Each of these three prongs is given equal weight, requiring that no consideration has primacy over any other.

Note that, similar to the model benefit corporation “duty to consider”, this balancing test does not require any specific outcome but only that the directors engage in this process when making decisions.

Right of Action

Under the DE PBC statute, provided that the director’s decisions are informed and disinterested, the director has no liability to any person as a result of the public benefit(s) identified in the charter or due to interests materially affected by the DE PBC’s conduct.

In contrast, the model benefit corporation statute provides for a new right of action relating to the failure of a benefit corporation to pursue or create its public benefit or the violation of an obligation, duty or standard or care under the model benefit corporation statute to a new right of action called a benefit enforcement proceeding.



While the DE PBC statute does not provide for this new enforcement action, it does contemplate enforcement of the director balancing test through a derivative suit. Such derivative suit may only be brought by stockholders owning

at least 2% of the outstanding shares or, if the shares are listed on a national securities exchange, the lesser of 2% or shares with a market value of at least \$2,000,000.

Reporting Requirements

Contrary to the model benefit corporation, a DE PBC is not required to produce an ABR, nor is it required to assess its social and environmental performance against an independent third-party standard. In lieu of the ABR requirement, a DE PBC, at a minimum of every other year is required to provide a statement to stockholders. This statement must include:

- the objectives established by the board to promote the public benefit(s);
- the standards used to measure progress toward the public benefit(s);
- objective factual information based on the standards identified by the board; and

- an assessment of the DE PBC’s success in meeting the objectives.

The charter or bylaws may also require (i) more frequent reporting; (ii) public disclosure; and/or (iii) third-party certification of the public benefit(s).

As there is no required standard for these statements (and no requirement that they be released publicly), the quality of such statements varies widely. DE PBCs which have also received B Corp certification often use their B Impact Report. Other statement forms include a regularly updated “impact” page and a specific year’s impact report.



Social Purpose Corporations

A Social Purpose Corporation (SPC) allows for the pursuit of financial profit along with a stated general and specific social and/or environmental benefits of its own designation. SPCs are required to notify prospective investors that their goals will not be limited to earning a profit. Its aim is to protect directors from shareholder legal action.

Corporate Purpose

An SPC, like the benefit corporation, is a subcategory of the traditional corporation, designed for social entrepreneurs. Unlike a benefit corporation, which must be organized for a “general public benefit,” an SPC’s purpose is limited to one or more social purposes set forth in its articles of incorporation.

SPCs adhere to the Anti-Revlon Mission Statement:

The mission of this social purpose corporation is not necessarily compatible with and may be contrary to

SPCs haven’t been as widely adopted as the benefit corporation and are currently only available to be formed in California, Florida and Washington.

Key considerations include: (i) Corporate Purpose, (ii) Fiduciary Duties, and (iii) Rights of Action.

maximizing profits and earnings for shareholders, or maximizing shareholder value in any sale, merger, acquisition, or other similar action of the corporation.

A social purpose includes promoting positive effects or minimizing negative effects on one or more of the following:

- The SPCs’ employees, suppliers, or customers;
- The local, state, national or global community; and/or
- The environment.



Fiduciary Duties

Like directors of traditional business corporations, directors of SPCs are subject to the duties of loyalty and care. In addition, directors of SPCs are required to consider the social purposes of the SPC when making business decisions. The statutes make clear that directors and

officers do not owe any duty to third party beneficiaries of the SPC’s social purpose(s). Directors are shielded from liability for any action, or failure to act, so long as the director reasonably believes that the action is intended to promote the social purpose(s) of the SPC.

Rights of action against SPCs and annual reporting requirements vary from state-to-state.

Rights of action against SPCs vary from state-to-state. One statute allows, among others, any person or group of persons that own 5% of more of the outstanding shares of an SPC’s parent company to maintain a right of action. In contrast, under other SPC statutes, only shareholders have standing to bring a derivative action against an SPC.

Annual reporting requirements also vary from state to state. However, unlike benefit corporation reports, there is no requirement that the social purpose report be assessed against an independent, third-party standard.

Low-Profit Limited Liability Companies

In general, low-profit limited liability companies (L3Cs) are a subcategory of the LLC designed to attract private foundation investments. An L3C shares the same fundamental characteristics of LLCs, such as flexibility in

organization, operation and tax treatment, liability protection, and ability to brand itself, market itself and signal to private foundations.



Currently, you can form an L3C in the states of Illinois, Kansas, Louisiana, Maine, Michigan, North Dakota, Rhode Island, Utah, Vermont and Wyoming.

As an untested entity form, the L3C also faces disadvantages. It faces the same disadvantages of the LLC and the risk of defaulting to traditional LLC status. It does not receive any special federal tax treatment advantages over the LLC, and state enabling statutes do not conform to federal tax law and regulation governing program related investments (PRIs). According to the IRS, program-related

Corporate Purpose

The L3C is unique among social enterprise forms in that it must be formed for a charitable or educational purpose within the meaning of Section 170(c)(2)(B) of the Internal Revenue Code (IRC). It must also pass the “But-For Test”: The L3C “would not have been formed but for the company’s relationship to the accomplishment of charitable or educational purposes.”

In addition to these affirmative requirements, there are restrictions. The production of income or the appreciation

investments are those in which (1) the primary purpose is to accomplish one or more of the foundation’s exempt purposes, (2) production of income or appreciation of property is not a significant purpose, and (3) influencing legislation or taking part in political campaigns on behalf of candidates is not a purpose.

Key considerations include: (i) Corporate Purpose, (ii) Fiduciary Duties, (iii) Rights of Action, and (iv) Reporting Requirements.

of property must not be a significant purpose of the L3C, and it cannot have a political or legislative purpose within the meaning of Section 170(c)(2)(D) of the IRC.

The requirements are designed to align L3C with PRI requirements under the IRC, but the IRC grants no special status to PRIs in L3Cs. In the event an L3C fails to satisfy any of these requirements, it immediately ceases to be an L3C and converts to a limited liability company by operation of law.



Fiduciary Duties

L3C statutes lack clarity regarding the fiduciary duties of their managers. Because L3C statutes are appended to a state's LLC Act, one needs to refer to the LLC Act to determine fiduciary duties of members or managers of L3Cs. State LLC Acts vary from state-to-state.

The L3C also faces the “Two Masters” problem: a conflict between charitable purpose and profit purpose.

Right of Action

No L3C statute grants standing to any group of individuals to bring a special right of action to enforce the charitable mission of the company. Accordingly, L3C members

The L3C faces a need for financial viability, but it can have “no significant purpose of the production of income.” Enabling statutes do not prioritize any one purpose over another, and do not give much guidance on governance or fiduciary issues.

must rely on derivative suits traditionally available to LLC members to allege violations of fiduciary duties against the L3C or its managers.

Reporting Requirements

Unlike all other social enterprise forms, the L3C is under no legal obligation to produce non-financial reports assessing the company's social or environmental performance.



WHAT ABOUT TRADITIONAL TAX-EXEMPT NONPROFIT ENTITY STRUCTURES?

Social enterprises may also be incorporated as a nonprofit organization under state law. The term, nonprofit, is used to describe a group formed to achieve a mission that involves serving the public good, rather than to make a profit. Any charitable organization that is interested in obtaining tax exempt status as a 501(c)(3) organization must first form as a nonprofit entity in a single U.S. jurisdiction.

Incorporating as a nonprofit profit organization requires the filing of a certificate or articles of incorporation with the Secretary of State. Incorporating as a nonprofit organization provides several benefits including (i) legal protection for individuals associated with the nonprofit, including its directors, (ii) ownership of property and money by the entity rather than by any individual, and (iii) the ability to retain and use profits earned in connection with the nonprofit's

charitable activities. While these benefits are significant, the process of forming as an independent legal entity will require that a large amount of time and energy be devoted to establishing organizational infrastructure and processes such as maintaining bank accounts and record books, setting up accounting processes, drafting a suite of organizational documents and internal policies, and complying with various state level reporting requirements on an ongoing basis.

After incorporation, a nonprofit organization may apply for tax exempt status to the Internal Revenue Service (IRS), and must provide a detailed narrative of activities in the Form 1023 application. The narrative must demonstrate that the organization's activities meet one of the exempt purposes and qualify the organization for tax exemption.



The nonprofit must word this section carefully and fully to present a complete picture of the nonprofit, while also leaving room for the organization's activities to grow over time. Form 1023 also requests information on sources of financial support, fundraising programs, the governing board, related organizations, management agreements and lease agreements, membership benefits, fees for services and whether services are limited to specific individuals. Form 1023 also includes questions about lobbying and political activities. Because of the extensive business and financial planning that is required by the application, the process of compiling a complete 1023 application often takes organizations at least two months.

The Internal Revenue Service has allowed for the creation of tax-exempt charitable organizations. These groups manifest in one of two ways: as private foundations or as public charities. A private foundation is a nonprofit charitable entity, which is generally created by a single benefactor, usually an individual or business. Using this initial seed donation, an investment is made to generate income, which is then

dispersed according to the agency's charitable priorities. The range of these priorities must adhere to Section 501(c)(3) of the Internal Revenue Code and includes such areas as: relief for the poor, advancement of education and the combating of community deterioration. Private foundations generally make use of grants to individuals or other charities, as opposed to direct funding of their own programs. A public charity, in contrast, tends to carry out some kind of direct activity, such as operating a homeless shelter. The only substantive difference between the two is the manner in which funds are acquired. The "public" in "public charity" refers to the solicitation of periodic donations from the community. The amount of these donations is used to determine a quantifiable intensity of public support, which is necessary in order to achieve status as a "public charity."

IRC Section 501(c) defines 29 distinct categories of tax exempt nonprofit organizations. Classification as a Public Charity under Section 501(c)(3) is generally preferable.



501(C)(3) ORGANIZATIONS

Public Charity classification is generally preferable.

- Traditional Public Charities — Organizations that are, by definition or activity, public charities (§170(b)(1)(A)(i)-(iv))
- Publicly Supported Charities — Organizations receiving a substantial amount of support from the general public or governmental entities (§509(a)(1))
- Gross Receipts/Service Provider Charities — Organizations receiving a substantial amount of support from the general public or governmental entities (§509(a)(2))
- Supporting Organizations — Organizations excluded from private foundation treatment due to close association with public charities (§509(a)(3))
- Public Safety Organizations — Organized and operated exclusively to test for public safety (§509(a)(4))

Private Foundations:

Private Non-Operating Foundation (a/k/a Grant-Making Foundation)

The Grant-Making Foundation is the most common type of Foundation. It does not provide services or conduct charitable activities; rather, makes grants to public charities that, in turn, provide charitable services or conduct

charitable activities. It is also subject to a 5% annual distribution requirement and various excise taxes (including a 2% excise tax on all net investment income).



Private Operating Foundation

The Private Operating Foundation is classified as a “hybrid”: it is treated as a public charity for purposes of charitable contribution with a 50% deduction limit. It does provide services or conducts charitable activities. It must expend 85% of its net investment income directly for purposes of carrying out its own charitable services or activities and must satisfy one of the following:

- Asset Test — at least 65% of the foundation’s assets:
 - Are devoted to its exempt activity or a related business
 - Consist of stock in a corporation that foundation controls (defined as at least 80% ownership), 85% of the assets of which are devoted to the exempt activity
- Endowment Test — the foundation distributes at least two-thirds of its minimum investment return directly for active conduct of its exempt activity
- Support Test — all three of the following criteria are met:
 - At least 85% of its support is normally received from the general public and five or more unrelated exempt organizations
 - Not more than 25% of its support is normally received from a single exempt organization
 - Not more than 50% of its support is received from gross investment income



I AM INTERESTED IN A HYBRID STRUCTURE. WHAT ARE MY OPTIONS?

Hybrid structures provide flexibility and adaptability to achieve a variety of organizational goals. Hybrids provide access to investment capital and grants, and may provide tax advantages to entities and investors. These business ventures may operate within an existing nonprofit organization, or they may be structured as a subsidiary or affiliate of a nonprofit organization.

However, a hybrid is difficult and costly to establish and maintain due to its complex organizational structure. It

Nonprofit Parent/For-Profit Subsidiary

This form is appropriate where:

- Activities of the subsidiary further the parent's charitable purpose and are not UBIT (unrelated business income tax) generating; or

requires high-level sophistication and emphasis on documenting and structuring transactions to avoid negative tax consequences (i.e., private inurement and unrelated business income). It also requires sophisticated legal, tax and accounting assistance.

Here are a few models:

- The parent is willing to pay UBIT, but activities of subsidiary are not significant compared to the parent's overall activities, and thus do not jeopardize the parent's tax-exempt status.



- Advantages include the ability to raise investment capital through the for-profit subsidiary, ability of the subsidiary to contribute charitable donations to its parent, and the ability of the subsidiary to attribute its activities to its parent (alter ego).

An example of this is the Mozilla Corporation, a taxable subsidiary of the Mozilla Foundation, a nonprofit

For-Profit Parent/Nonprofit Subsidiary

A nonprofit subsidiary is typically a foundation entity (a/k/a a grant-making foundation) with the ability to give grants for charitable purposes to tax-exempt organizations and causes that the parent wishes to support.

For instance, Google founded Google.org in 2005. During the Google IPO, the parent company (Google) granted

Commercial Co-Venture

A Commercial Co-Venture (CCV) arrangement results in a “charitable sales promotion” campaign (a/k/a cause-related marketing). Each entity retains autonomy, and their relationship is contractual in nature only. CCVs are

organization founded in 2003. The corporate subsidiary serves the nonprofit, public benefit goals of its parent, the foundation, and is responsible for product development, marketing and distribution of Mozilla products, including the development of Firefox and Thunderbird. The corporation functions as a self-sustaining social enterprise — money earned through its products is reinvested into the organization.

3 million shares to its subsidiary (Google.org), valued at approximately \$1.8 billion. The subsidiary donates \$100 million in grants, 80,000 hours, and \$1 billion in products every year.

governed primarily by state law, and more than half of all US states, plus the District of Columbia regulate CCVs. The entities must adhere to registration, contractual, disclosure, accounting, and bond requirements.



WHAT CERTIFICATION CAN I OBTAIN FOR MY SOCIAL ENTERPRISE?

Some social enterprises adopt traditional entity forms, such as the C Corp or the LLC, and thereafter seek to

obtain third-party certification confirming their purpose-driven approach.

“B CORP” CERTIFICATION

A prominent example is the “B Corp” certification offered by B Lab, a Pennsylvania-based nonprofit organization seeking to harness the power of business to solve social and environmental problems. B Corp certification is distinct from the entity forms discussed above; the former is a third-party certification available to a wide range of entity forms while the latter, for example, a benefit corporation, is a new corporate form authorized under state law.

An organization seeking to be B Corp certified must first take a “B Impact Assessment” and obtain a score of 80 or higher, adopt B Lab’s amendments to its articles of incorporation, sign the B Corp Declaration of Interdependence and Term Sheet, and pay the appropriate certification fee.² Once this process is complete, B Lab certifies the organization as a B Corp, at which point it is subject to B Lab’s private regulatory regime and randomly selected on-site reviews.



UL CERTIFICATION

Underwriters Laboratories (UL) was originally incorporated in Illinois over one hundred years ago with the mission of working for a safer world. UL offers several different certifications, including product specific certifications like their GREENGUARD and ECOLOGO certifications which indicate a product's compliance with specific environmental performance criteria and third-party chemical emissions standards, as applicable and organization specific certifications, like the UL 880. The UL 880 Standard for Sustainability for Manufacturing Organizations denotes an organization's commitment to sustainability and can be obtained by an organization, regardless of its corporate form. EO Certification Ownership Alliance, a public

benefit corporation itself, offers Certified EO, a third party certification for employee owned companies. Ownership Alliance's goal is to grow the employee owned economy to benefit workers, customers and local communities by creating material wealth opportunities for workers and their communities. In order to qualify for the EO certification, an organization must:

- Be at least 30% owned through an ownership program
- Provide meaningful access to the ownership program to all employees; and
- Ensure that ownership in the program does not become too concentrated.



RAINFOREST ALLIANCE

An international organization, the Rainforest Alliance offers the Rainforest Alliance Certified seal to farms, forests and businesses that meet rigorous environmental and social standards. For example, to attain certification for a farm, the farms must meet the criteria of the Rainforest Alliance Sustainable Agricultural Standard. This standard not only requires that the farm commit to protecting its natural

ecosystem, to not contribute to deforestation, to conserve natural resources, to be a good neighbor and employer but also to put in place effective planning and management to ensure that the farm can sustain its commitment to these standards. Farms are audited for compliance at least annually and must show an increasing level of compliance to the standards.

SUSTAINABILITY ACCOUNTING STANDARDS BOARD (SASB)

While SASB does not offer a third-party certification confirming an entity's social enterprise status, it is an important organization in the world of social enterprise in that the standards developed by SASB are used by investors to evaluate an organization's performance on

financially material environmental, social and governance factors. The standards promote transparency and clear disclosure on these topics, with the goal of helping investors to understand whether their money is truly going to an organization committed to sustainability.



DOES MY ORGANIZATION QUALIFY AS A SOCIAL ENTERPRISE FOR THE PURPOSES OF OBTAINING PRO BONO COUNSEL?

NYLPI's Pro Bono Clearinghouse maintains full discretion over the social enterprises it deems appropriate for pro bono legal services. Social enterprises are much more likely to qualify for pro bono legal services than traditional for-

profit businesses because they are organized to produce positive social and environmental benefits. A social enterprise may qualify for pro bono legal services based on the eligibility of the owner, or of the entity itself:

Owners' Eligibility

When the individual(s) behind the social enterprise is/are eligible for pro bono legal services;

Entity Eligibility

If the individual(s) themselves do not qualify, the social enterprise may qualify if it satisfies all of the following criteria: (a) it has a social or environmental mission and purpose, (b) it allocates a significant portion of revenue to supporting the mission of the organization, (c) it has insufficient operation funds, and (d) it is "time bound."



- Social or Environmental Mission and Purpose

A social enterprise pursues the enhancement of economic, health, or social condition and overall well-being of low-income and disadvantaged people and groups.

- Revenue Allocation

A social enterprise’s revenues, if any, are used to support the mission of the organization. This criterion is inapplicable when the social enterprise is pre-revenue. When the social enterprise begins producing revenues, the following factors may be considered to determine whether the revenue allocation satisfy this criterion:

- Whether the organization has dedicated itself to contributing a significant and material percentage of its revenues to charitable or nongovernmental organizations;

- Whether the formational documents of the organization require it to reinvest a significant percentage of the revenues back into the business;
- Whether the social enterprise has entered into commercial co-venture partnerships with charitable or nongovernmental organizations;
- Whether investors in the social enterprise made investments in the venture without an expectation of a market rate of return; and
- The social enterprise’s historic dividend payout ratio, if any.

- Insufficient Operating Funds

A social enterprise possesses insufficient funds to pay for legal services, and would not otherwise be paying legal



fees, or it has sufficient revenue but the matter for which it is seeking pro bono representation is integral and related to its mission.

- “Time Bound”

The pro bono relationship is viewed, from its inception, as being “time bound” – to last only until the social enterprise becomes profitable from a market perspective and can pay for reasonably priced and competent counsel without sacrificing its mission.

This criterion can be satisfied in a variety of ways and should be clearly communicated in the engagement letter. For example, the pro bono representation may terminate (i) when the social enterprise begins to generate revenue; (ii) when the social enterprise closes its first round of financing; or (iii) when the annual profits of the social enterprise exceed a predetermined amount.

This document is not exhaustive or all-inclusive and is intended for general guidance only. For more information, please consult qualified legal counsel.

NEED A LAWYER?

New York Lawyers for the Public Interest works with nonprofits and community groups in the New York City area and beyond to connect them with the resources of expert law firms. Contact NYLPI’s Pro Bono Clearinghouse at 212-244-4664.



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²Examples of third-party certifications include IRIS, the Global Reporting Initiative, Green America Certified Business, Green Seal Certification, and the ISO 26000.

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