Essay

Substance over Symbolism: Do We Need Benefit Corporation Laws?

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INTRODUCTION

The rise of environmental, social, and governance (ESG) investing in recent years has put increasing pressure on companies to demonstrate their commitment to sustainability and social responsibility.[1] ESG investing involves selecting companies based on their adherence to environmentally friendly practices, social responsibility, and robust governance.[2] By considering these criteria, investors aim to align their investment choices with personal values and influence positive societal change. Some have suggested that public benefit corporations (PBCs) offer an alternative for investors seeking to put their money into companies that prioritize societal and environmental impact alongside

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1. *See* Thomas Hazen, *Social Issues in the Spotlight: The Increasing Need to Improve Publicly-Held Companies' CSR and ESG Disclosures*, 23 UNIV. PA. J. BUS. L. 740, 740 (2021) ("Investors' desires have triggered increased corporate ESG disclosures to indicate companies' commitment to socially responsible behavior.").

2. E. Napoletano, *What Is ESG Investing?*, FORBES ADVISOR (2024), https://www.forbes.com/advisor/investing/esg-investing/ [https://perma.cc/GX7K-VEDY] ("ESG stands for environment, social and governance. ESG investors aim to buy the shares of companies that have demonstrated a willingness to improve their performance in these three areas.").

profits.[3] However, a closer examination reveals that benefit corporation laws are largely unnecessary and may even have negative unintended consequences.

Benefit corporations are a legal structure enabled by state statutes. These statutes mandate the pursuit of general public benefit, require consideration of stakeholder interests, and impose certain reporting requirements. In contrast, Certified B Corporations (B Corps) are companies that have undergone a private third-party certification process overseen by the non-profit B Lab. To become a Certified B Corp, a company must meet rigorous standards of social and environmental performance, accountability, and transparency. Importantly, a company does not need to be a benefit corporation to become a Certified B Corp, and not all benefit corporations are Certified B Corps.

Yet, as this article will demonstrate, the conventional corporate law framework, especially in states with constituency statutes, already provides ample flexibility for companies to pursue profits and purpose without the need for benefit corporation laws. The shareholder primacy norm often cited as necessitating benefit corporation laws is not in fact a legal requirement in most of the country. Courts consistently protect directors' business judgment when considering stakeholder interests under the business judgment rule. Additionally, many states have adopted constituency statutes, which explicitly permit or require directors to consider the interests of various stakeholders, such as employees, customers, and the community, in their decision-making process. As a result, conventional corporations already have wide latitude to operate their businesses in a manner consistent with ESG goals.

Furthermore, the benefit corporation statutes that have been enacted are rife with vague, unenforceable language and toothless accountability mechanisms. They provide illusory protections unlikely to be upheld by courts while saddling directors with nebulous duties that increase liability risk and weaken shareholder rights.

3. Lori Ioannou, *Looking for an Alternative to ESG Investing? Here's One Possibility*, WSJ (2023), https://www.wsj.com/finance/investing/esg-public-benefit-corporation-invest-8fc67117 [https://perma.cc/YRU8-9BJ2] ("As investors question the validity of ESG ratings, some are looking to public-benefit corporations instead.").

Ironically, benefit corporation laws may reinforce the false notion that traditional corporations are prohibited from considering social impact, undermining the corporate social responsibility movement. The conflicts of interest behind the push for these laws, led by B Lab, call their necessity into question. B Lab's own financial practices, including executive compensation that is notably higher than the nonprofit sector average, suggest a potential conflict between its pursuit of growth and its public benefit mission.[4] Moreover, B Lab's partnership with for-profit marketing ventures like B the Change Media, LLC, and its association with marketing service providers like Bark Media, blur the lines between its nonprofit advocacy and profit-oriented activities. These entanglements raise concerns about whether B Lab's legislative agenda is influenced by underlying profit motives rather than a pure drive to promote public good. The "benefit" moniker itself is susceptible to misuse and exploitation by shrewd entrepreneurs looking to greenwash and unfairly compete based on a misleading state-sponsored designation.

This article will proceed in three parts. Part I examines the nature of benefit corporation laws, assessing their redundancy given the flexibility of conventional corporate law and comparing B Lab's Model Benefit Corporation Legislation with Delaware's alternative approach. Part II offers a detailed critique of benefit corporation laws, demonstrating how conventional corporate law already enables the pursuit of profits with purpose and the ways in which benefit corporation statutes fail to provide meaningful protections or accountability. Finally, Part III examines the potential unintended consequences of these laws, including reinforcing misconceptions about shareholder primacy, increasing director liability risk, weakening shareholder rights, and inviting abuse of benefit designations.

4. B LAB COMPANY, *Return of Organization Exempt from Income Tax (OMB No. 1545-0047)*, (2014); *2014 Nonprofit Salary And Benefits: Operating Budget And CEO Pay*, THE NONPROFIT TIMES (Jan. 15, 2014), https://thenonprofittimes.com/npt_articles/2014-nonprofit-salary-and-benefits-operating-budget-and-ceo-pay/ [https://perma.cc/5AMD-ZVBR] (B Lab's 2014 Form 990 shows executive pay significantly surpassing the sector average for its budget range—$5M-$10M—with top officers earning over $200,000, compared to the average $153,858).

I. BENEFIT CORPORATIONS LAWS

A. THE REDUNDANCY OF BENEFIT CORPORATION LEGISLATION

B Lab, founded in the United States in 2006, launched the B Corp Certification, which they describe as a comprehensive assessment that evaluates a company's commitment to social and environmental responsibility.[5] This certification process involves a rigorous review of a company's practices and impact, aiming to ensure adherence to higher standards that extend beyond the traditional corporate focus on profit maximization.[6]

As noted on B Lab's website, B Corps are held to a higher bar than benefit corporations. Specifically, benefit corporations do not have a "set performance standard" and self-report their performance, whereas B Corps are subject to rigorous standards set by B Lab, an external entity that holds these companies accountable for their social and environmental performance.[7] This distinction implies that companies genuinely dedicated to societal and environmental impact have the option to demonstrate their commitment through B Corp Certification, thus rendering the legal status of a benefit corporation unnecessary.

It is noteworthy that companies have successfully obtained B Corp Certification despite not being legally structured as benefit corporations. For example, Ben & Jerry's is incorporated in Vermont and does not have the "Benefit Corporation" subtype.[8] Similarly, Thrive Market is a Delaware company without the "Benefit Corporation" entity type.[9] These companies have achieved B Corp Certification, indicating their commitment to

5. *Benefit Corporation vs. B Corp*, B LAB U.S. & CANADA (2023), https://usca.bcorporation.net/benefit-corporation-vs-b-corp/ [https://perma.cc/9CV6-2X3P]; *Why Certify?*, B LAB U.S. & CANADA https://usca.bcorporation.net/why-certify/ [https://perma.cc/E6D2-PHRA] ("B Corp Certification is the only certification that measures a company's entire social and environmental performance.").

6. B LAB U.S. & CANADA, *supra* note 5.

7. *Id.* (stating "benefit corporations have no performance bar and self-report their performance").

8. Business Search (Ben & Jerry's Homemade, Inc.), VERMONT SECRETARY OF STATE, CORPORATIONS DIVISION, https://bizfilings.vermont.gov/online/BusinessInquire/BusinessInformation?businessID=74657 [https://perma.cc/94KU-P7GA].

9. Entity Search (Thrive Market, Inc.), DELAWARE DEPARTMENT OF STATE: DIVISION OF CORPORATIONS, https://bizfilings.vermont.gov/online/BusinessInquire/BusinessInformation?businessID=74657 [https://perma.cc/94KU-P7GA].

pursuing profits with purpose, even though they are not legally benefit corporations. The fact that companies can and do commit to social and environmental standards without the legal designation of a benefit corporation underscores the argument that benefit corporation laws are unnecessary for genuine social change.

Furthermore, a corporation's legal entity status does not impact consumers' recognition of the corporation's social responsibility efforts. One study indicates that roughly two-thirds [64%] of global consumers only pay attention to company corporate social responsibility (CSR) efforts if an organization is going above and beyond what other companies are doing.[10] Meanwhile, half of consumers state they won't notice CSR efforts unless the company is specifically called out for inadequate CSR efforts.[11] This underscores that actions matter more than legal status, reinforcing the argument that benefit corporation laws are unnecessary because they do not significantly influence consumer recognition or behavior towards CSR efforts. Further compounding this issue, the MBCL statutes and Delaware's PBC law fail to require distinctive naming for benefit corporations, making it even more challenging for consumers to identify these entities.[12] This omission further underscores the argument that benefit corporation laws are unnecessary, as they do not significantly enhance consumer recognition or influence consumer behavior towards CSR efforts.

In summary, the creation of benefit corporations is not essential for companies to enact positive social and environmental change. The existence of B Corp Certification and consumer expectations for tangible impact render such laws redundant.

B. MODEL LEGISLATION VS. DELAWARE LAWS

The Model Benefit Corporation Legislation (MBCL), introduced by B Lab in 2010, was designed to integrate within

10. CONE COMMUNICATIONS & EBIQUITY, *Global CSR Study*, 1 14 (2015), https://odpowiedzialnybiznes.pl/wp-content/uploads/2015/06/publikacje_2015_cone_communications_ebiquity_global_csr_study.pdf [https://perma.cc/Y7ST-VKZ4].

11. *Id.*

12. Kennan Khatib, *The Harms of the Benefit Corporation*, 65 AM. UNIV. L. REV. 151, 171 (2015) ("The MBCL only mandates that benefit corporation status be denoted in a corporation's articles of incorporation but places no naming requirements [such as a suffix], making it difficult for consumers to quickly distinguish benefit corporations from traditional for-profits.").

existing corporate frameworks, aiming to standardize the legal structure for benefit corporations. It mandates the creation of a "general public benefit" and allows for additional specific public benefits to be listed in a corporation's articles of incorporation.[13] Advocates argue that the flexibility of requiring a "general public benefit" enables directors to pursue various public benefits and prevents narrow, potentially misleading benefits that do not serve the larger public interest.[14]

In contrast, Delaware's "public benefit corporation" (PBC) law, enacted in 2013, requires corporations to identify one or more specific public benefits in their charter but does not mandate a "general public benefit."[15] This specificity could be seen as a double-edged sword; while it may allow for tailored benefits aligned with a company's goals and industry, it also raises concerns about potential greenwashing if the benefits are too narrow.[16]

Moreover, under the MBCL, directors must consider the impact of their decisions on a broad range of stakeholders, including shareholders, employees, customers, the community, and the environment.[17] Delaware's statute carries a similar mandate,

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13. Model Benefit Corp. Legis. § 201(a), (2017) ("A benefit corporation shall have a purpose of creating general public benefit.").

14. WILLIAM H. CLARK, JR. & LARRY VRANKA, *The Need and Rationale for the Benefit Corporation: Why It Is the Legal Form That Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public*, 1 21–22 (2013) ("They are interested in creating a new corporate form that gives entrepreneurs and investors the flexibility and protection to pursue all of these public benefit purposes. The best way to give them what they need is to create a corporate form with a general public benefit purpose.").

15. Del. Code Ann. tit. 8, § 362(a)(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.").

16. WILLIAM H. CLARK, JR. AND LARRY VRANKA, *supra* note 14 at 22 ("The 'general public benefit' purpose helps to prevent abuse of the legislation by corporations interested in 'greenwashing.'").

17. Model Benefit Corp. Legis. § 301, (2017) ("[1] shall consider the effects of any action or inaction upon: the shareholders of the benefit corporation; [ii] the employees and work force of the benefit corporation, its subsidiaries, and its suppliers; [iii] the interests of customers as beneficiaries of the general public benefit or specific public benefit purposes of the benefit corporation; [iv] community and societal factors, including those of each community in which offices or facilities of the benefit corporation, its subsidiaries, or its suppliers are located; [v] the local and global environment; [vi] the short-term and long-term interests of the benefit corporation, including benefits that may accrue to the benefit corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the benefit

requiring a balance between the pecuniary interests of shareholders, the best interests of those materially affected by the corporation's conduct, and the specified public benefits.[18]

The reporting and certification requirements also differ significantly between the two models. The MBCL requires annual benefit reports detailing progress toward public benefits, publication on the corporation's website, and third-party certification.[19] Delaware's PBC law, however, only requires biennial reports to shareholders, without the obligation to make these reports public or to use third-party standards.[20]

These distinctions highlight the Delaware statute's more flexible and director-friendly approach, which may offer less rigorous external accountability. This raises the question of whether such laws are necessary or effective when existing legal structures already allow companies to pursue social and environmental goals without the imposition of benefit corporation legislation.

II. CRITIQUE OF BENEFIT CORPORATION LAWS

A. CONVENTIONAL CORPORATE LAW ALLOWS PURSUIT OF SOCIAL AGENDAS

1. Shareholder Wealth Maximization Not Legally Required

While it is a common belief that corporate law requires directors to prioritize shareholder wealth maximization, this is not

corporation; and [vii] the ability of the benefit corporation to accomplish its general public benefit purpose and any specific public benefit purpose.").

18. Del. Code Ann. tit. 8, § 365(a) ("[S]hall manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation.").

19. Model Benefit Corp. Legis. § 401, (2017); Model Benefit Corp. Legis. § 402, (2017) ("[b] Internet website posting. - A benefit corporation shall post all of its benefit reports on the public portion of its Internet website, if any"); WILLIAM H. CLARK, JR. AND LARRY VRANKA, *supra* note 15 at 5 ("'Third-party standard.' A recognized standard for defining, reporting, and assessing corporate social and environmental performance.").

20. Del. Code Ann. tit. 8, § 366(b) ("A public benefit corporation shall no less than biennially provide its stockholders with a statement as to the corporation's promotion of the public benefit or public benefits identified in the certificate of incorporation and of the best interests of those materially affected by the corporation's conduct.").

a legal imperative.[21] Advocates of benefit corporation laws, including B Lab, argue that landmark legal decisions have endorsed shareholder primacy, potentially constraining directors from considering other stakeholders' interests.[22] However, a closer examination of these cases reveals that they do not establish an invariable legal requirement to maximize shareholder wealth to the exclusion of other considerations.

For example, the case of *Dodge v. Ford* is often cited to suggest that a company's primary purpose is to serve its shareholders.[23] However, the context of this case and its language regarding shareholder primacy are arguably dicta and do not reflect a binding principle that directors must always maximize shareholder wealth.[24] Similarly, *Revlon Inc. v. MacAndrews & Forbes Holdings, Inc.* established a duty to maximize shareholder value only in specific change-of-control contexts, not as a general rule of corporate governance.[25] Finally, *eBay v. Newmark* ruled that directors cannot prioritize their own values over shareholder interests, but this decision is more about the rights of shareholders

21. *See* Margaret M. Blair & Lynn A. Stout, *Director Accountability and the Mediating Role of the Corporate Board*, 79 WASH. UNIV. L. Q., 406 (2001) ("Corporate law does not-nor should it-require directors to maximize the value of the company's common stock."); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N. Y. UNIV. L. REV. 733, 733 (2005) ("In fact, the law gives corporate managers considerable implicit and explicit discretion to sacrifice profits in the public interest. They would have such discretion even if the law pursued the normative goal of corporate profit-maximization because minimizing total agency costs requires giving managers a business judgment rule deference that necessarily confers such profit sacrificing discretion.").

22. WILLIAM H. CLARK, JR. AND LARRY VRANKA, *supra* note 14 at 7–8 ("*Dodge v. Ford* does not stand alone, and cases in other jurisdictions have reiterated the shareholder maximization duty that '[i]t is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders.' . . . Nevertheless, *Dodge v. Ford* remains good law and many still maintain that its 'theory of shareholder wealth maximization has been widely accepted by courts over an extended period of time.' It is against the paradigm of shareholder primacy that directors and their advisors analyze corporate decision making.").

23. *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919).

24. Lynn Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. BUS. REV. 163, 167, 175 (2008).

25. Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, DEL. J. CORP. L. 405, 432–33 (2013) ("[T]hey only have such an obligation only in one narrow setting: a corporation's 'end stage,' i.e., in a corporate break-up, when they initiate an active bidding process, or when they enter into a transaction that shifts a dispersed shareholding base into a controller's hands, essentially a privatization."); *Revlon, Inc. v. Macandrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (1986).

against those who control the company than a mandate on corporate purpose.[26]

These cases illustrate that while shareholder interests are important, they do not legally preclude directors from considering the welfare of employees, customers, the community, or the environment. Moreover, even if decisions like *Dodge*, *Revlon*, and *eBay* are interpreted to prioritize shareholders' interests, that does not mean directors must focus solely on maximizing the corporation's profits. The business judgment rule, as applied under Delaware law, typically protects directors, everyday decisions, allowing them to consider non-shareholder interests as long as there is a rational connection to shareholder value.[27] This means that directors' decisions to contribute to community or make charitable donations through the corporation are often protected, as such actions could reasonably be seen to promote shareholder value.[28]

Despite this protection, the seemingly unequivocal duty to maximize shareholder wealth during a sale, as highlighted in the *Revlon* decision, is not absolute and is subject to significant judicial deference. The *Revlon* requirements become moot when a corporation's sale has been approved by a majority of shareholders—even if the sale does not maximize shareholder wealth.[29] Consequently, courts seldom hold directors liable for damages under *Revlon* and are unlikely to enjoin a proposed sale pending shareholder vote based solely on the allegation that directors did not maximize shareholder value.[30]

26. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 (Del. Ch. 2010).

27. Aronson v. Lewis, 473 A.2d 805, 812 ("In making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.").

28. WILLIAM H. CLARK, JR. AND LARRY VRANKA, *supra* note 14 at 12 ("In the day-to-day context, directors can consider non-shareholder interests as long as they can show a rational connection between that consideration and shareholder value.").

29. Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 308–09 (Del. 2015) ("Because the Chancellor was correct in determining that the entire fairness standard did not apply to the merger, the Chancellor's analysis of the effect of the uncoerced, informed stockholder vote is outcome-determinative, even if Revlon applied to the merger.").

30. Mohsen Manesh, *Introducing the Totally Unnecessary Benefit LLC*, 97 N. C. L. REV. 603, 629 (2019) ("The upshot is that courts will almost never hold directors liable for damages under *Revlon* . . . ." (footnote omitted)).

In summary, a purpose-driven business may stipulate a social mission in its corporate charter and elevate that mission on par with or above profit-seeking. Benefit corporation legislation is not and was never necessary to accomplish this. The same analysis could also be applied to the corporation statutes of other states. In addition to corporate statute applications which allow corporations to pursue profits with purpose, a majority of states have went so far as adopting constituency statutes which affirmatively reject the shareholder primacy norm.

2. Thirty-two States Reject Shareholder Wealth Maximization

Even if Delaware's corporate law might be seen as prioritizing shareholder wealth maximization, it is not a universal mandate. Corporations can choose their state of incorporation, which allows them to be governed by the laws of that state, particularly in relation to directors' fiduciary duties and the corporation's lawful purposes.[31]

Beyond Delaware, a significant number of states, specifically thirty-two, have enacted constituency statutes that allow directors to consider a variety of stakeholders' interests, such as employees, customers, suppliers, and communities, when managing the corporation.[32] The extent of consideration varies: some states restrict this to scenarios of corporate sales or takeovers, while others permit these considerations in general board matters.[33] These statutes signal a departure from the principle of prioritizing solely shareholder interests, allowing for the inclusion of other stakeholders' interests when deemed appropriate.

The combination of the internal affairs doctrine and the prevalence of constituency statutes indicates that the legal framework is amenable to corporations pursuing broader social

31. *Id.* at 633 ("Although most large corporations choose to organize under Delaware law, all businesses have the option to incorporate elsewhere.").

32. J. Haskell Murray, *Corporate Purpose and the Business Roundtable*, 21 TRANS. TENN. J. BUS. L. 361, 366 (2020) ("[A] majority of states [though not Delaware] have adopted 'other constituency' statutes, which give directors more latitude to consider non shareholder stakeholders in decision-making."); Minn. Stat. § 302A.251, Subd. 5, MINN. STAT. (2024) ("In discharging the duties of the position of director, a director may, in considering the best interests of the corporation, consider the interests of the corporation's employees, customers, suppliers, and creditors, the economy of the state and nation, community and societal considerations . . . .").

33. Manesh, *supra* note 30 at 633–34.

objectives.[34] Consequently, the necessity for benefit corporation legislation is called into question. Existing corporate law already affords businesses the flexibility to prioritize social and environmental aims. Corporations can choose to incorporate in states that have explicitly moved away from the doctrine of shareholder wealth maximization, enabling directors to balance the interests of shareholders with those of other stakeholders.

B. ILLUSORY PROTECTIONS IN BENEFIT CORPORATION LAWS

Benefit corporation statutes are criticized for ambiguous language and weak enforcement, which fail to offer meaningful protections or obligations.[35] The requirement for benefit corporations to generate a "material positive impact on society and the environment" is criticized for its lack of clarity and enforceability.[36] Businesses can easily claim they meet this requirement by highlighting any socially or environmentally friendly aspect of their operations.[37]

Moreover, the directive for managers to consider the interests of non-owner stakeholders adds little to no real burden, as it is a standard business practice to consider the impact of

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34. *Id.* at 634 ("The existence of constituency statutes coupled with the internal affairs doctrine means socially minded businesses are not inexorably bound to shareholder primacy under Delaware law or the conventional corporate law of any other state that is perceived to mandate it. Rather, to the extent that the state of incorporation is a choice, so too are any supposed legal strictures imposed by shareholder primacy.").

35. Mark Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, BUS. LAWYER 1007, 1025 (2013) ("[T]he general public purpose does not delineate specific covenants or undertakings of the benefit corporation that a third party could match up against the actions taken by the corporation; rather, it sets forth a vague and general aspiration."); J. Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. UNIV. BUS. L. REV. 1, 30 (2012).

36. Mark Loewenstein, *Benefit Corporation Law*, 85 UNIV. CINCINNATI L. REV. 381, 390 (2017) ("[H]aving a positive effect on society and the environment is unmeasurable and, therefore, not amenable to an opinion that the benefit corporation 'acted in accordance' with that aspiration 'in all material respects.' Insofar as section 302[c][1] is concerned, therefore, the opinion is likely to be perfunctory and conclusory.").

37. Joseph W. Yockey, *Does Social Enterprise Law Matter?*, 66 ALA. L. REV. 767, 794 (2014) ("Despite their good intentions, provisions along these lines are arguably both too broad and too narrow. The ability to justify decisions by citing vague public benefit requirements or stakeholder interests could give managers 'broad cover' to act selfishly or with less commitment to social impact than investors prefer.").

decisions on various stakeholders for optimal profitability.[38] The mandate to balance these interests is similarly ineffective, as it does not necessitate equal consideration, allowing owner interests to prevail.[39]

A benefit enforcement proceeding is a lawsuit initiated by shareholders to ensure the company fulfills its public benefit obligations. As the sole legal tool for ensuring compliance with benefit corporation commitments, the enforcement proceeding has been criticized as ineffective.[40] The right to initiate such proceedings is restricted to owners, who face the challenge of balancing multiple goals and interests due to their financial stake in the corporation's profits.[41] Non-owners and government regulators lack standing to bring forth such actions.[42] Furthermore, the close-knit nature of most benefit corporations, where owners often double as managers, makes it unrealistic to expect them to sue themselves to enforce statutory commitments.[43]

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38. Stefan Padfield, *The Role of Corporate Personality Theory in Opting Out of Shareholder Wealth Maximization*, 19 TRANS. TENN. J. BUS. L. 443 (2018) ("[I]t is incorrect to say that 'regular corporations . . . cannot take into consideration social factors' because social factors impact the shareholder wealth analysis, and not always negatively. In fact, in determining the best path to maximizing shareholder value, corporations arguably must consider social factors in order to satisfy their duty of care to become informed of all material information reasonably available.").

39. Manesh, *supra* note 30 at 653 ("To 'balance' means that managers must merely give some weight to the interests of stakeholders, not that stakeholder interests should bear equal weight as the owners' interests. 'Balancing' can thus result in giving the interests of stakeholders so little weight as to allow the owners' interests to predominate.").

40. Christopher Hampson, *Bankruptcy & the Benefit Corporation*, AM. BANKRUPTCY L. J. 93, 117 (2022) ("[W]hile shareholders can bring benefit enforcement proceedings to enforce this obligation, such lawsuits seem not to have occurred. Similarly, no benefit enforcement proceedings have been brought . . . ."); Manesh, *supra* note 30 at 653 ("The sole legal vehicle aimed at ensuring that a self-proclaimed benefit entity actually fulfills its otherwise illusory statutory commitments is the benefit enforcement proceeding. But as an accountability mechanism, the benefit enforcement proceeding is farcical.").

41. Manesh, *supra* note 30 at 653 ("But the owners suffer from an obvious conflict of interest: the owners stand to gain financially from the business's profits.").

42. *Id.* ("[They] have a disincentive to bring a benefit enforcement action that might potentially interfere with the business's profit making.").

43. *Id.* at 654 ("[I]t is absurd to expect the owners to sue themselves in their managerial capacity to enforce the business's statutory commitment to create public benefit.").

Courts are likely to defer to the judgment of managers in enforcement proceedings due to the vague legal standards defining public benefit and managerial conduct, unless there is clear conflict of interest or bad faith.[44] The remedies available to owners, even if they prevail, are non-monetary, as the statutes prohibit financial damages.[45]

The lack of reported benefit enforcement proceedings since the enactment of the first statute suggests that owners are unlikely to challenge managerial decisions.[46] Critics also criticize the benefit report, intended to provide transparency and accountability, for its vague requirements and lack of auditing or penalties for misrepresentation, reducing it to a potential tool for self-promotion rather than effective oversight.[47]

This lack of accountability is further evidenced by the limitations of the benefit enforcement proceeding.[48] Only shareholders have standing to bring such a proceeding, and numerous factors make it unlikely shareholders would ever do so.[49] First, these proceedings may only be brought for injunctive relief, not monetary damages, reducing the incentive to bring suit.[50] Second, the model legislation stipulates that a benefit enforcement proceeding may be initiated by shareholders who beneficially or

44. WILLIAM H. CLARK, JR. AND LARRY VRANKA, *supra* note 14 at 28 ("If the corporation could show a meaningful good faith effort to pursue such positive impacts, then a judge would likely be reticent to interpose his or her judgment for the corporation's.").

45. Manesh, *supra* note 30 at 656 ("[T]he best a prevailing owner can hope for is some form of nonmonetary remedy, because money damages are statutorily prohibited.").

46. *Id.* at 656–57 ("[A]fter nearly a decade since the first benefit corporation statute, there are no reported cases involving a benefit enforcement proceeding.").

47. J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345, 360 (2014) ("Many of the few annual benefit reports that are currently available are self-promotional and do not provide much value to a reader looking for a full, fair evaluation of the business.").

48. Model Benefit Corp. Legis. § 102, (2017).

49. Yockey, *supra* note 37 at 797 (concluding that the benefit enforcement proceeding lacks effectiveness).

50. Model Benefit Corp. Legis. § 301(c), (2017) (safeguarding directors and officers from financial consequences due to their actions or non-actions, provided they comply with general business duties and the benefit corporation statute, or due to the corporation's lack of pursuit or creation of general or specific public benefits); Yockey, *supra* note 37 at 797 ("[T]here is no opportunity for money damages.").

of record own at least 2% of the total number of shares of a class or series outstanding at the time of the act or omission complained of. This ownership threshold is intended to reduce the possibility of nuisance suits, yet it also limits the pool of potential plaintiffs who can hold the corporation accountable.[51]

The statutorily mandated benefit report also does little to create accountability.[52] In theory, this report provides transparency, allowing the public to assess whether a benefit corporation is living up to its commitments.[53] In practice, however, the overly vague statutory requirements give corporations wide latitude in what to include or omit from the report.[54] Moreover, there is no requirement that the report be audited or certified, nor any express penalty for false or misleading reporting.[55] The lack of effective oversight transforms the benefit report into a self-promotional marketing tool rather than a real accountability mechanism.[56]

The Delaware public benefit corporation statute abandons much of the pretense around benefit reports, not requiring them to be made publicly available or assessed against a third-party standard.[57] This seems to concede that without meaningful enforcement, benefit corporations are really just accountable to their own shareholders like any other business.

By creating a state-sponsored "benefit" designation for private companies without corresponding accountability, benefit corporation statutes invite misuse and exploitation by

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51. Model Benefit Corp. Legis. § 305 (2017).

52. Steven Munch, *Improving the Benefit Corporation: How Traditional Governance Mechanisms Can Enhance the Innovative New Business Form*, 7 NW. J. L. SOC. POL'Y 170, 194 (2012) ("This presents a clear opportunity for selective reporting, if not outright misconduct.").

53. Loewenstein, *supra* note 36 at 386–87.

54. Munch, *supra* note 52 at 194 ("[I]t allows a benefit corporation's officers and directors to conduct all nonfinancial reporting, as long as they follow an outside standard in doing so.").

55. *Id.* ("To guard against this, the benefit corporation statutes should, at minimum, outline explicit penalties for directors and other corporate actors who provide false or misleading information on the company's social performance to investors or the public at large.").

56. Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOR. L. REV. 591, 611 (2011) ("If a standard-setter clearly and transparently sets low standards, it may qualify unrelated entities to form as benefit corporations just as would a standard-setter with higher standards, leaving the door open to greenwashing or even fraud.").

57. *See* 8 Del. C. § 366, 8 DEL. C. (2013).

entrepreneurs seeking marketing value without real commitment.[58] The statutorily required mechanisms of benefit enforcement proceedings and benefit reports offer minimal accountability in practice.[59] This lack of effective enforcement reveals that the purported stakeholder protections of benefit corporation laws are largely illusory.

In conclusion, legal scholars argue that the obligations imposed on benefit corporations—to create public benefits, consider stakeholder interests, and issue benefit reports—are vague and lack enforcement mechanisms. They contend that this renders the commitments of benefit corporations virtually indistinguishable from those of traditional corporations, with no real accountability for failing to prioritize public benefits or stakeholder interests.

C. QUESTIONABLE NEED FOR BENEFIT CORPORATION LAWS

Neither the Uniform Law Commission nor the Corporate Laws Committee of the ABA Business Law Section, both authoritative legal bodies, contributed to drafting the MBCL.[60] The ABA's Corporate Laws Committee has not reached a consensus on incorporating benefit corporation stipulations into the Model Business Corporation Act, reflecting ongoing debates about their value and efficacy.[61]

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58. *See* Brakman Reiser, *supra* note 56 at 617 ("The delegation to third party standard-setters to vet this public benefit and the lack of a statutory floor for what counts as public benefit make low standards and greenwashing particular concerns for the benefit corporation.").

59. Murray, *supra* note 47 at 361–62 ("A benefit corporation that does not see the value in using a third-party standard may choose to use the weakest standard available, provide little to no useful information to the market, and waste company resources in the process.").

60. Amy Klemm Verbos & Stephanie L. Black, *Benefit Corporations as a Distraction: An Overview and Critique*, 36 BUS. PROF. ETHICS J. 229, 243–44 (2017) ("With respect to the Model Benefit Corporation Legislation specifically, neither the Uniform Law Commission [ULC] also known as National Conference of Commissioners on Uniform State Laws, nor the Corporate Laws Committee of the American Bar Association Business Law Section [drafters of the Model Business Corporation Act] drafted this legislation."); *See* Kayleen Asmus, *Finding the Benefit in a New Administration: A Uniform B Corporation Legislation*, 43 J. CORP. L., 390 ("The Uniform Law Commission [ULC] should draft a uniform version of B corporation legislation addressing the major concerns of corporate organization—creation and purpose, accountability, and transparency. . . .").

61. Verbos and Black, *supra* note 60 at 243–44 ("ABA Business Law Section Committee on Corporate Laws [2013] could not reach a consensus on whether

The push for benefit corporation laws seems influenced by political trends rather than a real need.[62] Politicians often support these laws to appear in tune with popular social business trends, contrasting with the negative image of Wall Street and traditional corporations.[63] These laws are presented as flexible, not forcing companies to adopt them and claiming not to change existing corporate laws.[64] They're seen as a win-win, appealing to those advocating for social justice and those who support free markets.[65]

Research suggests that states with more environmentally focused workforces are more likely to adopt these laws, hinting at a political motive to appeal to green voters.[66] These laws are also seen as cost-effective for states, requiring little change in existing structures and promising some economic benefits without significant investment.[67]

The real benefits for states and politicians might be minor, but the appeal of attracting businesses with minimal effort is

to include benefit corporation provisions in the Model Business Corporation Act, … The ongoing debates raise significant issues and create uncertainty over whether and to what extent a lawyer or accountant might become liable for advice to their clients about the best way to form a socially-minded enterprise.").

62. J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 580 (2016) ("Under the interest group theory of legislation, politicians act in their own self-interest, for example they may act consistent with their desire to be reelected or keep their political party in power.").

63. *Id.* ("For state politicians, the reasons to support social enterprise laws are readily apparent. Social business is popular; Wall Street and traditional for profit corporations are not.").

64. *Id.* ("[T]hese laws purport to embrace freedom, do not force anyone to incorporate under the laws, and expressly deny altering the existing corporate laws.").

65. *Id.* ("Social enterprise laws allow the market to operate. The statutes appear to appeal to both the social justice advocates on the left and to the free market proponents on the right.").

66. *Id.* ("Research has shown that a 'larger "green" workforce exerts a significant positive influence on Benefit Corporation legislation passage,' suggesting that environmentally-friendly states are especially interested in social enterprise law.").

67. *Id.* ("[S]ocial enterprise laws have been promoted as no cost or low cost to states. Currently, there are not state-level tax breaks for the social enterprises and not even much in the way of necessary changes at secretary of state's offices. . .The benefits, therefore, do not have to be large to justify passage of these laws in the eyes of politicians.").

strong. Business leaders and activists likely support these laws, seeing potential personal and community benefits.[68]

In summary, while benefit corporation laws are marketed as a way for businesses to align with social and environmental goals freely, they may not be necessary. Existing laws already provide sufficient flexibility for such pursuits. The drive behind these laws seems more related to political image and attracting businesses with minimal state effort, rather than a genuine legal gap needing to be filled.[69]

D. COMPETING INTERESTS FOR BENEFIT CORPORATION LAWS

B Lab, a nonprofit entity, advocates for benefit corporation laws, raising questions about the appropriateness of its financial practices and executive compensation. While it is true that as a nonprofit, B Lab does not distribute profits to shareholders, its financial practices, including executive compensation, warrant scrutiny. In 2014 B Lab's executive pay of over $200,000 was notably higher than the nonprofit sector average for organization with similar budges—$5M-$10M—which was only $153,858.[70] This elevated level of compensation could suggest that the organization may prioritize expanding its certification business, which, while not distributing profits, could still serve to enhance the organization's influence and reach. If the pursuit of growth and influence becomes a primary driver for B Lab, rather than focusing on the public good, it could cast doubt on the authenticity of the benefit corporation model and suggest that the promotion of these laws might inadvertently align more closely with the organization's interests than with public benefit.[71]

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68. *Id.* ("The activists and business managers, mentioned above, are likely vocal, motivated, and influential groups, as those groups pay taxes, vote, and have a good bit to gain from the legislation.").

69. *Id.* at 580–81 ("[A] state politician warms to the social enterprise movement enough to take the legislation to a vote with little or no support from the state bar association.").

70. B LAB COMPANY, *supra* note 4; The NonProfit Times, *supra* note 4 (B Lab's 2014 Form 990 shows executive pay significantly surpassing the sector average for its budget range—$5M-$10M—with top officers earning over $200,000, compared to the average $153,858.).

71. B LAB COMPANY, *Return of Organization Exempt from Income Tax (OMB No. 1545-0047)*, (2007); B LAB COMPANY, *Return of Organization Exempt from Income Tax (OMB No. 1545-0047)*, (2022) (showing B Lab's revenue growth from approximately $1 million in 2007 to over $26 million in subsequent years correlates with the adoption of benefit corporation statutes and its own certification process).

B Lab's conflicts extend to its marketing strategies. While B Lab US & Canada, LLC, a 100% owned subsidiary mentioned in B Lab's Form 990, does play a role in supporting B Corporations, [72] it is pertinent to focus on B Lab's partnership with Bryan Welch, former chief executive of Ogden Publications Inc.[73] This partnership gave rise to B the Change Media, LLC, established in 2015 as a for-profit media company with a mission to report on business as a force for good.[74]

B the Change Media, which began as a storytelling venture, appears to have evolved into a larger marketing apparatus. Ogden Publications, alongside offering profitable publishing services, also provides Marketing Solutions.[75] Their website poses the question, "What can Ogden do for you?" and outlines solutions aimed at boosting presence and sales for clients seeking to reach "affluent rural consumers" or those with an eco-conscious mindset.[76] Furthermore, Ogden Publications extends its for-profit activities through its Capper's Insurance Service division, offering a range of insurance products.[77]

As of now, the B the Change brand is operated by Bark Media, a B Corporation established in 2017. This new entity emerged from Ogden Publications, with its founders being former executives of Ogden. Bark Media, beyond managing B the

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72. B LAB COMPANY, *supra* note 74 (See Form 990, Schedule R, detailing the operations and financials of B Lab US & Canada, LLC, a subsidiary of B Lab that supports and generates significant income from B Corporations in these regions, evidencing the entanglement of profit motives within its non-profit activities.).

73. The New School, *Check It Out! B the Change Media Has Launched!*, IMPACT ENTREPRENEURSHIP (2016), https://blogs.newschool.edu/tnschangemakers/2016/09/check-it-out-b-the-change-media-has-launched/ [https://perma.cc/83FB-Y994].

74. *Id.* ("They were formed as a partnership between B Lab, the community of Certified B Corporations, and Bryan Welch, former chief executive of Ogden Publications [B Corp since 2010].").

75. Ogden Publications, Inc., *Marketing Solutions*, OGDEN PUBLICATIONS, https://www.ogdenpubs.com/marketing-solutions/ [https://perma.cc/X7PR-VNZV].

76. *Id.* ("What can Ogden do for you? Whether you're trying to reach affluent rural consumers, green-thinking customers, or a little of both, we have solutions that will increase your presence and sales.").

77. Ogden Publications, Inc., *About Us*, OGDEN PUBLICATIONS, https://www.ogdenpubs.com/about-us/ [https://perma.cc/U3XR-CF4C] ("In addition to its media portfolio, Ogden Publications offers a complete line of individual accident, health and life insurance and annuity products through its Capper's Insurance Service division.").

Change Media, offers a suite of marketing and storytelling services.[78] These services range from content creation and email marketing to social media management and search engine optimization, all designed to amplify the presence and impact of their clients.[79]

This intricate web of for-profit ventures associated with B Lab and its certification raises questions about the entanglement of profit motives with nonprofit activities. The extensive marketing solutions provided by entities like Bark Media suggest a concerted effort to leverage B Lab's certification and a series of initiatives to potentially drive profits. Given this context, the line between B Lab's nonprofit advocacy and the for-profit marketing strategies of its associates becomes increasingly blurred, complicating the perception of B Lab's legislative agenda.

B Lab's model is indeed based on the idea that one can do well and do good simultaneously, promoting the social enterprise economy. However, this vision can be achieved through their certification model without necessitating the creation of new legal frameworks like benefit corporation legislation. The push for benefit corporation laws might therefore be seen as an unnecessary step that conflates the nonprofit's advocacy with profit-driven motives. This raises concerns about whether the push for benefit corporation legislation is truly driven by a desire to promote public good, or if it is influenced by underlying profit-oriented motives. In other words, if the primary aim is to foster social enterprise, why is certification alone not sufficient? The introduction of legislation appears to complicate the landscape, potentially obscuring the true motivations behind these initiatives.

States should not conflate the adoption of benefit corporation laws with fostering socially oriented enterprises. Current laws already provide sufficient flexibility for companies to focus on social and environmental objectives. The push for these laws is more accurately characterized as a branding exercise than a response to a true legal necessity. Instead of pursuing new, flawed legislation, states should focus on the existing legal

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78. Bark Media Co., *Our Work*, BARK MEDIA, https://www.barkmediaco.com/our-work/ [https://perma.cc/GW5K-DQGW] ("We create custom marketing and storytelling strategies for our clients that center on a deep understanding of their community.").

79. *Id.*

frameworks that enable companies to act responsibly and address stakeholder interests effectively.

III. NEGATIVE EFFECTS OF BENEFIT CORPORATION LAWS

A. MISLEADING PERCEPTIONS AND CORPORATE RESPONSIBILITY

Benefit corporation statutes may inadvertently reinforce the false notion that traditional corporations are barred from valuing societal benefits over profits.[80]

These laws, by establishing a legal framework that explicitly mandates stakeholder consideration for benefit corporations, could inadvertently suggest that traditional corporations lack this flexibility, although the statute advises against drawing such an inference.[81] This may lead to a misperception that the business judgment rule, which traditionally grants directors wide latitude to exercise their discretion in the best interests of the corporation, does not extend to considering stakeholder interests unless a company is a benefit corporation. The misconception also may lead managers and directors of standard corporations to believe that engaging in social initiatives risks shareholder litigation for breaching fiduciary duty.[82] Further, the public might assume that only benefit corporations bear the duty to promote public welfare, absolving traditional firms from such responsibilities.[83] Courts could even interpret these laws as

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80. Jessica Chu, *Filling a Nonexistent Gap: Benefit Corporations and the Myth of Shareholder Wealth Maximization*, 22 SOUTH. CALIF. INTERDISCIP. L. J. 155, 186 (2012) ("In other words, benefit corporations further reinforce the assumption that corporations exist only to make money for their shareholders.").

81. J. William Callison, *Benefit Corporations, Innovation and Statutory Design*, 26 REGENT L. REV. 143, 153 (2013) ("[A]ll other corporations that do not elect benefit corporation status and impliedly must act only in ways that relate to shareholder profit maximization.").

82. *Id.* ("For non-electing corporations, the existence of the benefit corporation alternative may weaken the promotion of socially responsible decision-making by corporate boards, the directors of which do not want to be brought into litigation or test the protections of the business judgment rule.").

83. Justin Blount & Kwabena Offei-Danso, *The Benefit Corporation: A Questionable Solution to a Non-Existent Problem.*, 44 ST MARYS L. J., 659 (2013) ("A new entity status may also create the perception in the minds of consumers, investors, and society as a whole that they should not expect much from typical corporations or should excuse their poor behavior as legally required under the shareholder wealth maximization norm.").

a directive for non-benefit corporations to focus solely on maximizing shareholder returns.

Ironically, these statutes, meant to promote socially conscious businesses, might decrease such activities across the business sector. Traditional corporations could cease beneficial programs, wrongly thinking the law forbids them.[84] This could lead shareholders and consumers to overlook irresponsible corporate actions, under the belief that businesses are merely adhering to legal profit imperatives.

The reinforcement of these misconceptions is a critical flaw in benefit corporation legislation. The false dichotomy it creates between "ethical" benefit corporations and "profit-driven" traditional firms is misleading and harmful to the corporate social responsibility movement.[85] Labeling benefit corporations as inherently altruistic may discourage standard corporations from engaging in socially beneficial initiatives, potentially causing more harm than good.

B. HEIGHTENED DIRECTOR LIABILITY AND REDUCED SHAREHOLDER RIGHTS

Benefit corporation statutes, while well-intentioned, may inadvertently elevate director liability and dilute shareholder rights. The statutes' vagueness in directing how to balance stakeholder interests invites legal uncertainty and the potential for increased litigation.[86] Directors, facing a spectrum of stakeholder demands, are not provided with concrete methods for resolving conflicts among these interests.[87]

84. *Id.* ("The development of entities like the benefit corporation creates the perception in the minds of entrepreneurs that they cannot carry out a social mission through a traditional business corporation.").

85. *Id.* ("The MBCL actually runs the risk of unintentionally setting the CSR movement back by creating a false dichotomy between benefit corporations and business corporations.").

86. Matthew J. Dulac, *Sustaining the Sustainable Corporation: Benefit Corporations and the Viability of Going Public*, 104 GEORGETOWN L.J. 171, 184 (2015) ("A major issue facing the public benefit corporation is whether its directors' ability to pursue interests other than those of its shareholders creates an 'accountability gap and possibly gives directors unfettered discretion in their decision making.'"); Murray, *supra* note 32 at 17, 29–32 ("The mandate that a benefit corporation pursue a 'general public benefit purpose' is too vague because it does not provide a practical way for directors to make decisions.").

87. Rae André, *Assessing the Accountability of the Benefit Corporation: Will This New Gray Sector Organization Enhance Corporate Social Responsibility?*, 110 J. BUS. ETHICS 133, 140 (2012) ("That the benefit corporation has multiple

The statutes' lack of precise fiduciary duties could subject directors to heightened liability risks. Courts assessing fiduciary breaches find scant statutory guidance.[88] Benefit enforcement proceedings could lead to regular shareholder challenges against board decisions, escalating inefficiencies and indemnification expenses for board members.[89] In severe cases, shareholders may resort to "greenmail," pressuring the company for greater profit distributions or conformity to their particular societal good ideals.[90]

Shareholder rights may also be undermined by benefit corporation laws, leading to less board accountability.[91] The absence of precedents concerning shareholder derivative actions adds to the unpredictability.[92] Evaluating whether directors have fulfilled their duties to benefit corporations presents a

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missions compounds the complexity of its organizational process for making trade-offs. Managing the needs and interests of multiple different clients—those who want improved human health, an improved environment, and more capital for entities with a public benefit purpose, for example—can only be exceptionally difficult.").

88. Christopher Lacovara, *Strange Creatures: A Hybrid Approach to Fiduciary Duty in Benefit Corporations*, 2011 COLUMBIA BUS. L. REV. 815, 815 (2012) ("B-corp statutes also appear to impose on B-corp directors a fiduciary duty in addition to the traditional duties of care and loyalty. However, the statutes fail to identify this duty and provide little guidance to courts called on to adjudicate claims for breach.").

89. J. Callison, *Putting New Sheets on a Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, the Dangers Created, and Suggestions for Change*, 2 AM. UNIV. BUS. L. REV. 85, 111 (2012) ("[T]his empowers shareholders and directors as eternal nags and reduces the efficiency of corporate boards [and increases the cost of obtaining board members], which face litigation whenever some portion of the company is unhappy with its direction.").

90. *Id.* ("At a higher extreme, it fosters a greenmail scenario where shareholders can seek to be bought off through higher profit distributions or through adherence to their idiosyncratic conception of the good.").

91. David Groshoff, *Contrepreneurship? Examining Social Enterprise Legislation's Feel-Good Governance Giveaways*, 16 UNIV. PA. J. BUS. L. 233, 238 (2013) ("SEL [social enterprise legislation] legitimizes a further weakening of shareholders' ability to enforce control over management"); *See* Alicia E. Plerhoples, *Can an Old Dog Learn New Tricks? Applying Traditional Corporate Law Principles to New Social Enterprise Legislation*, 13 TRANS. TENN. J. BUS. L. 221, 228 (2012) ("[R]ejecting the shareholder wealth maximization norm creates an accountability gap and possibly gives directors unfettered discretion in their decision making.").

92. Verbos and Black, *supra* note 60 at 252 ("Critics have a valid concern about the extent to which shareholders can bring derivative actions since there is no guiding case law on the subject.").

significant challenge.[93] In some jurisdictions, benefit corporation beneficiaries are not owed fiduciary duties, as exemplified by California's Benefit Corporation Law.[94]

Critics argue that these laws could prompt shareholder enforcement actions, exposing corporations to heightened liability and overregulation, thus dissuading established companies from adopting this form.[95]

The obligation to appoint a benefit director and produce regular reports imposes financial and administrative burdens, especially on smaller enterprises.[96] Some statutes obligate companies to provide these reports to shareholders at no cost, which could prove costly.[97] Therefore, these requirements may paradoxically increase transaction costs for social entrepreneurs, contrary to the legislation's intent to reduce such expenses.[98]

In summary, benefit corporation laws, designed to shield directors prioritizing societal and environmental goals, may instead amplify their liability and compromise shareholder rights. The statutes' indeterminate guidance could precipitate unintended legal and financial repercussions, discourage board accountability, and deter companies from considering the benefit corporation structure.

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93. Daryl Koehn, *Why the New Benefit Corporations May Not Prove to Be Truly Socially Beneficial*, 26 (2015), https://papers.ssrn.com/abstract=2638084 [https://perma.cc/EC6V-Q8NB] ("Legal scholars have voiced concern that judges will not be able to assess whether benefit corporation directors have fulfilled their fiduciary duties."); Murray, *supra* note 37 at 32.

94. *Id* at 26 ("[I]n some states, beneficiaries of benefit corporations qua beneficiaries are not owed any fiduciary duties. California's benefit corporation law, for example, explicitly states: 'A director shall not have a fiduciary duty to a person that is a beneficiary of the general or specific public benefit purposes of a benefit corporation arising from the status of the person as a beneficiary.'").

95. Chu, *supra* note 80 at 186 ("Despite their potential good, benefit corporations create too much potential liability and unneeded regulation to attract large and established companies.").

96. Murray, *supra* note 37 at 32 ("Currently, however, benefit corporation statutes mostly increase, not decrease, transaction costs for social entrepreneurs.").

97. *Id.* ("[S]ome state statutes expressly require that the reports be provided at no cost to the shareholders.").

98. *Id.* ("[B]enefit corporation statutes mostly increase, not decrease, transaction costs for social entrepreneurs.").

C. ABUSING "BENEFIT" DESIGNATIONS

The concept of a "benefit" designation, while seemingly noble, is susceptible to significant abuse. The ABA Business Law Section's committees, in an insightful letter to the Minnesota House of Representatives dated April 19, 2012, highlighted the potential for misleading implications of such legislation.[99] Although their critique was initially directed at the low-profit limited liability companies (L3C) model, their observations are equally pertinent to benefit corporations. The committees pointed out that the L3C legislation could wrongly imply unique advantages in securing program-related investments from private foundations under federal tax law, which is not the case.[100] This same misleading potential is present with benefit corporations, which may use the "benefit" label to suggest a socially beneficial brand established through state legislation, without offering any real advantages over traditional corporations.

Furthermore, the committees expressed concern over the risks of tranched investments, a structure promoted by L3C advocates, which could lead to private benefits that imperil a foundation's tax-exempt status.[101] They cautioned against using state entity law to create a new and potentially deceptive "brand" that designates private business ventures as socially beneficial without substantive justification.[102] This critique casts serious doubt on the necessity of benefit corporation laws, questioning whether they provide a distinct advantage or simply serve as an unnecessary and potentially confusing legal label.

The push for benefit corporation legislation, in part, stems from a desire to create a market for socially conscious investment. However, the ABA's analysis suggests that this effort may be misleading. Social enterprise, as a concept, is normatively

99. Daniel S. Kleinberger, *ABA Business Law Section, on Behalf of Its Committees on LLCs and Nonprofit Organizations, Opposes Legislation for Low Profit Limited Liability Companies (L3Cs)*, 2–4 (2012), https://papers.ssrn.com/abstract=2055823 [https://perma.cc/52B7-CGCL].

100. *Id.* at 3 ("L3C legislation implies otherwise and we believe is therefore misleading. Using a program related investment as part of the type of tranched financing promoted by L3C advocates portends serious risk of improper 'private benefit' . . . .").

101. *Id.* ("'Private benefit' transactions are improper for a private foundation and imperil a foundation's tax-exempt status.").

102. *Id.* ("[I]t is inappropriate and unnecessary to use state entity law to provide a new and potentially misleading 'brand' to mark private business ventures as socially beneficial.").

good and indeed valuable for promoting social and environmental change. However, the regular corporation and the nonprofit sector together provide all the necessary tools to achieve these goals without the need for additional legislation. It is critical to recognize that state entity law should not be used to create a misleading impression of social beneficence.[103] The branding of benefit corporations may not only be unnecessary but also risks creating false perceptions among investors and consumers. This reinforces the argument that benefit corporation laws may not be needed, as they could lead to potential abuse by companies seeking to capitalize on the "benefit" designation without contributing to genuine social or environmental change.

CONCLUSION

The proliferation of benefit corporation legislation in recent years, while well-intentioned, is largely unnecessary and potentially counterproductive. Conventional corporate law already provides ample room for businesses to pursue social and environmental objectives, particularly in states with constituency statutes. The shareholder wealth maximization norm is not a legal mandate, and courts have consistently protected directors' ability to consider stakeholder interests under the business judgment rule.

Moreover, the benefit corporation statutes enacted thus far are plagued by vague standards, weak accountability measures, and the potential for unintended consequences. These laws may perversely reinforce the misconception that traditional corporations cannot pursue social goals, thereby chilling corporate social responsibility efforts. They also create legal uncertainty that could increase director liability while weakening shareholder rights. The "benefit" moniker itself is ripe for abuse by bad actors seeking to greenwash their practices. In light of these serious shortcomings, states should reject benefit corporation legislation and instead focus on clarifying the substantial flexibility that already exists under traditional corporate law for businesses to serve a broad range of stakeholders.

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103. *Id.* ("The special danger of L3C legislation is that enactment gives a misleading state-government imprimatur.").