The End of Responsible Growth and Governance?: The Risks Posed by Social Enterprise Enabling Statutes and the Demise of Director Primacy

Abstract

Social benefit entities, such as benefit corporations and low-profit limited liability companies (or L3Cs) were designed to support and encourage socially responsible business. Unfortunately, instead of helping, the emergence of social enterprise enabling statutes and the demise of director primacy run the risk of derailing large-scale socially responsible business decisions. This could have the parallel impacts of limiting business leader creativity and risk taking. In addition to reducing socially responsible business activities, this could also serve to limit economic growth. Now that many states have alternative social enterprise entity structures, there is an increased risk that traditional entities will be viewed (by both courts and directors) as pure profit vehicles, eliminating directors’ ability to make choices with the public benefit in mind, even where the public benefit is also good for business (at least in the long term). Narrowing directors’ decision making in this way limits the options for innovation, building goodwill, and maintaining an engaged workforce, all to the detriment of employees, society, and, yes, shareholders.

The potential harm from social benefit entities and eroding director primacy is not inevitable, and the challenges are not insurmountable. This essay is designed to highlight and explain these risks with the hope that identifying and explaining the risks will help courts avoid them. This essay first discusses the role and purpose of limited liability entities and explains the foundational concept of director primacy and the risks associated with eroding that norm. Next, the essay describes the emergence of social benefit entities and describes how the mere existence of such entities can serve to further erode director primacy and limit business leader discretion, leading to lost social benefit and reduced profit making. Finally, the essay makes a recommendation about how courts can help avoid these harms.