



A MESSAGE FROM THE CHAIR



As we move into the fall, most of us have adjusted to the new normal for now. While many of us are still at home, many of us have adjusted to working without a daily commute.

Businesses are dealing with the impact that COVID-19 has had on their ability to reach out to customers.

Yet, the damage has been done to many businesses in a variety of industries. There are some companies that will not be able to make it back and have closed down, while others have consolidated operations.

Attorneys are helping their clients with transitioning to working within a different set of circumstances. Businesses that received PPP loans will be receiving forgiveness decisions in the coming weeks. Other companies are dealing with commercial real estate and lending issues.

Disruptions in supply chains, concerns over health and safety, and a general consumer skepticism of returning to the public are all legitimate obstacles in the way of businesses. Contractual provisions are being scrutinized with an eye toward clauses that are usually seen as boilerplate or afterthoughts. The French term, “force majeure,” is a clause which relates to “an act of God,” that some have used to exit out of contractual relationships.

On the flip side, the pandemic has created the opportunity for some to become entrepreneurs and start their own businesses. Even with the hurdles that many have to overcome, there are always individuals and companies seeking new ways to do things.

In the nonprofit sector, organizations have expressed concerns over reaching the communities they serve. Several nonprofits have gone to online

Zoom classes and hangouts to “meet” many that they usually see in person. Many that depend on in-person fundraisers have pivoted to online auctions to continue with their traditions.

There will be changes coming this fall including the possibility of a new United States Supreme Court justice with the unfortunate passing of Ruth Bader Ginsburg, as well as a presidential election. Justice Ginsburg was just the second woman appointed to the highest court in the land.

Justice Ginsburg’s legacy on the U.S. Supreme Court is that of a respected jurist and a profound member of the Court’s liberal wing. While she is known to be a champion of equal rights, especially for women, she also was a protector of intellectual property. The “Notorious” RBG, a nickname she embraced after New York-based rapper The Notorious B.I.G., will be remembered as a champion

for equal rights in the workplace and as someone who helped pave the way for so many other female attorneys and judges.

Jason J. Cruz
Chair, WSBA Business Law Section

*...most of us
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normal...*

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PPP LOAN FORGIVENESS DETERMINATION BEGINS

By: Jason J. Cruz

Earlier this year, businesses applied for and received Payment Protection Program (PPP) loans from the U.S. Department of the Treasury as a means to facilitate businesses through the COVID-19 shutdown.

This fall, determinations will be sent out by the Small Business Administration (SBA) for approving forgiveness applications.

As part of the CARES ACT, which was introduced into law this past spring, as a way to help small business owners and independent contractors, PPP provided forgivable loans through the SBA. The loans were intended to keep workers on employer's payrolls while keeping businesses afloat. The money must be used for payroll, rent, mortgage interest, or utilities. Small businesses who received a PPP loan had eight weeks to use the funds for qualifying purposes, and the entire loan could be forgiven. Alternatively, companies that fall below a 60 percent threshold for payroll costs were able to apply for partial forgiveness at an interest rate of 1 percent. Loan repayments must occur within two years if issued before June 5 of this year and within five years if received after June 5.

The process for filling out these forms was cumbersome and difficult for smaller businesses. According to a Government Accountability Office report, some businesses have spent 15 hours filling out the paperwork to apply for these loans.¹

As of the beginning of October, lenders have submitted 96,000 forgiveness decisions for SBA review.² Although some filling out the applications believed that the loans would be fully forgiven, the SBA will provide the final determination on the loans.

PPP borrowers have until 10 months after their covered period expires to apply for loan forgiveness. Lenders have 60 days after receiving a completed application to issue a decision to the SBA. The agency then has 90 days to render its own determination, per the SBA website.

Despite the efforts to help businesses, a recent survey (published on Sept. 30) conducted by the American City Business Journals noted that seven out of 10 businesses have seen their revenue decline since the start of the COVID-19 pandemic and many say their cash reserves are likely to run dry by 2021.³

Lawmakers in Washington, D.C. are working on another stimulus package which may bring additional relief for business owners that were not a part of the first round of PPP loans. While the details are still being ironed out, the proposed law would allow second loans to small businesses with fewer than 200 employees with a 25 percent reduction in quarterly revenue year over year due to the pandemic.⁴ It would also focus more on helping smaller businesses as the proposal in this second package would exclude publicly traded companies and limit businesses with more than

one physical location. Another issue that legislators would like to address is the tax implications of receiving a PPP loan. To the consternation of business owners, guidance has been muddled on whether business expenses covered by the PPP loan are tax-free. Deducting businesses expenses could result in a higher estimated tax payment for those businesses that pay their estimated taxes on a quarterly basis. The reason being is that the determination on loan forgiveness had not been issued prior

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to the 2020 third quarter estimated taxes which were due in September.

In this next round, there will be an emphasis on streamlining the loan forgiveness application so that business owners can return to operating their businesses instead of navigating the loan process. ■

1 "Small Business Administration: COVID-19 Loans Lack Controls and Are Susceptible to Fraud", Oct. 1, 2020, available at www.gao.gov/products/GAO-21-117T

2 Cowley, Stacy. "Small Business Loans Will Be Forgiven but Don't Ask How," *The New York Times*, Oct. 9, 2020, available at www.nytimes.com/2020/10/09/business/small-business-ppp-loans-forgiveness.html.

3 Lesk, Sari. "Exclusive Reader Survey: Businesses Report Revenue Declines

Diminishing Cash Reserves," *Milwaukee Business Journal*, Sept. 30, 2020, available at www.bizjournals.com/milwaukee/news/2020/09/30/businesses-report-revenue-declines-diminishing-ca.html.

4 See Congress-proposed Heroes Act, available at <https://appropriations.house.gov/sites/democrats.appropriations.house.gov/files/Updated%20Heroes%20Act%20Summary.pdf>.

B CORPS vs. BENEFIT CORPORATIONS: UNDERSTANDING THE KEY DISTINCTIONS

By: Ryan Carpenter

The terms “B Corp” and “benefit corporation” are often used interchangeably in common parlance, but they have distinct legal meanings.

A number of prominent brands including Patagonia, Lemonade, Ben & Jerry’s, Warby Parker, and Kickstarter have attained B Corp status. The trend of greater consumer emphasis on social and environmental purpose has led many startups to consider B Corp certification or incorporation as a public benefit corporation. Startups should understand the distinctions between B Corps and benefit corporations in order to evaluate whether such status fits their company’s particular circumstances.

Key Characteristics of B Corps

B Corp is the name awarded to companies by a nonprofit organization called B Lab if they meet certain eligibility criteria and pay membership fees. Eligibility entails meeting a number of social and environmental criteria as well as performance, accountability, and transparency standards. In many regards, the concept is analogous to the LEED certification for green building projects or the organic certification for agricultural products. Despite its name, a B Corp may be a corporation, limited liability company, partnership, sole proprietorship, or any other number of legal forms.

The B Lab organization created the “B Impact Assessment” for determining whether a business should qualify for B Corp status. Companies self-report how they score on various metrics that are designed to evaluate the business’s impact on society, its workers, the environment, and customers. A score of at least 80 out of 200 points must be

achieved on the assessment. On top of the B Impact Assessment, a B Corp must sign an “Agreement for B Corp Certification” with B Lab and pay membership fees. Annual fees are tied to annual sales revenues figures, making the certification affordable even to lower revenue startups.

Startups with less than 12 months of operations are only eligible for the “Pending B Corp” status designation. This is due to the fact that B Lab evaluates the practices and policies of a company over the prior 12-month period to make the B Corp certification determination. After operating for 12 months, an application can be submitted to become a certified B Corp. This pending status enables startups to signal to potential investors and customers their commitment to

benefit corporation or a social purpose corporation, the directors of a benefit corporation have a fiduciary duty to consider the implications of corporate conduct on materially affected stakeholders including employees, the public, and the environment. This stands in contrast to a traditional for-profit corporation, which limits the directors’ fiduciary duties to managing the corporation in a manner that maximizes financial returns for stockholders.

Notably, a benefit corporation does not have to obtain B Corp certification, whereas a certified B Corp that is formed as a corporation is required by B Lab to become a benefit corporation provided that the state of incorporation has a benefit corporation statute. Thus, in order to remain a certified B Corp in such a state, the corporation may need to incorporate as or convert into a benefit corporation. Despite the lack of a requirement

Startups should understand the distinctions between B Corps and benefit corporations in order to evaluate whether such status fits their company’s particular circumstances.

sustainable practices in the interim.

How Benefit Corporations Differ from B Corps

In contrast to a B Corp, a benefit corporation is a special type of legal entity incorporated in a state with a benefit corporation statute. Currently, over 30 states have passed benefit corporation legislation recognizing benefit corporation status. A benefit corporation must meet specific statutory requirements for the corporation and its directors. Sometimes referred to as a public

benefit corporation to register as B Corps, they may choose to do so in order to use the familiar B mark logo. Furthermore, most benefit corporations are required to prepare and submit an annual benefit report that is filed with the secretary of the state. The preparation by B Corps of the annual reports required by B Lab often also provides a useful foundation for completion of the legal reports mandated by the state for benefit corporations.

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B Corps vs. Benefit Corporations

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Delaware Public Benefit Corporation

As with traditional for-profit corporations, many businesses electing to become benefit corporations choose Delaware as the preferred forum. In order to incorporate as a Delaware public benefit corporation (PBC), the social purpose must be defined at the time the articles of incorporation are filed and the company is responsible for delivering periodic reports to stockholders that this social mission is being fulfilled. Alternatively, an existing corporation can convert to a PBC by amending its charter and bylaws. If stockholders feel that the company’s stated social and environmental goals are not being satisfied, they have the right to bring a lawsuit against the PBC. One potential challenge PBCs face is that current case law and legislation provide limited guidance on how

to balance the profit mission with broader stakeholder goals.

The B Corp Stamp of Approval

B Corp status has helped trendy startups signal to customers their commitment to the public good in addition to boosting shareholder value. Lemonade, the disruptive insurance startup that offers homeowners, renters, and pet health insurance, is currently the world’s only public benefit insurance company and also was awarded provisional B Corp certification. Etsy, the online marketplace for handcrafted goods, was among the first publicly traded companies to also be a certified B Corp. Ever since Patagonia became the first company in California to sign up for B Corp certification in 2012, the so-called “stakeholder capitalism” movement has extended across a wide array of industries and jurisdictions. As

founder Yvon Chouinard described it when Patagonia registered to be a B Corp, “Benefit corporation legislation creates the legal framework to enable mission-driven companies like Patagonia to stay mission-driven through succession, capital raises, and even changes in ownership.”

Considerations for Investors

An important consideration for companies weighing whether to highlight their social purpose in the form of B Corp or benefit corporation status is to evaluate how such a decision may be perceived by angel investors, venture capitalists, and other investor groups. Some investors may be wary of funding a company whose purpose extends beyond just maximizing shareholder returns. On the flip side, other investors are bound to find the environmental and societal aims attractive. ■

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GLOBAL M&A ACTIVITY DOWN IN Q2 BECAUSE OF CORONAVIRUS

By: Ryan Carpenter

Global mergers and acquisitions (M&A) activity dropped to its lowest point in over a decade in the second quarter of this year, according to data provider Refinitiv.¹

Companies retreated from their growth and expansion plans to concentrate on protecting their operations and employees in the midst of the coronavirus pandemic.

As reported widely, many CEOs were reluctant to seek out blockbuster deals that would transform their companies without more confidence in the financial outlook. Analysts say that instead, they capitalized on favorable financing conditions to raise capital by selling stock and borrowing at lower rates to drive equity and debt issuance to record highs.²

Capital Market Activity Somewhat Strong in Q1

"It was the quarter for capital market activity. Companies are making sure their balance sheets are strong and durable for what comes next," Michael Carr, global M&A co-head at Goldman Sachs Group Inc. told Reuters.³

The report noted that global M&A totaled \$485.3 billion in Q2 2020.⁴ That's a drop of 55 percent from 2019 and the lowest since the third quarter of 2009, according to Refinitiv. These numbers were based on more than 8,200 transactions. That's the lowest quarterly number since Q3 of 2004. Observers say that the decline was driven primarily by the United States, where M&A sank 85 percent from year-earlier levels to \$94.3 billion in the middle of the coronavirus pandemic. This marked the first time since the third quarter of 2009 that the U.S. has failed to take the spot in the rankings.

Europe and Asia saw more moderate declines of less than 10 percent, to \$182 billion and \$150 billion, respectively.⁵ Dealmakers

comment that the economic uncertainty brought about by the COVID-19 pandemic had reduced the ability of many companies to begin and successfully complete M&A negotiations.

"The main challenge to get deals done is that buyers have to be prepared to pay a full price while the current business performance is still well below pre-COVID-19 level," said JPMorgan Chase & Co. Global Co-head of M&A Dirk Albersmeier remarked in an interview with Reuters.⁶

Q1's Biggest Deals Abroad

The biggest deals of Q2 were in Europe, the Middle East, and Africa. For example, Liberty Global and Telefonica agreed in May to merge their British businesses, Virgin Media and O2, in a \$38 billion deal

European food-ordering firm Just Eat Takeaway.com NV agreed in June to acquire its U.S. peer Grubhub Inc. in a \$7.3 billion all-stock deal.⁹ This is one of only a number of cross-border deals completed in the quarter.

However, as some deals were announced, others that had been signed but were not yet completed, faded.

In June, Simon Property Group Inc., the largest mall operator in America, announced that it was halting its \$3.6 billion deal to buy Taubman Centers Inc. The reason given was poor performance in the retail sector during the coronavirus outbreak. (Nonetheless, the shareholders of Taubman Centers overwhelmingly voted to approve and adopt the company's merger agreement with Simon Property Group, despite its efforts to stop the proposed deal.)¹⁰

And private equity firm Sycamore Partners ended its \$525 million deal to acquire lingerie brand Victoria's

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that will create a giant in mobile and broadband.⁷ Also, National Commercial Bank, Saudi Arabia's largest bank, said recently that it would acquire the smaller lender Samba Financial Group for up to \$15.6 billion.⁸

Observers say that many of the transactions that are now alive are between parties that already knew each other or were in negotiations prior to the pandemic.

Secret from L Brands Inc. in May.¹¹ Also, the Japanese tech conglomerate SoftBank Group Corp halted its agreement to fund a \$3 billion tender offer for additional shares in co-working company WeWork.¹²

Many Predict Global M&A Uptick After COVID-19

Some observers say they're seeing a gradual pickup in M&A activity

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as some players adapt to a post-coronavirus environment.

“Right now we are seeing significant pick-up in client dialogue, just in the past three to four weeks,” said Goldman Sachs global M&A co-head Dusty Philip.¹³

“Many of our clients are starting to think big and outside of the box, asking themselves what has changed and how do I adjust my strategic priorities to reflect the pandemic we have all been living through.”¹⁴

Companies and their advisers are also getting used to the idea of

carrying on negotiations and due diligence online.

“Nearly all of the management presentations and expert sessions—from a diligence standpoint—are being done by video conference. That is true for most board meetings. We are also seeing companies employ drones and (camera crews) filming in place of site visits for due diligence,” said Bank of America Head of Global M&A Patrick Ramsey.¹⁵

There are more than a few companies that are fighting to regain their footing, but some

have leveraged the advances in technological innovation and are ready to emerge from the pandemic downturn stronger and eager to pursue acquisitions. ■

1 www.afr.com/companies/financial-services/global-m-and-a-catches-a-cold-without-lingering-effects-20201015-p565hk.

2 www.reuters.com/article/us-global-m-a/coronavirus-strikes-down-global-ma-as-companies-keep-their-distance-idUSKBN241190.

3 *Id.*

4 <https://mergers.whitecase.com/highlights/global-ma-value-collapses-to-record-lows-in-q2-2020>.

5 www.marketcrumbs.com/post/m-a-plummets-in-the-second-quarter.

6 *Supra* Note 2.

7 www.barrons.com/articles/liberty-global-and-telefonica-plan-38-billion-telecom-merger-in-u-k-51588862542.

8 <https://apnews.com/article/virus-outbreak-dubai-saudi-arabia-riyadh-united-arab-emirates-f6cb37169dd2c0308598fa6d8c378e4c>.

9 <https://techcrunch.com/2020/06/10/just-eat-takeaway-confirms-its-gobbling-up-grubhub-in-a-7-3b-deal/>.

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11 www.businessinsider.com/victorias-secret-partnership-with-sycamore-partners-implodes-2020-5#:~:text=Sycamore%20Partners%20will%20not%20acquire,to%20acquire%20a%20majority%20stake.

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13 *Supra* Note 2.

14 *Id.*

15 *Id.*