

The State of Social Enterprise and the Law

2020–2021

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NYU School of Law

The Grunin Center

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.

Contents

About the Authors	2
Introduction	3
Mapping State Legislation	5
Trends and Analyses	11
Conclusion	23
Appendix	24
Recognition of the Tepper Family	25

About the Authors

(As of the 2020–2021 academic year)

Sydney Forrest

Sydney is a first-year student at NYU School of Law. She is from Tampa, Florida. Before law school, Sydney attended Wesleyan University for her undergraduate degree in mathematics and Olin Graduate School of Business at Babson College for her MS in finance. At NYU, besides being a Tepper Fellow for the Grunin Center for Law and Social Entrepreneurship, Sydney is a Jacobson Leadership Scholar for Law and Business and the Social Innovation Symposium chair for the Social Enterprise & Startup Law Club. Outside of law school, she enjoys rock climbing, spending time with her younger sister, and taking non-degree math courses at NYU Courant.

Nadia Greggs

Nadia Greggs is a second-year JD candidate at NYU School of Law. She graduated with a BA in economics from Georgetown University and an MA from Hunter College in applied mathematics and statistics. Prior to law school, Nadia worked at the Board of Governors of the Federal Reserve System in Washington, DC where she assisted with research on competition and financial stability in the banking industry. She then moved on to develop student-growth metrics for New York State as a senior research analyst for an education research organization. In addition, she was an expert consultant for the Wisconsin Innocence Project. She is a member of the Black Allied Law Students Associate at NYU and will be joining Davis Polk & Wardwell after graduation.

Hannah Yang

Hannah Yang is a third-year student at NYU School of Law. She is interested in technology, sustainability, and social entrepreneurship. Yang is an articles editor for the *Environmental Law Journal*, and she was previously on the boards of the Supreme Court Forum, Environmental Law Society, and Rights Over Tech. In her first summer, she interned at the ACLU of Michigan. In her second summer, she interned at Morrison & Foerster in New York. As a student in the UN Diplomacy Clinic, Hannah served as a legal adviser to Solomon Islands. Prior to law school, she worked as a paralegal at Simpson Thacher. Yang graduated from Princeton University with a degree in chemistry. Upon graduation, she will be returning to Morrison & Foerster in their corporate practice group.

Introduction

Loosely defined, social entrepreneurship is the choice to pursue both social benefits and financial gain in a single business entity. However, the precise definition of this term lacks consensus and continues to be shaped by changes in both the public and private spheres. Throughout the different forms of social enterprise legislation, companies formed under these special legal forms are given flexibility to decide which social benefit they are going to pursue. This broad definition of social enterprise and the flexibility it gives companies to tackle social issues allows them to choose a purpose that most aligns with the visions of the business leaders. This has the potential of allowing businesses to address the pressing issues that society is facing today.

The past few years have seen the reverberations of racial unrest and sexism, each exacerbated by the devastation of a global pandemic. There are ways that COVID has made it particularly difficult for racial minorities and women to succeed in a profit-focused corporate structure. Researchers have found, for instance, that women left the workplace at four times the rate of men during the pandemic,² and that employees of color, LGBTQ+, and working parents are experiencing more challenges during the pandemic.³

With the increased public attention on these issues, some have also been turning to businesses, scrutinizing the role of corporations in these widespread social issues.⁴

In prior years, it was common to see corporations' social purposes focused on environmental goals, such as carbon neutrality, and improving employee benefits.⁵ Recently, however, corporations are seeking new solutions to also improve racial and gender equity in the workplace due to the spotlight the pandemic has shone on this problem.⁶

Benefit corporations have a unique opportunity to support these communities and respond to inequity via balancing social purposes with the economic interest of shareholders and ensure the future success of the corporation. While this imperative exists, some employees remain doubtful that employers will commit more resources to equity in the workplace during COVID and generally. Researchers from McKinsey & Company have found that diversity and inclusion initiatives may suffer, in part, from a misalignment of financial incentives and a lack of accountability in senior management.⁷

1. For further discussion of the varying definitions of social enterprise, please refer to the See GRUNIN CTR. FOR L. & SOC. ENTREPRENEURSHIP, MAPPING THE STATE OF SOCIAL ENTERPRISE AND THE LAW 8 (2018) [hereinafter 2017–2018 Tepper Report].

2. Avie Schneider et al., Multiple Demands Causing Women to Abandon Workforce, Nat'l Pub. Radio (Oct. 2, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/10/02/919517914/enough-already-multiple-demands-causing-women-to-abandon-workforce>

3. Kweilin Ellingrud et al., Diverse Employees are Struggling the Most During COVID-19—Here's How Companies Can Respond, McKinsey (Nov. 17, 2020), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diverse-employees-are-struggling-the-most-during-covid-19-heres-how-companies-can-respond#>

4. See generally Dealbook, Corporate America's Role in the Fight for Racial Justice, N.Y. TIMES (Oct. 1, 2020), <https://www.nytimes.com/2020/08/07/business/dealbook/corporate-america-racial-justice.html>; Lily Zheng, We're Entering the Age of Corporate Social Justice, Harv. Bus. Rev. (June 15, 2020), <https://hbr.org/2020/06/were-entering-the-age-of-corporate-social-justice>; Tonya Garcia, Companies are Speaking Out Against Racial Injustice After the Killing of George Floyd, but They Have to Back It Up with Action, MarketWatch (June 9, 2020), <https://www.marketwatch.com/story/companies-are-speaking-out-against-racial-injustice-after-the-killing-of-george-floyd-but-they-have-to-back-it-up-with-action-2020-06-05>

5. See Jonathan Neilan, Peter Reilly, and Glenn Fitzpatrick, Time to Rethink the S in ESG, Harv. L. Sch. F. Corp. Governance (June 28, 2020), <https://corpgov.law.harvard.edu/2020/06/28/time-to-rethink-the-s-in-esg/> (discussing the prior absence of discussions on the "S" relative to the "E" and "G" in ESG, and more recent uptick in focus on social issues since COVID-19).

6. For example of recent articles looking at this phenomenon, See Lauren Feiner, Tech Companies Made Big Pledges to Fight Racism Last Year—Here's How They're Doing So Far, CNBC (June 6, 2020), <https://www.cnbc.com/2021/06/06/tech-industry-2020-anti-racism-commitments-progress-check.html>; All Things Considered, Big Companies Are Finding Out They Need Help With Diversity Messaging, Nat'l Pub. Radio (June 18, 2021), <https://www.npr.org/2021/06/16/1007337981/big-companies-are-finding-out-they-need-help-with-diversity-messaging>; Gillian Friedman, Here's What Companies Are Promising to Do to Fight Racism, N.Y. TIMES (Aug. 23, 2020), <https://www.nytimes.com/article/companies-racism-george-floyd-protests.html>

7. Ellingrud et al., *supra* note 3.

This report, the fourth in the series, seeks to describe recent shifts in the perceived role of corporations in society and discusses the implications for specialized legal forms that have been created to house social entrepreneurial activities. Additionally, this report highlights recent developments in the Delaware public benefit corporation statute, four new state benefit corporation statutes, and the new 2020 ABA Model Legislation. New legislation is trending toward increased flexibility in the benefit corporation requirements, making it less costly to become a benefit corporation while moving away from the 2017 B Lab Model Legislation. For example, Delaware's amendments make it easier both to become or to terminate a benefit corporation by reducing the voting threshold and the universe of shareholders that can bring lawsuits. Alabama, Georgia, and Ohio have also enacted more flexible legislation in contrast to their prior, more restrictive, failed legislative attempts that followed B Lab models. More companies may choose to incorporate as benefit corporations because of this reduction in transaction costs and be better equipped to respond to the increasing needs of their employees.

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.

The Social Enterprise Law Tracker⁸

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 first 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.⁹



8. SOCIAL ENTERPRISE LAW TRACKER, <https://www.law.nyu.edu/centers/grunin-social-entrepreneurship/updated-social-enterprise-law-tracker>

9. GRUNIN CENTER FOR LAW AND SOCIAL ENTREPRENEURSHIP, <https://www.law.nyu.edu/centers/grunin-social-entrepreneurship>

Overview of Different Forms

There are several different legal forms available to house traditional businesses—including, for example, limited liability companies (LLC), C-corporations, and limited partnerships. Depending on factors that include how many people are forming the business, the preferred tax treatment, and how the individuals want their business to be funded, businesses can choose a legal form accordingly.¹⁰ Similarly, different types of legal forms have emerged to house social entrepreneurial approaches to doing business. The Social Enterprise Law Tracker maps the following social enterprise legal forms: the benefit corporation, 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

While different states may adopt legislation using the same label, social enterprise statutes are not uniform. Two states, for example, may both adopt the benefit corporation form, but the rules and regulations for the benefit corporation in each state may be very different.¹² Additionally, every form has undergone an evolution as state legislatures consider the interests of the business community, the legal community, and the public.¹³ Still, it is important to note generally what these categorizations represent.

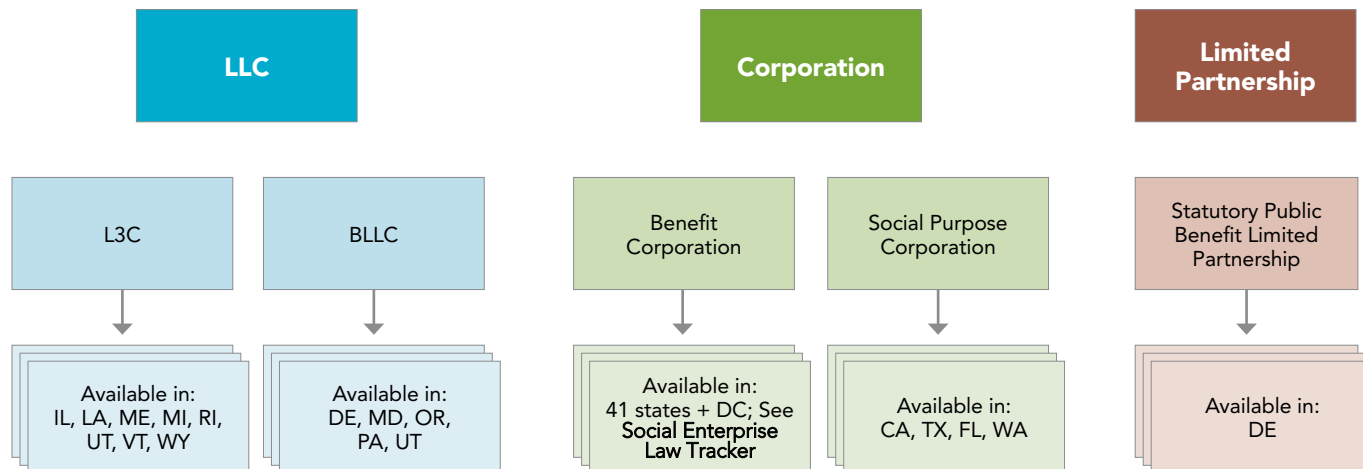
10. For more information about different business forms, please see Choose a Business Structure, U.S. Small Bus. Ass'n, <https://www.sba.gov/business-guide/launch-your-business/choose-business-structure>

11. SOCIAL ENTERPRISE LAW TRACKER, <https://www.law.nyu.edu/centers/grunin-social-entrepreneurship/updated-social-enterprise-law-tracker>

12. For example, See discussion of differences in the benefit corporation form for newly enacted legislation, found in the section “The Benefit Corporation Form in 2020” of this report.

13. See discussion *infra* section “Trends in Prior Attempts.”

Social Enterprise Forms in the United States



To start, there are two specialized limited liability company forms intended for social enterprises. The L3C was the first social enterprise form enacted in the United States, developed as a purpose-driven LLC with the intention of securing funding from United States private foundations interested in social investment in addition to grant-making.¹⁴ More recently, a separate LLC social enterprise form has emerged with less focus on attracting funding—the BLLC.¹⁵ BLLC legislation has been enacted in five states, and each state has done so somewhat differently.

Additionally, there are two common corporate forms authorized by state law: benefit corporations and SPCs. The benefit corporation form has the most widespread adoption within the United States. Benefit corporations must be distinguished from Certified B Corporations (also commonly known as B Corps), which are not a legal form, but rather companies that have been certified by

the independent nonprofit organization, B Lab.¹⁶ SPCs are an additional social enterprise form for corporations. California, Washington, and Florida recognize SPCs as a distinct corporate form, while Texas simply allows all for-profit corporations to adopt a social purpose without creating a new specialized form.¹⁷

Most recently, Delaware established a new social enterprise form that parallels a traditional limited partnership.¹⁸ In June of 2019, the law governing Delaware Limited Partnerships was amended to provide for the formation of the SPBLP.¹⁹ The SPBLP is defined as a for-profit limited partnership “that is intended to produce a public benefit... and to operate in a responsible and sustainable manner.”²⁰ Additionally, the partnership can consider social, economic, and political considerations without violating its fiduciary duty to act in the best interest of the partnership.

14. See 2017–2018 Tepper Report, *supra* note 1, at 6.

15. Maryland was the first state to adopt the BLLC form. The legislative history makes no mention of funding incentives and notes only a minimal small business effect in the fiscal summary. S.B. 595, 2011 Leg., Reg. Sess. (Md. 2011).

16. See generally Certification, CERTIFIED B CORP., <https://bcorporation.net/certification> (last visited June 18, 2021).

17. Tx. Bus. Org. Code. § 23.053.

18. For more about traditional limited partnerships, See Sean Peek, *A Quick Guide to Limited Partnerships*, CO—(Nov. 1, 2019), <https://www.uschamber.com/co/start/strategy/limited-partnerships-explained>

19. 82 Del. Laws c. 46, § 30 (2019).

20. DEL. CODE ANN. tit. 6, § 17-1202.

The Benefit Corporation Form in 2020

2020 was an especially active year for the benefit corporation form. As states continue to enact benefit corporation legislation across the nation, the benefit corporation form continues to evolve from its initial conception just 10 years ago.²¹ States new and old are exploring different provisions for benefit corporations. Delaware has revisited its existing Public Benefit Corporation (PBC) statute, amending several key provisions.²² Additionally, four new states enacted four very different benefit corporation statutes, with some major deviations from the model legislation.²³ The following chart highlights and compares several

provisions in the newly enacted legislation across the four states. Despite this continued legislative interest in the benefit corporation forms, however, states still failed to pass related legislation that would have provided specialized treatment of benefit corporations, such as reduced taxes or interest rates on loans.²⁴

21. In 2010, Maryland was the first state to adopt a benefit corporation statute.

22. See discussion *infra* section "Delaware 2020 Amendments to the Benefit Corporation."

23. See discussion *infra* section "Analysis of Enacted Legislation."

24 In 2020, this legislation under consideration was largely targeted toward specific sectors. NJ and PA considered financial incentives for manufacturing and industrial development in the form of reduced taxes and loan interest rates, respectively. A. 1298, 2020-2021 Leg., Reg. Session, (N.J. 2020); H.B. 813, 2019-2020 Leg., Reg. Sess. (Pa. 2019). For further discussion of the contents of the NJ bill, See Grunin Ctr. for Law & Soc. Entrepreneurship, Mapping the State of Social Enterprise and the Law 14 (2019) [hereinafter 2018–2019 *Tepper Report*] (discussing a substantially similar bill considered in 2018). The Pennsylvania bill's sponsor expressly stated that "We need to act now to promote benefit corporations so we can grow this exciting business sector." Michael J. Driscoll, DCED Business Loan Rates for Benefit Corporations, House Co-Sponsorship Memorandum (Feb. 21, 2019), <https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=H&SPick=20190&cosponid=28444>; additionally, NY attempted, but failed, to enact a provision that would have permitted benefit corporations to become public banks. S.B. 5565, 2019-2020 Leg., Reg. Sess. (N.Y. 2019).

Selected Features in 2020's Newly Enacted Benefit Corporations

	Alabama	Georgia	New Mexico	Ohio
Voting	2/3 approval	2/3 approval	2/3 approval	majority
Benefit Director	None	None	None	None
Statutory Definition of Stakeholders/ Public Benefit	"a positive effect, or reduction of negative effects, on one or more communities or categories of persons (other than shareholders solely in their capacity as shareholders) or on the environment, including effects of an artistic, charitable, economic, educational, cultural, literary, medical, religious, social, ecological, or scientific nature"	"a positive effect, or reduction of negative effects, on society, on the environment, or on one or more communities or categories of persons, entities, or interests, other than shareholders in their capacity as shareholders, including effects of an artistic, charitable, cultural, economic, ecological, educational, environmental, literary, medical, religious, scientific, social, or technological nature"	general: "a positive impact on society and the environment, taken as a whole, that is material taking into consideration the corporation's size and the nature of its business"; specific: "a positive effect on one or more communities or categories of persons, other than shareholders solely in their capacity as shareholders, or on the environment, including effects of an artistic, charitable, economic, educational, cultural, literary, medical, religious, social, ecological or scientific nature"	"bona fide positive effect or to reduce one or more bona fide negative effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific, or technological nature for the benefit of persons, entities, communities, or interests other than shareholders in their capacity as shareholders"

Selected Features in 2020's Newly Enacted Benefit Corporations				
	Alabama	Georgia	New Mexico	Ohio
Reporting Frequency	Annual	Annual	Annual	None
Filing Requirements	None	None	None	None
Third-Party Standard	Optional	Optional	Required	None
Public Availability	public, posted on a website if any, or provide a copy w/o charge to any person requesting a copy in writing	"shareholders of record, and to any other person who may request a copy in writing"	public, posted on a website if any, or provide a copy w/o charge to any person requesting a copy in writing	None
Limited Rights of Action	derivative suit or directly by stockholders with 5% (private) or \$5 million (publicly traded) ownership	no additional limitations	suit by company or derivative lawsuit by: director, 2% shareholder, 5% shareholder of parent	suit by the benefit corporation or derivative action by: director, 25% shareholder (private), \$2 million (publicly traded)
Limitations of Liability	director has no "duty to a person other than the benefit corporation due to any interest of the person in the status of the corporation as a benefit corporation or in any public benefit provision"	director has no duty to anyone who may have an interest in the public benefit(s) and no monetary liability for failure to pursue public benefit(s)	benefit corporation has no monetary liability	benefit corporation has no duty to beneficiaries, no monetary damages for failure to pursue public benefit(s)
Appraisal Rights	None	Permitted when converting either to or from a benefit corporation ²⁵	None	For corporations formed 1971 and later: None For corporations formed before 1971: Undetermined ²⁶
Other Things of Note			if publicly traded, an independent director must prepare the benefit report	"No particular purpose of a corporation has priority over any other purpose of the corporation"

25. O.C.G.A. § 14-2-1302(a)(5); Bill Text Section 2-2.

26. The statute provides dissenting shareholders rights if there is an amendment that "changes substantially the purposes of the corporation," but the statute does not articulate whether a conversion to or from a benefit corporation would constitute a "substantial" change. Ohio Rev. Code Ann. § 1701.74(A)(3).

Chart of the Selected Features in Model Legislation Available in 2020

The Corporate Laws Committee of the American Bar Association (ABA) officially added the benefit corporation form to the 2020 Model Business Corporation Act (MBCA).²⁷ This new model chapter on benefit corporations has been in discussions dating as far back as 2013, when the ABA published a white paper exploring the possibility.²⁸ That year, an astonishing seven states plus DC passed benefit corporation legislation, for a total of 20 benefit corporation statutes across the United States by the end of 2013.²⁹ Since that initial white paper, the total number of benefit corporation statutes has doubled.³⁰ Perhaps in response to this significant state interest in this new legal form, in 2019, the Corporate Laws Committee of the American Bar Association formally proposed an amendment to the MBCA.³¹ This new chapter has officially been adopted in the 2020 MBCA, with only one change to the 2019 proposal³²—removing specialized appraisal rights for shareholders.³³ This change coincides with the 2020 Delaware amendment, which also removed appraisal rights from its PBC statute.³⁴

The new 2020 ABA Model Legislation draws on some requirements from each of the 2017 B Lab Model Legislation and Delaware PBC statute. As a consequence, in addition to the variations across the many states, legislators now have a new model to consider in drafting benefit corporation bills. The chart below compares several key provisions across the three different models. Notably, with respect to limitations on rights of action, the 2020 ABA Model Legislation diverges slightly with the highest bar on shareholder standing requirements.³⁵ It remains to be seen whether the 2020 ABA Model Legislation will become widely adopted, or whether it will simply join the sea of variations across legislative forms.

27. MODEL BUS. CORP. ACT § 17 (2020) (Am. Bar Ass'n).

28. A.B.A. Bus. Law Section Corp. Laws Comm., Benefit Corporation White Paper, 68 Bus. Law. 1083 (2013).

29. See SOCIAL ENTERPRISE LAW TRACKER, <https://www.law.nyu.edu/centers/grunin-social-entrepreneurship/updated-social-enterprise-law-tracker>

30. By the end of 2018, just before the recent proposed amendment to the MBCA, there were already 35 benefit corporation statutes. By the end of 2020, the number had increased to 41. See *id.*

31. A.B.A. Bus. Law Section Corp. Laws Comm., Proposed Changes to the Model Business Corporation Act—New Chapter 17 on Benefit Corporations, 74 Bus. Law. 819, 821 (2019) [hereinafter 2019 Proposed Changes to MBCA].

32. See GRUNIN CTR. FOR LAW & SOC. ENTREPRENEURSHIP, MAPPING THE STATE OF SOCIAL ENTERPRISE AND THE LAW 14 (2020) [hereinafter 2019–2020 *Tepper Report*] (discussing the more specific contents of the 2019 proposed changes to the MBCA).

33. Compare 2019 Proposed Changes to MBCA, *supra* note 31, with MODEL BUS. CORP. ACT § 17 (2020) (Am. Bar Ass'n).

34. See discussion *infra* section “Delaware 2020 Amendments to the Benefit Corporation—Appraisal Rights.”

35. MODEL BUS. CORP. ACT § 17.06 (2020) (AM. BAR ASS'N).

Selected Features in Model Legislation Available in 2020

	2020 ABA Model Legislation	2017 B Lab Model Legislation³⁶	2020 Amended Delaware PBC Statute
Voting	2/3 approval	2/3 approval	simple majority
Benefit Director	None	Optional	None
Statutory Definition of Stakeholders/ Public Benefit	"a positive effect, or reduction of negative effects, on one or more communities or categories of persons (other than shareholders solely in their capacity as shareholders) or on the environment, including effects of an artistic, charitable, economic, educational, cultural, literary, medical, religious, social, ecological, or scientific nature"	distinguishes between general public benefit and specific public benefit	"a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature"
Reporting Frequency	Annual	Annual	Biennial
Third-Party Standard	Optional	Required	Optional
Filing Requirements	None	file with Secretary of State	None
Public Availability	public, posted on a website if any, or provide a copy w/o charge to any person requesting a copy in writing	public, posted on a website if any, or provide a copy w/o charge to any person requesting a copy in writing	Available to shareholders
Limited Rights of Action	derivative suit or directly by stockholders with 5% (private) or \$5 million (publicly traded) ownership; must be owned at the time of the challenged act/omission	directly by the benefit corporation or derivatively by 2% shareholder or 5% shareholder of parent; must be owned at the time of the challenged act/omission	suit may only be brought by 2% shareholders (private) or lesser of 2% vs \$2,000,000 (publicly traded)
Limitations of Liability	director owes no duty "to a person other than the benefit corporation due to any interest of the person in the status of the corporation as a benefit corporation or in any public benefit provision"	no monetary liability for (1) disinterested director/officer for action or inaction in considering shareholder interests; (2) director/officer/benefit corporation for failure to pursue a public benefit	director owes no duty to persons interested in the public benefits or balancing of shareholder and stockholder interests if "ordinary, sound judgment"
Appraisal Rights	None	None	None

36. BENEFIT CORP., Model Benefit Corporation Legislation (2017) [hereinafter *2017 B Lab Model Legislation*].

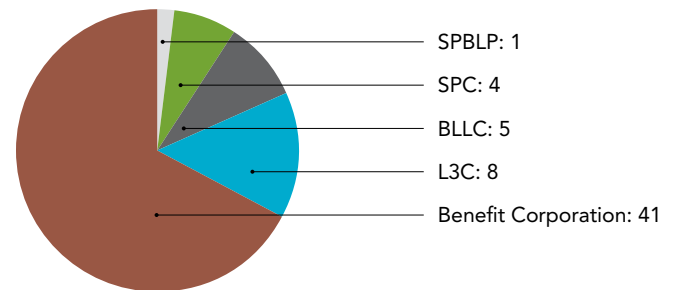
Trends and Analyses

Trends in Passage 2020 Trends

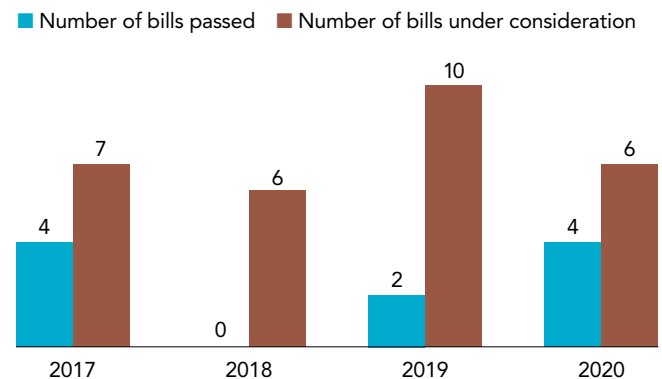
The benefit corporation remains the dominant social enterprise legal form under consideration. As shown in the chart above, the number of benefit corporation statutes far outnumbers any other social enterprise form. At the start of 2020, 14 states remained without a benefit corporation form.³⁷ Of these remaining states, half (seven) considered enacting benefit corporation legislation in 2020.³⁸ This is slightly fewer than the 10 states that considered enacting benefit corporation legislation in 2019.³⁹ However, the number of successfully enacted bills doubled to four in 2020,⁴⁰ compared with just two in 2019.⁴¹ By the end of 2020, there were 41 benefit corporation statutes across the United States.⁴²

The other social enterprise legal forms have had less legislative success. As of 2020, there are only five states with BLLC legislation.⁴³ As shown in the chart below, the BLLC form has not been successfully enacted in any states since 2018,⁴⁴ and the number of proposed bills each year remains low. Although the bill failed to pass, Oklahoma was the only state to consider BLLC legislation in 2020.⁴⁵ The proposed bill largely followed the Delaware BLLC statute.⁴⁶ It remains to be seen if the interest in the BLLC form will persist and follow the growing popularity of the LLC form more generally.⁴⁷

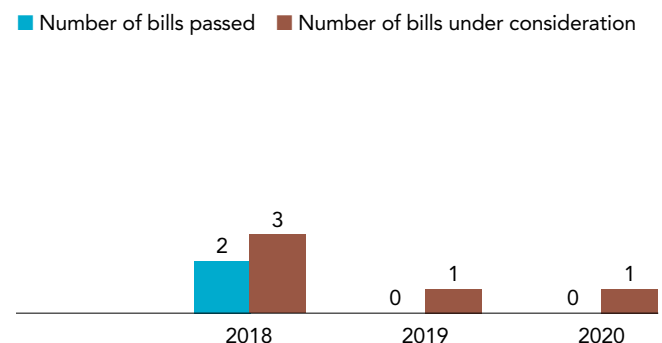
Count Of Social Enterprise Legislation in U.S. 2020



Passage Rates for Benefit Corporation Bills⁴⁸



Passage Rates for BLLC Bills⁴⁹



37. SOCIAL ENTERPRISE LAW TRACKER, <https://www.law.nyu.edu/centers/grunin-social-entrepreneurship/updated-social-enterprise-law-tracker>

38. Alabama, Georgia, Michigan, Mississippi, Missouri, New Mexico, and Ohio.

39. See 2019–2020 *Tepper Report*, *supra* note 32, at 7.

40. Alabama, Georgia, New Mexico, and Ohio.

41. See *id.*

42. This number includes DC. As such, there were only 10 states left without the benefit corporation form: Alaska, Washington, Wyoming, North Dakota, South Dakota, Iowa, Missouri, Michigan, Mississippi, North Carolina.

43. Delaware, Maryland, Oregon, Pennsylvania, and Utah.

44. In 2018, Delaware and Utah were the last states to successfully enact BLLC legislation. 81 Del. Laws, c. 357, § 34; H.B. 186, 62nd Leg., 1st Sess. (Ut. 2018).

45. S.B. 1741, 57th Leg., 2d Sess. (Okla. 2020).

46. Compare *Id.*, with DEL. CODE ANN. tit. 6 § 18.1202–1208 (2018).

47. See Walter D. Schwidetzky, The Pros and Cons of LLCs, J. Accountability (Dec. 1, 2018), <https://www.journalofaccountancy.com/issues/2018/dec/llc-pros-and-cons.html> (“IRS statistics show a 66% increase in domestic LLCs between 2005 and 2014.”); Mike Hartman, The Rise of the LLC, Inc. Plan (June 12, 2015), <https://www.incplan.net/blog/business-startup/the-rise-of-the-llc/>

48. See 2018–2019 *Tepper Report*, *supra* note 24; 2019–2020 *Tepper Report*, *supra* note 32. In 2017, the four states that passed bills were Kansas, Kentucky, Texas, and Wisconsin. In 2019, the two states that passed bills were Maine and Oklahoma. SOCIAL ENTERPRISE LAW TRACKER, <https://www.law.nyu.edu/centers/grunin-social-entrepreneurship/updated-social-enterprise-law-tracker>

49. In 2018, Utah and Delaware passed BLLC statutes; Connecticut introduced but did not pass a BLLC bill. See 2018–2019 *Tepper Report*, *supra* note 24, at 8. In 2019, Alabama introduced but did not pass a BLLC bill. 2019–2020 *Tepper Report*, *supra* note 32. In 2020, Oklahoma also introduced but did not pass a BLLC bill. S.B. 1741, 57th Leg., 2d Sess. (Okla. 2020).

There remained no new legislative interest in enacting the SPC and L3C forms during 2020. Although Washington did amend its SPC statute in 2020, these were only minor textual amendments to conform the statute with the state's Uniform Electronic Transactions Act.⁵⁰ There were no substantive changes to the SPC statute. Similarly, following Delaware's introduction of the new SPBLP form in 2019,⁵¹ no other states considered enacting legislation in 2020 to enable this new form of limited partnership.

Trends in Prior Attempts

Every state that considered a benefit corporation bill in 2020 has previously attempted to pass benefit corporation legislation. All of these states undertook at least three attempts to enact benefit corporation legislation, with two states making as many as five attempts. Exploring

the differences or similarities of proposed bills from previous attempts may provide insight as to what barriers states are facing in passing benefit corporation legislation.

For most of these states,⁵² the bills that were being considered in 2020 were similar if not identical to prior years' bills. Some states with bills that drew on elements of the 2017 B Lab Model Legislation also followed the updates to the model from year to year.⁵³ More often, however, the legislatures made no substantive changes to the proposed bills from year to year.⁵⁴ This raises the question of whether or not the challenges of passing social enterprise legislation is grounded in the specific substance and language of the bill, or if other factors may be more determinative. Absent evidence from legislative history, the exact reason for the success or failure of a bill is difficult to ascertain.

Trends in Prior Attempts			
	3 Attempts	4 Attempts	5 Attempts
States which enacted legislation in 2020	Alabama (2012, 2019, 2020) Georgia (2016, 2017, 2019) Ohio (2016, 2017, 2020)		New Mexico (2013, 2015, 2017, 2019, and 2020)
States which considered but did not pass legislation in 2020		Mississippi (2017, 2018, 2019, 2020) Michigan (2013, 2016, 2018, 2020)	Missouri (2014, 2017, 2018, 2019, and 2020)

50. S.B. 6028, 2019-2020 Leg., Reg. Sess. (Wash. 2020).

51. 82 Del. Laws c. 46, § 30 (2019).

52. This includes both the states that enacted legislation in 2020 and the three states that did not enact the benefit corporation form in 2020.

53. Compare H.B. 1956, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2014), with S.B. 76, 99th Gen. Assemb., 1st Reg. Sess. (Mo. 2017), and 2017 B Lab Model Legislation, *supra* note 36.

54. See, e.g., H.B. 230, 2019-2020 Leg., Reg. Sess. (Ga. 2020); H.B. 278, 2017-2018 Leg., Reg. Sess. (Ga. 2017); H.B. 1052, 2015-2016 Leg., Reg. Sess. (Ga. 2016).

Even when legislatures made some changes to the bills that have been proposed over the years, most states retained much of the same structure and substance of the bills in each attempt. For example, in 2020, Ohio largely retained the content of its prior bill from 2017, only adding language that a publicly traded company shall not amend its articles to include a beneficial purpose.⁵⁵ 2020 was also the only year that Ohio made any substantive changes to the text from prior years. This could indicate that the new language may have been important for the passage of the bill.⁵⁶

Alabama and New Mexico, however, are exceptions, as the benefit corporation legislation considered by these states has varied substantially over the years. Both states successfully enacted the benefit corporation legislation in 2020. Nonetheless, it is difficult to draw a connection between changing bills across multiple attempts and passage rates, because the other two states (Ohio and Georgia) that successfully enacted benefit corporation legislation in 2020 did not significantly change the legislation under consideration over the years. Although Ohio added one new provision in its 2020 legislation, the rest of the legislation is largely identical to previous bills. Similarly, Georgia's legislation has seen only minimal linguistic changes in its benefit corporation bills.

In both Alabama and New Mexico, the 2020 bills actively moved away from prior bills, which had more closely resembled B Lab models. Alabama has attempted to pass a benefit corporation form a total of three times. Each iteration of the bill looks very different. While its

initial attempt at benefit corporation legislation in 2012 largely resembles the prior B Lab models,⁵⁷ each subsequent version moved away from the B Lab models. 2019 marked the first major step away from the 2017 B Lab Model Legislation, as it attempted to pass both the benefit corporation together with the BLLC form.⁵⁸ By 2020, Alabama's bill shifted significantly to align more closely with the 2020 ABA Model Legislation.⁵⁹

New Mexico's first attempts at passing benefit corporation legislation in 2013 and 2015 did not follow the structure of the prior B Lab models.⁶⁰ However, in 2017, New Mexico's proposed benefit corporation legislation switched to follow the 2017 B Lab Model Legislation.⁶¹ In 2019, New Mexico tried again to pass a bill resembling the 2017 B Lab Model Legislation, but this attempt also failed.⁶² Strikingly, in 2020, New Mexico ultimately succeeded in passing benefit corporation legislation. This 2020 legislation abandoned the structural form of 2017 B Lab Model Legislation and reverted in form and structure back to its 2013 and 2015 attempts.⁶³ Despite the structural changes, several key substantive provisions are more closely aligned with the 2017 B Lab Model Legislation.⁶⁴ This may be further evidence of states experimenting and adjusting the legislation.⁶⁵

55. Compare S.B. 21, 133d Gen. Assemb., Reg. Sess. (Oh. 2020), with S.B. 205, 132d Gen. Assemb., Reg. Sess. (Oh. 2017). Interestingly, this seems to be moving in the opposite direction of Delaware, which is instead making it easier for publicly traded companies to become benefit corporations. See *infra* section "Delaware 2020 Amendments to the Benefit Corporation" (discussing a growing interest in Delaware legislation facilitating publicly traded benefit corporations).

56. Note, however, that changes in proposed bills in other states have not always resulted in a passed bill. For example, in Missouri, the sponsor initially introduced a bill that was largely identical to the 2019 failed bill. H.B. 1448, 100th Gen. Assemb., 2d Reg. Sess. (Mo. 2020). Later, this proposal was withdrawn, and a new version was introduced, eliminating the requirement to file the benefit report with the secretary of state. Compare *Id.* at § 351.1433 with H.B. 1936, 100th Gen. Assemb., 2d Reg. Sess. (Mo. 2020). No explanation was given for the withdrawal, and even the newly proposed bill failed to pass in 2020.

57. S.B. 569, 2012 Leg., Reg. Sess. (Ala. 2012).

58. S.B. 427, 2019 Leg., Reg. Sess. (Ala. 2019).

59. For further exploration of the specifics of the Alabama legislation, See discussion below in Analysis of Enacted Legislation.

60. H.B. 40, 2013 Leg., Reg. Sess. (N.M. 2013); S.B. 96, 2015 Leg., Reg. Sess. (N.M. 2015).

61. H.B. 467, 2017 Leg., Reg. Sess. (N.M. 2017).

62. H.B. 118, 2019 Leg., Reg. Sess. (N.M. 2019).

63. H.B. 118, 2020 Leg., Reg. Sess. (N.M. 2020).

64. For further exploration of the specifics of the New Mexico legislation, See discussion below in Analysis of Enacted Legislation.

65. This behavior of making a change to the proposed legislation in one year, only to revert back on that change in subsequent years, is also observed in Missouri (failed legislation). In 2019, the House version of Missouri's bill added a provision to the definition of "General Public Benefit" that precluded benefit corporations from defining "abortion services, human cloning, or prohibited human research" as a general public benefit. H.B. 1154 § 351.1400(5), 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019). However, the 2020 proposed benefit corporation bill eliminated this preclusion. H.B. 1448, 100th Gen. Assemb., 2d Reg. Sess. (Mo. 2020).

In summary, states have taken many different paths on the way to enacting benefit corporation legislation. Several states have managed to overcome whatever barriers there are to passage, even without substantial changes or experimentation to the proposed legislation from year to year. Other states continue to adjust the language of their proposed bills from year to year after unsuccessful attempts, possibly in an effort to determine an optimal set of specific requirements for benefit corporations. Finally, there is still evidence of interest and success in exploring and experimenting with the overall structure of benefit corporation legislation. Alabama and New Mexico are two such states which have made modifications to the structure of their proposed bills throughout the years, and ultimately succeeded in passing benefit corporation legislation in 2020.

Delaware 2020 Amendments to the Benefit Corporation

Delaware made a handful of changes to its public benefit corporation (PBC) statute⁶⁶ in 2020. These changes affected voting thresholds, appraisal rights, and benefit corporation litigation.

	2019 Delaware PBC Statute	2020 Amended Delaware PBC Statute
Voting	2/3 approval	simple majority
Limited Rights of Action	2% shareholders (private) or lesser of 2% vs \$2,000,000 (publicly traded) may bring a derivative action	suit may only be brought by 2% shareholders (private) or lesser of 2% vs \$2,000,000 (publicly traded)
Appraisal Rights	Permitted when converting into a benefit corporation	None

66. Delaware refers to their benefit corporations as “public benefit corporations” or PBCs. However, for the purposes of this report, we will refer to them simply as “benefit corporations.”

Voting Threshold

Under Delaware General Corporation Law, shareholders are entitled to vote on certain fundamental business transactions and charter amendments. For example, the decision to incorporate as a benefit corporation or to stop being a benefit corporation is a major business decision that requires a shareholder vote. The most recent amendment to the benefit corporation legislation in Delaware changes the required shareholder voting threshold from a supermajority two-thirds threshold to a majority when shareholders vote for a corporation to become or to terminate benefit corporation status.⁶⁷ Therefore, the majority threshold now is a minimum threshold for corporations to amend their charter to include or eliminate benefit corporation status.⁶⁸ There has been a gradual decline in Delaware of the voting threshold since enactment of the benefit corporation statute, with a 90% shareholder voting requirement in 2013,⁶⁹ amended to a two-thirds requirement in 2015,⁷⁰ and now the simple majority threshold provided by the 2020 amendment.⁷¹

Compared to other social enterprise forms in Delaware, the simple majority for PBCs is the lowest voting threshold required to terminate one of these special legal forms. To terminate their benefit form, BLLCs still require a two-thirds vote,⁷² and SPBLPs require a 100% vote of all general partners and of all limited partners who hold in the aggregate more than two-thirds of the interest of the company.⁷³

67. 82 Del. Laws, c. 256, § 17 (2020) (eliminating the special voting requirements for conversions pertaining to a public benefit corporation and thus allowing the general corporation requirements to govern).

68. DEL. CODE ANN. tit. 8 §§ 242, 251.

69. In 2013, the voting requirement was asymmetrical. 90% was required for converting from a general corporation to a benefit corporation, but only a two-thirds vote was required to convert from a benefit corporation to a general corporation. 79 Del. Laws, c. 122, § 8 (2013).

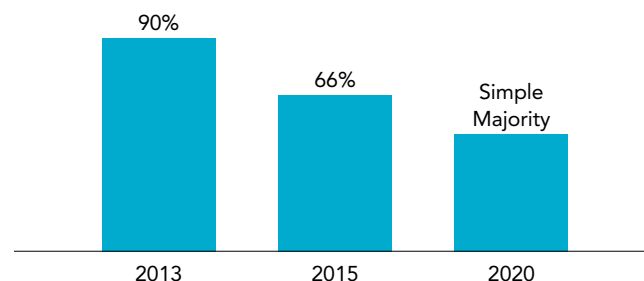
70. 80 Del. Laws, c. 40, § 12 (2015).

71. 82 Del. Laws, c. 256, § 17 (2020).

72. DEL. CODE ANN. tit. 6, § 18-1203.

73. DEL. CODE ANN. tit. 6, § 17-1203 (“[A] statutory public benefit limited partnership may not, without the approval (i) by all general partners, and (ii) limited partners who own more than 2/3 of the then current percentage or other interest in the profits of the limited partnership owned by all of the limited partners... cease to be a statutory public benefit limited partnership under the provisions of this subchapter.”).

Voting Threshold for Delaware Public Benefit Corporation Conversion



Appraisal Rights

Traditionally, appraisal rights are given in certain situations to minority shareholders that do not vote affirmatively for certain mergers or amendments. For example, if a minority shareholder unsuccessfully votes against a merger, it may have the opportunity to file with the Delaware Court of Chancery for an appraisal action. The court would have the opportunity to value what the shareholder's stake in the company is worth and award it that amount in cash.

Before the 2020 amendment, Delaware awarded appraisal rights when a company converted from a conventional corporation to a benefit corporation and when a company was involved in a merger that converted shares of a conventional corporation into shares of a benefit corporation.⁷⁴ The 2020 amendment eliminated these appraisal rights.⁷⁵

Litigation

Two changes were made to the Delaware benefit corporation law regarding litigation involving benefit corporations. In the prior version of Delaware's benefit corporation law, benefit corporations had the option of including a charter provision shielding disinterested directors from liability for not properly balancing⁷⁶ the corporation's beneficial purpose.⁷⁷ The 2020 amendment made this liability shield

74. 82 Del. Laws, c. 256, § 17 (2020).

75. *Id.*

76. Section 365(a) outlines the balancing requirement, stating “[t]he board of directors shall manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation.”

77. 82 Del. Laws, c. 256, § 18 (2020).

the default provision.⁷⁸ This essentially transformed the directors liability shield from an opt-in provision to an opt-out provision, requiring corporations to add a charter provision to opt out if so desired. The amendment also clarified what it means for a director to be disinterested, explicitly stating that a director's ownership or interest of stock in the benefit corporation does not in and of itself create a conflict of interest when the director is balancing decisions regarding the corporation's beneficial purpose.⁷⁹

Furthermore, the amendment narrowed the universe of those shareholders of benefit corporations that have standing to instigate a lawsuit by imposing a minimum ownership threshold. Prior to the 2020 amendment, this ownership standing requirement applied specifically only to derivative suits.⁸⁰ Now, under the 2020 amendment, the standing requirement to bring any kind of suit entails owning at least 2% of the benefit corporation's outstanding shares or the equivalent market value of exchange-traded shares where applicable.⁸¹ No similar ownership standing requirement applies to conventional Delaware corporations when shareholders look to bring suit.⁸²

78. *Id.*

79. *Id.*

80. 82 Del. Laws, c. 256, § 19 (2020). Litigation for corporations generally is brought as either a derivative or a direct suit. For more information on the differences between derivative and direct suits, See Practical Law Litigation, *Distinguishing Direct from Derivative Claims* (December 8, 2015), [https://content.next.westlaw.com/w-001-0268?__lrTS=20200906162055490&transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://content.next.westlaw.com/w-001-0268?__lrTS=20200906162055490&transitionType=Default&contextData=(sc.Default)&firstPage=true)

81. The law now reads as follows: Any action to enforce the balancing requirement of § 365(a) of this title, including any individual, derivative or any other type of action, may not be brought unless the plaintiffs in such action own individually or collectively, as of the date of instituting such action, at least 2% 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 the corporation with a market value of at least \$2,000,000 as of the date the action is instituted.

82. See, e.g., DEL. CODE ANN. tit. 8, § 327.

Reflection

Although the Delaware state legislature did not issue comments about its intentions behind these amendments, there are some important implications they may bring.

Because the 2020 amendments affect only the Delaware PBC form and not the Delaware BLLC or SPBLP form, businesses may have to be even more diligent in choosing which social enterprise form is best for them, should they choose to form a business in Delaware.

The Delaware 2020 amendments may serve to facilitate more mergers by and of benefit corporations. For example, a consequence of the lower voting threshold is that a smaller proportion of shareholders is necessary to vote to approve mergers involving benefit corporations. While facilitating friendly mergers, it is also important to note that a lower voting threshold would also make hostile takeovers easier.

Furthermore, several sources suggest that the 2020 amendments may have been made in order to encourage or make it easier for companies to become benefit corporations.⁸³ On one hand, the voting threshold is a double-edged sword, making it easier both to become a benefit corporation but also to remove the status as a benefit corporation. However, when taken into consideration along with the other two amendments, it seems like these 2020 amendments as a whole are aimed at making it easier (lowering voting threshold), less costly (elimination of appraisal rights), and less risky (reducing liability and increasing the standing requirements) to become a benefit corporation. Some have suggested that these amendments serve to support more publicly traded benefit corporations in particular, where the concerns of voting,

83. Elizabeth K. Lange and Elizabeth A. Diffley, *New Amendments to Delaware General Corporation Law Will Make It Easier for Companies to Become Public Benefit Corporations*, NAT. L. REV. (July 22, 2020), <https://www.natlawreview.com/article/new-amendments-to-delaware-general-corporation-law-will-make-it-easier-companies-to> ("The amendments, among other things, reduce impediments to use of the public benefit corporation form.")

appraisal, and potential litigation are even greater.⁸⁴ This may be a reason why the Delaware legislature amended only the PBC statute, and not the other social enterprise forms in Delaware, because it would be more common for a corporation to go public, rather than a limited liability company or a limited partnership.

Publicly Traded Benefit Corporations in Delaware

Looking Back: Etsy in 2017

B Lab requires that B Corps in the United States convert to a benefit corporation within a certain time after certification.⁸⁵ In November of 2017, Etsy, a publicly traded Delaware corporation,⁸⁶ dropped its B Corp status in order to avoid this conversion requirement.⁸⁷ In a public announcement, Etsy CEO Josh Silverman explained that the decision was made because “converting is a complicated, and untested process for existing public companies.”⁸⁸

Looking Forward: Four Publicly Traded Delaware PBCs

Three years later, as of December 2020, the total number of Delaware publicly traded benefit corporations now stands at three. Each started as privately held benefit companies that went public directly into the form of publicly traded benefit corporations: Laureate Education (2017),⁸⁹ Vital

Farms (2020),⁹⁰ and Lemonade Inc. (2020).⁹¹ In early 2021, one of the first companies converted from a more traditional publicly traded corporation into a publicly traded benefit corporation: Veeva Systems (2021).⁹² The process is now being tested, and it remains to be seen whether traditional publicly traded corporations will be less hesitant to make the switch to become benefit corporations now that such a conversion no longer is the untested endeavor that troubled Etsy’s CEO.

While all four of these publicly traded benefit corporations are required to create benefit reports as a part of Delaware’s benefit corporation laws, they are not required to publish them to the public.⁹³ Veeva Systems is the only one of these benefit corporations that requires public reporting in its charter, but has only become a benefit corporation very recently and will not require an annual report until 2022.⁹⁴ Accordingly, no benefit reports were available to access online for any of these companies. Other than Veeva’s publishing requirement, none of the four publicly traded benefit corporations elected to pursue any other reporting requirements above and beyond the default provisions in the Delaware PBC statute.

The corporation’s status as a benefit corporation is discussed in public filings such as 10-K Annual Reports and S-1 Initial Public Offering (IPO) Prospectuses in a variety of ways, including the “Risk” section of the report. Prospective investors are put on notice that these companies may make decisions that will not result in the best short-term financial outcomes for shareholders, but also that these companies may not actually achieve their stated beneficial

84. *Id.*; Bob O’Conner et al., 2020 Delaware Statutory Amendments Reduce Barriers to Becoming a Public Benefit Corporation, Wilson Sonsini (July 17, 2020), <https://www.wsgr.com/en/insights/2020-delaware-statutory-amendments-reduce-barriers-to-becoming-a-public-benefit-corporation.html>.

85. Legal Requirements, Certified B Corp., <https://bcorporation.net/certification/legal-requirements>.

86. Etsy was among the first to go public with a B Lab certification. Hiroko Tabuchi, *Etsy I.P.O. Tests Pledge to Balance Social Mission and Profit*, N.Y. TIMES (Apr. 16, 2015), <https://www.nytimes.com/2015/04/17/business/dealbook/etsy-ipo-tests-pledge-to-emphasize-social-mission-over-profit.html>

87. Etsy, Inc., Annual Report (Form 10-K) (Mar. 1, 2018) at 22 (“In 2017, we relinquished our Certified B Corporation status when we chose not to convert from a C Corporation to a public benefit corporation under Delaware law, one of B Lab’s requirements for continued certification.”) Nonetheless, Etsy continues to publish its impact in annual integrated reports. See, e.g., Etsy, Inc., Annual Report (Form 10-K) (Feb. 26, 2021).

88. Josh Silverman, *Business as a Force for Good: Defining Etsy’s Path*, ETSY NEWS (Nov. 25, 2017), <https://blog.etsy.com/news/2017/business-as-a-force-for-good-defining-etsys-path/>

89. Press Release, Laureate Education, Laureate Education Announces Closing of its Initial Public Offering (Feb. 6, 2017), <https://www.laureate.net/laureate-education-announces-closing-of-its-initial-public-offering/>

90. Chloe Sorvino, *Vital Farms’ Blockbuster IPO Proves Wall Street Has An Appetite For Sustainable Farming*, FORBES (Aug. 1, 2020), <https://www.forbes.com/sites/chloesorvino/2020/08/01/vital-farms-blockbuster-ipo-proves-wall-street-has-an-appetite-for-sustainable-farming/>

91. Lisa Horton, *Lemonade Announces Pricing of Initial Public Offering*, BUSINESSWIRE (July 01, 2020), <https://www.businesswire.com/news/home/20200701005989/en/>

92. Press Release, Veeva, Veeva Becomes First Public Company to Convert to a Public Benefit Corporation (Jan. 13, 2021), <https://www.veeva.com/resources/veeva-becomes-first-public-company-to-convert-to-a-public-benefit-corporation/>; Veeva Systems is also the only one out of the four publicly traded benefit corporations that is not a B Lab certified B Corp.

93. DEL. CODE ANN. tit. 8, § 366.

94. Veeva Systems Inc., Current Report (Form 8-K) (Jan. 27, 2021).

purposes.⁹⁵ A majority of them, three out of four, went as far as to list specific examples of how they may prioritize their stated beneficial purposes above maximizing shareholder value.⁹⁶ Some of the companies also included the risk that they may be subject to increased litigation.⁹⁷

In light of the amendment to the default voting threshold to become or convert from a benefit corporation in Delaware, it is interesting to consider which provisions these publicly traded benefit corporations have decided to adopt in their charters. Three kept the two-thirds voting threshold used in the 2015 amendment,⁹⁸ and only Veeva adopted a majority voting threshold that is consistent with the 2020 amendment.⁹⁹ The higher voting thresholds have a direct impact on the potential of mergers and acquisitions, and each of the companies discussed this impact in their public reporting. While some companies framed the benefit provisions as a hindrance to mergers,¹⁰⁰ others seemed to frame the heightened restrictions against mergers and acquisitions as a positive for preserving the

public benefit purpose.¹⁰¹ Benefit corporations that put a higher value on the ability of higher voting thresholds to protect their benefit provisions may choose to keep the two-thirds threshold.

States with Multiple Forms

Several states have enacted multiple forms of social enterprise legislation.¹⁰² In 2020, however, no states were able to enact a subsequent new form. Rather, all four bills proposed and passed in 2020 enacted the benefit corporation form as the first social enterprise form in the state.¹⁰³ This aligns with the continuing trend of states enacting the benefit corporation form first, before any other social enterprise forms.¹⁰⁴ Although some of the states that enacted a benefit corporation form in 2020 had previously attempted to enact other social enterprise forms, those attempts were not successful.¹⁰⁵

Additionally, there is a continuing trend that benefit corporation statutes typically precede BLLC legislation, if any. For example, although it was unsuccessful, in 2020 Oklahoma proposed a BLLC bill just one year after enacting the benefit corporation statute.¹⁰⁶ It is possible that Alabama may also follow its 2020 benefit corporation legislation with a BLLC bill in the future. Previously, in 2019, Alabama was one of the few states that attempted to pass a bill enacting both benefit corporations and BLLCs

95. Laureate Education discussed this as a reputational risk in its 2019 Annual Report. Laureate Education, Inc., Annual Report (Form 10-K) at 58 (Feb. 27, 2020). (“If we are not timely or are unable to provide this report, or if the report is not viewed favorably by parties doing business with us or regulators or others reviewing our credentials, our reputation and status as a public benefit corporation may be harmed.”) However, such reference was omitted in the subsequent Annual Report. Laureate Education, Inc., Annual Report (Form 10-K) (Feb. 25, 2021).

96. See, e.g., Vital Farms, Inc., Annual Report (Form 10-K) (Mar. 24, 2021) (“[W]e may take actions, such as building state-of-the-art facilities with technology and quality control mechanisms that exceed the requirements of USDA and the FDA, even though these actions may be more costly than other alternatives.”); Veeva Systems Inc., Proxy Statement (Schedule 14A) (Dec. 4, 2020) (“For instance, during the COVID-19 pandemic, we offered our solution for remote meetings with doctors free of charge through the end of calendar year 2020.”); Laureate Education, Annual Report (Form 10-K) (Feb. 27, 2020) (“[I]n exiting a market that is not meeting our goals, we may choose to “teach out” the existing student body over several years rather than lose an institution; even though this could be substantially more expensive.”).

97. See, e.g., Vital Farms, Inc., Annual Report (Form 10-K) (Mar. 24, 2021).

98. Laureate Education, Inc., Lemonade, Inc., and Vital Farms, Inc. require a two-thirds vote to amend the public benefit purpose.

99. Veeva Systems Inc., Current Report (Form 8-K) (Jan. 27, 2021).

100. See Laureate Education, Inc., Annual Report (Form 10-K) at 62 (Feb. 27, 2020) (highlighting that the benefit corporation status could delay or discourage mergers). However, this risk factor was removed from the subsequent Annual Report. Laureate Education, Inc., Annual Report (Form 10-K) at 54 (Feb. 25, 2021). See also Vital Farms, Inc., Annual Report (Form 10-K) (Mar. 24, 2021) (“[The two-thirds voting threshold] could limit the price that investors might be willing to pay in the future for shares of our common stock, and they could deter potential acquirers of our company, thereby reducing the likelihood that you would receive a premium for your shares of our common stock in an acquisition.”); Lemonade, Inc., Annual Report (Form 10-K) (“As a public benefit corporation, we are less attractive as a takeover target than a traditional company would be and, therefore, your ability to realize your investment through an acquisition may be limited.”).

101. See, e.g., Vital Farms, Inc., Annual Report (Form 10-K) (Mar. 24, 2021)

(“We believe that our public benefit corporation status will make it more difficult for another party to obtain control of us without maintaining our public benefit corporation status and purpose.”).

102. For a further discussion on prior trends and a chart listing all states with multiple forms of social enterprise legislation, See 2019–2020 *Tepper Report*, *supra* note 32, at 11–12.

103. Of the three states that proposed but did not pass benefit corporation legislation, Mississippi and Missouri had no prior existing social enterprise forms. The third state, Michigan, permits only L3Cs. SOCIAL ENTERPRISE LAW TRACKER, <https://www.law.nyu.edu/centers/grunin-social-entrepreneurship/updated-social-enterprise-law-tracker>

104. See 2019–2020 *Tepper Report*, *supra* note 32, at 11.

105. In prior years, both Alabama and Georgia had previously attempted to pass an L3C statute. S.B. 517, 2011 Leg., Reg. Sess., (Ala. 2011); H.B. 594, 151st Gen. Assemb., Reg. Sess. (Ga. 2011). Alabama had also previously attempted to enact the BLLC form together with the benefit corporation form. S.B. 427, 2019 Leg., Reg. Sess. (Ala. 2019).

106. S.B. 1741, 57th Leg., 2d Sess. (Okla. 2020) (BLLC bill), Okla. Stat. tit. 18, § 1201 (benefit corporation statute).

in a single bill.¹⁰⁷ While that joint bill failed, the following year, in 2020, Alabama succeeded in enacting a standalone bill enacting only the benefit corporation form.¹⁰⁸ It remains to be seen if Alabama will attempt to finish the work started in 2019 by introducing a standalone BLLC bill in the coming years.

Of the states that did not start with a benefit corporation form and instead had previously enacted another social enterprise form, most such states have also adopted the benefit corporation form. Only three states remain that have a social enterprise form but no benefit corporation statute.¹⁰⁹ Of those three remaining, Michigan has repeatedly attempted to pass a new benefit corporation statute as its second social enterprise form, including a proposed but unsuccessful bill in 2020.¹¹⁰

Analysis of Enacted Legislation

In 2020, Alabama, Georgia, Ohio, and New Mexico each enacted benefit corporation legislation. The following chart compares these newly enacted forms against three model legislations: the 2020 ABA Model, the 2017 B Lab Model, and the 2020 Amended Delaware legislation. While Georgia and Ohio do not follow any of the three models, Alabama aligns with the 2020 ABA Model Legislation and New Mexico appears to follow some provisions of the 2017 B Lab Model Legislation.¹¹¹ Reporting requirements across the 2020 legislation generally follow a combination of the model legislations, except Ohio, which has the most flexible reporting standards where reporting on the progress of beneficial purposes is left primarily to the corporation's charter. By contrast, Alabama, Georgia, and New Mexico all require an annual benefit report,

and both Alabama and New Mexico require the reports to be publicly available on the company's website. New Mexico also requires a third-party standard in reporting the corporation's progress in pursuing their public benefit.

In addition, Georgia, New Mexico, and Ohio have unique elements in their legislation, which are discussed further in the section below. Most notably, in contrast with Delaware's 2020 Amendments, several states included provisions that may make mergers or conversions to form benefit corporations more difficult. Georgia diverges from the models and is the only state among the four that provides appraisal rights for shareholders who vote against amendments to the articles of incorporation to become a benefit corporation, or vice versa. Ohio does not allow publicly traded companies to amend their articles of incorporation to include the benefit corporation provision. However, consistent with Delaware's 2020 Amendments, some states are also limiting the liability of benefit corporations. Ohio's benefit corporation statute has a unique balancing of interest provision that makes it so that having a beneficial purpose does not prevent the corporation from seeking other profit-generating purposes for which the corporation was formed. New Mexico also includes a distinct provision which limits a benefit corporation's monetary liability.

Finally, in 2020, Mississippi, Missouri, and Michigan each proposed benefit corporation legislation that did not pass.¹¹² These states generally followed the 2017 B Lab Model Legislation, though Michigan's proposed bill deviated somewhat in both form and substance.¹¹³

107. S.B. 427, 2019 Leg., Reg. Sess. (Ala. 2019). Oregon is the only state to have successfully enacted joint benefit company legislation that permits both benefit corporations and BLLCs in a single bill. Ore. Rev. Stat. §§ 60.750–.770 (2014).

108. H.B. 202, 2020 Leg., Reg. Sess. (Ala. 2020).

109. Michigan and Wyoming have both previously enacted the L3C form, while Washington has previously enacted the SPC form. SOCIAL ENTERPRISE LAW TRACKER, <https://www.law.nyu.edu/centers/grunin-social-entrepreneurship/updated-social-enterprise-law-tracker>

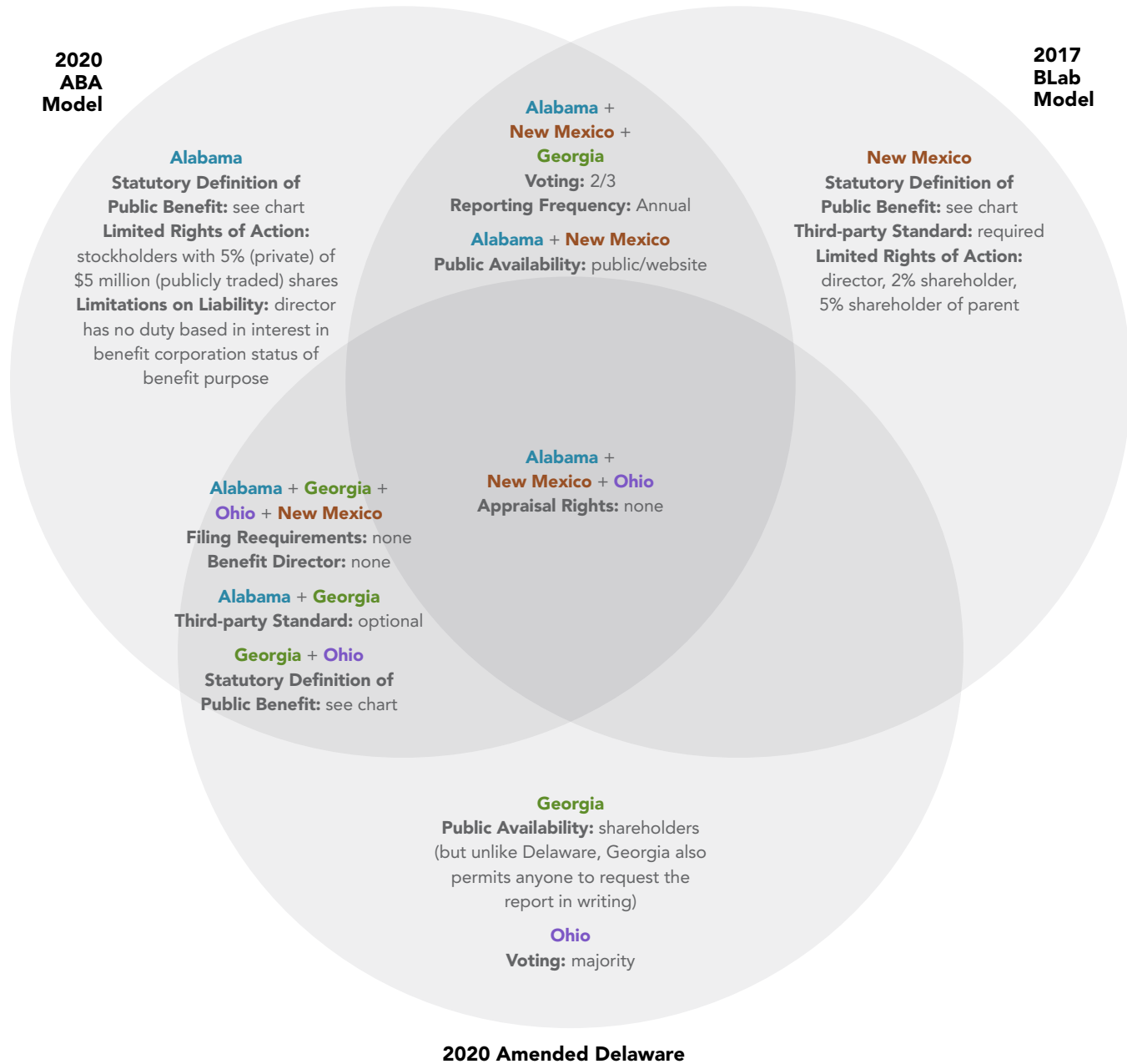
110. See, e.g., H.B. 6309, 6310, 6311, 6312, 100th Leg., Reg. Sess. (Mich. 2020).

111. See also *infra* Appendix.

112. H.B. 952; 2020 Reg. Sess. (Miss. 2020); H.B. 1936; 101st Gen. Assemb. (Mo. 2020); H.B. 6311, 100th Leg., Reg. Sess. (Mich. 2020).

113. For example, Michigan's proposed legislation includes four separate bills amending different portions of the general corporation statute. See H.B. 6309, 6310, 6311, 6312, 100th Leg., Reg. Sess. (Mich. 2020).

Comparison of Provisions of Newly Enacted Legislation with the Models



Does not follow models

Georgia

Limited Rights of Action:
No additional limitations
Limitations on Liability:
director has no duty based in interest in benefit purpose
Appraisal Rights: Permitted when converting either to or from a benefit corporation

New Mexico

Limitations on Liability:
benefit corporation has no monetary liability

Ohio

No Reporting Requirements:
(no reporting frequency, third-party standard, filing requirements, or public availability)

Limited Rights of Action:

director, 25% shareholder (private) \$2 million (publicly traded)

Limitations on Liability:

benefit corporation has no duty to beneficiaries, no monetary damages for failure to pursue public benefit(s)

How the New Legislation Compares to the Model Legislation

Alabama¹¹⁴

Alabama is an early adopter of the new 2020 ABA Model Legislation. In particular, this includes opting for the higher standing requirements of the ABA Model.¹¹⁵ Additionally, the ABA Model (and consequently the Alabama statute) balances the reporting requirements of the other two models, requiring annual reporting to be made publicly available, but leaving third-party standards optional.¹¹⁶ Although Alabama's bill was introduced before the formal adoption of the 2020 ABA Model, Alabama also declined to include the appraisal rights requirement originally set out in the ABA's 2019 proposal.¹¹⁷

Alabama's adoption of the 2020 ABA Model is consistent with the rest of its corporate law statutes, which had already followed the 2016 MBCA.¹¹⁸ It may be interesting to see if other states that have also adopted previous versions of the MBCA will similarly adopt the 2020 ABA Model for benefit corporations as well.¹¹⁹

Georgia¹²⁰

Georgia's benefit corporation legislation does not specifically follow any single model legislation, although many elements of Georgia's statute do align with parts of each of the different models.¹²¹ Georgia, like Delaware, does not require a benefit corporation to make its benefit report generally available to the public.¹²² Additionally, Georgia's benefit corporations must furnish the report upon

written request, which is included in both the 2020 ABA and 2017 B Lab Model Legislation.¹²³ Uniquely, Georgia diverged from all the models, and it is the only state in 2020 to enact legislation that does not limit standing to sue by number of shares held by a shareholder.¹²⁴ Georgia was also the only state that enacted legislation in 2020 that expressly includes appraisal rights for dissenting shareholders when a corporation converts either to or from a benefit corporation.¹²⁵ Both of these provisions are directly opposite of the Delaware 2020 amendments to the benefit corporation statute that constricted standing and eliminated appraisal rights.¹²⁶

New Mexico¹²⁷

New Mexico does not appear to follow the structure of any of the model legislations. However, it is substantively similar to the 2017 B Lab Model Legislation on most key provisions. In particular, it is the only state that enacted benefit corporation legislation in 2020 that distinguishes between general and specific public benefits.¹²⁸ Although New Mexico omits the specific designation of benefit director, it does incorporate some features of the optional benefit director's role. Under the 2017 B Lab Model Legislation, the benefit director is an independent director, elected by the Board, who is responsible for preparing an assessment of the corporations' compliance in furtherance of the benefit purpose(s).¹²⁹ Similarly, for publicly traded benefit corporations in New Mexico, the annual benefit report must be prepared by an independent director, elected by the Board.¹³⁰ In contrast, there are no requirements as to who must prepare the benefit report for privately held

114. ALA. CODE § 10A-2A-17; H.B. 202., 2020 Leg., Reg. Sess. (Ala. 2020).

115. ALA. CODE § 10A-2A-17.06.

116. *Id.* at § 17.05.

117. *Compare Id.*, with 2019 Proposed Changes to MBCA, *supra* note 31.

118. *Corporate Laws Committee*, AM. BAR ASS'N, https://www.americanbar.org/groups/business_law/committees/corplaws/ (last updated June 11, 2019).

119. Most of the remaining states without benefit corporation legislation follow at least one version of the MBCA—namely Washington, Alaska, Wyoming, South Dakota, Iowa, Mississippi, North Carolina. *Compare* SOCIAL ENTERPRISE LAW TRACKER, <https://www.law.nyu.edu/centers/grunin-social-entrepreneurship/updated-social-enterprise-law-tracker> with *id.*

120. GA. CODE § 14-2-1801–1807; H.B. 230, 2019–2020 Reg. Sess. (Ga. 2020).

121. For example, See charts above section “The Benefit Corporation Form in 2020” to *Compare* Georgia's definition of a public benefit and the limitations on director liability with the Delaware and ABA Models.

122. GA. CODE § 14-2-1807.

123. *Id.*

124. Instead, the legislation limits director liability. See *id.*, at § 1806(b).

125. *Id.* at § 14-2-1302. Michigan's proposed but not enacted bill also included rights for dissenting shareholders for corporations converting either to or from a benefit corporation. H.B. 6311, 100th Leg., Reg. Sess. (Mich. 2020).

126. See discussion *supra* Section “Delaware 2020 Amendments to the Benefit Corporation.”

127. N.M. STAT. ANN. § 53-12-7. H.B. 118, 2020 Leg., Reg. Sess. (N.M. 2020).

128. N.M. STAT. ANN. § 53-12-7.A. All of the proposed bills that did not pass also distinguished between general and specific public benefits. H.B. 952, § 3, 2020 Reg. Sess. (Miss. 2020); S.B. 624, § 1400, 100th Gen. Assemb., 2d Reg. Sess. (Mo. 2020); H.B. 6309, 100th Leg., Reg. Sess. (Mich. 2020).

129. 2017 B Lab Model Legislation, *supra* note 36, § 302(b)-(c).

130. N.M. STAT. ANN. § 53-12-7.E.

benefit corporations in New Mexico. Rather, the benefit corporation may designate any director or even an officer to prepare the report.¹³¹ It is possible that New Mexico only imposed the independent director requirement on publicly traded companies in recognition that the SEC prefers independent directors in other related contexts, such as an Audit Committee.¹³²

Ohio¹³³

Ohio's benefit corporation legislation does not follow any of the three models. Ohio's statute also differs from both Alabama's and Georgia's statute. The starkest contrast seems to be Ohio's provision preventing publicly held companies from becoming benefit corporations.¹³⁴ In addition, periodic disclosures to shareholders are optional and dependent on the articles of incorporation.¹³⁵ Generally, the Ohio legislation is quite broad and therefore flexible, distinguishing it from the other states that adopted legislation this year.

Ohio legislators may have been motivated by a desire to increase access to more investors for their companies, with an understanding that a significant number of investors want to invest in socially responsible companies.¹³⁶ Ohio's initiatives may especially target smaller, closely held companies.¹³⁷ Scholars have also suggested that Ohio has intentionally more flexible legislation than Delaware because Ohio may be competing with places like Delaware to attract more companies to incorporate in its state.¹³⁸

131. *Id.*

132. Audit Committee Disclosure, 64 Fed. Reg. 73,389 (Dec. 30, 1999) (to be codified as 17 C.F.R. pts. 210, 228, 229, 240).

133. OHIO REV. CODE ANN. § 1701.96; S.B. 21, 133d Gen. Assemb., Reg. Sess. (Oh. 2020).

134. OHIO REV. CODE ANN. § 1701.3(A)(5).

135. OHIO REV. CODE ANN. § 1701.38(A)(3).

136. Senator Dolan mentioned that "[s]ome estimate trillions of dollars of outside investment is denied to Ohio Companies because we don't currently allow this flexibility for benefit corporations." Senate Passes Dolan Bill Providing Additional Flexibility for Ohio Corporations, Oh. Senate (Mar. 7, 2019), <https://ohiosenate.gov/senators/dolan/news/senate-passes-dolan-bill-providing-additional-flexibility-for-ohio-corporations>

137. Cf. Jacob B. Phul, *To B or Not to B, Why Ohio Should Enact Benefit Corporation Legislation to Protect Small Businesses in Ohio Who Wish to Make a Profit While Making a Difference*, 9 OH. STATE ENTREPRENEURIAL BUS. L.J. 173, 184 (2014). There may be a belief that benefit corporation legislation is more popular or useful to those closely held, smaller companies, whose shareholders may have preferences beyond the size of dividends. Daniel Fisher, *Delaware 'Public Benefit Corporation' Lets Directors Serve Three Masters Instead Of One*, FORBES (Jul. 16, 2013), <https://www.forbes.com/sites/danielfisher/2013/07/16/delaware-public-benefit-corporation-lets-directors-serve-three-masters-instead-of-one/?sh=2b15f44fa278>

138. Cf. Phul, *supra* note 137, at 198.

Conclusion

2020 was an exciting year of changes in the United States social enterprise landscape. The ABA officially added the benefit corporation to its 2020 MBCA. Delaware made significant amendments to its existing benefit corporation legislation. Several companies are starting to test the waters as publicly traded benefit corporations. And four new states passed very different benefit corporation bills. Each of these initiatives provides different approaches to the driving question of whether benefit corporations can further social entrepreneurship.

COVID-19 has exacerbated and shone light on social inequalities, especially those in the workplace. We might think about whether or not any of these new or modified benefit corporation forms can help businesses tackle these long-standing issues both within their own ecosystems and in their broader communities. Additionally, it remains to be seen whether benefit corporation statutes provide adequate accountability mechanisms for stakeholders, such as employees, community members, and even shareholders. In light of the recent wave of countless businesses committing to revisit their own role in society in response to public demand, time will tell whether these companies will in fact take on responsibility for social change.

Companies are also looking for ways to signal their commitment or even act on their promises. Several leaders of Certified B Corps have called on companies to “walk the walk” by adopting the benefit corporation form. But there always remains the question: Is the benefit corporation the right way forward for social enterprise? Part of the challenge in answering this question is that there is no one benefit corporation form. If the growth in enactments in 2020 signifies state legislative buy-in to the benefit corporation form more generally, then we are still left

with the question of which statutory provisions will take preference. As evidenced in 2020, there is no shortage of options. Will any states (either in new enactments or amending existing statutes) follow the newly amended Delaware PBC statute? Will any follow Alabama’s lead and adopt the provisions of the ABA model? Or will states continue to break from the models, just like Georgia, New Mexico, and Ohio, either following other existing state statutes or crafting entirely new statutes to suit each state’s own goals and needs?

Companies may serve a signaling function, and their decisions of where to incorporate and which provisions they adopt in their charters may help legislators decide which provisions to adopt in their state legislation. Shareholders may signal their views, especially in the new publicly traded benefit corporations in Delaware. Will states prefer ease of incorporation, reducing the hurdles or even creating incentives to adopt the benefit corporation form? Or will states strengthen accountability mechanisms such as reporting requirements, reducing standing requirements, or expanding liability? Will the growing social movements of 2020 and calls to action influence these decisions?

Appendix

Comparing the States to the Models				
	Alabama	Georgia	New Mexico	Ohio
Voting	ABA/B Lab	ABA/B Lab	ABA/B Lab	DE
Benefit Director	ABA/DE	ABA/DE	ABA/DE	ABA/DE
Statutory Definition of Stakeholders/ Public Benefit	ABA	~ABA/DE	B Lab	~ABA/DE
Reporting Frequency	ABA/B Lab	ABA/B Lab	ABA/B Lab	Does not follow models: No reporting requirements
Third-Party Standard	ABA/DE	ABA/DE	B Lab	Does not follow models: No reporting requirements
Filing Requirements	ABA/DE	ABA/DE	ABA/DE	ABA/DE
Public Availability	ABA/B Lab	~DE: "shareholders of record, and to any other person who may request a copy in writing"	ABA/B Lab	Does not follow models: No reporting requirements
Limited Rights of Action	~ABA	Does not follow models: No additional limitations	B Lab	Does not follow models: Suit by the benefit corporation or derivative action by director, 25% shareholder (private), \$2 million (publicly traded)
Limitations of Liability	ABA	Does not follow model: Director has no duty based in interest in benefit purpose	Does not follow model: Benefit corporation has no monetary liability	~B Lab: Benefit corporation has no duty to beneficiaries, no monetary damages for failure to pursue public benefit(s)
Appraisal Rights	ABA/B Lab/DE	Does not follow model: Permitted when converting either to or from a benefit corporation	ABA/B Lab/DE	ABA/B Lab/DE

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