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BENEFIT CORPORATION GOVERNANCE: A DECADE
OF DEBATING BEST PRACTICES

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The benefit corporation is a unique corporate form that provides for both profit-making and social benefit. Unlike the traditional for-profit form, the benefit corporation requires an expanded fiduciary duty—consideration of stakeholders. However, this public-purpose benefit is not enforced by the state attorneys general office as it is under the nonprofit corporate form. This may impact the perceived integrity and sustainability of this corporate form and result in greenwashing, such as inadequately delivering on the social benefit promise or allowing it to drift. We review numerous meritorious critiques and proposals for reform of benefit corporation governance and recommend the inclusion of a state-certified board member who can report shirking of the mission to the state attorneys general office. This approach focuses on board accountability, as well as duty to mission and community. The focus attempts to leverage the governance structure of both for-profits and nonprofits in a cost-effective manner without direct oversight from the state attorneys general office.

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INTRODUCTION

*The current business and regulatory climate demands enforcement of fiduciary duties—those ethical and legal obligations of corporate responsibility that protect the interests of others, such as shareholders, stakeholders, or nonprofit missions.*¹

The benefit corporation is a prominent form of social enterprise that *expressly* mandates that the corporation both earn a profit and consider stakeholder interests. This balancing of profitability with public mission serves as an expanded fiduciary duty to shareholders and makes the benefit corporation a unique organizational form that attempts to morally legitimize business.² First introduced in 2010 in Maryland,³ the benefit corporation now exists in thirty-five states and the District of Columbia; however, controversy surrounding the utility of the benefit corporation's moral legitimacy and governance continues.⁴

1. Mark S. Blodgett & Linda Melconian, *Health-care Nonprofits: Enhancing Governance and Public Trust*, 117 BUS. & SOC'Y REV. 198, 198 (2012).

2. See Rae André, *Assessing the Accountability of the Benefit Corporation: Will This New Gray Sector Organization Enhance Corporate Social Responsibility?*, 110 J. BUS. ETHICS 133, 133 (2012) ("Eschewing traditional governmental authority, the benefit corporation derives its moral legitimacy from the values of its owners and the oversight of a third-party evaluator.")

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

4. See André, *supra* note 2, at 148 ("Despite the extensive positive publicity surrounding the benefit corporation, researchers and the public should be cautious about advancing its utility as an effective and accountable design for advancing social and environmental change.")

The benefit corporation is a dual blend of conflicting for-profit objectives and the nonprofit mission.⁵ It is yet another example of the challenge that stems from blurring for-profit and nonprofit sector distinctions, as a benefit corporation's board of directors (BOD) *must* advance both profit-making and stakeholder goals.⁶ This new corporate form may be a reaction to the recent era of corporate malfeasance⁷ and a way to attract investors interested in furthering a social mission.⁸ Whatever the rationale, after a decade of existence, the dust has settled on the governance values and structure of benefit corporations, but remaining uncertainties may set the stage for malfeasance.⁹ These uncertainties are generally due to a lack of an enforcement mechanism for the benefit corporation's expanded fiduciary duty to "consider stakeholders."¹⁰

5. Mark S. Blodgett, Linda J. Melconian & Jason H. Peterson, *Social Enterprise: Reaffirming Public Purpose Governance Through Shared Value*, 16 J. BUS. & SEC. L. 305, 314 (2016) (noting that "such blended objectives are the hallmark of social enterprise").

6. See J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 27–28 (2012) (noting that "[s]ince Biblical times, it has been well recognized that people cannot properly serve two masters, much less seven or more").

7. See Blodgett, Melconian & Peterson, *supra* note 5, at 312 (speculating that "perhaps the development of social enterprise is an inevitable reaction to corporate malfeasance in both [for-profit and nonprofit] sectors and the controversies on Wall Street"); see also Murray, *supra* note 6, at 3 (referencing major cases of corporate malfeasance that have captured the media's attention such as Enron); Heerad Sabeti, *The For-Benefit Enterprise*, HARV. BUS. REV., Nov. 2011, at 8–9 (stating that "they can fill the gaps created by failure of the three-sector model").

8. Dennis O'Reilly & Luciana Aquino-Hagedorn, *Benefit Corporations: An Introduction*, BLOOMBERG L., (Feb. 7, 2018), <https://wwwFOUNDERSWORKBENCH.COM/wp-content/uploads/2018/02/spBenefits-care-2718.pdf>.

9. See Blodgett, Melconian & Peterson, *supra* note 5, at 307 (noting that "they place the fundamental ethical values of corporate governance at a crossroads and require new policies to balance the blended objectives and fiduciary duties of shareholder for-profit objectives and nonprofit social mission") (citing John A. Pearce II & Jamie Patrick Hopkins, *Regulation of L3Cs for Social Entrepreneurship: A Prerequisite to Increased Utilization*, 92 NEB. L. REV. 259, 270 (2013)).

10. See Blodgett, Melconian & Peterson, *supra* note 5, at 307 (suggesting that "the explicit consideration of stakeholders differs from the traditional Corporate Social Responsibility (CSR), philanthropy and shared value where the public purpose is voluntary . . . the authors not only recognize the conflicting fiduciary duty and implications as current literature articulates but are also requiring that a new fiduciary stand should be established").

After all, what incentive is there for the BOD to favor the social mission over profit-making under a myriad of circumstances?

Enforcement of the expanded fiduciary duty is left to the shareholder derivative suit and not to the state attorneys general office, as with nonprofit enforcement.¹¹ Confusion may result when the public is confronted with different corporate forms that engage stakeholders, and “in the meantime, investors and consumers may not fully understand or appreciate what sets benefit corporations apart from traditional corporations.”¹² The shirking of benefit goals has occurred amidst this vague and self-policing regulatory regime where blurring of the sectors already lays the foundation for dual objective dilemmas among corporate forms generally.¹³ To help resolve these persistent concerns, we assess the current state of benefit corporation governance.

We review the governance principles and conflicts of benefit corporations and contrast them with for-profit and nonprofit governance principles. We then review a decade of critiques and proposed solutions of varying complexity that address this dual mission conflict. While meritorious and well-reasoned, we recommend a different approach without direct state attorney general oversight consistent with the benefit corporation’s status as a for-profit enterprise: strengthening the benefit corporation’s duty of obedience to its mission through board representation reflective of its stakeholder community. As state-created entities, a community-based approach is appropriate. Specifically, we propose that the state require and certify a mission and community-oriented board member, who would also alert the state attorney general’s office to lack of mission adherence. Certification should include training on board governance, fiduciary obligations such as obedience to the mission, assessment standards and approaches, reporting requirements, and adequate evidence of community experience with the applicable stakeholder mission. Legislative re-

11. DEL. CODE ANN. tit. 8, § 367 (1968)

12. Sharon C. Lincoln & Adrienne M. Ellman, *Benefit Corporations Have Arrived in Massachusetts*, BOS. BAR ASS’N: BUS. TRANSACTIONS NEWSLETTER (Jan. 11, 2013).

13. See Blodgett, Melconian & Peterson, *supra* note 5, at 315 (noting that unlike the blurring of the for profit and nonprofit sectors, “social enterprise consists of expressly legislated governance values blended in one form in contrast to these dual forms of traditional for-profit and nonprofit entities”).

form reflecting these internal and external governance mechanisms should assure appropriate communication for consideration of stakeholders within the benefit corporation's dual-purpose governance structure,¹⁴ and lessen additional burdens on state government oversight.

I.

THE PROBLEM

A. *Current Governance & Conflicts*

The phenomenon of “greenwashing,” where profit-making comes before or distorts an organization's avowed social mission (e.g., misrepresenting a product as environmentally safe), is the result of weak corporate governance standards.¹⁵

Benefit corporations that want a certification to prove their commitment to sustainability may choose to either undergo the more lenient independent third-party certification process (through Green America or Global Reporting Initiative) or undergo the rigorous B Lab Impact Assessment.¹⁶ There are several differences between third party certification processes and the B Lab Impact Assessment. Under the B Lab certification process, B Corporations must achieve a minimum verified score of 80 and recertification is required every three years against evolving standards.¹⁷ Independent third-party Green America has no such certification requirements.¹⁸ The B Lab Impact Assessment evaluates how a company interacts with workers, customers, communities, and the environment and requires the benefit corporation meet certain legal requirements, such as integrating stakeholder consideration into

14. Nancy B. Kurland, *Accountability and the Public Benefit Corporation*, 60 *BUS. HORIZONS* 519 (2017).

15. See Rae André, *Benefit Corporations at a Crossroads: As Lawyers Weigh in, Companies Weigh Their Options*, 58 *BUS. LAW & ETHICS CORNER* 243, 249 (2015) (commenting further, “many legal scholars suggest that because of their weak accountability and enforcement mechanisms, benefit corporation statutes, paradoxically, encourage corporate greenwashing and further corporate corruption”).

16. B LAB, <https://bcorporation.net/> (last visited Nov. 5, 2020).

17. *Certification*, B LAB, <https://bcorporation.net/certification> (last visited Feb. 25, 2021).

18. GREEN BUS. NETWORK, <https://www.greenamerica.org/gbn/certification> (last visited Feb. 25, 2021).

the governance structure.¹⁹ Lastly, and most importantly, the certifying benefit corporation must submit confidential documentation to validate the responses of the Impact Assessment.²⁰ Green America and the Global Reporting Initiative also require benefit corporations to answer a brief survey, but may lack follow up.²¹ Moreover, it is unlikely that these third parties check their surveys as rigorously as the B Corp Lab does, as Green America's and Global Reporting Initiative's less stringent procedural and legal requirements for certifying benefit corporations suggest that they may have more lenient policies when requesting supporting documentation to validate the certifying benefit corporation's survey.²² Green America's certification requirements focus on (1) the certifying company's value statement, (2) environmental responsibility, and (3) consumer accountability.²³ Clearly, this set of certification requirements is much less onerous on the certifying corporation than B Corp's legal demands, which require the benefit corporation to integrate stakeholder interests into its governance structure.²⁴ One third-party certifier, Benefit Corporations for Good, says they additionally subject companies to an interview "to screen out some companies with phony responses."²⁵ Only a small percentage of benefit corporations have the B-Corporation (B-Corp) designation that provides the B Lab standard of review.²⁶

Most states follow the Model Act proposed by B Lab and some follow Delaware legislation.²⁷ The Model Act sets forth

19. B LAB, *supra* note 17.

20. *Id.*

21. See Caleb Diehl, *Benefit Company Label Marred by Confusion and Lax Reporting Practices*, OR. BUS. (Sept. 20, 2018), <https://www.oregonbusiness.com/article/energy-environment/item/18511-benefit-company-label-marred-by-confusion-and-lax-reporting-practices>.

22. *See id.*

23. GREEN BUS. NETWORK, <https://www.greenamerica.org/gbn/about/whats-a-green-business/> (last visited Feb. 25, 2021).

24. B LAB, *supra* note 17.

25. Diehl, *supra* note 21.

26. *See id.*

27. MODEL BENEFIT CORP. LEGIS. § 301(e), B LAB (June 9, 2019), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [<https://perma.cc/5XN6-P459>] [hereinafter MODEL ACT]; see O'Reilly & Aquino-Hagedorn, *supra* note 8, at 1; Mark Loewenstein, *Benefit Corporation Law*, 85 U. CIN. L. REV. 381, 393 (2017).

values of good faith and best interests, while Delaware embraces responsible sustainability.²⁸ Under the Model Act, a specific benefit to the general public is required; under Delaware legislation, a specific benefit is also required along with “balancing” of profit and benefit.²⁹

Under the Model Act, the public benefit must be reported to shareholders, on the corporate website, and to the Secretary of State; under Delaware legislation, a report of the benefits to shareholders is required every two years.³⁰ Almost all states except Colorado and Delaware provide for annual reviews, but the statutory limitation on audits makes such practices either rare or nonexistent.³¹ As a for-profit business, the benefit corporation’s mission objective is not within the state attorney general’s nonprofit oversight. Further, neither legislative approach assigns a legal or fiduciary duty to the ultimate beneficiaries like in the traditional nonprofit corporate form.³²

It is important to distinguish benefit corporations from B-Corps. While B-Corps are closely monitored and held accountable to their social benefit by the independent third party, B Lab, regular, or statutory benefit corporations are not held accountable by B Lab, but rather by other third parties, if applicable. Statutory benefit corporations are simply corporate structures established under state law that protects these companies’ pursuits of social initiatives from shareholder lawsuits demanding profit maximization.

B-Corp status is a certification given by B Lab, the independent third-party nonprofit that developed and lobbied for benefit corporation legislation. Its certification goes to benefit corporations or any corporation that can pass and pay for B Lab’s exacting, expensive (as in tens of thousands of dollars), and time-consuming audit.³³ The audit covers everything from

28. O’Reilly & Aquino-Hagedorn, *supra* note 8, at 2.; MODEL ACT, *supra* note 27.

29. MODEL ACT, *supra* note 27.

30. See O’Reilly & Aquino-Hagedorn, *supra* note 8, at 3.

31. See Lydia Segal, *Benefit Corporations: A Step Towards Reversing Capitalism’s Crisis of Legitimacy?*, 24 VA. J. SOC. POL’Y & L. 97, 120 (2017) (citing J. Haskell Murray, *An Early Report on Benefit Reports*, 118 W. VA. L. REV. 25, 47 (2015)); MODEL ACT, *supra* note 27.

32. See O’Reilly & Aquino-Hagedorn, *supra* note 8, at 2.

33. See Diehl, *supra* note 21.

corporate sustainability practices and employees to suppliers³⁴ and must be repeated every two years—the length of the B-Corp certification.³⁵ Moreover, some claim that the recertification process becomes more exacting every time, discouraging recertification and resulting in a lack of rigorous review and reporting.³⁶ Thus, although all B-Corps are benefit corporations, most benefit corporations are not B-Corps. As of September 2018, there were 1,536 benefit corporations in the United States, but only 121 B-Corps.³⁷ Although some states generally follow the Delaware legislation, the majority of states follow the Model Act that was lobbied for by B Lab, and we rely on it for much of our discussion.

B. *Accountability Mechanisms for Benefit Corporations (but Not B-Corps) Under the Model Law*

The Model Law requires benefit corporations to create annual “benefit reports” describing their social and environmental performance. These reports must be filed with the Secretary of State³⁸ and be made available to shareholders³⁹ and the public, whether by posting on the company website⁴⁰ or giving reports *gratis* to those who request them.⁴¹ The benefit report is a self-evaluation by the benefit corporation of its own performance on its social mission, both successes and failures,⁴² against an assessment standard established by an inde-

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. MODEL BENEFIT CORP. LEGIS. § 402(d), B LAB (Apr. 17, 2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [<https://perma.cc/5XN6-P459>]. A number of states have elected not to follow this provision and do not, therefore, require filing any report with the Secretary of State. See J. Haskell Murray, *An Early Report on Benefit Reports*, 118 W. VA. L. REV. 25, 47 (2015); see also Reiser, *supra* note 3, at 604.

39. MODEL BENEFIT CORP. LEGIS. § 302(c), B LAB (Apr. 17, 2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [<https://perma.cc/5XN6-P459>].

40. *Id.* § 402(b).

41. *Id.* § 402(c); see also Segal, *supra* note 31, at 114.

42. See BENEFIT CORPORATION REPORTING REQUIREMENTS, <http://benefitcorp.net/businesses/benefit-corporation-reporting-requirements> (last visited Jan. 17, 2021); see also Segal, *supra* note 31, at 114 (citing Murray, *supra* note 38).

pendent third party.⁴³ The report must include an explanation of how the BOD chose that third-party standard.⁴⁴

C. *Assumptions Underlying Benefit Corporation Accountability Mechanisms*

The assumption underlying these accountability mechanisms is that the benefit corporation is capable of accurately assessing itself⁴⁵ and that shareholders, directors, and the public are competent and interested enough to hold the corporation accountable. Thus, rather than having the state set assessment standards and evaluate the benefit corporation, the company evaluates itself and pays a third party of its choosing to establish the assessment standard.⁴⁶ Furthermore, instead of the state or a third-party, the shareholders and members of the public audit or certify the benefit report.⁴⁷ The exceptions are New Jersey and Vermont, which require the state to audit the benefit reports filed with it.⁴⁸

Neither legislative approach ensures adequate state oversight like the well-established nonprofit corporate form. Although a third-party standard is required under the Model Act, it is allowed but not required under the Delaware legislation.⁴⁹ Confusion regarding standards can negatively impact benefit corporation governance and public perception; unfortunately, some “flaky benefit corporations” exist.⁵⁰

Under benefit corporation legislation, only shareholders have fiduciary enforcement capabilities through derivative

43. See Segal, *supra* note 31, at 114 (citing MODEL BENEFIT CORP. LEGIS. § 102, B LAB (Apr. 17, 2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%.20_4_17_17.pdf [https://perma.cc/5XN6-P459]).

44. *Id.* (citing Murray, *supra* note 38, at 30); see generally Model BENEFIT CORP. LEGIS. § 401, B LAB (Apr. 17, 2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%.20_4_17_17.pdf [https://perma.cc/5XN6-P459].

45. See Segal, *supra* note 31, at 119–21.

46. See *id.*

47. *Id.* at 114 (citing Justin Blount & Kwabena Offei-Danso, *The Benefit Corporation: A Questionable Solution to A Non-Existent Problem*, 44 ST. MARY'S L. J. 617, 650–53 (2013)).

48. Diehl, *supra* note 21.

49. See O'Reilly & Aquino-Hagedorn, *supra* note 8.

50. Daryl Koehn & Michael Hannigan, *Are Benefit Corporations Truly Beneficial*, 35 BUS. & PROF. ETHICS J. 165, 177 (2016).

suits. Mitch Nass identifies this as a moral hazard that prevents enforcement of the dual purpose by consumers and the public and allows for greenwashing.⁵¹ Unfortunately, remedies for greenwashing or failure to achieve public benefit are not included in the legislation.⁵² Furthermore, benefit corporation statutes do not expressly identify duties beyond the duties of care and loyalty and offer little guidance when breached, whereas nonprofit BODs have a duty of obedience to the public benefit.⁵³

Who polices deficient benefit corporations that do not pursue their social mission and do not file annual reports, or file false or unsatisfactory ones? The assumption, again, is that corporate self-policing is sufficient to ensure compliance and accountability. Thus, the state rarely reviews benefit reports, let alone audits them.⁵⁴ The third party also does not do these things.⁵⁵

Additionally, standing to sue a benefit corporation for failing to live up to its social promises or for filing a false report, as discussed *infra*, is the sole prerogative of the directors and shareholders⁵⁶—the public and intended social beneficiaries have no standing. The public benefit does not include a legal duty by BODs to beneficiaries.⁵⁷ Thus, the only way to hold a benefit corporation accountable, through the law, for its social mission and its annual reports is for shareholders or

51. Mitch Nass, *The Viability of Benefit Corporations: An Argument for Greater Transparency and Accountability*, 39 J. CORP. L. 875, 887 (2014).

52. *See id.*

53. *See* André, *supra* note 2, at 246–47. Christopher Lacovara, *Strange Creatures: A Hybrid Approach to Fiduciary Duty in Benefit Corporations*, 3 COLUM. BUS. L. REV. 815, 846 (2011) (“Non-profit directors’ duty of obedience provides guidance as to the relationship of B-Corp directors to the general and specific benefit purposes they adopt. The duty of obedience requires that directors ‘serve the beneficiary in the way that reasonable people would see as genuinely beneficial.’ The duty of obedience also governs both earning and spending—and therefore the full range of an organization’s activities for which the directors are responsible.”).

54. *See* Segal, *supra* note 31, at 120; Diehl, *supra* note 21.

55. *See* Segal, *supra* note 31, at 120; Diehl, *supra* note 21.

56. *See* Segal, *supra* note 31, at 120 (citing Justin Blount & Kwabena Offei-Danso, *The Benefit Corporation: A Questionable Solution to a Non-Existent Problem*, 44 ST. MARY’S L. J. 617, 645, 650, 669 (2013)); *see also* Brian Halse, Sandra Tomkowicz & Jennifer Halsey, *Benefit Corporation Concerns for Financial Service Professionals*, 67 J. FIN. SERV. PROF’LS 74, 77 (2013).

57. *See* O’Reilly & Aquino-Hagedorn, *supra* note 8.

directors to sue the board or for shareholders to replace the directors.⁵⁸ This does not conform to the best practices of governance of the nonprofit form where there is a legal or fiduciary duty to the public beneficiaries and state oversight. In other words, “those with the greatest interest in ensuring that the company does good have the least power to enforce it.”⁵⁹ Instead, that power resides with traditionally profit-motivated shareholders.⁶⁰

These limited enforcement mechanisms have been characterized as “flabbergasting” since they obstruct transparency.⁶¹ Some scholars assert that the obligation to file annual benefit reports effectively deters benefit corporations from lying.⁶² However, most benefit corporations do not bother producing annual benefit reports⁶³—one source claims that “reporting falls below [ten percent].”⁶⁴ And at least one state, New Jersey, tries to up the ante by allowing the state to revoke benefit corporation status if no report has been filed in two years.⁶⁵ But, to satisfy this law, benefit companies merely need to post a shell report. This filing requirement does not require verification that the contents are truthful, accurate, or that the company is doing what it promised to do in regard to furthering its social mission. In Oregon, director compensation is an example of financial information that does not have to be reported.⁶⁶ However, this does not conform to the Model Act, and neither does the state’s failure to require state

58. See Segal, *supra* note 31, at 114 (citing Justin Blount & Kwabena Offei-Danso, *The Benefit Corporation: A Questionable Solution to A Non-Existent Problem*, 44 ST. MARY’S L. J. 617, 645, 650, 669 (2013)).

59. *Id.* at 119.

60. See Steven Solomon, *Idealism That May Leave Shareholders Wishing for Pragmatism*, N.Y. TIMES, (Oct. 13, 2015), <https://www.nytimes.com/2015/10/14/business/dealbook/laureate-education-for-profit-school-public-benefit.html>.

61. Maxime Verheyden, *Public Reporting by Benefit Corporations: Importance, Compliance, and Recommendations*, 14 HASTINGS L. J. 37, 61 (2018).

62. Brett H. McDonnell, *Committing to Doing Good and Doing Well: Fiduciary Duty in Benefit Corporations*, 20 FORDHAM J. CORP. & FIN. L. 19, 33–34, 62 n. 155 (2014).

63. See Segal, *supra* note 31, at 120.

64. Diehl, *supra* note 21.

65. Michael A. Hacker, “Profit, People, Planet” Perverted: Holding Benefit Corporations Accountable to Intended Beneficiaries, 57 B.C. L. REV. 1747, 1779 (2016) (citing N.J. STAT. ANN. § 14A:18-11(d)(2) (West 2016)).

66. See Diehl, *supra* note 21.

filing and auditing of benefit reports. Secretary of State filings are required by other state statutes (e.g., Delaware PBC) but not by Oregon.⁶⁷ However, Oregon does require benefit reports to be posted online or publicly, but few, other than large companies, do so.⁶⁸ Tom Hering, co-founder of certifier Benefit Corporations for Good states, said “[Oregon] has not devoted any funding right now to go and do an audit. One of our goals is pushing legislators to do that.”⁶⁹ However, we must consider the incentives and advantages of non-compliance and the absence of state enforcement.

D. *Stakes are High for Benefit Corporations*

There is much to be gained by becoming a benefit corporation (particularly a B-Corp). It can be a recruitment tool—millennials prefer to patronize companies with a social purpose.⁷⁰ It can also be a branding tool to grow market share. One study found that sixty-four percent of consumers are likely to buy from companies that have a social purpose.⁷¹ Another found that sixty-six percent of consumers would spend more on goods sold by sustainable companies.⁷² Additionally, it can be a tool to attract capital and recognition.⁷³ A growing number of venture capitalists are seeking to fund companies with a social impact,⁷⁴ and wealth management firms are also showing increasing interest in sustainable companies.⁷⁵

67. *See id.*

68. *See id.*

69. *Id.*

70. *See* Peggie Pelosi, *Millennials Want Workplaces with Social Purpose. How Does Your Company Measure Up?*, TALENT ECON., (Feb. 20, 2018), <https://www.chieflearningofficer.com/2018/02/20/millennials-want-workplaces-social-purpose-company-measure/>; *see also* Diehl, *supra* note 21.

71. Simonetta Lein, *Why Sustainable Branding Matters*, FORBES (Aug. 20, 2018), <https://www.forbes.com/sites/theyec/2018/08/20/why-sustainable-branding-matters> (citing SHELTON GRP., BRANDS & STANDS: SOCIAL PURPOSE IS THE NEW BLACK (2018)).

72. *Id.* (citing NIELSEN, THE SUSTAINABILITY IMPERATIVE 10 (Oct., 2015)).

73. *See* Diehl, *supra* note 21.

74. *See* Mary Ann Azevedo, *Growth with an Impact: The Rise of VCs Looking to Fund a (Profitable) Cause*, CRUNCHBASE NEWS (Feb. 2, 2018), <https://news.crunchbase.com/news/growth-impact-rise-vcs-looking-fund-profitable-cause/>.

75. *See, e.g.*, Gael O’Brien, *Wall Street’s Flirtation with ‘Social Purpose,’* BUS. ETHICS (July 3, 2018), <http://business-ethics.com/2018/07/03/1322-wall-streets-flirtation-with-social-purpose/>.

Given these advantages, does the current system incentivize good faith or facilitate greenwashing? Do these advantages exploit their status—or the common confusion between benefit corporations and B-Corps—to lure socially conscious employees, customers, and investors without delivering on the social promise or delivering on it minimally? Does the system allow benefit corporations' missions to drift from their original purposes?⁷⁶

Those who drafted the Model Act apparently anticipated this problem,⁷⁷ and some say it specifically designed benefit corporations to do precisely the opposite—reduce greenwashing.⁷⁸ But, consider how current legal and accountability structures can provide opportunities for greenwashing or social mission shirking. For example, the fact that shareholders—but not social beneficiaries—can sue directors gives directors incentives to focus more on pleasing shareholders than on pleasing beneficiaries.⁷⁹ Thus, furtherance of the social mission will be prioritized if shareholders care about such mission, but not if they care only about profit, as they traditionally have.

Additionally, the law does not prescribe how benefit corporations should balance their social and profit goals.⁸⁰ That, together with the absence of meaningful external oversight, makes it easy for companies to shirk their social mission. Some scholars disagree, arguing that there should be no fear of greenwashing because of “safeguards,” such as the possibility of fraud lawsuits against companies that “game the reporting requirement.”⁸¹ However, assuming that they can show good

76. Hacker, *supra* note 65, at 1779 (citing J. Haskell Murray, *Defending Patagonia: Mergers and Acquisitions with Benefit Corporations*, 9 HASTINGS BUS. L.J. 485, 507 (2013) (discussing mission-drift)).

77. *See id.* at 1757–58.

78. *See* Kennan El Khatib, *The Harms of the Benefit Corporation*, 65 AM. U. L. REV. 151, 167–68 (2015) (citing WILLIAM H. CLARK, JR. & LARRY VRANKA, WHITE PAPER: THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION 2 (2013), <https://benefitcorp.net/sites/default/files/documents/Benefit%20Corporation%20White%20Paper.pdf>).

79. *See* Segal, *supra* note 31, at 100–01 (citing Kyle Westaway & Dirk Sampselle, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards, and Legislatures*, 62 EMORY L.J. 999, 1005–06 (2013)).

80. *See id.* at 119–20.

81. Michelle J. Stecker, *Awash in a Sea of Confusion: Benefit Corporations, Social Enterprise, and the Fear of “Greenwashing”*, 50 J. ECON. ISSUES 373, 378 (2016).

faith, executives can use the business judgment rule to defend a decision to delay or under-commit to the social mission, saying for instance, that they need to focus on short-term profits in order to achieve their long-term social mission.⁸²

Benefit corporations could also, more manipulatively, greenwash by investing the minimum in order to appear socially committed.⁸³ Or they might check all the boxes regarding their mandated social benefit while harming society in some other way. While measures of social impact are subject to manipulation,⁸⁴ there are also benefit corporations that failed to fulfill their social mission entirely. Seventh Generation, for instance, is a benefit corporation whose mission is to sell natural cleaning and personal products. In 2016, however, it settled a lawsuit charging that its products contained synthetic chemicals and that it had deceived customers into paying a premium price by falsely marketing its products and labeling them as natural.⁸⁵

Other benefit corporations, ranging from Tom's of Maine, Method Home, and the Honest Company, have also been sued or criticized for deceptive claims that their products were "natural."⁸⁶ The Honest Company, for instance, which had staked out a market position catering to consumers wanting safe and ecological detergents, faced backlash for using a chemical that it had listed as banned from its products.⁸⁷ Moreover, when faced with the laboratory findings of its presence in their detergents, the company, instead of admitting

82. See generally Segal, *supra* note 31, at 120.

83. See *id.*

84. See Khatib, *supra* note 78, at 183 (citing Brianna Cummings, *Benefit Corporations: How to Enforce a Mandate to Promote the Public Interest*, 112 COLUM. L. REV. 578, 603 (2012) (regarding the technical difficulties of measuring social performance)).

85. See Leon Kaye, *Seventh Generation Settles Class-Action Lawsuit Over 'Natural' Claims*, TRIPLE PUNDIT (Oct. 28, 2016), <https://www.triplepundit.com/story/2016/seventh-generation-settles-class-action-lawsuit-over-natural-claims/21756>.

86. *Id.*

87. See Serena Ng, *Laundry Detergent from Jessica Alba's Honest Co. Contains Ingredient It Pledged to Avoid*, WALL ST. J. (Mar. 10, 2016, 7:08 AM), <https://www.wsj.com/articles/laundry-detergent-from-jessica-albas-honest-co-contains-ingredient-it-pledged-to-avoid-1457647350>.

the problem, denied it, presumably fearing lower sales if the truth emerged.⁸⁸

Herring, who heads “Benefit Corporations for Good” in Oregon, thinks that greenwashing is pervasive right now.⁸⁹ In addition to greenwashing, other forms of abuse are evident. Walden University, a benefit corporation based in Minnesota, may have been narrowly fulfilling its official public benefit mission, but was, at the same time, allegedly engaging in borderline illegal and questionable profiteering.⁹⁰

Perhaps better governance values and reporting would lessen these improprieties and misrepresentations. Similar to the best practice reforms initiated for the nonprofit and for-profit sectors, “[t]he main aspects of benefit corporation statutes are built around the ideas of purpose, accountability, and transparency.”⁹¹ However, a comparison of the Model Act and the Delaware legislation reveals differences in that the Model Act requires publicly traded benefit corporations to appoint a benefit director, whereas Delaware law does not create the positions of benefit director or officer.⁹² This is a substantial difference in oversight mechanisms. Generally, the corporations are unregulated.⁹³ Some suggest outside beneficiaries and stakeholders should be able to bring suit to enforce social mission; however, further examination reveals complexities, weaknesses, and conflicts in this approach.⁹⁴ It may not be feasible for stakeholders to exercise accountability over the public benefit mission, which would be necessary to establish some credible basis for a suit by beneficiaries.⁹⁵

In general, the accountability, disclosure, and transparency of benefit corporations are minimal. This situation may be particularly regrettable considering the current era of

88. *See id.*

89. Diehl, *supra* note 21.

90. *See* Henry Kronk, *Walden University Grads Default on Their Federal Loans at Very Low Rates. But That’s Not Why They’re Under Investigation*, *ELEARNINGINSIDE* (Apr. 25, 2018) <https://news.elearninginside.com/walden-university/>.

91. O’Reilly & Aquino-Hagedorn, *supra* note 8, at 2.

92. *See Your Benefit Corporation Options: Should You Incorporate in Delaware or Elsewhere?*, *WALTERS KLUWER*, <https://www.wolterskluwer.com/en/solutions/ct-corporation/your-benefit-corporation-options-incorporate-in-delaware-or-elsewhere> (last visited Feb. 28, 2021).

93. *See* Diehl, *supra* note 21.

94. *See, e.g.*, Nass, *supra* note 51, at 891.

95. *See* Verheyden, *supra* note 61, at 57.

higher accountability for business and the ethical posturing of the advent of social enterprise. As a dual form, benefit corporations provide yet another mix of governance variables revolving around the blurring of fiduciary duties. They are one of the most current examples of the blurring of the business sectors, in which many for-profit companies are becoming more purpose and mission-driven, while many nonprofits are finding ways to generate income to become more financially sustainable.⁹⁶ In general, for-profits, nonprofits, and benefit corporations all pursue social missions, but the required dual form of the benefit corporation differentiates it from traditional corporate forms and is currently perceived to be an ethical dilemma for social entrepreneurs.⁹⁷ In this light, Rae André questions their utility to advance social benefit and recommends caution—“at the very least benefit corporations should be carefully monitored.”⁹⁸

The current governance conflict in benefit corporations signals the need for enhanced governance standards. The historic precedents of for-profit and nonprofit governance scandals may offer guidance for enhancing governance approaches. Therefore, it is helpful to review the governance of the nonprofit and for-profit sectors to more fully appreciate their business and societal impact and their attempts at governance reform that may or may not be applicable to the dual mission of the benefit corporation.

II.

TRADITIONAL SOLUTIONS

A. *For-Profit Oversight*

In a traditional for-profit corporation, agency drives accountability between both the BOD and corporate officers to the shareholders. Shareholders have remedies if there is a breach of the fiduciary relationship, thereby requiring man-

96. See Michael E. Cummings & Hans Rawhouser, *Lawyers and Bar Associations as Influencers in the Negotiated Landscape of Social-Business Hybridization*, 17 WYO. L. REV. 457, 457–58 (2017).

97. See Patricio Osorio-Vega, *The Ethics of Entrepreneurial Shared Value*, 157 J. BUS. ETHICS 982 (2019).

98. André *supra* note 2, at 148.

agement to place its interest second to the shareholders'.⁹⁹ Shareholders may vote for new board members as the existing members' terms expire.¹⁰⁰ Alternatively, shareholders may remove board members for cause in instances of excessive breaches.¹⁰¹ Shareholders may even sue the board derivatively on behalf of the corporation.¹⁰²

The derivative action allows shareholders to monitor and remedy harm in instances when management will not.¹⁰³ "[T]he purpose of the derivative action was to place in the hands of the individual shareholder a means to protect the interests of the corporation from the misfeasance and malfeasance of 'faithless directors and managers.'"¹⁰⁴ An integral part of the initiation of the derivative action is the "demand" in which shareholders are required to request that the board remedy the allegation.¹⁰⁵ Only if the board refuses may the shareholder(s) sue on behalf of the corporation.¹⁰⁶

Once on notice, the board often appoints a disinterested committee to determine whether the board should adopt the shareholder request.¹⁰⁷ For example, the committee will not include directors who may have been involved in an allegation

99. See RALPH C. FERRARA, KEVIN T. ABIKOFF & LAURA LEEDY GANSLER, *SHAREHOLDER DERIVATIVE LITIGATION* § 1.01 (1st ed. 2013).

100. *Id.*

101. *See id.* When a board member engages in an interested transaction such as selling land to the corporation at a price higher than the land's fair market value without disclosing such material information to the other independent and disinterested directors, the director has engaged in a breach of fiduciary duty and may be removed by the shareholders for cause. *See id.*

102. *Id.* "An action is derivative in nature when it is brought by a shareholder on behalf of the corporation as a whole for harm suffered by all shareholders in common." *Id.* § 1.02. "In *Tooley v. Donaldson, Lufkin & Jenrette Inc.*, 845 A.2d 1031 (Del. 2004), the Delaware Supreme Court clarified its position by distinguishing between direct claims of shareholders and derivative claims . . . the court stated that in order to determine whether a claim is derivative or direct, such analysis must turn solely on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who receive the benefit of any recovery or other remedy (the corporation or stockholders, individually)." *Id.* § 1.02 n. 11.

103. *See id.*

104. *Meyer v. Fleming*, 327 U.S. 161, 167 (1946).

105. *See, e.g., Dodge v. Woolsey*, 59 U.S. 331, 339 (1855).

106. *But see Aronson v. Lewis*, 473 A.2d 805, 808 (Del. 1984) (noting that notice could be waived if futile).

107. *See, e.g., Rales v. Blasband*, 634 A.2d 927 (Del. 1993).

of a conflict of interest involving that director. Should the board decline to follow the shareholder demand, the shareholder(s) may sue on their own.¹⁰⁸ The complaining shareholder(s) must then provide notice to all shareholders to allow them to join the suit if they wish. Any successful monetary remedies will go back to the corporation and not to the individual shareholder plaintiffs. Most derivative lawsuits include equitable remedies—not monetary damages.¹⁰⁹

B-Corp governance does not change the fiduciary relationship within the corporation, nor does it change the remedy. Even though the more modern perception of the corporate form expands the scope of decision-making to include stakeholder interests, it appears that shareholders do not share this perception when exercising the remedies described *supra*. Historically, shareholders have simply desired to maximize both share price and dividends.¹¹⁰ They are not compelled to engage in litigation on behalf of the social mission. “[A] key assumption driving benefit corporation legislation is that, when making decisions, traditional corporations must ignore the interests of stakeholders in order to maximize shareholder value.”¹¹¹ It is also unlikely that a shareholder would have standing to sue if the breach occurred at the direction of a stakeholder outside of the corporate form.

B. *Nonprofit Oversight*

Since the benefit corporation’s *express* public mission is its distinguishing factor from a for-profit corporation, we further differentiate among it and nonprofits. The biggest difference is that nonprofits cannot distribute profits as defined by the IRS,¹¹² while benefit corporations are expected to. Nonprofits are supposed to dedicate all their resources to their charitable

108. See *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188 (6th Cir. 1974). While the shareholder must pay attorney fees, those fees are often reimbursed should the suit be successful.

109. See, e.g., *id.* at 1191.

110. FERRARA, ABIKOFF & GANSLER, *supra* note 99, § 1.01.

111. André, *supra* note 2, at 245.

112. Rick Bell, *Non-Profit Corporation vs Public Benefit Corporation*, DELAWAREINC.COM: HARV. BUS. SCH. BLOG (June 30, 2020), <https://www.delawareinc.com/blog/non-profit-corporation-vs-public-benefit-corporation/>.

mission.¹¹³ They have no owners or shareholders and cannot distribute, even surplus funds, to their members.¹¹⁴

Benefit corporations, on the other hand, have owners, or shareholders.¹¹⁵ They can distribute profits to shareholders as dividends.¹¹⁶ However, there can be a blurring here since nonprofit employees, particularly executives, can be paid quite well.¹¹⁷ The combination of such compensation together with the nonprofit tax exemption may be regarded as somewhat similar to private inurement of for-profits.¹¹⁸ Also, “because principal business costs can be doctored, nonprofits have flexibility with private inurement.”¹¹⁹ For example it is perfectly legal for nonprofits to spend lavishly on conferences.¹²⁰ On the flip side, for-profits can take tax deductions for their charitable donations.¹²¹

A second major difference is that nonprofits are tax-exempt, and there are many conditions for their tax-exempt status. Legally, they must comply with Internal Revenue Code (IRC) requirements and pursue a mission that comports with one of the charitable categories described in IRC § 501(c) or (d).¹²² While the benefit corporation’s state-mandated social purpose greatly increases its need for accountability,¹²³ the ac-

113. *See id.*; *see also* Kathryn Smith, *Incentivizing Transparency: Agricultural Benefit Corporations to Improve Consumer Trust*, 55 SAN DIEGO L. REV. 887, 920 (2018).

114. Bell, *supra* note 112; Smith, *supra* note 113, at 920.

115. Bell, *supra* note 112.

116. *Id.*

117. Dean Baker, *End Bloated Salaries in the Nonprofit Sector*, STAN. SOC. INNOVATION REV., Spring 2019, at 57. However, while nonprofit employees can be paid well, the IRS requires that nonprofit employees be paid “reasonable compensation” which is defined as “the value that would ordinarily be paid for like services by like enterprises under like circumstances.” *Exempt Organization Annual Reporting Requirements: Meaning of “Reasonable” Compensation*, I.R.S., <https://www.irs.gov/charities-non-profits/exempt-organization-annual-reporting-requirements-meaning-of-reasonable-compensation> (Sept. 19, 2020).

118. Smith, *supra* note 113, at 920.

119. *Id.* at 922.

120. *See id.*

121. *See id.* at 921 n. 209.

122. *See* Kevin M. Yamamoto, *Taxing Income from Mailing List and Affinity Card Arrangements: A Proposal*, 38 SAN DIEGO L. REV. 221, 228–29 (2001); *see also* Smith, *supra* note 113, at 920.

123. *See* Verheyden, *supra* note 61, at 38.

accountability process for nonprofits is more rigorous than that for benefit corporations. Nonprofits must apply to the Internal Revenue Service (IRS) to receive nonprofit status (IRS Form 1023). The IRS must then ensure that the stated mission conforms to a particular IRS subsection defining the intended purpose.¹²⁴ Thus, nonprofits need government approval to exist while benefit corporations generally do not.

Accountability for benefit corporations is generally weak. The IRS is not involved in approving them. Benefit corporations merely need to include a public benefit clause listing their social objectives in their Certificate of Incorporation and file it with their state.¹²⁵ Furthermore, although benefit corporations are required to file reports on their social progress, these reports are neither seriously reviewed nor monitored.¹²⁶

Even though not legally required to file reports on their social progress, nonprofits often post annual progress reports for their members and donors.¹²⁷ Nonprofits often risk declining funding levels if they fall short.¹²⁸ Politically, in order to obtain and maintain their tax-exempt status, nonprofits must have the public's trust and approval that they are doing good for society and refraining from negative acts.¹²⁹ The nonprofit attention to public trust contrasts with the benefit corporation greenwashing that is promoted by their low reporting standards and low rate of compliance.¹³⁰

While we do not know the future impact of this new corporate form,¹³¹ the present regulatory environment demands governance standards that strengthen the values of accountability, disclosure, and transparency to best achieve the overall objective of benefit corporations generally—empowering business to achieve public good,¹³² a function traditionally reserved to nonprofits in the modern era. Therefore, “nonprofit governance standards are highly relevant to B-Corps, in part because legislators intend B-Corps to bridge the gap between

124. See Bell, *supra* note 112.

125. See *id.*

126. See *id.*

127. See *id.*

128. See *id.*

129. See Yamamoto, *supra* note 122, at 234.

130. See André, *supra* note 2, at 249; Diehl, *supra* note 21.

131. See Lincoln & Ellman, *supra* note 12.

132. See André, *supra* note 2, at 133–34.

for-profit and nonprofit entities” where the BODs also act for a public corporate constituency.¹³³ Nonprofit directors have a duty of obedience to make sure that the nonprofit is abiding by all applicable laws and regulations.¹³⁴ The duty of obedience also means that the board of directors must carry out the organization’s mission in accordance with the stated purpose by getting qualified as a nonprofit organization.¹³⁵ As with nonprofit directors, it is difficult for benefit corporation directors to change their public mission.¹³⁶ However, their missions reflect the regulatory differences set forth above; the nonprofit mission is stipulated under the IRC, while the benefit corporation selects from state statutory categories of social responsibility.

Generally, nonprofits are restricted to the purposes set forth in the IRC, while benefit corporations have a broader range of permissible purposes.¹³⁷ To qualify as a 501(c)(3)—the most coveted nonprofit form because it allows donors to deduct their donations—the organization must pursue one of the missions specified: “religious, charitable, scientific, literary, educational . . . or to foster public safety national and international amateur sports competition . . . or for the prevention of cruelty to children or animals”.¹³⁸ In some ways, the nonprofit mission can inform the benefit corporation dual form; however, their governance is only interrelated. Nonprofit governance does not work for the benefit corporation.

Simply stated, nonprofit governance does not work for the benefit corporation since it is a for-profit corporate form. There is no statutorily expressed fiduciary duty of obedience to the beneficiary mission as provided and enforced with nonprofits by the office of the state attorney general. Also, benefit corporations do not register with the IRS for tax-exempt status

133. See Christopher Lacovara, *Strange Creatures: A Hybrid Approach to Fiduciary Duty in Benefit Corporations*, 2011 COLUM. BUS. L. REV. 815, 843–44 (2012).

134. *Id.* at 847–48.

135. See Nick Price, *The Fiduciary Responsibilities of a Nonprofit Board of Directors*, BOARD EFFECT (Mar. 12, 2018), <https://www.boardeffect.com/blog/fiduciary-responsibilities-nonprofit-board-directors/>.

136. See *id.* at 847–49.

137. See Smith, *supra* note 113, at 923; see I.R.C. § 501(a) (2018); I.R.C. § 503(c)(3) (2018); DEL. CODE ANN. tit. 8, § 362(b) (1968).

138. Yamamoto, *supra* note 122, at 229–30.

since their dual mission includes earning profits for shareholders, and they do not rely upon donors like nonprofits do. Although benefit corporations have a required dual mission, for-profits and nonprofits commonly engage in some form of blended mission without jeopardizing their essential corporate form.¹³⁹ The benefit corporation's required "consideration of stakeholders" likewise does not jeopardize its for-profit corporate form. The benefit corporation's greatest deficiency—its comparative lack of accountability to the nonprofit form—perhaps demonstrates that state legislatures did not intend for nonprofit-type oversight and regulation of these entities. Instead, it was intended to continue the historic precedent that "business corporations serve a public purpose" and be subject to free-market consumer demand and approval, as well as the existing traditional for-profit regulatory regime.¹⁴⁰

However, over the past decade, numerous scholars have advanced the idea that external state oversight would enhance benefit corporation governance and responsibility to beneficiaries. Yet others opt for internal solutions to benefit corporation governance that emphasize balanced decision-making or a combination of both internal and external solutions. We review this literature and its primary observations, insights, and proposals below.

III.

WHAT HAS BEEN PROPOSED FOR B-CORPS: A DECADE OF OBSERVATIONS, INSIGHTS AND PROPOSALS

A decade of observations, insights and proposals continue to reflect governance concerns regarding benefit corporation adherence to public missions and the potential for creating greenwashing.¹⁴¹ However, these numerous and meritorious concerns leave us without a clear vision and mandate for regulatory reform. In general, these concerns address three major legislative deficiencies: (1) lack of guidance for BOD decision-

139. See Ryan Shaening Pokrasso, *For-Profit or Nonprofit or Hybrid?*, SPZ LEGAL (Feb. 20, 2019), <https://www.spzlegal.com/social-enterprise/for-profit-nonprofit-hybrid/>.

140. See Blodgett, Melconian & Peterson, *supra* note 5, at 308.

141. Verheyden, *supra* note 61, at 93–94 (cautioning about the need "to hold benefit corporations accountable for their public purpose" and the "risk of state-sanctioned greenwashing").

making; (2) lack of an effective enforcement mechanism for mission adherence; and (3) lack of sufficient reporting requirements. These governance concerns can be classified as either *internal*, involving BOD decision-making, duties, and appropriate corporate controls or *external*, calling for either state oversight, accountability, and mission enforcement or for a free market consumer-based oversight.

Internally, the benefit corporation BOD must be dedicated to and conscientious of fulfilling its fiduciary obligation to stakeholders, as well as to shareholders. Numerous scholars observe that BODs must fulfill their ethical and fiduciary obligations by practicing effective decision-making that balances profit-making with public benefit mission.¹⁴² However, the statutes offer little guidance for decision-making among conflicting interests.¹⁴³

Specifically, BODs should establish a decision-making process for dealing with conflicts between business performance and consideration of stakeholders with internal tracking of general benefit mission and any designated specific benefit mission.¹⁴⁴ Specific benefits terms should be defined in the bylaws and their objective be part of the decision-making process.¹⁴⁵ Further, the BODs can designate a benefit director to facilitate compliance with the decision-making process through annual reporting and engaging a third-party standard. Additionally, the public commenting period for the third-party standard should be changed to “an ongoing opportunity for public comment through the standard-setter’s website.”¹⁴⁶ This decision-making process can also include a “robust mechanism” of balanced guidance for determining when

142. See Andrew S. Gold & Paul B. Miller, *Fiduciary Duties in Social Enterprise*, in THE CAMBRIDGE HANDBOOK OF SOCIAL ENTERPRISE LAW 321, 327–30 (Benjamin Means & Joseph W. Yockey eds., 2018); McDonnell, *supra* note 62, at 22; Kyle Westaway & Dirk Sampselle, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards and Legislatures*, 62 EMORY L.J. 999, 1071–72 (2013) (recommending that general benefit be included in the bylaws and evaluated by the board for managerial adoption and that boards identify a process for mediating corporate purpose conflicts).

143. See McDonnell, *supra* note 62, at 72 (anticipating that the effect of statutes will be to establish processes for deciding conflicting interests).

144. See Westaway & Sampselle, *supra* note 142, at 1072–73.

145. *Id.* at 1073.

146. *Id.* at 1079.

each corporate mission, i.e., profits or societal benefit, prevails.¹⁴⁷ Andrew Gold recommends that BOD fiduciary decision-making discretion reflect good faith judgment as a key element for balancing interests.¹⁴⁸ Recognizing the expanded director role in achieving general benefit, William Clark recommends that the election process be robust to prevent director abuse of this corporate form's flexibility.¹⁴⁹

J. Haskell Murray suggests that the statute resolve decision-making conflicts by requiring selection of a primary master.¹⁵⁰ In perhaps a similar vein regarding selection or choice, J. William Callison suggests that an "expansive shareholder choice" should reign allowing them to determine the general or specific benefits to be pursued.¹⁵¹ This "contractual flexibility" could make benefit corporations work since they arise from shareholder choice.¹⁵²

Externally, a frequent and prominent proposal is an enactment of an effective enforcement mechanism to ensure mission adherence¹⁵³ and improved reporting requirements for transparency and accountability.¹⁵⁴ Numerous scholars suggest a heightened state oversight akin to the nonprofit corporate form that enforces BOD fiduciary duties and mission, with one recommending that "[s]tates should amend their benefit cor-

147. Reiser, *supra* note 3, at 593.

148. See Gold & Miller, *supra* note 142, at 321 ("A hybrid mandate inevitably involves a very broad grant of discretion New forms of social enterprise organization are still in their infancy, and leaving room for discretion is, potentially, one way of discovering what works best.").

149. William H. Clark Jr. and Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 850 (2012).

150. Murray, *supra* note 6, at 28 (noting that "directors would benefit from having a primary master and a clear objective").

151. J. William Callison, *Putting New Sheets on a Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, The Dangers Created, and Suggestions for Change*, 2 AM. U. BUS. L. REV. 85, 113 (2012).

152. *Id.* at 114.

153. See McDonnell, *supra* note 62, at 70–71 ("The core challenge at which the law is aimed is helping insure that the managers (directors and officers) of benefit corporations actually follow through on their commitment to pursue public benefit along with profit."); Reiser, *supra* note 3, at 593 ("[T]he benefit corporation lacks robust mechanisms to enforce dual mission, which will ultimately undermine its ability to expand funding streams and create a strong brand for social enterprise as sustainable organizations.").

154. See Verheyden, *supra* note 61, at 93–94.

poration legislation to include enforcement and oversight by state attorneys general in order to correct the lack of accountability and enforcement mechanisms of the current legislation.”¹⁵⁵

Others recommend following the United Kingdom’s Community Interest Company (CIC) oversight structure,¹⁵⁶ which is more formalized with strict government oversight and enforcement by a CIC regulator and is grounded in benefit to local communities.¹⁵⁷ In this vein, Thomas White proposes the creation of a State Government “Benefit Corporation Commission” (BCC) to ensure accountability to the public benefit since the legislation generally does not provide a cause of action to beneficiary stakeholders.¹⁵⁸ More specifically, the BCC would ensure that both general and specific benefit standards are met and balance them between shareholders and other stakeholders, while addressing legitimate concerns with sanc-

155. Hacker, *supra* note 65, at 1779; *see also* Michelle Cho, *Benefit Corporations in the United States and Community Interest Companies in the United Kingdom: Does Social Enterprise Actually Work?*, *Nw J. Int’l. L. & Bus.* 149, 171 (2017); Thomas J. White III, *Benefit Corporations: Increased Oversight Through Creation of the Benefit Corporation Commission*, 41 *J. LEGIS.* 329, 339 (2015); Ellen Berrey, *Social Enterprise Law in Action: Organizational Characteristics of U.S. Benefit Corporations*, 20 *TRANSACTIONS: TENN. J. BUS. L.* 21, 100 (2018); McDonnell, *supra* note 62, at 71; Emily Winston, *Benefit Corporations and the Separation of Benefit and Control*, 39 *CARDOZO L. REV.* 1785, 1837 (2018); Tiffany M. Burba, *To “B” or not to “B”: Duties of Directors and Rights of Stakeholders in Benefit Corporations*, 70 *VAND. L. REV. EN BANC* 329, 359 (2017) (proposing that undesignated constituents have standing to sue BODs to enforce public mission by petitioning the state attorney general, and stringent reporting requirements); Verheyden, *supra* note 61, at 94 (recommending “mandatory filing of the report with the secretary of state’s office and publication of these reports by the states in a permanent form, ideally in a database,” including sanctions for noncompliance).

156. *See, e.g.*, Hacker, *supra* note 65, at 1776; Cho, *supra* note 155, at 151–52.

157. *See* Cho, *supra* note 155, at 151 (noting that “in the U.K., successful CICs consist of local companies devoted to serving the immediate community”); Reiser, *supra* note 3, at 613.

158. White, *supra* note 155, at 349 (commenting that this is appropriate for nonprofits since they do not have the resources to defend unwarranted litigation; and while not so appropriate to for-profit benefit corporations, something is still lacking in the protection of their beneficiaries and its legislation should be changed).

tions and protecting against frivolous litigation.¹⁵⁹ The BCC would therefore add context and meaning to these standards that result in qualitative data for mission success with profits and would be comprised of a comprehensive membership of stakeholders including benefit corporation managers and BODs.¹⁶⁰

In addition to recommending state oversight, Ellen Berrey proposes to align the benefit corporation form with small business entrepreneurs while raising the bar for benefit corporation creation and accountability.¹⁶¹ Berrey advocates raising statutory standards and accountability with a waiting period and a two-prong threshold to entry by requiring more precision and substance in stating the corporate benefit in the Articles of Incorporation and increased vetting by the state.¹⁶² Berrey finds that there is much inactivity among U.S. benefit corporations, but, when there is action, it may be questionable or not even socially beneficial and, thereby, jeopardizes this corporate form's integrity.¹⁶³ Therefore, the lack of compliance with reporting needs to be a priority for legislative reform, especially since shareholders have not responded to this deficiency.¹⁶⁴

Others put their faith in the free market through marketing and consumer satisfaction.¹⁶⁵ Brett McDonnell recommends allowing managerial-entrepreneurial leadership and corporate reputation to shape this dual form, thus allowing

159. *See id.* at 348–51 (stating that “[g]iven the dissimilarity in issues involving social responsible information, it appears there is not a practical formula by which to standardize reporting requirements” nor those who can readily analyze data relevant to corporate social responsibility as there is with Wall Street financial analysts).

160. *See id.* at 351 (advocating that the data's qualitative complexity may be burdensome to enforcement by the state attorneys general, while the BBC's sole charge of benefit corporation assessment allows for more economically efficient enforcement).

161. Berrey, *supra* note 155, at 100.

162. *Id.* at 21, 100–01 (asserting that the legislation “falls short of its transformative promise to upend the prevailing model of shareholder supremacy”).

163. *Id.* at 103.

164. *See id.* at 102.

165. *See e.g.*, McDonnell, *supra* note 62, at 66 (stating that “benefit corporation managers who are visibly shirking their duties to do good will most likely find themselves not doing well either, as the various stakeholders withdraw their support from the company”).

the courts to enunciate best practices for balancing of dual missions.¹⁶⁶ Michelle Cho also asserts that branding and marketing practices are an effective public oversight that rely upon consumer satisfaction and reputation.¹⁶⁷

A variety of suggestions include a *mutual* solution with a “Public Benefit Plan” comprising of decision-making between the benefit corporation and the beneficiaries, thereby reducing the current separation of shareholder control and benefit and increasing beneficiary control that would reduce the ambiguities regarding the extent of managerial pursuit of social mission.¹⁶⁸

These proposals would also help measure social impact, a current deficiency of benefit corporation governance.¹⁶⁹ Emily Winston advocates for filing the plan with the state and allowing beneficiaries to track compliance.¹⁷⁰ There are several enforcement options: (1) beneficiaries could disassociate if displeased and the benefit corporation would lose its status if the beneficiaries are not replaced within a certain period to be defined by state statute; (2) the plan could be a contract with beneficiary rights to sue; and (3) beneficiaries could have enforcement rights.¹⁷¹ For options two and three, Winston believes that injunctive relief could be used to force social benefit actions.¹⁷²

Murray compares the Model Act with the Delaware PBC law and concludes that the Delaware legislation is superior.¹⁷³ However, he suggests amending it, “clarifying the priority of the specific public benefit purpose, requiring a partial-asset lock, imposing a charitable giving floor, providing more effec-

166. *Id.* at 72.

167. Cho, *supra* note 155, at 159.

168. See Winston, *supra* note 155, at 1834, 1841 (suggesting that “benefit corporations will be more likely to succeed in producing substantial social good if they require participation by beneficiaries in corporate decision making”).

169. See *id.* at 1835–36 (noting that reporting requirements are weak and there is no objective standard for measuring social benefit).

170. *Id.* at 1838.

171. *Id.* at 1838–39.

172. *Id.* at 1839.

173. See J. Haskell Murray, *Social Enterprise Innovation: Delaware’s Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345, 369–70 (2014).

tive enforcement mechanisms, and reconfiguring the current reporting requirements.”¹⁷⁴

Tiffany Burba takes the novel approach of recommending both board representation and the right to sue by a defined stakeholder.¹⁷⁵ She argues that a single stakeholder with a defined special interest should be able to enforce fiduciary duties with remedies beyond those simply in equity.¹⁷⁶ Interestingly, it appears that the remedy is limited to the designated director representing the single stakeholder.¹⁷⁷ She also advocates for all others who are neither shareholders nor the single stakeholder to have the capacity to petition public officials to advance fiduciary actions.¹⁷⁸

Also suggested are legislative choices that allow for experimentation with fiduciary discretion instead of imposing constraints upon it for increased accountability.¹⁷⁹ Some see benefit corporations as unnecessary and a detriment to the corporate form.¹⁸⁰ After all, state constituency statutes encourage for-profits to pursue public missions,¹⁸¹ and most states allow this discretion, which the courts generally defer to under the business judgement rule.¹⁸² Massachusetts law, for example, states that BODs may “consider the interests of the corporation’s employees, suppliers, creditors and customers, the econ-

174. *Id.* at 370.

175. Burba, *supra* note 155, at 332–33.

176. *Id.* at 333.

177. *Id.* at 358 (“The designated stakeholder may only sue its appointed director for dereliction of his duties, rather than the entire board.”).

178. *Id.* at 357.

179. Gold & Miller, *supra* note 142, at 321, 340 (“With this in mind, we counsel caution before moving too far in limiting fiduciary discretion in social enterprise settings.”).

180. See, e.g., Amy Klemm Verbos & Stephanie Black, *Benefit Corporations as a Distraction: An Overview and Critique*, 36 BUS. & PROF'L ETHICS J. 229, 229 (2017) (stating that benefit corporations increase director and corporate risk and include an inappropriate third-party standard, and thus “[e]ntity legislation, in particular, ought to be undertaken with an abundance of caution”).

181. See Dana Brakman Reiser, *The Next Big Thing: Flexible Purpose Corporations*, 2 AM. U. BUS. L. REV. 55, 61 (2012) (“Constituency statutes permit for-profit corporate directors to consider the interests of non-shareholder stakeholders when making decisions, dislodging any real or perceived legal requirement to maximize shareholder value.”).

182. See Kent Greenfield, *A Skeptic's View of Benefit Corporations*, 1 EMORY CORP. GOV'T & ACCOUNTABILITY REV. 17, 18 (2015).

omy of the state, the region and the nation, community and social considerations, and the long-term and short-term interests of the corporation and its shareholders.”¹⁸³

However, some legislative reform appears appropriate—perhaps akin to the enactment of the Sarbanes-Oxley Act (2002) that enhanced for-profit governance and investor confidence by shoring up fiduciary duties.¹⁸⁴ Enhanced standards can also positively impact the reputation and proliferation of the benefit corporation since its creation was premised on a more ethical concept of doing business. A benefit corporation transformation that is built upon both internal and external mechanisms will promote public benefit accountability.¹⁸⁵ We, therefore, propose a limited but effective mechanism to enhance BOD adherence to its required and expanded fiduciary duty to “consider stakeholders.”

IV.

RECOMMENDATION

State oversight is costly, and B-Corps are still relatively rare. As discussed *supra*, the costs associated with state oversight and monitoring of nonprofits by state attorneys general make sense because of the extensive tax benefits and the sheer number of nonprofits.¹⁸⁶ Similarly, with for-profits, shareholder initiatives including board removal and derivative lawsuits follow logically because of the natural alignment between profit-maximization and board decision-making.¹⁸⁷ As noted *supra*, these two alternatives simply do not align in the world of B-Corps.¹⁸⁸

Our proposal maintains a focus on board accountability and attempts to leverage the governance structure of both for-profits and nonprofits.¹⁸⁹ The proposal calls for a regulatory initiative in the form of state legislation and modest resource

183. *Id.* at 18–19 (quoting MASS. GEN. LAWS ch. 156D, § 8.30 (2004)); *accord.* Murray, *supra* note 6, at 1 (commenting “that states like Delaware could simply amend their existing corporate codes to expressly allow for a societal- or environmental-focused objective in a corporation’s charter”).

184. *See* Blodgett, Melconian & Peterson, *supra* note 5, at 311.

185. *See* Kurland, *supra* note 14, at 527.

186. *See supra* notes 112–140 and accompanying text.

187. *See supra* notes 99–111 and accompanying text.

188. *See id.*

189. *See infra* notes 190–99 and accompanying text.

allocation within the various state attorneys general offices. First, the legislation should require that the B-Corp board have at least one outside member representing the social component of the B-Corp's business.¹⁹⁰ Designating board representation has been proposed in a different setting, but, for the most part, commentators have failed to consider it as possible way to align the dual purpose of B-Corps.¹⁹¹ One commentator did propose the right to sue by a single defined stakeholder coupled with separate beneficiary representation, but the effectiveness of an assigned removed "watchdog" is problematic.¹⁹² This litigious approach attempts to align itself with the for-profit approach to too great of an extent while also relying on the unrealistic assumption that a single stakeholder will initiate accountability. Instead, our approach leverages the outside member and that member's interaction with the state attorney general and allows for a less formal administrative hearing to drive accountability.

Second, the state should require training for the constituent board member on both how to work with the board to advocate for constituents' interests and how to proceed if the B-Corp fails to do so. Third, the constituent board member should have the legal authority to "place a demand" on the B-Corp's BOD should it fall short with respect to its social mission. Finally, the constituent board member should have the standing to file a derivative complaint within the state attorney general office.

The constituent board member initiative includes three critical aspects: the who, the how, and the why. Ideally, the state legislation should specify that the constituent member be independent without any equitable position in the B-Corp. In other words, they should not have an economic stake in the B-

190. *See id.*

191. *See* Burba, *supra* note 155, at 359. The closest conceptually may be codetermination in Germany which establishes legal rights on behalf of German workers akin to owners. *See* Jeremy A. Trimble, *Codetermination: A Viable Strategy for The United States?* 29 J. TRANSNAT'L L. & POL'Y, 169, 174-75 (2019-20) (outlining history and parameters of codetermination under German law); Frank Anechiarico & Lydia Segal, *Democratic Governance as a Function of Ethics Management Strategies*, PUBLIC INTEGRITY 280 (2020) (discussing significance of codetermination for democratic accountability in organizations).

192. *See* Burba, *supra* note 155, at 359.

Corp either through employment or stock ownership. This is critical so that the decision-making is unfettered with a focus on the B-Corp's social purpose.¹⁹³

The constituent must also be a member of the stated social purpose of the B-Corp. For example, in the case of Patagonia, the constituent member could include someone who has a background in environmental causes or works in the nonprofit setting supporting the environment.¹⁹⁴ For smaller B-Corps with a more defined stakeholder beneficiary, the constituent could represent the stakeholder directly. The B-Corp should identify the constituent board representative when filing the Articles of Incorporation with the state. The designated constituent should serve regular terms subject to reelection by the shareholders. The appointment of a constituent serves as a condition for the creation of the business form, and states should only approve the formation upon approval of the constituent. For those B-Corps already in place, the board must source and propose potential directors, and shareholders must elect the initial constituent.

The constituent will have a voice representing the designated stakeholder and social cause within the board of directors. For example, a constituent at Leesa or Bombas would have a voice in board meetings to ensure that it continues to donate mattresses and socks, respectively, to those in need. This is increasingly important as senior management may change or board turnover may occur. The constituent at Athleta could further the social initiative of empowering women and girls as the constituent monitors shifting social norms which may become more prominent and critical beyond the founding of the company. Of course, the member needs a voice and support.

The state attorneys general office is in the best position to support the constituent. The office is well versed in social mission through its monitoring of nonprofits.¹⁹⁵ The primary resource and investment will be the training it develops and ad-

193. See *supra* notes 91–108 and accompanying text.

194. See Elissa Loughman, *Benefit Corporation Update: Patagonia Passes B Impact Assessment, Improves Score to 116*, PATAGONIA, <https://www.patagonia.com/stories/benefit-corporation-update-patagonia-passes-b-impact-assessment-improves-score-to-116/story-17871.html> (last visited Jan. 16, 2021).

195. See *supra* note 143 and accompanying text.

ministers for the constituent.¹⁹⁶ Topics should include the importance of maintaining the B-Corp's stakeholder mission as well as more technical topics such as interpreting stakeholder reports, placing a demand, and the mechanism for filing a derivative complaint. While the training would be mandatory for the constituent board member, all directors should be encouraged to participate. The state attorneys general office could also facilitate a user group consisting of the various constituent board members as an additional support system.

The constituent board member should have the legal authority to "place a demand" on the B-Corp should it fail with respect to its social mission and stakeholder community. This is similar to the shareholder demand in the for-profit setting.¹⁹⁷ The demand should clearly outline how the B-Corp is failing its stakeholder mission and should include as much objective data as possible. Ideally, the board will remedy the demand and the business form shall continue unscathed.

In the instances in which the board declines to make changes, the constituent should have standing to file a complaint with the state attorney general. This is similar to both the derivative lawsuit in the for-profit context in which shareholders litigate breaches of fiduciary duty and other wrongdoings and the standing of the attorney general in the nonprofit setting to monitor and enforce fiduciary breaches.¹⁹⁸ Here, the complaint will be heard through an administrative hearing and not litigated as a derivative lawsuit in a courtroom. Reflecting the origin of the equitable remedies in place for derivative lawsuits, the remedy here is simply removing the B-Corp form and allowing the business to continue as a traditional for-profit.¹⁹⁹

196. We do not address the costs of developing training. However, it may be reasonable to establish a small fee to the B-Corp to fund the training.

197. See FERRARA, ABIKOFF & GANSLER, *supra* note 99, § 1.03; see also *supra* note 105 and accompanying text.

198. See *supra* notes 99–102 and accompanying text; Hacker, *supra* note 65, at 1749–50 ("Holding corporations accountable, in the normal model, generally occurs in two ways: (1) if the entity is a for-profit corporation, directors are brought to task through a derivative suit commenced by the shareholders; and (2) if the entity is a nonprofit organization, directors or trustees are held accountable through legal actions brought by a state attorney general.") (citations omitted).

199. See *supra* notes 103–09 and accompanying text.

CONCLUSION

Benefit corporations are challenged with governance issues that can easily manifest themselves as greenwashing or other malfeasance. Unfortunately, this is a potent reminder of the recent era of for-profit and nonprofit corporate governance scandals. If the benefit corporation is to continue to offer a credible, desirable, and effective way of doing business that satisfies social objectives, then appropriate governance safeguards should be a top priority. Benefit corporations have drawn the attention of scholars, investors, and consumers who wish to preserve this for-profit, dual-purpose form that uniquely requires BODs to “consider stakeholders.”

Benefit corporations are a for-profit form, so comprehensive state nonprofit-type regulation is inappropriate for them. Any externally oriented governance through state oversight must be narrowly limited directives. Further, while it is worthwhile to emphasize BOD duties and ethically balanced decision-making, it is also necessary to impose enforcement requirements that affect internal governance practices.

After reviewing a decade of benefit corporation governance critiques, we identified three areas ripe for statutory reform: (1) lack of guidance for BOD decision-making; (2) lack of an effective enforcement mechanism for mission adherence; and (3) lack of sufficient community-based mission assessment, data collection, and reporting.²⁰⁰ We recommend BOD inclusion of a state-certified director trained in the community mission of the benefit corporation’s stakeholders, fiduciary duties including nonprofit obedience, and mission assessment standards and approaches that include data collection and reporting. This board member can also report shirking of

200. See, e.g., Verbos & Black, *supra* note 180, at 253 (“There is no consensus on what constitutes corporate social responsibility (CSR), which makes it more challenging to reconcile or integrate research on socially responsible engagement Given the great flexibility under present law, even shareholders, the only stakeholders allowed to bring a benefit enforcement action, may find hollow the benefits proponents promise in terms of accountability and enforcement to a public or specific benefit.”) (citations omitted); Murray, *supra* note 6, at 32 (“Even if directors are simply attempting to maximize net stakeholder value, the question of how to measure and compare stakeholder value remains largely unanswered.”); Reiser, *supra* note 181, at 59 (“Benefit corporation statutes differ in the level of detail at which they define the content of such standards.”).

mission adherence to the state attorneys general office. This should enhance BOD ethical decision-making by including the unique substantive governance of benefit corporations' missions—required “consideration of stakeholders”—within the ambit of the traditional guardian of nonprofit mission and also continue the historic tradition of for-profit adherence to a public mission. The present regulatory environment demands governance standards that strengthen the values of accountability, disclosure, and transparency to best achieve the overall objective of benefit corporations to empower businesses to achieve public good,²⁰¹ a function traditionally reserved for nonprofits in the modern era.

201. See André, *supra* note 2, at 134 (“This new type of corporation has a mission to do well (e.g., to make a profit) by doing good (e.g., by enhancing CSR), and in the process allows itself to be significantly influenced by stakeholders other than shareholders.”).