The State of Social Enterprise and the Law

2019-2020

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The Grunin Center

The Grunin Center for Law and Social Entrepreneurship was founded to create new ways for law and lawyers 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. The third in the series, this report 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 field as seen through the eyes of MicroVest, an impact investment fund that converted to the social enterprise form of a benefit limited liability company, and Impact Makers, one of the first benefit corporations involved in a lawsuit in the United States.

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Introduction

2019 marks the one-hundred-year anniversary of the famous *Dodge v. Ford* decision by the Michigan Supreme Court.[1] While this case is often cited for the view that American corporations exist primarily to create profits for their shareholders, it was just the beginning of a century-long and continuing debate about how, and for whom, corporations should be organized.

Through the mid-1900s, many corporate boards and executives did not yet adopt the model of shareholder primacy. Instead, most operated as "stewards or trustees" tasked with managing the interests of a broad range of stakeholders in addition to shareholders.[2] Half a century after *Dodge v. Ford*, Milton Friedman published his famous article arguing the board should serve as an agent to its shareholders, tasked with maximizing returns to distribute to shareholders.[3] By the late 1970s, the philosophy of shareholder primacy began to take root in the United States.[4]

2019 also saw large US corporations begin to enter the social purpose discussion with the Business Roundtable issuing a *Statement on the Purpose of a Corporation*.[5] Unlike its periodic statements made since 1997, which endorsed principles of shareholder primacy,[6] the 2019 Business Roundtable statement emphasized that corporations have a "fundamental commitment to all of our stakeholders."[7] For the first time in over 20 years, the Business Roundtable highlighted the interests of non-shareholders, including customers, employees, suppliers, and the communities in which corporations operate.

Why the Business Roundtable chose to make this statement is an open question. Some commentators have suggested that there has been an authentic change in attitudes among corporate leaders that recognize the downsides of a shareholder-centric approach. The chairman of the Business Roundtable and chairman of JPMorgan, Jamie Dimon, said that many companies are recognizing that "investing in their workers and communities…is the only way to be successful over the long-term."[8]

Other commentators view the Business Roundtable's actions as a defensive public relations move—an attempt to create the impression that large corporations care about the public good without having to change their behavior. The founders of B Lab, for instance, have asserted that shareholder interests and stakeholder interests are not as well aligned as the Business Roundtable statement suggests.[9] They, along with 33 B Corp CEOs, have challenged the Business Roundtable's members to "walk […] the walk of stakeholder capitalism."[10]

1 Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919).

2 Lynn A. Stout, *On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (in the Closet)*, 36 Seattle U. L. Rev. 1169 (2013) (noting the interests of employees, customers, and the nation). This philosophy is sometimes referred to as "managerial capitalism" or "managerialism."

3 Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y Times Mag., Sept. 13, 1970.

4 *See* Cydney Posner, *So Long to Shareholder Primacy*, Harv. L. Sch. F. Corp. Governance (Aug. 22, 2019), https://corpgov.law.harvard.edu/2019/08/22/so-long-to-shareholder-primacy/

5 *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans,'* Bus. Roundtable (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [hereinafter *Business Roundtable Statement*].

6 *See* Andrew Winston, *Is the Business Roundtable Statement Just Empty Rhetoric?*, Harv. Bus. Rev., Aug. 30, 2019.

7 *Business Roundtable Statement*, *supra* note 5.

8 *Id.* Some investment firms have also expressed an interest in broader stakeholders, which is potentially driving a shift among corporations seeking their investments. For example, BlackRock, one of the world's largest asset management firms, has recently committed to focus on long-term sustainability in its investment approach. *Sustainability as BlackRock's New Standard for Investing*, Blackrock (Jan. 2020), https://www.blackrock.com/corporate/investor-relations/blackrock-client-letter

9 Jay Coen Gilbert, Andrew Kassoy & Bart Houlahan, *Don't Believe the Business Roundtable Has Changed Until Its CEOs' Actions Match Their Words*, Fast Company (Aug. 22, 2019), https://www.fastcompany.com/90393303/dont-believe-the-business-roundtable-has-changed-until-its-ceos-actions-match-their-words (positing that corporations cannot "make an authentic commitment to all stakeholders if their fiduciary duty is to care only about shareholders").

10 33 B Corp CEOs put a full-page advertisement in the New York Times calling for these leaders to put their words into action by adopting benefit corporation governance structures for their businesses. B The Change, *Dear Business Roundtable CEOs: Let's Get to Work*, Medium (Aug. 25, 2019), https://bthechange.com/dear-business-roundtable-ceos-lets-get-to-work-25f06457738c

Regardless of why you think the Business Roundtable made its statement, it signals that the ongoing debate about the purpose of corporations is entering a new phase in the United States. Large, and even publicly traded, corporations are now joining the conversation on how stakeholder interests should be integrated in business decisions, and which stakeholder interests should be considered.[11] Interestingly, the Business Roundtable statement mostly aligns with the stakeholders highlighted in the B Lab Model Legislation and much of existing social enterprise legislation found in various states throughout the US.[12]

Since Vermont first recognized the low-profit limited liability company form just over a decade ago,[13] many state legislatures across the US have authorized alternatives to the traditional corporate legal forms. These alternative legal forms expressly permit the consideration of a broader set of stakeholders in corporate decision-making. Various types of legal forms have emerged since 2008, and several states are adopting multiple different forms. 2019 saw the introduction of a new type of legal form, with Delaware's statutory public benefit limited partnership.[14] This is the third specialized legal form permitted in Delaware.

The benefit corporation legal form in particular has been garnering increased recognition. For example, in 2019, the Corporate Laws Committee of the American Bar Association (ABA) recommended for the first time adding benefit corporation provisions to its 2020 Model Business Corporation Act (MBCA).[15] Explaining this proposal, it noted the widespread adoption of benefit corporation statutes and the significant number of benefit corporations formed throughout the United States. Legislatures considering adopting or modifying benefit corporation legislation typically referred to two illustrative sources—the Delaware benefit corporation legislation and B Lab Model Legislation. If approved,[16] legislatures will be able to refer to Chapter 17 of the 2020 MBCA as a third resource.

The benefit corporation and the other social enterprise forms as avenues for change will continue to be tested over the next decade, not just by legislatures but also by entrepreneurs and the courts. In our report, we explore the experience of MicroVest, an impact investment firm whose holding company transitioned to a Delaware statutory public benefit limited liability company in 2019. We also investigate the court filings of the recent *Impact Makers* lawsuit, one of the first lawsuits to involve a benefit corporation in the United States, and consider what the case might tell us about the future of lawsuits involving social enterprises.

11 The Business Roundtable signatories are CEOs of companies with a cumulative annual revenue of $7 trillion. *About Us*, Bus. Roundtable, https://www.businessroundtable.org/about-us (last visited July 3, 2020).

12 Unlike the B Lab Model Legislation, the Business Roundtable statement list of stakeholders does not expressly encompass the employees of the broader supply chain, stating only "our employees." Additionally, it also does not include broader societal concerns beyond "the communities in which we work." *Compare Business Roundtable Statement*, *supra* note 5, with Benefit Corp., *Model Benefit Corporation Legislation* § 301 (2017) [hereinafter *2017 Model Legislation*].

13 H.B. 775, 2007-2008 Leg., Reg. Sess. (Vt. 2008).

14 82 Del. Laws c. 46, § 30 (2019).

15 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 *Proposed MBCA*].

16 The comment period on the proposed new Chapter 17 to the MBCA ended December 31, 2019. The proposed changes are pending final approval by the Corporate Laws Committee.

Mapping State Legislation

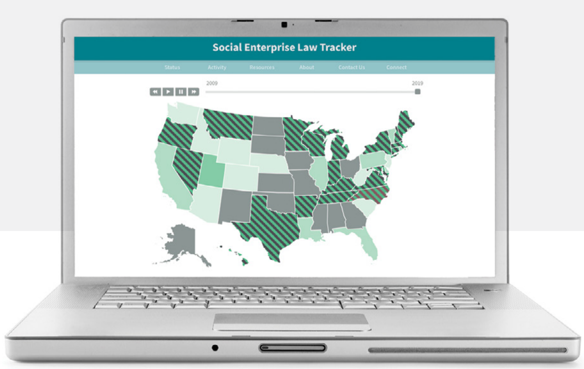
Every year the Grunin Center tracks legislative developments in the social enterprise field throughout the 50 states and the District of Columbia for our Social Enterprise Law Tracker.*

The Social Enterprise Law 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 50 US states and the District of Columbia.

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.



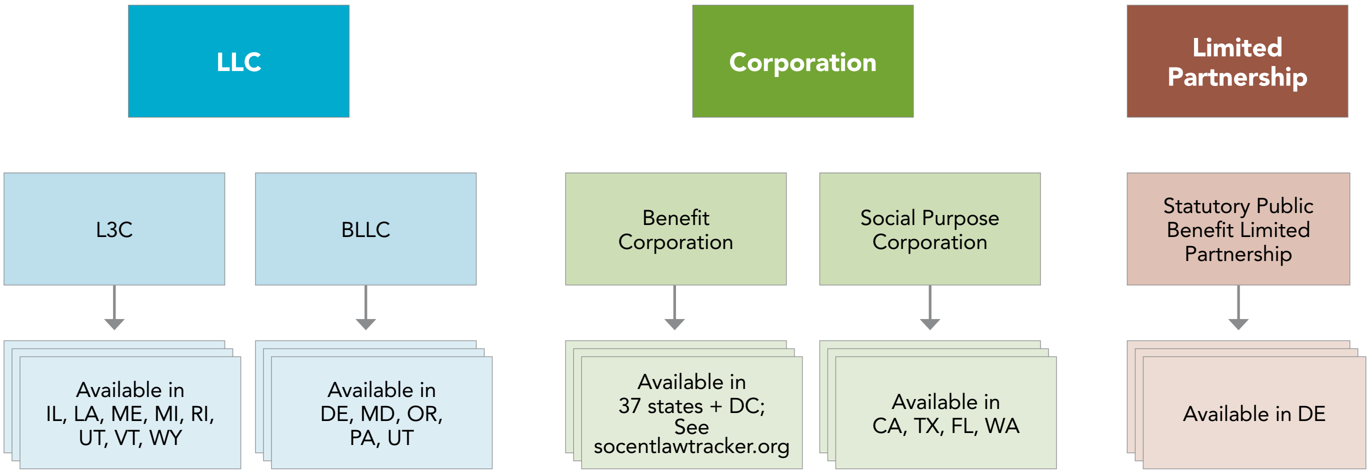
Social Entrepreneurship: Loosely defined, social entrepreneurship is the blend of pursuing both social benefits and financial gain in a single entity or mission. However, the precise definition of this term lacks consensus and continues to be shaped by changes in both the public and private spheres. (For further discussion of the varying definitions of social enterprise, please refer to the *2017–2018 Tepper Report*, “Defining the Field.”)

There are several different legal forms available to house traditional businesses—including, for example, limited liability companies (LLC), C-corporations, and limited partnerships. Similarly, different legal forms have emerged to house social entrepreneurial approaches. 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).

While different states may adopt legislation using the same label, social enterprise statutes are not uniform. Additionally, every form has undergone an evolution as legislatures respond to feedback from the business community, the legal community, and the public. Still, it is important to note generally what these categorizations represent.

* https://socentlawtracker.org/

Social Enterprise Forms in the United States

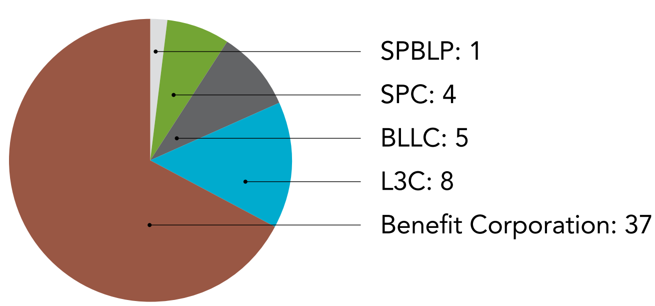


To start, there are two specialized **limited liability company** forms intended for social enterprises. The L3C was the first social enterprise form enacted in the US, developed as a purpose-driven LLC with the intention of securing funding from US private foundations interested in social investment in addition to grant making.[17] More recently, a separate LLC social enterprise form has emerged with less focus on funding—the BLLC.[18] BLLC legislation has been enacted in five states, and each state has done so somewhat differently.

Additionally, there are also two common **corporate forms**. Benefit corporations are a type of corporate entity authorized by state law. They must be distinguished from Certified B Corporations, which are companies that have been certified by the independent nonprofit organization, B Lab. Furthermore, while benefit corporation statutes are often based on the B Lab's Model Benefit Corporation Legislation, features vary across jurisdictions. 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.[19]

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

U.S. Social Enterprise Statutes Enacted as of 2019



17 *See* Grunin Ctr. For Law & Soc. Entrepreneurship, Mapping the State of Social Enterprise and the Law 6 (2018) [hereinafter *2017–2018 Tepper Report]*.

18 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).

19 Tx. Bus. Org. Code. § 23.053.

20 82 Del. Laws c. 46, § 30 (2019).

Some of the initial experiments by states, such as the L3C, spread quickly but have since lost favor. Others, like the benefit corporation, are as popular as ever. The number of benefit corporation bills introduced has been increasing over recent years, demonstrating a continued legislative interest. In 2017, seven states attempted to enact benefit corporation legislation.[21] This number dropped to six states in 2018.[22] However, in 2019, 10 states proposed legislation to enact the benefit corporation form.[23] Two states successfully enacted benefit corporation legislation in 2019[24]—Oklahoma and Maine. In fact, benefit corporations remain the most popular of the social enterprise forms in terms of both bills under consideration and enacted legislation. Furthermore, there is continued market interest in the benefit corporation form. As of July 2019, more than 7,000 businesses in the US had organized as benefit corporations.[25]

To underscore the popularity of the benefit corporation form, it is worth looking at the very limited legislative initiatives taken in 2019 with respect to the other most common forms. No legislatures attempted to pass either an L3C or an SPC statute in 2019. Moreover, Alabama was the only state to propose a BLLC bill, which ultimately failed to pass.[26] As of the end of 2019, the benefit corporation is offered in 37 states and the District of Columbia, the SPC in four states, the BLLC in five states, the L3C in eight states, and the SPBLP in one state.[27]

21 *2017–2018 Tepper Report*, *supra* note 18, at 13.

22 Grunin Ctr. For Law & Soc. Entrepreneurship, Mapping the State of Social Enterprise and the Law 14 (2019) [hereinafter *2018–2019 Tepper Report*].

23 Alabama (S.B. 427), Georgia (H.B. 230), Iowa (introducing three identical bills: H.F. 229, H.F. 312, and H.F. 645), Maine (S.P. 468), Mississippi (H.B. 8), Missouri (H.B. 1154), New Mexico (H.B. 118), North Dakota (H.B. 1466), Ohio (S.B. 21), and Oklahoma (H.B. 2423).

24 Georgia's bill passed both the house and senate, and the bill was delivered to the governor June 2020. There may be additional activity on Georgia's bill between drafting and publication of this report. H.B. 230, 2019-2020 Leg., Reg. Sess. (Ga. 2019).

25 *Proposed MBCA*, *supra* note 15.

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

27 *See supra* Figure "Social Enterprise Forms in the United States."

The benefit corporation form in 2019

By the end of 2018, the benefit corporation form had already spread across the United States and businesses could be set up as benefit corporations in all but 16 states.[28] During 2019, over half of those remaining states introduced legislation to enable the benefit corporation form.[29] Two states successfully enacted benefit corporation legislation in 2019—Oklahoma and Maine. Both had unsuccessfully attempted to pass a benefit corporation bill at least one time in the past.[30] The experience of 2019 is consistent with the trend that it sometimes takes several attempts to enact benefit corporation legislation.[31]

The Oklahoma Benefit Corporation Act was enacted in April of 2019 and became effective in November of 2019.[32] This is the first social enterprise form authorized in the state. The author of the bill, Senator Julia Kirt, stated that the benefit corporation designation "can be a tool for branding and a tool for attracting and retaining employees," as well as new jobs and investment.[33]

In Maine, An Act Concerning the Establishment of Benefit Corporations was enacted in June 2019 and went into effect in September 2019.[34] This is the second social enterprise form authorized in the state. Notably, Maine was an early adopter of the L3C form in 2010, but interest in the form has plateaued.[35]

28 The 16 states that had not enacted benefit corporation legislation by the end of 2018 are as follows: Alabama, Alaska, Georgia, Iowa, Maine (enacted 2019), Michigan, Mississippi, Missouri, North Carolina, North Dakota, New Mexico, Ohio, Oklahoma (enacted 2019), South Dakota, Washington, and Wyoming.

29 Ten states introduced benefit corporation legislation. *See supra* note 24.

30 *See, e.g.*, H.P. 792, 127th Leg., 1st Reg. Sess. (Me. 2015), S.B. 1121, 55th Leg., 2d Sess. (Okla. 2016).

31 For example, Kentucky passed benefit corporation legislation in 2017 but had failed attempts in 2014, 2015, and 2016. Indiana passed legislation in 2015 but had a failed attempt in 2014. Montana passed legislation in 2015 but had a failed attempt in 2013. Texas passed legislation in 2017 but had failed attempts in 2013. *See* Social Enterprise Law Tracker, https://socentlawtracker.org/

32 Okla. Stat. tit. 18, § 1201.

33 Steve Metzer, *Benefit Corporations Allowed Under New State Law*, J. Rec. (Apr. 29, 2019), https://journalrecord.com/2019/04/29/benefit-corporations-allowed-under-new-state-law/

34 Me. Stat. tit. 13-C, § 1801.

35 *See* discussion *infra* "Diminishing popularity of the first social enterprise form (Low-Profit Limited Liability Company)."

In addition, Georgia's bill recently passed both the house and senate.[36] The bill was delivered to the governor in June 2020. If the governor signs the bill into law, it will be the first social enterprise form authorized in the state. As with Oklahoma and Maine, Georgia had several failed attempts at enacting benefit corporation legislation.[37]

Other developments in 2019 include the introduction of three bills in Illinois, which purport to amend the state's benefit corporation legislation but contain no substantive provisions.[38] It is difficult to comment on what the Illinois legislature intends to amend, if anything, in its existing benefit corporation legislation.

In addition to state legislative action, the Corporate Laws Committee of the ABA has also proposed to amend its 2020 MBCA to include benefit corporations as a new chapter 17.[39] Among other things, the ABA's 2019 proposal sets a two-thirds voting requirement for a corporation to become a benefit corporation.[40] This is consistent with the B Lab Model Legislation, as well as the newly enacted benefit corporation legislation in both Oklahoma and Maine. However, the proposed amendment to the 2020 MBCA diverges from the others by entirely removing the two-thirds minimum vote to change a specific public benefit.

The proposed amendment to the 2020 MBCA also addresses director duties, reporting requirements, and enforcement proceedings.[41]

36 H.B. 230, 2019-2020 Leg., Reg. Sess. (Ga. 2019). Further updates may arise between drafting and publication of this report.

37 *See, e.g.*, H.B. 278, 2017-2018 Leg., Reg. Sess. (Ga. 2017); H.B. 1052, 2015-2016 Leg., Reg. Sess. (Ga. 2016).

38 These bills are referred to as "shell bills," which are intended to circumvent the regular legislative process before undergoing last-minute substantive amendments and being pushed through into law. H.B. 83, H.B. 685, S.B. 383, 101st Gen. Assemb. (Ill. 2019).

39 *Proposed MBCA*, *supra* note 15. The ABA has previously commented on benefit corporations to a limited extent in 2013, though there are several modifications in the proposed amendment to the 2020 MBCA. A.B.A. Bus. Law Section Corp. Laws Comm., Benefit Corporation White Paper, 68 Bus. Law. 1083 (2013).

40 More specifically, the minimum is "two-thirds of the votes entitled to be cast by each voting group entitled to vote on the amendment or transaction." This is reduced from the ABA's prior recommendation for a minimum vote of "90 percent of each class or series of shares, whether voting or nonvoting." *Id.*

41 *See* discussion *infra* "Governance and Director Responsibilities for Benefit Corporations" and "Certification and Reporting Requirements for Social Enterprises."

New form of legislation passed in Delaware (Statutory Public Benefit Limited Partnership)

In 2019, Delaware became the first state to pass legislation authorizing the creation of the SPBLP.[42] A limited partnership wishing to elect public benefit status in Delaware must both state that it is a statutory public benefit limited partnership and set forth in its certificate of limited partnership one or more specific benefits to be promoted.[43]

To assess the motivation behind adopting the SPBLP legislation, it is helpful to first take a step back and review the role of limited partnerships in the United States. The National Conference of Commissioners on Uniform State Laws notes a declining interest in the limited partnership form generally, but identifies two areas where the form has continued relevance: "(i) sophisticated, manager-entrenched commercial deals whose participants commit for the long term, and (ii) estate planning arrangements."[44] The limited partnership is also attractive to some businesses for tax management purposes.

Interestingly, even without the specialized legal form, under Delaware's existing statutes, businesses could already form limited partnerships that pursued a public benefit purpose.[45] Businesses, however, would need to amend the provisions of their limited partnership agreements. The new legislation may have been enacted to streamline this process and to create a standardized statutory form. Additionally, by formally electing the SPBLP, businesses can signal a strengthened commitment to the public benefit purpose, which may help attract both clients and investments.

42 82 Del. Laws c. 46, § 30 (2019).

43 Del. Code Ann. tit. 6, § 17-1202.

44 National Conference of Commissioners on Uniform State Laws, Uniform Limited Partnership Act (2013). This Uniform Limited Partnership Act has been adopted in 24 jurisdictions. However, Delaware's limited partnership statute does not follow this form.

45 Scott E. Waxman and Eric N. Feldman, 2019 *Amendments Affecting Delaware Alternative Entities*, K & L Gates (Aug. 1, 2019), http://www.klgates.com/2019-amendments-affecting-delaware-alternative-entities-07-31-2019/

The SPBLP is the third social enterprise form to be enacted in Delaware, following the benefit corporation (in Delaware, known as the "statutory public benefit corporation")[46] and the BLLC (in Delaware, known as the "statutory public benefit limited liability company").[47] The legislation requires SPBLPs to be managed in a way that is comparable to the state's other forms. For instance, similar to the directors in Delaware's benefit corporations, SPBLP managers must "balance the partners' pecuniary interests, the best interests of those materially affected by the limited partnership's conduct, and the public benefit or public benefits set forth in its certificate of limited partnership."[48]

Additionally, limited partners of the SPBLP who own at least 2%[49] of the interests in the profits of the limited partnership can bring a derivative lawsuit to ensure that the managers of the SPBLP continue to take into account the SPBLP's stated public benefit.[50] This is analogous to the derivative suit rights of benefit corporation stockholders in Delaware.[51] The SPBLP is also required to provide its limited partners with a statement, no less than biennially, as to the partnership's advancement of the public benefit(s) set forth in its certificate of limited partnership.[52] The statement requirements also closely follow those of Delaware's public benefit corporation statute.[53]

One difference from Delaware's benefit corporation legislation lies in the SPBLP's lack of any statutory provision referring to third-party standards or certifications in connection with the pursuit of the public benefit. Delaware's benefit corporation legislation expressly permits the benefit corporation to include a third-party standard or certification requirement in its certificate of incorporation or by-laws.[54] By contrast, the SPBLP statute makes no such mention of third-party standards or certifications in its substantive legislation.[55]

Delaware is a unique testing ground for new legal forms. Delaware is home to a very large number of companies, including over 66% of the Fortune 500 companies.[56] This is in part due to the commitment to modernize corporate law, and the quality of the courts and judges with specialized corporate expertise.[57] Over the years, Delaware has developed a rich body of case law, which helps to provide businesses greater predictability. Although the Delaware courts have not had reason to rule on these new legal forms, the passage of this third legal form indicates a continued legislative interest in statutory public benefit forms. It will be interesting to see the development of social enterprise forms in this particular legal environment.

Diminishing popularity of the first social enterprise form (Low-Profit Limited Liability Company)

In 2008, Vermont was the first state to enact legislation for a specialized legal form for social enterprises, with the passage of the first L3C statute.[58] Since then, the L3C form has diminished in popularity. No new L3C legislation has been enacted since 2012. Currently, only eight states offer the L3C form.[59]

46 Del. Code Ann. tit. 8, §361.

47 Del. Code Ann. tit. 6, §18-1201.

48 tit. 6, § 17-1204.

49 If the partnership interests are listed on a national securities exchange, this requirement can alternatively be satisfied by at least $2,000,000 in partnership interests.

50 tit. 6, § 17-1206.

51 tit. 8, § 367.

52 tit. 6, § 17-1205.

53 *Compare* tit. 8, § 366, *with* tit. 6, § 17-1205.

54 tit. 8, § 366.

55 The SPBLP legislation § 17-1205 shares the same title with the benefit corporation legislation § 366: "Periodic statements and third-party certification." However, the content of the SPBLP legislation omits reference to any third-party standards or third-party certifications.

56 About the Division of Corporations, Delaware, https://corp.delaware.gov/aboutagency/ (last visited July 11, 2020).

57 Jan Ting, *Why Do So Many Corporations Choose to Incorporate in Delaware*?, WHYY (Apr. 27, 2011), https://whyy.org/articles/why-do-so-many-corporations-choose-to-incorporate-in-delaware/

58 H.B. 775, 2007-2008 Leg., Reg. Sess. (Vt. 2008).

59 Illinois, Louisiana, Maine, Michigan, Rhode Island, Vermont, Utah, and Wyoming. In addition, Puerto Rico, the Crow Tribe of Indians, the Navajo Nation, and the Oglala Sioux Tribe have also adopted the L3C form. The L3C statute in North Carolina was repealed, though existing L3Cs may continue to use the designation.

Mapping State Legislation

Furthermore, there has been a decrease in legislative initiatives.[60] No states introduced legislation to authorize the L3C form in 2019. This is a further decrease from 2018, when three states unsuccessfully introduced L3C legislation.[61]

The L3C form is not the only specialized legal form for social enterprises interested in the LLC form. The emergence of the BLLC form in 2011 may have diminished the legislative interest in the L3C form. Although only five states have enacted the BLLC form as of 2019, unlike the L3C form, the BLLC form has seen continued legislative activity.[62] This may be similar to the pattern observed among the two specialized corporate legal forms for social enterprises. The SPC form has faced a decline in interest, correlated with the rise of the benefit corporation form.[63] No new SPC legislation has been enacted since 2014. However, in that same year, seven states enacted new legislation authorizing the benefit corporation form.[64] It remains to be seen whether there will be a continued decline in the L3C legislation, with a subsequent rise in the BLLC legislation.

In line with the diminishing legislative interest in the L3C form, social entrepreneurs also seem to be losing interest. Indeed, as of June 5, 2020, there are only 1,713 active L3Cs across the United States, a number that has barely changed since 2018.

The number of active L3Cs in some states is stagnating or even declining. In Vermont and Wyoming, the number of active L3Cs has declined since 2018. Louisiana and North

State	Active L3Cs as of July 6, 2015°	Active L3Cs as of 2018°°	Active L3Cs as of June 5, 2020°°°
Vermont	210	>500*	198
Wyoming	37	136	86
Louisiana	240	data not available	148
North Carolina	95	data not available	79
Rhode Island	6	22	28
Maine	63	>100	96
Utah	73	data not available	95
Illinois	203	308	363
Michigan	332	506	617

°J. Haskell Murray, *The Social Enterprise Law Market*, 75 Md. L. Rev. 541 (2016).

°°*2017–2018 Tepper Report*, *supra* note 18.

°°°*Latest L3C Tally*, *supra* note 66.

*This number includes inactive L3Cs. As of June 2020, a total of 592 businesses have organized as an L3C in Vermont since the form was first available, though most are now terminated, inactive, or dissolved. *Corporations Division*, Vt. Secretary St. https://bizfilings.vermont.gov/online/BusinessInquire/

Carolina have even seen a decrease in the number of L3Cs from 2015. In Rhode Island and Maine, the number of active L3Cs has remained relatively stable since 2018. In Utah, there has been only a marginal increase since 2015.

On the other hand, there have been some increases in registered L3Cs in both Michigan and Illinois. Michigan saw the largest jump, increasing by over 100 additional L3Cs from 2018. Interestingly, in Michigan, there is no benefit corporation legislation, so the L3C is the only specialized legal form available to social enterprises in the state. This is not the case for Illinois, despite also seeing an increase in the number of registered L3Cs. Still, while Illinois does permit companies to register as a benefit corporation, it appears to be significantly less popular than the L3C form. As of June 2020, there are only 26 active benefit corporations in Illinois,[65] compared to the more than 350 active L3Cs in Illinois.

60 *See 2018–2019 Tepper Report*, *supra* note 23 (discussing tax treatment of L3Cs and its potential impact on the decline of the legal form). *See, e.g.* J. William Callison & Allan W. Vestal, *The L3C Illusion: Why Low-Profit Limited Liability Companies Will Not Stimulate Socially Optimal Private Foundation Investment in Entrepreneurial Ventures*, 35 Vt. L. Rev. 273, 274 (2010) (stating that without changes to program-related investment rules, the L3C form is of little use).

61 Assemb. B. 10060, 2017-2018 Gen. Assemb., Reg. Sess. (N.Y. 2018), H.B. 19, 29th Leg., Reg. Sess. (Haw. 2017), S.B. 184, 190th General Court, Reg. Sess. (Mass. 2017).

62 In 2018, Delaware successfully enacted BLLC legislation. 81 Del. Laws, c. 357, § 34 (2018). In 2019, Alabama proposed new BLLC legislation, though the bill ultimately failed to pass. S.B. 427, 2019 Leg., Reg. Sess. (Ala. 2019).

63 The first SPC legislation was enacted in California in 2011, just a year after the first benefit corporation legislation was passed in 2010. S.B. 1301, 2013-2014 Leg., Reg. Sess. (Cal. 2014) (SPC); Assemb. B. 361, 2011-2012 Leg., Reg. Sess. (Cal. 2011) (benefit corporation).

64 Connecticut, Florida, Minnesota, Nebraska, New Hampshire, Utah, and West Virginia all enacted new benefit corporation legislation in 2014.

65 *Find a Benefit Corp*, Benefit Corporation, https://benefitcorp.net/businesses/find-a-benefit-corp?field_bcorp_certified_value=&state=Illinois&title=&submit2=Go&sort_by=field_bcorp_state_value&sort_order=DESC&op=Go&page=2

States with multiple forms

For most states that introduced bills in 2019, the bills represented an attempt to authorize the first social enterprise form in the state.[66] There were, however, a few notable exceptions. In 2019, Maine became the 13th state to adopt more than one social enterprise form after passing benefit corporation legislation on top of its existing L3C legislation. Additionally, Delaware became the second state after Utah to adopt a third social enterprise form.

Alabama, a state that has not yet enacted any social enterprise forms, unsuccessfully attempted to pass legislation authorizing both benefit corporations and BLLCs together in the same bill.[67]

The following chart identifies the 13 states that have adopted multiple social enterprise forms as of the end of 2019. Of these states, all have enacted benefit corporation legislation.

US State	Benefit Corporation	SPC	BLLC	L3C	SPBLP
California	Cal. Corp. Code § 14600 - 14631 (2012)	Cal. Corp. Code § 2500-3503 (2011)			
Delaware	Del. Code Ann. tit. 8 § 361-368 (2013)		Del. Code Ann. tit. 6 § 18.1202 - 18.1208 (2018)		Del. Code Ann. tit.6 § 17.1201-1208 (2019)
Florida	Fla. Stat. Ann. § 607.601 - 607.613 (2014)	Fla. Stat. Ann. § 607.501 - 607.513 (2014)			
Illinois	805 Ill. Comp. Stat. Ann. 40/1 - 40/5.01 (2013)			805 Ill. Comp. Stat. 180/1-5, 1-10(a)(1), 1-26, 15-5 (2009)	
Louisiana	La. Rev. Stat. Ann. § 12:1801 - 12:1832 (2012)			La. Rev. Stat. Ann. § 12:1301(A)(11.1), 1302(c), 1305(B)(3), 1306(A)(1), 1309(A) (2010)	

66 In contrast, in 2018, seven states considered enacting the second or third social enterprise statute in their states. *2018–2019 Tepper Report*, *supra* note 23.

67 In four of the five states with both social enterprise forms, the benefit corporation legislation was enacted first, followed some years later by the BLLC form. Oregon is the only state to have successfully enacted both forms together in a single bill. *See* H.B. 2296, 77th Leg. Assemb., Reg. Sess. (Or. 2013).

Mapping State Legislation

US State	Benefit Corporation	SPC	BLLC	L3C	SPBLP
Maine	Me. P.L. 2009, Ch. 328 § 1801-1832 (2019)			Sec. 1. 31 MRSA §602, sub-§10-A (2011)	
Maryland	Md. Code Ann., Corps. & Ass'ns § 5-6C-01 - 5-6C-08 (2010)		Md. Code Ann., Corps. & Ass'ns § 11-4A-1201 - 11-4A-1208, 11-1-502, 5-6C-03 (2011)		
Oregon	Ore. Rev. Stat. § 60.750 - 60.770 (2013)		Ore. Rev. Stat. § 60.750 - 60.770 (2013)		
Pennsylvania	15 Penn. Cons. Stat. § 3301-3305 (2012)		15. Penn. Cons. Stat.§ 8891-8898 (2016)		
Rhode Island	R.I. Gen. Laws Ann.§§ 7-5.3-1 to-7-5.3-13 (2013)			R.I. Gen. Laws §7-16-76 (2013)	
Texas	Tex. Bus. Org. Code § 21.951 - 21.959 (2017)	Tx. Bus. Org Code § 23.0001 - 23.110 (2013)			
Utah	Utah Code § 16-10b-101 - 16-10b-402 (2014)		Utah Code § 48-4-101 (2018)	Utah Code § 48-2c-102, -403, -405, -412, -1411 (2009)	
Vermont	Vt. Stat. Ann. tit. 11A §§ 21.01 to -.14 (2009)			Vt. Stat. Ann. tit. 11, §§ 3001(27), 3005(a), 3023(a) (2009)	

No new specialized tax treatment to social enterprises

There continues to be a general reluctance to offer specialized tax treatment to social enterprises.[68] Most bills introduced in 2019 made no mention of tax incentives. In Oklahoma, which successfully enacted benefit corporation legislation, the bill's sponsor went so far as to expressly denounce specialized tax treatment, making clear that benefit corporations will pay the same taxes as traditional corporations.[69]

Even the few state legislative attempts in 2019 to attach tax benefits to social enterprise forms have universally failed. Connecticut was unsuccessful in an attempt to amend existing benefit corporation legislation to include tax benefits, despite the tax benefits translating to a difference of only $250 over four years.[70] The Alabama bill was the only legislation in 2019 to contemplate tax treatment directly in the same bill proposing the new social enterprise legal forms. That tax treatment, however, was neither new nor unique to the social enterprise forms.[71]

68 *See 2018–2019 Tepper Report*, *supra* note 23, at 14.

69 Metzer, *supra* note 34.

70 H.B. 5265, 2019 Leg., Jan. Sess. (Conn. 2019). Connecticut's proposed bill sought to permit benefit corporations to pay their business entity tax every four years, rather than every two years, but only if the benefit corporation submits a copy of its benefit report to the Connecticut Department of Revenue Services at the end of the second year. The proposed tax treatment may have been intended to serve as a financial incentive to make such submissions, which are not required for benefit corporations in Connecticut.

71 S.B. 427, 2019 Leg., Reg. Sess. § 10A-12-5.01 (Ala. 2019) (allowing benefit corporations to make use of tax incentives found in Title 40 of the Alabama Code under the Tax Incentive Reform Act of 1992 (Chapter 9B), The Alabama Reinvestment and Abatements Act (Chapter 9G), and the Alabama Jobs Act (Article 16 of Chapter 18)).

Governance and Director Responsibilities for Benefit Corporations

Benefit corporation legislation serves the important role of defining the governance of these new legal forms. In particular, the legislation addresses the question of who should have responsibility for defining and directing the social purpose of a company, and whether the standards should be different between publicly traded versus privately held businesses. However, the answers are still unsettled. States, among others, are continuing to explore these questions through model legislation, proposed bills, and enacted legislation.

Reconsidering benefit directors

In the 2014 version of B Lab's Model Legislation, the benefit director role was seen as important for ensuring adherence to the benefit purpose of the corporation. It was required for publicly traded benefit corporations, and optional for all others.[72] The benefit director was an elected officer and independent from the corporation. The primary responsibility of the benefit director was to prepare the annual benefit report, which would include the benefit director's opinion whether the company acted in accordance with the benefit purpose and descriptions of anything that was not in compliance. In the official comments attached to the 2014 Model Legislation, the authors state that the independence of the benefit director and the requirement of the annual benefit report promoted greater transparency.[73] Since then, however, B Lab has moved away from putting the benefit director requirement in its model legislation, with its 2017 version making the benefit director position entirely optional.[74] The ABA proposed amendment to the 2020 MBCA takes one step further and declines to include a benefit director provision.[75] Rather, the official comment notes that benefit corporations may optionally choose to assign oversight responsibilities to a board committee or an officer within corporate management.[76]

State legislatures have also stepped away from requiring the designation of benefit directors in their proposed bills. Most of the bills introduced in 2019 removed the benefit director provisions entirely.[77] Oklahoma in particular had previously introduced bills requiring benefit directors for publicly traded companies.[78] However, in 2019, it successfully enacted a version with no specific benefit director provisions.

Of the few states that retained benefit director provisions in their proposed 2019 bills, Mississippi, Missouri, and New Mexico made the designation of a benefit director entirely optional.[79] The Alabama legislature did, however, propose benefit corporation and BLLC legislation requiring a benefit director, though the bill ultimately failed to pass.[80] Maine was the only state in 2019 to successfully enact a benefit corporation statute to include a

72 Benefit Corp., *Model Benefit Corporation Legislation* § 302 (2014) [hereinafter *2014 Model Legislation*].

73 *Id.* § 302 cmt.

74 *2017 Model Legislation*, *supra* note 12, § 302.

75 *Proposed MBCA*, *supra* note 15, § 17.04.

76 *Id.* § 17.04 cmt.

77 Specifically, this includes legislation proposed in Georgia, Iowa, North Dakota, Ohio, and Oklahoma (enacted).

78 *See, e.g*, S.B. 1121, 55th Leg., 2d Sess. § 8 (Okla. 2016) (requiring a benefit director for publicly traded companies, but keeping it optional for all other benefit corporations); S.B. 343, 56th Leg., 1st Sess. § 8 (Okla. 2017) (making the benefit director optional for all benefit corporations).

79 H.B. 8, 2019 Leg., Reg. Sess. § 9 (Miss. 2019); H.B. 1154, 100th Gen. Assemb., 1st Reg. Sess. §351.1421.1 (Mo. 2019); H.B. 118, 54th Leg., 1st Sess. §6.A (N.M. 2019).

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

benefit director requirement. Following the 2014 Model Legislation, it requires a benefit director for publicly traded benefit corporations, but not for privately held benefit corporations.[81]

Fiduciary duties of directors

In the traditional corporate context, directors have a fiduciary duty to act in the financial interests of shareholders. Benefit corporations arguably expand this duty. In the 2017 version of B Lab's Model Legislation, the director's standard of conduct is defined explicitly to require the consideration of certain additional stakeholders. There is also a general directive to consider the effects of action or inaction on the corporation's ability to accomplish "its general public benefit purpose and any specific public benefit purpose."[82] A few of the key stakeholders listed in the model include employees, customers, community and societal factors, and the local and global environment. Furthermore, directors are charged with consideration of both the short- and long-term interests of the benefit corporation. The B Lab's position on the standard of conduct of directors and these enumerated stakeholders has remained unchanged from the 2014 Model Legislation. The ABA proposed amendment to the 2020 MBCA would also require directors to act "in a responsible and sustainable manner" and to consider "the separate interests of stakeholders known to be affected by the business of the corporation."[83] The ABA's proposed list of stakeholders largely matches that of B Lab; however, the ABA proposal declines to mention both the short- and long-term interests of the benefit corporation.

Several states that introduced new bills in 2019 use language that is similar if not identical to the language in the B Lab Model Legislation for the sections on directors' duties. This list includes Mississippi, Missouri, and New Mexico,[84] as well as the two states that successfully enacted new benefit corporation legislation in 2019—Oklahoma and Maine.[85]

A few states provide less specific directives. Bills proposed in Alabama, Georgia, Iowa, North Dakota, and Ohio do not include a list of specific stakeholders. Instead, directors have a limited, and at times discretionary, fiduciary duty to consider the effect of decisions on achieving the corporation's benefit purpose(s).[86] For example, the North Dakota bill requires only that directors "consider the effects" of company decisions on the pursuit of a benefit purpose but sets no requirements for taking action. [87]Iowa adds an additional, but similarly broad, provision for the directors to consider the "best interests of persons materially affected by the benefit corporation's conduct."[88]

B Lab's 2017 Model Legislation stipulates that directors "shall consider the effects of any action or inaction upon" the enumerated stakeholders and public benefit purposes.[89] One of the bills proposed in 2019, however, gives directors greater discretion in which stakeholders to consider and when. Namely, Alabama's proposed bill states that "the director may" consider such factors outside of the more traditional shareholder model.[90] The use of the word "may" leaves it optional whether or not the benefit corporation considers the interests of additional stakeholders. This invites the question of whether an emerging trend in social enterprise legislation is moving in a direction that does not actually impose on benefit corporation directors any duty to consider the interests of a broader set of stakeholders beyond shareholders.[91]

81 Me. Stat. tit. 13-C, § 1822.

82 *2017 Model Legislation*, *supra* note 12, § 301(a)(1)(vii).

83 *Id.*

84 H.B. 8, 2019 Leg., Reg. Sess. § 8 (Miss. 2019); H.B. 1154, 100th Gen. Assemb., 1st Reg. Sess. § 351.1418 (Mo. 2019); H.B. 118, 54th Leg., 1st Sess. § 5 (N.M. 2019).

85 Okla. Stat. tit. 18, § 18-1207; Me. Stat. tit. 13-C, § 1821.

86 *See, e.g.*, H.B. 230, 2019-2020 Leg., Reg. Sess. § 14-2-1806 (Ga. 2019).

87 H.B. 1466, 66th Leg. Assemb., Reg. Sess. § 10-37-08 (N.D. 2019).

88 H.F. 645, 2019 Leg., Reg. Sess. § 490.1805 (Iowa 2019).

89 *2017 Model Legislation*, *supra* note 12, § 301.

90 S.B. 427, 2019 Leg., Reg. Sess. § 10A-12-2.03 (Ala. 2019).

91 Ohio's corporate law already has a constituency statute, which allows directors of ordinary corporations to consider stakeholders such as employees, suppliers, creditors, and customer and community and societal considerations. Ohio Rev. Code Ann. § 1701.59.

Changes as to who can bring enforcement proceedings

Enforcement proceedings in the corporate context are suits against corporations that fail to comply with their stated purposes or against directors for failure to comply with their fiduciary duties. Standing requirements limit who can bring these lawsuits. In the context of traditional corporations, shareholders may bring suits for failure to act in the financial interest of shareholders. In the context of benefit corporations, these suits can be brought for failure to comply with the benefit purpose. Allowing non-shareholder parties to bring enforcement proceedings could potentially shift control of the corporation away from shareholders to stakeholders.

Between 2014 and 2017, there was a shift in the B Lab position on the parties that can bring an enforcement proceeding against benefit corporations. B Lab narrowed the standing requirement in the 2017 Model Legislation, removing provisions that allowed directors and other persons specified in a corporation's by-laws to bring enforcement proceedings.

States have continued to experiment with the enforcement proceeding provisions but have largely deviated from the 2017 Model Legislation. The two most recently enacted bills (Maine and Oklahoma) continued to follow the 2014 Model Legislation, which provides broader standing requirements than the 2017 Model Legislation. This seems to match the trend across the country. Many introduced bills follow the 2014 model with either no or small adjustments.[92]

92 Maine, Mississippi, Missouri, and Oklahoma.

B Lab Model Benefit Corporation Legislation, § 305(c): A benefit enforcement proceeding may be commenced or maintained only:	
2014 Model Legislation	**2017 Model Legislation**
(1) directly by the benefit corporation; or **(2) derivatively by** (i) a person or group of persons that owned beneficially or of record at least 2% of the total number of shares of a class or series outstanding at the time of the act or omission complained of; or (ii) a director; or (iii) a person or group of persons that owned beneficially or of record 5% or more of the outstanding equity interests in an entity of which the benefit corporation is a subsidiary at the time of the act or omission complained of; or (iv) other persons as specified in the articles of incorporation or by-laws of the benefit corporation.	**(1) directly by the benefit corporation; or** **(2) derivatively by** (i) a person or group of persons that owned beneficially or of record at least 2% of the total number of shares of a class or series outstanding at the time of the act or omission complained of; or (ii) a person or group of persons that owned beneficially or of record 5% or more of the outstanding equity interests in an entity of which the benefit corporation is a subsidiary at the time of the act or omission complained of.

New Mexico's bill found a compromise between the two versions by still allowing directors to bring suits.[93] However, there is no stipulation that standing rules can be adjusted by the charter or by-laws.

Five states proposed bills which significantly deviated from both versions of the B Lab Model Legislation, either by severely restricting or by dramatically expanding who had standing to bring suit. For example, Ohio's proposed bill increased the minimum ownership stake required for shareholders to 25%.[94] It also included a separate standard for publicly traded companies, in such cases limiting standing to shareholders who own a minimum of $2 million worth of shares. Reducing the pool of individuals who have standing, Iowa's bill would permit benefit proceedings only from shareholders, and sets a higher limit of a 5% ownership stake.[95] Similarly in North Dakota, only shareholders would be permitted to bring suit—however, with no minimum ownership percentage.[96] Georgia's bill provided no enforcement proceeding rights to anyone, unless otherwise stipulated in the charter or by-laws.[97] On the other extreme, although it failed to pass, Alabama's proposed bill attempted to expand the list of parties with standing to include intended beneficiaries of any specific benefit purposes.[98] The benefit corporation/BLLC itself, the benefit manager, or an owner of the benefit corporation/BLLC also would have standing to bring an enforcement proceeding.

Despite most states following the 2014 Model Legislation, the ABA proposed amendment to the 2020 MBCA would limit standing to only shareholders.[99] Furthermore, it would require a minimum of a 5% ownership stake, as proposed in Iowa. Similarly to Ohio's bill, the proposed amendment to the 2020 MBCA sets a separate standard for publicly traded companies, permitting shareholders of such companies to satisfy standing with at least $5 million worth of shares. Only a few states make such a distinction for public companies, and the exact ownership value threshold varies across the country.[100] Notably, in Delaware, this double standard can be found in the statutes for all three specialized social enterprise forms, including the new SPBLP.[101]

93 H.B. 118, 54th Leg., 1st Sess. § 9(C) (N.M. 2019).

94 S.B. 21, 133d Gen. Assemb., Reg. Sess. § 1701.96(C) (Ohio 2019).

95 H.F. 645, 2019 Leg., Reg. Sess. §490.1807(1)(b) (Iowa 2019).

96 H.B. 1466, 66th Leg. Assemb., Reg. Sess. § 10-37-09 (N.D. 2019)

97 H.B. 230, 2019-2020 Leg., Reg. Sess. § 14-2-1806(b) (Ga. 2019).

98 S.B. 427, 2019 Leg., Reg. Sess. § 10A-12-4.01(b) (Ala. 2019).

99 *Proposed MBCA*, *supra* note 15, § 17.06.

100 *See, e.g.*, Ky. Rev. Stat. Ann. § 271B.7-400(8) (2017).

101 Enforcement proceedings can be brought by parties with at least 2% ownership stake. For companies listed on a national securities exchange, this ownership requirement can be satisfied with a minimum ownership stake of $2M. Del. Code Ann. tit. 6, §§ 18-1206, 17-1206; Del. Code Ann. tit. 8, § 367.

Certification and Reporting Requirements for Social Enterprises

One challenge of social entrepreneurship is ensuring accountability. While companies may define a public benefit purpose, these words need to be accompanied with real action. Benefit reporting serves an important role of improving transparency into the actions taken by social enterprises. Public reporting, state-agency filing requirements, and third-party standards can help to improve the effectiveness of the benefit report. Additionally, third-party certification requirements could help to further improve accountability by having an independent party evaluate the company's commitment to its benefit purpose. Finally, enforcement mechanisms are important to ensure corporations do not forgo reporting entirely.

Reporting requirements eased in newly proposed bills

The B Lab Model Legislation has consistently set annual reporting requirements in both the 2014 and 2017 versions.[102] Similarly, the proposed amendment to the 2020 MBCA also requires annual reporting.[103]

Benefit corporation legislation across the US consistently requires that companies prepare a benefit report detailing how the company has promoted a public benefit. However, bills introduced in 2019 showed a wide degree of experimentation across states with regard to the specific reporting requirements. Overall, bills with more ambitious reporting requirements tended to fail in the legislature, while legislation with more relaxed reporting standards saw more success in enactment. The new trend whereby states are easing reporting requirements gives corporations greater latitude to choose how they will make their progress known to the public.[104]

Ohio's legislation left any reporting requirements to be determined by the articles of incorporation, eliminating any statutory requirement for a benefit report.[105] While all other new bills required a benefit report detailing how the company has promoted a public benefit, Iowa and Delaware have parted from the Model Legislation by requiring only that a report be made once every two years, rather than annually.[106]

102 *2017 Model Legislation*, *supra* note 12, § 401; *2014 Model Legislation*, *supra* note 79, § 401.

103 *Proposed MBCA*, *supra* note 15. This is a shift from the ABA's 2013 proposal which required reporting only every other year.

104 The rates at which benefit corporations have been filing their annual benefit reports have generally been extremely low. Murray, *supra* note 68 (showing that compliance rates in relation to the reporting requirements has generally been around 10%); Maxime Verheyden, *Public Reporting by Benefit Corporations: Importance, Compliance, and Recommendations*, 14 Hastings Bus. L.J. 37, 62–76 (2018) (showing that reporting rates hovered between 8% and 14%, except in states with harsh penalties, like Minnesota, where the reporting rate was 100%).

105 S.B. 21, 133d Gen. Assemb., Reg. Sess. § 1701.38(A)(3) (Ohio 2019)

106 H.F. 645, 2019 Leg., Reg. Sess. § 490.1806 (Iowa 2019). Delaware's newly enacted SPBLP legislation follows the lead of the state's existing benefit corporation statute and only requires biennial reporting. Del. Code Ann. tit. 6, § 17-1205.

Public reporting

Public reporting is an additional tool to ensure that benefit corporations are held accountable. Shareholders, directors, and officers each have incentives that may discourage them from safeguarding the corporation's purpose through benefit enforcement proceedings.[107] Additionally, benefit corporation statutes arguably provide directors of the corporation with more discretion in their behavior, which could make it harder for shareholders and others to bring suit. Public reporting informs other stakeholders, such as employees, customers, contracting parties, potential investors, and members of the general public. Thereby, stakeholders may be empowered to choose who to do business with based on a company's public benefit pursuits.

Public reporting requirements have been popular across social enterprise forms, including benefit corporations, BLLCs, and SPCs. This trend is consistent with other forms of public accountability. Even some non-social enterprise businesses choose to prepare and disclose sustainability reports, sharing how the business has worked in furtherance of a sustainable global economy.[108] Such reporting to the public is seen to be a means of accountability and can build trust in businesses.[109] Public reporting in the context of social enterprise may serve similar functions.

In particular, both the 2014 and 2017 versions of B Lab Model Legislation require that a benefit report be prepared and delivered to shareholders within 120 days following the end of the fiscal year or alongside other annual reports. [110]This report must also be posted to a public portion of the company website, with the alternative option of providing free copies upon request, if no such website exists.

107 Verheyden, *supra* note 111 (noting that shareholders may be dissuaded from bringing a lawsuit to enforce a corporation's benefit purpose, because it might result in higher financial costs to the company, and then subsequently this would result in less profit for shareholders).

108 *See About Sustainability Reporting*, GRI https://www.globalreporting.org/information/sustainability-reporting/Pages/default.aspx (last visited July 12, 2020).

109 *See* About GRI, GRI https://www.globalreporting.org/information/about-gri/Pages/default.aspx (last visited July 12, 2020).

110 *2017 Model Legislation*, *supra* note 12, § 402; *2014 Model Legislation*, *supra* note 79, § 402.

The B Lab Model Legislation has largely been adopted in existing regulation across all forms, beyond just the benefit corporation form. Still, there have been some variations across the states. There has been some minimal variation on the number of days or the exact timing requirement, but most boards must provide shareholders with the benefit report within some specified time frame.[111]

Additionally, there has been variation in the mechanism of making the report publicly available. Many states follow the B Lab Model Legislation public website posting requirement. New Jersey is a minor exception, which does not include an alternative requirement if a company does not have a public portion of a company website.[112] Several other states have no public website posting requirement entirely, but these statutes expressly leave open the option for corporations to set additional public reporting requirements in the company organization documents.[113] Finally, benefit corporations in Minnesota have no requirements to make their reports either publicly available or even available to shareholders.[114] However, Minnesota does require filing with the Secretary of State, who then publishes a comprehensive list of reports on the State's publicly accessible website.

Uniquely, Hawaii's Sustainable Business Corporation requires a 60-day open comment period,[115] going beyond public reporting to public participation. This requirement resembles the administrative notice-and-comment period.[116] However, it is unclear how this process works in practice for a company without a website.[117]

111 *See, e.g.*, Okla. Stat. tit. 18, § (requiring the benefit report to be submitted within 120 days of the end of the fiscal period, or together with other annual reports to the shareholders).

112 N.J. Stat. Ann. § 14A:18-11.

113 For example, consider each of the various social enterprise forms in Delaware (benefit corporation, BLLC, and SPBLP), Oklahoma, Texas, and Wisconsin.

114 Minn. Stat. § 304A.301 (2019).

115 Haw. Rev. Stat. § 420D-11.

116 *See, e.g.*, *The Basics of the Regulatory Process*, EPA https://www.epa.gov/laws-regulations/basics-regulatory-process (last visited July 12, 2020).

117 For example, Asio Corporation, Hu`ena Power, Inc., Sustainable Services Hawai'i Corp., among others, each did not have public-facing websites as of June 2020.

Certification and Reporting Requirements for Social Enterprises

Filing requirements for benefit corporations

The 2014 and 2017 versions of the B Lab Model Legislation both contain provisions for filing of the benefit report with the Secretary of State.[118] Furthermore, both contain language suggesting a fee may be charged to the corporation for filing, without specifying a dollar amount.

State agency filing requirements could serve to promote transparency and to prevent abuses of the new legal forms. They can be used to assist states in monitoring the compliance of benefit corporations. For example, in Rhode Island, the benefit corporation enabling statute explicitly states that the Secretary of State can return the report after filing and request corrections within 30 days.[119] Another potential purpose of a filing requirement is to make the report a public record and therefore accessible to members of the public upon request.

Despite its inclusion in the Model Legislation, and its potential benefits for accountability, of the 37 benefit corporation statutes, over half omitted any requirement that the benefit report be filed with a state agency. Additionally, several bills introduced in 2019 discarded the requirement to file with the Secretary of State.[120] In fact, both bills that were successfully enacted in 2019 omitted the filing requirement. With respect to the bills that were proposed but not enacted, only Alabama introduced a bill that tasked the Secretary of State with the creation of a public database of all benefit reports.[121] Matching this seeming disinterest in filing requirements, the proposed amendment to the 2020 MBCA requires preparation of a benefit report but does not even mention filing the report with any state agency.

Filing requirements may be unpopular because they impose a cost both on the state and on the corporations themselves. Furthermore, some legislatures may be concerned about filing requirements discouraging small businesses and start-ups from becoming benefit corporations.

Third-party standards

Third-party standards serve as a kind of yardstick, which can be used to measure companies against past performance from year-to-year, or against other companies using the same standard. It should be noted that, unlike third-party certifications, third-party standards do not assess or evaluate individual companies. Still, it is a tool to support consistent and pre-defined reporting requirements.

Third-party standards appear to be prevalent within social enterprise legislation, as well as in broader sustainability initiatives. Proponents of third-party standards include major business leaders in both corporate and investment spheres. For example, the Sustainability Accounting Standards Board (SASB) serves as a tool for investors to identify sustainable businesses.[122] The focus is on providing information to allow investors to assess for themselves the sustainability of a corporation. This echoes the goals of third-party standards in benefit corporation legislation to promote information-sharing between businesses and their stakeholders.

The interest in third-party standards may be a recognition that sustainable investments align with economic interests.[123] For example, as previously noted, the CEO of BlackRock forecasts a significant reallocation of capital into more sustainable investments, as investors are "recognizing that climate risk is investment risk."[124] Elsewhere in the investment community, this also underlines

118 *2017 Model Legislation*, *supra* note 12, § 402(d); *2014 Model Legislation*, *supra* note 79, § 402(d).

119 7 R.I. Gen. Laws § 7-5.3-13(e).

120 These states include Delaware, Georgia, Iowa, Maine, New Mexico, and Oklahoma. Ohio lacks a statutory benefit report requirement, and thus also has no filing requirement.

121 S.B. 427, 2019 Leg., Reg. Sess. § 10A-12-3.03(d) (Ala. 2019).

122 *See Standards Overview*, Sustainability Acct. Standards Board, https://www.sasb.org/standards-overview/ (last visited July 12, 2020).

123 Billy Nauman, *Sharp Rise in Number of Investors Dumping Fossil Fuel Stocks*, Fin. Times (Sept. 9, 2019), https://www.ft.com/content/4dec2ce0-d0fc-11e9-99a4-b5ded7a7fe3f

124 Larry Fink, A Fundamental Reshaping of Finance, BlackRock https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter (last visited July 12, 2020).

the goal of the SASB, which aims to provide investors with clear information to identify sustainable investments based on metrics deemed "financially material."[125] Similarly, the Task Force on Climate-Related Financial Disclosures also provides a framework for informing investors of financial risk associated with climate change.[126] The investment industry appears supportive of these third-party standards for providing access to financially relevant information on sustainability.[127]

Both the 2014 and 2017 versions of B Lab Model Legislation require benefit corporations to issue a benefit report that assesses their performance in creating a public benefit against a third-party standard.[128] While benefit corporations can assess their own performance, the standard itself must be created by a third party with no interest in the corporation. These benefit report provisions are meant to act as a safeguard "against the abuse of benefit corporation status," by allowing shareholders and other stakeholders to judge the performance of the company against a recognizable standard.[129]

While the B Lab Model Legislation does not require any specific standards, the choice of standard must be consistent for each year of reporting. Furthermore, any changes in the choice must be explained in the benefit report. This was intended to standardize the report between different years to allow for easier comparison.[130]

Third-party standards requirements have been relatively uncontroversial. Nearly every state that has provided for the benefit corporation legal form has followed the Model Legislation. The single exception is Wisconsin,[131] which makes the third-party standard optional. However, the act still requires the benefit corporation to use a standard applied consistently from year to year and explaining any deviations in its reports.

A similar trend can be observed in BLLC legislation. Nearly all five states that have adopted the BLLC form as of 2019 require the use of a third-party standard in the creation of the benefit report.[132] The legislation in Pennsylvania and Utah both require BLLCs to explain why they have chosen a specific third-party standard and include any corporate connections they might have with the third party creating the standard in their report.[133]

L3Cs have the least third-party standard requirements. Their reporting requirements tend to match the requirements of the traditional LLC in each given state.

Despite the prevalence of these requirements, the proposed amendment to the 2020 MBCA does not require third-party standards. Instead, the board of directors may adopt any standards, including self-designed standards, to measure performance with respect to the benefit purpose. Still, individual companies may choose to include a third-party standard requirement in their charter or by-laws.[134]

Third-party certification

Third-party certification is one potential mechanism for greater transparency without direct government involvement in social enterprises. The Business Roundtable suggests that all companies already "share a fundamental commitment to all of our stakeholders."[135] In the absence of legal accountability mechanisms, third-party certification could serve as a private means of providing some independent accountability of the Business Roundtable member companies.

125 *Standards Overview*, *supra* note 129.

126 *About the Task Force*, Task Force on Climate-Related Fin. Disclosures, https://www.fsb-tcfd.org/about/ (last visited July 12, 2020).

127 *See, e.g.*, Fink, *supra* note 131 (voicing support of the frameworks developed by the SASB and the Task Force on Climate-related Financial Disclosures). In fact, BlackRock is setting its own disclosure requirements based on these third-party standards.

128 *2017 Model Legislation*, *supra* note 12, § 102.

129 *Id.* § 102 cmt. "third party standard."

130 *Id.*

131 Wis. Stat. § 204.401.

132 Only Delaware omits the third-party standard requirement.

133 15 Pa. Cons. Stat. § 8898(a)(2); Utah Code. Ann. § 48-4-401.

134 *Proposed MBCA*, *supra* note 15, § 17.05.

135 *Business Roundtable Statement*, *supra* note 5.

Certification and Reporting Requirements for Social Enterprises

However, both the 2014 and 2017 versions of B Lab Model Legislation do not include any requirements for third-party certification. This has been followed in both currently enacted, and newly proposed state legislation. Most state legislation expressly stipulates that third-party certification is not required, while others omit mention entirely. None of the proposed bills in 2019 required third-party certification.

Despite the absence of a third-party certification requirement in social enterprise legislation, the reverse is not true. Legal incorporation as a benefit corporation or equivalent legal structure within two years of third-party certification by B Lab is expected of certified B Corps that are incorporated in jurisdictions where specialized legal forms for social enterprises have been authorized. A non-compliant B Corp may have its certification revoked or may not be re-certified by the B Lab. If there are no such legal forms in the jurisdiction where a B Corp is incorporated, B Lab expects the B Corp to support the passage of benefit corporation legislation in its jurisdiction of incorporation.[136]

Enforcement mechanisms for reporting non-compliance

Both the 2014 and 2017 versions of the B Lab Model Legislation permit enforcement proceedings for inadequate reporting. However, this remedy is limited to only those who ordinarily have standing to bring a benefit enforcement proceeding.[137] The proposed amendment to the 2020 MBCA advises states to create a "judicial remedy for shareholders that do not receive an annual benefit report after request," recommending a procedure which follows the same protocol for shareholders requesting financial statements.[138]

Penalties for filing non-compliance, however, are less clear. Most statutes, including the B Lab Model Legislation, are silent as to the remedies available for failure to file the benefit report with the Secretary of State.[139] However, some states have included penalties for non-compliance. Rhode Island, for example, imposes a $25 penalty on benefit corporations that fail to file their report within 30 days of the deadline.[140] Additionally, in New Hampshire,[141] if the corporation is deemed to be in non-compliance, the Secretary of State administratively shall dissolve the corporation's status as a benefit corporation. In New Jersey,[142] the Secretary of State has discretion to dissolve the benefit corporation if it fails to file after two years. Minnesota has the harshest penalty. Failure to file before the deadline will lead to revocation of benefit corporation status with a $500 fee to renew status as a benefit corporation.[143] Furthermore, in the case of an intentional failure to file an annual benefit report, any shareholder may obtain payment for the fair value of their shares as a result of revocation of public benefit corporation status. Notably, and possibly a result of the state's harsh sanctions, in 2016, all active benefit corporations had filed their benefit reports.[144]

136 This requirement applies only to businesses that are organized in a state where such legal forms are available. *Legal Requirements*, Certified B Corp., https://bcorporation.net/certification/legal-requirements (last visited July 12, 2020).

137 *See* discussion *supra* "Changes as to who can bring enforcement proceedings."

138 *Proposed MBCA*, *supra* note 15.

139 As the proposed amendment to the 2020 MBCA makes no mention of filing the benefit report with the Secretary of State, it is silent on any remedies for the failure to do so.

140 7 R.I. Gen. Laws § 7-5.3-13.

141 N.H. Rev. Stat. Ann. § 293-C:13(V).

142 N.J. Stat. Ann. § 14A:18-11(d)(2).

143 Minn. Stat. § 304A.301.

144 Verheyden, *supra* note 111, at 71-73. *See also Business & Liens Data*, Minn. Secretary St., https://www.sos.state.mn.us/business-liens/business-liens-data/

Case Studies

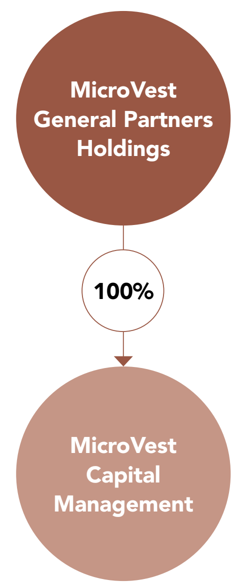
There are two tests to assess whether these social enterprise forms are succeeding. First, there is the market test. This market test is based on how many state legislatures are interested in adopting social enterprise legislation and how many entrepreneurs are interested in creating or transforming their business into a social enterprise form. The second test involves the judiciary because judges interpret and therefore set the boundaries of the laws being enacted to house social entrepreneurial activities.

Lessons learned from MicroVest[145]

In 2019, MicroVest General Partners Holdings changed its legal status to a Delaware statutory public benefit limited liability company (PBLLC). The conversion follows just shortly after Delaware passed legislation adopting the PBLLC form in 2018.[146] This case study provides insight into the early interest that this legal form is already generating, although time remains to tell both how many and what other kinds of companies may choose the PBLLC form.

MicroVest General Partners Holdings is owned by key team members and three nonprofit institutions: CARE,[147] Mennonite Economic Development Associates (MEDA),[148] and the Cordes Foundation,[149] each with an independent commitment to social responsibility. Additionally, as of early 2020, current and former employers collectively own approximately 20% of the shares.[150] The decision to convert to a PBLLC was ratified by 100% of these various shareholders.

MicroVest General Partners Holdings is a holding company and is the sole owner of its subsidiary MicroVest Capital Management (MicroVest). Thus, all the aforementioned shareholders have indirect ownership of MicroVest.



MicroVest, the subsidiary, is a private, for-profit asset management firm. As of March 31, 2020, the firm manages approximately $314 million in assets.[151] The firm provides discretionary investment advisory services to private funds, specializing in private debt capital for "Responsible Financial Institutions"[152] that lend to under-banked borrowers and small businesses in emerging markets. It is one of the first US-based microfinance investors. Its public benefit purpose is "to create scalable investment opportunities that support enterprising ventures and projects in underserved or underfinanced sectors and communities worldwide."[153]

145 MicroVest, https://microvestfund.com/ Telephone Interview with Monika Scherer, Gen. Counsel & Chief Compliance Officer, MicroVest (Mar. 9, 2020).

146 With the passage of the PBLLC legislation, Delaware joined a growing number of states to adopt multiple social enterprise forms. *See* discussion *supra* "States with multiple forms."

147 "CARE works around the globe to save lives, defeat poverty and achieve social justice." *Mission & Vision*, CARE, https://www.care.org/about/mission-vision

148 MEDA "is an international economic development organization whose mission is to create business solutions to poverty." *About MEDA*, MEDA, https://www.meda.org/about/about-meda

149 "We connect social entrepreneurs with the resources they need, convene events to strengthen the ecosystems of impact investing and social entrepreneurship, and catalyze 100% of our balance sheet for impact." Cordes Found., https://cordesfoundation.org/

150 Once the employee equity incentive plan is fully deployed, this has the potential of increasing to 35%.

151 *Our Firm*, MicroVest https://microvestfund.com/about-us/our-firm/ (last visited 07/12/2020).

152 MicroVest identifies these as lending institutions that are both financially sound and socially responsible. For more information, see MicroVest, 2019 Impact Report (2019), https://microvestfund.com/wp-content/uploads/2020/01/MicroVest_2019ImpactReport_FINAL_pages.pdf

153 Our Firm, *supra* note 158.

Structure of the conversion

Monika Scherer, the general counsel and chief compliance officer of MicroVest, recalls that the board decided to change the incorporation status to a PBLLC at the holding company level, rather than at the subsidiary management level, for several reasons. First, there was a concern about how to fully operationalize the PBLLC requirement to take into account all stakeholders (shareholders, clients, employees, broader community, environment) in decision-making at the asset management level when investment advisors also have a separate set of regulated fiduciary duties to pursue the best interests of their clients.[154] This indicates that MicroVest is taking seriously the additional fiduciary duties posed by the PBLLC as requirements with real legal consequence.

Second, the board chose to organize as a PBLLC at the parent company level because it wanted the public benefit to encompass more than just asset management and extend to the creation and scaling of financial inclusion investment products. While the management company retains its fiduciary duties for the day-to-day decisions and the specific details of each investment position, it must still fit within the overarching strategy that comports with the mission of the holding company. This also introduces the purpose at the early stages of developing the investment strategy. In other words, the PBLLC form creates a mandate at the holding company level that when the management company considers new investment strategies, these new investment vehicles must pursue the mission of financial inclusion and be scalable by design.[155]

Conversion process

One of the chief challenges for MicroVest in the conversion process was simply being an early mover in a field where there is still much for the entire industry to learn. When transitioning its holding company into a PBLLC, Scherer recalls that the actual steps required to convert into a PBLLC were relatively simple. As an impact-driven asset management firm in financial inclusion, it already satisfied the reporting requirements and was already operating with a public benefit purpose in mind. The conversion process required only a few filings in Delaware, as well as changes to the pre-existing operating agreement.

Rather, Scherer found that the most challenging aspect of the transition was that very few entities had converted to a PBLLC in Delaware before, and there was little experience with the Delaware PBLLC. While there were not a lot of steps required, execution was somewhat challenging due to the lack of precedent. After reaching out to Delaware lawyers for specific guidance, none had experience converting an LLC to a PBLLC. Additionally, Scherer noted that while there was ample information online relating to public benefit corporations, there was little practical guidance about the PBLLC statute. For example, there was no information or guidance specifically related to the PBLLC form about how to draft public benefit statements and how to restructure the LLC operating agreement. Despite these challenges, the board was determined to convert due to the benefits and opportunities this new legal form provided.

Conversion motivation

Not everyone in the legal industry is in full support of the BLLC form. One critic in particular suggests that it is entirely useless, as it provides no additional accountability mechanisms and the conventional LLC form permits significant flexibility in modifying the operating agreement and

154 *See* 17 C.F.R. § 276 (2005).

155 For example, buying distressed real estate may be a legitimate commercial investment strategy. However, it does not fit within the public benefit purpose of the holding company, and thus the management company would not pursue it.

defining the purpose of the company.[156] Additionally, as discussed in the prior sections, the BLLC form, at this time, is significantly less popular than the benefit corporation.

Still, Scherer and her team saw that there was more to the BLLC than implicated in the criticism. At the heart of the board's decision is mission preservation. As MicroVest continues to scale and grow, there was an interest at the level of the board to preclude mission drift. The board and shareholders wanted to ensure that the firm's mission was hard-wired into company documentation.

The board was attracted to the PBLLC form because of the statute's two-thirds voting majority protection on the company's mission statement. The board was further comforted by the fact that the company's public benefit would be registered and protected in a public registry. In light of these legal requirements, the board also felt that the PBLLC sent a stronger signal to all stakeholders about MicroVest's deep commitment to social impact. Additionally, the board believed that this PBLLC form would differentiate it from other impact investment funds, as well as larger asset management funds. In this way, MicroVest could continue to grow and attract more institutional investors, while simultaneously preserving its mission. While some legal scholars question the usefulness of the PBLLC form, Scherer questions whether a general, modified LLC agreement would have provided sufficient protection of the benefit purpose and sent a strong-enough signal to its shareholders.

The public benefit statement

When asked what she would do differently if she could go back and do this process over again, Scherer emphasized that she would have front-loaded the discussion on the public benefit statement. Scherer noted that this public benefit statement was the most delicate change to the operating agreement and required input from key stakeholders. This benefit statement is at the core of why the Board of Directors chose to make the conversion. It needs to be strong enough to preserve the mission while also retaining enough flexibility to be inclusive of all stakeholders, compatible with SEC investment advisor fiduciary duties, and adaptable for future changes in products and investment strategies. Both companies and legislatures are working to define this careful balance in shaping social enterprise legislation as the industry explores what it means to be a for-profit institution with a benefit purpose.

Conclusion

MicroVest is one example of an early market test of the new PBLLC form in Delaware. Despite criticism of the BLLC form more generally, MicroVest views it as a valuable feature to ensure that as the company grows, its mission of financial inclusion is embedded into the company's DNA. Additionally, MicroVest's conversion indicates that it is possible to balance different sets of fiduciary duties in pursuit of a public benefit purpose. However, the challenges during the conversion process indicate a continued need for further development of practical guidance in the field of social enterprise. Ultimately, the decision to convert indicates that, at least for MicroVest, independent of any other tax or explicit regulatory incentives, the benefit purpose is enough to drive interest in some companies adopting a legal social enterprise form. It remains to be seen if there will be continued interest in this PBLLC form in Delaware. Additionally, as the SPBLP legislation is nearly identical to the PBLLC form, the activity and interest around the PBLLCs may also be a sample of what might come in the years to follow for SPBLPs. Now, more than ever, companies in Delaware will face an array of options in how to incorporate with a social purpose.

156 *See, e.g.*, Mohsen Manesh, *Introducing the Totally Unnecessary Benefit LLC*, 97 N.C. L. Rev. 603 (2019).

Benefit corporation lawsuit

Filed in 2019, *Pirron v. Impact Makers, Inc.*[157] was one of the first benefit enforcement proceedings in the United States.[158] The story of Impact Makers provides insight into both the potential risks and the benefits of organizing as a benefit corporation.

In 2006, Michael Pirron founded Impact Makers Inc., an IT consulting company based in Virginia. In December 2007, Impact Makers became a Certified B Corporation to further signal its commitment to public benefit and differentiate its business model.[159] From its founding and throughout its growth, Impact Makers remained purpose driven. It committed to donate all profits to charity and kept a low employee turnover rate in a high-turnover industry.[160] Despite, or potentially due to, its commitment to the public benefit, Impact Makers grew quickly. By 2012, Impact Makers made the Inc. 5000 list of the fastest-growing private companies in the US and remained on the list for six consecutive years.[161]

In 2015, Impact Makers restructured as a benefit corporation in Virginia.[162] Impact Makers initially issued two classes of shares. Class A shares were voting shares with no rights to any distributions. These shares were owned exclusively by IM Holdings, Inc., a nonprofit with the sole purpose of furthering the public benefit purpose of Impact Makers.[163] Class B shares were equity shares that had no voting rights and no transfer rights. One hundred percent of the Class B shares were gifted to The Community Foundation and Virginia Community Capital, two local nonprofits that committed to using the returns to further impact investments.[164]

Both Impact Makers and IM Holdings were run by the same volunteer board. Pirron was appointed the senior director of Impact Makers and the permanent director of IM Holdings. Together, the positions gave him the authority to veto any proposals to amend the governing documents of both corporations, to issue additional shares in Impact Makers, to pay dividends in Impact Makers, to award equity or stock options to employees of Impact Makers.[165] Additionally, as permanent director of IM Holdings, Pirron could designate his own successor.[166] Pirron allegedly leveraged this protective structure to block proposals that would pay the volunteer board and distribute larger bonuses to executives.[167]

In April 2019, the board ratified the sale of IM Holdings' ownership in Impact Makers to a newly formed company, Benefit Holdings Inc. Pirron voted against the sale. The board cited the "deadlock and operational paralysis that existed in the Impact Makers Board of Directors" as motivation for the sale.[168] In particular, the chair expressed concerns that Pirron could not be removed from the position of permanent director, even for cause.[169] The board received an opinion from an attorney asserting that Class A shares had no economic value or rights,

157 Pirron v. Impact Makers, Inc., CL19002358-00 (Va. Cir. Ct. 2019).

158 Tricia Dunlap, *Why the Impact Makers B Corp Lawsuit Matters to All of Us*, Dunlap L. (June 17, 2019), https://dunlaplawplc.com/why-the-impact-makers-b-corp-lawsuit-matters-to-all-of-us/

159 *Impact Makers, Inc.*, Certified B Corp., https://bcorporation.net/directory/impact-makers-inc (last visited July 13, 2020).

160 Leigh Buchanan, *From Corporate Consulting to Giving Away the Company Profits*, Inc. (Oct. 13, 2014) https://www.inc.com/leigh-buchanan/inc.500-how-i-did-it-impact-makers-michael-pirron.html

161 *Impact Makers*, Inc., https://www.inc.com/profile/impact-makers (last visited July 13, 2020).

162 *Third Amended and Restated Articles of Incorporation*, Filing No. 1504171208 (Apr. 28, 2015), https://cis.scc.virginia.gov/EntitySearch/BusinessFilings

163 Complaint for Petitioner at ¶¶ 19, 22, Pirron v. Impact Makers, Inc., CL19002358-00 (Va. Cir. Ct. 2019).

164 Scott's Addition Firm Gifts Itself to Charity, Richmond BizSense (Apr. 22, 2015), https://richmondbizsense.com/2015/04/22/scotts-addition-firm-gifts-itself-to-charity/ Impact Makers also left open the option to issue non-voting preferred Class C shares, which were later used to raise capital. *Id.* at ¶ 26.

165 Complaint for Petitioner, *supra* note 170, at ¶ 24.

166 *Id.* at ¶ 19.

167 *Id.* at ¶¶ 35, 58.

168 This deadlock was allegedly preventing Impact Makers from pursing its public benefit purpose. *Id.* at Exhibit 11 (Meeting of the Board of Director Minutes, IM Holdings, Inc. (April 11, 2019)).

169 *Id.*

and thus $1,000 was "far in excess of the value."[170] As a consequence, IM Holdings lost its voting power in Impact Makers, stripping Pirron's position of permanent director of any governance control. In the same month, Benefit Holdings acted to removed Pirron from his position as senior director of Impact Makers.[171]

Pirron ultimately sued Impact Makers, saying he was improperly removed as permanent director of the board through an illegitimate sale of the $18.1 million firm[172] for only $1,000, jeopardizing the company's philanthropic mission.[173] Moreover, Pirron claimed that the suit arose from the "coordinated efforts of the defendants to empower and enrich themselves by targeting and eliminating Michael Pirron's authority as permanent director…thus destroying [IM Holdings]'s purpose and gutting Impact Makers' public benefit mission." The suit also included allegations of breach of the unique fiduciary duties of benefit corporations to consider the impact of actions on all stakeholders.

Ultimately, a private settlement was reached between Pirron and Impact Makers. The settlement reversed the sale of IM Holdings' voting shares in Impact Makers, thereby reinstating Pirron's authority as permanent director.[174]

The issues facing Impact Makers may very well be just a standard power struggle among company leaders.[175] At the same time, it could also indicate that Impact Makers was struggling with a real tension between maximizing profits versus pursuing stakeholder interests. If this dispute is, at its core, about the preservation of Impact Makers' benefit purpose, this lawsuit could be upheld as one of the first true tests of the benefit corporation structure. To start, given Pirron's role designed to uphold the benefit purpose of the corporation, it raises questions about the effectiveness of a single appointed benefit director. Additionally, the use of a sale to shift governance control specifically tests the effectiveness of the additional, if any, legal protections that the benefit corporation form might provide.[176] Pirron's allegations of breach of fiduciary duties would also have pushed the courts to determine which standards to use in evaluating whether directors have sufficiently considered or pursued a benefit purpose.

The structure created by Pirron ultimately survived, despite the actions of the directors. Given that the lawsuit was settled, it is difficult to understand the role that Impact Makers' designation as a benefit corporation played and whether the missions of the company were given heightened protection as compared to a traditional C-corporation.

170 *Id.*

171 *Id.* at ¶ 1.

172 Independently valued in 2018. *Id.* at ¶ 37.

173 *Dunlap*, *supra* note 165.

174 John Reid Blackwell, *Richmond-Based Impact Makers and Its Founder Settle Lawsuit*, Richmond Times-Dispatch (June 18, 2019), https://www.richmond.com/business/richmond-based-impact-makers-and-its-founder-settle-lawsuit/article_f591f6b8-3925-5c9e-9f81-210480a31a34.html

175 Leading up to the attempted sale of the company, the board had allegedly attempted to remove Pirron's control of Impact Makers. In January 2018, the board of Impact Makers removed Pirron as CEO. Additionally, in negotiating the separation agreement, Pirron requested a non-compete waiver for the Metro Washington DC region. The board allegedly refused to honor his request unless he stepped down as permanent director of IM Holdings and permitted the board to name his replacement. The directors allegedly also threatened to sue Pirron if he did not sign their Board Departure Agreement. Complaint for Petitioner, *supra* note 170, at ¶¶ 42, 67–70.

176 *Cf.* Robert G. Eccles, Leo E. Strine and Timothy Youmans, *3 Ways to Put Your Corporate Purpose Into Action*, Harv. Bus. Rev. (May 13, 2020) (noting one key protection of a benefit corporation would be to require the consideration of stakeholder interests in the context of a sale).

Conclusion

With the Business Roundtable's paradigm-shifting statement on the purpose of the corporation, the enactment of a new social enterprise form in Delaware, and the filing of one of the first lawsuits involving a benefit corporation, 2019 was an exciting and thought-provoking year for those interested in social enterprise and the law.

Alongside these developments, some trends first observed in previous reports have continued; the benefit corporation continues to be the most popular social enterprise form, while the L3C and the SPC forms continue their periods of stabilization. We have also observed a recent uptick in popularity of the BLLC form, with many states considering passing legislation.

Trends in the social enterprise landscape indicate continued experimentation concerning the changing role of the benefit director, increased discretion in fiduciary duties, the changes as to who can bring enforcement proceedings, and changes in the reporting and certification requirements. This raises crucial questions, such as what is the added value of specialized enterprise forms and what new risks could arise? Should publicly traded companies have different requirements from privately held companies?

Although benefit corporations remain the most popular social enterprise form, should we expect the emergence of more legislation enacting BLLCs and SPBLPs in states that already have benefit corporation statutes? Does MicroVest's recent conversion to a BLLC indicate a continued need for alternative legal forms? Will more states follow Delaware's lead, conforming the statutory requirements across the different types of social enterprise forms? And will there be a re-emergence of the L3C and SPC forms?

Our case study and our reporting on the Impact Makers lawsuit are complementary examples of the opportunities and the potential pitfalls these forms provide for entrepreneurs. It remains to be seen how much litigation will emerge, and how judges will rule on benefit corporations.

Although still unanswered, these open questions about social enterprise forms have moved into the mainstream.

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