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TAKING STOCK OF THE BENEFIT CORPORATION

By: Ronald J. Colombo*

ABSTRACT

Almost a decade ago, the “benefit corporation” first appeared on American soil. Its supporters proclaimed that this would usher in a new era of corporate social responsibility. Its detractors complained that the benefit corporation would facilitate managerial abuses that corporate law had worked so hard to curb. After nearly ten years of experience with the benefit corporation, who was the more accurate prognosticator? Moreover, has the benefit corporation given rise to developments, whether beneficial or negative, that were not expected or foreseen?

This Article traces the history of the benefit corporation, with a focus on the promise that its early supporters identified with it. It also examines the criticisms that this new form of business organization provoked. The Article concludes that, contrary to the predictions of both camps, the benefit corporation has not, apparently, resulted in much change at all.

In its final Section, the Article explores the reasons why the benefit corporation has had, thus far at least, such minimal impact on the course of American business and corporate law. The conclusion reached is that, for good or for ill, benefit corporation statutes do not materially change the rules of corporate governance. Rather, they simply explicitly permit benefit corporations to conduct themselves according to standards of conduct that traditional corporate law statutes already implicitly permit. Although the promoters of benefit corporation legislation have argued that even this minor change would have an impact on businesses by effecting a normative shift in corporate decision-making, contemporary market forces appear to have had the same result on a far broader scale.

Lastly, this Article considers some of the unexpected repercussions of the benefit corporation, whether manifested or growing in potential.

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I. INTRODUCTION

An interesting and rather recent development in American corporate law has been that of the “public benefit corporation,” otherwise known as simply the “benefit corporation.” First appearing in Maryland in 2010,¹ the benefit corporation builds upon previous attempts to explicitly marry the for-profit business corporation to objectives

1. See Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 594 (2011).

that are not wholly profit-oriented. Many well-known companies—Kickstarter, Patagonia,² and multi-billion-dollar DanoneWave (parent of brands including Activia, Dannon, and Horizon Organic)³—have opted to organize as benefit corporations.

The benefit corporation phenomenon was greeted with both cheers and jeers. Advocates of the benefit corporation heralded its advent as the dawn of a new age of corporate social responsibility. Naysayers derided the benefit corporation as an unnecessary and, moreover, dangerous development that threatened corporate law's carefully constructed shareholder protections.

With the hindsight of almost a decade of experience with the benefit corporation, what preliminary conclusions can be drawn? Which set of prognosticators is history proving correct? This Article seeks to answer these questions.

Part II of this Article will set forth a brief history of the benefit corporation and thereafter carefully examine the state statutes authorizing benefit corporations (in addition to the Model Legislation proffered by B Lab). As of this writing, thirty-six states have adopted some form of benefit corporation legislation, and another five are in the process of doing so.⁴

Part III will summarize the various comments, both positive and negative, that accompanied the introduction of the benefit corporation to the panoply of American forms of business organization. Accompanying this summary, I will provide a critical assessment of the various comments and predictions.

Part IV will consider the potential reasons behind the accuracy (or inaccuracy) of the various predictions concerning the benefit corporation. Part IV will also explore unanticipated developments regarding the benefit corporation.

The Article concludes that benefit corporation statutes have not had their anticipated effects, neither positive nor negative, because traditional corporate law, prevailing corporate norms, and contemporary market pressures combine to efface the changes putatively brought about by benefit corporation legislation.

2. See *What is a Benefit of a Corporation?*, BENEFIT CORP., www.benefitcorp.net (last visited May 29, 2019) [<https://perma.cc/4VXN-EX9P>].

3. See Ryan Deffenbaugh, *DanoneWave Launches as Country's Largest Public-Benefit Corporation*, WESTFAIR COMMS. (Apr. 26, 2017), <http://westfaironline.com/88619/danonewave-launches-countrys-largest-public-benefitcorporation> [<https://perma.cc/T652-S6BK>].

4. See *State by State Status of Legislation*, BENEFIT CORP., <http://benefitcorp.net/policymakers/state-by-state-status> (last visited Nov. 4, 2019) [<https://perma.cc/5Q7S-C6MY>].

II. BENEFIT CORPORATION LEGISLATION

A. Historical Background

Historically, the corporation has seesawed between an entity organized for the common good versus one created for private gain.⁵ This has been reflected in the law of corporations, which has undergone a variety of developments and stages, ranging from concessionary to natural entity to private property conceptualizations.⁶ In its current manifestation, the corporation is generally conceived of as a product of private ordering—a nexus of contracts—pursuant to which shareholders are afforded certain privileges of ownership status. This reaffirms the concept of shareholder primacy, a dominant feature of corporate law since at least 1932 when Adolf A. Berle and Gardiner C. Means published their influential book, *The Modern Corporation and Private Property*.⁷

Nevertheless, support for a more explicitly “common good” orientation of the corporation (as perhaps best exemplified under yesteryear’s concessionary approaches to the corporation) persists, generating a certain uneasiness over the current conceptualization of the corporation and the general thrust of corporate law.⁸ Indeed, from its earliest days, the concept of shareholder primacy has been challenged, as evidenced by the lively debate between Adolf Berle and Edwin Dodd throughout the 1930s over for whose benefit the corporation ought to be managed.⁹

An early, successful encroachment upon shareholder primacy came in the form of “nonshareholder constituency statutes,” a movement that began in the 1980s and culminated in in approximately thirty states passing legislation.¹⁰ This legislation explicitly enables corporate directors to “consider the interests of employees and other groups in

5. See, e.g., Colin Mayer, *Reinventing the Corporation*, 4 J. OF BRITISH ACADEMY, 53, 57–59 (2016). Of course, the insights of Adam Smith demonstrate that the two are not necessarily mutually exclusive. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS bk IV, Chapter II (Library of Economics and Liberty ed., 2000) (1776), www.econlib.org/library/Smith/smWN13.html [<https://perma.cc/EVM9-JM94>] (“By pursuing his own interest [the individual] frequently promotes that of the society more effectually than when he really intends to promote it.”).

6. See Ronald J. Colombo, *The Corporation as a Tocquevillian Association*, 85 TEMPLE L. REV. 1, 6–15 (2012).

7. ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

8. See, e.g., Matthew T. Bodie, *AOL Time Warner and the False God of Shareholder Primacy*, 31 J. CORP. L. 975 (2006).

9. See Fenner Stewart Jr., *Berle’s Conception of Shareholder Primacy: A Forgotten Perspective for Reconsideration During the Rise of Finance*, 34 SEATTLE U. L. REV. 1457, 1474–1491 (2011).

10. See Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85, 85 (1999); George A. Mocsary, *Freedom of Corporate Purpose*, 2016 B.Y.U. L. REV. 1319, 1359 n.212 (2016).

addition to shareholders when making decisions.”¹¹ In light of the business judgment rule¹² and the latitude it grants to directorial decision-making, many commentators have argued that these statutes were largely superfluous, offering merely marginal, unnecessary protections.¹³ Nevertheless, just because a director *can* do a particular thing and act without consequence, does not mean he or she *should* do such a thing. Thus, an argument could be made that nonshareholder constituency statutes serve an important normative role; even if accomplishing nothing else, these statutes broadcast to corporate directors a certain freedom to act on behalf of nonshareholder constituents with not simply technical impunity, but rather with the explicit imprimatur of corporate law. Given that shareholder primacy is a powerful corporate norm,¹⁴ the value of nonshareholder constituency statutes from a behavioral perspective should not be underestimated. The impact of such statutes has been undeniably blunted, however, by the fact that Delaware has not adopted a nonshareholder constituency statute.¹⁵

Building upon nonshareholder constituency statutes has been the phenomenon of “B Corps.”¹⁶ Pioneered by B Lab, B Corps are corporations that have obtained private, third-party certification (from B Lab) of their efforts to consider the impact of corporate decisions upon various specified nonshareholder constituents.¹⁷ Thus, whereby nonshareholder constituency statutes ostensibly enable corporate directors to veer from the North Star of shareholder primacy, B Lab certification serves to verify that a particular company has in fact tempered its embrace of shareholder primacy by taking into account the concerns of other constituents and corporate stakeholders.

In 2010, B Lab leveraged its certification expertise and drafted its model benefit corporation legislation (the “Model Legislation”) for states to adopt.¹⁸ The Model Legislation provides for the incorporation of a “benefit corporation”: a business enterprise with the hybrid

11. See Springer, *supra* note 10.

12. See generally Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83 (2004).

13. See Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPPERDINE L. REV. 971, 998–99 (1992).

14. See D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 280 (1998).

15. Mocsary, *supra* note 10, at 1359.

16. Reiser, *supra* note 1. I am not addressing the advent of CIC or L3C organizations in this history, as the former is a European (U.K.) phenomenon, and the latter is a variation on the limited liability company. See *id.* at 593–94. As such, neither directly concern the American business corporation.

17. Reiser, *supra* note 1. For a detailed explanation of the B Corp certification process, see Ke Cao et al., *Standing Out and Fitting In: Charting the Emergence of Certified B Corporations by Industry and Region*, in 19 ADVANCES IN ENTREPRENEURSHIP, FIRM EMERGENCE AND GROWTH 1, 8–9 (2017).

18. Mark J. Loewenstein, *Benefit Corporation Law*, 85 U. CIN. L. REV. 381, 383 (2017).

objective of combining profitmaking with a “general public benefit.”¹⁹ Not surprisingly, the Model Legislation’s provisions closely mirror those required to obtain B Lab certification.²⁰ Later that same year, B Lab successfully lobbied Maryland to become the first state to pass benefit corporation legislation.²¹ Whereas a B Corp voluntarily pledges to take into account the interests of nonshareholder constituencies in its decision-making (at the risk of losing its certification), a benefit corporation is statutorily bound to do so.²² This offers companies the prospect of “government-backed legitimacy,” enabling them to better distinguish themselves from the cacophony of twenty-first-century corporate voices touting their socially-responsible behavior.²³

B. *The Model Legislation*

The Model Legislation promulgated by B Lab has been extremely influential, forming the basis of the vast majority of state benefit corporation laws.²⁴ Indeed, over thirty jurisdictions have passed benefit corporation statutes, but only Delaware and Colorado have taken an approach that differs significantly from the Model Legislation’s approach.²⁵ This is unsurprising, given that B Lab drafted the Model Legislation before any state had experimented with benefit corporations, and has aggressively lobbied for the adoption of the Model Legislation.²⁶ Unfortunately, the Model Legislation did not profit from the vetting process employed by most other forms of model legislation, such as those proffered by the American Law Institute, leading to a number of alleged deficiencies that have been replicated in most of the adopting states.²⁷

In the sections immediately to follow, the pertinent text of the Model Legislation will be set forth, quoted where necessary and summarized where not. In so doing, I shall not strictly follow the layout of the Model Legislation but will, at times, consider certain sections together where helpful for purposes of analysis. Thereafter, the benefit corporation legislation adopted by Delaware will be set forth and examined. Particular deviations taken by other states will also be recognized.

19. Felicia R. Resor, *Benefit Corporation Legislation*, 12 WYO. L. REV. 91, 101 (2012).

20. *Id.* at 102.

21. Michael B. Dorff, *Why Public Benefit Corporations?*, 42 DEL. J. CORP. L. 77, 82 (2017).

22. See MODEL BENEFIT CORP. LEGISLATION § 301(a) (B LAB Apr. 17, 2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [<https://perma.cc/5XN6-P459>].

23. Lide E. Paterno, *Irresponsible Corporate-Responsibility*, 77 U. PITT. L. REV. 499, 520 (2016).

24. Loewenstein, *supra* note 18, at 381–82.

25. *Id.*

26. *Id.*

27. *Id.* at 383.

1. Continued General Applicability of State Corporate Law

Section 101 of the Model Legislation, along with the accompanying commentary, makes it abundantly clear that “[e]xcept as otherwise provided” by the Model Legislation, the enacting state’s business corporation law “shall generally apply to all benefit corporations.”²⁸ This underscores the hybrid nature of the benefit corporation as an entity that takes the form and adopts the general principles of the traditional business corporation, with a handful of adjustments aimed at better enabling the entity to operate “with a corporate purpose broader than maximizing shareholder value” and to “consciously undertake[] a responsibility to maximize the benefits of its operations for all stakeholders, not just shareholders.”²⁹

2. Electing Benefit Corporation Status

A newly formed corporation can incorporate as a benefit corporation by simply stating in its articles of incorporation that it is a benefit corporation.³⁰

With regard to existing business corporations, a two-thirds vote of “every class or series” of stock is required for the entity to adopt benefit corporation status.³¹ More specifically, the vote shall authorize the amendment of the entity’s articles of incorporation to add to its existing language “a statement that the corporation is a benefit corporation.”³² This two-thirds threshold for every class or series of stock applies “regardless of a limitation stated in the article of incorporation or bylaws on the voting rights of any class or series.”³³

The Model Legislation also addresses the prospect of a benefit corporation merging (or undergoing a consolidation, conversion, or share exchange) with a non-benefit corporation. In such situations, if the resulting or surviving entity is to be a benefit corporation, the shareholders of the non-benefit corporation must approve the transaction by a two-thirds vote of every class or series of stock.³⁴ This vote is not on the benefit corporation status of the resulting or surviving entity per se, but rather on the merger itself. Thus, in situations where a two-thirds vote for such a fundamental change is already required, the Model Legislation adds nothing to the process other than requiring that “every class or series” of shareholder approve the transaction (including those classes and series of shares that would not have ordina-

28. MODEL BENEFIT CORP. LEGISLATION § 101 (B LAB Apr. 17, 2017).

29. *Id.* § 101 cmt.

30. *Id.* § 103.

31. *See id.* § 104(a) (requiring “minimum status vote” to adopt benefit corporation status); *Id.* § 102 (defining “minimum status vote” as two-thirds of “every class or series” of stock).

32. MODEL BENEFIT CORP. LEGISLATION § 104(a) (B LAB Apr. 17, 2017).

33. *Id.* § 102.

34. *Id.* § 104(b)(1).

rily been entitled to vote upon the transaction). In the event that the supermajorities required for the merger is less than two-thirds, or in the event that certain classes or series of shares are not entitled to vote upon the merger, the merger may be approved under state corporate law, but the requirements of the benefit corporation statutes will not be fulfilled. Presumably, in this case, the transaction would go through as approved, but the resulting or surviving entity would not be a benefit corporation.

The Model Legislation dispenses with the aforementioned fundamental-transactions vote requirement in the case of a corporation where the shareholders may not vote on the merger under state law, pursuant to a typical “short form” merger statute.³⁵

Entities that avail themselves of the Model Legislation are called “benefit corporations,”³⁶ a non-copyrighted term that B Lab nevertheless jealously guards.³⁷

Finally, it should be noted that the Model Legislation limits benefit corporation status to domestic companies.³⁸

3. Terminating Benefit Corporation Status

Under the Model Legislation, a two-thirds vote of “every class or series” of stock is required for a business entity to terminate its benefit corporation status.³⁹ More specifically, the vote shall authorize the amendment of the entity’s articles of incorporation to delete therefrom language identifying the entity as a benefit corporation.⁴⁰ This two-thirds threshold for every class or series of stock applies “regardless of a limitation stated in the articles of incorporation or bylaws on the voting rights of any class or series.”⁴¹

If a merger (or consolidation, conversion, or share exchange) “would have the effect of terminating the status of a business corporation as a benefit corporation,” two-thirds of every class or series of stock of the benefit corporation must approve the transaction.⁴² Similar to the election of benefit corporation status, this vote is not, apparently, on the termination of the benefit corporation status but rather on the merger itself.⁴³ Thus, in the event that the supermajorities re-

35. *Id.* § 104(b)(2).

36. *Id.* § 101(a).

37. Loewenstein, *supra* note 18, at 382. Indeed, B Lab has reportedly threatened to actively oppose any legislation employing the “benefit corporation” nomenclature that does not meet their approval. *Id.* at 382 n.7.

38. MODEL BENEFIT CORP. LEGISLATION § 103 cmt. (B LAB Apr. 17, 2017).

39. *See id.* § 105(a) (requiring “minimum status vote” to terminate benefit corporation status); *Id.* § 102 (defining “minimum status vote” as two-thirds of “every class or series” of stock).

40. *Id.* § 105(a).

41. *Id.* § 102.

42. *Id.* § 105(b)(1).

43. *See id.* § 104(b)(1)–(2).

quired for the merger is less than two-thirds or in the event that certain classes or series of shares are not entitled to vote upon the merger, the possibility arises that the merger will be approved under state corporate law, but that the requirements for terminating benefit corporation status will not be fulfilled. Presumably, in this case, the transaction would go through as approved, but the resulting or surviving entity would retain its status as a benefit corporation.

Also, as with the election of benefit corporation status, the Model Legislation dispenses with the fundamental-transactions vote requirement in the case of a corporation where the shareholders are not entitled to vote on the merger under state law, pursuant to a typical “short form” merger statute.⁴⁴

Finally, in a provision that does supplant the ordinary operation of state corporate law, the Model Legislation declares that:

Any sale, lease, exchange, or other disposition of all or substantially all of the assets of a benefit corporation, unless the transaction is in the usual and regular course of business, shall not be effective unless the transaction is approved by at least the minimum status vote.⁴⁵

This provision prevents circumvention of the rules requiring a two-thirds vote to undertake a transaction that would strip an entity of its benefit corporation status.⁴⁶

4. Corporate Purposes and Public Benefit

The substantive meaning of the term “benefit corporation” is not provided in the Model Legislation’s definitions section. Rather, what it means to be a benefit corporation is encompassed by the Model Legislation as a whole, particularly section 201, “Corporate Purposes.”

Per section 201, a benefit corporation “shall have a purpose of creating general public benefit.”⁴⁷ Optionally adjoined to this mandatory purpose may be “one or more specific public benefits.”⁴⁸ Such optional “specific public benefits” shall not “limit the purpose of the benefit corporation to create general public benefit.”⁴⁹ Consequently, critical to an understanding of section 201 and the benefit corporation itself is an understanding of what constitutes a “general public benefit” and a “specific public benefit.” These are defined terms in the Model Legislation.

“General public benefit” is defined, in its entirety, as:

44. MODEL BENEFIT CORP. LEGISLATION § 105(b)(2) (B LAB Apr. 17, 2017).

45. *Id.* § 105(c).

46. *Id.* § 105 cmt.

47. *Id.* § 201(a).

48. *Id.* § 201(b).

49. *Id.*

A material positive impact on society and the environment, taken as a whole, from the business and operations of a benefit corporation assessed considering the impacts of the benefit corporation as reported against a third-party standard.⁵⁰

This definition immediately invites a number of criticisms. First, there is the curious conjunctive coupling of “society” with “the environment”—a coupling that persists throughout the Model Legislation’s commentary and subsequent sections.⁵¹ There is a panoply of needs and concerns that huge majorities of U.S. citizens would most likely recognize as critically important to the public, many of which rank higher than “the environment.” According to the Pew Research Center, Americans’ top priorities for 2018 consisted of (in order): terrorism, education, the economy, healthcare costs, social security, and Medicare.⁵² Only next comes the environment, tied with jobs.⁵³ Among the top priorities—and others—the Model Legislation singles out the environment for specific attention. Fortunately, the Model Legislation quickly adds the qualifier “taken as a whole,” clarifying that good works such as providing food, shelter, and clothing to the poor (to take one handful of examples) could still possibly be counted as providing a “general public benefit,” notwithstanding their lack of any obvious positive impact upon the environment per se. Indeed, the “taken as a whole” qualifier is critically important because many efforts to serve society might actually have a deleterious effect upon the environment, and the Model Legislation appears to sanction such an effect so long as it offsets some even greater, positive social effect.⁵⁴

The next curious aspect of the definition of “general public benefit” is that it fails to recognize the fact that a large number of successful, traditional business corporations create “general public benefits” simply by virtue of their success: employing men and women, distributing wages, providing and subsidizing medical benefits, growing retirement and other investment savings, and generating tax revenues. There is a reason why so many states and localities compete to land corporate relocations within their territories, and why Columbia University President Nicholas Murray Butler famously declared, “[I]n my judgment the limited liability corporation is the greatest single discovery of modern times . . . Even steam and electricity are far less important

50. MODEL BENEFIT CORP. LEGISLATION § 102 (B LAB Apr. 17, 2017).

51. *Id.* § 102 cmt.

52. Valerie Strauss, *New Poll of Americans’ Top Priorities for 2018 Has Education at No. 2 – Ahead of the Economy*, WASHINGTON POST (Jan. 25, 2018), https://www.washingtonpost.com/news/answer-sheet/wp/2018/01/25/new-poll-of-americans-top-priorities-for-2018-has-education-at-no-2-ahead-of-the-economy/?utm_term=.a7aeb4e3495f [https://perma.cc/DH8S-BSYH].

53. *Id.*

54. *But see* Joseph W. Yockey, *Does Social Enterprise Law Matter?*, 66 ALA. L. REV. 767, 795 (2015) (“[t]he statutory language implies that benefit corporations must adhere to a triple rather than double bottom line”).

than the limited liability corporation, and they would be reduced to comparative impotence without it.”⁵⁵ Thus, while one need not agree with Milton Friedman that *The Social Responsibility of Business is to Increase Its Profits*,⁵⁶ it is not too much to ask that the Model Legislation articulate why the aforementioned benefits do not constitute a “material positive impact on society”—or, even in the face of some offsetting environmental harm, “a material positive impact on society and the environment, *taken as a whole*.”

As such, the Model Legislation’s use of the terms “benefit corporation” and “general public benefit” are not as neutral as they may appear: they reflect a particular understanding of what constitutes a public benefit and appear to discount the tremendous public benefits that typical, traditional business corporations, both individually and in the aggregate, regularly bestow upon society.⁵⁷ Indeed, in some states, benefit corporation legislation was defeated on precisely these grounds: that the advent of the benefit corporation creates “a false dichotomy between ‘good’ and ‘bad’ business.”⁵⁸

This is not to suggest that there is no difference between the general social benefits of a free market system brought about via the pursuit of self-interest under the corporate form, on the one hand, and the more intentionally beneficent,⁵⁹ quasi-altruistic work of those companies identifying as benefit corporations on the other. Nor is it suggested that the free market system is without its flaws, including those stemming from the very same aforementioned pursuit of self-interest. It is nevertheless fair to criticize the Model Legislation for failing to identify and articulate such difference satisfactorily.

As indicated, the Model Legislation also provides a definition of “specific public benefit.” A “specific public benefit” includes:

- (1) providing low-income or underserved individuals or communities with beneficial products or services;
- (2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;
- (3) protecting or restoring the environment;
- (4) improving human health;
- (5) promoting the arts, sciences, or advancement of knowledge;
- (6) increasing the flow of capital to entities with a purpose to benefit society or the environment; and

55. NICHOLAS MURRAY BUTLER, 143D ANNUAL BANQUET OF THE CHAMBER OF COMMERCE OF THE STATE OF NEW YORK 48 (1911).

56. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32.

57. See BUTLER, *supra* note 55; cf. Ezra Rosser, *Poverty Offsetting*, 6 HARV. L. & POL’Y REV. 179, 180 (2012).

58. Alicia E. Plerhopes, *Delaware Public Benefit Corporations 90 Days Out: Who’s Opting In?*, 14 U.C. DAVIS BUS. L. J. 247, 249 (2014).

59. Cf. Alina S. Ball, *Social Enterprise Governance*, 18 U. PA. J. BUS. L. 919, 921 (2016) (“Social enterprises are business ventures that *intentionally* affect societal good.”) (emphasis added).

(7) conferring any other particular benefit on society or the environment.⁶⁰

This too is a curious provision. Recall that these enumerated particular benefits, if adopted, are deemed to be “in addition to” the purpose of “creating general public benefit.”⁶¹ Traditional canons of statutory construction would suggest, quite strongly, that these particular benefits do not of themselves create a general public benefit. It is difficult to see how that is so. Indeed, even benefits specifically relating to the environment are identified in this definition (three times), yet endeavoring to have a materially positive impact upon the environment was previously identified as an element of “general public benefit.” As such, the two definitional sections, “general public benefit” and “specific public benefit,” do not appear congruent.

Further, the existence of a catch-all provision (“(7) conferring any other particular benefit on society or the environment”) essentially renders items (1) through (6) unnecessary. It is, of course, not uncommon for legislation to list a variety of particulars and end with a more general, open-ended provision. However, this is usually done when the specifically-enumerated items serve some important purpose, such as establishing safe harbors or certain unquestionably sanctioned choices. Here, items (1) through (6) appear to do no such thing. They seem to be set forth primarily, if not solely, to serve some normative purpose—to promote those causes that the Model Legislation’s drafters deemed most worthy.

It would seem as though the Model Legislation could have been improved by dispensing with the odd dichotomy of “general public benefit” versus “specific public benefit,” and by simply adopting the general language of the catch-all provision set forth above. In other words, the substantive core of the benefit corporation could have been simply defined as “a corporation having as one of its purposes the conferral of a particular benefit on society.” Finally, the references to the environment are superfluous, given that environmental preservation and/or restoration is itself commonly understood as beneficial to society as a whole.

5. Accountability: Standard of Conduct for Directors

Subchapter 3 of the Model Legislation addresses accountability. The concept of accountability is introduced in the very definition of “general public benefit,” which includes an important reference to “a third-party standard”⁶² (a matter to which we shall return⁶³). Subchapter 4, entitled “Transparency,” arguably continues this focus on

60. MODEL BENEFIT CORP. LEGISLATION § 102 (B LAB Apr. 17, 2017).

61. *Id.* § 201(a)–(b).

62. *Id.* § 102.

63. *See infra* text accompanying notes 94–95.

accountability. As such, half of the Model Legislation’s four subchapters is devoted to the concept of benefit corporation accountability.

Section 301 initiates the focus on accountability by setting forth the standard of conduct for directors in a benefit corporation. Part (a) of section 301 articulates the interests that a director must consider in fulfilling his or her responsibilities to the benefit corporation. This important part merits recitation in full:

(a) Consideration of interests. In discharging the duties of their respective positions and in considering the best interests of the benefit corporation, the board of directors, 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 of the benefit corporation;
 - (ii) the employees and workforce of the benefit corporation, its subsidiaries, and its suppliers;
 - (iii) the interests of customers as beneficiaries of the general public benefit or a specific public benefit purpose of the benefit corporation;
 - (iv) community and societal factors, including those of each community in which offices or facilities of the benefit corporation, its subsidiaries, or its suppliers are located;
 - (v) the local and global environment;
 - (vi) the short-term and long-term interests of the benefit corporation, including benefits that may accrue to the benefit corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the benefit corporation; and
 - (vii) the ability of the benefit corporation to accomplish its general public benefit purpose and any specific public benefit purpose; and
- (2) may consider:
 - [(i) the interests referred to in [cite constituencies provision of the business corporation law if it refers to constituencies not listed above]; and*
 - (ii)] other pertinent factors or the interests of any other group that they deem appropriate; but*
- (3) need not give priority to a particular interest or factor referred to in paragraph (1) or (2) over any other interest or factor unless the benefit corporation has stated in its articles of incorporation its intention to give priority to certain interests or factors related to the accomplishment of its general public benefit purpose or of a specific public benefit purpose identified in its articles.⁶⁴

Part (a) is divided into three subparts: the first addressing those interests that a benefit corporation director must (“shall”) consider, the second addressing those that the director may (optionally) consider,

64. MODEL BENEFIT CORP. LEGISLATION § 301(a) (B LAB Apr. 17, 2017) (italics in original).

and the third addressing the question of prioritization. Let us review these subparts in turn.

Subpart (1) identifies those interests that a benefit corporation director must consider in discharging his or her duties. The interested parties include the various constituencies of the corporation, starting with the shareholders and proceeding through the corporation's employees, customers, and communities in which the company (or its subsidiaries or suppliers) is located. This is a fairly typical list of stakeholders and mirrors the lists provided in nonshareholder constituency statutes referenced previously.⁶⁵ Added to this list is the local and global environment, the short-term and long-term interests of the benefit corporation itself, and finally, "the ability of the benefit corporation to accomplish its general public purpose and any specific public benefit purpose."⁶⁶

According to the Model Legislation's official commentary, this section "is at the heart of what it means to be a benefit corporation" and amounts to a "rejection" of those authorities that require a corporation to "maximize the financial value of a corporation."⁶⁷ As the comment correctly points out, although the list of stakeholders is indeed similar to that found in most nonshareholder constituency statutes, these statutes typically merely *authorize* directors to consider such interests—the Model Legislation *requires* such interests to be considered.⁶⁸

Section 301(a) helps elucidate what the Model Legislation means when it refers to a "general public benefit."⁶⁹ By supplying this list of mandatory interests that benefit corporation directors "shall consider," the Model Legislation, consequently, provides us with the substantive content of "general public benefit." In other words, a "general public benefit" is something that has a net positive effect upon this universe of constituents and interests, "taken as a whole."

Subpart (2) enables the benefit corporation to supplement the list of interests with additional ones.⁷⁰ The official commentary does not address subpart (2), and it stands to reason that this subpart expresses the unremarkable proposition that the director of a benefit corporation may consider interests beyond the bare minimum list of interests provided by the Model Legislation. This would not be an exception that might swallow the general rule owing to the fact that, as previously discussed, the benefit corporation, regardless of the decisions it

65. *See supra* text accompanying notes 11–15.

66. MODEL BENEFIT CORP. LEGISLATION § 301(a)(1) (B LAB Apr. 17, 2017).

67. *Id.* § 301 cmt.

68. *Id.*

69. *See supra* text accompanying note 50.

70. MODEL BENEFIT CORP. LEGISLATION § 301(a)(2) (B LAB Apr. 17, 2017).

makes, is ultimately beholden to effecting a “material positive impact on society and the environment, taken as a whole.”⁷¹

Of greater significance is subpart (3), which clarifies that the director of a benefit corporation “need not give priority to a particular interest or factor” referenced above, unless, of course, the benefit corporation had committed to such a prioritization in its articles of incorporation.⁷² Perhaps this is intended to assuage fears that somehow shareholders of a benefit corporation would inevitably be relegated to an inferior position than to other corporate interests. Moreover, via its wording, subpart (3) acknowledges (if not invites) the prioritization of one particular interest or group of interests over certain others (subject to the overarching objective of effecting a “material positive impact on society and the environment, taken as a whole”⁷³). As such, the benefit corporation need not reject shareholder primacy; it only needs to temper it.

Part (b) of section 301 makes clear that “consideration of interests and factors in the manner provided by subsection (a) . . . does not constitute a violation” of directors’ traditional corporate law duties and would be in addition to interests and factors set forth in any non-shareholder constituency provisions already part of the adopting state’s corporate law.⁷⁴ This is an important acknowledgment as it ensures that compliance with the Model Legislation will not cause a director to run afoul of his or her duties under general business corporation law, especially if traditionally understood as requiring shareholder wealth maximization.

Part (c) goes a step further than part (b) and exonerates directors from personal liability for any shortcomings with respect to their obligation to consider the various interests set forth in part (a) aside from those arising out of a conflict of interest.⁷⁵ It also exonerates benefit corporation directors from personal liability for failing “to pursue or create general public or specific public benefit.”⁷⁶ The first exoneration identified is not particularly remarkable and is reminiscent of similar exculpatory provisions already contained in state corporate law indemnifying directors from duty-of-care claims but not duty-of-loyalty claims.⁷⁷ The second exoneration, regarding failure to pursue or create a general public or specific public benefit, is noteworthy as it permits directors to disregard the entire purpose of the benefit corporation with impunity. Presumably, drafters included part (c) in the

71. See *supra* text accompanying note 50.

72. MODEL BENEFIT CORP. LEGISLATION § 301(a)(3) (B LAB Apr. 17, 2017).

73. See *supra* text accompanying note 50.

74. MODEL BENEFIT CORP. LEGISLATION § 301(b) (B LAB Apr. 17, 2017).

75. *Id.* § 301(c).

76. *Id.*

77. See RONALD J. COLOMBO, THE LAW OF CORPORATE OFFICERS AND DIRECTORS §§ 2:9–2:10 (2018).

Model Legislation to help minimize the hesitancy individuals might have to serve as director of a benefit corporation.

Part (d) critically establishes that the directors of a benefit corporation do not “have a duty to a person that is a beneficiary of the general public benefit purpose or specific public benefit purpose”⁷⁸ and thus maintains the established corporate law principle that only shareholders may ordinarily sue directors for breach of duty.⁷⁹

Part (e) statutorily enshrines the business judgment rule with regard to obligations and duties arising under the Model Legislation. The formulation is modeled after the American Law Institute’s approach to the business judgment rule, and is a fair recitation of the rule:⁸⁰

Business Judgments. – A director who makes a business judgment in good faith fulfills the duty under this section if the director:

- (1) is not interested in the subject of the business judgment;
- (2) is informed with respect to the subject of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances; and
- (3) rationally believes that the business judgment is in the best interests of the benefit corporation.⁸¹

6. Accountability: Standard of Conduct for Officers

The Model Legislation addresses the standard of conduct for benefit corporation officers, requiring them to take into account the interests and factors that the benefit corporation directors must take into account, as discussed previously.⁸² Cognizant of the role that officers play within the organization, the Model Legislation only applies this standard with respect to matters over which the officer has “discretion” to act and only in circumstances where “it reasonably appears to the officer that the matter may have a material effect on the creation by the benefit corporation of general public benefit or a specific public benefit.”⁸³

Section 303 repeats the protections in place for directors of benefit corporations as follows:

78. MODEL BENEFIT CORP. LEGISLATION § 301(d) (B Lab Apr. 17, 2017).

79. The official commentary to section 301(d) references the ability of nonshareholders to bring a “benefit enforcement proceeding” if the benefit corporation’s articles of incorporation so provide. *Id.* § 301 cmt. According to the comment, the authority for allowing such suits is purportedly contained in section 305(b) of the Model Legislation. *Id.* However, section 305(b) permits no such thing, and the concept of nonshareholder lawsuits is nowhere addressed in the Model Legislation. The closest thing to this is permission for shareholders of a benefit corporation’s parent company to bring a lawsuit. *See id.* § 305(c)(2)(ii). As such, this commentary appears to be a scrivener’s error—an accidental holdover, perhaps, from an earlier version of the Model Legislation.

80. MODEL BENEFIT CORP. LEGISLATION § 301(e) & cmt. (B Lab Apr. 17, 2017).

81. *Id.* § 301(e).

82. *Id.* § 303(a); *see also supra* Part II.B.5.

83. MODEL BENEFIT CORP. LEGISLATION § 303(a) (B Lab Apr. 17, 2017).

- Part (b) of section 303 makes clear that “consideration of interests and factors in the manner provided by subsection (a) . . . does not constitute a violation” of the officer’s traditional corporate law duties.
- Part (c) of section 303 exonerates officers from personal liability for any shortcomings with respect to their obligations to consider the various interests set forth in part (a) aside from those arising out of a conflict of interest. It also exonerates them from personal liability if the benefit corporation fails “to pursue or create general public or specific public benefit.”
- Part (d) of section 304 extends the protections of the business judgment rule, as formulated in section 303, to benefit corporate officers.⁸⁴

Part (d), addressing the business judgment rule, should not be passed upon without some additional notice. There is no current consensus regarding whether the business judgment rule applies to corporate officers.⁸⁵ As such, there is a certain boldness in this particular provision of the Model Legislation. That was apparently not lost upon the legislation’s drafters who, in the official commentary, remarked that “[i]f the law of the enacting state is not clear that the business judgment rule applies generally to actions by officers of corporations, consideration should be given to confirm that the rule applies more broadly than just under this chapter.”⁸⁶ A less strident approach, particularly in the official comments was certainly possible, and arguably more in keeping with legislation drafted specifically to introduce a new form of business organization while leaving as much of pre-existing business corporation law as possible intact and untouched.

7. Accountability: Right of Action

In addition to the exoneration provisions for directors and officers set forth previously, the Model Legislation generally precludes anyone from bringing a claim against the corporation with respect to “failure of [the corporation] to pursue or create general public benefit or a specific public benefit” or “violation of an obligation, duty, or standard of conduct” under the Model Legislation.⁸⁷ The one exception to this preclusion is the “benefit enforcement proceeding.” The benefit enforcement proceeding is defined as:

A claim, action, or proceeding for:

- (1) failure of a benefit corporation to pursue or create general public benefit or a specific public benefit purpose set forth in its articles; or

84. *Id.* § 303(b)–(e).

85. See generally Gregory Scott Crespi, *Should the Business Judgment Rule Apply to Corporate Officers, and Does it Matter?*, 31 OKLA. CITY U. L. REV. 237 (2006).

86. MODEL BENEFIT CORP. LEGISLATION § 303 cmt. (B LAB Apr. 17, 2017).

87. *Id.* § 305(a).

- (2) violation of any obligation, duty or standard of conduct under this [chapter].⁸⁸

Section 305 expounds upon the concept of a benefit enforcement proceeding. Part (b) of the section precludes money damages against the corporation “for any failure . . . to pursue or create general public benefit or a specific public benefit.”⁸⁹ Interestingly, this preclusion does not extend to the second grounds for bringing a benefit enforcement proceeding: for a violation of “an obligation, duty, or standard of conduct” under the Model Legislation. As these two grounds certainly overlap to a degree, it is difficult to see how this line between them will be policed when it comes to claims for monetary damages.

Part (c) of section 305 identifies those parties who have standing to bring a benefit enforcement proceeding as: (1) the benefit corporation itself; (2) a 2% shareholder of any class or series of stock of the corporation (or group of such shareholders); and (3) a 5% shareholder of any class or series of stock of an entity of which the corporation is a subsidiary (or group of such shareholders).⁹⁰

There is no mention of the relief available in a benefit enforcement proceeding, other than the limitation on monetary liability set forth in section 305(b).

8. Accountability: The Annual Benefit Report

The Model Legislation requires the preparation of an “annual benefit report” by the benefit corporation.⁹¹ The report must contain a narrative description detailing the ways in which the corporation pursued a general public benefit and the extent to which such benefit was created (and the same with regard to a specific public benefit, if applicable).⁹² The report must also identify circumstances that have hindered its efforts in this regard.⁹³

The corporation must assess its “overall social and environmental performance” against a third-party standard and must explain its “process and rationale” for selecting such standard.⁹⁴ The Model Legislation defines the term “third-party standard” as independent entities with experience in assessing overall corporate social and environmental impact against various stakeholders. This definition includes organizations such as B Lab, the legislation’s author.⁹⁵ That

88. *Id.* § 102.

89. *Id.* § 305(b).

90. *Id.* § 305(c).

91. *Id.* § 401(a).

92. MODEL BENEFIT CORP. LEGISLATION § 401(a) (B LAB Apr. 17, 2017).

93. *Id.*

94. *Id.*

95. *Id.* § 102.

said, the benefit report itself need not be audited or certified by a third party.⁹⁶

The benefit report must set forth the “compensation paid by the benefit corporation during the year to each director in the capacity of a director.”⁹⁷ This is duplicative for public companies,⁹⁸ and is another arguably questionable encroachment upon state corporate law with regard to nonpublic companies.

Section 401 contains a few provisions regarding benefit directors and benefit officers. As set forth below, these are individuals that a benefit corporation may optionally appoint.⁹⁹ If a benefit corporation opts to appoint a benefit director or/and officer, it must disclose their names and contact addresses.¹⁰⁰ With regard to benefit directors, such persons shall include a separate report to accompany the annual benefit report addressing:

- (1) whether the benefit corporation acted in accordance with its general public benefit purpose and any specific public benefit purpose in all material respects during the period covered by the report.
- (2) Whether the directors and officers complied with [their standard of conduct, as discussed previously].
- (3) If the benefit director believes that the benefit corporation or its directors or officers failed to act or comply in the manner described in paragraphs (1) and (2), a description of the ways in which the benefit corporation or its directors or officers failed to act or comply.¹⁰¹

Should a benefit director resign, be removed, or decide not to stand for reelection, the annual benefit shall include as an exhibit “any written correspondence concerning the circumstances” relating thereto.¹⁰²

Finally, section 402 covers issues concerning the availability and dissemination of the annual benefit report. The report must be distributed to each shareholder either (1) 120 days following the end of the corporation’s fiscal year or (2) at the same time it delivers any other annual report.¹⁰³ Simultaneously, the report shall be filed with the secretary of state; such filing may omit information on director compensation and proprietary information.¹⁰⁴ The report shall be posted on the corporation’s website if it has one, and information regarding director compensation and proprietary matters may be omitted in the

96. *Id.* § 401(c).

97. *Id.* § 401(a)(4).

98. *See* 17 C.F.R. § 240.14a-101 (2018).

99. *See infra* text accompanying notes 107–115.

100. MODEL BENEFIT CORP. LEGISLATION § 401(a)(3) (B LAB Apr. 17, 2017).

101. *Id.* § 302(c).

102. *Id.* § 401(b).

103. *Id.* § 402(a).

104. *Id.* § 402(d).

posted version.¹⁰⁵ If the corporation does not have a website, copies shall be made available free of charge to “any person that requests a copy” and may omit director compensation and proprietary information.¹⁰⁶

9. The Benefit Director and Benefit Officer

In section 302, the Model Legislation provides for the optional inclusion of a “benefit director” on the board of a benefit corporation. This individual is to serve with the same “powers, duties, rights, and immunities” of all other directors.¹⁰⁷ He or she shall be subject to the same standards and procedures for election and removal as all other directors under state corporate law and the articles of incorporation.¹⁰⁸ He or she shall be subject to the same qualification requirements, with one exception: the benefit director “shall be an individual who is independent.”¹⁰⁹ The Model Legislation provides a definition of independence, keyed to the absence of a “material relationship” with the benefit corporation or a subsidiary of the benefit corporation.¹¹⁰ A material relationship will be conclusively presumed if: (1) the individual is or has been an employee of the benefit corporation (or one of its subsidiaries) within the last three years, (2) an immediate family member of the individual is or has been an executive of the benefit corporation (or one of its subsidiaries) within the last three years, or (3) the individual (or an entity over which the individual has control or a threshold ownership interest) owns 5% or more of the outstanding shares of the benefit corporation (calculated to include unexercised rights to acquire such shares).¹¹¹

Section 302 absolves the benefit director from personal liability “for an act or omission in the capacity of a benefit director unless the act or omission constitutes self-dealing, willful misconduct, or a knowing violation of the law.”¹¹² This protection is automatic and is in addition to any other provisions contained within the corporation’s articles or bylaws eliminating or limiting the personal liability of corporate directors.

As previously indicated, if the corporation has a benefit director, that director must prepare a separate report to accompany the corporation’s annual benefit report.¹¹³ The corporation may also opt to designate a “benefit officer.”¹¹⁴ Such an officer will have whatever

105. *Id.* § 402(b).

106. MODEL BENEFIT CORP. LEGISLATION § 402(c) (B LAB Apr. 17, 2017).

107. *Id.* § 302(a)(2).

108. *Id.* § 302(b).

109. *Id.*

110. *Id.* § 102.

111. *Id.*

112. MODEL BENEFIT CORP. LEGISLATION § 302(e) (B LAB Apr. 17, 2017).

113. *See supra* text accompanying note 101.

114. MODEL BENEFIT CORP. LEGISLATION § 304(a) (B LAB Apr. 17, 2017).

powers and duties are vested in him by the corporation, coupled with an obligation to prepare the corporation's annual benefit report.¹¹⁵

C. Delaware's Public Benefit Corporation Statute

Although Delaware never adopted a nonshareholder constituency statute,¹¹⁶ it did pass benefit corporation legislation in 2013. Delaware's approach to the benefit corporation differs in a number of significant ways from B Lab's Model Legislation. The following Sections assume familiarity with the Model Legislation discussed previously, and as such will engage in a more abridged examination (focusing more on critical differences).

As with the Model Legislation, Delaware's statute merely supplements (and supersedes where divergent) its pre-existing business corporation law.¹¹⁷ It also follows a similar, albeit tweaked nomenclature: a "public benefit corporation" is the entity enabled by Delaware's legislation, a minor departure from the term "benefit corporation" employed by the Model Legislation.¹¹⁸ But there the similarities largely end.

The most immediate and obvious difference between the two approaches is the size and detail of the legislative text itself. Whereas the Model Benefit Corporation Legislation runs twenty-three pages long (albeit with commentary included),¹¹⁹ the Delaware legislation for public benefit corporations is a mere three pages long.¹²⁰ This reflects Delaware's more modest approach, in which many of the features included in the Model Legislation are not included. Among these omissions are the concepts of benefit directors and benefit officers. Other items, addressed at length in the Model Legislation, are treated more succinctly and flexibly in the Delaware approach, further accounting for the disparity in length. The most significant examples of these differences are addressed below.

1. Formation

As with the Model Legislation, a corporation may be organized as a public benefit corporation *ab initio*, in which case there is no material difference between the two approaches.¹²¹

115. *Id.* § 304(b).

116. See Mocsary, *supra* note 10, at 1359.

117. DEL. CODE ANN. tit. 8, § 361 (Supp. 2018).

118. *Id.* Other jurisdictions have adopted more divergent names. See FLA. STAT. ANN. § 607.501 (West 2016) ("Social Purpose Corporations"); HAW. REV. STAT. ANN. § 420D-3 (LexisNexis 2017) ("Sustainable Business Corporations").

119. See *generally*, MODEL BENEFIT CORP. LEGISLATION (B LAB Apr. 17, 2017). The commentary consumes less than half the total lines of text.

120. DEL. CODE ANN. tit. 8, §§ 361–368 (Supp. 2018).

121. *Id.* § 361.

Similarly, an existing corporation may be reorganized as a public benefit corporation upon a two-thirds vote of outstanding voting stock or via the consequence of a merger upon the same margin of approval.¹²² However, Delaware grants appraisal rights to those shareholders who “neither voted in favor of such amendment or such merger or consolidation [giving rise to public benefit corporation status] nor consented thereto in writing.”¹²³ These rights entitle the dissenting shareholders to “an appraisal by the Court of Chancery of the fair value of the stockholder’s shares of stock.”¹²⁴ Other states, such as Colorado,¹²⁵ Florida,¹²⁶ Kansas,¹²⁷ and South Carolina¹²⁸ have followed Delaware’s lead here, and provide for an appraisal remedy for dissenting shareholders.

As with the Model Legislation, only a two-thirds shareholder majority is required for a public benefit corporation to shed such status and revert to (or otherwise become) an ordinary business corporation.¹²⁹

2. Corporate Purposes and Public Benefit

As stated earlier, the heart of the benefit corporation is its abandonment of the shareholder primacy norm.¹³⁰ On this count, Delaware’s law generally parallels that of the Model Legislation. As per the Delaware Act:

A public benefit corporation is a for-profit corporation organized under and subject to the requirements of this chapter that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. 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 public benefits identified in its certificate of incorporation.¹³¹

122. *Id.* § 363(a). Delaware had originally required a 90% vote of eligible shareholders to effect this change in corporate status, reflecting, perhaps, Delaware’s instinctive protectiveness of shareholder interests. See Kennan Khatib, Comment, *The Harms of the Benefit Corporation*, 65 AM. U. L. REV. 151, 187 n.198 (2015).

123. DEL. CODE ANN. tit. 8, § 363(b).

124. *Id.*

125. COLO. REV. STAT. § 7-101-504(3) (2018).

126. FLA. STAT. ANN. § 607.504(3) (West 2016).

127. KAN. STAT. ANN. § 17-72a03 (Supp. 2017).

128. S.C. CODE ANN. § 33-38-600 (Supp. 2018).

129. DEL. CODE ANN. tit. 8, § 363(c) (Supp. 2018).

130. See *supra* text accompanying notes 64–67.

131. DEL. CODE ANN. tit. 8, § 362(a). As with the Model Legislation, one could fairly take issue with the suggestion that traditional corporations (many if not most of them) don’t already produce public benefits and operate in responsible, sustainable manners.

A difference arises, however, with respect to how the term “public benefit” is defined. Recall how the Model Legislation defined public benefit:

A material positive impact on society and the environment, taken as a whole, from the business and operations of a benefit corporation assessed taking into account the impacts of the benefit corporation as reported against a third-party standard.¹³²

The Model Legislation then proceeded to promulgate a suggested list of “specific public benefits”¹³³ that could optionally be conjoined to the benefit corporation’s general public benefit. As the specific public benefit definition concluded with an open-ended provision (“conferring any other particular benefit on society or the environment”), I questioned its utility.¹³⁴ Additionally, I criticized the Model Legislation for tethering “general public benefit” to the environment. Furthermore, I critiqued it for promoting “the environment” in three of seven enumerated “specific public benefits.”¹³⁵ Delaware opted for a more streamlined approach, merging the concepts of “general public benefit” and “specific public benefit” into one as follows:

“Public benefit” means a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature.¹³⁶

The Delaware approach is arguably superior, as it eliminates the redundancies of the Model Legislation’s provisions. It also dispenses with the awkward calculus of achieving a “material positive impact on society and the environment, taken as a whole,” and more directly focuses on simply positive (or the reduction of negative) effects.¹³⁷ Finally, the Model Legislation’s flexibility notwithstanding, the broader articulation of potential categories of public benefit contained in the Delaware statute broadcasts a certain respectfulness of entrepreneurs and their diversity, acknowledging their ability to identify undertakings fairly characterized as providing public benefit. Delaware’s approach here has been influential, and a number of states have opted for the same or a similar definition of public benefit over that set forth by the Model Legislation.¹³⁸

132. MODEL BENEFIT CORP. LEGISLATION § 102 (B LAB Apr. 17, 2017).

133. *Id.*

134. *See supra* text accompanying notes 60–63.

135. *See supra* text accompanying notes 50–53.

136. DEL. CODE ANN. tit. 8, § 362(b) (Supp. 2018).

137. MODEL BENEFIT CORP. LEGISLATION § 102 (B LAB Apr. 17, 2017).

138. *See, e.g.*, COLO. REV. STAT. § 7-101-503 (2018); FLA. STAT. ANN. § 607.502(6) (West 2016); KAN. STAT. ANN. § 17-72a02(b) (Supp. 2017); TENN. CODE ANN. § 48-28-103 (Supp. 2018).

3. Stock Legend Requirement

Another innovation contained in the Delaware legislation that has been adopted elsewhere is the requirement that “[a]ny stock certificate issued by a public benefit corporation shall note conspicuously that the corporation is a public benefit corporation.”¹³⁹ This again underscores Delaware’s sensitivity to shareholder protection, as it serves to minimize the risk that an unwary investor might purchase stock in a public benefit corporation ignorant of the corporation’s status as such.

4. Standard of Conduct for Directors

Section 365 of the Delaware statute addresses the duties of directors. It commences by declaring broadly that:

The board of directors shall manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation’s conduct, and the specific public benefit or public benefits identified in its certification of incorporation.¹⁴⁰

This parallels Delaware’s description of a public benefit corporation set forth previously.¹⁴¹ Section 365 further operationalizes the prior general statement about how the corporation is to be managed by transforming the same text into a duty incumbent upon the board of directors.

Section 365 is analogous to section 301 of the Model Legislation discussed above which, in the wordier fashion of the Model Legislation, includes a litany of constituents and interests to be considered by the board, ending with the open-ended allowance for “other pertinent factors or the interests of any other group that” the board deems appropriate.¹⁴² To the extent that a substantive difference between sections 365 (Delaware) and 301 (the Model Legislation) exists, it would appear to be found in Delaware’s tethering of directorial duties to “those materially affected by the corporation’s conduct.”¹⁴³ The Model Legislation, contrariwise, mandates consideration of interests beyond such limitations, including factors like the “global environment.”¹⁴⁴ But this apparent difference could be illusory, because even under the Model Legislation, the directors are bound to consider “the

139. DEL. CODE ANN. tit. 8, § 364 (Supp. 2018). Similar provisions appear in the benefit corporation laws of California, Colorado, Montana, Nevada, and Tennessee. CAL. CORP. CODE § 14631 (West 2014); COLO. REV. STAT. § 7-101-505 (2018); 2015 Mont. LAWS § 11, 1326, 1332; NEV. REV. STAT. ANN. § 78B.130 (LexisNexis 2018); TENN. CODE ANN. § 48-28-105 (Supp. 2018).

140. DEL. CODE ANN. tit. 8, § 365(a) (Supp. 2018).

141. *Id.* § 362(a).

142. See *supra* text accompanying note 64.

143. DEL. CODE ANN. tit. 8, § 362(a) (Supp. 2018).

144. MODEL BENEFIT CORP. LEGISLATION § 301(a)(1)(v) (B LAB Apr. 17, 2017).

effects of any action or inaction” of the corporation upon such interests,¹⁴⁵ arguably tethering the board’s duty to the actual conduct of the corporation.

Unlike the Model Legislation, Delaware does not explicitly renounce the prioritization of one particular constituency over the other. Again, however, such renunciation is arguably superfluous, given the board’s mandate to “balance” the interests of shareholders with those of other constituencies and concerns.

As with the Model Legislation, the duties of public benefit corporation directors do not extend to purported beneficiaries of the corporation’s public-benefit mission.¹⁴⁶ The relevant text reads as follows:

A director of a public benefit corporation shall not, by virtue of the public benefit provisions of § 362(a) of this title, have any duty to any person on account of any interest of such person in the public benefit or public benefits identified in the certificate of incorporation or on account of any interest materially affected by the corporation’s conduct¹⁴⁷

The Model Legislation explicitly affords benefit corporation directors the protection of the business judgment rule in section 301(e).¹⁴⁸ Delaware apparently reaches the same result by declaring simply that:

[W]ith respect to a decision implicating the balance requirement in [section 365(a), quoted above], [a director] will be deemed to satisfy such director’s fiduciary duties to stockholders and the corporation if such director’s decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve.¹⁴⁹

Recall that the Model Legislation also exonerates directors from personal liability with regard to the fulfillment (or not) of their particular duties as directors of a benefit corporation, absent a showing of self-interest.¹⁵⁰ Delaware’s statute does not contain such exoneration as a default, but rather as an option.¹⁵¹ As per section 365(c) of the Delaware statute:

The certificate of a public benefit corporation may include a provision that any disinterested failure to satisfy this section shall not, for the purposes of § 102(b)(7) or § 145 of this title, constitute an act or omission not in good faith, or a breach of the duty of loyalty.¹⁵²

Sections 102(b)(7) and 145 of the Delaware General Corporation Law permit the indemnification of directors for breach of duty, so

145. *Id.* § 301(a)(1).

146. DEL. CODE ANN. tit. 8, § 365(b) (Supp. 2018).

147. *Id.*

148. MODEL BENEFIT CORP. LEGISLATION § 301(e) (B LAB Apr. 17, 2017).

149. DEL. CODE ANN. tit. 8, § 365(b) (Supp. 2018).

150. MODEL BENEFIT CORP. LEGISLATION § 301(c) (B LAB Apr. 17, 2017).

151. DEL. CODE ANN. tit. 8, § 365(c) (Supp. 2018).

152. *Id.*

long as such breach does not constitute an act or omission not in good faith or a breach of the duty of loyalty.¹⁵³ Consequently, section 365(c) permits public benefit corporations to carve out from the scope of potential liability all of a director's duties specific to the public benefit corporation statute, provided that the director's conduct in question was untainted by conflict of interest.

Unlike the Model Legislation, the Delaware statute does not address the duties of officers in a public benefit corporation.

Also, as previously mentioned, the Delaware statute does not address the possibility of a dedicated "benefit director" or a "benefit officer."¹⁵⁴ Interestingly, this is an area where some states have bucked both the Model Legislation (which permits the optional appointment of a benefit director or officer), and Delaware (which does not provide for such a position): nearly a dozen states have made the appointment of a benefit director mandatory.¹⁵⁵

5. The Right of Action

Whereas the Model Legislation sets forth a limited right of action referred to as a "benefit enforcement proceeding,"¹⁵⁶ in which monetary damages cannot be sought,¹⁵⁷ Delaware permits a regular derivative lawsuit "to enforce the requirements set forth in § 365(a) [articulating the duties of public benefit corporation directors]."¹⁵⁸ Although "to enforce" could be read as limited to equitable relief, the statute does not explicitly preclude the availability of monetary relief. Unlike an ordinary shareholder derivative lawsuit, however, a derivative lawsuit¹⁵⁹ to enforce director duties particular to the public benefit corporation may only be brought by a shareholder holding "at least two percent of the corporation's outstanding shares or, in the case of a corporation with shares listed on a national securities exchange, the lesser of such percentage of shares of at least \$2,000,000 in market value."¹⁶⁰

Some states, such as Minnesota, explicitly permit courts in a benefit enforcement action to order the termination of a company's benefit corporation status.¹⁶¹ Whether such equitable relief is available under

153. *Id.* § 102(b)(7); DEL. CODE ANN. tit. 8, § 145 (2011).

154. *See* DEL. CODE ANN. tit. 8, § 122(12) (2011).

155. *See, e.g.*, HAW. REV. STAT. ANN. § 420D-7 (LexisNexis 2017); IDAHO CODE § 30-2008 (2018); 805 ILL. COMP. STAT. ANN. 40/4.05 (West Supp. 2019); 15 PA. STAT. AND CONS. STAT. ANN. § 3322 (West Supp. 2019); 7 R.I. GEN. LAWS § 7-5.3-8 (2018); S.C. CODE ANN. § 33-38-410 (Supp. 2018); UTAH CODE ANN. § 16-10b-302(1) (LexisNexis Supp. 2018); VT. STAT. ANN. tit. 11A, § 21.10(a) (2016). *See also* D.C. CODE § 29-1303.02(a) (2013).

156. MODEL BENEFIT CORP. LEGISLATION § 305 (B LAB Apr. 17, 2017).

157. *Id.* § 305(b).

158. DEL. CODE ANN. tit. 8, § 367 (Supp. 2018).

159. *See* DEL. CODE ANN. tit. 8, § 327 (2011).

160. DEL. CODE ANN. tit. 8, § 367 (Supp. 2018).

161. MINN. STAT. ANN. § 304A.202 (West Supp. 2019).

the legislation of Delaware or jurisdictions that adhere more closely to the Model Legislation has not yet been litigated.

6. Disclosure

In lieu of an annual benefit report, as provided for by the Model Legislation, Delaware requires its public benefit corporations to issue a statement regarding its public benefit activities to shareholders “no less than biennially.”¹⁶² This statement shall address “the corporation’s promotion of the public benefit or public benefits identified in the certificate of incorporation and of the best interests of those materially affected by the corporation’s conduct.”¹⁶³ The statement shall specifically include:

- (i) The objectives the board of directors has established to promote such public benefit or public benefits and interests;
- (ii) The standards the board of directors has adopted to measure the corporation’s progress in promoting such public benefit or public benefits and interests;
- (iii) Objective factual information based on those standards regarding the corporation’s success in meeting the objectives for promoting such public benefit or public benefits and interests; and
- (iv) An assessment of the corporation’s success in meeting the objectives and promoting such public benefit or public benefits and interests.¹⁶⁴

Lacking B Lab’s financial incentive to require a third-party standard or assessment of the aforementioned biennial statement, Delaware does not impose this obligation upon its public benefit corporations. Delaware does, however, permit a public benefit corporation to amend its certificate of incorporation or bylaws to require the use of a third-party standard in its period statements.¹⁶⁵ It may also adopt an amendment to require the statement to be made more frequently than biennially and to make it available to the public.¹⁶⁶

III. HOPES AND FEARS REGARDING THE BENEFIT CORPORATION

When Maryland enacted the first benefit corporation statute in 2010, it did so with the hope of reaping certain rewards. As its sponsoring state senator proclaimed, “This is a great moment in the evolution of commercial life in Maryland and America,” allowing “companies a way to do good and do well at the same time.”¹⁶⁷ In-

162. DEL. CODE ANN. tit. 8, § 366(b) (Supp. 2018).

163. *Id.*

164. *Id.*

165. *Id.* § 366(c).

166. *Id.*

167. Michael R. Deskins, *Benefit Corporation Legislation, Version 1.0-A Breakthrough in Stakeholder Rights?*, 15 LEWIS & CLARK L. REV. 1047, 1049 (2011) (quoting Sen. Jamie Raskin).

deed, the benefit corporation was heralded as a way to achieve what many perceive to be the Holy Grail of corporate governance: “triple bottom line” results, pursuant to which corporate activity generates positive economic, social, and environmental outcomes.¹⁶⁸ This Section will summarize and assess those claims, along with the claims of those skeptics who argued against the promulgation of benefit corporation statutes.

A. *Anticipated Advantages of the Benefit Corporation*

As typified by the language quoted above, the advantages of the benefit corporation have largely been expressed in platitudes.¹⁶⁹ However, more specifically articulated benefits arising from this new business form can and have been propounded.

1. Liberation from the Shareholder Wealth Maximization Norm

The shareholder wealth maximization norm is arguably the bedrock feature of modern Anglo-American corporate law.¹⁷⁰ Pursuant to this norm, corporate officers and directors prioritize the maximization of shareholder value in their oversight and operation of the corporation.¹⁷¹ Some scholars claim that corporate directors and officers are duty-bound to comply with this norm,¹⁷² while others deny that the norm is compelled by law.¹⁷³ Regardless, even the norm’s detractors acknowledge that, whether legally binding or not, the shareholder wealth maximization norm has a tremendous hold upon corporate directors and officers, exerting significant pressure on how they view and fulfill their roles.¹⁷⁴ By explicitly downgrading shareholder wealth maximization as merely one of the multiple corporate objectives, benefit corporation statutes serve to unshackle the directors and officers of benefit corporations from this norm.¹⁷⁵ Moreover, some herald the benefit corporation as a “game changer,” potentially kicking off a competition that nudges all companies toward more socially-responsible behavior.¹⁷⁶

The degree to which directors of a benefit corporation discount the pressure to maximize shareholder profits has not been subjected to

168. *Id.* at 1049.

169. *See supra* text accompanying note 167.

170. *See* Ian B. Lee, *Efficiency and Ethics in the Debate about Shareholder Primacy*, 31 DEL. J. CORP. L. 533, 535 (2006).

171. *See id.*

172. *See* ROBERT CHARLES CLARK, *CORPORATE LAW* 678 (1986).

173. *See, e.g.*, Lyman Johnson, *Corporate Law Professors as Gatekeepers*, 6 U. ST. THOMAS L.J. 447, 450–51 (2009).

174. *See id.*

175. *See* Resor, *supra* note 19, at 106.

176. *See* Regina Robson, *A New Look Benefit Corporations: Game Theory and Game Changer*, 52 AM. BUS. L.J. 501, 504–05, 541, 544–52 (2015).

empirical analysis.¹⁷⁷ Thus, there is no data upon which to draw a conclusion regarding this hypothetical feature of the benefit corporation. It stands to reason that the board of a benefit corporation would feel less constrained to prioritize the financial interests of its shareholders as compared to the board of a typical, non-benefit corporation. However, it is far from certain that such a difference exists when a benefit corporation's board is compared to that of a non-benefit corporation that had already embraced a robust form of corporate social responsibility. Would, for example, a benefit corporation's board act any differently concerning the norm of shareholder wealth maximization than the board of a traditional business corporation that had already opted for B Lab certification?¹⁷⁸ In the absence of evidence, we can only speculate, but a significant difference here would be doubtful. Businesses that wished to de-prioritize the pursuit of private profits in favor of some other public-regarding goal or interest have already had the tools to do so at their disposal for quite some time.

2. Corporate Social Responsibility Accountability

Rare today is the public corporation that fails to espouse the values of corporate social responsibility ("CSR").¹⁷⁹ Also rare, however, are sustained efforts to ensure that corporate decisions and activity match corporate rhetoric in this regard.¹⁸⁰ Benefit corporation legislation typically proffers a means by which a benefit corporation's attestations of responsible behavior can be readily assessed: via third-party verification. With regard to this novelty, some empirical data does exist.¹⁸¹

Although benefit corporations must issue a report to shareholders regularly, and under the Model Legislation and in most jurisdictions, to make such report publicly available, this requirement falls short of its purpose according to many commentators. First, the ability of benefit corporations to select a third-party standard of their choice seriously undermines the utility of the report.¹⁸² Second, the historical experience of arguably analogous reporting, such as that provided by Institutional Shareholder Services, suggests the limited effectiveness

177. One case study of one particular benefit corporation has been carried out. See Nancy B. Kurland, *Accountability and the Public Benefit Corporation*, 60 BUS. HORIZONS 519 (2017). This study concluded that transition from a traditional corporation to benefit corporation status "enables a company to hold itself accountable to its stated public good." *Id.* at 527.

178. See *supra* text accompanying notes 16–17.

179. See Gerlinde Berger-Walliser & Inara Scott, *Redefining Corporate Social Responsibility in an Era of Globalization and Regulatory Hardening*, 55 AM. BUS. L.J. 167, 168–69 (2018).

180. See Resor, *supra* note 19, at 99–100.

181. See *id.* at 101–02.

182. Tammi S. Etheridge, *Lessons from Institutional Shareholder Services: Governing Benefit Corporations' Third-Party Standard*, 4 MICH. BUS. & ENTREP. L. REV. 239, 250 (2015).

of this approach generally.¹⁸³ Finally, the reporting requirement is left without a clear enforcement mechanism. Perhaps unsurprisingly, compliance with the reporting requirements, based upon early results, has been deemed “abysmal.”¹⁸⁴

Thus, it appears as though this particular feature of the benefit corporation has not been impactful. Further, nothing prevents non-benefit corporations from issuing similar reports, subject to the same ill-defined parameters contained in most benefit corporation statutes.¹⁸⁵ Again, the question must be asked: What does benefit corporation law enable that is not already enabled under traditional corporate law?

3. Marketplace Signaling and Internal Norm Reinforcement

Related to the concept of accountability is that of marketplace signaling and the reinforcement of internal corporate norms. An argument can be made that benefit corporation statutes enable businesses to more credibly broadcast a commitment to corporate social responsibility than their traditional business corporation counterparts.¹⁸⁶ This should make it easier for those businesses that are more authentically dedicated to corporate social responsibility to more effectively compete for CSR-minded investors, customers, and employees.¹⁸⁷ It should also serve to further instill its particular corporate culture in the minds of its internal constituents. The little empirical evidence available seems to support this eminently reasonable hypothesis.¹⁸⁸

Although the typical corporation may arguably already operate in as socially-responsible a manner as any benefit corporation, incorporation (or reincorporation) as a benefit corporation may enable the entity to better reap recognition of its efforts. Analogous examples of this phenomenon abound. It is, for example, unlawful for public universities to discriminate against student applicants on the basis of certain prohibited characteristics. Yet most such universities nevertheless trumpet their nondiscriminatory admissions policies. In short, with few exceptions, persons and entities that behave well generally desire to have this fact well-known and will embrace any reasonable oppor-

183. *Id.* at 259.

184. J. Haskell Murray, *An Early Report on Benefit Reports*, 118 W. VA. L. REV. 26, 26 (2015).

185. *See, e.g., Starbucks's Global Social Impact 2017 Performance Report*, STARBUCKS, <https://globalassets.starbucks.com/assets/8c1f8c07efde407e9d48bfaf518c0b45.pdf> (last visited June 8, 2019) [<https://perma.cc/H46V-RUUA>].

186. *See* Michael Vargas, *The Next Stage of Social Entrepreneurship: Benefit Corporations and the Companies Using This Innovative Corporate Form*, AM. BAR ASS'N (Sept. 19, 2018), https://www.americanbar.org/groups/business_law/publications/blt/2016/07/01_vargas/ [<https://perma.cc/M64B-EF2J>].

187. *See id.*; *see also* Joseph W. Yockey, *Using Form to Counter Corruption: The Promise of the Benefit Corporation*, 49 U.C. DAVIS L. REV. 623, 634–44 (2015).

188. *See* Ke Cao et al., *Positively Deviant: Identity Work Through B Corporation Certification*, 33 J. BUS. VENTURING 130 (2018); Kurland, *supra* note 177.

tunity to further disseminate this fact.¹⁸⁹ Benefit corporation status affords businesses such an opportunity.

Moreover, benefit corporation status apparently can serve to reinforce a socially-responsible corporate culture.¹⁹⁰ It can help a company shape its identity,¹⁹¹ and the very process of reorganizing as a benefit corporation can be a transformative experience. Reorganization “requires both top-down and bottom-up driven efforts that lead to clearly articulated and measurable goals that are communicated so clients and employees understand how the changes affect their everyday work.”¹⁹² In sum, the deliberate choice to organize a particular business as a benefit corporation can affect the corporation on a normative, cultural level that goes beyond simply the imposition of positive law upon the organization. Again, there are analogous examples of this phenomenon, such as that of a “covenant marriage.”¹⁹³ Proponents of covenant marriage hope not merely to make divorces more difficult, but rather to make the institution of marriage itself stronger.¹⁹⁴

4. Relegitimization of Capitalism

Capitalism has long had its detractors,¹⁹⁵ but following the collapse of the Soviet Union and in the waning years of the twentieth century, it appeared to lack any serious challengers.¹⁹⁶ But in the early years of the twenty-first century, fueled by rising income inequality, economic crises, and scandals, capitalism’s critics have vociferously re-emerged.¹⁹⁷ Although there still exists no serious challenger to capital-

189. The most vivid exception that comes to mind is that contained in Matthew 6:1–4 (“Take heed that you do not your justice before men, to be seen by them: otherwise you shall not have a reward of your Father who is in heaven. Therefore when thou dost an almsdeed, sound not a trumpet before thee, as the hypocrites do in the synagogues and in the streets, that they may be honoured by men. Amen I say to you, they have received their reward. But when thou dost alms, let not thy left hand know what thy right hand doth. That thy alms may be in secret, and thy Father who seeth in secret will repay thee.”) *Matthew* 6:1–4 (Douay-Rheims).

190. See Cao et al., *supra* note 188; Kurland, *supra* note 177.

191. See Cao et al., *supra* note 188.

192. See Kurland, *supra* note 177, at 527.

193. A “covenant marriage” is one in which the spouses agree to bind themselves to particular obligations aimed at strengthening the marital bond and reducing the potential for divorce. See generally Katherine Shaw Spaht, *Why Covenant Marriage? A Change in Culture for the Sake of the Children*, 46 LA. B.J. 116, 118 (1998).

194. See *id.*

195. See, e.g., KARL MARX, *DAS KAPITAL* (1867).

196. Cf. FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (2d ed. 2006).

197. See *Capitalism and its Critics: A Modern Marx*, *ECONOMIST* (May 3, 2014), <https://www.economist.com/leaders/2014/05/03/a-modern-marx> [https://perma.cc/YY9A-WVH9] (reviewing THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014)); Rafael Behr, *Even at Davos, Capitalism’s Critics Are Now Centre Stage*, *GUARDIAN* (Jan. 23, 2018, 1:00), <https://www.theguardian.com/commentisfree/2018/jan/23/davos-capitalism-corbynites> [https://perma.cc/J2LA-V3CQ].

ism,¹⁹⁸ some have opined that free-market economics is undergoing a “crisis of legitimacy.”¹⁹⁹ To them, the benefit corporation can potentially address this crisis, and relegitimize capitalism.²⁰⁰ Because benefit corporations “have the freedom to serve their stakeholders more fully, comprehensively and honestly,” they are better situated to “gain moral legitimacy, gratify their shareholders by discharging their moral obligations to society, and thus build faith in the capitalist system.”²⁰¹

It is extraordinarily difficult to assess this particular claim. From populists in Washington, D.C.²⁰² to socialists in New York,²⁰³ it does not appear as though the advent of the benefit corporation has somehow quelled the discontent. Time will tell whether the benefit corporation represents a harbinger of some more profound change in the economic landscape of America, an irrelevant development that will merely be referred to in footnotes in decades to come, or, perhaps, just the right prescription for what ails America’s twenty-first century economic system.

B. *Anticipated Disadvantages of the Benefit Corporation*

From its inception, benefit corporations have raised a number of concerns, largely conceptual in nature.²⁰⁴ The most salient are summarized and analyzed below.

1. Superfluous

As a threshold matter, many critics complain that benefit corporation legislation solves a problem that does not exist. Under existing corporate law, corporate management already has sufficient latitude to pursue objectives beyond shareholder wealth maximization, strictly

198. This calls to mind Winston Churchill’s famous quote about democracy, which others have reformulated as “capitalism is the worst economic system, except for all the others.” See, e.g., Matt Barnes, *Capitalism: The Worst Economic System, Except for All the Others*, PITT NEWS (Aug. 26, 2014), <https://pittnews.com/article/5424/opinions/capitalism-the-worst-economic-system-except-for-all-the-others/> [<https://perma.cc/5JEJ-U65Q>].

199. Lydia Segal, *Benefit Corporations: A Step Towards Reversing Capitalism’s Crisis of Legitimacy?*, 24 VA. J. SOC. POL’Y & L. 97, 99–100 (2017).

200. See *id.*

201. *Id.* at 117.

202. See Michael Lind, *Donald Trump, the Perfect Populist*, POLITICO MAG. (Mar. 9, 2016), <https://www.politico.com/magazine/story/2016/03/donald-trump-the-perfect-populist-213697> [<https://perma.cc/FPA6-Q6TM>].

203. See David Remnick, *Alexandria Ocasio-Cortez’s Historic Win and the Future of the Democratic Party*, NEW YORKER (July 16, 2018), <https://www.newyorker.com/magazine/2018/07/23/alexandria-ocasio-cortezs-historic-win-and-the-future-of-the-democratic-party> [<https://perma.cc/87VQ-WQ6J>].

204. For a particularly helpful summary, see Rae André, *Benefit Corporations at a Crossroads: As Lawyers Weigh In, Companies Weigh Their Options*, 58 BUS. HORIZONS 243–52 (2015).

defined.²⁰⁵ This lack of purpose serves to magnify all the other problems and costs attendant with the legislation.

Nevertheless, some early anecdotal evidence suggests that pre-existing legal flexibility notwithstanding, assumption of benefit corporation status can indeed have an organizational effect.²⁰⁶ Thus, even if corporate management is already empowered to effectively balance other interests alongside those of shareholders, and even if certain corporations can already credibly claim to be socially responsible, benefit corporation status appears to nevertheless embolden boards to exercise their discretion and to deepen an organization's sense of purpose.²⁰⁷

2. Counter-productive

To the extent that traditional corporate law already empowers officers and directors to take into account interests and concerns beyond that of shareholder wealth maximization simpliciter, benefit corporation statutes might not be harmlessly superfluous. Rather, they may be downright counter-productive to their advocates' goals. The promulgation of such statutes, especially with the fanfare usually accompanying such events,²⁰⁸ could very well be interpreted as a sign of their necessity and, moreover, the shortcomings of traditional corporate law with regard to nonshareholder constituencies. In other words, the existence and promotion of benefit corporation statutes arguably reinforces the false narrative that the traditional business corporations must be managed solely for the benefit of its shareholders.²⁰⁹ This, in turn, could retard more socially-responsible behavior on the part of the vast majority of (traditional) business corporations.²¹⁰

3. Managerial Discretion

One of the core challenges of modern corporate law has been how best to tackle the agency problem of directors and officers entrusted to manage property that is not their own. The benefit corporation makes this challenge significantly more difficult. On one end of the spectrum, the "two masters" dilemma presents itself, whereby even a director acting with the best of good faith may find his balancing obligations unworkable.²¹¹ On the other end of the spectrum, directors acting in bad faith should find it even easier to avoid liability given the

205. See Yockey, *supra* note 54, at 18.

206. See *supra* text accompanying notes 190–92.

207. Or, perhaps better put, exercise this power more aggressively and intentionally; the boards of business corporations have long needed to balance a variety of interests as part and parcel of their obligation to best serve corporate shareholders.

208. See *supra* text accompanying note 167.

209. See David G. Yosifon, *Opting Out of Shareholder Primacy: Is the Public Benefit Corporation Trivial?*, 41 DEL. J. CORP. L. 461, 463 (2017).

210. See *id.* at 461.

211. See Yockey, *supra* note 54, at 24–25.

interplay of the business judgment rule and the broader array of interests they must (and may) consider.²¹² And in the middle is the expanded set of interests with which a director may find himself or herself conflicted.²¹³

Then there is simply the question of accountability regarding the simple craft of corporate leadership and the measurement of corporate success.²¹⁴ How is “success” objectively defined and evaluated within the context of a corporation? Is there not a fundamental conflict of interest built into the Model Legislation in that, for the most part, the board itself defines what constitutes success—and selects the metrics by which to measure it? How are investors to recognize whether a benefit corporation’s profits are lower because of its altruistic undertakings or simply because of poor management? Perhaps these questions can ultimately be answered, but with great difficulty. In any event, at this early date, not enough data has been collected to enable an assessment.

Finally, even the most conscientious directors are arguably ill-equipped to discharge their duties within the benefit corporation structure. This is because neither the existing legislation nor the courts have helped clarify how directors are “to make decisions based on the divided loyalties of shareholders and stakeholders.”²¹⁵

4. Benefit Enforcement

At its core, the benefit corporation exists to pursue public benefits above and beyond those ordinarily produced by a successfully-managed corporation. But none of the currently promulgated benefit corporation statutes grant standing to public beneficiaries to challenge a benefit corporation’s failures in this regard. This is a severe shortcoming, as Chief Justice Strine of the Delaware Supreme Court forcefully pointed out.²¹⁶ Although shareholders have the right to bring benefit enforcement proceedings, there is little incentive for them to do so. Unsurprisingly, no shareholder to date has brought such a case against a benefit corporation.

212. See Bainbridge, *supra* note 12.

213. Gil Lan, *Benefit Corporations: A Persisting and Heightened Conflict for Directors*, 21 J. L. BUS. & ETHICS 113, 115 (2015).

214. See Yockey, *supra* note 54, at 23–24.

215. See Roxanne Thorelli, Note, *Providing Clarity for Standard of Conduct for Directors Within Benefit Corporations: Requiring Priority of a Specific Public Benefit*, 101 MINN. L. REV. 1749, 1751 (2017).

216. See Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 790–93 (2015).

5. Takeover Duties

Directors are subject to different duties and standards of conduct during a potential merger or acquisition.²¹⁷ Chief among these is an undeniable obligation to maximize shareholder (and only shareholder) value once a company's acquisition or change in control becomes inevitable.²¹⁸ How these duties and standards apply to a benefit corporation under threat of hostile acquisition, or within the context of a friendly merger, has yet to be seen.²¹⁹

6. Access to Capital and Additional Costs

Some have suggested that benefit corporations will compete poorly in the capital markets, given the lower shareholder returns they might be expected to generate.²²⁰ Whether this will be so, or whether the benefit corporation will enjoy the support of niche investors, remains to be seen. An impressive study published in the *Harvard Business Law Review* detected “a small and statistically insignificant response” by institutional investors to the passage of shareholder constituency statutes.²²¹ The study's authors concluded that institutional investors “tolerated expanded director duties” and are “evidence against fiduciary concerns impeding [alternative purpose] firms’ [(such as benefit corporations)] access to public capital.”²²² The authors were quick to correctly add, however, that “the insignificant reaction to constituency statutes does not guarantee a similar attitude toward alternative purpose firms.”²²³ For whereas constituency statutes were permissive in nature, benefit corporation statutes are obligatory.²²⁴

Others project increased transaction costs afflicting the benefit corporation, a supposition difficult to dismiss.²²⁵ Again, the empirical question of whether the upside of benefit corporation status is strong enough to shoulder this particular drawback has yet to be answered.

217. See generally RONALD J. COLOMBO, *LAW OF CORPORATE OFFICERS AND DIRECTORS* (2018).

218. See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).

219. But see Kristin A. Neubauer, *Benefit Corporations: Providing a New Shield for Corporations with Ideals Beyond Profits*, 11 J. BUS. & TECH. L. 109 (2016) (touting the enhanced ability of benefit corporations to resist hostile acquisitions by companies that would undermine their public-benefit mission).

220. See Kent Greenfield, *A Skeptic's View of Benefit Corporations*, 1 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 19 (2014).

221. Christopher Geczy et al., *Institutional Investing When Shareholders are Not Supreme*, 5 HARV. BUS. L. REV. 73, 129 (2015).

222. *Id.*

223. *Id.*

224. See *id.*

225. See André, *supra* note 204.

7. “Profit as the Preferred Medium for Effecting Social and Environmental Change”²²⁶

Finally, it must be kept in mind that wealth, and oftentimes great wealth, serves as the source of generous, sometimes transformative donations and charitable undertakings.²²⁷ To the extent that the benefit corporation sacrifices wealth, its own and that of its investors, to pursue some public benefit concomitantly with its operations as a business, it may be undermining its very desideratum. Again, perhaps time will supply the data necessary to help verify or reject this potential repercussion.

IV. CONCLUSION: WHITHER THE BENEFIT CORPORATION?

American corporate law has long taken the form of enabling legislation. As such, corporations in the United States have largely been free to organize themselves and conduct their affairs as best they and their various constituencies (primarily the shareholders) saw fit. Of course, certain aspects of corporate law are indeed not merely default rules, but features imposed by law upon all corporations, most prominently directors’ duties of loyalty and care.²²⁸ But practically, in the absence of bad faith or unreasonable behavior, directors typically enjoy tremendous latitude. It is rare that a board cannot successfully justify a decision as rational and in the benefit of the shareholders. Consequently, directors are rarely found to have acted outside of their fiduciary duties. This holds true with respect to decisions regarding corporate social responsibility as well.

Further, few corporations are immune to the pressures of public opinion. As such, the same sentiments that have led to the promulgation of benefit corporation statutes across the nation have long pushed corporations to embrace some measure of social responsibility. Uncommon is the corporation that neglects to “talk the talk” of corporate social responsibility. And given the power of social media, many corporations who flagrantly refuse to “walk the walk” of corporate social responsibility quickly incur the public’s umbrage.²²⁹

Not surprisingly, therefore, the initial impact of the benefit corporation appears muted. Indeed, one would be justified in observing that

226. Khatib, *supra* note 122, at 184.

227. See generally Shruti Rana, *Philanthropic Innovation and Creative Capitalism: A Historical and Comparative Perspective on Social Entrepreneurship and Corporate Social Responsibility*, 64 ALA. L. REV. 1121 (2013).

228. See William M. Lafferty et al., *A Brief Introduction to the Fiduciary Duties of Directors Under Delaware Law*, 116 PA. ST. L. REV. 837, 841 (2012).

229. See, e.g., Annie Gasparro & Tawnell D. Hobbs, *Starbucks Faces Backlash Over Arrest of Black Men*, WALL STREET J. (Apr. 15, 2018, 2:45 PM), <https://www.wsj.com/articles/starbucks-faces-protest-over-arrest-of-black-men-1523813258> [https://perma.cc/S7M4-ES24].

the advent of benefit corporation legislation is more an effect of the corporate social responsibility movement than a contributor thereto.

Regardless, why would a company elect benefit corporation status? Given the significant risks involved in assuming this status (primarily including increased costs, monitoring concerns, and potential difficulty accessing investor capital) and the marginal tangible upsides, such an election would seem to be a poor one.

But that overlooks the potentially significant intangible benefits that benefit corporation status might bring: signaling effects with regard to the outside world and normative effects internally. It would seem, therefore, that those organizations already committed to a particular socially-responsible identity might opt for incorporation (or reincorporation) as benefit corporations not because of anything contained in the text of the benefit corporation statutes, but rather because of the potential reputational and motivational value that association with this form of business organization might bestow.

As more firms opt for benefit corporation status, will pressure build on other companies to follow suit? Fruition of this hope seems unlikely. Such a domino effect was not discernable with regard to the analogous development of the “B Corp,” and that designation carries far fewer risks. Further, the market for the capital of truly dedicated, socially-responsible investors remains a niche market, as the far greater portion of the capital markets remains fixated upon investor return.²³⁰ Consequently, there is unlikely to be pressure for companies to assume benefit corporation status from one of the most influential sources of all: the capital markets.

Benefit corporation law could serve as a form of consumer/investor protection legislation, protecting socially-conscious investors from being duped into supporting companies whose embrace of corporate social responsibility is merely illusory. This would be a valuable function in light of the growing number of socially-responsible investors, and with it increase competition for their dollars. Query whether, however, existing securities laws regarding disclosure and fraud already serve this same purpose—at least with regard to the more egregious lack of corporate candor.

Sadly, with regard to this promise of improved accountability, benefit corporation law appears to have failed most demonstrably. Scant disclosures, lack of uniform standards, and lack of standing to bring a benefit enforcement proceeding have combined to dash these hopes.

An unanticipated service of benefit corporation laws might be to assist in the resolution of the controversy over corporate constitutional rights, more specifically with regard to the assertion of speech,

230. See Sarah Ponczek & Rachel Evans, *One Man's Quest to Make Socially Responsible Investing More Responsible*, BLOOMBERG (Aug. 28, 2018, 11:14 AM), <https://www.bloomberg.com/news/articles/2018-08-28/an-etf-iconoclast-s-quest-to-put-the-s-back-into-esg-investing> [<https://perma.cc/2QW8-WCHU>].

associational, and religious liberties. For two leading objections to the corporate assertion of such rights is: (1) the shareholder wealth maximization norm (which, the argument goes, belies any authentic or justifiable political or religious concerns on the part of the corporation), and (2) the purported unfairness of the board's commandeering of corporate resources in furtherance of political or religious ends not shared by all (or possibly not even by any) of the corporation's constituencies.²³¹ Benefit corporation status largely dispenses with each of these objections. First, the shareholder wealth maximization norm is explicitly jettisoned, replaced by a legal mandate to balance shareholder interests with those of other constituencies and purposes. This makes it difficult to credibly gainsay the authenticity of the corporation's attestation of particular political or religious principles. Second, the clarion signaling effect that benefit corporation status has upon corporate outsiders and insiders makes untenable the argument that there is any unfairness when the corporation's board takes action, be it of a political or religious nature, that is in furtherance of or otherwise consistent with the corporation's declared values and objectives. Thus, benefit corporation status can play a leading role in deciding how best to navigate the thicket of corporate constitutional rights. As I have expanded upon elsewhere,²³² a business's status as a benefit corporation can serve as a key factor in assessing the strength of its free speech, associational, or religious liberty assertions. Given how heated and controversial the debate over corporate constitutional rights has been, this contribution alone would make the benefit corporation movement well worth the effort.

231. See Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1034–52 (1998).

232. See RONALD J. COLOMBO, *THE FIRST AMENDMENT AND THE BUSINESS CORPORATION* (2014).

APPENDIX
Comparison Chart of Benefit Corporation Statutes

State / Statute	Definition of Corporate Purpose and Benefit	Minimum Vote to Elect Benefit Corp. Status	Appraisal remedy for shareholders dissenting from formation	Standard of conduct for directors	Right of action	Annual benefit report	Benefit director	Stock legend
Model Legislation	“A material positive impact on society and the environment....”	2/3 Minimum Status Vote	Not addressed	Directors “shall consider the effects of any action or inaction upon” (i) shareholders; (ii) employees; (iii) customers; (iv) community; (v) environment; (vi) the corporation; (vii) general or specific public benefit Directors “need not give priority to a particular interest”	Benefit enforcement proceeding; money damages precluded; limited to shareholders and the benefit corporation itself	Required; Subject to third party standard	Optional	Not addressed

Delaware (Del) DEL. CODE ANN. tit. 8, §§ 361 to 367 (Supp. 2018).	“[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)....”	2/3 Minimum Status Vote	Yes	“The board of directors shall manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation’s conduct, and the specific public benefit or public benefits identified in its incorporation.”	Derivative lawsuit permitted to enforce directors’ duties pertaining to the benefit corporation; limited to 2% shareholders	“[S]atement” regarding public benefit activities to be issued	Not addressed	Required
Arizona ARIZ. REV. STAT. ANN. §§ 10-2401 to 10-2442 (2014).	ML	2/3 Minimum Status Vote	Not addressed	ML	ML	ML	Not addressed	Not addressed
Arkansas ARK. CODE ANN. § 4-36-101 to § 4-36-401 (2013).	ML	2/3 Minimum Status Vote	Not addressed	ML	ML	ML ¹	Optional	Not addressed

California CAL. CORP. CODE §§ 14601 to 14631 (West 2012).	ML	2/3 Minimum Status Vote	Yes ⁱⁱ	ML	ML	ML ⁱⁱⁱ	Not addressed	Not addressed
Colorado COLO. REV. STAT. §§ 7- 101-501 to 7- 101-509 (2014).	Del	2/3 Minimum Status Vote	Yes	Del	Del	ML	Not addressed	Required
Connecticut CONN. GEN. STAT. §§ 33- 1350 to 33- 1364 (2014).	ML	2/3 Minimum Status Vote ^{iv}	Not addressed	ML	ML	ML	Not addressed	Required of publicly traded corporations, otherwise optional
Florida FLA. STAT. §§ 607.601 to 607.613 (2014).	Del	2/3 Minimum Status Vote ^v	Yes	ML	ML	ML	Not addressed	Optional

Hawaii HAW. REV. STAT. §§ 420D-1 to 420D-13 (2011).	ML	2/3 Minimum Status Vote	Not addressed	Neither ML nor Del ^{vi}	Neither ^{vii}	ML ^{viii}	Required	Not addressed
Idaho IDAHO CODE §§ 30-2001 to 30-2013 (2015).	ML	2/3 Minimum Status Vote	Not addressed	ML	ML	ML	Required of publicly traded corporations; otherwise optional	Not addressed
Illinois 805 ILL. COMP. STAT. 40/1.05 to 40/5.01 (2013).	ML	2/3 Minimum Status Vote	Not addressed	ML	ML	ML	Required	Not addressed
Indiana IND. CODE §§ 23-1.3-1-1 to 23-1.3-10-6 (2015).	ML	90% Minimum Status Vote	Not addressed	ML	ML	ML	Required	Not addressed

Kansas KAN. STAT. ANN. §§ 17- 72a01 to 17- 72a09 (2017).	Del	2/3 Minimum Status Vote	Yes	Del	ML	ML	Not addressed	Not addressed
Louisiana L.A. STAT. ANN. §§ 12:1801 to 12:1832 (2012).	ML	2/3 Minimum Status Vote	Not addressed	ML	ML	ML	Required	Required
Maine ME. REV. STAT. ANN. tit. 13-C, §§ 1801 to 1832 (2019).	ML	2/3 Minimum Status Vote	Not addressed	ML	ML	ML	Required of publicly traded corporations; otherwise optional	Not addressed
Maryland MD. CODE ANN., CORPS. & ASS'NS §§ 5-6c-01 to 5- 6c-08 (West 2010).	ML ^{ix}	2/3 Minimum Status Vote	Not addressed	ML	ML	ML ^x	Not addressed	Required

Massachusetts MASS. GEN. LAWS ch. 156E, §§ 1 to 16 (2012).	ML	2/3 Minimum Status Vote	Yes	ML	ML ^{si}	ML	Required	ML
Minnesota MINN. STAT. §§ 304A.001 to 304A.301 (2015).	ML	2/3 Minimum Status Vote	Yes	Del	ML	ML	Not addressed	Not addressed
Montana MONT. CODE ANN. §§ 35-1- 1401 to 35-1- 412 (2015).	ML	2/3 Minimum Status Vote	Required	ML	ML	ML	Not addressed	Required
Nebraska NEB. REV. STAT. §§ 21- 401 to 21-414 (2014).	ML	2/3 Minimum Status Vote	Not addressed	ML	ML	ML	Required of publicly traded corporations; otherwise optional	Not addressed

New Hampshire N.H. REV. STAT. ANN. §§ 293-C:1 to 293-C:13 (2015).	ML	2/3 Minimum Status Vote	Not addressed	ML	ML	ML	Required of publicly traded corporations; otherwise optional	Not addressed
New Jersey N.J. STAT. ANN. §§ 14A:18-1 to 14A:18-11 (West 2011).	ML	2/3 Minimum Status Vote	Not addressed	Neither	ML	ML	Optional	Not addressed
New York N.Y. BUS. CORP. LAW §§ 1701 to 1709 (McKinney 2012).	ML	3/4 Minimum Status Vote ^{xiii}	Not addressed	ML	ML ^{xiii}	ML	Not addressed	Not addressed
Oregon OR. REV. STAT. §§ 60.750 to 60.770 (2014).	ML	2/3 Minimum Status Vote	Not addressed	Neither ^{xiv}	Del ^{xv}	ML	Mandatory “benefit governor”	Not addressed

Pennsylvania 15 PA. CONS. STAT. §§ 3301 to 3331 (2013).	ML	2/3 Minimum Status Vote	Not addressed	ML	ML	ML	ML	Required	Not addressed
Rhode Island 7 R.I. GEN. LAWS ANN. §§ 7-5.3-1 to 7- 5.3-13 (2014).	ML	2/3 Minimum Status Vote	Not addressed	ML	ML	ML	ML	Required	Not addressed
South Carolina S.C. CODE ANN. §§ 33- 38-110 to 33- 38-600 (2012).	ML	2/3 Minimum Status Vote	Yes ^{vii}	ML	ML	ML	ML	Required	Not addressed
Tennessee TENN. CODE ANN. §§ 48- 28-101 to 48- 28-109 (2016).	Del	2/3 Minimum Status Vote	Yes ^{viii}	Del ^{viii}	Del	Del	Del	Not addressed	Not addressed

Utah UTAH CODE ANN. §§ 16- 10b-101 to 16- 10b-402 (West 2014).	ML	2/3 Minimum Status Vote	Not addressed	ML	ML	ML	ML	Required	Not addressed
Vermont VT. STAT. ANN. tit. 11A, §§ 21.01 to 21.14 (2011).	ML	2/3 Minimum Status Vote	Not addressed	ML	ML ^{xx}	ML ^{xxi}	ML	Required	Not addressed
Virginia V.A. CODE ANN. §§ 13.1- 782 to 13.1- 791 (2011).	ML	2/3 Minimum Status Vote ^{xxii}	Not addressed	ML	ML	ML	ML	Not addressed	Not addressed
Washington DC D.C. CODE §§ 29-1301.01 to 29-1304.01 (2013).	ML	2/3 Minimum Status Vote	Not addressed	ML	ML	ML	ML	Required	Not addressed

West Virginia W. VA. CODE §§ 31F-1-101 to 31F-5-501 (2014).	Majority Status Vote	Not addressed	ML	ML	ML	ML	Not addressed	Not addressed
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Key:

ML: Generally tracks the Model Legislation's approach.

Del: Generally tracks the Delaware approach.

ⁱ Arkansas’s Benefit legislation includes a requirement that the benefit corporation prepare an annual franchise tax report along with the benefit report. ARK. CODE ANN. § 4-36-401 (2013).

ⁱⁱ Section 14603 of the California benefit corporation statute states:

(a) A corporation may become a benefit corporation under this part by amending the corporation’s articles so that the articles contain a statement that the corporation is a benefit corporation. The amendment shall not be effective unless it is adopted by at least the minimum status vote. If the amendment is adopted, a shareholder of the corporation may, by complying with Chapter 13 (commencing with Section 1300) of Division 1, require the corporation to purchase at their fair market value the shares owned by the shareholder which are dissenting shares as defined in subdivision (b) of Section 1300 in accordance with the procedures in that chapter, as if the adoption of the amendment were a reorganization to which that chapter applies.

CAL. CORP. CODE § 14603 (West 2012).

ⁱⁱⁱ The definition does not include a failure to “create” a public benefit, and it adds another basis for suit—the failure to deliver or post the annual benefit report as required. CAL. CORP. CODE § 14630 (West 2012).

^{iv} Connecticut’s minimum status vote is substantially similar to the Model Legislation’s. CONN. GEN. STAT. ANN. § 33-1354 (2014).

^v Florida’s minimum status vote is substantially similar to the Model Legislation’s. FLA. STAT. § 607.602(7) (2016).

^{vi} Unlike the Model Legislation, directors are only required to consider the effects of the sustainable business corporation’s actions upon its shareholders and the accomplishment of general and specific public benefits. HAW. REV. STAT. ANN. § 420D-6 (2017).

^{vii} The statute does not limit actions to benefit enforcement proceedings nor does it limit monetary damages against the sustainable business corporation, but rather it states that shareholders or directors:

[S]hall have the right to bring direct or derivative claims to enforce corporate purposes and the standards for directors as set forth in section 414-221(a) and shall have the right to bring direct or derivative claims to enforce the general or specific public benefit purposes of the sustainable business corporation and the standard of conduct for directors pursuant to section 420D-6(a)(1).

Id. § 420D-10.

^{viii} Hawaii also uniquely requires that the benefit report include:

[a] statement that, as a private corporation under the direction of its board and accountable to its shareholders and the articles and bylaws of the sustainable business corporation, including those governing the general or specific public benefit purpose and the activities of the sustainable business corporation, the sustainable business corporation and its activities are subject to the oversight of the board of the

sustainable business corporation and are not subject to the direct oversight, regulation, or endorsement of any governmental body.

Id. § 420D-11(a)(8).

^{ix} The statute does not require that the general public benefit be “taken as a whole,” and it is measured “through activities that promote a combination of specific public benefits.” MD. CODE ANN., CORPS & ASS’NS § 5-6C-01(b) (West 2010).

^x The standard need not be “recognized” and there are no provisions addressing comprehensiveness, credibility, or the source of financial support for the entity that developed/controls the standard. Also, it states that the developing entity must be “independent of” the benefit corporation, rather than “not controlled by” it. *Id.* § 5-6C-01(e).

^{xi} The statute does contain the concept of a benefit enforcement proceeding. MASS. GEN. LAWS ANN. ch. 156E, § 14 (West, Westlaw through Ch. 34, except Ch. 37 of the 2019 1st Ann. Sess.) (“Except in a benefit enforcement proceeding, no person shall bring an action or assert a claim against a benefit corporation or its directors or officers . . .”).

^{xii} The New York statute omits language in Model Legislation definition (1)(i) regarding limitations on voting rights of any class or series and requires 3/4 vote (instead of 2/3 required in the Model Legislation). N.Y. BUS. CORP. LAW § 1702(2) (McKinney, Westlaw through L.2019, ch. 186).

^{xiii} The benefit enforcement proceeding concept is not included in this particular statute. An amendment was made to § 720(a)(1)(C) of the N.Y. Business Corporation Law to address actionable conduct. It allows a cause of action for (i) failure to pursue general or specific benefit, (ii) failure to deliver or post an annual report, or (iii) other neglect or failure of duties or standard of conduct of directors and officers. N.Y. Bus. Corp. Law § 720 (McKinney, Westlaw through L.2019, ch. 186).

^{xiv}

(2) A person may commence a direct or derivative proceeding, as appropriate, to compel a benefit company to provide a general public benefit or a specific public benefit or to require a governor, member, officer or manager to act in accordance with a duty or a standard of conduct set forth in the benefit company’s articles of incorporation or articles of organization, or prescribed under ORS 60.750 to 60.770, only if the person is:

- (a) The benefit company;
- (b) A governor;
- (c) A shareholder or member; or
- (d) Another person identified in the benefit company’s bylaws, articles of incorporation or articles of organization as having a right to commence a proceeding under this section.

(3) A benefit company is not liable for money damages as a consequence of failing to provide a general public benefit or a specific public benefit.

OR. REV. STAT. ANN. § 60.766 (West, Westlaw through laws enacted in 2018 Reg. Sess. & 2018 Special Sess. of 79th Legis. Assembly).

^{xv}

(2) A person may commence a direct or derivative proceeding, as appropriate, to compel a benefit company to provide a general public benefit or a specific public benefit or to require a governor, member, officer or manager to act in accordance with a duty or a standard of conduct set forth in the benefit company’s articles of incorporation or

articles of organization, or prescribed under ORS 60.750 to 60.770, only if the person is:

- (a) The benefit company;
 - (b) A governor;
 - (c) A shareholder or member; or
 - (d) Another person identified in the benefit company’s bylaws, articles of incorporation or articles of organization as having a right to commence a proceeding under this section.
- (3) A benefit company is not liable for money damages as a consequence of failing to provide a general public benefit or a specific public benefit.

OR. REV. STAT. ANN. § 60.766 (West, Westlaw through laws enacted in 2018 Reg. Sess. & 2018 Special Sess. of 79th Legis. Assembly).

^{xvi} “In addition to any other rights granted by law, a shareholder is entitled to dissent from and obtain payment of the fair value of his shares in the event of the consummation of a designation of a corporation as a benefit corporation pursuant to Section 33-38-210(A).” S.C. CODE ANN. § 33-38-600 (Westlaw, through 2019 Act. No. 90).

xvii

Any shareholder of a domestic for-profit corporation that holds shares of stock of the domestic for-profit corporation immediately prior to the effective time of the following actions shall be entitled to dissent and obtain payment for the shareholder’s shares under chapter 23 of this title; provided that such shareholder has neither voted in favor of the amendment or the merger or plan of share exchange nor consented to in writing pursuant to § 48-17-104[.]

TENN. CODE ANN. § 48-28-104(b) (LEXIS, LexisNexis through 2019 Reg. Session).

xviii

In discharging the duties of the position of director of a for-profit benefit corporation, a director shall consider the effects of any contemplated, proposed, or actual transaction or other conduct on the interests of those materially affected by the corporation’s conduct, including the pecuniary interests of shareholders, and the public benefit or public benefits identified in its charter and shall not give regular, presumptive, or permanent priority to the interests of any individual constituency or limited group of constituencies materially affected by the corporation’s conduct, including the pecuniary interests of shareholders.

Id. § 48-28-106(a).

^{xix} Vermont’s right of action does not contain a provision like Model Legislation § 305(a)–(b) stating that a benefit corporation is not liable for monetary damages for failure to create or pursue general or specific public benefit. *See* VT. STAT. ANN. tit. 11A, § 21.13(a)–(c) (2018). Vermont’s provision (c)(1) does not include “or create” after “pursue,” and provision (c)(2) does not include “obligation.” *Id.* § 21.13(c)(1)–(2).

^{xx} Vermont’s right of action provision does not include Model Legislation’s § 305(c)(1) permitting an action to be brought directly by the benefit corporation. *See id.* § 21.13(a)–(c). This provision does not cross-reference derivative suit provisions, rather provision (b)(1) states a suit may be brought by “a shareholder that would otherwise be entitled to commence or maintain a proceeding in the right of the benefit corporation on any basis,” and provision

(b)(3) states an action may be brought by 10% beneficial or record owners (rather than 5% in the Model Legislation). *Id.* § 21.13(b)(1), (3); MODEL BENEFIT CORP. LEGISLATION § 306(c)(2)(ii).

^{xxi} The first sentence adds requirement that the benefit corporation deliver an annual report to each shareholder and the report must be “in a format approved by the directors,” but the narrative description does not require description of process and rationale for selecting or changing the third-party standard. VT. STAT. ANN. tit. 11A, § 21.14(a)(1)(A)–(D). Other requirements vary as follows: the report must describe (i) a statement of the specific goals/outcomes identified to meet the purpose(s), (ii) a description of the actions taken to meet the goals/outcomes, (iii) circumstances that hindered attainment of the goals/outcomes, and (iv) specific actions the benefit corporation can take to improve performance or attain its goals/outcomes. *Id.* The statute does not include Model Legislation § 401(a)(2)(ii)(B) regarding explanation of change of third-party standard from immediately prior report and does not include Model Legislation § 401(a)(6) regarding statement of any connection between standards provider and benefit corporation. *See id.* Subsection (3) requires a statement of goals/outcomes for the next benefit report and that such list be approved by the shareholders of the benefit corporation, and does not include Model Legislation § 401(a)(7) regarding the statement of connection between the organization that established the third-party standard and the benefit corporation. *Id.* § (a)(3).

^{xxii} A definition not included. However, several provisions cross-reference to § 13.1-707 for the required vote (2/3 majority of each voting group, unless otherwise provided in articles or conditioned otherwise by the board of directors). *See* VA. CODE ANN. § 13.1-785 (2011).