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"Profit, People, Planet" Perverted: Holding Benefit Corporations Accountable to Intended Beneficiaries

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"PROFIT, PEOPLE, PLANET" PERVERTED: HOLDING BENEFIT CORPORATIONS ACCOUNTABLE TO INTENDED BENEFICIARIES

Abstract: For-profit social entrepreneurship is a steadily growing movement. As part of this movement, numerous states have enacted legislation authorizing the incorporation of benefit corporations, a new for-profit corporate form. In addition to generating profit for shareholders, benefit corporations must "create" a "public benefit." The mandate that a for-profit corporation pursue a humanitarian cause in addition to generating profit is a significant departure from shareholder primacy: the maxim that the sole purpose of a corporation is to generate return on investment for its shareholders. Although this legislation is a necessary and progressive evolution in corporate law, the current benefit corporation form lacks meaningful accountability and oversight mechanisms. It does little to deter bad actors from taking advantage of socially conscious consumers willing to pay a premium for ethically sourced goods and services by incorporating and operating sham benefit corporations. This Note argues for amending benefit corporation legislation to allow state attorneys general to oversee the creation of public benefits. An oversight and enforcement mechanism would root out and deter bad actors from perverting the purpose of the benefit corporation form, and it would hold benefit corporations accountable to their intended beneficiaries.

INTRODUCTION

In September 2015, Kickstarter, a for-profit crowdfunding website, reincorporated from a traditional corporation to a benefit corporation.[1] Kickstarter provides entrepreneurs with a platform to raise money from investors around the world.[2] The company's charter states that "[w]e measure our success as a

[1] *See* Mike Isaac & David Gelles, *Kickstarter Focuses Its Mission on Altruism Over Profit*, N.Y. TIMES (Sept. 20, 2015), http://www.nytimes.com/2015/09/21/technology/kickstarters-altruistic-vision-profits-as-the-means-not-the-mission.html [https://perma.cc/HP9X-ZTXD] (discussing Kickstarter's reincorporation as a benefit corporation); Yancey Strickler et al., *Kickstarter Is Now a Benefit Corporation*, KICKSTARTER BLOG (Sept. 21, 2015), https://www.kickstarter.com/blog/kickstarter-is-now-a-benefit-corporation [https://perma.cc/B3UV-5YRW] (announcing Kickstarter's reincorporation as a Delaware public benefit corporation and its pledge to donate 5% of post-tax profits to organizations promoting the arts and combating inequality). *See generally* William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 819 (2012) (describing the difference between benefit corporations and other corporations).

[2] *See About*, KICKSTARTER, https://www.kickstarter.com/about [https://perma.cc/CU76-SKC5] (describing how Kickstarter works).

company by how well we achieve [our] mission, not by the size of our profits."[3] By reincorporating as a benefit corporations, Kickstarter's founders sought to "reject[] business as usual, and the pursuit of profit above all."[4]

Echoing the tone of Kickstarter's founders, beginning with Maryland in 2010, more than half the states enacted legislation authorizing the incorporation of a new form of for-profit business corporation known generally as a benefit corporation.[5] Benefit corporations exist not only to maximize shareholder profit but also to pursue and create benefits for public, non-corporate stakeholders—intended beneficiaries.[6] Specifically, a benefit corporation must include in its certificate of incorporation that its purpose is to "create" a "gen-

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[3] *Charter*, KICKSTARTER, https://www.kickstarter.com/charter [https://perma.cc/8AQZ-YL4E] (alteration in original). The company's mission is "to help bring creative projects to life, and [to] connect people around creative projects and the creative process." *Id.* (alteration in original).

[4] Strickler et al., *supra* note 1 (alteration in original).

[5] *See* Steven Munch, *Improving the Benefit Corporation: How Traditional Governance Mechanisms Can Enhance the Innovative New Business Form*, 7 NW. J. L. & SOC. POL'Y 170, 171 (2012) (noting that Maryland was the first state to pass benefit corporation legislation); J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345, 348 (2014) [hereinafter Murray, *Social Enterprise Innovation*] (noting that approximately half the states have passed benefit corporation legislation); *State by State Status of Legislation*, B CORP., http://benefitcorp.net/policymakers/state-by-state-status [https://perma.cc/HK9G-C3HP] (collecting state-by-state information on benefit corporation legislation, either passed or pending). States use different nomenclature for their benefit corporations, but the basic legislation itself is generally quite similar. *See, e.g.*, DEL. CODE ANN. tit. 8, § 361 (2016) (naming Delaware's corporate form a "public benefit corporation"); HAW. REV. STAT. § 420D-2 (2011), http://www.capitol.hawaii.gov/hrscurrent/Vol08_Ch0401-0429/HRS0420D/HRS_0420D-0002.htm [https://perma.cc/8H4W-7226].
(naming Hawaii's benefit corporate form a "sustainable business corporation"); MASS. GEN. LAWS ch. 156E, § 1 (2014) (naming the Massachusetts version simply a "[b]enefit [c]orporation"). In addition to their benefit corporation statutes, California, Florida, and Washington also enacted statutes authorizing the incorporation of "social purpose corporations" or "flexible purpose corporations," which are similar to benefit corporations but are not required to pursue a "general" public benefit, are not required to consider the various stakeholders listed in the benefit corporation statute, and are not required to be assessed against a third-party standard. *See* J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 24 (2012) [hereinafter Murray, *Choose Your Own Master*] (describing the differences between various social purpose business entities); *cf.* YVON CHOUINARD, LET MY PEOPLE GO SURFING: THE EDUCATION OF A RELUCTANT BUSINESSMAN 3 (2006) ("[B]usiness can produce food, cure disease, control population, employ people, and generally enrich our lives. And it can do these good things and make a profit, without losing its soul.").

[6] Clark & Babson, *supra* note 1, at 838–39 (explaining how the benefit corporation form bucks the "paradigm of shareholder primacy"). At the beginning of the nineteenth century, corporations were formed by special acts of state legislatures, or in rare instances by Congress, and were chartered only for specific, usually public purposes. LINDA O. SMIDDY, SODERQUIST ON CORPORATE LAW AND PRACTICE § 1:2.1 (4th ed. 2012). Benefit corporations harken back to the earlier era in corporate law because the statutes require that these corporations are incorporated, at least in part, for a specific, generally public purpose. Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269, 272, 276–77 (2013) (reflecting on early corporate law and noting that benefit corporations "represent a return to early practices as well as a seeming ultra-modern innovation in corporate form").

eral public benefit."[7] Benefit corporations may also identify the creation of "specific public benefits."[8]

The benefit corporation was designed around the proposition that for-profit entities can and should be used to make progressive social and environmental contributions.[9] Indeed, corporations can wield immense power and should be encouraged to act responsibly and improve society, instead of simply operating to enlarge their bottom lines.[10] To deter passivity in this lofty mission, however, benefit corporation legislation must be written in a way that encourages and sustains humanitarian activity, and include mechanisms to hold accountable those corporations that fail to follow through on their promises.[11]

Holding corporations accountable, in the normal model, generally occurs in two ways: (1) if the entity is a for-profit corporation, directors are brought to task through a derivative suit commenced by the shareholders; and (2) if the entity is a nonprofit organization, directors or trustees are held accountable

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[7] MODEL BENEFIT CORP. LEGISLATION § 201(a) (BENEFIT CORP. 2014), http://benefitcorp.net/sites/default/files/documents/Model_Benefit_Corp_Legislation.pdf [https://perma.cc/YL9E-AWZE]; *see* J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 549 (2016) (calling this provision the "centerpiece" of benefit corporation legislation). A certificate of incorporation is a document issued by a state authority that grants a corporation its legal existence, the right to function as a corporation, and sets forth the basic terms of the corporation, including the number and classes of shares and the purpose of the corporation. *Articles of Incorporation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

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

[9] *See Benefit Corporation White Paper*, 68 BUS. LAW. 1083, 1083–84 (2013) (explaining that benefit corporations allow for-profit corporate entities to pursue humanitarian causes without incurring liability to shareholders); Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007, 1009–10 (2013) (describing the benefit corporation form against the backdrop of shareholder primacy and noting that benefit corporations have an "ambitious" mission); *see also* Kennan El Khatib, *The Harms of the Benefit Corporation*, 65 AM. U. L. REV. 151, 156 (2015) (stating that the benefit corporation "broke new ground" by allowing directors to take into account non-financial stakeholders); Munch, *supra* note 5, at 171, 175 (calling the benefit corporation the "most ascendant social enterprise innovation today" and noting that the benefit corporation helped socially entrepreneurs "escape the for-profit or nonprofit binary").

[10] *See* KENT GREENFIELD, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS & PROGRESSIVE POSSIBILITIES 124, 125 (2006) (proposing a shift in corporate law to promote the use of corporations as a tool for progressive change); Melvin Aron Eisenberg, *Corporate Conduct That Does Not Maximize Shareholder Gain: Legal Conduct, Ethical Conduct, the Penumbra Effect, Reciprocity, the Prisoner's Dilemma, Sheep's Clothing, Social Conduct, and Disclosure*, 28 STETSON L. REV. 1, 19 (1998) (arguing that nonmaximizing corporate activities should nonetheless be promoted because such activities can still lead to profit); *see also* Dana Brakman Reiser, *Theorizing Forms for Social Enterprise*, 62 EMORY L.J. 681, 683–84 (2013) (noting that the benefit corporation movement is based on the idea that corporations can make social change, but arguing that "[f]or a specialized legal form to succeed, it must permit social entrepreneurs to embrace this different ideal"). *See generally* Kent Greenfield & Gordon Smith, *Debate: Saving the World with Corporate Law?*, 57 EMORY L.J. 947 (2007) (debating whether corporate law can be used as a tool for social progress).

[11] *See* Mitch Nass, Note, *The Viability of Benefit Corporations: An Argument for Greater Transparency and Accountability*, 39 J. CORP. L. 875, 881 (2014) (arguing that "if benefit corporations are to become a viable corporate form . . . it will be the third-party transparency requirement coupled with stringent enforcement mechanisms that will drive this success").

through legal actions brought by a state attorney general.[12] Under the current benefit corporation model, however, intended beneficiaries are explicitly denied standing to enforce the creation of a public benefit, both in the courts and in benefit corporations' internal processes.[13] In addition, as will be discussed, even shareholders themselves have limited remedies to enforce the creation of a public benefit.[14] Because benefit corporations are for-profit entities and do not receive any unique tax advantages, it is unlikely that, under the current model, state attorneys general would have any power to intervene in a benefit corporation's internal affairs.[15]

Accordingly, this Note argues that although the benefit corporation movement represents a progressive evolution in corporate law, the current form lacks accountability and enforcement mechanisms necessary to make it a

[12] *See infra* notes 109–116 and accompanying text (describing state attorneys general's mandate to hold nonprofit organizations accountable to the public).

[13] *See, e.g.*, CAL. CORP. CODE § 14622(d) (West 2012) ("An officer shall not have a fiduciary duty to a person that is a beneficiary of the general or specific public benefit purposes of a benefit corporation arising from the status of the person as a beneficiary."); DEL. CODE ANN. tit. 8, § 365(b) (2016) (denying standing to intended beneficiaries and stating that directors of benefit corporations do not owe a fiduciary duty to "any person on account of any interest of such person in the public benefit or public benefits"); MASS. GEN. LAWS ch. 156E, § 10(e) (same); 15 PA. CONS. STAT. § 3321(d) (2014) (denying standing to intended beneficiaries); VT. STAT. ANN. tit. 11A, § 21.09(e) (2016) (same); MODEL BENEFIT CORP. LEGISLATION § 301(d) (same); Clark & Babson, *supra* note 1, at 850 (discussing the fact that benefit corporation legislation denies standing to intended beneficiaries); Gil Lan, *Benefit Corporations: A Persisting and Heightened Conflict for Directors*, 21 J.L. BUS. & ETH. 113, 116 (2015) (same). Standing is a jurisdictional matter that pertains to the power of a court to hear and decide an issue. Warth v. Seldin, 422 U.S. 490, 498 (1975). The requirement of standing guarantees that every claimant "is a proper party to invoke judicial resolution of the dispute." *Id.* at 518. The general requirement for Article III standing under the U.S. Constitution is that the moving party has personally suffered an "injury in fact," which is causally related to the litigated issue. *See, e.g.*, Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016) (setting forth that to establish standing, a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision"); Lujan v. Defenders of Wildlife, 504 U.S. 555, 570–71 (1992) (holding that plaintiffs did not suffer an "injury in fact" in suit brought by environmental groups alleging that federally-funded activities harmed certain species).

[14] *See infra* notes 71–97 and accompanying text (discussing the accountability mechanisms in benefit corporation legislation).

[15] Dana Brakman Reiser, *Regulating Social Enterprise*, 14 U.C. DAVIS BUS. L.J. 231, 240 (2014) (arguing that "investor-only accountability" in benefit corporation legislation is "suboptimal"); Nass, *supra* note 11, at 886 (noting the limited availability of enforcement mechanisms outside the purview of shareholders); *FAQ*, BENEFIT CORP., http://benefitcorp.net/faq [https://perma.cc/J6YK-GR47] [hereinafter *Benefit Corp FAQ's*] (noting that benefit corporations are taxed as C or S corps). This is in contrast to nonprofit charitable organizations, the missions of which can be enforced by state attorneys general, either by statutory or common law power. *See, e.g.*, CAL. CORP. CODE § 5250 (West 1980) (providing standing to attorney general to initiate suit for enforcement of the activities of charitable trusts); MICH. COMP. LAWS ANN. § 14.251(1) (West 2016) (same); N.Y. NOT-FOR-PROFIT CORP. LAW § 112(a) (McKinney 2016) (same); Joshua B. Nix, *The Things People Do When No One Is Looking: An Argument for the Expansion of Standing in the Charitable Sector*, 14 U. MIAMI BUS. L. REV. 147, 167 (2005) (stating that state attorneys general have standing to oversee nonprofits).

worthwhile contribution to the law.[16] Part I provides an overview of the socially conscious consumer and investor trend, the resultant introduction of benefit corporation legislation, and explores the concept of "greenwashing."[17] Part II discusses the benefit corporation within broader corporate law, introduces the enforcement and accountability mechanisms in the current benefit corporation form, and compares these mechanisms to the law governing nonprofit organizations.[18] Part III argues that the existing legislative framework fails to adequately protect the interests of intended beneficiaries, and advocates for the addition of state attorney general oversight modeled in part after the United Kingdom's Community Interest Company.[19]

I. THE BENEFIT CORPORATION MOVEMENT

The benefit corporation developed within an environment of public distrust of large corporations and a rejection of shareholder primacy by entrepreneurs and investors.[20] This Part outlines the socially conscious consumer and investor trend and the introduction of benefit corporation legislation.[21] Section A discusses the conflict between shareholder primacy and corporate social responsibility and provides an overview of the benefit corporation movement.[22] Section B explores the issue of "greenwashing" in the benefit corporation context.[23]

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[16] *See infra* notes 71–97, 133–174 and accompanying text.

[17] *See infra* notes 20–53 and accompanying text.

[18] *See infra* notes 54–128 and accompanying text.

[19] *See infra* notes 133–174 and accompanying text.

[20] *See* Alissa Mickels, *Beyond Corporate Social Responsibility: Reconciling the Ideals of a For-Benefit Corporation with Director Fiduciary Duties in the U.S. and Europe*, 32 HASTINGS INT'L & COMP. L. REV. 271, 272 (2009) (noting that "maximization of monetary wealth for enterprise owners as the utmost goal, has widely been criticized as a practice fostering such things as global warming, human rights abuse and labor violations"); Murray, *Choose Your Own Master*, *supra* note 5, at 3 (describing the fact that in recent years, stories of corporate wrong-doing have been commonplace); Mark J. Roe, *The Derivatives Market's Payment Priorities as Financial Crisis Accelerator*, 63 STAN. L. REV. 539, 541 (2011) (discussing the role that AIG, Bear Stearns, and Lehman Brothers played in causing the financial crisis of 2008); Frank Newport, *Americans Similarly Dissatisfied with Corporations, Gov't*, GALLUP (Jan. 17, 2013), http://www.gallup.com/poll/159875/americans-similarly-dissatisfied-corporations-gov.aspx [https://perma.cc/74X7-BLQ3] (finding that "[m]ore than 60% of Americans are dissatisfied with the size and power or influence of major corporations").

[21] *See infra* notes 24–53 and accompanying text.

[22] *See infra* notes 24–40 and accompanying text.

[23] *See infra* notes 41–53 and accompanying text.

A. Can Corporations Be Humanitarians? Rethinking Corporate Purpose and the Development of the Benefit Corporation

Corporate purpose is without a doubt the most salient distinction between benefit corporations and traditional corporations.[24] For much of corporate law's history, a blunt dichotomy existed between for-profit and nonprofit entities.[25] This was due in part to over-application of the Michigan Supreme Court's 1919 holding in *Dodge v. Ford Motor Co.*, where, in dictum, the court famously wrote that for-profit corporations are organized and operated exclusively for the benefit of their shareholders and directors must ensure that their actions put shareholder profit ahead of other competing interests.[26] This is regarded as the shareholder primacy theory of corporate law and it has dominated discussions of corporate law for most of the past century.[27] Thus, prior to

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[24] Frederick Alexander, *Delaware Public Benefit Corporations: Widening the Fiduciary Aperture to Broaden the Corporate Mission*, 29 J. APPLIED CORP. FIN. 66, 68 (2016); *see* Johnson, *supra* note 6, at 282–93 (discussing corporate purpose and the benefit corporation's unique mission).

[25] *See* Munch, *supra* note 5, at 175 (describing how the benefit corporation provided entrepreneurs with a different option, as opposed to the conventional choice between for-profit and nonprofit entities); J.P. MORGAN GLOBAL RESEARCH, IMPACT INVESTMENTS: AN EMERGING ASSET CLASS 5 (2010), http://www.ita.doc.gov/td/finance/publications/JPMorgan%20II%20Report.pdf [https://perma.cc/M6ZL-NJEK] [hereinafter J.P. MORGAN GLOBAL RESEARCH] (explaining that in years past, investors faced a "binary" choice between investing for profit and donating to charity). *But see* Kent Greenfield, *A Skeptic's View of Benefit Corporations*, 1 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 17, 18 (2014) (arguing that the current benefit corporation form does not "add much" to corporate law).

[26] 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."); *see* William T. Allen & Leo E. Strine, Jr., *When the Existing Economic Order Deserves a Champion: The Enduring Relevance of Martin Lipton's Vision of the Corporate Law*, 60 BUS. LAW. 1383, 1385 n.7 (2005) (noting that the *Dodge* decision "was atavistic even at its date of publication").

[27] *See, e.g.*, LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 4, 11, 25–27 (2012) (discussing and arguing against shareholder primacy); Milton Friedman, Opinion, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at A17 (arguing that the only reason corporations exist is to maximize shareholder value). *But see generally* Martin Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101 (1979) (noting that corporate law allows directors to take into account the interests of all affected constituencies). The debate over shareholder primacy dates back to at least the early 1930s and the famous Berle-Dodd debate captured in the *Harvard Law Review*. *See* C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77, 78–79 (2002) (stating that the Berle-Dodd debate was "the first clear debate over corporate social responsibility"). *Compare* A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931) (arguing "that all powers granted to a corporation or to the management of a corporation . . . are necessarily and at all times exercisable only for the ratable benefit of all the shareholders"), *with* E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148, 1156 (1932) (disputing the notion that corporations exist purely for profit and arguing that corporate managers could actually increase profits by focusing on other constituencies, thereby garnering public goodwill). In 2010, the Delaware Chancery Court reiterated the idea of shareholder primacy in *eBay Domestic Holdings, Inc. v. Newmark*. *See* 16 A.3d 1, 34 (Del. Ch. 2010). In that case, the court held that Craigslist, a for-profit Delaware corporation, could not enact a number of defensive measures designed to restrict the influence of eBay, a

the benefit corporation movement, there was trepidation that "the 'special attributes' of businesses that pursued both financial and social missions were 'likely to be fragile and easy to disrupt or destroy'" in large, particularly public corporations.[28] This is because shareholder primacy rejects the proposition that corporate directors can divert revenue to purposes other than creating monetary gain for shareholders.[29]

The conflict between social entrepreneurship and shareholder primacy was anecdotally demonstrated when, in 2000, the conglomerate Unilever acquired Ben & Jerry's, a quintessential environmentally conscious business.[30] Some commentators, including the founders of Ben & Jerry's themselves, argued that corporate law required the board of directors to accept an offer to sell the company because to do otherwise would result in shareholder liability.[31]

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minority stockholder. *Id.* at 6. The court noted that Craigslist "largely operates its business as a community service" and "does not expend any great effort seeking to maximize its profits." *Id.* at 7–8. The court further stated that directors of a for-profit Delaware corporation could not implement a business strategy that "openly eschews stockholder wealth maximization—at least not consistently with the directors' fiduciary duties under Delaware law." *Id.* at 35. Despite the court's strong language about shareholder primacy, a colorable argument could be made that the case should be constrained to its somewhat unique minority shareholder oppression fact pattern. *See* J. Haskell Murray, *Defending Patagonia: Mergers and Acquisitions with Benefit Corporations*, 9 HASTINGS BUS. L.J. 485, 493 (2013) (noting that academics have criticized *eBay* for this reason).

[28] Antony Page & Robert A. Katz, *Freezing Out Ben & Jerry: Corporate Law and the Sale of a Social Enterprise Icon*, 35 VT. L. REV. 211, 231 (2010) (quoting James E. Austin & Herman B. Leonard, *Can the Virtuous Mouse and the Wealthy Elephant Live Happily Ever After?*, 51 CAL. MGMT. REV. 77, 79 (2008)); *see also* J. William Callison, *Putting New Sheets on a Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, the Dangers Created, and Suggestions for Change*, 2 AM. U. BUS. L. REV. 85, 102–03 (2012) (arguing that the benefit corporation will be an unlikely choice for large corporations because all of the shareholders would have to choose to adopt a singular corporate mission, aside from the production of profit).

[29] *See Dodge*, 170 N.W. at 684 ("The discretion of directors is to be exercised in the choice of means to attain [shareholder profit], and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.") (alteration in original).

[30] *See* Page & Katz, *supra* note 28, at 230 (discussing the events leading up to and during Unilever's acquisition of Ben & Jerry's); April Dembosky, *Protecting Companies That Mix Profitability, Values*, NAT'L PUB. RADIO (Mar. 9, 2010, 12:00 AM), www.npr.org/templates/story/story.php?storyId=124468487 [https://perma.cc/SZ3Z-YDLQ] (stating that the sale of Ben & Jerry's "helped set the stage for today's young, idealistic companies").

[31] *See, e.g.*, Page & Katz, *supra* note 28, at 229 (noting that Ben Cohen, one of the founders of Ben & Jerry's, is quoted as saying that the board did not want to sell). The assertion that corporate law would require a sale of a company to the highest bidder in order to avoid a shareholder derivative suit is true only in very limited circumstances. *See* J. Haskell Murray & Edward I. Hwang, *Purpose with Profit: Governance, Enforcement, Capital-Raising and Capital-Locking in Low-Profit Limited Liability Companies*, 66 U. MIAMI L. REV. 1, 34 (2011) (noting that courts will decline to challenge the majority of directors' decisions); Page & Katz, *supra* note 28, at 232 (same). Absent evidence of some corporate perversion, courts will defer to the business judgment of corporate directors and will not disturb a business decision unless there is no rational basis upon which it could have been made. *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (enumerating the business judgment rule, which is the "presumption that in making a business decision the directors of a corporation acted on an informed basis,

Proponents of the benefit corporation sought to quell the fears of social entrepreneurs by disrupting the traditional for-profit, non-profit binary and using for-profit entities as tools for betterment of the public good.[32]

In addition to a socially conscious sentiment from entrepreneurs, the development of the benefit corporation may also be the result of an increase in socially conscious consumers and investors.[33] A 2015 study found that 66% of consumers surveyed were willing to pay more for products and services purchased from companies committed to positive social and environmental impact, up from

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in good faith and in the honest belief that the action taken was in the best interests of the company"); Shlensky v. Wrigley, 237 N.E.2d 776, 780 (Ill. App. Ct. 1968) (holding that whether "the decision of the directors was a correct one" would be "beyond [the court's] jurisdiction and ability") (alteration in original). *But see* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (finding that when it becomes apparent that the sale of a corporation is inevitable, the "directors' role change[s] from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders") (alteration in original). After the sale of Ben & Jerry's to Unilever, the conglomerate agreed to continue Ben & Jerry's commitment to social causes by donating 7.5% of Ben & Jerry's profits to a charitable foundation and agreed not to cut jobs or alter the production process. Constance L. Hays, *Ben & Jerry's to Unilever, with Attitude*, N.Y. TIMES (Apr. 13, 2000), http://www.nytimes.com/2000/04/13/business/ben-jerry-s-to-unilever-with-attitude.html?%20src=pm [https://perma.cc/B27J-5A22]. Unlike Ben & Jerry's, however, "other mission-driven companies may not have the same bargaining power to protect their own businesses." *See* Clark & Babson, *supra* note 1, at 836 (arguing that benefit corporations' missions may be destroyed or discouraged after acquisitions by large corporations); *see also* Thomas Lee, *Plum Organics' Quest to Do Good Poses Legal Risk to Campbell Soup*, SFGATE (Nov. 10, 2014, 11:56 AM), http://www.sfgate.com/green/article/Plum-Organics-quest-to-do-good-poses-legal-5882197.php [https://perma.cc/5ULT-7E46] (discussing Plum Organics' decision to reincorporate as a public benefit corporation after it was acquired by Campbell Soup Co. and Campbell's approval of the decision).

[32] *See* Khatib, *supra* note 9, at 151 (arguing that the benefit corporation was created "to quell the fears of entrepreneurs pursuing social and environmental objectives and profit"); Munch, *supra* note 5, at 170 (describing the emergence of a new type of entrepreneur that wants to produce positive social impact in addition to profit); Antony Page & Robert A. Katz, *Is Social Enterprise the New Corporate Social Responsibility?*, 34 SEATTLE U. L. REV. 1351, 1361 (2011) (noting that "proponents of social enterprise seek to promote and facilitate social enterprise formation through business organizations law"); Reiser, *supra* note 10, at 683–84 (describing entrepreneurs' "desire to blend their profit-making and social missions in a single entity").

[33] *See* Clark & Babson, *supra* note 1, at 819–21 (describing the increasing consumer demand for socially responsible companies and the products they produce and sell); Thomas J. White III, *Benefit Corporations: Increased Oversight Through Creation of the Benefit Corporation Commission*, 41 J. LEGIS. 329, 329–30 (2015) (noting that consumers have become more interested in production processes rather than the products itself, corporations have "adjusted in an effort to match the increased demand in social responsibility," and venture capitalist investors have started to take an interest in these companies). This is not entirely a new phenomenon. *See* LAWRENCE B. GLICKMAN, BUYING POWER: A HISTORY OF CONSUMER ACTIVISM IN AMERICA 1 (2009) (noting that throughout American history, consumers "have engaged in an almost continuous series of boycotts, demands for leisure and recreation, campaigns for access to the benefits of consumer society, and efforts to promote safe and ethical consumption"). Consumer activism waned but then regained popularity in the latter part of the 1980s and 1990s, continuing into today. *Id.* at 305. In particular, the "tendency toward political consumerism has accelerated" post-9/11. *Id.*

55% in 2014 and 50% in 2013.[34] The rise in socially conscious consumers has also led to significant investment in socially conscious businesses.[35] A 2010 report from J.P. Morgan Chase & Co. concluded that an increasing number of investors have discarded the choice between investing for profit and donating to charity.[36] In 2008, the Silicon Valley venture capital firm, Kleiner Perkins Caufield & Byers, announced that it was launching a "Green Growth Fund," focusing on investments in companies pursuing "green" ventures.[37]

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[34] *Green Generation: Millennials Say Sustainability Is a Shopping Priority*, NIELSON (Nov. 11, 2015), http://www.nielsen.com/us/en/insights/news/2015/green-generation-millennials-say-sustainability-is-a-shopping-priority.html [https://perma.cc/SDG9-TE98] [hereinafter NIELSON]. Nielson's Senior Vice President of Public Development & Sustainability stated: "Brands that establish a reputation for environmental stewardship among today's youngest consumers have an opportunity to not only grow market share but build loyalty among the power-spending Millennials of tomorrow, too." *Id.* In addition, an increasingly negative public perception of large corporations may have contributed to the rise of the benefit corporation. *See* Callison, *supra* note 28, at 89–91 (describing the social enterprise movement's push for new legislation); Murray, *Choose Your Own Master*, *supra* note 5, at 3–4 (discussing the rise of "social enterprise" in the aftermath of a multitude of corporate scandals); Susan Holberg & Mark Schmitt, *The Overpaid CEO*, DEMOCRACY J. (2014), http://democracyjournal.org/magazine/34/the-overpaid-ceo/2/?nomobile=1 [https://perma.cc/6QN8-QFWE] (discussing the controversy surrounding executive compensation and citing the benefit corporation form as recognizing that there are corporate stakeholders beyond shareholders). During the past few decades, accounts of corporations that caused economic, social, and environmental destruction in pursuit of profit have been plastered on the front pages of newspapers around the world. *See* Janine S. Hiller, *The Benefit Corporation and Corporate Social Responsibility*, 118 J. BUS. ETHICS 287, 287 (2013) ("In the wake of the most recent financial crisis, corporations have been criticized as being self-interested and unmindful of their relationship to society."); Murray, *Choose Your Own Master*, *supra* note 5, at 3–4 (discussing recent corporate scandals).

[35] *See* Clark & Babson, *supra* note 1, at 819–21 (describing the socially conscious consumer trend); Nass, *supra* note 11, at 876–77 (describing the rise in socially conscious consumers and investors); William H. Clark, Jr. et al., *The Need and Rationale for the Benefit Corporation: Why It Is the Legal Form That Best Addresses the Needs of Social Entrepreneurs, Investors, and Ultimately, the Public*, BENEFIT CORP. 2, http://benefitcorp.net/policymakers/benefit-corporation-white-paper [https://perma.cc/K9BC-ENRW] (same); *cf.* Janet E. Kerr, *Sustainability Meets Profitability: The Convenient Truth of How the Business Judgment Rule Protects a Board's Decision to Engage in Social Entrepreneurship*, 29 CARDOZO L. REV. 623, 624 (2007) (noting that the social entrepreneurship movement "is gaining respect among the younger generation of tomorrow's tech and business leaders as well as with long existing, publicly-held corporations").

[36] J.P. MORGAN GLOBAL RESEARCH, *supra* note 25, at 5; *see* Tom Zeller, Jr., *Can Business Do the Job All by Itself?*, N.Y. TIMES (Mar. 28, 2010), http://www.nytimes.com/2010/03/29/business/energy-environment/29green.html [https://perma.cc/K8H4-KTZK] (noting that investors are increasingly recognizing that "doing good . . . also enhance[s] shareholder value") (alteration in original). Starting in 2011, Forbes began publishing the "Impact 30," an annual list of prominent global socially-conscious entrepreneurs. *See* Robert T. Esposito, *The Social Enterprise Revolution in Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for the Benefit Corporation*, 4 WM. & MARY BUS. L. REV. 639, 644 (2013) (describing the Impact 30); *Impact 30*, FORBES, http://www.forbes.com/impact-30/list.html [https://perma.cc/Q8BP-T2HR].

[37] *See* Rebecca Buckman, *Kleiner Fund Will Target 'Green' Ventures*, WALL STREET J. (May 1, 2008, 12:01 AM), http://www.wsj.com/articles/SB120961269993458707 [https://perma.cc/XE2Y-X7HD] (describing the "Green Growth Fund"); Martin LeMonica, *Kleiner Perkins Launces $500 Million Green Growth Fund*, CNET (May 1, 2008, 8:01 AM), https://www.cnet.com/news/kleiner-perkins-launches-500-million-green-growth-fund/ [https://perma.cc/6UXD-FYX3] (same). For further

The growth in consumers' commitment to buying ethically and environmentally sourced goods has also led to the creation of B Lab, a private certification organization, which verifies socially and environmentally conscious businesses.[38] Jay Coen Gilbert, the co-founder of B Lab, has advocated for a "triple bottom-line approach" to corporate management: "profit, people and planet," which encourages corporate directors to weigh human and environmental costs together with profit building in their decision making.[39] B Lab certification is a heuristic for consumers, but it is also a key marketing tool for merchants targeting socially conscious consumers and investors.[40]

illustration, the private equity firm, Bain Capital, introduced a social impact investment platform, which "focus[es] on 'double bottom line' investments" that seek return on investment in addition to enhancing downtrodden communities and "improving quality of life." *Former Massachusetts Governor Deval L. Patrick Joins Bain Capital to Launch New Business Focused on Investments with Significant Social Impact*, BAIN CAPITAL (Apr. 14, 2015), https://www.baincapital.com/news/former-massachusetts-governor-deval-l-patrick-joins-bain-capital-launch-new-business-focused [https://perma.cc/M2HS-QVY7] (alteration in original). In the past, Bain Capital has been targeted for being motivated only by profit, lacking regard for the human consequences of its corporate takeovers. Sabrina Siddiqui, *Mitt Romney, Bain Capital Targeted Over GST Steel Plant Closure in New Priorities USA Action Ad*, HUFFINGTON POST (Aug. 7, 2012, 6:01 AM), http://www.huffingtonpost.com/2012/08/07/mitt-romney-bain-capital-gst-steel-plant-closure_n_1749296.html [https://perma.cc/QP7N-6GYF].

[38] *About B Lab*, B CORP., https://www.bcorporation.net/what-are-b-corps/about-b-lab [https://perma.cc/7U8G-2QPW]; *see 2014 Annual Report*, B CORP., https://www.bcorporation.net/news-media/annual-report-2014 [https://perma.cc/8JJ9-H22A] [hereinafter *2014 Annual Report*] (noting the rise in companies seeking certification). According to B Lab's 2014 Annual Report, the organization has certified over 1000 businesses. *2014 Annual Report*, *supra*. B Lab has also been active in lobbying for the passage of benefit corporation legislation. *See* Murray, *Social Enterprise Innovation*, *supra* note 5, at 249 n.4, 346 (discussing the role of the B Lab organization). The organization even assisted in drafting the Model Benefit Corporation Legislation ("Model Legislation"), which has been the blueprint for the majority of states' benefit corporation statutes. Brett McDonnell, *Benefit Corporations and Strategic Action Fields or (The Existential Failing of Delaware)*, 39 SEATTLE U. L. REV. 263, 282 (2016). The certified "B Corp" concept is easily confused with benefit corporations themselves, but B Corps are not necessarily incorporated under a state's benefit corporation statute. *See* Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007, 1038 n.20 (2013) (explaining that certified B Corps do not necessarily need to be incorporated as benefit corporations). Under B Lab's rules, however, if a certified B Corp is incorporated in states with a benefit corporation statute, the business must reincorporate as a benefit corporation within four years of receiving B Corp certification. *Corporation Legal Roadmap*, B CORP., https://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/legal-roadmap/corporation-legal-roadmap [https://perma.cc/9HV4-795E]. The certification is similar to the LEED certification for buildings or the Fair Trade certification for food products. *B-Lab*, PATAGONIA, http://www.patagonia.com/us/patagonia.go?assetid=68413 [https://perma.cc/9NDW-RYCZ] (discussing the B Lab certification). A similar organization, Social Enterprise UK, exists in the United Kingdom. *FAQs*, SOCIAL ENTERPRISE UK, http://www.socialenterprise.org.uk/about/about-social-enterprise/FAQs [https://perma.cc/8SFX-VJB7].

[39] Josh Patrick, *Assessing the Benefits of Becoming a Benefit Corporation*, N.Y. TIMES (June 14, 2013, 1:00 PM), http://boss.blogs.nytimes.com/2014/06/13/assessing-the-benefits-of-a-benefit-corporation [https://perma.cc/5U24-9EEC]. Prior to co-founding B Lab, Jay Coen Gilbert co-founded the basketball shoe and apparel company AND 1. *Jay Coen Gilbert*, B CORP., https://www.bcorporation.net/jay-coen-gilbert-0 [https://perma.cc/X8AP-W42K].

[40] *See* Loewenstein, *supra* note 38, at 1013 (noting that B Lab certification can increase a company's marketability and aid in attracting investment); NIELSON, *supra* note 34 (finding that many con-

B. Fake It 'til You Make It: "Greenwashing" and Benefit Corporations

For-profit corporations often exploit what has been coined the "sheep's clothing principle."[41] This is the idea that a benevolent charitable act by a corporation is likely to also be a carefully designed advertising scheme.[42] A problem arises in the benefit corporation context when companies reap the branding and goodwill benefits of the benefit corporation classification while only pretending to pursue and create public benefits.[43] The drafters of the Model

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sumers are willing to pay more for goods purchased from socially conscious businesses). A few notable B Corps include Patagonia, Warby Parker, Ben & Jerry's (a subsidiary of Unilever PLC), Plum Organics (a subsidiary of Campbell Soup Co.), The Honest Company, Method Products, Etsy, and Kickstarter. *See Ben & Jerry's*, B CORP., http://www.bcorporation.net/community/ben-and-jerrys [https://perma.cc/4LHW-BAPB]; *Kickstarter PBC*, B CORP., http://www.bcorporation.net/community/kickstarter-pbc [https://perma.cc/XG9G-HYQ4]; *Method Products, PBC*, B CORP., https://www.bcorporation.net/community/method-products-pbc [https://perma.cc/XGA8-TVRK]; *Patagonia, Inc.*, B CORP., http://www.bcorporation.net/community/patagonia-inc [https://perma.cc/9EP9-6JM5]; *Plum Organics*, B CORP., http://www.bcorporation.net/community/plum-organics [https://perma.cc/MSY2-N35R]; *The Honest Company*, B CORP., http://www.bcorporation.net/community/the-honest-company [https://perma.cc/4PQJ-XALB]; *Warby Parker*, B CORP., http://www.bcorporation.net/community/warby-parker [https://perma.cc/874X-P7B8].

[41] Eisenberg, *supra* note 10, at 14; *cf.* Miranda Perry Fleischer, *Libertarianism and the Charitable Tax Subsidies*, 56 B.C. L. REV. 1345, 1351 (2015) (discussing the "benefits (some tangible and some intangible)" that charitable givers receive in return for giving).

[42] Eisenberg, *supra* note 10, at 14. Examples of this could include Johnson & Johnson's Safe Kids Worldwide, Avon's Breast Cancer Crusade, and the many philanthropic arms of major corporations, such as the Ronald McDonald House Charities and the Coca-Cola Foundation. *See About Us*, RONALD MCDONALD HOUSE CHARITIES, http://www.rmhc.org/about-us [https://perma.cc/KQA6-J2TK]; *Breast Cancer Crusade*, AVON FOUND. FOR WOMEN, http://www.avonfoundation.org/causes/breast-cancer-crusade/ [https://perma.cc/QY4N-V2T7]; *Johnson & Johnson*, SAFE KIDS WORLDWIDE, http://www.safekids.org/johnson-johnson [https://perma.cc/WW3M-YVCH]; *The Coca-Cola Foundation,* COCA-COLA CO., http://www.coca-colacompany.com/our-company/the-coca-cola-foundation/ [https://perma.cc/ET2H-WGGA].

[43] *See* Alex Barinka & Jesse Drucker, *Etsy Taps Secret Irish Tax Haven and Brags About Transparency at Home*, BLOOMBERG (Aug. 14, 2015, 12:01 AM), http://www.bloomberg.com/news/articles/2015-08-14/etsy-taps-secret-irish-tax-haven-and-touts-transparency-at-home [https://perma.cc/F3FT-WNU9] (reporting on the secretive Irish tax haven that Etsy, Inc., a certified B Corp, recently implemented despite "promis[ing] to be a beacon for transparency as a public company"); *see also* Steven Davidoff Solomon, *Idealism That May Leave Shareholders Wishing for Pragmatism*, N.Y. TIMES (Oct. 13, 2015), http://www.nytimes.com/2015/10/14/business/dealbook/laureate-education-for-profit-school-public-benefit.html?_r=1 [https://perma.cc/5JTR-BBHW] (arguing that benefit corporations' "eye-grabbing do-gooding may mask deep, complicated issues"); Hannah Clark Steiman, *A New Kind of Company: A "B" Corporation*, INC. MAG. (July 1, 2007), http://www.inc.com/magazine/20070701/priority-a-new-kind-of-company.html [https://perma.cc/E9BB-ZNH8] (arguing that social purpose "[c]ertification, however, can be somewhat suspect; some organic farmers, for example, have said the organic certification system has actually weakened their movement by enabling the creation of organic factory farms"). Interestingly, Massachusetts forbids a company from advertising its benefit corporation status unless the company is in full compliance with the state's benefit corporation statute. MASS. GEN. LAWS ch. 156E, § 7; *cf.* Munch, *supra* note 5, at 190 (arguing that the "benefit corporation form may have limited effectiveness if it is does not include broader legal enforcement mechanisms").

Benefit Corporation Legislation ("Model Legislation") anticipated this phenomenon and termed it "greenwashing."[44]

Benefit corporations are in a unique position to capitalize on the socially conscious consumer trend by attracting patrons willing to pay a premium for ethically-sourced and -produced goods.[45] For example, in 2012, Patagonia, the outdoor clothing company and California benefit corporation, recorded over $500 million in sales and opened fourteen new stores while the company ran a nine-month "buy less" advertising campaign.[46] Ironically, that campaign encouraged customers to buy used products or hold onto their current products for a longer period of time.[47] Companies can use the socially responsible con-

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[44] MODEL BENEFIT CORP. LEGISLATION § 102 cmt. The term "greenwashing," as used by the drafters of the Model Legislation, is taken from the environmental context and then applied more generally to the infinite number of public benefits that could be a benefit corporation's purpose to create. *See id.*; Janet E. Kerr, *The Creative Capitalism Spectrum: Evaluating Corporate Social Responsibility Through a Legal Lens*, 81 TEMP. L. REV. 831, 846 (2008); *Greenwashing*, GREENPEACE, http://www.stopgreenwash.org [https://perma.cc/ER6J-ZS3T] (defining "greenwash" as "the act of misleading consumers regarding the environmental practices of a company or the environmental benefits of a product or service"); *Greenwashing*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/greenwashing [https://perma.cc/3N25-XYYP] (defining "greenwashing" as "expressions of environmentalist concerns especially as a cover for products, policies, or activities"); *cf.* Alicia E. Plerhoples, *Can an Old Dog Learn New Tricks? Applying Traditional Corporate Law Principles to New Social Enterprise Legislation*, 13 TRANSACTIONS: TENN. J. BUS. L. 221, 258 (2012) (discussing "mission-drift," a concept similar to "greenwashing," which occurs when a benefit corporation "prioritiz[es] shareholder gain at the expense of the social or environmental mission of the firm") (alteration in original). Some argue that inclusion of a third-party standard setter negates the possibility of the creation of nominal benefit corporations designed to "cash in on the cachet of being perceived as 'green'" when the corporations are not actually creating any public benefits. *Benefit Corporation White Paper*, *supra* note 9, at 1104.

[45] *See* NIELSEN, *supra* note 34 (noting that consumers are willing to pay more for "green" products); *see also Benefits of Becoming a Sustainable Business*, ECO-FFICIENCY, http://www.eco-officiency.com/benefits_becoming_sustainable_business.html [https://perma.cc/UV4L-T9G5] (noting that becoming a benefit corporation can lead to "enhanced brand and increase[d] competitive advantage") (alteration in original); Mehdi Miremadi et al., *How Much Will Consumers Pay to Go Green?*, MCKINSEY & CO. (Oct. 2012), http://www.mckinsey.com/business-functions/sustainability-and-resource-productivity/our-insights/how-much-will-consumers-pay-to-go-green [https://perma.cc/6Y6X-HJMA] (describing a survey which found that 70% of respondents in Europe and the United States were willing to pay 5% more for "green" products).

[46] Kyle Stock, *Patagonia's 'Buy Less' Plea Spurs More Buying*, BLOOMBERG (Aug. 28, 2013), http://www.bloomberg.com/bw/articles/2013-08-28/patagonias-buy-less-plea-spurs-more-buying [https://perma.cc/Q8AG-QKRX].

[47] *Id.* Patagonia is perhaps the quintessential benefit corporation; since 1985, well before the advent of the benefit corporation form, the outdoor clothing company pledged 1% of sales to causes that preserve and protect the environment. *1% for the Planet*, PATAGONIA, http://www.patagonia.com/us/patagonia.go?assetid=81218 [https://perma.cc/9GG6-NCST]. The company also provides health care and flexible working schedules even to part-time workers, mandates a code of conduct for materials suppliers, and uses environmentally friendly materials. Murray, *supra* note 27, at 487–88. As a mass-market company, Patagonia has, at times, struggled to maintain its socially conscious brand due to its relationships with materials suppliers. *See* Erica E. Phillips, *Patagonia's Balancing Act: Chasing Mass-Market Appeal While Doing No Harm*, WALL STREET J. (Aug. 17, 2016, 5:30 AM), http://www.wsj.com/articles/patagonias-balancing-act-chasing-mass-market-appeal-while-doing-no-

sumer movement to "distinguish their goods in the market" by offering "green" variations of already-established products.[48]

Sometimes, however, corporate humanitarian rhetoric is simply "window dressing," designed to lure consumers into thinking a company supports social or environmental causes when it actually does not.[49] For example, during the past decade, the oil and gas conglomerate British Petroleum ("BP"), which is not a benefit corporation, made a calculated series of branding moves designed to convey an environmentally conscious image.[50] BP advertised that it was making operations more efficient, reducing carbon emissions, and investing in renewable energy sources.[51] In a now infamous turn of events, however, in April 2010, BP's Deepwater Horizon drilling rig exploded and sank, hemorrhaging oil into the Gulf of Mexico.[52] The catastrophic environmental damage caused by the explosion has been blamed, at least partly, on the fact that the company ignored warning signs that the rig was in danger of failure in order to reduce costs.[53]

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harm-1471426200 [https://perma.cc/QB2R-QAAJ] (describing steps the company has taken to maintain control over its supply chain in order to avoid contracting with producers that do not hold themselves to Patagonia's ethical standards).

[48] *See* Larry E. Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431, 1453 (2006) (discussing how companies can differentiate their products to attract socially conscious consumers); *see also Frequently Asked Questions*, HONEST CO., https://www.honest.com/faq [https://perma.cc/UMG3-YEE7] (discussing how The Honest Company, a certified B Corp, creates and sells household products without harmful chemicals).

[49] Kerr, *supra* note 44, at 855 (quoting Ruth V. Aguilera et al., *Putting the S Back in Corporate Social Responsibility: A Multilevel Theory of Social Change in Organizations*, 32 ACAD. MGMT. REV. 836, 838 (2007)) (noting that some companies "introduce [corporate social responsibility] practices at a superficial level for window dressing purposes") (alteration in original); Khatib, *supra* note 9, at 181–82 (arguing that "there exists enormous potential for [benefit corporation] statutes to lead to legalized greenwashing") (alteration in original). A 2007 study found that of one thousand "green" products reviewed, all but one engaged in some sort of "greenwashing" advertising scheme. TERRACHOICE ENVTL. MKTG. INC., THE SIX SINS OF GREENWASHING: A STUDY OF ENVIRONMENTAL CLAIMS IN NORTH AMERICAN CONSUMER MARKETS 1 (2007), http://sinsofgreenwashing.org/findings/greenwashing-report-2007 [https://perma.cc/R66X-7TQ8].

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

[51] *Id.* at 1002–03.

[52] *Id.* at 988.

[53] *See* STOUT, *supra* note 27, at 1–2 (describing the BP oil spill and noting that the disaster could be linked to decisions to ignore safety warnings in order to save money); *Experts: BP Ignored Warning Signs on Doomed Well*, FOX NEWS (Nov. 17, 2010), http://www.foxnews.com/us/2010/11/17/experts-bp-ignored-warning-signs-doomed-1127061394.html [https://perma.cc/XY5N-655M] (discussing the finding that BP ignored warning signs of the rig's instability). Coca-Cola recently faced criticism in Denmark after its "PlantBottle," marketed as an environmentally friendly alternative to traditional plastic bottles, was found to contain only 15% plant-based materials. *See* Christopher Zara, *Coca-Cola Company (KO) Busted for 'Greenwashing': PlantBottle Marketing Exaggerated Environ-*

II. Fiduciary Duties and Director Accountability in Benefit Corporations, Traditional Corporations, and Nonprofit Organizations

Despite the prerogative to pursue humanitarian objectives, benefit corporations are nonetheless a form of traditional corporations, and as such, directors of both types of corporations are subject to the same common law fiduciary obligations.[54] Benefit corporation legislation as a whole, however, purports to include additional reporting requirements and accountability mechanisms not found in the traditional corporate form.[55] Section A of this Part outlines basic concepts in corporate law, and discusses the benefit corporation within this broader framework.[56] Section B then describes benefit corporation directors' duties and accountability procedures.[57] Section C explores the statutory and common law power of state attorneys general to oversee nonprofit organizations.[58]

A. Corporate Law Primer and an Overview of the Typical Benefit Corporation Characteristics

The items that must appear in a company's certificate of incorporation are more simplistic than required by earlier law, and today, certificates of incorpo-

mental Benefits, Says Consumer Report, INT'L BUS. TIMES (Sept. 3, 2013, 3:18 PM), http://www.ibtimes.com/coca-cola-company-ko-busted-greenwashing-plantbottle-marketing-exaggerated-environmental-benefits [https://perma.cc/Y3VD-T9SS]. For further illustration, in 2016, two lab tests commissioned by the Wall Street Journal found that detergent products produced by The Honest Company, a certified B Corp founded by actress Jessica Alba, contained a harmful chemical, which the company claims it does not use. Serena Ng, *Laundry Detergent from Jessica Alba's Honest Co. Contains Ingredient It Pledged to Avoid*, WALL STREET J. (Mar. 10, 2016, 7:08 PM), http://www.wsj.com/articles/laundry-detergent-from-jessica-albas-honest-co-contains-ingredient-it-pledged-to-avoid-1457647350 [https://perma.cc/CW4M-VPXX].

[54] *See* MARC J. LANE, SOCIAL ENTERPRISE: EMPOWERING MISSION-DRIVEN ENTREPRENEURS 128 (2011) (noting that the basic fiduciary duties, split between ownership and management, and tax status in the benefit corporation form are generally the same as in traditional corporations); Robert A. Katz & Antony Page, *The Role of Social Enterprise*, 35 VT. L. REV. 59, 86 (2010) (comparing social enterprise business forms to the traditional business form). Although there are other corporate forms that pursue humanitarian goals in addition to profit, such as the Low-Profit Limited Liability Company ("L3C"), the benefit corporation is the quintessential business form designed to balance these two goals. *See* Esposito, *supra* note 36, at 649, 681–94 (discussing the L3C, Flexible Purpose Corporation, Social Purpose Corporation, and benefit corporation forms and arguing that the benefit corporation is the most effective vehicle for "achieving the blended value goals of the social enterprise movement"). The L3C form is a hybrid business organization "that attempts to blend program related investments, with some small degree of income production for private foundations." Ann E. Conaway, *The Global Use of the Delaware Limited Liability Company for Socially-Driven Purposes*, 38 WM. MITCHELL L. REV. 772, 802 (2012) (internal quotations omitted).

[55] *See* Reiser, *supra* note 15, at 237–40 (noting the additional requirements included in benefit corporation legislation).

[56] *See infra* notes 59–70 and accompanying text.

[57] *See infra* notes 71–97 and accompanying text.

[58] *See infra* notes 98–128 and accompanying text.

ration must only state that a corporation exists to "conduct or promote any lawful business or purposes."[59] Benefit corporation legislation diverges from this generalist approach by requiring that such corporations must, to use the Model Legislation as an example, "have a purpose of creating a general public benefit," in addition to the "any lawful business or purposes" language.[60] Furthermore, benefit corporation legislation provides that a company's certificate of incorporation may identify the creation of one or more "specific public benefits."[61] Benefit corporations, like traditional corporations, however, operate for profit and do not receive any of the unique tax benefits available to non-profit organizations.[62]

A corporation's board of directors is responsible for managing the business and affairs of the corporation.[63] In general, shareholders, not directors,

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[59] *See* DEL. CODE ANN. tit. 8, §§ 101(b), 102(a)(3) (2016); ERNEST L. FOLK, III, THE DELAWARE GENERAL CORPORATION LAW §102.01 cmt. (6th ed. 2015); Alicia E. Plerhoples, *Social Enterprise as Commitment: A Roadmap*, 48 WASH. U. J.L. & POL'Y 89, 100 (2015); *see also* Matter of Appraisal of Ford Holdings, Inc. Preferred Stock, 698 A.2d 973, 976 (Del. Ch. 1997) (discussing the fact that unlike the corporation law of the nineteenth century, modern corporate law "is largely enabling in character").

[60] MODEL BENEFIT CORP. LEGISLATION § 201(a)–(b) (BENEFIT CORP. 2014) http://benefitcorp.net/sites/default/files/documents/Model_Benefit_Corp_Legislation.pdf [https://perma.cc/W5XZ-WVXH]. (defining a general public benefit as something having "[a] material positive impact on society and the environment").

[61] *Id.* § 201(b). Per the Model Legislation, examples of "specific public benefits" include: (1) providing low-income or underserved individuals or communities with beneficial products or services; (2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business; (3) protecting or restoring the environment; (4) improving human health; (5) promoting the arts, sciences, or advancement of knowledge; (6) increasing the flow of capital to entities with a purpose to benefit society or the environment; and (7) conferring any other particular benefit on society or the environment. *Id.* § 102 cmt.

[62] *See* LANE, *supra* note 54, at 128 (noting that benefit corporations are taxed in the same manner as any other for-profit corporation); *Benefit Corp FAQ's*, *supra* note 15 (same).

[63] *See* DEL. CODE ANN. tit. 8, § 141(a) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."); Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) ("Since a director is vested with the responsibility for the management of the affairs of the corporation, he must execute that duty with the recognition that he acts on behalf of others."). Delaware's corporate law is generally considered the most refined, and the state is home to the majority of the country's public corporations, which are thus governed by Delaware law. *See* Steven C. Caywood, *Wasting the Corporate Waste Doctrine: How the Doctrine Can Provide a Viable Solution in Controlling Excessive Executive Compensation*, 109 MICH. L. REV. 111, 136 n.26 (2010) (noting that Delaware is home to the majority of the country's corporations); Harwell Wells, *The Rise of the Close Corporation and the Making of Corporation Law*, 5 BERKELEY BUS. L.J. 263, 269 (2008) (noting that Delaware is the "most important site" for the development of U.S. corporate law); *About Agency*, DEL. DEP'T STATE, DIV. CORPS., http://www.corp.delaware.gov/aboutagency.shtml [https://perma.cc/MV4M-YNY6] ("More than 50% of all publicly-traded companies in the United States including 64% of the Fortune 500 have chosen Delaware as their legal home."). Indeed, most states rely on Delaware law as an example when interpreting or drafting their own corporate law. Clark & Babson, *supra* note 1, at 831.

own the majority share of a corporation's stock.[64] But in large, particularly public corporations, shareholders lack any real control over operations and business decision making, and as such, place their trust in the directors.[65] Thus, as a fundamental principle, corporate directors owe fiduciary duties to the shareholders, breaches of which are righted through shareholder derivative lawsuits.[66] Perhaps most importantly, however, directors of benefit corporations and directors of traditional corporations do not owe a fiduciary duty to any constituency other than the shareholders.[67]

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

[65] Schoon v. Smith, 953 A.2d 196, 206 n.34 (Del. 2008) (citing R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, 1 THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 4.16, at 4–113 (3d ed. 2008)); Fogel et al., *supra* note 64, at 518 (arguing that "an imbalance exists between management flexibility and investor/owner oversight").

[66] *See* DEL. CODE ANN. tit. 8, § 327 (providing the derivative suit mechanism); LANE, *supra* note 54, at 120 (describing the corporate fiduciary duties of loyalty and care); Claire A. Hill & Brett H. McDonnell, Stone v. Ritter *and the Expanding Duty of Loyalty*, 76 FORDHAM L. REV. 1769, 1771 (2007) (discussing corporate fiduciary duties); Marcia M. McMurray, *An Historical Perspective on the Duty of Care, the Duty of Loyalty, and the Business Judgment Rule*, 40 VAND. L. REV. 605, 606 (1987). In simplest terms, the duty of loyalty mandates that the best interests of the corporation and its shareholders take precedence over any interest of the directors that is not shared collectively by the shareholders. *See In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 750–52 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006). The duty of care, on the other hand, generally does not encompass the substance of a board decision but the method by which the board reached its decision. Brehm v. Eisner, 746 A.2d 244, 264 (Del. 2000) ("Due care in the decision-making context is *process* due care only."). In order to comply with the duty of care, in general, directors must properly inform themselves of all material information prior to rendering a decision. *See Van Gorkom*, 488 A.2d at 872. The duty of care, has, however, been rendered all-but obsolete by section 102(b)(7) of the Delaware corporate law. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2016) (stating that a provision included in a certificate of incorporation can eliminate personal monetary liability for a director, but not for breaches of the duty of loyalty).

[67] *See* DEL. CODE ANN. tit. 8, § 365(b) (denying standing to intended beneficiaries); McMurray, *supra* note 66, at 606 (discussing the fiduciary duties directors owe to shareholders). *Compare* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (suggesting that when deciding whether to accept a tender offer, a board of directors may consider "the impact on constituencies other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally)") (internal quotations omitted), *with* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (finding that when the sale of a corporation is inevitable, the directors' only prerogative is to sell at the highest price for the benefit of the shareholders). Following the merger craze of the 1980s, many states implemented "constituency statutes," which grant a board of directors the authority to consider the best interests of other "corporate constituencies when running a sales process or deciding whether to accept a takeover offer." Leo E. Strine, Jr., *Making It Easier for Directors to "Do the Right Thing"?*, 4 HARV. BUS. L. REV. 235, 238 (2014). But these statutes have little weight because they simply allow directors to consider non-financial stakeholders and do not require directors to do so. 15 PA. CONS. STAT. § 1715(a)(1) (2014) (providing that a board of directors "may, in considering the best interests of the corporation, consider . . . [t]he effects of any action upon any or all groups affected by such action, including . . . communities in which offices or other establishments of the corporation are located"); *see* Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 987 (1992) (noting that constituency statutes are "permissive" and

Each state's benefit corporation is slightly different, but the typical characteristics are: (1) that the corporation pledge to create a general public benefit, (2) that the directors consider the interests of non-financial stakeholders in addition to the interests of shareholders, and (3) a requirement to report on the corporation's total social and environmental performance using a third-party standard.[68] With the exception of these three general duties, however, directors of benefit corporations and directors of traditional corporations are governed by the same principles of corporate law.[69] Despite the duty to consider the impact of a benefit corporation's activities on constituencies other than shareholders, benefit corporation legislation denies those constituencies standing to enforce this requirement.[70]

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do not require directors to consider non-financial stakeholder's interests). Notably, however, Delaware, long the bastion of corporate law, chose not to enact a constituency statute. *See* Khatib, *supra* note 9, at 169 (noting that Delaware did not enact a constituency statute).

[68] *See* MODEL BENEFIT CORP. LEGISLATION §§ 201(a), 301(a), 401(a)(2); Clark & Babson, *supra* note 1, at 838–39 (listing these three general characteristics).

[69] *See* LANE, *supra* note 54, at 127–29 (comparing the basics of the benefit corporation form to its traditional corporation counterpart); Brett McDonnell, *Benefit Corporations: Do the Benefits Exceed the Costs?*, CLS BLUE SKY BLOG (Nov. 2, 2015), http://clsbluesky.law.columbia.edu/2015/11/02/benefit-corporations-do-the-benefits-exceed-the-costs/ [https://perma.cc/G6VS-T332] (explaining that the requirement that directors "must," as opposed to "may," pursue social purposes beyond profit is the key difference between benefit corporations and traditional corporate forms); Mark A. Underberg, *Benefit Corporations vs. "Regular" Corporations: A Harmful Dichotomy*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. BLOG (May 13, 2012), http://blogs.law.harvard.edu/corpgov/2012/05/13/benefit-corporations-vs-regular-corporations-a-harmful-dichotomy [https://perma.cc/59VE-86FU] (arguing that the benefit corporation "legal regime no more guarantees that those companies will make 'socially responsible' decisions than existing law prevents directors from doing so"); *see also* Rae André, *Assessing the Accountability of the Benefit Corporation: Will This New Gray Sector Organization Enhance Corporate Social Responsibility?*, 110 J. BUS. ETHICS 133, 138 (2012) (arguing that a traditional corporation's only "mission" is to make money, whereas a benefit corporation can have "many missions").

[70] *See, e.g.*, DEL. CODE ANN. tit. 8, § 365(b) (denying standing to intended beneficiaries); 15 PA. CONS. STAT. § 3321(d) (2014) (same); VT. STAT. ANN. tit. 11A, § 21.09(c) (2016) (same); MODEL BENEFIT CORP. LEGISLATION. § 305(a) (same). In contrast, unless authorized in their founding documents, nonprofit organizations do not have a derivative suit option, and as such, state attorneys general supervise these organizations on behalf of the public. *See* GEORGE GLEASON BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 363 (rev. 2d & 3d ed. Supp. 2015) (noting that state attorneys general have enforcement power over charitable trusts); Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 IND. L.J. 937, 938–39 (2004) (noting that all state attorneys general have common law enforcement power over charities and some states provide a statutory grant of authority to attorneys general); Thomas Lee Hazen & Lisa Love Hazen, *Punctilios and Nonprofit Corporate Governance—A Comprehensive Look at Nonprofit Directors' Fiduciary Duties*, 14 U. PA. J. BUS. L. 347, 408–12 (2012) (discussing the role of state attorneys general's oversight of charities in various states and the limited availability of derivative actions in the nonprofit context); Reiser, *supra* note 15, at 241 (noting that "[s]tate attorneys general safeguard assets devoted to charity within their states").

B. Fiduciary Duties of Directors and Internal Control in the Benefit Corporation Form

Benefit corporations, like traditional corporations, are for the most part, monitored by shareholders.[71] The very nature of the benefit corporation, however, extends the scope of the business judgment rule; directors of a benefit corporation could defend a decision that eschews short-term profit not only on the grounds that the decision would eventually lead to long-term profits, but also that the decision furthers the creation of the corporation's public benefit.[72] Ostensibly, shareholders are left with a theory of waste as their only remaining argument.[73] The doctrine of waste sets an extremely "low bar for defendants to justify their decisions"—even lower than that set by the business judgment rule.[74] Absent a clear breach of the duty of loyalty (or the duty of care in limited circumstances), shareholders of benefit corporations have a miniscule likelihood of success in a derivative suit that challenges a business decision.[75]

Benefit corporation legislation does, however, impose an important additional fiduciary obligation: directors must consider the effects of their decision making on constituencies other than shareholders.[76] A decision purportedly

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[71] *See* Reiser, *supra* note 15, at 240 (arguing that in the context of benefit corporation legislation, "reliance on self-policing or investor-only accountability is suboptimal"); Nass, *supra* note 11, at 886 (noting that accountability mechanisms in benefit corporation legislation are only available to investors and company-insiders).

[72] *See* Brett H. McDonnell, *Committing to Doing Good and Doing Well: Fiduciary Duty in Benefit Corporations*, 20 FORDHAM J. CORP. & FIN. L. 19, 38 (2014). A company's directors could, for example, defend the use of expensive but environmentally friendly containers by arguing that in so doing, they are garnering "customer good-will which could boost their sales." *Id.*

[73] *Cf. id.* (noting that under the business judgment rule, "[d]efendants are protected from claims that a decision was a bad deal for the corporation as long as they could rationally believe that it was a good deal," which is similar to the waste doctrine). To succeed on a theory of corporate waste, a plaintiff must show that there was "an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade." *Brehm*, 746 A.2d at 263. In 1969, in *Theodora Holding Corp. v. Henderson*, the Delaware Chancery Court held that a charitable gift within tax deduction limits was reasonable, did not constitute waste, and was not made in violation of any fiduciary duties. 257 A.2d 398, 399 (Del. Ch. 1969). The court noted that it was "obvious" that a "relatively small loss of immediate income" was outweighed by the long-term benefit conferred on the corporation by giving the gift. *Id.* at 405.

[74] *Henderson*, 257 A.2d at 405.

[75] *See* Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984) (holding that under the business judgment rule, "[a]bsent an abuse of discretion, [the board's] judgment will be respected") (alteration in original).

[76] *See* DEL. CODE ANN. tit 8, § 365(a) (requiring directors to balance the interests of shareholders, the interests of parties "materially affected by the corporation's activities," and creation of the corporation's public benefit); MODEL BENEFIT CORP. LEGISLATION § 301(1) (requiring benefit corporation directors to consider the effect of their decision making on constituencies other than shareholders). Although requiring a balancing of interests, benefit corporation legislation does not mandate that directors prioritize interests. *See, e.g.*, 805 ILL. COMP. STAT. 40/4.01(a)(3) (2014) (stating that benefit corporation directors are not required to give priority of any group over another, unless the corpora-

with this mandate in mind, however, would be nearly impossible for a court to critique and reverse.[77] In order to challenge a breach of this provision by derivative suit, in some states, shareholders must individually or collectively own, the lesser of two percent of the company's outstanding shares or $2 million in market value of the corporation's shares traded on a national securities exchange.[78] In contrast, in order to file a derivative suit alleging a fiduciary duty violation not related to this provision, corporate law generally requires only that a plaintiff own at least one share of the corporation at the time of the transaction at issue.[79] As the current Chief Justice of the Delaware Supreme Court wrote, "[W]hen corporate fiduciaries [are] allowed to consider all interests without legally binding constraints, they [are] freed of accountability to any."[80]

Aside from traditional derivative suits, benefit corporation legislation attempts to provide other accountability mechanisms.[81] Perhaps most closely related to a derivative suit, the legislation provides for initiation of a "benefit enforcement proceeding" to compel the directors to follow-through on their public benefit commitment(s).[82] Here too, intended beneficiaries lack standing, and only shareholders, directors, or investors that own a certain percentage of a benefit corporation's parent company can initiate these proceedings.[83] Unlike

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tion's articles direct them to do so); LA. STAT. ANN. §12:1821(A)(3) (2016) (same); VT. STAT. ANN. tit. 11A, §21.09(a)(3) (same); MODEL BENEFIT CORP. LEGISLATION § 301(a)(3) (same).

[77] *See* Leo E. Strine, Jr., *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 151 n.45 (2012) (criticizing the benefit corporation form and arguing that a court would be unlikely to "second guess" a decision that the directors claimed took into account non-corporate stakeholders); *see also* Shlensky v. Wrigley, 237 N.E.2d 776, 780 (Ill. App. Ct. 1968) (holding that whether "the decision of . . . the directors was a correct one" would be "beyond [the court's] jurisdiction and ability") (alteration in original).

[78] *E.g.*, COLO. REV. STAT. § 7-101-508 (2016); DEL. CODE ANN. tit 8, § 367; TENN. CODE ANN. § 48-28-108 (2016); *see* MODEL BENEFIT CORP. LEGISLATION § 305(c) (requiring 2% stock ownership in the benefit corporation or 5% ownership in the benefit corporation's parent company).

[79] *See, e.g.*, DEL. CODE ANN. tit 8, § 327.

[80] Strine, *supra* note 77, at 151 (alteration in original); *see* A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367 (1932) ("When the fiduciary obligation of the corporate management and 'control' to stockholders is weakened or eliminated, the management and 'control' become for all practical purposes absolute.").

[81] *See* MODEL BENEFIT CORP. LEGISLATION § 102(a) (requiring third-party certification); *id.* § 305(c) (providing for a "benefit enforcement proceeding"). At least one commentator has written that it is unlikely a shareholder would bring suit against a benefit corporation for its failure to create a public benefit. *See* Reiser, *supra* note 15, at 240 (arguing that if a benefit corporation's directors chose not to pursue the corporation's mission, shareholders would fail to hold them accountable and would "simply sit back and enjoy the greater returns").

[82] MODEL BENEFIT CORP. LEGISLATION § 305(c); *see* MASS. GEN. LAWS ch. 156E, § 14 (2014); N.J. STAT. ANN. § 14A:18-10 (West 2016).

[83] *See, e.g.*, MASS. GEN. LAWS ch. 156E, § 14(b)(2)(iii) (requiring 5% ownership in parent company to initiate a benefit enforcement proceeding); N.J. STAT. ANN. § 14A:18-10(b)(2)(c) (same); VT. STAT. ANN. tit. 11A, § 21.13(b)(3) (2016) (requiring 10% ownership in parent company); MODEL BENEFIT CORP. LEGISLATION § 305(c)(2) (requiring shareholders to have 2% ownership of the benefit

in derivative actions, monetary damages are not available; the only remedy is specific performance, i.e. creation of the corporation's public benefit.[84] One commentator has argued that at best, the benefit enforcement proceeding "empowers shareholders . . . as eternal nags . . . reduc[ing] the efficiency of corporate boards," and at worst, allows shareholders to "greenmail" a corporation by demanding larger profit distributions.[85]

In addition, a benefit corporation must report, at least annually, on the corporation's efforts to create the public benefit identified in its certificate of incorporation, which allows shareholders and the public to judge the corporation on its humanitarian endeavors.[86] Many states, and the Model Legislation, require benefit corporations to report on their efforts to create a public benefit using a third-party standard.[87] The Model Legislation requires that the third-party certification standard be "comprehensive," "developed by an entity that

corporation and investors to have 5% of the parent company to initiate a benefit enforcement proceeding).

[84] *See, e.g.*, CAL. CORP. CODE § 14620(f) (West 2012) (establishing that directors cannot face monetary liability for the failure to create a public benefit); MASS. GEN. LAWS ch. 156E, § 10(d) (same); N.J. STAT. ANN. § 14A:18-6(d) (same); 15 PA. CONS. STAT. § 3321(c)(2) (same); MODEL BENEFIT CORP. LEGISLATION § 301(c) (same); Callison, *supra* note 28, at 95 (noting that the Model Legislation exempts directors from monetary liability); Nass, *supra* note 11, at 887 (noting that benefit enforcement proceedings can only result in specific performance); *cf.* CAL. CORP. CODE § 14623(d) (West 2012) (providing that if a court finds that a benefit corporation did not comply with statutory requirements, it can award attorney's fees and other reasonable expenses incurred by a plaintiff in bringing a benefit enforcement claim); NEV. REV. STAT. ANN. § 78B.190(4) (LexisNexis 2016) (same). Specific performance is defined as "a court-ordered remedy that requires precise fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate . . . ." *Specific Performance*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[85] Callison, *supra* note 28, at 111 (alteration in original).

[86] *See, e.g.*, DEL. CODE ANN. tit. 8, § 366(b) (2016); MASS. GEN. LAWS ch. 156E, § 15(a); VT. STAT. ANN. tit. 11A, § 21.14(a) (2016); MODEL BENEFIT CORP. LEGISLATION § 401(a); *see also* HAW. REV. STAT. § 420D-11 (2011), http://www.capitol.hawaii.gov/hrscurrent/Vol08_Ch0401-0429/HRS0420D/HRS_0420D-0011.htm [https://perma.cc/9HD3-4EA4] (requiring benefit corporations to post their annual benefit report online for a "sixty-day public comment period prior to [its] final publication"); N.J. STAT. ANN. § 14A:18-11(d)(1)–(2) (requiring that benefit corporations file their benefit reports with the Department of Treasury, and stating that failure to do so could lead to revocation of benefit corporation status); Murray, *supra* note 7, at 556–57 & n.103 (discussing the benefit report requirement and citing state statutes meant to force benefit corporations to publish their report). In Florida, for example, if a benefit corporation fails to comply with the benefit report requirements, a court may order the benefit corporation to furnish the report after a shareholder requests a copy. FLA. STAT. § 607.613(4) (2016). This is similar to an action under section 220 of the Delaware general corporate law. *See* DEL. CODE ANN. tit. 8, § 220(c) (2016) (stating that if a shareholder requests to examine the corporation's books and records and the corporation refuses, a court may order the corporation to fulfill the shareholder's request).

[87] *See* VT. STAT. ANN. tit. 11A, § 21.03(a)(8) (2016) (defining "third-party certification" as "a recognized standard for defining, reporting, and assessing corporate social and environmental performance" that is "independent" and "transparent"); MODEL BENEFIT CORP. LEGISLATION § 401(a)(2) (requiring the inclusion of "[a]n assessment of the overall social and environmental performance of the benefit corporation against a third-party standard" in the company's annual reports).

is not controlled by the benefit corporation," "credible," and "transparent."[88] Third-party rating agencies are available to perform this task, but the Model Legislation does not provide guidance on the specific requirements imposed on the agencies.[89] Therefore, these agencies can be as stringent, or not, in their conceptualization of what it means to actually "create" a public benefit as would best serve their needs and the needs of the benefit corporation that procures their services.[90] In addition, third-party standard setters do not have any authority to revoke benefit corporation status, nor do they have the power to enforce the fiduciary duties of benefit corporation directors.[91]

Finally, the Model Legislation requires the appointment of an independent "benefit director" whose responsibility is to oversee the board's creation of a public benefit.[92] The appointment of a benefit director, however, is only required in some states.[93] In the states that do require a benefit director, this requirement may give rise to professional social enterprise inspectors whose pay depends on the substance of their opinions.[94] In addition, per the Model Legislation, the benefit director must certify annually that the corporation has acted in furtherance of its stated public benefit "in all material respects."[95] It is implausible, however, that every action taken by the corporation's board would—or even could—further the creation of the corporation's public benefit.[96]

In sum, consumers and intended beneficiaries, the best evaluators of a benefit corporation's efforts to create a public benefit, are denied standing in court, or any viable method outside of the legal system, to enforce the creation

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

[89] *See* Callison, *supra* note 28, at 94 (highlighting the fact that the Model Legislation "spills much ink" attempting to define "credible," "transparent," and "independent" in the third-party standard, but "fails to state how standards are applied or by whom"); Clark & Babson, *supra* note 1, at 845–46 (noting an array of rating agencies).

[90] *See* Reiser, *supra* note 15, at 238 (noting that the third-party standard setter does not itself evaluate a benefit corporation, and instead, a benefit corporation applies the standard itself); *see also* Loewenstein, *supra* note 38, at 1014, 1020–21 (discussing the ambiguity in the word "create," as used by benefit corporation legislation).

[91] *See* Reiser, *supra* note 15, at 238 (explaining that the third-party standard setter has no enforcement powers over the creation of a public benefit).

[92] MODEL BENEFIT CORP. LEGISLATION § 302; *see* N.J. STAT. ANN. § 14A:18-7(a) (requiring the board of directors of a benefit corporation to include one director who is designated as a "benefit director"). Some state legislation also includes a "benefit officer," who is responsible for preparing the annual benefit report. *See* MASS. GEN. LAWS ch. 156E, § 13; N.J. STAT. ANN. § 14A:18-9 (allowing for, but not requiring, a "benefit officer").

[93] Loewenstein, *supra* note 38, at 1024 n.73 (listing the states that do not require benefit directors).

[94] *Id.* at 1019–20.

[95] MODEL BENEFIT CORP. LEGISLATION § 302(c)(1).

[96] *See* Loewenstein, *supra* note 38, at 1024 (noting the impracticality of the "in all material respects" language).

of a public benefit, relegating them to judging benefit corporations based on scant self-reporting requirements.[97]

C. The Oversight and Enforcement Role of State Attorneys General

State attorneys general play various roles in overseeing charitable organizations and in limited circumstances, can prosecute for-profit corporations.[98] Subsection 1 of this Section describes the two ways in which state attorneys general can enforce the activities of nonprofit entities.[99] Subsection 2 outlines state attorneys general oversight of unfair and deceptive acts or practices.[100]

1. State Attorneys General and Charitable Organizations

Various types of entities qualify as nonprofit charitable organizations.[101] Benefit corporations are simply for-profit corporations and do not currently fall under the definition of charitable organization.[102] Individuals can create charitable trusts by creating a trust and, instead of naming specific beneficiaries, direct the trust to provide a benefit to charitable causes, such as "relief from poverty, advancement of education, religion and other purposes beneficial to the community."[103] In addition, similar to the formation of for-profit corporations, state laws provide for the formation of nonprofit corporations.[104] The majority of charities are incorporated as nonprofit corporations.[105] Nonprofit entities must first be recognized by state law to receive federal tax exemption.[106] Nonprofit organizations generally—like benefit corporations—

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

[98] *See infra* notes 101–116 and accompanying text (providing an overview of state attorney general power in this context).

[99] *See infra* notes 101–118 and accompanying text.

[100] *See infra* notes 119–128 and accompanying text.

[101] *See* EDMUND G. BROWN JR., CAL. ATTORNEY GEN., GUIDE FOR CHARITIES 2 (2005), https://oag.ca.gov/sites/all/files/agweb/pdfs/charities/publications/guide_for_charities.pdf [https://perma.cc/GE8S-QGBS] [hereinafter ATTORNEY GENERAL'S GUIDE FOR CHARITIES] (describing how an organization can qualify as a charity by operating as a nonprofit corporation, charitable trust, or unincorporated association).

[102] *Cf.* LANE, *supra* note 54, at 128 (noting that benefit corporations are taxed like ordinary for-profit corporations).

[103] ATTORNEY GENERAL'S GUIDE FOR CHARITIES, *supra* note 101, at 1.

[104] *Id.* at 2 (noting that nonprofit corporations cannot be formed "for the private gain of any person" and must instead operate to promote charitable purposes that benefit the public).

[105] Garry W. Jenkins, *Incorporation Choice, Uniformity, and the Reform of Nonprofit State Law*, 41 GA. L. REV. 1113, 1124 (2007) (noting that the majority of charities are nonprofit corporations, which means that "state law has an enormous impact on the nonprofit sector").

[106] 26 U.S.C. § 501 (2012). Section 501(c)(3) lists the types of entities that qualify for tax exemption. *Id.* § 501(c)(3).

operate for the benefit of an enumerated subset of the public.[107] To ensure that nonprofit organizations adhere to their missions, however, state attorneys general have either statutory or common law authority to initiate court proceedings on behalf of the public to enforce nonprofits' activities.[108]

The law governing charities in a few states provides a right of action to state attorneys general to initiate proceedings against nonprofit organizations in order to prevent harm to the public.[109] The rationale behind these statutes is to provide recourse for intended beneficiaries who would otherwise have no redress for a nonprofit organization's misuse of funds dedicated to charity.[110] Some state attorneys general have been particularly active in prosecuting nonprofit organizations.[111] California imposed heightened audit and disclosure standards; state attorneys general in Massachusetts and Oregon lobbied for legislation to require nonprofits to obtain attorney general approval prior to compensating their directors; the Oregon attorney general publishes on its website a list of the charities with the lowest percentage of contributions going to charitable causes.[112]

Where the attorney general lacks statutory authority to enforce the activities of a nonprofit organization, the common law doctrine of *parens patriae* provides standing for the attorney general to bring suit for harm to the state's

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[107] *See* ATTORNEY GENERAL'S GUIDE FOR CHARITIES, *supra* note 101, at 1 ("In common usage, the term 'charity' refers to an organization that performs charitable programs or sets aside any fund to be used for charitable purposes."). Perhaps the most notable difference between nonprofit organizations and for-profit corporations is that nonprofit organizations may never distribute profits (other than, of course, salaries), whereas a corporation can distribute profits to its shareholders in the form of a dividend. *See* Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980) (describing the distribution prohibition in the law governing nonprofits).

[108] *See infra* notes 109–116 (describing the role of state attorneys general in regulating charitable organizations).

[109] *See, e.g.*, CAL. CORP. CODE § 5250 (West 1980) (providing the attorney general express power to examine the activities of nonprofit organizations and initiate "proceedings necessary to correct . . . noncompliance"); GA. CODE ANN. § 14-3-170 (2016) (same); NEV. REV. STAT. ANN. § 82.536 (LexisNexis 2016) (same); N.Y. NOT-FOR-PROFIT CORP. LAW § 112 (McKinney 2016) (same).

[110] *See* Gary W. Herschman & Anjana D. Patel, *Attorney General Oversight of Transactions and Financial Practices of Nonprofit Corporations*, N.J. LAW., Apr. 2010, at 19, 20 ("[A]ttorney general oversight is a necessity afforded by the extension of common law charitable trust principles, and is often mandated by statute *to protect the public interest*.") (emphasis added); ATTORNEY GENERAL'S GUIDE FOR CHARITIES, *supra* note 101, at 34 ("[T]he Attorney General represents all the public beneficiaries of charity, who cannot sue in their own right.").

[111] *See* Hazen & Hazen, *supra* note 70, at 409–10 (discussing oversight of charities in various states by states' attorneys general).

[112] *Id.* For further illustration, in early October 2016, the New York attorney general issued a "notice of violation" to President-elect Donald J. Trump's charitable foundation, ordering the foundation to cease soliciting donations in New York because it had failed to properly register in the state. Steve Eder, *State Attorney General Orders Trump Foundation to Cease Raising Money in New York*, N.Y. TIMES (Oct. 3, 2016), http://www.nytimes.com/2016/10/04/us/politics/trump-foundation-money.html [https://perma.cc/8B32-7P6M].

quasi-sovereign interests.[113] To bring such an action, the attorney general must establish an interest separate from the interests of the private parties directly involved in the charity.[114] Thus, the attorney general must be able to "allege[] injury to a sufficiently substantial segment of [the] population."[115] In 1982, in *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, the U.S. Supreme Court stated that helpful to the determination of whether the state has alleged an injury to a significant enough proportion of its population to assert its *parens patriae* powers "is whether the injury is one that the state, if it could, would likely attempt to address through its sovereign lawmaking powers."[116]

In stark contrast to the role of attorneys general in the sphere of charitable organizations, benefit corporation legislation expressly disclaims standing for public beneficiaries and includes no powers of state attorney general oversight, leaving the job of oversight and enforcement entirely to shareholders.[117] In

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[113] *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico, *ex rel.*, Barez, 458 U.S. 592, 607 (1982) (stating that "the state must express a quasi-sovereign interest" in order for standing to be conferred); Florida v. Mellon, 273 U.S. 12, 16 (1927) ("[J]udicial relief sometimes may be granted to a quasi-sovereign state under circumstances which would not justify relief if the suit were between private parties."); Renee M. Jones & Michelle Welsh, *Toward a Public Enforcement Model for Directors' Duty of Oversight*, 45 VAND. J. TRANSNAT'L L. 343, 399–400 (2012) (noting that state attorneys general exert enforcement power over charities' activities through their common law *parens patriae* powers). *Parens patriae* "originated as an English equitable doctrine where the king served as 'guardian for persons legally unable to act for themselves.'" Michael L. Rustad & Thomas H. Koenig, Parens Patriae *Litigation to Redress Societal Damages from the BP Oil Spill: The Latest Stage in the Evolution of Crimtorts*, 29 UCLA J. ENVTL. L. & POL'Y 45, 78 (2011) (quoting Stephen Calkins, *An Enforcement Official's Reflections on Antitrust Class Actions*, 39 ARIZ. L. REV. 413, 433 (1997)). The U.S. Supreme Court has endorsed the doctrine as "the supreme power of every state . . . for the prevention of injury to those who cannot protect themselves." Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 57 (1890); *see Parens Patriae*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining *parens patriae* as "[a] doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen"). State attorneys general power to regulate charities may not include all charitable organizations. *See, e.g.*, ATTORNEY GENERAL'S GUIDE FOR CHARITIES, *supra* note 101, at 32 (noting that the California Attorney General has a "very restricted" "oversight role with respect to religious corporations").

[114] *Snapp*, 458 U.S. at 607. According to the Supreme Court, the state may assert a quasi-sovereign interest in bringing an action in two situations: (1) when the state has an interest in "the health and well-being—both physical and economic—of its residents in general," or (2) when it has an "interest in not being discriminatorily denied its rightful status within the federal system." *Id.* (noting that "the articulation of such interests is a matter for case-by-case development").

[115] *Id.* (alteration in original) (holding that "[a]lthough more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well"); *see also* Oregon v. Legal Servs. Corp., 552 F.3d 965, 974 (9th Cir. 2009) (holding that a state's "interest that its citizens benefit from voluntary federal grants" is not significant enough an interest to provide standing through *parens patriae* doctrine).

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

[117] *See* Reiser, *supra* note 10, at 613 (noting that "[t]here is no regulatory role for any public official in the benefit corporation"); *cf.* Alicia Plerhoples, *Will Benefit Corporations Be Considered Charities?*, SOCENTLAW (Oct. 26, 2012), http://socentlaw.com/2012/10/will-benefit-corporations-be-considered-charities [https://perma.cc/ZF9Q-43P9] (posing, but not answering, the question of whether benefit corporations will be considered charities by state attorneys general).

fact, Hawaii's statute, for example, specifically states that "[e]nforcement of those responsibilities [related to creating a public benefit] comes not from governmental oversight, but rather from new provisions on transparency and accountability . . . ."[118]

2. The Role of State Attorneys General in Enforcing Commercial Transactions Through Unfair and Deceptive Acts or Practices Statutes

In addition to enforcement and oversight of charities, state attorneys general are also granted enforcement power over commercial transactions through their states' unfair or deceptive acts or practices ("UDAP") statutes.[119] There is a UDAP statute on the books in every state and the District of Columbia.[120] The statutes typically apply to business transactions between individuals and corporations.[121] They provide a right of action to individuals and corporations, and public enforcement by state attorneys general.[122] The statutes also give attorneys general the power to scrutinize consumer grievances, enforce compliance with the statutes, move for injunctions or cease and desist orders, and obtain recompense for consumers.[123]

For comparison, in 2005, the United Kingdom introduced the Community Interest Company ("CIC"), which is similar to the benefit corporation, but includes a specialized Office of the Regulator of Community Interest Companies ("CIC Regulator") to oversee CICs' humanitarian efforts.[124] The CIC form also includes an asset lock, which limits a CIC to distributing thirty-five perfect of its profits each year, leaving the remaining profits for humanitarian purpos-

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[118] HAW. REV. STAT. § 420D-1 (2011), http://www.capitol.hawaii.gov/hrscurrent/Vol08_Ch0401-0429/HRS0420D/HRS_0420D-0001.htm [https://perma.cc/6ZJB-5UWS] (alteration in original).

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

[120] CAROLYN L. CARTER, NAT'L CONSUMER LAW CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES 3 (2009), https://www.nclc.org/images/pdf/car_sales/UDAP_Report_Feb09.pdf [https://perma.cc/5PJ4-R7NP].

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

[122] *Id.*

[123] Dunbar, *supra* note 119, at 430.

[124] *See* Keren G. Raz, *Toward an Improved Legal Form for Social Enterprise*, 36 N.Y.U. REV. L. & SOC. CHANGE 283, 307 (2012) (describing the CIC form); Reiser, *supra* note 10, at 613–14 (same); *What Is a CIC?*, CIC ASS'N, http://www.cicassociation.org.uk/about/what-is-a-cic [https://perma.cc/N38E-J9TL] (same). "A [CIC] is a limited company, with special additional features, created for the use of people who want to conduct a business or other activity for community benefit, and not purely for private advantage." *Community Interest Companies: Forms and Step-By-Step Guides*, OFF. REGULATOR COMMUNITY INT. COMPANIES, https://www.gov.uk/government/publications/community-interest-companies-business-activities [https://perma.cc/WK8M-US92] (alteration in original).

es.[125] The CIC Regulator determines whether a business organization is eligible to incorporate or reincorporate as a CIC.[126] The CIC Regulator also provides guidance on the creation of CICs, examines complaints that a CIC has drifted from its mission, and can even pursue legal action against a CIC.[127] Since the CIC form was created over ten years ago, about 11,000 CIC's have been incorporated.[128]

III. BENEFIT CORPORATION LEGISLATION SHOULD INCLUDE MECHANISMS FOR STATE ATTORNEY GENERAL OVERSIGHT AND ENFORCEMENT

Benefit corporations, like nonprofit charitable entities, exist to create a humanitarian benefit for an enumerated public group, but under current law, it is nearly impossible for the public to ensure that a benefit corporation is making a good faith effort to create its stated public benefit.[129] This Part argues that benefit corporation legislation should be amended to provide oversight and enforcement mechanisms to state attorneys general to act on behalf of intended public beneficiaries.[130] Part A contends that attorneys general may already have standing under current benefit corporation legislation, but notes the lim-

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[125] *See* OFFICE OF THE REGULATOR OF CMTY. INTEREST COS., INFORMATION AND GUIDANCE NOTES: CHAPTER 6: THE ASSET LOCK 5, 7 (2014), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/416360/14-1089-community-interest-companies-chapter-6-the-asset-lock.pdf [https://perma.cc/MFR7-8X7V] [hereinafter THE ASSET LOCK]; Sam Burne James, *Analysis: The Rise and Rise of Community Interest Companies*, THIRD SECTOR (June 1, 2015), http://www.thirdsector.co.uk/analysis-rise-rise-community-interest-companies/governance/article/1348096 [https://perma.cc/47XR-4C64].

[126] *Community Interest Companies*, OFF. REGULATOR COMMUNITY INT. COMPANIES, https://www.gov.uk/government/organisations/office-of-the-regulator-of-community-interest-companies [https://perma.cc/HHK3-MUW4] [hereinafter *Community Interest Companies*]. One of the architects of the CIC legislation, Stephen Lloyd, has said that the CIC Regulator's powers are "surprisingly wide." Stephen Lloyd, *Transcript: Creating the CIC*, 35 VT. L. REV. 31, 38 (2010). The CIC Regulator can hire forensic accountants to investigate a CIC's books; she has the authority to initiate civil proceedings against CIC's; she can also remove the directors and appoint a CIC receiver, who in turn, can initiate the dissolution or liquidation of the CIC. *See id.* at 38–39 (describing the powers of the CIC Regulator).

[127] *Community Interest Companies*, *supra* note 126. CIC's may pay dividends to private investors but the distributions are subject to an aggregate maximum cap of 35%. *See* THE ASSET LOCK, *supra* note 125, at 5, 7 (explaining recent updates to the dividend distribution cap). In addition, upon dissolution or liquidation, assets must either be transferred to a fully charitable organization, another CIC, or distributed towards the community benefit enumerated in the company's organizing documents. *Id.* at 3; *cf.* Murray, *supra* note 27, at 507–08 (arguing that benefit corporation legislation should include an asset lock provision).

[128] James, *supra* note 125.

[129] *See* Khatib, *supra* note 9, at 181–82 (arguing that the current legislative framework leaves an "enormous potential" for "legalized greenwashing"); Nass, *supra* note 11, at 888 (recommending changes to benefit corporation legislation such as "creating a more structured third-party oversight and transparency standard and expanding the scope of stakeholders that may bring a benefit enforcement proceeding").

[130] *See infra* notes 133–174 and accompanying text.

ited and uncertain applicability of such an approach.[131] Part B advocates for amending the legislation to include a statutory grant of authority to attorneys general to oversee and enforce the creation of public benefits; similar to the United Kingdom's CIC Regulator discussed in Part II.[132]

A. The Possibility for State Attorney General Oversight Under Existing Benefit Corporation Legislation

State attorneys general may find that their interest in protecting the public from sham nonprofit organizations places public benefit creation enforcement within their existing enforcement powers.[133] As previously noted, benefit corporation legislation specifically denies standing to intended beneficiaries, so that they cannot sue on their own behalf to enforce the creation of a public benefit.[134] Because benefit corporation legislation denies standing to intended beneficiaries, attorneys general may view this as a public policy reason to assert their oversight powers.[135]

Where attorneys general have statutory authority with regard to nonprofit organizations, a colorable argument could be made that such statutory authority also confers on attorneys general the power to enforce the public benefit activities of benefit corporations.[136] In the alternative, attorneys general may

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[131] *See infra* notes 133–145 and accompanying text.

[132] *See infra* notes 149–174 and accompanying text.

[133] Reiser, *supra* note 15, at 242 (explaining that attorneys generals' "interest in protecting the public interest in their jurisdictions" might force them to consider enforcing the creation of public benefits by benefit corporations); John Tyler, *Analyzing Effects and Implications of Regulating Charitable Hybrid Forms as Charitable Trusts: Round Peg and a Square Hole?*, 9 N.Y.U. J.L. & BUS. 535, 559 & n.69 (2013) (noting the possibility that attorney general authority to police benefit corporations could be found in existing charitable trust law). *But see* Murray & Hwang, *supra* note 31, at 38 (arguing that attorneys general lack the same interest in "ensuring proper management" of benefit corporations as shareholders).

[134] *See supra* note 13 and accompanying text (noting that benefit corporation legislation denies standing to intended beneficiaries).

[135] *See* Reiser, *supra* note 15, at 240 (discussing whether attorneys general will view public benefit creation enforcement "as part of their mandate").

[136] *See id.* at 241 (suggesting that if some or all of a social purpose corporation's assets are devoted to charitable purposes, it could fall within the reach of the statutory powers of attorneys general). Similarly, if a benefit corporation can be considered a charity, there is also the possibility that a court could rewrite the public benefit goal in a benefit corporation's certificate of incorporation under the *cy pres* doctrine, in order to avoid frustration of the public benefit goal. *See* Sean W. Brownridge, *Canning Plum Organics: The Avant-Garde Campbell Soup Company Acquisition and Delaware Public Benefit Corporations Wandering Revlon-Land*, 39 DEL. J. CORP. L. 703, 736 (2015) (arguing that "*cy pres* precedent functions as a foundation for Delaware courts to recognize the preservation and protection of social missions at organizations appreciably concerned with the production of public value"); Tyler, *supra* note 133, at 555 (explaining that courts may refine a benefit corporation's mission through the *cy pres* doctrine). *Cy pres* is an "equitable doctrine under which a court reforms a written instrument with a gift to charity as closely to the donor's intention as possible, so that the gift does not fail." *Cy Pres*, BLACK'S LAW DICTIONARY (10th ed. 2014).

be able to enforce benefit corporations' activities through common law power if the failure to pursue or create a public benefit harms the public.[137] A state attorney general must allege harm to a significant enough population in order to bring an action under her common law power.[138] Thus, if a company's public benefit language is written in such a way as to make it possible to establish an identifiable group of beneficiaries, a suit brought by the attorney general on behalf of that group seems plausible.[139]

Benefit corporations do not, however, hold funds "dedicated irrevocably to charitable purposes."[140] As such, state attorney general enforcement of the creation of public benefits under existing law would require a loose interpretation of the concept of charitable purpose.[141] In addition, benefit corporations are taxed as ordinary corporations and cannot qualify for treatment as tax-exempt charitable organizations under the Internal Revenue Code.[142] Finally, the benefit corporation standard does not mandate that a benefit corporation donate to charitable causes.[143] A benefit corporation can satisfy the statutory criteria by pledging to carry on its business for the benefit of "employees, suppliers, customers, creditors," or the public more generally by, for example, committing to operating in an environmentally friendly manner.[144] State actors

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[137] *See* Robert H. Lande, *New Options for State Indirect Purchaser Legislation: Protecting the Real Victims of Antitrust Violations*, 61 ALA. L. REV. 447, 462 (2010) (noting that state attorneys general in many states "have *parens patriae* authority to sue generally on behalf of victimized consumers within their states").

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

[139] *See* Russell v. Allen, 107 U.S. 163, 167 (1883) (holding that a public charitable trust "must[] be for the benefit of an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity"). This possibility may incentivize corporations to craft the language of their stated public benefit in generalized terms so as to insulate themselves from liability to intended beneficiaries. *See* Briana Cummings, *Benefit Corporations: How to Enforce a Mandate to Promote the Public Interest*, 112 COLUM. L. REV. 578, 609 (2012) (arguing that "those targeted by a corporation's 'specific public benefit' arguably have a greater moral claim than do those not directly targeted"); Loewenstein, *supra* note 38, at 1023 (arguing that the "expressed specific public benefit [may be] so narrowly drawn that its beneficiaries are limited and identifiable") (alteration in original).

[140] Reiser, *supra* note 15, at 241.

[141] *Id.*

[142] *See* 26 U.S.C. § 501(c)(3) (2012) (stating the requirements to be classified as a charitable organization); LANE, *supra* note 54, at 128 (noting that benefit corporations are taxed in the same manner as any other for-profit corporation); *Benefit Corp FAQ's*, *supra* note 15 (stating that benefit corporations are taxed as C or S corps); *see also Charitable Organization*, BLACK'S LAW DICTIONARY (10th ed. 2014) (noting that a charitable organization is tax-exempt).

[143] *See* Reiser, *supra* note 15, at 241 (noting that benefit corporations are unlikely to be considered charities).

[144] *See* CAL. CORP. CODE § 2602(b)(2)(B) (West 2015); *cf.* Clark & Babson, *supra* note 1, at 842 (noting that if a benefit corporation "consciously conducts its operations in a manner that is socially

likely would not view such a mission, though sufficient for qualification as a benefit corporation, as charitable for the purposes of state law governing charitable organizations.[145]

B. Possibilities for Legislative Change

Given the uncertainty under current legislation as to whether state attorneys general have statutory or common law power to enforce benefit corporations, certain amendments should be made to the legislation.[146] Subsection 1 discusses the effect that explicitly classifying benefit corporations and their fiduciaries as "trustees" of assets held for charitable purposes would have on attorney general enforcement capabilities.[147] Subsection 2 urges states to amend their benefit corporation legislation to include procedures for attorney general enforcement and oversight similar to the United Kingdom's CIC form.[148]

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

Professor Brakeman Reiser has argued that statutory classification of benefit corporation fiduciaries as "trustees" of charitable assets would provide an indirect avenue for attorneys general to oversee and enforce benefit corporations' charitable activities.[149] For example, fiduciaries of Illinois Low-Profit Limited Liability Corporations ("L3Cs") are classified as trustees of charitable assets and are thus subject to Illinois charitable trust law.[150] If this classification were included in benefit corporation legislation, attorneys general would be able to use their statutory power to hold directors of benefit corporations accountable for a failure to diligently oversee the management and use of char-

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and environmentally responsible, it would qualify as a benefit corporation regardless of whether it also contributes to or promotes charitable causes").

[145] *See* Reiser, *supra* note 15, at 241 (noting that such purposes are unlikely to be viewed as "charitable under state law").

[146] *See* Nass, *supra* note 11, at 888 ("If legislatures augment certain provisions in the benefit corporation legislation and courts strictly enforce compliance, incorporating as a benefit corporation will allow such a corporation to demonstrate that it is truly committed to social and environmental progress.").

[147] *See infra* notes 149–153 and accompanying text.

[148] *See infra* notes 154–174 and accompanying text.

[149] Reiser, *supra* note 15, at 241 (noting that it is unclear whether benefit corporations are trustees of assets dedicated to charitable purposes).

[150] 805 ILL. COMP. STAT. 180/1-26(d) (2014). L3Cs are for-profit businesses, some of whose profits are directed to charitable foundations. *See id.* (stating that Illinois L3C's are trustees of charitable assets and are thus subject to Illinois charitable trust law with respect to fiduciary duties); 805 ILL. COMP. STAT. § 40/4.01(d) (2014) (stating that "[a] [benefit corporation] director does not have a duty to a person that is a beneficiary of the general public benefit purpose or a specific public benefit purpose of a benefit corporation arising from the status of the person as a beneficiary") (alteration in original); *see also supra* note 54 (describing the L3C form).

itable assets.[151] This does not fully resolve the issue, however, because if benefit corporations are to retain their hybrid for-profit status, not all of a benefit corporation's assets can be devoted to charitable purposes.[152] By choosing not to dedicate any funds to charity and qualifying as a benefit corporation through another mechanism, benefit corporations could easily manipulate the law in order to shield directors from liability.[153]

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

Instead of providing indirect enforcement capabilities to attorneys general, as described in the previous Subsection, benefit corporation legislation should be amended to specifically provide attorneys general with oversight and enforcement power over benefit corporations.[154] The United Kingdom's CIC form, and the already existing statutory grants of authority to state attorneys general to oversee and enforce charities, could be reference points for drafting the addition of attorney general oversight and enforcement into benefit corporation legislation.[155] Given that attorneys general already have broad enforcement capabilities with regard to charitable enterprises, the regulation and enforcement of benefit corporations would be consonant to their current duties.[156]

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[151] *See* 805 ILL. COMP. STAT. 180/1-26(d) (stating that L3C directors are subject to charitable trust law).

[152] *See* Reiser, *supra* note 15, at 241 (noting that not all assets of benefit corporations are devoted entirely to charity); Nass, *supra* note 11, at 881 (noting that benefit corporations "hope to achieve the dual-purposes of profit maximization and the furtherance of a material public benefit").

[153] *See* Clark & Babson, *supra* note 1, at 842 (noting that by committing to social and environmental responsibility, an entity can qualify as a benefit corporation regardless of whether it donates to charity); *cf.* Khatib, *supra* note 9, at 182 (noting that "[a]s it currently stands, neither the [Model Legislation] nor [Delaware's benefit corporation] legislation contains a mechanism to investigate exploitation of the corporate form") (alteration in original). Upon incorporation, founders could include in the certificate of incorporation that the corporation exists not to donate to charitable causes, but instead, is committed to operating in a socially and environmentally-responsible manner. *See* Reiser, *supra* note 15, at 241 (noting that such broad purposes are unlikely to be charitable under state law); *see also* Loewenstein, *supra* note 38, at 1007–08 (noting that a benefit corporation could, for example, "opt to power the corporation's factory or offices with renewable sources of energy, even it [sic] the cost exceeded that of a carbon-based fuel").

[154] *See* Reiser, *supra* note 15, at 243 (noting the possibility that states could include attorney general oversight in their benefit corporation legislation); *see also* Loewenstein, *supra* note 38, at 1021–22 (proposing the inclusion of attorney general oversight in benefit corporation legislation); Nass, *supra* note 11, at 890 (arguing for government oversight in benefit corporation legislation). *But see* Murray, *Chose Your Own Master*, *supra* note 5, at 45 (arguing that "[p]rivate organizations are better equipped than state governments to build nuanced brands and to police them").

[155] *See supra* notes 124–128 and accompanying text (describing the CIC form).

[156] *See* Jones & Welsh, *supra* note 113, at 400 (arguing that "[e]xtending authority to cover directors of for-profit corporations could thus be seen as a natural extension of the attorney general's existing powers").

State attorneys general have common law power in all states and express statutory authority in some states to intervene in the management and affairs of a charitable organization in order to correct a departure from the purpose for which it was formed.[157] Thus, attorneys general have particular experience in assessing performance of the fiduciary duties in charitable trust law.[158] As such, benefit corporation legislation could be amended to include similar grants of authority to attorneys general.[159] Similarly, abandonment of a benefit corporation's humanitarian purpose or perversion of the corporate form to attract consumers may harm the public, enabling attorneys general to take action under UDAP provisions.[160]

Massachusetts and New Jersey require that a benefit corporation's annual benefit report be filed with the state authority.[161] New Jersey law also states that if a corporation has not delivered its report for two consecutive years, the state can revoke its legal status as a benefit corporation.[162] These reporting requirements indicate that state legislatures have already given some thought to the possibility of sham benefit corporations, and have taken small steps to integrate state oversight into the legislation.[163] In addition, passage of constitu-

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[157] *See, e.g.*, CAL. CORP. CODE § 5250 (West 1980) (granting the attorney general authority to enforce the activities of nonprofit charitable organizations); MICH. COMP. LAWS ANN. § 14.251 (West 2016) (providing that the attorney general "shall represent the people" in overseeing the activities of charitable trusts); RESTATEMENT (THIRD) OF TRUSTS § 94(2) (AM. LAW INST. 2012) (noting that a suit to enforce the activities of a charitable trust is normally brought by the Attorney General); BOGERT ET AL., *supra* note 70, § 363 (noting that a fulfillment of the objectives of a charitable trust is almost always enforced by the attorney general). Courts have, however, indicated a tendency to defer to nonprofit directors, much like the business judgment rule in suits regarding for-profit companies. *See, e.g.*, *In re* Multiple Sclerosis Serv. Org. of N.Y., Inc., 496 N.E.2d 861, 865, 868 (N.Y. 1986) (holding that directors of a nonprofit had the authority to define the organization's mission and were not bound by the language of its founding documents).

[158] Reiser, *supra* note 15, at 243 (noting the expertise of attorneys general in regulating charitable enterprises); *see* Brody, *supra* note 70, at 947 (noting that attorneys general have had "successes in educating the public about fraudulent fund raising and challenging wrongdoing, educating fiduciaries and staffs in meeting their legal obligations and improving charity governance, rectifying self-dealing and other breaches of fiduciary duty by charity insiders, and assisting charities that have lost their way to restructure or dissolve").

[159] *See* Loewenstein, *supra* note 38, at 1021–22 (noting that benefit corporation legislation could include attorney general oversight enforcement of public benefit creation); Reiser, *supra* note 15, at 240 (discussing the addition of attorney general oversight in benefit corporation legislation).

[160] Reiser, *supra* note 15, at 242 (explaining that the concern of the state attorneys general "in protecting the public interest in their jurisdictions" might force them to consider enforcing benefit corporations' creation of public benefits). *But see* Murray & Hwang, *supra* note 31, at 38 (arguing that attorneys general lack the same interest in "ensuring proper management" of benefit corporations as shareholders).

[161] *See* MASS. GEN. LAWS ch. 156E, § 16(d) (2014) (requiring a benefit corporation to submit its annual report to the state secretary); N.J. STAT. ANN. § 14A:18-11(d)(1) (West 2016) (same).

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

[163] *See* Reiser, *supra* note 15, at 243 (arguing that stricter disclosure requirements may help alert state authorities to disingenuous benefit corporations). *But see* Cummings, *supra* note 139, at 612

ency statutes indicates that states have recognized that corporations owe some degree of duty to public stakeholders.[164]

States should use the United Kingdom's CIC Regulator as an example when drafting attorney general enforcement into their benefit corporation legislation.[165] The CIC legislation includes the appointment of a CIC Regulator, who has a wide array of oversight and enforcement capabilities.[166] In particular, the CIC Regulator can investigate a CIC's books, initiate civil proceedings against CIC's, and expel directors.[167] Similarly, within state attorneys general offices, there is generally a division devoted to investigating and bringing claims against corporations for unfair and deceptive acts or practices.[168] In addition, attorneys general, compared to a separate, independent commission, have greater incentive to protect the public from deceptive business practices and are less susceptible to collusion with benefit corporations themselves.[169]

To further borrow from the CIC Regulator, an important step would be to require pre-approval from attorneys general before entrepreneurs could incorporate new corporations or reincorporate existing corporations as benefit corporations.[170] This initial check on benefit corporations would serve to dissuade

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(arguing that external reporting requirements encourage firms to "suppress information, focus on short-term results, and do the minimum necessary to comply with external requirements"). In addition, at the state level, there is at least some evidence of the recognition of the possible overlap between benefit corporation law and the law governing charitable trusts. *See* CAL. CORP. CODE § 2700 (West 2015) (noting that nothing in California's benefit corporation statute "shall be construed as negating existing charitable trust principles or the Attorney General's authority to enforce any charitable trust created").

[164] *See* Jones & Welsh, *supra* note 113, at 400 (noting that passage of constituency statutes indicate a "public conception of the corporation" that would support the addition of attorney general oversight). Constituency statutes allow directors to consider non-financial stakeholders in their decision making but, unlike benefit corporation statutes, do not mandate that directors do so. *See supra* note 67 (discussing constituency statutes).

[165] *See* White, *supra* note 33, at 351 (arguing for the creation of a "Benefit Corporation Commission," but advocating against inclusion of attorney general oversight); OFFICE OF THE REGULATOR OF CMTY. INTEREST COS., LEAFLETS: STATUS, ROLE, FUNCTION AND LOCATION 4 (2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/223957/13-785-community-interest-companies-regulators-status-role-function-and-location-guide.pdf [https://perma.cc/GL56-ZTSN] [hereinafter LEAFLETS] (discussing the role of the CIC Regulator in overseeing the activities of CIC's); *supra* notes 124–128 and accompanying text (discussing the CIC form).

[166] *See* Lloyd, *supra* note 126, at 38–39 (describing the duties of the CIC Regulator).

[167] *Id.*; *see* LEAFLETS, *supra* note 165, at 3, 5 (defining the CIC Regulator as "an independent statutory office-holder appointed by the Secretary of State for Business Innovation and Skills").

[168] *See* Reiser, *supra* note 15, at 242 (stating that "[p]rotecting investors and consumers from fraudulent and deceptive practices is another important part of the mandate of state attorneys general"); *supra* notes 119–123 and accompanying text (describing the role of state attorneys general in policing unfair and deceptive acts or practices).

[169] *Cf.* Loewenstein, *supra* note 38, at 1024–25 (discussing the fact that third-party rating agencies are susceptible to influence by benefit corporations).

[170] *See* LEAFLETS, *supra* note 165, at 4 (noting that the CIC Regulator assess applications from companies looking to become CIC's).

"bad actors" from incorporating disingenuous benefit corporations.[171] In addition to requiring pre-incorporation approval, states should also follow the examples of Massachusetts and New Jersey and require that the annual benefit report be submitted to the state.[172] Combining these two mechanisms would provide an initial check on corporate purpose and a subsequent check to ensure that approved benefit corporations do not engage in "greenwashing" or deviate from their stated purpose.[173] It is unlikely that genuine social enterprise entrepreneurs would resist these changes because additional reporting requirements would dissuade sham companies from choosing the benefit corporation form and would allow the truly socially and environmentally conscious companies to further differentiate themselves in the marketplace.[174]

CONCLUSION

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

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[171] *Cf.* Reiser, *supra* note 15, at 243 (noting that additional disclosure requirements may deter "bad actors").

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

[173] *See* Murray, *supra* note 27, at 508 (discussing "mission-drift," which is when an organization departs from its original purpose); Plerhoples, *supra* note 44, at 258 (same); *supra* notes 41–53 and accompanying text (discussing "greenwashing").

[174] *See* Reiser, *supra* note 15, at 243 (arguing that added requirements would dissuade "bad actors" from forming sham benefit corporations); Ribstein, *supra* note 48, at 1453 (discussing how companies can differentiate their products to attract socially conscious consumers); *cf. Benefit Corporation White Paper*, *supra* note 9, at 1104 (arguing that third-party standard setters reduce the likelihood for success of nominal benefit corporations).

fit corporations. Benefit corporations serve laudable, humanitarian purposes. Effective accountability and enforcement mechanisms through state attorneys general would serve to better promote and sustain those purposes.

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