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# All Public, No Benefit: Holding Oklahoma Public Benefit Corporations Accountable

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> *I think more and more people want to use services from companies that believe in something beyond simply maximizing profits.*[1]

### *Introduction*

Larry Fink, BlackRock Chairman and CEO, declared that his firm will allocate capital investments to companies with environmentally sustainable business models.[2] As the world's largest institutional investor, BlackRock's shift signals a watershed moment for corporate action on climate change.[3] Similarly, consumers increasingly prefer environmentally and socially responsible companies.[4] A company's long-term viability will therefore depend on its ability to distinguish itself through positive social and environmental impacts.[5]

BlackRock's paradigmatic shift comes amid an extraordinary movement in corporate law.[6] In the past decade, Oklahoma[7] and thirty-seven other

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1. Facebook, Inc., Registration Statement (Form S-1), at 68 (Feb. 1, 2012), http://tinyurl.com/fb-sec-reg-stmt [hereinafter Facebook Registration Statement].

2. Laurence D. Fink, *A Fundamental Reshaping of Finance*, BLACKROCK, https://www.blackrock.com/us/individual/larry-fink-ceo-letter (last visited Mar. 22, 2021).

3. Laurel Wamsley, *World's Largest Asset Manager Puts Climate at the Center of Its Investment Strategy*, NPR (Jan. 14, 2020, 3:22 PM ET), https://www.npr.org/2020/01/14/796252481/worlds-largest-asset-manager-puts-climate-at-the-center-of-its-investment-strate.

4. KARL HALLER, JIM LEE & JANE CHEUNG, IBM CORP., MEET THE 2020 CONSUMERS DRIVING CHANGE: WHY BRANDS MUST DELIVER ON OMNIPRESENCE, AGILITY, AND SUSTAINABILITY 5 (June 2020), https://www.ibm.com/downloads/cas/EXK4XKX8.

5. *See* Mark R. Kramer, *Larry Fink Isn't Going to Read Your Sustainability Report*, HARV. BUS. REV. (Jan. 20, 2020), https://hbr.org/2020/01/larry-fink-isnt-going-to-read-your-sustainability-report (observing that "companies that differentiate themselves through positive social impact are thriving" and a future where capital is increasingly allocated to those companies "is not far away").

6. *See* J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 4 (2012) [hereinafter Murray, *Choose Your Own Master*] (noting that many states have recently "passed statutes to facilitate the creation of social enterprises," such as low-profit limited liability company statutes and benefit corporation statutes).

7. Oklahoma recently passed a public benefit corporation law, which went into effect on November 1, 2019. *See* Steve Metzer, *Benefit Corporations Allowed Under New State*

states[8] passed statutes creating a new entity called a "public benefit corporation." Where a traditional for-profit corporation's central purpose is to maximize profits,[9] public benefit corporations may pursue profits for shareholders but must create environmental and social benefits for non-corporate stakeholders.[10]

The growth of public benefit corporations, however, has not been without criticism.[11] Over ninety percent of existing public benefit corporations nationwide do not disclose mandatory statements to the public detailing how the board of directors pursued general and specific public benefits.[12] Despite states' widespread adoption of public benefit statutes, scholars warn of the entity's futility and potential for deception.[13] However, this Note argues that enacting Oklahoma's public benefit statute is a significant endeavor. But if it is to capitalize on the social entrepreneurship movement, Oklahoma must provide its public benefit corporations with precise, modest, and reliable performance and communication standards.

This Note will propose modifications to the Oklahoma Benefit Corporation Act. Part II will explore traditional corporate purpose standards and the rise of social entrepreneurship. Part III will set forth and discuss Oklahoma's annual statement requirements and a public benefit corporation's duty to maximize public benefits. Considering the trend of social and environmental entrepreneurship, investment, and consumption, Part IV will propose two modest amendments to Oklahoma's law that will

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*Law*, J. REC. (Apr. 29, 2019), https://journalrecord.com/2019/04/29/benefit-corporations-allowed-under-new-state-law/.

8. *State by State Status of Legislation*, BENEFIT CORP., https://benefitcorp.net/policymakers/state-by-state-status (last visited Mar. 22, 2021).

9. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 711–12 (2014); *see also* Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders.").

10. 18 OKLA. STAT. § 1206(A) (Supp. 2020).

11. *See, e.g.*, Elizabeth Schmidt, *New Legal Structures for Social Enterprises: Designed for One Role but Playing Another*, 43 VT. L. REV. 675, 713–19 (2018) (arguing that public benefit corporations cannot accomplish their goals).

12. J. Haskell Murray, *An Early Report on Benefit Reports*, 118 W. VA. L. REV. 25, 26 (2015) [hereinafter Murray, *An Early Report*].

13. *See id.*; *see also* Kennan El Khatib, Comment, *The Harms of the Benefit Corporation*, 65 AM. U. L. REV. 151, 174–84 (2015); Mohsen Manesh, *Introducing the Totally Unnecessary Benefit LLC*, 97 N.C. L. REV. 603, 621–24 (2019); Joan MacLeod Heminway, *Let's Not Give Up on Traditional For-Profit Corporations for Sustainable Social Enterprise*, 86 UMKC L. REV. 779, 800–01 (2018); Kevin V. Tu, *Socially Conscious Corporations and Shareholder Profit*, 84 GEO. WASH. L. REV. 121, 170–71 (2016).

ensure accountability and transparency. Finally, Part V will consider how such modifications will help Oklahoma race to the top of the social and environmental equity markets.

## *II. Corporate Purpose and Social Entrepreneurship*

Throughout history, states have invented new business entities to capitalize on tax benefits and limit legal liability.[14] Just as when legislators adopted limited partnership statutes to ameliorate various issues in general partnership law, the invention of the public benefit corporation is a direct response to perceived deficiencies in general corporate law.[15] This Part outlines those deficiencies and how the social entrepreneurial movement addresses them.

### *A. Traditional Corporate Purpose Requirements*

Public benefit corporations represent a return to original corporate governance practices.[16] During the late eighteenth and early nineteenth centuries, states conceptualized corporations as "quasi-public entities, 'designed to serve a social function for the state.'"[17] State legislatures would award an exclusive corporate charter that authorized incorporation only if the corporation continually served the public and accounted for its actions.[18] As America's economy expanded, states substituted the exclusive charter system for general incorporation statutes that authorized

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14. *See* Daniel S. Kleinberger, *Two Decades of "Alternative Entities": From Tax Rationalization Through Alphabet Soup to Contract as Deity*, 14 FORDHAM J. CORP. & FIN. L. 445, 448 (2009) (highlighting the driving forces behind the limited liability company, limited liability partnership, and limited liability limited partnership).

15. *See* Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269, 276 (2012).

16. *Id.* at 272.

17. Citizens United v. FEC, 558 U.S. 310, 427 (2010) (Stevens, J., concurring in part and dissenting in part) (quoting Oscar Handlin & Mary L. Handlin, *Origins of the American Business Corporation*, 5 J. ECON. HIST. 1, 22 (1945)).

18. Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1144–45 (2012) (citing MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 65–108 (1992)).

incorporation without a mandatory public purpose.[19] Under these statutes, corporations could pursue "any lawful purpose or business."[20]

Eventually, courts[21] limited directorial latitude to pursue any lawful business purpose.[22] For example, in *Dodge v. Ford Motor Co.*,[23] the Michigan Supreme Court commanded majority shareholder and director Henry Ford to contribute cash to minority shareholders instead of using the excess capital to benefit society.[24] In oft-quoted dicta, the court declared that "[a] business corporation is organized and carried on primarily for the profit of stockholders. The powers of the directors are to be employed for that end."[25] Directors enjoy discretion in managing business affairs, but directors cannot deliberately limit profits.[26]

Despite the lofty language in *Dodge*, the business judgment rule limits the applicability of the shareholder primacy doctrine.[27] Under the business judgment rule, courts presume that, in deciding business matters, corporate directors acted "on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[28] *Shlensky v. Wrigley*[29] is a classic illustration of this rule. In *Shlensky*, minority shareholders sued on behalf of the Chicago Cubs to install lights at Wrigley

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19. *See* Ian Speir, *Corporations, the Original Understanding, and the Problem of Power*, 10 GEO. J.L. & PUB. POL'Y 115, 152 (2012).

20. 1 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 4:1 (3d ed. 2010); *see also* 1A WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 102 (rev. ed. 2010).

21. *See, e.g.*, eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33 (Del. Ch. 2010) (explaining that the defendants had failed to prove that their decision would have ultimately "translate[d] into increased profitability for stockholders").

22. Legal scholars and economists remain deeply divided on whether shareholder primacy is required. For in-depth analysis, see Murray, *Choose Your Own Master*, *supra* note 6, at 5–9.

23. 170 N.W. 668 (Mich. 1919).

24. *Id.* at 684–85.

25. *Id.* at 684; *see also eBay*, 16 A.3d at 33 (noting that the defendants had not proved that their decision "translates into increased profitability for stockholders").

26. *Dodge*, 170 N.W. at 684.

27. *See, e.g.*, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954–55, 959 (Del. 1985) (applying the business judgment rule, wherein the court defers to the board's decision if it can be attributed to a rational business purpose, and sustaining the board's reasonable business judgment); Beard v. Love, 2007 OK CIV APP 118, ¶ 29, 173 P.3d 796, 804 (describing the business judgment rule).

28. *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 124 (Del. Ch. 2009).

29. 237 N.E.2d 776 (Ill. App. Ct. 1968).

Field.[30] The shareholders argued that installing lights at Wrigley Field would boost attendance.[31] The Chicago Cubs' president refused to install lights because he believed that light pollution would deteriorate the quality of the surrounding neighborhood.[32] The Illinois Court of Appeals ruled that the business judgment rule affords directors protection to consider non-shareholder interests if there is a rational connection between that consideration and shareholder value.[33] It further stated that courts are "without authority to substitute [their] judgment for that of the directors."[34] With shareholder approval, traditional corporate directors support various philanthropic and environmental causes.[35] Ultimately, courts rarely order directors to act for shareholders.[36]

Despite traditional corporate law's flexibility and liability protections, public benefit proponents insisted on a new business entity that ensured comprehensive liability protection and effective branding.[37] Even though the business judgment rule presumes that directors act in the best interests of the company, critics of the shareholder primacy doctrine wanted a business entity that eliminated the risk of derivative litigation for placing profits and social benefits on equal footing.[38] Social and environmental entrepreneurs also wanted a business form that mandated, rather than

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30. *Id.* at 777.

31. *Id.* at 778.

32. *Id.*

33. *See id.* at 780.

34. *Id.* at 779 (quoting Helfman v. Am. Light & Traction Co., 187 A. 540, 550 (N.J. Ch. 1936)); *see also* Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 170–71 (2008) ("[C]ourts shield directors from liability under the business judgment rule so long as any plausible connection can be made between the directors' decision and some possible future benefit, however intangible and unlikely, to shareholders.").

35. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 712 (2014).

36. *See* Jonathan R. Macey, *A Close Read of an Excellent Commentary on* Dodge v. Ford, 3 VA. L. & BUS. REV. 177, 180 (2008); WILLIAM T. ALLEN, REINIER KRAAKMAN & GUHAN SUBRAMANIAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 298 (3d ed. 2009).

37. *See, e.g.*, El Khatib, *supra* note 13, at 166–69.

38. *See* WILLIAM H. CLARK, JR. & 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 10 (Jan. 18, 2013) (unpublished white paper), https://benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf.

tolerated, altruistic missions.[39] As markets grew to prefer "green" products and services, traditional corporations capitalized by marketing with socially responsible terms—without accountability measures—to lure consumers.[40] To prevent these issues, social and environmental entrepreneurs began brainstorming a new entity that capitalized on environmental branding while guaranteeing accountability.[41]

*B. The Dawn of Social Entrepreneurship*

Before the advent of the public benefit corporation in 2010, however, a non-profit entity tried to resolve the issues plaguing corporations by inventing a new certification method.[42] In 2006, a Pennsylvania non-profit named B Lab created a method of certifying corporations that sufficiently benefited non-corporate stakeholders.[43] To obtain this certification, a corporation must state in its articles of incorporation that it will consider non-shareholder constituencies in its decision-making processes.[44] After analyzing the corporation's historical decision-making processes, B Lab would certify the corporation as a "B Corp," thus signaling to shareholders, consumers, and stakeholders that the corporation actively pursues altruistic missions.[45]

Only four years after B Lab created B Corp certification, B Lab used its industry proficiency to craft its "Model Legislation."[46] The Model

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39. *Id.*

40. *Id.* at 2–3.

41. *Id.*

42. Dana Brakman Reiser, *Benefit Corporations - A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 594 (2011).

43. For a detailed explanation of the B Corp certification process, see Ke Cao, Joel Gehman & Matthew G. Grimes, *Standing Out and Fitting In: Charting the Emergence of Certified B Corporations by Industry and Region*, *in* HYBRID VENTURES 7–9 (Andrew C. Corbett & Jerome A. Katz eds., 2017) (vol. 19 in the *Advances in Entrepreneurship, Firm Emergence and Growth* series). I note that B Corps and public benefit corporations are distinct entities. B Corps are traditional for-profit corporations that B Lab has certified. Public benefit corporations are legal entities formed under state law.

44. *About Certified B Corps*, CERTIFIED B CORP., https://bcorporation.net/about-b-corps (last visited Mar. 22, 2021); *see also* David Adelman, *Understanding B Corporations*, G & B L., LLP (Aug. 6, 2010), https://gblawllp.com/2010/08/06/understanding-b-corporations/ (describing the history of B Corps).

45. *About Certified B Corps*, *supra* note 44.

46. *See* BENEFIT CORP., MODEL BENEFIT CORPORATION LEGISLATION WITH EXPLANATORY COMMENTS (Apr. 17, 2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf.

Legislation, which is identical to B Lab's certification procedures blended with state enabling legislation, authorized the formation of a new business entity.[47] With its Model Legislation finished, B Lab lobbied other states to adopt the public benefit corporation.[48]

These lobbying efforts took corporate law by storm.[49] After it drafted the Model Legislation, B Lab successfully petitioned Maryland to become the first state to pass a benefit corporation statute in 2010.[50] Oklahoma closed the 2010s as the thirty-sixth state to adopt public benefit corporation legislation inspired by B Lab's Model Legislation.[51] In all states with public benefit corporation statutes, public benefit corporations have an express purpose of creating general public benefits.[52] In most states, public benefit corporations must submit annual benefit reports to their shareholders and post them on their public websites.[53] The annual benefit report includes societal and environmental performance assessments under a third-party standard.[54]

Despite proponents' claims of altruistic corporate purpose and accountability, public benefit corporations are not living up to the hype in three ways. First, over ninety percent of existing public benefit corporations do not disclose required annual statements to the public.[55] Second, the language found in state statutes regarding a director's duty to consider various interests lacks specificity.[56] Third, statutes give public benefit corporations by and large absolute deference to create benefit performance standards.[57] And like its counterparts, Oklahoma's statute falls into similar traps.

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47. *See* Reiser, *supra* note 42, at 594.

48. *See* Murray, *Choose Your Own Master*, *supra* note 6, at 21–22.

49. *Cf. State by State Status of Legislation*, *supra* note 8 (observing that thirty-seven states have passed benefit corporation legislation).

50. *See* Act of Apr. 13, 2010, 2010 Md. Laws 980 (codified as amended at MD. CODE ANN., CORPS. & ASS'NS §§ 5-6C-01 to -08 (West 2020)).

51. *See* Metzer, *supra* note 7; *see also* Mark J. Loewenstein, *Benefit Corporation Law*, 85 U. CIN. L. REV. 381, 381 n.1 (2017) (collecting over thirty state statutes).

52. Loewenstein, *supra* note 51, at 383.

53. *See, e.g.*, MD. CODE ANN., CORPS. & ASS'NS § 5-6C-08(a), (c)(1).

54. *Id.* § 5-6C-08(a)(2).

55. *See* Murray, *Choose Your Own Master*, *supra* note 6, at 26.

56. *See, e.g.*, 18 OKLA. STAT. § 1207 (Supp. 2020).

57. *See* Metzer, *supra* note 7.

### *III. Oklahoma Benefit Corporation Act*

In November 2019, Oklahoma became the thirty-sixth state to adopt public benefit corporation legislation.[58] By that time, Oklahoma had at its disposal almost a decade of other states' experience. Yet Oklahoma decided to mirror the language of other states' statutes.[59] Because of this similarity, Oklahoma will largely encounter the same headaches as other states.

This Part analyzes the Oklahoma Benefit Corporation Act's accountability and transparency provisions. These provisions grant directors almost unlimited latitude to adopt benefit assessment standards and disclosure requirements.[60] Due to this discretion, Oklahoma public benefit corporations risk permitting the very greenwashing that public benefit proponents sought to prevent in the first place.

#### *A. Accountability – Duty to Consider Various Interests*

The Oklahoma Benefit Corporation Act (OBCA), which "reflects a clear standard of purpose, accountability and transparency for public benefit"[61] requires that public benefit corporations "have a purpose of creating general public benefit."[62] Additionally, the "certificate of incorporation of a [public] benefit corporation may identify one or more specific public benefits" that it plans on pursuing.[63] Thus, the OBCA offers public benefit corporate directors more latitude than directors of a traditional corporation.[64] Like traditional corporations, public benefit corporate shareholders generally monitor the board of directors.[65] When shareholders challenge business decisions in the corporate context, directors enjoy substantial protection under the business judgment rule.[66] This protection might expand given the

58. *Id.*
59. *See infra* note 102.
60. *See* 18 OKLA. STAT. § 1207.
61. Metzer, *supra* note 7.
62. 18 OKLA. STAT. § 1206(A).
63. *Id.* § 1206(B).
64. *See* Brett H. McDonnell, *Committing to Doing Good and Doing Well: Fiduciary Duty in Benefit Corporations*, 20 FORDHAM J. CORP. & FIN. L. 19, 38 (2014).
65. *See* Dana Brakman Reiser, *Regulating Social Enterprise*, 14 U.C. DAVIS BUS. L.J. 231, 234 (2014).
66. *See, e.g.*, Shlensky v. Wrigley, 237 N.E.2d 776, 780 (Ill. App. Ct. 1968) (upholding the board's decision not because it was correct but because it may have furthered a business purpose and there was no allegation of fraud, illegality, or conflict of interest in the making of the decision).

dual purpose of the public benefit corporation.[67] That is because where corporate directors must justify business decisions on the grounds of long-term profit maximization, public benefit corporate directors can argue that their decisions promote profits and both general and specific public benefits.[68]

Even with extensive legal protection, the OBCA imposes an additional duty on public benefit directors. Besides the duty to create a general public benefit, the OBCA charges directors to "*consider* the effects of any action or inaction upon" six classes of corporate and non-corporate stakeholders.[69]

The OBCA does not define how directors are to prioritize these various stakeholders.[70] Even while the OBCA tasks directors with producing general public benefits,[71] directors have near absolute discretion in prioritizing, for example, the interests of shareholders, the public benefit corporation's employees, the local community, and the global environment.[72]

The OBCA also does not define "consider" as used within the statute.[73] When a statute does not expressly define a word, courts presume the word has its plain or ordinary meaning.[74] To "consider" merely involves careful

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67. *See* McDonnell, *supra* note 64, at 61–62 (stating that directors of public benefit corporations may have a lesser probability of liability for certain business decisions).

68. *See id.*

69. 18 OKLA. STAT. § 1207(A)(1) (Supp. 2020) (emphasis added).

70. *See id.* § 1207(A)(3) (providing that the directors "[n]eed not give priority to a particular interest or factor . . . unless the benefit corporation has stated in its certificate of incorporation its intention to give priority to certain interests or factors"); J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345, 354 (2014) [hereinafter Murray, *Social Enterprise Innovation*]; *see also* Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007, 1027–34 (2013) (discussing governance difficulties that public benefit boards of directors will likely face).

71. 18 OKLA. STAT. § 1206(A).

72. *See id.* § 1207(A)(3).

73. *See id.* § 1202 (providing definitions for key terms used within the Oklahoma Public Benefit Corporation Act but providing no definition for the term "consider"); *see also id.* § 1207(A)(1).

74. *See, e.g.*, Smith v. United States, 508 U.S. 223, 228 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."); I.T.K. v. Mounds Pub. Schs., 2019 OK 59, ¶ 21, 451 P.3d 125, 136; *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 436 (2d ed. 2013).

thought.[75] Applying the plain meaning rule of statutory interpretation, public benefit directors need only "think about carefully"[76] or take into consideration the interests of non-corporate stakeholders before deciding to act purely for the shareholder's best interests. Under such a framework, if the minutes of a public benefit corporation's board meeting highlighted some "careful thought" about the impacts on the local climate, low-income neighborhoods, or some other identified stakeholder, then a court would not question the board's business judgment. While a director's duty to consider various interests is subject to the duty of good faith,[77] such a low decision-making threshold contravenes the OBCA's accountability purpose.

### *B. Transparency – Annual Benefit Statements*

The OBCA also seeks to ensure that public benefit directors remain transparent to shareholders and stakeholders. As drafted, the OBCA departs from other public benefit statutes in two ways.[78] First, directors enjoy significant discretion to adopt public benefit assessment standards.[79] Second, the OBCA does not demand public benefit corporations publish their annual benefit statements to the public.[80] These departures are not mere technicalities; public benefit directors can set the rules of the game and ensure that those who they promise to serve cannot question their performance. On this basis, the OBCA's transparency measures ring hollow.

#### *1. Performance Assessment Standards*

The OBCA grants public benefit directors a virtual blank check in adopting performance assessment standards. To be sure, public benefit directors must deliver an annual report to shareholders detailing the

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75. *See Consider*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/consider (last visited Mar. 23, 2021).

76. *Id.*

77. *See* 18 OKLA. STAT. § 867(2) (providing that directors are not shielded from liability for actions or omissions that are not in good faith).

78. *See* Brent J. Horton, *Rising to Their Full Potential: How a Uniform Disclosure Regime Will Empower Benefit Corporations*, 9 HARV. BUS. L. REV. 101, 106 n.26 (2019) (explaining that Delaware's Benefit Corporation Law, which has similar provisions to Oklahoma's, differs from the laws adopted by most states in material ways).

79. *See* 18 OKLA. STAT. § 1207(A)(1), (3).

80. *See id.* § 1210(A) (providing that benefit corporations shall give shareholders an annual statement concerning the "corporation's promotion of general public benefit and any specific public benefit identified in the certificate of incorporation").

corporation's performance.[81] Besides the objectives the board adopts as its general public benefit, the statement must also include: "The standards the board of directors has adopted to measure the corporation's progress in promoting general public benefit and any specific public benefit."[82] While the statement must include "[o]bjective factual information . . . regarding the corporation's success in meeting the objectives,"[83] the directors supply the objective information based on the standards they adopt.[84] In essence, the directors set the height of the hurdle they must clear.

States with statutes like the OBCA are witnessing widespread underreporting.[85] Even those public benefit corporations that submit annual benefit statements provide only self-promotional and elusive information.[86]

Consider Patagonia's 2019 Annual Benefit Corporation Report.[87] In that report, Patagonia highlighted its efforts to build its products without "unnecessary harm."[88] To be sure, much of its report highlights concrete benefits—fifty-two percent of its materials by weight are made of recycled materials.[89] But much of its report also leans on slippery language—reducing energy use throughout its supply chain, expanding regenerative organic agriculture as a source of its materials, and using innovative fleece blends.[90] Perhaps Patagonia follows through on the standards set in its annual reports. The lack of certainty, though, undermines any assurance of transparency.

To help alleviate this problem, some states require public benefit corporations to adopt a third-party performance assessment standard.[91] Yet, a third-party standard is not an ironclad solution; a standard that adopts subjective and minimal evaluation metrics is still prone to keeping the greenwashing door open.[92]

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81. *Id.*
82. *Id.* § 1210(A)(1)–(2).
83. *Id.* § 1210(A)(3).
84. *Id.*
85. Murray, *An Early Report*, *supra* note 12, at 34.
86. *See* Murray, *Social Enterprise Innovation*, *supra* note 70, at 360.
87. PATAGONIA, ANNUAL BENEFIT CORPORATION REPORT FISCAL YEAR 2019, https://www.patagonia.com/on/demandware.static/-/Library-Sites-PatagoniaShared/default/dwf14ad70c/PDF-US/PAT_2019_BCorp_Report.pdf (last visited May 21, 2021).
88. *Id.* at 6.
89. *Id.* at 8.
90. *Id.*
91. *See, e.g.*, MINN. STAT. ANN. § 304A.301(3) (West 2020).
92. Reiser, *supra* note 42, at 610–11.

On the other hand, states with stringent performance assessment standards are seeing widespread compliance.[93] Minnesota is an insightful example. Minnesota requires its public benefit corporations to choose an independent third-party performance standard and file the statement with the secretary of state.[94] The secretary of state revokes the public benefit corporation's status for failure to file the statement.[95] In its benefit statement, a public benefit corporation must explain "any circumstances that hindered efforts to pursue or create general public benefit."[96] Not coincidentally, Minnesota has one of the highest compliance rates in the United States.[97]

*2. Only Shareholder Disclosures*

When it enacted the OBCA, Oklahoma stressed that the public benefit designation reflects a clear standard of transparency.[98] To that end, the OBCA provides: "A benefit corporation shall annually provide *its shareholders* with a statement as to the corporation's promotion of general public benefit and any specific public benefit identified in the certificate of incorporation."[99] Unlike other states, Oklahoma public benefit corporations do not file their annual statements with the secretary of state.[100]

As the recognized corporate law pacesetter,[101] Delaware significantly influenced Oklahoma's legislature.[102] Neither the Delaware statute nor the

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93. Maxime Verheyden, *Public Reporting by Benefit Corporations: Importance, Compliance, and Recommendations*, 14 HASTINGS BUS. L.J. 37, 71–73 (2018).

94. MINN. STAT. ANN. § 304A.301(1), (3) (West 2020).

95. *Id.* § 304A.301(5).

96. *Id.* § 304A.301(3)(2)(ii)(C).

97. Verheyden, *supra* note 93, at 71–73.

98. Metzer, *supra* note 7.

99. 18 OKLA. STAT. § 1210(A) (Supp. 2020) (emphasis added).

100. *Compare id.*, *with* MINN. STAT. ANN. § 304A.301(1), *and* MASS. GEN. LAWS ANN. ch. 156E, § 16(d) (West 2020).

101. *In re* Prudential Ins. Co. Derivative Litig., 659 A.2d 961, 969 (N.J. Super. Ct. Ch. Div. 1995).

102. *Compare* 18 OKLA. STAT. § 1210(A) ("A benefit corporation shall annually provide its shareholders with a statement as to the corporation's promotion of general public benefit and any specific public benefit identified in the certificate of incorporation."), *with* DEL. CODE ANN. tit. 8, § 366(b) (West 2020) ("A public benefit corporation shall no less than biennially provide its stockholders with a statement as to the corporation's promotion of the public benefit or public benefits identified in the certificate of incorporation and of the best interests of those materially affected by the corporation's conduct.").

Oklahoma rule requires public disclosures.[103] On that basis, only eight percent of Delaware public benefit corporations voluntarily disclosed annual benefit reports to the public.[104] Until the OBCA is modified, Oklahoma stakeholders will not receive benefit statements unless public benefit corporations voluntarily disclose them.

Even amid widespread public benefit underreporting, Oklahoma deliberately chose not to require public benefit statements.[105] The OBCA, as originally drafted, stated, "A benefit corporation shall post all of its benefit reports on the public portion of its website, if any."[106] The draft legislation also required delivery of the annual statement to the Secretary of State.[107] Ultimately, Oklahoma rejected both measures.[108]

The OBCA's failure to identify a standard baseline will continue the trend of widespread underreporting and reporting of self-promotional information.[109] If a public benefit board adopts objectively low standards and opts not to disclose its performance to the public, it will have an unfair advantage against other public benefit corporations that adopt higher standards and disclose performance.[110] This is because the general public will have no way of evaluating which company in fact benefits stakeholders. Perhaps private ordering would be a sufficient check against public benefit corporations with minimal performance standards.[111] But without amendments to the OBCA, consumers do not have the tools to hold public benefit corporations accountable to their missions.

## *IV. Amendment Proposals*

Despite lofty intentions, the public benefit corporation experiment has produced underwhelming results. To date, fewer than 4,000 exist in the United States.[112] Comparatively, over three million corporations were

103. *See supra* note 102.
104. Verheyden, *supra* note 93, at 74–75.
105. Murray, *An Early Report*, *supra* note 12, at 43–44.
106. H.B. 2423, 57th Leg., 1st Sess., at 24 (Okla. 2019).
107. *Id.* at 25.
108. *See* 18 OKLA. STAT. § 1210(A) (Supp. 2020).
109. *See* Murray, *An Early Report*, *supra* note 12, at 43–44.
110. *See* Ronnie Cohen & Gabriele Lingenfelter, *Money Isn't Everything: Why Public Benefit Corporations Should Be Required to Disclose Non-Financial Information*, 42 DEL. J. CORP. L. 115, 124 (2017).
111. *See* Horton, *supra* note 78, at 119.
112. Metzer, *supra* note 7.

formed in the short time period from 2004 to 2007.[113] If Oklahoma is to capitalize on the burgeoning sustainability market, it must give public benefit directors a well-defined accountability standard and publicize benefit statements. This Part recommends modifications to the boards of directors' duty to various interests and annual benefit statement standards.

*A. Accountability – Corporate Purpose Statement*

Public benefit corporations exist to serve stakeholders.[114] Statutory ambiguity, however, allows directors to avoid serving these stakeholders. On the one hand, proponents of statutory ambiguity argue that the statute's open-ended language leaves room for private ordering and organizational flexibility.[115] These advocates reason that the public benefit statutes remain ambiguous to encourage market creativity, prevent a chilling effect, and promote widespread incorporation.[116] Market forces, they claim, will be a sufficient check against public benefit corporations that fail to produce profits and public benefits.[117] Accordingly, market forces will encourage social entrepreneurs to be innovative in creating public benefits.[118]

But the argument for ambiguity is premised on consumers and investors having sufficient information to make informed decisions. Public benefit corporations are a newer business entity with unreliable reporting mechanisms.[119] These mechanisms cannot provide accessible or valuable information.[120] Without readily available information, market forces are inept at distinguishing between those public benefit corporations that live up to their clear standard of purpose and those that do not.[121] The OBCA's

113. *See* Rodney D. Chrisman, *LLCs Are the New King of the Hill*, 15 FORDHAM J. CORP. & FIN. L. 459, 476 (2010).

114. Briana Cummings, Note, *Benefit Corporations: How to Enforce a Mandate to Promote the Public Interest*, 112 COLUM. L. REV. 578, 608 (2012).

115. *See id.* at 593.

116. *Id.*

117. *Id.*

118. *Id.*; *see also* William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 846 (2012) ("[M]arket forces will shape the landscape of third-party standards utilized by benefit corporations.").

119. Michael A. Hacker, Note, *"Profit, People, Planet" Perverted: Holding Benefit Corporations Accountable to Intended Beneficiaries*, 57 B.C. L. REV. 1747, 1779 (2016).

120. *See id.*

121. *See* Murray, *An Early Report*, *supra* note 12, at 34 (stating that less than ten percent of benefit corporations had released a benefit report). Cashless shops are an apt illustration. When New York City stores began rejecting cash from customers, market forces promptly

vague language increases learning costs, decreases consumer confidence in public benefit purpose, and undermines accountability.[122] Even with greater legal protections, aspiring social entrepreneurs will arguably be more confident forming a traditional corporation rather than an untested, uncertain, and unreliable public benefit corporation.[123]

Oklahoma public benefit directors are free to prioritize their firms' objectives.[124] When drafting the OBCA, Oklahoma legislators and other proponents emphasized clear accountability standards as a distinguishing feature of the new entity.[125] Yet, public benefit directors may pursue shareholders' interests at the expense of stakeholders.[126] On the other hand, restricting directorial discretion could impede strategy development and limit public benefit maximization.[127] This is because directors, more than state legislatures, are aware of the individual issues that their companies face.[128] Restricting a public benefit board's freedom to prioritize would hamstring its creativity in dealing with unique issues. And such restrictions would likely dissuade businesses from forming as public benefit corporations, thus minimizing public benefits.

Listing a clear corporate purpose statement in an entity's organizing documents presents a best-of-both-worlds solution. In addition to general incorporation requirements, public benefit certificates of incorporation need only "state that it is a benefit corporation."[129] A corporate purpose statement would list a public benefit corporation's stakeholder prioritization.[130] The list would put stakeholders on notice of who the public benefit corporation

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persuaded the New York City Council to ban shops from refusing cash. *See* Ed Shanahan & Jeffery C. Mays, *New York City Stores Must Accept Cash, Council Says*, N.Y. TIMES (Jan. 23, 2020), https://www.nytimes.com/2020/01/23/nyregion/nyc-cashless-ban.html. Distinguishing between cash-friendly and cashless stores is simple. Public benefit corporations are less readily distinguishable.

122. *See* Murray, *An Early Report*, *supra* note 12, at 26, 42.

123. El Khatib, *supra* note 13, at 186–88 (highlighting TOMS Shoes as an illustration of social entrepreneurs preferring the traditional corporate form over the public benefit corporation).

124. *See* 18 OKLA. STAT. § 1207(A)(3) (Supp. 2020).

125. Metzer, *supra* note 7.

126. *See* Murray, *An Early Report*, *supra* note 12, at 44–45.

127. *See* Joseph W. Yockey, *Does Social Enterprise Law Matter?*, 66 ALA. L. REV. 767, 802–03 (2015).

128. *Id.*

129. *See, e.g.*, 18 OKLA. STAT. § 1203(A).

130. *See* Murray, *Choose Your Own Master*, *supra* note 6, at 29–30.

considered in its decision-making processes. Doing so would set clear societal expectations while also guiding directors.

But publicly listing stakeholder prioritization could increase state enforcement costs. States currently struggle to enforce public benefit missions.[131] However, publicizing stakeholder prioritization would signal to markets how the firm plans on operating. Market participants could tailor their expectations to the firm's priorities, and firms could capitalize on market participants' values. Even if courts rarely enforced these stakeholder prioritizations, an informed market that prefers socially and environmentally sustainable firms would be a sufficient check against rogue directors.[132]

*B. Transparency – Publicized Benefit Statements*

The OBCA's failure to identify a standard baseline will arguably continue the trends of widespread underreporting and reporting of self-promotional information.[133] If a public benefit board adopts objectively low standards, it will have an unfair advantage against public benefit corporations that impose higher standards.[134] Public benefit supporters highlight the value of market forces in shaping director behavior.[135] However, market forces cannot serve as a check against firms unless they have informative data based on quantitative, standardized metrics.[136]

A public benefit corporation's power to adopt its own assessment standards reveals the difficulty of enforcing the OBCA's transparency requirement. Oklahoma's deliberate choice not to mandate public benefit statements compounds the problem. Substantive transparency will require publicized benefit statements based on objective information.

Current benefit assessment statements do not assure business transparency.[137] Many benefit statements are self-promotional, unreliable, and inconsistent.[138] King Arthur Flour's report is illustrative.[139] King Arthur

131. *See* Murray, *An Early Report*, *supra* note 12, at 33–34.
132. *See* Yockey, *supra* note 127, at 801–03; Murray, *An Early Report*, *supra* note 12, at 29–30.
133. *See* Murray, *An Early Report*, *supra* note 12, at 50–51.
134. *See* Cohen & Lingenfelter, *supra* note 110, at 124.
135. Cummings, *supra* note 114, at 610.
136. *See* Horton, *supra* note 78, at 119.
137. *See* Murray, *An Early Report*, *supra* note 12, at 26.
138. *See* Murray, *Social Enterprise Innovation*, *supra* note 70, at 359–60.

Flour, one of the most well-known public benefit corporations, stated in its 2018 benefit report that it rolled out a "Supplier Code of Conduct" to "hold suppliers accountable for social [and] environmental performance."[140] Like Patagonia, King Arthur Flour might follow through on its promises listed in its report. Yet, the glaring issue in the report is not performance, but prose; the language fails to assure consumers and stakeholders of tangible benefits. King Arthur Flour's report highlights a public benefit corporation's ability to use subjective language to greenwash its practices. Consumers and investors need impartial, clear, and accessible benefit data if they are to make informed decisions.

This is especially true when an entity considers reorganizing as a public benefit corporation to bolster public relations in the face of criminal charges. Pharmaceutical juggernaut Purdue Pharma is the most notorious example. Beginning in the mid-2000s, dozens of states and the U.S. Department of Justice commenced civil and criminal investigations of Purdue and its billionaire owners for causing the national opioid epidemic.[141] In the face of these civil and criminal investigations, Purdue filed for Chapter 11 bankruptcy on September 15, 2019.[142] After extensive investigation and posturing, Purdue and the U.S. Department of Justice entered into an agreement.[143] In addition to accepting responsibility for misconduct, the settlement agreement "will pave the way for Purdue to submit a plan of reorganization to the bankruptcy court that will transfer all of Purdue's assets to a public benefit company, and ultimately deliver more than $10 billion in value to claimants and communities."[144]

As King Arthur Flour's 2018 Report demonstrates, however, Purdue can advertise its efforts on behalf of these claimants and communities with

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139. KING ARTHUR FLOUR, BENEFIT CORPORATION ANNUAL REPORT 2018, https://www.kingarthurbaking.com/sites/default/files/2019-06/2018-bcorp-report.pdf (last visited Mar. 30, 2021).

140. *Id.* at 5.

141. Jan Hoffman & Katie Benner, *Purdue Pharma Pleads Guilty to Criminal Charges for Opioid Sales*, N.Y. TIMES (Oct. 21, 2020), https://www.nytimes.com/2020/10/21/health/purdue-opioids-criminal-charges.html.

142. Jan Hoffman & Mary Williams Walsh, *Purdue Pharma, Maker of OxyContin, Files for Bankruptcy*, N.Y. TIMES (Sept. 15, 2019), https://www.nytimes.com/2019/09/15/health/purdue-pharma-bankruptcy-opioids-settlement.html.

143. *See* Hoffman & Benner, *supra* note 141.

144. Press Release, Purdue, *Purdue Pharma Reaches Agreement with U.S. Department of Justice* (Oct. 21, 2020), https://www.purduepharma.com/news/2020/10/21/purdue-pharma-reaches-agreement-with-u-s-department-of-justice/.

minimal oversight. To be sure, Purdue's case differs because these claimants have the utmost interest to obtain "free or at cost" opioid addiction treatment.[145] But the blank check granted to Purdue Pharma, King Arthur Flour, and other public benefit corporations ensures that they may dress up how they are fulfilling their stated missions without actually following through.

Impact-weighted financial accounts present a sensible solution. These accounts would standardize the language by creating line items on public benefit corporations' financial statements.[146] The impact-weighted financial accounts would specifically list the efforts of creating public benefits. These efforts would be converted to monetary values, listed on the public benefit corporation's books, and disclosed to both shareholders and non-corporate stakeholders identified in the certificate of incorporation.[147]

The proliferation of large-scale capital markets necessitated the development of a standard financial accounting infrastructure.[148] Likewise, the importance of intangibles like environmental sustainability, community involvement, and social well-being requires a reliable reporting framework.[149] Modern capital and consumer markets increasingly value environmental and social sustainability.[150] The annual benefit statement allows all public benefit corporations to adopt divergent and subjective reporting standards.[151] Impact-weighted financial accounts, on the other hand, standardize the language firms use to communicate value creation to capital and consumer markets.[152]

But impact-weighted financial accounts could present complex issues. For instance, it is tremendously difficult to monetize the positive impact of

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145. *Id.*

146. *See* GEORGE SERAFEIM, T. ROBERT ZOCHOWSKI & JEN DOWNING, HARV. BUS. SCH., IMPACT-WEIGHTED FINANCIAL ACCOUNTS: THE MISSING PIECE FOR AN IMPACT ECONOMY 5 (2019), https://www.hbs.edu/impact-weighted-accounts/Documents/Impact-Weighted-Accounts-Report-2019.pdf.

147. *See id.*

148. *Id.*

149. DELPHINE GIBASSIER, MICHELLE RODRIGUE & DIANE-LAURE ARJALIÈS, ASS'N OF ACCTS. & FIN. PROS.-ASS'N OF CHARTERED CERTIFIED ACCTS., FROM SHARE VALUE TO SHARED VALUE: EXPLORING THE ROLE OF ACCOUNTANTS IN DEVELOPING INTEGRATED REPORTING IN PRACTICE 10 (Oct. 2015), https://www.imanet.org/-/media/0ac7971304674a8fba77572b4841aabf.ashx.

150. Facebook Registration Statement, *supra* note 1, at 68.

151. *See, e.g.*, 18 OKLA. STAT. § 1210 (Supp. 2020).

152. SERAFEIM ET AL., *supra* note 146, at 17.

King Arthur Flour's Supplier Code of Conduct. Calculating a public benefit corporation's outcome would increase information costs.[153] Such high learning costs may dissuade small entrepreneurs from choosing the public benefit corporation form. Therefore, impact-weighted accounts centered on inputs—such as charitable giving, employee training, and policies—instead of outcomes, is a moderate middle ground. Monetizing inputs gives public benefit corporations of all sizes a standard language to promote their brands.

Thus, Oklahoma should amend the OBCA's annual benefit statement provision to require public disclosure statements that detail what percentage of their budget a public benefit corporation spent. In the interest of protecting small start-ups with few assets from larger firms, the impact-weighted benefit statement will only list a firm's percentage spent to create public benefits. Publicizing impact-weighted benefit statements will also increase brand awareness by highlighting how much a public benefit corporation spends on its stakeholders. Indeed, these disclosures capitalize on sustainability-oriented consumers and investors. Consumers and investors will also have sufficient information to act as a check against dishonest firms.

## *V. Conclusion*

Profits and public benefits are linked.[154] Sustainable businesses are outperforming non-sustainable businesses.[155] The public benefit corporation is a prominent example of Oklahoma's willingness to amend its corporate law to capitalize on evolving markets. Yet, Oklahoma's law does not reflect clear standards of accountability, transparency, and higher corporate purpose. Public benefit corporations can effect change if they live up to their higher purpose. Modifying the OBCA to require publicly assessable corporate purpose statements and impact-weighted financial accounts ensures accountability and transparency without demanding too much from aspiring social entrepreneurs.

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153. *See id.* at 14.
154. GIBASSIER ET AL., *supra* note 149, at 17.
155. *Id.*