

# SOCIAL ENTERPRISE LAW IN ACTION: ORGANIZATIONAL CHARACTERISTICS OF U.S. BENEFIT CORPORATIONS

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*The benefit corporation is now the most widely adopted innovation in state corporate law in nearly two decades. Thirty-three states and the District of Columbia have passed legislation enabling the formation of benefit corporations. In these states, mission-driven for-profit firms can adopt the benefit corporation legal form to protect directors from liability as they pursue both a social purpose and private profits. Despite scholarly and political interest, little is known about the firms that incorporate as benefit corporations. This Article draws on an innovative national empirical study of benefit corporations, the first of its kind, to understand how business owners are using social enterprise law. The Article provides the most comprehensive count of benefit corporations available and original, data-driven analysis of benefit corporations' national dynamics and organizational characteristics. The findings reveal that at least 7704 benefit corporations have been formed since 2010, with Oregon, New York, Nevada, Delaware, and Colorado home to most. The field is highly varied, but there is a lot of inactivity and a substantial portion of benefit corporations are not evidently delivering any social or environmental benefits. Of the firms with an online presence, 71% do not describe themselves as benefit corporations, contradicting proponents' assertions that the legal status provides market differentiation. These findings suggest that benefit corporation legislation serves a subset of firms, yet it falls short of its transformative promise to upend the prevailing model of shareholder supremacy. Statutes are not well tailored to new, small, privately held businesses, and lack of oversight enables inappropriate firms to become and remain benefit corporations.*

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## I. INTRODUCTION

The benefit corporation is a new sort of American corporate entity that is legally obligated to pursue both a social mission and private profits.<sup>1</sup> Faced with unique legal requirements on their firms, directors and boards of benefit corporations must consider the impacts of their decisions not only on shareholders but also on their stakeholders who may include employees, customers, community members, the environment, and society at large.<sup>2</sup> According to its proponents, benefit corporation law upends the reigning model of shareholder supremacy, which directs firms to maximize shareholders' short-term financial returns.<sup>3</sup> The pay-off of this more flexible legal alternative, advocates say, is that social entrepreneurs can run mission-driven businesses that prioritize a "higher standard" of social responsibility.<sup>4</sup>

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<sup>1</sup> For a seminal statement on benefit corporation law, see WILLIAM H. CLARK & LARRY VRANKA, *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* (2013), [http://benefitcorp.net/sites/default/files/Benefit\\_Corporation\\_White\\_Paper.pdf](http://benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf). See also B LAB, *MODEL BENEFIT CORPORATION LEGISLATION WITH EXPLANATORY COMMENTS* (2017) [hereinafter *MODEL BENEFIT CORPORATION LEGISLATION*], [http://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20\\_4\\_17\\_17.pdf](http://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf).

<sup>2</sup> See generally William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 839–40 (2012) (discussing factors that led to the emergence of benefit corporations and unique requirements on benefit corporation directors to consider interests in addition to shareholder interests); Robert T. Esposito, *The Social Enterprise Revolution in Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for the Benefit Corporation*, 4 WM. & MARY BUS. L. REV. 639, 645 (2013) (describing the landscape leading to the emergence of an international social enterprise movement as "corporate law is on the precipice of a momentous sea change whose hallmark will be social enterprise entities that consider the interests of shareholders and stakeholders alike").

<sup>3</sup> CLARK & VRANKA, *supra* note 1, at 5–6. Shareholders and stakeholders are discussed in greater detail. See *infra* notes 40–55 and accompanying text.

<sup>4</sup> CLARK & VRANKA, *supra* note 1, at 6; see also JANE L. COLLINS, *THE POLITICS OF VALUE: THREE MOVEMENTS TO CHANGE HOW WE THINK ABOUT THE ECONOMY* 47 (2017) (explaining that those who participated in the social movement to create benefit corporations "saw the benefit corporation's new practices as challenging the notion that value on the stock market was value in real life and that short-term gains always trumped sustainable returns and social well-being"); Hans Rowhouser, Michael Cummings & Andrew Crane, *Benefit Corporation Legislation and the Emergence of a Social Hybrid Category*, 57

The benefit corporation is the most widely adopted innovation in state corporate law in nearly two decades.<sup>5</sup> Thirty-three states and the District of Columbia have enacted benefit corporation statutes, beginning with Maryland in 2010.<sup>6</sup> The adoption of a variation on benefit corporation legislation by the state of Delaware is especially noteworthy.<sup>7</sup> Delaware is home to the majority of publicly held U.S. companies, including the vast majority of Fortune 500 firms,<sup>8</sup> and Delaware law, upheld by the highly influential Delaware Court of Chancery, mandates that firms work to maximize shareholder value.<sup>9</sup> Beyond the United States, benefit corporation legislation passed in Italy in 2015 and has advocates in numerous other countries, such as Columbia and Canada.<sup>10</sup>

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CAL. MGM'T REV. 13, 20–27 (2015) (finding, based on empirical analysis of legislative records and interviews with thirty-two legislators and legislative aides, that proponents of benefit corporations emphasize the flexibility of this new organizational form and its positive spillover effects on society, the clarity it provides to stakeholders, and its compatibility with changing cultural mores).

<sup>5</sup> See Steven John Munch, *Essays on the Diffusion of State Corporate Law* (2015) (unpublished Ph.D. dissertation, Northwestern University) (on file with author).

<sup>6</sup> See *State by State Status of Legislation*, BENEFIT CORP., <http://benefitcorp.net/policymakers/state-by-state-status> (last visited Oct. 25, 2018) [hereinafter *State by State Status of Legislation*].

<sup>7</sup> For the idiosyncrasies of Delaware benefit corporation law, see *infra* notes 51–54 and accompanying text.

<sup>8</sup> See Alana Semuels, *The Tiny State Whose Laws Affect Workers Everywhere*, ATLANTIC (Oct. 3, 2016), <https://www.theatlantic.com/business/archive/2016/10/corporate-governance/502487/>. B Lab characterizes Delaware as “the most important state for businesses that seek access to venture capital, private equity, and public capital markets.” J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345, 350 n.35 (2014) [hereinafter *Social Enterprise Innovation*] (quoting B Lab on the significance of Delaware for corporate law).

<sup>9</sup> Brian R. Cheffins, *Delaware and the Transformation of Corporate Governance*, 40 DEL. J. CORP. L. 1, 1 (2015) (reviewing the significance of Delaware's contributions to U.S. corporate governance law over forty years). For a critique of Delaware's influence on corporate law, see KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* 107–12 (2006) (arguing that widespread deference to Delaware to govern the most powerful corporations is undemocratic). See also *infra* note 34 and accompanying text.

<sup>10</sup> See *International Legislation*, BENEFIT CORP., <http://benefitcorp.net/international-legislation> (last visited Oct. 25, 2018).

Firms have taken notice. While those interested in using business strategies to accomplish social or environmental objectives can choose from a growing menu of legal forms of social enterprise, the benefit corporation has become the most popular option.<sup>11</sup> High-profile examples of benefit corporations include Kickstarter, an online crowdfunding platform geared toward creative projects;<sup>12</sup> People Against Dirty, which sells “planet-friendly” Method and Ecover products and pays workers more than 40% of the minimum wage;<sup>13</sup> Warby Parker, whose “Buy a Pair, Give a Pair” program has distributed more than 4 million eyeglasses to individuals with low income;<sup>14</sup> This American Life, which produces narrative journalism for public radio;<sup>15</sup> and Patagonia, an outdoor apparel firm with a mission to “build the best product, do no unnecessary harm,

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<sup>11</sup> See generally DANA BRAKMAN REISER & STEVEN A. DEAN, SOCIAL ENTERPRISE LAW: TRUST, PUBLIC BENEFIT, AND CAPITAL MARKETS (2017) (explaining the range of specialized legal frameworks for social enterprises); Briana Cummings, Note, *Benefit Corporations: How to Enforce a Mandate to Promote the Public Interest*, 112 COLUM. L. REV. 578 (2012) (describing the emergence of benefit corporations as a for-profit form of social enterprise). The most recent, but unverified, count of benefit corporations identifies 5199 active firms. See *B Corp Impact Data*, DATA.WORLD, <http://data.world/blab/b-corp-impact-data> (last visited July 8, 2018); see also COLLINS, *supra* note 4, at 45 (contrasting the passage of more than 30 benefit corporation state statutes in six years with the passage of limited liability laws, which occurred over two decades); Kate Cooney et al., *Benefit Corporation and L3C Adoption: A Survey*, STAN. SOC. INNOVATION REV. (Dec. 5, 2014), [https://ssir.org/articles/entry/benefit\\_corporation\\_and\\_l3c\\_adoption\\_a\\_survey](https://ssir.org/articles/entry/benefit_corporation_and_l3c_adoption_a_survey) (showing that benefit corporation legislation has spread more rapidly across states than L3C legislation and that very similar numbers of L3C’s [1051] and benefit corporations [998] existed as of July 2014). A Google Trends analysis comparing all Google searches for “benefit corporation” and “L3C” in the United States between January 1, 2004, and August 2, 2018, shows that starting in January 2012, searches for benefit corporation became consistently more common than for L3C. *Google Trends: Compare “Benefit Corporation” and “L3C,” 2004 - Aug. 2, 2018* (on file with author). Google searches for benefit corporation peaked in popularity in September 2015. *Id.*

<sup>12</sup> KICKSTARTER, <https://www.kickstarter.com/about?ref=global-footer> (last visited Oct. 25, 2018).

<sup>13</sup> *People Against Dirty*, B LAB, <https://www.bcorporation.net/community/people-against-dirty> (last visited June 14, 2018).

<sup>14</sup> *Buy a Pair, Give a Pair*, WARBY PARKER, <https://www.warbyparker.com/buy-a-pair-give-a-pair> (last visited Oct. 25, 2018).

<sup>15</sup> Goli Sheikholeslami & Ira Glass, *Changes at This American Life*, THIS AMERICAN LIFE (July 9, 2015), <https://www.thisamericanlife.org/about/announcements/changes-at-this-american-life>.

use business to inspire and implement solutions to the environmental crisis.”<sup>16</sup> Laureate Education, the world’s largest network of for-profit higher education institutions, went public in February 2017, making it the first and thus far only publicly held benefit corporation.<sup>17</sup>

The genesis of benefit corporations has created much hype about remarkable firms and the potential for social change. Yet little is known about what exactly benefit corporations actually do or how they understand and pursue their social missions. This Article draws on an innovative and original empirical study to document the implementation of U.S. benefit corporation law. It analyzes social enterprise law in action, to show the real-life consequences of this legal innovation.<sup>18</sup> Specifically, it presents novel, unpublished data that demonstrate the prevalence, location, and timing of the creation of benefit corporations, as well as benefit corporations’ industries, organizational characteristics, and identities. It does so by identifying all known benefit corporations ever created (to capture age and geographic location) and by analyzing in-depth the online content of a random sample of 570 firms (to determine their organizational characteristics). It finds that at least 7704 benefit corporations were created between October 1, 2010, and December 31, 2017.<sup>19</sup> The in-depth sample analysis captures the wide range in benefit corporations’ organizational characteristics. It shows, for example, that the

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<sup>16</sup> *About*, PATAGONIA, <https://www.patagonia.com/blog/about/> (last visited Oct. 25, 2018).

<sup>17</sup> *About Laureate*, LAUREATE INT’L U., <https://www.laureate.net/AboutLaureate> (last visited June 14, 2018); David Gelles, *For Start-Ups, Altruism As an Alternative to Acquisition or I.P.O.*, N.Y. TIMES (Nov. 4, 2015), <https://www.nytimes.com/2015/11/05/business/dealbook/for-start-ups-altruism-as-an-alternative-to-acquisition-or-ipo.html> (describing Laureate’s IPO and identifying a few B Corps that are subsidiaries of publicly held corporations).

<sup>18</sup> In law and society scholarship, the long-running analytic distinction between law on the books and law in action is captured in the title—although not the content—of Roscoe Pound’s *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910). See also KITTY CALAVITA, *INVITATION TO LAW & SOCIETY: AN INTRODUCTION TO THE STUDY OF REAL LAW* 94 (2d ed. 2016) (identifying the gap between law on the books and in action as a central and foundational idea in the law and society field).

<sup>19</sup> See *infra* Part IV. A list of firms is available upon request from the Author.

overwhelming majority are small, privately held firms.<sup>20</sup> The sample includes social enterprise heavyweights, such as Patagonia and Mightybytes, a mid-sized Chicago web design and marketing firm with the tagline, “We build creative digital solutions for conscious companies,”<sup>21</sup> alongside Northern Nevada Pest Control,<sup>22</sup> Optimum Real Estate Management in New York,<sup>23</sup> and Colorado-based Seaway Heavy Lifting (SHL), which transports, installs, and manages equipment for offshore oil and gas extraction and wind farms worldwide.<sup>24</sup>

This Article proceeds in six Parts. Part II provides background on the legal requirements of benefit corporations. Part III discusses the challenges in identifying, studying, and understanding benefit corporations as business entities. Part IV describes the design of the study. Part V presents new empirical findings on the organizational characteristics of U.S. benefit corporations. The findings reveal the prevalence of benefit corporations, their states and timing of incorporation, and their industries as well as their products and services, size of workforce, geographic scope, and stated benefits. It includes analysis of the ease of registering as a benefit corporation with the Secretary of State (or equivalent office) in states with benefit corporation statutes. Part VI proposes strategies to support and protect the integrity of the benefit corporation form. These strategies include tailoring benefit corporation law, advocacy, and advising to the serve the needs of the vast majority of benefit corporations, which are very small new firms. The legal form should be treated as a means of motivating social entrepreneurs and facilitating a business community of social enterprises, rather than branding for unknown stakeholders.

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<sup>20</sup> See *infra* Part V.A.

<sup>21</sup> MIGHTYBYTES, <http://www.mightybytes.com> (last visited Oct. 29, 2018); see also COLLINS, *supra* note 4, at 50–51, 53 (interviewing Tim Frick, principal of Mightybytes, for her study of the benefit corporation/B Corporation movement).

<sup>22</sup> N. NEV. PEST CONTROL, <http://www.renonevadaexterminators.com/> (last visited Oct. 29, 2018).

<sup>23</sup> *Real Estate*, OPTIMUM ASSET MGMT., <https://www.optimumam.com/real-estate> (last visited Oct. 29, 2018).

<sup>24</sup> SEAWAY HEAVY LIFTING, <https://www.seawayheavylifting.com.cy/services> (last visited Oct. 29, 2018).

Furthermore, the threshold for becoming a benefit corporation should be raised, and oversight needs to be improved. The discussion also calls for systematic analyses and observational and interview research to gain deeper insight into patterns identified by this study. Part VII presents concluding comments.

## II. THE BENEFIT CORPORATION AS A LEGAL FORM OF SOCIAL ENTERPRISE

Over the last twenty-five years, there has been a surge of interest in social enterprise.<sup>25</sup> According to its proponents, social enterprise rests on two fundamental premises. First, the current capitalist economic system and its long-standing organizational paradigm of three sectors—public, private, and nonprofit—have produced tremendous wealth and opportunity. However, this system has unevenly distributed rewards around the globe and has caused grave damage to the natural environment and human well-being.<sup>26</sup> The division of organizations into these three sectors leaves them ill-equipped to adequately address extraordinarily complex problems, such as climate change, economic inequality, and the settlement of displaced migrants.<sup>27</sup> Second, capitalism can provide tools to solve many of the social and environmental problems it has created.<sup>28</sup>

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<sup>25</sup> See, e.g., RORY RIDLEY-DUFF & MIKE BULL, UNDERSTANDING SOCIAL ENTERPRISE: THEORY AND PRACTICE (2d ed. 2015) (examining the growth of social enterprises over the past thirty-five years at a local, national, and international level); DENNIS R. YOUNG ET AL., THE SOCIAL ENTERPRISE ZOO: A GUIDE FOR PERPLEXED SCHOLARS, ENTREPRENEURS, PHILANTHROPISTS, LEADERS, INVESTORS, AND POLICYMAKERS (Dennis R. Young et al. eds., 2016) (exploring different ways to classify and understand social enterprises); Cummings, *supra* note 11.

<sup>26</sup> YOUNG ET AL., *supra* note 25, at 1, 3–4.

<sup>27</sup> *Id.* at 4 (“[I]t is entirely reasonable to conceive of social enterprise as a response to failures (or more precisely ‘inefficiencies’) in all three of the conventional sectors . . .”).

<sup>28</sup> See generally PAUL HAWKEN ET AL., NATURAL CAPITALISM: CREATING THE NEXT INDUSTRIAL REVOLUTION (2008) (presenting arguments for the creation of a sustainable commerce design); WILLIAM McDONOUGH & MICHAEL BRAUNGART, CRADLE TO CRADLE: REMAKING THE WAY WE MAKE THINGS (2002) (arguing for the necessity of redesigning production models to eliminate waste caused by current practices). Many observers, particularly business experts, claim that corporations can best drive this radical transformation of capitalism. See, e.g., JOHN ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS (1997) (asserting that companies can



Indeed, capitalism can be fruitfully restructured so that people can mobilize its creative and productive processes—such as entrepreneurialism, competition, and market disruption—to transform society for the better.<sup>29</sup> Creating new institutions and organizational forms that span sectors is an essential part of the solution.

A broad range of activities fall under the social enterprise umbrella, from impact investing to conscious consumerism to fair trade certification. In the U.S. context, social enterprises are typically for-profit entities that generate revenue through commerce while advancing a social mission. They contrast to traditional corporations, which prioritize profit-making.<sup>30</sup> Captured in the slogan of B Lab, a U.S.-based nonprofit advocate of social enterprise, these firms “use the power of business to solve social and environmental problems.”<sup>31</sup>

Social enterprise law is the legal arm of this movement. It takes aim at a central premise of corporate governance law: that directors should serve the financial interests of shareholders above other stakeholders, objectives, and values.<sup>32</sup> Proponents of social enterprise law point to the norm of shareholder wealth maximization, specified in *Dodge v. Ford Motor*

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transition to sustainability by valuing profit-making, environmental quality, and social justice).

<sup>29</sup> See, e.g., Michael E. Porter & Mark K. Kramer, *Creating Shared Value*, 89 HARV. BUS. REV. 62 (2011) (discussing the desirability of companies rethinking their attitudes on value production). For a critical perspective, see Marshall Ganz et al., *Social Enterprise Is Not Social Change*, 16 STAN. SOC. INNOVATION REV. 59 (2018) (arguing that social enterprise and social entrepreneurship have done little to fix systemic social problems they purport to address).

<sup>30</sup> REISER & DEAN, *supra* note 11, at 52–53 (discussing the emergence of benefit corporations and comparing and contrasting existing frameworks with other for-profit corporate models); *Social Enterprise Innovation*, *supra* note 8, at 347–49 (defining “social enterprise” and providing a brief overview of benefit corporation model).

<sup>31</sup> CERTIFIED B CORP., <https://www.bcorporation.net> (last visited Oct. 29, 2018).

<sup>32</sup> CLARK & VRANKA, *supra* note 1, at 7–21 (discussing existing frameworks for corporate governance law).

*Co.*,<sup>33</sup> *eBay v. Newmark*,<sup>34</sup> and other cases, as the foremost legal obstacle.<sup>35</sup> The emergent body of social enterprise law has the express objective of shielding social enterprises from the legal and market pressures that lead businesses to prioritize financial returns over social mission.<sup>36</sup> It provides legal tools to owners who want to both generate monetary returns and achieve social goals, and may be willing to sacrifice some profit in the process.<sup>37</sup>

Above all else, social enterprise law enables the creation of a “fourth sector” of new hybrid corporate entities as alternatives to traditional for-profit and nonprofit firms.<sup>38</sup> The first generation of these hybrid entities began with low-profit limited liability companies (L3Cs). Over time, these forms have expanded to include benefit corporations and

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<sup>33</sup> 170 N.W. 668, 684 (Mich. 1919) (“A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among the stockholders in order to devote them to other purposes.”).

<sup>34</sup> 16 A.3d 1, 37 (Del. Ch. 2010) (affirming that corporate directors have a fiduciary duty to maximize shareholder value).

<sup>35</sup> See REISER & DEAN, *supra* note 11, at 4 (“Even if the notion that the law poses a threat to mission tends to be overblown, that first generation of social enterprise legal interventions served a valuable purpose by attacking the notion at the roots.”); J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 2, 17 (2012) [hereinafter *Choose Your Own Master*] (reviewing the social enterprise movement’s criticisms of the wealth maximization norm as well as claims made by skeptics and concluding that “the persistent common perception seems to be that directorial duties require placing shareholder wealth at the forefront”).

<sup>36</sup> REISER & DEAN, *supra* note 11, at 3 (explaining that new hybrid legal forms “aim not only to house social enterprises but to free them from the concern that the law will conspire with market forces to strip them of their social missions”).

<sup>37</sup> Dana Brakman Reiser, *Theorizing Forms of Social Enterprise*, 62 EMORY L.J. 681, 683 (2012) (analyzing how specialized legal forms are “permitting, achieving, and branding the difference of social enterprise”).

<sup>38</sup> *Id.* (observing that, according to social enterprise enthusiasts, “traditional for-profit and nonprofit legal forms frustrate social entrepreneurs’ bold new vision for achieving social change”); Joseph W. Yockey, *Does Social Enterprise Law Matter?*, 66 ALA. L. REV. 767, 772 (2015) (describing the “fourth sector” as comprised of non-governmental entities that combine elements of the business and nonprofit sectors).

entities specific to single state jurisdictions, most notably the social purpose corporation, a legal form currently available in California, Washington, and four other states as well as Puerto Rico.<sup>39</sup>

Under B Lab's leadership, social enterprise advocates have created, developed, and publicized model benefit corporation legislation.<sup>40</sup> Almost all states with benefit corporation statutes have adopted versions that closely resemble the model legislation. As defined in the model legislation, benefit corporations depart from the traditional for-profit corporate model in terms of their social objectives, accountability, and transparency.<sup>41</sup> The model legislation requires organizations to tailor the corporate purpose in their charters. Benefit corporations must have a "general public benefit," which is defined as "[a] material positive impact on society and the environment, taken as a whole, from the business and

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<sup>39</sup> REISER & DEAN, *supra* note 11, at 5 (explaining that the "first generation" of "[b]enefit corporations and their kin can be thought of as an open declaration that when investors and entrepreneurs reach a consensus to balance mission and profit, state law will not interfere"); *Choose Your Own Master*, *supra* note 35, at 19–24 (providing a brief history of frameworks for corporate governance); J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 543–54 (2016) [hereinafter *The Social Enterprise Law Market*] (same); see also *Certification Requirements*, B LAB, <https://bcorporation.net/certification/meet-the-requirements> (last visited Oct. 29, 2018) (differentiating social purpose corporations from benefit corporations on the grounds that social purpose corporations only have a specific beneficial purpose, rather than a general public benefit, and are only required to consider stakeholders with an interest in that purpose). In Puerto Rico and Tennessee, social purpose corporations are, confusingly, called public benefit corporations. *Certification Requirements*, B LAB, <https://bcorporation.net/certification/meet-the-requirements> (last visited Oct. 29, 2018).

<sup>40</sup> MODEL BENEFIT CORPORATION LEGISLATION, *supra* note 1. B Lab has played a central role in the benefit corporation movement by promoting the model legislation as the new corporate benefit corporation entity statute. CHRISTOPHER MARQUIS ET AL., CASE STUDY: B LAB: BUILDING A NEW SECTOR OF THE ECONOMY 10–12 (2011). B Lab leadership created the model legislation together with Drinker, Biddle, and Reath, LLP and firm partner William H. Clark, Jr. *Id.* at 10. The organization also has led and aided state-level efforts to pass legislation by lobbying lawmakers, mobilizing supporters, testifying, and assisting in customizing state-specific provisions. *Id.* at 9, 12; see also Jane L. Collins & Walter N. Kahn, *The Hijacking of a New Corporate Form? Benefit Corporations and Corporate Personhood*, 45 ECON. & SOC'Y 325, 326–27 (2016); Munch, *supra* note 5, at 136.

<sup>41</sup> REISER & DEAN, *supra* note 11, at 53–60 (comparing and contrasting the structure of benefit corporations with those of other for-profit entities); Clark & Babson, *supra* note 2, at 818–19; see also *FAQs*, B LAB, <http://benefitcorp.net/faq> (last visited Oct. 29, 2018) [hereinafter *FAQs*].

operations of a benefit corporation,”<sup>42</sup> and the model legislation further allows them to articulate “specific public benefits”:

- (1) providing low-income or underserved individuals or communities with beneficial products or services;
- (2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;
- (3) protecting or restoring the environment;
- (4) improving human health;
- (5) promoting the arts, sciences, or advancement of knowledge;
- (6) increasing the flow of capital to entities with a purpose to benefit society or the environment; and
- (7) conferring any other particular benefit on society or the environment.<sup>43</sup>

Other provisions of the model legislation address fiduciary conduct, shareholder voting, and disclosure.<sup>44</sup> The model legislation obligates directors to take into account, though not necessarily pursue, the interests of non-shareholders alongside shareholders’ financial interests.<sup>45</sup> Directors gain some protection from personal liability for making decisions that favor non-shareholders’ interests (or not), as well.<sup>46</sup> Shareholders can challenge how directors balance constituencies through claims that request injunctive relief.<sup>47</sup> Supermajorities of shareholders are

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<sup>42</sup> MODEL BENEFIT CORPORATION LEGISLATION, *supra* note 1, § 102.

<sup>43</sup> *Id.*

<sup>44</sup> REISER & DEAN, *supra* note 11, at 54–55; Clark & Babson, *supra* note 2, at 818–19; *see also FAQs*, *supra* note 41.

<sup>45</sup> MODEL BENEFIT CORPORATION LEGISLATION, *supra* note 1, § 301(a).

<sup>46</sup> *Id.* § 301(c).

<sup>47</sup> FREDERICK H. ALEXANDER, THE PUBLIC BENEFIT CORPORATION GUIDEBOOK: UNDERSTANDING AND OPTIMIZING DELAWARE’S BENEFIT CORPORATION GOVERNANCE MODEL 24 (2016), <https://higherlogicdownload.s3.amazonaws.com/GOVERNANCEPROFESSIONALS/a8892c7c-6297-4149-b9fc-378577d0b150/UploadedImages/Topical%20Pages%20Documents/PublicBenefitCorporationGuidebook.pdf>.

necessary to create or end benefit corporation status.<sup>48</sup> According to the model legislation, two mechanisms exist to create accountability: shareholders and directors have standing to sue to enforce public benefit obligations, and benefit corporations are required to share with shareholders, the public, and the state a statement on their performance in the form of a benefit report.<sup>49</sup> That report should contain a self-assessment of the organization's performance using a transparent, independent, reliable standard established by a third party.<sup>50</sup> In all other major respects, benefit corporations are subject to existing corporate law. There is no tax advantage.

Although the model legislation is widely used as a template, benefit corporation statutes vary somewhat across states. The most significant departure is Delaware, which introduced its public benefit corporation legislation in 2014.<sup>51</sup> In step with Delaware General Corporation Law, which disfavors regulation, Delaware's statutory provisions make few requirements of benefit corporations beyond modifying the director's duties and obliging the firm to state its specific benefits.<sup>52</sup> Directors must "balance" the shareholder interests, non-shareholder interests, and the specific benefits identified in the organization's charter.<sup>53</sup> Delaware's statute also has fewer mechanisms for disclosure and accountability than

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<sup>48</sup> MODEL BENEFIT CORPORATION LEGISLATION, *supra* note 1, § 102.

<sup>49</sup> *Id.* § 305 ("Right of action"); *id.* § 401 ("Preparation of annual benefit report").

<sup>50</sup> MODEL BENEFIT CORPORATION LEGISLATION, *supra* note 1, § 401(b); *see also* Cummings, *supra* note 11, at 595–602 (providing an overview of current practices regarding transparency and self-reporting in benefits corporations).

<sup>51</sup> The legislation adopted can be found at DEL. CODE ANN. tit. 8, §§ 361–368 (2018). For an account of the adoption of this legislation, *see, e.g., Delaware Enacts Benefit Corporation Legislation*, FOLEY HOAG LLP (July 23, 2013), <https://www.foleyhoag.com/publications/alerts-and-updates/2013/july/delaware-enacts-benefit-corporation-legislation>. *See generally* ALEXANDER, *supra* note 47, at 12–13 (comparing the traditional "ownership model" of Delaware corporate law with the "enterprise model" of Delaware benefit corporation law).

<sup>52</sup> Alicia E. Plerhopes, *Delaware Public Benefit Corporations 90 Days Out: Who's Opting In?*, 14 U.C. DAVIS BUS. L.J. 247, 253–54 (2014).

<sup>53</sup> DEL. CODE ANN. tit. 8, § 365(a) (2013); *Social Enterprise Innovation*, *supra* note 8, at 554.

the model legislation.<sup>54</sup> Colorado followed Delaware's approach of placing more relaxed requirements on benefit corporations.<sup>55</sup>

The potential pay-offs of becoming a benefit corporation are many. The special legal provisions are supposed to ensure the business's pursuit of its social mission and provide governance mechanisms to achieve the requirements.<sup>56</sup> Furthermore, the benefit corporation form is intended to provide legal protections to directors, expand shareholder rights, help businesses maintain their social mission during ownership changes, and provide greater access to capital when raising money.<sup>57</sup> Becoming a benefit corporation also can clarify the business's mission to interested parties, including business partners, employees, and consumers.<sup>58</sup> Another stated advantage is that the benefit corporation form can prevent "greenwashing"—in which companies make misleading and false claims about engaging in positive pro-environment activities while neglecting to disclose their negative environmental impacts.<sup>59</sup>

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<sup>54</sup> *Social Enterprise Innovation*, *supra* note 8, at 554. The Delaware statute requires a biannual benefit report, rather than an annual one. *Id.*; see also DEL. CODE ANN. tit. 8, § 366(b) (2018). It does not require that the report use a third-party standard, nor does it mandate the dissemination of the report to the public at large. *Social Enterprise Innovation*, *supra* note 8, at 554.

<sup>55</sup> REISER & DEAN, *supra* note 11, at 66.

<sup>56</sup> See *What Is a Benefit Corporation?*, BENEFIT CORP., <http://benefitcorp.net> (last visited July 1, 2018) (defining the benefit corporation as "[a] new legal tool to create a solid foundation for long term mission alignment and value creation. It protects mission through capital raises and leadership changes, creates more flexibility when evaluating potential sale and liquidity options, and prepares businesses to lead a mission-driven life post-IPO.").

<sup>57</sup> See *What Is a Benefit Corporation?*, BENEFIT CORP., <http://benefitcorp.net/attorneys> (last visited Oct. 29, 2018); *Why Is Benefit Corp Right for Me?*, BENEFIT CORP., <http://benefitcorp.net/businesses/why-become-benefit-corp> (last visited Oct. 29, 2018); see also Cummings, *supra* note 11, at 590–95 (discussing goals behind the benefit corporation form).

<sup>58</sup> Clark & Babson, *supra* note 2, at 819–24, 838, 840.

<sup>59</sup> See, e.g., *Choose Your Own Master*, *supra* note 35, at 33 ("The benefit corporation statute is said to be an antidote to 'greenwashing' and faux corporate social responsibility . . ."); see also Thomas P. Lyon & A. Wren Montgomery, *The Means and End of Greenwash*, 28 *ORG. & ENV'T* 223 (2015) (reviewing social scientific analyses of greenwashing and identifying mechanisms of misleading behavior); Michelle J. Stecker, *Amash in a Sea of Confusion: Benefit Corporations, Social Enterprise, and the Fear of "Greenwashing,"* 50 *J. ECON.*

Benefit corporations should not be confused with certified B Corporations (“B Corps”), despite their similar names and common origins in the work of B Lab.<sup>60</sup> The benefit corporation is a legal form of organization that a firm can opt into through filings with the Secretary of State, Division of Corporations, or equivalent office of its domicile state (so long as state legislation is in effect where it is incorporated). In contrast, B Corp certification refers to a private third-party assessment by B Lab, to determine whether the organization meets “rigorous standards of social and environmental performance, accountability, and transparency.”<sup>61</sup> B Lab explains its certification as such: “B Corp is to business what Fair Trade certification is to coffee or USDA Organic certification is to milk.”<sup>62</sup> Both for-profit and nonprofit entities (not just benefit corporations) can apply for B Corp certification. An organization can be a B Corp, a benefit corporation, or both.<sup>63</sup>

There is a lot of buzz about benefit corporations. In the American Bar Association’s *Business Law Today*, John Montgomery writes, “The benefit corporation may be the most significant development in corporate law since New York combined limited liability and free incorporation in 1811.”<sup>64</sup> In political circles, benefit corporations consistently get support across the political spectrum, appealing to both the do-good sentiments of liberals and progressives and the free enterprise ideology of conservatives and libertarians. According to B Lab, when state legislators

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ISSUES 373 (2016) (arguing that the structure of benefit corporations safeguards against greenwashing).

<sup>60</sup> For a historical account, see COLLINS, *supra* note 4, at 34–35.

<sup>61</sup> See *About B Corps?*, B LAB, <https://bcorporation.net/about-b-corps> (last visited Oct. 29, 2018).

<sup>62</sup> *Id.*

<sup>63</sup> However, B Lab requires most certified B Corp businesses in states with benefit corporation statutes to reincorporate as benefit corporations within a given time period. See *Certification*, B LAB, <https://bcorporation.net/certification> (last visited Oct. 29, 2018).

<sup>64</sup> John Montgomery, *Mastering the Benefit Corporation*, BUS. L. TODAY (July 2016), [https://www.americanbar.org/publications/blt/2016/07/02\\_montgomery.html](https://www.americanbar.org/publications/blt/2016/07/02_montgomery.html).

have voted on benefit corporation legislation, they have given it “an almost 90% approval rating overall.”<sup>65</sup>

The legislation also has its detractors. Skeptical legal analysts argue that benefit corporation statutes are not necessary and that assertions by advocates about the ruling model of shareholder supremacy mischaracterize the current state of corporate law.<sup>66</sup> Supporters counter that the legal form does useful extra-legal work by signaling a firm’s social mission<sup>67</sup> and creating institutional space that facilitates cooperation among firms, investors, and other stakeholders.<sup>68</sup> Other concerns of critics revolve around ambiguities in statutes. They argue that the definitions of general and specific public benefits are “vague” and “nebulous”<sup>69</sup> and do not include prioritization of the interests directors should consider.<sup>70</sup> Some skeptics note that the legislation lacks guidance on how firms should

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<sup>65</sup> COLLINS, *supra* note 4, at 9 (discussing sentiment that “many corporate lawyers are . . . suspicious that [benefit corporations] are not a very good idea, and maybe thinking ‘if it ain’t broke . . . .’”); see also *Why Pass Benefit Corporation Legislation*, BENEFIT CORP., <http://benefitcorp.net/policymakers/why-pass-benefit-corporation-legislation> (last visited Oct. 29, 2018).

<sup>66</sup> See, e.g., LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 25 (2012) (“The notion that corporate law requires directors, executives, and employees to maximize shareholder wealth simply isn’t true. There is no solid legal support for the claim . . . .”); Joan Macleod Heminway, *Shareholder Wealth Maximization as a Function of Statutes, Decisional Law, and Organic Documents*, 74 WASH. & LEE L. REV. 939, 971 (2017) (asserting that evidence of an enforceable norm of shareholder wealth maximization is “inclusive”); Lynn Stout & Sergio Gramitto, *Corporate Governance as Privately-Ordered Public Policy: A Proposal* (Cornell Law Sch. Research Paper No. 17-42, 2017), <http://ssrn.com/abstract=3042761> (arguing that shifting corporate governance to change how shares are owned, traded, and voted can effectively address myriad social and environmental problems such as rising economic inequality).

<sup>67</sup> See, e.g., J. Haskell Murray, *Defending Patagonia: Mergers and Acquisitions with Benefit Corporations*, 9 HASTINGS BUS. L.J. 485, 504, 505–06 (2013).

<sup>68</sup> Yockey, *supra* note 38, at 809–11.

<sup>69</sup> Kyle Westaway & Dirk Sampsel, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards, and Legislatures*, 62 EMORY L.J. 999, 1034–35 (2013).

<sup>70</sup> 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, 93–95 (2012).



manage and balance commitments to multiple missions,<sup>71</sup> which creates potential litigation risks<sup>72</sup> and uncertainty in how the courts will interpret statutes.<sup>73</sup> Another criticism is that benefit corporation law, with “tepid protections” for shielding the social missions of benefit corporations from resistant shareholders, fails to create a trusted brand that will attract investors.<sup>74</sup> Sociologists point out that, notwithstanding lofty rhetoric about the benefit corporation’s far-reaching potential, the law does not change the balance of power to provide greater authority to workers, consumers, or communities.<sup>75</sup> There also has been conservative political opposition to benefit corporation legislation in Colorado, Michigan, Minnesota, New Mexico, and North Carolina.<sup>76</sup> The North Carolina legislature attempted to pass benefit corporation legislation multiple times. Opponents consistently blocked or voted down the bills, claiming that the legislation harbors a socialist threat to free market enterprise.<sup>77</sup>

A major shortcoming of benefit corporation law, recognized by enthusiasts and critics alike, is the absence of sufficient mechanisms for transparency, accountability, and enforcement. The bar to entry to the benefit corporation status is very low. To declare themselves as benefit corporations, firms simply need to make the election to file state paperwork and, in some cases, add a few words or a short paragraph about

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<sup>71</sup> See, e.g., REISER & DEAN, *supra* note 11, at 76 (noting that few legal forms of social enterprise “articulate precisely how fiduciaries and managers should balance their enterprises’ dual commitments”); *Choose Your Own Master*, *supra* note 35, at 27–28.

<sup>72</sup> Clark & Babson, *supra* note 2, at 828–29; Joan Macleod Heminway, *Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations*, 40 SEATTLE L. REV. 611 (2017) (analyzing benefit corporation from the perspective of litigation risks).

<sup>73</sup> Westaway & Sampselle, *supra* note 69, at 1033.

<sup>74</sup> REISER & DEAN, *supra* note 11, at 76.

<sup>75</sup> Collins & Kahn, *supra* note 1, at 340 (“[T]he benefit corporation governance does not give workers, consumers or community members a voice in corporate governance. Should these groups perceive their interests to be ill-served by corporate decisions, the benefit corporation framework offers them no mechanisms to be heard.”).

<sup>76</sup> *Id.* at 328; Munch, *supra* note 5, at 137; see also, e.g., WYNNE COLEMAN, STOP SENATE BILL 26, THE NORTH CAROLINA BENEFIT CORPORATION ACT! (Apr. 11, 2011), <https://www.freedomadvocates.org/download/research/bcorp-sb26.pdf>.

<sup>77</sup> COLLINS, *supra* note 4, at 45.

the benefits they provide.<sup>78</sup> State statutes fail to create systems of accountability. In addition, federal securities laws do not fill in the gap; they apply only to public firms, while nearly all benefit corporations are privately held.<sup>79</sup> Firms are supposed to use their benefit reports (produced annually or biannually, depending on the state) to verify their impacts and create transparency. The model legislation calls for yearly reporting measured according to a third-party standard along with a compliance statement.<sup>80</sup> However, the requirements are ambiguous. Firms are obliged to provide only a narrative description of the benefits they have created and any obstacles they have encountered toward achieving those benefits.<sup>81</sup> The model legislation does not mandate an external audit or certification.<sup>82</sup> It further provides no method for verifying the truthfulness of the reports or even confirming that organizations have complied with filing requirements.<sup>83</sup>

### III. THE CHALLENGES OF STUDYING BENEFIT CORPORATIONS AS ORGANIZATIONS

Despite the legal significance of the benefit corporation innovation, the popularity of statutes, public enthusiasm, and scholarly intrigue, little systematic empirical information is available on benefit corporations *as organizations*. The growing corpus of academic articles, published primarily in law review journals, and books on social enterprise has interrogated benefit corporations from legal and ethical perspectives. This scholarship frequently mentions the names of a few high-profile benefit corporations but does not systematically survey firms or qualitatively analyze their activities in depth.

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<sup>78</sup> Callison, *supra* note 70, at 109–10.

<sup>79</sup> Alina S. Ball, *Social Enterprise Governance*, 18 U. PA. J. BUS. L. 919, 953–57 (2016).

<sup>80</sup> MODEL BENEFIT CORPORATION LEGISLATION, *supra* note 1, § 401(a).

<sup>81</sup> Cummings, *supra* note 11, at 590–95; J. Haskell Murray, *An Early Report on Benefit Reports*, 118 W. VA. L. REV. 25, 46 (2015) [hereinafter *Early Report*].

<sup>82</sup> Ball, *supra* note 79, at 963.

<sup>83</sup> *Id.*

### A. Existing Research

To date, four original empirical studies have examined firms that are benefit corporations.<sup>84</sup> Given the many difficulties of obtaining empirical data,<sup>85</sup> interested scholars have necessarily devoted much research activity to identifying and counting benefit corporations. As noted above, B Lab’s most recently posted list includes 5199 active benefit corporations.<sup>86</sup> The most up-to-date published count found 2636 benefit corporations as of fall 2015.<sup>87</sup> Previously, in July 2014, Kate Cooney and her colleagues identified 998 benefit corporations across the United States and further found that firms were adopting the benefit corporation form at a rate far faster than the L3C form.<sup>88</sup>

In 2014, Murray analyzed benefit reports from firms in four states—a total of 123 benefit corporations—by searching for the reports on businesses’ websites and, if none were posted, requesting reports from companies directly.<sup>89</sup> Of the 100 benefit corporations that were active, just 8% had benefit reports—an “abysmal” rate of compliance, according to Murray. Alicia Plerhoples’ 2014 descriptive study examined the organizational characteristics of the fifty-five benefit corporations

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<sup>84</sup> To my knowledge, some empirical research has been conducted on benefit corporation legislation. Munch, *supra* note 5, at 151. For a study of the diffusion of benefit corporation statutes, see Munch, *supra* note 5, at 151–53 (finding that states are more likely to conform to model legislation provisions if they wait longer to adopt the benefit corporation statute and if they view the Model Business Corporation Act as a complete standard rather than a collection of guidelines to be negotiated, while a larger Democratic legislative caucus is associated with greater departure from the model legislation); Rowhouser, Cummings & Crane, *supra* note 4, at 20–27 (showing that states are more likely to adopt benefit corporation legislation if state politics favor tax investments to address social problems, if there is an existing population of social enterprises, if the state’s population of nonprofit organizations is smaller, and if the state legislature already engages in policy innovation). Comparatively more empirical research is being conducted on certified B Corps, as B Lab has made systematic organizational information on B Corps available to researchers. See, e.g., Suntae Kim et al., *Why Companies Are Becoming B Corporations*, HARV. BUS. REV. (June 17, 2016), <https://hbr.org/2016/06/why-companies-are-becoming-b-corporations>.

<sup>85</sup> See *infra* Part III.B.

<sup>86</sup> See *supra* note 11 and accompanying text.

<sup>87</sup> *The Social Enterprise Law Market*, *supra* note 39, at 589.

<sup>88</sup> Cooney et al., *supra* note 11.

<sup>89</sup> *Early Report*, *supra* note 81, at 33–34.

that incorporated or converted in Delaware in the first three months after the new statute went into effect.<sup>90</sup> She found that most (74%) were most likely new, small businesses.<sup>91</sup> In terms of industry concentration, almost one third (31%) provided professional services,<sup>92</sup> and 11% each were in technology, education, or the production or sales of consumer products.<sup>93</sup> Some of those fifty-five firms failed to note their specific public benefits in their charters.<sup>94</sup>

The only extensive qualitative investigation of benefit corporations, by sociologists Jane Collins and Walter Kahn, is a case study of the benefit corporation/B Corp movement based on interviews with political advocates, attorneys, and business owners and analysis of legal documents and news coverage.<sup>95</sup> Their findings underscore the social significance of the benefit corporation beyond its legal framework.<sup>96</sup> Collins characterizes the benefit corporation movement as part of a larger project of moral reevaluation, describing it as “an attempt to acknowledge and value contributions that the current mode of economic reasoning made invisible,” such as the importance of workers’ skills and knowledge, the consequences of businesses for geographic places, and the value of a stable climate.<sup>97</sup> Collins and Kahn also point to the movement’s “enabling discourses” that expand the purpose of corporations and disrupt the prevailing ideology of shareholder value supremacy.<sup>98</sup> Their examination of the firms that are benefit

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<sup>90</sup> Plerhoples, *supra* note 52, at 257–59.

<sup>91</sup> *Id.* at 259; *see also Early Report, supra* note 81, at 43–44.

<sup>92</sup> Plerhoples, *supra* note 52, at 263.

<sup>93</sup> *Id.* at 264–65.

<sup>94</sup> *Id.* at 271.

<sup>95</sup> Collins & Kahn, *supra* note 1, at 328 (describing methodology); *see also* COLLINS, *supra* note 4 (reviewing statutes and common theories of governance). For a case study of B Lab based on secondary data, *see* MARQUIS ET AL., *supra* note 1.

<sup>96</sup> *See, e.g.,* Ball, *supra* note 79, at 961 n.199 (discussing the potential normative impact of hybrid-corporation statutes on solving governance issues).

<sup>97</sup> COLLINS, *supra* note 4, at 65.

<sup>98</sup> Collins & Kahn, *supra* note 1, at 345.

corporations, however, is primarily confined to a few that are active in the social enterprise movement.

In sum, there is little systematic empirical knowledge of benefit corporations as organizations, including what sorts of firms become benefit corporations and what precisely those firms are doing.

### B. *Obstacles to Obtaining Reliable Data*

A major obstacle to studying benefit corporations as organizations is simply identifying these entities.<sup>99</sup> The primary sources of information are decentralized, as each Secretary of State, Division of Corporations, or equivalent office maintains its own separate database for business entities. Many states do not record which entities are benefit corporations.<sup>100</sup> Only the state of Oregon, which has an extensive open data initiative, makes it possible to search its business entities database for benefit corporations.<sup>101</sup> Finding staff within the relevant offices who can provide this information is also challenging, although some can and do provide lists of benefit corporations on an ad hoc basis on request. Those lists have varying degrees of detail, from just names of active benefit corporations to more comprehensive records. For many years, B Lab has hosted a searchable, online database of active benefit corporations based on information it obtains from state offices and individuals' suggestions.<sup>102</sup> Since spring 2017, B Lab also has occasionally posted an updated list of benefit corporations on data.world, an online data repository site (and benefit corporation itself), as further described

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<sup>99</sup> See, e.g., *The Social Enterprise Law Market*, *supra* note 39, at 568 (describing challenges of obtaining data set); Plerhoples, *supra* note 52, at 257–59 (same).

<sup>100</sup> *The Social Enterprise Law Market*, *supra* note 39, at 568 n.183 (noting that advocates have told state governments benefit corporation legislation is very inexpensive to implement); see also *Why Pass Benefit Corporation Legislation*, *supra* note 65 (assuring legislators that “[p]assing benefit corporation legislation creates a no-cost economic development opportunity for states”).

<sup>101</sup> See *Open Data Portal*, OREGON.GOV, <https://data.oregon.gov> (last visited July 1, 2018).

<sup>102</sup> *Find a Benefit Corp*, BENEFIT CORP., <http://benefitcorp.net/businesses/find-a-benefit-corp> (last visited July 1, 2018).

below.<sup>103</sup> However, B Lab does not verify all names in its lists. For example, its most recently posted list includes at least twenty-six companies in California that are not in the California Secretary of State database.<sup>104</sup> To my knowledge, B Lab's lists have not previously been analyzed in published research.

A second challenge to studying benefit corporations, once their names have been identified, is the lack of systematic information available from states. Typically, a state's business entities database provides limited details for individual firms: the name of the business entity, its legal type and/or kind (e.g., corporation), its filing history, its date of incorporation, its status (e.g., good standing, consolidated, revoked), and its residency/jurisdiction (domestic to that state or "foreign," meaning that the entity is domiciled in another jurisdiction but registered to operate in the state). The name, address, and phone number of the registered agent also are usually included along with contact information for officers. Some databases provide the total number of shares a stock corporation is authorized to issue. Most do not provide the documents the entity has filed with the state. Those that do, such as California, provide access to the text of articles of incorporation, which may or may not include the benefit corporation's statement of its social benefits, along with other filings such as amendments. Few states post benefit corporations' annual reports.

Gathering this information is tedious. In all state databases other than Oregon's, the names of benefit corporations must be searched individually. Numerous click-throughs are necessary to access details. Apart from Oregon, the public cannot download state records on benefit corporations in bulk. Some states, most notably Delaware, charge fees to obtain the status and filing histories of individual entities.

A third hurdle is maintaining current, accurate information. This organizational field is constantly changing. New benefit corporations incorporate every day. Benefit corporations go into default or terminate

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<sup>103</sup> *B Lab*, DATA.WORLD, <https://data.world/blab> (last visited July 1, 2018); *see also infra* notes 108–110 and accompanying text.

<sup>104</sup> *See B Corp Impact Data*, *supra* note 11.

every day. Firms that the state records as “inactive” may still be operating a business, while “active” firms often show no signs of business activity. Firms go through permutations that affect their benefit corporation status; one might begin as a traditional corporation then convert to a benefit corporation then convert back to the traditional form again. They may be foreign entities in states that do not have benefit corporation law. Some firms that identify as benefit corporations on their websites and have been certified as B Corps by B Lab are not listed in a state database, or they cannot be identified in a state database because other entities have similar names.

A final obstacle is obtaining detailed, systematic information about benefit corporations from sources other than the states’ business entities databases, namely through the firm’s website or Facebook page or through the websites of third parties that aggregate information on businesses. Gathering information from these sources requires original, empirical, social scientific investigation. The research is labor intensive.

#### IV. DESIGN OF THE STUDY

This research study extends and expands Plerhoples’s 2014 study of fifty-five Delaware benefit corporations and Murray’s 2015 study of benefit reporting by 100 benefit corporations in four states.<sup>105</sup> It consists of two original datasets as well as a state-by-state comparison of the process of filing to become a benefit corporation. I created the first dataset by compiling the names and dates of incorporation of benefit corporations that have incorporated since the first statute went into effect, in October 2010. I selected states for inclusion in the dataset if they had been identified by B Lab as having passed benefit corporation legislation.<sup>106</sup> I gathered names of benefit corporations from multiple

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<sup>105</sup> *Early Report*, *supra* note 81; Plerhoples, *supra* note 52.

<sup>106</sup> See *State by State Status of Legislation*, *supra* note 6. Although the law creating the Delaware public benefit corporation diverges considerably from the model legislation, social enterprise advocates and the Delaware bar committee, among other Delaware officials, used the model legislation as their starting point. ALEXANDER, *supra* note 47, at 8–9. This dataset does not include social purpose corporations due to the unavailability of data.

sources over the course of three and a half years, from January 2015 through June 2018. Those sources include the online public database and internal records maintained by B Lab;<sup>107</sup> individual Secretary of State, Division of Corporations, or equivalent offices that responded to my direct requests for the names of benefit corporations; searches of Secretary of State offices' online databases for entities with "PBC" or "benefit corporation" in the name; and the comprehensive but non-exhaustive lists of benefit corporations posted by B Lab on data.world in spring 2017, winter 2018, and spring 2018.<sup>108</sup> In addition, I gleaned additional names from a non-exhaustive list of investors in benefit corporations<sup>109</sup> and a list of certified B Corps with impact data,<sup>110</sup> both also posted by B Lab on data.world in 2018. My research team checked the names of all these firms (or, if necessary, shortened variations of its name) in the business entities database for their respective state. If the state database did not list a firm, we searched for it using the Google search engine to determine if it had changed its name or if its name or domicile state had been listed erroneously.

According to this extensive inventorying, at least 7704 firms incorporated as benefit corporations in the United States between October 2010 and December 2017. This figure is an undercount, given the uneven availability of data.<sup>111</sup> It is much higher than those recorded in prior research or advertised by B Lab. This is largely because it includes all known entities that have *ever* incorporated as benefit corporations, whereas other figures presumably count only benefit corporations that someone (not necessarily the state government) identifies as currently active.

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<sup>107</sup> *Find a Benefit Corp*, *supra* note 102.

<sup>108</sup> *B Lab*, *supra* note 103.

<sup>109</sup> *Investors in Benefit Corporations*, DATA.WORLD, <http://data.world/blab/investors-in-benefit-corporations> (last visited July 1, 2018).

<sup>110</sup> *B Corp Impact Data*, *supra* note 11.

<sup>111</sup> For example, the dataset includes a relatively small number of California benefit corporations that incorporated in 2016 and only two in 2017. *B Corp Impact Data*, *supra* note 11.



For each of those 7704 firms, my research team searched states' online business entities databases to gather a few key data points: the state of incorporation, the date of incorporation, and, if available and different than the incorporation date, the date the entity became a benefit corporation. The statuses of benefit corporations (e.g., active, inactive, default) were not recorded due to the long duration of this study, ongoing changes in entities' business activity, and inconsistencies between the state records and online presence of some benefit corporations.

The second dataset captures the organizational characteristics and identities of a subset of benefit corporations. It consists of quantitative and qualitative information based on in-depth analysis of those firms' online content. To ensure the analysis captures the national dynamics of benefit corporations, I randomly sampled 10% (n=570) of all known entities that had incorporated as benefit corporations as of March 1, 2017.<sup>112</sup> This is not a nationally representative sample, given the limitations of obtaining an accurate national count, but it is the most representative sample available. With the aid of two research assistants, I searched for online content on these 570 benefit corporations, including their websites (e.g., the home page, About page, descriptions of Products & Services, any annual benefit reports posted) or their Facebook pages (if no website was available), B Lab's website with information on certified B Corps,<sup>113</sup> other web sites, and any electronic registration, amendments, and annual report filings available through the applicable Secretary of State, Division of Corporations, or equivalent office.

For this second dataset, my research assistants and I recorded data using a 50-question protocol, hosted on Survey Monkey.<sup>114</sup>

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<sup>112</sup> Sally J. McMillan, *The Microscope and the Moving Target: The Challenge of Applying Content Analysis to the World Wide Web*, 77 JOURNALISM & MASS COMM. Q. 80, 81–82 (2000) (describing the value of random sampling of websites for content analysis based on a rigorous sampling frame). The random sampling was conducted in two waves, one in spring 2015 and the second in spring 2017.

<sup>113</sup> B LAB, <http://www.bcorporation.net/> (last visited July 1, 2018).

<sup>114</sup> See *infra* Appendix B: Protocol for Online Content Analysis for U.S. Benefit Corporations.

Following best practices in social scientific research, questions were developed through an iterative process, starting with a pilot study for coding and recoding of the content for a subset of benefit corporations.<sup>115</sup> Most codes were identified inductively, based on the information available online. I created deductive codes for industry (using modified NAICS codes)<sup>116</sup> and some of the types of benefits identified by the firm (to capture specific benefits referenced in the model legislation, such as increasing capital flow to social enterprises). Closed-ended questions covered topics such as the primary and secondary industry, the benefits provided (e.g., service, product, health/well-being, environmental restoration, philanthropy), the types of benefits provided (social and/or environmental), and the public posting of a benefit report. Open-ended questions captured descriptions and direct quotes of web content on topics such as the products and services sold, the benefits provided, and any content on benefit corporation law. To ensure consistency and accuracy, research assistants received intensive training, and I reviewed and checked key variables for all firms that they coded. Each website took between ten minutes and an hour to code, depending on the depth of information available. Data are current as of mid-2017. The qualitative data were cleaned and imported into Dedoose, a qualitative analysis software package, for narrative analysis as well.

Importantly, the content analysis captures benefit corporations' own representations of their businesses—their public organizational discourse.<sup>117</sup> It is not an audit. Public websites should be understood,

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<sup>115</sup> Florian Kohlbacher, *The Use of Qualitative Content Analysis in Case Study Research*, FORUM 1, 11–16 (2006) (describing the method and process of developing a coding protocol for qualitative analysis).

<sup>116</sup> *North American Industry Classification System*, U.S. CENSUS BUREAU, <https://www.census.gov/eos/www/naics/> (last visited July 1, 2018). Modifications were made inductively to catch specific sectors and subsectors common to benefit corporations and of theoretical interest.

<sup>117</sup> See George Cheney, Lars Thøger Christensen, Charles Conrad & Daniel J. Lair, *Corporate Rhetoric as Organizational Discourse*, in THE SAGE HANDBOOK OF ORGANIZATIONAL DISCOURSE 81, 82 (David Grant et al. eds., 2004) (identifying one

analytically, as sites where businesspeople convey an image of their organization.<sup>118</sup> The study thus captures benefit corporations' own projections of their organizational image. Those projections may be aspirational and empirically inaccurate. Undoubtedly, some firms post false or misleading information about their business and operations.<sup>119</sup> My research team did not attempt to assess the veracity of claims made online.

Much of the content analysis coding is necessarily subjective and interpretive.<sup>120</sup> This was even true for seemingly objective categories such as industry<sup>121</sup> and products and services sold. Ongoing intercoder reliability checks and review of coding helped to ensure reliability and consistency. A final evaluative question in the protocol—whether the company is convincingly beneficial—is subject to bias and discussed as such below.<sup>122</sup>

Of the benefit corporations in the sample, 49% did not have an online presence or had a marginal online presence. Another 11% had a very limited online presence but at least indicated their industry, such as trucking or housecleaning. The content analysis focuses primarily on the

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form of corporate rhetoric as deliberate, persuasive strategies to project a unified image or identity of the company, apart from its products or services).

<sup>118</sup> Cindi Baldi, Caroline Bartel & Janet Dukerich, *Fostering Stakeholder Identification Through Expressed Organizational Identities*, in THE OXFORD HANDBOOK OF ORGANIZATIONAL IDENTITY 474, 474–75 (Michael Pratt et al. eds., 2016) (“Company websites are a form of symbolic management—an effort to portray the organization in a certain way to particular audiences . . . . [They] constitute purposeful efforts to craft a *desired or intended organizational image* . . . . It is this organizational image that provides a basis for external stakeholders’ initial evaluations of an organization’s attractiveness.”).

<sup>119</sup> Kent Walker & Fang Wan, *The Harm of Symbolic Actions and Green-Washing: Communications on Environmental Performance and Their Financial Implications*, 109 J. BUS. ETHICS 227, 228 (2012) (identifying corporations’ use of symbolic communications via their websites, such as their selective disclosure of information, to mask their lack of substantive environmental performance).

<sup>120</sup> See also Plerhoples, *supra* note 52, at 258–59 (discussing the subjectivity inherent in coding organizational characteristics, even seemingly objective categories such as industry).

<sup>121</sup> *Id.* at 259.

<sup>122</sup> See *infra* Part V.H.

40% of known benefit corporations with detailed websites (n=227, as of March 2017). Throughout this Article, the denominator for statistics changes depending on the data point, as noted in the text and footnotes. Many firms never represent their business activity online, so certainly some firms that show no indication of online activity are, indeed, operational (e.g., raising funds, selling goods and services).

Finally, in winter 2018, the research team examined the content and design of the state government's website in twenty-eight locales (twenty-seven states and Washington, D.C.) to assess the process of filing to become a benefit corporation. We did this in order to characterize the ease of registering as a benefit corporation based on (a) the technical interface and (b) the availability of educational information about benefit corporations provided by the state. We examined the forms posted online for download and submission (in person or by mail) and the online portals.<sup>123</sup> For the online portals, we followed the registration process as far as we could without violating state law, which prohibits the fraudulent creation of new businesses. Our analysis considered numerous factors: whether new entities had to register online, on paper, or had the option of either; whether the form and/or portal facilitated registration as a benefit corporation; whether the website featured information on registering as a benefit corporation; and whether the registrant had to specify the firm's benefits. We initially developed a score sheet, which we later distilled into a two-by-two grid, that captures key differences across the websites. These data are instructive for explaining why rates of incorporation may be higher in some states.<sup>124</sup>

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<sup>123</sup> This analysis is based on web content only. It does not consider the first-hand experience of registering as a benefit corporation in person at a state government office.

<sup>124</sup> Only limited information on the ease of registering a benefit corporation online in thirteen states was available to us, usually because of technical restrictions such as a requirement to pay a fee or a street address. In the case of the Illinois Secretary of State, the site was not functional.

## V. EMPIRICAL FINDINGS ON THE ORGANIZATIONAL CHARACTERISTICS OF U.S. BENEFIT CORPORATIONS

That at least 7704 benefit corporations have ever been created indicates that the benefit corporation form has appeal for many firms. This is, however, an extremely small proportion of the nearly thirty million businesses in the United States. Only .026% of those businesses are benefit corporations.<sup>125</sup> Of the 7704 benefit corporations, only 35% appear to be operational based on their publicly available online activity. In their web content or on third-party sites, these operational firms give visible indications that they are selling goods and services, actively raising funds, or otherwise getting their business ready to launch.<sup>126</sup> This 35% figure should be interpreted cautiously. Undoubtedly, some benefit corporations are operational but do not have an online presence. Having a website is less common than one might think. According to the U.S. Census Bureau's Survey of Business Owners and Self-Employed Persons, only 27% of businesses had a website in 2012 (21% of non-employers and 51% of employers), up from 25% in 2007.<sup>127</sup> A GoDaddy

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<sup>125</sup> In 2014, there were a total of 29,662,395 U.S. firms. These include 5.8 million employer firms and 23.8 million non-employer firms (with a single owner and no employees, e.g., real estate agents, “mom and pop” stores). *Private Firms, Establishments, Employment, Annual Payroll and Receipts by Firm Size, 1988-2014*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/advocacy/firm-size-data> (last visited July 25, 2018) (linking to file “U.S. static data: U.S. data including multiple tables”). As discussed in Part V.D, given the small size of nearly all benefit corporations and the types of businesses they are, a combination of non-employer firms and small employer firms (under 500 employees)—sometimes called “smaller firms”—is the appropriate referent point.

<sup>126</sup> For example, Piarc, an early stage benefit corporation led by a single scientist who specializes in research and development for algae-based biofuel and wastewater cleanup, is not be considered “operational” because it has not added to the “Updates” section of its website since November 26, 2014. *Updates*, PIARCS, <http://piarc.org/updates/> (last visited June 14, 2018).

<sup>127</sup> *Statistics for All U.S. Firms that Had a Website by Receipts Size of Firm, Gender, Ethnicity, Race, and Veteran Status for the U.S.: 2012*, U.S. CENSUS BUREAU (Feb. 23, 2016), [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=SBO\\_2012\\_00CSCB53&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=SBO_2012_00CSCB53&prodType=table). More financially successful firms are more likely to have websites. Fifty-two percent of firms with sales/receipts between \$500,000 and \$999,999 had a website, and 69% of firms with revenue of \$1 million or more had one. *Id.*

survey of very small U.S. firms found that just 40% had a website.<sup>128</sup> Some of the benefit corporations that do have websites create a misleading appearance of business activity when, in fact, they are not active. No national data are available to put this 35% figure in context, although the U.S. Bureau of Labor Statistics has found that approximately 80% of establishments survive their first year after opening, and about half still exist after five years.<sup>129</sup> The data presented in this Article are for all identified benefit corporations, not just those that appear operational.

*A. Prevalence of Benefit Corporations, Domicile States, and Timing of Incorporation*<sup>130</sup>

The overwhelming majority of the known 7704 benefit corporations are new, small firms. Most (94%) incorporated as firms after legislation went into effect in their state. The vast majority of these began as benefit corporations, although some incorporated as traditional corporations and then converted to benefit corporations. The remainder of benefit corporations (6%) began as traditional corporations (or as another form, such as nonprofits), then opted to become benefit corporations after state legislation went into effect in their domicile state. For example, Canvas Host, which hosts websites and provides website building tools that inform clients about their environmental footprint, first incorporated in Oregon in April 2005.<sup>131</sup> The firm then converted

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<sup>128</sup> GODADDY, GODADDY & REDSHIFT RESEARCH: SMALL BUSINESS SURVEY 2015, at 20 (2015), <https://blogcdn1.secureserver.net/wp-content/uploads/2015/09/GoDaddy-Global-Small-Business-Report-2015.pdf>.

<sup>129</sup> *Table 7: Survival of Private Sector Establishments by Opening Year*, U.S. DEP'T OF LAB., <https://www.bls.gov/bdm/bdimage.htm> (last visited July 25, 2018).

<sup>130</sup> Findings here are based on the data on 7704 benefit corporations recorded in their domicile state's business entity database.

<sup>131</sup> *Business Entity Data: Canvas Host*, OR. SECRETARY OF STATE, [http://egov.sos.state.or.us/br/pkg\\_web\\_name\\_srch\\_inq.show\\_det?p\\_be\\_rsn=1098643&p\\_src=BR\\_INQ&p\\_print=FALSE](http://egov.sos.state.or.us/br/pkg_web_name_srch_inq.show_det?p_be_rsn=1098643&p_src=BR_INQ&p_print=FALSE) (last visited Aug. 2, 2018).

to a benefit corporation in January 2014, immediately after legislation went into effect.<sup>132</sup>

As illustrated in Figure 1, most known benefit corporations are clustered in a few states, based on the available data through December 2017.<sup>133</sup> More than a quarter are in Oregon (26%), almost one-fifth in New York (19%), 18% in Nevada,<sup>134</sup> 16% in Delaware, and 8% in Colorado. Another 3% are in California and 2% in Maryland, with 9% in all other states combined.

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<sup>132</sup> *An Oregon Benefit Corporation*, CANVAS HOST, <https://www.canvashost.com/sustainability/benefit-company.php> (last visited Aug. 2, 2018).

<sup>133</sup> See Part IV for a description of the numerous data sources I used to create these statistics. See also Appendix A: Number of Known Benefit Corporations by State, as of April 2018. Data are not available for Nevada for 2017. Data are limited for a number of states. According to B Lab, California stopped tracking benefit corporations a few years ago, Colorado stopped tracking recently, and data have been difficult to obtain from South Carolina and Virginia. E-mail communication with Holly Ensign-Barstow (July 20, 2018) (on file with author). The low count of benefit corporations incorporated in California in 2016 and 2017 also may be because firms are opting to become social purpose companies instead, and the names of those firms are not tracked and made publicly available. For a discussion of social purpose companies, see REISER & DEAN, *supra* note 11, at 64–65. The total and state-level counts do not capture benefit corporations that are registered as foreign entities, but not benefit corporations, in other states. For example, a search for the California Secretary of State database for companies with names including “PBC” generates approximately 140 companies incorporated in Delaware and registered to do business in California (Delaware benefit corporations were previously required to include “PBC” in their name). At least some of these are likely Delaware benefit corporations but are not included in this dataset because they are not registered in California as benefit corporations.

<sup>134</sup> Data for 2017 are not available for Nevada. See *supra* note 133 and accompanying text.

**Figure 1. Proportion of Benefit Corporations, Smaller Firms, and U.S. Population by State**

	Proportion of U.S. benefit corporations <sup>135</sup>	Proportion of U.S. non-employers and employers with under 500 employees <sup>136</sup>	Proportion of U.S. population <sup>137</sup>
<b>Oregon</b>	26%	1%	1%
<b>New York</b>	19%	7%	7%
<b>Nevada</b>	18%	1%	1%
<b>Delaware</b>	16%	0.3%	0.3%
<b>Colorado</b>	8%	2%	2%
<b>California</b>	3%	13%	12%
<b>Maryland</b>	2%	2%	2%
<b>All other states</b>	9%	74%	72%

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<sup>135</sup> See *supra* note 133.

<sup>136</sup> Data on non-employer firms and firms with under 500 employees are for 2014. *Small Business Profile*, U.S. SMALL BUS. ADMIN., [https://www.sba.gov/sites/default/files/advocacy/All\\_States\\_0.pdf](https://www.sba.gov/sites/default/files/advocacy/All_States_0.pdf) (last visited July 25, 2018). Data are based on U.S. Census Bureau's Statistics of U.S. Businesses and Nonemployer Statistics.

<sup>137</sup> *Estimates of the Total Resident Population and Resident Population Age 18 Years and Older for the United States, States, and Puerto Rico: July 1, 2017*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/2017/demo/popest/state-detail.html> (last visited Aug. 6, 2018).



Do these state-by-state rates of benefit corporation incorporation mirror state-by-state incorporation of smaller firms?<sup>138</sup> Data limitations make it impossible to answer this question directly.<sup>139</sup> However, federal data on the geographic locations of smaller firms and on state population size provide instructive points of comparison. There is good reason to think that the geography of firms roughly reflects state-by-state patterns in the incorporation of smaller, privately held firms.<sup>140</sup> The geography of smaller firms also closely corresponds with state population size, as Figure 1 shows, providing further credence to the reliability of federal data on firm geography as a proxy for smaller firm incorporation.

With these caveats, state-by-state patterns in rates of benefit corporation incorporation diverge sharply from patterns in the state-by-state geographic locations of both smaller U.S. firms and the U.S.

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<sup>138</sup> For the purposes of this study, “smaller firms” include two categories: (1) non-employers, which just have an owner (e.g., real estate agent, “mom and pop” stores) and (2) employers with under 500 employees. Given this study’s findings on the size of benefit corporations, smaller firms are the most appropriate point of comparison. *See infra* Part V.D.

<sup>139</sup> Not all states consistently release data on the annual rates of business incorporation, and states do not provide data on rates of business incorporation by firm size. Data collected by the U.S. Census Bureau and the U.S. Department of Labor record the presence and size of firm by state, but they are based on the state in which the business is geographically located and not the state in which it is incorporated (which may be different). For example, the U.S. Census Bureau’s Business Formation Statistics are based on data from the Internal Revenue Service, which collects taxes based on a firm’s geographic location and not its domicile state. *Business Formation Statistics (BFS)*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/bfs.html> (last visited Aug. 6, 2018).

<sup>140</sup> Despite popular perception that Delaware (or else Nevada) is the best location to incorporate a company, business and legal advisors generally recommend that small businesses with a few investors incorporate in their home state. *See, e.g.,* Nellie Akalp, *The Many Variables to Consider When Choosing in Which State to Incorporate*, ENTREPRENEUR (Feb. 2, 2015), <https://www.entrepreneur.com/article/241528> (“As a rule of thumb, if your business has fewer than five shareholders, it’s best to keep things simple and incorporate or form an LLC in your home state.”); *Forming a Corporation: Where to Incorporate*, FINDLAW, <https://smallbusiness.findlaw.com/incorporation-and-legal-structures/forming-a-corporation-where-to-incorporate.html> (last visited Aug. 2, 2018) (recommending home state incorporation for smaller businesses that do not expect to expand: “incorporating in Delaware only really makes sense for large corporations”).

population, as Figure 1 illustrates. More than a quarter of the nation's known benefit corporations have incorporated or formed LLCs in Oregon, where just over one percent of smaller U.S. firms and one percent of Americans are geographically located. Only two of the five states with the most smaller-sized firms (California and New York, the first and fourth most populous states) have noteworthy numbers of benefit corporations.<sup>141</sup> Of the top seven states, only in Maryland does the national proportion of benefit corporations mirror the national proportion of smaller firms. Very few known benefit corporations have incorporated in Florida, where benefit corporation legislation went into effect on July 1, 2014, despite ranking third in the nation for the most smaller businesses and the most residents.<sup>142</sup>

Across states, trends in the incorporation of benefit corporations over time vary considerably. Figure 2 illustrates the number of firms that incorporated as benefit corporations annually for the top five states, starting after legislation went into effect in each state. In Oregon, where legislation became effective October 1, 2014, the rate of incorporation was fairly consistent between 2015 and 2017, with between 552 and 594 benefit corporations registering each year. For New York, the pattern of incorporation between 2012 and 2017 is striking. The pace of adoption there was very low in the first three years, jumped in 2015, and then continued to rise precipitously, such that more benefit corporations registered in New York in 2017 than in any other state on record that year. In contrast, Nevada experienced its highest rates of incorporation the first year, in 2014 (703 benefit corporations), and then the rate dropped steeply in the following two years. Delaware experienced a slow and steady rise in the rate of incorporation between mid-2013 and the

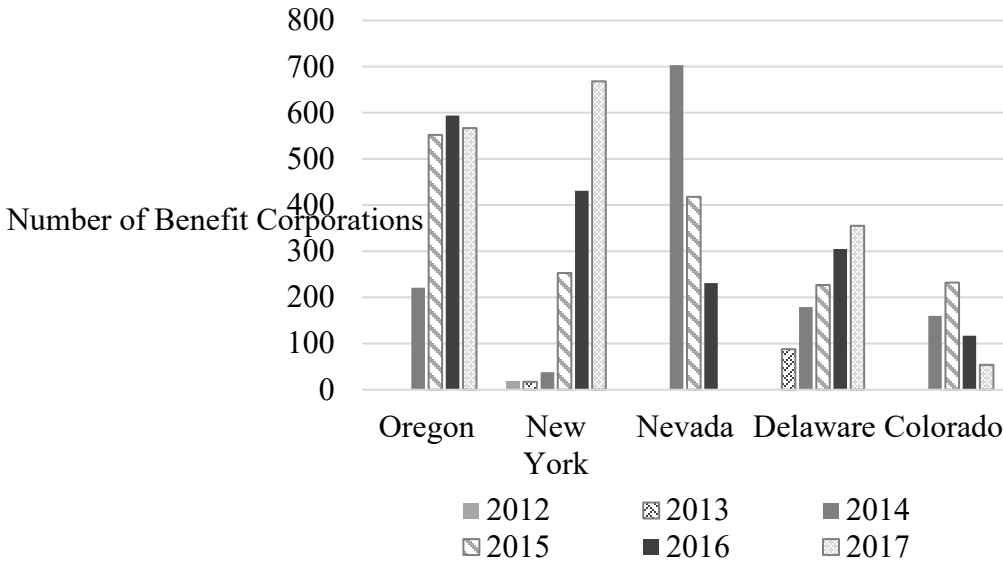
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<sup>141</sup> The states with the most smaller firms in 2014 were California (3.83 million, or 12.9% of U.S. smaller firms), Texas (2.56 million, or 8.7%), Florida (2.37 million, or 8%), New York (2.13 million, or 7.2%), and Illinois (1.2 million, or 4.1%). *See supra* notes 136–137.

<sup>142</sup> In Texas, which ranks second in the nation for both smaller businesses and population, benefit corporation legislation became effective in September 2017. *See supra* note 141.

end of 2017. The rate of incorporation in Colorado peaked in 2014 and, like Nevada, has since declined.<sup>143</sup>

**Figure 2. Annual Formation of Benefit Corporations in Top 5 States, 2012-2017**



The reasons for the differential patterns of incorporation across states and over time are not altogether obvious without statistical modeling.<sup>144</sup> The presence of smaller firms and the size of the state population do not neatly explain why benefit corporations decide to form in certain states, at least not in states where benefit corporations are most common. The timing of when a state passed benefit corporation legislation could be a factor, given that the seven top states for benefit corporation incorporation were among the twenty states that first passed legislation.<sup>145</sup> But the relationship between incorporation

<sup>143</sup> Because Colorado stopped collecting data on benefit corporations recently, the apparent drop in benefit corporations may also be due to underreporting, but it may indicate that the state is doing less to promote the legal form.

<sup>144</sup> The variables that other researchers have tested using statistical models to explain the passage of benefit corporation legislation, such as state employment in “green goods and services” might provide clues. See *supra* note 84 and accompanying text.

<sup>145</sup> See *State by State Status of Legislation*, *supra* note 6.

rates and legislation passage is not straightforward. Three of the top seven states for benefit corporation incorporation were among the earliest adopters of benefit corporation statutes—Maryland in 2010 and California and New York in 2011—but Vermont, New Jersey, Virginia, and Hawaii were early adopters, too, and those states have a low proportion of the nation’s benefit corporations. The remaining four top states (CO, DE, OR, NV) all passed legislation in 2013 (as did DC, AR, AZ, and RI).

The relatively high proportion of benefit corporations in Delaware, compared to the proportion of smaller U.S. firms in that state (16% vs 0.26%), is likely connected to Delaware’s popularity as a domicile state. In 2017, Delaware was home to more than 1.3 million legal entities, with 41,553 corporations and 143,996 LLCs incorporating in Delaware that year alone.<sup>146</sup> One possible reason for higher rates of benefit corporation incorporation in the top states might be the aggressiveness of a state-level political and legislative campaign by B Lab, elected officials, and other proponents. Additional explanatory factors could include favorable local press coverage, an existing density of social enterprises, state financial and legal resources for social enterprise, or a state bar familiar with social enterprise law.<sup>147</sup> Further empirical research would be necessary to test these and other possible explanations.

Another potential contributing factor to the differential rates of incorporation is whether the state government facilitates or impedes the process of filing as a benefit corporation, as explored in the next section.

### *B. The Ease of Filing as a Benefit Corporation*<sup>148</sup>

State governments can make it easier or more difficult for prospective business owners to incorporate as a benefit corporation. Eric Franklin Amarante observes that the architecture of the Nevada

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<sup>146</sup> *Annual Report Statistics*, DELAWARE.GOV, <https://corp.delaware.gov/stats/> (last visited Oct. 30, 2018); *see also supra* notes 6–9, 51–54 and accompanying text.

<sup>147</sup> *The Social Enterprise Law Market*, *supra* note 39, at 581–86.

<sup>148</sup> Results here are based on the qualitative assessment of the content and design of twenty-eight state government websites for incorporating new businesses, as of spring 2018.

Secretary of State website “inadvertently” facilitates the formation of benefit corporations, with a simple checkbox on the registration form that registrants could mark to incorporate their firms as benefit corporations.<sup>149</sup>

The websites of the Secretary of State, Division of Corporations, or equivalent government entity (such as a corporation commission) can influence the process of incorporating as a benefit corporation in at least two key respects. They can (1) facilitate a straightforward registration process through the business entities online portal and/or downloadable forms and (2) post educational information about benefit corporations. Figure 3 summarizes the results of an analysis of the ease of filing as a benefit corporation in twenty-eight locales, as of in early 2018.

**Figure 3. Ease of Filing as a Benefit Corporation by State<sup>150</sup>**

	Detailed educational information about benefit corporations	Minimal or no educational information about benefit corporations
Easy to register	CO, ID, OR, PA, TN, UT, VT	AR, CA, CT, DE, MN, NH, NV, RI, SC
Difficult to register	DC, NJ	AZ, FL, HI, IL, MD, MA, TX, VA

Registering as a benefit corporation through the websites of seven state governments (CO, ID, OR, PA, TN, UT, VT) appeared to be easy. The registration portal and/or downloadable forms gave clear indications of where and how a registrant should indicate that the firm is a benefit corporation. In addition, those seven websites provided

<sup>149</sup> Eric Franklin Amarante, *Nudging Entrepreneurs into Noncompliance: Why Does Nevada Have So Many Benefit Corporations?* 2 (Sept. 23, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2897684](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2897684); see also Cooney et al., *supra* note 11, at 3.

<sup>150</sup> The ease of registering a new business in Louisiana and New York could not be assessed given restrictions on use of the state governments’ websites.

substantial educational information about benefit corporations on topics such as the differences between traditional corporations and benefit corporations. For example, the Oregon Secretary of State web page “Register a Business” prominently included a link titled “File to Become a Benefit Company.”<sup>151</sup> That link led to another page that defines an Oregon benefit corporation as “a type of corporation or limited liability company that considers its impact on society and the environment in the business decision-making process, in addition to earning a profit.”<sup>152</sup> The page laid out the steps and requirements, with links to the printable forms for incorporating a new benefit corporation or LLC or for converting to a benefit corporation or LLC. There also were links to examples of third-party standards and another link to a more detailed FAQ page.<sup>153</sup> Oregon’s website was actually one of three websites, along with Colorado and Utah, that presented educational information about benefit corporations during the registration process. On the websites of nine other state governments (AR, CA, CT, DE, MN, NH, NV, RI, SC), the technicalities of registering as a benefit corporation through the online portal and/or downloadable forms appeared straightforward, but the state government posted little or no educational information about benefit corporations.

On at least two state government websites (DC and NJ), the business registration process seemed difficult, although the sites provided substantial educational information about benefit corporations. For example, the downloadable forms on the New Jersey Division of Revenue and Enterprise Services website did not include a benefit corporation option, and the benefit corporation option is never displayed through the entire online registration process, prior to final

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<sup>151</sup> See *Register a Business*, OR. SECRETARY OF STATE, <https://sos.oregon.gov/business/Pages/register.aspx> (last visited July 1, 2018).

<sup>152</sup> *File to Become a Benefit Corporation*, OR. SECRETARY OF STATE, <https://sos.oregon.gov/business/Pages/benefit-company.aspx> (last visited July 1, 2018).

<sup>153</sup> *Benefit Company FAQ*, OR. SECRETARY OF STATE, <https://sos.oregon.gov/business/Pages/benefit-company-faq.aspx> (last visited July 1, 2018).

submission.<sup>154</sup> Finally, the websites for eight other state governments (AZ, FL, HI, IL, MD, MA, TX, VA) appeared to present numerous obstacles to becoming a benefit corporation. In addition to providing little or no educational information, these sites did not have an option to register as a benefit corporation online or else did not make the option for selecting the benefit corporation option readily accessible. The Illinois Secretary of State online database had not been functionally accessible to the public for at least a year. The Texas Secretary of State website did not even have a standardized form with a benefit corporation option. It required individuals who wish to register benefit corporations to draft their own version of a form.

This analysis provides insight into a possible reason for the high rate of benefit corporation incorporation in some top five states. The governments of four of those states (CO, DE, OR, NV) encouraged the formation of benefit corporations by making the technicalities of registration (at least appear) easy.<sup>155</sup> Two of those four states (CO, OR) also posted substantial educational information about benefit corporations. Our research team could not lawfully begin the registration process on the website of the New York Department of State, Division of Corporations.

While this typology provides some indication that state government websites might facilitate or discourage the registration of benefit corporations, it is speculative. Anecdotally, it does not explain

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<sup>154</sup> See *New Jersey's Online Business Formation*, STATE OF N.J., <https://www.njportal.com/DOR/BusinessFormation/Home/Welcome> (last visited Aug. 2, 2018).

<sup>155</sup> As of the writing of this Article, the questions about benefit corporations on Nevada's online portal for business incorporation remain the same as it was when Eric Franklin Amarante analyzed it for a September 23, 2016 blog post. See Amarante, *supra* note 149, at 3; August 2, 2018 screenshot (on file with Author); see also Cooney et al., *supra* note 11, at 4 (describing the simple check box on Nevada's registration form). The third required (Yes/No) question asks, "Is this entity a 'Benefit Corporation?'" without providing information on what a benefit corporation is. If the user selects "Yes," they are required to fill in a text box regarding "[t]he purpose of the Corporation," without guidance on the requirements for benefit corporations. See Amarante, *supra* note 149, at 3. The online PDF of the Nevada Articles of Incorporation form is essentially the same. See *Instructions for Articles of Incorporation*, NEV. SECRETARY OF STATE, <https://www.nvsos.gov/sos/home/showdocument?id=668> (last visited Aug. 2, 2018).

why a state such as Pennsylvania, which makes the process apparently easy and provides substantial educational information, had only eighty-eight known benefit corporations as of December 31, 2017, five years after state legislation went into effect. Additional data and rigorous statistical tests are necessary to fully account for the differential rates of incorporation across states.

### C. *The Industries of Benefit Corporations*<sup>156</sup>

Benefit corporations represent a wide range of industries, as revealed by the online content analysis. Of the benefit corporations with an identifiable industry, the plurality (28%) provide professional services (see Figure 4). These services include consulting (7%), scientific research and development (4%), computer systems and design (3%), marketing (3%), and law firms (3%). For example, TeamBonding is a consulting firm in Massachusetts that facilitates corporate team-building events, games, and activities—what they call “playing with a purpose.”<sup>157</sup> Law firms range from solo practices such as Catalano Law, once known as “The Lawyer that Makes House Calls,”<sup>158</sup> to California-based Barbera Law, a boutique transactional firm specializing in mission-driven entrepreneurs.<sup>159</sup> Another 18% of benefit corporations specialize in wholesale or retail sales, primarily clothing and sporting goods (5%), food (3%), or medical, health, or personal care (3%). World’s First Wines, for instance, distributes sustainably produced Armenian wines.<sup>160</sup>

The educational firms and health care and social assistance firms vary widely (8% total or 4% each). Those in education include Human Journey, cofounded by human rights activist Desmond Tutu and partnered with major firms such as Facebook to teach the African

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<sup>156</sup> Results here are based on the content analysis of the websites and other online information for the 570 randomly sampled benefit corporations. Industry information was available for 289 benefit corporations; statistics reported in this Part are based on that denominator.

<sup>157</sup> TEAMBONDING, <https://www.teambonding.com/> (last visited July 1, 2018).

<sup>158</sup> CATALANO LAW, <https://www.catalanolawpc.com> (last visited Aug. 6, 2018).

<sup>159</sup> BARBERA CORP. LAW, <http://barberacorporatelaw.com/> (last visited Aug. 6, 2018).

<sup>160</sup> WORLD’S FIRST WINES, <http://www.worldsfirstwines.com> (last visited July 1, 2018).



concept of ubuntu,<sup>161</sup> and Minnesota-based Rasmussen Colleges, which offers courses online and on twenty-two campuses.<sup>162</sup> Among the health care and social assistance organizations are three telemedicine companies,<sup>163</sup> a dentist,<sup>164</sup> a psychic,<sup>165</sup> and a firm that offers instruction in daily living skills to adults with intellectual and developmental disabilities.<sup>166</sup> Most of the 8% of benefit corporations that sell information, communications, and technology are publishing software. Among them is Go Copia, which makes technology that enables organizations to donate food easily.<sup>167</sup> About 7% of benefit corporations are in the business of finance, insurance, or real estate. Rooted Investing was created by a former Wall Street investor with the goal of “bringing capital back to earth,” for local Portland, Oregon projects, such as affordable housing and solar energy.<sup>168</sup>

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<sup>161</sup> HUMAN JOURNEY, <http://www.humanjourney.com> (as of Oct. 16, 2017, defunct as of Aug. 6, 2018, but with some detail available at <https://www.facebook.com/ourhumanjourney/>).

<sup>162</sup> RASMUSSEN COLLS., <https://www.rasmussen.edu> (last visited Aug. 6, 2018).

<sup>163</sup> BAUSEY MED. SOLS., <http://www.bausey.com> (last visited Aug. 6, 2018); HC SMART, <https://hcsmart.com/> (last visited Aug. 6, 2018); T-MEDROBOTICS, <http://www.t-medrobotics.com> (last visited Aug. 6, 2018).

<sup>164</sup> DR. LIEM VU, <https://www.healthgrades.com/dentist/dr-liem-vu-xq4v8> (last visited Aug. 6, 2018).

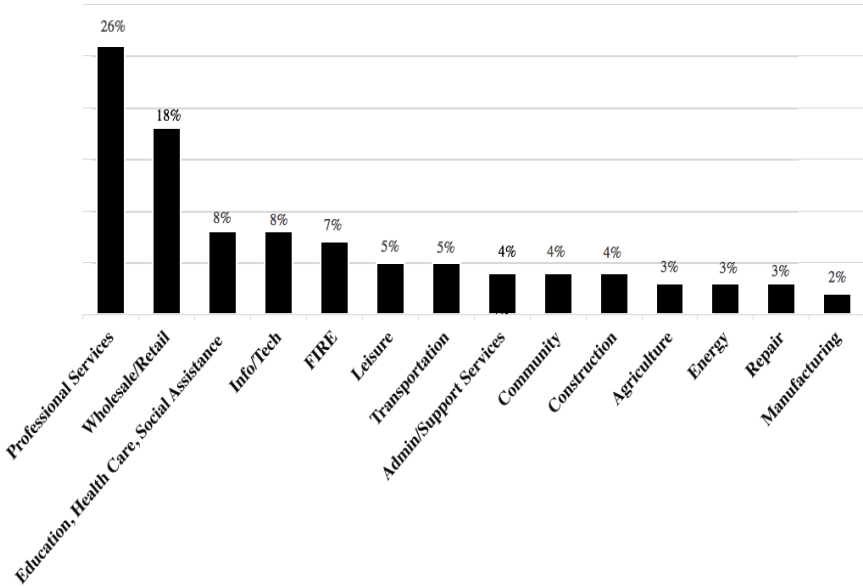
<sup>165</sup> SACRED COACHING, <https://www.facebook.com/SacredCoaching2013/> (last visited Aug. 6, 2018).

<sup>166</sup> ALLIES, <http://www.allies-llc.org/> (last visited Aug. 6, 2018).

<sup>167</sup> GO COPIA, <https://www.gocopia.com/index.html> (last visited July 1, 2018).

<sup>168</sup> ROOTED INVESTING, <http://www.rootedinvesting.com/> (last visited July 1, 2018).

**Figure 4. Industry of U.S. Benefit Corporations**



Another 5% of benefit corporations are in leisure or transportation. Indeed, more than 2% of all benefit corporations are very small trucking businesses that haul cargo, most of them incorporated in Nevada. Four percent of benefit corporations with an identifiable industry are community-oriented—specifically religious, grantmaking, civic, professional, or similar organizations. In other words, they tend to resemble traditional social service agencies or nonprofits such as trade associations or organizations doing social advocacy. They include Bir Mentor Network, “a network of like-minded Accelerators, Educational Institutions, Entrepreneurial Communities and Incubators worldwide that understand the importance of global collaboration, while focusing on the local needs,”<sup>169</sup> and an anti-tax coalition, Nevadans for Sound Government.<sup>170</sup> Four percent of benefit corporations sell administrative

<sup>169</sup> BIR MENTOR NETWORK, <https://www.birmn.org/> (last visited July 1, 2018).

<sup>170</sup> NEVADANS FOR SOUND GOV'T, <https://casetext.com/case/nevadans-for-sound-government-v-state> (last visited Aug. 6, 2018).

and support services (e.g., security, debt collection), and another four percent are in the construction industry.

**Figure 5. Proportion of U.S. Benefit Corporations and U.S. Smaller Firms by Industry**

Industry (NAICS code)	U.S. Benefit Corporations	U.S. Smaller Firms <sup>171</sup>
Professional/Scientific/Technical Services (54)	27%	14%
Wholesale/Retail (42, 44-45)	18%	11%
Education/Health Care/Social Assist. (61-62)	8%	11%
Info., Communications, Tech (51)	8%	13%
Finance, Insurance, Real Estate (52-53)	7%	1%
Leisure: Entertainment, Food, Hotels (71-72)	5%	13%
Transportation (48)	5%	2%
Admin. and Support Services (561)	4%	9%
Community: Religious, Grantmaking, Civic, Professional and Similar Organizations (813)	4%	5%
Construction (23)	4%	10%
Agriculture: Crop Production Activity (1151)	3%	.07%

<sup>171</sup> See *supra* note 133 and accompanying text. Data for Community (Religious, Grantmaking, Civic, Professional and Similar Organizations) and Agriculture (Crop Production Activity) subsectors are for 2015 and are only for smaller employers (under 500 employees); they do not include non-employers due to data limitations. Given the nature of those industries, it is unlikely there are substantial numbers of non-employer firms in those areas. See *2015 SUSB Annual Data Tables by Establishment Industry*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/2015/econ/susb/2015-susb-annual.html> (last visited July 30, 2018) [hereinafter *2015 SUSB Annual Data*].

Figure 5 compares the industries of benefit corporations and the industries of smaller U.S. firms (non-employers and employers with fewer than 500 employees in 2015).<sup>172</sup> It highlights ways in which benefit corporations diverge from their traditional corporate counterparts. Benefit corporations are *overrepresented* in professional services (by thirteen percentage points) and in the wholesale/retail sector (by seven percentage points).<sup>173</sup> One potential reason for this overrepresentation could be firm leaders' perceptions of the utility of the benefit corporation form for marketing. As advocates have argued, a mission-driven firm can use its benefit corporation form to differentiate its products, services, and organization from competitors, for marketing purposes.<sup>174</sup> For firms that sell products, the need to brand their wares is fairly self-evident. They use branding to convey, simultaneously, the meaning and the functionality of their wares—an aura or ethos or vision that, hopefully, resonates with consumers.<sup>175</sup>

Corporate branding is relevant for both professional services and wholesale/retail firms. This might help to explain why leaders in these industries are more likely to adopt the benefit corporation form. Business leader use corporate branding to cultivate an image for their organization, targeted to multiple audiences.<sup>176</sup> A good corporate brand communicates a compelling idea of a firm as a whole, one that encompasses the organization, its products and services, its business

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<sup>172</sup> 2015 SUSB Annual Data, *supra* note 171. The Census dataset includes a total of approximately 5.9 million firms. About 89% of those firms (5,265,682) employ fewer than twenty employees.

<sup>173</sup> Coding for this study did not differentiate between benefit corporations in the wholesale and retail sectors because the differences were usually not readily apparent from the website. Moreover, virtually all benefit corporations had a retail component. Nationally, 9% of smaller firms and 14% of smaller employers are in the retail industry. On small business employers, see BABSON COLLEGE, THE STATE OF SMALL BUSINESS IN AMERICA 2016, at 7 (2016), <http://www.babson.edu/executive-education/expanding-entrepreneurship/10k-small-business/Documents/goldman-10ksb-report-2016.pdf>.

<sup>174</sup> See CLARK & VRANKA, *supra* note 1.

<sup>175</sup> ROBERT JONES, BRANDING: A VERY SHORT INTRODUCTION 16–17 (2017).

<sup>176</sup> John M.T. Balmer & Edmund R. Gray, *Corporate Brands: What Are They? What of Them?*, 37 EUR. J. MARKETING 972, 974–76 (2003).

scope and strategy, its reputation as an employer, its values and cultural roots, and more. A good corporate brand provides a means for a firm to identify and differentiate itself. Corporate branding tends to be more effective than branding specific products or services, because it allows for greater complexity and is more adaptable and more efficient.<sup>177</sup>

Entrepreneurs in the professional services sector face distinct challenges when communicating what they do and why they differ from competitors, and those challenges could make the benefit corporation form particularly instrumental.<sup>178</sup> These are firms that perform activities requiring extensive expertise and training.<sup>179</sup> They typically are comprised of loosely linked units specializing in different expert practices, such as a full services law firm or a company that specializes in architecture and engineering. Professional services firms often find it challenging to explain what they do and the quality of their services. Such firms rely on specialized technical knowledge or the ability to do something “mundane” extremely well.<sup>180</sup> They often face difficulties differentiating themselves from other firms in the same niche, as they tend to offer similar, highly regulated services that are executed by employees with similar advanced education.<sup>181</sup> The professionals employed by such firms—who range from computer systems programmers to lawyers to scientific researchers to accountants—often have attributes that actually can impede with marketing: highly technical training (which can be difficult to explain), professional expectations (e.g., reliance on collegial collaboration within their profession, rather than cut-throat competition

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<sup>177</sup> *Id.*

<sup>178</sup> Vincent-Wayne Mitchell & William S. Harvey, *Corporate Brands: Professional Service Firms*, in CORPORATE BRANDING: AREAS, ARENAS AND APPROACHES 130, 131 (T.C. Melewar & S.F. Ayed Alwi eds., 2015).

<sup>179</sup> Service providers are likely to have advanced and specialized education and, therefore, some similar training and/or credentials. See *Industries at a Glance*, U.S. DEP'T OF LAB., <https://www.bls.gov/iag/tgs/iag54.htm> (last visited July 1, 2018).

<sup>180</sup> Mitchell & Harvey, *supra* note 178, at 131.

<sup>181</sup> This is frequently part of the sales pitch that marketing firms make to professional services firms that are potential clients. See, e.g., *Branding*, SIMONS MARKETING, <http://simonsmarketing.com/b2b-service-marketing/professional-services-firm-branding> (last visited July 29, 2018).

alone), and job requirements (e.g., earning fees, which take priority over time spent marketing).<sup>182</sup>

The leadership of a professional services firm might view the benefit corporation status as a way to overcome at least some of these obstacles and forge a distinctive corporate identity for consumers and other stakeholders. A professional services firm could opt for the benefit corporation status to convey a single identity as, say, mission driven, truly ethical, more authentic, or uniquely connected to the communities it serves. I return to *how* benefit corporations use their form as branding, or not, below.<sup>183</sup>

Another possible explanation for the overrepresentation of the professional services among benefit corporations might be rooted in the relationship between the firm and its employees. Firms in this industry rely on workforces with extensive expertise and training; this also is true of the information, communications, and technology industry, which is overrepresented among benefit corporations by five percentage points. It may be that owners of professional services and IT firms see “being beneficial” as a way to attract a highly educated workforce. Many organizations engage in employer branding.<sup>184</sup> They borrow marketing techniques to forge an organizational identity that helps them recruit and retain employees and improve employees’ productivity. Popular business news media have featured studies and surveys showing that millennials (ages twenty-two to thirty-seven in 2018) now comprise the largest group in the workforce and want to work for socially responsible

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<sup>182</sup> Mitchell & Harvey, *supra* note 178, at 133.

<sup>183</sup> See *infra* Part V.D.

<sup>184</sup> See, e.g., Tim Ambler & Simon Barrow, *The Employer Brand*, 4 J. BRAND MGMT. 185–206 (1996) (discussing branding strategies in the human resources context).

employers.<sup>185</sup> For example, a 2016 survey by Cone Communications found that 64% of millennials say they will decline a job if a company does not have strong corporate social responsibility values.<sup>186</sup> Whether or not these surveys capture real cross-generational differences,<sup>187</sup> employers in professional services and IT may be persuaded by the media attention (although this would not explain why those industries, and not others, are overrepresented among benefit corporations).<sup>188</sup>

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<sup>185</sup> See, e.g., THE MILLENNIAL IMPACT REPORT 2017 PHASE 1: MILLENNIAL DIALOGUE ON THE LANDSCAPE OF CAUSE ENGAGEMENT AND SOCIAL ISSUES (2017), [http://www.themillennialimpact.com/sites/default/files/reports/Phase1Report\\_MIR2017\\_060217.pdf](http://www.themillennialimpact.com/sites/default/files/reports/Phase1Report_MIR2017_060217.pdf) (discussing effect of 2016 election on millennials); Marissa Peretz, *Want to Engage Millennials? Try Corporate Social Responsibility*, FORBES (Sept. 27, 2017), <https://www.forbes.com/sites/theyec/2017/06/09/why-millennials-want-more-than-just-work-the-importance-of-your-double-bottom-line/#32182a945784>; *3/4 of Millennials Would Take a Pay Cut to Work for a Socially Responsible Company*, SUSTAINABLE BRANDS (Nov. 2, 2016), [http://www.sustainablebrands.com/news\\_and\\_views/organizational\\_change/sustainable\\_brands/34\\_millennials\\_would\\_take\\_pay\\_cut\\_work\\_socia](http://www.sustainablebrands.com/news_and_views/organizational_change/sustainable_brands/34_millennials_would_take_pay_cut_work_socia); see also *Why Is Benefit Corp Right for Me?*, *supra* note 57.

<sup>186</sup> 2016 Cone Communications Millennial Employee Engagement Study, CONE, <http://www.conecomm.com/research-blog/2016-millennial-employee-engagement-study#download-the-research> (last visited Aug. 1, 2017).

<sup>187</sup> Jean M. Twenge, *A Review of the Empirical Evidence on Generational Differences in Work Attitudes*, 25 J. BUS. PSYCHOL. 201, 202 (2010) (showing no generational differences in altruistic values between millennials and older generations).

<sup>188</sup> Organizational sociology has firmly established that experts who work within highly structured fields tend to behave in a similar manner as their peers because they mimic each other, a phenomenon called isomorphism. Paul DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 150 (1983). These experts' experiences of professionalization facilitate their copycatting, especially because their university training and their immersion in cross-organizational professional networks generate normative pressures to conform. *Id.* Theoretically, such isomorphism could explain the overrepresentation of benefit corporations among professional services and IT firms as well as the underrepresentation of benefit corporations in leisure and hospitality (by eight percentage points) and construction (by six percentage points), as neither of those industries have analogous credential requirements or educational institutions that would similarly socialize small business owners. However, there is little empirical evidence showing that advanced degree programs, such as law schools, are prioritizing corporate social responsibility in their curricula. See, e.g., Faith Stevelman, *Globalization and Corporate Social Responsibility: Challenges for the Academy, Future Lawyers, and Corporate Law*, 53 N.Y. L. SCH. L. REV. 817, 817 (2008/09).

Benefit corporations also are overrepresented in agricultural crop production, with 3% of benefit corporations in this subsector compared to 0.07% of firms nationally. These benefit corporations include Medisun Farms, a Southern Oregon collective of organic hemp farms that produce cannabis flower and extract in bulk,<sup>189</sup> and Nonquit Produce Company, a 5-acre Rhode Island family farm that formerly grew potatoes but has now diversified to sell local, “chemical-free” vegetables.<sup>190</sup> The overrepresentation of benefit corporations in agriculture is likely linked to the market and cultural dynamics of the sector. Although there is a growing market for organic, sustainably produced, and local food, agriculture remains a difficult industry to enter and succeed in.<sup>191</sup> Farming is costly, risky, and dominated by large agribusinesses. Owners of new, small, eco-friendly agricultural businesses commonly are connected to larger social movements around specialized farming methods and techniques (e.g., organic, aquaponics) and around particular foods, beverages, and products (e.g., grass-fed meat).<sup>192</sup> Producers get support from these movements both directly and indirectly. Such movements build distinctive markets by mobilizing politically and by fostering a collective identity among producers and consumers alike, based on cultural cues such as authenticity,

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<sup>189</sup> MEDISUN FARMS, <https://www.medisunfarms.com/> (last visited July 1, 2018).

<sup>190</sup> *Nonquit Salad Farm*, FARM FRESH RI, <http://www.farmfresh.org/food/farm.php?farm=2275> (last visited July 1, 2018).

<sup>191</sup> See, e.g., Oran B. Hesterman & Daniel Horan, *The Demand for ‘Local’ Food is Growing—Here’s Why Investors Should Pay Attention*, BUS. INSIDER (Apr. 25, 2017), <http://www.businessinsider.com/the-demand-for-local-food-is-growing-2017-4> (discussing some challenges in succeeding in the agriculture industry); *Organic Market Analysis*, ORGANIC TRADE ASS’N, <https://www.ota.com/resources/market-analysis> (last visited July 1, 2018) (providing data sets on organic market trends).

<sup>192</sup> See, e.g., BRIAN K. OBACH, ORGANIC STRUGGLE: THE MOVEMENT FOR SUSTAINABLE AGRICULTURE IN THE UNITED STATES (2015) (explaining how farmers and other groups formed coalitions to mobilize the organic agriculture movement); see also Neva Hassanein & Jack R. Kloppenburg, Jr., *Where the Grass Grows Again: Knowledge in the Sustainable Agriculture Movement*, RURAL SOC. 721, 732–35 (1995) (describing how Wisconsin dairy farmers became embedded in the sustainable agriculture movement by sharing information on alternative technologies).



sustainability, and naturalness.<sup>193</sup> These movements also validate producers' deep emotional connection to their work, which they tend to view as morally virtuous.<sup>194</sup> Producers' movement embeddedness likely helps them to sustain what is often economically precarious and physically challenging work. Furthermore, these business owners want to signal their market distinctiveness to consumers of local and organic food, who themselves are commonly motivated by do-good and be-healthy ethics and aspirations.<sup>195</sup> Both the benefit corporation movement, which valorizes social consciousness and long-term sustainability, and legal form would understandably speak to the needs and cultural sensibilities of many eco-oriented agricultural producers.

Meanwhile, benefit corporations are very modestly *underrepresented* in sectors where nonprofit organizations (and the government) have a strong or dominant presence.<sup>196</sup> Benefit corporations are relatively less common in the "community" industry category (underrepresented by one percentage point), which is overwhelmingly comprised of charitable and nonprofit organizations. Benefit corporations are also underrepresented in the education sector and health care and social assistance sector (by three percentage points total), where the nonprofit model is widely prevalent, especially for colleges and hospitals.<sup>197</sup> Importantly, there is not *overrepresentation* of

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<sup>193</sup> Klaus Weber et al., *Forage for Thought: Mobilizing Codes in the Movement for Grass-Fed Meat and Dairy Products*, 53 ADMIN. SCI. Q. 529, 529 (2008).

<sup>194</sup> *Id.* at 544.

<sup>195</sup> See, e.g., Josée Johnston et al., *Good Food, Good People: Understanding the Cultural Repertoire of Ethical Eating*, 11 J. CONSUMER CULTURE 293, 312 (2011) (finding that life style provided a sense of cultural distinction for many participants in study).

<sup>196</sup> These findings diverge somewhat from Plerhoples' analysis that 35% of the fifty-five first Delaware benefit corporations could have opted to become tax-exempt nonprofits. See *supra* notes 90–94 and accompanying notes. My study finds that 13% of benefit corporations nationally (and 18% of benefit corporations in Delaware) were in the education, health, social assistance, or other community-oriented industries. The differences in findings might be an artifact of our different coding criteria or distortions in her data due to the small sample size, or perhaps they differ because the type of firms that become benefit corporations has changed over time.

<sup>197</sup> U.S. DEP'T OF EDUC., POSTSECONDARY INSTITUTIONS AND COST OF ATTENDANCE IN 2017–18; DEGREES AND OTHER AWARDS CONFERRED, 2016–17; AND 12-MONTH ENROLLMENT, 2016–17: FIRST LOOK (PRELIMINARY DATA), at 4,

benefit corporations in the community, education, and health sectors, suggesting that firms are not disproportionately forgoing nonprofit status to become for-profit benefit corporations. These patterns likely indicate that the benefit corporation form is most appealing to firms that would otherwise be traditional corporations (such as T-MedRobotics, which conducts remote ultrasonography<sup>198</sup>), rather than organizations that would otherwise be nonprofits. Put differently, an owner or leader of a community, educational, health care, or social assistance organization likely finds the 501c(3) nonprofit model more legible and instrumentally attractive for revenue purposes, compared to the benefit corporation. Nonprofit organizations commonly rely on charitable contributions as a material source of revenue, and eligible donors can reduce their taxable income by making contributions to nonprofits. Homogeneity among nonprofit organizations also is well explained by the sociological theory of isomorphism. Similarly situated organizations face similar institutional and resource constraints, and they try to manage those constraints by copying each other's organizational forms and cultures.<sup>199</sup>

Further evidence for the conclusion that owners view the benefit corporation form as an alternative to the traditional corporation, but not to the nonprofit model, is evident in the newsworthy conversion of for-profit educational institutions. The most publicized is Laureate Education, a publicly traded firm that reports more than \$3 billion in revenue for the sixty-plus campus programs it owns in twenty different countries. Of the five other known universities and colleges that have

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Table 1 (2018), <https://nces.ed.gov/pubs2018/2018060.pdf> (documenting the numbers of public, for-profit, and nonprofit postsecondary institutions); *Fast Facts on U.S. Hospitals, 2018*, AM. HOSP. ASS'N, <https://www.aha.org/statistics/fast-facts-us-hospitals> (last visited Aug. 7, 2018) (documenting the numbers of public, for-profit, and nonprofit hospitals). The government has a notable presence in education and health care, as well, particularly in education, where 38% of establishments are public. *Industries at a Glance*, U.S. DEP'T OF LAB., <https://www.bls.gov/iag/tgs/iag62.htm> (last visited July 1, 2018) (documenting number of health care and social assistance establishments in the public and private sectors).

<sup>198</sup> T-MEDROBOTICS, <http://www.t-medrobotics.com> (last visited Aug. 2, 2018).

<sup>199</sup> DiMaggio & Powell, *supra* note 188, at 150–51.

become benefit corporations, four were formerly for-profit (Ace College of Education, Purdue University Global [formerly Kaplan University], Rasmussen College, Walden University); only Alliant International University began as a nonprofit.<sup>200</sup> Furthermore, the rapidly growing field of for-profit higher education has been riddled with well-documented problems.<sup>201</sup> Propped up by government financing and tax breaks, these schools widely participate in aggressive, predatory recruitment and related activities for programs with disturbingly low completion and job placement rates, all while leaving students in severe debt.<sup>202</sup> Undoubtedly, the benefit corporation moniker could serve as a tool for market differentiation and, for schools that engage in exploitative practices, deceptive corporate branding that makes the university seem altruistic and trustworthy.

These findings indicate that the benefit corporation is a desirable departure from a traditional corporation, more so than a desirable departure from a nonprofit model. That makes sense, given that social enterprise enthusiasts have framed the value of benefit corporations and designed the legal provisions in reference to traditional for-profit corporations. The results also show that benefit corporations do not seem to be crowding out and undermining the nonprofit sector.

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<sup>200</sup> Jeremy House, *Are College Benefit Corporations a New Model for Higher Ed?*, EDUC. DIVE (Feb. 6, 2018), <https://www.educationdive.com/news/are-college-benefit-corporations-a-new-model-for-higher-ed/515925/>.

<sup>201</sup> See, e.g., U.S. SENATE, FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS: MAJORITY COMMITTEE STAFF REPORT AND ACCOMPANYING MINORITY COMMITTEE STAFF VIEWS 8–10 (2012), [https://www.help.senate.gov/imo/media/for\\_profit\\_report/PartI-PartIII-SelectedAppendixes.pdf](https://www.help.senate.gov/imo/media/for_profit_report/PartI-PartIII-SelectedAppendixes.pdf).

<sup>202</sup> See generally TRESSIE McMILLAN COTTOM, LOWER ED: THE TROUBLING RISE OF FOR-PROFIT COLLEGES IN THE NEW ECONOMY (2017) (discussing practices and policies that have contributed to the rapid growth of for-profit colleges).

*D. Products and Services, Workforce Size, and Geographic Scope*<sup>203</sup>

The organizational attributes of benefit corporations vary widely, as demonstrated by the analysis of 227 active firms with detailed information online. Overall, there is tremendous range in the types of services and goods sold, the size of the workforce, and the geographic scope of their activity.

Assessing the size of the workforce of these firms is difficult, but the larger ones are usually discernable.<sup>204</sup> With more than 1400 employees, Patagonia is the only large benefit corporation active online (500+ employees), indicating that under 0.44% of active benefit corporations are large firms.<sup>205</sup> Just over 1% of benefit corporations are medium sized (100–499 employees).<sup>206</sup> They include E.O. Products, which makes naturally derived personal care merchandise like hand sanitizers derived from organic cane sugar,<sup>207</sup> and 3Degrees, an environmental firm that consults with Fortune 500 companies interested in reducing their greenhouse gas emissions.<sup>208</sup> Another 11% of benefit corporations active online are small (10–99 employees).<sup>209</sup> Among them are the Retail Industry Leaders Association, a trade association for retail

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<sup>203</sup> Findings here are based on the content analysis of the 227 benefit corporations for which there is detailed information available online. Statistics reported here are based on those 227 benefit corporations active online.

<sup>204</sup> The large firms tend to have a more developed website with a page about the leadership. These firms also are often reported on by the media and by websites that host business profiles.

<sup>205</sup> Compared to 0.06% of all large U.S. firms and 0.33% of large U.S. employer firms. For data set and additional information, see U.S. SMALL BUS. ADMIN., OFFICE OF ADVOCACY, SMALL BUSINESS PROFILE, (2017), [https://www.sba.gov/sites/default/files/advocacy/All\\_States\\_0.pdf](https://www.sba.gov/sites/default/files/advocacy/All_States_0.pdf) (last visited July 25, 2018).

<sup>206</sup> Compared to 0.3% of all medium U.S. firms and 1.5% of medium U.S. employer firms. For data set and additional information, see *supra* note 205.

<sup>207</sup> EO PRODUCTS, <https://www.eoproducts.com/hands/hand-sanitizers.html> (last visited Aug. 2, 2018).

<sup>208</sup> 3DEGREES, <https://3degreesinc.com/services/energy-and-climate-consulting/> (last visited Aug. 2, 2018).

<sup>209</sup> Compared to 4% of all small U.S. firms and 19% of small U.S. employer firms. For data set and additional information, see *supra* note 205 and accompanying text.

companies including Walmart, Home Depot, and Dollar General.<sup>210</sup> At least 31% are micro-firms (under ten employees or no employees, only an owner).<sup>211</sup> They include Prime Painting in Portland, Oregon, which specializes in residential work;<sup>212</sup> Oregon-based Journeys of Life Counseling, which provides Christian-inspired therapy;<sup>213</sup> and U.S. Automotive Gives Back in Pennsylvania, which publishes a directory of local automotive services companies, with proceeds aiding veterans injured in war.<sup>214</sup> It is reasonable to assume that the vast majority of those benefit corporations in the study whose size could not be ascertained (56%) are also very small with under ten employees or no employees at all.

About 23% of benefit corporations active online do business outside the United States. Among them is Utah-based Zuloo, Inc., which acquires businesses and invests in sanitation technology to improve “access to clean, safe sanitation” and “reimagine the bathroom experience” for the 40% of people worldwide who do not have a proper toilet.<sup>215</sup> Another 29% of the benefit corporations active online are working at the national level. They include Weal Life in Delaware, which is developing an app to help sick people crowdsource care in their communities,<sup>216</sup> and MindSpark, a “socially conscious” IT company in

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<sup>210</sup> RETAIL INDUSTRY LEADERS ASS’N, <https://www.rila.org/about/Pages/RILA-Retail-Members.aspx> (last visited Aug. 2, 2018).

<sup>211</sup> Compared to 96% of all medium U.S. firms and 79% of medium U.S. employer firms. For data set and additional information, see *supra* note 205 and accompanying text.

<sup>212</sup> PRIME PAINTING, <http://paintpdx.wixsite.com/prime-painting/about> (last visited Aug. 2, 2018).

<sup>213</sup> JOURNEYS OF LIFE COUNSELING, <http://www.journeysoflifecounseling.com/> (last visited Aug. 2, 2018).

<sup>214</sup> U.S. AUTOMOTIVE GIVES BACK, <https://www.usautomotivegivesback.com> (last visited Aug. 2, 2018).

<sup>215</sup> ZULOO, <https://www.zuloo.com/home> (last visited July 1, 2018).

<sup>216</sup> WEAL LIFE, <https://www.theweallife.com/> (last visited July 1, 2018).

California that employs American software testers, as an alternative to outsourcing to China or India.<sup>217</sup>

Other benefit corporations active online are local (25%) or regional (11%) in their scope. Healthy Markets (now defunct) was a microbusiness that organized two farmers markets outside Baltimore, Maryland, in connection with local health care facilities.<sup>218</sup> Delaware-based Perceptoscope describes itself as a “part technology think-tank, part public media arts experiment” that stages scalable public arts projects; participants use “mixed reality binocular viewers” based on artificial intelligence technology to engage with the places around them.<sup>219</sup> Some benefit corporations are extremely localized and personal. The owner of M.K. Watu, in Arkansas, created a benefit corporation “to mechanize the recycling aspect of my homestead. The goal . . . is to clean littered areas, find innovative ways to refurbish the trash collected, and share the findings in an open source manner.”<sup>220</sup> A small portion of benefit corporations active online seem to be very temporary or situation-specific endeavors, such as a short-lived website for an event.<sup>221</sup>

### *E. Stated Benefits*

What benefits do benefit corporations claim to provide? Although this analysis cannot determine whether a benefit corporation is indeed engaged in beneficial activities or having a beneficial impact, we still can glean useful information by analyzing the *claims* made by benefit corporations active online. A full 30% of the benefit corporations active online give no indication of the benefits they provide. Among

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<sup>217</sup> *The MindSpark Advantage*, MINDSPARK, <http://www.mindsparktech.com/the-mindspark-advantage/> (last visited July 1, 2018).

<sup>218</sup> See HEALTHY MARKETS, <https://healthymarketsmd.wordpress.com> (last visited July 1, 2018).

<sup>219</sup> See *Perceptoscope*, HACKADAY.IO, <https://hackaday.io/project/10637-perceptoscope/> (last visited July 1, 2018); *Perceptoscope*, KNIGHT FOUND., <https://knightfoundation.org/grants/6780> (last visited July 1, 2018).

<sup>220</sup> See GREATER DELTA PROJECT, <http://greatdp.blogspot.com> (last visited July 1, 2018).

<sup>221</sup> See, e.g., INT’L JANUS PROJECT, <https://web.archive.org/web/20160314200908/http://virgate.net/janus-global-pbc/> (last visited Aug. 2, 2018).

them are Trans-Fast Remittance in Nevada, The Tidy Sister cleaning service in Oregon, and Colorado-based used car dealership Chanbrook Services, also known as Street Smart Auto Brokers.<sup>222</sup> Benefit corporations active online that give no indications of even attempting to be beneficial are disproportionately located in Nevada (37% are in Nevada, although Nevada has 23% of benefit corporations nationally), Colorado (15% versus 9%), and Oregon (28% versus 24%). They are less common in New York (5% versus 14%) and non-existent in Delaware (0% versus 16%). This suggests that states that make it easy to register as a benefit corporation are enlisting a disproportionate number of firms that probably should not be benefit corporations. Compared to their national counterparts, more of these benefit corporations without stated benefits are in “blue” and “pink” collar industries—administrative and support services, construction and contracting, and repair and maintenance (e.g., hair salons)—and also financial services, insurance, and real estate (FIRE). Fewer are in the “white” collar industry of IT.

However, most of the benefit corporations active online (70%) make reference to (what they claim to be) their beneficial activity. They typically signal that they provide social benefits (41%) or both social and environmental benefits (23%). Virginia-based Liberation Kilt Company, for example, sells sustainably made kilts from textiles that symbolize progressive social causes such as fossil fuel divestment and lesbian, gay, bisexual, and transgender rights.<sup>223</sup> The firm donates 20% of its profits to non-governmental organizations, including the United Nations Office on Drugs and Crime and PEN International, a literary society. Just 6% of benefit corporations active online state that they focus solely on environmental benefits.

The firms that discuss their (purported) beneficial activities give indications of both the benefits they provide and the means by which they provide them. The most popular way that benefit corporations

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<sup>222</sup> See, e.g., *Our Mission*, TRANSFAST, <https://www.transfast.com/about> (last visited July 29, 2018); STREET SMART AUTO BROKERS, <https://www.streetsmartauto-brokers.com/> (last visited July 29, 2018); TIDY SISTER, <https://www.thetidysister.com/> (last visited July 29, 2018).

<sup>223</sup> LIBERATION KILT CO., <http://liberationkilt.com/> (last visited July 1, 2018).

active online say that they deliver benefits is through what I call *direct services* (44%). These are services that (should) directly deliver benefits to the populations with which the firm interacts. Firms' direct beneficial services include social impact advising and consulting with employees on conflict management skills. Praekelt Benefit Corporation is among the 18% of benefit corporations that provide *indirect services* by connecting end users with services. Praekelt's provision of indirect services is based on its fairly unique relationship to both the nonprofit and public sectors. The benefit corporation was formed by its sole owner, Praeklet.org, a foundation that develops open source mobile technologies to disseminate information and services, with a reach of more than 100 million people across 54 countries.<sup>224</sup> Praekelt Benefit Corporation created the WhatsApp Enterprise technology, which now helps more than a hundred thousand pregnant women and mothers access MomConnect, a platform developed by Praeklet.org for the South African government. Via WhatsApp, the firm helps the foundation and the government to deliver personalized messages to mothers, link women to health care facilities, and enable them to communicate directly with health professionals. (Praekelt expects to sell its technology for service delivery to other organizations interested in using WhatsApp for communications, illustrating how technologies developed to achieve social impacts can be commercialized.)

A substantial proportion of benefit corporations active online (30%) point to their *products* as a means of distributing benefits. Beneficial products range from energy-efficient commercial refrigeration to portable healthcare hardware that nurses can bring into communities, from organic and fair trade spices to recycled outdoor products like rubber mulch. Typically, the purported benefits go to individual customers. Pineapple Park in Las Vegas used to advertise its Dole Soft Serve as a "kosher, vegan friendly, fat-free, lactose-free, and dairy-free . . . deliciously healthy soft serve dessert" as "a better and healthier

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<sup>224</sup> PRAEKELT.ORG, <https://www.praekelt.org>; PRAEKELT.ORG, *Bringing WhatsApp to Social Impact Communication*, MEDIUM (Aug. 6, 2018) <https://medium.com/@praekeltorg/bringing-whatsapp-to-social-impact-communication-ee358c11299e> (last visited Nov. 20, 2018).



alternative to ice cream and frozen yogurt.”<sup>225</sup> A smaller set of firms characterize their products as bringing broader public health benefits and meeting basic health needs. MadiDrop produces water purification tablets that disinfect drinking water by destroying waterborne pathogens and protecting people against illness and disease.<sup>226</sup>

Another 24% of benefit corporations active online use *fundraising, philanthropy, and community service* as means of distributing benefits. Ladies Who Dine, a member organization with chapters in Las Vegas and Orange County, California, describes itself as “a community engagement organization that pairs philanthropy with fabulous dining experiences.”<sup>227</sup> Everest Receivable Services, a debt-collection company based in Buffalo, New York, encourages employees to volunteer in a cancer research bike riding fundraiser and donates to a dog rescue, children’s charities, and a food bank.<sup>228</sup> Another 21% of benefit corporations active online point to their *operations*—how they do business, from their recycling activities to the types of firms in their supply chain to their worker cooperative ownership structure—as the vehicle for their benefits. Equator Coffees & Teas, which the U.S. Small Business Administration named “National Small Business of the Year” in 2016, produces benefits through both its operations and its direct services.<sup>229</sup> For example, through its “chain of well-being,” the coffee roaster micro-credit loans to the farmers from whom it purchases coffee beans. Equator Coffees & Teas also is one of the 10% of benefit corporations active online that rely on multiple means of delivering benefits.

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<sup>225</sup> PINEAPPLE PARK, <https://www.thepineapplepark.com> (last visited July 1, 2018) (the firm subsequently changed the content of its website).

<sup>226</sup> MADIDROP, <https://www.madidrop.com> (last visited Aug. 6, 2018).

<sup>227</sup> LADIES WHO DINE, <http://www.ladieswhodine.com/about.html> (last visited Aug. 6, 2018).

<sup>228</sup> EVEREST RECEIVABLE SERVS., <http://everest-inc.com/2015/04/> (last visited Aug. 2, 2018).

<sup>229</sup> EQUATOR COFFEES & TEAS, <https://www.equatorcoffees.com/pages/chain-of-well-being> (last visited Aug. 2, 2018).

Regardless of the strategies they use to reach the public, many benefit corporations active online (again, 70%) have much to say about their stated benefits. My team's coding captured both the *primary* benefit each of these firms emphasized as well as any other *secondary* benefits they pointed to. The most popular *primary* benefit was health and wellness (16% of benefit corporations active online), which ranged from basic health care needs to spiritual enlightenment. Many other firms (12%) present their primary benefit in terms of their economic interventions. Most notable are firms in the social enterprise business niche, which characterize their primary benefits as actively working with other socially-conscious organizations (7%) and increasing capital flow to social enterprises (2%). Eleven percent of benefit corporations active online cite their environmental efforts as their primary benefit. Those include promoting or using renewable energy (4%), reducing human impact (4%), and sustainable agriculture (3%). Another 8% foreground the ways they empower disadvantaged populations, such as communities of color, poor people, or people with autism, typically through direct services or philanthropy. Five percent either reference their general charitable giving or their work prompting others to engage in philanthropy. Another 5% highlight their contributions to education. A small set of firms do not specify their precise benefits for humans or the environment but instead vaguely suggest that their goods, services, and operations are inherently beneficial. This is more common among those firms that sell products, such as organic soap or sustainably produced clothing.

Almost half of the benefit corporations active online describe additional *secondary* benefits of their businesses. In other words, 47% of benefit corporations claim to engage in activities that are beneficial in multiple ways—Liberation Kilt Company and Equator Coffees among them, but not Everest Receivables. Regardless of whether benefit corporations are discussing their primary or secondary benefits, benefit corporations active online still emphasize their contributions to health and well-being (23%). Substantial proportions point to the ways, big and small, they reduce their environmental impact (19%) or build civil society and strengthen communities (14%). Arkansas-based ER Assist claims to

do both and also treats its employees well (a primary or secondary benefit of 8% of firms), as it assists state governments with applying for and managing federal disaster grants.<sup>230</sup> The consulting firm cites its contributions to the complex work of helping communities recover from disasters, its diversion of debris from landfills, and its pay structure, which rewards employees based on their contributions to improving communities rather than their billable hours.

Another 16% of benefit corporations active online include advancing equity among their multiple primary and secondary benefits, through their empowerment of disadvantaged groups, underserved populations, and women. VOXAPOD, which has raised \$75,000 to bring to market its plastic-free, reusable menstrual cup, strives to provide women and girls around the world with “access to safe period care” so they are not prevented from going to school or work.<sup>231</sup> As the firm’s website explains, “No girl should be denied opportunity because of her biology.”

Of particular interest is the emerging social enterprise ecosystem of benefit corporations that intentionally do business with other benefit corporations, nonprofit organizations, and firms interested in corporate social responsibility. Fifteen percent of benefit corporations active online note that their primary or secondary benefit entails work with other social enterprises, which may involve providing support services (10%) or increasing cash flow to them (5%, although this figure increases if philanthropy is included). All of these specialized niche firms are in professional services (50%), finance (21%), IT (15%), or wholesale/retail (15%). They tend to be firms that provide multiple benefits through multiple means—heavy hitters, so to say. A socially conscious entrepreneur immersed in this social enterprise ecosystem could have a day packed with benefit corporations. She could get dressed in a sustainably produced outfit she ordered from Wylder (a boutique clothing curator<sup>232</sup>), then head to work on her start-up at Capsity (a co-

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<sup>230</sup> ER ASSIST, <http://www.erassist.com/> (last visited Aug. 6, 2018).

<sup>231</sup> VOXAPOD, <https://voxapod.com> (last visited July 1, 2018).

<sup>232</sup> WYLDER, <https://www.wyldergoods.com/> (last visited Aug. 6, 2018).

working space in Sacramento, California that fosters “an on-going experiment in creating the space for human relationships to manifest into community and social good”<sup>233</sup>), where she might consult with social impact advisors at Vita Global about becoming a B Corp,<sup>234</sup> then find inspiration by watching videos about #StoriesThatMatter on UPTOGOOD’s video-based campaign platform<sup>235</sup> while enjoying a coffee from Equator Coffee & Tea.

It is instructive to consider the silences—the benefits that benefit corporations are *not* saying they deliver. Few benefit corporations active online mention their interest in revolutionizing capitalism, although some say that they contribute to a broader goal of sustainability or that they commit to people and the planet alongside profit. This study finds that only a handful of benefit corporations claim to be restructuring fundamental precepts of contemporary capitalism, such as unequal and exploitative labor relations within the workplace and supply chain. While 8% mention giving employees meaningful work and fostering a supportive workplace culture, few claim to be restructuring the global economy through fair trade (4%), development in poor regions (2%), or products and services “made in America” (2%). Just 4% cite paying fair wages. Senda Athletics is one of these exceptions. It sells “ethically made,” fair-trade-certified soccer balls “to support our producers through improved livelihoods and community development.”<sup>236</sup>

Similarly, almost none of the benefit corporations active online describe their business as posing challenges to the power dynamics central to advanced capitalism, such as the accumulation of corporate control (0.44% or one active benefit corporation). Almost none are forming worker-owned cooperatives (1%). Perhaps more surprisingly, only 7% of active benefit corporations make any criticism of capitalism by, say, critiquing a corporate model that values profits above all else. A

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<sup>233</sup> *Social Mission*, CAPSITY, <http://www.capsity.com/social-mission/> (last visited July 1, 2018).

<sup>234</sup> VITA GLOBAL, <http://vita-global.com> (last visited Aug. 6, 2018).

<sup>235</sup> UPTOGOOD, <https://www.uptogood.org> (last visited July 29, 2017).

<sup>236</sup> SENDA, <https://sendaathletics.com/pages/manifesto> (last visited July 1, 2018).

full 93% have no critical commentary on capitalism. It appears that the people who run benefit corporations are not interested in taking on some of the thorniest problems at the heart of the current economic system, at least not ideologically or publicly. Rhetoric on challenging shareholder supremacy is the spirited language of advocates, not the market-oriented language of businesspeople.

*F. Publicizing Benefits and a Lack of Legal Greenwashing*

Benefit corporations differ in the extent to which they publicize their benefits online. About 45% of the benefit corporations active online put their benefits front and center, portraying whatever their beneficial activities are as central to their firm's identity. As they explain it, their business would not exist if it stopped being beneficial. Grassroots Capital Management's home page describes the company as "an investment manager promoting investment in multiple bottom line businesses delivering social and financial value and working to strengthen communities and eliminate poverty."<sup>237</sup> Another 17% of benefit corporations active online present their benefits as an important element but not the centerpiece of their organizational identity.<sup>238</sup> Again, a full 30% make no clear reference to being beneficial in any way, although a few of those firms have extremely vague statements about, say, supporting community.

In theory, benefit corporation law provides these firms with a tool to publicly convey their commitment to the social good. Business owners and managers can cite the firm's legal status as evidence when communicating with consumers, investors, communities, and other social enterprises. This study cannot explain how the law matters *within* a firm's operations, but it can reveal how benefit corporations active online *portray* and explain the law.

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<sup>237</sup> GRASS ROOTS CAP. MGMT., <http://www.grassrootscap.com> (last visited July 1, 2018).

<sup>238</sup> OR. MOBILE LAW., <http://www.oregonmobilelawyer.com/> (last visited Sept. 13, 2017). This firm now goes by the name Catalano Law, P.C. Since the original analysis, the website has been revised and now includes more information about the firm's benefit corporation status, including a detailed list of its positive impacts. *See* CATALANO LAW, P.C., <https://www.catalanolawpc.com> (last visited July 16, 2018).

Contrary to advocates' assertion that firms can use their benefit corporation status as market differentiation, most benefit corporations are not doing this, at least not in their online content.<sup>239</sup> This is surprising, especially given that an organization's website is one of the most important venues it has to advertise and explain itself to external audiences.<sup>240</sup> Close to three-quarters of benefit corporations active online (71%) make no mention of their legal status as a benefit corporation on their website. Nineteen percent mention their legal status briefly. Just 10% have an extensive discussion of being a benefit corporation. When benefit corporations do mention their legal status on their websites, they usually highlight it prominently, either on the home page or as a major feature under "About" (73%). For example, the (now inactive) "About" page for Kind Eye, which "curated" ethical personal care products for individuals and businesses, briefly stated the following: "We made a conscious decision to be a Massachusetts Benefit Corporation because we believe that a business needs to be about more than money. We need to care about our community and our environment in order to truly make a difference in the world."<sup>241</sup>

Some subsets of benefit corporations active online do more to advertise as benefit corporations. Of the benefit corporations that orient their business to other social enterprises, more than half (53%) publicize that they are benefit corporations on their websites. In addition, many older firms that incorporated first as regular corporations and then converted to benefit corporations after legislation passed communicate their legal form. Nearly half (49%) of these more established firms active online mention being benefit corporations, compared to 25% of firms that formed after legislation passed in their domicile state.

Some benefit corporations are also certified B Corps, and they prefer to highlight that certification. Fewer than 3% of all known benefit

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<sup>239</sup> CLARK & VRANKA, *supra* note 1, at 5 ("[E]ntrepreneurs that are 'sustainable,' 'green' or 'socially responsible,' may find that it is hard to distinguish themselves from other companies that make similar claims but don't actually behave as they advertise.").

<sup>240</sup> See Baldi, Bartel & Dukerich, *supra* note 118, at 474 ("[E]xternal stakeholders' initial impressions of organizations often come from their online presence.").

<sup>241</sup> *About*, KIND EYE, <http://www.kind-eye.com/about/> (last visited July 13, 2018).

corporations ever created (190 total) are currently certified as B Corps.<sup>242</sup> The rate of B Corp certification is higher among benefit corporations active online (12%). Yet benefit corporations that are certified B Corps almost always mention their B Corp status online (11%). In fact, they more often note just their B Corps certification alone (7%) rather than mention both their B Corp certification and their benefit corporation status (4%). The website for EO Products, which advertises “We make real products from real plants for real people,” is a striking example.<sup>243</sup> The site features numerous graphics-heavy, reader-friendly pages about the firm’s social and environmental mission, such as “Product Certification,” “Sustainable Manufacturing,” and “B Corp.” The first of the company’s three principles is “As a family owned B Corp, we put people and the planet before profits.”<sup>244</sup> EO’s benefit corporation status is never mentioned on the website.

In terms of their engagement in benefit corporation politics or activism, only a couple of benefit corporations active online indicate that they have ties to the larger benefit corporation law movement. Among them is the website services firm Canvas Host, which posts photographs of a January 2014 event where it was one of twenty-nine inaugural Oregon benefit corporations and an image of its inaugural benefit corporation certificate (as well as a now-removed photo of an employee registering at the Secretary of State’s office).<sup>245</sup>

These findings indicate numerous shortcomings of benefit corporation status. Many benefit corporation owners seem to care deeply about the benefits they provide, but their firm’s legal status appears to be far less important to them, at least in the public spotlight. In addition, benefit corporation status is not easy for many laypeople, including businesspeople without legal training, to explain. The terminology is confusing, especially given the similarities in the spelling and

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<sup>242</sup> See *B Corp Impact Data*, *supra* note 11.

<sup>243</sup> EO PRODUCTS, <https://www.eoproducts.com/catalog/category/view/s/values/id/153/> (last visited July 1, 2018).

<sup>244</sup> *Id.*

<sup>245</sup> *An Oregon Benefit Corporation*, *supra* note 132.

abbreviations of “benefit corporations” and “B Corps” (the “B” in B Corp stands for “Benefit”). Businesses and advocates sometimes use the misleading term “Certified Benefit Corporation” to describe certified B Corp firms, although that is less common now than earlier in the movement.<sup>246</sup> Of those benefit corporations that reference their benefit corporation status online, at least 11% inaccurately explain benefit corporations and B Corps or claim to be B Corps when they are not. For example, one organization states, “Benefit Corporations aka B Corps commit to public good.”<sup>247</sup> Others use unconventional language, such as “a Corporate Benefits company!”<sup>248</sup> Only a very small portion of benefit corporations active online (under 3%) post detailed, accurate educational information about benefit corporation law.<sup>249</sup> As these examples indicate, few benefit corporations try to educate their site visitors about benefit corporation law.

There are good reasons why a benefit corporation might publicize its B Corps certification. Doing so is easy. Unlike benefit corporation status, B Corps certification is well branded. B Corps have a recognizable logo, which certified B Corps often post on their websites alongside other third-party logos and certifications.<sup>250</sup> B Lab’s website is straightforward to use and engaging, with a separate web page for each certified B Corp that companies often link to. B Lab also has effectively designed and promoted slogans about social enterprise. Some benefit

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<sup>246</sup> See, e.g., Meghan French Dunbar, *What Are B Corps?*, CONSCIOUS MEDIA CO. (Jan. 3, 2015), <https://consciouscompanymedia.com/sustainable-business/what-are-b-corps/>; see also Munch, *supra* note 5, at 132 n.83.

<sup>247</sup> ER ASSIST, <http://www.erassist.com/> (last visited May 31, 2017). This text on the website has since been removed.

<sup>248</sup> See, e.g., *The Corporate American Dream (Dodge v. Ford)*, BNE PUB. (Apr. 5, 2016), <http://www.bnepublishing.com/corporate-american-dream-dodge-v-ford/>.

<sup>249</sup> See, e.g., *Frequently Asked Questions*, USAAUTOMOTIVEGIVESBACK.COM, <https://www.usautomotivegivesback.com/faq.html> (last visited July 1, 2018). This firm nonetheless conflates benefit corporation and B Corps.

<sup>250</sup> Organizations often post logos, badges, “seals of approval,” trustmarks, and other indicators of (purportedly objective) third-party endorsements or certifications to validate the legitimacy and authenticity of their business and the security of their services. See, e.g., K. Damon Aiken et al., *An International Investigation of Source Influence Effects of Internet Trustmarks*, 13 J. INTERNET COM. 89, 89–90 (2014).



corporations echo B Lab's language by discussing how they "use business as a force for good," even when not referring to their benefit corporation or B Corp status.<sup>251</sup> Some, such as EO Products, cut and paste sentences or passages from B Lab's web site.<sup>252</sup>

At the same time, these findings suggest that benefit corporations are not flagrantly using the law to greenwash. No companies mention their benefit corporation status without also asserting that they provide benefits (although the reality of their stated benefits may be questionable).

### G. Annual Benefit Reporting

Under the model benefit corporation legislation, firms are required to post on their website, if they have one, an annual benefit report that assesses their overall social and environmental performance against a third-party standard.<sup>253</sup> Most states statutes have a requirement of publicly posting a report, with Delaware the most noteworthy exception.<sup>254</sup> In this study, only 6% of benefit corporations that have a website or Facebook page and are incorporated in a state with a public posting requirement actually post their benefit report. Many of those reports do not reference a third-party standard. There are higher rates of reporting among benefit corporations that tailor their business to other social enterprises (18% of those active online post a benefit report) and

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<sup>251</sup> See, e.g., ROSEN, <http://rosenconvergence.com> (last visited July 1, 2018).

<sup>252</sup> See, e.g., *People Using Business as a Force of Good*, EO PRODUCTS, <https://www.eoproducts.com/eo-bcorp> (last visited July 1, 2018).

<sup>253</sup> MODEL BENEFIT CORPORATION LEGISLATION, *supra* note 1, § 401.

<sup>254</sup> J. Haskell Murray, *Corporate Forms of Social Enterprise: Comparing the State Statutes 1* (2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1988556](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988556). I updated Murray's chart, which was current as of January 15, 2015, to include six states that had passed benefit corporation legislation as of June 21, 2018 (ID, IN, KY, KS, TX, WI), using information from *State by State Status of Legislation*, *supra* note 6. Note that in addition to Delaware, three states (KY, MN, TX) do not require benefit corporations to make their benefits report publicly available. The following states require the public posting of a benefit report: AR, AK, CA, CO, CT, DC, FL, HI, ID, IL, IN, KS, LA, MD, MA, MO, NE, NV, NH, NJ, NY, OR, PA, RI, SC, UT, VA, VT, WV. The model legislation requires this, as well. MODEL BENEFIT CORPORATION LEGISLATION, *supra* note 1, §§ 401–402.

among older, more established benefit corporations (17% post a report, compared to 5% of more recently incorporated firms).

This finding of a 6% compliance rate overall corroborates and extends Murray's 2015 finding that just 8% of 100 benefit corporations active in four states made their benefit reports publicly available.<sup>255</sup> Murray identifies likely reasons for this noncompliance: business owners' lack of familiarity with statutory requirements, which is common at the onset of new laws; the small size of benefit corporations, as such firms tend to have very limited legal and financial resources; and the statutes' lack of enforcement mechanisms.<sup>256</sup> Furthermore, he surmises that social enterprise practitioners apparently do not view these reports as essential.<sup>257</sup> Only fourteen locales (thirteen states and DC) require benefit corporations to file their reports with the state government, and even fewer impose penalties for noncompliance with reporting requirements.<sup>258</sup> This points to the broader issue of the lack of mechanisms for protecting the rights of parties who are not shareholders, directors, or owners. As Murray reiterates, these benefit reports, which are supposed to be written using a third-party standard, are the key method for creating transparency.<sup>259</sup> However, annual reports currently are not a widely available resource for non-shareholders who want to keep benefit corporations accountable to their missions. Most benefit reports, if firms produce them, are best understood as branding and marketing, rather than assurance of good governance.<sup>260</sup>

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<sup>255</sup> See *Early Report*, *supra* note 81, at 33–35.

<sup>256</sup> *Id.* at 43–44.

<sup>257</sup> *Id.* at 43–46.

<sup>258</sup> *Id.* at 17, 52.

<sup>259</sup> *Id.* at 33 & n.35 (citing CLARK & VRANKA, *supra* note 1; William H. Clark, Jr., *The New Pennsylvania Benefit Corporation Law*, 84 PA. BAR ASS'N Q. 65, 69 (2013)).

<sup>260</sup> See also *Social Enterprise Innovation*, *supra* note 8, at 345, 360 (criticizing the lack of empirical data in benefit reports); Brent J. Horton, *Rising to Their Full Potential*, 9 HARV. BUS. L. REV. (forthcoming Winter 2018–2019) (manuscript at 28), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3195453](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3195453) (“[M]any benefit reports read more like advertisements full of fluff”).

### *H. But Are They Beneficial?*

Studying the firms that have become benefit corporations unavoidably raises the thorny topic of what, exactly, is beneficial. Are these businesses truly pursuing a social mission? Are they achieving that mission? Answering these questions ultimately requires first hand observational data, a thorough audit, or a rigorous third-party certification process. Otherwise, observers can never know what is really getting accomplished and what is window dressing. That said, this analysis raises important concerns that benefit corporation statutes fail to address. Of particular relevance, for this study, are the interconnected issues of how to assess if any given activity is indeed beneficial and how to conceptualize a firm's impact "as a whole."

Whether a benefit corporation is beneficial or not depends on the definition of "beneficial." Most states follow the model legislation by requiring the benefit corporation charter to identify a general public benefit and allowing the option of one or more specific benefits.<sup>261</sup> Again, the model legislation defines a general public benefit as "[a] material positive impact on society and the environment, taken as a whole, from the business and operations of a benefit corporation."<sup>262</sup> The text of the model legislation and the state statutes largely avoids defining what is beneficial.<sup>263</sup> It remains vague or jumps to specifics (although those tend to be vague, too). States' definitions of a general public benefit tend to be quite similar to the model legislation, although their definitions of specific benefits vary a bit more. Louisiana, for example, includes urban beautification and historic preservation as specific benefits, while Pennsylvania references economic development through the support of emerging technology firms.<sup>264</sup> A number of state statutes add language to contextualize those specific benefits.<sup>265</sup>

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<sup>261</sup> Heminway, *supra* note 72, at 619, 652.

<sup>262</sup> MODEL BENEFIT CORPORATION LEGISLATION, *supra* note 1, § 102.

<sup>263</sup> MODEL BENEFIT CORPORATION LEGISLATION, *supra* note 1, § 102.

<sup>264</sup> Heminway, *supra* note 72, at 663, 673 (citing LA. STAT. ANN. § 12:1803; 15 PA. STAT. AND CONS. STAT. ANN. § 3302).

<sup>265</sup> *Id.* at 620 n.40.

The complexity of defining “positive impact” becomes even more evident when we consider what benefit corporations actually say and do. The majority of benefit corporations active online claim that positive impacts are derived from their *business* (i.e., their products or services). Their emphasis on their beneficial business activity prompts questions about what counts as a beneficial product or service. Are the motorized scooters and wheelchairs sold by Colorado-based Best Priced Scooters intrinsically beneficial because they help consumers with limited physical mobility?<sup>266</sup> Cordan Electric designs, installs, and upgrades electrical systems in South Nevada; “affordable solar power” installation is among the many services it offers.<sup>267</sup> Does simply selling solar power, in a menu of other energy options, make the firm beneficial? Even the benefits of solar power are not entirely straightforward. When left unregulated, the process of manufacturing solar panels exposes workers, communities, and ecosystems to toxic chemicals such as lead and silicon tetrachloride, and old panels are not easily recycled.<sup>268</sup> This question about whether a product or service is inherently beneficial applies to firms in education, health care, and energy, in particular, but is not confined to those industries.

Assessments of whether a firm’s products and services are truly beneficial can be highly politicized. For example, Americans are deeply divided along partisan lines in terms of how they understand threats to security.<sup>269</sup> They would likely disagree about whether benefits are

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<sup>266</sup> See BEST PRICED SCOOTERS, <http://www.bestpricescootersandpowerwheelchairs.com/> (last visited July 1, 2018).

<sup>267</sup> CORDAN LLC ELECTRICAL SERVS., <http://cordanelectricllc.com/index.html> (last visited July 1, 2018).

<sup>268</sup> See, e.g., Dustin Mulvaney, *Solar Energy Isn’t Always as Green as You Think*, IEEE SPECTRUM (Nov. 13, 2014), <https://spectrum.ieee.org/green-tech/solar/solar-energy-isnt-always-as-green-as-you-think> (reviewing environmental risks in the life cycle of solar panels, from quartz mining to disposal).

<sup>268</sup> See also Callison, *supra* note 70, at 104 (“One man’s global warming is another’s agricultural crop enhancement—who is to say where ‘public benefit’ definitively lies?”).

<sup>269</sup> Conservatives and Republicans are more likely to feel they are threatened by external violence, terrorism, and culturally different groups. See, e.g., Jaime L. Napier et al.,

inherent to the business of Solutions Group International (SGI), which provides specialized security services, tactical training, threat assessments and anti-terrorism/counter-terrorism applications. The firm explains its benefits in terms of safety and social stability: “War, terrorism, criminal activity, workplace violence . . . the list of security-related worries preoccupying today’s society seems to grow each year. The world is changing. Complacency has never been wise, and at a time of increasing uncertainty, it has become outright dangerous and irresponsible.”<sup>270</sup> Similarly, given their divided opinions about safety and private gun ownership, Americans would likely have conflicting assessments about whether Oregon-based Kona’s Kustomz LLC—which sells, repairs, and customizes firearms—is a socially beneficial business.<sup>271</sup> Many people feel safer when they own a gun, but advocates for stricter gun regulation point to the deleterious consequences of having a gun at home, including higher rates of suicide and homicide as well as accidental shootings.<sup>272</sup> Lawmakers who supported benefit corporation legislation in states such as Arizona, Idaho, and New Hampshire, which have relaxed gun laws, might very well say that Kona’s Kustomz contributes to public and personal safety.

Then there is the issue of how to weigh a firm’s purported benefit against its other activities. The model legislation stipulates that “the concept of general public benefit requires consideration of all of the

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*Superheroes for Change: Physical Safety Promotes Socially (but Not Economically) Progressive Attitudes Among Conservatives*, 48 EUROPEAN J. SOC. PSYCHOL. 187 (2017).

<sup>270</sup> *About Solutions Group International*, SOLUTIONS GROUP INT’L, <http://www.solutionsgroupinternational.com/company.php> (last visited July 1, 2018).

<sup>271</sup> The firm’s Facebook page gives no indication of its social mission. *See Kona’s Kustomz LLC*, FACEBOOK, [https://www.facebook.com/konaz.kustomz/?fref=ps\\_result](https://www.facebook.com/konaz.kustomz/?fref=ps_result) (last visited July 1, 2018).

<sup>272</sup> Andrew Anglemeyer et al., *The Accessibility of Firearms and Risk for Suicide and Homicide Victimization Among Household Members: A Systematic Review and Meta-analysis*, 160 ANNALS INTERNAL MED. 101 (2014) (finding that gun ownership is correlated with higher risks of homicide and suicide, as well as accidental shootings); Mark Murray, *Poll: 58 Percent Say Gun Ownership Increases Safety*, NBC NEWS (Mar. 23, 2018), [https://www.nbcnews.com/news/amp/ncna859231?\\_\\_twitter\\_impression=true](https://www.nbcnews.com/news/amp/ncna859231?__twitter_impression=true) (reporting on a March 2018 NBC/Wall Street Journal opinion poll that found that 58% of Americans believe owning a personal gun improves ones safety).

effects of the business on society and the environment.”<sup>273</sup> High profile advocates of the legislation have elaborated some examples. A firm is “operating in a manner contrary to a benefit corporation,” write William Clark and Elizabeth Babson, if it is “reducing waste while increasing carbon emissions, or reducing both while remaining indifferent to the creation of economic opportunity for low-income individuals or underserved communities” or if it “gives ninety-five percent of its profits to charity . . . [but] were to use the lowest costs of production (e.g., child labor), source raw materials from non-sustainable sources, dump hazardous waste, etc.”<sup>274</sup> Critics of benefit corporation legislation argue that these definitions are too broad and poorly defined and, at once, too restrictive.<sup>275</sup>

Yet, statutes do not require benefit corporations to be beneficial in every respect. The benefit corporation must be doing at least one thing beneficial. Given the language of a positive impact “taken as a whole,” at what point is the full range of a firm’s activities egregiously harmful enough that its benefits do not merit a special status? Is a university educationally beneficial even if it leaves many students with useless credits and unsurmountable debt? Is an organic farm beneficial if it pays workers at exploitative rates? Firms are complex and might be beneficial in some ways but demonstrably harmful in others. According to the logic of benefit corporation statutes, harmful practices do not negate positive ones. Under law, SHL’s work on offshore oil and gas extraction does not “cancel out” its renewable energy contracting. AltSchool, which owns and runs private elementary schools in San Francisco and New York City, likely contributes to race-class segregation in schooling and the

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<sup>273</sup> MODEL BENEFIT CORPORATION LEGISLATION, *supra* note 1, § 102.

<sup>274</sup> Clark & Babson, *supra* note 2, at 841–42.

<sup>275</sup> See Justin Blount & Kwabena Offei-Danso, *The Benefit Corporation: A Questionable Solution to a Non-Existent Problem*, 44 ST. MARY’S L.J. 617, 634–35 (2013) (identifying differences in the interests of different stakeholders that would create an “almost irreconcilable conflict” for management); Callison, *supra* note 70, at 103 (arguing that the legislation should allow shareholders “the autonomy and freedom to pursue their own, self-defined ends and their own conception of the good”); *The Social Enterprise Law Market*, *supra* note 39, at 549 (describing criticisms of the general public benefit as too broad and inflexible).

siphoning of resources from the public schools that most Americans attend.<sup>276</sup> Yet its “personalized learning approach,” “diversity,” and “excellent, child-centered” education may be highly advantageous for its own students.<sup>277</sup> In these contexts, publicly identifying as a benefit corporation could have a “halo effect,” which leads consumers and other observers to evaluate a firm based on broad images or impressions, not fine-grained differences in its business or operations.<sup>278</sup>

The coding protocol for this study includes a final, summary question about whether the benefit corporation appears to be beneficial or not. Specifically, it asks whether a business is “logically or convincingly,” “arguably,” or “not logically or convincingly” a benefit corporation. My research team’s answers to the questions are highly subjective and interpretive. When looking at benefit corporations’ websites, some firms appear clearly beneficial or clearly not. This question was easiest to answer when the product or service was clearly beneficial (e.g., low-chemical household cleaners), when the firm claimed multiple benefits, and when it was a certified B Corp.

I cautiously surmise that half of the benefit corporations active online, and at most a fifth of all benefit corporations, are logically or convincingly beneficial. Bringing together this subjective assessment with the protocol question about whether benefit corporations appear operational narrows the pool even smaller. I infer that, based on their

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<sup>276</sup> See generally SEAN F. REARDON & JOHN T. YUN, PRIVATE SCHOOL RACIAL ENROLLMENTS AND SEGREGATION (2002), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/private-school-racial-enrollments-and-segregation> (showing that private schools in the United States are more racially segregated than their public counterparts, especially in the South and the West); Richard J. Murnane & Sean F. Reardon, *Long-Term Trends in Private School Enrollments by Family Income*, 4 AERA OPEN 1 (2018), <http://journals.sagepub.com/doi/abs/10.1177/2332858417751355> (explaining that private schools are an essential mechanism by which affluent families hoard opportunities for their children, and that class segregation via private schools deprives middle and lower income students’ opportunities to build relationships with affluent peers, which can confer long-range economic benefits, and it diverts affluent parents’ time, financial resources, and political capital from advocating for better public schools).

<sup>277</sup> *About*, ALTSCHOOL, <https://www.altschool.com/about-us#about-u> (last visited July 1, 2018).

<sup>278</sup> Lyon & Montgomery, *supra* note 59, at 228–29.

online content, 18% of all benefit corporations appear both operational and beneficial in at least one respect. Another 5% appear operational and arguably beneficial. Another 12% appear operational but not evidently beneficial. Likewise, I cautiously infer that the remaining 65% of all benefit corporations are inactive, have no online presence or an extremely limited online presence, or are not clearly operational. These assessments are tentative, based on limited information, and subject to bias.

## **VI. WHAT SHOULD BE DONE TO BETTER SUPPORT BENEFIT CORPORATIONS?**

The results of this study shed new light on the organizational dynamics of benefit corporations. Firms are implementing benefit corporation law in a variety of ways, with some carrying out the spirit of the law and others violating it. Many are not apparently putting the law to use. Further, many benefit corporations are undermining the broader goal of business-driven social responsibility. Legislators, advocates, and legal professionals should take heed. They should be clear about who is using benefit corporation law and how they are using it—how they are putting social enterprise law into action.

Those who wish to support benefit corporations should use systematic empirical research on the implementation of benefit corporation law. Some legal scholars who study benefit corporations have studied selective firms or have drawn from case studies and research conducted by trade, business, and advocacy groups.<sup>279</sup> While those studies and analyses often provide useful perspectives, they do not capture the broader field of benefit corporations. When researchers rely on familiar examples or convenience samples, they focus on already-successful and likely-to-be-successful businesspeople, such as those who have relationships with foundations, rather than the typical benefit

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<sup>279</sup> See, e.g., Brent J. Horton, *Rising to Their Full Potential: How a Uniform Disclosure Regime Will Empower Benefit Corporations*, 9 HARV. BUS. L. REV (forthcoming Winter 2018–2019) (manuscript at 21 n.13) (citing ALLIANZ, DUPONT, THE SKOLL FOUND. & SUSTAINABILITY, GROWING OPPORTUNITY: ENTREPRENEURIAL SOLUTIONS TO INSOLUBLE PROBLEMS (2007)), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3195453](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3195453).



corporation owner. Absent other data, there is no way to know if those examples are outliers or representative of broader trends.

Randomly sampled cases from a national population, as presented in this Article, are a reliable indicator of real-life benefit corporation activity. Empirical researchers also should use interviews and observations to qualitatively investigate what goes on *within* benefit corporations, the legal firms that advise them, and the government offices with which they interact. This research could reveal how businesspeople, attorneys, government officials, and consumers use benefit corporation law (or not) in the office, in the boardroom, in interactions with potential investors, in governance, and in their communities.

The findings generated by this systematic analysis point to three strategies for improving benefit corporation law and its implementation. The discussion incorporates relevant secondary research and suggestions for new empirical studies that could provide further insight.

#### *A. Tailor the Law and Advocacy to Small, New Firms*

It is very significant that the overwhelming majority of the known 7704 benefit corporations are new, small or very small, privately owned firms. This fact challenges the rhetoric of B Lab, which often characterizes benefit corporations as large or aggressively growing companies.<sup>280</sup> Those who promote, pass, and help firms implement benefit corporation law should tailor their responses appropriately to the businesses they want to serve.

In short, most of the needs of most benefit corporations will be similar to the needs of new, privately owned, small businesses. Accordingly, their needs will differ in important respects from larger, high-profile, established firms, such as Patagonia and People Against Dirty. Understanding the ownership structure of benefit corporations and their priorities for raising capital is crucial, given that benefit corporation proponents champion this legal innovation as protection

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<sup>280</sup> See, e.g., *Why Is Benefit Corp Right for Me?*, *supra* note 57 (“Benefit corps show investors and entrepreneurs from every industry what the future Fortune 500 looks and acts like.”).

from unreceptive shareholders, investors, and other firms looking to acquire businesses. Surveys and interviews with the owners of benefit corporations would be the ideal source of information on their needs. Absent that information, the existing data on smaller businesses and their owners can fill in some gaps. Under 2% of small businesses are publicly held.<sup>281</sup> Small, privately owned firms may have just one shareholder, i.e., the founder, or else a few known shareholders who may include family members or friends. Small businesses are more likely to raise funds through private placements, through which they can issue shares to select individuals and institutions.<sup>282</sup> This is a very different scenario than the dispersed ownership structure of larger publicly traded firms, whose stock is owned and traded by a wide range of institutions and individuals who normally do not have a close personal relationship with management.

Both proponents of benefit corporation law and law scholars routinely discuss the importance of venture capitalists and angel investors for capital formation for benefit corporations, or they assume anonymous stockholders.<sup>283</sup> But this is not supported by the facts of small business in general. For financing, smaller businesses rarely rely on venture or angel capital; those sources make up less than 2% of their business financing.<sup>284</sup> Most small business owners use their personal or family savings as their primary source of capital when starting or acquiring their business (57%) and when expanding or making

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<sup>281</sup> U.S. SMALL BUS. ADMIN., OFFICE OF ADVOCACY, FREQUENTLY ASKED QUESTIONS ABOUT SMALL BUSINESS 2 (2017) [hereinafter 2017 FAQs], <https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2017-WEB.pdf>.

<sup>282</sup> Chirantan Basu, *The Importance of Shareholders in Business*, CHRON (June 28, 2018), <https://smallbusiness.chron.com/importance-shareholders-business-20844.html>.

<sup>283</sup> See, e.g., Joan MacLeod Heminway, *To Be Or Not To Be (a Security): Funding For-Profit Social Enterprises*, 25 REGENT UNIV. L. REV. 299, 307–10 (2013) (explaining for-profit social enterprises' advantages and disadvantages when accessing financial capital); Yockey, *supra* note 38, at 816–17; Horton, *supra* note 260, at 25.

<sup>284</sup> “Angels” are accredited investors who provide small startups or entrepreneurs with financial backing. U.S. SMALL BUS. ADMIN., OFFICE OF ADVOCACY, SMALL BUSINESS FINANCE FREQUENTLY ASKED QUESTIONS (2016), [http://www.sba.gov/sites/default/files/Finance-FAQ-2016\\_WEB.pdf](http://www.sba.gov/sites/default/files/Finance-FAQ-2016_WEB.pdf).

improvements (22%), but most (57%) report that they are not trying to expand or make costly improvements (and, at least for non-employers, this is not for a lack of funds).<sup>285</sup> A Babson College survey of more established smaller employers (i.e., at least two years old, with four or more employees, with annual revenue over \$150,000) found that, when these firms applied for capital, they principally turned to banks and other financial institutions; more than 80% did.<sup>286</sup> They were four times more likely to turn to a financial institution than any other source. Few of these more established small businesses sought out angel investors or venture capitalists, and when they did, their success rates were low.<sup>287</sup> B Lab's catalogue of benefit corporations that have successfully raised capital from traditional investors contains only sixty-five firms in total.<sup>288</sup> Likewise, social investment firms do not normally narrow their focus to businesses with a social enterprise legal form.<sup>289</sup>

In other words, benefit corporation law appears to solve a problem related to raising capital that is not, in fact, a major obstacle for most mission-driven firms. According to Dana Brakman Reiser and Steven Dean, social enterprises struggle foremost with accessing *trustworthy* capital. A fledgling business might need, say, \$200,000 to start a commercial kitchen, and with that they need assure that investors will

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<sup>285</sup> *Id.* Only 1% of the owners of non-employer firms and 2% of owners of employer firms report that they wanted to expand or make capital improvements but could not obtain funding. *Statistics for All U.S. Firms by Sources Used to Finance Expansion or Capital Improvements by Industry, Gender, Ethnicity, Race, and Veteran Status for the U.S.: 2012*, U.S. CENSUS BUREAU, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited Aug. 6, 2017).

<sup>286</sup> BABSON COLLEGE, *supra* note 173, at 9–10.

<sup>287</sup> Fewer than 10% report that they sought out funds from an angel investor, and those that did received 9% of the amounts they requested. *Id.* Even fewer turned to venture capitalists, and they were uniformly unsuccessful. *Id.*

<sup>288</sup> *Investors in Benefit Corporations*, DATA.WORLD, <https://data.world/blab/investors-in-benefit-corporations> (last visited Aug. 6, 2018); see also *Benefit Corporations Raising Capital*, BENEFIT CORP., <http://benefitcorp.net/benefit-corporations-raising-capital> (last visited Aug. 6, 2018).

<sup>289</sup> J. Haskell Murray, *Social Enterprise and Investment Professionals: Sacrificing Financial Interests?*, 40 SEATTLE UNIV. L. REV 765, 777 n.68 (2017) (citing MARC J. LANE, SOCIAL ENTERPRISE: EMPOWERING MISSION-DRIVEN ENTREPRENEURS 188–201 (2011)).

not “pillage” their finances or sell out their mission if they become very profitable.<sup>290</sup> Yet benefit corporation owners apparently are not relying on the law to provide that assurance. Perhaps these owners reference their company’s legal form when they have conversations with investors, to try to figure out if an investor is trustworthy or to spark a conversation about values. But benefit corporation law, as written, is not designed centrally for their capital needs.<sup>291</sup>

The work experiences and demographics of American small businesses owners can also provide instruction for those seeking to support benefit corporation owners. Benefit corporation owners and smaller business owners likely share many similarities (although, again, survey or interview research is needed to demonstrate this definitively). Small businesses owners tend to be white men, middle aged or older (only 16% are under age thirty-five), and better educated than the American public.<sup>292</sup> Substantial portions of small businesses are owned by women (36%) and people of color (29%), but in smaller proportions than those groups’ representation in the population at large, while veterans are slightly overrepresented among small business owners (9%).<sup>293</sup> For many small businesses owners, especially non-employers (who comprise the vast majority of smaller businesses<sup>294</sup>), their business is a side project. Many work out of their home (60% of non-employers and 23% of smaller employers),<sup>295</sup> do not take any salary (30% of smaller employers), and do not rely on the business as their primary source of

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<sup>290</sup> REISER & DEAN, *supra* note 11, at 11.

<sup>291</sup> *Id.* at 20 (“[S]ocial enterprises cannot yet count on legal form to provide the assurances needed to access capital.”).

<sup>292</sup> U.S. SMALL BUS. ADMIN., OFFICE OF ADVOCACY, FREQUENTLY ASKED QUESTIONS ABOUT SMALL BUSINESS 2 (2014) [hereinafter 2014 FAQs], [https://www.sba.gov/sites/default/files/FAQ\\_March\\_2014\\_0.pdf](https://www.sba.gov/sites/default/files/FAQ_March_2014_0.pdf).

<sup>293</sup> *Id.*

<sup>294</sup> Approximately eighty percent of small businesses are non-employers. For a definition of non-employers, see *supra* note 138 and accompanying text.

<sup>295</sup> 2017 FAQs, *supra* note 281, at 3.

income (59% of non-employers).<sup>296</sup> Of the non-employers, 10% worked no hours per week on their business, and 42% worked less than twenty hours per week on it.<sup>297</sup> Employer firms tend to be small, especially at the beginning; start-ups, which are less than one year old, typically have six employees.<sup>298</sup> By definition, non-employers work on their own.

Trends in self-employment, as detailed in a series of recent reports by the U.S. Small Business Administration, provide some indications of the likely demographics of future benefit corporation entrepreneurs.<sup>299</sup> Not all self-employed individuals start new businesses, but the relationship between self-employment and entrepreneurship is strong.<sup>300</sup> Given current rates of self-employment, Millennials are less likely to become entrepreneurs than their older counterparts in the workforce (Generation X and Baby Boomers), suggesting fewer new businesses in the longer term.<sup>301</sup> Rural entrepreneurship is declining, too.<sup>302</sup> Meanwhile, self-employment of people over age sixty-two has increased somewhat.<sup>303</sup> With the aging of the Baby Boomer generation and longer life expectancies, entrepreneurship among seniors will likely become more important in coming years, at least temporarily, which could contribute to growth in new benefit corporations where they

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<sup>296</sup> *Survey of Business Owners and Self-Employed Persons, Statistics for Owners of Respondent Firms by Whether the Business Provided the Owner's Primary Source of Personal Income by Gender, Ethnicity, Race, and Veteran Status for the U.S.: 2012*, U.S. CENSUS BUREAU, [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=SBO\\_2012\\_00CSCBO05&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=SBO_2012_00CSCBO05&prodType=table) (last visited Aug. 6, 2018).

<sup>297</sup> *Id.*

<sup>298</sup> 2017 FAQs, *supra* note 281.

<sup>299</sup> For a collection of these reports, see *Issue Briefs*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/advocacy/issue-briefs> (last visited Aug. 6, 2018).

<sup>300</sup> DANIEL WILMOTH, THE ASCENT OF THE SENIOR ENTREPRENEUR 3 (Aug. 18, 2016), <https://www.sba.gov/sites/default/files/advocacy/Ascent-Senior-Entrepreneur.pdf>.

<sup>301</sup> DANIEL WILMOTH, THE MISSING MILLENNIAL ENTREPRENEURS (Feb. 4, 2016), [https://www.sba.gov/sites/default/files/advocacy/Millennial\\_IB.pdf](https://www.sba.gov/sites/default/files/advocacy/Millennial_IB.pdf).

<sup>302</sup> DANIEL WILMOTH, THE RETREAT OF THE RURAL ENTREPRENEUR (Sept. 29, 2017), <https://www.sba.gov/sites/default/files/advocacy/Ascent-Senior-Entrepreneur.pdf>.

<sup>303</sup> See WILMOTH, *supra* note 300, at 3.

live.<sup>304</sup> That growth could be further driven by immigrants, who are increasingly likely to start new businesses given their rising rates of self-employment.<sup>305</sup> The benefit corporation might have different appeal to (potential) business owners in each of these major demographic groups.

Thus, while the social enterprise movement has largely succeeded in achieving the passage of benefit corporation legislation, it is not clear what that means for entrepreneurs. What benefit corporation owners are doing is not the success that B Lab has imagined, in that major multinational corporations are not adopting the legal form. That said, the benefit corporation form seems to resonate with a small niche of business owners, discussed in the following section.

### *B. Treat the Legal Form as a Business Facilitator, Not Branding*

Another striking finding from this study is that most benefit corporations are not using their legal status for marketing purposes. It appears that many benefit corporation owners do not see the benefit corporation brand as meaningful. At least some portion likely does not understand what a benefit corporation is. Of those who do understand it, many apparently do not perceive their legal form as a selling point to attract consumers, customers, or investors.<sup>306</sup> They seem to care much more about announcing their businesses' benefits (real or imagined) than their legal form, at least in their online external communications.

What, then, is the benefit of the benefit corporation? It is quite possible that many business owners adopt the benefit corporation form not for ownership or marketing purposes but because it fits their self-image as an entrepreneur. Perhaps they see themselves as people working for the good of society and the environment, not a

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<sup>304</sup> *Id.* at 5–6.

<sup>305</sup> DANIEL WILMOTH, EXPLAINING THE EMERGENCY OF THE IMMIGRANT ENTREPRENEUR (Jan. 12, 2017), [https://www.sba.gov/sites/default/files/advocacy/Explaining\\_the\\_Emergence\\_of\\_the\\_Immigrant\\_Entrepreneur\\_508.pdf](https://www.sba.gov/sites/default/files/advocacy/Explaining_the_Emergence_of_the_Immigrant_Entrepreneur_508.pdf).

<sup>306</sup> This is not to say that benefit corporation owners keep their legal form a secret. Failure to disclose the benefit corporation form to prospective shareholders would probably constitute securities fraud that the courts would find to be actionable.

stereotypically heartless, greedy capitalist.<sup>307</sup> They may find the legal form affirming, for their own personal identities. This is probably especially true for entrepreneurs who emotionally identify with their work and see it as virtuous.<sup>308</sup>

In this case, benefit corporation law very well may boost entrepreneurship by motivating entrepreneurs. If entrepreneurs feel that the benefit corporation form resonates with their personal identities, then the law may be helping them to see themselves as businesspeople and their projects as valuable, worthwhile contributions to society. In scholarly terms, their legal consciousness—their everyday, commonsense understandings and uses of the law—may facilitate their hard work of launching and sustaining a business, by shaping their self-concept.<sup>309</sup> Interviews and ethnographic research with benefit corporation owners could verify and elaborate on this phenomenon.

Another advantage of the benefit corporation form is that it seems to encourage relationships among social enterprises. Again, 15% of benefit corporations active online have a primary or secondary benefit of working with other social enterprise or helping them generate capital, and these firms are much more likely to advertise that than their status as benefit corporations. This concentration of resources has great potential to fuel a supportive, thriving social enterprise ecosystem. That said, this might be the creation of a more insular network, rather than the movement of social enterprise into the mainstream business. The implication is that the benefit corporation, rather than being a new way to do business, is really about engendering a new cohort of businesses with a mission-driven focus.

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<sup>307</sup> For a catalogue of negative stereotypes of capitalists in popular culture, see *Capitalism is Bad*, TV TROPES, <https://tvtropes.org/pmwiki/pmwiki.php/Main/CapitalismIsBad> (last visited Aug. 2, 2018).

<sup>308</sup> Weber et al., *supra* note 193.

<sup>309</sup> See, e.g., PATRICK EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE 42–43 (1998).

*C. Raise the Threshold for Becoming a Benefit Corporation and Improve Oversight*

This study supports prior analyses that identify major problems, both actual and potential, with compliance with benefit corporation law. A key take-away of the findings is that too many of the wrong sorts of firms are becoming benefit corporations. This legal form seems to be *too* accessible, at least in some states. Over-adoption is diluting one of the original intended purposes of the benefit corporation: to serve as a reliable indicator of authentic social enterprise. In addition, the law's key mechanism of accountability is not working. Once firms incorporate as a benefit corporation or amend their existing charters, most flout a central provision of the law by not producing annual benefit reports.

Statutes should raise standards and require more accountability. Creating a higher threshold to becoming a benefit corporation is an important way to protect the integrity of the legal innovation. One option could be a wait period of a year or two before a firm can convert to the social enterprise form. It is encouraging that the older, more established firms active online are relatively more likely to post an annual benefit report (17% do) and are much more likely to appear to be both operating and offering logical benefits (74% compared to 40% of firms active online that formed after state legislation went into effect). A reasonable wait period, coupled with better government oversight and greater accountability, could transform the benefit corporation form into an achievement that firms work toward—a reward for their effort and a success. This is the case for B Corp certification (although the certification process entails far more rigorous oversight by B Lab than is reasonable to expect of Secretary of State offices, given budget limitations). Some firms that are working to become B Corps post about that goal on their website, pointing to their efforts to achieve certification as evidence of their commitment to their mission.

However, a wait period could be problematic if the benefit corporation form is indeed a meaningful spark that gets socially driven would-be entrepreneurs to start a business, as that advantage would be lost. Those aspiring business owners might see a one or two year wait as arbitrary and overly paternalistic, and they would lose out on the opportunity to use the benefit corporation form to protect and signal



their mission. Also, this strategy assumes that proponents should try to make the regulation of benefit corporations more like the certification of B Corps, the value of which is debatable given that each fills a different need and the B Corp certification process is far more resource intensive.

Another strategy for raising the bar to entry would be a two-prong approach that requires new business owners to more precisely specify their firm's benefits in their articles of incorporation (or related paperwork), coupled with more vetting by state government personnel. Statutes could stipulate that articles of incorporation need to include more substantive details on intended material benefits. They could require a description of the means by which the firm will deliver those benefits (i.e., products, direct services, indirect services, operations, philanthropy) and the intended beneficiaries. State personnel would need time and proper training to review firms' articles of incorporation. Regulators should recognize that, in the firm's first years, these most likely are *aspirational* benefits. This strategy, however, is not politically viable because it requires considerably more resources from state governments. The argument that more precise reporting would overly burden business owners is less compelling. The current situation demonstrates the hazards of allowing business owners to become benefit corporations without demonstrating that they understand the legal form.

Brent Horton proposes a uniform disclosure regime for benefit corporations, on the grounds that the lack of consistent reporting keeps away investors who want to be able to compare social enterprises using reliable data.<sup>310</sup> He calls for regulation by the U.S. Securities & Exchange Commission and common rules and standard measurements for benefit corporations across states.<sup>311</sup> Components of his proposal are compelling, such as rigorous SEC oversight and mandatory posting of annual reports on a centralized public website repository. Nonetheless, it focuses on downstream problems that pertain to established firms trying to raise capital. It is not tailored to the vast majority of benefit

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<sup>310</sup> Horton, *supra* note 260, at 35–44.

<sup>311</sup> *Id.* at 44.

corporations, nor does it address the fundamental problem—that the law makes it too easy for firms to adopt this legal form.

It is tempting to call for stricter requirements on annual reporting, to at least weed out firms that became benefit corporations but are not pursuing a social mission. Yet in this study, all Delaware benefit corporations active online and nearly all of those in New York indicate their beneficial activities, and neither of those state governments requires benefit corporations to file their annual reports with the state, much less impose a penalty for not doing so. Delaware does not require firms to distribute their reports to the public, either. This is further evidence that reporting is not a useful driver of compliance. There are certainly lessons to learn from the shrinking numbers of firms incorporating as benefit corporations in Nevada. The state did not revise its statutes nor did it even change its online interface for incorporating as a benefit corporation. Qualitative research on the relationships and interactions between those state governments and benefit corporations, including interviews with government staff, could identify effective state strategies that should guide legal and policy reforms.

The fact that no one, other than university professors, appears to be clamoring for benefit reports raises questions about the fundamental design of the law. Benefit corporation law presumes that shareholders will be a powerful enforcement tool. But, evidently, shareholders are not pushing back and asking for reports (assuming that, if a firm makes a report, the firm would post it on its website). This is a major signal of a problem with the regulatory regime. The massive underreporting by benefit corporations, combined with the lack of state oversight, raises the very real possibility that some firms are abusing benefit corporation law. For example, some companies might be using the legal form to try to hide financial losses.

This study's findings and analysis suggest that, at this time, advocates should not work to better brand the benefit corporation. Creating uniform branding, such as cross-state logo, would be difficult to do, given the federalism obstacles and the difficulty of getting states to coordinate. Furthermore, the problems with compliance need to be

addressed first. Otherwise, the authenticity of the benefit corporation form will be even further undermined.

## **VII. Conclusion**

Benefit corporation legislation offers an alternative legal form for business owners who view the traditional corporate legal structure as incompatible with their business objectives, values, and priorities. This novel study provides a unique window in the activities, and lack thereof, of all known firms that have become benefit corporations. It reveals important dynamics in firms' implementation of benefit corporation law. The field of benefit corporations is very heterogeneous, from their products and services to their industries to their stated benefits.

The findings of this study suggest that U.S. benefit corporation legislation has generated innovation and has served a subset of firms. Many firms have fully embraced the benefit corporation concept and have married it to their organization's identity and business. A smaller set of firms uses their benefit corporation form to publicly validate their firm's identities as social enterprises. One positive outcome is that the benefit corporation form appears to support (or at least not hamper) the emergence of a cohort of interconnected social enterprises.

However, the field of U.S. benefit corporations is mostly full of inactivity, activity that is not socially beneficial, and some questionable activity. A considerable number of benefit corporations are subverting and undermining the integrity of the legal innovation. The likely causes are the lack of accountability mechanisms in statutes, an apparent lack of legal knowledge among many business owners, the difficulties of explaining benefit corporation status, and perhaps intentional manipulation. More research is needed to understand how directors, boards, and attorneys understand and make use of benefit corporation law in their businesses and operations and also to understand how state governments are overseeing benefit corporation incorporation and reporting.

Absent better mechanisms for accountability and enforcement, firms that should not be benefit corporations will continue to become benefit corporations and stay benefit corporations, with little or no

repercussions. This will continue to dilute the authenticity, trustworthiness, and transformative potential of the benefit corporation.

**APPENDIX A.****Number of Known Benefit Corporations by State, as of July 2018 (7,704 total)**

State	Number of Known Benefit Corporations
AR	13
AZ	10
CA	247
CO	603
CT	67
DC	12
DE	931
FL	35
GA	1
HI	14
ID	14
IL	49
IN	5
KY	1
LA	12
MA	67
MD	121
MN	37

State	Number of Known Benefit Corporations
MT	1
NE	2
NH	54
NJ	5
NV	1362
NY	1447
OR	2028
PA	88
RI	8
SC	16
TN	3
TX	0
UT	36
VA	0
VT	0
KS	0
WV	0

## APPENDIX B

### Protocol for Online Content Analysis for U.S. Benefit Corporations Study

\* indicates required field

#### The Basics

\* 1. Coder Name:

\* 2. Date coded:

\* 3. Firm name:

\* 4. Sample Wave

2015

2017

\* 5. Case ID:

\* 6. State of Incorporation:

#### Information from the State Government's Business Entities Database

\* 7. Date company formed (01/01/0001 if unknown):

8. Date company became a benefit corporation (if available):

\* 9. Incorporated before or after state legislation went into effect

Before

After

Other/Unknown

**10. Status in database**

- |   |  |
|---|--|
| <input type="checkbox"/> Active               | <input type="checkbox"/> Revoked                       |
| <input type="checkbox"/> Default              | <input type="checkbox"/> Terminated                    |
| <input type="checkbox"/> Delinquent           | <input type="checkbox"/> No info- Fee required         |
| <input type="checkbox"/> Dissolved            | <input type="checkbox"/> No info- Site not functioning |
| <input type="checkbox"/> Good Standing        | <input type="checkbox"/> No info- Not in database      |
| <input type="checkbox"/> Inactive             | <input type="checkbox"/> No info provided by SOS       |
| <input type="checkbox"/> Not in Good Standing | <input type="checkbox"/> Other (please specify)        |

**11. Contact information: names of key individuals and title (director, president, benefits director, etc), address, phone and email if available. If multiple addresses are noted, include all:**

**12. Type of Benefit Corporation (if listed)**

- Benefit Corporation
- Benefit LLC
- Other (please specify):

**Key Organizational Characteristics****\* 13. Appears active? – *select one***

- Yes, identifiable with detail
- Yes, identifiable but can only tell industry and/or product/service
- No, not active or no info on the web (other than being listed in directories as a registered company)
- No, but it was active in an earlier round of coding

**14. URL:****15. Contact info (from website), for follow-up:****16. Product or service sold (brief description):**

**17. Detailed description of product/service sold (quotes, including slogans, headlines, with URLs):**

**18. Upload one image of logo, products/services, or other key info****19. Industry- 2nd order (most general)**

- Accommodation and Food Services (72)
- Administrative and Support Services (56) (e.g., security, cleaning, landscaping)
- Arts, Entertainment, and Recreation (71) (not places where people sleep or that also sell food/beverages)
- Agriculture (11)
- Construction (23)
- Educational Services (61) (e.g., schools, training centers)
- Environment
- FIRE (Finance, Insurance, Real Estate) (52-53)
- Health Care and Social Assistance (62)
- Information, Communication, & Technology (51)
- Manufacturing (31-33)

- Professional Service (54)
- Repair and Maintenance (81 subset), (e.g. automotive repair, salons)
- Transportation and Warehousing
- Wholesale/Retail (42,44,45)
- Other Nonprofit-Type Services (81 subset), e.g. religious, grant making, fundraising, civic, political, labor union, social advocacy, organizations that represent members (like trade associations, farmers markets)
- Unclear
- Other:

## 20. Industry- 1st order (more specific)

- Accommodation (e.g., hotel) - - - Accommodation and Food Services
- Food service (e.g., restaurant) - - - Accommodation and Food Services
- Cleaning - Administrative and Support Services
- Debt collection - Administrative and Support Services
- Security - Administrative and Support Services
- Other - Administrative and Support Services
- Arts, Entertainment, and Recreation (not places where people sleep or that also sell food/beverages)
- Farming - - - Agriculture
- Other - - - Agriculture
- Construction (e.g., regular or green building)
- Educational Services (e.g., schools, training centers)
- Energy (e.g., solar energy installation) - - - Environment
- Transportation (car or bike share) - - - Environment
- Waste Management (recycler, waste treatment) - - - Environment
- Financial Service (e.g. investment company) - - - FIRE
- Insurance (e.g. retirement plan) - - - FIRE
- Real estate (e.g. real estate property developers) - - - FIRE
- Health Care and Social Assistance
- Communication (e.g., wired telecommunications) - - - Information
- Media (e.g. book publishers) - - - Information
- Technology (e.g., software publishers) - - - Information
- Other (e.g. social networking site) - - - Information
- Clothing - - - Manufacturing
- Food (e.g. coffee) - - - Manufacturing
- Household/personal goods (e.g. organic soap) - - - Manufacturing
- Medicine/Medical diagnostic equipment - - - Manufacturing
- Office supplies - - - Manufacturing
- Wood/Paper products - - - Manufacturing
- Architectural/engineering - - - Professional Services
- Accounting (e.g., CPA office) - - - Professional Services
- Computer systems and design - - - Professional Services
- Consulting (e.g., management consulting) - - - Professional Services
- Design (e.g., interior) - - - Professional Services
- Fundraising (e.g., for a certain cause) - - - Professional Services
- Legal (e.g., law firm) - - - Professional Services
- Logistics - - - Professional Services
- Marketing/advertising - - - Professional Services
- Scientific research & development - - - Professional Services
- Other professional service (e.g., employment placement) - - - Professional Services
- Repair and Maintenance, e.g. automotive repair



- Transportation and Warehousing - - - Transportation and Warehousing
- Trucking - - - Transportation and Warehousing
- Clothing and sporting goods - - - Wholesale/Retail
- Electronics and appliances - - - Wholesale/Retail
- Plants (e.g., nursery) - - - Wholesale/Retail
- Food - - - Wholesale/Retail
- General retailer (e.g., Target) - - - Wholesale/Retail
- Home Goods (e.g., furniture, gardening equipment) - - - Wholesale/Retail
- Medicine/Health/Personal Care - - - Wholesale/Retail
- Office - - - Wholesale/Retail
- Other wholesale/retail(e.g., online shopping such as Amazon) - - - Wholesale/Retail
- Other Nonprofit-Type Services (81 subset), e.g. religious, grant making, fundraising, civic, political, labor union, social advocacy, organizations that represent members (like trade associations, farmers markets)
- Unclear
- Other:

### 21. Size of Organization

- Large company (500+ employees)
- Medium company (100-499 employees)
- Small company (10-99 employees)
- Micro company (1-9 employees or no employees)
- Can't tell size

### 22. Primary scope of activity

- Local
- Regional
- National
- International
- Unclear

### 23. Comments on the company (including change in name):

#### Stated Benefits

### 24. Emphasis of stated benefits

- Environmental benefits
- Social benefits (includes health)
- Both environmental and social benefits
- Benefits are unclear or not stated

### 25. Discussion of social/env'l benefits on website?

- Yes - extensive
- Yes - brief (1-2 sentences)
- None

### 26. Social/env'l commitment- is it part of the company's identity?

- The center of the company's identity** - e.g. Under "About," it prominently identifies as a socially/environmentally responsible company. It's difficult to imagine the company not identifying as responsible/beneficial given how much that is emphasized. Also, the company convincingly characterizes its main

product/service as beneficial.

- One important component of the company's identity** - The company mentions its benefits and/or being a social enterprise in a visible location but doesn't hammer you over the head with it. The company's main product/service is convincingly beneficial, although they may not describe it that way.
- Secondary to the company's identity** -The company mentions its benefits and/or being a social enterprise very briefly (e.g., 1-2 sentences) and/or not prominently, e.g., not on the home page and/or you have to dig a little to find that text. The company's main product isn't clearly and distinctively beneficial.
- Not part of the company's identity at all**

Paste key text on identity with URL(s). See "Who We Are" and "About" section. If applicable, include and label Mission Statement:

### 27. Stated Beneficial Activities (primary) - *select one*

- HEALTH/WELL BEING (e.g. health care delivery, fresh food)
- BASIC NEEDS (e.g., water, sanitation)
- EDUCATION (e.g. training, universities)
- ENVIRONMENT: Protect/restore the natural world
- ENVIRONMENT: Reduce human impacts
- ECONOMY: Increase capital flow to social enterprises
- ECONOMY: Actively work with other social enterprises or with firms on their corporate responsibility initiatives
- ECONOMY: Restructure economic relationships (e.g., fair trade)
- ECONOMY: Build a local economy
- ECONOMY: Promote econ development in undeveloped areas (e.g. rural, poor countries)
- ECONOMY: Made in the U.S.A.
- ECONOMY: Freedom from/alternative to corporate power
- EMPLOYEES: Worker or producer-owned cooperative
- EMPLOYEES: Pay workers well/fair wages
- EMPLOYEES: Treat workers well (e.g. meaningful work)
- EMPLOYEES: Give workers stock options
- EMPOWER/SERVE: The disadvantaged/underserved (e.g. poor, people of color)
- EMPOWER/SERVE: Women
- EMPOWERMENT: Promote workforce diversity
- EMPOWERMENT: Equal opportunity/anti-discrimination
- COMMUNITY: Philanthropy and/or volunteering
- COMMUNITY: Foster civil society/community/relationships
- COMMUNITY: Promote the arts
- COMMUNITY: Promote diversity
- COMMUNITY: Promote science/advancement of knowledge (i.e. basic research)
- GOVERNANCE: Encourage responsible industry practices
- GOVERNANCE: Transparent internal company operations
- Clearly harmful activities (such as dirty energy, military equipment)
- Unclear social or env'l benefits or None

Rewrite CAPITALIZED word and paste text examples/quotes with URL:

**28. Stated Beneficial Activities (secondary) - select all that apply but not the primary one**

- HEALTH/WELL BEING (e.g. health care delivery, fresh food)
- BASIC NEEDS (e.g., water, sanitation)
- EDUCATION (e.g. training, universities)
- ENVIRONMENT: Protect/restore the natural world
- ENVIRONMENT: Reduce human impact
- ECONOMY: Increase capital flow to social enterprises
- ECONOMY: Actively work with other social enterprises or with firms on their corporate responsibility initiatives
- ECONOMY: Restructure economic relationships (e.g., fair trade)
- ECONOMY: Build a local economy
- ECONOMY: Promote econ development in undeveloped areas (e.g. rural, poor countries)
- ECONOMY: Made in the U.S.A.
- ECONOMY: Freedom from/alternative to corporate power
- EMPLOYEES: Worker or producer-owned cooperative
- EMPLOYEES: Pay workers well/fair wages
- EMPLOYEES: Treat workers well (e.g. meaningful work)
- EMPLOYEES: Give workers stock options
- EMPOWER/SERVE: The disadvantaged/underserved (e.g. poor, people of color)
- EMPOWER/SERVE: Women
- EMPOWERMENT: Promote workforce diversity
- EMPOWERMENT: Equal opportunity/anti-discrimination
- COMMUNITY: Philanthropy and/or volunteering
- COMMUNITY: Foster civil society/community/relationships
- COMMUNITY: Promote the arts
- COMMUNITY: Promote diversity
- COMMUNITY: Promote science/advancement of knowledge (i.e. basic research)
- GOVERNANCE: Encourage responsible industry practices
- GOVERNANCE: Transparent internal company operations
- Unclear social or env'l benefits or None
- Clearly harmful activities (such as dirty energy, military equipment)

For a few of the selections, rewrite CAPITALIZED text and paste text examples/quotes with URL:

**19. How does the firm deliver its benefits?**

- PRODUCTS (including technology)
- SERVICES – DIRECT
- SERVICES—INDIRECT
- OPERATIONS (e.g. manufacturing process, supply chain, treatment of workers)
- PHILANTHROPY/Fundraising/Community Service (e.g. proceeds donated, money raised, time committed)
- Unclear
- Not applicable because no benefits stated
- Other:

**30. Critical commentary on capitalism**

- Critique of the PROFIT-ONLY model (e.g., puts profits and shareholders above all else, not balanced)
- Critique of the STATUS QUO/business-as-usual (e.g., consumerism)
- Critique of CHARITY

- Critique of POVERTY
- Critique of WEALTH overaccumulation/economic INEQUALITY
- Critique of SLAVERY
- Other
- No critical commentary on capitalism

For each CAPITALIZED option selected, paste text examples/quotes with URL:

**31. Religious references (mission and/or benefits)**

- No
- Yes (paste text with URL):

**On Being a Benefit Corporation**

**32. Mentions being a benefit corporation**

- Extensive discussion
- Brief mention (e.g., one sentence or just boilerplate/technical text)
- No mention

**33. Annual report posted (save on Dropbox, too)**

- Yes- detailed
- Yes - bare bones
- Yes- available via the SOS
- No

If yes, year of annual report:

**34. If yes to 33, upload Annual Benefit Report**

**35. Is a B Corporation? (also check bcorporation.net)**

- Yes, and posts B Impact report (score card)
- Yes, mentioned it on web site
- Yes, but does not mention it on web site
- No

**36. If the company prominently highlights its status as a benefit corporation and/or a B Corporation as part of its identity, what status is highlighted?**

- B Corporation
- Benefit corporation
- Both B Corporation + benefit corporation
- Neither/no status is highlighted prominently

**37. If B Corp:**

Impact Assessment Score:

Year:

**38. Motivations for being a B Corp (based on B Lab answers)**

Paste the text from B Lab's web site with URL:

**39. Key text on being a benefit corporation, B Corp, or both (include URL)- *focus on the company's Home and About pages and, in its annual report (if any), the letter/first page, headers, and any specific discussion elsewhere***

- Just combines discussion of benefit corporations and B Corps (accuracy is irrelevant, given the usage)
- Combines + inaccurately distinguishes benefit corporations (law) and B Corps (certification)
- Combines + accurately distinguishes benefit corporations (law) and B Corps (certification)
- Does not connect benefit corporations (law) and B Corps (certification)
- Not applicable (no reference to being a benefit corp or B Corp)

Paste all/substantial text on being a benefit corporation and/or B Corp with URL:

**40. If state provides access to legal filings, does the company have a filing that describe its benefits? (For CA, CO, FL, ID, MA, RI, UT, VA only as of Oct 2017)**

- Yes (if so, save PDF)
- Yes, but it is the state's boilerplate text or generic text
- No

Legal filings' text on benefits:

**Law and Social Enterprise**

**41. The company's accuracy with law on benefit corporations**

- It INACCURATELY describes being a B Corporation in terms of law
- It makes OTHER INACCURATE statements on law
- It provides ACCURATE explanations of benefit corporation law
- It provides clear, DETAILED explanations of benefit corporation law
- It makes no statements on law

Paste text with URL:

**42. The company's involvement with legal mobilization (activism involving benefit corporation law)**

- It has helped to PUSH for or endorsed benefit corporation legislation.
- It has been an ACTIVE participant in public events around law.
- It has shown no involvement in legal mobilization.
- Other (please specify)

Paste examples/quotes of text on law or discussion of the company's involvement in legal mobilization, with URL:

**43. Any other text on law or discussion of the company's involvement in law:**

**Workforce Demographics (best guess)**

(often is not clear, use visual image, name, and any other clues)

**44. Images of leadership are on website**

- Yes
- No

**45. Racial Identity of CEOs/Executive Directors/Presidents (#)**

**White:**

**Racial minority:**

**Unclear racial identity:**

**46. Gender Identity of CEOs/Executive Directors/Presidents (#)**

**Male:**

**Female:**

**Unclear gender identity:**

**47. Images of other employees, directors, advisors are on website**

Yes

No

**48. Racial Identity of other employees, directors, advisors are on website (#)**

**White:**

**Racial minority:**

**Unclear racial identity:**

**49. Gender Identity of other employees, directors, advisors are on website (#)**

**Male:**

**Female:**

**Unclear gender identity:**

**50. Type of company (summary subjective assessment)**

- Operational company that is logically or convincingly a benefit corporation
- Operational company that is arguably a benefit corporation
- Operational company that is not logically or convincingly a benefit corporation
- Plausible company that is logically or convincingly a benefit corporation (Plausible = it's not even clear the company is doing anything, e.g. it could just be a web site with random text)
- Plausible company that is arguably a benefit corporation
- Plausible company that is not logically or convincingly a benefit corporation
- Undeveloped website/some ideas posted online