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Making Benefit Corporations More Beneficial: Drafting Statutes to Entice Entrepreneurs and Consumers Alike

RYAN Z. ULLMAN©*

INTRODUCTION

As society has become increasingly socially and environmentally conscious, ethical and socially responsible corporate practices have become more and more important for continued commercial success.¹ Today's consumers are more concerned than ever about a company's ethical and

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¹See J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 547 (2016) (“[T]he market . . . is demanding a society-focused, for-profit entity[.]”); see also MARTIN P. THOMAS & MARK W. MCELROY, *THE MULTICAPITAL SCORECARD: RETHINKING ORGANIZATIONAL PERFORMANCE* 25 (2016) (discussing researchers' attempts to value reputation, as in a 2014 study suggesting that 17 percent of the Standard & Poor's 500's market capitalization reflected corporate reputation); Gordon L. Clark, Andreas Feiner, & Michael Viehs, *From the Stockholder to the Stakeholder: How Sustainability Can Drive Financial Outperformance*, ARABESQUE PARTNERS (2015), https://arabesque.com/research/From_the_stockholder_to_the_stakeholder_web.pdf (evaluating meta-analysis of more than 200 studies and sources on sustainability, concluding that “companies with strong sustainability scorecards show better operational performance and are less risky”); JOHN KAY, *OBLIQUITY* 5 (2010) (“Visionary companies pursue a cluster of objectives, of which making money is only one—and not necessarily the primary one. . . . Yet paradoxically, the visionary companies make more money than the purely profit driven companies.”).

social responsible practices when they make purchasing decisions,² and employees increasingly seek value in work that serves a larger public or social purpose.³ According to Grace Farraj, Senior Vice President for Public Development & Sustainability at Nielsen, brands that establish a reputation for environmental stewardship among today's consumers, "have an opportunity to not only grow market share but build loyalty among the power-spending Millennials of tomorrow."⁴

A recent study from professional services network Deloitte revealed that millennial respondents chose phrases such as "job creation," "profit generation," and "improving society" when asked for terms that most closely resembled their ideals of what businesses should accomplish.⁵ In addition, in a late 2015 Nielsen study polling over 30,000 online consumers in 60 different countries, 66% of respondents claimed they were willing to pay more for products and services purchased from companies committed to positive social and environmental impact, up from 55% in

² See FREDERICK H. ALEXANDER, *BENEFIT CORPORATION LAW AND GOVERNANCE: PURSUING PROFIT WITH PURPOSE* 47 (2017) ("[S]takeholders, including customers, workers, and communities . . . want to have a relationship with a company that is responsible to society and the environment—millions of consumers express this sentiment both in survey and through practice.").

³ See ERIC D. BEINHOCKER, *THE ORIGIN OF WEALTH* 413 (2007) ("Few employees jump out of bed in the morning fired up to maximize shareholder value. . . . But employees can attach to the concepts of building a great, lasting institution that creates opportunities for people through growth.").

⁴ See *Green Generation: Millennials Say Sustainability Is a Shopping Priority*, NIELSEN (Nov. 11, 2015), <http://www.nielsen.com/us/en/insights/news/2015/green-generation-millennials-say-sustainability-is-a-shopping-priority.html>.

⁵ See *Mind the Gaps: The 2015 Deloitte Millennial Survey*, DELOITTE, 2 (2015) <http://www2.deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/gx-wef-2015-millennial-surveyexecutivesummary.pdf> [https://perma.cc/DV74-E5T8]. Additionally, 75 percent of millennial respondents believe "businesses are too fixated on their own agendas and not focused enough on helping to improve society." *Id.*

2015 and 50% in 2013.⁶ Experiences of companies such as Etsy,⁷ Patagonia,⁸ Kickstarter,⁹ and Ben and Jerry's¹⁰ are just some examples demonstrating how a company's continued success is increasingly tied to the value of that company's social capital.¹¹

Many larger corporations today, after all, are often cast as villains instead of heroes. They purportedly exploit lower-income labor, introduce negative externalities, such as pollution, and destroy communities in the process.¹² In

⁶ *Green Generation: Millennials Say Sustainability is a Shopping Priority*, NIELSON (Nov. 11, 2015), <http://www.nielsen.com/us/en/insights/news/2015/green-generation-millennials-say-sustainability-is-a-shopping-priority.html>. In this study, even 51% of respondents ages 50 through 64 were willing to pay extra, which was an increase of seven percentage points from the previous year. *Id.*

⁷ Adele Peters, *Will Etsy Keep Its Commitment to Social Good After Its Management Shakeup?*, FAST COMPANY, May 4, 2017, <https://www.fastcompany.com/40418325/will-etsy-keep-its-commitment-to-social-good-after-its-management-shakeup>; see also Max Chafkin & Jing Cao, *Leave my Etsy Alone*, SCRIBD (May 19, 2017), <https://www.scribd.com/article/348778452/Leave-My-Etsy-Alone>.

⁸ B Corporation entry on Patagonia, Inc., B LAB (last visited Jan. 2, 2018), <https://www.bcorporation.net/community/patagonia-inc> (Patagonia, Inc. scored an Overall Benefit Score of 152. The median score is 55, and a score of 80 is needed to be eligible for certification.).

⁹ *Kickstarter is Now a Benefit Corporation*, KICKSTARTER, <https://www.kickstarter.com/blog/kickstarter-is-now-a-benefit-corporation>.

¹⁰ B Corporation entry on Ben and Jerry's, B LAB (last visited Jan. 2, 2018), <https://www.bcorporation.net/community/ben-and-jerrys> (Ben and Jerry's scored an Overall Benefit Score of 110. The median score is 55, and a score of 80 is needed to be eligible for certification.).

¹¹ Maria Stracqualursi, *The Rise of the Public Benefit Corporation: Considerations for Start-Ups*, BCLS LAB, <http://bclawlab.org/eicblog/2017/3/21/the-rise-of-the-public-benefit-corporation-considerations-for-start-ups>.

¹² See ALEXANDER, *supra* note 2, at xv (“Shareholder primacy . . . threatens the long-term health of our society. Everyone, including shareholders, would be better served by a financial and legal system that respects the interests of all corporate stakeholders—including workers, the

response to this perception, a new class of social entrepreneurs has emerged seeking to make money while also doing social good.¹³

There are legal and other obstacles, however, to enforcing dual missions of maximizing profit and producing social good.¹⁴ The traditional problem is that if profits could always be made by producing social good, charities would be swimming in resources, and for-profit entities would be the main benefactors of social goods.¹⁵ The cause of this

environment, and the community.”); *see also id.* at 21 (the operations of a corporation may “create risks to the global community by using a supply chain with human rights abuses, or create risks to future generations by wasting scarce resources or emitting environmentally harmful substances”).

¹³ Steven Munch, *Improving the Benefit Corporation: How Traditional Governance Mechanisms Can Enhance the Innovative New Business Form*, 7 NW J. L. & SOC. POL’Y 170, 170 (2012); *see also* The Honorable Leo E. Strine, Jr., *Foreword* to ALEXANDER, *supra* note 2, at xi (“In this debate has emerged a strain of realist courage in the form of the benefit corporation movement. . . . [T]he benefit corporation movement has sought to move the legal power structure established by corporation statutes in another way to give corporations the ability to make legally enforceable commitments to social responsibility and fair worker treatment, and to put teeth behind those commitments.”).

¹⁴ *See* ALEXANDER, *supra* note 2, at 2 (arguing that a corporate governance model that mandates accountability for all corporate interests would violate the shareholder primacy model central to traditional corporate law); *see also id.* at 25 (“It is logically impossible to maximize in more than one dimension at the same time. Thus, telling a manager to maximize current profits, market share, future growth profits, and anything else one pleases will leave that manager with no way to make a reasoned decision.” (quoting LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 238 (2012))).

¹⁵ Kevin V. Tu, *Socially Conscious Corporations and Shareholder Profit*, 84 GEO. WASH. L. REV. 121, 121 (2016); *see also* ALEXANDER, *supra* note 2 (“If a human being were to operate under the rule of always maximizing value for herself, no matter the cost to others, we would consider such a person a psychopath. . . . ‘Somehow, at the beginning of the twenty-first century, the corporation had evolved to the point of being a sociopathic institution, at odds with the deep-rooted prosocial tendencies in human psychology and behavior.’ (quoting SIMON DEAKIN, *Corporate Governance*

predicament is that entrepreneurs in the United States have long been restrained to choose between two primary organizational forms for large endeavors—corporation or nonprofit.¹⁶ Unfortunately, neither form is optimal for social enterprise.¹⁷

Social entrepreneurs have advocated that companies can produce social good at the same time as shareholder profit by using hybrid organizational forms mixing both goals of profit maximization and creation of social good for the business.¹⁸ Since 2008, for example, over thirty states have passed at least one form of social enterprise statute.¹⁹ These

and the Financial Crisis in the Long Run, in *THE EMBEDDED FIRM: CORPORATE GOVERNANCE, LABOR, AND FINANCE CAPITALISM* 15 (Cynthia A. Williams & Peer Zumbansen, eds., Cambridge University Press 2011)). “The returns of . . . universal ownership [of corporations by shareholders] suffer from the common-grazing effects of a corporate law regime that supports corporate managers who load negative externalities onto the system in order to ‘create value’ for their individual shareholders.” *Id.* at 5.

¹⁶ MUNCH, *supra* note 13, at 172 (“Social entrepreneurs in the United States have long been forced by business law and tax regulation to use one of two primary organizational forms for large-scale endeavors—the corporation or the nonprofit. Unfortunately, both forms are suboptimal for social enterprises.”).

¹⁷ *Id.*; *see also id.* at 174 (Noting that nonprofits have trouble securing favorable loans from banks and other traditional lenders because of their limited and inconsistent access to capital. Although government grants are available, they are not always awarded to the most deserving or effective nonprofits).

¹⁸ *See* ALEXANDER, *supra* note 2, at xi, 48-49 (“In short, commitment to stakeholders can create value for shareholders. This idea is supported by social science research demonstrating that people tend to act generously when others are perceived to do so, but may retaliate if others act unfairly, even if such retaliation compromises their own interests (*citing* BEINHOCKER, *supra* note 3, at 121 (“Humans have strongly ingrained rules about fairness and reciprocity that override calculated ‘rationality.’”))).

¹⁹ *See* J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 543 (2016) (“The 2008 Vermont Low-Profit Limited Liability

statutes authorize the formation of enterprises with mixed missions, allowing businesses to pursue both for-profit and social purposes by applying profit-maximization principles.²⁰

One type of social enterprise statute that has been gaining increasingly widespread attention are benefit corporation statutes.²¹ The first such act was enacted by the Maryland legislature in 2010 and half of the states not long thereafter.²² Benefit corporation laws create expanded fiduciary duties for directors and officers and require them to consider various stakeholder interests in addition to shareholder interests.²³ Benefit corporations must pursue a “general public benefit,”²⁴ which, according to the Maryland

statute was both the first L3C statute and the first social enterprise statute in the United States.”); *see also* Kate Cooney et al., *Benefit Corporation and L3C Adoption: A Survey*, STANFORD SOC. INNOVATION REV. (Dec. 4, 2014), https://ssir.org/articles/entry/benefit_corporation_and_l3c_adoption_a_survey (“This is no small matter—the last major legal form to be created in the United States was the LLP in 1991.”). Before 2009, there were constituency statutes in place in 33 states in response to *Revlon* that allowed directors the ability (but generally not the obligation) to consider the interests of other stakeholders. Delaware, however, did not adopt such a provision. ALEXANDER, *supra* note 2, at 28; *see also id.* at 57-58 (arguing why constituency statutes do not adequately address the problems that benefit corporation legislation seeks to remedy—namely, the difficulty moving a business to such a state and lack of enforcement mechanisms provided by benefit corporations).

²⁰ Munch, *supra* note 13, at 172.

²¹ *See id.* at 171 (“The benefit corporation is perhaps the most ascendant social enterprise innovation today.”).

²² *See id.* (Maryland was the first state to pass benefit corporation legislation).

²³ *See* ALEXANDER, *supra* note 2, at 2 (the Model Business Corporation Legislation (MBCL) “contains a number of provisions that require corporations to follow a broader fiduciary model”); *see also* MUNCH, *supra* note 13, at 171.

²⁴ *See* ALEXANDER, *supra* note 2, at 63 (“The [MBCL] eliminates shareholder primacy by requiring directors to consider a broad group of stakeholders when making decisions and by imposing a corporate purpose of creating a ‘general public benefit,’ which must be measured against a third-party standard that addresses the interests of all relevant stakeholders.”).

benefit corporation statute is “a material, positive impact on society and the environment,” measured using standards or grades developed by a third party.²⁵

The low-profit limited liability company (“L3C”) status, is another available option currently available in nine states after first being introduced in Vermont in 2008.²⁶ The adoption of L3C status, however, has slowed since 2014 and even regressed in some states.²⁷ By adopting some of the benefits of L3Cs, benefit corporations can potentially become the most widely used and relied-upon hybrid organizational form for social entrepreneurs.²⁸

Hybrid organizational forms provide a change in corporate decision-making law that has traditionally focused on shareholder primacy by expanding fiduciary duties of directors.²⁹ Benefit corporations, in particular, mix corporate arrangements and are attractive because they not only grant social entrepreneurs limited liability and access to abundant capital,³⁰ but they give directors the ability to consider other stakeholders rather than solely maximizing shareholder value while they make decisions, like a nonprofit.³¹

²⁵ See, e.g., MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01 (2010).

²⁶ See Dana B. Reiser, *Benefit Corporations – A Sustainable Form of Organization*, 46 WAKE FOREST L. REV. 591, 591 n.5 (2011).

²⁷ Cooney et al., *supra* note 19 (“Passage of L3C legislation seems to have stagnated, whereas benefit corporation legislation is quickly spreading across the country.”).

²⁸ See *infra* PART IV.

²⁹ See ALEXANDER, *supra* note 2, at 1-2 (the principals of shareholder primacy, in a nutshell, are that: (1) directors are elected by the shareholders, and, once elected have full authority to manage the corporation and (2) directors must prudently and unselfishly manage the corporation to create a financial return for shareholders. “[C]orporate law was about creating value for the shareholders.”).

³⁰ Munch, *supra* note 13, at 172-73.

³¹ See ALEXANDER, *supra* note 2, at 2 (“[C]orporate law was about creating value for shareholders, who owned the corporation and who elected its managers to oversee their investment.”).

One problem with shareholder primacy as the main focus of corporate decision-making is the potential for shareholders of businesses with strong socially conscious presence and goodwill to risk the reputation and social purpose of the corporation for the sake of higher stock prices in the short-term.³² Social entrepreneurs and their investors, on the other hand, want their businesses to produce positive social impact, even if that means limiting their financial returns, thus maintaining their long-term values.³³ These competing interests coming into conflict was evidenced as recently as 2017 by Whole Foods' activist shareholders pushing for sale of the company to Amazon for a temporary increase in stock value.³⁴ While the fate of Whole Foods'

³² See, e.g., *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986) (holding that when a corporation is to be sold in a cash-out merger, the directors' duty is to maximize the short-term value to shareholders, regardless of the interests of other constituencies); see also *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 15, 34-35 (Del. Ch. 2010) ("Having chosen a for-profit corporate form, . . . directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders."); ALEXANDER, *supra* note 2, at xii ("At a time when the irrationally tumultuous influences of volatile stock market forces are encouraging entrepreneurs to keep their companies private or to even go public without giving other stockholder a right to vote, benefit corporations also promise benefit to ordinary investors.").

³³ Munch, *supra* note 13, at 171 ("In 2010, The Redwoods Group faced certain financial losses, its management still refused to institute layoffs to cut costs because, in their estimation, to do so would be 'morally repugnant.' Instead, Redwood executives allowed the company to absorb an expected loss of 'several hundred thousand dollars.'" (citing John Murawski, *Beyond the Bottom Line*, THE NEWS & OBSERVER (Mar. 21, 2010), <http://www.newsobserver.com/2010/03/21/397969/beyond-the-bottom-line.html>)).

³⁴ See Frederick Alexander, *Activism Whole Foods, Etsy and Benefit Corporations*, WESTLAW J. CORP. OFFICERS & DIRECTORS LIABILITY (Aug. 7, 2017), http://www.mnat.com/files/BylinedArticles/Thomson%20Reuters_FHA_ActivismWholeFoodsEtsyandBenefitCorporationsAugust2017.pdf ("As often happens in these situations, the shareholder pressure led Whole Foods to sell itself in June to the highest bidder."). According to the author of the book *Conscious Capitalism*, Raj Sisodia, in an interview

socially-conscious vision is uncertain now that the grocer is under Amazon's control, the sale illustrates the importance to a company's stakeholders that the directors to look at factors other than shareholder primacy to preserve a business' long-term missions.³⁵

Nonprofit entities, on the other hand, allow social entrepreneurs extensive freedom to pursue social good, but are subject to far greater capital limitations.³⁶ Not only must nonprofits expend considerable time, staff, and resources to fundraising among private donors, they also often have trouble securing loans from banks due to their limited and inconsistent access to capital for repayment.³⁷ In addition, although nonprofits may undertake some commercial activity to support their mission, tax regulations greatly restrict that activity.³⁸

The main critics of benefit corporation legislation note the lack of tax breaks or other direct incentives for traditional for-profit corporations to change their structure, while at the same time imposing strict and often sometimes costly reporting requirements to maintain benefit corporation

regarding Whole Foods' acquisition by Amazon stated that "[Whole Foods directors] were constantly looking over their shoulders at these activist investors who have no agenda other than short term return." Ben Schiller, *Now That Whole Foods Belongs to Amazon, What Happens to Conscious Capitalism?*, FAST COMPANY (Jun. 21, 2017), <https://www.fastcompany.com/40432785/now-that-whole-foods-belongs-to-amazon-what-happens-to-conscious-capitalism>.

³⁵ See Schiller, *supra* note 34 ("Selling to Amazon raises questions about the future of the 'conscious capitalism' agenda that Mackey established at Whole Foods and [that he] hoped . . . would grow into a movement. . . . Amazon, by contrast . . . hasn't had much of a purpose beyond being extremely good at serving customers.").

³⁶ Munch, *supra* note 13, at 174.

³⁷ *Id.*

³⁸ *Id.*

status.³⁹ Many businesses choose to make private nonprofit B Lab their third-party evaluator and pay between \$500 and \$50,000 per year depending on their business' annual revenues, subject to a multi-part test and application approval.⁴⁰

In addition, the benefit corporation structure faces competition with the L3C as a tool for legislatures, which provides special tax benefits and simplifies compliance with Internal Revenue Service rules for program-related investments ("PRIs"), greatly increasing an L3C's likelihood of receiving funding from foundations and other private investors.⁴¹ Benefit corporations and LLCs do not currently have access to PRIs, but there may be a way to introduce them to the PRI program to incentivize more businesses to adopt the form due to increased access to funding.⁴²

Although proponents of benefit corporations espouse numerous purported advantages of benefit corporation structure over a traditional corporation,⁴³ the adoption of

³⁹ See *What you need to know about the Delaware B Corporation*, INCNOW, 2 (Mar. 2, 2018), <https://www.incnw.com/blog/2016/04/12/about-b-corps/> ("[A] Public Benefit Corporation does not have a separate federal tax designation, and like a general Delaware corporation, a Public Benefit Corporation is taxed as a C-[C]orp by default. Incorporating as a Public Benefit Corporation only affects corporate duties and corporate purpose, not federal or state tax status. Public Benefit Corporations may also make the S-[C]orporation tax election.").

⁴⁰ See *id.* ("Additionally, should you want your Public Benefit Corporation to carry a "B-[C]orp" seal, a private non-profit called B Lab can be paid \$500 to \$50,000 per year (depending on annual revenues) provided its multi-part test and application are approved."); see also Amy Kincaid, *Maryland Proposes the Benefit LLC*, CHANGE MATTERS (2016), <http://changematters.com/2011/03/benefit-llc/>.

⁴¹ Anne Field, *IRS Rule Could Help the Fledgling L3C Corporate Form*, FORBES (May 4, 2012), <https://www.forbes.com/sites/annefield/2012/05/04/irs-rules-could-help-the-fledgling-l3c/2/#334bb25a3114>.

⁴² See *infra* Part IV.

⁴³ See *infra* Parts I.A.-C.

benefit corporation status nevertheless remains low.⁴⁴ Lack of good data has made it difficult to evaluate progress on the adoption of social enterprise forms.⁴⁵

There will likely always be some normative criticism as to whether businesses should seek profit as well as social benefits.⁴⁶ Additionally, some scholars argue that benefit corporation structures are unnecessary to accomplish the dual objectives of shareholder profit and public benefits.⁴⁷ Despite the normative debate and associated concerns with benefit corporations, one estimate from corporate law experts predicts that benefit corporation status will nevertheless soon be available in all or nearly all American states.⁴⁸

⁴⁴ See ALEXANDER, *supra* note 2, at 9-10 (there are only five thousand benefit entities out of a total of 8 million business entities in the United States).

⁴⁵ See Cooney et al., *supra* note 19 (“To date, a lack of good data has made it difficult to evaluate progress.”).

⁴⁶ Kevin V. Tu, *Socially Conscious Corporations and Shareholder Profit*, 84 GEO. WASH. L. REV. 121, 121 (2016) (“The normative debate as to whether corporations should operate with the singular objective of maximizing shareholder wealth or broader societal obligations may never be settled. Even so, the growth of socially conscious corporations—that seek to create shareholder profit while advancing social missions—highlights a contemporary legal issue facing corporate directors and shareholders.”).

⁴⁷ *Id.* at 126 (“At worst, the resulting legal framework [of benefit corporations] contains an added layer of complexity, which may create increased uncertainty and inefficiency. Such complexity may be unnecessary to the extent that the traditional for-profit corporation provides a sufficient flexible form to accomplish the dual objectives of shareholder profit and public benefit.”).

⁴⁸ See Cooney et al., *supra* note 19 (“[A]t current rates, the benefit corporation form will soon be available in nearly all, if not all, states.”); see also Keven J. Stratton, *Making Millennial Money Matter: Benefit Corporations and Their Role in Estate Planning for Social Entrepreneurs*, 8 EST. PLAN. & CMTY. PROP. L.J. 553, 561 (2016) (“Due to the widespread adoption of for-benefit business entities over the past five years . . . estate planning attorneys need to become conversant in this topic to better serve the growing number of clients who are concerned about leaving a legacy

Thus, normative arguments aside, how should a legislature considering adopting benefit corporation and LLC statuses draft their legislation so as to uniformly incentivize business participation and at the same time keep businesses accountable to intended stakeholders?⁴⁹ Some potential ways may be to provide the option for benefit LLC status in addition to benefit corporation status,⁵⁰ increase tax benefits for benefit business forms,⁵¹ reduce formation and reporting costs,⁵² provide additional funding options, such as through project related investments (“PRIs”) to provide the benefits of competing business structures like the L3C, and standardizing benefit enforcement proceedings.⁵³

Part I begins with a discussion of benefit corporations and their advantages compared to choosing to elect as a traditional corporation.⁵⁴ Part II evaluates similarities and differences of state benefit corporation statutes throughout the United States while noting differences in accountability and transparency requirements.⁵⁵ Part III turns to alternate models of social enterprise companies and compares the benefits of Benefit Limited Liability Company (“BLLC”)

of more than just traditional assets. The benefit corporation, while not the only type of for-benefit entity, is perhaps the most useful in estate planning.”).

⁴⁹ See *infra* Part IV.

⁵⁰ This strategy allows businesses already registered as LLCs to avoid the extra step of converting to a corporate structure to take advantage of benefit corporation status, among other benefits. See Field, *supra* note 41.

⁵¹ See Cooney et al., *supra* note 19 (“Many social enterprise advocates have proposed more-dramatic incentives linked to L3Cs and benefit corporations, such as special tax incentives, or other legal changes to make investing in social enterprises easier and more attractive.”).

⁵² See *id.* (For example, it has been suggested that the administrative burden between states has made a difference in adoption. Nevada’s success, for example, may be traceable to a simple check box on its standard corporation form to make adoption of benefit corporation status easier).

⁵³ Namely, the L3C; see also *infra* PART IV.

⁵⁴ See *infra* Part I.

⁵⁵ See *infra* Part II.

structure provided in Maryland, Oregon, and Pennsylvania with the L3C structure.⁵⁶ Finally, Part IV suggests how benefit corporation acts can be standardized and improved to provide maximum social benefits and encourage adoption to promote sustainable business practices nationwide.⁵⁷

I. BACKGROUND

A. Introduction

Thirty-four United States jurisdictions have enacted Benefit Corporation statutes since 2010.⁵⁸ These statutes establish benefit corporations as legal entities under state law and require their directors to consider stakeholders named in the corporate charter, in addition to shareholders, in the course of decision-making.⁵⁹ Benefit corporations exist as hybrid business entities for which directors must balance the interests of a broader group of stakeholders with the

⁵⁶ See *infra* Part III.

⁵⁷ See *infra* Part IV.

⁵⁸ ALEXANDER, *supra* note 2, at 67; see also Joan MacLeod Heminway, *Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations*, 40 SEATTLE UNIV. L. REV. 611, 612 (2017) (“The proliferation of benefit corporation statutes . . . can largely be attributed to the active promotion work of B Lab.”).

⁵⁹ See Comment to MODEL BENEFIT CORPORATION LEGISLATION § 101 (2016), http://benefitcorp.net/sites/default/files/Model%20Benefit%20Corp%20Legislation_4_16.pdf (“This chapter authorizes the organization of a form of business corporation that offers entrepreneurs and investors the option to build, and invest in, a business that operates with a corporate purpose broader than maximizing shareholder value and that consciously undertakes a responsibility to maximize the benefits of its operations for all stakeholders, not just shareholders. Enforcement of that purpose and responsibility comes not from governmental oversight, but rather from new provisions on transparency and accountability included in this chapter.”).

interests of shareholders, instead of focusing solely on maximizing shareholder profits.⁶⁰

Benefit corporations are businesses with two purposes—generating revenue and pursuing social missions.⁶¹ Benefit corporations combine the greater good and social purpose of a nonprofit organization with the freedom to create and distribute profits among members and shareholders.⁶² Ultimately, the goal of benefit corporation legislation is to provide greater clarity and duties to corporate directors regarding the scope of their decision-making powers, making the structure appealing to corporate directors, shareholders, and consumers alike.⁶³ This represents a significant change in corporate law from *Revlon*,⁶⁴ in which the Court announced that the goal of corporate directors is short-term value maximization for shareholders, benefit corporation laws seek to ensure long-term value for shareholders, as well as the people and broader environments in which they conduct business.⁶⁵

⁶⁰ *See id.*

⁶¹ Munch, *supra* note 13, at 172.

⁶² *See* Reiser, *supra* note 26, at 591 (“Founders of social enterprises believe profits and social good can be produced in tandem and wish to form organizations that will pursue these dual missions.”).

⁶³ *See* Munch, *supra* note 13, at 187 (“Because of its explicit accountability measures, the benefit corporation is better able to attract and assure socially conscious investors, consumers, and even employees. As B Lab notes, the form can ‘help us tell the difference between a “good company” and just good marketing.’”).

⁶⁴ *See* *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (“The duty of the board had thus changed from the preservation of [the company] as a corporate entity to the maximization of the company’s value at a sale for the stockholders’ benefit.”).

⁶⁵ *See supra* Introduction; *see also infra* Part II; MODEL BENEFIT CORPORATION LEGISLATION § 301(a)(1) (2016) (“In discharging the duties of their respective positions and in considering the best interests of the benefit corporation, the board of directors, the committees of the board, and individual directors of a benefit corporation: (1) *shall consider* the effects of any action or inaction upon: (i) the shareholders . . . : (ii) the employees and work force of the benefit corporation, its subsidiaries, and its suppliers; (iii) the interest of customers as beneficiaries of the general

In the face of what some commentators call “green washing”⁶⁶—a phenomenon in which businesses espouse socially-conscious motives solely because those initiatives may be more attractive to environmentally or socially-conscious customers—choosing to incorporate as a benefit corporation ensures that a particular business is indeed “used as a force for good and not for evil.”⁶⁷ Benefit corporations help ensure a corporation’s intentions are sincere and not solely a branding move through compliance requirements in purpose, accountability, and transparency.⁶⁸

Entrepreneurs across the United States have been excited to use the benefit corporation form.⁶⁹ Over 927 benefit corporations have been formed in Delaware as of May 2017, demonstrating that the form is gaining traction.⁷⁰ In fact, since 2010, benefit corporations nationwide have raised more

public benefit or a specific public benefit . . . ; (iv) the local and global environment; (v) the short-term and long-term interests of the benefit corporation, including benefits that accrue . . . from its long-term plans. . . .”) (emphasis added).

⁶⁶ Roddy Scheer & Doug Moss, “Greenwashing”, THE ENVTL. MAG. (Apr. 21, 2013), <https://emagazine.com/greenwashing/> (“Corporations are falling all over themselves . . . to demonstrate that they are environmentally conscious. The average citizen is finding it more and more difficult to tell the difference between those companies genuinely dedicated to making a difference and those that are using a green curtain to conceal dark motives.”).

⁶⁷ See Jack Rodolico, *Benefit Corporations Look Beyond the Profit Motive*, NPR MORNING EDITION (June 18, 2014), <https://www.npr.org/2014/06/18/316349988/benefit-corporations-look-beyond-the-profit-motive> (“Many consumers want to do business with companies that have that kind of DNA. But how can they tell which ones are the real deal? In twenty-seven states, legislatures have created a legal status for benefit corporations.”).

⁶⁸ See ALEXANDER, *supra* note 2, at 71-78, 81-83.

⁶⁹ *Id.* at 67.

⁷⁰ *Id.*

than an aggregate \$1 billion from venture and private equity funds, corporations, and public markets.⁷¹

In addition to the thirty-four jurisdictions with benefit corporation legislation, six additional states are working on such statutes.⁷² Most state benefit corporation acts are based on model legislation created by B Lab (the private nonprofit that birthed the idea of benefit corporations) that requires a company, in the course of doing business, to create a material positive impact on society and the environment.⁷³ Five states, including Delaware, however, have adopted a model of benefit corporation legislation with substantial differences⁷⁴ from the Model Benefit Corporation Legislation (MBCL).⁷⁵ Internationally, Italian Parliament was the first country in the world to provide benefit corporation status across its entire territory when it recognized entities, called “Società Benefit,” directly modeled after United States benefit

⁷¹ *Id.*

⁷² *See id.* at 156-157 (demonstrating in Table 8 that thirty-four states and D.C. have benefit corporation laws in place); *see also* B LAB, *State by State Status of Legislation*, BENEFITCORP.NET, <http://benefitcorp.net/policymakers/state-by-state-status> (showing that six states are working on benefit corporation laws).

⁷³ *See* ALEXANDER, *supra* note 2, at 65 (“[B]usinesses must make a legally binding commitment to pursue positive social and environmental impact.”).

⁷⁴ *See infra* Part II.

⁷⁵ *See* ALEXANDER, *supra* note 2, at 67 (The states include Colorado, Delaware, Kansas, Kentucky, and Tennessee. This form includes the use of a slightly different term, “public benefit corporation” [PBC]. Aside from the differences, PBCs make substantially the same changes to shareholder primacy as the MBCL.).

corporations.⁷⁶ As of February 2016, Australia has also been contemplating its own national benefit corporation act.⁷⁷

B. Benefit Corporations vs. Certified B Corporations

The use of the term “benefit corporation” versus “B corporation” can lead to confusion because they are blanket terms describing two different concepts. Registered “benefit corporations” are business entities created specifically under state law in the thirty-three states and D.C. that formally recognize the benefit corporate form with accompanying legal status (“benefit corporations”).⁷⁸ Certified benefit corporations, or “B corps,” are business entities that have received voluntary certification from B Lab, the nonprofit from which the benefit corporation concept emerged.⁷⁹

The B Lab certification is an optional “seal of approval” for meeting the strictest benefit corporation standards

⁷⁶ Impact Makers, *Italian Parliament approves Benefit Corporation legal status*, IMPACT MAKERS BLOG (Feb. 22, 2016), <https://www.impactmakers.com/news/italian-benefit-corporations/> (“The Italian Parliament approved the Benefit Corporation law, making Italy the first country outside the USA to allow companies to register as Benefit Corporations.”).

⁷⁷ Ellie Cooper, *Push for Benefit Corporation Law*, PRO BONO AUSTRALIA (Mar. 9, 2016), <https://probonoaustralia.com.au/news/2016/03/623970/> (“Changes to Australia’s Corporations Act are being drafted to create ‘benefit corporations’ – a new form of for-profit for-purpose business – that will be put to government later this year.”).

⁷⁸ See ALEXANDER, *supra* note 2, at 65-66 (describing the origin of B Lab’s Benefit Impact Assessment and ultimate decision to draft model benefit corporation law so that corporations could make authentic, legally enforceable commitments to all stakeholders denoted in the corporate charter).

⁷⁹ *Id.* (“B Lab believes that even businesses with positive social and environmental performance should adopt a corporate governance structure that will ensure that impact performance is maintained.”).

without formal benefit corporation status.⁸⁰ B Corp status is to business what Fair Trade certification is to coffee or USDA Organic certification is to milk.⁸¹ A benefit corporation need not be certified by B Lab to be registered as a benefit corporation, and a business need not be registered as a benefit corporation in their state to receive B Lab certification.⁸² To date, more than twice as many businesses have chosen to register as benefit corporations under the laws of their jurisdiction than have chosen to become certified by B Lab. There is some overlap between the two, however, as some businesses choose both benefit corporation status as well as B Corp certification.⁸³

C. Benefits of Benefit Corporation Status Over Traditional For-Profit Status

⁸⁰ See Rodolico, *supra* note 67 (“Think of it this way: USDA certifies organic foods, and Good Housekeeping puts its seal of approval on quality products, like washing machines and skillet. And since 2006, a nonprofit organization called B Lab has been certifying corporations it deems to be concerned about their communities and the environment.”).

⁸¹ *See id.*

⁸² For example, a benefit corporation organized under the laws of the State of Maryland could choose to also become certified through B-Lab and become a “B-corp.” *See id.* Further, a traditional corporation can get B-Lab certification. *See What is a Benefit Corporation?*, MD. STATE LAW LIB. (Feb. 9, 2017), <https://www.peoples-law.org/how-form-benefit-corporation-maryland> (“[B Lab’s] recognition is not required in order to be considered a benefit corporation in the eyes of the state, but [B Lab] is one of the central trade associations surrounding benefit corporations and provides a 3 step process to be recognized as a certified B-Corp.”).

⁸³ Compare B Lab, *About B Corps*, B CORPORATION.NET, <https://www.bcorporation.net/what-are-b-corps> (last accessed Nov. 20, 2018) (“There are currently over 2,500 Certified B Corporations in more than 50 countries.”), with ALEXANDER, *supra* note 2, at 67 (“According to B Lab’s internal database, states report the formation of more than five thousand benefit entities, although states are likely overreporting the number in some cases. In Delaware, where very accurate numbers are reported, 927 benefit corporations have been formed as of May 2017.”).

Formally electing to register as a benefit corporation rather than solely receive B Lab certification as a C corporation provides many benefits, especially as they pertain to business growth, accountability, transparency, and enforcement the business's long-term mission.⁸⁴

The first benefit comes with the legal freedom for the corporation to pursue goals beyond shareholder profit for the long-term.⁸⁵ Under the shareholder primacy model,⁸⁶ directors risk litigation from dissatisfied shareholders for failure to act in the shareholder's best interests when the directors do not make decisions to maximize stock value.⁸⁷ Differences of opinion can arise, for example, when corporate officers must decide between using more expensive but less environmentally harmful manufacturing processes on one hand and delivering projected profits to shareholders on the other.⁸⁸ A traditional C corporation would potentially face a claim that it breached its fiduciary duty to shareholders, for example, if officers decided to use the more expensive and

⁸⁴ Obtaining B Lab certification satisfies most states' benefit corporation requirements and provides additional benefits, such as use of "Certified B Corporation" logos, access to service partnerships to save money, and some loan assistance programs from schools for those starting certified B corporations. *What is a Benefit Corporation?*, MD. STATE LAW LIB. (Feb. 9, 2017), <https://www.peoples-law.org/how-form-benefit-corporation-maryland>.

⁸⁵ See ALEXANDER, *supra* note 2, at 63 ("The [MBCL] eliminates shareholder primacy by requiring directors to consider a broad group of stakeholders when making decisions and by imposing a corporate purpose of creating a 'general public benefit,' which must be measured against a third-party standard that addresses the interests of all relevant stakeholders.").

⁸⁶ See *supra* Introduction; see also Part I.A.

⁸⁷ See Reiser, *supra* note 26, at 608-609 ("There is considerable debate about the degree to which for-profit fiduciaries may properly pursue other purposes without breaching their duties.").

⁸⁸ See *id.*

less harmful processes at the expense of profit.⁸⁹ Benefit corporations affirmatively require directors to consider the impact of their decisions on a broader group of stakeholders, and thus insulate the directors from derivative suits for waste or breach of fiduciary duty.⁹⁰

Another example of the problem with the shareholder primacy model, as discussed above in Part I,⁹¹ is that shareholders can pressure directors to perform a sale of the corporation to increase stock prices in the short term and maximize shareholder profit.⁹² The shareholders can hassle directors to sell, and under shareholder primacy are usually successful, potentially harming the employees and the corporation's goodwill in the process.⁹³ Benefit corporations balance competing demands—social responsibility and fiduciary responsibility—and allow directors to serve ethical and social missions set forth in the corporate charter without risk of breaching the fiduciary duty to shareholders or members.⁹⁴ This balancing prevents the corporation's intention or goodwill being cast into doubt in the long-term, as has happened recently with Whole Foods' acquisition by Amazon.⁹⁵

As a corollary of the first point, benefit corporations also insulate and preserve ethical and social missions as the organization grows and changes with new leadership and

⁸⁹ *See id.*

⁹⁰ *See* MODEL BENEFIT CORPORATION LEGISLATION § 301(a)(1) (proscribing a standard of conduct for directors).

⁹¹ *See supra* Introduction.

⁹² Alexander, *supra* note 34.

⁹³ *Id.* (“Etsy, a path-breaking online marketplace, laid off nearly a quarter of its employees this spring and hired a new chief executive officer in May after shareholder complaints of weak growth. As often happens in these situations, the shareholder pressure led Whole Foods to sell itself in June to the highest bidder, Amazon, as the premium that accompanies a sale is almost always a sure bet to boost a company's share price in the short term.”).

⁹⁴ *See supra* Introduction.

⁹⁵ *Id.*

business environments.⁹⁶ Businesses in many states provide shareholders a derivative right of action to enforce the corporation's obligations to fulfill its stated or general public benefit.⁹⁷ Benefit corporations must stick to the ethical goals and missions denoted in the charter or else lose status as a benefit corporation and the accompanying benefits as a result of a successful benefit enforcement proceeding initiated by the stockholders.⁹⁸ This ensures social entrepreneur's missions are preserved for the future and with changing leadership, as the benefit is in the corporation's DNA vis-a-vis reference to creation of benefits in the charter.⁹⁹

Further, benefit corporations have expanded access to funding.¹⁰⁰ Adopting a traditional for-profit business form bars tax-exemption and eligibility for deductive contributions, regardless of whether an entity pursues social purposes or charitable activity.¹⁰¹ Although corporations in many states have the power to make charitable contributions, many states require that the corporation receive at least some sort of indirect benefit to the

⁹⁶ See *infra* Part II.A.-D.; see also Stratton, *supra* note 47, at 561 (“[T]he entrepreneur’s vision is measurable and ensured to continue after he or she dies.”).

⁹⁷ See *infra* Part II.

⁹⁸ See Stratton, *supra* note 47, at 566 (“Coupled with a provision in the certificate of incorporation requiring the dissolution of the business should it lose its benefit status, the entrepreneur’s business would be required to return to its mission or else dissolve.”).

⁹⁹ See *id.*

¹⁰⁰ See Reiser, *supra* note 26, at 619 (“The benefit corporation statutes do not speak expressly to the question of financing, but adopters of this form would certainly be ineligible to receive deductible contributions. Rather, benefit corporations can pursue the funding sources available to traditional for-profits.”).

¹⁰¹ *Id.* (“Adopting a traditional business form bars tax-exemption and eligibility for deductible contributions, despite calls by some for a change in this position.”).

shareholders for such donations.¹⁰² For benefit corporations, however, charitable donations that produce general or specific public benefits are specifically in the best interests of the benefit corporation per the corporate charter.¹⁰³

Finally, and perhaps most importantly for stockholders, status as a benefit corporation is appealing from a branding perspective.¹⁰⁴ Today's consumers consider the ethical and social responsibility of a company when making purchasing decisions more than ever before.¹⁰⁵ In addition, potential employees increasingly find value in work that serves a larger purpose.¹⁰⁶ In one study conducted by The Intelligence Group, 64% of millennial respondents stated that it is a priority for them to "make the world a better place."¹⁰⁷ Further, according to a 2014 study from Horizon Media's Finger on the Pulse, 81% of millennials surveyed responded that they "expect companies to make a public commitment to good corporate citizenship."¹⁰⁸

When benefit corporations offer products to consumers, affiliations to partners, and jobs to employees, they sell a sense of righteousness or trustworthiness, or both.¹⁰⁹ Meanwhile, for-profit corporations solely sell

¹⁰² See Felicia R. Resor, *Benefit Corporation Legislation*, 12 WYO. L. REV. 91, 94 (2012) ("There are already some means by which organizations blur the boundaries of this binary system. Traditional for-profit corporations, for example, will make charitable gifts to not-for-profit organizations.").

¹⁰³ See *supra* Part I.A.

¹⁰⁴ See *supra* notes 1-6.

¹⁰⁵ *Id.*

¹⁰⁶ See *supra* Introduction.

¹⁰⁷ See Rob Asghar, *What Millennials Want in The Workplace (And Why You Should Start Giving It To Them)*, FORBES (Jan. 13, 2014), <https://www.forbes.com/sites/robasghar/2014/01/13/what-millennials-want-in-the-workplace-and-why-you-should-start-giving-it-to-them/#266e84154c40>.

¹⁰⁸ See Stracqualursi, *supra* note 11.

¹⁰⁹ See Reiser, *supra* note 26, at 622 ("Nonprofits, in essence, sell their halo. When they offer products to consumers, affiliations to partners, and jobs to employees, they are selling a sense of righteousness or trustworthiness, or both. For-profits sell efficiency. They offer products of

efficiency and short-term benefits.¹¹⁰ Thus, social entrepreneurs ultimately see benefit corporations as a way to combine efficiency, innovation and lean operations with a virtuous and responsible social mission.¹¹¹

II. FEATURES OF BENEFIT CORPORATIONS AND STATE-TO-STATE DIFFERENCES

B Lab has drafted model benefit corporation legislation that has served as a guideline for states choosing to provide the status.¹¹² Many states' benefit corporation statutes closely resemble the B Lab's model legislation,¹¹³ but five states' statutes benefit corporation laws follow a model originating in Delaware, dubbed Public Benefit Corporations, or PBCs.¹¹⁴

the highest quality and lowest price, affiliations to draw in revenue, jobs that pay a market wage, and training in efficient business operations. Social entrepreneurs see themselves as offering something quite different.”).

¹¹⁰ *Id.*

¹¹¹ See Alexander, *supra* note 34 (“Benefit corporation governance is a perfect on-ramp to authentic stewardship. It encourages and enables companies to make profits responsibly and create durable value for all stakeholders.”); see also Reiser, *supra* note 26, at 622 (“The profit motive makes them lean, efficient, innovative. But, their social mission keeps them virtuous and responsible.”).

¹¹² See ALEXANDER, *supra* note 2, at 64 (“A majority of the legislation adopted has generally followed the Model Benefit Corporation Legislation.”).

¹¹³ *Id.*

¹¹⁴ See *id.* (“Since 2013, several states have adopted an alternative model originating in Delaware.”). This alternate form was first adopted in Delaware in 2013 “and [is] now followed, to some degree, in five states.” *Id.* at 85. Some authors also refer to these forms as Flexible Benefit Corporations. *Id.* For consistency, this paper refers to these models as Public Benefit Corporations (PBCs).

PBC legislation makes the same fundamental changes to the conventional shareholder primacy model as the MBCL, with several significant differences.¹¹⁵

In addition, several other states offer a type of structure apart from benefit corporations and PBCs called social purpose corporations.¹¹⁶ Interestingly, every state that provides for social purpose corporations also provides benefit corporation status, except for the state of Washington.¹¹⁷ In the end, the PBC is a less rigid model than that provided by the MBCL.¹¹⁸

The largest differences in benefit corporation laws between jurisdictions regard: (i) whether the corporation must pursue a general as well as specific public benefit; (ii) the qualifications of entities eligible to act as third-party evaluators; (iii) whether a right of action is explicitly created for shareholders; and (iv) what proportion of shareholder votes are needed to amend the charter and elect benefit corporation status.¹¹⁹

Maryland, Oregon, and Pennsylvania have extended benefit corporation status to allow LLCs the option to adopt Benefit LLC status and receive the advantages of both

¹¹⁵ See *id.* at 85 (detailing differences between PBCs and the MBCL).

¹¹⁶ The SBC states are California, Florida, Minnesota, Tennessee, Texas, and Washington. *Id.* at 156-157.

¹¹⁷ See *id.*; see also Anne Field, *Benefit Corporations, L3Cs and All the Rest: Making Sense of Those Confusing Choices*, FORBES (May 25, 2012), <https://www.forbes.com/sites/annefield/2012/05/25/benefit-corporations-l3cs-and-all-the-rest-making-sense-of-those-confusing-choices/#23b2477326d1> (“Flexible Purpose Corporations [also known as ‘PBCs’], unlike the benefit variety, do not have to meet general public benefits. Instead, they can specify at least one ‘special purpose’—addressing environmental sustainability, for example, or building a park. So the social focus is a lot more narrowly defined than it is with Benefit Corporations.”).

¹¹⁸ ALEXANDER, *supra* note 2, at 87. States that adopt the PBC model should nevertheless maintain strong accountability and transparency requirements to obtain full societal and social entrepreneurship benefits. See *infra* Part IV.

¹¹⁹ See *infra* Part II.

benefit corporation and LLC status.¹²⁰ Whether states ultimately adopt the MBCL or PBC model with their benefit corporation legislation, they should aim to maintain strong accountability and transparency requirements for benefit corporations to maintain their legitimacy, and hold up against claims of “greenwashing.”¹²¹

A. Purpose

Under the MBCL, benefit corporations must first and foremost have a purpose of creating general public benefit.¹²² A general public benefit is defined by the MBCL as “a material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operation of a benefit.”¹²³ In addition, under the MBCL, and thus in most states’ statutes, benefit corporations may also elect to pursue a specific public benefit in addition to the general public benefit.¹²⁴ This choice means

¹²⁰ See ALEXANDER, *supra* note 2, at 156-157 (Table 8).

¹²¹ See *infra* Part IV.

¹²² B LAB, MODEL BENEFIT CORPORATION LEGISLATION § 102 (April 4, 2016), http://benefitcorp.net/sites/default/files/Model%20Benefit%20Corp%20Legislation_4_16.pdf.

¹²³ *Id.*; see also ALEXANDER, *supra* note 2, at 72 (“Although the board of a benefit corporation is entitled to select the standard, the statutory definition is rigorous. The most important aspect of the third-party standard requirement for this purpose is its comprehensiveness: the standard must address all of the interests that directors must consider under Section 301. The additional requirements of independence, credibility, and transparency (all of which are subject to judicial review) are intended to insure that public benefit status will not be abused. . . . The ‘as a whole’ language, paired with the use of an assessment that includes the aspects that a board must consider under Section 301, conveys that *all* interests with which directors must concern themselves are to be considered in the creation of positive impact.”).

¹²⁴ *Id.* (“In addition, a benefit corporation may, in its articles, add a specific benefit purpose. *Section 201 suggests that there is possibly a goal-*

that directors of a benefit corporation must consider effects of the corporation's business practices on shareholders, employees, customers, community where the corporation operates, local and global government, and its ability to create a material positive impact on society and the environment.¹²⁵ Under § 301(a)(2), the board *may* consider other "factors or interests" the board deems appropriate.¹²⁶ This provides flexibility for social entrepreneurs to align their business to pursue almost any public benefit imaginable.

As a change from the MBCL, Delaware and four other states have adopted a second model of benefit corporation law that creates "public benefit corporations" (PBCs).¹²⁷ PBCs are "intended to produce a public benefit or benefits and to operate in a responsible and sustainable manner."¹²⁸ Whereas the model legislation requires directors to consider impact of their decisions on all stakeholders, Delaware's PBC legislation goes even further than the MBCL and prescribes how the company is to be managed in a manner that addresses the concerns of a broad range of stakeholders.¹²⁹

oriented element to corporate purpose under the MBCL, which is quite different from conventional corporate law.") (emphasis in original).

¹²⁵ See *id.* at 69; see also B LAB, MODEL BENEFIT CORPORATION LEGISLATION § 301(a) (April 4, 2016), http://benefitcorp.net/sites/default/files/Model%20Benefit%20Corp%20Legislation_4_16.pdf.

¹²⁶ *Id.* at 177 (§ 301(a)(2)(ii)).

¹²⁷ See ALEXANDER, *supra* note 2, at 87. Colorado, Kansas, Kentucky, and Tennessee have followed Delaware in passing PBC legislation, but each have made modifications to the Delaware version. *Id.* PBCs are important because Delaware is the jurisdiction most often chosen by companies that go public or raise significant equity from venture capital or private equity investors. *Id.* at 85.

¹²⁸ *Id.*

¹²⁹ DEL. CODE ANN. tit. 8, § 362(a) ("To that end, a public benefit corporation shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or benefits identified in its certificate of incorporation.").

PBCs must also be organized with intent of pursuing both specific *and* general public benefits.¹³⁰ The charter, therefore, must include a statement of purpose that identifies one or more specific public benefits that will be promoted by the corporation in addition to a general public benefit.¹³¹ This is not a requirement under Maryland law or the MBCL, which only require a benefit corporation have a goal of pursuing a general public benefit.¹³² Delaware and PBC states mandate that public benefit corporations also pursue a “positive effect (or reduction of negative effects) on [one] or more categories of persons, entities, communities or interests,” other than stockholders in their capacities as stockholders, or a specific public benefit.¹³³

Concurrent with the movement to adopt benefit corporation statutes, a number of states adopted a form known generally as “social purpose corporations,” although the name varies from state to state.¹³⁴ These statutes similarly allow a departure from shareholder primacy in allowing directors to consider one or more stakeholders, but unlike benefit corporations, are not required to consider their general effect on society and the environment, i.e. production of a general public benefit.¹³⁵ As a result, they do not

¹³⁰ See *id.*; see also ALEXANDER, *supra* note 2, at 87 (“PBC law mandates that, in addition to considering all stakeholders, a PBC must choose a specific public benefit to promote.”).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*; see also 3p Contributor, *Benefit Corporation Laws: Delaware v. California*, TRIPLE PUNDIT (Jan. 15, 2015), <http://www.triplepundit.com/2015/01/benefit-corporation-laws-delaware-vs-california/>.

¹³⁴ See ALEXANDER, *supra* note 2, at 155-157. Social purpose corporation states include California, Florida, Minnesota, Tennessee, Texas, and Washington. *Id.* at 156-157.

¹³⁵ *Id.*

mandate the broad stakeholder governance envisioned by the benefit corporation statutes.¹³⁶

B. Accountability

Benefit corporation acts overcome problems associated with shareholder primacy and expand the fiduciary duties of directors by holding directors accountable when considering non-shareholder and non-financial interests while making decisions.¹³⁷ Under benefit corporation statutes, corporations are held accountable for creation of public benefits by (1) being assessed against a third-party standard¹³⁸ and (2) allowing shareholders to bring derivative lawsuits challenging whether that purpose is indeed being met.¹³⁹ These dual actions accomplish the goal of keeping businesses accountable to their employees, community, and the environment.

To satisfy their first obligation, benefit corporations organized in MBCL states must prepare and report to shareholders and the public (usually annually) describing the benefit corporation's efforts to pursue a public benefit.¹⁴⁰ This reporting includes an assessment of the benefit corporation's overall social and environmental performance as judged against a comprehensive, credible, independent, and transparent third-party standard.¹⁴¹ The board is entitled to select the third-party standard, but the statutory definition is hard to satisfy.¹⁴² This requires registered benefit corporations to describe how they have pursued their general

¹³⁶ *Id.*

¹³⁷ *See supra* Introduction; *see also* ALEXANDER, *supra* note 2, at 2.

¹³⁸ The PBC statute in Delaware permits, but does not require, a third-party standard. *Id.* at 88. This distinction is one of the most significant between the model legislation and PBC legislation. *Id.* tbl.5.

¹³⁹ *See* ALEXANDER, *supra* note 2, at 63.

¹⁴⁰ *See id.*

¹⁴¹ *See id.* at 88.

¹⁴² *See id.* at 72 (“Although the board of a benefit corporation is entitled to select the standard, the statutory definition is rigorous.”).

and specific public benefits and any circumstances that have hindered their ability to do so.¹⁴³ The most important aspect of the third-party standard requirement for this purpose is comprehensiveness. The standard must address all interests that directors must consider under MBCL § 301.¹⁴⁴

Second, benefit corporation statutes generally prescribe methods by which shareholders may hold directors and officers legally accountable for actions that do not pursue the corporation's stated public benefits or do not comply with benefit corporation law.¹⁴⁵ Many statutes provide a derivative right of action called a "benefit enforcement proceeding."¹⁴⁶ In these states, shareholders and directors can be derivatively sued by shareholders for failure to pursue the corporation's stated general or specific public benefit or for violation of a duty or standard of conduct.¹⁴⁷

The statutes typically limit potential plaintiffs in benefit enforcement proceedings to shareholders entitled to bring derivative actions and sometimes, other groups if specified in the corporation's governing document.¹⁴⁸ Therefore, Benefit corporation acts do not expand standing to challenge the conduct of benefit corporation fiduciaries to stakeholders, but do allow for such an expansion in inquiry in suits by parties to traditional derivative suits.¹⁴⁹

C. Transparency

¹⁴³ See *infra* Part II.C.

¹⁴⁴ ALEXANDER, *supra* note 2, at 72.

¹⁴⁵ Reiser, *supra* note 26, at 605 (2011) (Most statutes "offer a special right of action often called a 'benefit enforcement proceeding' to enforce the special duties of benefit corporation directors and officers and the public benefit purposes of the corporation.").

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 591 n. 83-84.

¹⁴⁹ *Id.* at 605-06.

States vary in their requirements regarding how public reports should be prepared and what entities assess performance.¹⁵⁰ Although evaluator criteria might differ for various businesses, the common rule is that an independent third party must evaluate the benefit corporation's performance, rather than the benefit corporation itself.¹⁵¹ In PBC states, however, there is no requirement to report more than twice per year, make the report public, or even to use a third-party standard in measuring its stakeholder performance.¹⁵²

In Maryland and MBCL states, the benefit corporation statute does not define an "independent" evaluator. Other states define independence to exclude those evaluators with direct or indirect "material relationships" with the benefit corporation or its subsidiaries, including current or recent employment, familial relationships with executive officers, or direct or indirect ownership/management of 5% or more of the benefit corporation's equity.¹⁵³

Under Texas' 2017 benefit corporation act, benefit corporations may—but are not required—to attain a periodic third-party certification or use a third-party standard.¹⁵⁴ Similarly, in Delaware, third-party evaluation of benefit corporations under an independent standard is optional unless so specified in the corporation's certificate of

¹⁵⁰ See ALEXANDER, *supra* note 2, at 99 ("PBCS is more flexible than the MBCL with respect to reporting.").

¹⁵¹ *Id.*

¹⁵² *Id.* ("Nonetheless, if a PBC chooses, it may include in its governing documents a provision that mandates that the corporate provide a report more frequently, that requires the report to be made public, or that requires the corporation to use a third-party standard in measuring its stakeholder performance."); see also DEL. CODE ANN., tit. 8 § 366(c) (2015).

¹⁵³ See Reiser, *supra* note 26, at 601 n.52.

¹⁵⁴ TEX. BUS. ORGS. § 3.007(e) (2017); see also TEX. BUS. ORGS. § 21.953 (2017).

incorporation, and the board is empowered to make such evaluations on its own.¹⁵⁵

Further, in the MBCL and therefore most jurisdictions, standard-setters must publicize “the factors considered when measuring the performance of a business, the relative weightings of those factors, the identity of the persons who developed and control changes to the standard, and the process by which those changes were made.”¹⁵⁶ Failure of a benefit corporation to timely prepare such a report is grounds for losing benefit corporation status in Maryland and under the MBCL.¹⁵⁷

The model legislation and state statutes generally require that benefit corporations deliver their report annually to shareholders as well as their public website, if they have one.¹⁵⁸ State-specific nuances also exist with respect to reporting.¹⁵⁹ The MBCL, and several other states, on one hand, require disclosure of a “benefit director,” optional “benefit officer,” directors’ compensation, statement by the benefit director, and names of anyone owning five percent or more of the corporation’s stock.¹⁶⁰ Meanwhile,

¹⁵⁵ *Benefit Corporation Laws: Delaware v. California*, TRIPLE PUNDIT (Jan. 15, 2015), <http://www.triplepundit.com/2015/01/benefit-corporation-laws-delaware-vs-california/>.

¹⁵⁶ Reiser, *supra* note 26, at 601 n.53, 54.

¹⁵⁷ See, e.g., MD. CODE, CORPS. AND ASS’NS §§ 5-6C-01 through 5-6C-08 (2010).

¹⁵⁸ See ALEXANDER, *supra* note 2, at 88 tbl.5.

¹⁵⁹ See Kevin Tu, *Socially Conscious Corporations*, 84 GEO. WASH. L. REV. 121, 147 n.180 (2016) (“In contrast to the Model Benefit Corporation Legislation, Delaware’s Public Benefit Corporation statute requires that a biennial statement be provided to shareholders as to the promotion of the public benefit(s) identified in public benefit corporation’s certificate of incorporation and the best interests of those materially affected by the corporation’s conduct. See DEL. CODE ANN. tit. 8, §§ 362(a), 366.”).

¹⁶⁰ See ALEXANDER, *supra* note 2, at 88 tbl.5.

Delaware and most PBC states do not require a benefit director.¹⁶¹

New Jersey, which followed the MBCL, requires reports to be filed with the state Department of the Treasury on penalty of forfeiture of benefit corporation status.¹⁶² Similarly, Hawaii also requires disclosure of information to the public, but Hawaii's statute disavows any government involvement explicitly.¹⁶³ Hawaii's statute instead mandates the report state that "the sustainable business corporation and its activities are subject to the oversight of the board of sustainable business corporation and are not subject to the direct oversight, regulation, or endorsement of any governmental body."¹⁶⁴ Vermont requires disclosure of the same information as New Jersey and other states and does not require filing reports with the State, but demands that benefit corporations submit their annual report for shareholder approval or rejection.¹⁶⁵

Many states have additional requirements that benefit corporations identify themselves as a benefit corporation in their name, inclusion of an abbreviation or other designation.¹⁶⁶ In Delaware, for example, a benefit corporation must affirmatively identify itself as a public benefit corporation by including the words "public benefit corporation," the abbreviation "P.B.C.," or designation "PBC" in its name.¹⁶⁷ California, by contrast, has no such

¹⁶¹ *See id.*

¹⁶² N.J. STAT. ANN. § 14A:18-11(a)(6)(d) (West 2011).

¹⁶³ *See* ALEXANDER, *supra* note 2.

¹⁶⁴ HAW. REV. STAT. § 420D-11 (2011).

¹⁶⁵ VT. STAT. ANN. tit. 11A, § 21.14(c) (West 2011).

¹⁶⁶ *See Benefit Corporation Laws: Delaware v. California*, TRIPLE PUNDIT (Jan. 15, 2015), <http://www.triplepundit.com/2015/01/benefit-corporation-laws-delaware-vs-california/>; *see also, e.g.*, MD. CODE ANN., CORPS. & ASS'NS §§ 1-502(a)(2), 1-502(b)(2) (2010).

¹⁶⁷ *See* DEL. CODE ANN., tit. 8, § 362(c); *see also Benefit Corporation Laws: Delaware v. California*, TRIPLE PUNDIT (Jan. 15, 2015), <http://www.triplepundit.com/2015/01/benefit-corporation-laws-delaware-vs-california/>.

requirement for benefit corporations to affirmatively identify as such.¹⁶⁸

Whether states adopting benefit corporation status choose to adopt a status based on the MBCL or PBC model, they should seek to include strong purpose, accountability, and transparency requirements to provide social benefits, preserve long-term organizational missions, and insulate business from claims of “greenwashing.”¹⁶⁹ These features should apply in equal force to benefit LLCs to further provide the same benefits to social entrepreneurs who prefer LLC status over a traditional for-profit corporate form.¹⁷⁰

III. BENEFIT LLCs VERSUS L3Cs

Although both benefit LLCs and L3Cs are oriented to support hybrid organizations, the benefit corporation/LLC and L3C were designed for different legal regimes and financing strategies.¹⁷¹ There are only four states that have both benefit corporation statutes as well as L3C statutes.¹⁷² No states have allowed LLCs receive the same access to funding in PRI’s like L3Cs.¹⁷³

With the passage of the first Low-Profit Limited Liability (“L3C”) statute in 2008, Vermont became the first state to pass an L3C statute as well as any form of social

¹⁶⁸ *See id.*

¹⁶⁹ *See supra* Part II; *see also infra* Part IV.

¹⁷⁰ *See id.*; *see also infra* Part IV.

¹⁷¹ *See* Cooney et al., *Benefit Corporation and L3C Adoption: A Survey*, STANFORD SOC. INNOVATION REV. (Dec. 4, 2014), https://ssir.org/articles/entry/benefit_corporation_and_l3c_adoption_a_survey.

¹⁷² *See id.* (“Interestingly, the states in which the L3C and benefit corporation are both allowed have little overlap. Only four states—Vermont, Illinois, Louisiana, and Rhode Island—have passed statutes for both forms.”).

¹⁷³ *See infra* Part IV.A.

enterprise statute in the United States.¹⁷⁴ Since then, eight states have passed similar L3C statutes.¹⁷⁵ L3C statutes attempt to fix the difficulty associated with obtaining funds as a nonprofit or other socially conscious business.¹⁷⁶ To accomplish this, L3C statutes enable easier access to funding, primarily by targeting Program Related Investments (“PRI”) from foundations.¹⁷⁷ This is accomplished by replacing “investment” in the regulations that authorize PRIs with “company” in the L3C statutes.¹⁷⁸ Essentially, because private foundations must spend five percent of their net worth in any given year, allowing L3Cs to mirror PRI requirements potentially allows L3Cs to attract a vast amount of private investment.¹⁷⁹

PRIs given to L3Cs are investments made not for financial reasons, but to facilitate the exempt purposes of private foundations.¹⁸⁰ Thus, L3C statutes generally require that the donation to the L3C “significantly furthers the accomplishment of one or more charitable or educational purposes” and require that the L3C “would not have been

¹⁷⁴ J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 543 (2016).

¹⁷⁵ *Id.* at 543-44.

¹⁷⁶ See Steven Munch, *Improving the Benefit Corporation: How Traditional Governance Mechanisms Can Enhance the Innovative New Business Form*, 7 NW J. L. & SOC. POL’Y 170, 174 (2012) (Noting that nonprofits have trouble securing favorable loans from banks and other traditional lenders because of their limited and inconsistent access to capital. Although government grants are available, they are not always awarded to the most deserving or effective nonprofits.); see also Murray, *supra* note 169, at 541-544 (“L3C statutes were drafted, primarily, to . . . aid social enterprises in their attempts to raise capital.”).

¹⁷⁷ Murray, *supra* note 174, at 544.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 544 n.9 (“IRS considers all moneys paid out as PRIs to be ‘qualifying distributions,’ which means they count toward the IRS’s requirement that five percent of their net worth in any given year.” (quoting Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337, 356 (2009))).

¹⁸⁰ *Id.* (citing Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337, 355-56 (2009)).

formed but for the company's relationship to the accomplishment of charitable or educational purposes."¹⁸¹ The L3C statutes also generally require that "[n]o significant purpose of the company is the production of income or the appreciation of property," but the statutes make clear that the production of significant income or appreciation of property standing alone is not conclusive evidence of a violation.¹⁸²

A major concern about L3Cs is that the IRS has not expressly endorsed the L3C as a safe harbor for PRIs.¹⁸³ Thus, costly written opinions from counsel or advanced private letter rulings by the IRS are currently required.¹⁸⁴ In addition, professors and practitioners have criticized the L3C for allegedly serving the same function as already-existing LLCs.¹⁸⁵

The principal advantage that benefit corporations and LLCs have over the L3C, CIC, and other hybrid organizational types, however, is that a benefit corporation/LLC does not require the business to be a nonprofit or not-for profit.¹⁸⁶ The benefit corporation/LLC model is further more beneficial because it holds the business accountable via a third-party standard-setting organization vetting that corporation's dedication to its general or stated

¹⁸¹ *Id.*; see also, e.g., VT. STAT. ANN. tit. 11, §§ 4001(14), 4162(2) (West 2015).

¹⁸² See, e.g., *id.*

¹⁸³ See Murray, *supra* note 169, at 545 n.13 (2016) (describing the IRS' proposed rules with examples of proper PRIs and suggesting that L3Cs could be proper recipients, but also noting that IRS guidance does not provide a complete safe harbor and sufficient caution is recommended (citing Carter G. Bishop, *The Low Profit LLC (L3C): Program Related Investment by Proxy or Perversion?*, 63 ARK. L. REV. 243, 250 (2010))).

¹⁸⁴ See *id.* at 545.

¹⁸⁵ See *id.* at 545-46.

¹⁸⁶ See *supra* Introduction; see also Part I.

public benefit, and its publication of a third-party evaluation to the public.¹⁸⁷

Currently, only Maryland, Oregon, and Pennsylvania allow benefit LLC status in addition to providing benefit corporation status.¹⁸⁸ These states' benefit LLC statutes are nearly identical to their respective benefit corporation statutes, but benefit LLCs rely on the LLC statute and contract law to fill gaps rather than the corporation statute.¹⁸⁹ Most proponents of benefit corporation statutes, including B Lab, do not encourage enactment of benefit LLC legislation at the same level as they do benefit corporation statutes, because they claim LLC law is already flexible enough for social entrepreneurs uninterested in a corporate form.¹⁹⁰ Nevertheless, many of the registered companies in Maryland choose to become benefit LLCs rather than benefit corporations.¹⁹¹ This trend informs future drafters of legislation that they should also authorize benefit LLCs in addition to ordinary benefit corporations in the statute.

IV. IMPROVING STATUTES TO MAXIMIZE BENEFITS AND INCENTIVIZE ADOPTION

¹⁸⁷ See ALEXANDER, *supra* note 2, at 155 (“Although such a provision [for benefit LLCs] might not be necessary . . . because the purpose, accountability, and transparency elements are mandatory, the provisions help to avoid the greenwashing concern.”).

¹⁸⁸ See *id.* at 156-57 tbl.8.

¹⁸⁹ Murray, *supra* note 159, at 551.

¹⁹⁰ *Id.* at 551 n.60 (citing J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 23 n.101 (2012)).

¹⁹¹ See Anne Field, *First-Ever Study of Maryland Benefit Corps Released*, FORBES (Jan. 25, 2013), <https://www.forbes.com/sites/annefield/2013/01/25/first-ever-study-of-maryland-benefit-corps-released/#1375d9925e80> (noting that in one early study in 2013 of the thirty-two registered companies in Maryland organized under its benefit corporation laws, twenty-four were benefit LLCs, not benefit corporations).

Generally, benefit corporations appear to be an effective way to produce social good for stakeholders at the same time as profits for shareholders.¹⁹² Model benefit corporation legislation has been enacted by most states,¹⁹³ but the main concern amongst proponents is that adoption remains low compared to the total number of businesses nationwide.¹⁹⁴

The main goal in improving benefit corporation legislation moving forward should be to increase adoption so that more-and-more stakeholders are considered.¹⁹⁵ This would lead to more companies “doing well while doing good,”¹⁹⁶ thus creating social benefits, being held accountable for their actions, and making the world a better place.¹⁹⁷ Communities would be increasingly prosperous because there would be both fewer negative externalities caused by corporations,¹⁹⁸ and more positive externalities.¹⁹⁹

The more businesses that become benefit corporations, the more market pressure those benefit corporations will

¹⁹² See *supra* Part II.

¹⁹³ B LAB, *State by State Status of Legislation*, BENEFITCORP.NET, <http://benefitcorp.net/policymakers/state-by-state-status> (showing that six states are working on benefit corporation laws).

¹⁹⁴ See *supra* Introduction; see also Part I.

¹⁹⁵ See ALEXANDER, *supra* note 2, at 5.

¹⁹⁶ Elizabeth Elving, *Corporations that Pursue Social Good as Well as Profit*, SHEPHERD EXPRESS (Mar. 13, 2018), <https://shepherdexpress.com/news/features/corporations-social-good/#/questions>.

¹⁹⁷ See Reiser, *supra* note 26, at 622 (“Even if an organizational form could reliably convey commitment and follow-through on dual mission, it can function as a strong brand only when enough entities adopt it and the brand’s meaning becomes known in the marketplace.”).

¹⁹⁸ Reducing negative externalities may result in, *inter alia*, reduced harmful emissions or increased use of sustainable materials in building. ALEXANDER, *supra* note 2, at 47.

¹⁹⁹ See *id.* at xv (“Everyone, including shareholders, would be better served by a financial and legal system that respects the interests of all corporate shareholders—including workers, the environment, and the community. Benefit corporation law is a tool for establishing such a system.”).

create, inspiring more businesses to become benefit corporations, creating an upward spiral.²⁰⁰ Some commentators have suggested that reaching this goal will take greater awareness, tax incentives, like the pass-through tax structure given to limited liability companies, and further interest from angels and VC investors to continue to expand benefit corporation structure.²⁰¹ To increase adoption, more large institutional investors must be enticed to join.²⁰² Their support and use would create market pressures to become more socially conscious and improve momentum of the benefit corporation movement.²⁰³

Ultimately, many socially conscious businesses that might be interested in adopting benefit corporation status might refrain from making a change because there appears to be no ostensible benefit, or they face obstacles including: (i) lack of tax or other benefits (unlike L3C structure);²⁰⁴ (ii) third-party assessments that cost money as well as time,²⁰⁵

²⁰⁰ See *id.* at 5 (“[B]enefit corporation governance can create better opportunities for entrepreneurs and investors interested in corporations that operate in a responsible and sustainable manner, and place market pressure on other businesses to do the same.”).

²⁰¹ See Deborah Sweeney, *Are Benefit Corporations the New Limited Liability Company?*, HUFFPOST (Aug. 28, 2013), http://www.huffingtonpost.com/deborah-sweeney/are-benefit-corporations_b_3819590.html (“It seems that many entrepreneurs just aren’t willing to adhere to the regulations and reporting requirements placed on benefit corporations. There aren’t any tax breaks given or filing fees waived—if you form a benefit corporation, you are doing it solely for the protection it provides while you continue to pursue your business’s social mission. Of course, as more people discover benefit corporations and figure out what they are there for, the numbers should go up.”).

²⁰² See *supra* Part IV.

²⁰³ See ALEXANDER, *supra* note 2, at 5.

²⁰⁴ See *infra* Part IV.A.

²⁰⁵ For example, entrepreneurs may choose not to form benefit corporations in light of the time and cost of satisfying reporting requirements: ultimately, the increased value of the brand is likely to offset these costs, but for the average entrepreneur who is not aware of the statistics, they may be put off by expensive reporting requirements. See *Sweeney*, *supra* note 201.

and (iii) difficulty making the change from LLC to benefit corporation.²⁰⁶

A. Provide Tax Benefits and Additional Sources of Capital

States should allow business to form as benefit LLCs as well as benefit corporations to provide liability protection and single tax that LLCs provide, while also allowing them to pursue a public benefit. While some commentators note that investors far prefer investing in a corporation rather than LLC,²⁰⁷ benefit LLCs may actually combat some of these concerns by providing clear purpose, accountability, and transparency for investors.²⁰⁸ As discussed below, providing the option for benefit LLCs would also make it easier for LLCs to bake their social purpose into the LLCs documents and reduce administrative hurdles.²⁰⁹

An additional benefit states could provide may come in the form of uniform tax benefit to entice businesses to pursue a public good and offset costs of amending the corporate charter and third-party assessment.²¹⁰ This tax benefit may ameliorate concerns some commentators have with benefit corporations in that the certification and reporting requirements being prohibitively high.²¹¹

Finally, taking inspiration from L3C structure, legislatures may amend benefit corporation law to create

²⁰⁶ *See id.*; *see also infra* Part IV.C.

²⁰⁷ *See* ALEXANDER, *supra* note 2, at 154 (citing as the lack of well-developed body of case law, more varied operating agreements, and lack of ability to prove the LLC is not “greenwashing” compared to benefit corporations).

²⁰⁸ *See id.* at 155.

²⁰⁹ *See infra* Part IV.C.

²¹⁰ *See supra* Part IV.

²¹¹ *See* Sweeney, *supra* note 201.

additional incentives for businesses by allowing additional funding opportunities.²¹² States could allow benefit corporations and benefit LLCs to receive PRIs from foundations and other investors and only use that money in furtherance of a specific or public benefit in line with the foundation's goals.²¹³

While there might be concern that businesses will use these funds to make a profit rather than a social benefit, benefit corporation statutes could be written like L3C statutes, which often require that the donation to the L3C “significantly furthers the accomplishment of one or more charitable or educational purposes” and that the L3C “would not have been formed but for the company’s relationship to the accomplishment of charitable or educational purposes.”²¹⁴ State legislatures could carefully modify their benefit corporation statutes to ensure that PRI funds only be used to materially further stated social purposes, such as by requiring benefit corporations perform accounting showing the disposition of the funds for those stated purposes.²¹⁵

B. Lowering Costly Assessment and Reporting Requirements

As more businesses make use of the benefit corporation structure, there will be more businesses providing auditing services, which will become cheaper with economies of scale.²¹⁶ Further, B Corp certification through B Lab is not

²¹² *See id.* (“Benefit corporations are a great idea, but will take greater awareness, tax perks like the pass-through tax structure given to limited liability companies, and further interest from angels and VC investors to continue to expand this structure.”).

²¹³ *See supra* Part III.

²¹⁴ *See, e.g.,* VT. STAT. ANN. tit. 11, §§ 4001(14), 4162(2) (West 2015).

²¹⁵ *See* Sweeney, *supra* note 201.

²¹⁶ *See* ALEXANDER, *supra* note 2, at 5 (“[B]enefit corporation governance can create better opportunities for entrepreneurs and investors interested in corporations that operate in a responsible and sustainable manner, and place market pressure on other businesses to do the same.”).

required (and for PBCs there is no requirement for an annual benefit report), so there is a possibility for a healthy market for third-party auditors.²¹⁷

To promote this healthy market, requirements for third-party evaluator in MBCL states should be uniform to ensure a common nationwide benchmark for public benefits to lift the trustworthiness of benefit corporations.²¹⁸ Allowing a corporation's board of directors perform the evaluation, as in Texas,²¹⁹ and potentially withhold that information from the public, defeats the purpose of benefit corporations and will not ensure that corporations are entirely accountable to the stakeholders they claim to benefit, potentially sanctioning greenwashing.²²⁰

C. Lowering Administrative Hurdles to Forming A Benefit Corporation

There are several ways in which states could make it easier for businesses to become benefit corporations. One way might be to lower administrative hurdles in the business formation stage. While Nevada allows a business to simply hit a box on its standard corporate form and become a benefit corporation,²²¹ this might be too easy. In the age of greenwashing and generally increased social awareness, states could not be sure that these social entrepreneurs would know what they are doing.²²² On the other hand, Maryland's system of simply requiring changing the name in the corporate charter might be more appropriate: Maryland

²¹⁷ See *supra* Part II.B.

²¹⁸ See *supra* Part II.

²¹⁹ TEX. BUS. ORGS. § 21.957(b) (2017).

²²⁰ See *supra* Part II.

²²¹ See NEV. REV. STAT. 78B.100; see also NEV. SEC. OF STATE FORM NRS 78 ARTICLES, <https://www.nvsos.gov/sos/home/showdocument?id=668>, at 1, l. 6.

²²² See *supra* Introduction; see also *supra* Part I.

added the requirement of a benefit legend into corporate names, and is the only state to do so.²²³

A third way is available in California.²²⁴ In California, becoming a benefit corporation requires only that a company either (1) amend its corporate charter; or (2) register by declaring, “This corporation is a benefit corporation” and identifying one or more specific public benefits.²²⁵ The statute also authorizes the pursuit of a general public benefit.²²⁶ Similarly, Maryland has introduced a benefit corporation legend into its law for corporate names; a company may become a benefit corporation simply by putting the term “benefit corporation” prominently in the business’s name.²²⁷

States should adopt benefit corporation laws that also allow benefit LLCs so that they can avoid changing their structure to a corporate entity before becoming a benefit corporation.²²⁸ Under the current state of the law, in most benefit corporation jurisdictions that do not allow benefit LLCs, businesses who want to become benefit corporations would have to move away from LLC to become a benefit corporation.²²⁹ Many businesses are unwilling to make this change because a corporate structure requires taking minutes at board meetings and does not have the associated tax benefits preferred by many smaller firms.²³⁰ In Maryland, for example, which allows benefit LLCs, more of the businesses have chosen to become benefit LLCs.²³¹ It’s

²²³ MD. CODE ANN., CORPS. & ASS’NS §§ 1-502(a)(2), 1-502(b)(2) (2010).

²²⁴ CAL. CORP. CODE. § 14601(a) (West 2011).

²²⁵ CAL. CORP. CODE. § 14602 (West 2011).

²²⁶ CAL. CORP. CODE. § 14601(c) (West 2011).

²²⁷ See Reiser, *supra* note 26, at 596 (“In May 2011, Maryland added the requirement of a benefit legend into corporate names; it is thus far the only state to have done so.”).

²²⁸ See *supra* Part IV.A.

²²⁹ Jane Haskins, *Should You Convert Your LLC to a Corporation?*, LEGALZOOM (Mar. 2015), <https://www.legalzoom.com/articles/should-you-convert-your-llc-to-a-corporation>; see *infra* Part III.

²³⁰ See Haskins, *supra* note 229.

²³¹ See Field, *supra* note 191.

possible that if there was no option for LLCs, many of these businesses may still be ordinary LLCs.²³²

Although critics argue that normal LLC law is already flexible enough to accommodate social entrepreneurs, there are additional branding benefits as businesses can display their commitment to improving society and by introducing the accountability, transparency, and purpose requirements.²³³ It literally allows any social entrepreneur to make their beneficial goals part of their LLC's DNA, while also signaling to consumers that their purpose is genuine.²³⁴

CONCLUSION

While the normative debate as to whether corporate law should allow businesses to both pursue a profit and social good is ongoing,²³⁵ the opportunity to establish such a benefit corporation, as already available in thirty-four United States jurisdictions, is likely to spread.²³⁶

Despite the number of states that provide benefit corporation status, adoption remains low amongst businesses.²³⁷ Proponents of benefit corporation legislation should seek to increase adoption amongst large businesses, because large-business adoption will likely provide the most

²³² See *supra* Part IV.

²³³ See *supra* Introduction; see also *supra* Part I.

²³⁴ See Munch, *supra* note 30, at 172; see *supra* Introduction; see also *supra* Part I-II.

²³⁵ Kevin V. Tu, *Socially Conscious Corporations and Shareholder Profit*, 84 GEO. WASH. L. REV. 121, 121 (2016) (“The normative debate as to whether corporations should operate with the singular objective of maximizing shareholder wealth or broader societal obligations may never be settled. Even so, the growth of socially conscious corporations—that seek to create shareholder profit while advancing social missions—highlights a contemporary legal issue facing corporate directors and shareholders.”).

²³⁶ See *supra* Introduction; see also *supra* Part I.

²³⁷ See *supra* Introduction.

market pressure on other businesses to adopt the structure themselves, thus causing the production of more social good.²³⁸

Several options to attract more businesses to become benefit corporations are to provide tax and other incentives, such as a lower tax rate for benefit corporations or fee waivers.²³⁹ Statutes could be crafted to make reporting and assessment requirements lower.²⁴⁰ Finally, barriers exist to creating a benefit corporation for many businesses, especially LLCs.²⁴¹ Benefit corporation laws should allow for benefit LLCs to entice more LLCs to join and reduce administrative and other hurdles.²⁴²

²³⁸ *See supra* Part IV.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*