EXAMINING TENNESSEE'S FOR-PROFIT BENEFIT CORPORATION LAW

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I. INTRODUCTION

This symposium article is the first to focus on the Tennessee For-Profit Benefit Corporation ("FPBC") Act, which became effective on January 1, 2016. Following the introduction, this article starts in Part II by providing an overview of the events leading to the passage of the FPBC Act, and then proceeds with an analysis of the substance of the Act. In Part III, the start of the substantive legal discussion, the article compares and contrasts the Tennessee FPBC law to similar laws passed in other states, while also examining the Tennessee law in the light of the academic literature. The article posits in Part III that Tennessee's FPBC law provides some helpful flexibility and specificity on the purpose of the entity issue, but could benefit from expressly requiring, or at least allowing, stakeholder prioritization. Further, perceived enforcement deficiencies in the statute, and a supposed lack of clarity on the "triple bottom line" nature of the Tennessee FPBC have resulted in a loss of support from social enterprise advocate B Lab and may have a negative impact on FPBC formations in the state. In the final substantive section, Part IV, this article provides empirical data on reporting compliance by Tennessee FPBCs. Moreover, Part IV compares those reporting results in Tennessee to data from earlier work, in other states, on benefit corporation reporting compliance. Additionally, Part IV includes recommendations of stronger statutory enforcement mechanisms, such as significant fines, to deal with the high levels of reporting noncompliance. In conclu-

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sion, the article suggests minor amendments to the Tennessee FPBC statute, to, among other things, more closely follow the Delaware and Colorado benefit corporation laws. These suggested amendments to the Tennessee FPBC statute would likely reengage B Lab, better protect stakeholders, and improve statutory clarity.

II. SOCIAL ENTERPRISE LAW AND BENEFIT CORPORATION OVERVIEW

Before diving in to the Tennessee-specific discussion, it may be helpful to provide a basic overview of social enterprise law in general for those who are unfamiliar.[1] Social enterprise has a plethora of definitions, but those definitions generally include that the business generates a significant amount of its income through trade (not mainly through donations) and that the organization's purpose is focused on doing social good, beyond merely making a financial profit.[2] A number of statutes have been enacted to allow, expressly, for the creation of social enterprises; commentators sometimes refer to these social enterprise legal forms, including the benefit corporation, as "hybrid entities."[3]

In the United States, Vermont passed the first statute providing for a social enterprise legal form in 2008: the Low-Profit Limited Liabil-

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[1] *See generally*, Dana Brakman Reiser, *Regulating Social Enterprise*, 14 U.C. DAVIS BUS. L.J. 231 (2014); 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); Joseph W. Yockey, *Does Social Enterprise Law Matter?,* 66 ALA. L. REV. 767 (2015).

[2] *See, e.g.,* Justin Blount & Patricia Nunley, *What Is A "Social" Business and Why Does the Answer Matter?,* 8 BROOK. J. CORP. FIN. & COM. L. 278, 278 (2014) ("While the popularity of these terms ["social entrepreneurship" and "social enterprise"] has grown, as a concept they have remained ill-defined. These terms are generally used to describe organizations that blend aspects of for-profit business with some type of mission benefitting society that is more typically associated with non-profit organizations.").

[3] *See, e.g.*, Alina S. Ball, *Social Enterprise Governance*, 18 U. PA. J. BUS. L. 919, 926 (2016) ("This section unpacks the term 'social enterprise' and explores the rise of hybrid-entity legislation in the development of the social enterprise sector. This part also explains the various contributions that hybrid-entity statutes have already made to expand and strengthen the social enterprise sector.").

ity Company ("L3C").[4] Eight states followed Vermont's lead, though North Carolina repealed its L3C statute effective January 1, 2014.[5] The L3C form was created, at least in part, to attract Program Related Investments ("PRIs") from foundations, and the L3C statutes intentionally mirror much of the PRI regulation language.[6] The Vermont L3C statute, on which many of the following L3C statutes were based, requires that the L3C "significantly furthers the accomplishment of one or more charitable or educational purposes" and requires that the L3C "would not have been formed but for the company's relationship to the accomplishment of charitable or educational purposes."[7] The L3C form has endured intense criticism, and has been at a relative legislative standstill, with the last state statute passed in 2012.[8]

Social enterprise statutes providing for the formation of benefit corporations and social purpose corporations ("SPCs") followed the passage of the early L3C statutes.[9] The first benefit corporation legislation passed in 2010 in Maryland, and currently thirty-three states and the District of Columbia have passed benefit corporation legislation.[10] The most

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[4] J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 543 (2016).

[5] *Id.* at 543–44.

[6] John A. Pearce II & Jamie Patrick Hopkins, *Regulation of L3Cs for Social Entrepreneurship: A Prerequisite to Increase Utilization*, 92 NEB. L. REV. 259, 261–62 (2013).

[7] VT. STAT. ANN. tit. 11, § 4162(1) (2010); *see also* Cassady V. Brewer & Michael J. Rhim, *Using the 'L3C' for Program-Related Investments*, TAX'N EXEMPTS, Nov./ Dec. 2009, at 11, 13 (stating that L3C statutes tend to follow the Vermont L3C language).

[8] *See, e.g.,* J. William Callison & Allan W. Vestal, *The L3C Illusion: Why Low-Profit Limited Liability Companies Will Not Stimulate Socially Optimal Private Foundation Investment in Entrepreneurial Ventures,* 35 VT. L. REV. 273, 274–75 (2010*);* Daniel S. Kleinberger, *A Myth Deconstructed: The "Emperor's New Clothes" on the Low-Profit Limited Liability Company,* 35 DEL. J. CORP. L. 879, 879 (2010); *Here's the Latest L3C Tally*, INTERSECTOR PARTNERS, L3C, https://www.intersectorl3c.com/l3c (last visited Sept. 1, 2017).

[9] J. Haskell Murray, *Social Enterprise and Investment Professionals: Sacrificing Financial Interests?*, 40 SEATTLE U. L. REV. 765, 769–73 (2017). In California, social purpose corporations were previously called flexible purpose corporations. *Id.* at 773.

[10] *Social Enterprise LawTracker: Benefit Corporations*, N.Y.U. http://socentlawtracker.org/#/bcorps (last visited Nov. 30, 2017) (not updated to include Texas, which went ef-

vocal proponent of the benefit corporation legislation is the non-profit organization B Lab, which certifies social enterprises.[11] Benefit corporations can be divided into two basic camps: (1) Model Framework[12] and (2) Delaware Framework.[13] Benefit corporation statutes that follow the Model Framework state that the entities have the purpose of creating a "general public benefit," defined as, "[a] material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation."[14] Benefit corporation statutes that follow the Delaware Framework generally require both a general public purpose and a specific public purpose.[15] Like the L3C, benefit corporations have received a fair bit of crit-

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fective September 1, 2017); *State by State Status of Legislation*, BENEFIT CORPORATION, http://benefitcorp.net/policymakers/state-by-state-status (last visited Nov. 30, 2017) (noting 33 passed benefit corporation laws (32 states and the District of Columbia). As discussed in this article, B Lab does not recognize Tennessee as a true "benefit corporation" due to perceived weaknesses in the statute, but we include Tennessee in our total count given the name of the statute and the social purpose of the entity type. Thus, we recognize 33 states and the District of Columbia with benefit corporation statutes of some variation.).

[11] Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007, 1012–13 (2013) (noting that B Lab is the primary power behind benefit corporation legislation and also stating that B Lab "seeks to achieve its mission in two ways. First, B Lab promotes the adoption of its Model Legislation that allows the formation of benefit corporations; and second, B Lab certifies a qualifying corporation as a 'Certified B Corporation,' meaning that the corporation has met B Lab's standards as a socially responsible corporation.").

[12] *See generally* MODEL BENEFIT CORP. LEGIS., (version as of April 17, 2017), http://benefitcorp.net/attorneys/model-legislation (last visited Sept. 1, 2017).

[13] *See generally* DEL. CODE ANN. tit. 8, §§ 361–368 (2011 & Supp. 2017).

[14] MODEL BENEFIT CORP. LEGIS. §§ 102, 201.

[15] DEL. CODE ANN. tit. 8, § 362(1)(a–b). The Delaware statute has broad, general language, such as the requirement that public benefit corporations "operate in a responsible and sustainable manner." *Id.* at § 362(1).The Delaware statute also requires identification of a specific public benefit by requiring that the benefit corporation "[i]dentify within its statement of business or purpose . . . one or more specific public benefits to be promoted by the corporation." *Id.* at § 362(1)(a). Colorado's benefit corporation statute contains similar requirements. COLO. REV. STAT. ANN. § 7-101-503(a)(1) (West 2015).

icism, but the benefit corporation movement does not seem to have plateaued yet; the most recent benefit corporation legislation just became effective on September 1, 2017, in Texas, and the total number of benefit corporations has risen significantly over the past few years.[16]

California, Washington, and Florida have each enacted an SPC statute.[17] Differing from the benefit corporation, the SPC does not require a broad general public benefit purpose nor consideration of all material stakeholders; instead, SPCs allows a more narrow special or specific purpose.[18] SPCs do not appear to have expanded beyond the three noted states, but the form, with its focus on the specific benefit purpose, has likely influenced other statutes and corporate law amendments, even without the benefit of advocacy from an organization like B Lab.[19]

III. TENNESSEE FOR-PROFIT BENEFIT CORPORATION HISTORY

Early attempts to introduce benefit corporation legislation in Tennessee were rebuffed, but, in 2015, B Lab secured the support of the Chamber of Commerce and Industry in Tennessee and made a more se-

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[16] *See generally,* Loewenstein, *supra* note 11 (noting and citing criticism of the benefit corporation form); *State by State Status of Legislation*, BENEFIT CORPORATION, http://benefitcorp.net/policymakers/state-by-state-status (last visited Nov. 30, 2017); *Find a Benefit Corporation*, BENEFIT CORPORATION, http://benefitcorp.net/businesses/find-a-benefit-corp (last visited Sept. 1, 2017).

[17] CAL. CORP. CODE §§ 2500–17 (West 2017); FLA. STAT. ANN. §§ 607.501–.513 (West 2017); WASH. REV. CODE §§ 23b .25.005–.150 (2017); Jonathan Brown, *When Social Enterprises Fail*, 62 VILL. L. REV. 27, 36 (2017) (noting the renaming of the California "flexible purpose corporation" statute to "social purpose corporation."); Lloyd Hitoshi Mayer & Joseph R. Ganahl, *Taxing Social Enterprise*, 66 STAN. L. REV. 387, 400 (2014) (noting the passage of the California "flexible purpose corporation" legislation in 2011, effective January 1, 2012); Alicia E. Plerhoples, *Social Enterprise as Commitment: A Roadmap*, 48 WASH. U. J.L. & POL'Y 89, 107 (2015).

[18] *See, e.g.,* CAL. CORP. CODE §§ 2500–17, 2602 (West 2017).

[19] For example, it is possible that Delaware and the states that follow the Delaware Framework were moved to require identification of a specific public benefit purpose by the SPC legislation and by the scholarship suggesting such a requirement would be wise.

rious push.[20] The Tennessee Bar Association ("TBA") Business Law Section Executive Council and Business Entity Study Committee was given only two weeks to offer amendments and their requests for additional time were denied.[21] Some members of the TBA Committee had reservations about benefit corporations, especially under the Model Framework, and the TBA committee based their amendments, in part, on statutes from states that largely follow the Delaware Framework.[22] In early 2015, before Tennessee passed benefit corporation legislation, a majority of states, but only three of the ten southeastern states, had passed their own versions of benefit corporation legislation.[23] The Tennessee benefit corporation bill passed unanimously (with primary sponsors from both parties), was signed by the governor on May 20, 2015, and became effective on January 1, 2016.[24] Ultimately, B Lab has decided not to support the

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[20] Joan Heminway, *Benefit Corporations: What am I Missing--Seriously?,* BUS. L. PROF. BLOG (Feb.23, 2015), http://lawprofessors.typepad.com/business_law/2015/ 02/benefit-corporations-what-am-i-missing-seriously.html; Joan Heminway, *Makin' Tennessee For-Profit Benefit Corporation Sausage,* BUS. L. PROF. BLOG (April 15, 2015), http://lawprofessors.typepad.com/business_law/2015/04/makin-tennessee-for-profit-benefit-corporation-sausage.html; Interview with Chris Sloan, Shareholder, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC (Aug. 16, 2017 at 14:30 CST) (Chris Sloan interfaced with the Chamber during the consideration of benefit corporation legislation. According to Chris Sloan, the Chamber had become convinced that Tennessee companies were incorporating out of state because of Tennessee's lack of a benefit corporation statute. Louisiana was noted as a popular state for benefit corporation formation for these Tennessee companies).

[21] *Makin' Tennessee For-Profit Benefit Corporation Sausage, supra* note 20.

[22] *Id.*

[23] *Social Enterprise LawTracker*, *supra* note 10 (South Carolina, Florida, and Virginia passed benefit corporation legislation before Tennessee). Louisiana, which also has a benefit corporation law, is not included in the SouthEastern Division of the Association of American Geographers' definition of "southeast." SE. DIV. OF THE ASS'N OF AM. GEOGRAPHERS, http://sedaag.org/ (defining the southeastern United States as "Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, and West Virginia.").

[24] TENN. CODE ANN. §§ 48-28-101 to -109 (2017); *Social Enterprise LawTracker*, *supra* note 10; Press Release, Tennessee Secretary of State, For Profit Benefit Corporation Formations Now Available (January 4, 2016) (available at https://sos.tn.gov/news/profit-benefit-corporation-formations-now-available); TN-HB767, TRACKBILL,

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, such as required use of a third-party standard, and does not, in B Lab's opinion, clearly state the "triple bottom line" nature of the FPBC.[25] As such, B Lab's Head of Legal Policy confirmed that, unlike other benefit corporations, Tennessee benefit corporations will have to add language to their governing documents, similar to non-benefit corporations in other states that have constituency statutes, if the Tennessee benefit corporations wish to be certified by B Lab.[26] Given that the FPBC legislation was championed by B Lab, the Tennessee legislators may have been wary of mandating use of a third-party standard, such as the one provided by B Lab. While B Lab currently provides use of its third-party standard for free on its website, use of the free third-party standard may be a gateway to the certification process for which organizations pay B Lab between $500 and $50,000+ a year.[27]

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https://trackbill.com/bill/tn-hb767-corporations-for-profit-as-enacted-enacts-the-for-profit-benefit-corporation-act-amends-tca-title-48/1135765/ (last visited Nov. 18, 2017); TN-SB972, TRACKBILL, https://trackbill.com/bill/tn-sb972-corporations-for-profit-as-enacted-enacts-the-for-profit-benefit-corporation-act-amends-tca-title-48/1137147/ (last visited Nov. 18, 2017).

[25] E-mails from Rick Alexander, B Lab, Head of Legal Policy, to Haskell Murray, Associate Professor, Belmont University (Aug. 31, 2017, 13:11 and 14:30 CST) (on file with author); *State by State Status of Legislation*, *supra* note 16 (omitting Tennessee from B Lab's map of states with benefit corporation statutes).

[26] E-mails from Rick Alexander, B Lab, Head of Legal Policy, to Haskell Murray, Associate Professor, Belmont University (Sept. 1, 2017, 13:11 and 14:30 CST) (on file with author).

[27] *Make it Official*, B CORPORATION, https://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/make-it-official (last visited Nov. 18, 2017) (showing annual certification fees ranging from $500 to $50,000+ depending on the annual revenue of the company seeking to be certified); *see also* e-mail from Brian Kingsley Krumm, Associate Professor, University of Tennessee College of Law, to Haskell Murray, Associate Professor, Belmont University (Sept. 27, 2017 09:14 CST) (stating that "I [Brian Krumm] would suggest that a reason for the state of Tennessee's legislature not requiring a mandatory third party standard was the potential appearance of a conflict of interest. Since B Lab lobbied in Tennessee to adopt the Model Benefit Corporation Legisla-

IV. ANALYZING THE TENNESSEE FOR-PROFIT BENEFIT CORPORATION LAW

The Tennessee social enterprise form is called a "for-profit benefit corporation"—instead of the "benefit corporation" under the Model Framework or "public benefit corporation" under the Delaware Framework—to distinguish between the non-profit "public benefit corporation" that already existed in Tennessee.[28] While the need for clarity is understandable, "for-profit benefit corporation" surely does not sound as socially focused as "benefit corporation," "public benefit corporation," or "social purpose corporation."

Non-FPBCs in Tennessee need approval of two-thirds of outstanding shares of each class of stock to: (1) become FPBC or (2) merge to become a FPBC.[29] The two-thirds shareholder approval is common among other benefit corporation laws, and is the same threshold suggested in the Model Framework.[30] Unlike under the Model Framework, shareholders under the Tennessee FPBC law are granted dissenters' rights after a vote to amend the purpose or status of the FPBC, or in the case of an FPBC merger, if the shareholder voted against the action.[31] A white paper written by proponents of B Lab and the benefit corporation form claims:

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tion, it is likely that legislators did not want to be endorsing a requirement in the legislation that as a practical matter, would be requiring Tennessee corporations to use the services of the only 'established and recognized' provider of such services.") (on file with author).

[28] *Makin' Tennessee For-Profit Benefit Corporation Sausage, supra* note 20; TENN. CODE ANN. § 48-28-101 (2017).

[29] TENN. CODE ANN. § 48-28-104(a)(1) (2017).

[30] *See* J. Haskell Murray, *Corporate Forms of Social Enterprise: Comparing the State Statutes* 1–2, 4, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988556&rec=1&srcabs=1542244&alg=1&pos=7 (showing that two-thirds shareholder approval is common among the benefit corporation statutes).

[31] TENN. CODE ANN. § 48-28-104(b) (2017). Similar dissenters' or appraisal rights exist in states like California, Florida, and Minnesota. CAL. CORP. CODE § 3305; FLA. STAT. ANN. § 607.605(3) (2017); MINN. STAT. ANN. § 304A.103(3) (West 2017).

> "[u]nlike in events that typically trigger dissenters' rights, opting in or out of benefit corporation status is not a liquidity event that provides a pool of cash to satisfy existing shareholders. Instead, any cash to be paid to shareholders would be required to come from the corporation itself. Since most businesses interested in new corporate form legislation are private, small, and growing ("cash-poor"), the existence of dissenters' rights where none existed prior would have a chilling effect on adoption."[32]

This reasoning seems weak because even for a "cash poor" company, if the decision to switch to a benefit corporation form was a good one, that company could find replacement capital.[33]

The Tennessee statute requires a specification of the FPBC's public benefit purpose or purposes, whether specific or general in nature.[34] This sort of specification could provide more clarity to directors

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[32] William H. Clark, Jr. & Larry Vranka, *White Paper: The Need and Rationale for the Benefit Corporation: Why It Is the Legal Form That Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public*, BENEFIT CORPORATION (Jan. 18, 2013), available at http://benefitcorp.net/sites/default/files/Benefit_ Corporation_White_Paper.pdf.

[33] J. Haskell Murray, *Defending Patagonia: Mergers and Acquisitions with Benefit Corporations*, 9 HASTINGS BUS. L.J. 485, 515 n. 94 (2013).

[34] Tennessee FPBCs must "include a statement regarding the purpose or purposes for which the corporation is organized including one (1) or more public benefits to be pursued by the corporation." TENN. CODE ANN. § 48-28-104(e)(1) (2016). Delaware, somewhat differently, requires identification of a *specific* purpose, but the statute also requires operation in a "responsible and sustainable manner" and requires directors to balance the interests of various stakeholder. DEL. CODE ANN. tit. 8, § 362(a)(1) (West 2017) (requiring identification of one or more specific benefit purpose's in the public benefit corporation's charter). *See also* DEL. CODE ANN. tit. 8, §§ 362(a) (West 2017) (noting that public benefit corporations are "intended to produce a public benefit or public benefits *and to operate in a responsible and sustainable manner*." Shortly thereafter, the statute requires that "a public benefit corporation shall be managed in a manner that

and all corporate constituents on the chosen objective(s) of the firm. Of course, if the Tennessee FPBC chooses a vague general public benefit purpose, the probability of misunderstanding among the corporate stakeholders will likely increase. In contrast, Delaware public benefit corporation law requires identification of a specific public benefit purpose, albeit while including language to ensure that all stakeholder interests are taken into account.[35]

The Tennessee FPBC law notes 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."[36] Similarly, the Tennessee FPBC directors' statutorily described duties require the directors to "*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." [37] While Tennessee's directorial duty language is close to the Delaware language, the Tennessee statute swaps the Delaware word "balance" for the Model Legislation's word "consider."[38] "Consider" seems less onerous than "balance," as "balance" suggests giving at least some weight to each group; commenta-

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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.") (emphasis added).

[35] DEL. CODE ANN. tit. 8, § 362(a) (West 2017).

[36] TENN. CODE ANN. § 48-28-104(d) (2017).

[37] TENN. CODE ANN. § 48-28-106 (2017) (emphasis added).

[38] *See* J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345, 355 (2014) (noting the word "balance" used by the Delaware benefit corporation law, in place of the Model Legislation's use of "consider," and noting the disagreement among commentators on the meaning of these two words.).

tors, however, are already debating the material differences, if any, between the two words.[39]

Interestingly, while the Tennessee FPBC statute gives the ability to choose a specific public benefit purpose, the statute also mandates that directors "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."[40] These two parts of the statute may be difficult for directors to reconcile, especially if the specific public benefit purpose is focused on a specific stakeholder group. For example, the Synchronous Health 2016 Annual Benefits Report lists "put customers first in design, implementation, and practice" as a specific benefit purpose.[41] If this purpose carries over to directorial decision-making, that specific purpose, arguably and oddly, probably violates the Tennessee statute by giving a single stakeholder group regular priority.[42] Similarly, a FPBC that has a specific public benefit purpose to benefit the local environment, will still, under the Tennessee statute, have to consider all those "materially affected" by the corporation's conduct and, presumably, will not be allowed to regularly prioritize the environment in director decision-making. Disallowing regular prioritization of any constituency or limited group of constituencies could be seen as a variation of what Bill

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[39] MODEL BENEFIT CORP. LEGIS. § 301(a) (version as of April 17, 2017), http://benefitcorp.net/attorneys/model-legislation (last visited Sept. 1, 2017) (setting forth the stakeholders whose interests directors of benefit corporations must consider, including shareholders, employees, customers, community, and environment.) Notably, creditors are not listed among the stakeholders that directors must consider. J. Haskell Murray, *Adopting Stakeholder Advisory Boards*, 54 AM. BUS. L.J. 61, 94 (2017). The term "peripheral stakeholder includes creditors. *Id.* at 64.

[40] TENN. CODE ANN. § 48-28-106(a) (2017).

[41] *Annual Benefits Report 2016*, SYNCHRONOUS HEALTH 5, https://synchronoushealth.co/publications/ (last visited Sept. 25, 2017).

[42] TENN. CODE ANN. § 48-28-106(a) (2017).

Callison has called the Model Legislation's "illiberalism problem."[43] In short, the "illiberalism problem," under the Model Framework, is that each benefit corporation must have a broad, general purpose, which does not allow for narrower conceptions of purpose such as to "benefit a particular low-income community or a particular river watershed."[44]

Somewhat differently, in Tennessee, the statutory language preventing the "regular, presumptive, or permanent priority" of a narrow group of constituents could be intended to ensure that directors are not required to maximize the short-term benefit to one group in every decision.[45] Further, the specific purpose in a Tennessee FPBC may not be tied to any one stakeholder group, and even if the specific purpose is focused mainly on one group, directors may be able to achieve the purpose, over the long-term, by sacrificing that stakeholder group's interest in the short-term. Still, I think the Tennessee statutory language would be clearer if it specified that the specific purpose can be prioritized, but that an individual stakeholder group should not have to win, *in the short-term, in each individual decision.*[46] At first blush, this statutory provision appears to limit director authority by not allowing them to regularly prioritize, but this part of the Tennessee law may be meant to expand director authority by making clear that directors do not have to prioritize a certain stakeholder group in *every* individual decision, even if the specific purpose focuses on a stakeholder group. In corporate governance, Professor Stephen Bainbridge claims that there are at least two important questions being asked in corporate governance: "(i) Who decides? . . .

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[43] 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, 99–104 (2012).

[44] *Id.* at 103.

[45] Phone conversation with Joan Heminway, (Sept. 26, 2017 at 1:00 p.m. CST).

[46] Perhaps, the confusion is between the means and the ends. Perhaps, a specific end or purpose is allowed, but the Tennessee legislature wanted to make clear that the means of pursuing that end was not to be through prioritizing a specific stakeholder group in each and every decision.

[and] (ii) Whose interests prevail?"[47] In the traditional for-profit corporation context, Professor Bainbridge posits that the answer to the first question is "the board of directors"[48] and the answer to the second question is the subject of the corporate social responsibility debate.[49] In the corporate social responsibility debate "at one end of the spectrum are those who contend corporations should be run so as to maximize shareholder wealth. At the other end are stakeholderists, who argue that directors and managers should consider the interests of all corporate constituencies in making corporate decisions."[50] The Tennessee FPBC law appears to leave the board of directors in charge of major decisions, but expressly allows non-shareholder focused interests to prevail.[51]

The Tennessee FPBC statute follows the current version of the Model Legislation, though not the early versions of the Model Legislation, in setting a shareholder ownership floor for eligibility to bring a public benefit based derivative lawsuit, also called a "benefit enforcement

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[47] Stephen M. Bainbridge, *Much Ado About Little? Directors' Fiduciary Duties in the Vicinity of Insolvency*, 1 J. BUS. & TECH. L. 335, 336 (2007).

[48] Stephen M. Bainbridge, *Executive Compensation: Who Decides?*, 83 TEX. L. REV. 1615, 1619, 1650–61 (2005) (reviewing LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION (2004)) (arguing for director primacy in governance, and arguing against increased power for shareholders as proposed in the Bebchuk and Fried book).

[49] Bainbridge, *supra* note 47, at 336.

[50] *Id. See generally* George A. Mocsary, *Freedom of Corporate Purpose*, 2016 BYU L. REV. 1319, 1342–68 (2016) (arguing that shareholder wealth maximization as a strategic purpose is both "the norm and the law," at least as a default in the traditional for-profit corporation context.).

[51] Some may argue that Tennessee corporate law already allows great flexibility in considering non-shareholder stakeholders, even in the merger and acquisition setting, given Tennessee's other constituency statute. TENN. CODE ANN. § 48-103-204 (2017); Christopher Geczy et al., *Institutional Investing When Shareholders Are Not Supreme*, 5 HARV. BUS. L. REV. 73, 96–97 n. 134 & 140 (2015) (stating that the Tennessee constituency statute allows the consideration of "nonshareholder interests to include 'other' factors" and the Tennessee statute is limited to publicly traded companies).

proceeding."[52] Bringing a derivative lawsuit for a director's breach of duties related to the public benefit requires ownership of at least 2% of the outstanding shares (or "shares having at least two million dollars ($2,000,000) in aggregate market value" if the company is publicly traded).[53]

The Tennessee FPBC statute makes clear that it does not affect other areas of the Tennessee corporate law, and that implications should not be made "as to whether, in exercising their duties, the officers or directors of a domestic business corporation that is not a for-profit benefit corporation may consider the impact of the corporation's transactions or other conduct" on other stakeholders or on public benefits listed in its charter.[54] Nonetheless, some worry that traditional corporations will be impacted by negative implication and that judges will require directors of traditional corporations to be more focused on shareholders because of the existence of a more societal focused for-profit form like the benefit corporation.[55] Statutory language dealing with benefit corporation reporting requirements will be addressed in the following section.

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[52] MODEL BENEFIT CORP. LEGIS. § 305(c) (version as of April 17, 2017), http://benefitcorp.net/attorneys/model-legislation (last visited Sept. 1, 2017) (granting standing to bring a benefit enforcement proceeding to "a person or group of persons that owned beneficially or of record at least 2% of the total number of shares of a class or series outstanding at the time of the act 823 or omission complained of."); *see also* J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 35 n.156 (2012) (noting that the change in the Model Legislation to add an ownership threshold for benefit enforcement proceedings).

[53] TENN. CODE ANN. § 48-28-108 (2017).

[54] TENN. CODE ANN. § 48-28-109 (2017).

[55] *See, e.g.*, Mark A. Underberg*, Benefit Corporations vs. "Regular" Corporations: A Harmful Dichotomy,* HARV. L. SCH. FORUM ON CORP. GOVERNANCE & FIN. REGULATION (May 13, 2012), https://corpgov.law.harvard.edu/2012/05/13/benefit-corporations-vs-regular-corporations-a-harmful-dichotomy/ ("The broader interests of responsible corporate governance are ill-served by creating a false dichotomy between "good" and "bad" companies. . . . There's no legal reason that all companies can't consider a wide range of interests in order to make responsible corporate decisions. Nor is there reason B Corp advocates should provide them with excuses not to do so by overstating the limitations placed on directorial discretion by existing law. It is also unfortunate that this rationale is now enshrined in the legislative histories of the B Corp laws, which

V. TENNESSEE FOR-PROFIT BENEFIT CORPORATION REPORTING

Similar to the Model Legislation, Tennessee's FPBC law requires annual reporting on the ways the entity pursued public benefit, achieved public benefit, and was hindered in its efforts.[56] The Tennessee statute gives benefit corporations "four months" after the close of its fiscal year to provide its annual benefit report, as opposed to "120 days" under the Model Legislation.[57] As with the Model Legislation, Tennessee benefit reports must be posted on the company's website, or, if the company does not have a website, the report must be provided to anyone who asks, free of charge.[58] Unlike the Model Legislation, the Tennessee statute does not require use of a third-party standard in evaluating the public benefit of the entity.[59]

After an e-mail request, I received a list of for-profit benefit corporation, formed between January 1, 2016 and June 30, 2017, from the Tennessee Secretary of State's office. The list included 168 domestic and foreign benefit corporations registered with the state.[60] The 168 companies included 34 foreign benefit corporations, though a number must have chosen the benefit corporation box by mistake, as some of those companies were formed in states without benefit corporation laws at the time of the entities' formation.[61] For the sample set, I included only

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could have unintended consequences in future court rulings further defining the scope of directors' fiduciary obligations."). Professor Joshua Fershee expressed similar sentiments in his presentation and paper at this symposium. Joshua Fershee, *The End of Responsible Growth and Governance?: The Risks Posed by Social Enterprise Enabling Statutes and the Demise of Director Primacy*, 19 TENN. J. BUS. LAW 361, 362 (2017).

[56] *Compare* MODEL BENEFIT CORP. LEGIS. §§ 401–02 *with* TENN. § 48-28-107.

[57] *Compare* TENN. § 107(b) *and* MODEL BENEFIT CORP. LEGIS. § 402(a).

[58] *Compare* MODEL BENEFIT CORP. LEGIS. § 402(b)–(c) *with* TENN. § 48-28-107(d)-(e).

[59] *Compare* MODEL BENEFIT CORP. LEGIS. § 401(a)(2) *with* TENN. § 48-28-107(c).

[60] Data for this paragraph on file with the University of Tennessee College of Law.

[61] *Social Enterprise LawTracker*, *supra* note 10 (showing no benefit corporation statute for Georgia, Mississippi, and Maine as of June 30, 2017. However, the June 30, 2017 list from the Tennessee Secretary of State included foreign corporations from these states listed as benefit corporations).

companies formed between January 1, 2016 and May 1, 2016, giving the companies a full year and four months to publish their reports. It is likely that many of the FPBCs ended their fiscal year December 31, so the reports would be due even earlier. I searched for the benefit reports on September 8-9, 2017. Of the 134 domestic for-profit benefit corporations in Tennessee, only 30 were formed before May 1, 2016. Of those 30, none had a published or available benefit corporation report. Eight had a website, but no posted report; I did not count social media pages as websites. Ten were noted as inactive or dissolved. Of the remaining twelve, I attempted to obtain a free report, as is my right under the Tennessee FPBC statute.[62] For two of those twelve companies, I could not find contact information and the name of the registered agent was too common to allow location. Of the remaining ten, one had a disconnected number posted online, one evidently had recently gone bankrupt, one claimed to be inactive (although it was active on the SOS website), six did not return my call or e-mail, and one had a full phone inbox and no posted e-mail address.

In earlier work, I found only eight percent of the benefit corporations in a sample set collected in 2014 from Virginia, New York, California, and Hawaii attempted benefit reports.[63] I had expected a better compliance rate in Tennessee, and certainly did not expect the zero percent compliance rate that I found, as benefit corporations have become better known, and one would think professionals have become more knowledgeable about this area of law. Tennessee, however, does not include the enforcement mechanisms suggested in that article, providing no significant statutory incentive to post benefit reports.[64] Further, the Tennessee FPBC is quite new in the state, and perhaps professionals are not yet educated on the reporting requirements. Also, perhaps many of the Tennessee benefit corporations were formed by mistake and are therefore completely unaware of their requirement to draft and post a

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[62] *See generally* J. Haskell Murray, *An Early Report on Benefit Reports*, 118 W. VA. L. REV. 25 (2015).

[63] *Id* at 33–35.

[64] *Id.* at 47–51.

benefit report. This hypothesis lines up well with Professor Joan Heminway's observation that roughly fifty percent of the early Tennessee FPBCs appear to have been incorporated as that legal entity form by mistake.[65] Finally, it may be that a significant percentage of the Tennessee FPBC are not yet formally inactive, but have effectively ceased operations. This sample size is quite small, and we may learn more about the compliance rates in future years.

In searching online for annual benefit reports, I did locate Synchronous Health's report. Synchronous Health was not formed 16 months before September 1, 2017 (May 1, 2016); rather, it was formed on June 6, 2016.[66] Synchronous Health's Annual Report was due April 1, 2017, and perhaps it posted its benefit corporation report at the same time.[67] While Synchronous Health should be applauded for drafting and posting a benefit report, an examination of the contents of that report reveals a thin marketing document without much specificity or information useful for holding the company accountable.[68]

In my e-mail and phone correspondence, I observed an incredible lack of knowledge about FPBCs, not only by the business people who owned them, but also by the lawyers and CPAs who assisted. A few

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[65] Joan Heminway, *Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations*, 40 SEATTLE U. L. REV. 611, 613–14 (2017) (noting that "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. Although this figure may seem impressive, a review of these Tennessee filings suggests that well more than half were erroneously organized as benefit corporations.").

[66] *Business Information Search*, TENN. SEC'Y STATE, https://tnbear.tn.gov/Ecommerce/FilingSearch.aspx (last visited Oct. 30, 2017) (enter "Synchronous Health" in search name field).

[67] *Id.*

[68] *See generally Annual Benefits Report 2016*, SYNCHRONOUS HEALTH, https://sync.health/publications/ (not focusing attention on what hindered the company's progress, but rather noting general accomplishments in 2016. The benefit report also contains very little hard data related to the company's social impact, and what little data is included seems chosen to highlight the very best achievements of the company in that particular year.).

noted that the corporations had, in fact, been formed as FPBCs by mistake, noting that the "domestic for-profit *benefit* corporation" could easily be confused with a traditional "domestic for-profit corporation."[69]

VI. CONCLUSION

Since January 1, 2016, Tennessee has joined the majority of states that have some form of benefit corporation law. Drawing significantly from the Colorado and Delaware laws, Tennessee passed a statute that allows as much or more private ordering than any previous state statute. Due to a perceived lack of commitment to a triple bottom line of "people, planet, and profit," and the absence of a third-party standard requirement, B Lab has refused to recognize Tennessee's FPBC statute as a "true" benefit corporation law. This article acknowledges flaws in B Lab's Model Legislation, but posits that a lack of support from B Lab could deprive Tennessee of many of the modest benefits of a benefit corporation statute, such as the social enterprise community building and marketing efforts led by B Lab. By Tennessee granting the positive sounding name of "benefit corporation" to certain organizations, the state seems well within its rights to require more assurance of some social good, and the state may need increased enforcement mechanisms to protect employees, consumers, and other stakeholders from being misled.[70] Among the few burdens placed on benefit corporations are the modest reporting requirements, and, as shown in this article, none of the benefit corporations during the period examined complied with the reporting provisions. Further, the only discovered benefit report, from outside of the studied period, was mostly a thin public relations document without much useful data. Going forward, the Tennessee legisla-

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[69] Due to privacy concerns, I will not cite the individual conversations with these business people and professionals, although the Excel spreadsheet of the companies contacted is on file with the University of Tennessee College of Law.

[70] Stefan J. Padfield, *Rehabilitating Concession Theory*, 66 OKLA. L. REV. 327, 332 (2014) ("Under concession theory, the state retains significant presumptive authority to regulate the corporate entity in exchange for granting this bundle of rights to incorporators. However, it is important to note here that I am using 'concession theory' to denote a theory of the corporation that gives deference to government regulation, as opposed to removing all limits on the state's right to regulate corporations.").

ture should consider reengaging B Lab, local entrepreneurs, and the TBA to improve its FPBC statute by, among other things, clarifying the stakeholder prioritization section, adding sensible penalties for non-reporting, and requiring more specificity in the benefit reports.[71]

[71] There are quite a number of other, more significant, amendments that could also be considered, including a partial asset lock and tax benefits, though these more burdensome requirements may need to be coupled with offsetting benefits to the entity. J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 550–51 (2016) (noting the proposed social enterprise solution of a partial asset lock); *see also,* Lloyd Hitoshi Mayer & Joseph R. Ganahl, *Taxing Social Enterprise,* 66 STAN. L. REV. 387, 441–442 (2014) (arguing that charitable tax status should not be extended to social enterprises, but that other, more minor, modifications of the tax code to aid social enterprises may be appropriate).