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## Benefit Corporation Legislation: An Opportunity for Kansas to Welcome Social Enterprises

### I. INTRODUCTION

The last decade has been marked with corporate scandals. From Enron to the subprime mortgage crisis, the BP oil spill to the Massey Energy mine explosion, Americans have become increasingly disillusioned with corporations.<sup>1</sup> At a time when unemployment rates are high and many Americans are struggling to make ends meet, the mere mention of “corporate America” brings to mind images of Wall Street fat cats lining their pockets with the hard-earned money of the less wealthy. Protestors involved in the Occupy Wall Street movement brought home the frustration and discontent with the “business as usual” attitude as they took to the streets to speak out against the traditional corporate culture of profit above all else.<sup>2</sup>

In the midst of growing dissatisfaction with traditional corporate maxims, one organization has been working hard to change the corporate landscape and prove that corporations can do *good* and also do *well*. B Lab, a Pennsylvania nonprofit, was founded in 2007 by three friends—Jay Coen Gilbert, Bart Houlahan, and Andrew Kassoy—to provide support to businesses and entrepreneurs who create social and environmental benefits as well as make a profit.<sup>3</sup> Gilbert and Houlahan are the original founders of AND1, a \$250 million basketball footwear, apparel, and entertainment company. Andrew Kassoy worked for

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1. See *The 2012 Harris Poll Annual RQ Public Summary Report*, HARRIS INTERACTIVE, 5 (Feb. 2012), [http://www.harrisinteractive.com/vault/2012\\_Harris\\_Poll\\_RQ\\_Summary\\_Report.pdf](http://www.harrisinteractive.com/vault/2012_Harris_Poll_RQ_Summary_Report.pdf) (reporting that only two in ten Americans think corporate America has a positive reputation).

2. *Declaration of the Occupation of New York City*, N.Y.C. GEN. ASSEMBLY (Sept. 29, 2011), <http://www.nycga.net/resources/declaration/>.

3. *The Non-Profit Behind B Corps*, BENEFIT CORP. INFO. CTR., <http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps> (last visited Nov. 8, 2013).

sixteen years in private equity before co-founding B Lab.<sup>4</sup> First, B Lab created a certification process for socially minded businesses. After recognizing the inadequacy of existing corporate law for social enterprises, the organization worked to draft model legislation to create a new kind of corporation—one that places social benefit above profit.<sup>5</sup> A version of this model legislation has been adopted in nineteen states and the District of Columbia to date.<sup>6</sup>

This Comment provides a critical look at benefit corporations, a new type of legal business form for businesses that are motivated to create social and environmental benefits as well as profits. This Comment explains the evolution of and need for a business form that is unrestrained by the wealth maximization norms of traditional corporations. It explains the main goals of benefit corporation legislation and its success thus far. The benefits of adopting benefit corporation legislation are threefold. First, it provides socially conscious and mission-driven companies with enhanced legal protection, especially in change of control scenarios, and a clear mandate of fiduciary duty. Second, it provides socially conscious, sustainable companies with legitimate branding as a company that “walks the walk” rather than only “talks the talk.” Third, it provides additional financing opportunities, including patient capital, and has the potential to provide additional financial benefits as more states adopt the new entity form.

This Comment also discusses criticisms of the legislation and provides context and counterpoints to the most persistent critiques. Finally, this Comment addresses the need for benefit corporation legislation in Kansas and concludes that Kansas should adopt the legislation and the recommendations for select provisions provided.<sup>7</sup>

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4. *The GIIRS Team*, GIIRS, <http://giirs.org/about-giirs/giirs-team> (last visited Oct. 31, 2013).

5. MODEL BENEFIT CORP. LEGISLATION (Apr. 10, 2013), *available at* [http://benefitcorp.net/storage/documents/Model\\_Benefit\\_Corporation\\_Legislation.pdf](http://benefitcorp.net/storage/documents/Model_Benefit_Corporation_Legislation.pdf).

6. *State by State Legislative Status*, BENEFIT CORP. INFO. CTR., <http://www.benefitcorp.net/state-by-state-legislative-status> (last visited Nov. 8, 2013) (listing states that have adopted Benefit Corporation legislation to include: Arizona, Arkansas, California, Colorado, Delaware, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Nevada, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, and Washington D.C.).

7. This Comment was born out of a short article about benefit corporations that was published in 2012. Anna R. Kimbrell, *The Benefit Corporation: Can Changes to Corporate Law Change Business As Usual?*, 1 MORAL CENTS 5, 5 (2012), <http://sevenpillarsinstitute.org/wp-content/uploads/2012/10/Benefit-Corporation-Paper-SPI-revisions-.pdf>.

## II. BACKGROUND

### A. *B Lab and B Corp Certification*

B Corp Certification and incorporation as a benefit corporation are not the same.<sup>8</sup> A company may choose to incorporate as a benefit corporation in a state that recognizes it as a legal entity and may also become certified as a “B Corp,” or it may choose only one or the other.<sup>9</sup> It is not necessary for a company to be B Corp certified if it is incorporated as a benefit corporation, although B Corp status may add value.<sup>10</sup> B Lab created the certification for businesses, much like the “Fair Trade” or “Organic” product certifications that consumers are familiar with, in an effort to aid consumers in differentiating between good companies and companies with good marketing.<sup>11</sup> B Corp Certification is a certification for the company rather than the company’s individual products. The certification process attempts to measure impact on non-shareholder stakeholders and scores each business on a range of categories in four primary impact areas: employees, consumers, the community, and the environment.<sup>12</sup> Businesses scoring above a threshold number are eligible for B Corp Certification.<sup>13</sup>

The certification effort has been quite successful. At present, there are 910 certified B Corps in twenty-nine countries, representing 60

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8. *Passing Legislation: The Difference Between Benefit Corporations and Certified B Corps*, BENEFIT CORP. INFO. CTR., <http://www.bcorporation.net/what-are-b-corps/legislation> (last visited Nov. 8, 2013).

9. *Id.*

10. *Id.*

11. WILLIAM H. CLARK ET AL., B-LAB, THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION: WHY IT’S THE LEGAL FORM THAT BEST ADDRESSES THE NEEDS OF SOCIAL ENTREPRENEURS, INVESTORS, AND, ULTIMATELY, THE PUBLIC 3 (Jan. 18, 2013), [hereinafter BENEFIT CORPORATION WHITE PAPER] available at [http://benefitcorp.net/storage/documents/Benefit\\_Corporation\\_White\\_Paper\\_1\\_18\\_2013.pdf](http://benefitcorp.net/storage/documents/Benefit_Corporation_White_Paper_1_18_2013.pdf).

12. *Why Become a B Corp?*, BENEFIT CORP. INFO. CTR., <http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp> (last visited Oct. 23, 2013). The definition of “stakeholder” is imprecise and often debated among organizational management and business ethics scholars. Generally, it refers to people and entities that are affected by a corporation’s behavior. For this Comment, the term “stakeholder” includes financial and non-financial stakeholders. Thus, “stakeholder” includes creditors, investors, and shareholders, and also employees, customers, suppliers, and communities. See, e.g., R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH (1984) (the first book to describe modern stakeholder theory); Andrew Keay, *Stakeholder Theory in Corporate Law: Has it Got What it Takes?*, 9 RICH. J. GLOBAL L. & BUS. 249 (2010) (discussing the shareholder primacy versus stakeholder theory debate and its origins).

13. *Id.* (requiring companies to score 80 out of 200 to qualify for B Corp certification).

industries.<sup>14</sup> Notable B Corp certified companies include: Patagonia, Ben & Jerry's, Seventh Generation, Method Products, Plum Organics, Etsy, Klean Kanteen, King Arthur Flour, UncommonGoods, Dansko, Cabot Creamery Cooperative, New Belgium Brewing Co., and Couch Surfing International.<sup>15</sup> The Impact Assessment created by B Lab is free to anyone and businesses are encouraged to use the tool for self-governance and benchmarking purposes. To become certified, however, a business is required to pay a certification fee (based on revenue), work with a B Lab advisor, submit supporting documentation, be subject to periodic auditing, and publish an Impact Assessment report annually.<sup>16</sup> The company must also amend its governing documents.<sup>17</sup>

B Lab requires most businesses to amend their governing documents to include language that expands traditional corporate responsibilities by requiring consideration of non-shareholder stakeholder interests, namely employees, consumers, the community, and the environment.<sup>18</sup> The legal effect of amending a corporation's governing documents is dependent on state law, and specifically whether the incorporating state has a constituency statute.<sup>19</sup> Although courts may give some deference to inclusion of these rights and responsibilities in the corporation's articles, they may not successfully overrule the shareholder profit maximization norm in certain situations.

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14. BENEFIT CORP. INFO. CTR., <http://www.bcorporation.net> (last visited Jan. 8, 2014).

15. *Find a B Corp*, BENEFIT CORP. INFO. CTR., <http://www.bcorporation.net/community/directory> (last visited Oct.23, 2013).

16. *See How to Become a B Corp*, BENEFIT CORP. INFO. CTR., <http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp> (last visited Oct. 23, 2013) (explaining the process and requirements to become a benefit corporation).

17. Depending on how and where the company is legally organized, it may need to amend its governing documents. *See generally Legal Roadmap*, BENEFIT CORP. INFO. CTR., <http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/1057-legal-roadmap> (last visited Nov. 8, 2013). For example, corporations organized in states without constituency statutes and LLCs must amend their articles of incorporation to include specific language before two years after receiving B Corp Certification. Corporations organized in states that have adopted benefit corporation legislation may have to amend their governing documents or elect benefit corporation status. *Corporate Legal Roadmap*, BENEFIT CORP. INFO. CTR., <http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/1061-corporation-legal-roadmap> (last visited Nov. 8, 2013).

18. *See supra* note 17.

19. *See infra* Section II.D for a discussion of constituency statutes; *see also* Stephen Bainbridge, *The Shareholder Wealth Maximization Principle Versus Non-Shareholder Constituency Statutes*, PROFESSOR BAINBRIDGE BLOG (May 5, 2012), <http://www.professorbainbridge.com/professorbainbridgecom/2012/05/the-shareholder-wealth-maximization-principle-versus-non-shareholder-constituency-statutes.html> (discussing the constituency statutes and the legal uncertainty of how they apply).

### B. Existing Business Forms

Businesses with models that pursue a dual mission of making a profit and providing a social benefit—social enterprises—are constrained by the choice of business forms available.<sup>20</sup> The nonprofit form is not always a viable choice because nonprofits are unable to distribute profits and be privately owned.<sup>21</sup> Nonprofits face difficulties in raising capital (both debt and equity) and have additional operational burdens imposed on them to maintain tax-exempt status.<sup>22</sup> Further, the trend among nonprofits has been increasingly to rely on the revenue generated in furtherance of their social purpose (“earned” revenue) and less on philanthropic and government support.<sup>23</sup> Operating costs for nonprofits have been increasing, private donations and governmental support have decreased, the number of nonprofit organizations has increased substantially causing competition for funds, and demand for the services provided by nonprofits has increased.<sup>24</sup> This has caused many nonprofits to walk a fine line to keep their tax-exempt status and others to seek a for-profit form that better suits their needs.

B Lab founder, Jay Coen Gilbert summed up the problem while presenting at TedxPhilly in 2010 like this:

Nonprofits, as wonderful as they are, and as many places as the market cannot reach, and as important as that is for nonprofits to be there—it’s really tough to do scalable change when you are walking around at the beginning of every year with a begging bowl hoping that people take whatever is left in their pocket at the end of the year and give it to you

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20. There are conflicting opinions about what the definition of social enterprise is and what it should be. See, e.g., Keren G. Raz, *Toward an Improved Legal Form for Social Enterprise*, 36 N.Y.U. REV. L. & SOC. CHANGE 283, 287–90 (2012) (advocating for a definition of social enterprise that excludes socially responsible businesses without a specific social mission that drives the organization). For the purposes of this paper, a “social enterprise” is an organization that has social benefit as its primary mission or that adopts a dual mission of profit and social benefit. See MARK J. LANE, *SOCIAL ENTERPRISE: EMPOWERING MISSION-DRIVEN ENTREPRENEURS* 7 (2011) (adopting a similar definition) (“[F]or purposes of this book, ‘social enterprise’ will refer to any business model that, to a significant degree, has a mission-driven motive . . . which may be exclusive of a profit motive or blended with one.”).

21. Revised Model Nonprofit Corporation Act §§1.40(10), 13.01 (1987); 26 C.F.R. §1.501(c)(3)-1(c)(2).

22. See generally J. Haskell Murray & Edward I. Hwang, *Purpose with Profit: Governance, Enforcement, Capital-Raising and Capital-Locking in Low-Profit Limited Liability Companies*, 66 U. MIAMI L. REV. 1, 9–14 (2011) (discussing the barriers to capital raising that non-profits face).

23. Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337, 353 (2009).

24. See LANE, *supra* note 20, at 8 (listing probable reasons for the trend as enumerated by the Social Enterprise Alliance).

to do your good works. Alms for the poor is not going to be sufficient. So the hard reality is that we have no choice but to harness the power of business to solve social and environmental problems.<sup>25</sup>

One of the most widely used forms of for-profit business is the corporation. There are many reasons why businesses choose the corporate form over other for-profit forms, including liability concerns, tax considerations, profit disbursement, and availability of financing.<sup>26</sup> Limited liability companies (LLCs) are a popular choice for social entrepreneurs because of the inherent flexibility in structure and organization, but the LLC form has drawbacks as well. Membership interests in LLCs are typically not as liquid as shares in a corporation; LLCs are unable to operate as publicly traded companies; and institutional investors and other sophisticated investors are less inclined to invest in an LLC.<sup>27</sup>

### C. *Traditional Corporate Law*

The long legal and social history of profit maximization as the central purpose of a corporation is at odds with the dual missions of social entrepreneurs. Social entrepreneurs fear that under traditional corporate law, they will be forced to make decisions that maximize profit for the corporation's owners rather than pursue the social purpose of the company, or make decisions that harm society or undermine the company's core values in pursuit of profit maximization. There is much debate over the extent to which directors and officers of corporations may pursue social purposes without breaching their fiduciary duties to shareholders.<sup>28</sup> There are three levels of judicial scrutiny afforded to

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25. Jay Coen Gilbert, *TedxPhilly: On Better Businesses*, YOUTUBE (DEC. 1, 2010), <http://www.youtube.com/watch?v=mGnz-w9p5FU> (beginning at 7'08").

26. See Steven Munch, *Improving the Benefit Corporation: How Traditional Governance Mechanisms Can Enhance the Innovative New Business Form*, 7 NW. J. L. & SOC. POL'Y 170, 173 (2012), available at <http://scholarlycommons.law.northwestern.edu/njls/vol7/iss1/6>.

27. See *id.* at 174.

28. Cf. Alissa Mickels, *Beyond Corporate Social Responsibility: Reconciling the Ideals of a For-Benefit Corporation with Director Fiduciary Duties in the U.S. and Europe*, 32 HASTINGS INT'L & COMP. L. REV. 271, 286 (2009) ("[S]ocially responsible companies who have created a culture and deliberate strategy of balancing a duty to all stakeholders are more likely to win the court's presumption that they are not in violation of their fiduciary duty to maximize shareholder profit."); Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 147-48, 155 (2012) ("[C]orporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders."); Mark A. Underberg, *Benefit Corporations vs. "Regular" Corporations: A Harmful Dichotomy*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE & FIN. REG. (May 13, 2012, 8:31 AM),

business decisions depending on the context in which the decision was made.<sup>29</sup>

When making day-to-day business decisions, directors are typically protected by the lenient business judgment rule. The business judgment rule “is a presumption that 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.”<sup>30</sup> The effect is a very high degree of judicial deference to director decision-making when the business judgment rule applies.

The business judgment rule is rebutted if, in a suit against a corporation’s directors, a plaintiff can show that the directors’ decision-making process was grossly negligent, was not made in good faith, or was tainted by a conflict of interest.<sup>31</sup> Lack of good faith consists, *inter alia*, of conscious disregard of a known duty to act.<sup>32</sup> Thus, shareholders wishing to challenge directors’ day-to-day decisions—in which the directors considered the interests of non-shareholder stakeholders and failed to increase profits normally—are barred by the business judgment rule as long as directors can show some rational connection between the decision and shareholder benefit, either in the short-term or long-term.<sup>33</sup> But what of a director who explicitly decides to pursue social good over profit? For a company that has made a commitment not to pursue profit at the expense of society or for a company with a primary goal of social benefit, director decisions that explicitly fail to take into account shareholder wealth maximization would likely not be afforded protection by the business judgment rule because the directors would have consciously disregarded a known duty and therefore would not have

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<http://blogs.law.harvard.edu/corpgov/2012/05/13/benefit-corporations-vs-regular-corporations-a-harmful-dichotomy/> (“[F]or the vast majority of corporate decisions, there is no legal restriction on directors’ ability to consider the interests of other stakeholders . . .”).

29. The strictest level of scrutiny is typically reserved for breach of duty of loyalty cases, which include situations in which the directors have a conflict of interest or in which they have acted other than in good faith. *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

30. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

31. *Id.* at 812–13.

32. *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 67 (Del. 2006); *Stone*, 911 A.2d at 370.

33. *Revlon Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (“A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders.”). If the plaintiff fails to rebut the business judgment rule, the burden of persuasion is on the plaintiff to prove waste, “an expenditure of corporate funds or a disposition of corporate assets for which no consideration is received in exchange and for which there is no rational business purpose.” 1 PRINCIPLES OF CORPORATE GOVERNANCE § 1.42 (1994). In the context of a social enterprise deciding to sacrifice profits by using corporate resources to further its social mission, it is possible that a court would find waste.

acted in good faith.<sup>34</sup>

When director attempts to defend against corporate takeover attempts are challenged, courts look at director decisions with enhanced scrutiny because takeover defenses necessarily have the effect of entrenching the directors in office.<sup>35</sup> Under standards established in *Unocal Corporation v. Mesa Petroleum Company*, directors are given protection of the business judgment rule only if they can initially show as a threshold matter that they were responding in good faith to a legitimate threat to the corporation and the responsive actions taken were “reasonable” in light of the threat.<sup>36</sup> Applying *Unocal* standards in *eBay Domestic Holdings, Inc. v. Newmark*, the Delaware Court of Chancery refused to uphold the shareholder rights plan adopted by the original founders—Craig Newmark and Jim Buckmaster—of Craigslist in an attempt to keep eBay from buying a controlling block of the stock.<sup>37</sup> The relevant commentary from the *eBay* case is that the court rejected the proposition that the premise of the rights plan—which specifically stated the public-service mission of the company—was a legitimate corporate policy that would be protected by the business judgment rule.<sup>38</sup> The court further stated:

Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The “Inc.” after the company name has to mean at least that. Thus, I cannot accept as valid for the purposes of implementing the Rights Plan a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders. . . .<sup>39</sup>

Based on the analysis of the Delaware Chancery Court, protecting a

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34. See J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 12 (2012) (arguing that cases enforcing shareholder profit maximization are rare because directors, officers, and their lawyers “seem to have realized they need to tie altruistic motivations back to long-term shareholder value”); see also Strine, *supra* note 28, at 155 (“Fundamental to the [business judgment] rule, however, is that the fiduciary be motivated by a desire to increase the value of the corporation for the benefit of the stockholders.”).

35. *Unocal Corporation v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985).

36. 493 A.2d 946, 949 (Del. 1985).

37. 16 A.3d 1, 35 (Del. Ch. 2010).

38. *Id.* at 34.

39. *Id.*



social mission is not a legitimate corporate interest worthy of judicial deference in the context of defending against a takeover attempt.

When a company is sold, courts impose an enhanced *Unocal* level of scrutiny on directors.<sup>40</sup> The court in *Revlon, Inc. v. MacAndrews & Forbes Holdings* established a director duty to maximize shareholder value, without regard to other constituencies, when the sale of the company is inevitable.<sup>41</sup> A director in this context no longer has the ability to consider non-shareholder stakeholders and defend the decision by pointing to some potential long-term benefit to shareholders. Directors have a duty to sell to the highest bidder. In a *Revlon* scenario, a social enterprise would therefore be forced to take the highest offer regardless of the likelihood of the acquiring company carrying on the mission of the social enterprise.

Although some states have enacted constituency statutes that allow directors to consider non-shareholder interests when making decisions in takeover contexts, these statutes are rarely invoked and have little case law to support their interpretation.<sup>42</sup> Ultimately, directors of for-profit corporations are required to consider shareholder wealth maximization above all else in the context of change-of-control situations—when the company is “for sale” and also when reacting to a perceived threat of takeover. Moreover, in daily decision-making, the protection of the business judgment rule may be revoked if a director “confesses” to making a decision to promote social good rather than increase profit.<sup>43</sup> For social enterprises, this is a sufficiently likely scenario that the threat of being sued for pursuing a social mission can stifle the social entrepreneur attempting to use a for-profit model to benefit society.

#### D. Constituency Statutes

In response to the *Revlon* ruling in 1986, many states passed constituency statutes that allow directors to consider other stakeholders when making decisions. Many commentators point to these constituency

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40. *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 42 (Del. 1994).

41. 506 A.2d 173, 182 (Del. 1986).

42. LANE, *supra* note 20, at 137–40; *See infra* Part II.D. for a more thorough discussion of constituency statutes.

43. *See Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (finding statements concerning the directors' motivations were important in determining whether the directors could be sued); Strine, *supra* note 28, at 147–48 (“By confessing that he was placing his altruistic interest in helping workers and consumers over his duty to stockholders, Henry Ford made it impossible for the court to afford him business judgment deference.”).

statutes to support the claim that existing law protects social enterprise directors from the standards established by *Revlon*.<sup>44</sup>

Currently, thirty-two states have some version of a constituency statute that permits corporate directors to consider the interests of non-shareholder stakeholders.<sup>45</sup> Notably, neither Delaware nor Kansas has a constituency statute. Chancellor Leo E. Strine of the Delaware Court of Chancery addressed the profit-maximizing pressures on boards in a recent law review essay:

Precisely because it is ultimately the equity market that is the primary accountability system for public firms, efforts to tinker around with the margins of corporate law through initiatives like constituency statutes, the so-called Corporate Social Responsibility movement, and antitakeover provisions have been of very little utility in insulating corporate boards from stockholder and stock market pressures.<sup>46</sup>

Constituency statutes vary considerably from state to state. A few apply only to publicly traded corporations;<sup>47</sup> nearly one third only apply in takeover or change of control situations;<sup>48</sup> and some mandate

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44. *E.g.*, Mickels, *supra* note 28, at 290; Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 169 (2008).

45. ARIZ. REV. STAT. ANN. § 10-2702 (2008); CONN. GEN. STAT. § 33-756(d) (2008); FLA. STAT. ANN. § 607.0830(3) (2007); GA. CODE ANN. § 14-2-202(b)(5) (2003); HAW. REV. STAT. § 414-221(b) (2004); IDAHO CODE ANN. §§ 30-1602, 1702 (2008); 805 ILL. COMP. STAT. ANN. 5/8.85 (2004); IND. CODE ANN. § 23-1-35-1(d) (2008); IOWA CODE ANN. § 491.101B (1999); KY. REV. STAT. ANN. § 271B.12-210(4) (2003); LA. REV. STAT. ANN. § 12:92(G)(2) (2008); ME. REV. STAT. ANN. tit. 13-C, § 831(6) (2009); MD. CODE ANN., CORPS. & ASS'NS § 2-104(b)(9) (2007); MASS. GEN. LAWS Ch. 15D §8.30 (2004); MINN. STAT. ANN. § 302A.251(5) (2004); MISS. CODE ANN. § 79-4-8.30(d) (2000); MO. ANN. STAT. § 351.347 (2001); NEV. REV. STAT. §78.138 (1999); N.J. STAT. ANN. §§ 14A:6-1(2), :6-14(4) (2003); N.M. STAT. ANN. § 53-11-35(D) (2004); N.Y. BUS. CORP. LAW § 717(b) (2003); N.D. CENT. CODE § 10-19.1-50(6) (2007); OHIO REV. CODE ANN. § 1701.59(E) (2009); OR. REV. STAT. § 60.357(5) (2009); 15 PA. CONS. STAT. ANN. § 1715 (1995); R.I. GEN. LAWS ANN. § 7-5.2-8(a) (2009); S.D. CODIFIED LAWS § 47-33-4(1) (2007); TENN. CODE ANN. §§ 48-103-202, 204 (2008); VT. STAT. ANN. tit. 11A, § 8.30(a)(3) (2007); VA. CODE ANN. §13.1-727.1 (1999); WIS. STAT. ANN. § 180.0827 (2002); WYO. STAT. ANN. § 17-16-830(g) (2009). For a more complete discussion of constituency statutes, see John Tyler, *Negating the Legal Problem of Having "Two Masters": A Framework for L3C Fiduciary Duties and Accountability*, 35 VT. L. REV. 117, 131–38 (2010). *See also* Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85 (1999).

46. Strine, *supra* note 28, at 153.

47. *See, e.g.*, CONN. GEN. STAT. § 33-756(d) (2008); VT. STAT. ANN. tit. 11A, § 8.30(a)(3) (2007); IDAHO CODE ANN. §§ 30-1602, 1702 (2008); S.D. CODIFIED LAWS § 47-33-4(1) (2007).

48. Constituency statutes that apply only in the context of a takeover include: IOWA CODE ANN. § 490.1108 (1999); LA. REV. STAT. ANN. § 12:92(g) (1994); MD. CODE ANN. CORPS. & ASS'NS § 2-104(9) (2007); MO. ANN. STAT. § 351.347(1) (2001); N.J. STAT. ANN. § 14A:6-1 (Supp. 2001); OR. REV. STAT. § 60.357 (1988); and TENN. CODE ANN. § 48-103-204 (1995). Constituency statutes that apply in the broader change of control context include: CONN. GEN. STAT. §33-756

consideration of shareholder interests while also allowing consideration of other stakeholder interests.<sup>49</sup> Some statutes explicitly list allowable stakeholders, some apply to directors but not officers, and a few have opt-in provisions.<sup>50</sup> Essentially, constituency statutes allow directors to consider some stakeholders in certain contexts. Constituency statutes do not require directors and officers to consider stakeholders when making decisions and do not prioritize non-shareholder stakeholders over shareholders. In his essay exploring the new L3C hybrid social enterprise entity, John Tyler sums up the effect of constituency statutes on social enterprises:

[T]here are strong legal and practical arguments that decisions to benefit non-shareholder interests or minimize effects on non-shareholders must still be justified relative to shareholder value . . . . [B]ecause maximizing shareholder value appears to be the dominant applicable theory for purposes of the for-profit corporation . . . constituency statutes may not generally protect directors motivated by a desire to maximize benefits to non-shareholder interests when doing so has no legitimate benefit to shareholders.<sup>51</sup>

The resultant insecurity has caused many mission-driven corporations to structure their enterprises creatively in an attempt to protect their corporate mission with shareholder agreements, stock class restrictions, non-profit arms, and amendments to the corporation's articles, all with limited success.<sup>52</sup> B Lab encourages companies seeking B Corp Certification to incorporate in a state with a constituency statute;

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(2008); IDAHO CODE ANN. §§ 30-1602, 1702 (2008); and S.D. CODIFIED LAWS §47-33-4(1) (2007). Lisa M. Fairfax, *Doing Well While Doing Good: Reassessing the Scope of Directors' Fiduciary Obligations in For-Profit Corporations with Non-Shareholder Beneficiaries*, 59 WASH. & LEE L. REV. 409, 463 (2002) (noting that constituency statutes were enacted in response to *Revlon* and almost one-third apply only in the context of a takeover).

49. MISS. CODE ANN. § 79-4-8.30(f) (2000); N.M. STAT. ANN. § 53-11-35(D) (2004); OHIO REV. CODE ANN. § 1701.59(F) (2003); WYO. STAT. ANN. § 17-16-830(g) (2009).

50. GA. CODE ANN. § 14-2-202(b)(5) (2003); TENN. CODE ANN. §48-103-204 (1995); PA. CONS. STAT. §1715 (1995).

51. Tyler, *supra* note 45, at 135, 137.

52. See, e.g., Ryan J. Gaffney, *Hype and Hostility for Hybrid Companies: a Fourth Sector Case Study*, 5 J. BUS. ENTREPRENEURSHIP & L. 329, 334–37 (discussing the traditional approaches of using multiple entities and not-for-loss affiliates); Dana Brakman Reiser, *Charity Law's Essentials*, 86 NOTRE DAME L. REV. 1, 47 (2011) (discussing various restrictions to the for-profit form for companies wanting to pursue charitable missions, including Google Inc.'s two-tier stock structure that protects the founders' mission.); Antony Page & Robert A. Katz, *The Truth About Ben and Jerry's*, STAN. SOC. INNOVATION REV. 39, 41 (2011) (discussing Ben and Jerry's dual tiered stock structure and noting that Google and New York Times Co. have similar structures to give supermajority voting to its founders).

however, the extent of the protection to dual mission corporate directors is unclear.<sup>53</sup> Some social enterprises have gravitated toward the limited liability company, which allows increased flexibility in its organizational documents. LLCs, however, are also often less attractive to investors, particularly institutional investors, because of the lack of ownership transferability and inability to go public. Other businesses have avoided the existing corporate law barriers by creating separate non-profit arms or related foundations.<sup>54</sup>

In response to this struggle to fit within the confines of the traditional corporate structure and existing corporate law, B Lab enlisted a corporate attorney to draft model legislation and began a nationwide campaign to create a new legal business form, the benefit corporation.

#### *E. Model Benefit Corporation Legislation*

Unlike LLCs, which originated in the early 1990s, benefit corporations are not a completely new type of business entity. Under the model legislation, benefit corporations are traditional corporations, incorporated under a state's general corporate law, that have elected to be subject to special provisions that impose stricter accountability and transparency requirements and explicitly alter some traditional corporate norms.<sup>55</sup> States that have adopted benefit corporation legislation add the legislation to the existing corporate code and companies elect benefit corporation status, much like statutory close corporation provisions.<sup>56</sup>

The main characteristics of benefit corporations are: (1) a requirement that the corporation have a purpose to create a material positive impact on society and the environment; (2) a requirement that directors consider non-shareholder interests as well as shareholder interests when making decisions; and (3) a requirement to publish an annual report of its social and environmental performance measured by an independent, third-party standard.<sup>57</sup> Electing to become a benefit corporation is voluntary and requires a two-thirds vote of the shareholders.<sup>58</sup>

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53. Tyler, *supra* note 45, at 137.

54. Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337, 365 (2009) (discussing the "multiple-entity" approach and its disadvantages).

55. MODEL BENEFIT CORP. LEGISLATION § 101(c) (B Lab 2013).

56. *See e.g.*, DEL. CODE ANN. tit. 8, §§ 341–356 (2013).

57. BENEFIT CORPORATION WHITE PAPER, *supra* note 11, at 15.

58. MODEL BENEFIT CORP. LEGISLATION § 104 (B Lab 2013).

A benefit corporation must adopt a general purpose to create a “material, positive impact on society and the environment, taken as a whole, as assessed against a third-party standard, from the business and operations of a benefit corporation.”<sup>59</sup> Benefit corporations are allowed to have a specific public benefit as well, and the model legislation lists many possibilities, including: providing low-income or underserved individuals or communities with beneficial products or services, promoting economic opportunity for individuals or communities beyond the creation of jobs in the ordinary course of business, preserving the environment, and improving human health.<sup>60</sup> The legislation was written so that financial interests of the corporation do not necessarily take precedence over the public benefit purposes.

Directors of a benefit corporation are required to consider the effects of any action or inaction on shareholders, employees, customers, the community, and the environment.<sup>61</sup> Additionally, the legislation explicitly requires directors to consider both the long-term and short-term interests of the corporation and to consider how decisions will affect the corporation’s ability to accomplish its general public benefit purpose.<sup>62</sup> In theory, shareholders could bring an action against directors and officers for failure to create a positive social and environmental impact, but they could not bring a claim for failure to maximize profit.<sup>63</sup> The legislation does limit director liability for monetary damages, however, so shareholders may be limited to injunctive relief from a court.<sup>64</sup>

Further, a benefit corporation is required to create and publish an annual benefit report that includes a description of the ways the corporation created a material positive impact and any ways it failed to accomplish creating a positive impact.<sup>65</sup> It is also required to explain why it chose, and how it applied, the third-party standard that it used.<sup>66</sup> Benefit corporations are not required to use the third-party standard created by B Lab, nor become B Corp certified, but they must use a third-party organization that provides comprehensive, credible,

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59. §§ 201(a), 102 (2013).

60. §§ 201(b), 102(a) (2013).

61. § 301(a)(1) (2013).

62. § 301(a)(1)(vi) (2013).

63. § 305 (2013).

64. § 301(c) (2013).

65. § 401 (2013).

66. § 401(a) (2013).

independent, and transparent standards.<sup>67</sup> Of course, B Lab's B Corp Certification is a possible third-party standard, but there are many other third-party standards available as well. B Lab published a list of recommended third-party standards including: The Global Reporting Initiative (GRI), GreenSeal, Underwriters Laboratories (UL), ISO2600, and Green America.<sup>68</sup> Some organizations may provide a better fit for a particular industry, business size, or regional area. Although the model legislation allows organizations to choose any third party standard, to eliminate the potential for fraud and to allow for ease of data collection, Kansas should consider limiting the choices to a few well-known and respected standards.

Maryland was the first state to pass benefit corporation legislation in April 2010.<sup>69</sup> Since then eighteen additional states and the District of Columbia have passed the legislation.<sup>70</sup> Three more states have introduced the legislation<sup>71</sup> and Washington has passed "Special Purpose Corporation" legislation that requires corporations to adhere to a third-party corporate social responsibility standard if the requirement is included in the articles of incorporation.<sup>72</sup>

#### *F. Other Hybrid Entities*

In addition to the benefit corporation, there have been other new "hybrid" legal entities adopted by various states. The limited liability low profit company (L3C) is the most successful, having been adopted by nine states to date.<sup>73</sup> The L3C was created to attract program-related investments (PRIs) from foundations.<sup>74</sup> The idea is that, although

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67. § 102(a) (2013) ("Third-party standard.").

68. *Selecting a Third Party Standard*, BENEFIT CORP. INFO. CTR., <http://benefitcorp.net/selecting-a-third-party-standard/list-of-standards> (last visited Nov. 8, 2013).

69. MD. CODE ANN. CORPS & ASS'NS § 5-6C-01 (West 2012).

70. States that have enacted benefit corporation legislation include: Arizona, Arkansas, California, Colorado, Delaware, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Nevada, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, and the District of Columbia. *Passing Legislation*, BENEFIT CORP. INFO. CTR., <http://www.bcorporation.net/what-are-b-corps/legislation> (last visited Nov. 9, 2013).

71. *Passing Legislation*, BENEFIT CORP. INFO. CTR., <http://www.bcorporation.net/what-are-b-corps/legislation> (last visited Nov. 9, 2013).

72. WASH. REV. CODE § 23B.25.040(2)(b) (2012), available at <http://apps.leg.wa.gov/rcw/default.aspx?cite=23B.25&full=true>.

73. *Laws, AMERICANS FOR COMMUNITY DEVELOPMENT*, <http://americansforcommunitydevelopment.org/legislation.html> (last visited Sept. 28, 2013).

74. BENEFIT CORPORATION WHITE PAPER, *supra* note 11, app. C 2. According to the paper's authors:

foundations have the latitude to invest in businesses that have a charter substantially similar to the mission of the foundation, due diligence to research PRIs is costly and time consuming. As a result, most foundations overlook the potential investment opportunity in for-profit companies that have missions that would qualify for the funding. The L3C seeks to rectify this by putting explicit language, sanctioned by the IRS for PRIs, in its organizational documents to make it easier for foundations to recognize the L3C as a potential investment.<sup>75</sup> Ultimately, proponents hope that the IRS will recognize L3Cs as preemptive program-related investments.<sup>76</sup>

On the same day that benefit corporation legislation passed in California, the legislators also passed the Corporate Flexibility Act, making the flexible purpose corporation another incorporation option for social entrepreneurs.<sup>77</sup> Flexible purpose corporations must include in their articles of incorporation a statement of specific purpose.<sup>78</sup> The purpose can either be one of the activities that charitable organizations are authorized by the IRS to have for tax-exempt status, or it can be a purpose of providing a long-term or short-term benefit to the corporation's employees, suppliers, customers, creditors, the community and society, or the environment.<sup>79</sup> Flexible purpose corporations are not required to be assessed by a third-party standard or to pursue a general public benefit the way that benefit corporations must.<sup>80</sup> They are permissive and allow directors to consider the specific purpose when making decisions, much like constituency statutes, but do not require directors to consider other non-shareholder stakeholders when making

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Program-related investments are investments made by foundations to support charitable activities that involve the potential return of capital within an established time frame. Tax-exempt section 501(c)(3) private foundations are required to distribute 5% of their income each year for charitable purposes, either in the form of grants or investments. If they choose to invest the money, any investment must qualify as a PRI, which as defined by sections 4944(c) and 170(c)(2)(B) of the Internal Revenue Code are those investments with primarily religious, charitable, scientific, literary, or educational purposes.

*Id.*

75. *The Concept of the L3C*, AMERICANS FOR COMMUNITY DEVELOPMENT, <http://americansforcommunitydevelopment.org/concept.html> (last visited Jan. 10, 2012).

76. *Cf.* BENEFIT CORPORATION WHITE PAPER, *supra* note 11, app. C 3 (noting that the IRS has not approved program-related investments in L3Cs and this may pose a risk to foundations who invest in L3Cs "as somehow 'pre-approved' by the IRS").

77. CAL. CORP. CODE §§ 2500–3503 (2012).

78. §§ 2602(b)(2)(A)–(B).

79. *Id.*

80. *Id.*

decisions the way benefit corporation statutes do.<sup>81</sup> The statute protects flexible purpose corporations from lawsuits for failure to maximize shareholder profit in change-of-control situations without the added requirement of transparency or mandate to produce a social benefit.<sup>82</sup>

Maryland, the first state to pass benefit corporation legislation, later passed a benefit LLC statute modeled on the benefit corporation legislation.<sup>83</sup> The addition of the benefit requirements to the LLC statute was likely unnecessary as the LLC form is highly flexible and can accommodate social enterprises with ease. Unlike the L3C, which was created with a specific purpose of increasing investments from foundations, the benefit LLC in Maryland merely provides the added benefit of branding. Washington has also passed legislation allowing incorporation of social purpose corporations.<sup>84</sup> The legislation is very similar to benefit corporation legislation except that directors are not mandated to consider other stakeholders. Instead, directors *may* consider other stakeholders when making decisions, much like under a constituency statute.<sup>85</sup>

The rise in the number of social enterprise statutes enacted in recent years is promising as a sign that the public and legislators recognize the need for additional entity forms. There is a possibility, however, that the vast number of statutes will create unnecessary competition—for example, between the flexible purpose corporation and the benefit corporation in California—frustrating the effort and ultimately causing more difficulty for consumers.

### III. ANALYSIS

Commentators on the new benefit corporation legislation have thus far been critical, not only of distinct provisions of the Model Benefit Corporation Legislation, but of the legislation generally.<sup>86</sup> Although

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81. *Id.*

82. § 2700(c).

83. MD. CODE ANN., CORPS. & ASS'NS §§ 4A-1101–1108 (2013).

84. WASH. REV. CODE § 23B.25.005–.150. (2012).

85. *Id.*

86. Michael R. Deskins, *Benefit Corporation Legislation, Version 1.0-A Breakthrough in Stakeholder Rights?*, 15 LEWIS & CLARK L. REV. 1047, 1067 (2011) (criticizing the Maryland statute for failing “to cure the issue of stakeholder neglect in corporate decision-making”); Briana Cummings, *Benefit Corporations: How to Enforce A Mandate to Promote the Public Interest*, 112 COLUM. L. REV. 578 (2012) (arguing that the requirements of certification from an independent third party and annual reports to the public “are ill-suited to the regulation of social welfare objectives”).



some argue that benefit corporations are unnecessary and that current corporate law is adequate to accommodate mission-driven businesses,<sup>87</sup> those who support the idea of social enterprise legislation have concerns that the vagueness of the public-benefit requirement and the third-party standard opens the door to “greenwashing” or fraud.<sup>88</sup> Others argue that choosing to incorporate as a benefit corporation limits a company’s ability to attract capital because investors are less likely to invest in companies without profit as the primary goal.<sup>89</sup>

#### A. *Enhanced Legal Protection*

##### 1. Successor Concerns and Change-of-Control Scenarios

Whether directors of mission-driven businesses breach their fiduciary duties by considering non-shareholders when making decisions depends considerably on the context of the decision, and is anything but clear.<sup>90</sup> There is evidence to suggest that even decisions usually afforded protection by the business judgment rule may not be afforded such protection when a director explicitly states that a decision was made without regard for shareholder wealth maximization.<sup>91</sup> In a recent essay, Leo E. Strine, Jr., Chancellor of the Delaware Court of Chancery, commented on the famous case of *Dodge v. Ford Motor Co.*,<sup>92</sup> in which Henry Ford explicitly declined to increase the dividend to shareholders in order to reinvest in the company and thus improve the lives of his workers.<sup>93</sup> Chancellor Strine stated that “[b]y confessing that he was placing his altruistic interest in helping workers and consumers over his duty to stockholders, Henry Ford made it impossible for the court to afford him business judgment deference.”<sup>94</sup>

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87. Underberg, *supra* note 28.

88. Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?* 46 WAKE FOREST L. REV. 591, 611 (2011).

89. Ashley Schoenjahn, *New Faces of Corporate Responsibility: Will New Entity Forms Allow Businesses to Do Good?*, 37 J. CORP. L. 453, 471–72 (2012).

90. See Part II.C., *supra*.

91. See Murray, *supra* note 34, at 12 (arguing that cases enforcing shareholder profit maximization are rare because directors, officers, and their lawyers “seem to have realized they need to tie altruistic motivations back to long-term shareholder value”).

92. 170 N.W. 668 (Mich. 1919).

93. *Id.* at 671. (“My ambition,” declared Mr. Ford, “is to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this, we are putting the greatest share of our profits back into the business.”).

94. Strine, *supra* note 28, at 147–48.

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Benefit corporation statutes clearly define the dual-mission purpose of socially motivated businesses and go one step further by *requiring* directors and officers to consider other stakeholders when making decisions. The legislation circumvents the debate over whether a corporation *should* consider other stakeholders to act ethically and bypasses the muddy waters surrounding fiduciary duties in traditional corporations by clearly articulating that the fiduciary duties for directors of benefit corporations extend to non-shareholder stakeholders. Whether the mandate is enforceable and specific enough to guide directors in decision-making is debated; and as time goes on, additional tweaking of the statutes may be necessary to ensure compliance and ultimately balance the rights afforded to shareholders and directors.

Critics argue that benefit corporation legislation allows directors to make excuses for poor decisions. While the benefit corporation legislation does give corporate directors enhanced protection from shareholder lawsuits for failure to maximize profit, directors in traditional corporations are already largely protected by the business judgment rule, absent a showing of waste, for day-to-day decisions.<sup>95</sup> A clear and distinct statute is needed because there is uncertainty as to whether the business judgment rule applies to social enterprises and directors are unable to act in the best interest of all stakeholders in change-of-control situations in many states. Further, the legislation potentially gives shareholders additional power to bring an action for a benefit corporation's failure to pursue the general public benefit to which it is committed. Although relief is limited to nonmonetary remedies, shareholders could potentially seek injunctive relief and alter the course of conduct of the corporation.<sup>96</sup> In addition, shareholders always have the ability to vote out a director or to sell their shares in the company if they are unsatisfied with the direction the company is taking. Finally, existing corporate law provides protection for self-dealing, misrepresentation, and fraud.<sup>97</sup> Benefit corporation legislation does not alter that external framework.

The important benefit that the legislation provides to social

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95. See *supra* notes 28–32 and accompanying text.

96. MODEL BENEFIT CORP. LEGISLATION § 102 (benefit enforcement proceeding) and § 301(c) (exoneration from personal liability generally) (B Lab 2013).

97. See, e.g., Schoenjahn, *supra* note 89, at 456 (“The business judgment rule does not blindly protect every decision that boards make . . . [it] does not protect directors who breach their fiduciary duties or make decisions without critically assessing the information necessary to reach an informed decision.”).

enterprises is that it rebuts the *Unocal* and *Revlon* standards, which are the certain legal impediments to any for-profit corporation in a non-constituency statute state that does not adhere to profit maximization as its primary consideration. Additionally, the legislation clarifies the gray area surrounding director fiduciary duties in decision-making roles on a day-to-day basis. Some academics have minimized the need for this enhanced legal protection,<sup>98</sup> but successor concerns and fear of the company's mission becoming diluted at succession or after acquisition are common and well-founded.<sup>99</sup> As the table below illustrates, many socially conscious companies have fewer social initiatives after acquisition.

Table 1: Takeover of ethical companies by multinationals (examples)<sup>100</sup>

Company	Product	Acquiring company	Ethiscore* before	Ethiscore* after
Body Shop	Cosmetics	L'Oréal	11	3.5
Green & Blacks	Chocolate	Cadbury Schweppes	16	8.5
Ben and Jerry's	Ice cream	Unilever	n/a	3.5
Tom's Maine	Toothpaste	Colgate Palmolive	16	10.5

\* Ethiscore is a rating that takes into consideration nearly 300 topics under five main categories: animals, environment, people, politics, and sustainability.<sup>101</sup>

In fact, socially conscious businesses may be more likely to be the targets of takeovers—friendly or hostile.<sup>102</sup> Some larger corporations

98. See, e.g., Einer R. Elhauge, *Corporate Managers' Operational Discretion to Sacrifice Profits in the Public Interest*, in ENVIRONMENTAL PROTECTION AND THE SOCIAL RESPONSIBILITY OF FIRMS 13, 14 (Bruce L. Hay et al. eds., 2005) (arguing that managers of ordinary corporations have some legal discretion to sacrifice profits in the public interest); LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 32 (2012) ("As far as the law is concerned, maximizing shareholder value is not a requirement; it is just one possible corporate objective out of many.").

99. Dobrinka Veljković & Daliborka Petrović, *The Role of Corporate Image in the Process of Company Takeovers*, 8(1) MEGATREND REV.: THE INT'L REV. APPLIED ECON. 77, 88–89 (2011).

100. Adapted from *id.* at 88.

101. *Ethical Ratings*, ETHICAL CONSUMER, <http://www.ethicalconsumer.org/shoppingethically/ourethicalratings.aspx> (last visited Oct. 27, 2013).

102. See Alicia E. Plerhoples, *Can an Old Dog Learn New Tricks? Applying Traditional Corporate Law Principles to New Social Enterprise Legislation*, 13 TRANSACTIONS: TENN. J. BUS. L. 221, 233–34 (2012). According to Plerhoples,

A social enterprise with steady or high growth (or the potential for such) might face a sale or change in control transaction, either because the company's stock price reflects its pursuit of a social or environmental mission or because profit-maximizing businesses

view companies with an ethical corporate image as an easy entry into the market,<sup>103</sup> while others might target socially responsible businesses precisely because they do not maximize shareholder profits.<sup>104</sup> Companies that are not running at maximum efficiency can be bought and “trimmed” to be much more profitable.

One goal—and one of the most important potential benefits—of incorporating as a benefit corporation is ensuring that the mission of the corporation will survive when the company is sold or the founder’s successor takes over. By incorporating as a benefit corporation, Patagonia’s founder, Yvon Chouinard, hoped to ensure that the mission of the corporation would survive.<sup>105</sup> According to Chouinard,

Patagonia is trying to build a company that could last 100 years. . . . Benefit corporation legislation creates the legal framework to enable mission-driven companies like Patagonia to stay mission-driven through succession, capital raises, and even changes in ownership, by institutionalizing the values, culture, processes, and high standards put in place by founding entrepreneurs.<sup>106</sup>

Most benefit corporation statutes require at least a two-thirds vote of all shareholders for the corporation to transition from a benefit corporation to a traditional corporation.<sup>107</sup> However, only California, Massachusetts, Delaware, and Colorado benefit corporation statutes explicitly provide for dissenters’ rights, which may increase the likelihood of shareholder lawsuits from investors who are unhappy with a transition to or from benefit corporation status.<sup>108</sup> Allowing for

want a piece of the market share for conscientious consumers. That is, a social enterprise may face a change in control transaction precisely because company earnings are not its only bottom line.

*Id.*

103. *Id.*

104. *Id.* See also Murray, *supra* note 34, at 39 (acknowledging that “successful social enterprises . . . may be prime hostile takeover targets”).

105. Bart King, *Patagonia is First to Register for Benefit Corporation Status in California*, SUSTAINABLE BRANDS (Jan. 4, 2012), [http://www.sustainablebrands.com/news\\_and\\_views/articles/patagonia-first-register-%E2%80%98benefit-corporation%E2%80%99-status-california](http://www.sustainablebrands.com/news_and_views/articles/patagonia-first-register-%E2%80%98benefit-corporation%E2%80%99-status-california).

106. *Id.*

107. MODEL BENEFIT CORP. LEGISLATION § 104 (B Lab 2013). An amendment to the articles or a fundamental transaction that will terminate benefit corporation status also requires a minimum two-thirds vote. § 105 (2013).

108. CAL. CORP. CODE § 14604 (2012); MASS. GEN. LAWS ANN. ch. 156E, §5 (2012) (allowing for appraisal rights only in the context of a traditional corporation electing benefit corporation status); S.B. 47, 147th Gen. Assemb. (Del. 2013); H.B. 13-1138, 69th Gen. Assemb., 1st Sess. (Colo. 2013).

dissenters' rights adds an additional layer of protection for corporations seeking benefit corporation status by ensuring that investors' and directors' interests remain aligned and preventing potential litigation.

*B. Branding and Differentiation*

Although individual statutes vary by state, the public benefit requirement in the model legislation is purposely broad to avoid allowing companies to choose one narrow, specific public-benefit purpose and claim benefit corporation status.<sup>109</sup> This reduces the likelihood that a corporation will falsely market itself as “green” or socially beneficial when it is actually doing very little good overall. The model legislation also contains detailed descriptions of independent third-party standards, and B Lab has published guidelines for businesses choosing a third-party standard.<sup>110</sup> Despite this, much of the criticism of benefit corporations is due to the ambiguity of the third-party standard requirement.<sup>111</sup> Professor Dana Brakman Reiser, in a 2011 law review article, articulated this concern:

The requirement of general public benefit is vague and undefined. The determination of whether a particular organization's goals pursue a general public benefit is left to an unregulated third-party standards setter. . . . 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.<sup>112</sup>

Socially conscious watchdog organizations have struggled for years to clearly articulate a set of metrics that effectively measures non-financial performance of companies.<sup>113</sup> Part of the complication in determining effective metrics is that there is no “one-size-fits-all” approach. Arguably, companies in less common industries would be marginalized if the statute was written with strict guidelines on the third-

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109. BENEFIT CORPORATION WHITE PAPER, *supra* note 11, at 21.

110. *Criteria for Acceptable Third Party Standards*, BENEFIT CORP. INFO. CTR., <http://benefitcorp.net/selecting-a-third-party-standard/criteria-for-acceptable-third-party-standards> (last visited Oct. 24, 2013).

111. Reiser, *supra* note 88.

112. *Id.*

113. Symposium, *Panel Discussion: Reform: Are There Too Many Cooks in the Corporate Kitchen?*, 2 FORDHAM FIN. SEC. & TAX L.F. 67, 80 (1997) (noting that social benefit organizations “have been struggling for the last couple of years . . . to define some non-financial measure of performance that might influence investors”).

party standard that should be applied. Luckily, after years of working to measure non-financial performance and an increased demand for sustainability reporting from private companies, many reputable organizations have emerged, some tailored to specific industries and others more generalized.<sup>114</sup>

The model legislation allows the company to determine the proper third-party standard and requires the company to disclose its reasons for choosing the standard. The provision from the model legislation prescribes requirements for a comprehensive standard that is “developed by an organization that is independent of the benefit corporation,” is credible, and is transparent.<sup>115</sup>

Although most companies that are willing to undergo enhanced scrutiny, greater transparency, and increased potential liability are likely quite committed to operating a mission-driven business, the lack of regulation and consensus on third-party standards is a legitimate concern.<sup>116</sup> It may be that states will be forced to amend their statutes in the future to restrict further the third-party standard requirement, or it may be that courts will ultimately offer further clarification as to the way the third-party standard should be applied and which standards qualify for benefit corporations. For example, a court may eventually need to rule on a case interpreting when a third party has the requisite experience and knowledge to develop an allowable third-party standard.<sup>117</sup>

One important aspect of the benefit corporation reporting requirement is that it not only requires the company to report its successes in pursuing the general—and specific, if any—purpose, but also to report its shortcomings.<sup>118</sup> It requires the company to report its rationale for selecting or changing the third-party standard used to prepare the report.<sup>119</sup> Kansas, and other states, should consider adopting

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114. See *supra* note 68 and accompanying text.

115. MODEL BENEFIT CORP. LEGISLATION § 102(a) (B Lab 2013).

116. See Kyle Westaway & Dirk Sampselle, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards, and Legislatures*, 62 EMORY L.J. 999, 1039 (2013) (“It is essential to note that the statutes explicitly state that the assessment [of a corporation’s benefit purpose and performance] ‘does not need to be audited or certified by a third party’”).

117. E.g., MODEL BENEFIT CORP. LEGISLATION § 102 (B Lab 2013) (defining “third-party standard” as a standard that is comprehensive, developed by an independent organization, credible, and transparent). The third-party credibility requirement is satisfied only when a person is shown to have “access to necessary expertise to assess overall corporate social and environmental performance.” *Id.* Without more specific criteria, this requirement is ambiguous and could lead to abuse.

118. §401(a)(1)(iii).

119. BENEFIT CORPORATION WHITE PAPER, *supra* note 11, at 18.

existing credible reporting standards, like the B Corp Certification or Global Reporting Initiative standards, as model third-party standards with room for additional organizations to apply for inclusion in the statute. It will be up to the states or the shareholders to demand a highly credible reporting standard, the legitimacy of which may have important consequences for the long-term success of the benefit corporation.

Traditional corporations increasingly generate “sustainability reports” with varying levels of transparency and reporting criteria.<sup>120</sup> It is difficult for many small social enterprises to compete with large marketing budgets and resources. If the benefit corporation is successful in gaining notoriety and respect for good business practices, the higher transaction costs of mandatory reporting and analysis incurred annually by benefit corporations may be offset by the savings in marketing and branding required to convince consumers of the sustainability and socially beneficial policies of the organization. Labels like “organic” and “fair trade” have established this type of legitimacy and consumer trust; however, without additional regulation and oversight, the benefit corporation may find this level of acceptance unattainable. B Corp certified companies, for example, are randomly audited and information is verified when the company initially seeks certification. Allowing courts to order a similar audit of benefit corporations, as a remedy in a benefit enforcement proceeding, would likely achieve a higher level of legitimacy for the benefit corporation “brand.”

### C. Access to Capital and Financial Incentives

Benefit corporations have been criticized for their inability to attract capital because investors are more likely to be interested in corporations with profit as the primary motive.<sup>121</sup> However, the rapid growth of Socially Responsible Investing (SRI) and Impact Investing tends to prove that investors are looking at factors other than simply the highest return when choosing where to invest their money.<sup>122</sup> The SRI

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120. See *GRI Year In Review 2011–12*, GLOBAL REPORTING INITIATIVE, <https://www.globalreporting.org/resource/library/GRI-Annual-Report-2011-2012.pdf> (last visited Dec. 22, 2013) (citing the KPMG 2011 International Survey of Corporate Responsibility Reporting) (“95 percent of the 250 biggest companies in the world report their sustainability performance.”).

121. Schoenjahn, *supra* note 89, at 471–72.

122. *Perspectives on Progress: The Impact Investor Survey*, JP MORGAN AND GLOBAL IMPACT INVESTING NETWORK, at 21 (Jan. 7, 2013), available at [http://www.thegiin.org/cgi-bin/iowa/download?row=489&field=gated\\_download\\_1](http://www.thegiin.org/cgi-bin/iowa/download?row=489&field=gated_download_1) (surveying a set of 99 impact investors, each managing more than \$10 million in assets, who expect investing to grow from eight billion in

movement currently represents almost ten percent of U.S. assets under management, roughly \$2.3 trillion.<sup>123</sup> Traditionally, socially responsible investors boycotted companies that engaged in “bad” behavior—tobacco, alcohol, weapons, etc. More recently, investors have begun to seek out “good” companies and invest in enterprises that will have the most social impact, called Impact Investing.<sup>124</sup> A 2009 report published by the Monitor Institute, a philanthropy and nonprofit management consulting firm originally founded by Harvard economist Michael Porter, estimates that Impact Investing has the potential to grow to about one percent of total managed assets, approximately \$500 billion, over the next five to ten years.<sup>125</sup>

B Lab has developed a Global Impact Investing Ratings System (GIIRS) that provides rating and analytics for social and environmental impact of companies and funds similar to financial ratings and analytics.<sup>126</sup> Launched in September 2011, it now boasts over \$4 billion impact assets under management, provides ratings for 246 companies and 32 funds, and has an additional 103 companies and 28 funds in the works.<sup>127</sup> How much Impact Investing and SRI will grow in years to come is anyone’s guess, but the trend of investing with more in mind than financial return is undoubtedly growing and may give social enterprises access to additional revenue streams.

Although IRS regulations for tax-exempt nonprofits are rigid, benefit corporations, like L3Cs, can qualify for program-related investments, and it is possible that eventually legislators at the federal level may be persuaded to give tax advantages to benefit corporations. Philadelphia recently gave tax preference to certified sustainable businesses—B Corp certified businesses included—in the form of a tax credit of \$4,000.<sup>128</sup>

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2012 to nine billion in 2013).

123. *2010 Report of Socially Responsible Investment Trends in the United States*, UNITED STATES SOCIAL INVESTMENT FORUM (USSIF), at 7 (2010), available at [http://www.ussif.org/files/Publications/10\\_Trends\\_Exec\\_Summary.pdf](http://www.ussif.org/files/Publications/10_Trends_Exec_Summary.pdf).

124. GLOBAL IMPACT INVESTING NETWORK, <http://www.thegiin.org/cgi-bin/iowa/resources/about/index.html> (last visited Oct. 27, 2013) GIIRS defines impact investing as “investments made into companies, organizations, and funds with the intention to generate measurable social and environmental impact alongside a financial return.” *Id.*

125. Jessica Freireich & Katherine Fulton, *Investing for Social and Environmental Impact Executive Summary*, MONITOR INSTITUTE, at 3 (Jan. 2009), available at [http://www.monitorinstitute.com/impactinvesting/documents/InvestingforSocialandEnvImpact\\_Exec\\_Sum\\_000.pdf](http://www.monitorinstitute.com/impactinvesting/documents/InvestingforSocialandEnvImpact_Exec_Sum_000.pdf).

126. GIIRS, <http://giirs.org> (last visited Oct. 27, 2013).

127. *Id.*

128. *Philadelphia First City to Offer Green Biz Tax Incentives*, SUSTAINABLEBUSINESS.COM (Dec. 4, 2009), <http://www.sustainablebusiness.com/index.cfm/go/news.display/id/19350>.



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At least three universities have created financial incentives for social enterprises to hire recent graduates. New York University's Stern School of Business provides loan assistance for graduates who pursue careers in social enterprise, Yale School of Management has implemented a loan forgiveness program for graduates who go on to work for B Corp certified companies, and University of Pennsylvania's Wharton School and the University of North Carolina's Kenan-Flagler Business School offer educational discounts to employees of B Corp companies.<sup>129</sup>

Benefit corporation legislation offers greater protections for mission-driven social enterprises to go public, more confidence in taking on new investors, and more legal certainty, thus eliminating a large financing barrier. Benefit corporations that are financed with private equity or venture capital are more likely to attract patient investors who are aligned with companies' missions and goals. As benefit corporations become more widespread and well-known, additional financial opportunities and incentives will likely materialize.

#### D. Kansas

##### 1. Kansas Economic Climate

Nationally and statewide, the administrative focus has been on the best way to create jobs. Governor Sam Brownback's administration has made growing the Kansas economy and creating more jobs the central focus of legislative efforts.<sup>130</sup> The Kansas Chamber of Commerce includes "free enterprise" and "removing obstacles that impede job creation" as core principles.<sup>131</sup> New tax legislation and current economic conditions are estimated to produce a \$327 million budget shortfall in the fiscal year beginning in July 2013, which will limit the amount of funding available to state funded social programs.<sup>132</sup> Adopting benefit corporation legislation in Kansas, while not a substitute, would

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129. Murray, *supra* note 34, at 50.

130. Kansas Office of the Governor, *Growing the Kansas Economy*, <https://governor.ks.gov/road-map/growing-kansas-economy> (last visited Feb. 2, 2013).

131. The Kansas Chamber, 2012 LEGISLATIVE AGENDA FOR ECONOMIC GROWTH, at 1 (2012), available at [http://www.kansaschamber.org/wp-content/uploads/2011/05/2012-2012\\_Leg\\_Agenda1.pdf](http://www.kansaschamber.org/wp-content/uploads/2011/05/2012-2012_Leg_Agenda1.pdf) (last visited Oct. 22, 2013).

132. Tim Carpenter, *Kansas facing long-term \$327M budget hole*, TOPEKA CAPITAL JOURNAL (Nov. 6, 2012, 1:03 PM), <http://cjonline.com/news/2012-11-06/kansas-facing-long-term-327m-budget-hole>.

encourage social entrepreneurs to create startups in the state and may help bridge the gap by addressing social need in certain sectors. Kansas has ample opportunities for socially focused businesses—from agriculture, technology, and energy production, to manufacturing—and has a wide variety of industries that align with many existing social ventures. Any business can be a for-benefit business when it adopts best practices in core areas like employment, the environment, and community impact.

Farming and agriculture provide ample opportunities for social ventures—for example, organic farming is one of the fastest growing agricultural segments in the country.<sup>133</sup> The Kansas Department of Agriculture lists over eighty certified organic producers in the State.<sup>134</sup> The current administration is also focusing on the problem of declining populations in rural Kansas. Small farming operations, local distributors, or retailers may be a potential source of new jobs and population growth if given the proper incentives. The high-speed Google Fiber initiative has already prompted entrepreneurs and city officials in Kansas City to explore possible businesses that may develop around the new technology.<sup>135</sup> Although benefit corporation legislation has been introduced in a number of Midwestern states, it has yet to be introduced in Missouri, which would give Kansas the added advantage of being the state of choice for social entrepreneurs looking to incorporate a business in the Kansas City metropolitan area.

A few companies in the area have recently become B Corp certified. Ogden Publications, in Topeka, Kansas, became a B Corp certified company in May of 2010.<sup>136</sup> The company boasts a variety of well-known and niche publications including: Mother Earth News, Natural Home, Utne Reader, Grit, Gas Engine, and Motorcycle Classics.<sup>137</sup> In Kansas City, Big Vision Media Group, a branding and marketing

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133. *Organic Agriculture*, USDA ECONOMIC RESEARCH SERVICE, <http://www.ers.usda.gov/topics/natural-resources-environment/organic-agriculture.aspx> (last updated May 26, 2012).

134. *Certified Organic Producers in Kansas*, KANSAS DEPT. OF AGRICULTURE, [http://www.ksda.gov/kansas\\_agriculture/content/153/cid/1157](http://www.ksda.gov/kansas_agriculture/content/153/cid/1157) (last visited Feb. 7, 2013).

135. See Cyrus Farivar, *Startups, would you couch-surf Kansas City just to get Google Fiber?*, ARS TECHNICA (Aug. 23, 2012, 6:40 PM), <http://arstechnica.com/business/2012/08/startups-would-you-couchsurf-kansas-city-just-to-get-google-fiber/> (describing an innovative idea to bring social entrepreneurs into Kansas City homes rent-free to take advantage of Google Fiber and start new companies called Homes For Hackers).

136. Ogden Publications, Inc., *Find a B Corp*, B CORPORATION.NET, <http://www.bcorporation.net/community/ogden-publications-inc> (last visited Nov. 13, 2013).

137. OGDEN PUBLICATIONS, <http://www.ogdenpubs.com> (last visited Nov. 13, 2013).

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company, became B Corp certified in April 2011, and Arnold Development Group, a real estate investment and development firm that creates mixed-use walkable neighborhoods, became B Corp certified in November 2011.

The brilliance of the benefit corporation legislation is that it bypasses the debate of to what extent corporations should act ethically and instead, recognizing that a growing number of entrepreneurs are seeking to create socially-focused for-profit companies, creates an entirely voluntary process by which corporations and investors can choose to be held to higher levels of accountability. The legislation uses free market principles to allow a new type of for-profit business model to flourish while also addressing social issues. South Carolina Representative Tommy Stringer (R), who introduced the recently enacted benefit corporation legislation in South Carolina, pointed to the potential for private enterprises to address social problems:

By passing the South Carolina Benefit Corporation Act, we have joined the vanguard of states that are looking beyond government programs to solve our social problems. This inventive legislation will unleash the generosity of existing South Carolina businesses who wish to promote their commitment to corporate responsibility. Furthermore, this legislation enhances our ability to attract new businesses to our state that are willing to invest in our future.<sup>138</sup>

It reduces the potential for litigation by ensuring that investors and directors are on the same page in terms of commitment to the company's mission and opens up new potential funding sources as the number of investors looking for social impact in addition to financial return grows.

## 2. Delaware Corporate Law

Although Kansas traditionally follows Delaware corporate law,<sup>139</sup> the State of Kansas has a unique set of policy considerations that do not affect the State of Delaware. Because of these unique considerations, Kansas has adopted legislation that differs from Delaware. For example, because of Kansas's strong ties with family farmers, the State—along

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138. Rep. Tommy Stringer, *SC Benefit Corporation Bill Signed into Law*, TOMMYSTRINGER.COM (June 15, 2012), <http://www.tommystringer.com/2012/06/15/benefit-corporation-bill-signed-into-law>.

139. Edwin W. Hecker, Jr., *Fiduciary Duties in Business Entities*, 54 U. KAN. L. REV. 975, 975 (2006) (stating that Kansas has "consciously chosen to follow Delaware's lead in business legislation" and citing examples of Kansas courts articulating this choice).

with many other large agricultural states—has laws regulating corporate ownership of farming land.<sup>140</sup> Also, Kansas adopted the Business Entity Transactions Act<sup>141</sup> three years ago rather than adopt Delaware's provisions separately addressing various mixed entity transactions.<sup>142</sup>

Delaware recently passed its own version of benefit corporation legislation.<sup>143</sup> Rather than follow the model legislation, Delaware came up with its own version of the legislation, with many of the essential requirements stripped out. Most importantly, the Delaware legislation makes a third-party standard optional,<sup>144</sup> reduces the reporting requirement to biennially and only to shareholders,<sup>145</sup> and requires a specific public benefit purpose rather than a general public benefit requirement.<sup>146</sup> The Delaware version includes other variations from the model, including: a requirement of 90% shareholder approval to become a public benefit corporation;<sup>147</sup> dissenters' rights for shareholders voting "no" to public benefit corporation status;<sup>148</sup> a majority vote (rather than a two-thirds vote requirement) to approve the merger or sale of the company;<sup>149</sup> and the requirement that the corporation include "PBC" or some variant in its legal name.<sup>150</sup>

The first two important changes are the lack of a third-party standard requirement and the lack of a public reporting requirement, which are cornerstones of the model legislation. As previously mentioned, the third-party standard has been the subject of criticism because of the possibility for abuse. These concerns, however, stem from the possibility that a company could seek out a weak standard to use in annual reporting rather than a well-respected third-party standard. This concern about potential "greenwashing" becomes particularly well-founded when there is no third-party standard requirement at all.

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140. KAN. STAT. ANN. §§ 17-5901 to -5909; see Keith D. Haroldson, *Two Issues in Corporate Agriculture: Anticorporate Farming Statutes and Production Contracts*, 41 DRAKE L. REV. 393, 400 (1992) (stating that the block of nine Midwestern states with anti-corporate farming statutes could be considered the "anticorporate farming zone").

141. KAN. STAT. ANN. §§ 17-78-101 to -78-607.

142. See, e.g., DEL. CODE ANN. tit. 8, §§ 254, 263-266, 388-390; DEL. CODE ANN. tit. 6, §§ 18-209, 18-212 to -214, 18-216.

143. tit. 8, §§ 361-368.

144. tit. 8, § 366(c).

145. § 366(b), (c).

146. § 362(a).

147. § 363(a).

148. § 363(b).

149. § 363(c).

150. § 362(c).

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Combined with the lack of public reporting requirements and the Public Benefit Corporation (or PBC) naming convention, the lack of third-party standards creates the likelihood that a company could misrepresent its overall social, environmental, and governance achievements while benefiting from the “PBC” brand. The combination of these provisions has the potential to significantly undermine public transparency and accountability, two tenants of the model legislation.

The third important divergence from the model legislation is the specific public benefit purpose requirement. Unlike California’s Flexible Purpose Corporation, which allows for a narrow purpose only, the Delaware legislation, while requiring a specific public purpose, also contains overarching language that may, in fact, be more stringent than even the model legislation’s “general purpose” requirement. The Delaware law requires directors to “manage or direct the business and affairs of the public benefit corporation in a manner that balances (1) the pecuniary interests of the stockholders, (2) the best interests of those materially affected by the corporation’s conduct, and (3) the specific public benefit or public benefits identified in its certificate of incorporation.”<sup>151</sup> So, although the statute requires a specific public benefit, it requires directors to “balance” the interests of shareholders, stakeholders, and the public benefit(s). By contrast, the model legislation only requires directors to “consider” the interests of a list of stakeholders.

Despite Kansas’s history in following Delaware’s corporate law, there are good reasons to instead pass a modified version of Delaware’s public benefit corporation legislation. Colorado recently passed a version similar to the Delaware version, except it includes annual public reporting requirements and, at least implicitly, requires a third-party standard.<sup>152</sup> Kansas, like Delaware, does not have a constituency statute protecting directors of dual-mission companies. The emergence of social enterprises in recent years puts Kansas at a distinct disadvantage in attracting any market share in this emerging sector. Kansas should therefore consider adopting a version of the model legislation or version similar to Colorado’s with explicit provisions requiring an independent third-party standard.

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151. § 365(a).

152. H.B. 13-1138, 69th Gen. Assemb., 1st Sess. (Colo. 2013).

### 3. Recommended Provisions

To maximize the value of benefit corporation legislation, both to social enterprises and to Kansas, the following recommendations should be included in any provisions adopted by the State. First, the legislation should include dissenters' rights both in the context of traditional corporations switching to benefit corporation status and for benefit corporations switching to traditional corporation status. Second, Kansas should only adopt the requirement of a designated benefit director if additional qualifications are included. Third, the legislation should allow only a select few third party standards and require annual benefit reports be recorded within a public database.

#### a. Dissenters' Rights

Although the model legislation is thorough, most states have adopted a version of the model legislation to suit their own needs and address concerns. California, Massachusetts, Delaware, and Colorado are the only states to adopt dissenters' rights for shareholders opposed to the transition to a benefit corporation. In California, dissenting shareholders who oppose the transition to or from benefit corporation status have appraisal rights.<sup>153</sup> The risk in not adopting dissenters' rights, in addition to undermining the overall goal of aligning shareholder and director interests, is an increased risk of litigation from the dissenting shareholders.<sup>154</sup> On the other hand, allowing dissenters' rights for all minority shareholders makes it difficult for cash-strapped start-ups and early stage companies to elect benefit corporation status.<sup>155</sup>

Although adopting dissenters' rights may dissuade some companies from electing benefit corporation status, the potential cost of litigation far outweighs the cost of any cash payout to dissenting shareholders. Most companies interested in becoming benefit corporations are socially conscious companies with strong ethical and philanthropic goals. These companies likely have investors and shareholders who support the ethical focus of the company and are less likely to object to its electing benefit corporation status. Despite this, a corporation with profit as its primary

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153. CAL. CORP. CODE §§ 14603–14604 (2012).

154. See Murray, *supra* note 34, at 36 (warning that states that do not adopt dissenters' rights are "likely to face lawsuits from shareholders who object to the altering of the fundamental nature of their investment").

155. BENEFIT CORPORATION WHITE PAPER, *supra* note 11, at 27.

purpose, and social benefit second, is a profoundly different investment—and may generate a very different rate of return—than a corporation that puts the two on par or elevates social benefit above profit. Likewise, a benefit corporation transitioning to a traditional corporation is a fundamentally different investment for a shareholder who values transparency, accountability, and social impact.

Kansas should consider adopting dissenters' rights in both contexts, but only if there is no accessible marketplace to sell the shares. For example, dissenting shareholders of publicly traded companies would not be afforded the extra protection of appraisal rights. Admittedly, adopting dissenters' rights disproportionately affects small growing companies unable to buy back dissenting shares. Despite this, it is in the State's best interest to reduce the potential for litigation and protect and encourage investment. These public policy rationales outweigh the provision's potential for inhibiting adoption by a select few companies.

#### b. Benefit Director

The requirement of a benefit director—an independent director charged with writing an opinion as to whether the corporation, directors, and officers complied with the general and specific benefit requirements—should only be adopted if additional qualifications are included.<sup>156</sup> The model legislation requires that the benefit director be independent but allows the person to serve simultaneously as benefit officer.<sup>157</sup> The benefit officer is charged with the duty of preparing the benefit report.<sup>158</sup> To prepare a report articulating the achievements and setbacks in pursuing benefit goals, the officer would need to be intimately involved in the day-to-day operations and strategic plans of the corporation. One person holding both positions of director and benefit officer necessarily creates a conflict of interest by effectively eliminating the requirement that the benefit director be independent.<sup>159</sup>

While the benefit director provision was included to add an additional layer of transparency, it may have the opposite effect.<sup>160</sup>

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156. Cf. MODEL BENEFIT CORP. LEGISLATION § 302 (B Lab 2013) (permitting, but not requiring, the appointment of a benefit director).

157. § 302(b).

158. § 304(b)(2).

159. See § 102 (defining "Independent" as "having no material relationship with the benefit corporation" but excluding benefit directors and officers).

160. § 302 cmt. at 16–17 ("The statement of the benefit director required by subsection (c) is an important part of the transparency required under this chapter.").

Particularly in a small corporation, every director and officer should stand behind the benefit report and be aware of the benefit activities of the corporation. Dedicating one director as the spokesperson and certifier of the benefit report may deflect attention away from other directors and officers and potentially make the benefit director a target for replacement when benefit activities do not meet shareholders' expectations.<sup>161</sup> The benefit director may consequently be placed in the position of blaming other directors and officers for their failure to meet benefit goals, or risk replacement. If the reasons for a poor benefit report are systemic, replacing the benefit director would do little in the way of remedying the problem but may allow the corporation to avoid answering to shareholders in the short term.

If the goal of the benefit director is to enhance accountability, then the provision should include specific qualifications for the independent director. The provision could require, for example, that the benefit director be knowledgeable about or have prior experience with the third-party standard used to create the report. Otherwise, the director's opinion is of little value to shareholders. States considering including the benefit director position in the legislation should include additional qualification requirements, disallow the same person serving as benefit officer, and exempt small corporations—whether or not a statutory close corporation—from the requirement.<sup>162</sup> Alternatively, Kansas can choose to follow the approach taken by Delaware and Colorado and leave these provisions out.

### c. Enforcement and Accounting

To avoid the potential of benefit corporations adopting weak third-party standards, Kansas should consider amending the third-party standard requirement by adopting a few specific standards that meet the statutory criteria of comprehensiveness, credibility, independence, and transparency. Understandably, B Lab has refrained from promoting its own metrics as the only possible third-party standard so as to avoid accusations that it is acting in self-interest with the legislative effort. The

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161. § 302(c) (requiring the benefit director to include a statement of opinion as to whether the benefit corporation fulfilled its general and specific benefit goals).

162. States excluding the benefit director requirement include: California, Maryland, New York, and Virginia. States that have included a benefit director requirement include: Hawaii, Louisiana, Massachusetts, New Jersey, South Carolina, and Vermont. See J. Haskell Murray, *Benefit Corporations—State Statute Comparison Chart* (Jan. 1, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1988556](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988556) (last updated Dec. 6, 2012).



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reality, however, is that passage of the legislation in numerous states will spur many new companies—and not all of them an experienced nonprofit like B Lab—to create third-party certifications and assessments.

It would be wise for Kansas to adopt a few proven third-party standards and periodically review them to include additional industry-specific standards as needed. For example, because a benefit corporation is not required to obtain certification, but rather is required to use third-party standards to do a self-assessment, it makes sense that states adopt third-party standards providers who offer use of the standards without charge. Currently B Lab and Global Reporting Initiative (GRI) offer their assessment tools without charge.<sup>163</sup> Certifications or third-party standards assessments, other than those approved by the State, may be valuable to benefit corporations but ideally would not impact whether a company maintains benefit corporation status.

Requiring benefit corporations to use the standards put in place by one of only a few well-established third-party organizations would make it easier to implement a judicial remedy for shareholder suits (benefit enforcement proceedings). Specifically, rather than being limited to injunctive relief, courts would be able to require benefit corporations to bear the cost of a third-party audit in response to claims that the company has failed to serve a general public benefit. Adopting third-party standards of organizations that are capable of performing thorough independent audits and allowing an audit as a potential judicial remedy will give shareholder investors extra assurance that the corporation is fulfilling its dual mission and is accurately representing its efforts in annual reports.

Kansas should also consider requiring that benefit corporations register with the Attorney General's office, in the same way that charitable organizations do, by filing a copy of the annual benefit report with the office.<sup>164</sup> This central database would aid consumers in verifying benefit corporations and allow them to compare socially-focused organizations before investing or donating. Also, it would help the State and others track compliance with the annual benefit report requirement and create easy access to data on the measurable social, community, or environmental impact of registered benefit corporations.

Benefit corporation incentives are also gaining popularity. San

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163. BENEFIT CORPORATION WHITE PAPER, *supra* note 11, at 24.

164. Illinois recently added such a registration requirement to benefit corporation legislation passed August 2012 (effective January 1, 2013). S.B. 2897, 97th Gen. Assemb. (Ill. 2012).

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Francisco and Philadelphia now offer certain financial incentives to benefit corporations and a few universities have begun tuition forgiveness programs for students who go to work for benefit corporations. If the Kansas government or if other institutions in the State desire to offer tax advantages or other financial incentives to these types of social enterprises to encourage their growth, defined third-party standards will enable them to identify fraud or track and regulate businesses receiving incentives. Offering tax breaks or financial incentives, including encouraging local government product and service appropriation, could increase the desirability of incorporating in Kansas.

States that are resistant to the new legislation will likely be at a distinct disadvantage when it comes to attracting market share in this emerging sector of social enterprise. Encouraging social enterprises may help states address pressing societal needs that are not fully met by non-profit assistance and government programs. For example, B Corp certified companies are 55% more likely to cover some of the cost of insurance for their employees and 68% more likely to donate 10% or more of their profits to charity each year.<sup>165</sup> Social businesses are more likely to put offices in low socio-economic areas, like inner cities, and to engage with the community to address issues of poverty or education.<sup>166</sup> Innovative young thinkers are even willing to take a pay cut to work for socially responsible businesses.<sup>167</sup> Cultivating a climate open to social enterprise is one step toward attracting intellectual capital to the State. Tying incentives to local social benefits would help attract socially motivated companies to Kansas and help to address some of the State's pressing social needs. Eliminating legal barriers that exist for social enterprises is one step toward growing local economies and creating more jobs.

Benefit corporation legislation has passed with bi-partisan support in every state that has adopted it. It costs the states little to nothing, has the

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165. *The Evolution of an Entity: A Closer Look at Benefit Corporations*, SOCENTLAW.COM, <http://socentlaw.com/wp-content/uploads/2013/09/Final-B-Corp-Infographic1.jpg> (last accessed Nov. 13, 2013).

166. See, e.g., Blanca Torres, *IPO ignites "Pandora Effect" in Oakland*, SAN FRANCISCO BUSINESS TIMES (June 15, 2011, 1:05 PM), <http://www.bizjournals.com/sanfrancisco/blog/2011/06/pandora-ipo-oakland-office-space.html?page=all>.

167. See *New MBAs Would Sacrifice Pay for Ethics*, THE DAILY STAT, HARVARD BUSINESS REVIEW (May 17, 2011), <http://web.hbr.org/email/archive/dailystat.php?date=051711> (finding that graduating MBAs would take a salary reduction of over \$8,000 a year to work for ethical companies).

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potential to attract growing businesses and start-ups, and is completely voluntary for companies and shareholders alike. The legislation, in other words, is non-threatening. By creating distinct provisions under state corporate law in which shareholders, officers, and directors must affirmatively choose to participate, it avoids the intense ethical debate of whether corporations should be socially responsible. The legislation does not impose ethical obligations on existing corporations, nor does it imply that all corporations should be benefit corporations. Instead, it allows lawmakers to recognize the growing social enterprise movement while eliminating barriers to continued growth and leaving it up to the market to do the rest.

#### IV. CONCLUSION

Although benefit corporations are relatively new and untested, there is a growing demand for socially conscious businesses and a need for new legal business forms to accommodate them. Businesses that are firmly committed to pursuing social and environmental benefits should not be intimidated by traditional corporate norms and forced to bypass their mission for fear of litigation. Regardless of the specific legal reality faced by individual businesses, there is a strong and persistent assumption that profit maximization is the primary and central purpose of the corporation. Benefit corporation legislation includes a clear articulation of fiduciary duty by mandating the consideration of more than profit when making decisions. This clear articulation, along with a public benefit requirement, serves as notice to potential investors that the corporation, at minimum, will not make decisions to increase profitability if the decision will have a negative impact on society or the environment and, at maximum, may make decisions that reduce profitability in order to provide a public benefit.

Given the spike in socially conscious investors and funds, a clear framework for socially minded businesses allows access to financing that may be more patient and is closely aligned with the goals of the organization. The certainty of the legal framework should encourage businesses to scale and take on additional investors, and encourage entrepreneurs to create more socially focused businesses.

The benefit corporation gives social enterprises a way to differentiate themselves from other corporations that have large marketing budgets and make misleading claims about social and environmental responsibility. Benefit corporation legislation is a way for companies to embrace the social responsibility claims that many companies make—to

“walk the walk” rather than just “talk the talk.” As with any new legislation, benefit corporation statutes will certainly create some questions about how the statutes will apply in certain situations and how courts will interpret them. In particular, additional checks on the third-party standard providers or acceptable third-party standards will likely be required, although Kansas has the opportunity to limit potential misuse of the third-party standard requirement at adoption of the legislation. Despite its uncertainties, benefit corporation legislation takes an important step toward recognizing and encouraging an emerging sector of innovation and entrepreneurial spirit, and has the potential to alter the landscape of corporate America.