

## **Balancing Public and Corporate Interests through Corporate Charter Law**

There is growing concern that special interest money has steadily taken over our government and increasingly marginalizes the will of the general public.<sup>i</sup> Due to their virtually unlimited financial resources, corporate interests represent the largest special interest in question.

Incorporation is a privilege granted by states—the public—to corporations, rather than the federal government. While charter law varies from state to state, corporate charters *are subject to renewal, revocation and forfeiture by the states in which they are granted*. This fact points to the option of using state charter laws to help restore “balance between large corporations and human beings and our government”.<sup>ii</sup>

Richard L. Grossman, former co-director of the Program on Corporations, Law and Democracy (POCLAD) argued that dealing with corporations through the charter process is essential to any real reform and is “*as crucial to self-government as our right to vote. Both are basic franchises, essential tools of liberty.*”<sup>iii</sup> [emphasis added]

Throughout much of our country’s history, states played a significant role in governing corporations. Over time, state judges and legislators, facing increasing pressure from industry, granted business interests greater privileges through charter law. The lever of corporate governance used to shape and hold corporations accountable in the past may be rusty from lack of use, but is still available as a mechanism for balancing corporate and public interest in charter law.<sup>iv</sup> States can enforce corporate charter law provisions already on the books, the federal government can establish national standards for multi-national corporations and minimum standards for state corporate charters, and new provisions can be added to state charter laws to guide and assess corporate behavior and responsibility and shape mutually beneficial public/corporate relationships.

### **Using the laws that exist**

All state incorporation laws include measures to ensure that the public benefits derived from corporations outweigh their public harm. While oversight of corporate compliance with charter provisions can be described as lax to non-existent, rules governing corporate conduct exist in charter law and could be enforced.

“Who defines the corporation controls the corporation.”<sup>v</sup> Since states define what a corporation is and what it can and cannot do, citizens are in a position to demand review and revision of state corporate charters. For example, expiration dates for corporate charters of 20, 30 or 50 years were common in the past. While business has successfully lobbied for “perpetual existence” under corporate charter, it is not a guaranteed right. Delaware has the most lenient corporate charter law in the land. It holds the corporate charters for over half of all publicly traded companies in the US. But even Delaware charter law leaves the door open for provisions to limit the duration of a charter.<sup>vi</sup>

A striking and recent real-case example of corporate charter governance is currently underway. In April, 2010 an explosion at Upper Big Branch Coal Mine, owned by Massey Energy Company, resulted in the death of 29 miners. Massey Energy is headquartered in Virginia, but is chartered in Delaware.

A report of the incident by an independent investigative panel appointed by the Governor of West Virginia was released on May 19<sup>th</sup>, 2011. The investigation determined that the explosion was “preventable” and “the result of a pattern of disregard of worker safety laws.”<sup>vii</sup> A subsequent report by the Mine Safety and Health Administration released on December 6<sup>th</sup>, 2011 concurred with the conclusions of the Governor’s panel.<sup>viii</sup>

On June 8<sup>th</sup>, 2011 two public interest organizations, Appalachian Voices and Free Speech for People, submitted a letter to Delaware Attorney General, Beau Biden, calling for an investigation of Massey Energy and revocation of Massey’s charter.<sup>ix</sup> Rainforest Action Network joined this request soon after its filing. The request for an investigation is under review by the Delaware Attorney General as of this writing.

### **A role for national corporate charter law standards**

Many corporations are no longer single estate operations, but global conglomerates. Three hundred of the corporations found on the Fortune 500 are incorporated under Delaware law. Does it make sense that the rules for these multi-national business behemoths are written by individual states? There is a growing call for national standards related to governance of multinational businesses.<sup>x</sup> Citizens can petition their representatives to heed this call.

Additionally, many corporations seek charters in states with the most lenient charter law provisions. Establishing federal minimum standards related to state corporate charter laws would go a long way toward

creating a foundation of basic expectations for corporations across the country, thereby reducing the temptation to attract businesses through lenient laws at the possible expense of the public good.

### **Reimagining corporations**

In addition to using existing law, there is the option of establishing a new kind of corporation. Seven states have already signed legislation allowing for Benefit or B Corporations and interest is growing in other states including Massachusetts. Certified B Corporations are a new type of corporation that “uses the power of business to solve social and environmental problems.” xi B corporations consider social benefit as well as profit in their operation and commit to:

- Meet comprehensive and transparent social and environmental performance standards;
- Meet higher legal accountability standards;
- Build business constituency for public policies that support sustainable business.

Citizens can petition their representatives to work for inclusion of B Corporation language in state charter law. Corporate law is important because it has an impact on laws that govern virtually every issue we face as a society – the health and safety of the public and the environment, energy, the economy, campaign finance reform, worker rights and benefits, and foreign policy.xii

Should entities that are given the privilege to exist by the public be subject to accountability for their impact on society? All state legislatures “continue to have the historic and the legal obligation to grant, to amend, and to revoke corporate charters. They are responsible for overseeing corporate activities.”xiii Corporations can be dissolved for fraudulently obtained certificates of incorporation, repeated and excessive abuse of authority granted by the state, continued violation of the law, or when there is proof of illegal, oppressive or fraudulent behavior on the part of corporate directors or those in control.xiv Federal law can mandate minimum standards for state corporate charter law to establish a common baseline for state corporate charters. Limited liability provisions can be revised so that the cost of excessive risk gone bad is not completely externalized for payment by taxpayers while profits are fully internalized.

Elected state officials have the power to create, revise and revoke corporate charters. Citizens have the right to demand that elected officials consider public as well as corporate benefits and protections when enacting laws that affect the public’s well being, and that those who harm citizens and society in the pursuit of profits above all else are held accountable. Corporate charter law is a tool that can be used by citizens and states to reset the balance of power between corporate and public interests.

<sup>i</sup> Findings from a national survey of registered voters conducted by Hart Research Associates:  
[http://freespeechforpeople.org/sites/default/files/me10129b\\_public.pdf](http://freespeechforpeople.org/sites/default/files/me10129b_public.pdf) Accessed: 2/25/12

<sup>ii</sup> J.D. Clements, *Corporations are Not People*, Berrett-Koehler Publishers, Inc., San Francisco, 2012, p. 155.

<sup>iii</sup> R.L. Grossman & F.I. Adams, *TAKING CARE OF BUSINESS* Citizenship and the Charter of Incorporation:  
<http://www.nancho.net/bigbody/chrtink1.html> Accessed: 2/26/12

<sup>iv</sup> *ibid*

<sup>v</sup> *ibid*

<sup>vi</sup> Delaware Code, Annotated title 8, § 102: “A provision [may limit] the duration of the corporation/s existence to a specified date; otherwise, the corporation shall have perpetual existence.”

<sup>vii</sup> <http://online.wsj.com/public/resources/documents/wvamine0519.pdf> Accessed: 2/26/12

<sup>viii</sup> <http://www.msha.gov/Fatals/2010/UBB/UBBSummary.pdf> Accessed: 2/25/12

<sup>ix</sup> <http://www.freespeechforpeople.com/sites/default/files/FSFP-AVpressrelease060811.pdf> <sup>ix</sup> Findings from a national survey of registered voters conducted by Hart Research Associates: [http://freespeechforpeople.org/sites/default/files/me10129b\\_public.pdf](http://freespeechforpeople.org/sites/default/files/me10129b_public.pdf) Accessed: 2/25/12

<sup>ix</sup> See ii

<sup>ix</sup> J.D. Clements, *Corporations are Not People*, Berrett-Koehler Publishers, Inc., San Francisco, 2012, p. 155.

<sup>ix</sup> R.L. Grossman & F.I. Adams, *TAKING CARE OF BUSINESS* Citizenship and the Charter of Incorporation:  
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<sup>ix</sup> <http://online.wsj.com/public/resources/documents/wvamine0519.pdf> Accessed: 2/26/12

<sup>x</sup> J.D. Clements, *Corporations are Not People*, Berrett-Koehler Publishers, Inc., San Francisco, 2012, p. 62

<sup>xi</sup> <http://www.benefitcorp.net/state-by-state-legislative-status> Accessed: 2/26/12

<sup>xii</sup> J.D. Clements, *Corporations are Not People*, Berrett-Koehler Publishers, Inc., San Francisco, 2012, p. 155

<sup>xiii</sup> The Model Business Corporation Act, first written in 1931 by the committee on corporate laws of the American Bar Association, and revised twice since, is the basis for chartering laws in more than half the states and the District of Columbia. Although strongly protecting corporate property, this model law gives courts full power to liquidate the assets of a corporation if they are “misapplied or wasted.” It requires the secretary of state “from time to time” to list the names of all corporations which have violated their charters along with the facts behind the violations. Decrees of involuntary dissolution can be issued by the secretary of state and by courts: R.L. Grossman & F.I. Adams, *TAKING CARE OF BUSINESS* Citizenship and the Charter of Incorporation: <http://www.nancho.net/bigbody/chrtink1.html> Accessed: 3/07/12

<sup>xiv</sup> *ibid*