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The Harms of the Benefit Corporation

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The Harms of the Benefit Corporation

COMMENTS

THE HARMS OF THE BENEFIT CORPORATION

KENNAN EL KHATIB*

The benefit corporation cannot be ignored. To date, thirty states, including Delaware and the District of Columbia, have enacted benefit corporation legislation, signifying that the new legal status is here to stay. Largely established to quell the fears of entrepreneurs pursuing social and environmental objectives and profit, the benefit corporation appears to put an end to the legal uncertainty linked to the consideration of other constituencies irrespective of whether such consideration ultimately promotes shareholder value.

While many legal commentators have analyzed the initial impact and advantages of the benefit corporation, few have explored the ability of the existing traditional for-profit legal framework to accommodate for-profit, mission-driven companies. This Comment argues that, due to the increasingly accepted notion that profitability and the pursuit of social and environmental impact are no longer mutually exclusive concepts, the traditional for-profit framework permits social entrepreneurs to consider other constituencies in most contexts and that social entrepreneurs can effectively circumvent the contexts that bar such considerations when adequately counseled. This Comment also analyzes the new corporate form's potential for abuse, suggesting that one of the core impetuses for the creation of the benefit corporation—abating greenwashing—may actually be exacerbated. While seemingly innocuous, the benefit corporation fosters

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a harmful dichotomy with traditional for-profits that encourages consumers to evaluate companies based on legal status instead of business practices.

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INTRODUCTION

The list of business associations is vast: the corporation, close corporation, nonprofit, general partnership, limited partnership, limited liability partnership, limited liability limited partnership, limited liability company, and low-profit limited liability company,

just to name a few. This list of corporate forms continues to expand, with each offering a unique set of advantages based on the type of business and its founders' objectives. The emergence of new corporate forms gives credence to the saying "Necessity is the mother of invention." The seemingly unmet needs of social entrepreneurs served as the catalyst for the emergence of yet another corporate form: the benefit corporation.¹

The Model Benefit Corporation Legislation ("MBCL"), drafted by William Clark and promulgated by the nonprofit B Lab,² seeks to better protect directors' decisions that take into consideration other constituencies as opposed to solely shareholder value.³ Under the MBCL, benefit corporations are required to (1) have a corporate purpose to create a material positive impact on society and the environment, (2) consider non-shareholder constituencies along with the financial interests of shareholders, and (3) assess their annual performance through the use of third-party standards and benefit reports.⁴

In 2010, Maryland became the first state to adopt and pass benefit corporation legislation.⁵ As of October 2015, thirty states and the District of Columbia have followed suit and successfully enacted benefit corporation legislation.⁶ In 2013, Delaware enacted a series of statutory provisions that recognized the benefit corporation as a corporate form.⁷ While some proponents of the benefit corporation

1. See WILLIAM H. CLARK, JR. & LARRY VRANKA, WHITE PAPER: THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION 1, 2 (2013) [hereinafter WHITE PAPER], <http://benefitcorp.net/sites/default/files/documents/Benefit%20Corporation%20White%20Paper.pdf>. The White Paper discusses the underlying rationales in support of creating benefit corporations. *Id.* at 1. It also provides commentary to the Model Benefit Corporation Legislation ("MBCL"). *Id.* at app. A.

2. BENEFIT CORP. INFO. CTR., *MBCL Legislation*, <http://benefitcorp.net/attorneys/model-legislation>.

3. BENEFIT CORP. INFO. CTR., *MBCL Legislation* 1, 2 (June 24, 2014) http://benefitcorp.net/sites/default/files/documents/Model_Benefit_Corp_Legislation.pdf; see WHITE PAPER, *supra* note 1, at 1 (claiming that the sustainable business movement is constrained by an outdated legal framework).

4. See WHITE PAPER, *supra* note 1, at 2 (listing the major characteristics and requirements of the benefit corporation).

5. *Maryland First State in Union to Pass Benefit Corporation Legislation*, CSRWIRE (Apr. 14, 2010, 10:57 AM), http://www.csrwire.com/press_releases/29332-Maryland-First-State-in-Union-to-Pass-Benefit-Corporation-Legislation.

6. *State by State Status*, BENEFIT CORP. INFO. CTR., <http://benefitcorp.net/policymakers/state-by-state-status> (last visited Oct. 26, 2015) [hereinafter *State by State Status*]. Additionally, as of September 2015, five more states have introduced benefit corporation legislation. *Id.* (Alaska, Kentucky, New Mexico, North Dakota, and Oklahoma).

7. *Governor Markell Signs Public Benefit Corporation Legislation*, NEWS.DELAWARE.GOV (July 17, 2013), <http://news.delaware.gov/2013/07/17/>

predict that Delaware's actions tipped the national scale in favor of the benefit corporation by legitimizing the legal status of these corporations, Delaware's modifications to the MBCL further accentuate the weaknesses of the benefit corporation: the lack of an effective enforcement mechanism and the potential for abuse.⁸

The current state of benefit corporation legislation has created drastically varying models of the corporate form that potentially promote "legalized 'greenwashing,'" the phenomenon that occurs when marketers attract consumers by using terms like "green," "responsible," "sustainable," or "charitable" to describe their products without substantiating any of their claims.⁹ While the use of the benefit corporation's legal status to verify the efficacy of social enterprises attempts to ameliorate greenwashing by pairing green consumers with companies that are required to use third-party standards to verify their social and environmental impact, the promulgation of the MBCL predates the establishment of an effective enforcement and compliance program. As a direct consequence of its untimely rollout, the implementation of the MBCL led to many states enacting benefit corporation legislation that actually demands little in terms of cost and action of its early adopters. The result is a corporate form primed for abuse by pseudo-"social" entrepreneurs looking to profit off consumers' and shareholders' misplaced trust in the new legal status. In this sense, a very real public problem could emerge. The benefit corporation's intended purpose of fostering consumer reliance on legal status to verify whether a company is in fact a genuine social enterprise creates a harmful dichotomy with traditional for-profit companies, further exacerbating the problem.¹⁰ As a result, socially and environmentally conscious consumers may be more likely to circumvent judging a corporation based on its business

governor-markell-signs-public-benefit-corporation-legislation (noting that, although benefit corporations form under the traditional corporate structure, the benefit corporation's certificate of incorporation must note the corporation's intended public benefits).

8. *Today Marks a Tipping Point in the Evolution of Capitalism*, BCORPORATION BLOG (July 17, 2013), <http://www.bcorporation.net/blog/today-marks-a-tipping-point-in-the-evolution-of-capitalism> (noting that Delaware's enactment of benefit corporation legislation has created a clear path for social enterprise).

9. WHITE PAPER, *supra* note 1, at 2, 23–24.

10. See 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> (discussing the potential harm to traditional corporations arising from the creation of the benefit corporation).

practices and instead rely on perceived “greenness” conferred by organizing as a benefit corporation.

The success of the MBCL legislation in influencing state lawmakers is partly the result of exploiting the uncertainty that exists in the realm of social enterprises and the legality of considering other constituencies in the ordinary course of business. This Comment argues that the legal framework governing traditional for-profits sufficiently accommodates social entrepreneurs’ pursuit of social and environmental objectives while insulating directors who use a triple bottom line approach from liability for their considerations of those interests.¹¹ The advent of new research helps dispel the long-standing belief that social enterprise and profitability are mutually exclusive concepts, ultimately making it easier for judges and investors to grasp the long-term benefits that accrue to shareholders when directors consider non-financial interests. In addition to articulating the suitability of the traditional for-profit legal framework for social entrepreneurs, this Comment brings to light the benefit corporation’s potential for abuse. This Comment also explains why the traditional for-profit remains the preferred corporate form for putting social entrepreneurs’ products and services at the disposal of socially and environmentally conscious consumers while minimizing the possibility of misleading consumers.

Part I of this Comment will provide a brief overview of the legal history that ultimately gave rise to the benefit corporation. This Part will also examine the major components of benefit corporation legislation by differentiating between state statutes that closely follow the MBCL and Delaware’s Public Benefit Corporation Legislation. Lastly, this part will disentangle the oft-confused “B-Corp” certification process from the statutory benefit corporation. Part II will assert that the current legal framework for traditional corporations supports social enterprises’ consideration of other constituencies without requiring a change of legal status from a traditional for-profit to a benefit corporation. Further, this Part will demonstrate the connection between the benefit corporation and the unintended, yet foreseeable, consequence of legalized greenwashing and its paralyzing effect on consumer decision making. Part III will conclude by explaining why, after weighing the advantages and

11. The triple bottom-line framework consists of maximizing (1) profit, (2) social, and (3) environmental impact. See Alicia E. Plerhoples, *Can an Old Dog Learn New Tricks? Applying Traditional Corporate Law Principles to New Social Enterprise Legislation*, 13 TRANSACTIONS: TENN. J. BUS. L. 221, 231, 233 n.65 (2012).

disadvantages of the benefit corporation, the traditional for-profit form remains the best corporate form for both social entrepreneurs and green consumers. Finally, this Part will provide an example of a mission-driven company succeeding as a traditional for-profit corporation.

I. THE ROAD TO THE BENEFIT CORPORATION

Before analyzing the benefit corporation as it currently exists, it is important to examine the underlying rationale and motivation for its emergence. Analyzing the emergence of the benefit corporation requires understanding the legal framework in existence prior to the establishment of the benefit corporation, surveying the legislative efforts taken in an attempt to remedy perceived legal obstacles impeding social entrepreneurs, and reviewing the MBCL drafters' intent in creating the benefit corporation. This section will then explore the requirements of the MBCL and compare and contrast them with Delaware's benefit corporation legislation.

A. *The Emergence of the Benefit Corporation As a Corporate Form*

The need to appease social entrepreneurs who feared entering a market that seemingly punished rather than rewarded directors who considered non-financial interests spurred the creation of the benefit corporation.¹² The benefit corporation broke new ground by expressly permitting, and even mandating, directors to consider constituencies other than their shareholders and by providing directors with the clarity and security to pursue non-shareholder interests.¹³ Because a director's ability to consider non-shareholder interests hinges on the level of scrutiny that the reviewing court applies, the first step in determining social entrepreneurs' ability to consider other constituencies under the for-profit legal framework requires an analysis of the triggers and parameters of the two relevant tests: the business judgment rule¹⁴ and the enhanced business

12. E.g., 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?src=pm> (quoting Terry Mollner, the founder of a socially responsible mutual fund, in response to Ben & Jerry's sale to Unilever: "We think it's horrible that a company has no choice but to sell to the highest bidder or get sued").

13. See WHITE PAPER, *supra* note 1, at 10 (emphasizing that the legal uncertainty concerning directors' ability to consider non-financial interests under the existing legal framework has made it difficult for directors to feel legally protected); see also *infra* note 16 and accompanying text.

14. See WHITE PAPER, *supra* note 1, at 12-14; see also Mary Siegel, *The Illusion of Enhanced Review of Board Actions*, 15 U. PA. J. BUS. L. 599, 605 (2013) ("The business

judgment rule,¹⁵ the latter of which creates different obligations on directors depending on the particular facts of the case.¹⁶ Additionally, examination of the evolution of the courts' treatment of the shareholder primacy doctrine illustrates the doctrine's limited application in the day-to-day decision making functions of social enterprises. The following subsections will explore the landmark decisions and doctrines that ultimately prompted the development of the benefit corporation and the reactive measures that some state legislatures took in an effort to sidestep these judicial determinations.

1. *Board decisions and the varying levels of judicial scrutiny*

Although there are six tests¹⁷ Delaware¹⁸ courts use when adjudicating a board's business decisions, only three are relevant to this discussion¹⁹: the business judgment rule, the enhanced business

judgment rule serves to protect and promote the role of the board as the ultimate manager of the corporation. Because courts are ill equipped to engage in post hoc substantive review of business decisions, the business judgment rule 'operates to preclude a court from imposing itself unreasonably on the business and affairs of a corporation.'")

15. See WHITE PAPER, *supra* note 1, at 12–14; see also Siegel, *supra* note 14, at 609 (defining the enhanced business judgment rule as an intermediate standard of review that requires a board of directors to prove good faith and reasonable investigation during a corporate takeover).

16. Under the enhanced business judgment rule, this Comment is concerned only with fact patterns giving rise to either *Unocal* or *Revlon* obligations on directors because they are regarded as the most constraining on directors' flexibility in decision making. See generally WHITE PAPER, *supra* note 1, at 11–14 (concluding that under *Unocal* and *Revlon*, social entrepreneurs face constant legal uncertainty).

17. For a comprehensive overview of the six tests applied by Delaware courts, see generally Siegel, *supra* note 14, at 602–16. The six tests are the business judgment rule, the enhanced business judgment rule, *Revlon*, the entire fairness test, *Blasius*, and the *Schnell* doctrine. *Id.*

18. In recognition of Delaware's role as the leader in corporate law and as a magnet for businesses of all sizes, this Comment bases its assertions and conclusions only on the Delaware tests. This limitation in scope derives from the notion that if a company and its board can successfully maneuver through the different tests in Delaware, there are no remaining obstacles for social entrepreneurs in their choice of where to incorporate. This Comment exclusively focuses on either circumventing or passing the Delaware tests because Delaware is one of the only remaining states that has not enacted a constituency statute. See *infra* note 72 and accompanying text (listing the states that have enacted constituency statutes). In the event that a business seeks to incorporate in a state that has enacted a constituency statute, the analysis ends there. See *infra* notes 142–43 and accompanying text (explaining that the only substantial difference between the discretion afforded to directors under a constituency statute and the statutory benefit corporation is that the former generally permits, as opposed to mandates, the consideration of other constituencies).

19. The tests of entire fairness, *Blasius*, and *Schnell* are tripped by reasons unrelated to a board's pursuit of social or environmental objectives and, therefore,

judgment rule, and the rule established in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*²⁰ The business judgment rule affords directors the greatest deference in making business decisions.²¹ The rule provides directors with “a presumption that in making a business decision[,] the directors of a corporation acted on an informed basis, in good faith[,] and in honest belief that the action taken was in the best interests of the company.”²² The burden rests with the party challenging the decision to establish facts that rebut the presumption.²³ Under the business judgment rule, directors can consider non-shareholder interests as long as there is a rational connection between that consideration and shareholder value.²⁴ The Delaware Supreme Court held that “[w]hen director decisions are reviewed under the business judgment rule, th[e] [c]ourt will not question rational judgments about how promoting non-stockholder interests—be it through making a charitable contribution, paying employees higher salaries and benefits, or more general norms like promoting a particular corporate culture—ultimately promote stockholder value.”²⁵ Accordingly, the business judgment rule will

will not be discussed further in this Comment. *See generally* *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983) (illustrating that entire fairness is typically the proper test when dealing with conflict-of-interest cases); *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439–40 (Del. 1971) (permitting the court to invalidate a board’s determination without first attributing fault to the board’s decision to address inequitable, yet legally permissible actions); *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 668 (Del. Ch. 1988) (noting that the *Blasius* test is tripped by a board’s improper purpose).

20. 506 A.2d 173 (Del. 1986).

21. *See* *Siegel*, *supra* note 14, at 605, 607–08 (illustrating that plaintiffs are rarely able to prevail when the business judgment rule applies).

22. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (citing *Kaplan v. Centex Corp.*, 284 A.2d 119, 124 (Del. Ch. 1971)), *overruled by* *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000); *Robinson v. Pittsburgh Oil Ref. Corp.*, 126 A. 46, 49 (Del. Ch. 1924).

23. *Aronson*, 473 A.2d at 812.

24. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 33 (Del. Ch. 2010); *see also* William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 835 (2012) (“[C]ourts reviewing decisions made in the day-to-day context will not question rational judgments about how seemingly promoting non-shareholder interests (such as a corporation’s decision to make charitable contributions or to otherwise support the community in which their operations are located) ultimately promote shareholder value.” (footnote omitted)).

25. *eBay*, 16 A.3d at 33. Moreover, Delaware’s rationale for the business judgment rule is premised on the realization by courts that in the inherently risky environment of business, directors need to operate under a legal framework that allows them to freely take risks rather than live in constant fear of lawsuits. DEL. CODE ANN. tit. 8, § 141(a) (2015); *Gagliardi v. TriFoods Int’l, Inc.*, 683 A.2d 1049, 1052 (Del. Ch. 1996).

protect the vast majority of directors' and executives' day-to-day business decisions relating to the manufacturing, marketing, and selling of their products; the corporation's investments and charitable contributions; and any fair trade, employment, and supplier issues, so long as the court deems them to be "rational."²⁶

Other contexts limit a board's discretion in making business decisions. One such context arises when a corporation employs defensive measures to avoid a hostile takeover, triggering the enhanced business judgment rule.²⁷ In *Unocal Corp. v. Mesa Petroleum Co.*,²⁸ the Supreme Court of Delaware established a two-prong test to determine whether the board acted properly in defending against a takeover attempt.²⁹ The first prong requires that directors "ha[ve] reasonable grounds for believing that a danger to corporate policy and effectiveness exist[s]."³⁰ The second prong requires that the defensive measure "be reasonable in relation to the threat posed" to "come within the ambit of the business judgment rule."³¹ Under the *Unocal* test, the burden of proof lies with the board.³² While the *Unocal* test represents the application of a higher form of judicial scrutiny, in practice it is not difficult for corporations to satisfy both prongs of the test.³³

The Delaware Supreme Court similarly applies heightened scrutiny to evaluate a target board's decisions in the hostile takeover context, in which the posterity of the corporation is threatened.³⁴ A board

26. See *eBay*, 16 A.3d at 36; Underberg, *supra* note 10, at 2 ("I am not aware of a single case holding directors liable for a routine business decision because they considered non-shareholder interests or that impose a general duty to maximize profits and short-term shareholder value."). But see Clark Jr. & Babson, *supra* note 24, at 834–36 (noting that some day-to-day decisions might lead to reduced shareholder value but conceding that the contrary argument is just as likely).

27. See *Unocal Corp. v. Mesa Petrol. Co.*, 493 A.2d 946, 955 (Del. 1985) (noting that a board of directors does not have absolute power to defeat a hostile takeover).

28. *Id.* at 946.

29. *Id.* at 955.

30. *Id.* While the court in *Unitrin, Inc. v. American General Corp.* further refined the first prong of the *Unocal* test by adding that the court must first hold that a defensive measure is neither preclusive nor coercive before shifting the inquiry to determine whether the measure lies within the "range of reasonableness" to pass the second prong of the *Unocal* test, this refinement has no impact on the other-constituency analysis on which this Comment focuses. 651 A.2d 1361, 1387–88 (Del. 1995).

31. *Unocal*, 493 A.2d at 955.

32. *Id.*

33. See Siegel, *supra* note 14, at 619–23 (noting that directors had a seventy-nine percent success rate under *Unocal* with non-independent boards and an eighty-four percent success rate with independent boards).

34. See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182, 184 (Del. 1986) (describing Pantry Pride's attempted hostile takeover of Revlon,

assumes *Revlon* duties³⁵ “when a corporation undertakes a transaction which will cause: (a) a change in corporate control; or (b) a break-up of the corporate entity.”³⁶ Once a company triggers *Revlon*, directors may no longer consider other constituencies; the directors’ sole obligation shifts to seeking the best value reasonably available to stockholders.³⁷ In spite of this narrow objective, directors can still utilize flexible means to pursue this mandate.³⁸ Additionally, the Delaware Supreme Court has since clarified that when applying enhanced judicial scrutiny, a court should only be “deciding whether the directors made a *reasonable* decision, not a *perfect* decision.”³⁹ Despite the differences in the contexts that give rise to heightened scrutiny and in the breadth of each test, target corporations win the vast majority of their cases under *Revlon*.⁴⁰ Further, a director can potentially avoid *Revlon* review by adopting a long-term strategy, making the company’s break-up or dissolution less likely.⁴¹

which included the shifting of a board’s obligations to shareholders from protecting a company during the takeover attempt to seeking the best value reasonably available to shareholders when it became apparent that the takeover was inevitable).

35. *See id.* at 182 (observing that the director’s duty to protect the company can change during a hostile takeover, requiring the directors to maximize the corporation’s value for the shareholders’ benefit).

36. *Paramount Commc’ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 48 (Del. 1994).

37. *Id.*

38. *See* Siegel, *supra* note 14, at 625 (“Delaware courts have sought to situate these *Revlon* duties within the broader context of the directors’ fiduciary duties, stressing that once the board convinces the court that it has *sought* to maximize shareholder value, the court will defer to the board’s decision[.]” (emphasis added)).

39. *QVC Network, Inc.*, 637 A.2d at 45; *see also id.* (advising against the use of hindsight determinations of the reasonableness of the board’s selection); *In re Del Monte Foods Co. S’holders Litig.*, 25 A.3d 813, 830 (Del. Ch. 2011) (noting that the test should consider the best available option at the time of the director’s decision).

40. *See* Siegel, *supra* note 14, at 628–29 (“Of the thirty-nine cases that found a corporation to be in *Revlon* mode, courts in thirty-one cases (or seventy-nine percent) held that the boards had met their *Revlon* duties.” (footnotes omitted)). Moreover, as in *Unocal*, a board of directors operating with a majority of independent directors is afforded greater deference in its efforts to seek the maximization of the company’s value at the time of sale. *Revlon*, 506 A.2d at 176 n.3; *see also* Siegel, *supra* note 14, at 630–31 (noting that, of the target corporations that met their *Revlon* duties, seventy-seven percent had boards with a majority of independent directors, but also finding that their success did not hinge on having independent boards, as five of the eight cases that failed *Revlon* had independent boards). However, the five cases where companies with independent boards failed to meet their *Revlon* duties are alternatively explained by (1) failing to get reliable market information, or (2) permitting corporate management to pursue a bid that favors the management. *Id.* at 630–32.

41. *See* *Paramount Commc’ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1150–51, 1154 (Del. 1989) (“Directors are not obliged to abandon a deliberately conceived

While triggering *Revlon* duties precludes directors from considering other constituencies, both the enhanced business judgment rule under *Unocal* and the deferential business judgment rule permit directors to consider the impact of business decisions on constituencies other than shareholders, including society and the environment generally.⁴² For example, the *Unocal* court expressly allowed directors to consider other constituencies such as creditors, customers, employees, and even the broader community.⁴³ The *Revlon* court, however, narrowed the extent to which directors could consider other constituencies under *Unocal*, holding that the consideration of other constituencies requires “that there be some rationally related benefit accruing to the stockholders.”⁴⁴ However, once a company’s break-up or sale is inevitable, the duty of the board of directors changes from preservation of the corporate entity to maximization of the company’s value at sale; conversely, if the company’s dissolution is not inevitable, then *Revlon* is inapplicable and directors may consider other constituencies.⁴⁵

2. *The shareholder primacy doctrine’s limited applicability*

The shareholder primacy doctrine applies to board decisions only in limited scenarios. The court in *Dodge v. Ford Motor Co.*⁴⁶ established the seminal doctrine that courts and law professors continue to cite nearly a century later.⁴⁷ The doctrine simply states that a company that elects to incorporate as a traditional for-profit serves primarily to maximize profits for its stockholders.⁴⁸ Directors retain discretion in choosing the means to pursue that end, but the end itself can never

corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy.”).

42. *Revlon*, 506 A.2d at 176.

43. *Unocal Corp. v. Mesa Petrol. Co.*, 493 A.2d 946, 955 (Del. 1985).

44. *Revlon*, 506 A.2d at 176.

45. *Id.* at 182; see *supra* note 41 and accompanying text (proposing one potential method, the formation of a long-term corporate strategy, to avoid triggering *Revlon* mode).

46. 170 N.W. 668 (Mich. 1919).

47. See *Shlensky v. Wrigley*, 237 N.E.2d 776, 779–80 (Ill. App. Ct. 1968) (citing *Dodge* as part of the final holding); Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 165 (2008) (confirming that courts cite *Dodge* to establish a corporate director’s authority to serve the shareholder’s interest). *But see* J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 10 (2012) (highlighting professors who claim that cases like *Dodge* are rare).

48. See *Dodge*, 170 N.W. at 684 (“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.”).

aim to limit profits.⁴⁹ Additionally, in *Dodge*, the court narrowly held that a corporate policy that *intentionally* seeks to reduce profits is invalid as a matter of law.⁵⁰ Thus, even given directors' wide latitude in making business decisions, the court criticized Henry Ford's policy that ostensibly aimed to make cars more affordable and to pay better wages because Ford contrived the policy after determining that the shareholders had made enough money—a decision that was not his to make.⁵¹ In this respect, the court concluded that Ford's refusal to pay dividends was not the result of his discretion, but was wholly arbitrary in light of the company's continued and ascertainable financial success.⁵² Many commentators have since argued that *Dodge's* influence has waned and that courts now readily accept that traditional for-profits can regularly consider non-shareholder interests.⁵³

The court in *eBay Domestic Holdings, Inc. v. Newmark*⁵⁴ echoed the result in *Dodge* when it held craigslist's corporate policy invalid as a matter of law, making it the only modern case since *Dodge* to fail the first prong of the *Unocal* test.⁵⁵ In *eBay*, craigslist founders and controlling shareholders, James ("Jim") Buckmaster and Craig Newmark, implemented a poison pill as a defense to a takeover attempt by eBay.⁵⁶ The court ultimately held that it was not the

49. *Id.*

50. *Id.*

51. *See id.* at 671, 683–84 (indicating that Henry Ford thought that the company was making "too much money, [] had too large profits, and that, although large profits might be still earned, a sharing of them with the public . . . ought to be undertaken").

52. *See id.* at 683 (noting that it had been common practice to declare large dividends under similar situations in the past).

53. *See, e.g.,* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 773 (2005) (distinguishing the Michigan Supreme Court's description of profit-seeking as the "primary," but not "exclusive" corporate goal); Stout, *supra* note 47, at 165–67, 170–71 (arguing that the shareholder supremacy doctrine first articulated in *Dodge* is outdated dicta from a state court that holds little influence in the realm of corporate law). The particular factual background of the case helps shed light on its holding: Henry Ford deliberately avoided issuing dividends to keep profits out of the hands of his future competitor, the Dodge brothers. *See* Stout, *supra* note 47, at 167; *see also* Nathan Oman, *Corporations and Autonomy Theories of Contract: A Critique of the New Lex Mercatoria*, 83 DENV. U. L. REV. 101, 134–35 (2005) (arguing that the fiduciary relationship between a director and the corporation "places few limits on managerial decision-making" and that *Dodge* was decided on protecting the rights of dissenting shareholders from unreasonable oppression, not unprofitable business decisions).

54. 16 A.3d 1 (Del. Ch. 2010).

55. *See* Siegel, *supra* note 14, at 619–20, 620 n.94 (confirming that *eBay* is the only modern case to fail the first prong of *Unocal*).

56. *See eBay*, 16 A.3d at 20–21, 28 (defining "poison pill" as shareholders' rights

poison pill that was unreasonable; rather, it was the core of craigslist's corporate policy, which expressly aimed to not monetize its website, that was invalid.⁵⁷ Buckmaster and Newmark could have potentially avoided the result in *eBay* by rejecting eBay's initial offer to purchase part of their company for millions of dollars.⁵⁸ Instead, Buckmaster and Newmark accepted large sums of money and voluntarily ceded partial control of their company to a party that objected to their corporate policy.⁵⁹ The *eBay* court bluntly stated that a for-profit corporation is not the correct corporate form for pursuing purely philanthropic ends.⁶⁰

Despite holding that the directors in both *eBay* and *Dodge* breached their fiduciary duties by failing to maximize shareholder wealth, some courts have limited the application of the shareholder primacy doctrine.⁶¹ A classic example of courts protecting directors seeking not to maximize shareholder wealth can be found in *Shlensky v. Wrigley*.⁶² In *Shlensky*, minority shareholders believed that offering night games would make the Chicago Cubs a more profitable baseball franchise.⁶³ The directors, however, refused to install lights to host night games because, according to the directors' assessments, installing lights could result in a decline in the quality of life of residents near Wrigley Field.⁶⁴ The court ultimately ruled in favor of the directors and went on to argue that the potential for decline in the quality of life of residents could hurt property values in the surrounding neighborhood, which would harm shareholders' long-term economic interests.⁶⁵ Although *Shlensky* illustrates only one example of courts' willingness to find—and even invent—long-run rationalizations to restore discretion to directors in making business decisions,⁶⁶ Delaware case law also supports this assertion. In *Unocal*,

plans that “fundamentally are defensive devices that, if used correctly, can enhance stockholder value but, if used incorrectly, can entrench management and deter value-maximizing bidders at the stockholders' expense”).

57. *Id.* at 28–29, 34.

58. *See id.* at 10 (noting that eBay offered \$15 million for a minority interest in craigslist, which Buckmaster and Newmark rejected).

59. *See id.* at 11, 16 (noting that eBay aspired to monetize craigslist).

60. *Id.* at 34.

61. *See, e.g., Unocal Corp. v. Mesa Petrol. Co.*, 493 A.2d 946, 954–55, 958 (Del. 1985) (using the business judgment rule to uphold a director's decisions when made reasonably).

62. 237 N.E.2d 776 (Ill. App. Ct. 1968).

63. *Id.* at 777.

64. *Id.* at 778.

65. *Id.* at 780.

66. *See Stout, supra* note 47, at 170–71 (noting that “courts regularly allow corporate directors to make business decisions that harm shareholders in order to benefit other corporate constituencies” and that courts primarily shield directors

the Delaware Supreme Court noted that the board had a “fundamental duty and obligation to protect the corporate enterprise, which includes stockholders[.]”⁶⁷ This language, in addition to the court expressly permitting directors to consider other constituencies, supports the view that directors can consider other constituencies without breaching fiduciary duties owed to shareholders.⁶⁸ Thus, in Delaware, the shareholder primacy doctrine only applies when board decisions trigger *Revlon*.⁶⁹

3. *The advent of constituency statutes*

In addition to precedent that supports giving broad decision making authority to directors who pursue legitimate corporate ends, many state legislatures have cleared confusion pertaining to the shareholder primacy doctrine by enacting constituency statutes.⁷⁰ Constituency statutes allow directors to consider the impact of business decisions on constituencies other than shareholders, including the short- and long-term interests of a corporation’s employees, suppliers, creditors, customers, local and national economies, and society generally.⁷¹ So far, thirty-three states have enacted constituency statutes, unequivocally permitting directors to make business decisions in consideration of these other constituencies.⁷²

from liability under the business judgment rule so long as there is some possible future benefit, however unlikely, flowing to shareholders).

67. *Unocal Corp. v. Mesa Petrol. Co.*, 493 A.2d 946, 954 (Del. 1985). The court’s mentioning that the corporate enterprise includes shareholders implies that there are other constituencies a fiduciary may properly consider.

68. *Id.* at 955.

69. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).

70. WHITE PAPER, *supra* note 1, at 8–9.

71. *See, e.g.*, CONN. GEN. STAT. § 33-756(d) (2015) (“[D]irector[s] . . . may consider . . . the long-term as well as the short-term interests of the corporation . . . [and] the interests of the corporation’s employees, customers, creditors and suppliers . . .”); WYO. STAT. ANN. § 17-16-830(g)(v) (2015) (providing that directors may consider “[a]ny other factors relevant to promoting or preserving public or community interests”); *see also* IND. CODE. § 23-1-35-1(f) (2015) (“Certain judicial decisions in Delaware and other jurisdictions, which might otherwise be looked to for guidance in interpreting Indiana corporate law, including decisions relating to potential change of control transactions that impose a different or higher degree of scrutiny on actions taken by directors in response to a proposed acquisition of control of the corporation, are inconsistent with the proper application of the business judgment rule under this article.”).

72. ARIZ. REV. STAT. ANN. § 10-2702 (2015); CONN. GEN. STAT. § 33-756(d); FLA. STAT. § 607.0830(3) (2015); GA. CODE ANN. § 14-2-202(b)(5) (2015); HAW. REV. STAT. § 414-221(a)–(b) (2015); IDAHO CODE § 30-1602 (2015); 805 ILL. COMP. STAT. ANN. 5/8.85 (2015); IND. CODE ANN. § 23-1-35-1(d); IOWA CODE § 490.1108A (2015); KY.

Noticeably missing from the list of states that have enacted constituency statutes is Delaware.⁷³ However, Delaware case law has expressly addressed the ability of directors to consider interests beyond shareholders' interests in certain contexts.⁷⁴ In the case of routine business decisions assessed under the deferential business judgment rule, directors will have little difficulty in considering the impact a business decision has on other constituencies.⁷⁵ Even under heightened review in the hostile takeover context, Delaware courts allow directors to consider non-shareholder interests, provided the directors can point to some rationally related benefit accruing to shareholders, and do not require directors to abandon long-term corporate strategies in the interest of increasing short-term shareholder value.⁷⁶

REV. STAT. ANN. § 271B.12-210(4) (West 2015); LA. REV. STAT. ANN. § 12:1821(a) (2015); ME. REV. STAT. tit. 13-C, § 832 (2015); MD. CODE ANN., CORPS. & ASS'NS § 2-104(b)(9) (LexisNexis 2015); MASS. GEN. LAWS ch. 156B, § 65 (West 2015); MINN. STAT. ANN. § 302A.251(5) (2015); MISS. CODE ANN. § 79-4-8.30(f) (2015); MO. REV. STAT. § 351.347(1) (2015); NEB. REV. STAT. § 21-2432(2) (2015); NEV. REV. STAT. § 78.138(4) (2015); N.J. STAT. ANN. § 14A:6-1(2) (West 2015); N.M. STAT. ANN. § 53-11-35(D) (2015); N.Y. BUS. CORP. LAW § 717(b) (McKinney 2015); N.D. CENT. CODE § 10-19.1-50(6) (2015); OHIO REV. CODE ANN. § 1701.59(E) (LexisNexis 2015); OR. REV. STAT. § 60.357(5) (2015); 15 PA. CONS. STAT. § 1715(a)(1) (2015); 7 R.I. GEN. LAWS § 7-5.2-8(a) (2015); S.D. CODIFIED LAWS § 47-33-4 (2015); TENN. CODE ANN. § 48-103-204 (2015); VT. STAT. ANN. tit. 11A, § 8.30(a) (2015); VA. CODE ANN. § 13.1-727.1 (2015); WIS. STAT. § 180.0827 (2015); WYO. STAT. ANN. § 17-16-830(e).

73. See *supra* note 72 (listing the thirty-three states that have adopted constituency statutes).

74. While there is no case law that discusses the consideration of other constituencies in the day-to-day context where the business judgment rule would be applied, its absence is quite telling. The courts would presumably apply the business judgment rule because nothing will have invoked enhanced business judgment. See *infra* note 75 and accompanying text (supporting the assertion that day-to-day decisions will be scrutinized under the deferential business judgment rule). The court would likely defer to the business judgment of the directors who are best suited to determine the short- and long-term interests at stake concerning a particular decision. See *id.* Arguing the contrary warrants the prediction that courts would face countless lawsuits challenging the day-to-day decisions as opposed to the decision making process.

75. See Clark, Jr. & Babson, *supra* note 24 (explaining that day-to-day business decisions that have the most social and environmental impact are afforded the protection of the business judgment rule).

76. *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1154 (Del. 1989); *Unocal Corp. v. Mesa Petrol. Co.*, 493 A.2d 946, 955 (Del. 1985). Of course, if a court makes a finding that the company's dissolution or break-up is inevitable, then *Revlon* applies, and the consideration of other constituencies becomes ill-suited. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 184 (Del. 1986).

4. *The fallacy that existing legal frameworks do not accommodate for-profit mission-driven companies*

The benefit corporation as a corporate form emerged primarily to deal with social entrepreneurs' fears that the current legal framework does not shield directors from liability in the pursuit of social and environmental missions.⁷⁷ William Clark, one of the leading proponents of the benefit corporation who also helped draft the MBCL, often cites Ben & Jerry's as the iconic example meriting the creation of such a corporate form.⁷⁸ Ben & Jerry's was sold to Unilever instead of another investor, Terry Mollner, who had made an earlier bid to take the company private.⁷⁹ Ben Cohen, one of Ben & Jerry's' founders, stated that he would have preferred to keep the company private; however, the board felt obligated to accept the higher offer to keep the company public.⁸⁰ Accordingly, benefit corporation status offers a possible solution to social entrepreneurs facing threats to the posterity of their corporate culture.⁸¹ This remains one of the principal motivations underlying the formation of the benefit corporation.⁸² Other rationales for the emergence of the benefit corporation are summarized in the White Paper, which lists market demand by consumers, investors, and social entrepreneurs

77. See WHITE PAPER, *supra* note 1, at 1, 10 (interpreting the lack of case law on considering non-financial interests as indicative of courts' reluctance to adjudicate these issues and their inclination to "fall back on shareholder primacy").

78. See *id.* at 6 ("These fears are exacerbated by cautionary tales of investor-led board takeovers of private companies and stories like the iconic forced sale of Ben & Jerry's to Unilever."); Kevin Ercoline, Note, *Beyond Puffery: Providing Shareholder Assurance of Societal Good Will in Crowdfunded Benefit Corporations*, 64 AM. U. L. REV. 169, 174-77 (2014) (using the takeover of Ben & Jerry's as a case example to advocate for alternative business entities); Clark Jr. & Babson, *supra* note 24, at 837-38 (citing to the sale of Ben & Jerry's to Unilever as an indicator that the pre-benefit corporation corporate framework does accommodate for social enterprises).

79. Clark Jr. & Babson, *supra* note 24, at 838.

80. See Hays, *supra* note 12 ("The plan to take Ben & Jerry's private came apart when Dreyer's offered \$38 a share in a stock swap. 'The board felt they had no choice but to let all three groups put their best offers on the table yesterday,' Mr. Mollner said, adding, '[w]e think it's horrible that a company has no choice but to sell to the highest bidder or get sued.'").

81. See, e.g., Ercoline, *supra* note 78, at 177 (observing that the benefit corporation is one business entity that helps "combat the possibility of forcing [a] [b]oard of social enterprise [from] decid[ing] between the company's social ideals and profit maximization in a takeover scenario").

82. See *id.* at 177-78 (using the takeover of Ben and Jerry's to exemplify social entrepreneurs' concerns regarding threats to corporate culture that may be alleviated by protections offered by benefit corporation status).

and the prevention of greenwashing as the primary impetuses for the creation of the benefit corporation.⁸³

Recent research suggests that sixty-eight million U.S. consumers base their purchasing decisions on their sense of social and environmental values.⁸⁴ Additionally, approximately eighty-seven percent of consumers indicated that they would switch to a socially responsible brand where price and quality are equal.⁸⁵ Some consumers are willing to spend up to twenty percent more on green products and services.⁸⁶ These numbers illustrate that the current consumer market is primed for socially and environmentally driven businesses.⁸⁷

Correspondingly, for many of the same reasons listed above, investors and entrepreneurs are tapping into the “green” consumer market. In 2010, J.P. Morgan released a report that valued this market opportunity at between \$400 billion and \$1 trillion, with profits ranging from \$183 billion to \$667 billion.⁸⁸ Additionally, the J.P. Morgan report noted that expected returns varied greatly, as some investors expected returns “to outperform traditional investments.”⁸⁹ The report’s executive summary concluded that investors and entrepreneurs increasingly believe that they need not sacrifice financial returns in exchange for social impact.⁹⁰ When viewed holistically, the market demand for socially and environmentally conscious companies by consumers, investors, and entrepreneurs allows directors to derive myriad rational benefits that accrue to shareholders by considering the impact of the corporation’s products and services on society, the environment, and their balance sheets.⁹¹

Lastly, the benefit corporation’s emergence was intended to reduce greenwashing.⁹² The drafters of the MBCL sought to use the

83. See WHITE PAPER, *supra* note 1, at 2–5 (examining and advocating for legislation supporting benefit corporations as a method through which states, entrepreneurs, and the public may all benefit by allowing corporations to consider public benefits).

84. *Benefits of Becoming a Sustainable Business*, ECO-OFFICIENCY, http://www.eco-officiency.com/benefits_becoming_sustainable_business.html (last visited Oct. 26, 2015).

85. *Id.*

86. *Id.*

87. *Id.*

88. NICK O’DONOHUE ET AL., J.P.MORGAN, *IMPACT INVESTMENTS: AN EMERGING ASSET CLASS 1*, 6 (2010), http://ventureatlanta.org/wp-content/uploads/2011/11/JP-Morgan-impact_investments_nov2010.pdf.

89. *Id.*

90. *Id.*

91. See *id.* at 7–8 (discussing possible benefits accrued from impact investments that aim to improve the lives of vulnerable people, the environment at large, or expand access to basic services for people in need).

92. See WHITE PAPER, *supra* note 1, at 2–3 (describing the problem of

branding advantages conferred by electing benefit corporation status to attract social entrepreneurs and to deter the practice of greenwashing by imposing some barriers to entry, such as annual reporting and third-party standard requirements.⁹³ Further, the White Paper suggests that requiring benefit corporations to list a general public benefit may prevent abuse of the new corporate form where benefit corporations (1) list an overly specific public benefit, (2) consider that public benefit, and (3) render a decision that does not comport with the spirit of the MBCL.⁹⁴

The White Paper goes on to refute theories that the benefit corporation could devolve into a legalized form of greenwashing, stating that “[a] company deciding to become a benefit corporation will necessarily be legally required to meet higher standards of corporate purpose, accountability and transparency.”⁹⁵

The goal of combating greenwashing thus greatly relies on the effective use of third-party standards and annual reporting requirements to serve as a method of substantiating benefit corporations’ claims of generating public benefit.⁹⁶ These safeguards are in place to ensure compliance with a company’s general public benefit and to provide management, directors, shareholders, and judges with criteria to determine what constitutes an acceptable third-party standard.⁹⁷ Expenses incurred from hiring third parties to assess overall social and environmental performance combined with those from annual reporting requirements are intended to dissuade companies that exclusively seek marketing and branding advantages from registering as benefit corporations.⁹⁸ The expectation is to reduce greenwashing by

“greenwashing,” resulting from the overuse of socially responsible terms to lure consumers into purchasing products).

93. See generally *id.* at 2–3, app. C, at 7–8 (identifying the problem of greenwashing and distinguishing the MBCL from California’s Flexible Purpose Corporation (“FPC”) in that the MBCL’s use of annual reporting and third-party standards promote real accountability).

94. See *id.* at 21–22 (providing an example of a company listing the benefit of “keeping the river in back of the factory free from toxic effluents” and then considering, yet dismissing, all other non-financial interests). This hypothetical also raises the issue of measuring whether the board’s ultimate decision “considered” the public or general benefit.

95. *Id.* at 23–24.

96. See *id.* at 2–3, app. C, at 7–8 (using the combination of third-party standards and annual reporting as a method through which consumers can check whether a corporation that advertises as being socially responsible actually is socially responsible).

97. *Id.* at 25.

98. See *id.* (recognizing that, although benefit corporations under the MBCL are not required to have their benefit reports certified or audited by a third party,

pairing green consumers with companies that have in fact substantiated their claims of social and environmental impact.⁹⁹

In sum, the complexity of Delaware case law, compounded by Delaware's decision not to enact a constituency statute, created an air of uncertainty that looms over social entrepreneurs. The emergence of the benefit corporation represents one way to assuage these fears. However, on closer review, Delaware case law leaves social entrepreneurs with enough flexibility to pursue their social and environmental objectives when adequately counseled.¹⁰⁰ Armed with new data and research illustrating the feasibility of both creating social impact and generating profit, social entrepreneurs are in a much better position to demonstrate how their business decisions, policies, and corporate cultures ultimately increase shareholder value.¹⁰¹ In any event, state legislatures reacted to the White Paper and the benefit corporation—a simple and immediate solution to social entrepreneurs' problems—took the nation by storm.¹⁰² However, as is the case with any legislation predicated on model legislation, the outcome produced an array of benefit corporations that differ in substantial ways.¹⁰³ The resulting heterogeneity partly derives from disagreement among state legislatures as to the most efficient ways to enforce the public benefit mandate without deterring both social entrepreneurs and investors from the corporate form.

“verification can and will become a means by which certain benefit corporations distinguish themselves on a competitive basis to attract greater confidence in their claims of environmental and social performance”).

99. *Id.* at app. A, at 7.

100. *See id.* at 13 (explaining that some academic legal experts believe that the absence of statutes or case law prohibiting companies from prioritizing social and environmental benefits over maximizing shareholder value permits the pursuit of such objectives). *Contra* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33 (Del. Ch. 2010) (stating that “[p]romoting, protecting or pursuing non-stockholder considerations [with defensive measures] must lead at some point to value for stockholders”).

101. *See supra* notes 88–90 and accompanying text (valuing the “green” consumer market opportunity at between \$400 billion and \$1 trillion, with profits ranging from \$183 billion to \$667 billion).

102. *State by State Status, supra* note 6 (listing the states that adopted or proposed benefit corporation legislation).

103. *Cf.* PAUL H. ROBINSON & MARKUS DICK DUBBER, AN INTRODUCTION TO THE MODEL PENAL CODE 1, 5 (1999), <https://www.law.upenn.edu/fac/phrobins/intromodpencode.pdf> (reviewing the influence of the 1962 Model Penal Code on thirty-four state criminal codes).

B. *The Current State of Benefit Corporations*

As of October 2015, thirty states and the District of Columbia have passed benefit corporation legislation, and an additional five states have introduced such legislation.¹⁰⁴ While many states have adopted the core components of the MBCL, some states, most notably Delaware, have passed legislation that greatly differs from the MBCL and detracts from some of the key rationalizations in support of the benefit corporation as a corporate form.¹⁰⁵

1. *Model benefit corporation legislation*

The major requirements of the MBCL can be summarized as follows: (1) corporations must state a general public benefit and may also include a specific public benefit;¹⁰⁶ (2) election or termination of benefit corporation status requires at least two-thirds affirmative shareholder vote;¹⁰⁷ (3) corporations must use a third-party standard to measure social and environmental performance;¹⁰⁸ (4) directors must consider their decisions' impact on shareholders, employees, customers, the community and society, the local and global environment, the short- and long-term interests of the benefit corporation, and their decisions' ability to accomplish general and specific public benefits;¹⁰⁹ (5) "benefit enforcement proceedings" can be filed by the benefit corporation, shareholders that hold at least two percent of the corporation's stock, a director of the corporation, an owner that holds at least five percent of the parent of a benefit corporation, or any other person listed in the corporation's bylaws or charter;¹¹⁰ and lastly, (6) benefit corporations must publicly post an annual benefit report.¹¹¹

The MBCL's explanatory comments provide that directors named in benefit enforcement proceedings cannot be held monetarily liable for their failure to pursue or create a general or specific public benefit.¹¹² Additionally, the MBCL only mandates that benefit

104. *State by State Status*, *supra* note 6.

105. *See, e.g.*, DEL. CODE ANN. tit. 8, § 366(c) (2015) (eliminating a third-party standard requirement for measuring public benefit).

106. MODEL BENEFIT CORP. LEGIS. §§ 102, 201(a)–(b) (2014) (defining a "[g]eneral public benefit" as "[a] material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation").

107. *Id.* §§ 104–05.

108. *Id.* § 102.

109. *Id.* § 301(a)(1)(i)–(vii).

110. *Id.* §§ 102, 305(b).

111. *Id.* § 401(a).

112. *Id.* § 305(a); *see also* Brianna Cummings, Note, *Benefit Corporations: How to*

corporation status be denoted in a corporation's articles of incorporation but places no naming requirements (such as a suffix), making it difficult for consumers to quickly distinguish benefit corporations from traditional for-profits.¹¹³

2. Delaware's public benefit corporation legislation

On July 17, 2013, Delaware Governor Jack Markell signed Delaware Public Benefit Corporation ("PBC") legislation, which became effective on August 1, 2013.¹¹⁴ Benefit corporation proponents celebrated Delaware's adoption of the PBC due to Delaware's reputation as the industry leader in corporate law.¹¹⁵ While Delaware's PBC legislation bears a strong resemblance to the MBCL, it differs in five significant ways.¹¹⁶

First, PBCs are required to stipulate a specific public benefit in their charters, which directly contradicts the MBCL's approach of permitting benefit corporations to list a specific public benefit only after listing a general public benefit.¹¹⁷ Second, unlike the MBCL,

Enforce a Mandate to Promote the Public Interest, 112 COLUM. L. REV. 578, 593 (2012) (concluding that benefit enforcement proceedings are an ineffective method of increasing corporate accountability).

113. MODEL BENEFIT CORP. LEGIS. § 103.

114. See *supra* note 7 and accompanying text.

115. See *supra* note 8 and accompanying text (noting that some benefit corporation advocates believe that Delaware's actions paved the way for benefit corporations nationwide by legitimizing the legal status of the corporate form).

116. See generally J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345 (2014) (providing an in-depth analysis of Delaware's Public Benefit Corporation ("PBC") legislation); Alicia E. Plerhoples, *Delaware Public Benefit Corporations 90 Days Out: Who's Opting In?*, 14 U.C. DAVIS BUS. L.J. 247 (2014) (analyzing the composition of the first Delaware Public Benefit Corporations ("PBCs")).

117. DEL. CODE ANN. tit. 8, § 362(a)(1) (2015); MODEL BENEFIT CORP. LEGIS. §§ 102, 201(a)–(b); see also Murray, *Social Enterprise Innovation*, *supra* note 116, at 354 (observing that the specific public benefit requirement is the only area in which the PBC is less flexible than the MBCL). An argument can be made that Delaware's PBC legislation requires the pursuit of a general public benefit too. See DEL. CODE ANN. tit. 8, § 362(a) (stating that the statutory requirements are "intended to produce a public benefit or public benefits [(specific public benefit)] and to operate in a responsible and sustainable manner [(general public benefit)]" (emphasis added)). The argument relies on the premise that because the statute already requires listing a specific public benefit, "responsible and sustainable manner" indicates something separate and more akin to the MBCL's general public benefit. *Id.*; see MODEL BENEFIT CORP. LEGIS. § 102 (defining "general public benefit" as "[a] material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation"). However, the Delaware Legislature's decision not to simply replicate the language of the MBCL

Delaware legislation does not require PBCs to use third-party standards to assess compliance.¹¹⁸ Third, Delaware's statute imposes a balancing-of-interests test, without any guidance on how to apply the test, in contrast to the MBCL's consideration-of-the-interests test.¹¹⁹ Fourth, PBCs need only issue a benefit report biennially and only to shareholders as opposed to MBCL's requirement that the report be released annually to the public.¹²⁰ Finally, Delaware's iteration of the MBCL's benefit enforcement proceeding substantially limits the class that can bring derivative suits to stockholders.¹²¹

Most recently, on June 24, 2015, Governor Markell signed Senate Bill 75, which contained several amendments to Delaware's PBC laws.¹²² The amendments became effective on August 1, 2015.¹²³ The Legislature removed the prior requirement that a PBC "include in its name a specific 'public benefit corporation' identifier."¹²⁴ Instead, the new amendment requires that a corporation, "prior to issuing unissued shares of stock or disposing of treasury shares, provide notice to any person to whom such stock is issued or who acquires such treasury shares that it is a public benefit corporation."¹²⁵ Another amendment relaxes the voting percentages required to

makes any interpretation purely speculative.

118. DEL. CODE ANN. tit. 8, § 366(c)(3); MODEL BENEFIT CORP. LEGIS. § 102.

119. *See* DEL. CODE ANN. tit. 8, § 362(a) (requiring that a public benefit corporation balance "the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation"); MODEL BENEFIT CORP. LEGIS. § 301(a) (creating a broad consideration-of-interests test for benefit corporations to determine the best interests of the corporation by considering the effect of any action on the shareholders, employees, customers, general public, and community and societal factors).

120. DEL. CODE ANN. tit. 8, § 366(b), (c)(2); MODEL BENEFIT CORP. LEGIS. § 401.

121. *See* DEL. CODE ANN. tit. 8, § 367 ("Stockholders of a public benefit corporation owning individually or collectively, as of the date of instituting such derivative suit, at least [two percent] of the corporation's outstanding shares or, in the case of a corporation with shares listed on a national securities exchange, the lesser of such percentage or shares of at least \$2,000,000 in market value, may maintain a derivative lawsuit . . ."); MODEL BENEFIT CORP. LEGIS. § 305 (giving a right of action to the benefit corporation, two-percent or greater owners in the benefit corporation, directors, five-percent or greater owners in parent companies to which the benefit corporation is a subsidiary, or anyone else "specified in the articles of incorporation or bylaws of the benefit corporation").

122. Gregory P. Williams, *Amendments to the DGCL*, HARV. L. SCH. F. CORP. GOVERNANCE & FIN. REG. (June 30, 2015), <http://corpgov.law.harvard.edu/2015/06/30/amendments-to-the-dgcl>.

123. *Id.*

124. *Id.*

125. DEL. CODE ANN. tit. 8, § 362(c) (effective Aug. 1, 2015).

approve charter amendments or transactions that convert a business entity to a PBC from ninety to two-thirds.¹²⁶

Delaware's adoption of PBC legislation ostensibly marks a major victory for the corporate social responsibility ("CSR") movement. However, the initial reaction to these key differences has been mixed, with some commentators encouraging Delaware to amend its statute to more closely mimic the MBCL and others praising Delaware for its more flexible approach.¹²⁷ In light of Delaware's most recent amendments, there seems to be little effort to eliminate Delaware PBCs' specific benefit requirement.¹²⁸

3. *Deciphering the labels: "Certified B Corp" vs. benefit corporation status*

The terms "Certified B Corp" and "benefit corporation" are often used interchangeably, yet both refer to two distinct entities. B Lab, the nonprofit that promulgated benefit corporation legislation, confers "B-Corp" certification on companies, while "benefit corporation" is a legal status administered by the state.¹²⁹ The two differ in important ways: B-Corp certification requires that a corporation achieve a verified minimum score on its third-party assessment, while statutory benefit corporations are not required to meet any benchmarks.¹³⁰ Additionally, B Lab grants B Corps access to services to help them with marketing, sales, and raising and saving money.¹³¹ Because B-Corp certification is available to both benefit corporations and traditional for-profits, becoming B-Corp certified represents one way for traditional for-profits to obtain marketing and branding advantages without altering their legal status.

126. DEL. CODE ANN. tit. 8, § 363(a), (c) (effective Aug. 1, 2015).

127. Compare Murray, *Social Enterprise Innovation*, *supra* note 116, at 350–51, 351 n.36 (quoting B Lab co-founder Jay Coen Gilbert expressing hope that Delaware would eventually follow the MBCL more closely), with Plerhoples, *supra* note 116, at 253–57 (arguing that Delaware's PBC legislation is more flexible and, thus, potentially better than the MBCL).

128. DEL. CODE ANN. tit. 8, § 362(a)(2) (2015).

129. *Benefit Corporation vs. Certified B Corp*, B LAB, <http://benefitcorp.net/what-makes-benefit-corp-different/benefit-corp-vs-certified-b-corp> (last visited Oct. 26, 2015); *The Non-Profit Behind B Corps*, B LAB, <https://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps> (last visited Oct. 26, 2015).

130. *Benefit Corporation vs. Certified B Corp*, *supra* note 129 (explaining that certified B Corps are evaluated according to the B Impact Assessment, whereas benefit corporations use the B Impact Assessment as a third-party standard for annual reporting even though benefit corporations are not required to have their performance verified or audited).

131. *Id.*

II. THE HARMS OF THE BENEFIT CORPORATION

The momentum garnered in favor of social enterprise does little more than indicate the market's readiness to accept that social enterprise and profitability are no longer mutually exclusive concepts. So long as social entrepreneurs genuinely believe that social impact and profit can be sought in tandem and take reasonable steps to actuate those beliefs, the traditional for-profit remains a viable corporate form for the pursuit of those objectives. Although it may seem that the adoption of the benefit corporation as a separate legal status from traditional for-profits innocuously provides social entrepreneurs with yet another corporate form from which to choose, the creation of such an option advances a harmful dichotomy that wrongly presumes benefit corporations' capability of generating more social and environmental impact than traditional for-profits.¹³² The subsequent sections argue that not only does the existing legal framework accommodate for-profit mission-driven companies, but also that the creation of the benefit corporation increases the potential for greenwashing.

A. *The Traditional For-Profit is a Suitable Corporate Form for Social Enterprises*

The theory that the benefit corporation emerged as a result of legal necessity is misleading. Rather, it is the uncertainty of a court's treatment of a modern social enterprise's ability to consider non-shareholder interests that gave rise to the benefit corporation.¹³³ Instead of wading through the murky waters, advocates of the benefit corporation have preyed on the fears of social entrepreneurs to help solidify the new corporate form. This section argues that the existing traditional for-profit legal framework carves out enough space for well-counseled social entrepreneurs to comfortably pursue their socially and environmentally driven missions. Finally, this section revisits the Ben & Jerry's example and argues that its founders could have employed myriad tactics to sidestep *Revlon* altogether.

132. See Underberg, *supra* note 10 (arguing that the benefit corporation movement, however well-intentioned, further propagates the notion that existing corporate forms prevent directors from considering their decisions' impact on other constituencies).

133. See WHITE PAPER, *supra* note 1, at 7, 10, 12, 14 (explaining how courts' treatment of modern social enterprises has resulted in uncertainty that has, in turn, stymied the growth of social enterprise).

1. *Addressing the legality of social enterprises operating as traditional for-profits*

The vast majority of business decisions that have the largest social and environmental impact fall under the business judgment rule.¹³⁴ Day-to-day decisions and decisions concerning where and how products are manufactured, marketed, and sold will be scrutinized under this standard.¹³⁵ Because the market, investors, and courts have recognized the financial value in pursuing social and environmental objectives, directors will be able to more easily draw a rational connection between the consideration of other constituencies and its impact on shareholder value.¹³⁶ As a result, social enterprises facing a challenge to a board decision invoking the business judgment rule should be able to demonstrate successfully that “the action taken was in the best interests of the company.”¹³⁷ Facebook, Google, Whole Foods, the New York Times, and Starbucks are all examples of companies that have doggedly pursued social missions without legal challenge to their corporate cultures.¹³⁸ One common trait among these corporations is that they all have achieved great financial success.¹³⁹ Thus, an

134. See Clark, Jr. & Babson, *supra* note 24, at 839 (categorizing judicial review of director decision making into: (1) day-to-day decisions, (2) defensive decisions, and (3) change of control decisions, conceding that the first category is subject to the business judgment rule).

135. *Id.* at 835; see also Underberg, *supra* note 10 (noting that “directors have close to a free hand when considering matters that are most likely to have broader social and environmental implications”).

136. See *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000); 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, 634 (2007) (arguing that “[s]ocial entrepreneurship projects in the public sector can fulfill the social and financial interests of publicly held corporations and their shareholders” and that director decisions in pursuit of such projects are assessed under the business judgment rule); *supra* notes 24, 44, 84–90 and accompanying text (drawing the connection between the requirement of a rationally related benefit accruing to shareholders and the pursuit and creation of social and environmental benefit); see also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2771 (2014) (“While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so.”). *Hobby Lobby* represents the first instance in which the U.S. Supreme Court has expressly alluded to the benefit corporation. *Hobby Lobby*, 134 S. Ct. at 2771.

137. *Aronson*, 473 A.2d at 812.

138. See Anthony Page & Robert A. Katz, *Socially Responsible Business: The Truth About Ben and Jerry’s*, STAN. SOC. INNOVATION REV. (2012), http://www.ssireview.org/articles/entry/the_truth_about_ben_and_jerrys (noting that these companies regularly pursue social missions “with vigor,” and that Google and Facebook have both “asserted that providing services, rather than making a profit, was their top priority”).

139. See *id.* (referring to the corporations as “successful,” “promising,” and

assumption can be made that with profitability comes greater discretion to jointly pursue financial and non-financial interests.¹⁴⁰

Even in contexts in which directors are held to a higher level of judicial scrutiny for their actions, directors still enjoy great discretion in their ability to consider other constituencies. Outside of Delaware, social entrepreneurs can choose to incorporate in states that have constituency statutes.¹⁴¹ The key difference between a constituency statute and the MBCL is that the former *permits* directors to consider the interests of other constituencies, while the latter *mandates* that directors consider them.¹⁴² This distinction is merely semantic given that benefit corporation legislation has thus far found no tangible way to determine whether a board of directors has actually considered a particular constituency.¹⁴³ In Delaware, *Unocal* expressly permits the consideration of other constituencies.¹⁴⁴ While the White Paper deceptively frames the *Unocal* test as a substantial check on directors' discretion in making business decisions, the express authority to consider other constituencies and the ease with which business decisions pass judicial scrutiny under the business judgment rule should allay social entrepreneurs' fears.¹⁴⁵

"prominent").

140. *See id.* (underscoring that financial success is critical to avoid legal challenges and maintain control).

141. However, this Comment argues that even absent constituency statutes, directors will be able to consider other constituencies along the same line of reasoning that permits Delaware corporations to do so.

142. *Compare* 15 PA. CONS. STAT. ANN. § 1715(a) (West 2015) (using "may" in describing how directors discharge their duties), *with* MODEL BENEFIT CORP. LEGIS. § 301(a)(1) (2014) (using "shall" in describing a director's duty to consider the interests of other constituencies).

143. *See, e.g.,* Cummings, *supra* note 112, at 603–05 (describing the corporate industry's reliance on quantitative data and the difficulty of quantifying social and environmental benefit).

144. *See Unocal Corp. v. Mesa Petrol. Co.*, 493 A.2d 946, 955 (Del. 1985) (permitting the consideration of creditors, customers, employees, and the community at large).

145. *Id.*; *see also* WHITE PAPER, *supra* note 1, at 12–13 (failing to mention *Unocal's* allowance of the consideration of other constituencies); Siegel, *supra* note 14, at 622 (finding that, as of 2013, boards had a seventy-nine percent success rate under the *Unocal* test). Further, a board that pursues social objectives can increase its likelihood of success under *Unocal* by employing a board of independent directors. *See* Siegel, *supra* note 14, at 622–23 (noting that only four independent boards have failed *Unocal*). The companies that had independent boards that failed *Unocal* did so because their defensive tactics precluded shareholder voting rights, which is irrelevant to the other-constituency analysis. *See id.* at 623.

The express permission to consider other constituencies, coupled with compelling data of companies' success under heightened review, effectively results in the application of the deferential business judgment rule.¹⁴⁶ Regardless, the White Paper incorrectly classifies the benefit corporation's emergence as the only way for social enterprises to avoid the result in *eBay*.¹⁴⁷ In doing so, the White Paper perpetuates the misconception that taking social and environmental goals into consideration is the functional equivalent of implementing policies that "openly eschew[] stockholder wealth maximization."¹⁴⁸ Rather, the primary lesson from *eBay* is that craigslist indeed chose the wrong corporate form for its corporate policy.¹⁴⁹ Not actively seeking to attain profit while organized as a for-profit corporation contravenes the fundamental principles of that corporate form.¹⁵⁰ Relatedly, social entrepreneurs should note that unless they sincerely believe—in addition to being able to offer probative evidence—that they can achieve social or environmental objectives and operate profitably, a for-profit corporate model is not the proper corporate form.¹⁵¹ However, to use the result in *eBay* to frighten social entrepreneurs who view profitability and social enterprise as

146. See *supra* notes 33, 40 and accompanying text (noting the overwhelming success with which companies survive both the *Unocal* and *Revlon* tests). The statistics demonstrating directors' abilities to meet their obligations under both the *Unocal* and *Revlon* standards of review is of particular importance to the other-constituency analysis because passing these tests causes courts to revert to the application of the business judgment rule—the most deferential form of judicial review—giving directors the best probability of avoiding an in-depth review of their socially and environmentally driven business decisions. See *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 33 (Del. Ch. 2010) (stating that courts, under the business judgment rule, will not question how seemingly rational business judgments affect long-term shareholder value).

147. See *eBay*, 16 A.3d at 32, 34; WHITE PAPER, *supra* note 1, at 12–13 (“While the facts of *eBay* are unique and a different company’s publicly-oriented mission may be considered a legitimate corporate policy, Chancellor Chandler’s language suggests that Delaware courts will seek to limit the ‘purely philanthropic ends’ of mission-driven companies, especially when their directors’ decisions are reviewed under *Unocal*’s scrutiny.”); *supra* notes 57–60 and accompanying text (recognizing the significance of *eBay* failing the first prong of the *Unocal* test).

148. *eBay*, 16 A.3d at 35.

149. *Id.* at 34.

150. See *id.* (affirming that a board owes a fiduciary duty to its stockholders to “promote the value of the corporation” and finding that the corporate form was an inappropriate platform to carry out purely philanthropic goals because stockholders expected a return on their investments).

151. See Page & Katz, *supra* note 138 (arguing that “financial success is critical to maintaining control” over social missions).

increasingly converging ideas is misleading. In contrast to many other corporate forms, the emergence of the benefit corporation relies on the absence of litigation when considering other constituencies rather than evolving from a line of cases that solidify the corporate form as an actual solution to the rapidly growing CSR movement.¹⁵²

Lastly, legal commentators have greatly exaggerated the impact of decisions that trigger *Revlon* mode on directors' discretion to consider other constituencies.¹⁵³ While the White Paper accurately notes that other constituencies may not be considered once a company triggers *Revlon*, there are certain strategies a company can implement to avoid *Revlon* duties entirely.¹⁵⁴ The ability to avoid

152. See WHITE PAPER, *supra* note 1, at 13 (“There is a credible view among some academic legal experts that because there is no specific provision in the Delaware statute preventing consideration of other stakeholder interests, if a company were to actually include the requirement of such consideration, including the possibility of not maximizing shareholder value, in the purpose clause of its certificate of incorporation or in defining the directors’ fiduciary standards, such a requirement might withstand the court’s scrutiny in a defensive or change of control situation and be given effect.”). Despite making this concession, benefit corporation advocates continue to focus on the absence of legal authority to further their movement. See *id.* (“In the absence of statutory authority or precedent and in light of decisions including *Revlon* and *eBay*, the practical reality is that practitioners—general counsel and outside counsel—are typically unwilling to recommend such a course of action because the legal analysis is so unclear.”).

153. See *id.* (noting that although skilled counsel can circumvent *Revlon* duties, it is the “ambiguity about when *Revlon* duties are triggered” that contributes to widespread fear (emphasis added)).

154. *Id.* One such strategy that allows companies to circumvent *Revlon* mode is outlined in *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140, 1150–51, 1154 (Del. 1989) (holding that “[d]irectors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy,” and, finding such a plan, the court applied the *Unocal* test instead of the *Revlon* rule). The strategy involves adopting a long-term corporate plan that paints a clear picture that the company’s dissolution or break-up is not inevitable. *Id.* at 1150. But see *eBay*, 16 A.3d at 33 (“*Time* did not hold that corporate culture, standing alone, is worthy of protection as an end in itself. Promoting, protecting, or pursuing nonstockholder considerations must lead at some point to value for stockholders.” (footnote omitted)). So long as the corporate policy does not resemble the policy in *Dodge* or *eBay*, social enterprises should face little difficulty in avoiding the ominous shareholder primacy doctrine. *Id.* at 35 (defining craigslist’s corporate policy as one that “openly eschews stockholder wealth maximization”); *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (defining Ford’s corporate policy as one which sought “the reduction of profits” as an end). Alternatively, a company can abstain from initiating an active bidding process. See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986). Yet another strategy to retain control is through super-voting stock and contractual arrangements with other shareholders. See Page & Katz, *supra* note 138 (“When Google

triggering *Revlon* mode is best examined by revisiting the oft-cited example of Ben & Jerry's.

2. *Ben & Jerry's revisited: The bittersweet truth*

The problem with citing Ben & Jerry's as the archetypal business scenario demonstrating the need for the benefit corporation is that the analysis often ignores founders' decisions and portrays them as victims when, in actuality, they positioned the company to "sell to the highest bidder or get sued."¹⁵⁵ First, founders Ben Cohen and Jerry Greenfield decided to take Ben & Jerry's public in 1984, which introduced a contingent of outside shareholders whose interests the company then had to consider.¹⁵⁶ Second, the board put Ben & Jerry's in play when it began negotiating deals to take the company private, representing another voluntary decision.¹⁵⁷ Third, because the founders never litigated the matter, the outcome of the case cannot be accurately predicted. Accordingly, the argument that Ben & Jerry's would not have succeeded at trial had it established a long-term strategy that preserved a valid corporate culture and convinced the courts that its dissolution was not inevitable cannot be substantiated.¹⁵⁸ Rather, a court could have found that mere consideration of selling Ben & Jerry's failed to trigger *Revlon* mode, especially if the court concluded that the founders' decision to oppose the transaction was valid in their capacity as shareholders

went public in 2004, for example, with super-voting stock for the insiders, the company candidly admitted that public shareholders' voting rights would have little impact on the company's direction. Facebook's 2012 initial public offering of stock allowed its founder, Mark Zuckerberg, to retain control through a combination of super-voting stock and contractual arrangements with other shareholders.").

155. See Hays, *supra* note 12 (discussing how a lack of options for Ben & Jerry's prompted the board to take the company private).

156. *Id.* The director liability fears that largely gave rise to the benefit corporation also underplay the reality that most social enterprises are closely held. Robert T. Esposito & Shawn Pelsinger, *The Supreme Court's First Brush with Social Enterprise*, STAN. SOC. INNOVATION REV. (July 21, 2014), http://www.ssireview.org/blog/entry/the_supreme_courts_first_brush_with_social_enterprise. The Delaware Code and MBCL provisions that require a two-thirds affirmative shareholder vote to modify existing legal status before becoming a benefit corporation contributes to the theory that the benefit corporation form appeals mostly to closely held corporations or new social enterprises. DEL. CODE ANN. tit 8, § 363(c) (2015); MODEL BENEFIT CORP. LEGIS. §§ 104–05 (2014). Such a vote is less likely to pass in publicly traded companies with broad ownership.

157. Hays, *supra* note 12.

158. *Id.*; see *Paramount*, 571 A.2d at 1150–51 (affirming this method as a potential strategy to avoid triggering *Revlon*).

instead of as directors.¹⁵⁹ Lastly, Ben & Jerry's' founders began considering the sale of their company due to financial and operational issues.¹⁶⁰ Although people close to Cohen and Greenfield said "they were motivated by fear of litigation," provisions in the company charter would have indemnified them.¹⁶¹ Of course, had Ben & Jerry's incorporated in a state with a constituency statute, the outcome could have been more easily avoided.¹⁶²

Commentators citing the Ben & Jerry's example often correctly determine that a reviewing court would have applied *Revlon*, but, in highlighting such a conclusion, they neglect the sequence of events leading to the triggering of *Revlon*.¹⁶³ A well-advised corporation can avoid *Revlon* altogether if it maintains its financial success, steers clear of putting itself in play, or proactively implements a long-term strategy to reduce the likelihood that a court would find its dissolution or break-up inevitable.¹⁶⁴ Moreover, the supposed forced sale of Ben & Jerry's—which purportedly exemplifies the dangers of pursuing social and environmental impact as a traditional for-profit—

159. Page & Katz, *supra* note 138 ("As shareholders, they were entitled to enjoy the benefits of selfish ownership, which ironically in this context could have been exercised altruistically to maintain the company's social mission.").

160. *Id.*

161. *Id.* Ben & Jerry's indemnification provision reads:

No director of the Corporation shall be personally liable to the corporation or its stockholders for money damages for any action taken, solely as a director, based on a failure to discharge his or her own duties in accordance with Section 8.30 (entitled "General Standards for Directors") of the Vermont Business Corporation Act, except for: (i) the amount of financial benefit received by a director to which the director is not entitled; (ii) an intentional or reckless infliction of harm on the Corporation or the shareholders; (iii) a violation . . . [for unlawful distributions]; or (iv) an intentional or reckless criminal act. The foregoing additional provisions shall not be construed in any way so as to impose or create any duty or liability.

Ben & Jerry's Homemade, Inc., Quarterly Report (10-Q) (Aug. 7, 1995). The consideration of other constituencies can be argued to place Cohen and Greenfield in the second exemption, but it would likely be difficult to prove that their actions not to sell to the highest bidder rose to the level of "intentional or reckless infliction of harm." See *id.* But see Ercoline, *supra* note 78, at 176 (noting that even though legal scholars debate whether the sale of Ben & Jerry's triggered *Revlon* mode, "rejecting Unilever's offer would have likely resulted in several long and drawn out legal battles . . . costing [Ben & Jerry's] millions in attorney's fees").

162. See, e.g., *supra* notes 71–72 (providing a list of state constituency statutes).

163. See, e.g., WHITE PAPER, *supra* note 1, at 13; Clark, Jr. & Babson, *supra* note 24, at 837–38.

164. See *supra* note 154 and accompanying text (detailing strategies corporations can take to sidestep *Revlon*).

ironically resulted in a positive outcome for a business facing financial difficulties.¹⁶⁵ Unilever's winning bid could have also reflected the company's valuation of both Ben & Jerry's and its ability to apply its resources and management to turn the company around.¹⁶⁶

The fact that Cohen and Greenfield chose not to litigate the matter substantially limits this fact-intensive case's relevance from lending support to the argument in favor of benefit corporations. Without adjudication, the example merely serves as proof that financial success is critical to maintaining control of a company. Ultimately, using the case to garner support for the benefit corporation and misconstruing it to be an embodiment of the quintessential legal issues faced by social enterprises is deceptive.¹⁶⁷

B. The Statutory Benefit Corporation Promotes Rather than Prevents Greenwashing

Even if the benefit corporation were legally necessary, the current rudimentary enforcement mechanism paired with the corporate form's vast potential for misuse demands that lawmakers view this corporate form with greater suspicion.¹⁶⁸ The precipitous rise of the benefit corporation may, in part, be from its assumed effect of reducing greenwashing within a market that is largely unmonitored.¹⁶⁹ In practice, however, there exists enormous

165. See Clark, Jr. & Babson, *supra* note 24, at 838 ("Although Ben & Jerry's worked out a plan with Unilever to preserve many aspects of its corporate mission, other mission-driven companies may not have the same bargaining power to protect their own businesses." (footnote omitted)). While the founders of Ben & Jerry's felt "forced" to sell, ironically Unilever's chief executive Paul Polman recently stated that Unilever would seek B-Corp certification. Jo Confino, *Will Unilever Become the World's Largest Publicly Traded B Corp?*, GUARDIAN (Jan. 23, 2015, 10:34 AM), <http://www.theguardian.com/sustainable-business/2015/jan/23/benefit-corporations-bcorps-business-social-responsibility>.

166. This point is made to illustrate that the winning bidder should not always be painted as the villain. The winning bidder may actually be best option in assisting an otherwise struggling company.

167. See Page & Katz, *supra* note 138 (discussing the various ways in which a court could have decided *Ben & Jerry's*).

168. This Comment does not presume that corporations that have opted to assume benefit corporation status are in fact ill-intentioned or that promoters of the MBCL could have predicted the outcome of state-by-state legislation; rather, this Comment attempts to shed light on the current framework's potential for abuse and its unintended effect on the future of the CSR movement.

169. See WHITE PAPER, *supra* note 1, at 22–24 (describing the importance of the "general public benefit" purpose and holding benefit corporations to "higher standards of corporate purpose" to prevent greenwashing).

potential for these statutes to lead to legalized greenwashing. The White Paper dismisses the observation that the benefit corporation promotes legalized greenwashing because the MBCL requires companies “to meet higher standards of corporate purpose, accountability and transparency.”¹⁷⁰ However, the toothless benefit enforcement proceeding in addition to Delaware not requiring the use of a third-party standard cast doubt on the White Paper’s assertion.¹⁷¹ In fact, Delaware’s divergences from the MBCL permit the exact legalized greenwashing that the MBCL sought to eradicate because the PBC mandates that corporations *include* a specific public benefit in their charters.¹⁷² Thus, even though proponents of benefit corporations view Delaware’s enactment of PBC legislation as a step in the right direction, it actually symbolizes a giant step backwards with Delaware serving as the lodestar for legalized greenwashing.

Under the current Delaware PBC statutory provisions, a company could hypothetically organize as a benefit corporation, choose not to use a third-party standard to avoid costs, and yet still attain all of the branding benefits related to the corporate status.¹⁷³ As it currently stands, neither the MBCL nor the PBC legislation contains a mechanism to investigate exploitation of the corporate form.¹⁷⁴

170. *Id.* at 23–24.

171. *See supra* note 112 and accompanying text (criticizing the effectiveness of the benefit corporation’s enforcement mechanisms); *see also supra* Part I.B.2 (comparing and contrasting Delaware’s PBC legislation with the MBCL). Even outside of Delaware, the vast list of third-party standards that companies can comb through promotes “third-party shopping,” the act of attaining certification by a third party that caters to and specializes in a given company’s industry. *See generally How Do I Pick a Third Party Standard?*, BENEFIT CORP., <http://benefitcorp.net/third-party-standards/list-of-standards> (last visited Oct. 26, 2015). At first glance, the multitude of third-party standards may seem preferable, but it also represents an overly saturated market, which may cause third parties to gain reputations for their lax assessments to generate more business.

172. *See* WHITE PAPER, *supra* note 1, at 21–22 (“The ‘general public benefit’ purpose helps to prevent abuse of the legislation by corporations interested in ‘greenwashing.’ Without the general public benefit purpose, a corporation could name a single, narrow ‘specific public benefit’ purpose (e.g., keeping the river in back of the factory free from toxic effluents) and then ‘consider’ and dismiss all other non-financial interests when making decisions. This would undermine one of the main purposes of the legislation, namely the creation of a new corporate form whose corporate purpose is to create benefit for society generally.”).

173. *See supra* notes 117–18 and accompanying text (noting the absence of third-party requirements or enforcement proceedings in the Delaware PBC legislation).

174. *See* Cummings, *supra* note 112, at 591–92 (noting that “[u]nder existing law, then, directors escape liability as long as they do ‘not act with complete disregard to the consequences of their decisions’ and do not steal”).

Directors are not deterred from such misuse of the corporate form because of MBCL's express exoneration of directors from liability for failure to pursue or create public benefit¹⁷⁵ and Delaware's blanket protection of any board decisions provided they are "informed and disinterested."¹⁷⁶ Even if a company with good intentions complies with all of Delaware's statutory provisions, the difficulty in measuring social impact makes any "score" subject to manipulation.¹⁷⁷

The B-Corp certification system that existed prior to the advent of the statutory benefit corporation better served to hold companies accountable to their claims of creating and providing social and environmental benefit; B-Corp certification best serves this purpose because only corporations that have employed third-party standards and "passed" the assessment are able to advertise the certification.¹⁷⁸ As of October 2015, there are 822 registered B Corps nationwide, all of which must meet B Lab's verified minimum score on the B Impact Assessment.¹⁷⁹ Out of these 822 B Corps, only two are incorporated in Delaware.¹⁸⁰ In contrast, as of October 2015, there are thirty-nine benefit corporations registered in Delaware since the PBC legislation took effect in August 2013, none of which are B-Corp certified.¹⁸¹

The fact that companies incorporated in Delaware are opting into Delaware's PBC at an alarmingly higher rate than into B Lab's B-Corp

175. MODEL BENEFIT CORP. LEGIS. § 305(a), (c) (2014).

176. DEL. CODE ANN. tit 8, § 365(b) (2015). Section 365(c) also permits PBCs to include in their certificates of incorporation "a provision that any disinterested failure to satisfy this section shall not . . . constitute an act or omission not in good faith, or a breach of the duty of loyalty." *Id.* § 365(c).

177. See Cummings, *supra* note 112, at 603 (underscoring the technical difficulties in reliably obtaining and measuring social metrics).

178. See generally *supra* Part I.B.3.

179. Find a B Corp, B LAB, https://www.bcorporation.net/community/find-a-b-corp?search=&field_industry=&field_city=&field_state=&field_country=United+States (last visited Oct. 26, 2015); see *Benefit Corporation vs. Certified B Corp*, B LAB, *supra* note 129 (stating that a passing score is eighty out of 200 points). The full B Impact Assessment, which purports to examine and measure a corporation's performance against dozens of best practices on employee, community, and environmental impact, takes approximately ninety minutes to complete. See B IMPACT ASSESSMENT, <http://bimpactassessment.net> (last visited Oct. 26, 2015). A Quick Impact Assessment can be measured in as little as twenty minutes. See *id.*

180. Find a B Corp, *supra* note 179.

181. Find a Benefit Corp, BENEFIT CORP., <http://benefitcorp.net/businesses/find-a-benefit-corp> (last visited Oct. 26, 2015). It is unclear whether any of the thirty-nine benefit corporations registered in Delaware are in the midst of completing or seeking B-Corp certification or an alternative third-party standard. It is clear, however, that neither of the two B Corps incorporated in Delaware has registered as a PBC. *Id.* (illustrating that no PBC has obtained B-Corp certification).

certification demonstrates that companies favor the legal status over the certification. There are two explanations for this lopsidedness: either (1) prior to the enactment of PBC legislation, directors did not feel comfortable carrying out their fiduciary duties while in pursuit of social and environmental objectives, or (2) PBC legislation has made it possible for companies to reap the benefits of going green without demanding much more in terms of cost, purpose, performance, accountability, or transparency as opposed to the more costly, yet demonstrative, B-Corp certification. Certainly, some combination of both is entirely possible as well. One indicator that the second explanation is the more likely of the two is that none of Delaware's PBCs are certified.¹⁸² In either case, if Delaware truly represents the tipping point in the CSR and benefit corporation movement, then the current framework of PBC legislation fails to provide consumers with any real assurance that the companies they choose are actually champions of corporate social responsibility.¹⁸³

III. PROFIT AS THE PREFERRED MEDIUM FOR EFFECTING SOCIAL AND ENVIRONMENTAL CHANGE

One of the most important lessons from *eBay* and its aftermath is that it is critical for social entrepreneurs to sincerely strive to produce profitable returns while attempting to create social and environmental impact.¹⁸⁴ The modern social entrepreneur is better positioned now, more than ever, to make a compelling case that profits and social and environmental objectives can be successfully contemporaneously pursued.¹⁸⁵ The growing trend of legislatures

182. *Id.*

183. *But see* 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, 113–14 (2012) (arguing that liberalizing the current benefit corporation legislation to permit even greater flexibility is the way to prevent misuse of the benefit corporation).

184. Justice Alito, writing for the majority in *Hobby Lobby*, stated, “In fact, recognizing the inherent compatibility between establishing a for-profit corporation and pursuing nonprofit goals, States have increasingly adopted laws formally recognizing hybrid corporate forms.” *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2771 (2014).

185. Perhaps one reason that social entrepreneurs choose for-profit business associations is that profit provides a motivating force for innovation and efficiency that is absent in the nonprofit setting. *See* J. Gregory Dees & Beth Battle Anderson, *For-Profit Social Ventures*, 2 INT’L J. ENTREPRENEURSHIP EDUC. 1, 5 (2003) (theorizing that social entrepreneurs may choose for-profit corporate forms because they want to “do well” and “[do] good” simultaneously and that profit can be channeled to encourage efficiency and innovation).

and courts accepting the notion that socially and environmentally driven companies that consider other constituencies can do so without harming shareholders reflects the reality that the benefit corporation is unnecessary.¹⁸⁶ This increasingly accepted notion recognizes that even if a board's decision marginally harms shareholders in the short term, it may lead to the growth of intangible benefits, such as goodwill and brand recognition, in the long term; these intangible benefits, in turn, can theoretically cycle back to increase shareholder value, representing a rational benefit accruing to the shareholder.

A. Judging a Book by Its Cover: The Harmful Dichotomy Caused by Encouraging Social Enterprises to Organize as Benefit Corporations

The benefit corporation does not peacefully coexist with traditional for-profits. The creation of the benefit corporation has created a false dichotomy between traditional corporations and benefit corporations. Because there are only limited contexts in Delaware when companies cannot consider the impact of business decisions on a wide array of constituencies, the benefit corporation fosters the illusion that benefit corporations are automatically more socially and environmentally conscious than traditional corporations.¹⁸⁷

The benefit corporation's legal status brings marketing and branding benefits intended to serve as a tool for consumers to distinguish the "good" companies from the "bad."¹⁸⁸ This dichotomy increases the likelihood of consumers judging a company based on its legal status instead of the merits of its business practices and product and service considerations. The emergence of the benefit corporation, without further safeguards and stricter enforcement,¹⁸⁹ is not the appropriate shortcut to pair socially and environmentally conscious

186. See NICK O'DONOHUE ET AL., *supra* note 88, at 12, 14–15 (analogizing the risks of impact investments to venture capital or high-yield debt investments and positing that creating positive impact and generating financial return are two aims that can coexist).

187. See Underberg, *supra* note 10 (arguing that making a distinction between benefit corporations and traditional corporations creates a "false dichotomy between 'good' and 'bad' companies" due to their choice of legal entity).

188. *Id.*; see FAQ, BENEFIT CORP., <http://benefitcorp.net/business/business-faqs> (last visited Oct. 26, 2015) (contrasting the socially driven mission of benefit corporations with that of the profit-making goals of the traditional corporate form).

189. Potential solutions that this Comment does not further explore are: (1) using the benefit enforcement proceeding as a tool to redirect corporate conduct to achieve a general public benefit and (2) removing blanket monetary liability protection for directors who grossly abuse the benefit corporation status.

consumers with social enterprises. Traditional for-profits remain the best way to balance raising capital¹⁹⁰ with decision making flexibility.

B. Social Enterprises Succeeding Under Existing Corporate Forms

TOMS Shoes (“TOMS”) is a for-profit social enterprise incorporated in Delaware and based in Los Angeles, California.¹⁹¹ TOMS chiefly became famous for its one-for-one policy, which states, “With every product you purchase, TOMS will help a person in need.”¹⁹² In 2011, due to the success of its shoe line, TOMS expanded the one-for-one model and launched TOMS Eyewear, which provides eye-care services to a person in need with every eyeglass purchase.¹⁹³

In August 2014, Bain Capital LLC agreed to acquire a fifty-percent stake in TOMS, which, at that time, was valued at \$625 million.¹⁹⁴ TOMS founder Blake Mycoskie, who had been the sole owner, retained half of the company and will continue to be in charge.¹⁹⁵ The company has employed a business model that balances profit-seeking ventures with the pursuit of social missions aimed at helping people in need.¹⁹⁶ Mycoskie is no longer the sole owner and continues to operate in a state without a constituency statute to

190. One advantage of the benefit corporation legal status is its ability to attract “patient capital”; therefore a shareholder base is less likely to apply pressure for short-term results. Underberg, *supra* note 10. A traditional for-profit social enterprise should be able to attract the same shareholder base by listing clear mission statements in their articles of incorporation and marketing itself as a double or triple bottom line company. Traditional for-profits are also less likely to scare off investors who would otherwise be put off by the benefit corporation’s conferral of blanket protections on directors.

191. *TOMS Shoes, LLC*, COMPANIESNY.COM, <http://www.companiesny.com/n/business/toms-shoes-llc/4645815> (last visited Oct. 26, 2015); *Where We Work*, TOMS, <http://www.toms.com/jobs> (last visited Oct. 26, 2015).

192. *One for One*, TOMS, <http://www.toms.com/improving-lives> (last visited Oct. 26, 2015).

193. *Giving Sight*, TOMS, <http://www.toms.com/what-we-give-sight> (last visited Oct. 26, 2015). TOMS has since launched “Coffee by TOMS Roasting Co.,” which provides one week of clean water to a person in need for every bag of coffee a consumer purchases. *About Coffee by TOMS Roasting Co.*, TOMS, <http://www.toms.com/coffee> (last visited Oct. 26, 2015).

194. Greg Roumeliotis & Olivia Oran, *Exclusive: Bain Capital to Invest in Shoemaker TOMS—Sources*, REUTERS (Aug. 20, 2014, 2:16 PM), <http://www.reuters.com/article/2014/08/20/us-toms-baincapital-idUSKBN0GK1ZZ20140820>.

195. *Id.* (reporting that, despite the deal, Mycoskie will “stay at the helm”).

196. *Giving Shoes*, TOMS, <http://www.toms.com/what-we-give-shoes> (advertising that “TOMS has given more than 45 million pairs of new shoes to children in need”) (last visited Oct. 26, 2015); *Giving Sight*, TOMS, <http://www.toms.com/what-we-give-sight> (last visited Oct. 26, 2015) (noting that TOMS has helped give over 325,000 people access to eye care).

protect him in running a business model that considers the impact of its business decisions on other constituencies; yet even with the availability of PBC legislation in Delaware, TOMS chooses not to organize as a benefit corporation.¹⁹⁷ To date, there is no evidence that TOMS has considered electing benefit corporation status; nevertheless both the MBCL and Delaware's PBC legislation make it extremely difficult to adopt the legal status.¹⁹⁸ Amending the certificate of incorporation becomes proportionately more difficult as a company's shareholder base increases. Accordingly, benefit corporation status is a viable option only for new social enterprises.

The TOMS CSR model provides an important lesson. At the forefront, TOMS is a concrete example of a company exhibiting financial success without compromising its corporate culture and policy. TOMS also represents a social enterprise that organized as a traditional for-profit and maintained its legal status despite the emergence of the benefit corporation. Consumers have unequivocally received TOMS's social message that the company broadcasts through "cause-based marketing" and its "caring capitalism" business model.¹⁹⁹ Further, TOMS's business structure provides additional lessons. While TOMS is a for-profit company, all of its charitable practices are run through its nonprofit subsidiary Friends of Toms.²⁰⁰ Although this Comment argues that the creation of a nonprofit subsidiary is unnecessary to insulate directors in their pursuit of social and environmental missions, social enterprises have the option under the existing legal system to mimic TOMS's business structure to best combine financial benefit with maximizing social

197. See Kyle Stock, *Bain Capital Buys Toms, Will Still Give Away Shoes*, BLOOMBERG BUS. (Aug. 21, 2014), <http://www.bloomberg.com/bw/articles/2014-08-21/bain-capital-buys-toms-the-625-million-do-gooder-shoe-company> (quoting Bain's Ryan Cotton on Mycoskie: "Blake found that for-profit and a bottom-line focus didn't have to be in conflict with for-good"). Legislation similar to Delaware's PBC also exists in California. See CAL. CORP. CODE § 2600-05 (2015).

198. See 80 Del. Laws c. 40, § 12 (2015) (to be codified at DEL. CODE ANN. tit. 8, § 363(a) (2015)) (requiring two-thirds affirmative vote by shareholders to become a benefit corporation); MODEL BENEFIT CORP. LEGIS. §§ 104, 105 (2014) (same). Notably, Delaware only recently amended its PBC laws in August 2015 to reduce the affirmative vote from ninety percent to two-thirds. Compare DEL. CODE ANN. tit. 8, § 363(a) (2014), with 80 Del. Laws c. 40, § 12 (2015).

199. See Preeti Mehta, *Capitalism's Moral Compass: The Argument for Cause-Based Marketing*, ANALYTIC PARTNERS (Mar. 25, 2014), <http://www.analyticpartners.com/news-blog/2014/03/capitalism%E2%80%99s-moral-compass-the-argument-for-cause-based-marketing/> (predicting that cause-based marketing will reach \$1.84 billion in 2014).

200. *Id.*

and environmental impact.²⁰¹ The takeaway is that the existing traditional for-profit legal framework provides all of the benefits of social enterprise without introducing the slew of problems associated with the fledgling benefit corporation.

CONCLUSION

The current legal framework, either through constituency statutes or through Delaware case law, largely permits directors to consider the impact of their decisions on constituencies other than shareholders. The courts and markets are primed to recognize the coexistence of social enterprises and profitability, making it increasingly likely that courts will find a rational connection between considering other constituencies and ultimately promoting shareholder value. Many legal commentators and supporters of benefit corporation legislation have utilized fears exacerbated by the holdings in *Revlon* and *eBay* to help propel the benefit corporation into the mainstream. Instead of relying on legal precedent, advocates of the MBCL rely on the absence of case law to prove the point that there is too much risk involved in pursuing social enterprise under the current traditional for-profit legal framework. Perhaps the fear of litigation has overwhelmingly deterred social entrepreneurs from registering as traditional for-profits; but, until the matter is litigated, the underpinnings of the benefit corporation remain based on mere speculation, not law. In reality, jurisprudence on the matter clearly recognizes that directors can consider other constituencies when making business decisions and need only maximize shareholder value in certain scenarios, all of which are avoidable in well-guided social enterprises.

The advantages of electing benefit corporation status are substantially outweighed by the drawbacks of the existence of such a corporate form. Not only does the emergence of the benefit corporation create a harmful dichotomy between traditional corporations and benefit corporations, but it also aggravates the very issue the legal status attempts to eradicate: greenwashing. The Delaware benefit corporation legislation's failure to include benefit enforcement proceedings and its requirement that corporations list specific public benefits in their charters directly contradicts the aspirations of the benefit corporation drafters. Outside of Delaware, states that have enacted legislation that closely resembles the MBCL have still contributed to the legalized greenwashing issue due to the

201. Of course, the nonprofit subsidiary will also experience the added benefit of tax-exempt status.

inability of the MBCL's benefit enforcement proceedings to effectively ensure compliance or ferret out exploitation of the corporate form.

While there are certain inherent advantages that benefit corporation status provides—like raising “patient” capital along with marketing and branding incentives—the traditional for-profit can nearly, if not completely, achieve the same result through strategic marketing. The traditional for-profit provides for greater flexibility in decision making without potentially deterring investors who fear that the statutory benefit corporation absolves directors of traditional accountability. B-Corp certification, as opposed to the benefit corporation's completely separate legal status, provides social enterprises with marketing and branding benefits while eliminating the potential for greenwashing by requiring that corporations meet certain benchmarks, or at least expend resources, in an effort to achieve higher standards of corporate purpose, accountability, and transparency.

Finally, there are examples of social enterprises maintaining their traditional for-profit status even with the availability of the benefit corporation, demonstrating the suitability of the traditional for-profit for social enterprises. Although the underlying idea of the benefit corporation is well-meaning, Delaware's departure from the MBCL's language in key respects, in addition to the MBCL's creation of a lax enforcement system possibly to promote widespread adoption, detracts from the intentions of the drafters. Benefit corporation legislation, as it currently exists, is nothing more than the result of riding the wave of the corporate social responsibility movement.
