

University of Colorado Law School

Colorado Law Scholarly Commons

Articles

Colorado Law Faculty Scholarship

2017

Benefit Corporation Law

Mark J. Loewenstein

University of Colorado Law School

Follow this and additional works at: <https://scholar.law.colorado.edu/articles>



Part of the [Business Organizations Law Commons](#), [Legislation Commons](#), and the [State and Local Government Law Commons](#)

Citation Information

Mark J. Loewenstein, *Benefit Corporation Law*, 85 U. CIN. L. REV. 381 (2017), available at <https://scholar.law.colorado.edu/articles/873>.

Copyright Statement

Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact jane.thompson@colorado.edu.

HEINONLINE

Citation:

Mark J. Loewenstein, Benefit Corporation Law, 85 U.
Cin. L. Rev. (2017)

Provided by:

William A. Wise Law Library

Content downloaded/printed from [HeinOnline](#)

Tue Dec 5 11:15:18 2017

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)



Use QR Code reader to send PDF to your smartphone or tablet device

BENEFIT CORPORATION LAW

Mark J. Loewenstein*

I. INTRODUCTION

Since 2010, thirty-one states and the District of Columbia¹ have adopted legislation authorizing the creation of a benefit corporation,² and an additional seven states are considering such legislation.³ This legislation is based, to a greater or lesser extent, on Model Legislation (the Model Legislation)⁴ drafted for B Lab Company (B Lab), a Pennsylvania nonprofit corporation that has been the driving force behind the adoption of benefit corporation legislation across the country.⁵ Even those state statutes that vary from the Model Legislation have been significantly influenced by it.⁶ In this article, I explore some of the more troubling features of the Model Legislation and consider the non-Model Legislation variations adopted in Delaware and Colorado.

* Professor, University of Colorado Law School

1. ARIZ. REV. STAT. ANN. §§ 10-2401–10-2442 (2016); ARK. CODE ANN. §§ 4-36-101–401 (2016); CAL. CORP. CODE § 14600 (Deering 2016); COLO. REV. STAT. §§ 7-101-501–509 (2016); DEL. CODE. ANN. tit. 8, §§ 361–368 (2016); D.C. CODE §§ 29-1301.01–29-1304.01 (2016); FLA. STAT. ANN. §§ 607.601 – 607.613 (LexisNexis 2016); HAW. REV. STAT. §§ 420d-1–420d-13.805 (LexisNexis 2016); IDAHO CODE §§ 30-2001–2013 (2016); 805 ILL. COMP. STAT. ANN. §§ 40/1-40/5.01 (LexisNexis 2016); IND. CODE ANN. §§ 23-1.3-1-1–10-5 (LexisNexis 2016); LA. STAT. ANN. §§ 1801–1832 (2016); MD. CODE ANN., CORPS. & ASS'NS §§ 5-6c-01 to -08 (LexisNexis 2016); MASS. ANN. LAWS CH. 156e, §§ 1–16 (LexisNexis 2016); MINN. STAT. ANN. §§ 304a.001 – 304a.301 (LexisNexis 2016); MO. ANN. STAT. §§ 355 (West 2016); NEB. REV. STAT. ANN. §§ 21-401–21-414 (LexisNexis 2016); NEV. REV. STAT. ANN. §§ 78b.010-190 (LexisNexis 2016); N.H. REV. STAT. ANN. § 293-c:1–293-c:13 (LexisNexis 2016); N.J. STAT. ANN. §§ 14a:18-1–11 (West 2016); N.Y. BUS. CORP. LAW §§ 1701–1709 (LexisNexis 2016); OR. REV. STAT. ANN. §§ 60.750 – 770 (LexisNexis 2016); 15 PA. CONS. STAT. §§ 3301-3331 (2016); 7 R.I. GEN. LAWS §§ 7-5.3-1–7-5.3-13 (2016); S.C. CODE ANN. §§ 33-38-110 (2016); TENN. CODE ANN. §§ 48-28-101–109 (2016); UTAH CODE ANN. §§ 16-10b-101–16-10b-402 (LexisNexis 2016); VT. STAT. ANN. tit. 11a, §§ 21.01–08 (2016); VA. CODE ANN. §§ 13.1-782–791 (2016); WASH. REV. CODE ANN. §§ 23b.25.005 to .150 (LexisNexis 2016); W. VA. CODE ANN. §§ 31f-1-101–31f-5-501 (LexisNexis 2016).

2. The legislation in some of these jurisdictions does not use the term “benefit corporation,” but rather employs some variation of it. For instance, the Colorado and Delaware acts use the term “public benefit corporation.” This article uses the term benefit corporation to refer to any entity formed under these laws.

3. *State by State Status of Legislation*, BENEFIT CORP., <http://benefitcorp.net/policymakers/state-by-state-status> (last visited Oct. 17, 2016) (pending in Alaska, Oklahoma, Michigan, Georgia, Ohio, Iowa, and Kentucky).

4. *Model Benefit Corporation Legislation*, BENEFIT CORP. (Apr. 4, 2016), http://benefitcorp.net/sites/default/files/Model%20Benefit%20Corp%20Legislation_4_16.pdf.

5. *See About B Lab*, B CORP., <https://www.bcorporation.net/what-are-b-corps/about-b-lab> (last visited Oct 17, 2016).

6. *See* Alicia E. Plerhoples, *Delaware Public Benefit Corporations 90 Days Out: Who's Opting In?*, 14 U.C. DAVIS BUS. L. J. 247, 253 (2014) (“The statutory provisions of benefit corporations vary slightly from state to state, but are each based on the [Model Legislation] . . .”).

But first, a word about the term “benefit corporation.”

B Lab and its supporters have been insistent that jurisdictions considering benefit corporation legislation adhere to the principles of the Model Legislation or eschew the term benefit corporation, even though B Lab does not own any rights to the term.⁷ The widespread adoption of benefit corporation legislation and the influence of the Model Legislation on that legislation are testaments to the successful efforts of B Lab. In fact, all but five of the adopting jurisdictions do use the term benefit corporation and hew fairly closely to the Model Legislation.

B Lab’s insistence on some semblance of uniformity in benefit corporation legislation is rational. Investors, consumers, and others dealing with what purports to be a benefit corporation should be able to assume that it shares important characteristics with all other corporations that are called benefit corporations, irrespective of where that corporation may have been incorporated.⁸ On the other hand, as a practical matter will investors and consumers differentiate between a “benefit corporation” and a “public benefit corporation” (the term used in Delaware and Colorado) or a “benefit company” (the term used in Oregon)? It seems unlikely that they would.⁹ In any case, if an investor or consumer were truly concerned with the way in which the benefit corporation operated, he or she would have to do more than just rely on the fact that the corporation was organized under the benefit corporation provisions, a topic to which I will return below. To do otherwise would be like treating all foods that are promoted as “healthy” as being comparably healthy. B Lab recognized this dilemma from its very inception and has created a certification route for benefit corporations. If a benefit corporation meets certain standards specified by B Lab, it is eligible for certification as a Certified B Corp, a sort of “Good

7. The author was a member of a Colorado Bar Association committee that worked on benefit corporation legislation. During the course of that effort, as more fully documented in Herrick K. Lidstone, Jr., *The Long and Winding Road to Public Benefit Corporations in Colorado*, COLO. LAW., Oct. 30, 2015, at 39, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2266654, the author was told by representatives from B Lab that they would actively oppose any benefit corporation legislation that did not meet with their approval, but we (the Bar committee) were free to propose legislation that did not employ the “benefit corporation” term. The B Lab web site says this about the issue: “Using the model legislation ensures that your state remains consistent with other states that have passed the legislation. This is particularly important for investors who rely upon this consistency to reduce their due diligence requirements when evaluating a company. The ability to recognize that a benefit corporation is the same in Illinois as it is in Florida allows the free market to function effectively.” *The Model Legislation*, BENEFIT CORP., <http://benefitcorp.org/attorneys/model-legislation> (last visited Oct. 17, 2016).

8. *The Model Legislation*, *supra* note 7.

9. *Id.* (The B Lab web site supports this conclusion: “The new Delaware entity is technically called Public Benefit Corporation (or PBC), but will typically be referred to colloquially as benefit corporation.”).

Housekeeping Seal of Approval.”¹⁰

II. SOME PROBLEMS WITH THE MODEL LEGISLATION

The Model Legislation was drafted by Bill Clark, a Philadelphia lawyer, for his client, B Lab.¹¹ As a result, the Model Legislation did not have the benefit of a vetting process that other model legislation may receive.¹² For instance, model legislation promulgated by the American Law Institute (ALI), such as the Model Penal Code, benefits from the input of a diverse group of advisors and consultants. These acts are ultimately subject to a vote of approval by the membership of the ALI and the entire process typically takes many years.¹³ That vetting process helps insure a final product that represents the input of many experts from across the entire country. Perhaps because of the absence of such a process, the Model Legislation suffers from a number of problems. Four of those problems, each of which was addressed in some way by the Delaware and Colorado benefit corporation acts, are described below.

A. *The Purpose Clause*

The Model Legislation has been revised, to the better, since its initial publication in 2010. Nevertheless, some fundamental problems remain, the first and foremost of which is its purpose clause. Unlike a regular corporation, a benefit corporation must have as a purpose “creating a general public benefit,”¹⁴ which is defined in the Model Legislation as “[a] material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations.”¹⁵ All but a handful of businesses, however, cannot avoid having a negative impact on the environment¹⁶ and even the most “green” businesses will have some sort of a carbon footprint and will

10. See *How to Become a B Corp*, B CORP., <https://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp> (last visited Oct 17, 2016).

11. See *The Model Legislation*, *supra* note 7.

12. *Id.* The web site where the Model Legislation is posted does state that it “has evolved based on input from state legislatures, state bar associations, Secretaries of State offices, Attorney General offices, nonprofit groups and businesses.” *Id.* This input, however, occurred after the Model Legislation was initially published and a comparison of that version and the most recent version (dated April 4, 2016) indicates only minimal changes.

13. *How the Institute Works*, THE AM. L. INST., <https://www.ali.org/about-ali/how-institute-works/> (last visited Oct. 17, 2016).

14. *Model Benefit Corporation Legislation*, *supra* note 4, § 201(a).

15. *Id.* § 102.

16. A company in the business of cleaning up toxic waste dumps might be one that has a material positive effect on the environment.

use some nonrenewable energy resources. For instance, the B Lab website lists, and includes a brief description of, certified B Corps, among which is a company called Elemental Herbs.¹⁷ According to the Elemental Herbs website, the company's mission is "to harness the natural powers of the environment's purest, most elemental ingredients and organic herbs in order to offer natural healing products that are good for people and good for the earth."¹⁸

Elemental Herbs reports on the B Lab website that it increases its use of renewable energy annually, minimizes travel and its carbon footprint, and that more than 5% of its energy comes from renewable sources.¹⁹ The company is obviously proud of its environmental policies. Another way to read this disclosure, however, is that more than 90% of the energy that Elemental Herbs uses comes from nonrenewable sources and that it has a carbon footprint from travel and other activities. Not disclosed in its listing on the B Lab website, but disclosed on its own website, is that Elemental Herbs ships its products via FedEx, UPS, or the U.S. Postal Service,²⁰ each of which, of course, has a negative effect on the environment. Not disclosed on either the B Lab website or the Elemental Herbs website is how the company gets the herbs and other raw materials and ingredients that it needs for its product line to its production facility. Presumably, this material is transported in some way that has a negative environmental impact. What this demonstrates is that Elemental Herbs can only really seek to minimize its environmental impact; it cannot have a *positive* impact on the environment. Moreover—and this may be a mere quibble with the language of the Model Legislation—Elemental Herbs is in no position to "create" this or any general public benefit.²¹

The general public benefit definition has a second problem: in many instances what is good for the environment (e.g., shutting down a plant that is powered by a nonrenewable fuel) is bad for society. A plant shutdown results in unemployment, which, in turn, has secondary negative effects on families, the local community, and other businesses, such as suppliers, who are dependent on that plant, to name just a few negative effects. The reverse is also true: what may be good for society

17. *All Good by Elemental Herbs*, B CORP., <https://www.bcorporation.net/community/all-good-elemental-herbs> (last visited Oct, 17 2016).

18. *Good Story*, ELEMENTAL HERBS, <http://www.elementalherbs.com/about-us-1/> (last visited Oct 17, 2016).

19. *All Good by Elemental Herbs*, *supra* note 17.

20. *Shipping*, ELEMENTAL HERBS, <http://www.elementalherbs.com/shipping/> (last visited Oct 17, 2016).

21. See Mark J. Loewenstein, *Benefit Corporations: A Challenge to Corporate Governance*, 68 BUS. LAW. 1007, 1014 (2013) ("The Model [Act] provides no guidance as to what it means to 'create' a general . . . public benefit A more apt term may be 'pursue.'").

may be bad for the environment. Communities compete vigorously for new factories and other businesses because increased employment and economic activity is good in so many ways for a community, yet inevitably, there is a negative effect on the environment. In sum, the required general public benefit purpose clause creates an unrealistic and conflicting mandate on the benefit corporation. The Colorado and Delaware statutes, which are discussed below, address this shortcoming.

Finally, the Model Legislation permits a benefit corporation to have as a purpose a “specific public benefit,” but such a purpose must be in addition to, not in lieu of, the general public benefit purpose described above. The Model Legislation lists examples of specific public benefit purposes, e.g., “providing low-income or underserved individuals or communities with beneficial products or services; promoting economic opportunity for individuals or communities beyond the creation of jobs . . . ; . . . improving human health; [and] promoting the arts, science, or advancement of knowledge.”²² These are all worthwhile activities, but if a corporation is formed to achieve one or more of the goals, say promoting the advancement of knowledge, it cannot use the benefit corporation provisions unless it also has as a purpose of creating a material positive impact on society and the environment. It may be the organizers determine that they cannot achieve both the general public benefit and the specific public benefit in which they have a particular interest. They therefore must forgo the benefit corporation label. The Delaware and Colorado approach also corrects this, as more fully described below.

B. The Annual Report

The Model Legislation requires the benefit corporation to prepare an annual report describing, among other things, “[t]he ways in which [it] pursued [the] general public benefit during the year and the extent to which [the] general public benefit was created.”²³ The report must be sent to shareholders, posted on the company’s web site, and filed with the secretary of state.²⁴ As noted above, the benefit corporation likely cannot “create” a “material positive impact on society and the environment.” More difficult, however, is the requirement that the benefit corporation assess its “overall social and environmental

22. *Model Benefit Corporation Legislation*, *supra* note 4, § 102.

23. *Id.* § 401(a)(1)(i).

24. *Id.* § 402. Most states that have adopted benefit corporation legislation have done away with the filing requirement, including California, Colorado, Connecticut, Delaware, Florida, Hawai’i, Idaho, Illinois, Indiana, Louisiana, Maryland, Montana, Nevada, New York, Oregon, Tennessee, Virginia, Vermont, Washington, and West Virginia.

performance”²⁵ against a “third-party standard” that meets certain defined criteria set forth in the benefit corporation statute.²⁶ Among other things, for instance, the Model Legislation requires that the selected third-party standard have publicly available information about the “identity of the directors, officers, material owners, and the governing body of the entity that developed and controls revisions to the standard.”²⁷ It is unusual, to say the least, for legislation to require companies to assess themselves using a third-party standard that satisfies such detailed criteria. This is the sort of requirement best left to the private sector; that is, a certifying organization, such as B Lab, might insist that as a condition to receiving and maintaining a B Corp certification, the applicant must engage in a self-assessment along the lines that the Model Legislation mandates. But the *state* interest in such requirement is difficult to see and, inasmuch B Lab meets the statutory requirement of providing a third-party standard, smacks of self-interest.

More importantly, however, one might question the wisdom of requiring such an annual report. How can a company reasonably assess the extent to which its actions had a material positive effect on society and the environment? How could Elemental Herbs, for instance, measure its carbon footprint, given that it ships its products all over the country (and, perhaps, the world)? And what would be the value of such an assessment? Its report for 2016, posted on the B Lab web site, is opaque, to say the least.²⁸ Elemental Herbs assesses its environmental practices with a score of “23,” but its community practices at “0,” with an “overall” score of “106.” There is no indication what these scores mean, except that a footnote indicates that to maintain its B Corp certification, the reporting benefit corporation needs a minimum score of 80.

Moreover, like almost all benefit corporations, Elemental Herbs is a privately held business. Wouldn't its owners/employees be fully aware of its activities without seeking to quantify them? The requirement of an annual report is one that investors in a benefit corporation can insist upon as a condition to their investment, if they so desire, and shape that report in a way that is meaningful to them. As to others, such as consumers who may be interested in an assessment of the societal and environmental impact of a benefit corporation, it is fanciful to think that they will go to a company's website, download the report, and then be

25. *Id.* § 401(a)(2).

26. *Id.*

27. *Id.* § 102.

28. *All Good by Elemental Herbs 2016 B Impact Report*, B CORP., <https://www.bcorporation.net/community/all-good-elemental-herbs/impact-report/2016-01-25-000000> (last visited Oct. 17, 2016).

able to make an intelligent decision as to how the company's performance compares to other possible purveyors of the goods or services that they are interested in. The Elemental Herbs report amply bears this out. The certification of a third party is much more useful to the consumer and private ordering is much more efficient for the investor. The Delaware statute addresses the annual report in a more evenhanded fashion, as more fully developed below.

C. The Benefit Enforcement Proceeding.

The Model Legislation creates a new cause of action, called a "benefit enforcement proceeding" and defined as a claim for "(1) failure of a benefit corporation to pursue or create [the] general public benefit or a specific public benefit set forth in its articles; or (2) violation of any obligation, duty, or standard of conduct under this chapter."²⁹ Section 305 of the Model Legislation makes clear that a benefit enforcement proceeding is the exclusive cause of action against the benefit corporation or its directors or officers for claims covered by its definition and that the benefit corporation "shall not be liable for monetary damages."³⁰ The benefit enforcement proceeding may be brought "directly" by the benefit corporation or "derivatively" by shareholders owning at least 2% of the outstanding stock; a director; shareholders of the parent corporation of a benefit corporation; or "other persons as specified in the articles of incorporation or bylaws of the benefit corporation."³¹ Finally, two other sections of the Model Legislation (sections 302(e) and 303(c)) exonerate directors and officers, respectively, from personal liability.

There are problems with this statutory scheme. First, it is odd, to say the least, for a corporation to bring a "direct" cause of action against its officers or directors for nonmonetary relief. Are we to presume that the board of directors would authorize a cause of action seeking nonmonetary relief against themselves for, say, failing to create a general public benefit? That is inconceivable: why would they do such a thing and what good could possibly come of it?

Second, as to derivative actions, the Model Legislation provides standing to directors who, traditionally, do not have standing to maintain a derivative action; typically only shareholders have standing to maintain a derivative action.³² More fundamentally, any such derivative action seems doomed to failure. Under the evolving jurisprudence of

29. *Model Benefit Corporation Legislation*, *supra* note 4, § 102.

30. *Id.* § 305.

31. *Id.* § 305(c).

32. *See, e.g.*, FED. R. CIV. P. 23.1(b).

derivative litigation, any shareholder who desires to maintain such an action must first make a demand on the board of directors that it take some action with respect to the wrong of which the shareholder complains, unless the shareholder can plead, with particularity, why such demand would be futile.³³ If the board refuses the demand, its decision would be protected by the business judgment rule. The plaintiff–shareholder would have to overcome the presumptions of that rule, presumptions that protect the decision from judicial examination.³⁴ Overcoming those presumptions is, thus, a high bar for the plaintiff. If the board rejects the demand, the shareholder’s role in the litigation is over.³⁵ Similarly, if the board accepts the demand, “the corporation supplants the derivative plaintiff for the purpose of enforcing its corporate rights.”³⁶ Finally, even if the shareholder is able to prosecute the action because, for instance, it was able to avoid the demand requirement, the board of directors can appoint a “special litigation committee” to consider whether the action should go forward or on what basis it should be resolved.³⁷ Consequently, and especially since monetary relief is precluded by the statute, there is little incentive to bring such a claim. Unsurprisingly, there are no reported instances of derivative litigation involving a benefit corporation.

Third, the persons with the greatest incentive to sue the benefit corporation—the beneficiaries of its specific public benefit—are expressly denied standing unless the articles or bylaws otherwise provide, and even then these persons would not be able to obtain monetary relief. And, it is difficult to imagine a benefit corporation providing in its articles or bylaws that members of the public have standing to sue it for failing to “create or pursue” a general or specific public benefit.

In sum, the benefit enforcement proceeding provisions provide an ephemeral remedy against (and perhaps for) the benefit corporation that does not create or pursue the public benefits set forth in its articles. I surmise that the drafters determined that some remedy was necessary, but the remedy so provided is, at best, an illusion of one. The drafters of the Delaware act appear to agree with this assessment, as more fully

33. Delaware has adopted the “demand futility” rule. See *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984). A number of states have adopted the “universal demand” rule that is set out in the MODEL BUS. CORP. ACT § 7.42 (ABA 2002) and requires demand in all cases.

34. See generally, JAMES D. COX & THOMAS L. HAZEN, *BUSINESS ORGANIZATIONS LAW* 198–200 (3rd ed. 2011).

35. *Id.* at 454 (“Most courts hold that, if an independent board decides in good faith against the demand (that is, rejects the demand), the directors’ refusal to sue falls within the business judgment rule, and the suit must be dismissed.”).

36. *Id.* at 453–54.

37. *Id.* at 459–68.

described below.

D. The Benefit Director

The early versions of the Model Legislation required that each benefit corporation have a benefit director. Although a later iteration limited the requirement to “publicly traded” benefit corporations,³⁸ the current version eliminates the requirement.³⁹ For benefit corporations that elect to have a benefit director, the benefit director must be “independent”⁴⁰ and is charged by section 302(c) of the Model Legislation with the responsibility of preparing an opinion, for inclusion in the benefit corporation’s annual report, indicating:

“(1) whether the benefit corporation acted in accordance with its general public benefit purpose and any specific public benefit purpose in all material respects during the period covered by the report;”

(2) whether the directors and officers, when discharging their duties to the corporation, considered the effects of any “action or inaction” on the shareholders, employees, suppliers, customers, the community, the local and global environment, etc.; and

(3) if the directors or officers failed to satisfy (1) or (2), “a description of the ways in which the benefit corporation or its directors or officers failed to act or comply.”⁴¹

This opinion places a heavy burden on the benefit director. For instance, it is difficult to understand what the “in all material respects” requirement of section (1) means. This language is typically used in legal opinions when the recipient of the opinion seeks assurances that its counterparty complied “in all material respects” with a binding covenant or agreement. A lender may wish to know, for example, that its borrower complied with the covenants in the loan agreement that required the borrower to perform certain obligations and refrain from taking certain actions. The attorney preparing the opinion would have to inquire of the client what actions the client took (and refrained from taking) with respect to each such covenant or agreement and then determine whether the client complied “in all material respects.” The attorney may have to make a judgment as to whether a failure on the part of the client was material in order to give (or withhold) the opinion.

38. *Model Benefit Corporation Legislation*, BENEFIT CORP. (June 24, 2014) § 302. http://benefitcorp.net/sites/default/files/documents/Model_Benefit_Corp_Legislation.pdf

39. *Model Benefit Corporation Legislation*, *supra* note 4, § 302.

40. *Model Benefit Corporation Legislation*, *supra* note 4, § 102. “Independent” is defined as “[h]aving no material relationship with a benefit corporation or a subsidiary of the benefit corporation.” *Id.* The definition provides examples of relationships that “will be conclusively presumed” to negate independence, including owning 5% of more of the outstanding shares of the benefit corporation. *Id.*

41. *Id.* § 302(c).

It is entirely unclear how these concepts translate for an opinion under the Model Legislation. The general public benefit is, in essence, an aspiration of the benefit corporation; having a positive effect on society and the environment is unmeasurable and, therefore, not amenable to an opinion that the benefit corporation “acted in accordance” with that aspiration “in all material respects.” Insofar as section 302(c)(1) is concerned, therefore, the opinion is likely to be perfunctory and conclusory.

Section 302(c)(2) is equally challenging. The directors of a benefit corporation are required by section 301(a) to take into account the effects of any action they take or any “inaction” on a long list of what might be called stakeholders in the corporation’s activities, although the Model Legislation does not use the term “stakeholder.” The benefit director has to opine on whether the officers and director in fact discharged that responsibility. To render such an opinion, the benefit director apparently would have to consider each action and inaction of the board of directors and corporate officers, an impossible task if the corporation is actively engaged in business. How is the benefit director even to know of every action, much less “inaction,” taken by each officer and director?

Subsection (3) is nearly as daunting, requiring the benefit director to describe the ways in which they “failed to act or comply.” This opinion imposes on the benefit director the obligation of determining, among other things, how the board or officers might have assessed the environmental or societal impact of an action they declined to take. For instance, if the board was offered the opportunity to acquire a competing business, but declined to consider the offer, did the board breach its obligations by failing to consider the environmental and societal effects if they had decided to make the acquisition? Posing the question has an absurd quality, but the obligation so described is certainly within the plain language of the Model Legislation. Again, the opinion is likely to be perfunctory and of minimal value. Considering the absence of monetary liability for the benefit director and the cost of a thorough opinion (assuming one could in good faith be rendered), the incentives do not point in the direction of a meaningful opinion.

III. THE DELAWARE AND COLORADO ACTS.

As noted above, B Lab and its supporters have been insistent that states adopting benefit corporation legislation hew to the terms of the Model Legislation and they opposed legislation that deviated too much

therefrom.⁴² As a result of this policy, B Lab and a committee of the Colorado Bar Association (the Committee) opposed one another for several years over benefit corporation legislation.⁴³ The stalemate was broken in 2013 when the Committee became aware of a proposed benefit corporation bill in Delaware that had received the backing of B Lab and seemed to meet at least some of the objections that the Committee had to the Model Legislation.⁴⁴ In particular, the Committee objected to provisions in the Model Legislation that required every benefit corporation to have the purpose of creating a general public benefit (as defined), prepare an annual report based on a third-party standard, allow for a benefit enforcement proceeding (as set out in the Model Legislation), and include a benefit director. The Delaware proposal (subsequently enacted into law) and the Colorado statute, which closely tracked the Delaware proposal, addressed these problems.

A. The Purpose Clause

The Delaware and Colorado statutes provide that a benefit corporation (called a “public benefit corporation”⁴⁵ in the statutes) “is a for-profit corporation. . . that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner.”⁴⁶ Public benefit is defined as “a positive effect (*or reduction of negative effects*) on one or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature.”⁴⁷ Thus, under this approach a benefit corporation may identify one or more benefits that it wishes to pursue and still qualify as a benefit corporation. It need not have as a purpose creating a material positive impact on society and the environment. In addition, the option found in the Model Legislation

42. *Id.* § 102. It is unclear what deviations B Lab would accept. From the author’s personal experience as a member of the Colorado Bar Association committee that had responsibility for the benefit corporation legislation in Colorado, B Lab would not accept an act that did not require an annual assessment based on a third-party standard, as described in the Model Legislation.

43. See Lidstone, *supra* note 7, at 5–6 (discussing this process).

44. *Id.*

45. The author is unaware of why Delaware opted for the term “public benefit corporation” as opposed to simply “benefit corporation.” The Committee decided that the simplest course of action was to adopt the Delaware bill, making only those changes that were necessary to comply with Colorado law. As noted in the text, however, B Lab was able to get the Colorado legislature to accept a few changes to the Delaware model, making Colorado closer to the Model Legislation than the Delaware act.

46. DEL. CODE ANN. tit. 8, § 362(a) (2016) (emphasis added).

47. *Id.* § 362(b) (emphasis added).

to identify an optional “specific public benefit” is mooted; the benefit corporation can identify as many or as few public benefits as it wishes.

Importantly, the Delaware and Colorado statutes do require the benefit corporation to “be managed in a manner that balances the stockholders’ pecuniary interests, the best interests of those materially affected by the corporation’s conduct, and the public benefit or public benefits identified in its certificate of incorporation.”⁴⁸ B Lab, in a press release posted on its website, referred to this provision, writing that the Delaware statute “embraces the critical idea of model benefit corporation legislation: a general public benefit that requires the consideration of all stakeholders affected by the corporation’s conduct.”⁴⁹ Interestingly, in this press release B Lab tweaks the idea of a general public benefit; it clearly does not mean a material positive impact on society and the environment. Rather, in the press release the term seems to mean any benefit to the public, which is the essence of the Delaware and Colorado legislation.

B. The Annual Report.

Another substantive change reflected in the Delaware statute (but not the Colorado statute) is that the requirement of an annual report is replaced with a biennial one, and most importantly, the assessment may, but need not, be measured against a third-party standard. This was one of the key sticking points in the negotiations that the Committee had with B Lab representatives during the course of the consideration of the Colorado benefit corporation legislation. Obviously, the drafters of the Delaware legislation had a similar concern, but prevailed. When the Delaware draft was embraced by the Committee, B Lab had little choice but to agree to support it in Colorado, but B Lab insisted (and prevailed) on including a requirement that the annual report include an assessment against a third-party standard, as defined.

C. The Benefit Enforcement Proceeding

The Delaware and Colorado statutes greatly streamline the provisions related to benefit enforcement proceedings. They limit standing to shareholders who own at least two percent of the corporation’s outstanding shares. For corporations with shares listed on a national securities exchange, the threshold is the lesser of two percent or two million dollars in market value.⁵⁰ Gone is the possibility of a direct

48. *Id.* § 362(a).

49. See Lidstone, *supra* note 7, at 6.

50. DEL. CODE ANN. tit. 8, § 367; COLO. REV. STAT. § 7-101-508 (2016).

action by the corporation or derivative standing for directors, stockholders of a parent corporation, or other persons specified in the articles or bylaws.

D. The Benefit Director.

Finally, the Delaware and Colorado statutes do away with even the option of a benefit director. The original version of the Model Legislation included a requirement that each benefit corporation have a benefit director. A later version limited the requirement to publicly held corporations and the current version eliminates the requirement entirely. By acquiescing in the Delaware version of benefit corporation legislation, B Lab may be recognizing that the benefit director concept has serious flaws. The requirement makes little sense in a close corporation, as the corporation likely would have to locate, hire, and compensate someone, independent of the corporation (as defined in the Model Legislation), to fulfill the role. This added expense adds little value to the corporation. In a publicly held benefit corporation (of which there are very few), the burden added to the benefit director may make it difficult to locate a suitable individual. Finally, the main function of the benefit director—to opine on the extent to which the benefit corporation achieved its public benefit purpose—is of questionable value to the corporation’s stakeholders, as discussed above.

IV. CONCLUSION

Benefit corporations have been around for a relatively short time, yet a majority of the states have adopted authorizing legislation and hundreds of entities have formed under the provisions of those laws.⁵¹ Most of this legislation follows the Model Legislation, flawed though it may be. Delaware and Colorado have eschewed many of the provisions of the Model Legislation, and modified others, creating laws that are more flexible for social entrepreneurs. Whether future adoptions are based on the Model Legislation or on the Delaware model remains to be seen, but the Delaware model does present a real alternative to the

51. For a listing, see *Find a Benefit Corp*, BENEFIT CORP., http://benefitcorp.org/businesses/find-a-benefit-corp?field_bcorp_certified_value=&state=&title=&submit2=Go&sort_by=title&sort_order=ASC&op=Go (last visited Oct. 17, 2016).

Model Legislation, providing more of an “enabling act” than prescriptive legislation.⁵²

52. See Plerhoples, *supra* note 6, at 250 (“[T]he [Delaware act is] less restrictive than [the Model Legislation].”). This is unsurprising. The Delaware General Corporation Law is “an enabling statute intended to permit corporations and their shareholders the maximum flexibility in ordering their affairs. . . . [I]t is written with a bias against regulation.” LEWIS S. BLACK, JR., DEL. DEPT. OF STATE, WHY CORPORATIONS CHOOSE DELAWARE (2007) at 2, https://corp.delaware.gov/pdfs/whycorporations_english.pdf.