

# SOCIAL ENTERPRISE INNOVATION: DELAWARE'S PUBLIC BENEFIT CORPORATION LAW

J. HASKELL MURRAY\*

*“Systems should exist to serve society. Right now our capitalist system is not serving society; it’s serving shareholders. And we can’t run around expecting different outcomes until we change the rules of the game.”<sup>1</sup>*

—Jay Coen Gilbert (Co-founder, B Lab)

*“Delaware, the leading incorporation state, engages in significant and continual, legal innovation. . . . Delaware is not the only state to be continually revising its corporation code: other states invariably follow suit, revising their codes to follow Delaware’s innovations.”<sup>2</sup>*

—Roberta Romano (Professor, Yale Law School)

## INTRODUCTION

B Lab co-founder Jay Coen Gilbert provided the first introductory quotation during his 2010 TEDx Talk in Philadelphia, in which he discussed the companies that B Lab certifies, called certified B corporations, and criticized corporate law for not focusing on societal good.<sup>3</sup> Since Gilbert’s talk in 2010, B Lab has been active. Not only has the non-profit organization privately certified over 900 companies,<sup>4</sup> but B Lab has also taken the lead in convincing more than twenty states and the District of Columbia to pass benefit

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\* J. Haskell Murray, J.D. is an Assistant Professor of Management at Belmont University where he teaches business law and alternative dispute resolution courses. The Author thanks for their comments: the participants in the Southeastern Law Scholars Conference, the participants in the Southeastern Academy of Legal Studies in Business Conference, Cassady Brewer (Georgia State University College of Law), Deborah Burand (University of Michigan Law School), Bill Callison (Faegre Baker Daniels LLP), Marcia Narine (St. Thomas University School of Law – Florida), Alicia Plerhoples (Georgetown Law Center), Dana Brakman Reiser (Brooklyn Law School), and those noted in the footnotes as interviewees. Portions of this article echo the Author’s thoughts expressed at [www.theconglomerate.org](http://www.theconglomerate.org). Kevin Hoffman and Andrew Cziok provided valuable research assistance. The opinions expressed and any errors made are solely those of the Author.

<sup>1</sup> TEDx Talks, *TEDxPhilly - Jay Coen Gilbert - On Better Businesses*, YOUTUBE, at 10:06–10:18 (Dec. 1, 2010), <http://www.youtube.com/watch?v=mGnz-w9p5FU>.

<sup>2</sup> Roberta Romano, *The Need for Competition in International Securities Regulation*, 2 THEORETICAL INQUIRIES L. 387, 394 n.21, 509 (2001).

<sup>3</sup> See TEDx Talks, *supra* note 1, at 9:40–10:20.

<sup>4</sup> *Legal Roadmap*, B CORP., <http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/legal-roadmap> (B Lab certifies C-Corporations, S-Corporations, LLCs, LLPs, LPs, Benefit Corporations, Sole Proprietors, and entities formed outside of the U.S. and Canada); *B the Change*, B CORP., <http://www.bcorporation.net/b-the-change> (last visited April 14, 2014) (“There is a growing community of more than 950 Certified B Corps. . . .”).

corporation statutes,<sup>5</sup> in Mr. Gilbert's words, "chang[ing] the rules of the game."<sup>6</sup>

Most states have based their benefit corporation statutes on the Model Benefit Corporation Legislation (the "Model"), a model statute drafted by Drinker Biddle attorney Bill Clark who has worked with B Lab in their efforts.<sup>7</sup> After eighteen months of lobbying and negotiating, B Lab even convinced Delaware, the recognized pacesetter in U.S. corporate law,<sup>8</sup> to amend its corporate statute.<sup>9</sup> Delaware, however, established its own version of the benefit corporation law. While most of the other states adhere closely to the Model, Delaware seems to have merely consulted the Model and created a new social enterprise form called a "*public* benefit corporation" (PBC).<sup>10</sup> This Article builds on the Author's previous work on benefit corporations, compares the Model and the PBC law, and offers suggestions for improving both legal frameworks.<sup>11</sup>

<sup>5</sup> B Lab, *State by State Legislative Status*, BENEFIT CORP., <http://www.benefitcorp.net/state-by-state-legislative-status> (last visited May 12, 2014). The exact number of states with benefit corporation statutes is changing rapidly. During the course of editing this Article the number of states climbed from nineteen to twenty-five. In addition, to those twenty-five states, the New Hampshire legislature has passed a benefit corporation statute and is waiting on the Governor's signature.

<sup>6</sup> See TEDx Talks, *supra* note 1, at 10:17–18.

<sup>7</sup> MODEL BENEFIT CORP. LEGIS. <http://benefitcorp.net/attorneys/model-legislation> A benefit corporation white paper, of which Bill Clark was also a principal draftsman, claims that the purposes of the benefit corporation law include: (1) addressing demand by social entrepreneurs; (2) redefining corporate purpose to have a societal focus; and (3) increasing transparency and accountability for socially-focused corporations. William H. Clark & Larry Vranka, *The Need and Rationale for the Benefit Corporation: Why It Is the Legal Form that Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public*, BENEFITCORP (Jan. 18, 2013), available at [http://benefitcorp.net/storage/documents/Benefit\\_Corporation\\_White\\_Paper\\_1\\_18\\_2013.pdf](http://benefitcorp.net/storage/documents/Benefit_Corporation_White_Paper_1_18_2013.pdf).

<sup>8</sup> *In re Prudential Ins. Co. Derivative Litig.*, 659 A.2d 961, 969 (N.J. Super. Ct. Ch. Div. 1995) ("Delaware is recognized as a pacesetter in the area of corporate law."); Larry E. Ribstein & Erin Ann O'Hara, *Corporations and the Market for Law*, 2008 U. ILL. L. REV. 661, 678 (2008) ("The corporation leader in the United States is now Delaware."); Omari Scott Simmons, *Branding the Small Wonder: Delaware's Dominance and the Market for Corporate Law*, 42 U. RICH. L. REV. 1129, 1172 (2008) ("Delaware is viewed as a pioneer and perennial leader in the market for corporate law."). Cf. William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L. REV. 1, 1 (2009) (admitting Delaware's dominance in the area of corporate law, but "challeng[ing] the widely held view that Delaware corporate law is dominant because it possesses superior traits, such as a well-understood statute, many judicial decisions interpreting the law, and wise and experienced judges administering that law."); see Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 240 (1985) (noting that Delaware is sensitive to issues involving corporate law and often acts in a prompt, but carefully reasoned manner to protect its preeminent market position.)

<sup>9</sup> B Lab, *Delaware Benefit Corporation Legislation*, BENEFIT CORP., [http://benefitcorp.net/storage/documents/Delaware\\_Benefit\\_Corporation\\_Legislation.pdf](http://benefitcorp.net/storage/documents/Delaware_Benefit_Corporation_Legislation.pdf) (last visited Mar. 14, 2014).

<sup>10</sup> See *id.* See also J. Haskell Murray, *Benefit Corporations: State Statute Comparison Chart* (July 17, 2013) (unpublished chart), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1988556](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988556).

<sup>11</sup> See generally J. Haskell Murray, *Defending Patagonia: Mergers & Acquisitions with Benefit Corporations*, 9 HASTINGS BUS. L. J. 485 (2013) [hereinafter Murray, *Defending Patagonia*].

This Article proceeds in five primary parts. Part I provides a brief overview of benefit corporation statutes, the PBC law, and the larger social enterprise movement. Part II claims that the PBC law allows more private ordering than does the Model, and argues that most of the PBC provisions that provide greater flexibility are positive developments. Next, Part III posits that the PBC law provides superior guidance to directors, but this Part also suggests several additional amendments that would improve clarity. Part IV dissects the branding aspect of both the Model and the PBC law and determines that the Model provides for slightly stronger branding, but opines that the social enterprise branding efforts are best left to the private organizations that generally have more available resources and can likely respond more rapidly to the needs of the market than the government. Finally, Part V briefly examines the remaining challenges facing those involved with the PBCs and sets the stage for future research. The Article concludes with a summary of the Article's major claims and provides projections regarding the future of social enterprise legislation.

## I. HISTORICAL OVERVIEW

### A. *Social Enterprise and Benefit Corporations*

The term “social enterprise” is not well defined in the academic literature.<sup>12</sup> Certain commentators have defined “social enterprise” narrowly, as an entity offering products or services that directly impact the disadvantaged.<sup>13</sup> Companies like Ben & Jerry's and Patagonia would be excluded from this narrow definition because their products are directed at more affluent consumers.<sup>14</sup> Other commentators have defined “social enterprise” broadly, as an entity that uses business methods while also maintaining a *significant* social purpose.<sup>15</sup> This Author does not adhere strictly to either definition and instead prefers to define social enterprise as an entity that uses commercial activity to drive revenue with the common good as its *primary*

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gonia]; J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1 (2012) [hereinafter Murray, *Choose Your Own Master*].

<sup>12</sup> Murray, *Choose Your Own Master*, *supra* note 11, at 4 n.4; *see also* Alicia E. Plerhoples, *Representing Social Enterprise*, 20 CLINICAL L. REV. 215, 223–232 (2013) (explaining the various models of social enterprise, including: a stakeholder governance model, a pluralist ownership business model, a corporate philanthropy business model, and a beneficial products or services business model).

<sup>13</sup> *See, e.g.*, Christine Hurt, *CSR v. Social Entrepreneurship*, THE CONGLOMERATE (Apr. 16, 2012), <http://www.theconglomerate.org/2012/04/csr-v-social-entrepreneurship.html> (“Social E’s make a different kind of widget that isn’t needed by rich people, but by the needy: affordable clean water, light sources, hygiene products, sanitation, etc.”).

<sup>14</sup> *Id.*

<sup>15</sup> MARC LANE, *SOCIAL ENTERPRISE: EMPOWERING MISSION-DRIVEN ENTREPRENEURS* 3–7 (2011).

purpose.<sup>16</sup> Social enterprise can also be used to refer to companies that form under a social enterprise statute, such as the benefit corporation and public benefit corporation statutes analyzed in this Article.<sup>17</sup>

The benefit corporation statute is the most widely adopted social enterprise statute.<sup>18</sup> The first benefit corporation statute was passed by Maryland in 2010.<sup>19</sup> Currently, approximately half of the states have passed some form of benefit corporation statute with roughly fifteen additional states considering legislation.<sup>20</sup> The non-profit organization B Lab has been the major force behind the passing of these benefit corporation statutes.<sup>21</sup> B Lab began privately certifying companies as “certified B corporations” in 2007<sup>22</sup> and also

<sup>16</sup> This definition is drawn from two of the three prongs of the Social Enterprise Alliance’s (SEA) definition of social enterprise. The first prong, “directly addresses an intractable social need,” is omitted for the purposes of this Article because it would exclude companies like Patagonia and Ben & Jerry’s, which are typically described as iconic social enterprises. See *What is a Social Enterprise?*, SOC. ENTERPRISE ALLIANCE, <https://www.se-alliance.org/why#whatsasocialenterprise> (last visited Mar. 14, 2014) (emphasis added). While the Author’s definition is arguably overbroad and the SEA’s definition will likely be useful in other contexts, the SEA’s definition is overly restrictive for use in this Article. The Author’s definition is also arguably over-restrictive as neither the Model nor the PBC law expressly requires that the common good be the entity’s primary purpose. In both legal frameworks, shareholders and other stakeholders must be considered and there is not any discussion of whose interests are primary. Without adding the word “primary,” however, it would be nearly impossible to distinguish between social enterprises and traditional for-profits that engage in some significant level of corporate social responsibility. The Author is a member of the policy committee of the Nashville chapter of the SEA.

<sup>17</sup> Brian Galle, *Social Enterprise: Who Needs It?* 54 B.C. L. REV. 2025, 2025-26 (2013). The social enterprise statutes that have been passed in at least one state include benefit corporation, public benefit corporation, benefit LLC, low-profit limited liability company (L3C), flexible purpose corporation, and social purpose corporation. *New Types of For-Profit Entities*, COMMUNITYENTERPRISELAW.ORG, <http://communityenterpriselaw.org/new-types-of-for-profit-entities/>

<sup>18</sup> Some form of the benefit corporation legislation has been passed in more than twenty states and the District of Columbia; the next most popular social enterprise statute is the low-profit limited liability company (L3C) statute, which has been passed in nine states, including Rhode Island and North Carolina. 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, 3–4 (2011). However, no state has passed an L3C statute since Rhode Island in 2011. See *id.* at 4 n.12. In 2013, North Carolina enacted “a new LLC Act, which among other things removed the prior law’s authorization of . . . L3Cs.” Doug Batey, *North Carolina Becomes the First State to Drop L3Cs*, LLC LAW MONITOR (July 9, 2013), <http://www.llclawmonitor.com/2013/07/articles/lowprofit-llcs/north-carolina-becomes-the-first-state-to-drop-l3cs/>. As of March 3, 2014, 1,000 L3Cs were registered in the U.S. See *Latest L3C Tally*, INTERSECTOR PARTNERS, L3C (Mar. 3, 2014), [http://www.intersectorl3c.com/l3c\\_tally.html](http://www.intersectorl3c.com/l3c_tally.html).

<sup>19</sup> John Tozzi, *Maryland Passes ‘Benefit Corp.’ Law for Social Entrepreneurs*, BLOOMBERG BUSINESSWEEK, April 13, 2010 (noting that in April 2010 Maryland became the first state to pass benefit corporation legislation.).

<sup>20</sup> B Lab, *Legislation*, B CORP., <http://www.bcorporation.net/what-are-b-corps/legislation> (last visited Mar. 14, 2014) (chronicling benefit corporation legislation efforts and results).

<sup>21</sup> See *id.*; Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 601–02 (2011).

<sup>22</sup> See *Our History*, B CORP., <http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps/our-history> (last visited Mar. 14, 2014).

provides the predominant “third-party standard” required by the Model.<sup>23</sup> The primary parts of the Model include:

- (1) mandatory “general public benefit” purpose and optional “specific public benefit” purpose(s);<sup>24</sup>
- (2) election or termination of benefit corporation status by an affirmative vote by at least two-thirds of shareholders;<sup>25</sup>
- (3) mandatory use of a comprehensive, independent, credible, transparent third-party standard to measure social and environmental performance;<sup>26</sup>
- (4) mandatory consideration by directors of seven listed sets of stakeholders;<sup>27</sup>
- (5) provision of a “benefit enforcement proceeding” to be brought by the benefit corporation, shareholders of at least 2% of the benefit corporation stock, a director of the benefit corporation, owner of at least 5% of the parent of a benefit corporation, or any other persons listed in the bylaws or articles of the benefit corporation;<sup>28</sup>
- (6) mandatory public posting of an annual benefit report.<sup>29</sup>

The Model requires a statement that the entity is a “benefit corporation” in the corporation’s articles of incorporation, but the Model does not have any special naming requirements for entities created under it, making benefit corporations, formed in states that follow the Model, relatively difficult to track.<sup>30</sup> The state’s general business corporation law applies to benefit corporations; however, the benefit corporation statute controls over the state’s general business corporation law in the event of a conflict.<sup>31</sup>

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<sup>23</sup> See Murray, *Choose Your Own Master*, *supra* note 11, at 21–22 (explaining the differences between a benefit corporation and a certified B corporation).

<sup>24</sup> MODEL BENEFIT CORP. LEGIS. §§ 102, 201(a)–(b) (2013). “General public benefit” is defined as “[a] material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation.” *Id.* § 102.

<sup>25</sup> *Id.* §§ 104–05.

<sup>26</sup> *Id.* § 102.

<sup>27</sup> The seven groups of stakeholders are: (1) Shareholders; (2) Employees (of the benefit corporation, its subsidiaries, and its suppliers); (3) Customers (as beneficiaries of the general or specific public benefit); (4) Community and society; (5) The local and global environment; (6) Short- and long-term interests of the benefit corporation; and (7) Ability to accomplish general and any specific public benefit. *Id.* § 301(a)(1)(i)–(vii).

<sup>28</sup> *Id.* §§ 102, 305(c).

<sup>29</sup> *Id.* § 401.

<sup>30</sup> *Id.* §103. See also J. William Callison, *Benefit Corporations, Innovation, and Statutory Design*, 26 REGENT U. L. REV. 143, 146 (2013) (noting the Model’s lack of special naming requirements, including the lack of any restriction on traditional for-profit corporations’ ability to use “benefit corporation” in their names).

<sup>31</sup> MODEL BENEFIT CORP. LEGIS. §101(c).

### B. Delaware and Public Benefit Corporations

B Lab and various organizations in Delaware, including the Council of the Corporation Law Section of the Delaware State Bar Association and the Delaware Court of Chancery, worked on benefit corporation legislation for eighteen months before Delaware proposed its PBC law.<sup>32</sup> On July 17, 2013, Delaware Governor Jack Markell signed the PBC legislation, which became effective on August 1, 2013.<sup>33</sup> Given Delaware's leadership in corporate law, B Lab celebrated the passage of the PBC law and expressed excitement that Delaware decided to embrace something akin to the general public benefit concept,<sup>34</sup> which is the cornerstone of the Model, but is purposefully absent in the Flexible Purpose Corporation Law adopted in California.<sup>35</sup> Multiple individuals within B Lab have expressed the opinion that Delaware's law could be improved by requiring public, annual reporting and by requiring

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<sup>32</sup> See B Lab, *supra* note 9. Frederick Alexander was a member of the Council of the Corporation Law Section of the Delaware Bar Association's Committee on Benefit Corporations. Telephone Interview with Frederick H. Alexander, Partner, Morris, Nichols, Arshat, & Tunnell LLP (Aug. 15, 2013). Mr. Alexander explained that he was quite skeptical of the proposed benefit corporation legislation at the start of the process, but that he became more convinced that the law might be of some use. *Id.* He took no position on whether a significant number of investors will be comfortable investing significant amounts of capital in benefit corporations. *Id.* Erik Trojjan, B Lab's Director of Policy, said that most of the objections regarding the benefit corporation legislation was coming from the state bar associations and that business people accept the benefit corporation concept more eagerly than lawyers. Telephone Interview with Erik Trojjan, Dir. of Policy, B Lab (Aug. 15, 2013).

<sup>33</sup> See *Governor Markell Signs Public Benefit Corporation Legislation*, NEWS.DELAWARE.GOV (July 17, 2013), available at <http://news.delaware.gov/2013/07/17/governor-markell-signs-public-benefit-corporation-legislation/>; see also Governor Jack Markell, *A New Kind of Corporation to Harness the Power of Private Enterprise for Public Benefit*, HUFFINGTON POST (July 22, 2013), [http://www.huffingtonpost.com/gov-jack-markell/public-benefit-corporation\\_b\\_3635752.html](http://www.huffingtonpost.com/gov-jack-markell/public-benefit-corporation_b_3635752.html).

<sup>34</sup> MODEL BENEFIT CORP. LEG. § 201.

<sup>35</sup> See B Lab, *supra* note 9; see also Telephone Interview with Erik Trojjan, *supra* note 32 (stating that Delaware PBC law was a big win for B Lab and noting approvingly that Delaware's law was closer to the Model than the Flexible Purpose Corporation because of Delaware's embrace of the general public benefit purpose concept). B Lab called Delaware "the most important state for businesses that seek access to venture capital, private equity, and public capital markets." B Lab, *supra* note 20. B Lab exuberantly promoted Delaware's entrance into the social enterprise space as a "tipping point in the evolution of capitalism" and as a "seismic shift in corporate law." Michael Sadowski, *A Tipping Point in the Evolution of Capitalism: Interview with Bart Houlihan from B Lab*, SUSTAINABILITY, (July 30, 2013), <http://www.sustainability.com/blog/a-tipping-point-in-the-evolution-of-capitalism-interview-with-bart-houlihan-from-b-lab#.UkycBIOE6F8>; E-mail from Katie Kerr, B Lab, to J. Haskell Murray, Assistant Professor of Management, Belmont Univ. (Aug. 27, 2013, 11:25 AM) (on file with author). While Delaware is obviously influential in matters of corporate law, it seems a bit soon to be talking about a "seismic shift," given that available data suggests that fewer than 300 benefit corporations had been formed in the first three years of benefit corporation statutes and just a few days before the Delaware PBC went effective on August 1, 2013. J. Haskell Murray, *How Many Benefit Corporations Have Been Formed?*, L. & SOC. ENTREPRENEURSHIP (July 23, 2013, 9:23 AM), <http://soctentlaw.com/2013/07/how-many-benefit-corporations-have-been-formed/>.

PBCs to use a third-party standard to measure public benefit.<sup>36</sup> Delaware's new framework<sup>37</sup> has already been largely followed by one state, Colorado. Colorado did, however, adopt reporting requirements that are similar, in many respects, to the Model.<sup>38</sup>

The remainder of the Article will explore the major differences between the PBC law and the Model and will provide some suggestions for improvement.

## II. PRIVATE ORDERING

Professor Lawrence Hamermesh has argued that “enhancing flexibility to engage in private ordering” is a dominant goal in Delaware's corporate law.<sup>39</sup> In line with Professor Hamermesh's claim, the Delaware PBC allows for a greater amount of private ordering than the Model in certain key areas.<sup>40</sup> One major difference between the two statutory schemes is that the

<sup>36</sup> While B Lab has been mostly putting a positive spin on the passage of Delaware's PBC law, Jay Coen Gilbert, B Lab's co-founder, expressed his hope that Delaware would eventually come in line with the Model and require public, annual benefit reporting. Jay Coen Gilbert, *Every 500 Years or So*, STAN. SOC. INNOVATION REV. BLOG (Apr. 18, 2013), [http://www.ssireview.org/blog/entry/every\\_500\\_years\\_or\\_so](http://www.ssireview.org/blog/entry/every_500_years_or_so). B Lab's director of policy, Erik Trojian, stated that the biggest problem with the Delaware law was that it did not require a third-party standard. Telephone Interview with Erik Trojian, *supra* note 32. Of course, B Lab is the primary third-party standard provider in this area, but B Lab also provides its standard online for free for those who wish to use it and do not want to pay to be certified. *Id.* While the Model and most individual state benefit corporation statutes require a third-party standard, none of the current social enterprise statutes require certification. *See infra* Appendix, Table 1.

<sup>37</sup> *See* Frederick H. Alexander, *DGCL Amended to Authorize Public Benefit Corporations*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Aug. 15, 2013, 9:13 AM), <http://blogs.law.harvard.edu/corpgov/2013/08/15/dgcl-amended-to-authorize-public-benefit-corporations/> (explaining some of the “salient elements” of Delaware's recent PBC law).

<sup>38</sup> Colo.Rev.Stat. Ann. § 7-101-507 (West 2013). *See* Callison, *supra* note 30, at 163 (explaining that B Lab insisted that Colorado adopt public reporting, even though Delaware's version of the law had not required public reporting). Bill Callison, an attorney involved with the benefit corporation legislation in Colorado, stated that B Lab was not receptive to Colorado passing a statute that mirrored Delaware's PBC statute, and claimed that B Lab pushed for various modifications, including mandatory, publicly available benefit reporting and required use of a third-party standard. Telephone Interview with Bill Callison, Partner, Faegre Baker Daniels LLP (July 17, 2013). Interestingly, the Colorado statute does not expressly state the required frequency of the benefit report, nor does it expressly state that the third-party standard is required for all PBCs in Colorado. Colo.Rev.Stat. Ann. § 7-101-507 (West 2013). These apparent oversights may have stemmed from melding the Delaware PBC with the Model without careful integration. The Colorado statute largely tracks the Delaware PBC with the exception of the benefit report section. *See generally* Herrick K. Lidstone, Jr., *The Long and Winding Road to Public Benefit Corporations in Colorado* (Feb. 28, 2014) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2266654](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2266654). During the editing process of this Article, Minnesota also passed a Public Benefit Corporation Act, which accepts some, but not all, of the Delaware PBC framework. Brandon C. Mason & Jonathan L.H. Nygren, *Public Benefit Corporations Come to Minnesota*, FAEGRE BAKER DANIELS, Apr. 29, 2014, <http://www.faegrebd.com/21503>

<sup>39</sup> Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1752 (2006).

<sup>40</sup> “Private ordering” is used here to describe company-specific contractual provisions regarding corporate governance, generally found in a company's articles or bylaws. Jill E.

PBC law does *not* require a third-party standard for measuring public benefit.<sup>41</sup> The PBC law does, however, expressly allow individual PBCs to require use of a third-party standard by including the requirement in the PBC's certificate of incorporation or bylaws.<sup>42</sup> In some ways, Delaware's approach in the benefit corporation debate is reminiscent of the state's approach to the proxy access debate: expressly allowing adoption of the debated provision, but leaving implementation and most of the contracting details to the individual corporations.<sup>43</sup>

The PBC is not quite as flexible as two other social enterprise forms: the Flexible Purpose Corporation (FPC) in California<sup>44</sup> and the Social Purpose Corporation (SPC) in Washington.<sup>45</sup> The FPC and SPC statutes allow the entity's purpose to be relatively narrow; for example, an FPC or SPC could choose its social purpose to be focused only on the environment, and not the entity's other stakeholders such as employees and customers.<sup>46</sup> The PBC statute contains broader mandatory language and requires entities formed under the PBC statute to be operated in a "responsible and sustainable manner."<sup>47</sup> In addition, directors of a PBC must not only consider the "pecuniary interest of the stockholders" and the specific public benefit(s) of the PBC, but also the broad category of "the best interests of those materially affected by the corporation's conduct."<sup>48</sup> The broad, mandatory general purpose statements in the PBC statute, which are not found in the FPC or

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Fisch, *Leave it to Delaware: Why Congress Should Stay out of Corporate Governance*, 37 DEL. J. CORP. L. 731, 743 n.80 (2013); see also D. Gordon Smith, Matthew Wright & Marcus Kai Hintze, *Private Ordering with Shareholder Bylaws*, 80 FORDHAM L. REV. 125, 127 n.12 (2011) (describing different definitions for "private ordering" and stating that "[c]onsistent with the most common usage in corporate law scholarship, we use the term 'private ordering' as a near synonym for 'contracting' or 'transacting'") (citation omitted). Benefit corporation statutes, in general, provide firms with more options when organizing, given that the traditional for-profit corporate law, at least in Delaware, did not clearly allow altering fiduciary duties or consideration of non-stockholder interests when the corporation enters *Revlon*-mode. Delaware Public Benefit Corporations: FAQs, at 1 (on file with author).

<sup>41</sup> DEL. CODE ANN. tit. 8, § 366(c) (West 2013). B Lab likely pushed for Delaware to follow the Model and require a third-party standard. See Telephone Interview with Erik Trojjan, *supra* note 32. B Lab serves as both a driving force behind the lobbying efforts and a provider of the dominant third-party standard. This dual role seems to suggest a conflict of interest, but that conflict is lessened somewhat because B Lab provides the third-party standard for free to those companies who choose not to be certified, and certification is not required by either the PBC law or the Model. See *infra* Appendix, Table 1.

<sup>42</sup> DEL. CODE ANN. tit. 8, § 366(c) (West 2013).

<sup>43</sup> Lucian A. Bebchuk & Scott Hirst, *Private Ordering and the Proxy Access Debate*, 65 BUS. LAW. 329, 339–40 n.47 (2010) (noting that Delaware corporate law allows proxy access as explicitly stated in the enactment of DEL. CODE ANN. tit. 8, § 112 (West 2013)).

<sup>44</sup> See generally CAL. CORP. CODE §§ 2500–17, 2600–05, 2700–02, 2800, 2900, 3000–02, 3100, 3200–03, 3300–06, 3400–01, 3500–03 (West 2012).

<sup>45</sup> See generally WASH. REV. CODE §§ 23B.25.005–150 (West 2013).

<sup>46</sup> *Id.* § 23B.25.020; CAL. CORP. CODE § 2602 (West 2012).

<sup>47</sup> tit. 8, § 362(a).

<sup>48</sup> *Id.* § 365(a).

SPC statutes, seem to be the primary reason B Lab has expressed public support for the PBC law.<sup>49</sup>

B Lab prefers a holistic approach to corporate purpose and claims that a narrow, specific public purpose, such as the public purposes allowed by the FPC and SPC statutes, “would not meet the primary objective of [the Model] to create a new corporate form whose corporate purpose requires it to create benefit for society *generally*.”<sup>50</sup> In contrast, Bill Callison, a partner at Faegre Baker Daniels LLP who has written multiple academic articles on social enterprise forms, prefers more flexibility and would allow shareholders to choose either a narrow or broad purpose.<sup>51</sup> Callison noted the “mighty load” a mandatory “general public purpose” creates for a social enterprise that desires a more defined mission because that entity will be forced to consider numerous stakeholders in every decision.<sup>52</sup> While allowing significant freedom may be desirable, this Author is not convinced that a mandatory “general public benefit” purpose requirement is without value. A mandatory “general public benefit” purpose may be useful to remind social enterprises that they should not unnecessarily harm any stakeholders and should be mindful of how their actions may impact others.<sup>53</sup> The problem with a mandatory “general public benefit” as conceived by the Model is discussed in the next Part and stems from the vagueness of the term “general public benefit” and the lack of guidance for directors.<sup>54</sup>

Table 1 of the Appendix compares significant provisions of Delaware’s PBC law and the Model. The Model requires, among other things, (1)

<sup>49</sup> See Gilbert, *supra* note 36; Trojian *supra* note 32; B Lab, *supra* note 9 (“The Delaware draft legislation embraces the critical idea of model benefit corporation legislation: a general public benefit purpose that requires the consideration of all stakeholders affected by the corporation’s conduct, not simply a narrow special purpose . . . Each state’s legislation differs somewhat from the model benefit corporation draft, but all of them, now including Delaware, meet the bar of providing for an overarching general public benefit obligation, accountability to all stakeholders, and impact transparency”).

<sup>50</sup> Legal FAQ’s, BENEFITCORP.NET, <http://benefitcorp.net/attorneys/legal-faqs> (emphasis added) (last visited Mar. 12, 2014). *see also* TEDx Talks, *supra* note 1, at 11:08–11:21 (“It is nice that it is a fair trade cup of coffee, but if they are dumping effluents or treating their workers poorly, that doesn’t really help anybody; if you are giving all of your profits to charity, but dumping toxins in the river behind your factory that’s not great either. So the issue is how do we look at the whole company”).

<sup>51</sup> See Callison, *supra* note 30, at 160; *see generally* 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 (2012) [hereinafter Callison, *Putting New Sheets on a Procrustean Bed*]. Minnesota seems to have embraced flexibility, allowing for both General Benefit Corporations or Specific Benefit Corporations under their Public Benefit Corporation Act. *See* Mason & Nygren, *supra* note 38. *See generally* Deborah J. Walker, *Please Welcome the Minnesota Public Benefit Corporation*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2408241](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2408241)

<sup>52</sup> Callison, *supra* note 30, at 152.

<sup>53</sup> Murray, *Choose Your Own Master*, *supra* note 11, at 17–18 (discussing the power of norms in corporate law); *accord* Joseph W. Yockey, *Does Social Enterprise Law Matter?* \_\_\_ ALA. L. REV. \_\_\_ (forthcoming 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2389024](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2389024).

<sup>54</sup> *See infra* Part III.

appointing of a benefit director for public corporations, (2) drafting and public posting of an annual benefit report, and (3) using a third-party standard to measure the corporation's social and environmental performance.<sup>55</sup> The PBC only requires biennial reporting and makes all the other provisions mentioned in the immediately preceding sentence optional.<sup>56</sup> The only major area where the PBC statute is *less* flexible than the Model is in requiring the identification of a specific public benefit purpose or purposes, which will be discussed in the next section on director guidance and assists in defining the PBC's priorities.<sup>57</sup> However, as shown above and in Table 1 of the Appendix, the PBC law allows significantly more private ordering overall than the Model. The PBC law may therefore provide the PBC with additional flexibility and time and cost savings, especially in the reporting and standards area.<sup>58</sup>

### III. DIRECTOR GUIDANCE

One of this Author's main criticisms of the Model has been, and still is, the lack of guidance it provides for directors in carrying out their responsibilities.<sup>59</sup> The Model requires directors to "consider" seven different stakeholder groups,<sup>60</sup> and directs them to pursue "general public benefit" but does

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<sup>55</sup> The January 2012 version of the Model requires that the third-party standard be "comprehensive," "independent," "credible," and "transparent." § 102(a). Some of the state statutes do not explicitly state the requirements of the third-party standard in detail. The July and December 2012 versions of the Model revise the independence requirement from a more robust definition to simply "[d]eveloped by an entity that is not controlled by the benefit corporation." See Murray, *supra* note 10 (comparing and contrasting the provisions of the various benefit corporation statutes).

<sup>56</sup> See *infra* Appendix, Table 1.

<sup>57</sup> See *infra* Part III. The PBC also requires a higher hurdle for adoption of entity status (90% instead of two-thirds) and expressly provides dissenters' rights, but these provisions deal with entry and exit from the entity form rather than with the day-to-day operation of the entity. See *infra* Appendix, Table 1.

<sup>58</sup> Various legal scholars have made the case for increased private ordering in certain areas of corporate law. See, e.g., D. Gordon Smith, et al., *Private Ordering with Shareholder Bylaws*, 80 *FORDHAM L. REV.* 125, 170–75 (2011); Lucian A. Bebchuk & Scott Hirst, *Private Ordering and the Proxy Access Debate*, 65 *BUS. LAW.* 329, 358 (2010) ("We hope that the recent realization by many public corporations and corporate law firms of the value of private ordering and allowing shareholders to opt out of corporate governance arrangements will lead [public officials] to support such changes."). Using third-party standards to measure social benefit and the public posting of benefit reports can have value, but the question is whether they are worth the cost. Also, as suggested in Part IV, other considerations include whether the statutes should give entities the flexibility to choose whether to use a third-party standard at all and whether the branding benefits are more valuable than that flexibility.

<sup>59</sup> See generally J. Haskell Murray, *Defending Patagonia*, *supra* note 11; J. Haskell Murray, *Choose Your Own Master*, *supra* note 11, at 27; see also Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 *BUS. LAW.* 1007, 1027–34 (discussing decision making difficulties that are likely to be faced by boards of directors of benefit corporations).

<sup>60</sup> See MODEL BENEFIT CORP. LEGIS. § 301(a) (2013). The seven listed stakeholder groups can actually be broken out into 13 different groups (1) shareholders, (2) employees of the benefit corporation, (3) employees of the benefit corporation's subsidiaries, (4) employees of

not provide or require the establishment of any priorities to guide directors.<sup>61</sup> The Model *allows* companies to choose one or more “specific public benefit purpose[s],” in addition to the “general public benefit purpose,” but does not *require* that any specific public benefit purpose be chosen and states that the specific public benefit purpose cannot displace the requirement to pursue a general public benefit.<sup>62</sup>

Delaware moved in the direction of more directorial guidance by requiring PBCs to choose a specific public benefit purpose or purposes, yet created some uncertainty by requiring directors to “manage or direct the business and affairs of the public benefit corporation in a manner that *balances* [1] the pecuniary interests of the stockholders, [2] the best interests of those materially affected by the corporation’s conduct, and [3] the specific public benefit or public benefits identified in its certificate of incorporation.”<sup>63</sup> The word “balance,” used by the PBC legislation, is arguably more onerous than the word “consider” that was used by the drafters of the Model, though there is already disagreement over the intended meaning of those two words.<sup>64</sup>

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the benefit corporation’s suppliers, (5) customers, (6) community, (7) society, (8) local environment, (9) global environment, (10) short term interests of the benefit corporation, (11) long term interests of the benefit corporation, (12) ability to accomplish general public benefit, and (13) ability to accomplish any specific public benefit.

<sup>61</sup> *Id.* §§ 102, 201(a). Unlike the Model, New York’s benefit corporation statute helpfully expressly states that general public benefit should have priority over other corporate purposes, but the general public benefit is still a vague concept, which likely includes benefit to shareholders. N.Y. BUS. CORP. LAW § 1706(a) (McKinney 2012).

<sup>62</sup> MODEL BENEFIT CORP. LEGIS. §201(b) (2013). As Professor Lyman Johnson insightfully explains, the Model and most of the state benefit corporation statutes, focus on the corporation as a whole when addressing corporate purpose, but shift to a fragmented multi-stakeholder approach when discussing the required considerations in director decision-making. See Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269, 281–91 (2013). Hawaii is an exception, and focuses on the corporation as a whole for both corporate purpose and directorial decision-making. *Id.* at 289–90 (citing HAW. REV. STAT. § 420D-6(a)(1) (West Supp. 2011)). Professor Johnson claims that statutory drafters “missed [an] opportunity to bring conceptual and doctrinal harmony to the interrelationship of [1] corporate purpose, [2] a corporation’s best interests, and [3] fiduciary duties that has long been missing in corporate law.” *Id.* at 290. Furthermore, Professor Johnson argues the drafters should have focused directors “exclusively to the corporation’s best interests and to advancing its avowed institutional purposes.” *Id.*

<sup>63</sup> DEL. CODE ANN. tit. 8, § 365(a) (2013) (emphasis added). While the Delaware statute requires identification of the specific public benefit(s) in the PBC’s certificate of incorporation, at least one attorney has used the Model’s “general public benefit” language as the PBC’s “specific public benefit purpose” in that entity’s certificate of incorporation, and expressly left the details of the specific public benefit purpose to the bylaws. This legal maneuvering may provide desired flexibility to management and is currently being allowed by the Delaware Secretary of State, but it seems to limit the transparency and shareholder power achieved by requiring the specific public benefit(s) in the certificate of incorporation. E-mail from Jeffrey A. Fromm, Partner, Dorsey & Whitney LLP, to J. Haskell Murray, Assistant Professor of Management, Belmont Univ. (Sept. 28, 2013, 4:00 PM ) (on file with author).

<sup>64</sup> “Balance” could mean giving exactly equal weight to each factor, but more likely means giving *some* weight to each factor. “Consider,” however, only requires directors to think about each factor and could allow directors to completely disregard a factor after considering it. It is unclear from the commentary whether Delaware’s use of “balance” over “consider” was purposeful or important to the drafters. Delaware Public Benefit Corporations:

In previous work, this Author has discussed the value of a well-defined corporate purpose statement in the statutes and in an entity's legal organizing documents as a signaling and guiding mechanism, even if the priorities outlined in the corporate purpose statement will probably rarely be enforced in court.<sup>65</sup> As Professor Julian Velasco has noted, "people obey the law for many different reasons, and not simply out of fear of punishment."<sup>66</sup> Former Chancellor of the Delaware Court of Chancery William Allen has written, in the duty of care context, that "there is some virtue to the judicial articulation of nonenforceable standards of conduct" since "most human beings place value on thinking of themselves as moral actors who live up to societal expectations."<sup>67</sup> The situation here is analogous; a required statement of purpose should set clearer societal expectations regarding director conduct and thus may influence behavior even if the courts rarely interfere.<sup>68</sup>

While the Delaware PBC law could have been more clear by expressly stating that the PBC's *top* priority is its specific public benefit purpose,<sup>69</sup> requiring PBCs to identify a specific public benefit purpose is a positive change, which will likely aid directors in decision-making and may allow shareholders and courts to create some level of accountability for directors.<sup>70</sup>

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FAQs (on file with author). Rick Alexander, who was on Delaware's benefit corporation drafting committee, thinks that the differences between the words "balance" and "consider" are minor, unimportant, and have been overblown. *See* Telephone Interview with Alexander, *supra* note 32. He explained that "balancing" can result in decisions that give one factor so little weight that it is negligible. *Id.* However, Alexander's fellow committee member, Samuel Nolen, thought that "balance" would set a higher hurdle for directors than "consider." Telephone Interview with Samuel A. Nolen, Partner, Richards, Layton & Finger (Sept. 12, 2013). Moving in the opposite direction, attorney Bill Callison thinks that "consider" is the more active term, and that "balance" is quite vague and less vulnerable to attack. Telephone Interview with Bill Callison, Partner, Faegre Baker Daniels LLP (July 17, 2013); *accord* Callison, *supra* note 30, at 157.

<sup>65</sup> *See* Murray, *Choose Your Own Master*, *supra* note 11, at 28–30. *See generally* Yockey, *supra* note 53.

<sup>66</sup> Julian Velasco, *The Role of Aspiration in Corporate Fiduciary Duties*, 54 WM. & MARY L. REV. 519, 524 (2012).

<sup>67</sup> William T. Allen et al., *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and Its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449, 460 n.40 (2002).

<sup>68</sup> Both the Model and the PBC statute contain significant protections for directors against personal liability. The Model states that "[e]xcept as provided in the [articles of incorporation] [bylaws], a director is not personally liable for monetary damages" for performance of her duties in compliance with traditional corporation duties in that state or "for failure of the benefit corporation to pursue or create general public benefit or specific public benefit." MODEL BENEFIT CORP. LEGIS. § 301(c) (2013). Delaware's PBC statute states that directors will not be liable if a decision "is both informed and disinterested and not such that no person of ordinary, sound judgment would approve." DEL. CODE ANN. tit. 8, § 365(b).

<sup>69</sup> Delaware Public Benefit Corporations: FAQs at 2 (on file with author).

<sup>70</sup> For an effective corporate governance framework, director accountability and authority must be balanced. On one hand, "[i]f every decision of A is to be reviewed by B, then all we have really is a shift in the locus of authority from A to B and hence no solution to the original problem." KENNETH J. ARROW, *THE LIMITS OF ORGANIZATION* 78 (1974). On the other hand, "[w]ithout adequate constraints and incentives, management might divert resources through excessive pay, self-dealing, or other means; reject beneficial acquisition offers to maintain its independence and private benefits of control; over-invest and engage in empire-building; and

Further, in the event of a conflict, courts may invoke the long-established canon of statutory interpretation to decide that the PBC's specific purpose requirement controls over the more general statutory requirements to consider all those "materially affected by the corporation's conduct."<sup>71</sup>

#### IV. BRANDING AND ENFORCEMENT

Branding facilitated by social enterprise statutes could be useful to investors, consumers, and governments that wish to quickly identify socially oriented companies.<sup>72</sup> Yet tension often exists between branding and private ordering.<sup>73</sup> Maintenance of a useful brand associated with a group of companies generally requires a fair level of consistency, often achieved through mandatory rules.<sup>74</sup> Those rules must be, at least occasionally, monitored and enforced to ensure that companies do not significantly stray and dilute the brand.<sup>75</sup>

Branding is one area where proponents of the Model may argue that the Model is superior to the PBC. Some proponents of the Model may point to the required annual benefit report, the mandatory use of a third-party standard, and the availability of a benefit enforcement proceeding as forming a

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so forth." Lucian Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 850 (2005).

<sup>71</sup> See *MacEvoy Co. v. United States ex rel. Calvin Tomkins Co.*, 64 S.Ct. 890, 894 (1944) (explaining that specific terms in a statute control over more general terms).

<sup>72</sup> See, e.g., S.F., CAL., MUN. CODE: CAL. BENEFIT CORP. DISCOUNT ORDINANCE § 14C.3, available at [http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:sanfrancisco\\_ca](http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:sanfrancisco_ca) (last visited Sept. 15, 2013) (San Francisco provides preferences in government contracting to California benefit corporations); Cf. *Philadelphia First City to Offer Green Biz Tax Incentives*, SUSTAINABLEBUSINESS.COM (Dec. 4, 2009, 9:56 AM) <http://www.sustainablebusiness.com/index.cfm/go/news.display/id/19350>.

<sup>73</sup> See tit. 8, § 365(a). This still leaves open the question of whether directors should give priority to stockholders or the specific purpose. Given that the name of the entity is *public benefit* corporation and that traditional for-profit corporations are sometimes described as giving stockholders first priority, it seems logical that the specific purpose should control in zero-sum situations where the directors have to decide between the two.

<sup>74</sup> William H. Clark, Jr. & Amber A. Hough, *A New Paradigm for State Corporation Laws*, 84 N.D. L. REV. 1059, 1060 (2008) (praising the North Dakota Publicly Traded Corporations Act for accomplishing "'branding' by requiring a corporation to either opt in or out of being subject to all of the provisions of the Act, and thus prohibiting a corporation from cherry-picking among the Act's provisions." (emphasis added)).

<sup>75</sup> Currently, the "certified B corporation" brand is monitored by B Lab, which occasionally administered audits of the certified B corporations. *B Corporation Compliance*, B REVOLUTION CONSULTING, <http://www.brevolutionconsulting.com/consulting-services/b-corporation-compliance/>. Benefit corporations, however, will not be monitored by an outside organization, unless they choose a third-party standard that includes oversight. Even B Lab's standard can be used by benefit corporations without obtaining certification or submitting to B Lab's oversight. Benefit corporations might be monitored by their own shareholders bringing benefit enforcement proceedings, but while some shareholders may look out for other stakeholders, asking shareholders to bring benefit enforcement proceedings is a bit like asking the fox to guard the henhouse. Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 593 (2011) (questioning the enforcement mechanisms in the benefit corporation statutes and opining that weak or ineffective enforcement could undermine social enterprise brand creation).

base for the Model's brand.<sup>76</sup> However, as explained in the following sections, due to the lack of effective enforcement mechanisms and lack of effective quality control, none of these three statutory provisions will likely facilitate the creation of a strong, useful brand for benefit corporations as a whole, under the current language of the Model.

While it might be possible to create a valuable brand through a social enterprise statute, the majority of social enterprise branding should be left to the market, which can create a number of more clearly defined brands within the social enterprise area and can better respond to diverse and fluctuating stakeholder preferences. If, however, the Model is to be used as a branding vehicle, it should at least be amended to require an identifier in each benefit corporation's name, similar to the Delaware PBC legislation's requirement of "PBC," "P.B.C.," or "Public Benefit Corporation."<sup>77</sup> The Model could also be amended to set quantifiable social impact minimums in areas like charitable giving. Requiring all benefit corporations, including PBCs, to achieve such minimum levels of social impact would counteract opportunistic uses of the benefit corporation and PBC forms and increase the usefulness of the overall brand.<sup>78</sup>

The following sections discuss the statutory requirements that some may argue lead to better branding by the Model, the related provisions (if any) in the PBC statute, and the arguments for leaving the branding aspect of social enterprise primarily (though not exclusively) in the private sphere.

#### A. Annual, Publicly-Available Benefit Report

The Model requires an annual benefit report be sent to shareholders "[w]ithin 120 days following the end of the fiscal year of the benefit corporation" or at the same time the benefit corporation delivers other annual

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<sup>76</sup> The PBC only requires a biennial benefit report and the use of the third-party standard is optional under the PBC. See *infra* Appendix, Table 1.

<sup>77</sup> tit. 8, § 362(c). This Author suggests amending the Model and existing benefit corporation statutes to require including "Benefit Corporation," "B. Corp.," or "B.C." in the name of each benefit corporation. At least one group of researchers, including the Author, is currently attempting to locate all benefit corporations and the task is proving quite difficult because most secretaries of states are simply including benefit corporations with traditional for-profit corporations. Erik Trojian at B Lab commented that requiring some version of "Benefit Corporation" in the legal name of the entities would be costly for existing companies that wish to convert to benefit corporations. See Trojian, *supra* note 32. The cost would not impact new entities, however, and it will be relatively difficult for existing companies with dispersed ownership to convert to a benefit corporation, in any event, as most states require approval by two-thirds of the shareholders. See MODEL BENEFIT CORP. LEGIS. §§ 102, 104(a). Further, the naming requirement does not seem to have impacted Delaware significantly, as it is already leading all benefit corporation states, other than California, in the number of benefit corporations or PBCs formed. J. Haskell Murray, *The Number of Delaware Public Benefit Corporations*, BUSINESS LAW PROF BLOG, Mar. 21, 2014, [http://lawprofessors.typepad.com/business\\_law/2014/03/the-number-of-delaware-public-benefit-corporations.html](http://lawprofessors.typepad.com/business_law/2014/03/the-number-of-delaware-public-benefit-corporations.html)

<sup>78</sup> Murray, *Defending Patagonia*, *supra* note 11, at 506 (2013).

reports to shareholders.<sup>79</sup> The benefit report must be posted to a publicly available portion of the company's website or provided free of charge upon request.<sup>80</sup> The Model does not, however, expressly include an enforcement mechanism specifically related to either the truthfulness or even the existence of those reports.<sup>81</sup> As a result, a number of benefit corporations have chosen not to provide the benefit corporation reports, and little to no action seems to have been taken to correct these statutory violations.<sup>82</sup> Even if benefit corporations regularly produce annual benefit reports, the reported information may not be of much use because most of the required categories in the Model are vague, allowing for significant puffery.<sup>83</sup> For example, the first requirement of the benefit report is "a narrative description of ways the benefit corporation pursued and created a general public benefit, and any specified public benefit."<sup>84</sup> This requirement and most of the requirements

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<sup>79</sup> MODEL BENEFIT CORP. LEGIS. § 401(b).

<sup>80</sup> *Id.*

<sup>81</sup> Perhaps, concerned parties could bring a benefit enforcement proceeding if a benefit report was not posted and sent, as required by the relevant state statute. *See id.* § 305. Only shareholders, directors, greater-than-five-percent owners of the benefit corporation's parent corporation, or other persons specified in the articles or bylaws of the benefit corporation have standing to bring a benefit enforcement proceeding. *Id.* Thus, those likely to be most upset and most closely tied to the general public benefit are unlikely to have standing. New Jersey's benefit corporation law does have some teeth, removing benefit corporation status from corporations that do not file a benefit report for two consecutive years. *See* N.J. STAT. ANN. § 14A:18–11(d)(2) (West 2013). This enforcement mechanism, however, may allow directors to convert from a benefit corporation to a traditional corporation without the typical, required shareholder vote. This method of converting to a traditional corporation was almost certainly not envisioned by the legislature, and thus attempting this tactic could open directors to a derivative lawsuit. Further, Massachusetts's benefit corporation law forbids a company from holding itself out as a benefit corporation unless it is in full compliance with the statute, including the filing of an annual benefit report. *See* MASS. GEN. LAWS ANN. ch. 156E, § 7 (West 2013). The benefit corporation statutes of most states, however, do not expressly provide for consequences for failing to post or file the benefit report.

<sup>82</sup> As an example, Global Contribution Corporation claims to have become the first benefit corporation in the world on October 1, 2010 in Maryland, but as of September 15, 2013, Global Contribution Corporation still had not posted an annual benefit report to its website, as required by the Maryland state statute. GLOBAL CONTRIBUTION CORPORATION, <http://global-contributioncorp.com/> (last visited Mar. 13, 2014); MD. CODE ANN., CORPS. & ASS'NS § 5-6C-08(c) (West 2013).

<sup>83</sup> The Model simply requires that the annual benefit report includes: (1) a narrative description of ways the benefit corporation pursued and created a general public benefit, and any specified public benefit; (2) any circumstances that have hindered the creation of the general or any specific public benefit; (3) the process and rationale for selecting or changing the third-party standard used to prepare the benefit report; (4) an assessment, of the overall social and environmental performance of the benefit corporation; (5) the name of the benefit director and the benefit officer (if applicable) and a correspondence address for each of them; (6) [t]he directors' compensation paid by the benefit corporation, which may be redacted from publicly posted versions of the report; (7) [t]he name of each person who owns 5% or more outstanding shares in the benefit corporation; (8) the benefit director's annual compliance statement; and (9) a statement of any connection between the organization creating the third-party standard, or its directors, officers, or 5% or more shareholders, and the benefit corp. or its directors, officers, or 5% or more shareholders, if that connection "might materially affect the credibility of the use of the third-party standard." MODEL BENEFIT CORP. LEGIS. § 305.

<sup>84</sup> *Id.*

that follow, appear to give benefit corporation directors great latitude in what they do and do not report.<sup>85</sup> Many of the few annual reports that are currently available are self-promotional and do not provide much value to a reader looking for a full, fair evaluation of the business.<sup>86</sup> In addition, even the portion of the annual benefit report that must be measured against a third-party standard is unlikely to create a strong brand due to the significant differences among the current third-party standard providers.<sup>87</sup> The statutes, or perhaps a self-regulatory organization, could provide more specific requirements for all benefit corporation reporting such as percentage of revenue donated to charities, hours per employee donated to charities, recycling per employee (in pounds), and percentage of employees paid a living wage.<sup>88</sup> By defining the categories that must be reported on, the regulator could prevent companies from only showing their best side. Choosing these required categories would be difficult, given the variety of social enterprises in existence, and a cost/benefit analysis that examines the burden on the companies should be undertaken. The costs of annual benefit reporting may prove too costly for some social enterprises. If, however, any benefit reports are to be required, those reports should require specific categories and verifiable data so that readers of the report could compare benefit corporations to one another and gain a more complete understanding of the social impact of the business over time.

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<sup>85</sup> We do not yet know how courts will interpret the benefit report provisions of the state benefit corporation statutes.

<sup>86</sup> See, e.g., Rick Dakan, *Annual Benefit Corporation Report for 2011*, MOB RULES GAMES 2 (April 11, 2012), <http://www.mobrulesgames.com/storage/Mob%20Rules%20Annual%20Benefit%20Report.pdf> (on file with the author) (making statements such as “we feel like we provided a respectable impact as a company given our small size and limited resources” yet providing almost no substantive support for this supposed impact). King Arthur Flour is one of the leading benefit corporations, and its benefit report is one of the most professional and detailed this Author has seen, but even their 2013 benefit report reads much more like a promotional flier than a rigorous, transparent annual report. Some of the benefits to the community are extremely vague. For example, the report states that King Arthur Flour produces “some solid waste” and that they implemented a “zero-sort recycling system” in 2009, but does not say how much waste or how much recycling was done. King Arthur Flour, *Benefit Corporation Report 2013*, [http://www.kingarthurfLOUR.com/about/documents/KAF\\_Anual\\_Report\\_FY13\\_public.pdf](http://www.kingarthurfLOUR.com/about/documents/KAF_Anual_Report_FY13_public.pdf). Even the more specific claims, such as the statement that “the company donated \$100,000.00 in dollars, goods, and time to various organizations,” are difficult to evaluate without more data about King Arthur Flour’s size, how the goods and time were valued, and to whom the gifts were made. *Id.* The report does state that “[f]or the most part, we donate cash or products to nonprofit organizations within a 100-mile radius of Norwich, Vermont,” but does not specify how much “for the most part is” or provide detailed information about those nonprofits. *Id.*

<sup>87</sup> See List of Standards, BENEFIT CORP., <http://benefitcorp.net/third-party-standards/list-of-standards> (last visited Mar. 2, 2014) [hereinafter “Standards”]. (The standards appear to have different focuses. For example, at least one standard, Green Seal Business Certification, appears to focus most heavily on the impact on the environment).

<sup>88</sup> For items like “percentage of employees paid a living wage” the statute or SRO would need to make sure that companies were using the same living wage calculator, such as the calculator provided by Massachusetts Institute of Technology, if the company employees were in the United States. *Poverty in America Living Wage Calculator*, MASSACHUSETTS INSTITUTE OF TECHNOLOGY, <http://livingwage.mit.edu> (last visited Apr. 22, 2014).

In contrast to the Model, Delaware only requires biennial reporting and does not require public posting of the benefit reports.<sup>89</sup> If the reporting requirements of the Model were more robust and coupled with an effective enforcement mechanism, the Delaware PBC law's decreased frequency in required reporting and relative lack of transparency (through not requiring public posting) could be areas of weakness for the Delaware PBC law as compared to the Model. There may be some value to a business, its customers, and its shareholders to having a benefit report publicly posted each year, but the costs may outweigh those benefits for some businesses, especially the smaller entities.<sup>90</sup>

Without revisions to the Model to add more rigor and reliability, it seems unlikely that annual, publicly posted benefit reporting will contribute significantly to building the brand of benefit corporations. The reporting requirements under both the Model and Delaware PBC statutes could be improved by: (1) requiring a few simple but specific disclosures; (2) including an effective enforcement mechanism for companies that violate the requirements; (3) considering a reporting exemption for extremely small social enterprises; and (4) leaving the majority of the reporting requirements to the private certifiers.<sup>91</sup>

### B. Third-Party Standard

The Model, unlike the Delaware PBC law, requires use of a third-party standard.<sup>92</sup> Available third-party standards vary significantly, and simply requiring a third-party standard is not likely to lead to a consistent and valuable brand.<sup>93</sup> Updated versions of the Model require that the third-party standard be "comprehensive," "independent," "credible," and "transparent," but those requirements will be difficult to enforce and, in any event, do not appear aimed at creating a consistent brand.<sup>94</sup> A benefit corporation that does not see the value in using a third-party standard may choose to use the

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<sup>89</sup> DEL. CODE ANN. tit. 8, § 366(b) (2013).

<sup>90</sup> Dana Brakman Reiser, *For-Profit Philanthropy*, 77 *FORDHAM L. REV.* 2437, 2451 (2009) (stating that the majority of social enterprises are small businesses).

<sup>91</sup> Specific quantifiable disclosures might include items such as annual charitable giving (as a percentage of revenue or earnings) or total employee hours volunteered. An effective enforcement mechanism could be as simple as expressly allowing impacted individuals, and not just shareholders, to bring a summary action against a benefit corporation for failure to file its benefit report, though this amendment would have to be carefully drafted to minimize destructive litigation. Private certifiers, such as B Lab, could require more extensive reporting above the floor set by the statutes, and could create brands that appeal to specific segments of the population.

<sup>92</sup> MODEL BENEFIT CORP. LEGIS. § 102.

<sup>93</sup> See Standards, *supra* note 87.

<sup>94</sup> MODEL BENEFIT CORP. LEGIS. § 102. The definition of independence has been scaled back in the most recent version of the Model. The January 26, 2012 version required, among other things, that at least two-thirds of the governing body of the third-party standard creator be independent and prevented material financing of the third-party standard creator by companies being measured. The July 30, 2012 version only required that the third-party standard be

weakest standard available, provide little to no useful information to the market, and waste company resources in the process. Under the current language of the Model, this sort of activity by opportunistic benefit corporations would be difficult to punish, and thus mechanisms should be put in place to ensure quality third-party standards, or the Model should be revised to follow Delaware and allow benefit corporations to forgo a third-party standard if the directors determine that the costs exceed the benefits to their firm.

### C. Benefit Enforcement Proceedings

To encourage pursuit of public benefit, the Model creates a benefit enforcement proceeding process through which issues related to public benefit can be addressed in court.<sup>95</sup> Among the listed stakeholders that directors must consider, the statute only gives shareholders standing to bring a claim under the benefit enforcement proceeding process. The fact that other stakeholders cannot bring a claim creates some doubt that the benefit enforcement proceedings alone will give third parties confidence in the social value created by benefit corporations.<sup>96</sup> Even if benefit corporation shareholders are interested in the public benefit of the entity or even if the benefit corporation voluntarily chooses to give standing to other persons, the statute forecloses the possibility of monetary liability for failure to pursue or create a general public benefit.<sup>97</sup> With monetary damages unavailable, plaintiffs and their attorneys have less incentive to bring benefit enforcement proceedings, benefit corporation directors have less reason to fear the proceedings, and the public should have less confidence in the proceedings as an effective enforcement or brand-creating mechanism.<sup>98</sup>

According to the Delaware PBC law, shareholders must own, individually or collectively, “at least two percent of the corporation’s outstanding shares,” or if publicly listed, the lesser of two percent and “at least two million dollars in market value” to bring a derivative lawsuit to enforce the

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“[d]eveloped by an entity that is not controlled by the benefit corporation.” Murray, *supra* note 10.

<sup>95</sup> MODEL BENEFIT CORP. LEGIS. § 305.

<sup>96</sup> *Id.* § 305(b). Benefit corporations can give standing to non-shareholders in the company’s articles of incorporation or bylaws. *Id.* § 305(c)(iv). See Johnson, *supra* note 62, at 292.

<sup>97</sup> MODEL BENEFIT CORP. LEGIS. § 305(b).

<sup>98</sup> The statutes probably render the benefit enforcement proceedings largely impotent on purpose. The fear of frivolous litigation is likely a major concern. See generally William H. Clark & Larry Vranka, *The Need and Rationale for the Benefit Corporation: Why It Is the Legal Form that Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public*, BENEFITCORP (Jan. 18, 2013), available at [http://benefitcorp.net/storage/documents/Benefit\\_Corporation\\_White\\_Paper\\_1\\_18\\_2013.pdf](http://benefitcorp.net/storage/documents/Benefit_Corporation_White_Paper_1_18_2013.pdf); Delaware Public Benefit Corporations: FAQs (on file with author). An effective enforcement mechanism would address both the need for consistent achievement of above average public good by benefit corporations and the fear of frivolous lawsuits. Plaintiff attorneys will likely play a key role in how many actions are brought; correctly aligning the incentives for them will be pivotal.

duties of a PBC director under the statute.<sup>99</sup> Furthermore, PBC directors are deemed to have satisfied their responsibility of balancing the interests of stockholders, those materially impacted by the corporations, and the specific public benefit(s) identified in its certificate of incorporation if the directors' decision "is both informed and disinterested and not such that no person of ordinary, sound judgment would approve."<sup>100</sup>

Under both the Model and the PBC, courts are unlikely to find directors liable. In neither the Model nor the PBC statutory framework are the non-shareholder stakeholders expressly given enforcement rights.<sup>101</sup> While both statutes explicitly incorporate public good into the corporation's purpose, both severely limit the role of non-shareholders in corporate governance.

#### D. Private or Public Branding

If the Model proponents wish to create a brand through statutes and public enforcement, they would do better requiring an annual floor of charitable giving, a partial asset lock, or another measurable item to increase the likelihood of significant social impact.<sup>102</sup> However, private organizations like B Lab are better equipped than the government to successfully brand social enterprises.<sup>103</sup> Alternatively (or additionally), a self-regulatory agency might be created to evaluate and discipline the third-party standard providers like B Lab.<sup>104</sup>

The social enterprise area is evolving quickly, and state governments likely lack the necessary resources to keep up with the changes and engage in the type of enforcement needed to maintain a valuable brand.<sup>105</sup> In addi-

<sup>99</sup> DEL. CODE ANN. tit. 8, § 367 (2013). The current version of the Model, but only a handful of the individual state benefit corporation statutes, require that the 2% shareholder threshold be cleared to bring a benefit enforcement proceeding. Murray, *supra* note 10.

<sup>100</sup> *Id.* § 365(b).

<sup>101</sup> MODEL BENEFIT CORP. LEGIS. §§ 301(d), 303(d), 305(b); *Id.* §§ 365(b), 367–68 ; *accord* Johnson, *supra* note 62, at 292.

<sup>102</sup> See generally Murray, *Defending Patagonia*, *supra* note 11. Some may argue that a charitable giving floor would drive social enterprises out of business, but if the threshold is set reasonably low (but better than the average profit-focused corporation), then perhaps the social enterprises that would be driven out of business would be ones that should not have existed anyway. The charitable giving could be measured in dollars or in employee time, which would allow companies that did not have excess cash to donate time instead.

<sup>103</sup> To become a "certified B corporation," companies must earn at least 80 of the 200 available points on the B Impact Assessment, created by B Lab, "which assesses the overall impact of [the] company on its stakeholders." *Performance Requirements*, B CORP., <http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/performance-requirements> (last visited Mar. 18, 2014). Additionally, B Lab conducts a social audit of ten percent of the certified B corporations each year. Christina Bianco, *B Lab Visits B Corps in Mexico*, B CORP. (July 2, 2013), <http://www.bcorporation.net/blog/b-lab-visits-b-corps-in-mexico>.

<sup>104</sup> Cf. J.W. Verret, *Dr. Jones and the Raiders of Lost Capital: Hedge Fund Regulation, Part II, a Self-Regulation Proposal*, 32 DEL. J. CORP. L. 799, 819–24 (2007) (proposing the use of self-regulation in the hedge fund context).

<sup>105</sup> See Lloyd Hitoshi Mayer & Brendan M. Wilson, *Regulating Charities in the Twenty-First Century: An Institutional Choice Analysis*, 85 CHI.-KENT L. REV. 479, 494 (2010) (noting that state attorneys general are usually underfunded and overworked).

tion, the term “social good” means very different things to different people, and therefore it is likely better to have private organizations develop various standards, allowing the market to determine which standards, if any, are useful and valuable.<sup>106</sup> While the Model superficially appears to lead to better social enterprise branding, the current mandatory provisions in the Model are unlikely to create a valuable brand because they do not require consistency and have not created effective enforcement mechanisms. The intensive branding efforts are therefore better left to the private market, which can provide more dynamic and nuanced responses with greater ease and effectiveness.

## V. REMAINING QUESTIONS FOR PUBLIC BENEFIT CORPORATIONS

At least five unanswered questions remain regarding PBCs in Delaware, most of which also apply to benefit corporations in general. First, with only about 250 total benefit corporations formed nationwide as of July 2013, not enough for a noticeable bump in Delaware’s state revenue even if Delaware quickly matches that number by itself, what other reasons account for Delaware’s decision to pass the PBC law?<sup>107</sup> Delaware may have been acting proactively, positioning itself for the possibility of a future drastic increase in the formation of benefit corporations.<sup>108</sup> Delaware’s actions may also be explained, in large part, by the political process. Constituents in various

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<sup>106</sup> For example, one brand could be the predominant third-party standard for environment focused companies, one for employment focused companies, one for more liberal companies, and one for more conservative companies. See J. Haskell Murray, *Chick-fil-A as a social enterprise?*, THE CONGLOMERATE (Aug. 20, 2012), <http://www.theconglomerate.org/2012/08/chick-fil-a-as-a-social-enterprise.html>.

<sup>107</sup> Over one million entities are formed in Delaware, so a few hundred more entities, standing alone, would be relatively insignificant. *Why Incorporate in Delaware*, STATE OF DELAWARE, <http://corp.delaware.gov/> (last visited Apr. 22, 2014); J. Haskell Murray, *How Many Benefit Corporations Have Been Formed?*, SOCENTLAW.COM (July 23, 2013), <http://socentlaw.com/2013/07/how-many-benefit-corporations-have-been-formed/> (posting data from B Lab that suggest that approximately 250 benefit corporations had been formed as of mid-2013). As of April 1, 2014, that number has increased to slightly more than 400 benefit corporations, including PBCs, according to data collected by the Author, Kate Cooney (Yale), Matthew Lee (Harvard, PHD Student), and Justin Koushyar (Emory, PHD Student) (data on file with the Author). In 2007, an average of 430 limited liability companies (LLCs) were formed in Delaware each workday, more than the total number of benefit corporations formed nationwide in four years. Mohsen Manesh, *Delaware and the Market for LLC Law: A Theory of Contractibility and Legal Indeterminacy*, 52 B.C. L. REV. 189, 201 (2011). As of January 31, 2014, six months after the Delaware PBC law went effective, there were a total of 87 PBCs formed in Delaware. E-mail from April Wright, Delaware Secretary of State’s Office, to J. Haskell Murray, Assistant Professor of Management, Belmont Univ. (February 28, 2014, 7:37 AM EST) (on file with author). Granted, the number of benefit corporations and PBCs may increase substantially in the future, but, currently, extremely few entities have been formed.

<sup>108</sup> Stephen Bainbridge, *Delaware Moves into B-Corp Market*, PROFESSORBAINBRIDGE.COM (April 12, 2013, 12:07 PM), <http://www.professorbainbridge.com/professorbainbridge.com/2013/04/delaware-moves-into-b-corp-market.html>.

states have been active in expressing their anti-Wall Street sentiment.<sup>109</sup> Public preference for more socially-motivated over profit-focused companies being vocally expressed, coupled with the fact that the financial cost of the statutes to the state is essentially zero, makes the pitch of the social enterprise proponents virtually irresistible to legislatures.<sup>110</sup> Due to the negligible financial costs associated with the social enterprise statutes, the statutes are likely to provide a net increase in a state's revenue even if the revenue derived from the statutes is extremely low. Social enterprise proponents in the United States have been unable to convince states or the national government to provide tax breaks to social enterprises.<sup>111</sup> While a few cities have provided some benefits to social enterprises, benefits to date have been quite small and presumably did not come at significant cost.<sup>112</sup>

Second, how will courts hold directors of PBCs accountable? The statutory directive provided by the Delaware PBC law requires the balancing of “[1] the pecuniary interests of the stockholders, [2] the best interests of those materially affected by the corporation's conduct, and [3] the specific public benefit or public benefits identified in its certificate of incorporation.”<sup>113</sup> With traditional for-profit corporations, the business judgment rule shields directors from most liability and the PBC law explicitly states that directors will not be liable if a decision “is both informed and disinterested and not such that no person of ordinary, sound judgment would approve.”<sup>114</sup> When directors of traditional for-profit corporations openly admit to eschewing shareholder wealth, some courts have held those directors accountable.<sup>115</sup> Will directors of PBCs be liable if they openly admit to eschewing the identified specific public benefit? Requiring the adoption of specific public benefit purpose was included to give directors and investors additional clarity.<sup>116</sup> Without clarity on priority or weight of the factors that PBC directors must balance, significant accountability imposed by the courts becomes highly

<sup>109</sup> See, e.g., *About Us*, OCCUPY WALL STREET, <http://occupywallst.org/about/> (last visited Sept. 15, 2013) (an “online resource for the growing occupation movement happening on Wall Street and around the world . . . fighting back against the corrosive power of major banks and multinational corporations over the democratic process, and the role of Wall Street in creating an economic collapse that has caused the greatest recession in generations.”).

<sup>110</sup> Of course, there are other types of costs to the states stemming from the benefit corporation legislation, including costs in the form of legislature time spent focusing on the legislation and possible confusion created by the benefit corporation statute.

<sup>111</sup> See Usha Rodrigues, *Entity and Identity*, 60 EMORY L.J. 1257, 1317 n.277 (2011) (explaining that the L3C advocates have been unable to convince the IRS to make the Program Related Investment process easier for foundations that invest in an L3C). The United Kingdom, however, has recently provided significant tax relief for social investments. Astrid Zweynert, *UK boosts social enterprise with 30 pct tax relief on social investments*, THOMSON REUTERS FOUNDATION (Mar. 19, 2014 10:00 PM), <http://www.trust.org/item/20140320000037-95mrd/>.

<sup>112</sup> See *supra* note 72.

<sup>113</sup> DEL. CODE ANN. tit. 8, § 365(a) (West 2013).

<sup>114</sup> *Id.* § 365(b); Delaware Public Benefit Corporations: FAQs (on file with author).

<sup>115</sup> See, e.g., *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 46 (Del. Ch. 2010); *Dodge v. Ford Motor Co.*, 170 N.W. 668, 683–84 (Mich. 1919).

<sup>116</sup> Delaware Public Benefit Corporations: FAQs (on file with author).

unlikely.<sup>117</sup> Furthermore, because only shareholders (and a few internal stakeholders) possess the right to sue, employees and various external stakeholders might not be protected, especially given the statutory bar from liability, except in the most extreme circumstances.<sup>118</sup> Only time will tell whether simply mandating that the PBC directors balance the various stakeholder interests will lead to positive results, even if actual enforcement is quite limited. Even if actual enforcement is limited, perhaps the PBC law will lead to norms that will provide some deterrent against directors using social enterprise to further their own causes instead of the interests of the social enterprise and society at large.

Third, how will courts deal with PBCs in the mergers and acquisitions context?<sup>119</sup> The mergers and acquisitions context presents unique challenges in Delaware because Delaware law requires more searching inquiry than the law in many other states, which, unlike Delaware, have constituency statutes.<sup>120</sup> It will be interesting to see whether the seminal *Unocal* and *Revlon* cases hold any weight in the PBC context.<sup>121</sup> If the cases are not applied for PBCs, the omnipresent specter of directorial self-interest will need to be addressed by policymakers or judges.<sup>122</sup> Perhaps the statutory statement suggesting that liability may be imposed for self-interested decisions will address this concern.<sup>123</sup> To prevent PBC directors from easily “selling out” through a sale of the company, this Author has suggested elsewhere the imposition of a charitable giving floor and a partial-asset lock.<sup>124</sup> In the traditional for-profit corporation context, mergers can have a disciplining effect on directors, but in the PBC context, directors seem free to choose any rea-

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<sup>117</sup> The Author has uncovered no reported litigation involving benefit corporations or PBCs. This current lack of litigation is likely due to a combination of the entity forms being so new, the entities being mostly small, and the entities being mostly closely-held.

<sup>118</sup> tit. 8, § 365(b); George W. Dent, Jr., *Corporate Governance Without Shareholders: A Cautionary Lesson From Non-Profit Organizations*, 39 DEL. J. CORP. L. (forthcoming 2014) (manuscript at 8–9) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2285730&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2285730&download=yes).

<sup>119</sup> There have yet to be any reported hostile takeovers in the benefit corporation context. Daniel Fisher, *Delaware's Public Benefit Corporation Lets Directors Serve Three Masters Instead of One*, FORBES.COM (July 16, 2013, 2:06 PM), <http://www.forbes.com/sites/danielfisher/2013/07/16/delaware-public-benefit-corporation-lets-directors-serve-three-masters-instead-of-one/> (quoting the Model's drafter, Bill Clark, that “[w]e haven't had a hostile run at a benefits corporation yet. . .”).

<sup>120</sup> Murray, *Defending Patagonia*, *supra* note 11, 490–98.

<sup>121</sup> See generally Murray, *Defending Patagonia*, *supra* note 11; cf. Lyman Johnson and Rob Ricca, *The Dwindling of Revlon*, \_\_\_ WASH. & LEE L. REV. \_\_\_ (forthcoming 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2379736](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2379736) (claiming that the importance of *Revlon* is and should be diminishing).

<sup>122</sup> Cf. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985) (discussing, in the takeover context, the “omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders.”)

<sup>123</sup> DEL. CODE ANN tit. 8, § 365(b) (2013); see Brian D. Galle, *Social Enterprise: Who Needs It?* 54 B.C. L. REV. 2025, 2041 (2013) (explaining how benefit corporation can be converted to traditional corporations at virtually no cost to the company).

<sup>124</sup> Murray, *Defending Patagonia*, *supra* note 11, at 513.

sonable bid through the balancing of various stakeholder interests.<sup>125</sup> To avoid warranted lawsuits, directors of PBCs and benefit corporations will need to be informed, disinterested, and take good minutes of the balancing process that took place. While unhappy shareholders may still sue directors of PBCs if directors take a lower financial bid, PBC directors will likely have significantly more protection than directors of a traditional for-profit Delaware corporation.<sup>126</sup> Over time, researchers will be able to measure whether higher premiums were obtained by traditional corporations or PBCs and may be able to determine which entity type leads to greater long-term value creation.

Fourth, will PBCs be able to attract significant amounts of outside capital, and will they be formed with significant frequency? The ability or inability to attract significant outside capital will likely impact the number of PBCs formed. To date, the vast majority of social enterprises have been closely-held, and only a few have attracted outside capital, which is often needed to scale business operations.<sup>127</sup> According to the US SIF Foundation, an association of organizations, investment firms, and professionals dedicated to more responsible investing, \$3.7 trillion in the U.S. is “invested according to strategies of sustainable and responsible investing” (SRI) and represents approximately eleven percent of the assets under management in the U.S.<sup>128</sup> SRI includes “investment strategies that explicitly take into account the environment, social and governance performance of companies [and can include] social screening, shareholder advocacy and proactive investing.”<sup>129</sup> SRI, however, reaches well beyond most definitions of social enterprise.<sup>130</sup> J.P. Morgan has surveyed ninety-nine organizations that, collectively, made \$8 billion in impact investments in 2012 and planned to make \$9 billion in impact investments in 2013.<sup>131</sup> This smaller, but growing and still significant, pool of capital may be available to founders of PBCs with solid business plans. “Crowdfunding” may be another avenue to capital

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<sup>125</sup> Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 112–19 (1965).

<sup>126</sup> Telephone Interview with Samuel A. Nolen, *supra* note 64.

<sup>127</sup> Joan MacLeod Heminway, *To Be or Not to Be (A Security): Funding For-Profit Social Enterprises*, 25 REGENT U. L. REV. 299, 308–09 (explaining some of the capital-raising challenges facing social enterprises).

<sup>128</sup> US SIF Foundation, *Report on Sustainable and Responsible Investing Trends in the United States 2012*, TIAA-CREF 10 (2012), available at <https://www.tiaa-cref.org/public/pdf/ussiftrends2012.pdf>.

<sup>129</sup> *Socially Responsible Investing: How does Socially Responsible Investing work?*, TIAA-CREF, <http://www1.tiaa-cref.org/public/advice-planning/education/socially-responsible-investing/strategies/index.html> (last visited Mar. 18, 2014).

<sup>130</sup> For example, social screening “involves building an investment portfolio through a process that explicitly eliminates or deliberately includes certain stocks or bonds based on the performance of those companies.” *Id.*

<sup>131</sup> See Yasemin Saltuk, *Perspectives on Progress: The Impact Investor Survey*, J.P.MORGAN SOC. FIN. 3 (Jan. 7, 2013), available at [http://www.jp.morganchase.com/corporate/socialfinance/document/207350\\_JPM\\_Perspectives\\_on\\_Progress\\_2013-01-07\\_1018749\\_ada.pdf](http://www.jp.morganchase.com/corporate/socialfinance/document/207350_JPM_Perspectives_on_Progress_2013-01-07_1018749_ada.pdf).

for PBCs.<sup>132</sup> Moreover, two social enterprise stock exchanges have been launched abroad: the Social Stock Exchange in London and the Impact Investment Exchange Asia.<sup>133</sup> While sources of capital have begun to spring up for these new socially focused entity forms, investors will demand assurances, through statutes or private contracting, that they will receive an adequate financial and social return.<sup>134</sup> As of January 31, 2014, approximately six months after the Delaware PBC law went effective, only eighty-seven Delaware PBCs have been formed, though some, like Plum PBC and Method Products are larger companies than the typical social enterprise.<sup>135</sup>

Finally, will states follow Delaware's innovation in the social enterprise area and mimic Delaware's PBC law? Although states have often followed Delaware's lead in corporate law,<sup>136</sup> B Lab has emerged as a powerful force in advocating for the Model.<sup>137</sup> B Lab still appears to be championing the Model and resisting legislation based on Delaware's PBC law.<sup>138</sup> As stated above, one state, Colorado, followed Delaware even before the Delaware statute was effective, and other states are considering legislation similar to Delaware's PBC law.<sup>139</sup> Colorado, however, received significant resistance from B Lab, and Colorado ultimately passed a statute that followed the Dela-

<sup>132</sup> See *Crowdfunding and its Implications for the Entrepreneurial Ecosystem*, UNIV. OF COLORADO-Boulder & KAUFFMAN FOUNDATION (July 13, 2013), <http://crowdfundconference.org/program-and-schedules/> (The panel on "crowdfunding social enterprise" mentioned that both crowdfunding and social enterprise sprung from populist roots, and also discussed crowdfunding as a possible way to fund social enterprises.); Christine Hurt, *Pricing Disintermediation: Crowdfunding and Online Auction IPOs*, available at, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2406205](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2406205) (stating that "[f]or-profit social entrepreneurs may find equity crowdfunding both appealing and available.")

<sup>133</sup> Pete Troilo, *Are Social Stock Exchanges the Great Equalizer to Democratize Development Finance?*, DEVEX (July 15, 2013), <https://www.devex.com/en/news/are-social-stock-exchanges-the-great-equalizer-to-democratize-development-finance/81436> (describing both stock exchanges and noting that the Social Stock Exchange attracted eleven listed companies in its first month).

<sup>134</sup> See generally Dana Brakman Reiser & Steven A. Dean, *Hunting Stag with Fly Paper: A Hybrid Financial Instrument for Social Enterprise*, 54 B.C. L. REV. 1495 (2013) (exploring a potential way to provide the necessary assurances through financial instruments and private contracting).

<sup>135</sup> E-mail from April Wright, Delaware Secretary of State's Office, to J. Haskell Murray, Assistant Professor of Management, Belmont Univ. (February 28, 2014, 7:37 AM) (on file with author).

<sup>136</sup> *In re Prudential Ins. Co. Derivative Litig.*, 659 A.2d at 969 ("Delaware is recognized as a pacesetter in the area of corporate law."); Ribstein & O'Hara, *supra* note 8, at 678 ("The corporation leader in the United States is now Delaware."); Simmons, *supra* note 8, at 1172 ("Delaware is viewed as a pioneer and perennial leader in the market for corporate law."). Cf. Carney & Shepherd, *supra* note 8, at 1 (admitting Delaware's dominance in the area of corporate law, but "challeng[ing] the widely held view that Delaware corporate law is dominant because it possesses superior traits, such as a well-understood statute, many judicial decisions interpreting the law, and wise and experienced judges administering that law.").

<sup>137</sup> See Susan Adams, *Corporate Responsibility Nonprofit, B Lab, Shows Strong Growth*, FORBES.COM (Mar. 16, 2011, 11:29 AM), <http://www.forbes.com/sites/susanadams/2011/03/16/corporate-responsibility-nonprofit-b-lab-shows-strong-growth/>.

<sup>138</sup> See Callison, *supra* note 30.

<sup>139</sup> The Author serves as an advisor to certain state bar association committees that are considering benefit corporation legislation. See also *id.* at 159; Lidstone, *supra* note 38, at 6.

ware PBC law in many areas, but Colorado's PBC law contained B Lab's desired reporting requirements.<sup>140</sup> Commentators have pointed to flaws in social enterprise statutes, and have had some success in challenging social enterprise statutes that use a limited liability company framework (mainly, low-profit limited liability companies, called L3Cs), an area where B Lab is not focused.<sup>141</sup> Benefit corporation legislation, however, has passed unanimously in a number of states and often without much variation from the Model, because the offer to the states has been packaged in such an appealing manner.<sup>142</sup> The statutes appear to appeal to some of the social justice advocates on the left and to some of the free market proponents on the right.<sup>143</sup> Additionally and importantly, B Lab has become a vocal, connected, persistent, and well-funded advocate for the Model.<sup>144</sup> From the early evidence, it appears that Delaware's PBC framework will enter the social enterprise conversation because of Delaware's position in corporate law.<sup>145</sup> Nevertheless, given B Lab's influence, the Delaware's PBC law may be more successful in achieving incremental changes, rather than an immediate, wholesale revolution in social enterprise.

## CONCLUSION

Delaware has innovated in the benefit corporation area by creating its own statutory framework to compete with the Model, and when Delaware talks, other states listen.<sup>146</sup> This Article has provided a comparative analysis

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During the editing process, Minnesota passed a Public Benefit Corporation Act that followed portions of the Delaware PBC law. Mason & Nygren, *supra* note 38.

<sup>140</sup> See Lidstone, *supra* note 38, at 12.

<sup>141</sup> See, e.g., Daniel S. Kleinberger, *A Myth Deconstructed: The "Emperor's New Clothes" on the Low-Profit Limited Liability Company*, 35 DEL. J. CORP. L. 879 (2010); Carter G. Bishop, *The Low-Profit LLC (L3C): Program Related Investment by Proxy or Perversion?*, 63 ARK. L. REV. 243 (2010); J. William Callison & Allan W. Vestal, *The L3C Illusion: Why Low-Profit Limited Liability Companies Will Not Stimulate Socially Optimal Private Foundation Investment in Entrepreneurial Ventures*, 35 VT. L. REV. 273 (2010); Murray & Hwang, *supra* note 18; Cassidy V. Brewer, *Seven Ways to Strengthen and Improve the L3C*, 25 REGENT U. L. REV. 329 (2013); Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591 (2011); Murray, *Choose Your Own Master*, *supra* note 11; Callison, *Putting New Sheets on a Procrustean Bed*, *supra* note 51.

<sup>142</sup> B Lab, *supra* note 20.

<sup>143</sup> See Kyle Westaway, *Something Republicans and Democrats Can Agree On: Social Entrepreneurship*, STAN. SOC. INNOVATION REV. BLOG (Apr. 17, 2012), [http://www.ssireview.org/blog/entry/something\\_republicans\\_and\\_democrats\\_can\\_agree\\_on\\_social\\_entrepreneurship](http://www.ssireview.org/blog/entry/something_republicans_and_democrats_can_agree_on_social_entrepreneurship) (stating that social entrepreneurship is both a solution that liberals can support because of the social and environmental focus and a solution that conservatives can support because social entrepreneurship looks to the free market, not government, for solutions).

<sup>144</sup> See Callison, *supra* note 30, at 163–65 (explaining the influence of B Lab on the political process).

<sup>145</sup> See, e.g., CASS BREWER, STATE BAR OF GEORGIA, *Report of Ad Hoc Benefit Corporation Committee: Executive Committee, Business Law Section 12-17* (2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2401144](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2401144) (analyzing and considering the "Delaware Approach" in the context of a potential benefit corporation law in Georgia).

<sup>146</sup> *In re Prudential Ins. Co. Derivative Litig.*, 659 A.2d at 969 ("Delaware is recognized as a pacesetter in the area of corporate law."); Ribstein & O'Hara, *supra* note 8, at 678 ("The

of Delaware's PBC law and the Model, and suggested that Delaware's approach is superior in most areas. Despite Delaware's superiority, this Article also calls for policymakers to consider amendments to Delaware's PBC statute, including clarifying the priority of the specific public benefit purpose, requiring a partial-asset lock, imposing a charitable giving floor, providing more effective enforcement mechanisms, and reconfiguring the current reporting requirements. Social enterprise legal forms are extraordinarily recent additions to the list of possible business entity types. While Delaware's PBC law is likely to have significant influence on social enterprise statutes, continued innovation in this field, from inside and outside of Delaware, is both likely and necessary.

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corporation leader in the United States is now Delaware."); Simmons, *supra* note 8, at 1172 ("Delaware is viewed as a pioneer and perennial leader in the market for corporate law."). Cf. Aaron Lucchetti & Brett Philbin, *E.F. Hutton Breaks Silence*, WALL ST. J. (Apr. 22, 2012), <http://online.wsj.com/article/SB10001424052702303978104577360340767735510.html> (mentioning the advertising slogan, "When E.F. Hutton talks, people listen.").

## APPENDIX

TABLE 1

Provision	PBC Law	Model
Benefit Director	Optional; not mentioned	Mandatory for public companies <sup>147</sup>
Benefit Officer	Optional; not mentioned	Optional; expressly allowed. <sup>148</sup>
Benefit Report Preparation	Biennially <sup>149</sup>	Annually <sup>150</sup>
Benefit Report Public Posting	Optional <sup>151</sup>	Mandatory—post on website; if no website, provide for free on request. <sup>152</sup>
Identification of Specific Public Benefit Purpose(s)	Mandatory <sup>153</sup>	Optional <sup>154</sup>
Minimum Ownership for Shareholder Standing in Derivative Lawsuits	2%; or if the PBC is publicly traded then the lesser of 2% and \$2 million in market value <sup>155</sup>	2% <sup>156</sup>
Third-party Standard	Optional <sup>157</sup>	Mandatory <sup>158</sup>
Third-party Certification	Optional <sup>159</sup>	Optional <sup>160</sup>
Dissenters' Rights	Provided <sup>161</sup>	Not expressly provided
Election of Status	90% of shareholders <sup>162</sup>	Two-thirds of shareholders <sup>163</sup>
Termination of Status	Two-thirds of shareholders <sup>164</sup>	Two-thirds of shareholders <sup>165</sup>

<sup>147</sup> MODEL BENEFIT CORP. LEGIS. § 302(a) (2013).

<sup>148</sup> *Id.* § 304(a).

<sup>149</sup> DEL. CODE ANN. tit. 8, § 366(b) (West 2013). Delaware public benefit corporation committee member Rick Alexander explained that the Delaware PBC's departure from the annual requirement was meant to allow the PBCs some space between the reports and to provide PBCs more time to focus on their substantive work. Telephone Interview with Frederick H. Alexander, Partner, Morris, Morris, Nichols, Arsht, & Tunnell LLP (Aug. 15, 2013).

<sup>150</sup> MODEL BENEFIT CORP. LEGIS. §401(a).

<sup>151</sup> tit. 8, § 366(c).

<sup>152</sup> MODEL BENEFIT CORP. LEGIS. §402.

<sup>153</sup> tit. 8, § 362(a). The requirement to identify a specific public benefit was intended "to provide focus to the directors . . . and [to give] investors notice of, and some control over, specific public purposes the corporation serves." Delaware Public Benefit Corporations: FAQs at 2 (on file with author).

<sup>154</sup> MODEL BENEFIT CORP. LEGIS. §201(b).

<sup>155</sup> tit. 8, § 367; *see* Lidstone, *supra* note 38, at 13-15 (explaining the provision as implemented in Colorado's public benefit corporation law).

<sup>156</sup> MODEL BENEFIT CORP. LEGIS. § 305(c)(2)(i).

<sup>157</sup> tit. 8, § 366(c).

<sup>158</sup> MODEL BENEFIT CORP. LEGIS. §§ 102, 401(a)(2).

<sup>159</sup> tit. 8, § 366(c).

<sup>160</sup> MODEL BENEFIT CORP. LEGIS. §401(c).

<sup>161</sup> tit. 8, § 363(b).

<sup>162</sup> *Id.* § 363(a).

<sup>163</sup> MODEL BENEFIT CORP. LEGIS. §104.

<sup>164</sup> tit. 8, § 363(c).

<sup>165</sup> MODEL BENEFIT CORP. LEGIS. §105.

