PROFIT, PEOPLE, PLANET, AND PERVERSION: THE NEED FOR ATTORNEY GENERAL ENFORCEMENT IN BENEFIT CORPORATION LEGISLATION

Abstract: For-profit, social entrepreneurship is a growing movement. As a result, in recent years, legislation authorizing the incorporation of a new form of for-profit business corporation known as a "benefit corporation" has been signed into law in numerous states. In addition to generating profit for shareholders, benefit corporations must "create" a "public benefit." The requirement that a corporation support a humanitarian cause in addition to turning a profit is a significant departure from shareholder primacy—the idea that the sole purpose of a corporation is to make money. While this legislation is a progressive and needed evolution in U.S. corporate law, the current benefit corporation form includes only limited, toothless accountability and enforcement mechanisms. The current legislation does little to deter bad actors from taking advantage of socially conscious consumers willing to pay a premium for ethically sourced goods and services. This Note argues for the addition of attorney general oversight and enforcement in benefit corporation legislation in order to root out and deter the incorporation and marketing of sham benefit corporations.

INTRODUCTION

Beginning with Maryland in 2010, more than half the states and the District of Columbia have enacted legislation authorizing the incorporation of a new form of for-profit business corporation known as a "benefit corporation."[1] Benefit corporations exist not only to maximize shareholder

[1] *See* ARIZ. REV. STAT. ANN. §§ 10-2401 et seq. (West 2015); ARK. CODE ANN. §§ 4-36-101 et seq. (West 2013); CAL. CORP. CODE §§ 14600 et seq. (West 2012); DEL. CODE ANN. tit. 8, § 362 et seq. (West 2013); FLA. STAT. ANN. § 607.601 et seq. (West 2014); COLO. REV. STAT. ANN. § 7-101-501 et seq. (West 2014); HAW. REV. STAT. §§ 420D-1 et seq. (West 2013); ILL. COMP. STAT. ANN. act 40 et seq. (West 2013); MASS. GEN. LAWS ch. 156E et seq. (West 2012); MD. CODE ANN., CORPS. & ASS'NS §§ 5-6C-01 et seq. (West 2012); MINN. STAT. ANN. § 304A.001 et seq. (West 2015); NEB. REV. STAT. § 21-401 et seq. (2014); NEV. REV. STAT. ANN. §§ 78B.010 et seq. (West 2014); N.H. REV. STAT. ANN. §§ 293-C:1 et seq. (2015); N.J. STAT. ANN. §§ 14A:18-1 et seq. (West 2015); N.Y. BUS. CORP. LAW §§ 1701–09 et seq. (McKinney 2013); L.A. REV. STAT. ANN. §§ 12:1801-32 et seq. (West 2013); 5 PA. STAT. ANN. §§ 3301–33 et seq. (West 2013); OR. REV. STAT. ANN. §§ 60.750 et seq. (West 2014); R.I. GEN. LAWS. ANN. §§ 7-5.3 et seq. (West 2013); S.C. CODE ANN. §§ 33-38-110 et seq. (2013); UTAH CODE ANN. § 16-10b-101 et seq. (West 2014); VT. STAT. ANN. tit. 11A, §§ 21.01 et seq. (2013); VA. CODE ANN. §13.1-782

Electronic copy available at: http://ssrn.com/abstract=2818855

value but to pursue and create benefits for the public.[2] Specifically, a benefit corporation must include in its certification of incorporation that its purpose is to "create" a "general public benefit."[3] Benefit corporations may also identify the creation of certain "specific public benefits."[4]

The benefit corporation form is built on the proposition that for-profit entities can and should be used to make progressive social and environmental contributions.[5] Indeed, large corporations do wield immense power and should be encouraged to act responsibly and improve society, not just enlarge their bottom lines.[6] To deter passivity in this lofty mission, benefit

---

et seq. (West 2013); D.C. CODE §§ 29-1301.01 et seq. (West 2013); W. VA. CODE ANN. § 31F-1-101 et seq. (West 2014); WASH. REV. CODE ANN. §§ 23B.25.005 et seq. (West 2012); *see also* J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law,* 4 HARV. BUS. L. REV. 345, 348 (2014) [hereinafter Murray, *Social Enterprise Innovation*] (noting that approximately half the states have passed benefit corporation legislation); *State by State Status of Legislation*, B LAB, http://benefitcorp.net/policymakers/state-by-state-status (last visited Feb. 29, 2016) (collecting state-by-state information on benefit corporation legislation, either passed or pending). States have different nomenclature for their benefit corporations, but the legislation is generally quite similar. *See* DEL. CODE ANN. tit. 8, § 361 (naming Delaware's corporate form a "public benefit corporation"); HAW. REV. STAT. § 420D-2 (naming Hawaii's benefit corporate form a "sustainable business corporation"). In addition to their benefit corporation statutes, California, Florida, and Washington also enacted statutes authorizing the incorporation of "social purpose corporations" or "flexible purpose corporations," which are similar to benefit corporations but are not required to pursue a "general" public benefit, are not required to consider the various stakeholders listed in the benefit corporation statute, and are not required to be assessed against a third-party standard. *See* J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 24 (2012) [hereinafter Murray, *Choose Your Own Master*] (describing the differences between various social purpose business entities).

[2] William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 819, 838–39 (2012) (discussing the benefit corporation form against the "paradigm of shareholder primacy").

[3] MODEL BENEFIT CORP. LEGISLATION § 201(a) (William H. Clark, Jr. 2016). A certificate of incorporation is a document issued by a state authority that grants a corporation its legal existence, the right to function as a corporation, and sets forth the basic terms of the corporation, including the number and classes of shares and the purpose of the corporation. *Articles of Incorporation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[4] MODEL BENEFIT CORP. LEGISLATION § 201(b)

[5] *See Benefit Corporation White Paper*, 68 BUS. LAW. 1083, 1083–84 (2013) [hereinafter *White Paper*] (describing the "fuzzy border" between the divergent conceptions of corporate purpose); Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007, 1009–10 (2013) (describing the benefit corporation form against the backdrop of shareholder primacy and noting that benefit corporations have an "ambitious" mission).

[6] *See* KENT GREENFIELD, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS & PROGRESSIVE POSSIBILITIES 124, 125 (2006) (proposing a drastic shift in corporate law to promote the use of corporations as a tool for progressive change); *see also* Dana Brakman Reiser, *Theorizing Forms for Social Enterprise*, 62 EMORY L.J. 681, 683–84 (2013) (noting that the benefit corporation movement is based on the idea that corporations can make social change but arguing that, "[f]or a specialized legal form to succeed, it must permit social entrepreneurs to embrace this different ideal.") *See generally* Kent Greenfield & Gordon Smith, *Debate: Saving the*

Electronic copy available at: http://ssrn.com/abstract=2818855

corporation legislation must be written in a way that encourages and sustains humanitarian activity and include mechanisms to hold accountable those corporations that fail to follow through on their promises.[7] Under the current legislative framework, however, intended beneficiaries are denied standing to enforce a benefit corporation's creation of a public benefit, whether through the courts or through a corporation's internal reporting processes.[8] Thus, like their conventional counterparts, benefit corporations are, to a significant extent, self-policing and investor-regulated.[9]

World with Corporate Law? 57 EMORY L.J. 947 (2008) (debating whether corporate law can be used as a tool for social progress).

[7] *See* Mitch Nass, *The Viability of Benefit Corporations: An Argument for Greater Transparency and Accountability*, 39 J. CORP. L. 875, 881 (2014) (arguing that "if benefit corporations are to become a viable corporate form . . . it will be the third-party transparency requirement coupled with stringent enforcement mechanisms that will drive this success."); Melvin Aron Eisenberg, *Corporate Conduct That Does Not Maximize Shareholder Gain: Legal Conduct, Ethical Conduct, the Penumbra Effect, Reciprocity, the Prisoner's Dilemma, Sheep's Clothing, Social Conduct, and Disclosure*, 28 STETSON L. REV. 1, 19 (1998) (arguing that nonmaximizing corporate activities should nonetheless be promoted because such activities can still lead to profit).

[8] *See, e.g.*, DEL. CODE ANN. tit. 8, § 365(b) (West 2013) (denying standing to intended beneficiaries and stating that directors of benefit corporations do not owe a fiduciary duty to "any person on account of any interest of such person in the public benefit or public benefits"); 15 PA. CONS. STAT. ANN. § 3321(d) (West 2013) (denying standing to intended beneficiaries); CAL. CORP. CODE § 14622(d) (West 2012) (same); MASS. GEN. LAWS ANN. ch. 156E, § 10(e) (West 2012) (same); VT. STAT. ANN. tit. 11A, § 21.09(e) (West 2011) (same); MODEL BENEFIT CORP. LEGISLATION § 301(d) () (same); Gil Lan, *Benefit Corporations: A Persisting and Heightened Conflict for Directors,* 21 J.L. BUS. & ETH. 113, 116 (2015) (discussing the fact that benefit corporation legislation denies standing to third-party beneficiaries);; Clark & Babson, *supra* note X, at 850 (same). Standing is a jurisdictional matter that pertains to the power of a court to hear and decide an issue. Warth v. Seldin, 422 U.S. 490, 498 (1975). The requirement of standing also guarantees that every claimant "is a proper party to invoke judicial resolution of the dispute." *Id*. at 518 The general requirement for Article III standing under the U.S. Constitution is that the moving party has personally suffered an "injury in fact," which is causally related to the litigated issue. *See e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 570–71 (1992) (holding that plaintiffs did not suffer an "injury in fact" in suit brought by environmental groups alleging that federally-funded activities harmed certain species); Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 489–90 (1982) (holding organization dedicated to separation of church and state lacked standing to challenge government's conveyance of property to church organization under Federal Property and Administrative Services Act of 1949).

[9] Dana Brakman Reiser, *Regulating Social* Enterprise, 14 U.C. DAVIS BUS. L. J. 231, 240 (2014) (arguing that "investor-only accountability" in benefit corporation legislation is "suboptimal"); Nass, *supra* note X, at 886 (noting the limited availability of enforcement mechanisms outside the purview of shareholders). This is in contrast to nonprofit charitable organizations, the activities of which can be enforced by state attorneys general. *See* Commonwealth ex rel. Corbett v. Citizens Alliance for Better Neighborhoods, Inc., 983 A.2d 1274, 1277 (Pa. Commw. Ct. 2009) (holding that "it is the well-settled law" that the Attorney General is responsible for supervision of charities through *parens patriae* powers); Joshua B. Nix, *The Things People Do When No One Is Looking: An Argument for the Expansion of Standing in the*

Electronic copy available at: http://ssrn.com/abstract=2818855

Accordingly, this Note argues that the current benefit corporation form lacks the accountability and enforcement mechanisms necessary to make it a worthy contribution to corporate law.[10] Part I provides an overview of the socially conscious consumer and investor trend, the resultant introduction of benefit corporation legislation, and then explores the concept of "greenwashing."[11] Part II discusses the benefit corporation within broader U.S. corporate law, introduces the enforcement and accountability mechanisms in current benefit corporation law, and then compares these mechanisms to the law governing charitable trusts and nonprofit corporations.[12] Part III argues that the existing legislative framework fails to adequately protect the interests of the intended public beneficiaries of benefit corporations' public works.[13] In conclusion, Part III advocates for the addition of state attorney general oversight and enforcement in the legislation to prevent the incorporation of sham benefit corporations and abandonment of humanitarian undertakings.[14]

I. THE BENEFIT CORPORATION MOVEMENT

The benefit corporation form developed within an environment of public distrust of large corporations and a rejection of shareholder primacy by entrepreneurs and investors.[15] This Part outlines the socially conscious

---

Charitable Sector, 14 U. MIAMI BUS. L. REV. 147, 167 (2005) (stating that state attorneys general have standing to enforce charitable trusts); John W. Vinson, *The Charity Oversight Authority of the Texas Attorney General,* 35 ST. MARY'S L.J. 243, 244–45 (2004) ("Charitable interests . . . having no stockholders or specifically identifiable owners, are protected and enforced by the Attorney General on behalf of the public—charity's ultimate beneficiary."). In addition to powers at common law, some states such as New York, provide statutory authority for the attorney general to initiate a suit against a charity on behalf of the public. *See, e.g.*, N.Y. NOT-FOR-PROFIT CORP. LAW § 112(a) (McKinney 2016) (providing standing to attorney general to initiate suit for enforcement of charitable trusts); CAL. CORP. CODE SMALL CAPS§ 5250 (West 2016) (same); MICH. COMP. LAWS ANN. § 14.251(1) (West 2016) (same).

[10] *See infra* notes X–X and accompanying text.

[11] *See infra* notes X–X and accompanying text.

[12] *See infra* notes X–X and accompanying text.

[13] *See infra* notes X–X and accompanying text.

[14] *See infra* notes X–X and accompanying text.

[15] *See* Murray, *Choose Your Own Master*, *supra* note X, at 3 (describing the fact that in recent years, stories of corporate wrong-doing have been commonplace); Mark J. Roe, *The Derivatives Market's Payment Priorities As Financial Crisis Accelerator*, 63 STAN. L. REV. 539, 541 (2011) (discussing the role that AIG, Bear Stearns, and Lehman Brothers played in causing the financial crisis of 2008); 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, 272 (2009) (noting that "maximization of monetary wealth for

consumer and investor trend and the introduction of benefit corporation legislation.[16] Part A discusses the dichotomy between shareholder primacy and corporate social responsibility and provides an overview of the benefit corporation movement.[17] Part B explores the issue of "greenwashing" in the benefit corporation context.[18]

A. Companies Can Be Humanitarians Too: Rethinking Corporate Purpose and the Development of the Benefit Corporation

For many years, the accepted belief was that there was a dualistic distinction between for-profit and nonprofit entities.[19] This belief was based partly on the 1919 holding in *Dodge v. Ford Motor Co.*, where, in *dictum*, the Michigan Supreme Court famously wrote that a for-profit corporation is organized and operated exclusively for the benefit of its shareholders.[20] This court decision has been applied broadly to support the concept of shareholder primacy, which is that corporations exist purely to make a profit.[21] As a result,

---

enterprise owners as the utmost goal, has widely been criticized as a practice fostering such things as global warming, human rights abuse and labor violations."); Frank Newport, *Americans Similarly Dissatisfied With Corporations, Gov't*, GALLUP (Jan. 17, 2013), http://www.gallup.com/poll/159875/americans-similarly-dissatisfied-corporations-gov.aspx (finding "[m]ore than 60% of Americans are dissatisfied with the size and power or influence of major corporations . . . .").

[16] *See infra* notes X–X and accompanying text.

[17] *See infra* notes X–X and accompanying text.

[18] *See infra* notes X–X and accompanying text.

[19] *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, 175 (2012) (describing how the benefit corporation provided entrepreneurs with a different option, as opposed to the conventional choice between for-profit and nonprofit entities); J.P. MORGAN GLOBAL RESEARCH, IMPACT INVESTMENTS: AN EMERGING ASSET CLASS 5 (2010), http://www.ita.doc.gov/td/finance/publications/JPMorgan%20II%20Report.pdf [hereinafter J.P. MORGAN] (explaining that in years past, investors faced a "binary" choice between investing for profit and donating to charity).

[20] *See* 170 N.W. 668, 684 (Mich. 1919).

[21] *See e.g.*, LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 4, 25–27 (2012) (discussing and arguing against shareholder primacy); Milton Friedman, Opinion, *The Social Responsibility of Business is to Increase its Profits,* N.Y. TIMES, Sept. 13, 1970, http://query.nytimes.com/gst/abstract.html?res=9E05E0DA153CE531A15750C1A96F9C946190D6CF (arguing that the only reason corporations exist is to maximize shareholder value). The debate over shareholder primacy dates back to at least 1932 and the famous Berle-Dodd debate captured in the Harvard Law Review. *See* C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77, 78–79 (2002) (stating that the Berle-Dodd debate was "the first clear debate over corporate social responsibility"). *Compare* A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931) (arguing "that all powers granted to a corporation or to the management

and prior to the benefit corporation movement, there was trepidation that "the 'special attributes' of businesses that pursued both financial and social missions were 'likely to be fragile and easy to disrupt or destroy'" in a large corporation.[22] This fear was anecdotally demonstrated in 2000 when the conglomerate Unilever acquired Ben & Jerry's, a quintessential environmentally conscious business.[23] Some, including the founders themselves, argued that corporate law required the Ben & Jerry's board of directors to accept an offer to sell the company or else face shareholder liability.[24] Echoing these concerns, the founders of Kickstarter, an online

---

of a corporation . . . are necessarily and at all times exercisable only for the ratable benefit of all the shareholders . . . ."), *with* E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148, 1156 (1932) (disputing the notion that corporations exist purely for profit and arguing that corporate managers could actually increase profits by focusing on other constituencies, thereby garnering public goodwill).

[22] Antony Page & Robert A. Katz, *Freezing Out Ben & Jerry: Corporate Law and the Sale of a Social Enterprise Icon*, 35 VT. L. REV. 211, 231 (2010) (quoting James E. Austin & Herman B. Leonard, *Can the Virtuous Mouse and the Wealthy Elephant Live Happily Ever After?*, 51 CAL. MGMT. REV. 77, 79 (2008)).

[23] *See id.* at 230 (discussing the events leading up to and during Unilever's acquisition of Ben & Jerry's); April Dembosky, *Protecting Companies that Mix Profitability, Values*, NAT. PUB. RADIO (Mar. 9, 2010, 12:00AM), www.npr.org/templates/story/story.php?storyId=124468487 (stating that the sale of Ben & Jerry's "helped set the stage for today's young, idealistic companies").

[24] *See Page* & Katz, *supra* note X (*Freezing*), at 229 (noting that Ben Cohen, one of the founders of Ben & Jerry's is quoted as saying that the board did not want to sell). The assertion that corporate law would require a sale of a company to the highest bidder in order that the company's directors could avoid a shareholder derivative suit is true only in very limited circumstances. *See* 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, 34 (2011) (noting that courts will decline to challenge the majority of directors' decisions); Page & Katz, *supra* note X (*Freezing*), at 232 (same). Absent evidence of some corporate perversion, courts will defer to the business judgment of corporate directors and will not disturb a business decision unless there is no rational basis upon which it could have been made. *See* Aronson v. Lewis*,* 473 A.2d 805, 812 (Del. 1984) (enumerating the business judgment rule, which is the "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."); Shlensky v. Wrigley, 237 N.E.2d 776, 780 (Ill. App. Ct. 1968) (holding that "the decision of whether the directors was a correct one" would be "beyond [the court's] jurisdiction and ability."). *But see* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (finding that when it becomes apparent that the sale of a corporation is inevitable, the "directors' role change[s] from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders . . . ."). After the sale of Ben & Jerry's to Unilever, the conglomerate agreed to continue Ben & Jerry's commitment to social causes by donating 7.5% of Ben & Jerry's profits to a charitable foundation and agreed not to cut jobs or alter the production process. Constance L. Hays, *Ben & Jerry's To Unilever, With Attitude*, N.Y. TIMES (Apr. 13, 2000), http://www.nytimes.com/2000/04/13/business/ben-jerry-s-to-unilever-with-attitude.html?%20src=pm. Unlike Ben & Jerry's, however, "other mission-driven companies may not have the same bargaining power to protect their own businesses." *See* Clark & Babson, *supra* note X, at 836 (arguing that benefit corporations' missions may be destroyed or discouraged

crowd-funding platform, which recently reincorporated as a benefit corporation, stated that they chose to reincorporate because the potential prerogative to sell would force them to make choices not in the "best interest[s] of the company."[25] In response to the fears illustrated by these anecdotes, the creators of the benefit corporation sought to disrupt the traditional for-profit, non-profit binary in order to use for-profit entities as a tool for social good.[26]

---

after acquisitions by large corporations). *But see* Thomas Lee, *Plum Organics' Quest to Do Good Poses Legal Risk to Campbell Soup*, SFGATE (Nov. 10, 2014, 11:56AM), http://www.sfgate.com/green/article/Plum-Organics-quest-to-do-good-poses-legal-5882197.php (discussing Plum Organics' decision to reincorporate after it was acquired by Campbell Soup Co. and the acquirer's approval of the decision).

[25] *See* Yancey Strickler et al,, *Kickstarter is Now a Benefit Corporation*, KICKSTARTER BLOG (Sept. 21, 2015), https://www.kickstarter.com/blog/kickstarter-is-now-a-benefit-corporation (announcing Kickstarter's reincorporation as a Delaware public benefit corporation); Mike Isaac & David Gelles, *Kickstarter Focuses Its Mission on Altruism Over Profit*, N.Y. TIMES (Sept. 20, 2015), http://www.nytimes.com/2015/09/21/technology/kickstarters-altruistic-vision-profits-as-the-means-not-the-mission.html (discussing Kickstarter's reincorporation as a benefit corporation); *see also Charter*, KICKSTARTER, https://www.kickstarter.com/charter (last visited Feb. 25, 2016) (stating that the company's mission is to "help bring creative projects to life, and that connect people around creative projects and the creative process."). Despite the proliferation of the notion that shareholder primacy dictates corporate decision-making, there is actually no *per se* legal requirement that corporate directors make decisions in the normal course of business with the sole purpose of maximizing monetary gain for shareholders. *See* Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1154 (Del. Ch. 1989) ("Directors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy."); STOUT, *supra* note X, at 29–31 (discussing how the business judgment rule generally shields directors from liability for a failure to maximize shareholder value); Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Firms Seek Profit*, 47 WAKE FOREST L. REV. 135, 155 (2012) (noting that corporate law does not require directors to maximize shareholder value in the short-term); *see also* William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264–72 (1992) (discussing the two divergent conceptualizations of corporate purpose). For example, in Massachusetts, directors may, in fulfilling their duties, "consider the interests of the corporation's employees, suppliers, creditors and customers, the economy of the state, the region and the nation, community and societal considerations, and the long-term and short-term interests of the corporation and its shareholders." MASS. GEN. LAWS ch. 156D, § 8.30(a)(3) (2016). Nonetheless, shareholder primacy still dominates discussions of corporate purpose in academic circles and by courts in *dictum*. *See* STOUT, *supra* note X, at 6, 29 (stating that "judicial musings" about maximization of shareholder value "remain[] mere dicta" because courts refuse to impose liability on directors for declining to maximizing shareholder value in the short-term); *see also* Joe Nocera, *Down with Shareholder Value*, N.Y. TIMES, (Aug. 10, 2010), http://www.nytimes.com/2012/08/11/opinion/nocera-down-with-shareholder-value.html?_r=0 (noting that shareholder primacy "has long since become the mantra of the business culture.").

[26] *See* Kennan El Khatib, *The Harms of the Benefit Corporation*, 65 AM. U. L. REV. 151, 151 (2015) (arguing that the benefit corporation was created "to quell the fears of entrepreneurs pursuing social and environmental objectives and profit . . . ."); Reiser, *supra* note X, at 683–84 (describing entrepreneurs' "desire to blend their profit-making and social missions in a single entity."); Munch, *supra* note X, at 170 (describing the emergence of a new type of entrepreneur that wants to produce positive social impact in addition to profit); Antony Page & Robert A. Katz,

In addition to socially conscious sentiment from entrepreneurs, the development of the benefit corporation may also be the result of an increase in socially conscious consumers and investors.[27] For example, a 2015 Nielson study found that sixty-six percent of consumers surveyed were willing to pay more for products and services purchased from companies committed to positive social and environmental impact, up from fifty-five percent in 2014 and fifty percent in 2013.[28] The rise in socially conscious consumers has also

---

Is Social Enterprise the New Corporate Social Responsibility?, 34 SEATTLE U. L. REV. 1351, 1361 (2011) (noting that "proponents of social enterprise seek to promote and facilitate social enterprise formation through business organizations law . . . ."). Jay Coen, co-founder of B Lab, an organization that certifies socially conscious businesses as "B Corps," has advocated for a "triple bottom-line approach" to corporate management: "profit, people and planet." *See* Josh Patrick, *Assessing the Benefits of Becoming a Benefit Corporation*, N.Y. TIMES (Jun 14, 2013, 1:00 PM), http://boss.blogs.nytimes.com/2014/06/13/assessing-the-benefits-of-a-benefit-corporation; *see also* Michael R. Deskins, *Benefit Corporation Legislation, Breakthrough in Stakeholder Rights?*, 15 LEWIS & CLARK L. REV. 1047, 1063 (2011) (discussing the "triple bottom line" approach); *Triple Bottom Line*, ECONOMIST (Nov. 17, 2009), http://www.economist.com/node/14301663 (same).

[27] Clark & Babson, *supra* note X, at 819–21 (describing the increasing consumer demand for socially responsible companies and the products they produce and sell). This is not entirely a new phenomenon. *See* LAWRENCE B. GLICKMAN, BUYING POWER: A HISTORY OF CONSUMER ACTIVISM IN AMERICA 1 (2009) (noting that throughout American history, consumers "have engaged in an almost continuous series of boycotts, demands for leisure and recreation, campaigns for access to the benefits of consumer society, and efforts to promote safe and ethical consumption."). Consumer activism waned but then regained popularity in the latter part of the 1980's and 1990's, continuing into today. *Id*. at 305. In particular, the "tendency toward political consumerism has accelerated" post-9/11. *Id*. In addition, an increasingly negative public perception of large corporations may have contributed to the rise of the benefit corporation. *See* Murray, *Choose Your Own Master*, *supra* note X, at 3–4 (discussing the rise of "social enterprise" in the aftermath of a multitude of corporate scandals); J. William Callison, *Putting New Sheets on a Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, the Dangers Created, and Suggestions for Change*, 2 AM. U. BUS. L. REV. 85, 89–91 (2012) (describing the social enterprise movement's push for new legislation); Susan Holberg & Mark Schmitt, *The Overpaid CEO*, 34 DEMOCRACY JOURNAL (2014), http://democracyjournal.org/magazine/34/the-overpaid-ceo/2/?nomobile=1 (discussing the controversy surrounding executive compensation and citing the benefit corporation form as recognizing that there are corporate stakeholders beyond shareholders). During the past few decades, accounts of corporations that caused economic, social, and environmental destruction in pursuit of profit have been plastered on the front pages of newspapers around the world. *See* Janine S. Hiller, *The Benefit Corporation and Corporate Social Responsibility*, 118 J. BUS. ETHICS 287, 287 (2013) ("In the wake of the most recent financial crisis, corporations have been criticized as being self-interested and unmindful of their relationship to society."); Murray, *Choose Your Own Master*, *supra* note X, at 3–4 (discussing recent corporate scandals).

[28] *Green Generation: Millennials Say Sustainability is a Shopping Priority*, NIELSON (Nov. 11, 2015), http://www.nielsen.com/us/en/insights/news/2015/green-generation-millennials-say-sustainability-is-a-shopping-priority.html [hereinafter NIELSON]. Nielson's Senior Vice President of Public Development & Sustainability stated: "Brands that establish a reputation for environmental stewardship among today's youngest consumers have an opportunity to not only grow market share but build loyalty among the power-spending Millennials of tomorrow, too." *Id*.

led to significant investment in socially conscious businesses.[29] A 2010 report from J.P. Morgan Chase & Co. concluded that an increasing number of investors are rejecting the choice between investing for profit and donating to charity.[30] The benefit corporation offers consumers and investors an alternative to outdated conventional for-profit entities.[31]

Somewhat ironically, many corporations have sought certification from B Lab and/or incorporated or reincorporated as benefit corporations partly in order to profit from the rise in socially conscious consumers.[32] B Lab is a non-profit organization that certifies socially and environmentally

---

[29] *See* Nass, *supra* note X, at 876–77 (describing the rise in socially conscious consumers and investors); Clark & Babson, *supra* note X, at 819–21 (describing the socially conscious consumer trend); William H. Clark, Jr. et al., *The Need and Rationale for the Benefit Corporation: Why it is the Legal Form that Best Addresses the Needs of Social Entrepreneurs, Investors, and Ultimately, the Public* 2 (Benefit Corporation White Paper 2012), http://benefitcorp.net/policymakers/benefit-corporation-white-paper (same); *cf.* Janet E. Kerr, *Sustainability Meets Profitability: The Convenient Truth of How the Business Judgment Rule Protects A Board's Decision to Engage in Social Entrepreneurship*, 29 CARDOZO L. REV. 623, 624 (2007) (noting that the social entrepreneurship movement "is gaining respect among the younger generation of tomorrow's tech and business leaders as well as with long existing, publicly-held corporations.").

[30] J.P. MORGAN, *supra* note X, at 5; *see* Tom Zeller, Jr., *Can Business Do the Job All by Itself?*, N.Y. TIMES (Mar. 28, 2010), http://www.nytimes.com/2010/03/29/business/energy-environment/29green.html (noting that investors are increasingly recognizing that "doing good . . . also enhance[s] shareholder value"). Starting in 2011, Forbes began publishing the "Impact 30," an annual list of prominent global social entrepreneurs. *See* Robert T. Esposito, *The Social Enterprise Revolution in Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for the Benefit Corporation*, 4 WM. & MARY BUS. L. REV. 639, 644 (2013) (describing the Impact 30); *Impact 30*, FORBES.COM, http://www.forbes.com/impact-30/list.html (last visited Mar. 22, 2016). For further illustration, the private equity firm, Bain Capital, recently introduced a social impact investment platform, which "will focus on 'double bottom line' investments" that seek return on investment in addition to enhancing overlooked communities or "improving quality of life." *Press Release, Former Massachusetts Governor Deval L. Patrick Joins Bain Capital to Launch New Business Focused on Investments with Significant Social Impact*, BAIN CAPITAL (Apr. 14, 2015), http://www.baincapital.com/newsroom/former-massachusetts-governor-deval-l-patrick-joins-bain-capital-launch-new-business. In the past, Bain Capital has been targeted as motivated only by profit, lacking regard for the human consequences of its corporate takeovers. Sabrina_Siddiqui, *Mitt Romney, Bain Capital Targeted Over GST Steel Plant Closure In New Priorities USA Action Ad*, HUFFINGTON POST (Aug. 7, 2012, 6:01AM), http://www.huffingtonpost.com/2012/08/07/mitt-romney-bain-capital-gst-steel-plant-closure_n_1749296.html.

[31] *See* Munch, *supra* note X, at ****FIND SUPPORT****

[32] *See 2014 Annual Report*, B LAB, https://www.bcorporation.net/news-media/annual-report-2014 (last visited Nov. 22, 2015) (noting the rise in companies seeking certification) [hereinafter *2014 Annual Report*]; Kerr, *supra* note X (*Sustainability Meets*) at 629–30 (arguing that social entrepreneurship is at a "tipping point" and that companies are recognizing the profit potential in social entrepreneurship). ***ADD SUPPORT TO SAY THEY ARE DOING IT TO PROFIT (if you want in light that Kerr source seems sufficient)***

conscious businesses as "Certified B Corporations."[33] According to B Lab's 2014 annual report, the organization has certified over one thousand businesses.[34] B Lab certification, and classification as a benefit corporation in general, is a potentially lucrative marketing tool that enables companies to appeal to consumers willing to pay more for goods and services produced or sold by companies that self-identify as supporters of humanitarian causes.[35]

B. Fake It 'Til You Make It: "Greenwashing" in the Benefit Corporation Context

---

[33] *About B Lab*, B LAB, https://www.bcorporation.net/what-are-b-corps/about-b-lab (last visited Mar. 28, 2016). B Lab has also been active in lobbying for the passage of benefit corporation legislation. *See* Murray, *Social Enterprise Innovation*, *supra* note X, at 249 n.4, 346 (discussing the role of the B Lab organization). The organization even assisted in drafting the Model Benefit Corporation Legislation ("Model Legislation"), which has been the blueprint for the majority of states' benefit corporation statutes. Brett McDonnell, *Benefit Corporations and Strategic Action Fields or (The Existential Failing of Delaware)*, 39 SEATTLE U. L. REV. 263, 282 (2016).. The B Corp concept is easily confused with benefit corporations themselves, but B Corps are not necessarily incorporated under a state's benefit corporation statute. *See* Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007, 1038 n.20 (2013). Under B Lab's rules, however, if a B Corp is incorporated in states with a benefit corporation statue, the business must reincorporate as a benefit corporation within four years of receiving B Corp certification. *Corporation Legal Roadmap*, B LAB, https://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/legal-roadmap/corporation-legal-roadmap (last visited Nov. 22, 2015). The certification is similar to the LEED certification for buildings or the Fair Trade certification for food products. *B-Lab*, PATAGONIA, http://www.patagonia.com/us/patagonia.go?assetid=68413 (last visited Nov. 22, 2015) (discussing the B Lab certification). Since 1985, the outdoor clothing company Patagonia has pledged one percent of sales to causes that preserve and protect the environment. *1% for the Planet*, PATAGONIA, http://www.patagonia.com/us/patagonia.go?assetid=81218 (last visited Nov. 22, 2015). A similar organization, Social Enterprise UK, exists in the United Kingdom. *FAQs*, SOCIAL ENTERPRISE UK, http://www.socialenterprise.org.uk/about/about-social-enterprise/FAQs (last visited Feb. 29, 2016).

[34] *2014 Annual Report*, *supra* note X (collecting the number of certified B Corps).

[35] *See* Loewenstein, *supra* note X, at 1013 (noting that B Corp certificate can increase a company's marketability and aid in attracting capital investment); NIELSON *supra* note X (finding that many consumers are willing to pay more for goods purchased from socially conscious businesses). Notable B Corps include Patagonia, Warby Parker, Ben & Jerry's (a subsidiary of Unilever PLC), Plum Organics (a subsidiary of Campbell Soup Co.), The Honest Company, Method Products, Etsy, and Kickstarter. *See Ben & Jerry's*, B LAB, http://www.bcorporation.net/community/ben-and-jerrys (last visited Nov. 22, 2015); *Kickstarter PBC*, B LAB, http://www.bcorporation.net/community/kickstarter-pbc (last visited Nov. 22, 2015); *Method Products, PBC*, B LAB, https://www.bcorporation.net/community/method-products-pbc (last visited Nov. 22, 2015); *Patagonia, Inc*., B LAB, http://www.bcorporation.net/community/patagonia-inc (last visited Nov. 22, 2015);;; *Plum Organics*, B LAB, http://www.bcorporation.net/community/plum-organics (last visited Nov. 22, 2015); *The Honest Company*, B LAB, http://www.bcorporation.net/community/the-honest-company (last visited Nov. 22, 2015); *Warby Parker*, B LAB, http://www.bcorporation.net/community/warby-parker (last visited Nov. 22, 2015).

For-profit corporations often exploit what has been coined the "sheep's clothing principle."[36] This is the idea that a benevolent charitable act by a corporation may also be a carefully designed advertising scheme.[37] A problem arises in the benefit corporation context, however, when companies reap the branding and goodwill benefits of the benefit corporation classification while only pretending to actually pursue and create public benefits.[38] The Model Benefit Corporation Legislation ("Model Legislation") terms this phenomenon "greenwashing."[39]

---

[36] Eisenberg, *supra* note X, at 14; *cf.* Miranda Perry Fleischer, *Libertarianism and the Charitable Tax Subsidies,* 56 B.C. L. REV. 1345, 1351 (2015) (discussing the "benefits (some tangible and some intangible)" that charitable givers receive in return for giving).

[37] Eisenberg, *supra* note X, at 14. Examples of this could include Johnson & Johnson's Safe Kids Worldwide, Avon's Breast Cancer Crusade, and the many philanthropic arms of major corporations, such as the Ronald McDonald House Charities and the Coca-Cola Foundation. *See Johnson & Johnson*, SAFE KIDS WORLDWIDE, http://www.safekids.org/johnson-johnson (last visited Jan. 29, 2016); *Breast Cancer Crusade*, AVON FOUNDATION FOR WOMEN, http://www.avonfoundation.org/causes/breast-cancer-crusade/ (last visited Jan. 29, 2016); *The Coca-Cola Foundation,* THE COCA-COLA CO., http://www.coca-colacompany.com/our-company/the-coca-cola-foundation/ (last visited Jan. 29, 2016); *About Us,* RONALD MCDONALD HOUSE CHARITIES, http://www.rmhc.org/about-us (last visited Jan. 29, 2016); *cf.* Alex Barinka & Jesse Drucker, *Etsy Taps Secret Irish Tax Haven and Brags About Transparency at Home*, BLOOMBERGBUSINESS (Aug. 14, 2015, 12:01AM), http://www.bloomberg.com/news/articles/2015-08-14/etsy-taps-secret-irish-tax-haven-and-touts-transparency-at-home (reporting on the secretive Irish tax haven that Etsy, Inc., a certified B Corp, recently implemented despite "promise[ing] to be a beacon for transparency as a public company . . . ."); Hannah Clark Steiman, *A New Kind of Company: A "B" Corporation*, INC. MAG. (July 1, 2007), http://www.inc.com/magazine/20070701/priority-a-new-kind-of-company.html (arguing that social purpose "[c]ertification, however, can be somewhat suspect; some organic farmers, for example, have said the organic certification system has actually weakened their movement by enabling the creation of organic factory farms.").

[38] *See* MODEL BENEFIT CORP. LEGISLATION § 102, cmt. (Third-Party Standard) (William H. Clark, Jr. 2016). Interestingly, Massachusetts forbids a company from advertising its benefit corporation status unless the company is in full compliance with the state's benefit corporation statute. MASS. GEN. LAWS ch. 156E § 7 (West 2012); *cf.* Munch, *supra* note X, at 190 (arguing that the "benefit corporation form may have limited effectiveness if it is does not include broader legal enforcement mechanisms."); Steven Davidoff Solomon, *Idealism That May Leave Shareholders Wishing for Pragmatism*, N.Y. TIMES (Oct. 13, 2015), http://www.nytimes.com/2015/10/14/business/dealbook/laureate-education-for-profit-school-public-benefit.html?_r=1 (arguing that benefit corporations' "eye-grabbing do-gooding may mask deep, complicated issues.").

[39] MODEL BENEFIT CORP. LEGISLATION § 102, cmt. (Third-Party Standard); *cf.* 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, 258 (2012) (discussing "mission-drift," a concept similar to "greenwashing," which is when a benefit corporation "prioritize[es] shareholder gain at the expense of the social or environmental mission of the firm."). Some argue that inclusion of a third-party standard setter negates the possibility of the creation of nominal benefit corporations designed to "cash in on the cachet of being perceived as 'green'" when the corporations are not actually creating any public benefits. *See White Paper*, supra note X, at 1104. The term "greenwashing," as used by the drafters of the Model Legislation, is

Benefit corporations are in a unique position to capitalize on the socially conscious consumer trend by attracting patrons willing to pay a premium for ethically sourced and produced goods.[40] For example, in 2012, the outdoor clothing company Patagonia, a California benefit corporation, recorded over five hundred million dollars in sales and opened fourteen new stores, ironically while the company ran a nine-month "buy less" advertising campaign.[41] Companies can also use the socially responsible consumer movement to "distinguish their goods in the market" by offering "green" variations of already-established products.[42] Benefit corporations also receive other advantages, such as in San Francisco, where the city gives preference to benefit corporations in awarding city contracts.[43]

Sometimes, however, corporate humanitarian rhetoric is "window dressing," designed to lure consumers into thinking a company supports social or environmental causes when it actually does not.[44] For example,

---

taken from the environmental context and then applied more generally to the infinite number of public benefits that can be a benefit corporation's purpose to create. *See* MODEL BENEFIT CORP. LEGISLATION § 102, cmt. (Third-Party Standard)(); Janet E. Kerr, *The Creative Capitalism Spectrum: Evaluating Corporate Social Responsibility Through A Legal Lens*, 81 TEMP. L. REV. 831, 846 (2008); *Greenwashing*, GREENPEACE, http://www.stopgreenwash.org (last visited Feb. 23, 2016) (defining "greenwash" as: "the act of misleading consumers regarding the environmental practices of a company or the environmental benefits of a product or service."); (defining the term greenwashing).

[40] *See* NIELSEN, *supra* note X (noting that consumers are willing to pay more for "green" products); *see also* Mehdi Miremadi et al., *How Much Will Consumers Pay to Go Green?*, MCKINSEY & CO. (Oct. 2012), http://www.mckinsey.com/business-functions/sustainability-and-resource-productivity/our-insights/how-much-will-consumers-pay-to-go-green (describing a survey which found that seventy percent of respondents in Europe and the U.S. were willing to pay five percent more for "green" products); *Benefits of Becoming a Sustainable Business,* ECO-OFFICIENCY, http:// www.eco-officiency.com/benefits_becoming_sustainable_business.html (last visited Feb. 23, 2016) (noting that becoming a benefit corporation can lead to "enhanced brand and increase[d] competitive advantage").

[41] Kyle Stock, *Patagonia's 'Buy Less' Plea Spurs More Buying*, BLOOMBERG (Aug. 28, 2013), http://www.bloomberg.com/bw/articles/2013-08-28/patagonias-buy-less-plea-spurs-more-buying.

[42] *See* Larry E. Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431, 1453 (2006) (discussing how companies can differentiate their products to attract socially conscious consumers); *see also Frequently Asked Questions*, THE HONEST CO., https://www.honest.com/faq (last visited Mar. 30, 2016) (discussing how The Honest Company, a Certified B Corporation, approaches creating household products without harmful chemicals).

[43] *See* S.F., CAL., ADMIN. CODE, ch. 14C.3.(d), (g) (2012) (in "determining the apparent highest ranked proposal or the apparent low bid," benefit corporations receive a 4% increase or decrease in the amount of their bid); Loewenstein, *supra* note X, at 1020 n.54.

[44] Kerr, *supra* note X (*Creative*), at 855 (quoting Ruth V. Aguilera et al., *Putting the S Back in Corporate Social Responsibility: A Multilevel Theory of Social Change in Organizations,* 32 ACAD. MGMT. REV. 836, 838 (2007)) (noting some companies "introduce [corporate social responsibility] practices at a superficial level for window dressing purposes"); Khatib, *supra* note

during the past decade, the multinational oil company BP made a calculated series of branding moves designed to convey the image that the company supported progressive environmental causes.[45] BP advertised that it was making operations more efficient, reducing carbon emissions, and investing in renewable energy sources.[46] In a now infamous turn of events, however, on April 20, 2010, BP's Deep Horizon drilling rig exploded and sank, hemorrhaging oil into the Gulf of Mexico.[47] The catastrophic environmental damage caused by the explosion has been blamed, at least partly, on the fact that the company ignored warning signs that the rig was in danger of failure in order to reduce costs.[48] As the BP anecdote illustrates, benefit corporation legislation must include mechanisms to hold corporations accountable for use of the benefit corporation form to exploit socially conscious consumers.[49]

X, at 181–82 (arguing that "there exists enormous potential for [benefit corporation] statutes to lead to legalized greenwashing."). A 2007 study found that of 1,000 "green" products reviewed, all but one engaged in some sort of "greenwashing" advertising scheme. TERRACHOICE ENVIRONMENTAL MARKETING, THE SIX SINS OF GREENWASHING: A STUDY OF ENVIRONMENTAL CLAIMS IN NORTH AMERICAN CONSUMER MARKETS, 1(2007), http://sinsofgreenwashing.org/findings/greenwashing-report-2007.

[45] *See* Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TUL. L. REV. 983, 1002–03 (2011) (describing the various steps BP took to improve its environmental image). BP also ran a series of advertisements aimed at educating individual consumers about their personal environmental impact. *Id*. at 1002.

[46] *Id.* at 1002–03.

[47] *Id.* at 988.

[48] *See* STOUT, *supra* note X, at 1–2 (describing the BP oil spill and noting that the disaster could be linked to decisions to ignore safety warning in order to save money); *Experts: BP Ignored Warning Signs on Doomed Well*, FOXNEWS (Nov. 17, 2010), http://www.foxnews.com/us/2010/11/17/experts-bp-ignored-warning-signs-doomed-1127061394.html (discussing the finding that BP ignored warning signs of the rig's instability). Coca-Cola recently faced criticism in Denmark after its "PlantBottle," marketed as an environmentally-friendly alternative to traditional plastic bottles, was found to contain only 15% plant-based materials. *See* Christopher Zara, *Coca-Cola Company (KO) Busted For 'Greenwashing': PlantBottle Marketing Exaggerated Environmental Benefits, Says Consumer Report*, INT'L BUS. TIMES (Sep. 3, 2013, 3:18 PM), http:// www.ibtimes.com/coca-cola-company-ko-busted-greenwashing-plantbottle-marketing-exaggerated-environmental-benefits. For further illustration, in 2016, two lab tests commissioned by The Wall Street Journal found that detergent products produced by the Honest Company, a certified B Corp founded by actress Jessica Alba, contained a harmful chemical, which the company claims it does not use. Serena Ng, *Laundry Detergent From Jessica Alba's Honest Co. Contains Ingredient It Pledged to Avoid*, WALL ST. J. (Mar. 10, 2016, 7:08PM), http://www.wsj.com/articles/laundry-detergent-from-jessica-albas-honest-co-contains-ingredient-it-pledged-to-avoid-1457647350.

[49] *See infra* notes X–X and accompanying text ***Add direct source or two***.

II. BENEFIT CORPORATIONS, CONVENTIONAL CORPORATIONS, AND NONPROFITS: WHAT'S THE DIFFERENCE?

Despite the prerogative to pursue humanitarian objectives, the benefit corporation is still a form of conventional corporation, and as such, directors of both types of corporations are subject to the same statutory and common law fiduciary obligations.[50] Benefit corporation legislation as a whole does, however, include additional reporting requirements and accountability mechanisms not found in the conventional corporate form.[51] This Part examines the reporting and accountability mechanisms contained in the benefit corporation form and discusses similar procedures in charitable trust law.[52] Section A outlines basic concepts in U.S. corporate law and discusses the benefit corporation within this broader framework.[53] Section B then describes the directorial duties and accountability procedures in benefit corporation legislation.[54] Section C explores state attorney general statutory and common law power to oversee nonprofit organizations and compares this to the accountability procedures in benefit corporation legislation.[55]

A. Corporate Law and Typical Characteristics of the Benefit Corporation Form

The items that must appear in a certificate of incorporation are "greatly simplified from prior law" and today, corporations are only required to state that they exist to "conduct or promote any lawful business or purposes."[56] Benefit corporation legislation diverges from this generalist

---

[50] *See* LANE, *supra* note X, at 128 (noting the basic fiduciary duties, split between ownership and management, and tax status in the benefit corporation form are generally the same as in traditional corporations); Robert A. Katz & Antony Page, *The Role of Social Enterprise*, 35 VT. L. REV. 59, 86 (2010) (comparing social enterprise business forms to the traditional business form).

[51] *See* Reiser, *supra* note X, at 237–40 (noting the additional requirements included in benefit corporation legislation).

[52] *See infra* notes X–X and accompanying text.

[53] *See infra* notes X–X and accompanying text.

[54] *See infra* notes X–X and accompanying text.

[55] *See infra* notes X–X and accompanying text.

[56] *See* DEL. CODE ANN. tit. 8 §§ 101(b), 102(a)(3) (2014); ERNEST L. FOLK, III, THE DELAWARE GENERAL CORPORATION LAW, §102.01, cmt. (6th ed. 2015); Alicia E. Plerhoples, *Social Enterprise As Commitment: A Roadmap*, 48 WASH. U. J. L & POL'Y 89, 100 (2015); *see also* Matter of Appraisal of Ford Holdings, Inc. Preferred Stock, 698 A.2d 973, 976 (Del. Ch. 1997) (discussing the fact that unlike the corporation law of the nineteenth century, modern corporate law "is largely enabling in character").

approach because the legislation requires that a benefit corporation must, to use the Model Legislation as an example, "have a purpose of creating a general public benefit" in addition to the "any lawful business or purposes" language.[57] Furthermore, benefit corporation legislation provides that a company's certificate of incorporation may identify the creation of one or more "specific public benefits."[58] By blending for-profit and nonprofit charitable organizations, the benefit corporation represents a divergence from traditional concepts of U.S. corporate law.[59] Although there are other corporate forms that pursue humanitarian goals in addition to profit, such as the Low-Profit Limited Liability Company ("L3C"), the benefit corporation is the quintessential business form designed to balance these two goals.[60]

Under the Delaware General Corporate Law, a corporation's board of directors is responsible for managing the business and affairs of the corporation.[61] In general, shareholders, not the directors, are the owners of a

---

[57] MODEL BENEFIT CORP. LEGISLATION § 201(a) – (b) (William H. Clark, Jr. 2016).

[58] *Id*. § 201(b). Per the Model Legislation, examples of "specific public benefits" include:

> (1) providing low-income or underserved individuals or communities with beneficial products or services; (2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business; (3) protecting or restoring the environment; (4) improving human health; (5) promoting the arts, sciences, or advancement of knowledge; (6) increasing the flow of capital to entities with a purpose to benefit society or the environment; and (7) conferring any other particular benefit on society or the environment.

§ 102 & cmt. (Specific Public Benefit)().

[59] *See* Khatib, *supra* note X, at 156 (stating that the benefit corporation "broke new ground" by allowing directors to take into account non-financial stakeholders); Munch, *supra* note X, at 175 (noting that the benefit corporation helped socially entrepreneurs "escape the for-profit or nonprofit binary.").

[60] *See* Esposito*no italics*, supra note X, at 649, 681–94 (discussing the Low-Profit Limited Liability Corporation ("L3C"), Flexible Purpose Corporation, Social Purpose Corporation, and benefit corporation forms and arguing that the benefit corporation is the most effective vehicle for "achieving the blended value goals of the social enterprise movement"); Munch, *supra* note X, at 171 (calling the benefit corporation the "most ascendant social enterprise innovation today"). The L3C form is a hybrid business organization "that attempts to blend program related investments, with some small degree of income production for private foundations." Ann E. Conaway, *The Global Use of the Delaware Limited Liability Company for Socially-Driven Purposes*, 38 WM. MITCHELL L. REV. 772, 802 (2012) (internal quotations omitted) (describing the L3C form).

[61] *See* DEL. CODE ANN. tit. 8, § 141(a) (West 2013); Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985). Delaware corporate law is generally considered the most refined corporate law and the state is home to the majority of the country's public corporations, which are thus governed by Delaware corporate law. *See* Steven C. Caywood, *Wasting the Corporate Waste Doctrine: How the Doctrine Can Provide a Viable Solution in Controlling Excessive Executive Compensation,* 109 MICH. L. REV. 111, 136 n.26 (2010) (noting that Delaware is home to the majority of the country's corporations); Harwell Wells, *The Rise of the Close Corporation and the Making of Corporation Law*, 5 BERKELEY BUS. L.J. 263, 269 (2008) (noting that Delaware is the "most important site" for the development of U.S. corporate law); *About Agency*, DEL. DEPT. OF STATE,

corporation.[62] In large public corporations, however, shareholders lack any real control over operations and business decision-making, and as such, place their trust in the corporation's directors.[63] Thus, as a fundamental principle of corporate law, directors and officers of a corporation owe fiduciary duties to the corporation's shareholders, breaches of which are righted through shareholder derivative lawsuits.[64] Statutory and common law fiduciary duties apply equally to directors of traditional corporations and directors of benefit corporations.[65] Importantly, however, directors of benefit corporations and traditional corporations do not owe a legal duty to any constituency other than the shareholders.[66]

DIV. OF CORPS., http://www.corp.delaware.gov/aboutagency.shtml (last visited Dec. 21, 2015) ("More than 50% of all publicly-traded companies in the United States including 64% of the Fortune 500 have chosen Delaware as their legal home."). Indeed, most states rely on Delaware law as an example when interpreting or drafting their own corporate law. *See* Clark & Babson, *supra* note X, at 831.

[62] *See* Harwell Wells, *The Birth of Corporate Governance*, 33 SEATTLE U. L. REV. 1247, 1251–52 (2010) (discussing the difference between "ownership" and "control" of corporations); Eric M. Fogel, etno period al., *Public Company Shareholders Acting As Owners: Three Reforms-Introducing the "Oversight Shareholder"*, 29 DEL. J. CORP. L. 517, 518 (2004) (arguing that shareholders of large public corporations do not exercise control and instead, simply sell their shares when problems arise).

[63] *See* Schoon v. Smith, 953 A.2d 196, 206 n.34 (Del. 2008) (citing R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, 1 THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 4.16 at 4–113 (3d ed. 2008)); Fogel, *supra* note X, at 518 (arguing that "an imbalance exists between management flexibility and investor/owner oversight.").

[64] *See* DEL. CODE ANN. tit. 8, § 327 (West 2013) (providing the derivative suit mechanism); MARC J. LANE, SOCIAL ENTERPRISE: EMPOWERING MISSION-DRIVEN ENTREPRENEURS 120 (2011) (describing the corporate fiduciary duties of loyalty and care); Claire A. Hill & Brett H. McDonnell, *Stone v. Ritter and the Expanding Duty of Loyalty*, 76 FORDHAM L. REV. 1769, 1771 (2007) (discussing the corporate fiduciary duties); *cf.* Gantler v. Stephens, 965 A.2d 695, 708–09 (Del. 2009) (holding that officers of a corporation owe shareholders the same duties as directors) Primarily, the fiduciary duties are the duties of loyalty and care. *See* Marcia M. McMurray, *An Historical Perspective on the Duty of Care, the Duty of Loyalty, and the Business Judgment Rule*, 40 VAND. L. REV. 605, 606 (1987). In the simplest terms, the duty of loyalty mandates that the best interests of the corporation and its shareholders take precedence over any interest of the directors that is not shared collectively by the shareholders. *See* In re Walt Disney Co. Derivative Litig., 907 A.2d 693, 750–52 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006). The duty of care, on the other hand, generally does not encompass the substance of a board decision but the process in which the board reached its decision. Brehm v. Eisner, 746 A.2d 244, 264 (Del. 2000) ("Due care in the decision-making context is *process* due care only.") (emphasis in original).

[65] *See* LANE, *supra* note X, at 128 (noting that the benefit fiduciary duties are the same as its conventional corporation counterpart); Loewenstein, *supra* note X, at 1010 (outlining the difference between benefit corporations and nonprofit entities).

[66] *See* DEL. CODE ANN. tit. 8, § 365(b) (West 2013) (denying standing to third parties); McMurray, *supra* note X, at 606 (discussing the fiduciary duties directors owe to shareholders). *Compare* Unocal v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (suggesting that when deciding whether to accept a tender offer, a board of directors may consider "the impact on constituencies other than shareholders (i.e., creditors, customers, employees, and perhaps even the

Each state's benefit corporation legislation is slightly different, but the three typical requirements of the benefit corporation form are: (1) that the corporation pledge to create a general public benefit; (2) that the directors consider the interests of non-financial stakeholders in addition to the interests of shareholders; and (3) a requirement to report on the corporation's total social and environmental performance using a third-party standard.[67] The requirements that the corporation create a public benefit and that directors consider non-financial stakeholders is certainly a departure from the maxim of shareholder primacy.[68] But with the exception of these three general duties,

---

community generally)") (internal quotations omitted), *with* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (finding that when the sale of a corporation is inevitable, the directors' only prerogative is to sell at the highest price for the benefit of the shareholders). Following the merger craze of the 1980's, many states implemented "constituency statutes," which grant a board of directors the authority to consider the best interests of other "corporate constituencies when running a sales process or deciding whether to accept a takeover offer." Leo E. Strine, Jr., *Making It Easier For Directors to "Do the Right Thing"?*, 4 HARV. BUS. LAW REV. 235, 238 (2014). But these statutes have little weight because they simply allow directors to consider non-financial stakeholders and do not require directors to do so. Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes,* 19 PEPP. L. REV. 971, 987 (1992); 15 PA. STAT. AND CONS. STAT. ANN. § 1715(a)(1) (West **year**) (providing that a board of directors "may, in considering the best interests of the corporation, consider . . . [t]he effects of any action upon any or all groups affected by such action, including . . . communities in which offices or other establishments of the corporation are located."). Notably, however, Delaware, long the bastion of corporate law, chose not to enact a constituency statute. *See* Khatib, *supra* note X, at 169 (noting that Delaware did not enact a constituency statute).

[67] *See* MODEL BENEFIT CORP. LEGISLATION §§ 201(a), 301(a); 401(a)(2) (William H. Clark, Jr. 2016); Clark & Babson, *supra* note X, at 838–39; Clark & Vranka, *supra* note X, at 1 (same).

[68] *See* Brett McDonnell, *Benefit Corporations: Do the Benefits Exceed the Costs?*, CLS BLUE SKY BLOG (Nov. 2, 2015), http://clsbluesky.law.columbia.edu/2015/11/02/benefit-corporations-do-the-benefits-exceed-the-costs/ (explaining that the requirement that directors "must," as opposed to "may," pursue social purposes beyond profit is the key difference between benefit corporations and traditional corporate forms); *see also* Rae André, *Assessing the Accountability of the Benefit Corporation: Will This New Gray Sector Organization Enhance Corporate Social Responsibility?*, 110 J. BUS. ETHICS 133, 138 (2012) (arguing that a traditional corporation's only "mission" is to make money, whereas a benefit corporation can have "many missions."). Importantly, however, despite the duty to consider the impact of a corporation's activities on constituencies other than shareholders, benefit corporation legislation excludes other constituencies from standing to enforce this requirement. *See* MODEL BENEFIT CORP. LEGISLATION. § 305(a) () (denying standing to intended public beneficiaries). Under Delaware's benefit corporation law, in managing the corporation, directors have a statutory duty to balance the interests of shareholders, the interests of parties "materially affected by the corporation's activities," and the creation of the corporation's public benefit. DEL. CODE ANN. tit 8, § 365(a) (West **year**). While requiring a balancing of interests, benefit corporation legislation does not mandate that directors prioritize interests. *See* LA. REV. STAT. ANN. §12:1821(A)(3) (2013) (stating that benefit corporation directors are not required to give priority of any group over another, unless the corporation's articles direct them to do so); 805 ILL. COMP. STAT. ANN. 40/4.01(a)(3) (2013) (same); VT. STAT. ANN. tit. 11A, §21.09(a)(3) (West 2011) (same). In order to enforce this provision by derivative suit, however, shareholders must own, individually or collectively, the lesser of two percent of the company's outstanding shares or $2 million in market

directors of benefit corporations and directors of traditional corporations are governed by the same corporate law principles.[69]

In particular, benefit corporations, like conventional corporations, are, for the most part, policed by shareholders.[70] In contrast, directors of charitable trusts do not have shareholders looking over their shoulders, but attorneys general have the power to enforce charitable organizations on behalf of the public.[71] Benefit corporations, like charitable trusts exist to benefit the public, but the legislation denies intended beneficiaries standing to hold benefit corporations accountable for a failure to pursue a public benefit.[72] No state has included attorney general enforcement in their benefit corporation legislation, and as such, the job of oversight and enforcement is left entirely to a benefit corporation's shareholders.[73]

---

value of the corporation's shares traded on a national securities exchange. DEL. CODE ANN. tit 8, § 367 (West 2013); *see* COLO. REV. STAT. ANN. § 7-101-508 (West 2014) (requiring the same). In contrast, in order to file a derivative suit alleging a fiduciary duty violation not related to section 365(a), Delaware law simply requires that the plaintiff own one share of the corporation at the time of the transaction at issue. DEL. CODE ANN. tit 8, § 327 (West 2013).

[69] *See* LANE, *supra* note X, at 127–29 (comparing the basics of the benefit corporation form to its traditional corporate counterpart); McDonnell, *supra* note X, at 32 (noting that under traditional corporate law, directors *may* pursue objectives other than shareholder value maximization, but under benefit corporation statutes, directors *must* pursue such objectives); Mark A. Underberg, *Benefit Corporations vs. "Regular" Corporations: A Harmful Dichotomy*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. BLOG (May 13, 2012), http://blogs.law.harvard.edu/corpgov/2012/05/13/benefit-corporations-vs-regular-corporations-a-harmful-dichotomy (arguing that the benefit corporation "legal regime no more guarantees that those companies will make 'socially responsible' decisions than existing law prevents directors from doing so.").

[70] *See* Reiser, *supra* note X, at 240 (arguing that in the context of benefit corporation legislation, "reliance on self-policing or investor-only accountability is suboptimal."); Nass, *supra* note X, at 886 (noting that accountability mechanisms in benefit corporation legislation are only available to investors and company-insiders).

[71] *See* GEORGE GLEASON BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 363 (rev. 2d and 3d ed. 2015 supp.) (noting that state attorneys general have enforcement power over charitable trusts); Reiser, *supra* note X, at 241 (noting that "[s]tate attorneys general safeguard assets devoted to charity within their states"); *see also* Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law,* 21 U. HAW. L. REV. 593, 595 (1999) (noting that in the corporation context, "shareholders keep an eye on the directors").

[72] *See, e.g.*, DEL. CODE ANN. tit. 8, § 365(b) (West 2013) (excluding standing for third parties); 15 PA. CONS. STAT. ANN. § 3321(d) (West 2013) (same); VT. STAT. ANN. tit. 11A, § 21.09(c) (West 2011) (same); MODEL BENEFIT CORP. LEGISLATION. § 305(a) (William H. Clark, Jr. 2016) (same).

[73] *See* Reiser, *supra* note X, at 613 (noting that "[t]here is no regulatory role for any public official in the benefit corporation."); *cf.* Alicia Plerhoples, *Will Benefit Corporations Be Considered Charities?*, SOCENTLAW (Oct. 26, 2012), http://socentlaw.com/2012/10/will-benefit-corporations-be-considered-charities (posing, but not answering, the question of whether benefit corporations will be considered charities by state attorneys general). In fact, Hawaii specifically states that "[e]nforcement of the responsibilities [related to creating a public benefit

For comparison, in 2005, the United Kingdom introduced the Community Interest Company ("CIC"), which is similar to the benefit corporation, but includes a specialized Office of the Regulator of Community Interest Companies ("CIC Regulator") to oversee the humanitarian efforts of these companies.[74] The CIC Regulator determines whether a business organization is eligible to incorporate or reincorporate as a CIC.[75] The CIC Regulator provides guidance on the creation of CICs and examines complaints that a CIC has drifted from its mission, pursuing an action against such CIC "if necessary."[76] The CIC blends the government-regulation aspects in U.S. charitable trust law with the for-profit aspects of general corporate law.[77]

---

corporation] comes not from governmental oversight, but rather from new provisions on transparency and accountability . . . ." HAW. REV. STAT. ANN. § 420D-1 (West *year*).

[74] *See* Keren G. Raz, *Toward an Improved Legal Form for Social Enterprise*, 36 N.Y.U. REV. L. & SOC. CHANGE 283, 307 (2012) (describing the CIC form); Reiser, *supra* note X, at 613–14 (same); *What is a CIC?*, CIC ASSOC., http://www.cicassociation.org.uk/about/what-is-a-cic (last visited Feb. 29, 2016) (same). "A [CIC] is a limited company, with special additional features, created for the use of people who want to conduct a business or other activity for community benefit, and not purely for private advantage." *Community Interest Companies: Forms and Step-By-Step Guides*, OFFICE OF THE REGULATOR OF COMMUNITY INTEREST, , https://www.gov.uk/government/publications/community-interest-companies-business-activities (last visited Feb. 29, 2016).

[75] *Community Interest Companies*, OFFICE OF THE REGULATOR OF COMMUNITY INTEREST, https://www.gov.uk/government/organisations/office-of-the-regulator-of-community-interest-companies (last visited Feb. 29, 2016) [hereinafter *Community Interest Companies*]. One of the architects of the CIC legislation, Stephen Lloyd, has said that the CIC Regulator's powers are "surprisingly wide." Stephen Lloyd, *Transcript: Creating the CIC*, 35 VT. L. REV. 31, 38 (2010). The CIC Regulator can hire forensic accountants to investigate a CIC's books, she has the authority to initiate civil proceedings against CIC's, she can also remove the directors and appoint a CIC receiver, who in turn, can initiate the dissolution or liquidation of the CIC. **this is kind of a run on sentence, try to rephrase** *See id.* at 38–39 (describing the powers of the CIC Regulator).

[76] *Community Interest Companies*, *supra* note X. CIC's may pay dividends to private investors but the distributions are subject to an aggregate maximum cap of 35%. *See* OFFICE OF THE REGULATOR OF COMMUNITY INTEREST COMPANIES, INFORMATION AND GUIDANCE NOTES: CHAPTER 6: THE ASSET LOCK 5, 7 (2014), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/416360/14-1089-community-interest-companies-chapter-6-the-asset-lock.pdf (explaining recent updates to the dividend distribution cap). In addition, to become a CIC, companies must commit to an irrevocable "asset lock," which means that upon dissolution or liquidation, assets must either be transferred to a fully charitable organization, another CIC, or distributed towards the community benefit enumerated in the company's organizing documents. *Id.* at 3 (describing the asset lock requirement); *cf.* J. Haskell Murray, *Defending Patagonia: Mergers and Acquisitions with Benefit Corporations*, 9 HASTINGS BUS. L.J. 485, 507–08 (2013) (arguing that benefit corporation legislation should include an asset lock provision).

[77] *See* ***I think you need a direct source here, can be one in this supra cite*** *supra* notes X–X and accompanying text (describing the government regulation inherent in charitable trust law); *cf.* Page & Katz, *supra* note X(the role of social), at 88 (arguing that "[t]he United Kingdom

B. Fiduciary Duties and Internal Control in the Benefit Corporation

Benefit corporation legislation does, however, include limited, shareholder-initiated enforcement mechanisms.[78] First, a benefit corporation must report, at least annually, on the corporation's efforts to create the public benefit identified in its certificate of incorporation, which allows shareholders and the public to judge the corporation on its humanitarian endeavors.[79] Many states and the Model Legislation require benefit corporations to report on their efforts to create a public benefit using a third-party standard.[80] The Model Legislation requires that the third-party certification standard be "comprehensive," "developed by an entity that is not controlled by the benefit corporation," "credible," and "transparent."[81] Third-party rating agencies are available to perform this task, but the Model Legislation does not provide much guidance on the specific requirements imposed on the agencies.[82] Therefore, these agencies can be as stringent, or not, in their

---

recognized the potential breadth of a for-profit social enterprise's purpose in its enactment of a legal form tailored to them: a [CIC]").

[78] *See* MODEL BENEFIT CORP. LEGISLATION. §§ 102(a) (requiring third-party certification), 305(c) I think this is (c) not (a) (providing for a "benefit enforcement proceeding") (William H. Clark, Jr. 2016); *see also* Raz, *supra* note X, at 305 (arguing that the benefit corporation form contains limited accountability procedures). At least one commentator has written that it is unlikely a shareholder would bring suit against a benefit corporation for its failure to create a public benefit. *See* Reiser, *supra* note X, at 240 (arguing that if a benefit corporation's directors chose not to pursue the corporation's mission, shareholders would fail to hold them accountable and would "simply sit back and enjoy the greater returns").

[79] *See e.g.*, DEL. CODE ANN. tit. 8, § 366(b) (West 2013); VT. STAT. ANN. tit. 11A, § 21.14(a) (West 2012); MASS. GEN. LAWS ANN. ch. 156E, § 15(a) (West 2012); MODEL BENEFIT CORP. LEGISLATION § 401(a) (); *see also* N.J. STAT. ANN. § 14A:18-11(d)(1)–(2) (West 2011) (requiring that benefit corporations file their benefit reports with the Department of Treasury, and stating that failure to do so could lead to revocation of benefit corporation status); HAW. REV. STAT. ANN. § 420D-11(b) (West 2011) (requiring benefit corporations to post their annual benefit report online for a "sixty-day public comment period prior to [its] final publication.").

[80] *See* MODEL BENEFIT CORP. LEGISLATION § 401(a)(2) () (requiring the inclusion of "[a]n assessment of the overall social and environmental performance of the benefit corporation against a third-party standard" in company's annual reports); VT. STAT. ANN. tit. 11A, § 21.03(a)(8) (West 2012) (defining "third-party certification" as "a recognized standard for defining, reporting, and assessing corporate social and environmental performance" that is "independent" and "transparent") ***I would put in at least one more state to support assertion that "many states…" You could cite to Vt. 21.14(a)(2) and then make the definition citation in 21.03 its own sentence in the footnote.

[81] MODEL BENEFIT CORP. LEGISLATION § 102 (2013) (defining "third-party standard").

[82] *See* Callison, *supra* note X, at 94 (highlighting the fact that the Model Legislation "spills much ink" attempting to define "credible," "transparent," and "independent" in the third-party standard, but "fails to state how standards are applied or by whom."); Clark & Babson, *supra* note X, at 845–46 (noting an array of rating agencies).

conceptualization of what it means to actually "create" a public benefit as would best serve their needs and the needs of the benefit corporation that procures their services.[83] In addition, third party standard setters do not have any authority to revoke benefit corporation status, nor do they have the power to enforce the fiduciary duties of benefit corporation directors.[84]

Second, benefit corporation legislation provides for initiation of a "benefit enforcement proceeding" to compel the corporation to follow-through on its commitment to create a public benefit.[85] Again, however, third parties do not have standing and only shareholders, directors themselves, or investors owning a certain percentage of the benefit corporation's parent company can initiate these proceedings.[86] In addition, unlike in shareholder derivative actions, monetary damages to the corporation are not available and the only remedy is specific performance.[87]

Finally, the Model Legislation requires the appointment of an independent "benefit director" whose responsibility is to oversee the board's creation of a public benefit.[88] Many states, however, including

---

[83] *See* Loewenstein, *supra* note X, at 1014, 1020–21 (discussing the ambiguity in the word "create," as used by benefit corporation legislation). ***Need more support here. I think Reiser at 238 backs up what you are saying. The Clark & Babson source only stated that rating agencies exist (and nothing about how they operate/rate) which fits better as cite for FN83.

[84] *See* Reiser, *supra* note X, at 238 (explaining the role of the third party standard setter).

[85] MODEL BENEFIT CORP. LEGISLATION § 305(c) (William H. Clark, Jr. 2016); *see* MASS. GEN. LAWS ANN. ch. 156E, § 14 (West 2012); N.J. STAT. ANN. § 14A:18-10 (West 2011).

[86] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 156E, § 14(b)(2)(iii) ((requiring five percent ownership in parent company to initiate a benefit enforcement proceeding); VT. STAT. ANN. tit. 11A, § 21.13(b)(3) (West 2013) (requiring ten percent ownership in parent company); N.J. STAT. ANN. § 14A:18-10(b)(2)(c) (West 2011) (same); MODEL BENEFIT CORP. LEGISLATION § 305(c)(2) () (requiring shareholders to have two percent ownership of the benefit corporation and investors to have five percent of parent company to initiate a benefit enforcement proceeding).

[87] *See, e.g.*, 15 PA. STAT. AND CONS. STAT. ANN. § 3321(c)(2) (West 2013) (establishing that directors cannot face monetary liability for the failure to create a public benefit); CAL. CORP. CODE § 14620(f) (West 2012) (same); MASS. GEN. LAWS ANN. ch. 156E, § 10(d) (West 2012) (same); N.J. STAT. ANN. § 14A:18-6(d) (West 2011) (same); MODEL BENEFIT CORP. LEGISLATION § 301(c) () (same); Nass, *supra* note X, at 887 (noting that benefit enforcement proceedings can only result in specific performance); Callison, *supra* note X, at 95 (noting that the Model Legislation exempts directors from monetary liability); *cf.* NEV. REV. STAT. ANN. § 78B.190(4) (West 2014) (providing that if a court finds that a benefit corporation did not comply with statutory requirements, it can award attorney's fees and other reasonable expenses incurred by a plaintiff in bringing a benefit enforcement claim). CAL. CORP. CODE § 14623(d) (West 2012) (same). Specific performance is defined by Black's Law Dictionary as "a court-ordered remedy that requires precise fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate . . . ." *Specific Performance*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[88] MODEL BENEFIT CORP. LEGISLATION § 302 (2013); *see* N.J. STAT. ANN. § 14A:18-7(a) (West 2011) (requiring the board of directors of a benefit corporation to include one director who is designated as a "benefit director"). Some state legislation also includes a "benefit officer," who

California, Maryland, New York, and Virginia, have declined to mandate appointment of a benefit director.[89] In the states that do require one, such requirement may give rise to career social enterprise auditors whose compensation is based on the content of their opinions.[90] In addition, per the Model Legislation, the benefit director must certify annually that the corporation has acted in furtherance of its stated public benefit "in all material respects."[91] It is implausible, however, that every action taken by the corporation's board would, or even could, further the creation of the corporation's public benefit.[92] In sum, consumers and intended beneficiaries, the best evaluators of a corporation's efforts to create a public benefit, are denied standing to enforce the creation of a public benefit and are relegated to judging benefit corporations based on scant self-reporting requirements.[93]

C. The Role of Attorneys General in Protecting the Public Welfare

Charitable trusts, like benefit corporations, exist to provide a benefit to an enumerated subset of the public.[94] In addition, as in the law

---

is responsible for preparing the annual benefit report. *See* MASS. GEN. LAWS ANN. ch. 156E, § 13 (West 2012); N.J. STAT. ANN. § 14A:18-9 (West 2011) (allowing for, but not requiring, a "benefit officer").

[89] Loewenstein, *supra* note X at 1024 n.73 (listing the states that do not require benefit directors).

[90] *See id.* at 1019–20 (noting that "[e]ven if an industry of social were to emerge, it would be of questionable value" because there is a distinct possibility that benefit corporations could "shop" around for rating agencies and that the benefit director). ***Your support for FN 91 is a little too attenuated. There is nothing in Lowenstein that describes the motivations of the rating agencies or the individual agents who give ratings.

[91] MODEL BENEFIT CORP. LEGISLATION § 302(c)(1) (William H. Clark, Jr. 2016).

[92] *See* Loewenstein, *supra* note X, at 1024 (noting the impracticality of the "in all material respects" language).

[93] *See id*. at 1021 (noting that beneficiaries are "[p]erhaps the best judges of the effectiveness of the corporation's efforts" to create a public benefit).

[94] *See* Russell v. Allen, 107 U.S. 163, 167 (1883) ("[Charitable trusts] may, and indeed must, be for the benefit of an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity."); BOGERT, *supra* note X, § 363 (describing the beneficiaries of charitable trusts). Perhaps the most notable difference between charitable trusts and corporations is that charitable trusts may never distribute profits to trustees, whereas a corporation can distribute profits to its shareholders in the form of a dividend. *See* Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980) (describing the distribution prohibition in the law governing nonprofits). The Restatement (Third) of Trusts defines a "trust" as:

> [A] fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the

governing benefit corporations, trustees of charitable assets owe fiduciary duties to the trust and to other trustees, but not to the intended public beneficiaries of the trust's activities.[95] Accordingly, public beneficiaries are generally denied standing to bring suit to enforce a charitable trust's activities.[96] To ensure that charities adhere to their missions, however, state attorneys general have either statutory or common law authority to initiate court proceedings on behalf of the public to enforce charities' activities.[97]

Where the attorney general lacks statutory authority to enforce the activities of a charitable trust, the common law doctrine of *parens patriae* may provide standing for the attorney general to bring suit for harm to the state's quasi-sovereign interests.[98] To bring such an action, however, the

---

> property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee.

RESTATEMENT (THIRD) OF TRUSTS § 2 (2003) [hereinafter RESTATEMENT OF TRUSTS].

[95] *See* Gary, *supra* note X, at 598–603 (1999) (describing the various fiduciary duties contained in trust law); *see generally* RESTATEMENT OF TRUSTS §§ 76–84 (identifying the duties of charitable trustees). ***I don't see anything about thee last clause in TAN96 about no duties to intended public. Is this just implied?

[96] *See* BOGERT, *supra* note X, § 363 (noting that intended beneficiaries generally lack standing to bring suit against a trust) ***I;m pretty sure it is 363 not 414 but take a look; Gary, *supra* note X, at 618 (same); *see also* RESTATEMENT OF TRUSTS § 94, cmt. g (stating that "[t]he mere fact" that someone, as a member of the public, stands to benefit from a trust's activities or the fact that that "person is a possible recipient of benefits" is not sufficient grounds for standing).

[97] *See, e.g.*, CAL. CORP. CODE § 5250 (West 2011) (providing the attorney general express power to examine the activities of nonprofit corporations and initiate "proceedings necessary to correct . . .noncompliance"); MICH. COMP. LAWS ANN. § 14.251 (West) (providing that Attorney General "shall represent the people" in enforcing charitable trusts); OR. REV. STAT. ANN. § 128.710 (West) (providing enforcement authority to Attorney General); MINN. STAT. ANN. § 501B.31(5) (West) (same); NEV. REV. STAT. ANN. § 82.536 (West) (same); N.Y. NOT-FOR-PROFIT CORP. LAW § 112 (McKinney *year*) (same); Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1863–64 (2000) (describing the doctrine of *parens patriae* ***this is a confusing explanatory parenthetical because you haven't yet discussed parens patriae. I would delete or just use source to add to AG power argument); *see also* BOGERT, *supra* note X, § 363 (noting that a charitable trust is almost always enforced by the attorney general); RESTATEMENT OF TRUSTS § 94(2) (noting that a suit to enforce a charitable trust can generally only be brought by the attorney general or a trustee ***source mentions a couple more individs who can bring suit).

[98] *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico, *ex rel*., Barez, 458 U.S. 592, 607 (1982) (stating that "the state must express a quasi-sovereign interest" in order for standing to be conferred); Florida v. Mellon, 273 U.S. 12, 16 (1927) ("[J]udicial relief sometimes may be granted to a quasi-sovereign state under circumstances which would not justify relief if the suit were between private parties.");. *Parens patriae* "originated as an English equitable doctrine where the king served as "guardian for persons legally unable to act for themselves." Michael L. Rustad & Thomas H. Koenig, *Parens Patriae Litigation to Redress Societal Damages from the BP Oil Spill: The Latest Stage in the Evolution of Crimtorts*, 29 UCLA J. ENVTL. L. & POL'Y 45, 78 (2011) (quoting Stephen Calkins, *An Enforcement Official's Reflections on Antitrust Class Actions*, 39 ARIZ. L. REV. 413, 433 (1997)). The U.S. Supreme Court has endorsed the doctrine as "the

attorney general must establish an interest separate from the interests of the private parties directly involved in the charity.[99] Thus, the attorney general must be able to "allege[] injury to a sufficiently substantial segment of [the] population" to stay in court.[100] In 1982, in *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, the U.S. Supreme Court stated that helpful to the determination of whether the State has alleged an injury to a significant

---

supreme power of every state . . . for the prevention of injury to those who cannot protect themselves." Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 57 (1890); *see Parens Patriae*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining *parens patriae* as "[a] doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen . . . .").

[99] *Snapp*, 458 U.S. at 607. According to the U.S. Supreme Court, the State may assert a quasi-sovereign interest in bringing an action in two situations: when the State has an interest in "the health and well-being-both physical and economic-of its residents in general" or when it has an "interest in not being discriminatorily denied its rightful status within the federal system." *Id.* (noting that "the articulation of such interests is a matter for case-by-case development").

[100] *Id.* (holding that "[a]lthough more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well . . . ."); *see* Oregon v. Legal Servs. Corp., 552 F.3d 965, 974 (9th Cir. 2009) (holding that the state's "interest that its citizens benefit from voluntary federal grants" is not significant enough an interest to provide standing through *parens patriae* doctrine). Due in part to "lax" enforcement by attorneys general, in limited circumstances courts have recognized standing for "specially interested beneficiaries" to enforce a trust's activities. *See* Hooker v. Edes Home, 579 A.2d 608, 612–13 (D.C. 1990) (describing the "special interest" doctrine); BOGERT, *supra* note X, § 414 (commenting on the "special interest doctrine" and noting that attorney general intervention has been "lax"); RESTATEMENT OF TRUSTS § 94, cmt. g (discussing the "specially interested beneficiary" concept); *see also* San Diego County Council v. Escondido, 14 Cal. App. 3d 189, 196–97 (Cal. Ct. App. 1971) (finding County Council of Scouts had standing in individual capacity to enforce conveyance of trust property to Boy Scouts and Girl Scouts, which had been referenced as beneficiaries by the trust); City of Paterson v. Paterson Gen. Hosp., 235 A.2d 487, 495 (N.J. Super. Ch. Div. 1967) (finding city and two residents had standing to bring suit seeking to prevent defendant hospital from changing its location); Lumen N. Mulligan, *What's Good for the Goose Is Not Good for the Gander: Sarbanes-Oxley-Style Nonprofit Reforms*, 105 MICH. L. REV. 1981, 2001 (stating that "[nonprofit] disclosure documents seem fated to languish in the basements of state attorneys generals' offices." ***this is kind of difficult to understand in isolation); Hansmann, *supra* note X, at 873–74 (stating that state's attorneys general fail to "devote[] any appreciable amount of resources to the oversight of nonprofit firms."); *cf.* RESTATEMENT OF TRUSTS § 94, cmt. e. (noting that in a suit brought by a "specially interested beneficiary," the attorney general must be joined as a party). The rationale for limiting standing to specially interested beneficiaries, like excluding intended public beneficiaries from standing in benefit corporation legislation, is based on the assertion that "vexatious litigation . . . would result from recognition of a cause of action by any and all of a large number of individuals" who claimed a right to receive the benefits created by a charitable trust. *Hooker*, 579 A.2d at 608; *see* Munch, *supra* note X, at 190 (noting that "one can easily imagine the endless, non-meritorious stream of litigation" if benefit corporation legislation provided standing to anyone with a tenuous claim to the public benefits created by a corporation). Importantly, however, because intended beneficiaries are specifically denied standing by statute, the specially interested beneficiary doctrine would not allow beneficiaries to bring suit to enforce benefit corporations. *See* ***direct cite***; *supra* notes X–X and accompanying text (explaining that standing is denied to third-party beneficiaries of a benefit corporation's public benefit work).

enough proportion of its population to assert its *parens patriae* powers "is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers."[101]

In addition to charitable trust enforcement and oversight capabilities, state attorneys general are also granted enforcement power over commercial transactions through their states' unfair or deceptive acts or practices ("UDAP") statutes.[102] There is a UDAP statute on the books in every state and the District of Columbia.[103] The statutes typically apply to business transactions between individuals and corporations.[104] They grant a private right of action to individuals, corporations, and provide for public enforcement through state attorneys general.***← paraphrase***[105] Specifically, the statutes give the attorney general the power to examine consumer grievances, procure guarantees of compliance with the statutes, pursue injunctions or cease and desist orders, and seek restitution for consumers.***← paraphrase slightly***[106] Abandonment of a benefit corporation's humanitarian purpose or perversion of the corporate form to attract consumers may harm the public, enabling attorneys general to take action.[107]

III. BENEFIT CORPORATION LEGISLATION SHOULD PROVIDE STANDING TO ATTORNEYS GENERAL TO OVERSEE AND ENFORCE BENEFIT CORPORATIONS

---

[101] *Snapp*, 458 U.S. at 607.

[102] *See* Anthony Paul Dunbar, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 TUL. L. REV. 427, 430 (1984) (discussing the role of attorneys general in consumer complaints).

[103] CAROLYN L. CARTER, CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES, NAT'L CONSUMER L. CENTR. 3 (2009)

[104] Michael Flynn, *This Is the End . . . My Friend: Disgorgement, Dissolution and Sequestration as Remedies Under State UDAP Statutes*, 21 LOY. CONSUMER L. REV. 181, 183 (2008).

[105] *Id.*

[106] Dunbar, *supra* note X, at 430.

[107] Reiser, *supra* note X, at 242 (explaining that attorneys generals' "interest in protecting the public interest in their jurisdictions" might force them to consider benefit corporation enforcement). *But see* 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, 38 (2011) (arguing that attorneys general lack the same interest in "ensuring proper management" of benefit corporations as shareholders).

Benefit corporations exist to create a humanitarian or environmental benefit for an enumerated public group.[108] But the current body of legislation denies standing to intended public beneficiaries—the group that stands to gain the most from benefit corporations.[109] As such, this Part argues that the legislation should be amended to provide oversight and enforcement capabilities to state attorneys general on behalf of intended public beneficiaries.[110] Part A contends that attorneys general may already have standing under the current benefit corporation legislation, but notes the limited and uncertain applicability of such an approach.[111] Part B advocates for amendment of the legislation to clearly include a statutory grant of authority to attorneys general to oversee and enforce the creation of public benefits.[112]

A. Possibilities for Attorney General Intervention Under Current Legislation

State attorneys general may find that their interest in protecting the public positions benefit corporation enforcement falls within their existing enforcement powers over charitable trust.[113] First, where attorneys general have statutory authority with regard to charitable trusts, they could argue that such statutory authority also allows them to enforce the activities of benefit corporations.[114] Second, attorneys general may be able to enforce

---

[108] *See* ***direct cite***; *supra* notes X–X and accompanying text (explaining the purpose behind the benefit corporation).

[109] *See* Khatib, *supra* note X, at 181–82 (arguing that the current legislative framework leaves an "enormous potential" for "legalized greenwashing"); Nass, *supra* note X, at 888 (recommending changes to benefit corporation legislation such as "creating a more structured third-party oversight and transparency standard and expanding the scope of stakeholders that may bring a benefit enforcement proceeding.").

[110] *See infra* notes X–X and accompanying text.

[111] *See infra* notes X–X and accompanying text.

[112] *See infra* notes X–X and accompanying text.

[113] *See* Reiser, *supra* note X, at 242 (noting that attorneys general may view it their prerogative to oversee and enforce benefit corporations); John Tyler, *Analyzing Effects and Implications of Regulating Charitable Hybrid Forms as Charitable Trusts: Round Peg and a Square Hole?*, 9 N.Y.U. J.L. & BUS. 535, 559 & n.69 (2013) (noting the possibility that attorney general authority to police benefit corporations could be found in existing charitable trust law).

[114] *See* Reiser, *supra* note X, at 241 (suggesting that if some or all of a social purpose corporations' assets are devoted to charitable purposes, it could fall within the reach of attorneys general's statutory powers). Similarly, if a benefit corporation can be considered a charity, there is also the possibility that a court could rewrite the public benefit goal in a benefit corporation's certificate of incorporation under the *cy pres* doctrine, in order to avoid frustration of the public benefit goal. *See* Sean W. Brownridge, *Canning Plum Organics: The Avant-Garde Campbell Soup*

benefit corporations' activities through the use of *parens patriae* power if the failure to pursue or create a public benefit damages the public in their state.[115] A state attorney general must allege harm to a significant enough population in order to bring an action under its *parens patriae* power.[116] Thus, if a company's public benefit language is such that it is possible to establish an identifiable group of beneficiaries, a suit brought by the attorney general on behalf of that group seems plausible.[117] In addition, because benefit corporation legislation denies standing to intended beneficiaries, attorneys general may view this as a public policy basis to assert their enforcement powers.[118]

Company Acquisition and Delaware Public Benefit Corporations Wandering Revlon-Land, 39 DEL. J. CORP. L. 703, 736 (2015) (arguing that "*cy pres* precedent functions as a foundation for Delaware courts to recognize the preservation and protection of social missions at organizations appreciably concerned with the production of public value."); Tyler, *supra* note X, at 555 (explaining that courts may refine a benefit corporation's mission through the *cy pres* doctrine); *Cy Pres*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining *cy pres* as an "equitable doctrine under which a court reforms a written instrument with a gift to charity as closely to the donor's intention as possible, so that the gift does not fail.").

[115] *See* Robert H. Lande, *New Options for State Indirect Purchaser Legislation: Protecting the Real Victims of Antitrust Violations*, 61 ALA. L. REV. 447, 462 (2010) (noting that state attorneys general in many states "have *parens patriae* authority to sue generally on behalf of victimized consumers within their states."). One commentator writes that attorneys general have three charity regulation goals: "protecting charitable assets, protecting consumers and investors from fraud or deception, and safeguarding the general public interest." Reiser, *supra* note X, at 240.

[116] *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico, *ex rel*., Barez, 458 U.S. 592, 607 (1982) ***cite cases in full first time each Part (stating that attorneys general must be more than a "nominal party" to bring suit through use of *parens patriae* power); Oregon v. Legal Servs. Corp., 552 F.3d 965, 971 (9th Cir. 2009) (noting that "the Supreme Court has disapproved of considering abstract questions of wide public significance amounting to generalized grievances.") (internal quotations omitted).

[117] *See* Russell v. Allen, 107 U.S. 163, 167 (1883) (holding that a public charitable trust "must[] be for the benefit of an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity."); Allred v. Beggs, 84 S.W.2d 223, 227 (Tex. 1935) (holding that "[a] charity for the orphan children of a state is a public charity, but a charity for the orphan children of deceased Masons, Odd Fellows, Baptists, Catholics, etc., of a state is not a public charity." I would quote the sentence before this in Beggs. This is confusing) This possibility may incentivize corporations to craft the language of their stated public benefit in generalized terms so as to insulate themselves from liability to third parties. *See* Briana Cummings, *Benefit Corporations: How to Enforce a Mandate to Promote the Public Interest*, 112 COLUM. L. REV. 578, 609 (2012) arguing that "those targeted by a corporation's 'specific public benefit' arguably have a greater moral claim than do those not directly targeted . . . ."); Loewenstein, *supra* note X, at 1023 (arguing that the "expressed specific public benefit [may be] so narrowly drawn that its beneficiaries are limited and identifiable.").

[118] *See* Reiser, *supra* note X, at 240 (discussing whether attorneys general will view benefit corporation enforcement "as part of their mandate.").

It is unclear, however, whether benefit corporations "hold[] . . . property . . . for the benefit of charity," and as such, state attorney general enforcement of benefit corporations under existing law would require a loose interpretation of the charitable trust concept.[119] First, benefit corporation legislation clearly does not require that a corporation's assets be "dedicated irrevocably to charitable purposes."[120] In addition, benefit corporations are taxed as ordinary corporations and do not qualify for treatment as charitable organizations under the Internal Revenue Code.[121] Finally, the benefit corporation standard does not mandate donation to charitable causes.[122] A benefit corporation can satisfy the criteria by pledging to carry on its business for the benefit of "employees, suppliers, customers, creditors," or the public more generally by, for example, committing to conducting operations in an environmentally friendly manner.[123] Such a mission, though sufficient for qualification as a benefit corporation, would not be viewed as charitable by state actors.[124]

B. Possibilities for Legislative Change

Given the uncertainty under current legislation as to whether state attorneys general have statutory or common law power to enforce benefit

---

[119] RESTATEMENT OF TRUSTS § 2 (defining "charitable trust"); *See* Reiser, *supra* note X, at 241–42 (discussing whether or not benefit corporations and other hybrid business forms will be considered charitable). It should be noted that attorney general enforcement as discussed herein is separate from the State's power to prosecute unfair and deceptive trade practices. *See supra* note X (discussing state attorneys generals' unfair and deceptive trade practices powers).

[120] Reiser, *supra* note X, at 241; *cf.* Thomas J. White III, *Benefit Corporations: Increased Oversight Through Creation of the Benefit Corporation Commission*, 41 J. LEGIS. 329, 351 (2015) (arguing that the possibility for financial gain in benefit corporations makes it less likely that attorneys general would enforce their obligations, as opposed to nonprofits, where no one stands to gain a financial benefit).

[121] *See* 26 U.S.C. § 501(c)(3) (2012) (stating the requirements to be classified as a charitable organization); *Charitable Organization*, BLACK'S LAW DICTIONARY (10th ed. 2014) (noting that a charitable organization is tax-exempt); Lane, *supra* note X, at 128 (noting that benefit corporations are taxed in the same manner as any other for-profit corporation).

[122] *See* Reiser, *supra* note X, at 241 (noting that benefit corporations are unlikely to be considered charities).

[123] *See* CAL. CORP. CODE § 2602(b)(2)(B) (2014); *cf.* Clark & Babson, *supra* note X, at 842 (noting that if a benefit corporation "consciously conducts its operations in a manner that is socially and environmentally responsible, it would qualify as a benefit corporation regardless of whether it also contributes to or promotes charitable causes.").

[124] *See* Reiser, *supra* note X, at 241 (noting that such purposes are unlikely to be viewed as "charitable under state law.").

corporations, certain amendments should be made to the legislation.[125] Subsection 1 discusses the effect that explicitly classifying benefit corporations and their fiduciaries as "trustees" of assets held for charitable purposes would have on attorney general enforcement capabilities.[126] Subsection 2 urges states to amend their benefit corporation legislation to include procedures for attorney general enforcement and oversight.[127]

1. Statutory Classification of Benefit Corporation Fiduciaries as "Trustees"

Statutory classification of benefit corporation fiduciaries as "trustees" of charitable assets would provide an indirect avenue for attorneys general to oversee and enforce benefit corporations' charitable activities.[128] For example, fiduciaries of Illinois L3C's are classified as trustees of charitable assets and are thus subject to Illinois charitable trust law.[129] If this classification were included in benefit corporation legislation, attorneys general would be able to use their statutory power to hold directors of benefit corporations accountable for a failure to diligently oversee the management and use of charitable assets.[130] This does not fully resolve the issue, however, because if benefit corporations are to retain their hybrid for-profit status, not all of a benefit corporation's assets can be devoted to charitable purposes.[131] By choosing not to dedicate any funds to

---

[125] *See* Nass, *supra* note X, at 888 ("If legislatures augment certain provisions in the benefit corporation legislation and courts strictly enforce compliance, incorporating as a benefit corporation will allow such a corporation to demonstrate that it is truly committed to social and environmental progress.").

[126] *See infra* notes X–X and accompanying text.

[127] *See infra* notes X–X and accompanying text.

[128] *Cf.* Reiser, *supra* note X, at 241 (noting that it is unclear whether benefit corporations are trustees of assets dedicated to charitable purposes) ***I don't see support for this. Is it the part about Illinois?.

[129] *See* 805 ILL. COMP. STAT. ANN. 180 / 1-26(d) (2013) (stating that Illinois L3C's are trustees of charitable assets and are thus subject to Illinois charitable trust law with respect to fiduciary duties); *id.* § 40 / 4.01(d) (2013) (stating that "[a] [benefit corporation] director does not have a duty to a person that is a beneficiary of the general public benefit purpose or a specific public benefit purpose of a benefit corporation arising from the status of the person as a beneficiary.").

[130] *See* 805 ILL. COMP. STAT. ANN. 180/1-26(d) (2013) (stating that L3C directors are subject to charitable trust law). ***Need more support. At minimum, describe the enforcement power of AGs to oversee charitable assets under Ill. law

[131] *See* Nass, *supra* note X, at 881 (noting that benefit corporations "hope to achieve the dual-purposes of profit maximization and the furtherance of a material public benefit . . . ."); Reiser, *supra* note X, at 241 (noting that not all assets of benefit corporations are devoted entirely to charity).

charity, benefit corporations could easily manipulate the law in order to shield directors from liability.[132]

2. Benefit Corporation Legislation Should Be Amended to Include Attorney General Statutory Enforcement Power

Instead of providing indirect enforcement capabilities to attorneys general, as described in the previous Subsection, benefit corporation legislation should be amended to specifically provide attorneys general with oversight and enforcement power over benefit corporations.[133] The United Kingdom's CIC business form and existing statutory grants of authority to attorneys general to oversee and enforce charitable trusts could be points of reference for drafting the addition of attorney general oversight and enforcement in benefit corporation legislation.[134] This change would be significant, but would also be necessary to correct the currently inadequate oversight and enforcement procedures in benefit corporation legislation.[135] Given that attorneys general already have broad enforcement capabilities with regard to unfair and deceptive trade practices and with regard to

[132] *See* Clark & Babson, *supra* note X, at 842 (noting that a benefit corporation can qualify as such, regardless of whether it contributes to charitable causes, if it commits to social and environmental responsibility***paraphrase***); *cf.* Khatib, *supra* note X, at 182 (noting that "[a]s it currently stands, neither the [Model Legislation] nor [Delaware's benefit corporation] legislation contains a mechanism to investigate exploitation of the corporate form."). Upon incorporation, founders could include in the certificate of incorporation that the corporation exists not to donate to charitable causes, but instead, is committed to operating in a socially and environmentally-responsible manner. *See* Reiser, *supra* note X, at 241 (noting that such broad purposes are unlikely to be charitable under state law).

[133] *See* Reiser, *supra* note X, at 243 (noting the possibility that states could include attorney general enforcement in their benefit corporation legislation); *see also* Loewenstein, *supra* note X, at 1021–22 (proposing the inclusion of attorney general enforcement in benefit corporation legislation); *see also* Nass, *supra* note X, at 890 (arguing for government oversight in benefit corporation legislation). *But see* Murray, *Chose Your Own Master*, *supra* note X, at 45 (arguing that "[p]rivate organizations are better equipped than state governments to build nuanced brands and to police them.").

[134] *See* ***Direct cite***; *supra* notes X–X and accompanying text (describing the CIC form).

[135] *See* Kent Greenfield, *A Skeptics View of Benefit Corporations*, 1 EMORY CORPORATE GOVERNANCE AND ACCOUNTABILITY REV. 17, 18 (2014) (arguing that benefit corporation legislation does not "add much" to corporate law); *supra* note X (noting that benefit corporation legislation does not allow directors to do anything that was not already available to them under traditional corporate law).

charitable enterprises, the regulation and enforcement of benefit corporations would be consonant to their current duties.[136]

State attorneys general are given express statutory authority to intervene in the management and affairs of a charitable organization in order to correct a departure from the purpose for which it was formed.[137] Thus, attorneys general already have particular experience in assessing performance of the fiduciary duties in charitable trust law.[138] As such, benefit corporation legislation could be amended to include similar grants of authority to attorneys general.[139] In addition, Massachusetts and New Jersey already require that a benefit corporation's annual benefit report be filed with the state authority.[140] New Jersey law also states that if a corporation has not delivered its report for two consecutive years, the state can revoke its legal status as a benefit corporation.[141] These reporting requirements indicate that states have already given some thought to the possibility of sham benefit corporations, and have taken small steps to integrate state oversight into the legislation.[142]

---

[136] *See* Reiser, *supra* note X, at 244 (noting that attorneys general have "broad investigatory and prosecutorial powers" regarding consumer protection and charity regulation). ***I'd try to diversify your support here. Easily done by adding source on charitable or UDAP powers discussed earlier

[137] *See, e.g.*, CAL. CORP. CODE § 5250 (West *year*) (granting attorney general authority to enforce charitable activities); MICH. COMP. LAWS ANN. § 14.251 (West *year*) (providing that Attorney General "shall represent the people" in enforcing charities); BOGERT, *supra* note X, § 363 (noting that a charitable trust is almost always enforced by the Attorney General); RESTATEMENT OF TRUSTS § 94(2) (noting that a suit to enforce a charitable trust is normally brought by the Attorney General). Courts have, however, indicated a tendency to defer to nonprofit directors, much like the business judgment rule in suits regarding for-profit companies. *See* In re Multiple Sclerosis Serv. Org. of N.Y., Inc., 496 N.E.2d 861, 865, 868 (N.Y. 1986) (holding directors of nonprofit had authority to define the organization's mission and were not bound by the language of its founding documents).

[138] Reiser, *supra* note X, at 243 (noting the expertise of attorneys general in regulating charitable enterprises).

[139] *See* Loewenstein, *supra* note X, at 1021–22 (noting that benefit corporation legislation could include attorney general enforcement); Reiser, supra note X, at 240 (discussing the addition of attorney general oversight in benefit corporation legislation).

[140] *See* MASS. GEN. LAWS ANN. ch. 156E, § 16(d) (West 2012) (requiring a benefit corporation to submit its annual report to the state secretary); N.J. STAT. ANN. § 14A:18-11(d)(1) (West 2011) (same).

[141] *See* N.J. STAT. ANN. § 14A:18-11(d)(2) (stating that the state can revoke benefit corporation status after a two-year failure to deliver the report).

[142] *See* Reiser, *supra* note X, at 243 (arguing that stricter disclosure requirements may help alert state authorities to disingenuous benefit corporations). *But see* Cummings, *supra* note X, at 612 (arguing that external reporting requirements encourage firms to "suppress information, focus on short-term results, and do the minimum necessary to comply with external requirements . . . ."). In addition, at the state level, there is at least some evidence of the recognition of the possible overlap between benefit corporation law and the law governing charitable trusts. *See* CAL. CORP.

States should use the United Kingdom's CIC Regulator as a point of reference when drafting attorney general enforcement into their benefit corporation legislation.[143] The CIC legislation includes the appointment of a CIC Regulator, who has a wide array of oversight and enforcement capabilities.[144] In particular, the CIC Regulator can investigate a CIC's books, initiate civil proceedings against CIC's, and expel directors.[145] Similarly, within state attorneys general offices, there is generally a division devoted to investigating and bringing claims against corporations for unfair and deceptive trade practices.[146] In addition, attorneys general, compared to a separate, independent commission, have greater incentive to protect the public from deceptive business practices and are less susceptible to collusion with benefit corporations themselves.[147]

To further borrow from the CIC Regulator, an important step would be to require pre-approval from attorneys general before entrepreneurs could incorporate new corporations or reincorporate existing corporations as benefit corporations.[148] This initial check on benefit corporations would serve to dissuade "bad actors" from incorporating disingenuous benefit corporations.[149] In addition to requiring pre-incorporation approval, states should also follow the examples of Massachusetts and New Jersey and

---

CODE § 2700 (West 2015) (noting nothing in a particular California benefit corporation law statute "shall be construed as negating existing charitable trust principles or the Attorney General's authority to enforce any charitable trust created.").

[143] *See* White, *supra* note X, at 351 (arguing for the creation of a "Benefit Corporation Commission," but advocating against inclusion of attorney general enforcement); ***Direct source on CIC****supra* note X and accompanying text (discussing the CIC form).

[144] *See* Lloyd, *supra* note X, at 38–39 (describing the duties of the CIC Regulator).

[145] *Id.*; *see* OFFICE OF THE REGULATOR OF COMMUNITY INTEREST COMPANIES, LEAFLETS: STATUS, ROLE, FUNCTION AND LOCATION 3, 5 (2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/223957/13-785-community-interest-companies-regulators-status-role-function-and-location-guide.pdf [hereinafter LEAFLETS] (defining the CIC Regulator as "an independent statutory office-holder appointed by the Secretary of State for Business Innovation and Skills . . . .").

[146] *See* Reiser, *supra* note X, at 242 (stating that "[p]rotecting investors and consumers from fraudulent and deceptive practices is another important part of the mandate of state attorneys general . . . ."); *supra* note X (describing the role of attorneys general in policing unfair and deceptive trade practices).

[147] *Cf.* Loewenstein, *supra* note X, at 1024–1025 (discussing the fact that third-party rating agencies are susceptible to influence by benefit corporations).

[148] *See* LEAFLETS, *supra* note X, at 4 (noting that the CIC Regulator assess applications from companies looking to become CIC's).

[149] *Cf.* Reiser, *supra* note X, at 243 (noting that additional disclosure requirements may deter "bad actors").

require that the annual benefit report be submitted to the state.[150] Combining these two mechanisms would provide an initial check on corporate purpose and a subsequent check to ensure that approved benefit corporations do not engage in "greenwashing" or deviate from their stated purpose.[151] In sum, attorneys general are well suited to undertake an office of benefit corporation enforcement by blending the existing duties of charitable enforcement and policing unfair and deceptive trade practices.[152]

CONCLUSION

By merging the formerly binary distinction between for-profit and nonprofit organizations, the benefit corporation represents a divergence from traditional concepts of U.S. corporate law. This new corporate form promotes the use of for-profit entities for positive, progressive, social and environmental benefit. The current legislation, however, lacks viable, robust accountability mechanisms necessary to make the benefit corporation a worthwhile contribution to corporate law. States should amend their benefit corporation legislation to include enforcement and oversight by state attorneys general in order to correct the lack of accountability and enforcement mechanisms of the current legislation. Attorneys general are well suited to create an office of benefit corporation enforcement by blending the existing duties of charitable enforcement and policing unfair and deceptive trade practices. As such, attorney general enforcement of

---

[150] *See* MASS. GEN. LAWS ANN. ch. 156E, § 16(d) (West 2012) (requiring a benefit corporation to submit its annual report to the state secretary); N.J. STAT. ANN. §§ 14A:18-11(d)(1), (2) (West 2011) (requiring the same and stating that the state can revoke benefit corporation status after a two-year failure to deliver the report).

[151] *See* Plerhoples, *supra* note X, at 258 (discussing "mission-drift," which is when an organization departs from its original purpose); Murray, *Defending Patagonia*, *supra* note X, at 508 (same); *supra* notes X–X and accompanying text (discussing "greenwashing") ***None of these sources really support your point about the enforcement mechanisms function and instead just describe the last part of "do not engage in…" incorporate some of the sources you just relied on in this subsection***. It is unlikely that social enterprise entrepreneurs would resist these changes because additional reporting requirements would dissuade sham companies from choosing the benefit corporation form and would allow the truly socially and environmentally conscious companies to further differentiate themselves in the marketplace. *See* Reiser, *supra* note X, at 243 (arguing that added requirements would dissuade "bad actors" from forming sham benefit corporations); Ribstein, *supra* note X, at 1453 (discussing how companies can differentiate their products to attract socially conscious consumers); *cf. White Paper*, supra note X, at 1104 (arguing that third-party standard setters reduce the likelihood for success of nominal benefit corporations).

[152] Reiser, *supra* note X, at 241 (arguing that combining the charitable and unfair and deceptive trade practices duties of attorney generals to police social enterprises makes sense).

benefit corporations would supplement current duties and would greatly improve the protections against the incorporation of sham benefit corporations. Benefit corporations serve laudable, humanitarian purposes. Effective accountability and enforcement mechanisms through state attorneys general would serve to better promote and sustain those purposes.

MICHAEL A. HACKER

Preferred Citation: