

# Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations

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Benefit corporations—corporations organized for the express purpose of realizing both financial wealth for shareholders and articulated social or environmental benefits<sup>1</sup>—have taken the United States by storm. With Maryland passing the first benefit corporation statute in 2010,<sup>2</sup> legislative growth of the form has been rapid. Currently, thirty states and the District of Columbia have passed benefit corporation statutes, and seven additional states have legislation pending.<sup>3</sup>

The proliferation of benefit corporation statutes and B Corp certifications (a seal of approval, of sorts)<sup>4</sup> can largely be attributed to the active promotional work of B Lab Company (B Lab), a nonprofit corporation organized in 2006 under Pennsylvania law that supports social enterprise and business mission alignment writ large.<sup>5</sup> B Lab works with individuals and interest groups to generate attention to social enterprise and mission alignment in two key ways. First, it focuses its operations on creating a movement around firms that “meet the highest standards of

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1. See, e.g., J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 22–23 (2012) (summarizing the benefit corporation form); Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 593–606 (2011) (describing the benefit corporation form in detail). Under most state statutes, a benefit corporation must articulate both social and environmental benefits.

2. See B Lab, *Maryland First State in Union to Pass Benefit Corporation Legislation*, CSRWIRE (Apr. 14, 2010, 10:57 AM), [http://www.csrwire.com/press\\_releases/29332-Maryland-First-State-in-Union-to-Pass-Benefit-Corporation-Legislation](http://www.csrwire.com/press_releases/29332-Maryland-First-State-in-Union-to-Pass-Benefit-Corporation-Legislation) [<http://perma.cc/3V8X-3MCD>]; Debra Cassens Weiss, *Md. Adopts Nation's First Law Creating Do-Goooder 'Benefit Corporations'*, A.B.A. J. (Apr. 15, 2010, 4:06 PM), [http://www.abajournal.com/news/article/md\\_adopts\\_nations\\_first\\_law\\_creating\\_do-goooder\\_benefit\\_corporations/](http://www.abajournal.com/news/article/md_adopts_nations_first_law_creating_do-goooder_benefit_corporations/) [<http://perma.cc/68KD-TFZ7>].

3. See B Lab, *State by State Status of Legislation*, <http://benefitcorp.net/policymakers/state-by-state-status> [<http://perma.cc/669E-P6BX>].

4. See *What are B Corps?*, B CORPORATION, <https://www.bcorporation.net/what-are-b-corps> [<http://perma.cc/AUN6-YHD3>] (“B Corp is to business what Fair Trade certification is to coffee or USDA Organic certification is to milk.”).

5. See J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 575–78 (2016). See generally *About B Lab*, B CORPORATION, <https://www.bcorporation.net/what-are-b-corps/about-b-lab> (offering information about, among other things, B Lab’s history, funding, governance, and operations). A quick search of the Pennsylvania Department of State’s online database, <https://www.corporations.pa.gov/search/corpsearch>, confirms the corporate status of B Lab.

verified, overall social and environmental performance, public transparency, and legal accountability” and “align the interests of business with those of society and to help high impact businesses be built to last.”<sup>6</sup> Second, B Lab engenders awareness of and support for the benefit corporation form and B Corp certification. B Lab also supplies model benefit corporation legislation, social enterprise standards that may meet the requirements of benefit corporation statutes in various states, and other services to social enterprises.

Professor Haskell Murray reports that, as compared to other states, Nevada and Delaware, leaders in the benefit corporation incorporation race, have already registered relatively large numbers of benefit corporation incorporations (Nevada with 1,130 and Delaware with 368).<sup>7</sup> The larger number of benefit corporation incorporations in these two states is somewhat predictable given the history of and efforts encouraging incorporations in both states. Also, Delaware decisional law is arguably particularly unfriendly to for-profit corporate boards that fail to place shareholder financial wealth maximization first in every decision they make.<sup>8</sup>

However, outside of Nevada and Delaware, benefit corporation statutes have not, by and large, been the entity law version of a “field of dreams” that some imagined or may have promised.<sup>9</sup> Statutes have been enacted, but social enterprise firms have not gravitated to them in large numbers. In other words, despite the legislative popularity of the form, there have not been as many benefit corporation incorporations as one might expect. In the first four years of benefit corporation authority, for example, Maryland reported fewer than forty benefit corporations.<sup>10</sup> Tennessee’s benefit corporation statute came into effect in January 2016, and as of May 2, 2016, Secretary of State filings evidence the organization of twenty-six for-profit benefit corporations.<sup>11</sup> Although this figure may

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6. See *About B Lab*, *supra* note 5.

7. See Murray, *supra* note 5, at 588 (app. A). The number of Nevada benefit corporations may over-count the number of actual benefit corporations, however. See *infra* note 15 and accompanying text.

8. The Delaware Court of Chancery opinion in *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 35 (Del. Ch. 2010), is widely cited as a reason and catalyst for benefit corporation statutes. See *infra* note 24 and accompanying text.

9. The reference is to the popular 1989 Universal City Studios fantasy film, *Field of Dreams*, starring Kevin Costner famous for the line, “If you build it, he will come.” See *FIELD OF DREAMS* (Gordon Company 1989).

10. *Benefit Corporations and Benefit LLCs formed in Maryland as of August 20, 2014*, MD. ST. DEP’T OF ASSESSMENTS & TAX’N, <http://dat.maryland.gov/businesses/Documents/Benefitcorppllc.pdf> [<https://perma.cc/VL38-KB6A>].

11. Tennessee for-profit benefit corporation charter information included in this Article comes from charters obtained in response to a public records request filed with the Business Services Division of the Office of the Tennessee Secretary of State. These charters are on file with the author. Record

seem impressive, a review of these Tennessee filings suggests that well more than half were erroneously organized as benefit corporations.<sup>12</sup> Colorado, another recent adopter of the benefit corporation, does appear to have a large number of filings (ninety in total as of June 12, 2016, based on the list of Colorado benefit corporations on the B Lab website).<sup>13</sup> However, as with Tennessee, a number of these listed corporations appear to be erroneously classified.<sup>14</sup> Professor Murray, Professor Eric Franklin, and others have raised similar concerns about the descriptive power of the Nevada data on benefit corporation filings.<sup>15</sup> These anecdotal offerings indicate that published lists of benefit corporations—even those constructed from state filing data—may over-count the number of qualified benefit corporations, perhaps significantly.

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keeping differences among states with authorized benefit corporations make accurate, comprehensive data difficult to obtain. Although many states have online databases for corporations and other state-chartered business entities, those databases may or may not be searchable in a manner that allows for the easy or accurate identification of benefit corporations. Yet, public records requests, like the one made in Tennessee, may enable researchers to secure the information they seek. Although B Lab includes a list of “benefit corporations” on its website, the list includes LLCs and is preceded by an explanation/disclaimer:

The list below is B Lab’s best effort to create an accurate accounting of benefit corps and is inclusive of all data collated by B Lab from state agency reports. Many states do not currently track the names or number of benefit corporations. B Lab continuously collects this data, however each state has [sic] different level of reporting capabilities.

B Lab, *Find a Benefit Corp.*, <http://benefitcorp.net/businesses/find-a-benefit-corp>.

12. Among other things, the filings include corporate purposes like: “SERVICE AUTO GLASS,” “TRUCKING,” “Buy, sell, rent, and /or lease commercial and residential property,” “retail,” and the like.

13. B Lab, *Find a Benefit Corporation*, [http://benefitcorp.net/businesses/find-a-benefit-corp?field\\_bcorp\\_certified\\_value=&state=Colorado&title=&op=Go&sort\\_by=field\\_bcorp\\_state\\_value&sort\\_order=ASC](http://benefitcorp.net/businesses/find-a-benefit-corp?field_bcorp_certified_value=&state=Colorado&title=&op=Go&sort_by=field_bcorp_state_value&sort_order=ASC) [<http://perma.cc/5M9B-A2HY>].

14. For example, the Colorado Secretary of State filing history of DDD Land Surveying Inc. (listed as a benefit corporation on the B Lab website), *History and Documents*, COLO. SECRETARY OF ST. <http://www.sos.state.co.us/biz/BusinessEntityHistory.do?quitButtonDestination=BusinessEntityDetail&pi1=1&nameTyp=ENT&entityId2=20121295013&srchTyp=ENTITY&masterFileId=20121295013> [<https://perma.cc/4PXL-SG5P>], indicates that the corporation’s articles of incorporation were amended to add public benefit corporation status and then later amended to remove it. The Colorado Secretary of State filing history for another B Lab listed benefit corporation, Rizuto’s Cotton Candy, Inc., lists its corporate purpose as “Food Service Cotton Candy,” calling into question its status as a benefit corporation.

15. See Kate Cooney et al., *Benefit Corporation and L3C Adoption: A Survey*, STAN. SOC. INNOVATION REV., Dec. 5, 2014, [http://ssir.org/articles/entry/benefit\\_corporation\\_and\\_l3c\\_adoption\\_a\\_survey](http://ssir.org/articles/entry/benefit_corporation_and_l3c_adoption_a_survey); Eric Franklin, *Nudging Entrepreneurs into Noncompliance: Why does Nevada have so many Benefit Corporations?*, UNLV L. BLOG (Sept. 23, 2016), <http://unlvlawblog.blogspot.com/2016/09/nudging-entrepreneurs-into.html> [<http://perma.cc/5EMQ-6UUF>]; Murray, *supra* note 5, at 581 (observing that Nevada’s reported number of benefit corporation filings “may have been boosted by the inclusion of a benefit corporation check box on the state form, which incorporators may or may not have fully understood”).

Research for this Article identified no publicly held U.S. benefit corporations.<sup>16</sup> For these purposes (and as referenced throughout this Article), the term “publicly held” in reference to a corporation is defined to mean a corporation (a) with a class of equity securities registered under § 12 of the Securities Exchange Act of 1934, as amended (1934 Act);<sup>17</sup> or (b) otherwise required to file periodic reports with the U.S. Securities and Exchange Commission (SEC) under § 13 of the 1934 Act.<sup>18</sup> Yet, Laureate Education, Inc., which converted to a Delaware benefit corporation in the fall of 2015, has filed a Form S-1 for its initial public offering.<sup>19</sup> Moreover, benefit corporations may be subsidiaries of publicly held corporations (as Ben & Jerry’s Homemade Inc., New Chapter Inc., and Plum, PBC have demonstrated<sup>20</sup>), and corporations certified as B Corps have begun to enter the ranks of publicly held corporations (perhaps Etsy, Inc. being the most

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16. As this article was going to press, Laureate Education, Inc. announced the closing of its initial public offering, making it the first publicly traded benefit corporation. See Press Release, Laureate Education Announces Closing of its Initial Public Offering (Feb. 6, 2017), <http://www.laureate.net/NewsRoom/PressReleases/2017/02/Laureate-Education-Announces-Closing-of-its-Initial-Public-Offering> [https://perma.cc/6P73-QXHZ] [hereinafter Laureate Education Press Release]; see also Haskell Murray, *First Standalone Publicly Traded Benefit Corporation - Laureate Education*, BUS. L. PROF. BLOG (Feb. 10, 2017), [http://lawprofessors.typepad.com/business\\_law/2017/02/first-standalone-publicly-traded-benefit-corporation-laureate-education.html](http://lawprofessors.typepad.com/business_law/2017/02/first-standalone-publicly-traded-benefit-corporation-laureate-education.html) [https://perma.cc/LA8P-E6B4]. Thus, the prediction made at the end of this paragraph has now become a reality. Due to publication deadlines, this Article does not fully reflect the completion of the Laureate Education offering.

17. 15 U.S.C. § 781 (2012).

18. *Id.* § 78m.

19. See Alex Barinka, *Laureate Education Plans IPO as a Public Benefit Company*, BLOOMBERG (Oct. 2, 2015), <http://www.bloomberg.com/news/articles/2015-10-02/kr-backed-laureate-education-files-for-initial-public-offering> [http://perma.cc/RBM4-RVL6]; Brad Edmondson, *The First Benefit Corporation IPO Is Coming, And That's A Big Deal*, TRIPLEPUNDIT (Feb. 4, 2016), <http://www.triplepundit.com/2016/02/first-benefit-corporation-ipo-coming-thats-big-deal/#> [http://perma.cc/RX29-5XP6]; Chris Lange, *Laureate Education Updates Finances in Most Recent IPO Filing*, 24/7 WALL ST. J. (May 23, 2016), <http://247wallst.com/services/2016/05/23/laureate-education-updates-finances-in-most-recent-ipo-filing/> [http://perma.cc/EQ9T-6UB7]. On the eve of publication of this Article, Laureate Education’s initial public offering proceeded to closing. Specifically, the registration statement was declared effective on January 31, 2017, and the offering closed on February 6, 2017. See Laureate Education Press Release, *supra* note 16.

20. See Shelley Alpern, *When B Corp Met Wall Street*, CLEAN YIELD (Mar. 18, 2015), <http://www.cleanyield.com/when-b-corp-met-wall-street/> [http://perma.cc/BQ9M-TY22]; Aman Singh, *Campbell Becomes America’s First Public Company to Acquire a Public Benefit Corporation: In Conversation with Plum Organics’ Cofounder*, CSRWIRE (Sept. 9, 2013, 8:41 AM), <http://www.csrwire.com/blog/posts/1005-campbell-becomes-america-s-first-public-company-to-acquire-a-public-benefit-corporation-in-conversation-with-plum-organics-cofounder> [http://perma.cc/49DR-BCQE]; Anthony Tagliente, *Better Know a Deal: A First for Benefit Corporations*, TRIPLEPUNDIT (Aug. 5, 2015), <http://www.triplepundit.com/2015/08/better-know-deal-first-benefit-corporations/#> [http://perma.cc/LCG2-8375].

well-known to date<sup>21</sup>). It likely is only a matter of time before we will see the advent of publicly held U.S. benefit corporations.

With the likely prospect of publicly held U.S. benefit corporations in mind, this Article engages in a thought experiment. Specifically, the Article views the publicly held U.S. benefit corporation from the perspective of litigation risk. It first situates, in Part I, the U.S. benefit corporation in its structural and governance context as an incorporated business association. Corporate purpose and the attendant managerial authority, responsibilities, and fiduciary duties are the key points of reference. Then, in Part II, the Article seeks to identify and describe the salient, unique litigation risks that may be associated with publicly held corporations with the structural and governance attributes of a benefit corporation. These include both state litigation under the *ultra vires* doctrine and similarly situated statutory causes of action, as well as actions for breach of a corporate law fiduciary duty, and federal law causes of action for securities fraud and misstatements. The reflections in Part III draw conclusions from the synthesis of the observations made in Parts I and II. Specifically, Part III links the importance of a publicly held benefit corporation's public benefit purpose to litigation risk management from several perspectives. The commentary in Part III is intended to be of use to government officials, policymakers, legal advisors of corporations, benefit corporation management, and academic observers, among others.

### I. WHAT MAKES A BENEFIT CORPORATION DIFFERENT?

In the United States, a benefit corporation is a type of for-profit corporation organized under specially tailored provisions included in a state's corporate law.<sup>22</sup> Benefit corporations are designed to facilitate the use of the corporate form to conduct social enterprise—business that seeks to benefit society or the environment as well as shareholders—or

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21. See Hiroko Tabuchi, *Etsy I.P.O. Tests Pledge to Balance Social Mission and Profit*, N.Y. TIMES: DEALBOOK (Apr. 16, 2015), [http://www.nytimes.com/2015/04/17/business/dealbook/etsy-ipo-tests-pledge-to-emphasize-social-mission-over-profit.html?\\_r=0](http://www.nytimes.com/2015/04/17/business/dealbook/etsy-ipo-tests-pledge-to-emphasize-social-mission-over-profit.html?_r=0). Other publicly held B Corps include or have included Brazil's Natura Cosméticos S.A. and Rally Software Development Corp. (acquired by CA Technologies—CA, Inc.—in 2015). See Ariel Schwartz, *A Public Company Has Finally Become A B Corp*, FASTCO.EXIST (Dec. 23, 2014, 8:18 AM), <http://www.fastcoexist.com/3040158/a-public-company-has-finally-become-a-b-corp> [<http://perma.cc/CW97-9KQK>].

22. See Brett McDonnell, *Benefit Corporations and Strategic Action Fields or (the Existential Failing of Delaware)*, 39 SEATTLE U. L. REV. 263, 280 (2016) (“State statutes legally define benefit corporations. These statutes sit atop the basic business corporation statute. That is, benefit corporations are business corporations, subject to all of the rules of the business corporation statute, except insofar as the benefit corporation statute provides different or additional rules. The statutes add just a few new rules.”).

otherwise engage in mission alignment.<sup>23</sup> Specifically, benefit corporation legislation was introduced in response to concerns that directors and officers of social enterprises organized as corporations may be held liable in court actions challenging their compliance with applicable fiduciary duties.<sup>24</sup>

As a result, primary areas of focus in the substantive legal doctrine include: (1) provisions on corporate purpose (defining the category and scope of the corporation's operating objectives, including principally the benefit corporation's public benefit<sup>25</sup>); (2) management authority; and (3) fiduciary duties.<sup>26</sup> Each of these features of benefit corporation law plays

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23. See, e.g., McDonnell, *supra* note 22, at 264 ("Benefit corporations . . . are meant as a vehicle for entrepreneurs and investors who want to be involved in social enterprises, that is, businesses seeking both a healthy financial return for their investors while also committing to other socially valuable goals." (footnote omitted)); J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345, 348 (2014) ("The benefit corporation statute is the most widely adopted social enterprise statute." (footnote omitted)).

24. The heart of the concern is that a court will find that board members or officers have breached an applicable fiduciary duty by taking an action that the board determines to be in the best interest of the corporation but fails to maximize financial benefits to shareholders. Two court opinions—*Dodge v. Ford*, 170 N.W. 668 (Mich. 1919), an "old chestnut" decided in the closely held corporate context under Michigan law, and the more recent Delaware law opinion in *Ebay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 35 (Del. Ch. 2010)—are typically used to support the argument that corporate management should fear this result. See Murray, *supra* note 1, at 13–17. Because social enterprises, by their nature, exist to serve constituencies beyond shareholders and objectives beyond profit and wealth maximization, promoters, directors, and officers of social enterprise firms may be especially uneasy about the broad-based adoption of a rule requiring management to always act to maximize financial benefits to shareholders in order to comply with applicable fiduciary duties.

25. In this Article, I generally use the term "corporate purpose" to narrowly refer to the purpose of an individual corporation as stated in its corporate charter. Other corporate governance scholars and commentators often use the term "corporate purpose" more broadly—in referring to the overall purpose of the corporate form and in particular, the policy rational for its statutory existence and the constituencies it is intended to serve and benefit. See, e.g., Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269, 276–78 (2013) (using "corporate purpose" in this broader sense).

26. Many commentators also point out the benefit corporation report as a core distinctive component. See, e.g., McDonnell, *supra* note 22, at 280; J. Haskell Murray, *An Early Report on Benefit Reports*, 118 W. VA. L. REV. 25, 30–33 (2015) [hereinafter Murray, *Early Report*]; Alicia E. Plerhoples, *Social Enterprise As Commitment: A Roadmap*, 48 WASH. U. J.L. & POL'Y 89, 104–105 (2015); Reiser, *supra* note 1, at 604; see also J. Haskell Murray, *Understanding and Improving Benefit Corporation Reporting*, BUS. L. TODAY, July 2016, at 1 [hereinafter Murray, *Understanding and Improving*]. However, not every state requires that a benefit report be filed, there is no remedy for noncompliance, and many benefit corporations are not meeting their reporting requirements. See generally Murray, *Early Report*, *supra*, at 31, 42–43 (cataloguing these matters). Accordingly, this benefit corporation feature apparently does not independently impact litigation risk and this Article omits it as a key feature. Of course, there are other distinctive aspects of public benefit corporation law that deserve exploration, perhaps in another future article. Among those not well explored in the literature to date (with minor exception): supermajority approval requirements for mergers with and conversions into other corporations. See, e.g., J. Haskell Murray, *Defending Patagonia: Mergers and Acquisitions with Benefit Corporations*, 9 HASTINGS BUS. L.J. 485 (2013) [hereinafter Murray, *Defending Patagonia*] (focusing generally on benefit corporation mergers through a hypothetical case study).

a distinct yet interconnected role in establishing the structure and governance norms of a benefit corporation from a statutory perspective. This Part describes the statutory provisions relating to these three doctrinal focal points using examples from state benefit corporation statutes. Together, these three aspects of benefit corporation doctrine provide a foundational depiction of the nature of the benefit corporation as a business association.

### A. Corporate Purpose

Most modern statutory corporate law provisions outside the benefit corporation context typically allow a corporation to be organized for any lawful purpose.<sup>27</sup> Some state corporation law statutes, notably the General Corporation Law of the State of Delaware, known informally as the Delaware General Corporation Law (DGCL),<sup>28</sup> require that a corporation's chartering document, typically called a certificate of incorporation or articles of incorporation (charter), include a statement of corporate purpose.<sup>29</sup> Most state corporate statutes, including those adopting the scheme established in the Model Business Corporation Act (MBCA),<sup>30</sup> allow a corporation to rely on the statute for the adoption of an all-encompassing corporate purpose and make the inclusion of a charter provision on corporate purpose permissive.<sup>31</sup> Regardless of the source of a corporation's purpose (statute and charter or statute alone), for-profit corporations, including social enterprises organized as corporations, usually take advantage of the full breadth of the permitted purposes for which a corporation can be organized and operated under the applicable state law.<sup>32</sup>

Benefit corporation statutes are designed to change that norm. They typically provide for mandatory charter provisions requiring certain content. Specifically, to be organized as a benefit corporation, a firm must

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27. See Johnson, *supra* note 25, at 282 (“[A]ll corporate statutes are silent and agnostic on purpose, speaking to ‘purpose’ only by way of permitting a corporation to conduct ‘any lawful business or purposes.’”) (footnotes omitted); Adam J. Sulkowski & Kent Greenfield, *A Bridle, A Prod, and A Big Stick: An Evaluation of Class Actions, Shareholder Proposals, and the Ultra Vires Doctrine As Methods for Controlling Corporate Behavior*, 79 ST. JOHN’S L. REV. 929, 945–48 (2005) (“While the requirement of listing specific corporate purposes and powers was removed from state incorporation laws, the requirement that the corporation’s purposes and activities be ‘lawful’ or ‘legal’ was never removed.”).

28. See DEL. CODE ANN. tit. 8, §§ 101–398 (2016).

29. See § 102(a)(3).

30. See generally MODEL BUS. CORP. ACT (AM. BAR ASS’N 1984).

31. See MODEL BUS. CORP. ACT § 2.02(b)(2)(i) (AM. BAR ASS’N 1984).

32. See Sulkowski & Greenfield, *supra* note 27, at 947–48 (setting forth examples that illustrate this point). Yet, the MBCA and state statutes based on it allow corporations to provide for more specific corporate purposes in their chartering documents. See MODEL BUS. CORP. ACT § 2.02(b)(2)(i) (AM. BAR ASS’N 1984).



expressly set forth in its charter a general or specific public benefit purpose—a purpose to benefit society or the environment.<sup>33</sup>

These requirements for and definitions of public benefit are variously specified from state to state. Appendix 1 provides a chart summarizing the requirements for general versus specific public benefit purposes in the states adopting benefit corporation statutes. Definitions of general public benefit and specific public benefit from the various state statutes are included in Appendix 2.

Most states require that the charter include a general public benefit to both society and the environment and permit the charter to include one or more specific public benefit purposes.<sup>34</sup> The Colorado, Delaware, and Tennessee statutes require the statement of at least one public benefit purpose.<sup>35</sup> Minnesota law provides for two discrete types of benefit corporation based on the type of public benefit provided for in the charter—a general benefit corporation and a specific benefit corporation.<sup>36</sup>

State statutes define general public benefit in a relatively consistent manner. These definitions typically provide that general public benefit comprises a “material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation.”<sup>37</sup> Some statutes omit the reference to a third-party standard.<sup>38</sup>

Statutory definitions of specific public benefit differ more widely, although still within a relatively narrow range. The key benefits called out in these statutes include:

- serving low-income or underserved individuals or communities;
- fostering extraordinary economic opportunity or economic development for individuals or communities;
- protecting, preserving, or restoring the environment;
- bettering human health;
- stimulating the arts, sciences, or development of knowledge;

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33. See *infra* apps. 1 and 2; see *infra* text accompanying notes 34–41.

34. These states include Arizona, Arkansas, California, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia, West Virginia, and Washington, D.C. See *infra* apps. 1 and 2.

35. See *id.*

36. See *id.*

37. States with this specific definition include Arizona, Arkansas, Illinois, Louisiana, Nebraska, New York, and Rhode Island. See *infra* app. 2.

38. New Jersey’s and Oregon’s statutes are examples. See N.J. STAT. ANN. § 14A:18-1 (West 2016); OR. REV. STAT. ANN. § 60.750 (West 2016). See generally *infra* app. 2 (recording these and other general purpose definitions in state benefit corporation statutes).

- improving the flow of capital to entities with a public benefit purpose; and
- advancing society or the environment in another identifiable manner.<sup>39</sup>

Several states include broad introductory language contextualizing the specified benefits.<sup>40</sup> Certain states also tweak the individual expressions of the specific benefits listed in the statute.<sup>41</sup>

Examples of benefit purposes from actual corporate charters may help illustrate the overall import of these various statutory expressions of a required benefit purpose. Tennessee for-profit benefit corporation SaveMomLife Corporation reports a public benefit purpose “to inspire, motivate and uplift mothers of all ages and races through mentoring programs and support services geared in the areas of advancing family, business and spiritual growth.”<sup>42</sup> IFATHOM, INC., another for-profit benefit corporation organized under Tennessee law, “intends to pursue . . . economic and social capital development among youth demographics via entrepreneurial problem-solving, project-based learning and community engagement.”<sup>43</sup> Beta Bionics, Inc., a Massachusetts benefit corporation, has “the purpose of creating a general public benefit, with a specific public benefit of improving human health.”<sup>44</sup> And the articles of incorporation of Jason Wiener, P.C., a Colorado public benefit corporation, include a lengthier public benefit purpose:

(a) to create material, positive general public benefit, including but not limited to: (i) providing legal and business consulting services to start-up ventures, and mission-centered social and environmental enterprises; (ii) promoting democratized ownership structures; and (iii) advancing clean and distributed energy; (b) to engage in the transaction of all lawful business or pursue any other lawful purpose or purposes for which a PBC may be incorporated under Colorado

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39. See generally *infra* app. 2 (documenting the contents of specific purpose definitions in state benefit corporation statutes).

40. See, e.g., S.C. CODE ANN. § 33-38-130 (2015) (“‘Specific public benefit purpose’ means a benefit that serves one or more public welfare, religious, charitable, scientific, literary, or educational purposes, or other purposes or benefits beyond the strict interest of the shareholders of the benefit corporation.”); VA. CODE ANN. § 13.1-782 (2015) (“‘Specific public benefit’ means a benefit that serves one or more public welfare, religious, charitable, scientific, literary, or educational purposes, or other purpose or benefit beyond the strict interest of the shareholders of the benefit corporation.”).

41. See, e.g., 15 PA. CONS. STAT. § 3302 (2016); VT. STAT. ANN. tit. 11A, § 21.03 (2016). See generally *infra* app. 2.

42. Charter, SaveMomLife Corporation, art. 12 (on file with author).

43. Articles of Amendment for Restatement Charter, IFATHOM, INC., art. 3 (on file with author).

44. Third Amended and Restated Articles of Organization, Beta Bionics, Inc., art. II, at <http://corp.sec.state.ma.us/CorpWeb/CorpSearch/CorpSearchViewPDF.aspx>.

law; and (c) to have, enjoy, and exercise all of the rights, powers, and privileges conferred upon PBCs incorporated pursuant to Colorado law, whether now or hereafter in effect, and whether or not herein specifically mentioned.<sup>45</sup>

Many of the benefit purposes set forth in benefit corporation chartering documents could easily be pursued by either a for-profit or nonprofit firm.

Charter-based descriptions of a corporate purpose are always important as a frame for a board of directors' decision-making in any corporation. In a benefit corporation, however, corporate purpose is much more central as a matter of statutory law than it is in legislative enactments governing other for-profit corporations. The importance of a benefit corporation's general or specific public benefit becomes more apparent when viewed through the lens of the statutorily defined management authority and responsibility and fiduciary duties.

### *B. Management Authority and Responsibilities*

For the most part, U.S. benefit corporation legislation adopts the management structure of a for-profit corporation organized under the general corporate law of the jurisdiction of incorporation without regard to the benefit corporation rules. However, a significant number of U.S. benefit corporation statutes require that an annual benefit report be filed and mandate the designation of a "benefit corporation director" (either generally or if the firm is a publicly held corporation) or provide for the optional designation of a benefit director—a board member who is responsible for preparing a compliance opinion for inclusion in the benefit report.<sup>46</sup> These benefit corporation statutes may exculpate a benefit director from personal liability for conduct undertaken in that capacity (within express limits).<sup>47</sup> In almost all of those jurisdictions requiring an annual benefit report filing, the benefit corporation statute provides for an

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45. First Amended and Restated Articles of Incorporation, Jason Wiener, P.C., art. III, at <http://www.sos.state.co.us/biz/ViewImage.do?fileId=20141486758&masterFileId=20141023819>.

46. See *infra* app. 3 (summarizing information about benefit director and officer provisions in the various state benefit corporation statutes). A recent article notes that the rate of compliance with benefit report filing requirements has been very low. See Murray, *Early Report*, *supra* note 26, at 34–35 (summarizing a limited test of benefit corporations in four states); see also Murray, *Understanding and Improving*, *supra* note 26.

47. See, e.g., S.C. CODE ANN. § 33-38-410(F) (2016) (“[A] benefit director is not personally liable for monetary damages for any act or omission taken in that capacity unless the act or omission constitutes a transaction from which the director derived an improper personal benefit, willful misconduct, or a knowing violation of law.”); VT. STAT. ANN. tit. 11A, § 21.10(f) (2016) (“[A] benefit director shall not be personally liable for any act or omission taken in his or her official capacity as a benefit director unless the act or omission is not in good faith, involves intentional misconduct or a knowing violation of law, or involves a transaction from which the director directly or indirectly derived an improper personal benefit.”).

optional “benefit officer” who is responsible for preparing the benefit report and exercising powers and duties designated in the bylaws or by resolution of the board.<sup>48</sup> A chart summarizing the current statutes providing for benefit directors and benefit officers is attached as Appendix 3. Overall, these positions exist to help establish and ensure compliance with the corporation’s public benefit.

U.S. benefit corporation legislation also may include a provision tailoring corporate management objectives. For example, Tennessee law provides that “[a] for-profit benefit corporation shall be managed in a manner that considers the best interests of those materially affected by the corporation’s conduct, including the pecuniary interests of shareholders, and the public benefit or public benefits identified in its charter.”<sup>49</sup> Similar provisions exist in other state benefit corporation laws. In most cases, they are included in the provision defining the concept of a benefit corporation under that state’s law.<sup>50</sup> This type of management provision directly connects the benefit corporation’s expressed charter-based public benefit to the managerial function.

### C. Fiduciary Duties

Director standards of conduct (and, if provided for under state law, officer standards of conduct)<sup>51</sup> in the U.S. benefit corporation context typically derive from both the general standards of conduct under the jurisdiction of incorporation’s for-profit corporation law and the specific corporation’s articulated public benefit. Specifically, although state laws vary, benefit corporation statutes relating to director fiduciary duties may:

- incorporate by reference the general standards of conduct from the state corporate law;

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48. *See infra* app. 3 (indicating states with benefit officer provisions).

49. TENN. CODE ANN. § 48-28-104(d) (2015).

50. *See, e.g.*, DEL. CODE ANN. tit. 8, § 362(a) (2016). Specifically, the definition provides that: A “public benefit corporation” is a for-profit corporation organized under and subject to the requirements of this chapter that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. To that end, *a public benefit corporation shall 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.*

*Id.* (emphasis added). *See also, e.g.*, COLO. REV. STAT. ANN. § 7-101-503(1) (2016) (providing a similar definition).

51. Although some U.S. benefit corporation statutes only call out director standards of conduct (leaving officer standards of conduct to the general corporate statutory and decisional law rules), some state acts do provide express standards of conduct for officers. *See, e.g.*, CONN. GEN. STAT. ANN. § 33-1360 (2016); 805 ILL. COMP. STAT. ANN. 40/4.10 (2016); VT. STAT. ANN. tit. 11A, § 21.11 (2016).

- mandate, in satisfaction of the directors' overall positional duties and considering the best interests of the corporation, board consideration of the effects of corporate action or inaction on the corporation's general or specific public benefit and, in many statutes, on various constituencies (including shareholders, employees, customers, and the community), the environment, and short-term and long-term corporate interests;
- disavow a requirement that the board prioritize, in its decision-making, shareholder financial interests or any other interest not identified as a priority interest in the corporation's charter;
- state that a director complying with the statutory standard of conduct is not liable for that conduct as a director;
- expressly permit a benefit corporation to include in its charter a provision declaring that any disinterested failure to satisfy the statutory standard of conduct does not constitute a breach of the duty of loyalty; and
- deny that any director owes a duty to a beneficiary of the public benefit purpose because of that person's status as a beneficiary.<sup>52</sup>

Professor Lyman Johnson notes that these provisions generally connect the benefit corporation's best interests to its public benefit.<sup>53</sup> However, he also aptly notes that many benefit corporation statutes then "take an odd turn" when they require the board to consider, along with that public benefit, constituencies other than those related to the public benefit.<sup>54</sup>

Some states, however, have a different scheme for director standards of conduct—one that does not require the consideration of specific named stakeholders unconnected to the corporation's actions or public benefit. Tennessee law, for example, provides that, to comply with his or her fiduciary duty:

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52. See, e.g., ARIZ. REV. STAT., § 10-2431 (2016); CONN. GEN. STAT. ANN. § 33-1358 (2016); FLA. STAT. ANN. § 607.607 (2016); MINN. STAT. ANN. § 304A.201 (2016). The listed attributes of state benefit corporation statutes addressing director fiduciary duties represent an aggregate sampling and are relatively typical, but (as the text notes) there is some variance from state to state.

53. See Johnson, *supra* note 25, at 288–89 (noting that by "keeping the focus on the corporation rather than on one stakeholder within the corporation, the [benefit corporation] statutes . . . coherently align the corporation's best interests with the ongoing pursuit of the purpose(s) for which the corporation was formed").

54. See *id.* at 289 (noting that benefit corporation laws of this kind "seem to formulate fiduciary duties in stakeholder terms, not in terms of the corporation's best interests or furthering corporate purposes").

[A] director shall consider the effects of any contemplated, proposed, or actual transaction or other conduct on the interests of those materially affected by the corporation's conduct, including the pecuniary interests of shareholders, and the public benefit or public benefits identified in its charter and shall not give regular, presumptive, or permanent priority to the interests of any individual constituency or limited group of constituencies materially affected by the corporation's conduct, including the pecuniary interests of shareholders.<sup>55</sup>

Delaware law focuses on a balancing of interests rather than a consideration of interests, providing that

[t]he board of directors shall manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation.<sup>56</sup>

Colorado's Benefit Corporation Act takes an almost identical approach to that taken under the Delaware law, requiring that

[t]he board of directors . . . manage or direct the business and affairs of a public benefit corporation in a manner that balances the pecuniary interests of the shareholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit identified in its articles of incorporation.<sup>57</sup>

Yet, both Delaware and Colorado benefit corporation law (like the benefit corporation laws of many other states, as noted at the end of the bullet

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55. TENN. CODE ANN. § 48-28-106(a) (2016). Like the more typical U.S. benefit corporation statutes, the Tennessee statute goes on to disclaim director duties to those with an interest in the corporation's public benefit, provide that compliance with the statutory duty prevents a director from being held liable, and allow the corporation's charter to provide that a "disinterested failure" to satisfy the board's express standard of conduct does not "constitute an act or omission not in good faith, or a breach of the duty of loyalty" for fiduciary duty and indemnification purposes. § 48-28-106 (b) to (c).

56. DEL. CODE ANN. tit. 8, § 365(a) (2016). The statute then proceeds, like the similar Tennessee provision, with duty and liability disclaimers (with a director discharging his or her fiduciary duties "if such director's decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve") and an express authorization to include in the corporation's charter a provision obviating claims of bad faith and breach of the duty of loyalty (whether for fiduciary duty or indemnification purposes) if the failure to satisfy the standard of conduct is disinterested. § 365(b)-(c).

57. COLO. REV. STAT. ANN. § 7-101-506(1) (2016). The statute then continues much like the Delaware act, except that the permissive charter provision negating bad faith and breach of the duty of loyalty appears to be conditioned on whether the individual director at issue is disinterested. § 7-101-506(2) to (3).

point list of common fiduciary duty provisions provided above)<sup>58</sup> expressly disclaim that directors owe fiduciary duties to the various named stakeholder beneficiaries.<sup>59</sup>

The statutory expressions of benefit corporation management fiduciary duties differ from state to state. However, in each U.S. benefit corporation law, there is an unsurprising, fundamental anchoring proposition: the law requires directors (and, as applicable, officers) to consider the corporation's public benefit in addition to any financial interest of shareholders.<sup>60</sup> In this regard, Professor Alicia Plerhoples writes:

A benefit corporation's board and its individual directors are tasked with considering the impact of corporate actions on various stakeholders and the corporation's general public benefit. Similarly, all officers of the corporation must consider the impact of the corporate actions on stakeholders if "the officer has discretion to act with respect to a matter" and "it reasonably appears to the officer that the matter may have a material effect on the creation by the benefit corporation of general public benefit or a specific public benefit . . . ."<sup>61</sup>

As a result, corporate purpose (in the form of the benefit corporation's public benefit or benefits) is an important foundation for fiduciary duty compliance in the U.S. benefit corporation.

Thus, as the reader may have foreseen, the specific corporate purpose of a U.S. benefit corporation is a focal point for corporate organization and operations. The central role of corporate purpose in the benefit corporation context—from chartering through management dictates and fiduciary duties—suggests (among other things) particular litigation risks attendant to a benefit corporation's stated public benefit or benefits. Identifying and describing these distinctive risks is important to both entity choice and a firm's decision to raise capital in a public market.

## II. WHAT MAY BE THE KEY LITIGATION RISKS FOR PUBLICLY HELD U.S. BENEFIT CORPORATIONS?

This Article focuses on litigation risk in the public company context. Having identified that specific focus, it is important to note two foundational conceptual matters relative to litigation risk in this setting—first, that the causes of action in the private and publicly held benefit

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58. See *supra* note 52 and accompanying text.

59. See COLO. REV. STAT. ANN. § 7-101-506(2)(a); DEL. CODE ANN. tit. 8, § 365(b).

60. See Murray, *supra* note 1, at 33 ("Benefit corporation statutes state that directors *must* consider multiple stakeholders in each and every decision they make.").

61. Plerhoples, *supra* note 26, at 117 (quoting MODEL BENEFIT CORP. LEGIS. § 301(a) (2014)).

corporation milieu may be quite similar to the extent they emanate from state corporate law and second, that a publicly held benefit corporation in the United States is likely to have a litigation risk profile that is much the same at its core as that for a publicly held U.S. corporation in general. These two fundamental observations expose certain litigation risks and focus attention on several principal causes of action that are likely to be significant challenges for publicly held U.S. benefit corporations. The remainder of this Part illuminates both the observations and the key causes of action.

State law claims based on corporate law are largely independent of a corporation's private or public ownership. The likelihood that claims will be brought, however, may be greater in a publicly held social enterprise corporation because shareholders and their objectives may be less homogeneous. In particular, individual holders of widely dispersed publicly held shares likely have no preexisting relationship with the firm or each other and may not weigh or balance the relative values of the financial, social, or environmental corporate purposes of a benefit corporation, as applicable, the same way.<sup>62</sup> Managerial agency costs to shareholders may be less uniform and less certain than in a firm primarily aligned toward the production of shareholder financial wealth. In addition, some commentators have observed that publicly held firms are stronger magnets for litigation in the wake of twenty-first century regulatory reforms, including specifically the Sarbanes-Oxley Act of 2002.<sup>63</sup> Accordingly, while the nature of state corporate law claims may be the same for publicly held corporations as it is for privately held corporations, litigation risk may be higher for publicly held firms than for privately held firms.

A publicly held benefit corporation in the United States shares litigation risk with publicly held U.S. corporations in general; many relevant trends in litigation involving publicly held firms generally would appear to be transferable in the publicly held U.S. benefit corporation setting. For example, shareholder litigation involving mergers and acquisitions has been prevalent among U.S. public companies (although perhaps is now declining somewhat),<sup>64</sup> as has shareholder litigation

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62. See, e.g., McDonnell, *supra* note 22, at 274 ("Public corporations, which are larger due to their publicly-traded shares, typically have thousands of shareholders, none of whom control the business. Most shareholders have no personal ties to the business, and institutional investors own a majority of the shares.")

63. See, e.g., Eric L. Talley, *Public Ownership, Firm Governance, and Litigation Risk*, 76 U. CHI. L. REV. 335, 336–37 (2009).

64. See RAVI SINHA, CORNERSTONE RESEARCH, SHAREHOLDER LITIGATION INVOLVING ACQUISITIONS OF PUBLIC COMPANIES: REVIEW OF 2015 AND 1H 2016 M&A LITIGATION (2016), <https://www.cornerstone.com/Publications/Reports/Shareholder-Litigation-Involving-Acquisitions->



involving exclusive forum selection bylaws and other intra-corporate litigation management processes.<sup>65</sup> Opportunistic behavior of the plaintiffs' bar is a key driver of overall public company litigation trends in the for-profit corporation setting generally.<sup>66</sup> One would expect that behavior to have similar impacts on litigation trends involving (and, therefore, the litigations risks for) publicly held benefit corporations specifically.

Given these general observations, a publicly held U.S. benefit corporation should expect that disgruntled shareholders desiring to vindicate their complaints would focus primarily on state actions alleging a breach of fiduciary duty and federal actions for securities fraud. Yet, the importance of corporate purpose in the benefit corporation and the introduction of statutory causes of action raises the specter of state law claims outside the fiduciary duty context that are uncommon in publicly held firms not organized as benefit corporations. Moreover, the context and nuances of fiduciary duty and securities fraud actions brought against a publicly held U.S. benefit corporation may be different from those for similar causes of action against the typical publicly held U.S. corporation not organized as a benefit corporation.

Specifically, a shareholder grievance against a publicly held benefit corporation is likely to include claims that the corporation has taken action or is operating outside the scope of its promised social enterprise objectives (i.e., its corporate purpose).<sup>67</sup> Accordingly, shareholder

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2016 [<https://perma.cc/QY33-G43H>] (documenting recent trends in public company merger and acquisition litigation).

65. See, e.g., Verity Winship, *Shareholder Litigation by Contract*, 96 B.U. L. REV. 485 (2016) (describing the debates and analyzing recent legal actions involving these shareholder litigation management tactics).

66. See, e.g., Brian Cheffins et al., *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs' Bar*, 2012 COLUM. BUS. L. REV. 427 (describing general trends affecting the plaintiffs' bar and their contribution to shareholder/investor litigation).

67. These claims effectively constitute investor claims of greenwashing akin to those raised by consumers based on alleged false advertising of products or services. See Miriam A. Cherry, *The Law and Economics of Corporate Social Responsibility and Greenwashing*, 14 U.C. DAVIS BUS. L.J. 281, 282 (2014) ("Greenwashing occurs when a corporation increases its sales or boosts its brand image through environmental rhetoric or advertising, but in reality does not make good on these environmental claims."); Mitch Nass, Note, *The Viability of Benefit Corporations: An Argument for Greater Transparency and Accountability*, 39 J. CORP. L. 875, 877 (2014) ("Greenwashing" is a marketing strategy that seeks to capitalize on the demand for socially conscious corporations' products and services provided by advertising green initiatives that may or may not accurately represent the company's actual goals and behavior."). Investment greenwashing has been a concern in benefit corporation legislation. See, e.g., Murray, *Choose Your Own Master*, *supra* note 1, at 33 ("[W]ithout at least some minimal level of board accountability, the benefit corporation statute could be an avenue to greenwashing and faux CSR rather than an antidote to them."); Kennan Khatib, Comment, *The Harms of the Benefit Corporation*, 65 AM. U. L. REV. 151, 151 (2015) (asserting that the benefit corporation form encourages greenwashing); Herrick K. Lidstone, Jr., *The Long and Winding Road to*

disputes might be vindicated through state law *ultra vires* actions (legal proceedings alleging that corporate action is beyond the scope of the powers that the corporation has the authority to exercise)<sup>68</sup> and statutory causes of action designed to hold a benefit corporation to its promised public benefit or benefits. Similarly, state fiduciary duty and federal securities fraud actions against publicly held U.S. benefit corporations might focus on the benefit corporation's failure to conduct its business and operations in a manner consistent with its public benefit or benefits. This Part briefly explores these potential causes of action.

### A. State Law Actions

Publicly held U.S. benefit corporations with shareholder complaints about the firm's adherence to its corporate purpose should expect to see *ultra vires* and similar statutory claims brought under state corporate law focusing specifically on those complaints.<sup>69</sup> However, the facts underlying that type of action may also support a claim that the corporate directors breached their fiduciary duties under state corporate law—specifically a breach of the duty of loyalty and, if a separately constituted legal action, a breach of good faith.<sup>70</sup> The likelihood that any of these state-law-based cases will be brought depends on, among other things, the precise facts at issue and the remedies sought; facts may not be sufficient to support a particular claim, or a viable claim may not allow an aggrieved claimant to a desired remedy.<sup>71</sup> For example, shareholders may be able to prevail on a

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*Public Benefit Corporations in Colorado*, COLO. LAW., Jan. 2014, at 39, 44–45 (describing aspects of the greenwashing issue in the benefit corporation context).

68. See, e.g., Charles E. Carpenter, *Should the Doctrine of Ultra Vires Be Discarded?*, 33 YALE L.J. 49, 49 (1923) (“If the corporation enters into a transaction which is beyond the powers expressly or impliedly contained in the charter or articles of incorporation or in violation of the statutory restriction, the transaction is said to be *ultra vires*, i.e., beyond the powers of the corporation.”); Michael A. Schaeftler, *The Purpose Clause in the Certificate of Incorporation: A Clause in Search of a Purpose*, 58 ST. JOHN’S L. REV. 476, 478 (2012) (“An attempt by a corporation to act beyond its purposes or powers is considered to be an *ultra vires* activity . . .”).

69. Although this is the author's prediction, others have acknowledged the possibility of legal action on *ultra vires* actions involving benefit corporations. See, e.g., John Tyler et al., *Producing Better Mileage: Advancing the Design and Usefulness of Hybrid Vehicles for Social Business Ventures*, 33 QUINNIAC L. REV. 235, 265 (2015) (“Perhaps an attorney general might be able to assert that a given benefit corporation's activities are *ultra vires* if they did not consider the effects of their decisions on the designated interests, and two thirds of the shareholders did not vote to ratify the actions or convert to regular corporate status.”).

70. Legal actions for breach of fiduciary duty are often brought as shareholder derivative actions against directors and officers and not against the corporation itself. See *infra* note 116 and accompanying text (on derivative actions for breach of fiduciary duty). Nevertheless, the subject corporation is an active player in shareholder derivative litigation and bears litigation risk (albeit not the prospect of a detrimental monetary judgment) as a result.

71. This is endemic to the process of choosing an optimal cause of action through which to pursue a claim for wrongful conduct. See, e.g., *McFaul v. Ramsey*, 61 U.S. 523, 525 (1857) (“The

claim that benefit corporation directors approved a corporate transaction that is beyond the corporation's powers as defined by statutory law and the corporation's charter, entitling them to injunctive relief; yet, the directors' approval of the transaction may not have violated applicable standards of conduct or liability that would result in damages payable to the corporation. In all, the specifics of fiduciary duty law, general corporate law, and benefit corporation law make it unlikely that benefit corporations and their managers will be held liable.<sup>72</sup>

To illustrate these points about state law claims in the publicly held benefit corporation context, a summary of certain general related considerations under benefit corporation law may be helpful. The remainder of this Part provides that summary. Unless otherwise noted, although the focus of the analysis is publicly held benefit corporations, the causes of action, claims, and limitations described in this Part are available in court proceedings involving privately held or publicly held benefit corporations.

### 1. *Ultra Vires* and Similar Statutory Claims

A corporation acting outside the bounds of its statutory and charter-based purposes and powers to act often is said to be acting in a manner that is *ultra vires*.<sup>73</sup>

Through the nineteenth and early twentieth centuries, the *ultra vires* doctrine was central to corporate law. Limiting the corporation's legal authority to certain powers enumerated in the corporate charter, the doctrine was considered an important tool to protect the state's interest in restricting the power and size of corporations and to protect the shareholders from managerial overreaching.<sup>74</sup>

While the doctrine has not been an active basis for legal actions (especially since the advent of general corporate purpose clauses<sup>75</sup>), it continues to be a possible litigable claim.<sup>76</sup>

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distinction between the different forms of actions for different wrongs, requiring different remedies, lies in the nature of things . . . .").

72. See Murray, *supra* note 1, at 33–36 (noting and explaining this overall difficulty in holding benefit corporation directors accountable for their allegedly wrongful corporate conduct).

73. See Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (with Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1302 (2001) ("Traditionally, the corporation's powers were limited to the explicit objects of the corporation as defined in the corporate charter.").

74. Greenfield, *supra* note 73, at 1302.

75. See *supra* note 32 and accompanying text.

76. See generally Greenfield, *supra* note 73, at 1360 ("[T]he traditional doctrine of *ultra vires*, thought to be defunct, is in fact alive in important respects."); Sulkowski & Greenfield, *supra* note 27, at 930 ("[T]he [*ultra vires*] doctrine was almost done away with during the 1900s inasmuch as

To that point, “[t]he incorporation statutes of forty-nine states allow these states to dissolve a corporation or enjoin it from engaging in *ultra vires* activities—that is, activities outside of the corporation’s authority.”<sup>77</sup> In a 2005 law review article, Professors Adam Sulkowski and Kent Greenfield identify advantages and disadvantages to *ultra vires* actions.<sup>78</sup> While actions alleging *ultra vires* activity are not often discussed as a litigation alternative, they seem like a more obvious option in the benefit corporation context given the distinguishing and strong role of corporate purpose in the benefit corporation form.

The *ultra vires* doctrine protects the shareholders’ interest in the firm more broadly than a pure financial wealth maximization norm.

[T]he doctrine “was seen as essential for the protection of the investing public.” The notion was that shareholders made investment decisions based in part on the scope of permissible business activities in which a corporation could engage. The specific activities listed in the corporate charter were regarded as an important part of the “contract” between shareholders and the firm (and its management). It was assumed that shareholders cared which activities the firm engaged in, and if the firm went beyond the activities specified in the corporate charter it was a violation of the firm’s contractual duty to the shareholders. The *ultra vires* doctrine enforced the limitation on the corporation’s activities even when the unauthorized venture was likely to be profitable.<sup>79</sup>

We may presume that the corporation’s articulated benefit purpose motivates shareholder investments in benefit corporations, and as a result, we may expect a high level of shareholder engagement with the adherence of board and officer conduct to that benefit purpose. Accordingly, a publicly held benefit corporation with disaffected shareholders should expect *ultra vires* litigation if the shareholder complaints include a failure of the corporation to adhere to its articulated corporate purpose.

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companies are now free to alter their field of business as they wish, a narrow slice of this doctrine remains.”).

77. Sulkowski & Greenfield, *supra* note 27, at 945.

78. *See id.* at 949–52. The stated advantages include: “no ambiguous standard or difficult threshold to hurdle,” “fewer unforeseeable contingencies and fewer evidentiary burdens,” and “the remedies allowed for in all states except North Dakota are either equitable relief (including injunctions) or the dissolution of the company.” *Id.* at 949. Two obstacles to a successful *ultra vires* claim are identified: “producing evidence that a company is presently engaging in unlawful conduct and then convincing the judge to use the court’s powers in equity to enforce the relevant law by requiring action or the cessation of action by the company.” *Id.* at 950. The coauthors further note that “[t]he key limitation to the *ultra vires* doctrine is that it will work only when a corporation is violating a law in a jurisdiction where it is engaged in a business activity.” *Id.* at 961–52.

79. Greenfield, *supra* note 73, at 1304–05 (footnotes omitted).

In seeming recognition of this fact, laws in many states adopting the benefit corporation form create an express statutory cause of action to enforce compliance with the corporation's public benefit, most often called a "benefit enforcement proceeding."<sup>80</sup> The action may be brought directly or derivatively, but derivative plaintiffs must meet a relatively high threshold level of share ownership (typically 2% or 5% beneficial or record ownership) to have standing.<sup>81</sup> The plaintiff in a benefit enforcement proceeding cannot seek monetary damages for the benefit corporation's "failure . . . to [pursue or] create a general public benefit or any specific public benefit."<sup>82</sup> However, benefit corporation statutes typically provide for the reimbursement of the plaintiff's attorney fees if a court determines that the failed compliance is "without substantial justification" or "without justification."<sup>83</sup> Finally, benefit corporation statutes providing for benefit enforcement proceedings may foreclose

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80. *See, e.g.*, Dana Brakman Reiser, *Regulating Social Enterprise*, 14 U.C. DAVIS BUS. L.J. 231, 239 (2014) ("[B]enefit corporations [sic] shareholders can sue to enforce directors' obligations, including in a special benefit enforcement proceeding authorized by many statutes"); Nass, *supra* note 67, at 886 ("The unique enforcement provision that many benefit corporation statutes share is the benefit enforcement proceeding. This is a right of action granted to company insiders who seek enforcement of the company's duty to further a public benefit.") (footnotes omitted). Research for this Article in March 2016 identified benefit enforcement proceeding provisions in the benefit corporation laws of the following states: California, Connecticut, Florida, Idaho, Illinois, Indiana, Louisiana, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, Oregon, Pennsylvania, Rhode Island, and South Carolina.

81. *See, e.g.*, CONN. GEN. STAT. ANN. § 33-1362(c) (West 2014):

A benefit enforcement proceeding may be commenced or maintained only (1) directly by the benefit corporation, or (2) derivatively in accordance with the provisions of chapter 601 by (A) a person or group of persons that owns beneficially or of record not less than five per cent of the total number of shares of a class or series outstanding at the time of the act or omission complained of, (B) a person or group of persons that owns beneficially or of record ten per cent or more of the outstanding equity interests in an entity of which the benefit corporation is a majority-owned subsidiary at the time of the act or omission complained of, or (C) other persons as specified in the certificate of incorporation or bylaws of the benefit corporation.

82. *See, e.g.*, CONN. GEN. STAT. ANN. § 33-1362(b) ("A benefit corporation shall not be liable for monetary damages under sections 33-1352–33-1364, inclusive, for any failure of the benefit corporation to pursue or create a general public benefit or any specific public benefit."); MONT. CODE ANN. § 35-1-1412(3) (2015) ("A benefit corporation is not liable for monetary damages for any failure of the benefit corporation to create general public benefit or a specific public benefit.")

83. *See, e.g.*, ALA. CODE § 12-19-272(a) (1987) ("[I]n any civil action commenced or appealed in any court of record in this state, the court shall award . . . reasonable attorneys' fees and costs against any attorney or party, or both, who has brought a civil action, or asserted a claim therein, or interposed a defense, that a court determines to be without substantial justification, either in whole or part."); MONT. CODE ANN. § 35-1-1412(4) ("If the court in a benefit enforcement proceeding finds that a failure to comply with this part was without justification, the court may award an amount sufficient to reimburse the plaintiff for the reasonable expenses incurred by the plaintiff, including attorney fees and expenses, in connection with the benefit enforcement proceeding.")

*ultra vires* actions as a matter of positive law.<sup>84</sup> Accordingly, as a means of holding benefit corporations and their management to the corporation's chartered benefit purpose, the benefit enforcement proceeding is a relatively dominant, albeit weak (because of the limits on plaintiffs and the unavailability of monetary damages), accountability tool, and the statutes providing for it may preclude common law *ultra vires* claims.<sup>85</sup>

## 2. Breach of Fiduciary Duty Claims

Benefit corporation shareholder dissatisfaction may also manifest itself in actions for breach of fiduciary duty—whether alleged to occur in the general, ongoing monitoring or management of the corporation or in specific decision-making on transactions or other conduct. These actions may assert traditional fiduciary duty claims (e.g., that the directors have acted in a manner inconsistent with good faith or the duties of care or loyalty)<sup>86</sup> or claims that the directors failed to discharge the specific standards of conduct made applicable to them under the state's benefit corporation statute (detailed *supra* Part I.3).

Delaware judicial opinions constitute the leading body of corporate fiduciary duty law in the United States and are especially important for existing publicly traded firms (which are overwhelmingly Delaware corporations).<sup>87</sup> To the extent that current Delaware fiduciary duty law directs corporate boards or officers to prioritize shareholder interests (especially financial wealth interests) over either the firm's chartered corporate purpose or nonshareholder constituencies required to be considered under benefit corporation statutes,<sup>88</sup> we may expect that law to

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84. See, e.g., CONN. GEN. STAT. ANN. § 33-1362(a) ("Except in a benefit enforcement proceeding, no person may bring an action or assert a claim against a benefit corporation or its directors or officers with respect to . . . the failure to pursue or create a general public benefit or any specific public benefit identified in its certificate of incorporation . . ."); 15 PA. STAT. AND CONS. STAT. ANN. § 3325(a)(1) (West 2013) ("Except in a benefit enforcement proceeding, no person may bring an action or assert a claim against a benefit corporation or its directors or officers with respect to . . . failure to pursue or create general public benefit or a specific public benefit set forth in its articles.").

85. Accord Nass, *supra* note 67, at 886–88 (engaging a similar analysis).

86. Director liability for monetary damages for a failure to discharge the duty of care are discounted here because of the prevalence of exculpation provisions, but breaches of the duty of care may be alleged against officers or to seek equitable relief or contest the applicability of the business judgment rule. See Julian Velasco, *A Defense of the Corporate Law Duty of Care*, 40 J. CORP. L. 647, 656–57 (2015).

87. See Lisa L. Casey, *Twenty-Eight Words: Enforcing Corporate Fiduciary Duties through Criminal Prosecution of Honest Services Fraud*, 35 DEL. J. CORP. L. 1, 9 (2010) ("Executives of most public companies look to Delaware law for the content and enforcement of their fiduciary duties."); Pamela Mathy, *Honest Services Fraud After Skilling*, 42 ST. MARY'S L.J. 645, 723 (2011) ("It is well accepted that many public companies incorporate in Delaware to ensure that Delaware law's limitation on director and officer personal liability will apply to any alleged breaches of fiduciary duties.").

88. The potential application of *Revlon* duties in a benefit corporation context provides an example. This is an uncertain area under benefit corporation law, to say the least. See, e.g., *infra* notes

be inapplicable in any judicial review of board conduct in the benefit corporation setting. Yet, those expectations may not be valid. Over time, judicial opinions interpreting managerial fiduciary duties in the benefit corporation context will offer us insights on the elements of general corporate fiduciary duty law that apply under benefit corporation law. Benefit corporation legislation compromises the relative certainty and predictability of Delaware fiduciary duty law.

Delaware law's treatment of good faith questions may lead to different results in the application of benefit corporation fiduciary duty law in the various states. Delaware law conceptualizes good faith as a component of the duty of loyalty.<sup>89</sup> As previously noted, benefit corporation statutes may allow a benefit corporation to provide in its charter that disinterested failures to comply with the statutory standards of conduct are not actionable as breaches of the duty of loyalty.<sup>90</sup> As a result, actions against Delaware benefit corporations for breach of fiduciary duty alleging a lack of good faith would not be available in firms with those charter provisions unless the allegations of bad faith also included facts establishing self-interest. However, courts applying the fiduciary duty law of jurisdictions that recognize a separate cause of action for breach of good faith claims may allow those claims to proceed notwithstanding the corporation's inclusion of the permitted charter provisions excepting disinterested conduct from the duty of loyalty.<sup>91</sup>

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108–111 and accompanying text. *See generally* Sean W. Brownridge, *Canning Plum Organics: The Avant-Garde Campbell Soup Company Acquisition and Delaware Public Benefit Corporations Wandering Revlon-Land*, 39 DEL. J. CORP. L. 703 (2015) (noting the uncertainty, positing solutions to key questions, and proposing a new framework); Alicia E. Plerhoples, *Can an Old Dog Learn New Tricks? Applying Traditional Corporate Law Principles to New Social Enterprise Legislation*, 13 TRANSACTIONS: TENN. J. BUS. L. 221 (2012) (examining the *Revlon* doctrine in the flexible purpose corporation context).

89. *See* Stone ex rel. AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006) (“[T]he fiduciary duty of loyalty is not limited to cases involving a financial or other cognizable fiduciary conflict of interest. It also encompasses cases where the fiduciary fails to act in good faith.”).

90. *See supra* note 52 and accompanying text (representing a list of typical provisions in benefit corporation statutes, including provisions that “expressly permit a benefit corporation to include in its charter a provision declaring that any disinterested failure to satisfy the statutory standard of conduct does not constitute a breach of the duty of loyalty”).

91. Both Colorado and Tennessee law address this possibility directly in their respective statutes. *See* COLO. REV. STAT. ANN. § 7-101-506(3) (West 2014) (“The articles of incorporation of a public benefit corporation may include a provision that a disinterested director’s failure to satisfy this section does not, for the purposes of section 7-108-401 or article 109 of this title, constitute an act or omission *not in good faith or a breach of the duty of loyalty.*” (emphasis added)); TENN. CODE ANN. § 48-28-106(c) (West 2016) (“The charter of a for-profit benefit corporation may include a provision that any disinterested failure to satisfy this section shall not, for the purposes of §§ 48-18-301 to -303 or §§ 48-18-501 to -509, constitute an act or omission *not in good faith, or a breach of the duty of loyalty.*” (emphasis added)).

As a general matter, assuming a viable fiduciary duty claim, the liability or financial responsibility of corporate directors for breaches of fiduciary duty may be narrowed through the application of up to four mandatory or permissive aspects of corporate law. These include exculpation for breaches of the duty of care, indemnification (statutory and privately ordered), director and officer liability insurance, and the possible application of the business judgment rule in the judicial review process.<sup>92</sup> Officers, as well as directors, may benefit from indemnification, insurance, or the business judgment rule.<sup>93</sup>

These same protections are—or may be—available to directors and officers in the benefit corporation context. Yet, where available, the application of these protections to fiduciary duty litigation involving managers of benefit corporations remains untested because benefit corporation fiduciary duty litigation is, itself, untested. For example, courts may reconsider whether, and if so when, to apply the business judgment rule to review alleged breaches of duty arising under benefit corporation law.<sup>94</sup> Under applicable rules in some state benefit corporation statutes, the board must consider the effects of its conduct on specific constituencies as well as the corporation's charter-based public benefit or public benefits.<sup>95</sup> This statutory requirement decreases the discretion afforded to corporate management (by specifically defining what management must consider) and limits the need for and reliance on management expertise. Accordingly, statutory considerations may undercut the rationale for, or decrease the need for, the business judgment rule.<sup>96</sup> To the extent that courts adopting the business judgment rule credit management discretion and expertise in managing the firm as a rationale

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92. See Todd M. Aman, *Cost-Benefit Analysis of the Business Judgment Rule: A Critique in Light of the Financial Meltdown*, 74 ALB. L. REV. 1, 15 (2010–2011) (“[T]he vast majority of directors receive protection from liability risk (through the business judgment rule, exculpation statutes, insurance, indemnification, and so on.)”; Cynthia A. Williams & John M. Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights?*, 74 U. CIN. L. REV. 75, 92 (2005) (“[T]he combination of the business judgment rule, indemnification, insurance, and exculpation, . . . together produce[s] . . . a low risk of personal liability.”).

93. There is some debate about the applicability of the business judgment rule to the decisions and actions of corporate officers. See, e.g., Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 414 (2013) (“[N]either the doctrinal nor policy aspects of the business judgment rule have been settled with respect to officers[.]”). This Article assumes for the sake of its argument that the rule may apply to officers.

94. The ill-understood and contested rationales for the business judgment rule may increase the likelihood of a challenge to the rule in novel contexts. See, e.g., Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439, 454 (2005) (noting “deep-rooted disagreement about the basic purpose and thrust of the business judgment rule” in addressing its application to corporate officers).

95. See *supra* notes 49–50 and accompanying text.

96. See generally Brownridge, *supra* note 88, at 727–30; Johnson, *supra* note 93, at 411–13 (noting the formulations and rationales for the business judgment rule).



for use of the business judgment rule,<sup>97</sup> why should a court give any credit to directors or officers for complying with a statutory duty requiring them to take specific constituencies and matters into consideration—a duty that limits management discretion and the exercise of management expertise? Moreover, if the business judgment rule does apply, we should expect that the subsequent judicial assessment of a rational business purpose would take into account the specific, express, chartered corporate purpose of the firm.<sup>98</sup>

Difficult unanswered questions also exist in connection with benefit corporation cash-out mergers and other conflicting interest transactions that may invoke an entire fairness review of a transaction. In adjudicating conflicting interest claims involving U.S. publicly held benefit corporations, the judiciary has a chance to revisit the notions of fair dealing (process) and fair price as components of entire fairness, as identified and described under, for example, *Weinberger v. UOP, Inc.*<sup>99</sup> For instance, one might ask how the statutorily required management considerations impact (if at all) the notion or analysis of fair dealing. Moreover, benefit corporation management and legal counsel will want to consider, in moving forward with a transaction that could be subject to entire fairness review, how the concept or evaluation of fair price may be affected by a corporation's public benefit or any related nonfinancial value that inures to shareholders as a result of the transaction.

Additional doctrinal uncertainty may result from the application of enhanced judicial review of board decision-making under *Unocal*<sup>100</sup> and

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97. See Johnson, *supra* note 93, at 412 (“Delaware courts frequently ground the rule in that section of the corporate statute providing that the business and affairs of a corporation are to be managed by or under the direction of its board.”).

98. The judicial conception of a rational business purpose in the general for-profit corporate context is broad enough to encompass objectives other than shareholder wealth maximization as a general matter. See Kevin V. Tu, *Socially Conscious Corporations and Shareholder Profit*, 84 GEO. WASH. L. REV. 121, 139 (2016) (“The application of the business judgment rule also shows that a rational business purpose is not narrowly limited directly to the pursuit of shareholder profit in the short term.”). Benefit corporation law expressly opens a whole new avenue for breadth in this area:

Benefit corporations open the door for irresponsible directors to justify their actions (including self-interested actions) by pointing to some public benefit justification (or alternatively when public benefit is involved, to some private shareholder benefit justification). Managerial accountability has proven difficult in for-profit enterprises, and it is difficult to conceptualize accountability in a hybrid entity with both broad general public purposes and narrow private purposes.

J. William Callison, *Putting New Sheets on a Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, the Dangers Created, and Suggestions for Change*, 2 AM. U. BUS. L. REV. 85, 108 (2012) (footnote omitted).

99. 457 A.2d 701, 711–15 (Del. 1983).

100. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

*Unitrin*.<sup>101</sup> Under *Unocal*'s first prong,<sup>102</sup> for example, what is a “danger to corporate policy and effectiveness”<sup>103</sup> in the benefit corporation context (which assumes the best interests of the corporation involve more than the maximization of shareholder financial wealth)? What are “reasonable grounds for belief”<sup>104</sup> in that danger in this environment? The second prong of *Unocal*<sup>105</sup> also provides food for thought as applied to benefit corporations. In particular, to the extent that existing judicial doctrine is founded on shareholders with exclusive or primary interests in financial wealth maximization, a court may construe coercion or the range of reasonableness differently under *Unitrin*.<sup>106</sup> Several commentators provide useful information and preliminary insights on some of these questions.<sup>107</sup>

*Revlon*<sup>108</sup> duties, however, as originated in Delaware and applied in a number of other states with benefit corporation statutes, present an even clearer opportunity for a conflict between existing fiduciary duty doctrine and benefit corporation law in a takeover defense environment. A number of scholars and other pundits have already commented on the applicability and relevance of *Revlon* to a benefit corporation's decision to engage in deal protection tactics.<sup>109</sup> One commentator aptly summarizes the potential for dissonance in a cogent paragraph:

Public benefit corporations . . . are, of course, novel ideas within the realm of Delaware corporate law. In some instances, this novelty clashes with the well-settled decisions of Delaware business courts, most notably that of *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, a 1986 decision issued by the Supreme Court of Delaware. In its

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101. *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361 (Del. 1995).

102. Under *Unocal*, the judicial review of director actions approving corporate defenses from an unsolicited change in control is frequently said to have two prongs, the first of which requires directors to prove a “danger to corporate policy or effectiveness”—a threat to the firm—and the second of which requires directors to prove that the defensive action taken is proportional to the threat. *See, e.g.*, Murray, *Defending Patagonia*, *supra* note 26, at 490–91; Bernard S. Sharfman, *A Theory of Shareholder Activism and its Place in Corporate Law*, 82 TENN. L. REV. 791, 824–25 (2015); Robert B. Thompson & D. Gordon Smith, *Toward a New Theory of the Shareholder Role: “Sacred Space” in Corporate Takeovers*, 80 TEX. L. REV. 261, 282–83 (2001).

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

104. *Id.*

105. *Id.* at 955–56.

106. *See Unitrin*, 651 A.2d at 1386–88 (defining and describing the role of coercion and the range of reasonableness under *Unocal*).

107. *See generally* Sean W. Brownridge, *A Wolf in Sheep's Clothing: Unocal and the Defensive Mechanism Hidden in Corporate Benefit Purpose*, 60 VILL. L. REV. 903 (2015). *See also* Murray, *Defending Patagonia*, *supra* note 26, at 490–94.

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

109. *See, e.g.*, Brownridge, *supra* note 88 (providing an analysis of the application of *Revlon* to benefit corporations); Murray, *Defending Patagonia*, *supra* note 26, at 495–98 (describing “*Revlonland*” in the context of benefit corporations).

most basic formulation, *Revlon* holds that “when a target board of directors enters *Revlon*-land, the board’s role changes from that of ‘defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company.’ Less colloquially, *Revlon*-land is the space in which the duty of a target corporation’s board shifts from corporate preservation to maximization of the company’s value for the benefit of the shareholders.<sup>110</sup>

The challenges to directors and officers, corporate legal advisors, and the judiciary are palpable, and a showdown on the central questions relative to the application of fiduciary duty doctrine in this context is seemingly inevitable unless (and perhaps even if) legislatures directly address the potential for conflict between the statutory duties of benefit corporation management and judicially construed management fiduciary duties under *Revlon*.<sup>111</sup>

However, U.S. benefit corporation statutes also provide new protections to corporate management. Most prominently, they permit limitations of director liability for disinterested breaches of duty by authorizing charter provisions that customize the duty of loyalty to exclude a disinterested failure to satisfy the applicable statutory standard of conduct.<sup>112</sup> In practical reality, absent the possibility that a specific, separate cause of action may be brought asserting action or inaction lacking in good faith,<sup>113</sup> director liability for a breach of the duty of loyalty would have to rest on a conflicting interest. State benefit corporation acts also restrict potential claimants in an action against directors by providing that directors do not owe duties to any beneficiaries of the corporation’s public benefit purpose as a result of that beneficiary status.<sup>114</sup> Thus, although new director and officer fiduciary duties exist in the benefit corporation context, liability for breach of these duties (and any resulting *in terrorem* effect) has been statutorily limited.

These doctrinal issues are significant. But, they do not provide the entire picture of fiduciary duty litigation risk. Litigation risk assessment should take into account the nature of the cause of action in addition to the substantive claim. Management breaches of fiduciary duty most commonly are adjudicated in class actions or shareholder derivative

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110. Brownridge, *supra* note 88, at 706 (footnotes omitted).

111. *Accord id.* at 749 (“[T]he Delaware legislature should clearly delineate how the interests in Section 365(a) are to be balanced, and the Delaware business courts should carefully evaluate how *Revlon* applies to public benefit corporation directors who find themselves in *Revlon*-land, so as to articulate a standard, one way or the other, that brings clarity to the matter.”).

112. See *generally supra* note 91 and accompanying text.

113. See *supra* note 91 and accompanying text.

114. See *supra* note 59 and accompanying text.

actions.<sup>115</sup> Despite some decisional law references to a fiduciary duty to the corporation and its stockholders or shareholders, in most decision-making contexts, the fiduciary duties of corporate management are owed to the corporation and the corporation is entitled to any relief awarded.<sup>116</sup> The cases brought in connection with mergers and acquisitions are a large exception, typically generating class action litigation rather than shareholder derivative litigation.<sup>117</sup>

Although the process of class action litigation is untouched by benefit corporation law, under some state benefit corporation statutes, derivative actions for breach of the statutorily mandated fiduciary duties are expressly contemplated and addressed. Delaware's benefit corporation law, for example, provides that:

Stockholders of a public benefit corporation owning individually or collectively, as of the date of instituting such derivative suit, at least 2% of the corporation's outstanding shares or, in the case of a corporation with shares listed on a national securities exchange, the lesser of such percentage or shares of at least \$2,000,000 in market value, may maintain a derivative lawsuit to enforce the requirements set forth in § 365(a) of this title.<sup>118</sup>

The benefit corporation statutes in Colorado and Tennessee include a substantially similar provision.<sup>119</sup>

By affording a right of action only to derivative plaintiffs having a requisite percentage or dollar value of shareholdings, benefit corporation laws may decrease the prospect of fiduciary duty enforcement litigation. Although the 2% threshold level of ownership for derivative actions under the Colorado, Delaware, and Tennessee statutes is lower than the standard 5% test for benefit enforcement actions,<sup>120</sup> 2% still is a high threshold of ownership for shareholder rights in a publicly held corporation. Even a 1% threshold seems high in the public company context.<sup>121</sup> Retail investors

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115. See Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV. 1747, 1762 (2004).

116. See David J. Beck, *The Legal Profession at the Crossroads: Who Will Write the Future Rules Governing the Conduct of Lawyers Representing Public Corporations?*, 34 ST. MARY'S L.J. 873, 889 (2003) ("A corporation's shareholders ordinarily cannot bring an individual suit to recover for a wrong committed solely against the corporation, even if the shareholders also suffer damages as a result of the wrong. . . .").

117. See Thompson & Thomas, *supra* note 115, at 1762.

118. DEL. CODE ANN. tit. 8, § 367 (2013).

119. COLO. REV. STAT. ANN. § 7-101-508 (West 2014); TENN. CODE ANN. § 48-28-108 (2016).

120. See *supra* note 81 and accompanying text.

121. *Contra* Patty M. DeGaetano, *The Shareholder Direct Access Teeter-Totter: Will Increased Shareholder Voice in the Director Nomination Process Protect Investors?*, 41 CAL. W. L. REV. 361, 413 (2005) ("The one percent threshold to place a shareholder access proposal on the ballot is too low.

would be highly unlikely to own that high a threshold of ownership in a public company, although institutional investors (which typically are less likely to bring legal actions against the firms in which they invest) may cross a 1% or 2% level of public company ownership.<sup>122</sup> The composition of equity investors in publicly held benefit corporations is a matter about which much speculation exists. Institutional investors may or may not play a significant role in this sector of the market for publicly traded securities once it emerges. Moreover, an observer's view on the perceived appropriateness of a required level of ownership for the exercise of a shareholder right depends on the observer's assessment of the costs and benefits associated with that shareholder right. It is important to note in this context the existence of an alternative market value test for corporations with exchange-traded securities.<sup>123</sup> In a firm with a high market capitalization or per-share values, it may be easier, but still not easy, for a disgruntled shareholder to qualify under this market value test.

In addition, under benefit corporation laws that provide for benefit enforcement proceedings,<sup>124</sup> legal actions for a failure to comply with the benefit corporation standards of conduct for directors are expressly foreclosed. Shareholders are relegated to using a benefit enforcement proceeding to advance these kinds of claims in court.<sup>125</sup> This cause of action is legislatively constructed and unique to benefit corporations.<sup>126</sup> Putative shareholder plaintiffs also must qualify with a threshold level of ownership of shares in the corporation in order to bring suit.<sup>127</sup>

Thus, judicial accountability tools are relatively weak, and limits on management liability for fiduciary duty breaches in state benefit corporation statutes are relatively strong. In states where they are

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This would allow, in essence, 'the tail to wag the dog,' because only one of a company's shareholders would be able to set a costly and time-consuming process in motion.").

122. See, e.g., *id.* at 396 n.209 ("[O]f publicly traded companies, the SEC estimated that 84% have at least one institutional shareholder that has maintained ownership of at least 1% of the shares outstanding for one year. Even so, submission of security holder proposals by large holders is rare, based on a review of a sample of 237 security holder proposals in 2002, where only three were found to have been submitted by a holder of more than 1% of the shares outstanding, and all three of those were submitted by the same security holder." (citations omitted)); Alicia Davis Evans, *The Investor Compensation Fund*, 33 J. CORP. L. 223, 246 (2007) ("Because it is unlikely that any one retail investor will hold a 1% stake in a public company, generally institutions will be the only stockholders with the independent power (i.e., not as a part of a group) to initiate proceedings. The managers of such institutions, as sophisticated businesspeople, are unlikely to file charges that lack merit.").

123. See, e.g., *supra* note 118 and accompanying text.

124. See *supra* notes 81–83 and accompanying text.

125. See, e.g., CONN. GEN. STAT. ANN. § 33-1362(a) (2014) ("Except in a benefit enforcement proceeding, no person may bring an action or assert a claim against a benefit corporation or its directors or officers with respect to . . . the violation of an obligation, duty or standard of conduct under sections 33-1352 to 33-1364, inclusive.").

126. See *supra* notes 80–85 and accompanying text.

127. See *supra* note 81 and accompanying text.

available, shareholder derivative actions are constrained to classes of plaintiffs based on the percentage or market value of their ownership interests. Shareholder access to benefit enforcement proceedings is similarly restricted.<sup>128</sup> When layered onto the liability protections that benefit corporation management may have available, the regulation of causes of action in the benefit corporation context complete an overall picture of limited accountability.

### *B. Federal Securities Fraud and Misstatement Claims*

Benefit corporation law does not address federal securities law engagement or compliance, except indirectly (e.g., by reference to benefit corporations having exchange-traded shares<sup>129</sup>). This is unsurprising because the statutory and regulatory schemes have different objectives. The focus of securities regulation is not to protect corporate purpose or the best interest of the firm; rather, securities regulation protects investors, markets, and capital raising generally.<sup>130</sup> Yet, for benefit corporations to survive, they must engage in financing activities, and some of those involve the sale and purchase of financial instruments recognized as securities.

Publicly traded benefit corporations, like other public companies, will be actively regulated under both legal regimes.<sup>131</sup> Most aspects of securities regulation (and the accompanying potential for litigation) should be the same for both general for-profit corporations and benefit corporations. However, the risk of specific types of securities fraud claims against U.S. public benefit corporations may be anticipated.

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128. See *supra* notes 118–127 and accompanying text.

129. See *supra* note 118 and accompanying text.

130. See, e.g., Joan MacLeod Heminway, *What is a Security in the Crowdfunding Era?*, 7 OHIO ST. ENTREPRENEURIAL BUS. L.J. 335, 337 (2012) (“Although variously stated, the key policies underlying U.S. securities regulation are the protection of investors and the maintenance of the integrity of the national securities markets, with the overall objective of enhancing prospects for capital formation to sustain business activity and growth.”); Meeka Jun, *New Capital Markets and Securities Regulations in Hungary: A Comparative Analysis of the Insider Trading Regulations in Hungary and the United States*, 19 BROOK. J. INT’L L. 1047, 1067–68 (1993) (“The stated policy of the securities regulations is to foster capital flow, to promote securities markets, and to safeguard investors.”); Constance Z. Wagner, *Securities Fraud in Cyberspace: Reaching the Outer Limits of the Federal Securities Laws*, 80 NEB. L. REV. 920, 928–29 (2001) (describing these policies as “protection of investors, ensuring that markets are fair, efficient, and transparent, and reducing systemic risk”).

131. See, e.g., Christopher M. Bruner, *Managing Corporate Federalism: The Least-Bad Approach to the Shareholder Bylaw Debate*, 36 DEL. J. CORP. L. 1, 26 (2011) (“A typical public company in the United States will find itself regulated by corporate law made in Delaware and securities regulation made by Congress and the SEC.”); James J. Park, *Two Trends in the Regulation of the Public Corporation*, 7 OHIO ST. ENTREPRENEURIAL BUS. L.J. 429, 432–34 (2012) (describing how securities law and state corporate law, as well as securities exchanges, regulate public company governance).

Securities fraud claims often are based on misstatements of material fact or omissions of material fact that make existing statements misleading.<sup>132</sup> The most well-known bases for this particular cause of action are Section 10(b) of the 1934 Act (Section 10(b))<sup>133</sup> and Rule 10b-5 adopted by the SEC under Section 10(b) (Rule 10b-5).<sup>134</sup> Accordingly, this Article focuses its securities regulation litigation risk analysis on the substantive doctrine under Section 10(b) and Rule 10b-5. However, it should be acknowledged that securities fraud and misstatement liability are also cognizable under state law and elsewhere under federal securities law as a component of public offering regulation,<sup>135</sup> proxy regulation,<sup>136</sup> tender offer regulation,<sup>137</sup> and going-private regulation.<sup>138</sup> The elements of these fraud and misstatement claims are different (including because, e.g., some claims—including those under Section 10(b) and Rule 10b-5—require proof of scienter and some do not), and the relief that may be sought (damages, rescission, etc.) varies.<sup>139</sup> Nevertheless, the prominence of Section 10(b)/Rule 10b-5 litigation makes it a useful example.

Successful securities fraud actions brought under Section 10(b) and Rule 10b-5 require proof by the plaintiff of three core elements constituting wrongful conduct, regardless of whether enforcement is public or private. To violate Section 10(b) and Rule 10b-5, a defendant's actions must be (1) deceptive or manipulative (including by misstating a material fact or omitting to state a material fact necessary to make disclosed information not misleading), (2) in connection with the purchase or sale of a security, and (3) taken with the requisite scienter.<sup>140</sup> Proof of

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132. See, e.g., Patrick M. Garry et al., *The Irrationality of Shareholder Class Action Lawsuits: A Proposal for Reform*, 49 S.D. L. REV. 275, 302 (2003–2004) (“The vast majority of securities fraud complaints refer to misstatements made by management ‘in the regular course of business,’ including press releases, conversations with the media, voluntary disclosures in public speeches, and government-required reports.”); Billy Kloos et al., *Securities Fraud*, 43 AM. CRIM. L. REV. 921, 924 (2006) (“Material misrepresentations and omissions give rise to the most common securities fraud actions.”).

133. 15 U.S.C. § 78j (2012).

134. 17 C.F.R. § 240.10b-5 (2016).

135. See 15 U.S.C. §§ 77l, 77m(a)(2), 77q.

136. See 17 C.F.R. § 240.14a-9.

137. See 15 U.S.C. § 78n(e).

138. See 17 C.F.R. § 240.13e-3.

139. See, e.g., Edward A. Fallone, *Crowdfunding and Sport: How Soon Until the Fans Own the Franchise?*, 25 MARQ. SPORTS L. REV. 7, 19 (2014) (“The elements of a cause of action for securities fraud differ slightly from the elements of a common law fraud claim.”).

140. See, e.g., *S.E.C. v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999) (“To have violated Section 10(b) and Rule 10b-5, . . . [the defendant] must have: (1) made a material misrepresentation or a material omission as to which he had a duty to speak, or used a fraudulent device; (2) with scienter; (3) in connection with the purchase or sale of securities.” (citation omitted)); *S.E.C. v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1467 (2d Cir. 1996) (“In order to establish primary

additional elements is required both for a successful criminal securities fraud action under Section 10(b) and Rule 10b-5 (including willful conduct), which must meet the higher “beyond a reasonable doubt” standard of evidence for criminal actions,<sup>141</sup> and for a successful private civil action under Section 10(b) and Rule 10b-5 (including reliance, a loss, and loss causation).<sup>142</sup>

Why might legal action under Section 10(b) and Rule 10b-5 be a notable litigation risk for publicly traded benefit corporations? Private plaintiffs may bring legal actions under Section 10(b) and Rule 10b-5 for alleged misstatements of material fact relating to the defendant firm’s business. Most often, these cases are brought as class actions.<sup>143</sup> A recent example of this genre of securities fraud action is *In re Lululemon Securities Litigation*, a case centering on a false and misleading statement about the quality of yoga pants sold by lululemon athletica inc.<sup>144</sup> Although the *Lululemon* case was dismissed (based on the plaintiffs’ failure to plead that the alleged statements were either false or misleading in any material respect) and that dismissal was affirmed on appeal, the risk of suit alone—as well the possibility of success, or even survival of a motion to dismiss—in some cases is itself a litigation risk.

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liability under § 10(b) and Rule 10b-5, a plaintiff is required to prove that in connection with the purchase or sale of a security the defendant, acting with scienter, made a material misrepresentation (or a material omission if the defendant had a duty to speak) or used a fraudulent device.”)

141. See 15 U.S.C. § 78ff (2012) (requiring willful, or in the case of a false or misleading statement in an application, report, or document, willful and knowing conduct); see also *United States v. O’Hagan*, 521 U.S. 642, 665 (1997) (“To establish a criminal violation of Rule 10b-5, the Government must prove that a person ‘willfully’ violated the provision.”).

142. See, e.g., *In re Int’l Bus. Machines Corp. Sec. Litig.*, 163 F.3d 102, 106 (2d Cir. 1998) (“To state a cause of action under Section 10(b) or Rule 10b-5 plaintiffs must prove that IBM (1) made misstatements or omissions of material fact; (2) with scienter; (3) in connection with the purchase or sale of securities; (4) upon which plaintiffs relied; and (5) that plaintiffs’ reliance was the proximate cause of their injury.”); *Bloor v. Carro, Spanbock, Londin, Rodman & Fass*, 754 F.2d 57, 61 (2d Cir. 1985) (“In order to state a claim for relief under section 10(b) a plaintiff must allege that, in connection with the purchase or sale of securities, the defendant, acting with scienter, made a false material representation or omitted to disclose material information and that plaintiff’s reliance on defendant’s actions caused him injury.”).

143. See, e.g., Mark K. Harder, *Getting the Federal Securities Fraud Laws Moving Again After Chiarella and Dirks: A Proposal for Reform*, 10 J. CORP. L. 711, 728 n.185 (1985) (“Rule 10b-5 actions are commonly time consuming, complex, and often class actions.”).

144. 14 F. Supp. 3d 553 (S.D.N.Y. 2014), *aff’d*, 604 F. App’x 62 (2d Cir. 2015). The trial court adequately summarized the allegations in the complaint in this short paragraph:

Boiled down to a summary version, lead plaintiff alleges that if only lululemon had someone try on its black luon yoga pants before they shipped, it would have realized they were sheer; similarly, if lululemon had only had someone exercise in certain athletic wear (enough to produce sweat), it would have realized that the colors bled. As a result, lead plaintiff alleges that defendants’ various statements referencing, *inter alia*, the high quality of lululemon’s products and the steps the company took to fix the quality issues were materially false or misleading.

*Id.* at 562.



Litigation of this kind seems likely to strike publicly held benefit corporations because of the inherent difficulty the firm and its advisors have in accurately and completely conveying the relationship between or among the beneficiaries of a benefit corporation's general or specific public benefit corporate purpose. Public commentary on the initial filing for the Laureate Education, Inc. initial public offering addresses this issue:

[I]n a public benefit corporation, the benefit can be hard to define. That appears to be true in the case of Laureate. I'm not particularly sure what creating a "positive effect" through "offering diverse education programs" actually means.

Given the vagueness here, instead of being a force for good, Laureate's benefit may simply result in greenwashing, that is, use of a public-relations-enhancing social purpose to fritter away money without oversight. To be sure, a Delaware-based public benefit corporation is required to be audited every two years for compliance with its objective, and Laureate has picked B Corp as its auditor. Still, given the newness of this form, it is uncertain how rigorous this auditing is, or even can be, given the loose benefit here.

This vagueness might be fine in a private company with only a few owners who can do whatever they want with their company—like paying Bill Clinton millions—but Laureate will be public, with thousands of shareholders.<sup>145</sup>

Because the public benefit is so central to the existence and operations of a benefit corporation, both consumers and investors will rely on the public disclosures of and about it.<sup>146</sup> From the investor standpoint, disclosures on and connected to a benefit corporation's public purpose will be used to price securities in what will be a new sector of the public securities markets. Pricing inaccuracies spark investor dissatisfaction, which may lead to allegations of materially false or misleading disclosures. Notwithstanding the likely protections of a watchdog marketplace,<sup>147</sup> the risk of litigation over inaccuracies and misunderstandings is salient.

A potentially significant legal digression on the extent of this litigation risk involves the loss causation element in private legal action.<sup>148</sup>

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145. Steven Davidoff Solomon, *Idealism That May Leave Shareholders Wishing for Pragmatism*, N.Y. TIMES: DEALBOOK (Oct. 13, 2015), [http://www.nytimes.com/2015/10/14/business/dealbook/laureate-education-for-profit-school-public-benefit.html?\\_r=0](http://www.nytimes.com/2015/10/14/business/dealbook/laureate-education-for-profit-school-public-benefit.html?_r=0).

146. See Michelle J. Stecker, *Awash in a Sea of Confusion: Benefit Corporations, Social Enterprise, and the Fear of "Greenwashing,"* 50 J. ECON. ISSUES 373, 378 (2016) ("The fear of corporate greenwashing is a valid concern for socially conscious consumers and investors.").

147. See *id.* at 378–79.

148. See generally Robert N. Rapp, *Plausible Cause: Exploring the Limits of Loss Causation in Pleading and Proving Market Fraud Claims Under Securities Exchange Act §10(b) and SEC Rule*

If a shareholder's Section 10(b)/Rule 10b-5 claim against a benefit corporation relates to the corporation's underdisclosure of the weight it gives to shareholder financial wealth maximization in a particular context and the directors' actions favoring shareholder financial wealth lead to higher prices for the defendant's shares in the market, the shareholder may have a difficult time alleging and proving a loss and, therefore, loss causation. One legal commentator argues that this risk may be inherent in the benefit corporation structure:

[I]t is arguable that . . . the directors of a benefit corporation will follow the power—they are elected by shareholders—and will ultimately serve the private interests of the shareholders rather than some broad social good. When faced with a conflict between shareholder interests and social goods, directors will likely align with the shareholders, since only the shareholders vote for directors.<sup>149</sup>

Public enforcement of a price-enhancing disclosure lapse would still exist on these facts, lest there be a concern that the lack of loss causation prevents enforcement action from being taken against the corporation under Section 10(b) and Rule 10b-5. Moreover, a creative trial lawyer may find another way for a private civil plaintiff to remedy damages resulting from inaccurate disclosures.

Loss causation issues notwithstanding, the difficulty in managing disclosures and investor expectations in publicly held U.S. benefit corporations seem likely to generate securities fraud and misstatement cases, including individual and class actions brought under Section 10(b) and Rule 10b-5. An additional factor to consider in this context is the very public nature of publicly held benefit corporations and the spotlight likely to be focused on early adopters. Professor Hillary Sale's work on "publicness"<sup>150</sup> informs this aspect of the publicly held benefit corporation: "As corporations grow, the groups grow and so do their responsibilities. When they choose to become public corporations, they become subject to multiple regimes. Then, when scandals occur, public focus on what they are doing and the corporate governance system grows."<sup>151</sup>

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10b-5, 41 OHIO N. U. L. REV. 389 (2015) (focusing on the loss causation element in Section 10(b)/Rule 10b-5 actions).

149. Callison, *supra* note 98, at 109.

150. See Hillary A. Sale, *J.P. Morgan: An Anatomy of Corporate Publicness*, 79 BROOK. L. REV. 1629 (2014); Hillary A. Sale, *Public Governance*, 81 GEO. WASH. L. REV. 1012 (2013); Hillary A. Sale, *The New "Public" Corporation*, 74 LAW & CONTEMP. PROBS. 137, 141 (2011) [hereinafter Sale, *New "Public" Corporation*].

151. Sale, *New "Public" Corporation*, *supra* note 150, at 141.

The Internet, the blogosphere, and other factors in contemporary business life, when layered onto public company disclosure regulation, make public company activities easier to notice and follow. Every word of every public statement—including those on websites and in product promotions, as well as those in public filings—can easily be captured and analyzed by unhappy investors desiring to remedy losses through litigation.<sup>152</sup> Benefit corporations in the public markets, like a shiny new penny, are likely to get special notice and, as a result, be subject to enhanced scrutiny. This attention may also increase the risk of securities fraud and misstatement litigation.

### III. WHAT USEFUL INFORMATION CAN WE DERIVE FROM THE EXPECTED UNIQUE LITIGATION RISKS ATTENDANT TO BEING A PUBLICLY HELD U.S. BENEFIT CORPORATION?

The foregoing summary of the unique attributes of benefit corporations and distinctive aspects of the litigation risks they may bear as public companies highlights a number of governance, regulatory, and public and private enforcement issues. This Part is designed to identify and describe those issues. A common thread unites these observations: corporate purpose.

In the benefit corporation form, the articulated corporate purpose—a benefit purpose—plays a dominant role. The benefit purpose is identified in the corporation's charter and is the focus of firm management in operating the firm's business and informing others about the firm and its operations. The possibility of liability (for the firm and the individuals who manage it) necessarily becomes a concern in planning for and operating the benefit corporation's business. Sensitivity to these concerns is heightened for publicly held benefit corporations.

Novel managerial obligations and fiduciary duties in the benefit corporation form build upon, leverage, and complement the corporation's benefit purpose. Benefit corporation directors and officers are required to conduct their corporate activities in a statutorily mandated environment that affords them challengingly constrained, vague, and multifaceted discretion to manage the firm. In this difficult organizational setting, however, the managers of the benefit corporation are well protected from liability for failing to fully comply with the governance rules applicable to their conduct:

Benefit corporations are not only *required* to have the purpose of creating “general public benefit,” but they can be held accountable

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152. See generally *id.* at 137 (“[A]s reporting requirements grow and technology increases, information becomes more accessible, digestible, and analyzable.”).

by shareholders should they become derelict in that duty. In turn, the directors and officers of benefit corporations are legally protected when they consider decisions based on the interests beyond those of just their shareholders. Voluntarily undertaking these duties and obligations by becoming a benefit corporation truly embeds them in the institution, acting as a safeguard against any potential slackening of commitment over time.<sup>153</sup>

Overall, the benefit corporation structure places pressure on the intersection between the corporation's benefit purpose and managerial conduct.

This structural pressure on officers and directors is not accompanied by meaningful state law accountability mechanisms for enforcing these new, distinctive management norms. Traditional state law protections for corporate managers are available to benefit corporation directors and officers, and these protections have been expanded under benefit corporation law—although perhaps not perfectly—to cover the new risks attendant to managing a benefit corporation.<sup>154</sup> One could conclude that benefit corporation law provides little assurance that directors and officers will not defect or shirk.<sup>155</sup>

Yet, as is true in the regulation of corporate management generally, market forces also are likely to play a role in assuring that benefit corporation directors and officers hew to the firm's benefit purpose and act in accordance with their fiduciary duties:

Corporate directors operate within a pervasive web of accountability mechanisms that substitute for monitoring by residual claimants. A variety of market forces provide important constraints. The capital and product markets, the internal and external employment markets, and the market for corporate control all constrain shirking by firm agents.<sup>156</sup>

The extent to which market forces may play a role in managing the managers of benefit corporations depends on the health, efficiency, and maturity of the markets in which the firm participates. Undoubtedly,

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153. Shelley Alpern, *When B Corp Met Wall Street*, CLEAN YIELD ASSET MGMT. (Mar. 18, 2015), <http://www.cleanyield.com/when-b-corp-met-wall-street> [<https://perma.cc/J7LU-TRMR>].

154. See *supra* notes 112–114 and accompanying text (describing new protections available under benefit corporation statutes).

155. See generally Lynn A. Stout, *On the Proper Motives of Corporate Directors (or, Why You Don't Want to Invite Homo Economicus to Join Your Board)*, 28 DEL. J. CORP. L. 1 (2003) (“Directors frequently hold only small stakes in the companies they manage. Moreover, a variety of legal rules and contractual arrangements insulate them from liability for business failures. Why then should we expect them to do a good job?”).

156. Stephen M. Bainbridge, *Unocal at 20: Director Primacy in Corporate Takeovers*, 31 DEL. J. CORP. L. 769, 785 (2006).

publicly held benefit corporations will participate in markets that will provide helpful norms and discipline. However, owing to the central nature of corporate purpose in benefit corporations, they occupy a new, unique place in the market for business entities and will be a novel piece of the for-profit corporate public investment market. The ability of the market to discipline and correct managerial wrongdoing in publicly held benefit corporations is untested.

Accordingly, it is difficult to tell whether benefit corporation law has struck the right balance between the board's authority (in terms of its obligations and duties) and its accountability. Perhaps only time will tell. As one observer concluded, "Ultimately, the shareholders and others who are relying on the requirements of . . . any benefit corporation act must rely on the integrity of the board of directors—as must the shareholders of all corporations."<sup>157</sup>

This reliance is undoubtedly more comfortable for small-firm investors and shareholders, who are likely to know each other and the corporate managers better and be able to monitor the corporate managers more closely. In the public firm setting, however, these close relationships do not typically exist. Other than shareholder litigation, the main way in which shareholders hold public company directors accountable is by failing to reelect them—no small task:

The right to elect the company's board of directors is the primary control that shareholders have in furthering a material public benefit. This is not a novel provision unique to benefit corporation legislation; it is standard for traditional corporations. Shareholders are able to elect the directors they feel are best able to pursue a socially beneficial policy, which experts argue represents shareholders' main means of controlling a benefit corporation. However, this right is of limited practical effect in providing a company's stakeholders with the capability to hold directors accountable in the course of their duties.<sup>158</sup>

Thus, shareholder voting power in director elections is a real, but likely weak, accountability tool. Its weakness may be more pronounced in the publicly held benefit corporation context to the extent that there is disagreement in the shareholder base on how to properly balance the various focal points of the corporation's chartered public benefit. The commonly dispersed, disaggregated shareholdings of public companies may increase the likelihood of disagreement about the way in which the

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157. Herrick K. Lidstone, Jr., *The Long and Winding Road to Public Benefit Corporations in Colorado*, COLO. LAW., Jan. 2014, at 39, 44.

158. Nass, *supra* note 67, at 886 (footnotes omitted).

board of directors must or should weigh the various interests and constituencies the corporation serves in its deliberations.

As played out in the public realm, the uncertain governance environment for U.S. benefit corporations may beg for more than shareholder enforcement mechanisms. Additional regulation at the state or federal level also may play a role:

Governance is not just about relationships between officers, directors, and shareholders. Public companies operate in a public sphere, making public disclosures on a regular basis. The SEC dictates what, when, why, and how much they must say. Corporations are also subject to media and blogging. So is the SEC. These factors combine to increase expectations about the SEC's role and pressure for the SEC to do something when things go wrong. That pressure shifts to corporations, their public disclosures, and their governance choices.<sup>159</sup>

This cyclical relationship between the governed and the government will continue to evolve the rules and norms for all publicly held firms, including publicly held benefit corporations. This evolution is likely to occur both through traditional legislative and regulatory enactments and through selective public enforcement.

In fact, the same factors that may catalyze government intervention in publicly held U.S. benefit corporations contribute to the overall risk of litigation against these firms. Public disclosure mandates and overall “publicness,” when layered onto doctrinal uncertainties in benefit corporation law, may resurrect—in a new context—debates waged in past judicial opinions relating to for-profit corporations generally. As the analysis in Part II indicates, these debates may include (among other things): the nature of a viable claim that corporate action is *ultra vires* and the extent to which that claim can be pursued;<sup>160</sup> the classification of good faith claims against directors or officers as a matter of fiduciary duty analysis under Delaware law and the laws of other states;<sup>161</sup> the applicability of the business judgment rule in the judicial review of decisions made and actions taken by benefit corporation directors and officers;<sup>162</sup> the application of entire fairness judicial review and other forms of enhanced judicial scrutiny (including over antitakeover measures adopted by benefit corporations' boards of directors);<sup>163</sup> shareholder standing to bring derivative litigation against benefit corporation directors

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159. Sale, *New “Public” Corporation*, *supra* note 150, at 144.

160. *See supra* notes 80–85 and accompanying text.

161. *See supra* notes 89–91 and accompanying text.

162. *See supra* notes 94–98 and accompanying text.

163. *See supra* notes 99–111 and accompanying text.

or officers;<sup>164</sup> and the elements of a misstatement or omission claim under Section 10(b) and Rule 10b-5.<sup>165</sup>

Moreover, benefit corporation law brings with it new doctrine that will be independently scrutinized in the wake of shareholder or investor dissatisfaction. Benefit corporation incorporation (including, crucially, the required corporate purpose clauses) and benefit report filings, benefit enforcement proceedings, and other novel aspects of benefit corporation law not addressed in this Article invite, and are likely to require, judicial interpretation (and possible legislative adjustment). For example, given that even a limited review of incorporation filings reveals a number of erroneous filings<sup>166</sup> and that compliance with benefit report filing requirements similarly appears to be wanting,<sup>167</sup> enforcement action may be anticipated. One also might anticipate litigation battles over the availability of benefit enforcement proceedings.<sup>168</sup>

The distinctive features of the benefit corporation form, taken together with key attendant litigation risks for publicly held U.S. benefit corporations identified in this Article, confirm and underscore the key role that corporate purpose plays in benefit corporation law. A benefit corporation's corporate purpose underlies in some way each of the traits and risks identified. Undoubtedly, observations beyond those included here can be made on the governance, regulatory, and enforcement issues involving publicly held U.S. benefit corporations. Even if additional observations are made, however, the central position of the benefit purpose is likely to loom large.

The information, analysis, and observations supplied in this Article have salience for government officials, policymakers, benefit corporation management, legal advisors of corporations, and academic observers, among others. Specifically, reflections on the substance of this Article may:

- help secretaries of state identify, and instigate them to address, compliance problems in benefit corporation filings, especially in charter documents;
- inspire promoters of benefit corporation legislation, members of the corporate bar, and legislators to inquire deeply into the existing state law relating to *ultra vires* actions and director and officer fiduciary duties before recommending the adoption of benefit corporation legislation in that state;

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164. See *supra* notes 118–118 and accompanying text.

165. See *supra* notes 148–144 and accompanying text.

166. See *supra* notes 12 & 14 and accompanying text.

167. See *supra* note 46.

168. See *supra* notes 80–85 and accompanying text.

- increase the attention of drafters of model benefit corporation legislation and individual state benefit corporation statutes to, among other things, the formulation of the statutory public benefit requirement, exculpation authorization, and requirements for and restrictions on private enforcement actions (e.g., benefit enforcement proceedings and shareholder derivative litigation);
- prompt state legislators and members of the corporate bar to review existing benefit corporation statutes on a regular basis and suggest changes that decrease doctrinal uncertainty and increase predictability in interpretation and application;
- encourage directors and officers of benefit corporations to work with corporate counsel to create checklists for routine management and common transactional decision-making that incorporate focused, state-of-the-art legal analysis and evolving best practices borrowed from analogous areas of for-profit and not-for-profit corporate law;
- offer new considerations and perspectives to benefit corporation management and legal counsel relevant to the choice of whether to take a benefit corporation public;
- enhance the attentiveness of benefit corporation directors, officers, and legal counsel to the accuracy and completeness of public disclosures (especially to avoid overclaiming or otherwise misrepresenting the firm's public benefit purpose); and
- stimulate additional research into unsettled questions under corporate or securities law addressed or referenced in the preceding pages or otherwise relevant to benefit corporations.

If this Article causes any of these things to occur as the prospect of publicly held benefit corporations becomes increasingly likely—or even if the Article merely prompts additional questions about corporate purpose that various constituencies may ask—it will have succeeded in its mission.

#### CONCLUSION

Benefit corporations may or may not be a necessary or desirable tool in the U.S. entity law toolbox. Regardless, benefit corporation legislation has been widely adopted, businesses are incorporating under those legislative enactments, and a few among the resultant benefit corporations are poised to enter the public securities markets. As a result, it is important to better understand the unique attributes of benefit corporation law as a component of corporate law and to begin to anticipate the associated litigation risk publicly held U.S. benefit corporations may face. This



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Article undertakes to make progress in addressing these objectives with the hope that subsequent work will further engage them.

APPENDIX 1: SUMMARY OF PUBLIC BENEFIT PROVISIONS IN STATE  
BENEFIT CORPORATION STATUTES (CURRENT AS OF MARCH 2016)

State	General Benefit Required	Specific Benefit Required	Specific Benefit Optional
Arizona	X		X
Arkansas	X		X
California	X		X
Colorado		X <sup>a</sup>	
Connecticut	X		X
Delaware		X <sup>a</sup>	
Florida	X		X
Hawaii	X		X
Idaho	X		X
Illinois	X		X
Indiana	X		X
Louisiana	X		X
Maryland	X		X
Massachusetts	X		X
Minnesota	X <sup>b</sup>	X <sup>c</sup>	
Montana	X		X
Nebraska	X		X
Nevada	X		X
New Hampshire	X		X
New Jersey	X		X
New York	X		X
Oregon	X		X
Pennsylvania	X		X
Rhode Island	X		X
South Carolina	X		X
Tennessee	X <sup>d</sup>		
Utah	X		X
Vermont	X		X
Virginia	X		X
West Virginia	X		X
Washington, D.C.	X		X
<sup>a</sup> at least one <sup>b</sup> if incorporated as a general benefit corporation		<sup>c</sup> if incorporated as a specific benefit corporation <sup>d</sup> at least one public benefit required	

APPENDIX 2: PUBLIC BENEFIT DEFINITIONS IN STATE BENEFIT  
CORPORATION STATUTES (CURRENT AS OF MARCH 2016)

<b>State and Statutory Reference</b>	<b>General Public Benefit Definition</b>	<b>Specific Public Benefit Definition</b>
<p>Arizona  ARIZ. REV. STAT. § 10-2402</p>	<p>“General public benefit” means a material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation.</p>	<p>“Specific public benefit” includes:</p> <ul style="list-style-type: none"> <li>(a) Providing low-income or underserved individuals or communities with beneficial products or services.</li> <li>(b) Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business.</li> <li>(c) Protecting or restoring the environment.</li> <li>(d) Improving human health.</li> <li>(e) Promoting the arts, sciences or advancement of knowledge.</li> <li>(f) Increasing the flow of capital to entities with a purpose to benefit society or the environment.</li> <li>(g) Conferring any other particular benefit on society or the environment as specified in the benefit corporation's articles of incorporation.</li> </ul>

<b>State and Statutory Reference</b>	<b>General Public Benefit Definition</b>	<b>Specific Public Benefit Definition</b>
<p>Arkansas</p> <p>ARK. CODE § 4-36-103</p>	<p>“General public benefit” means a material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation;</p>	<p>“Specific public benefit” means:</p> <p>(A) Providing low-income or underserved individuals or communities with beneficial products or services;</p> <p>(B) Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;</p> <p>(C) Preserving the environment;</p> <p>(D) Improving human health;</p> <p>(E) Promoting the arts, sciences, or advancement of knowledge;</p> <p>(F) Increasing the flow of capital to entities with a public benefit purpose; and</p> <p>(G) Conferring any other particular benefit on society or the environment.</p>

<b>State and Statutory Reference</b>	<b>General Public Benefit Definition</b>	<b>Specific Public Benefit Definition</b>
<p>California</p> <p>CAL. CORP. CODE § 14601</p>	<p>“General public benefit” means a material positive impact on society and the environment, taken as a whole, as assessed against a third-party standard, from the business and operations of a benefit corporation.</p>	<p>“Specific public benefit” includes all of the following:</p> <ul style="list-style-type: none"> <li>(1) Providing low-income or underserved individuals or communities with beneficial products or services.</li> <li>(2) Promoting economic opportunity for individuals or communities beyond the creation of jobs in the ordinary course of business.</li> <li>(3) Preserving the environment.</li> <li>(4) Improving human health.</li> <li>(5) Promoting the arts, sciences, or advancement of knowledge.</li> <li>(6) Increasing the flow of capital to entities with a public benefit purpose.</li> <li>(7) The accomplishment of any other particular benefit for society or the environment.</li> </ul>

<b>State and Statutory Reference</b>	<b>General Public Benefit Definition</b>	<b>Specific Public Benefit Definition</b>
Colorado  COLO. REV. STAT. ANN. § 7-101-503	“Public benefit” means one or more positive effects or reduction of negative effects on one or more categories of persons, entities, communities, or interests other than shareholders in their capacities as shareholders, including effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific, or technological nature.	

<b>State and Statutory Reference</b>	<b>General Public Benefit Definition</b>	<b>Specific Public Benefit Definition</b>
<p>Connecticut</p> <p>CONN. GEN. STAT. ANN. § 33-1351</p>	<p>“General public benefit” means a material positive impact on both society and the environment, taken as a whole, as assessed against a third-party standard, from the business and operations of a benefit corporation.</p>	<p>“Specific public benefit” includes:</p> <p>(A) Providing low-income or underserved individuals or communities with beneficial products or services;</p> <p>(B) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;</p> <p>(C) protecting or restoring the environment;</p> <p>(D) improving human health;</p> <p>(E) promoting the arts, sciences or advancement of knowledge;</p> <p>(F) increasing the flow of capital to other benefit corporations or similar entities whose purpose is to benefit society or the environment; and</p> <p>(G) conferring any other particular benefit on society or the environment.</p>

<b>State and Statutory Reference</b>	<b>General Public Benefit Definition</b>	<b>Specific Public Benefit Definition</b>
Delaware  DEL. CODE ANN. TIT. 8, § 362	“Public benefit” means a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature.	



<b>State and Statutory Reference</b>	<b>General Public Benefit Definition</b>	<b>Specific Public Benefit Definition</b>
<p>Florida</p> <p>FLA. STAT. ANN. § 607.602</p>	<p>“General public benefit” means a material, positive effect on society and the environment, taken as a whole, as assessed using a third-party standard which is attributable to the business and operations of a benefit corporation.</p>	<p>“Specific public benefit” includes, but is not limited to:</p> <ul style="list-style-type: none"> <li>(a) Providing low-income or underserved individuals or communities with beneficial products or services;</li> <li>(b) Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;</li> <li>(c) Protecting or restoring the environment;</li> <li>(d) Improving human health;</li> <li>(e) Promoting the arts, sciences, or advancement of knowledge;</li> <li>(f) Increasing the flow of capital to entities that have as their stated purpose the provision of a benefit to society or the environment;</li> </ul> <p>and</p> <ul style="list-style-type: none"> <li>(g) Any other public benefit consistent with the purposes of the benefit corporation.</li> </ul>

<b>State and Statutory Reference</b>	<b>General Public Benefit Definition</b>	<b>Specific Public Benefit Definition</b>
<p>Hawaii</p> <p>HAW. REV. STAT. ANN. § 420D-2</p>	<p>“General public benefit” means a material positive impact on society and the environment, taken as a whole and as measured by a third-party standard under section 420D-12, from the business and operations of a sustainable business corporation.</p>	
<p>Idaho</p> <p>IDAHO CODE ANN. § 30-2002</p>	<p>“General public benefit” means a material positive impact on society and the environment, taken as a whole, as assessed under a third-party standard, resulting from the business and operations of a benefit corporation.</p>	<p>“Specific public benefit” includes:</p> <ul style="list-style-type: none"> <li>(a) Providing low-income or underserved individuals or communities with beneficial products or services;</li> <li>(b) Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;</li> <li>(c) Protecting or restoring the environment;</li> <li>(d) Improving human health;</li> <li>(e) Promoting the arts, sciences or advancement of knowledge;</li> <li>(f) Increasing the flow of capital to entities with a purpose to benefit society or the environment; or</li> <li>(g) Conferring any other particular benefit on society or the environment.</li> </ul>

<b>State and Statutory Reference</b>	<b>General Public Benefit Definition</b>	<b>Specific Public Benefit Definition</b>
<p>Illinois</p> <p>805 ILL. COMP. STAT. ANN. 40/1.10</p>	<p>“General public benefit” means a material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation.</p>	<p>“Specific public benefit” means:</p> <ul style="list-style-type: none"> <li>(1) providing low-income or underserved individuals or communities with beneficial products or services;</li> <li>(2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the ordinary course of business;</li> <li>(3) preserving the environment;</li> <li>(4) improving human health;</li> <li>(5) promoting the arts, sciences or advancement of knowledge;</li> <li>(6) increasing the flow of capital to entities with a public benefit purpose; or</li> <li>(7) the accomplishment of any other particular benefit for society or the environment.</li> </ul>

<p>Indiana</p> <p>IND. CODE ANN. § 23-1.3-2-7</p> <p>&amp;</p> <p>IND. CODE ANN. § 23-1.3-2-10</p>	<p>“General public benefit” means a material positive impact on society and the environment, taken as a whole, assessed against a third party standard, from the business and operations of a benefit corporation.</p>	<p>(a) “Specific public benefit” means a benefit that serves:</p> <p>(1) one (1) or more public welfare, religious, charitable, scientific, literary, or educational purposes; or</p> <p>(2) other purposes or benefits beyond the strict interests of the shareholders of the benefit corporation.</p> <p>(b) The term includes the following:</p> <p>(1) Providing low income or underserved individuals or communities with beneficial products or services.</p> <p>(2) Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business.</p> <p>(3) Protecting or restoring the environment.</p> <p>(4) Improving human health.</p> <p>(5) Promoting the arts, sciences, or advancement of knowledge.</p> <p>(6) Increasing the flow of capital to entities with a purpose to benefit society or the environment.</p> <p>(7) Conferring any other particular benefit on society or the environment.</p>
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<b>State and Statutory Reference</b>	<b>General Public Benefit Definition</b>	<b>Specific Public Benefit Definition</b>
<p>Louisiana</p> <p>LA. STAT. ANN. § 12:1803</p>	<p>“General public benefit” means a material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation.</p>	<p>“Specific public benefit” means any of the following:</p> <ul style="list-style-type: none"> <li>(a) Serving low-income or underserved individuals or communities.</li> <li>(b) Promoting economic opportunity for low-income or underserved individuals or communities.</li> <li>(c) Preserving the environment, promoting positive impacts on the environment, or reducing negative impacts on the environment.</li> <li>(d) Improving human health.</li> <li>(e) Promoting the arts, sciences, or advancement of knowledge.</li> <li>(f) Increasing the flow of capital to entities with a purpose listed in this Paragraph.</li> <li>(g) Historic preservation.</li> <li>(h) Urban beautification.</li> </ul>

<b>State and Statutory Reference</b>	<b>General Public Benefit Definition</b>	<b>Specific Public Benefit Definition</b>
<p>Maryland</p> <p>MD. CODE ANN., CORPS. &amp; ASS'NS § 5-6C-01</p>	<p>“General public benefit” means a material, positive impact on society and the environment, as measured by a third-party standard, through activities that promote a combination of specific public benefits.</p>	<p>“Specific public benefit” includes:</p> <ol style="list-style-type: none"> <li>(1) Providing individuals or communities with beneficial products or services;</li> <li>(2) Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;</li> <li>(3) Preserving the environment;</li> <li>(4) Improving human health;</li> <li>(5) Promoting the arts, sciences, or advancement of knowledge;</li> <li>(6) Increasing the flow of capital to entities with a public benefit purpose; or</li> <li>(7) The accomplishment of any other particular benefit for society or the environment.</li> </ol>

<b>State and Statutory Reference</b>	<b>General Public Benefit Definition</b>	<b>Specific Public Benefit Definition</b>
<p>Massachusetts</p> <p>MASS. GEN. LAWS ANN. CH. 156E, § 2</p>	<p>“General public benefit”, a material, positive impact on society and the environment, taken as a whole, as measured by a third-party standard, from the business and operations of a benefit corporation.</p>	<p>“Specific public benefit”, any of the following:</p> <ul style="list-style-type: none"> <li>(1) providing low-income or underserved individuals or communities with beneficial products or services;</li> <li>(2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;</li> <li>(3) promoting the preservation and conservation of the environment;</li> <li>(4) improving human health;</li> <li>(5) promoting the arts, sciences, access to and advancement of knowledge;</li> <li>(6) increasing or facilitating the flow of capital and assets to entities with a general public benefit purpose; or</li> <li>(7) conferring any other particular benefit on society or the environment.</li> </ul>

<b>State and Statutory Reference</b>	<b>General Public Benefit Definition</b>	<b>Specific Public Benefit Definition</b>
Minnesota  MINN. STAT. ANN. § 304A.021	“General public benefit” means a net material positive impact from the business and operations of a general benefit corporation on society, the environment, and the well-being of present and future generations.	“Specific public benefit” means one or more positive impacts, or reduction of a negative impact, on specified categories of natural persons, entities, communities, or interests, other than shareholders in their capacity as shareholders, as enumerated in the articles of a public benefit corporation.



<b>State and Statutory Reference</b>	<b>General Public Benefit Definition</b>	<b>Specific Public Benefit Definition</b>
<p>Montana</p> <p>MONT. CODE ANN. § 35-1-1402</p>	<p>“General public benefit” means a material, positive impact on society and the environment, taken as a whole, as assessed against a third-party standard, from the business and operations of a benefit corporation.</p>	<p>“Specific public benefit” means:</p> <ul style="list-style-type: none"> <li>(a) providing low-income or underserved individuals or communities with beneficial products or services;</li> <li>(b) promoting economic opportunity for individuals or communities beyond the creation of jobs in the ordinary course of business;</li> <li>(c) preserving the environment;</li> <li>(d) improving human health;</li> <li>(e) promoting the arts, sciences, or advancement of knowledge;</li> <li>(f) increasing the flow of capital to entities with a public benefit purpose; or</li> <li>(g) the accomplishment of any other particular benefit for society or the environment.</li> </ul>

<b>State and Statutory Reference</b>	<b>General Public Benefit Definition</b>	<b>Specific Public Benefit Definition</b>
<p>Nebraska</p> <p>NEB. REV. STAT. ANN. § 21-403</p>	<p>“General public benefit” means a material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation[.]</p>	<p>“Specific public benefit” includes:</p> <ul style="list-style-type: none"> <li>(a) Providing low-income or underserved individuals or communities with beneficial products or services;</li> <li>(b) Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;</li> <li>(c) Protecting or restoring the environment;</li> <li>(d) Improving human health;</li> <li>(e) Promoting the arts, sciences, or advancement of knowledge;</li> <li>(f) Increasing the flow of capital to entities with a purpose to benefit society or the environment; and</li> <li>(g) Conferring any other particular benefit on society or the environment[.]</li> </ul>

<b>State and Statutory Reference</b>	<b>General Public Benefit Definition</b>	<b>Specific Public Benefit Definition</b>
<p>Nevada</p> <p>NEV. REV. STAT. ANN. § 78B.040</p> <p>&amp;</p> <p>NEV. REV. STAT. ANN. § 78B.060</p>	<p>“General public benefit” means a material positive impact on society and the environment, taken as a whole, as assessed against a third-party standard, from the business and operations of a benefit corporation.</p>	<p>“Specific public benefit” includes, without limitation:</p> <ol style="list-style-type: none"> <li>1. Providing low-income or underserved individuals or communities with beneficial products or services;</li> <li>2. Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;</li> <li>3. Protecting, preserving or restoring the environment;</li> <li>4. Improving human health;</li> <li>5. Promoting the arts, sciences or advancement of knowledge;</li> <li>6. Increasing the flow of capital to entities with a general public benefit purpose; and</li> <li>7. The accomplishment of any other particular benefit for society or the environment.</li> </ol>

<b>State and Statutory Reference</b>	<b>General Public Benefit Definition</b>	<b>Specific Public Benefit Definition</b>
<p>New Hampshire</p> <p>N.H. REV. STAT. ANN. § 293-C:2</p>	<p>“General public benefit” means a material positive effect on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation.</p>	<p>“Specific public benefit” includes:</p> <ul style="list-style-type: none"> <li>(a) Providing low-income or underserved individuals or communities with beneficial products or services;</li> <li>(b) Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;</li> <li>(c) Protecting or restoring the environment;</li> <li>(d) Improving human health;</li> <li>(e) Promoting the arts, sciences, or advancement of knowledge;</li> <li>(f) Increasing the flow of capital to entities with a purpose to benefit society or the environment; and</li> <li>(g) Conferring any other particular benefit on society or the environment.</li> </ul>

<b>State and Statutory Reference</b>	<b>General Public Benefit Definition</b>	<b>Specific Public Benefit Definition</b>
<p>New Jersey</p> <p>N.J. STAT. ANN. § 14A:18-1</p>	<p>“General public benefit” means a material positive impact on society and the environment by the operations of a benefit corporation through activities that promote some combination of specific public benefits.</p>	<p>“Specific public benefit” includes:</p> <ul style="list-style-type: none"> <li>(1) Providing low-income individuals or communities with beneficial products or services;</li> <li>(2) Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;</li> <li>(3) Preserving the environment;</li> <li>(4) Improving human health;</li> <li>(5) Promoting the arts, sciences or advancement of knowledge;</li> <li>(6) Increasing the flow of capital to entities with a public benefit purpose; and</li> <li>(7) The accomplishment of any other particular benefit for society or the environment.</li> </ul>

<b>State and Statutory Reference</b>	<b>General Public Benefit Definition</b>	<b>Specific Public Benefit Definition</b>
<p>New York</p> <p>N.Y. BUS. CORP. LAW § 1702 (McKinney)</p>	<p>“General public benefit” means a material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation.</p>	<p>“Specific public benefit,” includes:</p> <ul style="list-style-type: none"> <li>(1) providing low-income or underserved individuals or communities with beneficial products or services;</li> <li>(2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;</li> <li>(3) preserving the environment;</li> <li>(4) improving human health;</li> <li>(5) promoting the arts, sciences or advancement of knowledge;</li> <li>(6) increasing the flow of capital to entities with a public benefit purpose; and</li> <li>(7) the accomplishment of any other particular benefit for society or the environment.</li> </ul>
<p>Oregon</p> <p>OR. REV. STAT. ANN. § 60.750</p>	<p>“General public benefit” means a material positive impact on society and the environment, taken as a whole, from the business and operations of a benefit company.</p>	

<p>Pennsylvania</p> <p>15 PA. STAT. AND CONS. STAT. ANN. § 3302</p>	<p>“General public benefit.” A material positive impact on society and the environment, taken as a whole and assessed against a third-party standard, from the business and operations of a benefit corporation.</p>	<p>“Specific public benefit.” Includes:</p> <ul style="list-style-type: none"> <li>(1) providing low-income or underserved individuals or communities with beneficial products or services;</li> <li>(2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;</li> <li>(3) preserving the environment;</li> <li>(4) improving human health;</li> <li>(5) promoting the arts, sciences or advancement of knowledge;</li> <li>(6) promoting economic development through support of initiatives that increase access to capital for emerging and growing technology enterprises, facilitate the transfer and commercial adoption of new technologies, provide technical and business support to emerging and growing technology enterprises or form support partnerships that support those objectives;</li> <li>(7) increasing the flow of capital to entities with a public benefit purpose; and</li> <li>(8) the accomplishment of any other particular benefit for society or the environment.</li> </ul>
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<b>State and Statutory Reference</b>	<b>General Public Benefit Definition</b>	<b>Specific Public Benefit Definition</b>
<p>Rhode Island</p> <p>7 R.I. GEN. LAWS ANN. § 7-5.3-2</p>	<p>“General public benefit” means a material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation.</p>	<p>“Specific public benefit” includes:</p> <ul style="list-style-type: none"> <li>(i) Providing low-income or underserved individuals or communities with beneficial products or services;</li> <li>(ii) Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;</li> <li>(iii) Protecting or restoring the environment;</li> <li>(iv) Improving human health;</li> <li>(v) Promoting the arts, sciences, or advancement of knowledge;</li> <li>(vi) Increasing the flow of capital to entities with a purpose to benefit society or the environment; and</li> <li>(vii) Conferring any other particular benefit on society or the environment.</li> </ul>



<b>State and Statutory Reference</b>	<b>General Public Benefit Definition</b>	<b>Specific Public Benefit Definition</b>
<p>South Carolina</p> <p>S.C. CODE ANN. § 33-38-130</p>	<p>“General public benefit” means a material positive impact on society and the environment taken as a whole, as assessed against a third-party standard, from the business and operations of a benefit corporation.</p>	<p>“Specific public benefit purpose” means a benefit that serves one or more public welfare, religious, charitable, scientific, literary, or educational purposes, or other purposes or benefits beyond the strict interest of the shareholders of the benefit corporation, including:</p> <ul style="list-style-type: none"> <li>(a) providing low-income or underserved individuals, families, or communities with beneficial products, services, or educational opportunities;</li> <li>(b) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;</li> <li>(c) preserving or improving the environment;</li> <li>(d) improving human health;</li> <li>(e) promoting the arts, sciences, or advancement of knowledge;</li> <li>(f) increasing the flow of capital to entities with a public benefit purpose; or</li> <li>(g) conferring any other particular benefit on society and the environment.</li> </ul>

<b>State and Statutory Reference</b>	<b>General Public Benefit Definition</b>	<b>Specific Public Benefit Definition</b>
Tennessee  TENN. CODE ANN. § 48-28- 103	“Public benefit” means a positive effect or reduction of negative effects on one (1) or more categories of persons, entities, communities, or interests, other than shareholders in their capacities as shareholders, including, but not limited to, an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific, or technological effect[.]	

<b>State and Statutory Reference</b>	<b>General Public Benefit Definition</b>	<b>Specific Public Benefit Definition</b>
<p>Utah</p> <p>UTAH CODE ANN. § 16-10b-103</p>	<p>“General public benefit” means a material positive impact on society and the environment:</p> <p>(a) taken as a whole;</p> <p>(b) assessed against a third-party standard; and</p> <p>(c) from the business of a benefit corporation.</p>	<p>“Specific public benefit” includes:</p> <p>(a) providing low-income or underserved individuals or communities with beneficial products or services;</p> <p>(b) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;</p> <p>(c) protecting or restoring the environment;</p> <p>(d) improving human health;</p> <p>(e) promoting the arts, sciences, or advancement of knowledge;</p> <p>(f) increasing the flow of capital to entities with a purpose to benefit society or the environment; and</p> <p>(g) conferring any other particular benefit on society or the environment.</p>

<b>State and Statutory Reference</b>	<b>General Public Benefit Definition</b>	<b>Specific Public Benefit Definition</b>
<p>Vermont</p> <p>VT. STAT. ANN. TIT. 11A, § 21.03</p>	<p>“General public benefit” means a material positive impact on society and the environment, as measured by a third-party standard, through activities that promote some combination of specific public benefits.</p>	<p>“Specific public benefit” includes:</p> <p>(A) providing low income or underserved individuals or communities with beneficial products or services;</p> <p>(B) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;</p> <p>(C) preserving or improving the environment;</p> <p>(D) improving human health;</p> <p>(E) promoting the arts or sciences or the advancement of knowledge;</p> <p>(F) increasing the flow of capital to entities with a public benefit purpose; and</p> <p>(G) the accomplishment of any other identifiable benefit for society or the environment.</p>

<b>State and Statutory Reference</b>	<b>General Public Benefit Definition</b>	<b>Specific Public Benefit Definition</b>
<p>Virginia</p> <p>VA. CODE ANN. § 13.1-782</p>	<p>“General public benefit” means a material positive impact on society and the environment taken as a whole, as measured by a third-party standard, from the business and operations of a benefit corporation.</p>	<p>“Specific public benefit” means a benefit that serves one or more public welfare, religious, charitable, scientific, literary, or educational purposes, or other purpose or benefit beyond the strict interest of the shareholders of the benefit corporation, including:</p> <ol style="list-style-type: none"> <li>1. Providing low-income or underserved individuals or communities with beneficial products or services;</li> <li>2. Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;</li> <li>3. Preserving or improving the environment;</li> <li>4. Improving human health;</li> <li>5. Promoting the arts, sciences, or advancement of knowledge;</li> <li>6. Increasing the flow of capital to entities with a public benefit purpose; and</li> <li>7. Conferring any other particular benefit on society or the environment.</li> </ol>

<b>State and Statutory Reference</b>	<b>General Public Benefit Definition</b>	<b>Specific Public Benefit Definition</b>
<p>West Virginia</p> <p>W. VA. CODE ANN. § 31F-1-102</p>	<p>“General public benefit” means a material positive impact on society and the environment taken as a whole, as measured by a third-party standard, from the business and operations of a benefit corporation.</p>	<p>“Specific public benefit” means a benefit that serves one or more public welfare, religious, charitable, scientific, literary or educational purposes, or other purpose or benefit beyond the strict interest of the shareholders of the benefit corporation, including:</p> <ol style="list-style-type: none"> <li>(1) Providing low-income or underserved individuals or communities with beneficial products or services;</li> <li>(2) Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;</li> <li>(3) Preserving or improving the environment;</li> <li>(4) Improving human health;</li> <li>(5) Promoting the arts, sciences or advancement of knowledge;</li> <li>(6) Increasing the flow of capital to entities with a public benefit purpose; and</li> <li>(7) Conferring any other particular benefit on society or the environment.</li> </ol>

<b>State and Statutory Reference</b>	<b>General Public Benefit Definition</b>	<b>Specific Public Benefit Definition</b>
<p>Washington, D.C.</p> <p>D.C. CODE ANN. § 29-1301.02</p>	<p>“General public benefit” means the material positive impact that the business and operations of a benefit corporation has on society and the environment, taken as a whole, assessed against a third-party standard.</p>	<p>“Specific public benefit” includes:</p> <p>(A) Providing low-income or underserved individuals or communities with beneficial products or services;</p> <p>(B) Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;</p> <p>(C) Preserving the environment;</p> <p>(D) Improving human health;</p> <p>(E) Promoting the arts, sciences, or advancement of knowledge;</p> <p>(F) Increasing the flow of capital to entities with a public benefit purpose; and</p> <p>(G) The accomplishment of any other particular benefit on society or the environment.</p>

APPENDIX 3: SUMMARY OF BENEFIT CORPORATION DIRECTOR AND  
OFFICER PROVISIONS IN STATE BENEFIT CORPORATION STATUTES  
(CURRENT AS OF MARCH 2016)

State	Director Required	Director Optional	Depends on Public Company Status	Officer Optional	No Benefit Director/ Officer Statute
Arizona		X		X	
Arkansas					X
California					X
Colorado					X
Connecticut	X			X	
Delaware					X
Florida		X		X	
Hawaii	X			X	
Idaho			X	X	
Illinois	X			X	
Indiana	X			X	
Louisiana	X			X	
Maryland					X
Massachusetts	X			X	
Minnesota					X
Montana					X
Nebraska			X	X	
Nevada					X
New Hampshire			X	X	
New Jersey	X			X	
New York					X
Oregon		X			
Pennsylvania			X	X	
Rhode Island			X	X	
South Carolina	X			X	
Tennessee					X
Utah			X	X	
Vermont			X <sup>a</sup>	X	
Virginia					X
West Virginia					X
Washington D.C.	X			X	

<sup>a</sup> optional for close corporations