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Tennessee's for Profit Benefit Corporation Act: Will More Regulation Achieve the Desired Results

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TENNESSEE'S FOR PROFIT BENEFIT CORPORATION ACT: WILL MORE REGULATION ACHIEVE THE DESIRED RESULTS?

Brian Krumm*

Professor Murray provides an excellent overview of social enterprise law and his insights and analysis of Tennessee's For-Profit Benefit Corporation Act make a significant contribution to the literature. However, I would like to challenge the notion that additional regulations in the form of state oversight and fines are necessary to ensure that the social benefit aspects of the Benefit Corporation ("B Corporation") are actively pursued.

THE PURPOSE OF REGULATION

The purpose of regulatory laws are to protect the public from what is viewed as unethical or dangerous business activities. Because many socially-minded individuals have begun aligning their investment and consumer decisions with their personal values and social impact, the B Corporation offers the opportunity to attract investments from such individuals. Within this context, the behavior that the state would seek to regulate is "Greenwashing," which refers to a company's use of the branding and goodwill benefits of B Corporation status to increase sales while only feigning to create public benefits.¹

To address this concern the Model Benefit Corporation Legislation ("MBCL"), requires B Corporations to:

"(1) have a corporate purpose to create a material positive impact on society and the environment, (2) consider non-shareholder constituencies along with the financial interest of shareholders, and (3) assess their annual per-

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¹ Michael A. Hacker, *"Profit, People, Planet" Perverted: Holding Benefit Corporations Accountable to Intended Beneficiaries*, 57 B.C. L. REV. 1747, 1757 (2016).

formance through the use of third-party standards and benefit reports.”²

COMPARING THE TENNESSEE ACT WITH THE MBCL

The key difference between the MBCL and Tennessee’s For-Profit Benefit Corporation Act is the role of a third-party standard in evaluating the corporation’s success in conferring a public benefit. The MBCL defines the third-party standard as a reporting standard for the environmental and social performance of a business that is comprehensive, transparent, credible, and “developed by an entity that is not controlled by the benefit corporation.”³ While the charter or bylaws of a B Corporation may require the use of a third-party standard in assessing the B Corporation’s success in conferring a public benefit, Tennessee explicitly does not require the use of a third-party standard for annual benefit assessments.⁴

B LAB DOES NOT ENDORSE THE TENNESSEE ACT

Although B Lab, a non-profit organization that offers third party certification⁵ to B Corporations, supports the Model Benefit Corporation

² Kennan El Khatib, Comment, *The Harms of the Benefit Corporation*, 65 AM. U. L. REV. 151, 153 (2015).

³ MODEL BENEFIT CORP. LEGIS. § 102 (April 17, 2017), http://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf (last visited Sept. 12, 2017).

⁴ TENN. CODE ANN. § 48-28-107(c) (Supp. 2017).

⁵ B Corporation certification (also known as B Lab certification or B Corp certification) “is a private certification issued to for-profit companies by B Lab.” Sarah McKinney, *The Business Metrics You Can’t Afford to Ignore In the New Economy*, FORBES, Aug. 18, 2014, <https://www.forbes.com/sites/groupthink/2014/08/18/the-business-metrics-you-cant-afford-to-ignore-in-the-new-economy/#686620045c00>; see *What are B Corps?*, B LAB <https://www.bcorporation.net/what-are-b-corps> (last visited Oct. 30, 2017). “To be granted and to preserve certification, companies must receive a minimum score on an online assessment for ‘social and environmental performance’, satisfy the requirement that the company integrate B Lab commitments to stakeholders into company governing documents, and pay an annual fee” ranging from \$500 to \$50,000. McKinney, *supra* note 5; see *Make it Official*, B LAB (last visited Oct. 30, 2017), <http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/make-it-official>. As of 2017, there are 2,100 “Certified B Corps” across “130 industries” in 50

Legislation, it does not recognize all social purpose corporation legislation.⁶ Despite the fact that Tennessee's B Corporation Act is similar to the MBCL in most material respects, B Lab does not endorse Tennessee's B Corporation Act.⁷ As Professor Murray points out, "B Lab has decided not to support the Tennessee FPBC statute as passed, and does not recognize it as a 'true' benefit corporation statute because the Tennessee statute does not have certain enforcement mechanisms, . . . and does not; in B Lab's opinion, clearly state the 'triple bottom line' nature of the [For-Profit Benefit Corporation]."⁸

However, only three states have B Corporation statutes that contain enforcement mechanisms.⁹ My understanding of the "triple bottom

countries. *What are B Corps?*, B LAB, <https://www.bcorporation.net/what-are-b-corps> (last visited Oct. 30, 2017).

⁶ Khatib, *supra* note 2, at 154; *Legal Roadmap*, B LAB, <https://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/legal-roadmap> (last visited Sept. 12, 2017). Currently, B Lab does not recognize social purpose corporation legislation (including benefit corporation legislation) passed in the following states and territories as equivalent to B Lab's standard: Tennessee, Washington, Florida, Minnesota, Puerto Rico, Texas, and California. Therefore, any benefit corporation from these states that seek "Certified B Corporation" status must complete additional steps as determined by B Lab.

⁷ *Legal Roadmap*, B CORPORATIONS (last visited Sept. 12, 2017), <https://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/legal-roadmap>.

⁸ J. Haskell Murray, *Examining Tennessee's For-Profit Benefit Corporation Law*, 19 TENN. J. BUS. L. 325, 330–31 (2017); see also Jessica Bruder, *For "B Corps," a New Corporate Structure and a Triple Bottom Line*, N.Y. TIMES (Sept. 12, 2017), <https://boss.blogs.nytimes.com/2012/03/14/for-b-corps-a-new-corporate-structure-and-a-triple-bottom-line/> (defining the triple bottom line as an accountability for "creating positive social and environmental impacts" as well as generating profits).

⁹ Christopher Wirth, *Benefit Corporation Reporting Requirements*, DRINKER BIDDLE & REATH LLP (June 10, 2015), <http://benefitcorp.net/sites/default/files/Benefit%20Corporations%20Chart.pdf>. The following states answer with specific consequences to aid enforcement:

line” statement that B Lab requires is that it is an acknowledgement by the corporation of accountability for creating positive social and environmental impacts as well as generating profits. Do such provisions protect the potential investor or consumer from “Greenwashing” any more effectively than the reporting requirements that are contained in the Tennessee statute? Does the B Lab’s “triple bottom line” provide any more assurance of a B Corporation’s effectiveness in achieving both its for-profit and social enhancement objectives than Tennessee’s definition of “Public Benefit?”¹⁰

The fact that Tennessee For-Profit Benefit Corporations are not required to assess their annual performance through the use of third-party standards and benefit reports may be at the heart of B Lab’s lack of recognition of Tennessee’s For-Profit Benefit Corporation Act. I would suggest that a reason for the state of Tennessee’s legislature not requiring a mandatory third party standard was due to the potential appearance of a conflict of interest. Since B Lab lobbied in Tennessee to adopt the MBCL, it is likely that legislators did not want to endorse a requirement in the legislation that, as a practical matter, would require Tennessee corporations to use the services of the only “established and recognized” provider of such services. Because the fee for B Lab certification ranges from \$500 to \$50,000, depending on company size, this would essentially be imposing a tax on Tennessee For-Profit Benefit Corporations for an annual benefit assessment based on standards which the citizens of Tennessee had no role in establishing. Furthermore, although Tennessee does not explicitly require the use of a third-party standard for annual

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- (1) Minnesota (“The secretary of state shall revoke the corporation’s status as a benefit corporation. If the corporation did not file intentionally, shareholders may obtain payment for the fair value of their shares.”);
 - (2) New Hampshire (“The secretary of state shall administratively dissolve the corporation.”);
 - (3) New Jersey (“If the corporation does not file a report for two years, it will lose its status as a benefit corporation until it files a benefit report.”).

¹⁰ See TENN. CODE ANN. § 48-28-103(3) (defining a public benefit as “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”).

benefit assessments, it does not prohibit such assessments if the For-Profit Benefit Corporation elects to pursue certification with B Lab and take advantage of such annual reports.

EVALUATING THE POSITIVE SOCIAL AND ENVIRONMENTAL IMPACTS

While B Lab has been an effective force in promoting the use of B Corporations, is B Lab certification truly an effective mechanism for evaluating whether a B Corporation is really meeting its socially beneficial objectives? Looking specifically at Patagonia, “the outdoor clothing company” focused on a campaign to encourage consumers to either “buy less” or buy used products in an attempt to promote conservation and “green” living in 2012.¹¹ Yet Patagonia still recorded sales in excess of \$500 million and continued to grow, opening fourteen new stores during its “buy less” campaign.¹² This supports the argument that B Corporations have the potential to become sustainable and successful businesses. However, can the consuming and investing public effectively determine whether a particular company has achieved its stated positive social, environmental, and economic impacts without independent investigation?

Though Patagonia is certified by B Lab and must undergo B Lab’s Impact Assessment every two years, B Lab certification only requires corporations to score a forty percent.¹³ Arguably, this low threshold for certification does not support the idea that a B Lab certified corporation has achieved its positive and environmental impacts. However, Patagonia included specific obligations in its Articles of Incorporation

¹¹ Hacker, *supra* note 1, at 1758.

¹² *Id.*

¹³ *What is considered a “good” score?* B LAB, <https://www.bimimpactassessment.net/how-it-works/frequently-asked-questions/top-10#who-develops-the-standards> (last visited Sept. 24, 2017) (B Lab’s Impact Assessment only requires a score of 80 out of 200 for certification).

when it re-organized as a B Corporation in 2012.¹⁴ These specific obligations are annually evaluated by Patagonia to determine whether the company is achieving a positive social and environmental impact and provides a more detailed measurement of the good conferred upon the public by Patagonia.

CONCLUSION

When evaluating whether the B Corporation has conferred a positive benefit on society, it is up to the potential investor or consumer to undertake the necessary due diligence to determine if the for-profit benefit corporation in which they are conducting business is really pursuing the public benefits that are stated in their charter. The required reporting criteria and mechanisms outlined in Tennessee Code Annotated section 48-28-107¹⁵ can clearly provide the potential investor or customer the

¹⁴*Annual Benefit Corporation Report: Fiscal Year 2016*, PATAGONIA WORKS (2017), <http://www.societabenefit.net/wp-content/uploads/2016/11/Patagonia-2016.pdf> (last visited Sept. 24, 2017). Specifically, Patagonia outlined the following six commitments to measure the company's benefit impact: 1% for the Planet (one percent of Patagonia's net revenue is given to nonprofit charitable organizations that promote environmental conservation and sustainability); "build the best product with no unnecessary harm;" "conduct operations causing no unnecessary harm;" "sharing best practices with other companies;" "transparency;" and "providing a supportive work environment." *Id.*

¹⁵ See § 48-28-107, which provides for notices of shareholder meetings and annual benefit reports, states:

(a) A for-profit benefit corporation shall include in every notice of a meeting of shareholders a statement to the effect that it is a for-profit benefit corporation subject to this chapter.

(b) No later than four (4) months after the close of a for-profit benefit corporation's fiscal year, the for-profit benefit corporation shall deliver to its shareholders an annual benefit report covering the immediately preceding fiscal year. The annual benefit report shall state the name of the for-profit benefit corporation and contain, with regard to the period covered by the report, a narrative description of:

(1) The ways in which the corporation pursued the public benefit or public benefits stated in its charter;

(2) The extent to which that public benefit purpose or purposes were pursued and achieved; and

(3) Any material circumstances that hindered efforts to pursue or achieve the public benefit or public benefits.

(c) A for-profit benefit corporation is not required to have its annual benefit report audited, certified, or otherwise evaluated by a third party.

(d) A for-profit benefit corporation shall post its annual benefit reports on the public portion of its web site, if any; provided, the compensation paid to directors and financial or proprietary information may be omitted from the posted annual benefit reports.

(e) If a for-profit benefit corporation does not have a web site, the for-profit benefit corporation shall provide a copy of its most recent annual benefit report, without charge, to any person who requests a copy; provided, the compensation paid to directors and financial or proprietary information may be omitted from the provided annual benefit reports.

(f) The charter or bylaws of a for-profit benefit corporation may require that the corporation use a third-party standard in connection with or attain a periodic third-party certification addressing the corporation's promotion of the public benefit or public benefits identified in the charter or the best interests of those materially affected by the corporation's conduct.

type of information necessary to make informed decisions in this regard. Furthermore, The Tennessee Comptroller of the Treasury has the authority to initiate evaluations of this legislation to see if the objectives of the legislation are achieved, once enough time has passed to obtain data to make an informed analysis.