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Public Reporting by Benefit Corporations: Importance, Compliance, and Recommendations

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INTRODUCTION

Social entrepreneurship is becoming increasingly popular.[1] Social enterprises commit to a social and or environmental purpose as a second master besides shareholders.[2] There is a growing demand of consumers, investors and employees for such enterprises.[3] The legal world reacted with frenetic legislative activity, resulting in new legal entities to accommodate these social enterprises.

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1. *See* J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV 1, 26 n.115 (2012) (mentioning the plethora of media articles, and business and law school programs and other clinics related to this topic).

2. The terms "social enterprise," and "social entrepreneurship" will, for the purposes of this paper, mean enterprises with such a double purpose of (i) pursuing profit generation (ii) pursuing a social and or environmental purpose. Legal scholars have used similar definitions, *see, e.g.*, Murray, *Master, supra* note 1, at 4 n.4; Anthony Page & Robert A. Katz, *Is Social Enterprise the New Corporate Social Responsibility?,* 34 SEATTLE U. L. REV. 1351, 1353 (2011); Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269, 269 (2013).

3. *See infra* notes 35–38 and accompanying text.

One of these new entities,[4] the benefit corporation, exists in thirty-three states and the District of Columbia,[5] and legislation is also under review in a handful of other states.[6] Although the different state statutes are far from identical, there are some common characteristics. All states provide for (i) a broader corporate purpose,[7] (ii) an expanded fiduciary duty encompassing non-shareholder interests,[8] and (iii) a framework for reporting about social and environmental achievements.[9]

It is precisely this broader corporate purpose and expanded fiduciary duty in for profit companies that fundamentally innovate American corporate law.[10] The purpose of the benefit corporation statutes is ambitious: Accommodating social entrepreneurship in a special legal entity and giving social entrepreneurs the opportunity to use this legal entity as a way to signal to consumers, investors, and employees that they are genuinely doing business in a responsible manner.[11] This ambitious purpose and the effect of a state-sanctioned corporate responsibility label makes accountability pivotal. The state legislators have opted for a "transparency-based accountability" model[12] thereby making the periodic reporting requirement of crucial importance.

4. This includes the low-profit limited liability company, available in eight states, the flexible purpose corporation in California and the social purpose corporation in Washington and Florida. *See generally Status Tool*, SOCIAL ENTERPRISE LAW TRACKER (for a state-by-state overview of the available alternatives for benefit corporations), http://socentlawtracker.org/#/bcorps [https://perma.cc/N6H8-R4TX]; Murray, *Master*, *supra* note 1, at 22–24 (describing these corporate entities and the differences with benefit corporations in more detail).

5. *See infra* Appendix I for a table of all states that have enacted benefit corporation legislation. A number of states have seen benefit corporation legislation fail: *See Status Tool,* SOCIAL ENTERPRISE LAW TRACKER, http://socentlawtracker.org/#/bcorps (last visited Apr. 19, 2017).

6. *See Status Tool,* SOCIAL ENTERPRISE LAW TRACKER, http://socentlawtracker.org/#/bcorps (last visited Apr. 19, 2017).

7. *See infra* note 66 for a description of the way this broader purpose is defined in the different states.

8. Note that there is no fiduciary duty *towards* these non-shareholders; *see infra* note 95 and accompanying text.

9. William H. Clark Jr. & Elizabeth K. Babson, *How Benefit Corporations are Redefining the Purpose of Business Corporations,* 38 WM. MITCHELL L. REV. 817, 838–839 (2013); Jessica Chu, *Filling a Nonexistent Gap: Benefit Corporations and the Myth of Shareholder Wealth Maximization*, 22 S. CALIF. INTERDISC. L.J. 155, 161–162 (2012); Kennan El Khatib, *The Harms of the Benefit Corporation,* 65 AM. U. L. REV. 151, 153 (2015); Vanisha Sukdeo, *What is the Benefit of a 'Benefit Corporation'? Examining the Advantages and Detriment,* 31 BANKING & FIN. L. REV. 89, 91 (2011).

10. *See infra* notes 89–108 and accompanying text for a description of the liability regime for violations of these expanded fiduciary duties.

11. *See infra* notes 35–62 and accompanying text.

12. The credits for coining this term in this context go to Briana Cummings, *Benefit Corporations: How to Enforce a Mandate to Promote the Public Good,* 112 COLUM. L. REV. 578, 595 (2012).

However, in his early report on reporting compliance, Dr. Haskell Murray found a problematically low reporting rate, between eight and ten percent.[13] In this paper, I expand the data on benefit reporting, by analyzing reporting rates in Oregon, Colorado, Minnesota and Delaware. By crossing these results with other variables,[14] I test some of the potential reasons suggested as causes of the low reporting rate,[15] and I test other reasons which have not yet been suggested in the literature.[16] This results in a thorough understanding of the parameters influencing the benefit corporations' reporting. Based on these parameters, I provide recommendations to state legislators.[17] These recommendations do not only target states with benefit corporation statutes, whose public reporting provisions are summarized in Appendix I. The recommendations also target states where benefit corporation legislation is under review.[18] The data I have accumulated and the recommendations I make should enable these legislators to make more informed decisions about public reporting.

For instance, two of the three benefit corporation statutes that entered into force in 2017 lack an obligation to publish the benefit report and all three statutes lack enforcement mechanisms backing the reporting duties of the benefit corporations.[19] In light of the importance given to accountability by proponents of the benefit corporation statutes and the fact that the overwhelming majority of states still mandate publication,[20] this paper first thoroughly analyzes the importance of public reporting from a theoretical point of view.

Empirically, this paper also aims to add to the limited available data about benefit corporations. Since the adoption of the first statute in 2010,[21]

13. J. Haskell Murray, *An Early Report on Benefit Reports*, 118 W. VA L. REV. 25, 34–35 (2015) (suggesting different reasons for the low reporting, without testing them statistically).

14. Third-party certification, headquarters, size, principal place of business and corporate age.

15. *See e.g.*, Murray, *Benefit Reports*, *supra* note 13.

16. For instance, I cross the results in terms of third-party certification with the reporting rates.

17. Note that Italy has also adopted a benefit corporation statute that is very similar to the MBCL and mandates an annual report that has to be placed on the website, if a "Societa benefit" has one, *see* L. 28 dicembre 2015, n. 208, G.U. Dec. 30, 2015, n. 302 (It.), art. 376–84. Similar legislation has also been adopted in Puerto Rico, creating the "Corporacion de Beneficio Social" and the "Compania de Responsabilidad Limitada con Fin Social." *See* P.R. LAWS AN. tit. 14, § 4071–4084 (2016) for the corporation (requiring annual filing of a benefit report with a state agency). B Lab states that legislation is on its way in Australia, Argentina, Chile, Canada and Colombia as well. *International Legislation,* B LAB, http://benefitcorp.net/international-legislation [https://perma.cc/QM6R-TVHW]. In that sense, this paper's findings may also be interesting for foreign legislators considering enacting similar legislation.

18. *See supra*, note 6 and accompanying text.

19. *See infra* Appendix I.

20. *See infra* note 69 and Appendix I.

21. The first state to adopt a benefit corporation statute was Maryland; *see* MD. CODE ANN., CORPS. & ASS'NS §§ 5-6C-01 to 5-6C-08 (LexisNexis 2016).

there is still a scarcity of information about the firms that incorporate as, or convert to, benefit corporations,[22] why they do so,[23] and whether they comply with the legal requirements.[24] Moreover, a comparison of voluntary reporting in Delaware and of compliance in the mandatory systems in Oregon, Colorado, and Minnesota will add to the literature about the usefulness of mandatory legal rules and mandatory disclosure.

One of the reasons for the lack of information about benefit corporations — besides their recent inception — is the fact that they are almost exclusively private companies.[25] This implies a natural limitation with regard to the depth and the uniformity of the gathered information.

Before describing the structure of this paper, it is important to make a terminological clarification. While B Lab[26] used the name "benefit corporation" in the Model Benefit Corporation Legislation (MBCL) it drafted and promoted, state legislators have used different names. For instance, Delaware uses "public benefit corporation," whereas Oregon uses "benefit company."[27] In this paper, I will use the term "benefit corporations" when referring to all the entities that have the three characteristics mentioned

22. A study which partially analyzes this is Alicia E. Plerhoples, *Delaware Public Benefit Corporation 90 Days Out: Who's Opting In?*. 14 U.C. DAVIS BUS. L.J. 247–280 (2014). My study is useful to complement this study, which (i) only analyzed Delaware public benefit corporations (ii) only analyzed corporations that became public benefit corporations within 30 days after the statute's entry into force (i.e., early adopters) (iii) did not analyze third-party certification, size and principal place of business.

23. *See generally* Megan Burkhart et al., *Conference Report, The State of Social Enterprise: Maryland*, (an early survey limited to Maryland about these motives) https://www.slideshare.net/changematters/maryland-benefit-corporations-analysis-full-report [https://perma.cc/U592-FHEU]; Michael B. Dorff, *Why Public Benefit Corporations,* 42 DEL. J. CORP. L. (forthcoming 2017) (analyzing the motives of a sample of 25 benefit corporations), *available at* https://ssrn.com/abstract=2848617.

24. *See* Murray, *Benefit Reports*, *supra* note 13 (analyzing benefit reporting in Virginia, Hawaii, California and New York).

25. The only exception is Laureate Education, a Delaware public benefit corporation listed on Nasdaq since February 1, 2017. Etsy Inc., a company listed on Nasdaq was a benefit corporation until 2017. It decided not to apply for recertification when it faced the obligation to convert to a public benefit corporation. *See* David Gelles, *Inside the Revolution at Etsy,* https://www.nytimes.com/2017/11/25/business/etsy-josh-silverman.html [https://perma.cc/6WMJ-89PH]. About the dilemma which faced Etsy Inc. Alicia Plerhoples, *Social Enterprise As Commitment: A Roadmap,* 48 WASH. U. J.L. & POL'Y 89, 109 n.96 (2015).

26. B Lab is a nonprofit that, for the purposes of this paper has played an important role in the benefit corporation movement by fulfilling three roles: (i) It is the market leader in corporate social responsibility certification amongst benefit corporations, (ii) has actively promoted the adoption of benefit corporation statutes (*see infra* note 31) and (iii) it has developed the most used third-party standard used by benefit corporations in their periodic reports (B Impact Assessment) (*see infra* note 305 and accompanying text). *See also About B Lab*¸ B LAB, https://www.bcorporation.net/what-are-b-corps/about-b-lab [https://perma.cc/6WRU-DBYM].

27. *See* Appendix I for an overview of the benefit corporation names.

above.[28] Benefit corporations have to be distinguished from B Corporations,[29] which are companies that have been certified by B Lab.[30]

A final preliminary comment concerns the rationale and motives for benefit corporation legislation. While I do devote a substantial part of my article to an analysis of the motives that drove state legislators to adopt the statutes, this analysis does not necessarily imply an endorsement of these motives. Rather, I intend to take the existence of benefit corporations in the majority of states as a given and show how crucially important public reporting is, given the legislators' intentions.

In Part I, I analyze why public reporting is crucial for benefit corporations. After a discussion of the motives leading to the adoption of benefit corporation statutes, I argue that accountability is crucial to reach the statutes' goals. I then explain why public reporting is necessary for accountability and why it could also be considered as a separate goal. Finally, I analyze why I believe that the benefits of imposing public reporting outweigh the costs, and I briefly discuss enforcement of such a public-reporting requirement. *In Part II*, I analyze benefit reporting data in Oregon, Colorado, Minnesota and Delaware and analyze some potential explanations for the low reporting levels. *In Part III*, based on these results, I make some recommendations to enhance the reporting system in a way that strikes a balance between the need for transparency and the practical reality as shown by the data.

I. THE IMPORTANCE OF PUBLIC REPORTING

A. THE TRANSPARENCY-BASED ACCOUNTABILITY SYSTEM.

1. *Analysis of the Motives: Accountability is Crucial.*

In this section, I first reconstrue the common motives leading to the

28. I will use the different and specific terms, such as benefit company and public benefit corporation when discussing specific states' legal entities. A list of benefit corporation and company legislation is included in Appendix I.

29. This is a very important distinction, which is not always strictly respected in practice. For instance, benefit corporations often appear to be confused about the name of the legal structure they have adopted.

30. To become a certified B Corporation for two years, companies have to meet minimum performance requirement of 80 points (out of 200) on the B Impact Assessment test, meet legal requirements (which in some states, includes conversion to the benefit corporation status), take part in a yearly auditing of ten percent of the B Corporations, and finally pay a fee that ranges from $500 to $50,000 depending on annual sales levels. *See Make it Official*, B LAB, https://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/make-it-official-2 [https://perma.cc/6GYG-U8WK].

adoption of benefit corporation statutes. I analyze the legislative documents in all of the states discussed in Part II, as well as documents issued by B Lab,[31] the drafter of MBCL,[32] and other different relevant actors.[33] The motives expressed by these sources combine three factors: A growing demand for socially and environmentally responsible enterprises, legal obstacles hindering social enterprises, and the goal of countering greenwashing.[34] Thereafter, I discuss the *raison d'être* of benefit corporation statutes and why public reporting is crucial for these statutes to reach their goals.

a. Growing Demand for Socially and Environmentally Responsible Enterprises by Investors, Employees, Consumers, and Entrepreneurs.

The first factor leading to the adoption of benefit corporation legislation is the increased demand for socially and environmentally responsible businesses by different groups: investors, consumers, and employees.[35] Proponents systematically refer to the growing market for socially responsible investing.[36] Furthermore, they invoke the impact of the social

31. B Lab has sponsored some of the benefit corporation bills. *See* Be the Change Oregon Steering Committee, *Oregon Benefit Company Backgrounder*, B LAB, 7 (Feb. 22, 2013) (listing B Lab as initial sponsor for bill), https://olis.leg.state.or.us/liz/2013R1/Downloads/CommitteeMeetingDocument/10835 [https://perma.cc/7UEJ-UKYV]; *Benefit Corporations: Hearing on AB 361 Before the Assemb. Judiciary Comm.*, 2011–12 Leg. Sess. 5 (Cal. 2011) (disclosing B Lab sponsorship of California bill).

32. William Clark drafted the MBCL, Benefit Corporation, *The Model Legislation*, B LAB (Apr. 9, 2017), http://benefitcorp.net/attorneys/model-legislation [https://perma.cc/2NAB-CNWE]. He also acted as one of the initial draftsmen of the Oregon benefit company statute. His fellow draftsmen were Oregon corporate lawyers gathered in an Oregon Corporate Lawyers' Committee. *See* Be the Change Oregon Steering Committee, *supra* note 31, at 6.

33. These actors include the governor of Delaware at the time of the adoption of the statute and members of the different committees involved in the drafting and the preparation of the legislation.

34. Nonetheless, an underlying motive of some proponents of benefit corporation legislation is even more ambitious: Starting a movement to influence *all corporations* to act not only in the interests of shareholders, but also of other stakeholders. B Lab may well focus on social enterprises on most of its webpages, but on its page for donations, one can read: "With your contribution, you help us create a world in which one day all companies will compete not just to be the best in the world, but to be the best FOR the world." *Help build a global movement to redefine success in business*, B LAB https://donatenow.networkforgood.org/BtheChange [https://perma.cc/JPA2-F46L]. *See also* Leo E. Strine Jr., *Making it Easier for Directors to "Do the Right Thing"*, 4 HARV. BUS. L. REV, 235, 253 (2014).

35. Proponents also mention entrepreneurs, but they are discussed in the next paragraph because I consider them representative of the supply side of the market for social enterprises.

36. *See* Be the Change Oregon Steering Committee, *supra* note 31; *see also* D. J. Vogt, Legislative Director, *The Oregon Business Association (OBA) Supports House Bill 2296*, OR. BUS. ASS'N (Mar. 18, 2013) (testimony before the Or. H. Comm. on Bus. & Lab.); *and* Justin Delaney, Vice President and Associate Counsel, *Statement of Support for HB 2296-3*, STANDARD INS. CO. (Mar. 18, 2013) (testimony

and environmental responsibility of businesses on consumers' choices.[37] A very similar argument is made about employees. Employees, proponents argue, are more willing to work for socially and environmentally responsible companies.[38]

The increasing demand for socially and environmentally responsible enterprises does not necessarily call for legal intervention. If the supply side adapts to the growing demand, the market equilibrium will change and the quantity of social enterprises will rise. In this scenario, the supply side consists of entrepreneurs willing to create social impact in a profitable way. The proponents argue that a large number of entrepreneurs want to create such social enterprises.[39]

Creating a nonprofit is not the most suitable option for many of these entrepreneurs. First, the nondistribution constraint[40] implies the impossibility of raising equity capital and difficulties securing debt financing,[41] and might deter talented entrepreneurs from starting a social

before the Or. H. Comm. on Bus. & Lab.); Clark & Babson, *supra* note 9, at 822 (citing different reports to prove the potential of the socially responsible investing market); Deborah J. Walker, *Please Welcome the Minnesota Public Benefit Corporation*, 11 U. ST. THOMAS L.J. 151, 179–180 (2013) (member of the drafting committee of the Minnesota Act referring to socially responsible investing). *See also Hearing on AB 361*, *supra* note 31, at 4 (stating that the bill will enable benefit corporations to "attract capital from the growing community of investors seeking both financial return and social impact"); Press Release, State of Del., Governor Markell Signs Public Benefit Corporation Legislation (July 17, 2013) (stating that the public benefit corporations statute will help accelerating the socially responsible "investment opportunity"), http://news.delaware.gov/2013/07/17/governor-markell-signs-public-benefit-corporation-legislation/ [https://perma.cc/TW6M-92UN].

37. Clark & Babson, *supra* note 9, 819–20 and the studies they refer to; *see* Press Release, State of Del., *supra* note 36 (stating that public benefit corporations will help businesses "attract customers"). Although the proponents focus on consumers, this category could be expanded to all potential contracting parties since, for instance, suppliers may also be especially keen on doing business with benefit corporations. Some B Corporations are already awarded discounts by other B Corporations. *See Save Money and Access Services*, B LAB (listing a number of B Corporations offering discounts to other B Corporations), https://www.bcorporation.net/become-a-b-corp/why-become-a-b-corp/save-money-and-access-services [https://perma.cc/W3YA-WDFX].

38. *See* Press Release, State of Del., *supra* note 36 (stating that public benefit corporations will help businesses "attract talent"). *See also* Alicia E. Plerhoples, *Nonprofit Displacement and the Pursuit of Charity Through Public Benefit Corporations*, at 39 (Geo. Univ. Law Ctr., Scholarship @ Geo. Law, 2016), http://ssrn.com/abstract=2817881 (mentioning the potential psychic rewards for employees of public benefit corporations and comparing them to nonprofit employees).

39. *See* Clark & Babson, *supra* note 9, at 823–24.

40. *See infra* note 63–65 and accompanying text.

41. *See* Anurag Gupta, *L3C's and B Corps: New Corporate Forms Fertilizing the Field Between Traditional For-Profit and Nonprofit Corporations*, 8 N.Y.U. J.L. & BUS. 203, 214 (2011); Steven Munch, *Improving the Benefit Corporation: How Traditional Governance Mechanisms Can Enhance the Innovative New Business Form*, 7 NW. J.L. & SOCIAL POLICY 170, 174 (2012) (explaining a double consequence of this inability: the time and money invested in finding donors and the difficulties securing loans because of the "inconsistent access to capital for repayment"); Thomas Kelley, *Law and Choice of*

enterprise with the double purpose of public-benefit creation and profit generation. Further, it is a typical feature of social enterprises to have income-generating activities at the core of their business and to directly or indirectly harness these activities to achieve public benefit.[42] For nonprofits, however, tax regulations significantly limit the allowed commercial activities.[43] Other inconveniences facing nonprofits include limitations in terms of lobbying and political campaigning.[44] As a result, many social entrepreneurs are bound to use for-profit entities as vehicles for their businesses.

Accordingly, the growing demand by investors, consumers, and employees should result in a strong spike in creation of for-profit social enterprises. This is when the proponents' second claim — the legal obstacles hindering the supply of social enterprises — becomes relevant.

b. Legal Uncertainty for Corporations With a Broader Purpose.

Proponents argue that directors who consider other interests than those of the shareholders when running a business face a significant risk of liability for breaching their fiduciary duties.[45] The magnitude of this risk is contested

Entity on the Social Enterprise Frontier, 84 TUL. L. REV. 337, 354 (2009) (focusing on the difficulties in securing debt financing).

42. *E.g.*, Patagonia, a clothing-retailer California benefit corporation sells outdoor clothing as its core business. Some of its social and environmental actions are directly part of its core business (e.g., using environmentally preferred materials). Others are an indirect result of the revenue generated by the core business (e.g., donating one percent of sales to environmental organizations). *See* J. Haskell Murray, *Defending Patagonia: Mergers & Acquisitions With Benefit Corporations*, 2 HASTINGS BUS. L.J. 485, 488 (2013) (listing some social and environmental initiatives of the company).

43. Anurag Gupta, *L3C's and B Corps: New Corporate Forms Fertilizing the Field between Traditional For-Profit and Nonprofit Corporations,* 8 N.Y.U. J.L. & BUS. 203, 215 (2011); Steven Munch, *Improving the Benefit Corporation: How Traditional Governance Mechanisms Can Enhance the Innovative New Business Form,* 7 NW. J.L. & SOCIAL POLICY 170, 174 (2012).

44. Anurag Gupta, *supra* note 43, at 213.

45. *See* Bill Campbell, Equilibrium Capital Group Principal, Testimony before the Or. S. Bus. & Transp. Comm. (May 16, 2013) (explaining the narrow definition of fiduciary duties in Delaware and the fact that the influence of this on Oregon drove him to join the drafting process for the statute). *See also* Eric Friedenwald-Fishman, creative director of the Metropolitan group, Testimony before the Or. S. Bus. & Transp. Comm. (May 16, 2013) (mentioning the "potential confusion and perception of risk for directors" that would be solved by the bill). In California, the author and B Lab claimed that the bill would enable directors to have clarity about the fact that their fiduciary duties would include "*creating a material positive impact on society and the environment, even in liquidity scenarios*[.]" *Hearing on AB 361*, *supra* note 31, at 4. Walker, *supra* note 36, 157 (referencing the concern of director liability by a member of the Minnesota Act's drafting committee). *See also Benefit Corporations: Hearing on AB 361 Before the S. Banking & Fin. Inst. Comm.* (Cal. 2011) (statement of Sen. Juan Vargas, Chairman, S. Banking & Fin. Inst. Comm.) (arguments in support of the bill made by the American Sustainable Business Council and the Social Venture Network); Clark & Babson, *supra* note 9, at 825–38.

and this paper does not intend to take a stance in the debate about the corporate purpose.[46] While proponents and some authors argue that corporate law mandates that corporations "*maximize the (long-term) interests of the corporation's stockholders*,"[47] others claim that directors are allowed to balance both shareholders' and other stakeholders' interests and that there is no legal requirement to (only) maximize shareholder value.[48] In any case, this debate and the ensuing legal uncertainty[49] was one of the reasons why proponents of benefit-corporation legislation believed that a statutory intervention was necessary. Benefit-corporation statutes are thus adopted to create legal certainty by shielding benefit corporation directors from shareholder suits based on director consideration of the public-benefit purpose or stakeholders' interests.[50]

46. The following description is simplified and is not intended to capture all the nuances in this debate.

47. *See, e.g.*, Clark & Babson, *supra* note 9, at 825–26; Kristin A. Neubauer, *Benefit Corporations: Providing A New Shield for Corporations With Ideals Beyond Profit*, 11 J. BUS & TECH. L. 109, 112–13 (2016) (discussing Delaware law); Ian Kanig, *Sustainable Capitalism Through the Benefit Corporation: Enforcing the Procedural Duty of Consideration to Protect Non-Shareholder Interests*, 64 HASTINGS L.J. 863, 872–78 (2013); Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1176 (1981) (arguing that managers have to maximize returns for shareholders); Jonathan R. Macey, *A Close Read of an Excellent Commentary on* Dodge v. Ford, 3 VA. L. & BUS. REV. 177, 177–90 (2008) (arguing that the shareholder maximization norm exists, but is only a default rule and is rarely enforced).

48. Chu, *supra* note 9, at 163–81 (discussing corporate law history, articles of incorporations, state statutes and state case law to conclude that there is no such thing as a legal requirement to maximize shareholder wealth maximization); David Groshoff, *Contrepreneurship? Examining Social Enterprise Legislation's Feel-Good Governance Giveaways*, 16 U. PA. J. BUS. L. 233, 238–39 (2013); Justin Blount & Kwabena Offei-Danso, *The Benefit Corporation: A Questionable Solution to a Non-Existent Problem*, 44 ST. MARY'S L.J. 617, 660 (2013) (arguing that there is no legal obligation for managers to (only) maximize profits); Cummings, *supra* note 12, at 587–588 (stating that there is no statutory requirement to maximize shareholder value and that the exceptions in takeover and reorganization situations are effectively countered by constituency statutes and the business judgment rule). *See also* Kent Greenfield, *A Skeptic's View of Benefit Corporations*, 1 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 17, 18 (2014) (arguing that benefit corporation legislation is based on a misinterpretation of the law).

49. *See* Be the Change Oregon Steering Committee, *supra* note 31, at 4. The drafters of the Oregon benefit company statute acknowledge that lawyers disagree on this issue but that the uncertainty remains. They then mention that the statute they have drafted ends this uncertainty. References to this uncertainty are widespread in the literature. *See* Chu, *supra* note 9, at 183 ("ambiguities in the law"); El Khatib, *supra* note 9, 155 and 169 ("uncertainty"); Felicia R. Resor, *Benefit Corporation Legislation*¸12 WYO. L. REV. 91, 95 (2012) ("uncertainty"); Murray, *Master*, *supra* note 1, 17 ("confusion"); Walker, *supra* note 36, 159 (2013-2014) ("confusion"); Kyle Westaway & Dirk Sampselle, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards and Legislatures*, 62 EMORY L.J. 999, 1005 n.26 (2013) ("litigation risks").

50. Chu, *supra* note 9, 183 (although the author disagrees with the need for benefit corporation statutes, she acknowledges the benefit for mission-driven directors in terms of doing away with legal ambiguities creating a risk of liability). Most authors who believe that there is no requirement to maximize shareholder value — a requirement that effectively hinders mission-driven companies —

c. The Need to Differentiate from Greenwashing Companies.

To explain why legislators choose to create a separate legal entity with a duty to pursue the public benefit and to take non-shareholder interests into account, the two preceding factors do not suffice. Other options existed for legislators wishing to create more legal certainty for social entrepreneurs. For instance, a constituency statute allows, but does not oblige, directors to take other stakeholders' interests into account when making business decisions.[51] Constituency statutes are a simple way to eliminate the concern of shareholder primacy.[52] A variant on these statutes — allowing traditional corporations to select a socially and environmentally responsible governance structure — could have removed the legal obstacles for social entrepreneurs.[53]

The missing piece of the puzzle is the need for differentiation from greenwashing companies — greenwashing being defined as "disinformation disseminated by an organization so as to present an environmentally responsible public image."[54] Not only do the proponents argue that there is

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regard the adoption of benefit corporation statutes as unnecessary. In their opinion, the traditional for profits are suited to accommodate mission-driven companies and creating benefit corporations even undermines this possibility. *See* El Khatib, *supra* note 9, 175–181 (pointing to the growing data on the success of socially responsible enterprises, the constituency statutes, and the business judgment rule, as well as critically reviewing the case law); J. William Callison, *Benefit Corporations, Innovation and Statutory Design,* 26 REGENT U. L. REV. 143, 153 (2013) (calling the created dichotomy the "Bipolarity Problem"); Groshoff, *supra* note 48, at 234 ("This Article suggests that SEL [social enterprise legislation] is a "con" led by entrepreneurs called 'contrepreneurs.' . . . I argue that contrepreneurs have advanced a deceptive maze of needless SEL using ethically-questionable marketing"). *See also* Stefan J. Padfield, *Corporate Social Responsibility & Concession Theory,* 6 WM. & MARY BUS. L. REV. 33–34 (2015) (warning that pushing socially responsible entrepreneurs to a specific legal entity could marginalize CSR and even create "CSR "ghettos"). *But see* Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps,* 25 REGENT U. L. REV. 269, 276, 297 (2012) (calling the shareholder primacy norm "ill founded" and "faulty" but considering benefit corporation legislation desirable because this legislation promotes pluralism in corporate forms).

51. Clark & Babson, *supra* note 9, at 829–830 (describing constituency statutes). *See* El Khatib, *supra* note 9, 164–165 n.72, for references to all (33) states with constituency statutes.

52. Chu, *supra* note 9, 172 (claiming that the shareholder primacy doctrine is effectively invalidated in a majority of states which have constituency statutes). *But see* Clark & Babson, *supra* note 9, 831–833 (deeming the existing constituency statutes insufficient because of the legal uncertainty caused by a lack of case law and because they don't protect mission-driven investors and executives who are in a minority position).

53. *See* Dana Brakman Reiser, *Benefit Corporations — A Sustainable Form of Organization?,* 46 WAKE FOREST L. REV. 591, 595 (2011) (referring to the Oregon example, *see infra* note 61).

54. Oxford Online Dictionary, 2004, https://en.oxforddictionaries.com/definition/greenwash [https://perma.cc/UZ6K-A5MG]. Greenwashing is not only targeted at consumers, but also at investors and employees. *See, e.g.*, Jacob Vos, *Actions Speak Louder Than Words: Greenwashing in Corporate*

an increased demand and that there are obstacles hindering the supply but, they also often refer to the risk of greenwashing.[55] Since companies are aware of the value of corporate social responsibility, all claim to act this way, causing a decline in trust by the public.[56] As mentioned above, investors, consumers, and employees are eager to invest in, consume products or services of, or work for socially and environmentally responsible companies.[57] They are even willing to accept a lower return on investment,[58] a higher price on goods or services,[59] or a lower wage,[60] if they can trust the claims made by enterprises. The main reason for the need of a separate legal entity with a *duty* to pursue public benefit and consider non-shareholder interests is the creation of a label of reliability for the companies' claims regarding social and environmental responsibility.[61] In other words, the

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America, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 673, 674–87 (2009) (about the rise of greenwashing, its targets, and its impact) and Eric L. Lane, *Greenwashing 2.0*, 38 COLUM. J. ENVTL. L. 280, 283 (2013) (arguing that greenwashing should not only be analyzed through business to consumer cases, but also through business to business cases). For the purpose of this article, greenwashing must be construed more broadly as not only creating an environmentally responsible public image, but also a socially responsible public image.

55. *See infra* note 51–62 and accompanying text.

56. Clark & Babson, *supra* note 9, at 820 (discussing the fact that the more popular terms in the social enterprise sphere are used, the less they mean).

57. *See supra* note 35–38 and accompanying text.

58. Craig R. Everett, *Measuring the Social Responsibility Discount for the Cost of Equity Capital: Evidence from Benefit Corporations*, 3 J. BEHAV. FIN. & ECON 55, 69 (2013) (finding that the ninety-four founders who were surveyed were willing to accept thirty-five percent less return on equity compared to an investment in a regular corporation). Note that this lower financial return on investment would normally be coupled with a higher social return on investment. *See generally* Adam Richards, *Social Return on Investment and Social Enterprise: Transparent Accountability for Sustainable Development*, 3 SOCIAL ENTERPRISE JOURNAL 31, 33–34 (2007).

59. *See* Stephanie M. Tully & Russel S. Winer, *The Role of the Beneficiary in Willingness to Pay for Socially Responsible Products: A Meta-Analysis*, 90 JOURNAL OF RETAILING 255, 262 (2014) (finding a mean premium for socially responsible products of 16.8% and that sixty percent of respondents were willing to pay at least part of this premium); Plerhoples, *supra* note 38, at 40 (referring to TOMS Shoes' "buy-one-give-one business model" and the willingness of consumers to pay more because they know a second pair will be donated). *See generally* Christopher Marquis and Andrew Park, *Inside the Buy-One-Give-One Model*, STAN. SOC. INNOVATION REV., Winter 2014, at 28, 31–33 (about the positive results of this model).

60. *See* Murray, *Master*, *supra* note 1, at 52 (suggesting that social enterprises may be able to pay their employees less because of "nontangible benefits" and "loan forgiveness programs" which have recently been created by business schools such as the Yale School of Management and the NYU Stern School of Business, and stating that even without loan repayment, employees may accept a lower wage because of the socially and environmentally responsible nature of the enterprise).

61. *See* Plerhoples, *supra* note 38, at 40 (referring to authors arguing that the branding benefit is the main benefit of social enterprise statutes). *See* also Joseph W. Yockey, *Using Form to Counter Corruption: The Promise of the Public Benefit Corporation*, 49 U.C. DAVIS L. REV. 623, 639–40 (2015) (expressing his doubts concerning the legal obstacles for social enterprises and naming the branding advantages targeting investors, employees and consumers as a "better justification for the PBC"). *See*

separate legal entity helps to persuade investors, consumers, and employees that the company's socially and environmentally responsible approach is genuine, and does not constitute greenwashing.[62]

d. The Benefit Corporation's *Raison d'Être*: Accountability for its Social Purpose.

Professor Henry B. Hansmann famously gave a demand-focused *raison d'être* for nonprofits. He argued that "contract failure" in the market for goods and services that are hard to evaluate by consumers, in terms of value and quality, needed to be solved by imposing a "non-distribution

also Rujeko Muza, *Benefit Corporations: The Need for Social For-Profit Entity Legislation in North-Dakota,* 90 N. DAKOTA L. REV. 581, 595 (2014) ("While constituency statutes afford greater protection for directors, they do little for companies, employees, consumers, and shareholders who want to require, rather than just permit, directors to consider non-financial interests.") *But see* Clark & Babson, *supra* note 9, at 838 (naming the shareholder primacy norm as one of the two reasons, besides avoiding greenwashing). I argue that shareholder primacy is not a sufficient reason to explain the need for benefit corporation statutes (*supra* note 51–54 and accompanying text). This may even be more clear in states creating benefit LLC's such as Maryland and Oregon. In certain states, LLCs are so flexible that authors deem them appropriate to be used by social entrepreneurs, *see, e.g.*, Murray, *Master, supra* note 1, 19; Emily Cohen, *Benefit Expenses: How the Benefit Corporation's Social Purpose Changes the Ordinary and Necessary,* 4 WM. & MARY BUS. L. REV. 269, 273 (2013) (referring to the Uniform Limited Liability Act which allows LLCs to have other purposes than for profit purposes). In Oregon, the adoption of the benefit company statute is even more proof of a desire to create a differentiating brand, since Section 60.047 of Title 7 of the Oregon Revised Statutes already permitted companies to include in their articles of association a "provision authorizing or directing the corporation to conduct the business of the corporation in a manner that is environmentally and socially responsible." This provision was adopted in 2007.

62. Be the Change Oregon Steering Committee, *supra* note 31, at 2: The drafters of the Oregon benefit company bill mention "*differentiat[ing] the company in a confusing marketplace in which everyone is claiming to be a responsible or green business*" as a benefit of being a benefit company. In California, B Lab and the author of the bill mentioned this differentiation as a benefit of incorporating as a benefit corporation, *see* Hearing on AB 361, *supra* note 31, at 4. The United States Green Building Council California Advocacy Committee also refers to the general public benefit provisions as a way to differentiate benefit companies from companies doing socially and environmentally responsible actions as a form of marketing; *see S. Banking & Fin. Inst. Comm. Hearing, supra* note 45. *See also* William H. Clark Jr. & Larry Vranka, *Benefit Corporation White Paper*, at 22 (Jan. 18, 2013) (referring to the mandated pursuit of a general public benefit as a protection against greenwashing) http://benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf [https://perma.cc/WXG6-LHT2]. *See* Walker, *supra* note 36, at 57, where a member of the Minnesota Act's drafting committee made an argument about avoiding greenwashing. *See* also Westaway & Sampselle, *supra* note 49, at 1085 (listing "*decreased greenwashing*" as one of the advantages of benefit corporations because of the heightened accountability); Chu, *supra* note 9, at 183–85 (acknowledging the signaling power of benefit corporations to differentiate themselves from greenwashing companies).

constraint."[63] Given that nonprofits may not distribute profits to the people controlling them,[64] consumers are more willing to purchase these goods and services, since raised prices or lowered quality would not (directly) benefit these people.[65]

A similar reasoning can be applied to benefit corporations. Rather than to solve market failure, benefit corporations have been created to exploit a market opportunity. This opportunity lies in the increased demand by consumers, investors, and employees for social entrepreneurship. To be useful to exploiting this market opportunity, benefit corporation statutes impose their own double constraint: An obligation to (i) take non-shareholder interests into consideration and (ii) pursue the general and/or specific[66] public benefit while being profitable. The true *raison d'être* of benefit corporations is thus supplying a corporate form accountable for its socially and environmentally responsible mission in response to the increased demand by consumers, investors, and employees.[67]

In order to do this, the benefit corporation statutes have created a public brand.[68] This brand could be defined, by using the oft-used mantra about

63. Henry B. Hansmann, *The Role of Nonprofit Enterprise,* 89 YALE L.J. 835, 838 (1980). *Cf.* I.R.C. § 501(c)(3) (2012) ("no part of the net earnings of which inures to the benefit of any private shareholder or individual").

64. Hansmann, *supra* note 63, at 838 (mentioning "members, officers, directors or trustees").

65. *Id.* at 843–45.

66. Most states follow the MBCL and mandate the pursuit of a "general public benefit," while allowing the companies to set a specific benefit that they want to pursue. *See* J. Haskell Murray, *Corporate Forms of Social Enterprise: Comparing the State Statutes, available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988556 [https://perma.cc/4BN9-ZQWM], for an overview of the states following the MBCL. A minority of states follow the Delaware statute model, which mandates the pursuit of a specific public benefit, but does not require the pursuit of a general public benefit as such, *see id.* Some authors criticize this approach, *see, e.g.*, El Khatib, *supra* note 9, at 188, or express their concerns about such an approach, *see* Clark & Vranka, *supra* note 62, at 22 (referring to the mandated pursuit of a general public benefit as a protection against greenwashing). I, however, agree with Strine and Montgomery, who focus on the duty to operate in a "responsible and sustainable manner" and the duty to take stakeholder interests into account. *See* Strine, *supra* note 34, at 244. *See also* John Montgomery, *Mastering the Benefit Corporation*, BUS. L. TODAY, July 2016, at 1, 3–4. For the purpose of this paper, it is important to note that both models create a brand and that the Delaware model does not weaken the brand to an extent that would warrant significantly more lenient accountability.

67. *Compare* Westaway & Sampselle, *supra* note 49, at 1043 (mentioning the "*enhanced accountability to purpose and stakeholders"* as the *raison d'être* of benefit corporations) *with* Frederick Alexander, *Delaware Public Benefit Corporations: Widening the Fiduciary Aperture to Broaden the Corporate Mission,* 28 J. APPLIED CORP. FIN. 66 (2016) (stating, in the context of normal corporations, that "while corporations could certainly be good employers and valuable resources to the community, that was not their *raison d'etre* — corporate law was about creating value for the stockholders, who owned the corporation, and who elected its managers to oversee their investment").

68. The distinction between "public branding" and "private branding" is made in Murray, *Master, supra* note 1, at 45 (advocating for a strong private brand coupled with a more flexible corporate law).

benefit corporations: *Businesses that meet higher standards of corporate purpose, accountability, and transparency*.[69] The influence of this public brand should not be underestimated. Empirical evidence suggests that consumers react favorably to brands of companies who support social causes for (what are perceived to be) "appropriate reasons."[70] The state's authorization[71] to carry the benefit-corporation name may well contribute to the perception of legitimacy of a company's social actions.[72] In sum, states grant benefit corporations a concession of a brand. Indeed, this concession may well warrant a limited[73] and partial[74] revival of a modernized concession

Other commentators acknowledge the branding purpose of the benefit corporation law; *see, e.g.*, Cummings, *supra* note 12, at 594, and Walker, *supra* note 36, at 157.

69. This phrase is stated by the proponents of the statutes, *e.g.*, Governor Jack Markell, *A New Kind of Corporation to Harness the Private Enterprise for Public Benefit*, HUFFINGTON POST (July 22, 2013, 2:06 PM) http://www.huffingtonpost.com/gov-jack-markell/public-benefit-corporation_b_3635752.ht-ml [https://perma.cc/Z4P3-XQ5B] ("Delaware public benefit corporations . . . will have three unique features that make them potential game changers. These three features concern corporate purpose, accountability, and transparency"); Jay Coen Gilbert, *Can I Get A Witness?! The Evolution of Capitalism*, HUFFINGTON POST (Sept. 27, 2011, 7:08 PM) http://www.huffingtonpost.com/jay-coen-gilbert/benefit-corporation-legislation-_b_976650.html [https://perma.cc/4F62-6E34]. Also echoed in the literature: e.g., Michelle J. Stecker, *Awash in a Sea of Confusion: Benefit Corporations, Social Enterprise, and the Fear of "Greenwashing*," J. ECON. ISSUES 373, 376 (2016); Murray, *Early Report*, *supra* note 13, at 29.

70. *See* Michael J. Barone et al., *The Influence of Cause-Related Marketing on Consumer Choice: Does One Good Turn Deserve Another?* 28 J. ACAD. MARKETING SCI. 248, 249 (2000).

71. Only a minority of states requires benefit corporations to include the designation of the corporate entity type in the firm name. Murray, *Market, The Social Enterprise Law Market, 75* MD. L. REV. 541, 559 (2016) (listing the states where this is the case but, including Delaware where this requirement has been repealed by 250 Del Laws Ch. 40 (S.B. 75)). Although I agree with Murray that a requirement to include the name may help create a stronger brand, *id.* at 560, I do not think that the absence of such a requirement hurts the brand in such a way that would not require any accountability. Of the 321 public benefit corporations incorporated in Delaware between August 1, 2015, and August 8, 2016 (the entry into force of the amendment and the last day incorporations where accounted for in the file sent to me by the Delaware Secretary of State's Office), 241 of 321 public benefit corporations used either P.B.C., PBC or Public Benefit Corporation in their firm name. In Oregon, there are no requirements mentioned in the statute concerning the designation as a benefit company. However, a nonnegligible amount of benefit companies with websites referred to their status as benefit company *and* all benefit companies are searchable online. States requiring benefit corporations to identify their benefit corporation status include Minnesota (2012); Colorado, COLO. REV. STAT. § 7-101-503(4) (2016); and Louisiana, LA. REV. STAT. ANN. § 12:1804.D (2016).

72. Alnoor Ebrahim et al., *The governance of social enterprises: Mission drift and accountability challenges in hybrid organizations*, 34 RES. IN ORGANIZATIONAL BEHAV. 81, 86 (2014) (stating — in regards to L3C's, Community Interest Companies and Benefit Corporations — that the legal recognition gives more legitimacy to the dual purpose of social enterprises).

73. Not implying that corporations are not the product of a contract and only require filing of articles of incorporation. It is not necessarily based on the grant of "permission" to incorporate but rather on the grant of a "state-conferred benefit." *See infra* note 75.

74. Only applicable to benefit corporations and potentially to other social enterprise statutes.

theory[75] of the corporation.[76] While the criticized old variant focused on concession through state regulation,[77] the focus for benefit corporations should be on accountability.[78]

Accountability is thus crucial for benefit corporations and the lack thereof could have severe negative consequences. In the short term, allowing the incorporation of benefit corporations without an enforceable accountability system would, in effect, create the risk[79] of a state-sanctioned form of greenwashing.[80] On a more long-term basis, if this core rule is not enforced, benefit corporations do not respond to the demand in the market.

75. The concession theory entails that corporations are created through concession by the state, rather than by private contracting, *see* Larry E. Ribstein, *Limited Liabilities and Theories of the Corporation,* 50 MD. L. REV. 80, 85 (1991); Stefan J. Padfield, *The Silent Role of Corporate Theory in the Supreme Court's Campaign Finance Cases,* 15 U. PA. J. CONST. L. 832, 842 (2013); David Ciepley, *Neither Persons nor Associations: Against Constitutional Rights for Corporations,* 1 J.L. & CTs. 221, 224 (2013).

76. *See* Murray, *Early Report*, *supra* note 13, at 39, 42 (tying the concession theory to benefit corporations because of the positive effect of the brand name.). *Cf.* Padfield, *Silent Role*, *supra* note 75, at 842 (mentioning the "state-conferred benefit argument" as a way to tie the concession theory to the modern era with simple formations through filings). *But see* David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social Responsibility after Citizens United,* 89 N.C. L. REV. 1197, 1219–20 (criticizing this "state-conferred benefits" claim in the context of corporate political speech based on modern theories of corporate law and the First Amendment). *See* Stefan J. Padfield, *The Dodd-Frank Corporation: More Than a Nexus-of-Contracts*, 114 W. VA. L. REV. 209, 218–20 (2011), for a rejection of Yosifon's arguments. *See also* Padfield, *Corporate Social Responsibility*, *supra* note 50, 1–34 (arguing that proponents of mandatory CSR should support the concession theory of corporate personality).

77. For common criticism about the old variant (and arguments aiming to refute this criticism), *see* Stefan J. Padfield, *Rehabilitating Concession Theory,* 66 OKLA. L. REV. 327, 342–59 (2014). *See id.* at 333, about the focus on regulation.

78. J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV 345, 357 (stressing the importance of consistency, monitoring and enforcement to maintain a useful brand).

79. The proponents of benefit corporation are conscious of this risk and consider the "higher standards of corporate purpose, accountability[,] transparency," the potential liability, and the reporting requirements as sufficient to curb this risk. *See* Clark & Vranka, *supra* note 62, at 23–24, *and* Be the Change Oregon Steering Committee, *supra* note 31, at 4 (acknowledging the risk of greenwashing and mentioning the reporting against a third-party standard, imposing a general public benefit purpose and the enforcing mechanism as ways to mitigate this risk). Some commentators have expressed their concerns about the accountability system and have argued that it may lead to "legalized greenwashing." *See* El Khatib, *supra* note 9, at 181. *See also* Murray, *Master*, *supra* note 1, at 33 (warning that an inappropriate accountability system may cause "an unprecedented amount of rent seeking").

80. In explaining this risk, I do not assume that firms choosing to incorporate as or to convert to benefit corporations are per se planning on "greenwashing." I merely aim to point out the risk that is created by the current legal regime. Besides, the risk of greenwashing should concern all involved parties. The states will only have created a viable corporate entity if its signaling force is reliable, which is impossible when there is a high risk of greenwashing. Existing benefit corporations will also want this risk to be limited, because a reliable signaling force is precisely one of the reasons why they decided to become a benefit corporation.

This would make the corporate form unnecessary. Investors, customers, and employees would first trust the created label of social entrepreneurship.[81] After a while, however, this initial trust would fade and the lack of an efficient system of accountability would endanger the sustainability of the benefit corporation as a legal entity.[82]

2. *Accountability requires public reporting*

All state legislators use a "transparency-based accountability" model.[83] Although this choice has been criticized in the literature,[84] it is the current state of the law in all states with benefit corporation legislation and an analysis of alternatives would fall outside the scope of this paper.[85]

The accountability system comprises two compulsory pillars: Director (and officer) liability and periodic benefit reports.[86] However, a description of these rules urges a distinction between two different models: The MBCL and the Delaware model.[87] Some of these differences contribute to the view that the Delaware public benefit corporation system is more flexible than the

81. Currently, the label is used in a figurative sense, although one author has argued for the creation of a benefit corporation label (comparable to the label for certified B Corporations) in California. *See* Sarah Thornsberry, *More Burden Than Benefit? Analysis of the Benefit Corporation Movement in California*, 7 J. BUS. ENTREPRENEURSHIP & L. 159, 186–87 (2013).

82. *See* Reiser, *Benefit Corporations*, *supra* note 53, at 622 (stressing the importance of reliability of the claims of social value and arguing that the enforcement of the dual mission is critical for this reliability); Dana Brakman Reiser, *Theorizing Forms for Social Enterprise*, 62 EMORY L.J. 681, 735–36 (2013) (focusing on the importance of enforcement of the different standard of social enterprises).

83. *See supra* note 12 and accompanying text.

84. *See* Cummings, *supra* note 12, at 578–627 (offering an alternative model of accountability based on adaptive learning, internal accountability and accountability to professional peers and to those who the corporation claims to benefit); Thomas J. White, *Benefit Corporations: Increased Oversight through Creation of the Benefit Corporation Commission*, 41 J. LEGIS. 329, 346–52 (2015) (advocating for the creation of a Benefit Corporation Commission which would act as a more reliable guardian of stakeholder interests).

85. For some alternatives, other than those in the previous footnote, see, e.g., Michael A. Hacker, *People Planet and Perversion: The Need for Attorney General Enforcement in Benefit Corporation Legislation*, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2818855&download=yes [https://perma.cc/8YC7-A893].

86. "Officers" is mentioned between brackets because three states — Colorado, Maryland, and Tennessee — did not explicitly create a regime for officer liability in benefit corporations. The MBCL also provides for the optional appointment of a "benefit director" and or a benefit officer. A benefit director is an independent member of the board who is in charge of preparing an annual compliance statement. MODEL BENEFIT CORP. LEGIS. § 302(c) (2016). A benefit officer prepares the benefit report and has all the powers relating to the creation of general or specific public benefit. MODEL BENEFIT CORP. LEGIS §304(b)(2016). This optional extra layer will not be discussed further and was not included in the Colorado, Minnesota, or Delaware statutes.

87. *See* Appendix I for an overview of all statutes' public reporting provisions.

MBCL.[88]

In the following paragraphs, the two compulsory pillars will be discussed for both models.

a. Director and Officer Liability Requires Private Reporting.

While the different statutes limit director and officer liability in a number of different ways, I will mainly focus on two important factors: The potential plaintiffs and the standard of review.[89]

The MBCL provides for a "benefit enforcement proceeding" as the only way to claim damages for the failure of a benefit corporation to pursue general or specific public benefit, or for other violation of obligations, duties, and standards of conduct created by benefit corporation legislation.[90] Under the MBCL, this suit can be brought by a limited number of plaintiffs:

> (1) directly by the benefit corporation; or
>
> (2) derivatively . . . by:
>
> (i) a person or group of persons that owned beneficially or of record at least [two percent] of the total number of shares of a class or series outstanding at the time of the act or omission complained of;
>
> (ii) a director;
>
> (iii) a person or group of persons that owned beneficially or of record [five percent] or more of the outstanding equity interests in an entity of which the benefit corporation is a subsidiary at the time of the act or omission complained of; or
>
> (iv) other persons as specified in the articles of

88. *See* Plerhoples, *Who's opting in?*, *supra* note 22, at 254 (explaining how this fits in Delaware's corporate law tradition); Murray, *Delaware*, *supra* note 78, at 351 (also referring to Delaware's corporate law tradition).

89. Other limitations include the limitations in terms of monetary damages; *see infra* note 113 and accompanying text.

90. MODEL BENEFIT CORP. LEGIS § 305(a). Identical provisions adopted, e.g., in ARIZ. REV. STAT. § 10-2433.A; ARK. CODE ANN. § 4-36-305(a); and CAL. CORP. CODE §§ 14601(b), 14623(a). *But see* OR. REV. STAT. ANN. § 60.766 (calling this a proceeding against a benefit company, without using the term "benefit enforcement proceeding").

incorporation or bylaws of the benefit corporation.[91]

Some states have the same restrictions but do not provide a threshold of percentage of shares for shareholders. The Oregon statute does not grant standing to equity holders of subsidiaries.[92] Colorado and Minnesota are among the minority of states that do not provide a separate benefit enforcement proceeding (from the proceeding used to claim damages for director liability)[93] and they limit the number of plaintiffs for derivative suits even more. In these states, suits cannot be initiated by directors, affiliated companies, or persons mentioned in the bylaws or articles — only stockholders satisfying a certain threshold may bring suit.[94] Finally, it is important to note that most states' statutes explicitly mention that directors (and officers) do not owe any duty to the beneficiaries of their public benefit purpose.[95]

The MBCL,[96] the Oregon statute,[97] the Colorado statute,[98] the Minnesota statute,[99] and the Delaware statute[100] all apply (some kind of) business judgment rule to directorial (and managerial) decisions in benefit corporations. Since the "interests of the corporation" are broadened under benefit corporation law,[101] this gives directors (and officers) more discretion — applying the business judgment rule using a broader "corporate interest" gives directors more discretion since they could refer to stakeholder interests to justify a decision which harms shareholders. As such, the main focus of

91. MODEL BENEFIT CORP. LEGIS 305(c) (2016). *See also* Section (d) of the MBCL for a definition of beneficial ownership.

92. *E.g.*, CAL. CORP. CODE § 14623(b); ARK. CODE ANN. § 4-36-305(c). *But see* OR. REV. STAT. ANN. § 60.766, which does not state such a threshold either for regular shareholders and does not provide standing to shareholders of subsidiaries.

93. *See* Appendix I.

94. DEL. CODE ANN. tit. 8, §367. Colorado has a nearly identical provision. *See* COLO. REV. STAT. § 7-101-508. Minnesota does not provide a threshold for shareholders but it does provide the same provision in all other respects. MINN. STAT. ANN. §304A.202.1.

95. *See, e.g.*, OR. REV. STAT. ANN. § 60.760(5)(c) (governors); OR. REV. STAT. ANN. § 60.764(3)(c) (officers and managers); COLO. REV. STAT. § 7-101-506(2)(a) (directors); DEL. CODE ANN. tit. 8, §365(b) (directors).

96. MODEL BENEFIT CORP. LEGIS § 301(e) (2016), and explanatory comment by the author (referring to the business judgment rule explicitly). Same provision: ARIZ. REV. STAT. § 10-2432(F).

97. OR. REV. STAT. ANN. § 60.760(4). Section 60.760(4) refers to Sections 60.357 and 63.155, which state the Oregon variant of the business judgment rule for corporations and LLCs.

98. COLO. REV. STAT. § 7-101-506(b).

99. MINN. STAT. ANN. §304A.201 subdiv. 4.

100. DEL. CODE ANN. tit. 8, § 365(b).

101. *See supra* notes 61–62 and accompanying text.

litigation will likely be procedural, rather than substantive.[102]

Unless shareholders expressly agree to give standing to other stakeholders, only shareholders (and in some states, directors) are able to initiate a liability claim.[103] This in effect gives shareholders the key to safeguard the social and environmental mission of the company.[104] To be able to fulfil this role, shareholders need information. It is thus logical to require the benefit corporation to present the shareholders with some information about their achievements in terms of public benefit.[105] To achieve that goal, every statute requires benefit corporations to prepare a periodic benefit report[106] and to send it to the shareholders.[107] The content of this report differs in the MBCL and the Delaware model[108] but both report models asses a company's achievements in pursuit of their public benefit.

b. Efficient accountability requires public reporting.

Even if shareholders are fully informed, however, director (and officer) liability is an imperfect instrument to hold benefit corporations accountable for their double mission.[109]

102. *See* Kanig, *supra* note 47, at 899 (emphasizing the strict procedural liability for the failure to — at least procedurally — consider non-shareholder interests in board decisions).

103. The assumption is that the stakeholders (the community, employees) will, in principle, not be shareholders and at least not meet statutory thresholds. Note the interesting proposal by Alicia Plerhoples, *supra* note 38 (advocating for a requirement to have stakeholders as shareholders in public corporations pursuing a charitable public benefit and thus enable certain stakeholders to sue).

104. Callison warns that shareholders could also misuse this key and use it as a tool for greenmail. Callison, *supra* note 50, at 154.

105. Reiser, *Social Enterprise*, *supra* note 82, at 707 ("Information is a precondition for effective investor enforcement.") Note that only Vermont benefit corporations provide for a shareholder vote about the benefit report. *See* VT. STAT. ANN tit. 11A, § 21.14(c). Only if endorsed by a majority of the shareholders, will the benefit corporation be able to place the report on the website.

106. The report is annual in the MBCL. MODEL BENEFIT CORP. LEGIS. §§ 401, 402. The report is also annual in Oregon (OR. REV. STAT. ANN. § 60.768(1)), Colorado (COLO. REV. STAT. § 7-101-507(1)), Minnesota (MINN. STAT. ANN. §304A.301., subdiv. 1); as well as in all the other states, *see* Appendix I, except in Delaware, where the report is biennial unless the articles or the bylaws require a more frequent delivery, *see* DEL. CODE ANN. tit. 8, §366(b).

107. This is the case in all statutes listed in Appendix I except the Minnesota statute. Minnesota Public Benefit Corporations are technically not obliged to send the report to shareholders. However, they do have an obligation to file the report with the secretary of state's office, who publishes the report online. *See* MINN. STAT. ANN. §304A.301.1; *see also infra* note 233.

108. Amongst other reasons, because Delaware does not require the use of an independent third-party standard, *see infra* note 304 and accompanying text. While Colorado's statute is very similar to Delaware's in many respects, it does mandate the use of a third-party standard in the benefit report, *see* COLO. REV. STAT. § 7-101-507(1)(b).

109. *See also* Murray, *Delaware, supra* note 78, 362 n.98 (suggesting that the statute makes the proceeding "impotent on purpose" because of the fear of frivolous lawsuits).

The first reason is the limited number of potential plaintiffs. Unless shareholders expressly agree to give standing to other stakeholders, they are able to keep a de facto monopoly on the standing to initiate a liability suit.[110] Unlike in traditional corporations, however, shareholders are not expected to safeguard only their own investments; benefit-corporation shareholders might be expected to safeguard a social and environmental mission benefitting other beneficiaries. It seems fair to say that in cases of conflict with their own monetary interests, shareholders may not play a perfect safeguarding role.[111]

This issue is exacerbated by the traditional collective action problems of derivative suits.[112] While lead-plaintiff shareholders have to bear substantial costs, they also must share the benefits with the other shareholders — in benefit corporations, also with stakeholders. Certain states' monetary-damages limitations in suits against benefit-corporation directors and officers only increase this problem.[113]

Moreover, the increased discretion given to directors (and officers)[114] makes it even harder for shareholders to enforce the public mandate.[115]

110. *See supra* notes 90-95 and accompanying text. The shareholders' power is shared with the directors in some of the states but, in closed benefit corporations, the interests of directors and majority shareholders will be aligned.

111. *See* White, *supra* note 84, at 346 (arguing that the mere right for shareholders to voluntarily initiate a benefit enforcement proceeding does not sufficiently safeguard other stakeholders' interests); *id.* at 347 (explicitly casting doubts about whether shareholders will protect stakeholders' interest when they conflict with theirs); Westaway & Sampselle, *supra* note 49, 1040–43 (pointing out the problem of shareholder under-motivation due to the lack of monetary incentives and the problem of stating a harm when there is no economic injury to the corporation — also mentioning the exception of shareholder over-motivation if shareholders are also stakeholders); Reiser, *Benefit Corporations*, *supra* note 53, at 613 (pointing to the obvious conflict of interest); Murray, *Early Report*, *supra* note 13, at 45 (expressing his doubts about the adequateness of shareholders to defend other stakeholders' interests, after mentioning the problem of conflicts of interests). *See also* Groshoff, *supra* note 48, at 262 (writing with a very critical view on shareholders' willingness to start a benefit enforcement proceeding in case of harm to other stakeholders' interests). A potential example of the inadequateness of letting shareholders guard the interest of stockholders is the fact that only seven percent of California benefit corporations complied with the requirements of publicly disclosing their benefit report, according to Murray's study, although California explicitly allows the benefit enforcement proceeding to be used against the failure of a benefit corporation to post the annual benefit report. *See* CAL. CORP. CODE § 14601(b)(3).

112. Dana Brakman Reiser, *Social Enterprise*, *supra* note 82, at 716 (pointing out that this is even more the case than fore traditional corporations because of the limitations in terms of monetary damages). *See infra* note 113 and accompanying text.

113. *See, e.g.*, Oregon (OR. REV. STAT. ANN. § 60.760(5) (governors), Oregon (OR. REV. STAT. ANN. § 60.764(3) (officers)); MINN. STAT. ANN. § 304A.202 subdiv. 1(b).

114. *See supra* note 86.

115. *See* Reiser, *Benefit Corporations*, *supra* note 53, at 613. It will also arguably make it harder to enforce the fiduciary duties towards shareholders. This concern has been expressed by numerous interest groups in different states. *See, e.g.*, *S. Banking & Fin. Inst. Comm. Hearing*, *supra* note 45, at 7 (comments by the Corps. Comm. of the Bus. L. Section of the Cal. State Bar).

Therefore, transparency is also necessary to preclude directors (and officers) from furthering their own interests and taking advantage of the enhanced discretion they have by using stakeholder interests as a false excuse.[116]

Given the imperfection of the director (and officer) liability instrument, it is not surprising that the MBCL and most states' statutes mandate public availability of the periodic reports.[117] All states with such an obligation, except for Oregon,[118] require benefit corporations with websites to post the reports on their websites.[119] If they have no website, the benefit corporation must send it to any person requesting it, free of charge.[120] In Delaware and two other states that recently adopted similar statutes, public reporting is not mandated by the statute but may be mandated by the company's certificate of incorporation or by its bylaws.[121] In Minnesota, public reporting is achieved by filing the report with the secretary of state's office, which publishes the reports online.[122]

This system of public reporting is aimed at informing other stakeholders about the benefit corporation's public-benefit achievements.[123] Informed stakeholders are more able to intervene and signal when a company is not actually doing what it purports to do.[124] Critics of the transparency-based accountability system have expressed their concerns about the ability of outside stakeholders to monitor benefit corporations' public mandate.[125] While this monitoring may not be perfect, there are sufficient reasons to believe that it would at least add value to the imperfect director (and officer)

116. *See generally*, about this risk, Cummings, *supra* note 12, at 589–90 (arguing that accountability is crucial to avoid this); Reiser, *Benefit Corporations*, *supra* note 53, at 600.

117. *See* Appendix I.

118. Oregon gives companies the choice between publication on the website or on request. It is unclear whether this was intended. There is no reference to this in the preparatory works. *See* OR. REV. STAT. ANN. § 60.768(4).

119. *See* Appendix I.

120. MODEL BENEFIT CORP. LEGIS § 402(c). Note that New Jersey and New York do not provide a request procedure. The statute only mentions that the benefit corporation should post the report on the website if it has one. *See* N.J. STAT. ANN. § 14A:18-11(c); N.Y. BUS. CORP. LAW § 1708.

121. The two other states are Kentucky and Texas. *See* DEL. CODE ANN. tit. 8, §366(c)(2); app. I.

122. *See* MINN. STAT. ANN. §304A.301 subdiv. 1. *See infra* note 233 and accompanying text.

123. Strine, *supra* note 34, at 244 (stating that the Delaware statement is targeted at informing "investors and other constituencies").

124. Plerhoples called this kind of accountability "indirect," in the sense that they cannot directly sue directors. *See* Alicia Plerhoples, *Social Enterprise*, *supra* note 25, at 134.

125. *See infra* note 80.

liability system.[126] Informed consumers can then "vote with their feet"[127] or use social media and other internet-based applications to express their concerns about certain companies' public-benefit practices.[128] Employees, who may have sacrificed monetary benefits to work at a social enterprise,[129] will be inclined to enforce the public purpose by sharing their concerns.[130] Other contracting parties such as suppliers could use benefit reports to inform their decisions to enter into a contract or to grant discounts.[131] Competitors could sue benefit corporations who issue misleading or erroneous reports.[132] Finally, potential new investors could use the reports to assess the genuineness of a company's public purpose.[133]

B. TRANSPARENCY AS A SEPARATE GOAL

The aforementioned "mantra" defining benefit corporations contains transparency as the third prong of the added brand value of the benefit

126. *See* Brett McDonnell, *Committing To Doing Good and Doing Well: Fiduciary Duty in Benefit Corporations*, 20 FORDHAM J. CORP. & FIN. L. 19, 64 (2014) (explaining that fiduciary duty constraints are insufficient and complemented by reputational constraints, and attributing an important role to benefit reports to create this latter constraints).

127. By not purchasing goods and services from companies with poor reports. *See* Plerhoples, *Social Enterprise*, *supra* note 25, at 134 (albeit critical because of the lack of standardization). *Cf. Legislative Talking Points*, B LAB (stating that the benefit report could help consumers make more informed decisions), http://benefitcorp.net/policymakers/legislative-talking-points [https://perma.cc/5HRR-CPBF].

128. *See* Stecker, *supra* note 69, at 378. *See, e.g.*, *Corporate Petitions*, CARE 2 PETITIONS, (a petition site with a separate page for corporate accountability), http://www.thepetitionsite.com/corporate-accountability/#hottest [https://perma.cc/C66W-M8PT]. I acknowledge that the existing literature on consumer rationality could create doubts as to whether consumers would really intervene. *See generally* Jacob Jacoby, *Is It Rational to Assume Consumer Rationality? Some Consumer Psychological Perspectives on Rational Choice Theory,* 6 ROGER WILLIAMS U. L. REV. 81–161 (2000); M. Neil Browne et al., *Protecting Consumers From Themselves: Consumer Law and the Vulnerable Consumer*, 63 DRAKE L. REV. 157 (2015). My claim is not, however, that consumers alone, or even together with other stakeholders, will create perfect monitoring. I merely believe that they would create an added value to the director (and officer) liability system.

129. *See supra* note 38.

130. If their concerns do not lead to actions, employees could decide to leave to work for other social enterprises. The competition for young employees, who are increasingly concerned with social impact, may well be another factor driving companies to comply. They could also act as whistle-blowers, *see* Stecker, *supra* note 69, at 378.

131. *See supra* note 37.

132. *See* Stecker, *supra* note 69, at 378 (mentioning pressure by competitors). This author also mentions other potential policing constituencies — media, consumer protection groups, individuals, social and environmental organizations. *See infra* notes 150-51 and accompanying text about this pressure in terms of fraud suits.

133. *See Legislative Talking Points*, *supra* note 127 (stating that the benefit report could help investors make more informed financing decisions).

corporation statutes.[134] The added value of mandatory public reporting can mostly be tied to social enterprises' need to differentiate themselves from greenwashing companies.[135]

First, a corporation's commitment to periodically reporting public benefit achievements assessed against a third-party standard diminishes the risk of (perceived) greenwashing.[136] Second, the choice to opt in to a system with costly mandatory disclosure rules may have a strong signaling power.[137] One author argues that the "credibility or signaling power of statutory requirements that allow for sanctions" will always be superior to private hiring of auditors.[138] Hence, transparency may well be a separate goal, as it enforces and supports the constraint in a similar manner as the non-distribution constraint does for nonprofits.[139]

C. The Benefits Outweigh the Costs

Producing a benefit report obviously comes at a cost. This cost may be especially taxing for small enterprises and startups[140] and can be divided in direct and indirect costs.[141]

The direct cost of producing a benefit report is relatively low. There are plenty of free third-party standards[142] and third-party certification is not mandated. Obviously, preparing the report will have a certain opportunity cost, as it will temporarily divert the attention of one or more employees from the core business of the company. However, benefit corporations have committed to put the social purpose at the core of their enterprise.[143] It would

134. *See supra* note 69 and accompanying text.

135. *See supra* notes 54-62 and accompanying text.

136. *Cf. Legislative Talking Points*, *supra* note 127 (stating that the reporting requirements help prevent greenwashing).

137. Joseph W. Yockey, *Does Social Enterprise Law Matter?*, 66 ALABAMA L. REV. 767, 821 (2015) (comparing this with federal securities laws).

138. *Id.* at 821.

139. *Ibid.*

140. For the purposes of this paper, "startup" is used to refer to recently created companies which do not necessarily seek exponential growth.

141. This distinction is also a distinction between ex-ante costs and ex-post costs.

142. The three third-party standards used in the analyzed reports — the B Impact Assessment, the Global Reporting Initiative and Green America — are all free. For links to the pages of these three standards and other potential third-party standards, see *How do I pick a Third Party Standard,* B LAB, http://benefitcorp.net/businesses/how-do-i-pick-third-party-standard [https://perma.cc/LU57-U5NP].

143. *See*, for instance, Eric Friedenwald-Fishman Testimony, *supra* note 45: "The legislation gives companies . . . the legal protection to do good and do well by allowing us to incorporate individual ideals of social responsibility and environmental awareness into the very fabric of our companies." *See also* Be the Change Oregon Steering Committee, *supra* note 31, at 4. By explicitly opting out of the shareholder wealth maximization norm, benefit corporations make their social and environmental mission a second

thus not make sense to exempt them from publishing a report since their commitment to the social purpose, if genuine, implies tracking their progress. Besides, corporations who have a social and/or environmental mission will often feel the need to report this to the public.[144] Finally, from the standpoint of costly reporting as a signaling device, reporting has to bear a certain cost to play its role.[145]

The indirect costs, such as the legal consequences of a poorly drafted report, could potentially be higher. Many benefit corporations are startups[146] and small companies[147] with inherently limited budgets, preventing them from hiring expensive lawyers and consultants like listed corporations preparing Corporate Social Responsibility reports.[148] However, there are several ways to mitigate this problem. The different secretary of state's offices could follow Minnesota's example and make a template available.[149] Second, while it seems unlikely that mere unintentional misstatements will lead to massive litigation,[150] in extreme cases of intentionally misleading

bottom line; *see* Michael Deskins, *Benefit Corporation Legislation, Version 1.0-A Breakthrough in Stakeholder Rights?*, 15 LEWIS & CLARK L. REV. 1047, 1050 (2011).

144. Chu, *supra* note 9, at 186. Chu argues that the reporting requirements impose too much costs on corporations who already publish about their impact. However, she acknowledges that these corporations are willing to invest in reporting their impact, which in effect diminishes the extra costs of creating a benefit report, especially when the marketing benefits of a reliable benefit corporation label are taken into account.

145. *See supra* notes 137-38 and accompanying text. *See* Yockey, *supra* note 137, at 821 (mentioning that the requirements should be mandatory and backed by sanctions). I believe it would be wrong to say that there is no need for an additional administrative burden for benefit corporations, *see, e.g.*, Eric Franklin Amarante, *The Colorado Benefit Corporation Act's Missed Opportunities*, at 8, *available at* http://ssrn.com/abstract=2030427 [https://perma.cc/74FY-YE2L], if this burden is necessary to enforce this double constraint that constitutes the *raison d'être* for this new legal entity.

146. *See* Appendix II.b, III.b, IV and V.b.

147. *See id.*

148. *But see* Burkhart et al., *supra* note 23 (finding that 44% of respondent benefit corporations "received help from a third-party consultant to address social benefit goals, requirements" but that (only) "25% of those respondents think the services were useful in helping to achieve their social benefit goals").

149. *Minnesota Public Benefit Corporation / Annual Benefit Report*, OFF. OF THE MINN. SEC'Y OF STATE, http://www.sos.state.mn.us/media/1934/dcannualbenefitreport.pdf [https://perma.cc/ST97-QYXD].

150. A practical consideration limiting the risk of actual tort liability for misrepresentations may be the small size of most benefit corporations. It seems unlikely that the plaintiff's bar would massively target companies with very limited assets in a similar way to multinationals, such as in the *Kasky v. Nike* case, as described in Jacob Vos, *Actions Speak Louder Than Words: Greenwashing in Corporate America,* 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 673, 690–91 (2009). Securities fraud claims about greenwashing will probably also be hard to bring because of the difficulty to prove materiality and causation. S*ee, e.g.*, Miriam A. Cherry & Judd F. Sneirson, *Chevron, Greenwashing, and the Myth of "Green Oil Companies,"* 3 WASH. & LEE J. ENERGY, CLIMATE & EVN'T 133, 136 (2012). In my opinion, the main litigation risk for socially responsible enterprises will continue to come from claims based on labelling of products and advertising slogans, such as the claims alleged in *Daugherty v. Method Products*. *See* Class Action Complaint at 18–22, Daugherty v. Method Products, PBC, No. 16-01226

statements or fraud, the risk of liability is a socially desirable deterrent.[151]

While the public reporting requirement obviously comes at a certain cost, these costs are limited and warranted in view of the purpose of the benefit corporation legal entity. Admittedly, some companies will decide not to adopt the benefit corporation structure because the costs do not make it worthwhile for them. These costs and the filtering effect they create are necessary to allow benefit corporations to differentiate themselves as non-greenwashing companies.

D. VERY LIMITED ENFORCEMENT

With the importance of transparency in mind, it is flabbergasting that the enforcement mechanisms are as limited as they are. Most states' statutes, with Minnesota as a notable exception,[152] provide very limited guarantees.[153] The MBCL requires the filing of the report with the secretary of state's office, but less than half of the states have mandated this and a minority of these states have provided for an explicit sanction for not filing.[154] Only a handful of states explicitly make the benefit-enforcement proceeding available for claims regarding the publication of the benefit report[155] but, it seems that the language of the other statutes that create benefit-enforcement proceedings implicitly make the proceedings available for such claims.[156]

(N.D.N.Y. Oct. 7, 2016), ECF No. 1. *See also* Vincent v. People Against Dirty, PBC, http://www.mppsettlement.com [https://perma.cc/NA3D-EPLN].

151. *See* Stecker, *supra* note 69, at 378 (mentioning anti-fraud suits as a way to make sure that benefit reports are accurate); McDonnell, *supra* note 126, at 33–34 (mentioning the importance of anti-fraud suits as a way to monitor the reliability of the reports and suggesting that Rule 10b-5 will probably be applicable). *See also* Steven Munch, *Improving the Benefit Corporation: How Traditional Governance Mechanisms Can Enhance the Innovative New Business Form*, 7 NW. J.L. & SOCIAL POLICY 170, 194 (2012) (arguing for explicit statutory sanctions for directors including false or misleading information in the benefit report); Clark & Babson, *supra* note 9, at 847 (2013) (mentioning that directors are already subject to litigation for fraud or intentionally misleading statements and considering this as " a sufficient incentive to provide complete and accurate benefit reports").

152. *See infra* note 233–235 and accompanying text.

153. An example of the limited enforcing is described by Murray, *Delaware*, *supra* note 78, at 359 n.82 (describing how a Maryland benefit corporation claiming to be the first benefit corporation in the world failed to comply with the requirement to post the report online). Maryland's secretary of state's website has listed this corporation as "forfeited" (last visited, Jan. 18. 2017).

154. *See infra* Appendix I for an overview of the 13 states which require filing, the fee they charge, and the timing of this filing. See the same Appendix for a listing of the different sanctions provided by the statutes.

155. *See* CAL. CORP. CODE § 14601(b)(3); MONT. CODE ANN. § 35-1-1402(2); CONN. GEN. STAT. ANN. § 33-1351(3); NEV. REV. STAT. ANN. § 78B.030(3); W. VA. CODE ANN. 31F-4-403(a). *See also* Appendix I.

156. The MBCL defines "benefit enforcement proceeding" as: "Any claim or action or proceeding for (1) failure of a benefit corporation to pursue or create general public benefit or a specific public benefit

The effectiveness of this enforcement mechanism, however, is highly doubtful, theoretically,[157] and Professor Murray's early study indicated that the enforcement is insufficient in practice.[158] The hypothesis that the existing enforcement mechanism does not lead to a (sufficiently) high compliance rate, will also be tested in Part II.

II. PUBLIC REPORTING DATA

In this part, I focus on the actual data of public reporting by benefit corporations. The majority of the literature agrees on the important role of transparency but the prevailing assumption — that benefit corporations will actually publish these reports — needs examination. Some pre-existing data suggests that there is an acute problem in benefit reporting that may undermine the sustainability of benefit corporations.[159] After a short review of this pre-existing data, I present and analyze the data I collected in Oregon, Colorado, Minnesota, and Delaware about the number of reporting companies, as well as a number of other variables, such as companies' principal place of business, date of incorporation as a proxy for corporate age,[160] third-party certifications, and number of employees as a proxy for size. I have also tried to analyze industries as a variable but the limited information available prevented a determination of industry with sufficient certainty to include this variable in my analysis.

I chose Oregon, Colorado, Minnesota, and Delaware because they represent the majority of the different approaches states have taken with regards to public benefit reporting.[161] Oregon mandates public reporting, lets

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purpose set forth in its articles; or (2) violation of *any obligation, duty, or standard of conduct under this [chapter]*." MODEL BENEFIT CORP. LEGIS. § 102 (emphasis added). The comment under this section of the MBCL clarifies that one of the obligations enforceable through the benefit enforcement proceeding is the obligation to post the report on the website or provide it on request. All states that have adopted this broad definition of benefit enforcement proceeding have thus arguably implicitly made the proceeding available to enforce this obligation. *See* Appendix I for an overview.

157. *See supra* notes 89-116 and accompanying text for the concerns regarding the efficiency of the benefit enforcement proceeding.

158. *See infra* notes 166-169 and accompanying text.

159. *See id.*

160. This proxy is imperfect since it counts corporations who reincorporated as benefit corporations or were created by merger of acquisition as new corporations. However, it is the best available proxy to evaluate this variable and it is the proxy used by earlier articles analyzing the same variable. *See* Plerhoples, *Who's Opting In?*, *supra* note 22, at 260 (acknowledging the imperfection but noting, *id.* at n.60, that the date of incorporation still refers to the original date of incorporation, even in case of conversions and pointing to the lack of websites as an indication of the high number of startups); Eric L Talley, *Corporate Form and Social Entrepreneurship: A Status Report from California (and Beyond)*, 9, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2144567 [https://perma.cc/UN5F-73S8].

161. Furthermore, they were offering the data for free.

companies choose between website publication and publication-by-request, and does not provide for explicit sanctions for not reporting.[162] Colorado mandates public reporting, requires companies with websites to post their report online, and does not mention any legal sanctions for non-reporting.[163] Minnesota mandates filing benefit reports with the secretary of state's office and provides a sanction for noncompliance.[164] Finally, Delaware makes public reporting optional.[165]

A. PREEXISTING DATA

In a 2015 article,[166] Professor Murray describes how he looked for the benefit reports of the benefit corporations formed in 2012 in California, Hawaii, New York, and Virginia — both on websites and by contacting representatives, or the registered agent of, the corporations.[167] He found a compliance rate of between eight percent and ten percent (if he leaves out the nonresponsive companies). Furthermore, Professor Amarante found that only one of the 697 Nevada benefit corporations has complied and published its benefit report online.[168] The compliance level in Maryland is reported to be low as well.[169]

B. OREGON

1. *Legal Background*

Section 60.768 of the Oregon Revised Statutes requires benefit companies to prepare an annual benefit report and send it to their shareholders.[170] It also obliges benefit companies to either make all of their benefit reports available on "the publicly accessible pages of the benefit company's website" or to provide a copy of the most recent benefit report without a charge to a person requesting it "unless providing a copy would

162. *See infra* notes 170-75 and accompanying text.
163. *See infra* notes 211-14 and accompanying text.
164. *See infra* notes 233-35 and accompanying text.
165. *See infra* notes 250-51 and accompanying text.
166. Murray, *Early Report*, *supra* note 13.
167. He did the actual search in July 2014. *Id.* at 33.
168. Eric Franklin Amarante, *Why does Nevada Have so Many Benefit Corporations? [Blog Post]* (the results will be presented in a future article), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstra-ct_id=2897684 [https://perma.cc/PZ23-64HH]. *See infra* note 281 and accompanying text for one potential reason for this low compliance in Nevada.
169. *See* Burkhart et al., *supra* note 23.
170. OR. REV. STAT. ANN. § 60.768(1) and (3).

violate a provision of applicable law."[171] Oregon is the only state that mandates public reporting but does not mandate companies with websites to post their reports on their website.[172] The Oregon statute does not mention an explicit deadline for the report to be posted or sent[173] and does not provide for an explicit sanction for noncompliance.[174] Finally, Oregon is the only state I analyzed where both corporations and LLCs can adopt the benefit company form.[175]

2. *Hypothesis*

Formulating a realistic hypothesis as to the benefit-reporting compliance rate requires a comparison of the states mentioned above with the Oregon regulatory regime. Since Oregon lets both corporations and LLCs opt for the benefit company status, one would expect to see smaller companies and thus less resources to produce a benefit report. Furthermore, since my data set was larger and surfaced a larger time span, the influence of early adopters — who may even have lobbied for the passing of the bill — may be more limited, leading to a lower percentage of compliance. On the other hand, I granted the companies five more months to comply.[176] Also, my study is done approximately two years after Professor Murray's so the learning costs may have dropped, leading to a higher compliance rate. Therefore, I believe that the differences with Murray's study balance each other out so I have set the hypothesis at ten percent compliance.

3. *Methodology*

I analyzed the 133 benefit companies which were created before December 31, 2014, and listed as active benefit companies on Oregon's Secretary of State's website on January 6, 2017.[177] By choosing this cut-off

171. OR. REV. STAT. ANN. § 60.768 (4). It is uncertain what provision would warrant such an exception.

172. *See* Appendix I.

173. *Ibid.*

174. Although Section 60.766(1) of the Oregon Revised Statutes arguably implicitly makes the derivative suit against directors available in case of not publication of the report. *See also supra* note 156 for states which create a benefit enforcement proceeding.

175. The only other state providing this option is Maryland.

176. In July 2014, Murray looked at reports of companies incorporated in 2012. In January 2017, I looked at reports of companies incorporated in 2014 or before.

177. The list contained 139 companies but I manually checked each company's page on the secretary of state's website and six other companies were inactive, although still counted as active in the DOS excel

date, I wanted to make sure that, in the absence of a statutory deadline,[178] the corporations had enough time to publish a report.

My methodology consisted of searching for each company's website by browsing the internet and looking for a benefit report on this website. I carefully looked at every relevant page of the websites and counted the companies that posted their benefit reports.[179] In January 2017,[180] I sent emails, letters, social-media messages, and messages through contact forms to all companies whose benefit report I had not been able to locate, formally requesting that they send me their report.[181] In February 2017, I sent a reminder to the companies who still had not sent me their reports.[182]

Additionally, I used publicly available information to collect data on other variables, including companies' principal place of business,[183] date of incorporation as a proxy for corporate age,[184] third-party certifications,[185] and

file. The six companies are DP Staffing LLC, DP Packaging LLC, Xedecnation LLC, Goes LLC, Sweet Spot Yoga LLC, and Fabienne Photography & Design LLC.

178. The Oregon statute provides a deadline of 120 days after the end of the company's fiscal year or concurrently with the delivery of the annual report to shareholders. There is no such statutory deadline to post the report online or make it available to the public. OR. REV. STAT. ANN. § 60.770(3) and (4).

179. While this method does not offer a guarantee that I did not miss a benefit report, I believe that if a careful researcher is unable to locate the report, it is unlikely that an average third party (be it a potential consumer or supplier) would be able to locate it. Furthermore, in the communications sent to companies whose benefit reports I was not able to locate, I asked them to point me to the section of their website where they did post it, in case I missed it.

180. Between January 5 and January 9, 2017, I tried to contact all the companies in a time period of about ten days, to make sure they would not quickly create a report prompted by other companies in the small social enterprise sphere. *See* Murray, *Early Report*, *supra* note 13, at 34, for a similar concern and methodology.

181. To limit the costs and the environmental impact of my study, I did not send letters to companies whose email address I had or that I could contact through email, a contact form or through social media. For the letters, I used the addresses I found on the secretary of state's office website. When address of principal place of business and mailing address where different, I sent a letter to both.

182. I had to use letters for 80 companies. Some of them were returned to me with the message "undeliverable as addressed," "insufficient address," "no such number" and "forward time exp." I sent new letters to the addresses mentioned on the secretary of state's website, tried to contact individual members and founders and tried to find new addresses. The fact that some companies' address does not seem to correspond with a real address, that their forwarding time is expired etcetera does not exclude that they would have shared this information if I had the opportunity to call them, but the fact that I, as a member of the public (and "any person") am not able to receive their report on request makes them noncompliant.

183. Principal place of business is derived from the secretary of state's website (collected on Jan. 6 2017).

184. The date of incorporation is derived from the companies' page on the secretary of state's website (collected on Jan. 6, 2017). *See supra* note 160 about this proxy.

185. I checked whether the benefit companies in the sample were certified by B Lab as B Corporations or certified by Green America. For the B Corporation certification, I used the *Find a B Corp,* B LAB, https://www.bcorporation.net/community/find-a-b-corp [https://perma.cc/6QW2-8HBY], webpage and searched for the benefit company names. I also checked the companies listed under

number of employees as a proxy for size.[186] I have not been able to determine the number of employees for every company, limiting company-size results.[187] I applied the chi-squared test with Yates's correction for continuity, as well as Fisher's exact test to establish whether the differences in reporting across the different variables are significant. I set the level of significance at 0.05.

When assessing whether a company complied with the mandatory publication of a benefit report, I have shown leniency and have decided not to disqualify reports because they lack information mandated by the statute.[188] In general, when a company published a document, called it "benefit report," and included most of the required information, I have considered this as a compliant company.[189] Of course, there is no statutory obligation to use the expression "benefit report" and documents with a comparable content have also been accepted as compliant.[190]

Furthermore, even if I chose December 31, 2014, as a cut-off date, aiming to compare compliance with regards to the 2015 report, I have shown some leniency here as well. Companies that published a 2014 report but not a 2015 report have also been counted as compliant.[191] I believe that this leniency is legitimate because the statute does not provide a deadline to publish the report.[192]

Although some leniency is shown with regards to the satisfaction of the content requirements and with regards to the timing, I do not believe it would be legitimate to accept B Impact Reports as sufficient to comply with the benefit reporting requirement in Oregon. These B Impact Reports are prepared for certified B Corporations but lack the narrative description

"Oregon." Screen captures of the pages on B Lab website are on file with the author. For the Green America certification, I searched for the benefit companies names on the Green America website (*National Green Pages*, GREEN AMERICA, http://www.greenpages.org/). Screen captures of the pages on Green America's website are on file with the author. I also checked every company's website (if existing) to check whether they mentioned another certification. I did not count product certifications or local sustainability certifications, because they do not assess both social and environmental issues.

186. Firm size is mostly derived from the LinkedIn pages of the companies and sometimes from their websites (screen captures on file with the author).

187. This is related to the general limitation following from the private nature of most benefit corporations.

188. *See* Appendix II.a for a more detailed description of which legal requirements were complied with by the different benefit corporations.

189. *See* Appendix II.a for an overview of how every compliant benefit corporation met the legal requirement.

190. *Id.*

191. *Id.*

192. *See supra* note 178 and accompanying text.

prescribed by the statute.[193] Furthermore, B Impact Reports are not published every year, but rather every two years. To be sure, being a B Corporation is a sign of the willingness to be transparent but it does not in itself imply compliance with benefit company requirements.

4. *Results*

The compliance rate is slightly higher than the hypothesis. Nineteen (14%) of all benefit companies complied, fourteen did this via their website, and five sent their report on request.[194] Twenty-five percent of the incorporated benefit companies complied, while approximately eleven percent of the benefit LLC's complied.[195] The compliance percentage would only rise to seventeen percent after elimination of all companies that have been administratively dissolved since the data set was composed[196] and to thirty-three percent after exclusion of companies without active websites.

The compliance rate is significantly higher among converted benefit companies (53%) than among companies which incorporated as benefit companies (6%).[197]

Many early adopters complied. For instance, all six companies designated in 2013 have complied.[198] The compliance rate among companies designated as such before the end of January 2014 is sixty-five percent,[199] while only five percent of the other 113 companies complied. This difference is statistically significant.[200]

I only found a number of employees for thirty-six of the 133 benefit companies. All of them fall below the 500 employees limit used by the Office of Advocacy of the U.S. Small Business Administration to define

193. OR. REV. STAT. ANN. § 60.768(1) and (3). The website does include "Company Highlights" which are, however, extremely limited, not specified per year, and not included for all companies.

194. *See* Appendix II.b.

195. *Ibid.*

196. The data set I chose inherently represents a snapshot. Removing these companies from the data set altogether would not be warranted given the fact that nineteen of the 133 companies in the data set have filed for reinstatement at least once after been dissolved by the secretary of state.

197. The p-value is lower than 0.0001, both with Fisher's exact test and the chi-square test with Yates' continuity correction. *See infra* II.6 summarizing table.

198. While the statute entered into force on January 1, 2014, companies could make the necessary filings before and some are officially designated as benefit companies in December 2013.

199. Thirteen out of twenty companies complied.

200. The p-value is lower than 0.0001, both with Fisher's exact test and the chi-square test with Yates' continuity correction. *See infra* II.6 summarizing table.

small businesses.[201] The majority of these benefit companies were even part of the category of microbusinesses, [202] with between 1 and 10 employees.[203] Among the companies I could find a number of employees for,[204] I noticed a trend of increasing compliance when moving to categories with more employees.[205] The compliance level is thirty-three percent in companies with one to ten employees, seventy-eight percent in companies with eleven to fifty employees, and one-hundred percent in companies with more than fifty employees.[206] It is impossible to know, however, whether this trend is representative for the whole population.

Twenty of the 133, or fifteen percent of the analyzed benefit companies, are certified by a third-party.[207] The difference in compliance between benefit companies certified by a third-party (60%) and the non-certified benefit companies (6%) is statistically significant.[208]

Finally, ninety-eight percent of the benefit companies have their principal place of business in Oregon.[209] The difference in compliance with companies having their principal place of business out of state is not significant.[210]

C. COLORADO

1. *Legal Background*

Section 7-101-507 of the Colorado Revised Statutes requires public benefit corporations to prepare an annual benefit report and to send it to their

201. *See* Appendix II.b. *See* Office of Advocacy, *Frequently asked questions*, U.S. SMALL BUSINESS ADMINISTRATION, https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf [https://perma.cc/3XXQ-85KU].

202. Two-thirds of the benefit companies I found a number of employees for had between one and ten employees. Office of Advocacy, *The Role of Microbusinesses in the Economy,* U.S. SMALL BUSINESS ADMINISTRATION, https://www.sba.gov/sites/default/files/Microbusinesses_in_the_Economy.pdf, [https://perma.cc/R5BQ-5QB5].

203. *See* Appendix II.b.

204. *Ibid.*

205. *Ibid.*

206. *See* Appendix II.a.

207. *Ibid.* Sixteen are only B Corporations, two are only certified by Green America, and two are certified by both B Lab and Green America.

208. *See infra* II.6 Summarizing table. The p-value is lower than 0.0001 both with Fisher's exact test and the chi-square test with Yates' continuity correction. *See infra* II.6 summarizing table.

209. *See* Appendix II.b.

210. *See infra* II.6 Summarizing table. The p-value values with Fisher's exact test and the chi-square test with Yates' continuity correction are respectively 1.00 and 0.905. *See infra,* II.6 summarizing table.

shareholders.[211] It also obliges public benefit corporations with websites to make all of their benefit reports available on "the public portion of its website."[212] Public benefit corporations without websites have to provide a copy of their most recent benefit report without a charge to persons requesting them.[213] The Colorado statute lacks an explicit deadline for sending or posting the report and does not provide any statutory enforcement mechanism for the failure to do so.[214]

2. *Hypothesis*

Since Colorado has a public reporting system similar to the one in the states Professor Murray analyzed, I set the hypothesis at ten percent.

3. *Methodology*

On February 9, 2017, I searched the Colorado Secretary of State's database for all public benefit corporations that had their public benefit status before December 31, 2014.[215] After eliminating the dissolved and delinquent corporations, the data set contained 19 active public benefit corporations.[216]

I applied the same method as for Oregon benefit companies. In February 2017,[217] I checked the public benefit corporations' websites and sent emails, letters, and messages through contact forms to all corporations without a website to request a copy of their most recent benefit report.[218] A couple of weeks later, I sent a reminder to the companies who had not sent me their report or answered my request.

Just as for Oregon, I used publicly available information to collect data about other variables, such as third-party certifications,[219] date of

211. COLO. REV. STAT. § 7-101-507(1) and (3).

212. COLO. REV. STAT. § 7-101-507(4).

213. COLO. REV. STAT. § 7-101-507(5).

214. *See* Appendix I.

215. The Colorado statute requires public benefit corporations to include either PBC, P.B.C., or public benefit corporation in its domestic entity name. *See* COLO. REV. STAT. § 7-101-503(4). I then entered these three designations in the search engine and eliminated the corporations that had these designations in their name without actually being public benefit corporations.

216. All delinquent public benefit corporations had this status for more than six months.

217. More precisely, on February 10, 2017.

218. Indeed, all public corporations with a website and without benefit report are noncompliant. *See* COLO. REV. STAT. § 7-101-507(4). Unlike Oregon benefit companies, *see supra* note 172, Colorado public benefit corporations cannot choose between online publication or publication on request. Hence, I only sent emails or letters to the public benefit corporations that did not have a website.

219. *See supra* note 185. I applied exactly the same method as for Oregon. *See supra* note 185.

incorporation as a proxy for corporate age,[220] and principal place of business.[221] I was not able to track the size of enough companies to include this variable in the analysis.[222] I applied the chi-square with Yates's continuity correction and Fisher's exact test to establish whether the differences in reporting across the different variables are significant and I set the level of significance at 0.05.

Finally, when evaluating documents issued by the corporations, I applied the same leniency as I did for benefit companies in Oregon, with regards to both content and timing of the report.[223]

4. *Results*

Again, the compliance rate is slightly higher than the hypothesis. Two of the nineteen, or eleven percent of all public benefit corporations complied.[224] One did this by posting its report on the website; the other had no website and send its report on my request.[225] This compliance rate only rises to 12.5% if companies without websites are excluded.

One out of three converted and one out of sixteen incorporated public benefit corporations complied.[226] The difference is not statistically significant.[227] There is no statistically significant difference between the corporations that filed for public benefit corporation status in the first month.[228]

Only public benefit corporations certified by a third party complied.[229] The difference in compliance between public benefit corporations certified

220. The date of incorporation is derived from the secretary of state's office website.

221. The principal place of business is derived from the secretary of state's office website.

222. I only found a number of employees for three public benefit corporations, namely Jason Wiener, P.C., a Public Benefit Corporation (1), Ecospire, PBC (1-10), and Vention Resources PBC (3).

223. *See infra* Appendix III.a. The Colorado statute also does not provide for a deadline and requires the benefit report to include a narrative description. *See* COLO. REV. STAT. § 7-101-507(1).

224. *See* Appendix III.b.

225. *Id. See* Appendix III.b.

226. *Id. See* Appendix III.b.

227. *See infra* II.6 summarizing table. The p values with Fisher's exact test and the chi-square test with Yates' continuity correction are respectively 0.298 and 0.706. *See infra* II.6 summarizing table.

228. *See infra* II.6 summarizing table. The p values with Fisher's exact test and the chi-square test with Yates's continuity correction are respectively 1.000 and 0.706. *See infra* II.6 summarizing table. The comparative lack of statistical significance in Colorado when compared with the other states is striking. While it is unclear what the source of this difference is, one hypothesis may be the very small number of observations in Colorado, as compared to the other states.

229. *See* Appendix III.b.

by a third party (100%), and the noncertified public benefit corporations (6%) is not statistically significant.[230]

Finally, ninety-five percent of the public benefit corporations had their principal place of business within the state of Colorado.[231] The difference in compliance with companies having their principal place of business out of state is not significant.[232]

D. MINNESOTA

1. *Legal background*

Section 304A.301 of the Minnesota Statutes requires public benefit corporations to prepare an annual benefit report and to send it to the secretary of state before every April 1.[233] The secretary of state revokes the public benefit corporation's status for failure to file this report.[234] There is no requirement to send the report to the shareholders, but the secretary of state publishes the reports online.[235]

2. *Hypothesis*

The Minnesota statute requires filing of the report with the secretary of state's office[236] and requires the secretary of state to revoke the public benefit corporation status of corporations which fail to file their benefit report.[237] Therefore, I expected a one-hundred percent compliance level.

3. *Methodology*

On February 28, I crossed a list of sixty-seven Minnesota public benefit

230. *See infra* II.6 summarizing table. The p values with Fisher's exact test and the chi-square test with Yates' continuity correction are respectively 0.105 and 0.186.

231. *See* Appendix III.b.

232. The p values with Fisher's exact test and the chi-square test with Yates's continuity correction are respectively 1.00 and 0.186.

233. MINN. STAT. ANN. § 304A.301, subdiv. 1 and § 304A.301, subdiv. 5.

234. MINN. STAT. ANN. § 304A.301, subdiv. 5 (reinstatement). Reinstatement is possible (subdiv. 6), intentional failure creates a right for shareholders to receive the fair value of their shares (subdiv. 7) and public benefit corporations have to change their corporate name (subdiv. 8).

235. *2015 Public Benefit Corporation Annual Reports*, OFFICE OF THE MINNESOTA SECRETARY OF STATE STEVE SIMON, http://www.sos.state.mn.us/business-liens/business-liens-data/public-benefit-corporations-annual-reports-2015/ [https://perma.cc/RY7L-ZQPY].

236. MINN. STAT. ANN. § 304A.301 subdiv. 1.

237. MINN. STAT. ANN. § 304A.301 subdiv. 5.

corporations active on August 8, 2016,[238] with the secretary of state's office database and found thirty-six active public benefit corporations that existed before December 31, 2015.[239] Minnesota only allowed the filing for public benefit corporation status starting in January 2015, necessitating placing the cut-off date one year later. Minnesota's clear deadline for filing each year's report allowed this later cut-off date.[240]

The Minnesota Secretary of State publishes the benefit reports of all public benefit corporations annually on its webpage. I consulted this webpage and matched every report with the relevant corporation.

Just as for Oregon and Colorado, I used publicly available information to collect information about other variables, such as third-party certifications,[241] number of employees as a proxy for size,[242] date of incorporation as a proxy for corporate age,[243] and principal place of business.[244] I have not been able to determine the number of employees for every company, which limits the results in terms of company size.[245]

4. *Results*

My hypothesis regarding compliance is confirmed. All thirty-six public benefit corporations filed their reports with the secretary of state's office and they are all available online.[246] While I have no data about public benefit corporations whose status may have been revoked for failing to file a report, it is certain that one-hundred percent of active public benefit corporations[247] complied with the requirement.

Finally, ninety-seven percent of the public benefit corporations have

238. I first consulted the list mentioned on *List of MN PBC'S*, HULI CONSULTING (list current as of Aug. 10, 2016), http://www.huliconsulting.com/mn-pbc-list/, and then eliminated the benefit corporations that were inactive on February 28, 2017.

239. Twenty-six of these public benefit corporations were specific benefit corporations, while 10 of them were general public benefit corporations. Specific public benefit corporations fall under a more flexible legal regime, comparable to Delaware's (e.g., no mandatory use of a third-party standard) except for the obligation to file an annual report with the secretary of state's office. General public benefit corporations fall under a regime that is more comparable to the MBCL.

240. *See supra* note 233.

241. *See supra* note 185. I applied exactly the same method as for Oregon, *see supra* note 185.

242. Firm size is mostly derived from the LinkedIn pages of the companies and sometimes from their websites (screen captures on file with the author).

243. The secretary of state's office website mentioned the date of incorporation.

244. Principal place of business is derived from the website of the companies and sometimes from publicly available databases.

245. This is related to the general limitation following from the private nature of most benefit corporations.

246. *See* Appendix IV.

247. On February 28, 2017.

their principal place of business within the state of Minnesota.[248] Since all companies complied, breaking down the compliance in terms of the other variables is superfluous.[249]

E. DELAWARE

1. *Legal background*

Section 366 of the Delaware General Corporation Law mandates that public benefit corporations, at least biennially, prepare a “statement as to the corporation's promotion of the public benefit or public benefits identified in the certificate of incorporation and of the best interests of those materially affected by the corporation's conduct” (i.e., a public benefit statement) and to send it to their shareholders.[250] The default rule does not mandate making this statement available to the public, but the certificate of incorporation or bylaws may require this.[251] The statute does not mention the way the statement should be made available to the public.

2. *Hypothesis*

Since the publication of a public benefit statement is not compulsory, the hypothesis has to be conceived differently. My hypothesis is that five percent of the public benefit corporations make this information available to the public.

3. *Methodology*

On October 19, 2016, the Delaware Secretary of State’s office sent me a list of all the public benefit corporations which had been filed.[252] After elimination of the surrendered, dissolved, converted, forfeited, and voided companies, I had a data set of 161 public benefit corporations filed before December 31, 2014.[253]

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248. *See* Appendix IV.

249. *See* Appendix IV for a breakdown.

250. DEL. CODE ANN. tit. 8, § 366(b).

251. DEL. CODE ANN. tit. 8, § 366(c).

252. E-mail from Lora J Nacrelli to Maxime Verheyden (Oct. 19, 2016, 11:04 AM) (on file with author).

253. I eliminated the public benefit corporations listed as such in the file authored by April Wright, who works at the Secretary of State of Delaware. The file dates from October 2016 and was posted on the Data World database, https://data.world/newco/newco-mission-statements [https://perma.cc/B7BU-JQUB], in November 2016. The surrendered, dissolved, and converted status is voluntary, so I decided

In January 2017,[254] I sent emails, letters, social-media messages, and messages through contact forms to all companies whose benefit statement I was not able to locate on the internet. I inquired whether they had opted for voluntary disclosure and if so, whether they were willing to send me their statement.[255] In February 2017, I sent a reminder to the companies who had not sent me their report or answered my question.

Just as for Oregon, Colorado, and Minnesota, I used publicly available information to collect data about other variables, such as companies' third-party certifications,[256] number of employees as a proxy for size,[257] date of incorporation as a proxy for corporate age,[258] and principal place of business.[259] I have not been able to determine the number of employees for every company, limiting the results in terms of company size.[260] I applied the chi-square test with Yates's continuity correction, as well as Fisher's exact test to establish whether the differences in reporting across the different variables are significant. I set the level of significance at 0.05.

Finally, when evaluating documents issued by the corporations, I applied the same leniency as I did for benefit companies in Oregon, with regards to both content and timing of the report.[261]

4. *Results*

Again, the reporting rate was slightly higher than the hypothesis: Eight percent. Seven percent reported via the website and one percent sent me

to leave them out of my data set. Forfeited is a status for companies without a registered agent. I checked and all the companies with this status did not have a registered agent on January 8, 2017. I decided to still send out letters and emails to void companies. If one of them had responded, I would check whether they had regularized their situation.

254. From January 9 until January 11, 2017.

255. For eighteen companies, the only address I found was the registered agent's. None of them responded. Some letters were returned to me, but the reasoning of note 180 applies here as well: If I, as a regular member of the public, am unable to contact them to find the report, it is not publicly available.

256. *See supra* note 185. I applied exactly the same method as for Oregon.

257. Firm size is mostly derived from the LinkedIn pages of the companies and sometimes from their websites (screen captures on file with the author).

258. The date of incorporation was available in the file sent to me by the Delaware secretary of state's office.

259. Principal place of business is derived from the website of the companies and sometimes from publicly available databases.

260. This is related to the general limitation following from the private nature of most benefit corporations.

261. *See infra* Appendix V.a. The Delaware statute made "making the statement available to the public" optional and does not mention anything about a deadline if a corporation's articles or bylaws require such publication. *See* DEL. CODE ANN. tit. 8, §366(c)(2). This would thus be something that could be stipulated in these articles or bylaws.

their report on request.[262] This reporting rate would only rise to eleven percent if all of the companies without websites and the companies that I only contacted the registered agents for would be excluded.

Of those reporting, fewer incorporated as public benefit corporations originally (5%) than those that converted to the public benefit status (15%). The difference in reporting between converted and incorporated companies is not statistically significant.[263]

A substantial portion of reporting corporations were among the first to file for the public benefit corporation status. Five of the fourteen that filed on the first day have published their report. The reporting rate of public benefit corporations designated as such within one month after the entry into force of the statute is twenty-six percent, compared to five percent for later-designated public benefit corporations. This difference is statistically significant.[264]

I have found the number of employees for ninety-seven of the 161 public benefit corporations. All of these companies, except one, fell below the 500-employee threshold for small businesses.[265] The majority of these companies were microbusinesses with between one and ten employees.[266] Among the companies I found a number of employees for,[267] I noticed a trend of increasing compliance in categories of companies with a higher number of employees. Eight percent of corporations with one to ten employees, 14.29% of corporations with between one and fifty employees, and thirty-three percent of the corporations with more than fifty employees reported.[268] It is impossible to know, however, whether this trend is representative for the whole population.

Twelve percent of the analyzed public benefit corporations are certified by a third-party.[269] The voluntary disclosure level is forty-percent for this group.[270] The difference in compliance between public benefit corporations

262. *See infra* Appendix V.b.

263. *See infra* II.6 summarizing table. The p-value is 0.090 with Fisher's exact test and 0.1290 with the chi-square test with Yates's continuity correction. *See infra* II.6 summarizing table.

264. *See infra* II.6 summarizing table. The p-value is 0.004 with Fisher's exact test and 0.003 with the chi-square test with Yates's continuity correction. *See infra* II.6 summarizing table.

265. *See infra* Appendix V.a. The only exception was Rasmussen College, Inc., a Public Benefit Corporation, with between 1,001 and 5,000 employees.

266. *See infra* Appendix V.a.

267. These are the ninety-seven companies mentioned above.

268. *See infra* Appendix V.b.

269. *See infra* Appendix V.b. Note that this does not include Ian Martin PBC (an American subsidiary of a Canadian certified B corporation) or the subsidiaries of People Against Dirty, PBC (People Against Dirty Manufacturing, PBC and Method Products, PBC). *See also infra* note 357–58 about groups of benefit corporations.

270. *See infra* Appendix V.b.

certified by a third party (40%) and the non-certified public benefit corporations (3%) is statistically significant.[271]

I found princip place of business addresses for 122 public benefit corporations. The principal places of business of the public benefit corporations are dispersed over at least[272] twenty-two states. Forty-nine of 122 (or 40% of) public benefit corporations have their principal place of business in California.[273] Only three have their principal place of business in Delaware.

271. *See infra* II.6 summarizing table. The p-value is lower than 0.0001, both with Fisher's exact test and the chi-square test with Yates' continuity correction. *See infra* II.6 summarizing table.

272. I was unable to locate the headquarters of thirty-seven public benefit corporations.

273. *See infra* Appendix. V.b.

F. SUMMARIZING TABLE

STARTUP			**THIRD-PARTY CERTIFICATION**		
Oregon Converted	Reported	Did not report	*Oregon Third-party certification*	Reported	Not reported
Converted	13	12	Certified	12	8
Incorporated	6	102	Not certified	7	106
Fisher	p-value (Two-tailed)	< 0.0001	Fisher	p-value (Two-tailed)	< 0.0001
Chi square with Yates correction	p-value (Two-tailed)	< 0.0001	Chi square with Yates correction	p-value (Two-tailed)	< 0.0001
Colorado Converted	Reported	Did not report	*Colorado Third-party certification*	Reported	Not reported
Converted	1	2	Certified	1	0
Incorporated	1	15	Not certified	1	17
Fisher	p-value (Two-tailed)	0.298	Fisher	p-value (Two-tailed)	0.105
Chi square with Yates correction	p-value (Two-tailed)	0.706	Chi square with Yates correction	p-value (Two-tailed)	0.186
Delaware Converted	Reported	Did not report	*Delaware Third-party certification*	Reported	Not reported
Converted	6	34	Certified	8	12
Incorporated	7	114	Not certified	5	136
Fisher	p-value (Two-tailed)	0.090	Fisher	p-value (Two-tailed)	< 0.0001
Chi square with Yates correction	p-value (Two-tailed)	0.129	Chi square with Yates correction	p-value (Two-tailed)	< 0.0001
Minnesota converted	Reported	Did not report	*Minnesota third-party certification*	Reported	Did not report
Converted	14	0.000	Certified	5	0.000
Incorporated	22	0.000	Not certified	31	0.000

EARLY ADOPTERS			SIZE		
Oregon early adopter	Reported	Did not report	*Oregon size*	Reported	Not reported
Early adopters	13	7	1-10 employees	8	1
Other	6	107	11-50 employees	7	
Fisher	p-value (Two-tailed)	< 0.0001	51+ employees	3	
Chi square with Yates correction	p-value (Two-tailed)	< 0.0001	Unknown	1	9
Colorado early adopters	Reported	Did not report	*Colorado size*	Reported	Not reported
Early adopters	0	3	1-10 employees	2	
Other	2	14	11-50 employees	n/a	n/a
Fisher	p-value (Two-tailed)	1.000	51+ employees	n/a	n/a
Chi square with Yates correction	p-value (Two-tailed)	0.706	Unknown	0	1
Delaware early adopters	Reported	Did not report	*Delaware size*	Reported	Not reported
Early adopters	6	17	1-10 employees	4	4
Other	7	131	11-50 employees	5	3
Fisher	p-value (Two-tailed)	0.004	51+ employees	4	
Chi square with Yates correction	p-value (Two-tailed)	0.003	Unknown	0	6
Minnesota early adopters	Reported	Did not report	*Minnesota size*	Reported	Did not repor
Early adopters	16	0	1-10 employees	14	
Other	20	0	11-50 employees	3	
			51+ employees	3	
			Unknown	16	

G. ANALYSIS

A first look at the data urges a distinction between the findings in Oregon, Colorado, and Delaware where the reporting rates were low and in Minnesota where the reporting rate was high.

1. *Oregon, Colorado, and Delaware*

In line with earlier findings of low reporting rates in Hawaii, California, New York, Virginia, Nevada, and Maryland, I have found low reporting rates in Oregon (14%) and Colorado (11%). The reporting rate is even lower in Delaware (8%), where public reporting is optional. These reporting rates all remain low after exclusion of some companies that may be more likely to be inactive or less likely to respond. In Oregon, for instance, these reporting rates remained low (only 33%) after eliminating both subsequently-dissolved companies and companies without websites.[274] In Colorado, eliminating the companies without websites only led to a 1.5% increase.[275] In Delaware, excluding the corporations without active websites and the ones where only the registered agent was contacted leads to a slight increase to eleven percent.[276]

In the following paragraphs, I discuss some potential reasons for these low reporting rates. In order to do that, I cross the reporting rates with the other collected variables, and I use the answers given by the noncompliant responding companies

a. Learning Costs

The first potential explanation mentioned by Professor Murray to explain low compliance rates are the learning costs associated with the new requirements for benefit corporations.[277] Some benefit corporations' answers suggest that they lack knowledge about their reporting duties. For instance, some Oregon benefit companies seemed not to know what exactly

274. *See supra* note 196 and accompanying text.
275. *See supra* notes 222-23 and accompanying text.
276. This might be necessary to mitigate the risk that the eighteen letters sent to registered agents did not reach the companies, that the used addresses are based on online and unofficial sources, and to compensate the fact that some letters were returned to me.
277. Murray, *Early Report*, *supra* note 13, at 43.

a benefit report is.[278] Besides these spontaneous reactions, there is a more quantitative data point to support the learning cost argument. There is a significantly higher percentage of reporting among early-adopters in both Oregon and Delaware.[279] A substantial number of these early-adopter compliers were B Corporations and were thus better informed about benefit corporation reporting requirements.[280] A final aspect related to learning costs, which takes it to a more worrying extreme, is that a subset of the benefit companies may well have been "nudged into noncompliance."[281] Indeed, Oregon's model articles of incorporation and articles of organization make the election of benefit company status dependent on the mere checking of a box.[282] This has probably led a significant number of the benefit companies to choose the benefit company status without fully realizing the legal consequences. My analysis showed that four of the eleven noncompliant Oregon benefit companies who responded did not know they were benefit companies before I contacted them.

278. One respondent just sent me a URL that included factual information about socially and environmentally responsible policies, without any periodic element to it, while benefit reports are inherently periodic and even annual in the case of Oregon. Interestingly, their policy document (dated June 13, 2014) included reference to the goal to publish an annual report in addition to their sustainability page. They had not done this more than two years later. Another respondent simply and asked what a benefit report is.

279. *See supra* notes 200, 264, and their accompanying text. As mentioned above, this is not the case in Colorado. The reasons for this are unclear.

280. Fourteen of the twenty benefit companies designated as such in Oregon within the first month after the entry into force of the statute where B Corporations. Nine of them complied. Nine of the twenty-three Delaware public benefit corporations filed in August were B Corporations and four of them disclosed. Some even actively supported the adoption of the benefit company bill. Equilibrium Capital Group, Celilo Group Media, and Metropolitan Group were signatories of the Be the Change Steering Committee's letter *and* representatives of these companies were members of the Committee which drafted the document. Be the Change Oregon Steering Committee, *supra* note 31, at 6. *Cf.* Talley, *supra* note 160, at 7 (describing the high number of incorporations in the first month in California as an example of "inventorying," meaning that new benefit corporations were already prepared before the statute took effect).

281. *See* Amarante, *supra* note 168 (suggesting that a majority of the Nevada benefit corporations have chosen the status unintentionally because of the way the incorporation process is set up — checking a box and adding a public benefit without any control and limited information — and will fail to comply with the legal requirements, including the reporting requirements). *See also* J. MacLeod Heminway, *Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations*, 40 SEATTLE U. L. REV. 611, 613–14 (2017) (suggesting unintentional filings as benefit corporations in Tennessee and Colorado).

282. *See Oregon Articles of Organization* (mentioning that additional requirements apply), http://sos.oregon.gov/business/Documents/business-registry-forms/llc-articles.pdf [https://perma.cc/T7QJ-9GRZ]; *Oregon Articles of Incorporation*, http://sos.oregon.gov/business/Docu-ments/business-registry-forms/dbc-articles.pdf [https://perma.cc/2NB2-Z3FW].

b. Startups

The statistically significantly higher reporting percentage among converted benefit corporations in Oregon[283] indicates that startup companies have a harder time reporting about their impact.[284] Besides this statistical difference, respondents explicitly voiced motives for nonreporting that were related to their startup status. Two Oregon respondents explicitly referred to startup-related reasons to explain their noncompliance,[285] and ten of the forty-three Delaware respondents used similar explanations for their lack of voluntary reporting.[286]

c. Small Size

Murray also points to the small size of benefit corporations.[287] Although data about size was only found for a limited number of benefit corporations, the data gathered here reveals that all but one of those companies are small enterprises.[288] The majority are even microbusinesses.[289] In Oregon and Delaware, there seems to be a trend to more compliance when moving from a category of smaller companies to a category of larger companies.[290] The only exception is Colorado, where both of the complying corporations were in the smallest category. However, I did not find enough size data in Colorado to determine whether or not this was simply a reflection of the smaller size of the population in general. The general trend of lower compliance of smaller companies is in accordance with prior research in other domains of corporate reporting showing low reporting compliance rates by smaller corporations.[291]

283. *See supra* note 197.

284. The difference is not statistically significant in Colorado. The reasons for this remain unclear but the small sample size seems to be a contributing factor. There was no statistically significant difference in Delaware either.

285. One respondent mentioned the lack of real activity in the marketplace. Another respondent referred to the fact that his company was still in the "survey process."

286. These motives included e.g., the too recent launch of the company to assess the impact, only recently achieved profitability (where the specific public benefit was to share some of these profits) and mentioning that the company is in "development stage."

287. *See* Murray, *Early Report*, *supra* note 13, at 43–44 (pointing to the fact that a large number of corporations did not have a website and that the complying companies included larger ones, such as Patagonia and Greyston Bakery).

288. *See supra*, II.6 summarizing table.

289. *Id.*

290. *See supra* notes 205 and 269.

291. *See, e.g.,* Matthew P. Harrington & Eric A. Lustig, *IRS Form 8300: The Attorney-Client Privilege and Tax Policy Become Casualties in the War Against Money Laundering*, 24 HOFSTRA L. REV.

d. Third-party certification

As expected, the reporting level is higher among companies that have been certified by a third-party.[292] This difference is statistically significant in Oregon, Colorado, and Delaware. Certified corporations are usually among the largest companies.[293] Furthermore, they usually have more prior knowledge about benefit corporations because of their close relation with B Lab. Hence, the high number of compliant certified B Corporations reinforces the company size and the learning costs as reasons for noncompliance.

e. Absence of Statutory Enforcement

Furthermore, Professor Murray suggested that the absence of real statutory enforcement also contributed to low compliance results.[294] While California has explicitly made the benefit enforcement proceeding available to assert claims regarding the failure to post a report, the low reporting rate implies that this enforcement mechanism is insufficient.[295] Oregon implicitly makes a liability suit available for nonreporting, but this tool also seems to have very limited effects.[296] The contrast with Minnesota, a state with an actual enforcement mechanism[297] and perfect compliance is striking.

f. Industry

Due to the limited information that was available, it was impossible to classify companies in industries with sufficient certainty to include this as a variable.[298]

623, 636 n.57 (1996) (mentioning a 42% compliance rate for small corporations (less than 10 million dollars in assets) for the filing of form 8300 (reports of cash payments over $10,000).

292. *See supra* note 160 about using a company's incorporation date as a proxy for corporate age.

293. Of the Delaware corporations I found a number of employees for, only thirty-five percent of certified B Corporations are in the microbusinesses group (1-10 employees), while this is the case for fifty-two percent of the total population. Of the Oregon corporations I found a number of employees for, this was the case for 31.25% of certified B Corporations and sixty-six percent for the whole population. While the only B Corporation in Colorado is small, there is insufficient data about other public benefit corporations size in that state.

294. *See* Murray, *Early Report*, *supra* note 13, at 44–45.

295. *See also infra* note 323 and accompanying text.

296. *See supra* notes 156 and 174; Appendix II.b.

297. *See* Appendix I for an overview of the statutes.

298. This is a potential area of further research.

g. Principal place of business

Although there is no significant difference in reporting between out-of-state companies and domestic companies, the analysis of the principal places of business did reveal an interesting finding. Unlike in Oregon, Colorado and Minnesota,[299] the majority of Delaware public benefit corporations have their principal place of business in another state.[300] A quick comparison of these results with the very-low percentage of out-of-state public benefit corporations and benefit companies incorporated in Colorado, Minnesota, and Oregon indicates that Delaware is winning at least part of the competition for public benefit corporation charters.[301] Further research is needed to show whether or not this becomes a trend and whether or not the victory will be as big for Delaware as its dominance over large and listed corporation charters.[302]

h. Third-Party Standards

A first finding is that not all reporting companies use a third-party standard. Currently, the majority of states, including Oregon and Colorado, require the use of a third-party standard in the benefit report.[303] A minority, including Delaware, make the use of a third-party standard optional.[304] Compliance with the third-party standard requirement is far from perfect in states where the standard is mandatory. The compliance rates vary from fifty-eight percent in Oregon to fifty percent in Colorado. In states where the standard is optional, there is a striking difference between Delaware, at sixty-four percent, and Minnesota specific public benefit corporations (*see supra*, footnote 239), at zero percent.

Further, most companies that published a benefit report and used a third-

299. *See* Appendices II.b., III.b. and IV. *See also* Talley, *supra* note 160, at 8 (finding that only 5% of the California Benefit Corporations and Flexible Purpose Corporations were headquartered out of state).

300. *See* Appendix V.b.

301. Interestingly, the majority of these out of states corporations could have incorporated as a benefit corporation in the state where they have their principal place of business. *See also* Delaware Committee Report, *Purpose of the Bill* (mentioning the potential incentives for the formation of new corporations in Delaware as a reason for adopting the bill).

302. In 2015, eighty-six percent of the corporations based in the United States which did an initial public offering were incorporated in Delaware. Sixty-six percent of the Fortune 500 companies were incorporated in Delaware. *See* Jeffrey W. Bullock, *Delaware Division of Corporations 2015 Annual Report*, https://corp.delaware.gov/Corporations_2015%20Annual%20Report.pdf [https://perma.cc/3W2Y-5DGJ].

303. *See* Appendix I

304. *See* Appendix I.

party standard used the B Impact Assessment,[305] confirming the position of B Lab as the market leader. Although many alternatives exist,[306] and B Lab explicitly refers to them,[307] there still exists a sentiment that the requirements for third-party standards may have been written with the B Impact Assessment in mind.[308]

Finally, a couple of companies mentioned the inadequateness of the available third-party standards to measure the impact created by their specific company. Indeed, social impact standards are in their infancy. One respondent referred to the difficulties involved with the assessment of carbon impact.[309] Some companies solve this problem by developing their own key performance indicators to supplement the incomplete third-party standard.[310] This too may come at a cost since it seems likely that some companies decided, when faced with this problem, to simply not report.[311] The issue of inadequacy of the existing standards is mentioned in the literature as well.[312]

The low level of reporting companies is not the only concern regarding benefit reports. The concern about limited enforceability of the content requirements expressed in the literature seems to be confirmed in practice.[313]

305. Seven of the nine compliant companies in Oregon which used a third-party standard used the one offered by B Lab. In Delaware, six of the seven voluntary reporting public benefit corporations using a third-party standard used B Lab's. *See* Appendix II.a and V.a. Although early commentators have indicated that product certifiers and others may decide to enter into the market, the competition remains limited.

306. *See supra* note 142.

307. On the website and in legislative documents. *See How do I pick a Third Party Standard*, *supra* note 142; Be the Change Oregon Steering Committee, *supra* note 31. *But see* Groshoff, *supra* note 48, at 266–65 (stating that "B Lab attempts to create legislation that will coerce entities to pay funds to B Lab for legally questionable certification tools").

308. *See, e.g.*, Renatto Garcia, *Re-Engineering Georgia's Corporate DNA: A Benefit Analysis and Practicality Assessment for Benefit Corporation Legislation in Georgia*, 6 J. MARSHALL L.J. 627, 658 (2012) (arguing that for benefit corporation legislation to serve its purpose, the measures of accountability and transparency should be set by a "party without bias or interest").

309. This was a representative of an Oregon benefit company.

310. This was, for instance, the case for Exemplar Companies, a Delaware public benefit corporation.

311. One Delaware public benefit corporation, for instance, explained how they had found it challenging to aggregate the benefits their company created and that this was the reason for the lack of voluntarily compliance. This partially confirms Yockey's assumption that in absence of efficient enforcement, companies that have a hard time measuring impact will not or only partially disclose. *See* Yockey, *supra* note 137, at 796.

312. *See* Westaway & Sampselle, *supra* note 49, at 1077 (acknowledging the potential of inaccurateness of impact measurement). *See also* Murray, *Early Report*, *supra* note 13, at 48 (about the inherent difficulties to prescribe reporting of objective information for companies coming from a range of different industries); Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007, 1011–12 (2013). *See generally* Yockey, *supra* note 137, at 796 (about the challenge of "interpreting social information in firms with social complex missions").

313. *See* Murray, *Early Report*, *supra* note 13, at 46 (the levels of uses of third-party standards).

Some even argue that the existing content requirements are insufficient.[314] While it is clear that the content requirements and the enforcement mechanism could be ameliorated, I will not go into further detail about the appropriate statutory amendments to pursue this goal. Such proposals would need to be informed by a careful study of the existing third-party standards and an evaluation of a larger sample of benefit reports.

2. *Minnesota*

The analysis of the Minnesota data teaches that the statutory sanction of revocation of the public benefit corporation status has led to reporting by all active companies. While it is uncertain how many times the secretary of state has actually had to use this sanction,[315] Minnesota shows that it can induce all active companies to report. Further, the requirement to file the benefit report, coupled with the review by the secretary of state and the severe sanctions for noncompliance have led to a substantially higher level of compliance with the third-party standard requirement. Ninety percent of the Minnesota general public benefit corporations complied, while only fifty-eight percent of the Oregon benefit companies and fifty percent of the Colorado public benefit corporations complied.[316]

Yet, the low number of active public benefit corporations in Minnesota suggests that this perfect compliance has its price.

It seems unlikely that the three other states would be able to retain or attract the same number of corporations if they would sanction companies like Minnesota does. Minnesota's population of public benefit corporations are more likely to exhibit the characteristics associated with compliance. For example, the percentage of converted companies is higher (39%) than in Oregon (19%), Colorado (15%), and Delaware (25%). Minnesota also has a higher percentage of companies with more than fifty employees (15%), than Oregon (8%), Colorado (0%), and Delaware (13%). Finally, Minnesota's percentage of certified corporations (13.8%), is higher than Colorado's (5%) and Delaware's (12.4%), and it's quite close to Oregon's (15%).

314. *See* Yockey, *supra* note 137.

315. Three public benefit corporations have been reinstated, according to the website.

316. Admittedly, the voluntary use of a third-party standard is very low (0%), compared to the sixty-four percent in Delaware. This probably also stems from the fact that the reporting benefit corporations in Delaware are the eight percent who want to do more than legally required.

III. RECOMMENDATIONS

A. MANDATING PUBLIC REPORTING

Public reporting is an essential piece of the accountability system because it enables outside stakeholders to monitor benefit corporations and to partially ameliorate the imperfect director (and officer) liability system.[317] Furthermore, it has a strong individual signaling power.[318] I have argued that, in general, the benefits strongly outweigh the costs.[319] The voluntary system in Delaware has not led to a higher reporting rate than the mandatory systems in other states.[320] Therefore, my first recommendation is to mandate public reporting.

B. THE ENFORCEMENT-SUSTAINABILITY TRADE-OFF

Before discussing my other recommendations, it is important to briefly describe the "enforcement-sustainability trade-off." On the one hand, my results demonstrate that the reporting levels are low in states without real enforcement. Compliance is perfect, however, in Minnesota, where the secretary of state provides actual enforcement. On the other hand, Minnesota only had sixty-seven active public benefit corporations twenty-one months after the entry into force of its statute.[321] This number is too small to provide the aura of reliability that social entrepreneurs seek. More adopters are necessary for the benefit corporation to be a sustainable corporate form. The Minnesota experience suggests that creating actual enforcement without considering the practical difficulties experienced by some benefit corporations will likely deter entrepreneurs from choosing the benefit corporation legal form.

C. ENFORCING PUBLIC REPORTING

One of the reasons for the lack of compliance with the public reporting requirements is the lack of enforcement.[322] Private enforcement through director (and officer) liability has proven to be insufficient, which is not

317. *See supra,* Part I.1.2.
318. *See supra* Part I.2.
319. *See supra* Part. I.3.
320. The fact that all reporting rates are low is not an argument against mandating such reporting but, rather shows some practical problems and lack of enforcement, which urge policy recommendations.
321. *List of MN PBC'S, supra* note 238.
322. *See supra* notes 294-97, and accompanying text.

surprising given the aforementioned limits in terms of standing.[323] In particular, the low compliance rate in California, a state that explicitly provided this kind of enforcement seems to confirm these presumptions.

1. *Enforcement Mechanism*

To be able to enforce the public reporting requirement, states need information. Thus, obliging benefit corporations to file their benefit report with the secretary of state's office is necessary.[324] Mandatory filing of the report could further increase the level of compliance by requiring the use of a third-party standard if the state refuses to file incomplete reports.[325] This would be beneficial for the quality and the comparability of the reports. However, it is not sufficient since it does not assure the publication of benefit reports.[326]

States should mandate filing of reports on an online database or website.[327] Currently, only Minnesota makes the benefit reports of its public benefit corporations available online.[328] Such a database would ensure actual public availability in a more reliable way than the current combination of posting the report on the website or providing it on request. This is shown in practice by the one-hundred percent availability of reports in Minnesota. The large number of non-responsive companies elsewhere,[329] shows that the option to choose to make the report available on request merely creates an illusion of public availability. Moreover, the efforts and the slowness currently represent an important hurdle for stakeholder monitoring. On

323. Murray, *Early Report*, *supra* note 13, at 49–50. *See supra* notes 89-95, and accompanying text.

324. Currently, fourteen of the thirty-one statutes requiring filing of the report with the secretary of state's office. *See infra* Appendix I for an overview of the 14 states who require filing, the fee they charge, and the timing of this filing. Some commentators have pleaded for a filing requirement, *see* Murray, *Early Report*, *supra* note 13, at 47 (combining this suggestion with the need for sanction in case of noncompliance); Garcia, *supra* note 308, at 673 (arguing that a filing requirement serves the ends of accountability and transparency, while advocating for an exception if the Secretary of State is not able to handle the processing of these reports); Hacker, *supra* note 85.

325. *See infra* note 326.

326. It could also inform states about the way benefit corporations are interpreting and applying the statutory requirements in terms of content of the benefit report. This would enable states to adapt these requirements or, potentially, sanction unsatisfactory reporting. Rhode Island already has a procedure of evaluation of the annual report. R.I. GEN. LAWS § 7-5.3-13(e). (If it does not fit the requirements, the secretary of state sends it back). *See* OFF. OF THE MINN. SEC'Y OF STATE, *supra* note 149. In this template, the secretary of state's office mentions that certain information is required in the benefit report and that the office may return incomplete reports unfiled.

327. *See* Murray, *Early Report*, *supra* note 13, at 50, 50 n.135 (for the same suggestion). In footnote 135, Murray addresses the problem of extra costs.

328. OFFICE OF THE MINNESOTA SECRETARY OF STATE STEVE SIMON, *supra* note 235.

329. *See* Appendices II.b, III.b, and V.b.

average, it took reporting benefit corporations thirty-one days after my first request to send me their report.[330] Requiring every company to post their report online is not a satisfying alternative either. Even if all companies wanted to report on their website, the accessibility of these webpages in the future is a concern. This can be avoided with a public database that features documents in a more permanent format. Besides enhancing the comparability of benefit reports,[331] it would strengthen the role of liability for intentional misrepresentations, since such documents are usually more easily admissible in court.[332]

This system obviously entails a certain cost for the states. Different ways to offset these costs include charging a higher filing fee[333] or cooperation with private parties such as B Lab.[334] States could also save costs by adapting their existing databases or simply creating a different webpage and posting the reports there, as Minnesota did.

2. *Sanctioning Noncompliance*

Besides mandating filing of the benefit report with the secretary of state's office and publishing the reports in a database, states should create real sanctions for the failure to send the reports. In this section, I suggest a set of potential sanctions.

First, the traditional method of imposing fines as sanctions could be used.[335] Additionally, noncompliant benefit corporations may be sanctioned with the retraction of all tax advantages given by the state. Although such

330. Interestingly, the average time was shorter for respondents contacted through regular mail (twenty-nine days on average) than those respondents contacted via email (thirty-four days on average).

331. *See* Murray, *Early Report*, *supra* note 13, at 50–51.

332. MARK BAGNOLI ET AL., NOT ALL CSR REPORTS ARE CREATED EQUAL: REPORT QUALITY AND VOLUNTARY THIRD-PARTY ASSURANCE 1 (Purdue U. Krannert Graudate Sch. of Mgmt., 2016) (stating that pdf files are accepted as evidence in American courts, whereas regular webpages are not), http://www.krannert.purdue.edu/academics/Accounting/bkd_speakers/papers/BHW.pdf [https://perma.cc/2F7V-WKMM].

333. *See infra* Appendix I for the fees that are currently charged. After all, by publishing these reports on a publicly accessible forum, the state helps the branding and marketing purposes sought by social entrepreneurs.

334. This kind of public service by B Lab could be even more warranted in light of its partial funding (between one million and five million dollars) by the United States Agency for International Development. *See Our Funders*, B LAB, https://www.bcorporation.net/what-are-b-corps/the-non-profit nonprofit-behind-b-corps/our-funders (last visited Apr. 19, 2017).

335. Currently, Rhode Island is the only state imposing fines. It imposes a twenty-five dollars per report filed late. R.I. GEN. LAWS § 7-5.3-13(f) (2016). *See also* Murray, *Early Report*, *supra* note 13, at 48 (suggesting fines).

tax advantages are not yet widespread[336] and most literature has focused on removing disadvantages for benefit corporations,[337] it seems likely that other states will consider doing this to try to win the competition for benefit corporation charters.[338] Tax advantages would be given because of the social mission of benefit corporations and would not be warranted if benefit corporations are not complying with transparency requirements. Repetitive noncompliance could also be sanctioned with administrative dissolution,[339]

336. The only advantage for benefit corporations as such is the California Benefit Corporation Discount applicable to California Benefit Corporations who are in good standing. The discount takes the form of a four-percent adjustment of bids made by Benefit Corporations for the purposes of determining the highest ranked bid when bidding for city contracts. S.F., CAL., MUN. CODE, CAL. BENEFIT CORP DISCOUNT ORDINANCE § 14C.3.

337. In particular, authors have focused on the competitive disadvantage for benefit corporations compared to tax-exempt nonprofits because they would only be able to deduct a maximum of ten percent of their taxable income as a charitable contribution. *See* IRC § 170 (b). *See, e.g.,* Cohen, *supra* note 61, at 308 (advocating for a 'benefit expense' as a way to offer an unlimited deduction for charitable expenses made by benefit corporations); Lloyd Hitoshi Mayer & Joseph R. Ganahl, *Taxing Social Enterprise*, 66 STAN. L. REV. 387, 439 (2013) (suggesting a softening of the distinction between charitable donations and business expenses). Finally, a general information letter by the IRS addressed exactly this issue and clarified that charitable contributions made by benefit corporations in order to generate goodwill usually fall under the (completely deductible) category of business expenses. I.R.S. Gen. In. Ltr. 2016-0063 (June 2, 2016).

338. While B Lab stresses on its website that the benefit corporation statutes have no tax impact, in light of their more ambitious goal to make *all* companies adopt a benefit corporation governance model, *see supra* note 34, it seems likely that they will advocate for such advantages in the future. Some have reported that B Lab has already advocated for such advantages in the past. *See S. Banking & Fin. Inst. Comm. Hearing*, *supra* note 45, at 8 (comments of the Nonprofit and Unincorporated Organizations Committee of the Business Law Section of the State Bar). Different authors have also argued for favorable tax treatment of benefit corporations. *See, e.g.*, Thornsberry, *supra* note 81, at 186 (suggesting a tax break for benefit corporations); Mayer & Ganahl, *supra* note 337, at 439–41 (suggesting "tax benefits for hybrids as hybrids"); Minhas, *Enhancing the Legal and Regulatory Environment for Investment in Social Enterprises*, 3 MICH. J. OF PRIVATE EQUITY & VENTURE CAPITAL L. 257, 274 (advocating for "tax incentives for hybrid/for-profit entities"). Other authors indicated that tax advantages will likely be adopted in the near future. *See, e.g.*, Benjamin Moses Leff, *The Case Against For-Profit Charity,* 42 SETON HALL L. REV. 819, 822 (2012). I do not make a substantive judgment about new tax advantages for social enterprises. *See generally* Anup Malani & Eric A. Posner, *The Case for For-Profit Charities,* 93 VA. L. REV. 2017 (2007) (arguing that tax advantages should not be based on the for-profit or nonprofit form, but on the social benefit created by the entity). *But see* Leff, *supra* note 338, at 822 (defending the current state of the law).

339. This sanction already exists in New Hampshire without the repetitive element, *see* N.H. REV. STAT. ANN. § 293-C:13. V, and is part of the current version of the Alaska Bill, *see* HB 124, 30th Leg., 2nd Sess. (Alaska 2017), and Murray, *Early Report*, *supra* note 13, at 48, suggested its adoption. However, caution is recommended when it comes to the interplay of this sanction and the supermajority requirement to convert to a regular corporation. *See* Murray, *Early Report*, *supra* note 13, at 47–48 (warning that the penalty of revoking the benefit corporation status (existing in Minnesota) may be used to avoid the supermajority requirement to convert to a regular corporation). Murray also notes that the possibility of shareholders getting a fair value for their shares in the case of intentional noncompliance

but the severe effects on legal certainty warrant certain leniency measures. For instance, benefit corporations should first receive a notice alerting them that they have not complied with the requirement.[340] This is particularly relevant because most benefit corporations are in a startup phase, making it harder to comply with corporate formalities. For example, sixty-six of the 106 (62%) of all non-converted Oregon benefit companies have received a late-annual-report notice at least once.[341]

D. EXCEPTIONS

Only mandating public reporting and actually enforcing this would arguably create a new problem. It is very likely that a lot of companies that did not comply will change their status if they are faced with actual enforcement. More importantly, some entrepreneurs may be deterred from forming benefit corporations in the future. However, to create a valuable benefit corporation brand, there needs to be a large pool of such corporations that comply with the legal requirements. Some of the reasons for noncompliance that were apparent from the data warrant exceptions to the reporting obligation.

1. *Startups: Comply or Explain Provision*

In states with low reporting rates, a high percentage of the analyzed companies did not convert to a benefit corporation, which suggests that many benefit corporations are new businesses.[342] This indication has been confirmed by a couple of respondents who spontaneously explained that the reason for the absence of a report was the early stage of the launching of their business.[343] The fact that the reporting rate in Oregon is significantly higher

will probably remain theoretic due to the difficulty in proving intent. *See* MINN. STAT. ANN. § 304A.301 subdiv. 5–7.

340. Compare this with the template to comply with reporting requirement in Minnesota, which mentions "Notice: Failure to file this form by March 31 of this year will result in the revocation of the corporation's public benefit status without further notice from the Secretary of State, pursuant to Minnesota Statutes, Section 304A.301." OFF. OF THE MINN. SEC'Y OF STATE, *supra* note 149.

341. Seventeen of these sixty-six benefit companies were at some point effectively dissolved and have filed for reinstatement. Filing for reinstatement costs $100. *How to Reinstate an Oregon Corporation,* NORTHWEST REGISTERED AGENT, http://www.northwestregisteredagent.com/reinstate-revive-oregon-corporation.html [https://perma.cc/3U8P-4MHY].

342. Eighty-one percent in Oregon (107/133), eighty-four percent in Colorado (16/19), seventy-five percent in Delaware (121/161). *See* Appendices II.b, III.b, and V.b. Compare this with sixty-one percent in Minnesota (22/36).

343. *See supra* notes 285-86.

among converted companies,[344] possibly suggests that startups have more difficulties complying with the public reporting requirement.

The compliance-cost issue for startups requires balancing certain conflicting interests. On the one hand, public reporting is crucial to holding benefit corporations accountable, which is of utmost importance to protect third-parties and to make this corporate entity viable.[345] On the other hand, startups have limited means and a high mortality rate.[346] Because of the difficult-to-meet supermajority requirements for conversion,[347] startups will continue to be the main source of new benefit corporations.[348] Because the benefit corporation brand cannot survive without adopters, the needs of startups must be considered. At the same time, completely exempting them from reporting requirements may well erode the benefit corporation brand.

The trick is to find the right balance between exempting startups from (publicly) reporting in their first few years and providing them with no exceptions. One option is including an opt-out rule for newly incorporated benefit corporations. For example, benefit corporations might be allowed to postpone reporting in the first three years after incorporation, providing that they explain why they are doing so. Making benefit corporations explain in cases that do not comply would also discourage existing businesses planning to convert to benefit corporations from liquidating and reincorporating to escape reporting requirements.

2. *No exception for small companies*

I would not advocate for the creation of a similar opt-out exception for

344. Fifty-two percent versus six percent. *See supra* note 197 and accompanying text.

345. *See supra* Part I.1.2.

346. *See* Office of Advocacy, *supra* note 201 (noting that between 2004 and 2014, on average, 78.5% of new businesses survived one year but also that survival rates after five years ranged from 45.4% to 51.4% — the rate noted for a one-year interval was approximately one-third). All twenty-eight surrendered, forfeited, and dissolved public benefit corporations and forty-one of the forty-three voided public benefit corporations in the Delaware data set were incorporated as public benefit corporations.

347. Most states require a two-third majority for conversion to a benefit corporation. *See, e.g.*, COLO. REV. STAT. § 7-101-504(1); MINN. STAT. ANN. § 304A.021 subdiv. 5 and MINN. STAT. ANN. § 304A.103 subdiv. 2; and DEL. CODE ANN. tit. 8, §363(a). One exception is Oregon, *see* OR. REV. STAT. ANN. § 60.756 (requiring a simple majority except if the governing documents require a higher threshold).

348. B Lab seems aware of this, since it has dedicated a page of its website specifically to startups. *See Are You a Startup*, B LAB, http://benefitcorp.net/businesses/are-you-startup [https://perma.cc/6DCV-ZMVF]. Note that different authors have argued that the majority of social enterprises (the target of benefit corporation statutes) are startups. *See* McDonnell, *supra* note 126, at 25. *See also* Walker, *supra* note 36, at 29 (predicting that most benefit corporations will be small socially minded startups). *See also* Brett R. Smith et al., *Social Enterprises and the Timing of Conception: Organizational Identity Tension, Management, and Marketing*, 22 J. NONPROFIT & PUB. SECTOR MKTG. 108, 127 (2010) (finding that firms that are social enterprises at inception typically suffer less from identity tension).

small enterprises or microbusinesses.[349] The most important policy consideration motivating this decision is that most benefit corporations are small and are likely to remain small. Exempting all small benefit corporations from publishing benefit reports would make public reporting the exception instead of the rule. These smaller corporations opted in to a label with a certain marketing value and certain legal protections. The price they have to pay is accountability and transparency. Not requiring older smaller enterprises to publish a report would weaken the brand and would thus give these small enterprises an advantage without requiring them to pay the price.[350]

E. OTHER MEASURES TO REDUCE COSTS AND IMPROVE QUALITY

States could adopt six other measures to reduce the costs of reporting and to increase the value of benefit reports. The advantages of reports with more informational value is clear given the crucial role of reports in the accountability and transparency framework.[351]

First, one of the reasons for low reporting rates seems to be the learning costs. This factor could be addressed by a range of different measures. Before incorporation, it seems important to let entrepreneurs make more informed decisions regarding their entity choice.[352] Providing a different document for the incorporation of benefit corporations seems like an important first step towards that goal. This could be complemented by different educational materials, such as brochures and webpages. That would also remind existing benefit corporations of their legal duties.

Second, states could undoubtedly help benefit corporations to comply with reporting requirements by providing templates of benefit reports.[353] This would lower costs for the companies and probably increase compliance rates. Obviously, one size does not fit all. The template, however, would be optional to use and could include space for benefit corporations to customize it to their own needs.

Third, states should provide a deadline for the publication of the benefit reports. Both shareholders and other stakeholders should receive

349. *But see* Murray, *Early Report*, *supra* note 13, at 50 (advocating for an exception or a scaling for small and/or young enterprises).

350. *See* Yockey, *supra* note 137, at 821 (in general about nonreporting firms reaping the aura without real sanction for greenwashing).

351. *See supra* Section I.

352. *See supra* notes 281-82, and accompanying text.

353. Minnesota's Secretary of State's Office already provides such a template, *see* OFF. OF THE MINN. SEC'Y OF STATE, *supra* note 149. Other states could follow this template and adapt it to their needs.

information on a timely basis. Currently, a lot of different bills provide a deadline for submission to shareholders but not for publication on the website (or making it available to the public).[354] One option would be to do as the Kansas legislature has very recently done, expressly stating that the posting should happen concurrently with the submission to shareholders.[355] If the statute requires filing of the report, it could simply provide a yearly deadline.[356]

Fourth, no state currently has a provision allowing for consolidation of benefit reports for benefit corporations who are part of corporate groups.[357] Thus, these benefit corporations each have to publish their own benefit report, creating an additional cost potentially penalizing benefit corporations who want to expand. It would be advisable to include a provision giving the opportunity to benefit corporations who have subsidiary benefit corporations to publish a consolidated benefit report, comparable to consolidated financial statements.[358]

Finally, a measure that would enhance the value of public reporting is the approach of the Hawaiian benefit corporation statute — requiring the report to be made available for public commenting before finalizing it.[359] Including this public-comment requirement would be an effective way to give outside stakeholders a voice about the impact of benefit corporations.[360]

CONCLUSION

Public reporting is a crucial element of current benefit corporation statutes. First, it is necessary to hold benefit corporations accountable for their public purpose. This is pivotal in view of the objective to create a legal entity that signals the reliability of the company's social and environmental

354. *See* Appendix I.

355. New Sec. 6(e), HB 2697, 2016 Leg. Sess. (Kan. 2016).

356. *See* MINN. STAT. ANN. § 302A.301.A.1 ("before each April 1").

357. *See* Murray, *Early Report*, *supra* note 13, at 56 (mentioning that there is no provision for consolidation and citing William Clark who agreed that there was no exception for subsidiaries under the MBCL).

358. My sample included different benefit corporations that were part of a group structure. One Delaware public benefit corporation, People Against Dirty, PBC, has at least two subsidiaries which are public benefit corporations. Patagonia Inc., a California benefit corporation, has at least three subsidiaries who are benefit corporations. In Minnesota, three different public benefit corporations are part of the same group (Apex).

359. *See* HAW. REV. STAT. § 420D-11(b).

360. Robert T. Esposito also suggests the Hawaiian statute's approach in his article, *The Social Enterprise Revolution in Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for the Benefit Corporation*, 4 WM. & MARY BUS. L. REV. 639, 712 (2013) (noting that the Hawaii approach presupposes assessment against a third-party standard).

responsibility claims to investors, consumers and employees. Secondly, transparency itself furthers this same goal. Because the benefits in terms of serving these objectives outweigh the costs, I have argued that public reporting has a crucial role in the benefit corporation statutes.

Nonetheless, my empirical study of benefit reporting has shown very low reporting rates in Oregon, Colorado, and Delaware, ranging from eight percent to fourteen percent. This lack of reporting could create a risk of state-sanctioned greenwashing and could endanger the sustainability of these new legal entities. By analyzing some other variables, such as company size, company age, and third-party certification, I have identified some potential reasons for these low levels of reporting. In particular, I have highlighted learning costs, the large amount of startups and small companies, and the absence of statutory enforcement as important factors.

In Minnesota, compliance with the reporting requirement was perfect for the active public benefit corporations. The main difference with Oregon, Colorado, and Delaware is the fact that the Minnesota statute creates a strong enforcement mechanism, namely, filing of the report with the secretary of state's office and revocation of the public benefit corporation status upon a failure to do so.

In view of these findings, I argue that policy recommendations regarding public reporting require a fundamental trade-off between enforcement and sustainability. While perfect enforcement creates a strong brand in terms of quality, it may limit the quantity too much, endangering the sustainability of benefit corporations.

Hence, after having recommended that all legislators mandate public reporting, I have sought to develop a framework of efficient enforcement, coupled with exceptions that seem warranted in view of the data and the purpose of the legislators. I recommend mandatory filing of the report with the secretary of state's office and publication of the reports by the states in a permanent form, ideally in a database. Noncomplying companies can be sanctioned by a combination of fines, retraction of tax advantages and eventually administrative dissolution. With the aforementioned trade-off in mind, I suggest a comply-or-explain exception for starting companies in the first few years after incorporation. Finally, I have made some other recommendations which could limit the costs and enhance the quality of reporting.

If states are not prepared to implement some of these changes to support the promise of increased purpose, accountability and transparency, they could create a short-term risk of state-sanctioned greenwashing. In the long run, benefit corporations would not respond to the market needs they were created to address, which could render this corporate entity unsustainable.

APPENDICES

Appendix I: Overview of benefit corporation statutes

State	In effect	Frequency	Third-party standard	Filing with the secretary of state	Publication on website mandated	Deadline publication	Sanction for non-public reporting	Statute
Model: Benefit Corporation	X	Annual	Mandatory	Yes	Yes, if the company has a website	Not explicit	Benefit enforcement proceeding (BEP) (implicit)*	MODEL BENEFIT CORP. LEGIS
Arizona Benefit Corporation	Dec. 31, 2014	Annual	Mandatory	Yes, concurrently with SH	Yes, if the company has a website	Not explicit	BEP (implicit)*	ARIZ. REV. STAT. §§ 10-2401 – 10-2442 (LexisNexis 2016).
Arkansas Benefit Corporation	July 18, 2013	Annual	Mandatory	Yes, concurrently with SH (before due date of franchise tax), $70	Yes, if the company has a website	Not explicit	BEP (implicit)*	ARK. CODE ANN. §§ 4-36-101 – 401 (2016).
California Benefit Corporation	Jan. 1, 2012	Annual	Mandatory	No	Yes, if the company has a website	Not explicit	BEP (explicit)	CAL. CORP. CODE § 14600-14631 (Deering 2016).
Colorado Public Benefit Corporation	Apr. 1, 2014	Annual	Mandatory	No	Yes, if the company has a website	No (not even for shareholder)	None[1]	COLO. REV. STAT. §§ 7-101-501 – 101-509 (2016).
Connecticut Benefit Corporations	Oct. 1, 2014	Annual	Mandatory	No	Yes, if the company has a website	No	BEP (explicit)	CONN. GEN. STAT. ANN §§ 33-1350 – 33-1364 (West 2016).
Delaware Public Benefit Corporation	Aug. 1, 2013	At least biennial	Optional	No	Optional	No	None	DEL. CODE. ANN. tit. 8, §§ 361-368 (West 2016).

1. Does not create a benefit enforcement proceeding and only states conditions for derivative suits to enforce the obligation to balance stakeholder interests. *See* COLO. REV. STAT. §§ 7-101-501–09.

District of Columbia	May 1, 2013	Annual	Mandatory	Yes, with mayor, biennially	Yes, if the company has a website	Not explicit	BEP (implicit)*	D.C. Code Ann. §§ 29- 1301-01-1304-01 (West 2016).
Florida Benefit Corporation	July 1, 2014	Annual	Mandatory	No	Yes, if the company has a website	No	BEP (implicit)* No specific enforcement mechanism (only specific for shareholders)	FLA. STAT. ANN. §§ 607.601 – 607.613 (LexisNexis 2016).
Hawaii Sustainable Business Corporation	July 8, 2011	Annual	Mandatory	No	Yes, if the company has a website	No	None[2]	HAW. REV. STAT. ANN. §§ 420D-1–420D-13 (LexisNexis 2016) .
Illinois Benefit Corporation	Jan. 1, 2013	Annual	Mandatory	No	Yes, if the company has a website	No	BEP (implicit)*	805 ILL. COMP. STAT. §§ 40/1-40/5.01 (West 2016).
Idaho Benefit Corporation	July 1, 2015	Annual	Mandatory	No	Yes, if the company has a website	Not explicit	BP(implicit)*	IDAHO CODE ANN § 30-2001-2013 (West 2016).
Indiana Benefit Corporation	Jan 1, 2016	Annual	Mandatory	Yes, concurrently with SH, $10 to 15	Yes, if the company has a website	Not explicit	BEP (implicit)*	IND. CODE ANN. § 23-1.3-1-1 to 23-1.3-10-6 (LexisNexis 2016).
Kansas Public Benefit Corporation	July 1, 2017	Annual	Mandatory	No	Yes, if the company has a website	Not explicit	None	H.B. 2153
Kentucky Public Benefit Corporation	July 1, 2017	Annual	Optional	No	Optional	Not explicit	No	H.B. 35
Louisiana Benefit Corporation	Aug. 1, 2012	Annual	Mandatory	No	Yes, if the company has a website	Not explicit	BEP (implicit)*	LA. REV. STAT. ANN. §§ 12:1801–12.1832 (LexisNexi 2016).
Massachusetts Benefit Corporation	Dec. 1, 2012	Annual	Mandatory	Yes, with annual report, $75	Yes, if the company has a website	Not explicit	No right to hold itself out as benefit corporation BEP (implicit)*	MASS. ANN. LAWS ch. 156E, §§ 1–16 (LexisNexis 2016).
Maryland Benefit Corporation	Oct. 1, 2015	Annual	Mandatory	No	Yes, if the company has a website	Nothing explicit	None[3]	MD. CODE ANN., CORPS. & AS'NS §§ 5-6C-01 to 5-6C-08 (LexisNexis 2016).
Minnesota Public Benefit Corporation	Jan. 1, 2015	Annual	Mandatory for GBC Optional for SPC	Yes, $35, before April 1	Not required, state has database	Before April 1	Revocation of public benefit corporation status	MINN. STAT. ANN. §§ 304A.001 – 304A.301 (West 2016).

2. Does not create a benefit enforcement proceeding and only states conditions for derivative and direct suits to enforce corporate purposes. *See* HAW. REV. STAT. ANN. §§ 420D(1)–(13).

3. Neither creates benefit enforcement proceeding, nor mentions anything about which suit and which conditions exist. *See* MD. CODE ANN., CORPS. & AS'NS §§ 5-6C-01–08.

Montana Benefit Corporations	Oct. 1, 2015	Annual	Mandatory	No	Yes, if the company has a website	Not explicit	BEP (explicit)	MONT. CODE ANN. §§ 35-1-1401 – 35-1-1412 (2016).
Nebraska Benefit Corporation	July 18, 2014	Annual	Mandatory	Yes, concurrently with SH, fee of $25 ab 2017	Yes, if the company has a website	Not explicit	BEP (implicit)*	NEB. REV. STAT. ANN. §§ 21-402 – 21-414 (West 2016).
New Hampshire Benefit Corporation	Jan. 1, 2015	Annual	Mandatory	Yes, concurrently with SH, fee $35	Yes, if the company has a website	Not explicit	Administrative dissolution by SoS BEP (implicit)*	N.H. REV. STAT. ANN. §§ 293-C:1 – 293-C:13 (LexisNexis 2016).
Nevada Benefit Corporation	Jan. 1, 2014	Annual	Mandatory	No	Yes, if the company has a website	Not explicit	BEP (explicit)	NEV. REV. STAT. ANN. §§ 78B.010-78B.190 (LexisNexis 2016).
New Jersey Benefit Corporation	March 1, 2011	Annual	Mandatory	Yes, department of treasury, together with SH, $70	Yes, if the company has a website but there is no alternative	Not explicit	Department may forfeit status as benefit corporation if 2 years of non filing + BEP (implicit)	N.J. STAT. ANN. §§ 14a:18-1 -14a:8-11 (West 2016).
New York Benefit Corporation	Feb. 10, 2012	Annual	Mandatory	Yes, together with SH, $60	Yes, if the company has a website but there is no alternative	Not explicit	None[4]	N.Y. BUS. CORP. LAW §§ 1701–1709 (LexisNexis 2016).
Oregon Benefit Companies	Jan. 1, 2014	Annual	Mandatory	No	Choice between publishing on website and sending on request	Not explicit	BEP(implicit)[5]	OR. REV. STAT. ANN. §§ 60.750 – 60.770 (West 2016).
Pennsylvania Benefit Corporation	Jan. 1, 2013	Annual	Mandatory	Yes, concurrently with SH, $70	Yes, if the company has a website	Not explicit	BEP (implicit)	15 PA. STAT. AND CONS. STAT. ANN. §§ 3301-3331 (West 2016).
Rhode Island Benefit Corporation	Jan. 1, 2014	Annual	Mandatory	Yes, con-currently with share-holders, $10[6]	Yes, if the company has a website	Not explicit	Fine of $25 per year if 30 days late BEP (implicit)	R.I. GEN. LAWS §§ 7-5.3-1 – 7-5.3-13 (2016).
South Carolina Benefit Corporation	June 14, 2012	Annual	Mandatory	Yes, con-currently with SH, $10	Yes, if the company has a website	Not explicit	BEP(implicit)	S.C. CODE ANN. §§ 33-38-110 – 33-38-600 (2016).

4. Neither creates benefit enforcement proceeding, nor mentions anything about which suit and which conditions exist. *See* N.Y. BUS. CORP. LAW §§ 1701–09.

5. Does not create a benefit enforcement proceeding, but Section 60.766(1) of the Oregon Revised Statutes has the same effect as the definition of the benefit enforcement proceeding.

6. Sixty dollars combined with annual report.

Tennessee For-Profit Benefit Corporation	Jan. 1, 2016	Annual	Optional	No	Yes, if the company has a website	Not explicit	None[7]	TENN. CODE ANN. §§ 48-28-101 to 48-28-109 (2016)
Texas Public Benefit Corporation	Sept. 1, 2017	At least biennial	Optional	No	Optional	No	None	H.B. 3488
Utah Benefit Corporation	May 13, 2014	Annual	Mandatory	Yes, when filing annual report. Fee unknown.	Yes, if the company has a website	Not explicit	BEP (implicit)	UTAH CODE ANN. §§ 16-10b-101 – 16-10b-402 (LexisNexis 2016).
Vermont Benefit Corporation	July 1, 2011	Annual	Mandatory	No	Yes, if the company has a website	Not explicit	BEP(implicit)	VT. STAT. ANN tit. 11A, §§ 21.01–21.14 (2016).
Virginia Benefit Corporation	July 1, 2011	Annual	Mandatory	No	Yes, if the company has a website	Not explicit	BEP (implicit)	VA. CODE ANN. §§ 13.1-782 to 13.1-791 (West 2016).
West Virginia Benefit corporation	July 1, 2014	Annual	Mandatory	No	Yes, if the company has a website	Not explicit	BEP (explicit)	W. VA. CODE ANN. §§ 31F-1-101 to 31F-5-501 (LexisNexis 2016)

Appendix II: Data Oregon

a)Compliant benefit companies and their reports

	Company name- title of report	Number of employees	Certification	-Date of incorporation -Date of filing for benefit corporation status	Narrative description[8]	(A) Assess the extent to which the benefit company met or exceeded a third-party standard that the benefit company selected and identified in the benefit report.	(B) Describe the process and rationale the benefit company used to select or to change the third-party standard described in subparagraph (A) of this paragraph.
1	Equilibrium Capital Management, Inc. Benefit Company Report For 2014 Year	11-50	B Corporation	- 6/30/2011 - 12/3/2013	Yes	Yes B Impact Assessment	No[9]
2	Metropolitan Group, L.L.C. 2015 Annual Report	11-50	B Corporation	- before 1/1/2001[10] - 12/24/2013	Yes	Yes B Impact Assessment	No
3	Neil Kelly Co., Inc 2015 B Corp Narrative	201-500	B Corporation	- 6/22/1964 - 12/24/2013	Yes	No But Certified B Corporation	No
4	Green Girl Land Development Solutions LLC	1-10	No	- 12/26/2013 - 12/26/2013	Yes	Yes	Yes

7. Does not create a benefit enforcement proceeding and only states conditions for derivative suits to enforce balancing of stakeholder interests. *See* TENN. CODE ANN. §§ 48-28-101–09.

8. *See* Section 60.768(2)(a) of the Oregon Revised Statutes for the prescriptions regarding this narrative description.

9. Explains the meaning of the standard but not the rationale or the process behind the choice.

10. Precise incorporation date not available on secretary-of-state office's website.

	Green Girl Land Development Solutions LLC 2015 Benefit Report					B Impact Assessment[11]	
5	BestHq LLC 2015 Corporate Social Responsibility and Benefit Report	1-10	Green America	-12/31/2013 -12/31/2013	Yes	Yes Green America	Yes
6	Palace Industries, Inc. Section on website titled 'B Company'	11-50	B Corporation	-3/04/2002 -12/31/2013	Yes	No But Certified B Corporation	No
7	Canvas Dreams, LLC Sustainability Metrics[12]	1-10	B Corporation	-04/08/2005 -1/2/2014	Yes	No[13] But Certified B Corporation	Yes
8	Gladrags Sustainable Women's Health, LLC Annual Benefit Report 2015	1-10	B Corporation	-02/22/2011 -1/2/2014	Yes	Yes B Lab Impact Assessment	No
9	Freeroot Ventures Inc. 2015 Benefit Company Report	11-50	B Corporation	-2/18/2010 -1/2/2014	Yes	Yes B Lab Impact Assessment	Yes
10	Immix Law Group PC Immix Law Annual B Corp Report -2016	11-50	B Corporation	-3/22/2011 -1/2/2014	Yes	No But Certified B Corporation	No
11	Ingenuity Innovation Center, LLC 2015 Transparency Benefit Report	1-10	No	-11/13/2012 -1/2/2014	Yes	Yes B Lab Impact Assessment	No
12	Beau Delicious! International, LLC Oregon's First Benefit Company 2015 Report	51-200	B Corporation	-8/16/2005 -1/6/2014	Yes	No	No
13	Celilo Group Media, Inc. Benefit Company Report 2015	11-50	B Corporation	-06/05/2003 -1/17/2014	Yes	No[14] Use own formula[15] But Certified B Corporation	No
14	Henkels Law LLC Annual Benefit Company Report 2015-2016	Unknown	No	-04/03/2014 -04/03/2014	Yes	Yes B Impact Assessment[16]	Yes
15	Enso LLC 2015 Year End Benefit Report	Unknown	No	-02/03/2014 -06/19/2014	Yes	No	No
16	Tony's Chocolonely, Inc Tony's Chocolonely annual fair report 2014/2015	11-50	B Corporation	-07/17/2014 -07/17/2014	Yes	Global Reporting Initiative	

11. Literally calls B Lab the standard but shows a score on the B Impact Assessment.

12. The CEO of this company referred to the webpage as being their 2015 benefit report.

13. Note that this corporation is also a B Corporation and could have included the B Impact Assessment.

14. Note that this corporation is also a B Corporation and could have included the B Impact Assessment.

15. Total coupon redemptions x average transaction size.

16. The company also used the Oregon State Bar Sustainable Future Section, Partners in Sustainability, as a secondary standard but could not use it as a primary standard because the Managing Member of the firm served on the executive board of the Sustainable Futures Section. *See* OR. REV. STAT. ANN. § 60.750(6)(b)

17	Hopworks Urban Brewery LLC HUB Sustainability Report: 2014	51-200	B Corporation	-6/9/2006 -7/18-2014	Yes	No But Certified B Corporation	No
18	Fair Flies, LLC Annual Benefit Corp Statement	1-10	No	-11/12/2014 -11/12/2014		B Impact Assessment*[17]	No
19	Catalyst Law, LLC Annual Benefit Report	1-10	No	-11/17/2014 -11/17/2014	Yes	No	No

b)Data Oregon

–Benefit Reports

	Complied on their website	Complied by sending on request	Non-responsive	Responded no	Total
Total number	14	5	103	11	133
INC	4	2	17	1	24.00
LLC	10	2	86	9	107
PC	0	1	0	0	1
LTD	0	0	0	1	1

–Principal place of business

	OR	WA	ID	CA	Total
Number	129	1	1	2	133

–Website

	Websites	No websites	Total
Number	57	76	133
Number with benefit reports	19	0	19
Compliance rate	33.33%	0%	14%

17. Fair Flies, LLC, stated that they used the B Corp Handbook (Ryan Honeyman) as a guide and independent third-party standard. This book does not provide such a standard but does explain the B Impact Assessment. Thus, Fair Flies relied on an indirect source in explaining a valid third-party standard.

Appendix III Data Colorado
a)Complying Colorado public benefit corporations and their reports

Company name- title of report	Number of employees	Certification	-Date of incorporation -Date of filing for benefit corporation status	The ways in which the public benefit corporation promoted the public benefit identified in the articles of incorporation and the best interests of those materially affected by the corporation's conduct;	Any circumstances that have hindered the public benefit corporation's promotion of the identified public benefit and the best interests of those materially affected by the corporation's conduct	The process and rational for selecting or changing the third-party standard used to prepare the benefit report	An assessment of the overall social and environmental performance of the public benefit corporation against a third-party standard
Vention Resources, Inc., PBC PBC Annual Report	1-10	No	-7/8/2014 -7/8/2014	Yes	Yes	No	No
Jason Wiener, P.C., a Public Benefit Corporation 2015 Public Benefit Report	1-10	B Corporation	-1/12/2014 -8/10/2014	Yes	Yes	Yes	Yes

b)Data Colorado
–Benefit Reports

	Complied on website	Complied by sending on request	No report on website	Non responsive	Total
Number	1	1	7	10	19
Percentage	5%	5%	37%	53%	

–Principal place of business

	CO	TX	Total
Number	18	1	19

–Website

Website	Websites	No websites	Total
Number	10	9	17
Number with benefit reports	1	1	
Compliance rate	10%	11.11%	

Appendix IV Data Minnesota
–Benefit Reports

	Reports available online
Number	36
Compliant	36
Compliance percentage	100%

–Principal place of business

	Minnesota	Iowa
Number	35	1

–Website

	Websites	No websites	Total
Number	27	9	36
% with website	75%	25%	

Appendix V Data Delaware
a)Voluntary reporting public benefit corporations and their reports

	Company name-title of report	Number of employ-ees	Certification	-Date of incorporation -Date of filing for benefit corporation status	(1) The objectives the board of directors has established to promote such public benefit or public benefits and interests;	(2) The standards the board of directors has adopted to measure the corporation's progress in promoting such public benefit or public benefits and interests	(3) Objective factual information based on those standards regarding the corporation's success in meeting the objectives for promoting such public benefit or public benefits and interests	(4) An assessment of the corporation's success in meeting the objectives and promoting such public benefit or public benefits and interests
1	Alter Eco Americas PBC 2015 Full Circle Sustainability Impact Report	11-50	B Corporation Green America	- 4/19/2004 - 8/1/2013	Yes	Yes B Impact Assessment	Yes	Yes
2	Exemplar Companies, PBC 2013-2014 Exemplar's First Annual Benefit Report	11-50	No	- 4/13/2007 - 8/1/2013	Yes	Yes B Impact Assessment Own Key Performance Indicators[18]	Yes	Yes
3	Grassroots Capital Management Corp., PBC[19] Annual Benefit Report 2015	1-10	B Corporation	- 10/5/2007 - 8/1/2013	Yes	Yes B Impact Assessment	Yes	Yes
4	Plum PBC Mission report 2015	51-200	B Corporation	-12/18/'08 -8/1/2013	Yes	Yes B Impact Assessment	Yes	Yes
5	Raven + Lily PBC Community Give Back Impact For 2016	1-10	B Corporation	-8/1/2013 -8/1/2013	Yes	No But Certified B Corporation	Yes	No
6	Handup PBC Our Impact in 2016	1-10	No	-8/21/2013 -8/21/2013	Yes	No	No	Yes

18. Also used their own 'Key Performance Indicators,' because they are disappointed with the way B Lab evaluates their impact. They don't feel like their improvements are visible.
19. Expressly targeted at stakeholders.

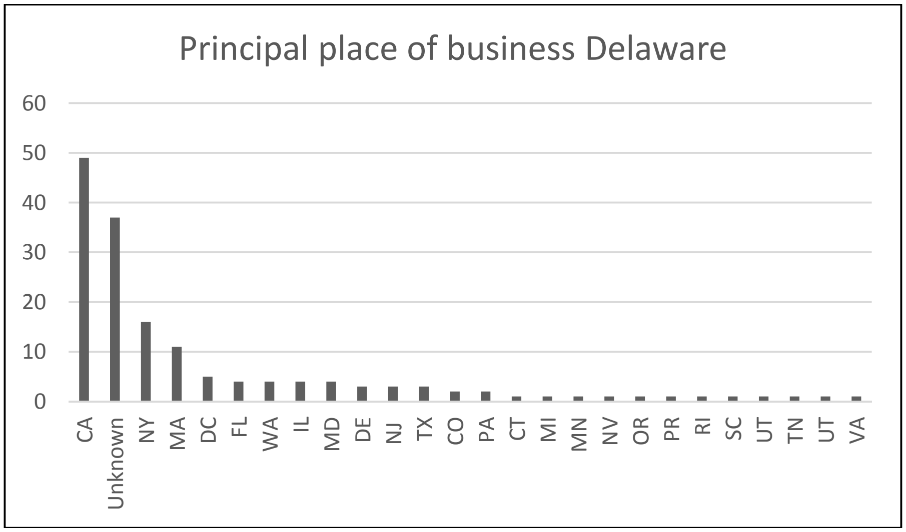
7	Global Uprising, PBC Benefit Corporation Report	11-50	B Corporation	-10/2/2013 -10/2/2013	Yes	No[20] But Certified B Corporation	Yes	Yes
8	Rescue Social Change Group, PBC Benefit Corporation Report 2016	51-200	B Corporation	-7/14/2014 -7/14/2014	Yes	Yes B Lab Impact Assessment	Yes	Yes
9	Potluck Energy, PBC. Benefit Corporation[21] 2014 Annual Report	1-10	No	-8/12/2014 -8/12/2014	Yes	No	Yes	Yes
10	Altschool, PBC 2016 Benefit Corporation Report	51-200	B Corporation	-12/27/2011 -10/8/2014	Yes	Yes B Lab Impact Assessment	Yes	Yes
11	EA Engineering, Science, and Technology, Inc. PBC 2014-2015 Corporate Social Responsibility Report and Public Benefit Corporation Statement	201-500	No	-9/11/1986 -12/12/'14	Yes	Yes, Global Reporting Initiative	Yes	Yes
12	Beanfields, PBC Beanfields 2015 BPC Statement	11-50	B Corporation Green America	-12/19/14 -12/19/14	No	No[22] But Certified B Corporation	Yes	No
13	Maps Public Benefit Corporation Biennial Special Purpose Review[23]	11-50	No	-12/19/14 -12/19/14	Yes	No	Yes	Yes

b)Data Delaware
—Benefit Reports

	Complied on their website	Complied by sending on request	Responded without sending	Non-responsive	Total
Number	12	1	43	105	161
% with benefit reports	7%	1%	27%	65%	

20. Note that this corporation is also a B Corporation and could have included the B Impact Assessment.
21. Using Benefit Corporation interchangeably with Public Benefit Corporation.
22. Note that this corporation is also a B Corporation and could have included the B Impact Assessment.
23. This review is a note in the Consolidated Financial Statements of the 100% shareholder of the PBC, a nonprofit.

–Principal place of business



-Website

	Websites	No websites	Total
Number	114	47	161
Number with reports	13	0	
Reporting rate	11.40%		