

THE MISSING METRICS OF SUSTAINABILITY: JUST HOW  
BENEFICIAL ARE BENEFIT CORPORATIONS?

MIRIAM F. WEISMANN\*

ABSTRACT

*Fiduciary duty is the central organizing legal principle of corporate governance in for-profit entities. Expressed as the duty of care and the duty of loyalty, fiduciary duty obligates directors and managers to maximize shareholder wealth. This legal constraint may expose for-profit entities and their directors to potential legal liability when they choose social benefit as a significant corporate purpose. To circumvent this restriction, a majority of states have responded by enacting laws creating new forms of business organizations known as Benefit Corporations and L3Cs. These states have rewritten the rules of domestic corporate governance through legislative innovation of business organization models that seemingly accommodate two potentially conflicting ethical obligations: the fiduciary duty to shareholders and the social responsibility to the stakeholders. A recent study by Rae Andre (“Andre”) considered the utility of the Benefit Corporation as a vehicle to facilitate corporate social responsibility (“CSR”) using five sample states. This article builds upon and expands that research by analyzing all of the current thirty-nine state enactments of “benefit legislation” to determine whether the new benefit laws require accountability through financial and/or accounting reporting requirements, and thus, enable measurement of the real extent and benefit of the corporate activity. Additionally, in an attempt to navigate the still largely untested waters of “measuring the benefit” of Benefit Corporations, a national survey of benefit entities was conducted as part of the research for this paper, focusing on real asset allocation to the stated beneficial purpose. Based on the research and survey information, this article concludes that the real measure of benefit may be primarily to the benefit entity in pursuit of establishing enhanced brand exposure as opposed to any measurable social value. This conclusion is consistent with Andre’s prior research demonstrating the limited utility of Benefit Corporations in the delivery of CSR.*

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\* **J.D., LLM (taxation)** Professor of Business Law and Tax, Florida International University. Served as the United States Attorney for the Southern District of Illinois and the Assistant Supervisory Special Counsel to the Office of Special Counsel, John C. Danforth, WACO investigation. Her most recent book, *Money Laundering-Legislation, Regulation & Enforcement*, was published in 2015. A special thank you to Dan Garces, CPA, MSA, for his assistance in the survey project. Also, a special thank you to Dr. Fred Perry for his wise editorial assistance.

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*William Clark, author of the model benefit corporation legislation used in 18 states, warned benefit corporations to come up with the equivalent of generally accepted accounting principles (“GAAP”) for reporting purposes, “[o]therwise, ‘public benefit corporation’ could become as diluted and meaningless a term as ‘organic beef’ or ‘Chilean sea bass.’”<sup>1</sup>*

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<sup>1</sup> Daniel Fisher, *Delaware’s ‘Public Benefit Corporation’ Lets Directors Serve Three Masters Instead of One*, FORBES, (July 16, 2013, 2:06 PM).

THE NEVER-ENDING DEBATE OVER THE BUSINESS CONSTRAINT OF  
FIDUCIARY DUTY

Under current United States corporate law, fiduciary duty is the central organizing principle of corporate governance in for-profit entities.<sup>2</sup> Expressed as the duty of care and the duty of loyalty, fiduciary duty obligates directors and managers to maximize shareholder wealth.<sup>3</sup> This legal constraint generally exposes directors and managers of for-profit entities to potential legal liability when they engage in sustainable corporate governance practices, such as when using social benefit as a central corporate purpose. The law was stated long ago in the famous and oft-cited case *Dodge v. Ford Motor Co.*:

A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the non-distribution of profits among stockholders in order to devote them to other purposes . . . [Consequently], it is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others . . . .<sup>4</sup>

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<sup>2</sup> Justice Cardozo has made the following famous admonition regarding the duties of a fiduciary in a business transaction. “Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petition to undermine the rule of undivided loyalty by the ‘disintegrating erosion’ of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.” *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (citation omitted).

<sup>3</sup> *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919); *Katz v. Oak Indus., Inc.*, 508 A.2d 873, 879 (Del. Ch. 1986).

<sup>4</sup> *Id.* at 684.

This maxim of corporate fiduciary responsibility is rooted not only in case law, but also in economic policy as well.<sup>5</sup> The critical point sometimes overlooked is that *unless modified by statute*, traditional fiduciary duties require corporate managers to engage in shareholder primacy<sup>6</sup> and further the pecuniary interests of shareholders. Thus, fiduciary duty requires them to maximize corporate profits subject to the obligation to comply with independent legal constraints.<sup>7</sup> While former Delaware Chief Justice Veasey observes that although “Delaware’s jurisprudence holds that the interests of stockholders are primary and may

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<sup>5</sup> Milton Friedman, Nobel Prize winner and chief architect of the University Of Chicago School Of Economics, addressing the business’ responsibility to the public, “[T]here is one and only one social responsibility of a business—to use its resources and engage in activities designed to increase its profits.” Milton Friedman, *A Friedman Doctrine-The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, § 6 (Magazine), at 122.

<sup>6</sup> “While the vitality of ‘primacy,’ which this norm is called, has been debated in this era of control contests and executive compensation, the norm remains a beacon in matters of corporate purpose and governance. Simply stated, primacy recognizes a fiduciary duty imposed on directors to further shareholder interests by maximizing shareholder profits, subject to inconsistent legal obligations upon them, and within the discretion permitted them by the business judgment rule.” Denise Alter, *Corporate Art Collecting and Fiduciary Duties to Shareholders: Legal Duties and Best Practices for Directors and Officers*, 2009 COLUM. BUS. L. REV. 1, 18 (2009).

<sup>7</sup> See *United States v. Automobile Workers*, 352 U.S. 567, 572 (1957) (quoting 40 CONG. REC. 96 (statement of President Roosevelt) “All contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders’ money for such purposes; and, moreover, a prohibition of this kind would be, as far as it went, an effective method of stopping the evils aimed at in corrupt practices acts.”); See, e.g., MICHAEL P. DOOLEY, FUNDAMENTALS OF CORPORATION LAW 97 (1995) (noting that corporate law scholars “generally agreed that management’s principal fiduciary duty is to maximize the return to the common shareholders.”); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 278 (1998) (“Corporate directors have a fiduciary duty to make decisions that are in the best interests of the shareholders.”); STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 419-29 (2002); ROBERT CHARLES CLARK, CORPORATION LAW 17-19, 677-81 (1986); American Bar Association Committee on Corporate Laws, *Other Constituencies Statutes: Potential for Confusion*, 45 BUS. LAW. 2253, 2257-61 (1990); Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1492 (1992); Bernard Black & Reinier Kraakman, *Delaware’s Takeover Law: The Uncertain Search for Hidden Value*, 96 NW. U. L. REV. 521, 527 (2002); Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target’s Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1191-92 (1981); Ronald J. Gilson & Reinier Kraakman, *Delaware’s Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 BUS. LAW. 247, 267 n.65 (1989); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L. J. 439, 440-41 (2001); Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 23 (1991); Jonathan R. Macey & Geoffrey P. Miller, *Corporate Stakeholders: A Contractual Perspective*, 43 U. TORONTO L. J. 401, 402-03 (1993).

not be trumped by that of other constituencies . . . those interests may be considered if congruent with the interests of the stockholders,”<sup>8</sup> the Delaware courts remain firm that “[d]irectors of a for-profit Delaware corporation cannot deploy a rights plan to defend a business strategy that openly eschews stockholder wealth maximization—at least not consistently with the directors’ fiduciary duties under Delaware law.”<sup>9</sup> The Supreme Court is on the same footing as Delaware jurisprudence. Consider Justice Stevens *Citizens United v. Federal Elections Comm’n* dissent.<sup>10</sup>

The structure of a business corporation, furthermore, draws a line between the corporation’s economic interests and the political preferences of the individuals associated with the corporation; the corporation must engage the electoral process with the aim “to enhance the profitability of the company, no matter how persuasive the arguments for a broader or conflicting set of priorities.”<sup>11</sup>

However, while the case law appears to be well settled, the debate about the correctness of the principles of fiduciary duty and shareholder primacy is not.<sup>12</sup> For those scholars dedicated to a stakeholder agenda, the case law and other legal precedent pose no obstacle to arguing both in favor of a corporate duty to the “other constituencies” and for an outright

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<sup>8</sup> E. Norman Veasey, *Should Corporation Law Inform Aspirations for Good Corporate Governance Practices—or Vice Versa?*, 149 U. PA. L. REV. 2179, 2184 (2001); see, e.g., *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (for the proposition that the “board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders.”).

<sup>9</sup> *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 35 (Del. 2010).

<sup>10</sup> 558 U.S. 310 (2010).

<sup>11</sup> *Citizens United*, 558 U.S. at 470-71 (citation omitted).

<sup>12</sup> Professor Stout cites the *Hobby Lobby* case for the proposition that “[m]odern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not.” While the case does say that, however, Professor Stout omits the next several critical sentences that clarify the court’s thinking: “For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives. Many examples come readily to mind. *So long as its owners agree*, a for-profit corporation may take costly pollution-control and energy-conservation measures that go beyond what the law requires.” Thus, shareholder consensus is the key element which relieves the fiduciary obligation. Lynn Stout, *Corporations Don’t Have to Maximize Profits*, N.Y. TIMES (April 16, 2015, 6:46 AM), (emphasis added).

rejection of shareholder primacy. Indeed, seizing upon language in the American Law Institute (“ALI”) and other sources, the argument has been cobbled together as follows. The final version of the ALI’s Principles of Corporate Governance reflects the ambiguous rule that directors, under limited circumstances, are allowed to consider the interests of non-shareholder constituencies.<sup>13</sup> The general rule provides that “a corporation . . . should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.”<sup>14</sup> However, corporations may pursue non-profit-enhancing objectives in three conditions: (1) such action is required for staying within the boundaries of the law; (2) such action is taken in light of ethical considerations appropriate to responsible conduct of business; or (3) a reasonable amount of resources may be dedicated to charitable causes.<sup>15</sup> Parenthetically, however, these three conditions do not appear to alter the precedential value of traditional fiduciary duty cases.

Another approach concerns the use of the business judgment rule to immunize directors who consider other constituency interests.<sup>16</sup> Yet, courts are still cautious not to overrule *Dodge* as precedent, instead concluding that shareholder primacy and the business judgment rule work in lockstep.<sup>17</sup>

Stakeholder advocate Einer Elhauge is constrained to admit that profit maximization for the benefit of shareholders is a norm in law and economics.<sup>18</sup> But Elhauge then counters with the notion that “even proponents of a profit-maximizing duty concede, no corporate statute has ever stated that the sole purpose of corporations is maximizing profits for shareholders.”<sup>19</sup> Except, the case law does.<sup>20</sup> But in any case, it may be

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<sup>13</sup> See Am. Law Inst., Principles of Corporate Governance: Analysis and Recommendations § 2.01(a) (1994).

<sup>14</sup> Am. Law Inst., Principles of Corporate Governance: Analysis and Recommendations § 2.01(a) (1994).

<sup>15</sup> Am. Law Inst., Principles of Corporate Governance: Analysis and Recommendations § 2.01(b) (1994).

<sup>16</sup> See, e.g., *Shlensky v. Wrigley*, 237 N.E.2d 776, 780 (Ill. App. Ct. 1968).

<sup>17</sup> Where *Dodge* emphasized the directors’ duty to maximize profits, *Shlensky* emphasized the directors’ authority and discretion. Ultimately, however, the court found them to be consistent. The Illinois Appellate Court did not reject the profit-maximizing norm laid down by *Dodge*, but rather followed *Dodge* in holding that the business judgment rule immunized the directors’ decision from judicial review.

<sup>18</sup> Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 735-39 (2005).

<sup>19</sup> *Id.* at 763 (quoting ROBERT CLARK, CORPORATE LAW 17, 687 (1986)).

<sup>20</sup> See *Dodge*, 170 N.W. at 684 (stating that a corporation is organized and carried on primarily for the profit or benefit of the stockholders).

fair to counter with a single question: if the law of shareholder primacy is obsolete and no longer viable, then why bother legislating around it?<sup>21</sup>

This scholarly debate will surely continue, but the legal footing of shareholder primacy based upon traditional fiduciary duty appears to remain firm.<sup>22</sup> At least firm enough to give pause to those considering the absolute certainty that the business judgment rule will immunize and protect directors and management from liability in the pursuit of social agendas. It is that very legal precedent regarding traditional notions of fiduciary duty that have unquestionably necessitated the emergence of legislative innovation in business organizational forms.<sup>23</sup>

Historically, the primacy of the corporate obligation to ensure shareholder wealth maximization prompted the rise of the traditional non-profit corporation.<sup>24</sup> With a non-profit there are no monetary distributions to shareholders and all of the funds must be used for a qualified charitable purpose.<sup>25</sup> The qualified charitable, religious, educational, scientific, or literary purposes that exempt a corporation from federal taxation and establish the non-profit entity are determined by the Internal Revenue Service (“IRS”) under section 501(c) of the Internal Revenue Code (“IRC”).<sup>26</sup> The corporation must file an election with the IRS to obtain the corporate legal status and tax exemption.<sup>27</sup>

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<sup>21</sup>Some argue that the assault on shareholder primacy is merely an attack on the basic tenets of managerial capitalism: “[C]onservatives, both authoritarian and libertarian, understood stakeholder concerns and the necessity of taking them into account as a means to the end of profit maximization. But they feared that egalitarian efforts to promote the stakeholder vision rested on a fundamental misunderstanding both of human nature and of capitalism that would impair long-term growth by enmeshing corporate executives in ever more elaborate webs of communitarian regulations... and by creating an inexhaustible source of excuses for poorly performing managers to put off long-suffering shareholders. As one freshly minted M.B.A. pontificated, ‘The stakeholder model aggravates the principal-agent problem at the heart of corporate capitalism-it gives agents too much wiggle room to evade their responsibility to promote the principal’s interest.’” Philip E. Tetlock, *Cognitive Biases and Organizational Correctives: Do Both Disease and Cure Depend on the Politics of the Beholder?*, 45 ADMIN. SCI. Q. 293, 319 (2001).

<sup>22</sup>Henry N. Butler & Fred S. McChesney, *Why They Give at the Office: Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation*, 84 CORNELL L. REV. 1195, 1195 (1999) (“For centuries legal, political, social, and economic commentators have debated corporate social responsibility ad nauseam.”) (emphasis omitted).

<sup>23</sup>See Dodge, 170 N.W. at 684.

<sup>24</sup>See Lester M. Salamon, *The Rise of the Nonprofit Sector*, 73 FOREIGN AFF. 109, 109 (1994).

<sup>25</sup>See *Exemption Requirements - 501(c)(3) Organizations*, IRS (last updated Aug. 27, 2017), <https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-section-501-c-3-organizations>.

<sup>26</sup>See *id.*

<sup>27</sup>*Id.*

The non-profit option has been, for the most part, untenable in financial terms, particularly in a weak economy because charitable giving slows when financial times are bad. It is also very difficult for non-profits to raise money.<sup>28</sup> Simply put, there is no return on capital and no wealth maximization for the contributor.<sup>29</sup> It is all about a corporate purpose dedicated to “doing good.”<sup>30</sup>

Beginning in 1984, in an effort to facilitate the movement of corporate governance toward corporate social responsibility, twenty-six states enacted constituency statutes.<sup>31</sup> A constituency statute is permissive in nature and allows directors to consider non-shareholder interests in making business decisions.<sup>32</sup> There are only a few cases that have interpreted selected state constituency statutes where the interests of the shareholders and other stakeholders are not aligned and in conflict.<sup>33</sup> Indeed, “judicial interpretation of the constituency statutes to date has been sparse and uninformative, invariably referring to the constituency statutes [in *dicta* in a] tangential manner.”<sup>34</sup> No court has yet provided an analysis of the legality or constitutionality of constituency statutes, or even an explanation of how they should be implemented in specific contexts.<sup>35</sup> Most “courts have hesitated to deviate from the longstanding principle of shareholder primacy, even though state legislatures have enacted statutes that purport to change the longstanding principle.”<sup>36</sup> “Instead, ‘constituency statutes currently function only to the extent that they do not

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<sup>28</sup> E.g., Ruth McCambridge, *Spinning Straw Into Gold*, NON-PROFIT QUARTERLY (December 21, 2002), <https://nonprofitquarterly.org/2002/12/21/spinning-straw-into-gold/>.

<sup>29</sup> WILLIAM A. BROWN, STRATEGIC MANAGEMENT IN NONPROFIT ORGANIZATIONS 177 (2014).

<sup>30</sup> See Skoll World Forum, *GameChangers: The World's Top Purpose-Driven Organizations*, FORBES (Nov. 4, 2013).

<sup>31</sup> For a list of states with constituency statutes, see Wai Shun Wilson Leung, *The Inadequacy of Shareholder Primacy: A Proposed Corporate Regime that Recognizes Non-Shareholder Interests*, 30 COLUM. J.L. & SOC. PROBS. 587, 613, 620 (1997).

<sup>32</sup> *Id.* at 620.

<sup>33</sup> Lynda J. Oswald, *Shareholders v. Stakeholders: Evaluating Corporate Constituency Statutes Under the Takings Clause*, 24 J. CORP. L. 1, 7 (1998).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 7; see Steven M.H. Wallman, *The Proper Interpretation of Corporate Constituency Statutes and Formulation of Director Duties*, 21 STETSON L. REV. 163 (1991).

<sup>36</sup> Nathan E. Standley, *Lessons Learned From the Capitulation of the Constituency Statute*, 4 ELON L. REV. 209, 223 (2012).



conflict with shareholder primacy.”<sup>37</sup> Thus, existing case law leaves largely unanswered the degree to which a board of directors may rely on a constituency statute when, for example, the sale of the company becomes inevitable.<sup>38</sup> Not surprisingly, due to the difficulty of implementing a rule that synergizes conflicting constituency demands, the American Bar Association has not supported this particular legislative innovation either.<sup>39</sup>

Notably, Stephen Bainbridge, in a legal analysis, distinguished between the uses of constituency statutes for “operational” as opposed to “structural” decisions by corporate boards.<sup>40</sup> Operational decision-making involves more of the ordinary day-to-day type of decisions where the courts appear to defer to board discretion.<sup>41</sup> However, as the decisions become more material, involving such matters as the sale of substantially all of the corporate assets or mergers and acquisitions, shareholder primacy and fiduciary duty tend to dictate the legal result.<sup>42</sup> Of course, it is the grey area in between those decisions that are clearly day-to-day operational decisions on one end of the spectrum and a material structural change involving the corporate assets on the other end.<sup>43</sup> The ambiguity in the case law understandably creates board discomfort. Indeed, Nathan Standley decried that the use by corporate boards of constituency statutes at all, observing that “the best thing constituency statutes can do is to teach a valuable lesson to legislators going forward: when expanding the scope

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<sup>37</sup> *Id.* (citing Anthony Bisconti, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in Revlon Land?*, 42 *LOV. L.A. L. REV.* 765, 784 (2009)).

<sup>38</sup> Thomas G. Lovett & Veronica Basel, *The Role of the Constituency Statute in the Shareholder's World*, (2011), <https://tinyurl.com/y9oxjro8>.

<sup>39</sup> In 1990, the Committee on Corporate Laws of the Section of Business Law of the American Bar Association (ALI-ABA), as part of the preparation of the Revised Model Business Corporation Act (the Model Act), reviewed constituency statutes. See ABA Committee on Corporate Laws, *Other Constituencies Statutes: Potential For Confusion*, 45 *BUS. LAW.*, 2253, 2254-55, 2257-61 (1990) (where the Committee concluded that the Model Act should not be amended in light of these statutes, opining that “other constituency statutes may create opportunities for misunderstanding and thus pose potential for mischief unless the courts carefully construe them consistently with existing law”).

<sup>40</sup> Stephen M. Bainbridge, *Interpreting Non-shareholder Constituency Statutes*, 19 *PEPPERDINE L. REV.* 971, 974 (1992).

<sup>41</sup> *Id.* at 975-76.

<sup>42</sup> *Id.* at 982.

<sup>43</sup> *Id.*

of directors' concerns, especially outside of the takeover context, be intentional and leave no ambiguity."<sup>44</sup>

With the damage to the capital markets wrought by memorable corporate debacles, such as Enron and WorldCom, and the impact of the more recent subprime mortgage crisis, investors began to consider more sustainable market investment alternatives. The Dow Jones became a leader in the movement to create sustainable investing as a market alternative. The Dow Jones Sustainability Index ("DJSI") was launched in 1999 as the first global benchmark in sustainable investing.<sup>45</sup> The index utilizes a defined set of criteria to measure and assess the economic, social, and environmental opportunities of the companies that the DJSI has listed, which are chosen based on the Corporate Sustainability Assessment by RobecoSAM.<sup>46</sup> The metric is explained as a system utilizing "indices [that] serve as benchmarks for investors who integrate sustainability considerations into their portfolios, and provide an effective engagement platform for companies who want to adopt sustainable best practices."<sup>47</sup> Sustainability is defined as a "business approach that creates long-term shareholder value by embracing opportunities and managing risks deriving from economic, environmental and social developments."<sup>48</sup> In terms of measuring sustainability, DJSI, in partnership with RobecoSam, created an auditable and transparent metric system which measures both the quantitative and qualitative aspects of sustainable investing practices of global for-profit corporations.

Still, this shift toward corporate social responsibility and sustainable investing, by publicly traded companies, subject to heightened disclosure requirements, continues to pose a problem for privately held U.S. corporations in terms of business organizational options. Given the perceived inadequacy of constituency type statutes to solve the problem, many states and the District of Columbia responded by enacting laws creating a new form of business organization known as a Benefit

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<sup>44</sup> Standley, *supra* note 37, at 210.

<sup>45</sup> *Dow Jones Sustainability Indices*, ROBECOSAM, (2016), <http://www.sustainability-indices.com/index-family-overview/djsi-family-overview/index.jsp> [hereinafter "DJSI"].

<sup>46</sup> RobecoSam Assessments, (2016), <http://www.sustainability-indices.com/sustainability-assessment/index.jsp>.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

Corporation.<sup>49</sup> Nine states have added L3C legislation to create a similar, albeit less restrictive, model to the Benefit Corporation in the form of a limited liability company (“LLC”). In essence, these states have rewritten the rules of domestic corporate governance through legislative innovation of business organization models that attempt to accommodate two potentially conflicting ethical obligations: the fiduciary duty of a corporation to shareholders and the social responsibility of a corporation to the stakeholders.<sup>50</sup> Benefit Corporations and L3C enactments are collectively referred to as “benefit legislation.”<sup>51</sup> Benefit legislation was designed for the express purpose of allowing a business entity to pursue a dual corporate mission of shareholder wealth maximization and social good without the attendant concern of facing a lawsuit for breach of fiduciary duty.<sup>52</sup> Parenthetically, Canada has copied the Benefit Corporation model into its own domestic legislation, noting that the U.S. model “combats short-termism and rebuilds the public trust.”<sup>53</sup>

Herrick Lidstone argued, however, that the creation of the Benefit Corporation was unnecessary given the recent Supreme Court decision in *Burwell v. Hobby Lobby Stores, Inc.*, hereinafter referred to as *Hobby Lobby*,<sup>54</sup> where the Supreme Court stated in a narrowly decided opinion that profit maximization was not the only permissible goal of a closely held corporation.<sup>55</sup> However, most commentators cite only the first sentence in

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<sup>49</sup> Standley, *supra* note 37, at 231.

<sup>50</sup> See Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style*, 29 DEL. J. CORP. L. 649, 696 n. 178 (2004) (arguing that “[w]hatever position one may hold about the role of regulation, it cannot affect the insight that establishing legal fiduciary duties to several constituencies faces serious implementation problems”).

<sup>51</sup> See *Why Pass Benefit Corporation Legislation*, BENEFIT CORPORATION, <http://benefitcorp.net/policymakers/why-pass-benefit-corporation-legislation>; see also *How do I Create General Public Benefit*, Benefit Corporation, <http://benefitcorp.net/businesses/how-do-i-create-general-public-benefit>.

<sup>52</sup> *Id.*

<sup>53</sup> Dennis J. Tobin, *The Evolution of the Corporation: The Public Benefit Corporation*, 4, 9 (Oct. 13, 2015) [http://blaney.com/files/EvolutionPublicBenefitCorporations\\_DTobin\\_2013.pdf](http://blaney.com/files/EvolutionPublicBenefitCorporations_DTobin_2013.pdf).

<sup>54</sup> Herrick K. Lidstone Jr., *The Long and Winding Road to Public Benefit Corporations in Colorado*, (April 22, 2017), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2266654](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2266654).

<sup>55</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2271 (2014) (stating that “[m]odern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so”).

the *Hobby Lobby* opinion about pursuing interests other than profit and then omit the next several critical sentences that clarify the Court's thinking:

For-profit corporations, *with ownership approval*, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives. Many examples come readily to mind. *So long as its owners agree*, a for-profit corporation may take costly pollution-control and energy-conservation measures that go beyond what the law requires.<sup>56</sup>

Owner agreement or consensus is a key element in relieving directors and management of traditional fiduciary obligation. Not surprisingly, those directors who face possible suit for breach of fiduciary duty are not as confident about the breadth of *Hobby Lobby* protection, as evidenced by the many states that have passed benefit legislation, which expressly include in the statutory text an express waiver of liability provision where owner consensus is not present.<sup>57</sup>

Thus, as a new third option, added to the for-profit and non-profit organizational models, many hail the wave of state benefit legislative reform as long overdue. For example, Thomas Jones and Will Felps argued that the traditional for-profit shareholder wealth maximization model is obsolete, offering further justification for alternative models of corporate governance.<sup>58</sup> On the other hand, for those investors caught up in the black box of investment products that lacked transparency and investor protection, the idea of a Benefit Corporation is a confusing one that opens the door to arguably conflicting stakeholder interests. For example, Amir Barnea and Amir Rubin have carefully documented and

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<sup>56</sup> *Id.* (emphasis added).

<sup>57</sup> See *infra* Appendix A; but see DEL. CODE ANN. TIT. 8, § 102(b)(7) (2008) (Delaware's statute does not permit the corporation to eliminate or limit the liability of a director as enumerated: "(i) [f]or any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under [other sections of the Delaware code]; or (iv) for any transaction from which the director derived an improper personal benefit").

<sup>58</sup> E.g., Thomas M. Jones & Will Phelps, *Shareholder Wealth Maximization and Social Welfare: A Utilitarian Critique*, 23 *Business Ethics Quarterly* 2 (2013).

assessed the conflicts arising between managing shareholders engaged in CSR programs that cater to self-serving interests to the detriment of passive shareholder interests.<sup>59</sup>

Seemingly missing from the debate about whether shareholder wealth maximization is a “good or bad” idea, is an analysis of the reason for fiduciary duty as the central organizing principle of corporate governance in the first instance.<sup>60</sup> Key to this inquiry is the question of how a servant, serving two masters, can resolve or prioritize the dual and often conflicting demands of those masters. By quick example, a corporation is running a deficit and needs to lay off workers in order to retain solvency. The supervisors disagree with management over the lay-offs because the company provides needed jobs to the community and families will be hurt. Fiduciary duty principles, grounded in the obligation of shareholder wealth maximization, provide the immediate business solution: solvency of the company is the primary obligation. However, without that guidance, the company would be required to resolve two conflicting stakeholder interests: protection of shareholder investment on one hand and protection of employees and their families in the community on the other. The winner becomes less predictable where fiduciary duty is supplanted by state benefit legislation, which is typically silent in this regard. Benefit Corporations allow a dual mission of wealth maximization and corporate social responsibility, which are not always mutually exclusive but still embrace inherently conflicting priorities of multiple stakeholders. Embracing duties to several constituencies faces serious implementation problems.<sup>61</sup>

In assessing the benefits of a Benefit Corporation, where fiduciary duty is no longer a gauge of absolute shareholder protection, the question arises whether the state benefit legislation provides adequate protection to investor interests. Because the benefit legislative model may differ from state to state, this question becomes more difficult to answer with certainty.<sup>62</sup> As we will see, the nagging problem of ambiguity in state

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<sup>59</sup> Amir Barnea & Amir Rubin, *Corporate Social Responsibility as a Conflict Between Shareholders*, 97(1) *J.BUS.ETHICS* 71-86 (2006).

<sup>60</sup> E.g., Jonathan R. Macey & Geoffrey P. Miller, *Corporate Stakeholders: A Contractual Perspective*, 43 *U.TORONTO L.J.* 405, 406 (1993).

<sup>61</sup> See, e.g., John Armour, Henry Hansmann, & Reineir Kraakman, *Agency Problems, Legal Strategies and Enforcement 2-4* (Harvard Law School, Olin Center for Law, Economics and Business, Discussion Paper No. 664, (2009), [http://www.law.harvard.edu/programs/olin\\_center/papers/pdf/Kraakman\\_644.pdf](http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kraakman_644.pdf).

<sup>62</sup> See *infra* Appendix A for a supportive statutory analysis.

constituency legislation, which sapped this option of its vitality, remains a continuing problem in benefit legislation as well.<sup>63</sup>

#### MAPPING NEW LEGISLATION (APPENDIX A)

State law controls the formation and governance of corporations.<sup>64</sup> Most states have fashioned their respective state benefit legislation after a model statute that was drafted by the private sector.<sup>65</sup> However, there are some significant variations state to state. Generally, there are two statutory model variations: the Benefit Corporation and the L3C. There is a third entity, not a creature of legislation, which has no legal status: the BCorp.<sup>66</sup> The following provides an analysis and comparison of these three organizational models.

This article surveys the thirty state Benefit Corporation statutes<sup>67</sup> and the nine L3C<sup>68</sup> state statutes to assess the type of statute, formal accountability reporting requirements, third-party oversight, if any, and entity and director liability waiver provisions. Appendix A maps the results of the analysis. Research conducted by Andre previously considered benefit legislation in five states, analyzing the benefit corporation as a “gray sector organization” or “GSO.”<sup>69</sup> A gray sector organization is one that floats in the “gray zone,” not quite a for-profit, not quite a non-profit, but rather a combination of the relative benefits of a for-profit, a non-profit and a government organization into one benefit entity.<sup>70</sup>

Andre’s study questioned whether a Benefit Corporation was the best vehicle for delivering corporate social responsibility. The article

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<sup>63</sup> Standley, *supra* note 37 at 209-10. (Standley warned that the failure to learn from the legislative ambiguities in constituency statutes with the emergence of benefit corporations could impact the efficacy of benefit corporation legislation in much the same way).

<sup>64</sup> *Corporations*, LEGAL INFORMATION INSTITUTE, <https://www.law.cornell.edu/wex/corporations>.

<sup>65</sup> See *Model Benefit Corporation Legislation*, B CORPORATION, [http://benefitcorp.net/sites/default/files/Model%20Benefit%20Corp%20Legislation\\_4\\_16.pdf](http://benefitcorp.net/sites/default/files/Model%20Benefit%20Corp%20Legislation_4_16.pdf).

<sup>66</sup> *What are B Corps?*, B CORPORATION, <https://www.bcorporation.net/what-are-b-corps>.

<sup>67</sup> See *infra* Appendix A for legislative citations for each respective state benefit corporation.

<sup>68</sup> See *infra* Appendix A for legislative citations for each respective state L3C corporation.

<sup>69</sup> Rae Andre, *Assessing the Accountability of the Benefit Corporation: Will This New Gray Sector Organization Enhance Corporate Social Responsibility?*, 110(1) J.BUS.ETHICS 133, 133-150 (2013).

<sup>70</sup> *Supplemental Guidance: Public Sector Definition*, THE INSTITUTE OF INTERNAL AUDITORS: NORTH AMERICA, (Dec. 2011), <https://na.theiia.org/standards-guidance/Public%20Documents/Public%20Sector%20Definition.pdf>.

concluded that there are design-based flaws in the accountability requirements for the Benefit Corporation that detract from its utility as an effective delivery tool for CSR.<sup>71</sup> Andre's conclusions are supported in the literature. Herrick Lidstone himself only cautiously endorses the use of a Benefit Corporation and notes its "limited utility."<sup>72</sup> This article builds upon and extends the Andre analysis by mapping the legislative models for all thirty-nine current state benefit enactments governing Benefit Corporations and L3Cs. This analysis illustrates the demonstrable lack of accountability and transparency, which detracts from the quality of investor protection and the ability to measure the corporation's real commitment to the dual social benefit purpose.

Thus, by comparison, unlike the requirement of audited financial statements to become part of the DJSI,<sup>73</sup> the state legislative models do not include any meaningful quantitative metrics or disclosure requirements to assess or enable measurement of the real value or benefit of Benefit Corporations.<sup>74</sup> The absence of any meaningful requirement to measure or disclose financial information also supports the conclusion that, without metrics, there is a demonstrable lack of public accountability. Finally, this article concludes, in conformity with Andre's findings, that the Benefit Corporation is more of a tool for establishing brand in the marketplace than for the effective delivery of CSR.<sup>75</sup>

#### BENEFIT CORPORATIONS VS. BCORPS

A Benefit Corporation is one that provides a "general public benefit" ("GPB") as part of its corporate purpose. GPB has been defined in most statutes as "a material positive impact on society and the

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<sup>71</sup> Andre, *supra* note 70, at 149-150.

<sup>72</sup> Lidstone, *supra* note 54, at 33.

<sup>73</sup> DJSI Assessment, *supra* note 47 (DJSI is created in conjunction with the RobecoSam Corporate Sustainability Assessment (CSA)). Each year, RobecoSAM invites the world's largest 2,500 publicly traded companies, measured by free-float market capitalization based on the S&P global BMI Index, to participate in the annual CSA. An industry-specific questionnaire featuring approximately 8-120 questions (depending on the industry) on financially relevant economic, environmental and social factors is the starting point for RobecoSAM's annual assessment. *The Corporate Sustainability Assessment at a Glance*, ROBECOSAM, <http://www.robecosam.com/en/sustainability-insights/about-sustainability/corporate-sustainability-assessment/index.jsp>.

<sup>74</sup> See *infra* Appendix A for a supportive statutory analysis.

<sup>75</sup> Andre, *supra* note 70, at 146-48.

environment” measured against a “third-party standard.”<sup>76</sup> However, the corporation is still required to operate with a profit motive.<sup>77</sup>

The major characteristics of the benefit corporation common to almost all state benefit statutes reviewed in this study include: (1) a requirement that benefit corporations must have a corporate purpose to create a material positive impact on society and the environment; (2) an expansion of the duties of the directors to require consideration of non-financial stakeholders as well as the financial interests of shareholders; and (3) an obligation to report on its overall social and environmental performance using a comprehensive, credible, independent and transparent “third-party standard.”<sup>78</sup> Statutory analysis reveals that the third-party standard is not defined in the various state legislative enactments and is routinely left to the independent discretion of the benefit entity.<sup>79</sup>

Moreover, the enacting state’s benefit legislation is situated within its existing state corporation code so that the enacting state’s existing corporation code applies to benefit corporations in every respect except those explicit provisions that are unique in the benefit legislation.<sup>80</sup> As noted in Appendix A, Delaware, the most popular state in the nation for incorporations and home to half of all publicly traded corporations,<sup>81</sup> does *not* require any third-party standard oversight or reporting. In any case, some have scoffed at the notion of delegating to private parties the determination of “the bona fides of hybrid entities (referring to benefit corporations).”<sup>82</sup>

Not only do these state benefit enactments not include any mandatory financial reporting or disclosure, they expressly exclude from disclosure executive director compensation and “proprietary financial information.”<sup>83</sup> In short, the Annual Benefit Report filed with the

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<sup>76</sup> See *infra* Appendix A for statutory language.

<sup>77</sup> William H. Clark & Larry Vranka, *White Paper, The Need and Rationale for the Benefit Corporation: Why is it the Legal Form That Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public*, BENEFIT CORPORATION (Jan. 26, 2012), [http://benefitcorp.net/sites/default/files/Benefit\\_Corporation\\_White\\_Paper.pdf](http://benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf).

<sup>78</sup> *Id.*

<sup>79</sup> See *infra* Appendix A for a supportive statutory analysis.

<sup>80</sup> See *infra* Appendix A for a supportive statutory analysis.

<sup>81</sup> Lucian Bebchuk & Alma Cohen, *Firm’s Decisions Where to Incorporate*, 56 J.L. & ECON. 383, 386 (2003).

<sup>82</sup> Dana Brakman Reiser, *Benefit Corporations - A Sustainable Form of Organization?*, 46 WAKE FOREST L.REV. 591, 606 (2011).

<sup>83</sup> See *infra* Appendix A for a supportive statutory analysis.



secretary of state does not include any financial reporting or other quantitative data,<sup>84</sup> much like any other ordinary corporate annual report.<sup>85</sup>

As of July 2014, a study issued by Stanford University reported 998 nationally registered Benefit Corporations.<sup>86</sup> To put this in perspective, 169,000 companies incorporated in Delaware alone in 2014.<sup>87</sup> However, it is somewhat difficult to obtain an accurate count of actual registered Benefit Corporations because many secretary of state offices simply lump Benefit Corporations in with the count of all registered corporations in the state. Also, four states, Illinois, Louisiana, Rhode Island, and Vermont have both Benefit Corporations and L3Cs.<sup>88</sup> Finally as noted in Appendix A, many states have only just passed the legislation during 2015, and the Annual Benefit Reports have not yet been filed in those states, so some data is lacking.

A L3C, based on a limited liability company model, limits the role of income production or property appreciation and requires the L3C to establish one or more charitable or educational purposes.<sup>89</sup> Typically, a L3C must qualify as a “low profit” LLC, and the legislation requires the company “at all times” to significantly further the accomplishment of one

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<sup>84</sup> See Del.Code Ann. tit. 8, § 362 (“(a) 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. In the certificate of incorporation, a public benefit corporation shall (1) identify within its statement of business or purpose pursuant to § 102(a)(3) of this title one or more specific public benefits to be promoted by the corporation, and (2) state within its heading that it is a public benefit corporation. (b) ‘Public benefit’ means 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) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature. ‘Public benefit provisions’ means the provisions of a certificate of incorporation contemplated by this subchapter”).

<sup>85</sup> The Delaware annual report for a corporation must include only the following basic internal details about the corporation: the physical address of the company’s location; the name and address of one officer; the names and addresses of all Directors, and authorization by an officer to file the report. *The Delaware Annual Report*, HARVARD BUSINESS SERVICES, INC., <https://www.delawareinc.com/corporation/delaware-annual-report/>.

<sup>86</sup> Kate Cooney, Justin Koushyar, Matthew Lee, & Haskell Murray, *Benefit Corporation and L3C Adoption: A Survey*, STANFORD SOCIAL INNOVATION REVIEW (Dec. 5, 2014).

<sup>87</sup> Bret Melson, *How Many Companies Incorporated in Delaware in 2014?*, HARVARD BUSINESS SERVICES, INC. (Jan. 12, 2015), <https://www.delawareinc.com/blog/how-many-companies-incorporated-in-delaware/>.

<sup>88</sup> See *infra* Appendix A for supporting statutory analysis.

<sup>89</sup> Robert Keatinge, *LLCs and Nonprofit Organizations - For-Profits, Nonprofits, and Hybrids*, 42 SUFFOLK U.L. REV. 553, 581 (2009).

or more of the charitable or educational purposes within the meaning of Section 170(c)(2)(B) of the Internal Revenue Code of 1986.<sup>90</sup> Yet, the L3C does not share not-for-profit status with charitable organizations.<sup>91</sup> Significantly, however, no third-party review or oversight is required at all.<sup>92</sup> As of January 2016, 1,325 companies have become L3C companies in the nine states that have passed the L3C legislation.<sup>93</sup> There were 1051 companies in July 2014.<sup>94</sup>

California has its own spin on the L3C model.<sup>95</sup> In 2012 it passed, alongside its benefit corporation law,<sup>96</sup> the “FlexC” or flexible corporation legislation. Here, the articles of incorporation must contain one of two statements: (1) that the company intends to pursue a public purpose, in one of the categories that non-profits operate in, or (2) that the company intends to create short-term or long-term benefits for the company’s employees, suppliers, customers, creditors, the environment, or community and society. No third-party oversight is required.<sup>97</sup> Parenthetically, the reaction of the private legal community to the legislation was singularly negative. Several legal experts noted “without independent monitoring, there’s greater risk of abuse and the potential for investors to be misled.”<sup>98</sup>

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.* 581-83.

<sup>92</sup> See *infra* Appendix A for a support statutory analysis.

<sup>93</sup> As noted in the website database, “[t]hese are L3Cs that are showing as ACTIVE by the various Secretaries of State. This tally does NOT include L3Cs that have been organized at one time in their respective states and are now inactive, administratively dissolved, expired or no longer recognized by the state in which they were organized.” *What is an L3C?*, INTERSECTOR PARTNERS, L3C, <https://www.intersectorl3c.com/l3c>.

<sup>94</sup> Cooney, *supra* note 87 at \*2.

<sup>95</sup> CAL. CORPS. CODE. TIT. 1 §2500 (West, 2011) (amended 2015). (Oct. 9, 2011) at 21-28. DIVISION 1.5. CORPORATE FLEXIBILITY ACT OF 2011 Chapter 1. General Provisions and Definitions 2500. “This division shall be known and may be cited as the Corporate Flexibility Act of 2011...2602. The articles of incorporation shall set forth: (a) The name of the flexible purpose corporation that shall contain the words ‘flexible purpose corporation’ or an abbreviation of those words. (b)(1) Either of the following statements, as applicable: (A) ‘The purpose of this flexible purpose corporation is to engage in any lawful act or activity for which a flexible purpose corporation may be organized under Division 1.5 of the California Corporations Code, other than the banking business, the trust company business or the practice of a profession permitted to be incorporated by the California Corporations Code, for the benefit of the long-term and the short-term interests of the flexible purpose corporation and its shareholders and in furtherance of the following enumerated purposes.’”

<sup>96</sup> CAL. CORPS. CODE §14600 (West, 2012).

<sup>97</sup> CAL. CORPS. CODE. TIT. 1 §2602 (West, 2011) (amended 2015).

<sup>98</sup> Kendall Taggart, *Corporations That Claim To Do Good Need More Oversight, Experts Say*, NBC BAY AREA (Oct. 15, 2012, 8:45 AM), [http://www.nbcbayarea.com/news/local/Corporations\\_that\\_claim\\_to\\_do\\_good\\_need\\_more\\_oversight\\_\\_experts\\_say-174140111.html](http://www.nbcbayarea.com/news/local/Corporations_that_claim_to_do_good_need_more_oversight__experts_say-174140111.html).

The third entity, known as a BCorp, has no legal status whatsoever; it is merely a brand.<sup>99</sup> This means that a company has merely received “BCorp certification” from a private sector third-party company. The most popular of the private sector certifiers is B-Lab.<sup>100</sup> B-Lab certification is a third-party standard requiring companies to meet social sustainability and environmental performance standards, meet accountability standards, and to be transparent to the public according to the score they receive on the assessment.<sup>101</sup> Some Benefit Corporations opt to use B-Lab as the “third-party standard” when required by statute, but not all do so.<sup>102</sup> B-Lab claims that its certification applies to the whole company across all product lines and issue areas.<sup>103</sup> For-profits of all legal business structures are also eligible for certification.<sup>104</sup>

Specifically, the B-Lab certification is a point system that focuses on how well the company uses “the power of business to solve social and environmental problems.”<sup>105</sup> A company must complete an online assessment to obtain certification. If the company earns a minimum score of 80 out of 200 points it will then undergo an “assessment review process,” which is a “conference call verifying the claims made in [its] assessment.”<sup>106</sup> Companies are required to provide unspecified supporting documentation before they are certified by B-Lab.<sup>107</sup>

While the assessment covers the company’s entire operation, it only measures “the positive impact of the company in areas of governance, workers, community, the environment, as well as the

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<sup>99</sup> Keatinge, *supra* note 90 at 579.

<sup>100</sup> *See About B-Lab*, B CORPORATION, <https://www.bcorporation.net/what-are-b-corps/about-b-lab>.

<sup>101</sup> *Certified B Corps and Benefit Corporations*, B CORPORATION, <https://www.bcorporation.net/what-are-b-corps/certified-b-corps-and-benefit-corporations>.

<sup>102</sup> Not all B Corporations are corporations. Looking at the examples listed on the B Lab website, “B Corporations” appear to be corporations, limited liability companies, and even limited liability partnerships. *Community*, B CORPORATION (April 7, 2009), <http://www.bcorporation.net/community> (The B Lab website does not discuss the choice of business organizational form).

<sup>103</sup> B-Lab Certification, *supra* note 101.

<sup>104</sup> *Id.*

<sup>105</sup> *Certified B Corps and Benefit Corporations*, B CORPORATIONS, <https://www.bcorporation.net/what-are-b-corps/certified-b-corps-and-benefit-corporations>.

<sup>106</sup> *Performance Requirements*, B CORPORATIONS, <http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/performance-requirements>.

<sup>107</sup> *Id.*

product or service the company provides.”<sup>108</sup> Again, by comparison, there is no financial measurement involved in the process, unlike the required disclosure of audited financial statements to become part of the DJSI, nor is there any determination about what portion of the company’s assets and/or revenues are actually devoted to its beneficial purpose. Also, B-Lab certification allows the company bylaws to remain secret. B-Lab reports on its website 1381 certified B-Lab certifications across one-hundred and twenty-one industries in forty-one countries as of August 2015.<sup>109</sup>

Not surprisingly, Benefit Corporations and BCorps are frequently confused and the labels are often used interchangeably in the marketplace.<sup>110</sup> As noted, the registered Benefit Corporation can also choose to obtain BCorp certification to satisfy the independent third-party standards review requirement when mandated by state statute. However, many BCorps, not licensed as a benefit corporation or L3Cs in any state, generally seek B-Labs certification simply to enhance their brand as a “sustainable” corporation. BCorps, not licensed as a benefit entity, remain obligated to follow traditional corporate principles, including the fiduciary duty to maximize shareholder wealth.<sup>111</sup> Parenthetically, other lesser-known third-party private sector certification competitors exist in the marketplace. BCorp certification has become yet another cottage industry.

#### MISSING METRICS

As previously noted, the analysis in Appendix A reveals that the law does not require any accounting or financial metrics to measure sustainability or the impact of public good in the marketplace. This leaves open several unanswered questions. For example, how much benefit does the Benefit Corporation have to do to meet its dual corporate purpose? How successful does the benefit have to be? What is the appropriate balance between benefit and profit? Is there a minimum allocation of corporate assets to each corporate purpose? Is there liability for failing to meet the benefit goals?

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Keatinge, *supra* note 90 at 579.

<sup>111</sup> *Id.* at 580.

In terms of investor transparency, disclosure requirements requiring answers to these questions are absent. The statutes generally waive any obligation to report executive compensation or other “proprietary financial information.”<sup>112</sup> Likewise, and perhaps most important, there is no requirement to disclose that portion of the corporate assets committed to the beneficial purpose. But disclosure leading to accountability in regard to Benefit Corporations is critical. Indeed, Charles Coate and Mark Mitschow warn that the dual purposes of Benefit Corporations may lead to increased incidences of fraud without internal accounting mechanisms in place.<sup>113</sup> They observe that an unethical manager has the opportunity to divert funds either from earnings or the social benefit activity and attribute the loss or shortfall to the lack of profits or the social mission.<sup>114</sup> The authors emphasize the need to disclose the actual amount of financial resources dedicated to the social benefit.<sup>115</sup> Briana Cummings concurs and observes from a wholly legal perspective that third-party standards and annual public reports are ill suited to regulate companies or produce public accountability.<sup>116</sup> More financial disclosure should be required.

The research also shows that several state statutes specifically waive corporate liability for failing to meet benefit goals.<sup>117</sup> Thus, there is arguably little need to quantify benefit impact where there is no liability for failing to meet the standard.

Given that corporations are required to file yearly annual reports with their respective secretary of state offices and, as a part of that process Benefit Corporations are mandated to submit a Benefit Report, an investor might still consider looking here for disclosure. Companies, such as *Benefitcorporation.net*, provide links to several published Annual Reports of Benefit Corporations also certified by B-Lab.<sup>118</sup> Those highlighted on

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<sup>112</sup> See *infra* Appendix A for a supportive statutory analysis.

<sup>113</sup> CHARLES J. COATE & MARK C. MITSCHOW, *BENEFIT CORPORATIONS AS A SOCIALLY RESPONSIBLE BUSINESS MODEL: THE ROLE OF ACCOUNTING* IN RESEARCH ON PROFESSIONAL RESPONSIBILITY AND ETHICS IN ACCOUNTING 129, 143 (Cynthia Jeffrey ed. 2015).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Briana Cummings, *Benefit Corporations: How to Enforce a Mandate to Promote the Public Interest?*, 112 COLUMBIA L. REV. 578, 627 (2012).

<sup>117</sup> See *infra* Appendix A for a supportive statutory analysis.

<sup>118</sup> *Find a Benefit Corp*, BENEFIT CORPORATION,  
<http://benefitcorp.net/businesses/find-a-benefit-corp>.

the website included: Greyston Bakery,<sup>119</sup> Patagonia,<sup>120</sup> King Arthur Flour,<sup>121</sup> SCS Global Services,<sup>122</sup> 3Degrees Inc.,<sup>123</sup> and Turnstile Tours.<sup>124</sup> A review of these annual reports reveals expensive looking, glossy brochure type publications with little or no financial or accounting information about the company. The B-Lab point system is however highlighted in the reports (i.e., how many miles we biked; how many hours we volunteered; what we gave to employees in annual benefits, etc.)

Patagonia, famous for its clothing and smiley face T-shirts, disclosed in its annual benefit report the amount of charitable contributions made during the year: “we donated 1% of net sales, totaling \$5,602,433, to 773 nonprofit charitable organizations that promote environmental conservation and sustainability.”<sup>125</sup> Turnstile Tours included a section called “Metrics and Financial Review,” where they disclosed that they had not made any profit in 2012 and identified those individuals and groups who had received disclosure of financial statements.<sup>126</sup>

The absence of any meaningful financial disclosure in the several company Annual Benefit Reports examined, and the state benefit legislative enactments prompted the creation of a benefit survey asking ten simple questions. The problem was not in the questions; it was in the answers—or lack thereof.

#### BENEFIT SURVEY (APPENDIX B)

In an attempt to navigate the still largely untested waters of measuring the “benefit” of Benefit Corporations, a national survey of benefit entities was conducted to focus on real asset allocation by each one to the stated beneficial corporate purpose. As a logical corollary to the inquiry about asset allocation to the beneficial purpose, the survey sought

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<sup>119</sup> Greyston Bakery, *Benefit Corporation Report* (2012), [http://benefitcorp.net/sites/default/files/documents/greyston\\_annual\\_2012\\_ks\\_05.pdf](http://benefitcorp.net/sites/default/files/documents/greyston_annual_2012_ks_05.pdf).

<sup>120</sup> Patagonia Works, *Annual Benefit Corporation Report* (2013), [http://benefitcorp.net/sites/default/files/CA\\_Patagonia\\_report\\_2014.pdf](http://benefitcorp.net/sites/default/files/CA_Patagonia_report_2014.pdf).

<sup>121</sup> King Arthur Flour, *Annual Report* (2014), [http://www.kingarthurflour.com/about/documents/King\\_Arthur\\_Flour\\_Benefit\\_Corporation\\_Report\\_for\\_Fiscal\\_Year\\_2014.pdf](http://www.kingarthurflour.com/about/documents/King_Arthur_Flour_Benefit_Corporation_Report_for_Fiscal_Year_2014.pdf).

<sup>122</sup> SCS Global Services, *Annual Report* (2012), [http://benefitcorp.net/sites/default/files/documents/scs\\_annualreport2012\\_0.pdf](http://benefitcorp.net/sites/default/files/documents/scs_annualreport2012_0.pdf).

<sup>123</sup> 3Degrees, Inc., *Annual Report* (2013), [https://3degreesinc.com/sites/default/files/3D\\_BCorpAnnualReport\\_2013\\_3.pdf](https://3degreesinc.com/sites/default/files/3D_BCorpAnnualReport_2013_3.pdf).

<sup>124</sup> Turnstile Tours, *Benefit Report* (2012), [http://benefitcorp.net/sites/default/files/documents/NY\\_Turnstile-Tours-Benefit-Report-2012-Compressed.pdf](http://benefitcorp.net/sites/default/files/documents/NY_Turnstile-Tours-Benefit-Report-2012-Compressed.pdf).

<sup>125</sup> Patagonia, *supra* note 121.

<sup>126</sup> Turnstile Tours, *supra* note 125.

to determine whether corporations embrace this new model of corporate social entrepreneurship in an effort “to really do good,” and devote corporate resources to that end, or merely to enhance the public perception of a “sustainable brand” as a more effective marketing tool.

The survey was separated into three areas: demographics, resource allocation, and stakeholder impact. The survey was administered through Qualtrics and sent to 220 Benefit Corporations nationally in August 2014. Repeated survey blasts were sent over the next several months to encourage responses. The survey questions follow:

### *Demographics*

1. In what state was the business incorporated as a Benefit Corporation?
2. Has your company been certified as a benefit corporation by an independent third-party?
  - Yes
  - No
  - If yes, which third-party
    - B Labs
    - BCSI (“Benefit Corporations Standards Institute”)
    - Other
3. What are the annual revenues of the company?
  - \$50,000-\$150,000
  - \$150,000-\$300,000
  - \$300,000-\$600,000
  - \$600,000-\$1,000,000
  - More than \$1 million dollars
4. How many employees work for the company?
  - 1-10
  - 10-20
  - 20-50
  - 50-100
  - 100-200
  - More than 200 employees

5. How does your company demonstrate positive social impact (“PSI”) through its corporate activities? [insert text box]

*Resource Allocation*

6. How much of the company’s annual revenues are spent on the PSI purpose in a 12 month period?
- More than \$10,000
  - More than \$30,000
  - More than \$50,000
  - More than \$100,000
7. How many employee hours are devoted to the PSI on a monthly basis?
- More than 10
  - More than 20
  - More than 30
  - More than 40
  - At least one employee in the company is fully dedicated to the PSI
8. Does the company commit resources other than money and labor to the PSI?
- Yes
  - No
  - If yes, please describe [insert text box]

*Stakeholder Impact*

9. Has the incorporation as a Benefit Corporation provided a positive impact on the company’s brand development and/or reputation in the market place?
- Yes
  - No
  - If yes, please describe in what ways [insert text box]



10. Has the operation as a Benefit Corporation created any competing interests between stakeholders, including shareholders, employees, suppliers, lenders, the community, etc.?
- Yes
  - No
  - If yes, please identify the competing or conflicting interests [insert text box]

After many months, only seven companies responded. While not statistically significant, the responses are included in Appendix B. Notably, five of the seven registered benefit companies that did respond also had third-party B-Lab certification.

Accordingly, in an effort to increase survey responses, in June 2015, B-Lab was asked to assist in the survey process by either circulating the survey to its certified BCorps or by providing its own accumulated data, if any, responsive to the survey questions. B-Lab responded in August 2015 and surprisingly admitted to retaining almost no contact information about its certified companies. A company representative stated “[u]nfortunately—we have a hard time tracking down contact information for benefit corps. They are tracked by the secretary of state and but (sic) we can rarely get email addresses. To that end, all the benefit corps we know about are listed on the site . . . Rest assured, however, that our contact list is pretty sparse so it’s not the best vehicle anyway. It is really hard to tell how many of these companies are actually operating and under what name. Hopefully, we’ll build the database over time.” B-Lab was also asked if it maintained any of the data requested in the survey. There was no response.

Yet, the sparse answers to the survey are still of some interest, though perhaps not statistically relevant. Of the seven benefit corporations responding to the survey, five were B-Lab certified, two were not. Six companies had only 1-10 employees. Four devoted 1-3% of the company’s annual revenues to the beneficial purpose, the fifth 4-6%, and two reported over 15%. All seven companies reported that there was a positive impact on brand in the community. Five companies reported that there were no real competing interests among the stakeholders that were problematic; however, two reported that there were some problems: “financial bottom line always wins, as CSO, I am working to change that and to create more long-term focused decision making” (Appendix B).

Arguably, the survey responses, or lack thereof, did offer one possible message.<sup>127</sup> Benefit corporations are not going to make voluntary public financial disclosures that have the potential to create adverse inferences about the sincerity of the commitment to the beneficial purpose. Given that neither the state benefit legislation nor the third-party standard organizations like B-Lab require this kind of accountability, the benefit entity remains a black box that sheds little or no light on the corporate commitment to sustainability or its dual beneficial purpose. The metrics needed to evaluate transparency and commitments to the beneficial purpose are simply missing.

#### ALL ABOUT BRAND: THE MINISKIRT OF THE 21<sup>ST</sup> CENTURY?

The full implications of the question of whether a benefit entity legitimately pursues a beneficial purpose or is merely an advertising ploy is better left to another article. However, it is significant to observe that the benefit legislative trend has begun to slow and even reverse itself in significant ways, which may be a result of the dilution of benefit entity effectiveness as predicted by Clark. For example, in 2010, North Carolina passed an L3C law, and in 2014, abolished it.<sup>128</sup> Describing the Act as “deadwood,” and “not necessary,” observers noted that, “It’s a well-motivated attempt to facilitate a good thing but in practice it doesn’t work.”<sup>129</sup> The attempt to pass Benefit Corporation legislation in North Carolina similarly failed in 2013 and in Kentucky in 2013.<sup>130</sup> Michigan has also opposed benefit corporation legislation.<sup>131</sup>

Both Indiana and Kentucky rejected L3C legislation in 2011.<sup>132</sup> Rhode Island was the last state in 2012 to pass L3C legislation.<sup>133</sup> Much

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<sup>127</sup> Unfortunately, the statistical significance of the survey data cannot be analyzed as intended using the chi square test. The textbook version of the chi square test of independence allows a researcher to determine whether variables are independent of each other or whether there is a pattern of dependence between them. If there is a dependence, the researcher can claim that the two variables have a statistical relationship with each other. One intention of the survey was to determine if there was statistical relationship between the amount of corporate assets dedicated to the beneficial purpose and the promotion of brand. Parenthetically, the chi square formula is the sum of the observed minus the expected, squared, and divided by the expected. Certainly, much more was expected when the survey was circulated than what was observed.

<sup>128</sup> See *infra* Appendix A for a supportive statutory analysis.

<sup>129</sup> Anne Field, *North Carolina Officially Abolishes the L3C*, FORBES MAGAZINE (January 11, 2014).

<sup>130</sup> See *infra* Appendix A for a supportive statutory analysis.

<sup>131</sup> See *infra* Appendix A.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

has been written about the deceleration of L3C legislation nationally.<sup>134</sup> The trend, at least as to the L3C model, appears to be fading away into obsolescence, much like the fate of state constituency statutes. As previously noted, the private legal community is generally suspect of this form of business organization due to the complete absence of oversight and supervision.<sup>135</sup> It also remains a mystery to some regarding the best way to implement potentially conflicting corporate purposes.<sup>136</sup>

Professor Celia Taylor of University of Denver Sturm College of Law, has argued that benefit entities are unnecessary and tied to brand perception, stating the following:

I continue to believe that special legal designation of benefit status is not necessary. In time, empirical analysis may be able to establish whether the new legislation in Delaware and elsewhere makes any meaningful difference in corporate behavior or whether it simply provides another avenue for corporations to tout their “good” behavior.<sup>137</sup>

Is the Benefit Corporation here to stay or is it just another marketing tool to promote brand? Regardless of good intention, benefit legislation should establish accounting or financial reporting metrics or risk becoming another meaningless “going green” slogan. Financial and accounting metrics will lend credibility to the corporate form, offer better transparency and protection to investors, and create accountability where none currently exists. Briana Cummings agreed that accounting and financial disclosure is critical, but cautioned that “[t]here is still a place, then, for measurement, external auditing, and reporting in an effective mission accountability framework, but all need to be adapted to take into account the unique characteristics of corporations’ ‘public benefit’ objectives.”<sup>138</sup> It is an admonition worth considering in the design of

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<sup>134</sup> Rick Cohen, *Social Responsibility or Marketing Ploy? The Branding of L3Cs*, THE NONPROFIT QUARTERLY (May 27, 2014), <https://nonprofitquarterly.org/2014/05/27/social-responsibility-or-marketing-ploy-the-branding-of-l3cs/>.

<sup>135</sup> Taggart, *supra* note 99.

<sup>136</sup> See Licht, *supra* note 51; see also Macey, *supra* note 61.

<sup>137</sup> Herrick Lidstone, *Public Benefit Corporations in Colorado: Why A Public Benefit Corporation Rather Than A Non-PBC?* THE RACE-TO-THE BOTTOM (May 21, 2013, 6:01AM), <http://www.theracetothetbottom.org/social-responsibility>.

<sup>138</sup> Cummings, *supra* note 117 at 627.

reporting metrics that will more accurately reflect and be tailored to the impact of benefit activity.

### RECOMMENDATIONS

The marketplace does offer some useful guidance to benefit entities in establishing metrics for sustainability evaluation and financial reporting. The Sustainability Accounting Standards Board (“SASB”), a non-profit company, reports that it is the only standard maker to create measurement:

[Designed to support disclosure of material sustainability information in a cost-effective, decision-useful way . . . ]  
As the language of business, accounting should capture meaningful information on the sustainability factors most relevant to a company’s management and its investors. Although financial statements continue to provide valuable information to internal and external decision makers, in order to better inform management and to attract long-term investors, companies must tell a more complete story of how they create value over time.<sup>139</sup>

This is consistent with the recommendation of Charles Coate and Mark Mitschow, that Benefit Corporations should develop internal accounting system controls to prevent misdirection from either corporate goal and to provide assurances to outside accountants that fraud controls have been put in place.<sup>140</sup>

Parenthetically, as an example of the disconnect between investor perception and corporate hype, SASB’s data shows that the lack of meaningful metrics has affected investor perceptions about sustainability in most companies. They report that, “80% of CEOs think their company is approaching sustainability as a route to competitive advantage, but only 14% of investors believe the companies they invest in are doing so.”<sup>141</sup>

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<sup>139</sup> *For Companies: Why SASB?*, SUSTAINABILITY ACCOUNTING STANDARDS BOARD (SASB), <http://using.sasb.org/>.

<sup>140</sup> *E.g.*, Coate, *supra* note 105.

<sup>141</sup> SASB, *supra* note 144.

Additionally, the third-party oversight standard in the beneficial legislation should be defined. As demonstrated by predecessor state constituency legislation, ambiguity in statutory enactments of this type creates more problems than it solves.<sup>142</sup> As noted previously, the corporate watchdogs are not accountants, lawyers, or other professionals. Benefit Corporations may choose to utilize any one of a number of private sector “certification” organizations, like B-Lab. Arguably, B-Lab’s online certification process, which requires little or no supporting documentation and does not inquire regarding asset allocation and/or commitment to the beneficial purpose, falls short of promoting investor transparency.

Finally, benefit legislation should provide guidance on the balance between the potentially competing interests of the shareholders and other stakeholders. Thomas Lovett and Veronica Basel framed the problem in the context of state constituency statutes, asking the following: “When the interests of shareholders and other constituencies are aligned, the target board’s decision is easy[,] [b]ut what if those interests are not aligned?”<sup>143</sup> That question has the same force in the context of benefit legislation. Indeed, once the rules of fiduciary duty are no longer the roadmap for resolving conflicting stakeholder interests, businesses should be provided some legislative guidance about how to resolve conflicting stakeholder interests when they arise in the dual-purpose context. The absence of such guidance may be a liability risk that boards are unwilling to undertake, and, thus, echoing the prediction that benefit legislation will soon float away into obsolescence or at best, become another meaningless marketing slogan.

So, just how beneficial is a benefit corporation? Without some kind of metric to quantify the answer, this innovative business model remains an investment black box. Consistent with Andre’s research demonstrating the limited utility of a Benefit Corporation in the delivery of CSR,<sup>144</sup> this article concludes that benefit legislation offers no real promise for the delivery of a sound sustainable investment alternative to investors in the marketplace.

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<sup>142</sup> Standley, *supra* note 37.

<sup>143</sup> Lovett, *supra* note 39.

<sup>144</sup> Andre, *supra* note 70.

## APPENDIX A

\*To the extent that each state follows the B-Labs model legislation it shall read “Model Legislation.” Variations in the statutory language will be noted where applicable, as each statute contains variations in the language.

State Legislation	Type of Entity and Effective Date*	Reporting Requirement*	Third-party Oversight*	Liability*
<b>Arizona SB 1238</b>	Benefit Corporation (2014)	Statement in the Annual Report regarding efforts to establish and pursue GPB. But, neither the benefit report nor the assessment of the performance of the corporation is required to be audited or certified by a third-party standards provider.	GPB assessed against a third-party standard developed by an entity not controlled by the benefit corporation. No further certification required. Standard must be credible and transparent. No financial measurements included in suggested criteria.	A director does not have any legal liability to any beneficiary of the GPB; also not liable for the failure of the benefit corporation to pursue or create GPB.
<b>Arkansas HB 1510</b>	Benefit Corporation (2013)	Model legislation and compensation paid to directors and proprietary financial information is not required to be reported.	Model legislation	Model legislation

THE MISSING METRICS OF SUSTAINABILITY: JUST HOW BENEFICIAL ARE BENEFIT CORPORATIONS?

2017

State Legislation	Type of Entity and Effective Date*	Reporting Requirement*	Third-party Oversight*	Liability*
<p><b>Cal.</b>  <b>AB 361</b>  <b>Flex C</b>  <b>SB 201</b></p>	<p>Benefit Corporation (2012)</p>	<p>Model legislation                      Flex C: The articles of incorporation must contain one of two statements: (1) that the company intends to pursue a public purpose, in one of that categories that non-profits operate in, or (2) that the company intends to create short-term or long-term benefits for the company employees, suppliers, customers, creditors, the environment, or community &amp; society.</p>	<p>Model legislation</p>	<p>Model legislation</p>
<p><b>Colo.</b>  <b>HB 13-1138</b></p>	<p>Benefit Corporation (2014)</p>	<p>Model legislation</p>	<p>Model legislation</p>	<p>Model legislation</p>

State Legislation	Type of Entity and Effective Date*	Reporting Requirement*	Third-party Oversight*	Liability*
Comm. SB 23, HB 5597 Section 140	Benefit Corporation (2014)	Model legislation	Model legislation	Model legislation
Del. SB 47	Benefit Corporation (2013)		Do not have to assess using an independent third-party assessment standard, unless so specified in the corporation's certificate of incorporation. Otherwise, the board is empowered to make such assessment on its own.	



State Legislation	Type of Entity and Effective Date*	Reporting Requirement*	Third-party Oversight*	Liability*
<b>Hawaii SB 298</b>	Sustainable Benefit Corporation (SBC) (2011)	SBC must declare in articles that it operates for the benefit of both owners and other stakeholders in the community.	Model legislation	There is no regulatory enforcement of the legal provisions.
<b>Idaho SB 1076</b>	Benefit Corporation (2015)	Model legislation	A company does not have to receive certification to hold its status. Weak third-party standard requirement.	Provides for a Benefit enforcement proceeding but not against the corp. or the directors for the failure to pursue or create a public benefit as established in its articles. No money damages are awarded.
<b>Indiana HB 1015</b>	Benefit Corporation (2015)	Model legislation L3C failed to pass in 2011	Model legislation	Model legislation

State Legislation	Type of Entity and Effective Date*	Reporting Requirement*	Third-party Oversight*	Liability*
<p><b>Flo. SB 654, HB 685</b></p>	<p>Creates two new entity types: Social Purpose Corporations and Benefit Corporations (2014)</p>	<p>Social Purpose Corporations are created to pursue or create one or more public benefits of a specific nature. This means that in the incorporating documents of the corporation, the entity will set forth the specific public benefits it seeks to further in its operations. This is distinct from Benefit Corporations, which are created to pursue or create a general public benefit (without a specific nature required).</p>	<p>Model legislation</p>	<p>Provides for a Benefit enforcement proceeding against the corp. not the directors for: (a) The failure of a social purpose corporation to pursue or create a public benefit or a specific public benefit established in its articles of incorporation; or b) A violation of any obligation, duty, or standard of conduct under the statute.</p>

State Legislation	Type of Entity and Effective Date*	Reporting Requirement*	Third-party Oversight*	Liability*
<p><b>Illinois SB 2897</b></p> <p><b>SB 0239</b></p>	<p>Benefit Corp. (2013)</p> <p>L3C (2010)</p>	<p>BC patterned on California legislation. L3C must qualify as a low profit LLC, the company must at all times significantly further the accomplishment of one or more of the charitable or educational purposes within the meaning of Section 170(c)(2)(B) of the Internal Revenue Code of 1986</p>	<p>BC, not L3C are required to operate under specific standards set forth by B-Labs. L3C is merely required to accomplish its stated purpose.</p>	<p>Model legislation</p>
<p><b>Louisiana HB 1178</b></p> <p><b>HB 1421</b></p>	<p>Benefit Corp. (2012)</p> <p>L3C (2010)</p>	<p>Model Legislation</p>	<p>Model Legislation</p>	<p>Model Legislation</p>

State Legislation	Type of Entity and Effective Date*	Reporting Requirement*	Third-party Oversight*	Liability*
<b>Maine LD 1265</b>	L3C (2011)	L3C must qualify as a low profit LLC, the company must at all times significantly further the accomplishment of one or more of the charitable or educational purposes within the meaning of Section 170(c)(2)(B) of the Internal Revenue Code of 1986	Do not have to assess using an independent third-party assessment standard; the company is merely required to accomplish its stated purpose	Model Legislation
<b>Maryland SB 690/ HB 1009</b>	Benefit Corp. (2010)	Model Legislation	Model Legislation	Model Legislation

State Legislation	Type of Entity and Effective Date*	Reporting Requirement*	Third-party Oversight*	Liability*
Mass. HB 4352	Benefit Corp. (2012)	Model Legislation	Model Legislation	Provides for a Benefit enforcement proceeding but not against the corp. or the directors for the failure to pursue or create a public benefit as established in its articles. No money damages are awarded.
Michigan SB 1445	L3C (2009)	L3C must qualify as a low profit LLC the company must at all times significantly further the accomplishment of one or more of the charitable or educational purposes within the meaning of Section 170(c)(2)(B) of the Internal Revenue Code of 1986	Do not have to assess using an independent third-party assessment standard; the company is merely required to accomplish its stated purpose	Model Legislation

State Legislation	Type of Entity and Effective Date*	Reporting Requirement*	Third-party Oversight*	Liability*
Minn. SF 2053 HF 2582	Benefit Corp. (2014)	Model Legislation	Model Legislation	Model Legislation
Montana SF 2053 HF 2458	Benefit Corp. (2015)	Model Legislation	Model Legislation	Model Legislation
Nebraska LB 751	Benefit Corp. (2014)	Model Legislation	Model Legislation	Model Legislation

State Legislation	Type of Entity and Effective Date*	Reporting Requirement*	Third-party Oversight*	Liability*
<b>Nevada AB 89</b>	Benefit Corp. (2013)	Model Legislation	Model Legislation	Provides for a benefit enforcement proceeding but not against the corp. or the directors for the failure to pursue or create a public benefit as established in its articles. No money damages are awarded.
<b>N.H. SB 215</b>	Benefit Corp. (2014)	Model Legislation	Model Legislation	Model Legislation
<b>N.J. S 2170</b>	Benefit Corp. (2011)	Model Legislation	Model Legislation	Model Legislation

State Legislation	Type of Entity and Effective Date*	Reporting Requirement*	Third-party Oversight*	Liability*
<b>N.Y. A4692-a and S79-a</b>	Benefit Corp. (2011)	Model legislation and compensation paid to directors and proprietary financial information is not required to be reported.	Model Legislation	Model Legislation
<b>N.C. SB 308</b>	L3C authorized in 2010 repealed 2014	Benefit Corporation failed to pass 2013		
<b>Oregon HB 2296</b>	Benefit Corp. (2013)	Model Legislation	Model Legislation	Model Legislation
<b>Penn. HB 1616</b>	Benefit Corp. (2012)	Model Legislation	Model Legislation	Model Legislation



State Legislation	Type of Entity and Effective Date*	Reporting Requirement*	Third-party Oversight*	Liability*
R.I. HB 5720 HB 5279	Benefit Corp. (2014)	Model Legislation	Model Legislation	Model Legislation
S.C. HB 4766	Benefit Corp. (2012)	Model Legislation	Model Legislation	Model Legislation
Tenn. HB 0767/ SB 0972	Benefit Corp. (2015)	Model Legislation	Model Legislation	A for-profit benefit corporation will not be liable for monetary damages for any failure of the for-profit benefit corporation to pursue or create general public benefit or any specific public benefit.

State Legislation	Type of Entity and Effective Date*	Reporting Requirement*	Third-party Oversight*	Liability*
<b>Utah SB 133</b>	L3C (2009)	L3C must qualify as low profit LLC. The company must at all times significantly further the accomplishment of one or more of the charitable or educational purposes within the meaning of Section 170(c)(2)(B) of the Internal Revenue Code of 1986	Do not have to assess using an independent third-party assessment standard; the company is merely required to accomplish its stated purpose	Model Legislation
<b>Vermont S 263 H 0775</b>	Benefit Corp. (2010)  L3C (2008)	L3C must qualify as low profit LLC. The company must at all times significantly further the accomplishment of one or more of the charitable or educational purposes within the meaning of Section 170(c)(2)(B) of the Internal Revenue Code of 1986	Do not have to assess using an independent third-party assessment standard; the company is merely required to accomplish its stated purpose	Model Legislation

State Legislation	Type of Entity and Effective	Reporting Requirement*	Third-party Oversight*	Liability*
Virginia HB 2358	Benefit Corp. (2011)	Model Legislation	Model Legislation	Model Legislation
D.C. B 19-058	Benefit Corp. (2013)	Model Legislation	Model Legislation	Model Legislation
Wash. HB 2239	Benefit Corp. (2014)	Model Legislation	Model Legislation	Model Legislation
W.V. SB 202	Benefit Corp. (2014)	Model Legislation	Model Legislation	Model Legislation
Wyoming HB 0182	L3C (2009)	L3C must qualify as a low profit LLC. The company must at all times significantly further the accomplishment of one or more of the charitable or educational purposes within the meaning of Section 170(c)(2)(B) of the Internal Revenue Code of 1986	Do not have to assess using an independent third-party assessment standard; the company is merely required to accomplish its stated purpose	Model Legislation

## APPENDIX B

**Initial Report****1. In what state was the business incorporated as a Benefit Corporation?**

Answer	Total Responses
Delaware	2
Maryland	1
Nevada	1
California	3
Total	7

Statistic	Select State
Most Common	California (42.86%)
Total Responses	7

**2. Has your company been certified as a benefit corporation by an independent third-party?**

#	Answer	Response	%
1	Yes	5	71%
2	No	2	29%
3	BCSI ("Benefit Corporation Standards Institute")	0	0%
4	B Labs	5	71%
5	Other	0	0%

**Other**

Statistic	Value
Min Value	1
Max Value	4
Total Responses	7

**3. What are the annual revenues of the company?**

#	Answer		Response	%
1	\$50,000- \$150,000		1	14%
2	\$150,000- \$300,000		1	14%
3	\$300,000- \$600,000		2	29%
4	\$600,000- \$1,000,000		0	0%
5	More than \$1 Million		3	43%
	Total		7	100%

Statistic	Value
Min Value	1
Max Value	5
Mean	3.43
Variance	2.62
Standard Deviation	1.62
Total Responses	7

**4. How many employees work for the company?**

#	Answer		Response	%
1	1-10		6	86%
2	11-20		0	0%
3	21-50		1	14%
4	51-100		0	0%
5	101-200		0	0%
6	More than 200 employees		0	0%
	Total		7	100%

Statistic	Value
Min Value	1
Max Value	3
Mean	1.29
Variance	0.57
Standard Deviation	0.76
Total Responses	7

### 5. How does the company demonstrate positive social impact ("PSI") through its corporate activities?

Text Response
<p><a href="http://www.bcorporation.net/community/terra-education-inc">http://www.bcorporation.net/community/terra-education-inc</a>            By acting as environmentally &amp; socially conscious as possible, measuring and managing both bottom lines and reporting on successes and shortcomings.</p> <p>Measuring and starting to manage enviro, social and spiritual bottom lines and reporting on successes and shortcomings.</p> <p>We are sourcing local, sustainably produced food for our customers, as well as supporting the in the kitchen with recipes etc.</p> <p>Our production of grass fed beef preserves grass lands and prevents the conversion of land to monocrop agriculture and it eliminates the use of feedlots. Beyond the basics, our goals for sustainable ranching (water quality, soil health, native grasses, etc) improve the land we use.</p> <p>Community outreach, buying from local/green vendors, making clients feel equal, etc.</p>

Statistic	Value
Total Responses	6

### 6. How much of the company's annual revenues are spent on the PSI purpose in a 12 month period?

#	Answer		Response	%
1	1%-3%		4	57%
2	4%-6%		1	14%
3	7%-10%		0	0%
4	10%-15%		0	0%
5	More than 15 %		2	29%
	Total		7	100%

Statistic	Value
Min Value	1
Max Value	5
Mean	2.29
Variance	3.57
Standard Deviation	1.89
Total Responses	7

### 7. How many employee hours are devoted to the PSI on a monthly basis?

#	Answer		Response	%
1	More than 10		1	20%
2	More than 20		1	20%
3	More than 30		0	0%
4	More than 40		2	40%
5	At least one employee in the company is fully dedicated to the PSI		1	20%
	Total		5	100%

Statistic	Value
Min Value	1
Max Value	5
Mean	3.20
Variance	2.70
Standard Deviation	1.64
Total Responses	5

### 8. Does the company commit resources other than money and labor to the PSI?

#	Answer	Response	%
1	No	4	67%
2	Yes, please describe	2	33%

#### Yes, please describe

Community projects and volunteering  
 Business practice - we believe in being equal with our clients, vendors, employees.

Statistic	Value
Min Value	1
Max Value	2
Total Responses	6

### 9. Has the incorporation as a Benefit Corporation provided a positive impact on the company's brand development and/or reputation in the market place?

#	Answer	Response	%
1	No	0	0%
2	Yes, please describe in what ways	7	100%
	Total	7	100%



**Yes, please describe in what ways**  
 marketing materials, strategic partnerships  
 other benefit corps & Certified B Corps hire me b/c of it  
 marketing advantage  
 I guess  
 it's a supportive community  
 It makes you more conscious of where your money is going, and how you can better impact the world with how you operate.

Statistic	Value
Min Value	2
Max Value	2
Mean	2.00
Variance	0.00
Standard Deviation	0.00
Total Responses	7

**10. Has the operation as a Benefit Corporation created any competing interest between stakeholders, including shareholders, employees, suppliers, lenders, the community, etc.**

#	Answer	Response	%
1	No	5	71%
2	Yes, please identify the competing or conflicting interests	2	29%
	Total	7	100%

**Yes, please identify the competing or conflicting interests**  
 financial bottom line always wins, as CSO, I am working to change that and to create more long-term focused decision making  
 I am using Catchafire

Statistic	Value
Min Value	1
Max Value	2
Mean	1.29
Variance	0.24
Standard Deviation	0.49
Total Responses	7

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