The State of Social Enterprise and the Law

2021–2022

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The Grunin Center for Law and Social Entrepreneurship was founded to create new ways for law to support positive change in the world. Our mission is to enhance the community of lawyers and legal institutions engaged in social entrepreneurship and impact investing and to accelerate their effective participation in these fields. To this end, the Grunin Center publishes *The State of Social Enterprise and the Law* annually.

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Introduction

The social enterprise legislative landscape in the United States has reached a crossroads. In the past decade, legislative focus has centered on the creation of new forms to accommodate social enterprises.

Owing to the success of this movement, legislative interest in new forms has slowed.[1] Rather, states are now introducing legislation both to incentivize adoption and to remove barriers to conversion to social enterprise forms. Recent amendments will have major implications for management and shareholders of publicly held companies that are considering converting to the benefit corporation form.

Corporate social responsibility and effective stakeholder governance have become important buzzwords for businesses. A recent study found that more than 60% of consumers prefer to "buy from companies with a reputation for purpose" and over half will pay more for these brands.[2] In response to these changing norms, the Business Roundtable released a statement in 2019 declaring that the purpose of a corporation expands beyond shareholders to customers, employees, and the community.[3] To date, the CEOs of more than 130 companies have signed this statement, thereby publicly committing their companies to take into consideration the views of a broad range of stakeholders.

In the two years since the release of the Business Roundtable statement, researchers have explored whether this statement "represents a meaningful commitment" by its corporate signatories or is merely empty rhetoric.[4] According to a recent report summarizing this research, some suggest that the effect of the statement on corporate decision-making thus far has been "mostly for show."[5] Their research suggests that very few of the companies that have signed on to the statement have made corporate governance changes or supported shareholder proposals that reflect the pledges embodied in the statement.[6]

Despite these mixed results, the corporate sector is increasingly turning to social enterprises as an alternative to traditional corporate forms. For example, a report published by Deloitte in late 2020 discusses the resiliency of social enterprises and their ability to "thrive" during times of disruption.[7] It specifically touts social enterprises' capacity to better respond to and adapt to adversity due to their tendency to approach issues "from a human angle first." This research conducted by Deloitte suggests that as businesses search for ways to respond to new challenges, such as the pandemic, they may seek out the flexibility that social enterprise forms offer.[8]

This report, the fifth in the series, explores the latest developments in US social enterprise law and changes to legislative priorities. Additionally, the report highlights the impact of Delaware's 2020 amendment to its Public Benefit Corporation (PBC) statute, efforts by some states to provide financial advantages to benefit corporations, and implications these legislative initiatives may have for the future adoption of social enterprise forms.

1. Forty-one states and Washington, DC, have passed legislation to authorize at least one social enterprise form. See discussion *infra* section "Possible Financial Incentives for Benefit Corporations."

2. Chris Kelly, *Study: 71% of consumers tire of empty promises, spurring 'age of cynicism,'* Marketing Dive (May 25, 2021), https://www.marketingdive.com/news/study-71-of-consumers-tire-of-empty-promises-spurring-age-of-cynicism/600774

3. *Statement on the Purpose of a Corporation*, Bus. Roundtable (Aug. 19, 2019), https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationJuly2021.pdf

4. Geoff Colvin, *America's top CEOs didn't live up to their promises in Business Roundtable letter, researchers find*, Fortune (Aug. 5, 2021), https://fortune.com/2021/08/05/business-roundtable-letter-statement-on-the-purpose-of-a-corporation-stakeholder-capitalism-american-ceos

5. *Id.*

6. *Id.*

7. Jeff Schwarz et al., *The social enterprise in a world disrupted*, Deloitte Insights (Dec. 9, 2020), https://www2.deloitte.com/us/en/insights/focus/human-capital-trends/2021/social-enterprise-survive-to-thrive.html?msclkid=dd038b04c0b011ec9ed0a041d7ab3d04

8. An interesting example of the increased recognition of social enterprises in the legal field was the inclusion of a question about incorporating as a benefit corporation on the July 2021 NYS bar exam. *New York State Bar Examination*, MEE & MPT Questions, https://www.nybarexam.org/ExamQuestions/JULY2021QA.pdf

Mapping State Legislation

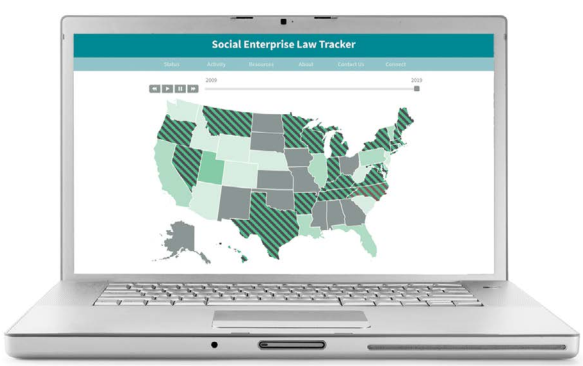
Every year the Grunin Center for Law and Social Entrepreneurship at NYU School of Law tracks legislative developments in the social enterprise field throughout the 50 states and the District of Columbia for our Social Enterprise Law Tracker.[9]

The Social Enterprise Law Tracker

This mapping of state legislation is based on findings drawn from the Social Enterprise Law Tracker. Designed as a comprehensive online resource for legal practitioners and researchers, the Social Enterprise Law Tracker compiles relevant legislative actions across the United States.

Using an interactive map, the Social Enterprise Law Tracker aims to make it easy for users to see at a glance which states allow for the various social enterprise legal structures, as well as how social enterprise legislation has spread across the country from 2009 to the present day. The Social Enterprise Law Tracker is the first such tool to provide comprehensive mapping of social enterprise legislation in the United States.

The Social Enterprise Law Tracker was developed in 2013 by Shawn Pelsinger and Robert Esposito, both Jacobson Fellows in Law & Social Enterprise at New York University School of Law. The Social Enterprise Law Tracker is now managed and updated by the Grunin Center for Law and Social Entrepreneurship at NYU School of Law.[10]



Overview of Different Forms

The Social Enterprise Law Tracker maps the following social enterprise legal forms: the benefit corporation (including the PBC), the social purpose corporation (SPC), the low-profit limited liability company (L3C), the benefit limited liability company (BLLC), and the statutory public benefit limited partnership (SPBLP).[11]

As the above graphic shows, while several states have authorized more than one form designed to house social entrepreneurial activities, the state that provides for the broadest range of social enterprise forms is Delaware, which has authorized the BLLC, the PBC, and the SPBLP. Delaware first passed its benefit corporation legislation in 2013. Then, in 2018, Delaware passed BLLC legislation to create a social enterprise LLC form. In 2019, Delaware then created the SPBLP form, which mirrors a traditional limited partnership. Importantly, in 2020, Delaware amended its PBC legislation to make it easier for publicly held companies to convert to the PBC form.[12] As a result, Delaware companies are increasingly converting to PBCs both before and after going public.[13]

9. Social Enterprise Law Tracker, https://socentlawtracker.org/

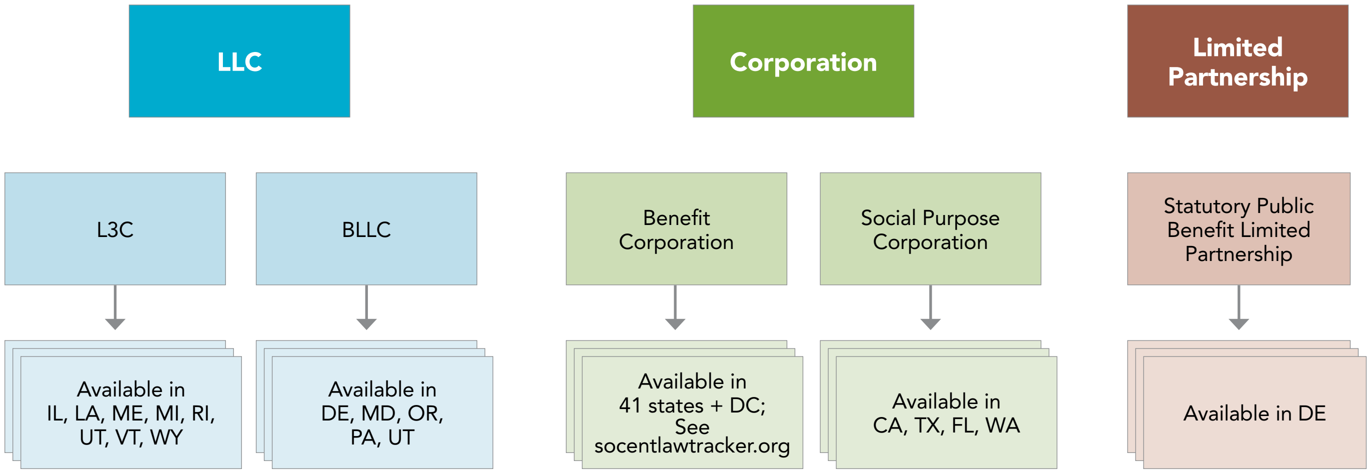
10. Grunin Center for Law and Social Entrepreneurship, https://www.law.nyu.edu/centers/grunin-social-entrepreneurship

11. For a further description of these forms, *see* Grunin Ctr. for L. & Soc. Entrepreneurship, Mapping The State of Social Enterprise and the Law 6 (2021) [hereinafter *2020-2021 Tepper Report*].

12. *See 2020-2021 Tepper Report*, *supra* note 11, at 14.

13. See discussion *infra* section "Adoption of Benefit Corporation Form by Publicly Held Companies."

Social Enterprise Forms in the United States[14]



The difference in legislative adoption by states across these various social enterprise forms may simply reflect corporate interest in particular forms over others. It is challenging, however, to make any assumptions about adoption rates by social enterprises of the various forms. Given that the majority of social enterprises are privately held, there is a lack of reliable data on active US social enterprises and the legal forms they have chosen. One source estimates that there were slightly more than 2,000 active L3Cs in the US as of February 2022.[15] Data on benefit corporation adoption is similarly sparse, although there has been some research that suggests more enterprises are adopting the benefit corporate form/PBC form than any of the other social enterprise forms.[16] As more publicly held companies consider converting into or incorporating at the outset as a benefit corporate form or PBC form, we may soon have more reliable information about the popularity of these forms and the types of companies that elect them over traditional corporate forms.

Social Enterprise Legislation in 2021

2021 experienced a significant decline across all social enterprise legislation, and no states successfully enacted legislation to authorize any new social enterprise forms for the first time since the Social Enterprise Law Tracker launched in 2013. This may represent a new inflection point in the US social enterprise legislative landscape as states appear to be more likely to amend, or leave in place, existing legislation, rather than attempt to authorize new legal forms for enterprises aiming to engage in social entrepreneurial activities.

Three states attempted but failed to pass benefit corporation legislation in 2021. Of these three, two states, Iowa and Mississippi, failed to pass legislation authorizing the benefit corporation form after multiple prior attempts, while Wyoming failed in its initial attempt to pass legislation that would authorize the benefit corporation form. Additionally, Hawaii and Maine introduced legislation intended to promote greater adoption of their already existing benefit corporation form.

Only one state attempted to revise legislation addressing legal forms other than the benefit corporation: Delaware passed minor amendments to its BLLC legislation.

14. *Id.*

15. *Latest L3C Tally*, InterSector Partners, https://www.intersectorl3c.com/l3c (last visited June 20, 2022). To put it in context, this represents a two-fold increase from approximately 1,000 L3Cs in 2014. *See* Kate Cooney et al., *Benefit Corporation and L3C Adoption: A Survey*, Stan. Social Innovation Rev. (Dec. 5, 2014), https://ssir.org/articles/entry/benefit_corporation_and_l3c_adoption_a_survey

16. One study cites an unverified count of 5,199 active benefit corporations in the US as of July 2018. Ellen Berrey, *Social Enterprise Law in Action: Organizational Characteristics of U.S. Benefit Corporations*, 20 Transactions: Tenn J. Bus. L. 21, 25 n. 11 (2018).

Summary of 2021 legislative attempts and enacted amendments

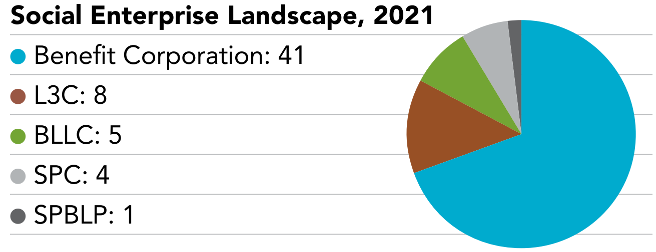
State	Corporate Form	Bill Description	Result
Delaware	BLLC	Amends Title 6 to provide for the manner in which an LLC may become a BLLC and requires that the BLLC company agreement set forth the specific public benefit(s) to be promoted by the company	Passed and signed by governor
Hawaii	Benefit Corporation	Establishes a state policy that encourages HI corporations to make a commitment to social responsibility and establishes a social responsibility corporate awards program	Carried over to 2022 Regular session
Iowa	Benefit Corporation	Establishes benefit corporation form	Failed to pass (4th failure in past 6 years)
Maine	Benefit Corporation	Directs the secretary of state to develop website information related to promoting public awareness of benefit corporations and providing businesses with directions for establishing themselves as benefit corporations	Passed and signed by governor
Mississippi	Benefit Corporation	Establishes benefit corporation form	Failed to pass (5th attempt in past 5 years)
Pennsylvania	Benefit Corporation	Amends Title 15 to further provide for the standard of conduct for directors, benefit directors, and officers of benefit corporations	Referred to Commerce; no actions since taken
		If borrower for industrial development project is a benefit corporation, it receives a 1.5% discount on the standard interest rate of the loan	Referred to Commerce; no actions since taken
Wyoming	Benefit Corporation	Establishes benefit corporation form	Failed to pass (1st attempt)

Trends in Passage

2021 Trends

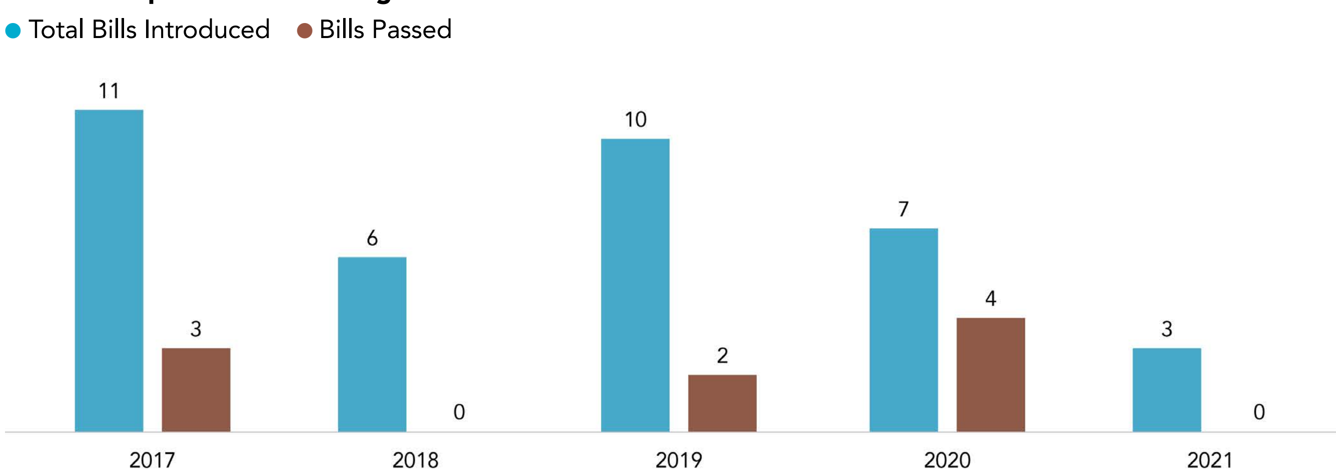
The US landscape remains unchanged from 2020. The benefit corporation continues to be the most widely authorized social enterprise form, with over 80% of states having passed legislation. After 2020, only 10 states remained without a benefit corporation form.[17] Of these, three states introduced legislation in 2021, but all failed to pass.[18] This reflects the recent trend of declining benefit corporation bill introductions (down from 10 in 2019 and seven in 2020). Given the high prevalence of the benefit corporation form throughout the US, states are shifting their focus to promoting use of the benefit corporation form, rather than passing new authorizing legislation.[19]

Social Enterprise Landscape, 2021



Legislative interest in the other four social enterprise forms has been nearly nonexistent in recent years. The last state to enact any form other than the benefit corporation was Delaware in 2019.[20] Since then, states have passed a handful of minor amendments to existing legislation, but there have been few attempts to introduce legislation creating new forms.[21] Although many states experimented with multiple forms in the past decade, it appears that benefit corporations will remain the dominant social enterprise form for the foreseeable future.

Benefit Corporation Bill Passage Rates



17. Social Enterprise Law Tracker, https://socentlawtracker.org/

18. Iowa, Mississippi, and Wyoming.

19. See discussion *infra* section "Adoption of Benefit Corporation Form by Publicly Held Companies."

20. Delaware created the SPBLP form in 2019 and remains the only state to enact the form. In 2020 and 2021, states passed a handful of minor amendments to existing legislation, but there have been few attempts to introduce legislation creating new forms. *2020-2021 Tepper Report*, *supra* note 11, at 10-11.

21. Oklahoma was the only state to introduce legislation for a non-benefit corporation form in 2020. The state's attempt at enacting BLLC legislation failed to pass.

Adoption of Benefit Corporation Form by Publicly Held Companies

Since Delaware amended its PBC statute in 2020, there has been movement of more Delaware corporations choosing at the outset or converting into the PBC form because of lowered risks and costs associated with its adoption. The main amendments to the PBC statute in 2020 were a reduction in the shareholder voting threshold to convert to, and exit, the PBC form; the removal of appraisal rights for shareholders in a PBC; and a higher level of director protections.[22] While it is still too early to tell, by reducing the legal risks and costs of converting into or out of the PBC form, Delaware may have succeeded in encouraging more companies to try to use the PBC form.[23]

Prior to these 2020 amendments, only a handful of companies, including Laureate Education, Lemonade Inc., and Vital Farms, converted into PBCs just before they went public. However, in 2021, following the amendments, several already publicly held companies, such as Veeva Systems and United Therapeutics, converted into the PBC form and garnered overwhelming support for these conversions from their shareholders, including from institutional shareholders. The CEO of Veeva Systems, in a letter to the shareholders, stated:

> "Looking ahead, Veeva has the potential to become essential to the process of developing medicines and cures and bringing them to patients. Society's interest in the success and sustainability of this process is clear. Our vision is not sustainable over the long term if it is only about financial returns."[24]

He expressed further his belief that switching to the PBC form would align the company's ethos with its charter and create a more sustainable business going forward.[25] This suggests that the additional incentives and protections the Delaware legislature has provided to those companies that choose to convert into PBCs are gaining some traction. However, we might ask whether some companies are better suited for the form than others, and whether companies like Veeva Systems may have a more aligned or pressing business rationale for adopting the form than companies operating in other sectors, with different customer bases, or with differing capital or ownership structures.

22. Including creating a higher bar to meet a conflict of interest and requiring that shareholders must hold 2% of a corporation's outstanding shares or, if on a national exchange, 2% worth at least $2 million to bring a derivative suit to enforce the statute's balancing requirement against the board. 2020-2021 Tepper Report, *supra* note 11, at 10.

23. Christopher Marquis, *Companies Show Rising Support for Public Benefit Corporate Governance*, Forbes (Mar. 1, 2021), https://www.forbes.com/sites/christophermarquis/2021/03/01/companies-show-rising-support-for-public-benefit-corporate-governance/?sh=7699d1ee3320

24. Veeva Systems, CEO Letter to Shareholders (Dec. 4, 2020), https://www.veeva.com/pbc/

25. *Id.*

Institutional Investor Support for Benefit Corporations

To see more conversions by publicly held corporations into benefit corporations, institutional investors will need to be convinced of the value of such conversions. Similarly, concerns about the risks associated with operating as a benefit corporations will need to be addressed. Without an existing body of case law that tests these forms, much of this is conjecture at this point. However, there was movement in 2021 by several key institutional investors that suggests they are open, at least in some cases, to investing in benefit corporations, particularly those incorporated in Delaware as PBCs.

As a few publicly held companies have been converting to the PBC form, attention has moved to institutional investors to see how they react. The 2021 proxy season has been characterized as an important arena for debate around the role of corporations in society and how social purpose can be embedded in legal form. Some institutional investors have begun to publicly voice their stances on the matter.

More specifically, institutional investors like Vanguard and BlackRock have started to vote in support of management and board-led initiatives to adopt the PBC form. For example, in its October 2021 Investment Stewardship Insights report, Vanguard stated that it would support United Therapeutics' board-proposed conversion into a PBC, reasoning that the potential benefits of converting into a PBC that accrue to United Therapeutics outweighed the potential risks, like litigation, in the long run.[26]

BlackRock also has publicly indicated its support, as a general matter, for management and board-led initiatives to convert companies into PBCs. But this support was qualified: In BlackRock's Investment Stewardship 2022 Policy Updates, the firm released guidelines for how it believes converting to a PBC should be handled, including requiring a shareholder vote even if not required by the state, and openly stated that it would "generally support such management proposals," as long as it believes shareholder interests were protected.[27] However, in contrast to its qualified support for board-led initiatives to convert into PBCs, BlackRock has shown opposition to shareholder-led proposals to convert to the benefit form. Tellingly, BlackRock's own board voted against a shareholder proposal in 2021 to convert BlackRock into a PBC.[28] In the 2021 proxy statement, the board stated:

> "To our knowledge, only a handful of U.S. publicly traded corporations have gone public as, or have converted to be, public benefit corporations, and none are large-cap publicly-traded financial institutions or comparable to BlackRock in terms of market capitalization or global footprint.
>
> "Conversion to a [PBC] may alienate our clients and investors who believe their interests are not being served, as there are no major financial services firms that have adopted the [PBC] structure. Moreover, the impact that a conversion would have on BlackRock's stock price, market capitalization and overall operational and financial performance is unknown. This uncertainty also could impact our ability to attract and retain employees, and to compete for employees with other financial services firms that are not [PBC]. In addition, while our clients and shareholders have expressed support for our existing sustainability initiatives, none of them, other than the proponent of this proposal, have expressed any interest in BlackRock converting to a [PBC]."

In addition to expressing a hesitancy to convert because of the dissimilarity between BlackRock and other corporations that had adopted the form, the board indicated concerns about the legal and regulatory costs it would take to convert as a heavily regulated entity.[29]

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26. Vanguard, Vanguard Investment Stewardship Insights (Oct. 2021), https://corporate.vanguard.com/content/dam/corp/advocate/investment-stewardship/pdf/perspectives-and-commentary/UTHR_1860972_102021_online.pdf

27. BlackRock, Investment Stewardship: 2022 Policies Updates Summary 4 (Feb. 23, 2022), https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-engprinciples-global-summary.pdf

28. BlackRock, 2021 Proxy Statement: Notice of Annual Meeting, 98-99, (May 26, 2021), https://www.sec.gov/Archives/edgar/data/1364742/000119312521118007/d73637ddef14a.htm#toc73637_39a

29. *Id.* at 99.

Reading between the lines of the rationale given by BlackRock's board opposition to converting itself into a PBC, this may suggest that BlackRock is unlikely to vote in favor of PBC conversions of companies similarly situated to BlackRock. But perhaps the larger takeaway is that key institutional investors like Vanguard and BlackRock currently believe that choosing a new corporate form like the PBC is an area where the management and the board, not activist shareholders, should take the lead.

Recognition by institutional investors of the PBC as a viable option for publicly held companies could have major implications for the future of the form. However, aversion to shareholder-led campaigns to adopt the form may slow down this progression. A greater number of PBC conversions is essential to understand the impact of conversion and to shape regulatory and corporate governance regimes for PBCs. Furthermore, as this form is tested in the courts, some of the concerns that BlackRock expressed in its proxy statement might be addressed. Ultimately, this could result in greater support from institutional investors for PBC conversions among the companies they hold and even themselves.

Possible Financial Incentives for Benefit Corporations

Another area that has seen legislative movement in the past two years has been the consideration of financial incentives for choosing a benefit corporation over traditional corporate forms. Specifically, both New Jersey (initially introduced to committee in 2020 and reintroduced in 2022) and Pennsylvania (in 2021) proposed legislation that would give financial benefits to those corporations, among others, that adopt the benefit corporation form.

While neither state has yet to pass this legislation, their approach may be a harbinger of legislative initiatives to come as states create financial incentives to encourage companies to adopt one of the new legal forms for social entrepreneurial activities.

New Jersey's proposed "Garden State Manufacturing Jobs Act" would establish a "Garden State Corporation" that would grant tax credits if a corporation meets certain requirements, including using facilities within the state and granting employees greater power in corporate decision-making.[30] This tax benefit nearly doubles if the Garden State Corporation is also a benefit corporation.[31]

Similarly, Pennsylvania is considering a bill to promote in-state job creation through the creation of the Pennsylvania Industrial Development Authority, which would provide a standard low-interest loan for corporations that enter into the program and meet its requirements.[32] Participating businesses that are also benefit corporations would receive an additional 1.5% reduction in the standardized interest rate.[33]

Passage of these bills could lead to a higher prevalence of benefit corporations in Pennsylvania and New Jersey, but, more broadly, these states could act as a testing ground for how businesses react to financial incentives for adopting social enterprise forms.

30. Assemb. 1319, Gen. Assemb, Reg. Sess. (NJ 2022).

31. *Id.*

32. HB 501, Gen. Assemb. Reg. Sess. (Pa. 2021).

33. *Id.*

Conclusion

2021 was marked by declining legislative interest in authorizing new social enterprise forms. Given the high saturation of benefit corporation legislation throughout the United States and its dominance among the legal forms created to explicitly encourage social entrepreneurship, this trend is likely to continue. However, the impact of existing legislation that authorized new forms is increasingly evident as publicly held companies are utilizing the benefit corporation form for the first time and institutional investors have expressed their, albeit qualified, support for conversions by companies into some of these new social enterprise forms, namely the PBC.

With multiple social enterprise forms are now available across most states, the next US legislative developments may involve strategies to increase adoption of these forms by new and existing businesses. The two states that have attempted to introduce minor financial incentives for benefit corporations have been unable to enact those bills. Will these attempts increase in the future, and if so, will they be met with similar legislative resistance?

Consumers continue to demand that companies pursue purposes beyond the creation of shareholder value. As evidenced by the lack of meaningful reforms since the Business Roundtable's 2019 statement, these changes likely will not occur organically. The benefit corporation form provides an opportunity to hold corporate decision-makers accountable for their commitments to stakeholders. Institutional investors have signaled their willingness to support proposed conversions if they are made by the company's board and management. Will more boards of publicly held company willingly introduce benefit corporation proposals? If not, will shareholders continue to push for these initiatives themselves in the face of limited, if any, institutional investor support?

Recognition of the Tepper Family

We would like to extend our gratitude to the Tepper Family for funding this research project, with particular thanks to Marvin Tepper ’58, Elise Tepper, Jacqueline Tepper ’90, Edward Tepper, and Shelley Tepper.