

BENEFICIAL BENEFIT LLCs?

*J. Haskell Murray**

I. INTRODUCTION

Over the past decade, states have passed a plethora of social enterprise statutes, allowing for the creation of for-profit businesses with express and mandatory social purposes. These social enterprise forms include low-profit limited liability companies (L3Cs), benefit corporations, public benefit corporations, social purpose corporations, and benefit LLCs. Among these forms, the benefit LLC may have received the least attention in the legal academic literature, with research uncovering no full academic articles focused on the entity form. While benefit LLC laws have only been passed in two states—Maryland and Oregon—the form has experienced the highest per state formations of any of the social enterprise forms.¹ The benefit LLC form has been relatively popular compared to other social enterprise forms, but that relative popularity does not mean that the legal entity form is wise.

Part II of this symposium article details the brief history of the benefit LLC. Part III summarizes and examines the substance of the benefit LLC statutes. Part IV situates benefit LLCs within the social enterprise law landscape, attempts to explain the relative popularity of the form, and highlight flaws in the benefit LLC conceptual framework. The last substantive section, Part V, then discusses the legal options for social entrepreneurs who seek flexibility, minimal costs, and pass-through taxation. A brief conclusion—highlighting the article’s thesis that the benefit LLC entity type is largely unnecessary, but also not particularly harmful—brings the article to a close.

II. BENEFIT LLC HISTORY

The first benefit LLC statute was passed in 2010 in Maryland, at the

* J. Haskell Murray is an Assistant Professor of Management and Business Law at Belmont University. The Author thanks, for their comments and conversations about this Article, the attendees of the University of Cincinnati College of Law’s 29th Annual Corporate Law Center Symposium, Cass Brewer, and Bill Callison. William Ball provided excellent research assistance. The opinions expressed and any errors made are solely those of the author.

1. J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 588 (2016) [hereinafter *The Social Enterprise Law Market*] (showing, as of late 2015, 94 benefit corporations, 141 L3Cs, and 320 benefit LLCs per state with the respective social enterprise statutes. Tennessee and Montana were not included in the benefit corporation state number as their statutes had passed the state legislatures, but were not effective at the time the data was gathered).

same time and in the same state as the first benefit corporation statute.² The benefit corporation legislation was ultimately passed in another 30 jurisdictions (as of mid-2016), while the benefit LLC only achieved passage in one additional state—Oregon—for a total of two benefit LLC statutes.³ According to former Maryland state senator Jamie Raskin, the benefit LLC legislation was championed by a few local business people who were interested in a benefit form but preferred the LLC backdrop to the corporation, likely due to taxation issues.⁴ Oregon included the ability to form benefit corporations *and* benefit LLCs under its “benefit companies” statute.⁵ In Oregon, Bill Campbell, one of the architects of the legislation, said that there was some worry about the strong profit-focused language in Delaware’s *eBay v. Newmark*⁶ case, and a purpose of the Oregon benefit LLC language was to combat any future common law creep from the corporation-focused case of *eBay* into the LLC area.⁷ Neither Maryland nor Oregon appeared to face significant opposition in the proposal of the benefit LLC legislation.⁸ B Lab, the nonprofit organization that has championed the benefit corporation legislation, has not yet publicly pushed for the passage of benefit LLC legislation.⁹ A

2. Keren G. Raz, *Toward an Improved Legal Form for Social Enterprise*, 36 N.Y.U. REV. L. & SOC. CHANGE 283, 300 (2012); MD. CODE ANN., CORPS. & ASS’NS §§ 5-6C-01 to 08 (LexisNexis through Oct. 1, 2016 and all chapters of the 2016 Regular Session of the Maryland General Assembly).

3. Robert T. Esposito, *Charitable Solicitation Acts: Maslow’s Hammer for Regulating Social Enterprise*, 11 N.Y.U. J.L. & BUS. 463, 465 (2015) (noting over 30 jurisdictions have passed benefit corporation legislation); *State by State Legislative Status*, BENEFIT CORP. INFO. CTR., <http://benefitcorp.net/policymakers/state-by-state-status> (last visited June 15, 2016) (showing the jurisdictions that have passed benefit corporation legislation); John Tyler, Evan Absher, Kathleen Garman, Anthony Luppino, *Producing Better Mileage: Advancing the Design and Usefulness of Hybrid Vehicles for Social Business Ventures*, 33 QUINNIPIAC L. REV. 235, 241 (2015) (noting that only Maryland and Oregon have passed benefit LLC statutes); *see generally*, *The Social Enterprise Law Market*, *supra* note 1.

4. Telephone Interview with Jamie Raskin, former Maryland State Senator (May 25, 2016); J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 53 n. 101 (2012) [hereinafter *Choose Your Own Master*].

5. OR. REV. STAT. ANN. § 60.750(1) (West through through end of the 2016 Reg. Sess. and ballot measures approved at the 11/8/16 General Election, pending classification of undesignated material and text revision by the Oregon Reviser) (“‘Benefit company’ means a corporation or a limited liability company that is incorporated, organized, formed or created under ORS 60.754.”).

6. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010) (“Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The ‘Inc.’ after the company name has to mean at least that.”).

7. Telephone Interview with Bill Campbell, Head of Sustainability and Structuring and General Counsel, Equilibrium (July 19, 2016).

8. Telephone Interview with Jamie Raskin, *supra* note 4; Telephone Interview with Bill Campbell, *supra* note 7.

9. *Choose Your Own Master*, *supra* note 4; *see generally* News & Media, CERTIFIED B CORPORATIONS, <https://www.bcorporation.net/news-media> (last visited July 1, 2016) (showing no articles promoting benefit LLC legislation by B Lab).

few years ago, Bill Clark, the drafter of the Model Benefit Corporation Legislation, who has also worked with B Lab, said that the benefit LLC form has not been promoted because the current LLC statutes are thought to be flexible enough to accommodate social entrepreneurs, whereas there is much more uncertainty in the corporation laws of various states.¹⁰ More recently, Bill Clark noted that benefit LLC legislation was moving forward in some additional states, including Pennsylvania, and that he hoped for all companies to eventually adopt the benefit paradigm.¹¹ As of late 2015, approximately 50 benefit LLCs had been formed in Maryland and 590 benefit LLCs had been formed in Oregon.¹²

III. BENEFIT LLC STATUTORY SUBSTANCE

The benefit LLC statutes largely follow the Model Benefit Corporation Legislation and their state benefit corporation statutes, but the benefit LLC statutes fill in gaps with their state LLC statutes rather than with their state corporation statutes.¹³ The benefit LLC statutes appear to be drafted as a socially focused add-on to the existing LLC statutes and not as a fully standalone entity statute. While the Maryland benefit LLC statute is divided into eight sections, the first five sections merely deal with definitions, election/termination of status, application of the subtitle, and references to benefit LLC status.¹⁴ The meatier, final three sections deal with the purpose of benefit LLCs, management considerations, and annual benefit reporting.¹⁵

The purpose of the benefit LLC, similar to the statutorily prescribed benefit corporation purpose, is creating a general public benefit, which is defined as “a material, positive impact on society and the

10. *Choose Your Own Master*, *supra* note 4.

11. Bill Clark, 8th Annual Berle Symposium at Seattle University School of Law: The Basis on Which Society Should Demand Responsible Business Behavior (June 27, 2016), http://law.seattleu.edu/multimedia-library/berle-center/berle-symposium-viii?destinationID=E6Eej2HzSEct8psJvJZO_Q&contentID=X1wZDRKsSEKdAPCIF_Emow&orderByDirection=asc&pageIndex=1&pageSize=10.

12. *The Social Enterprise Law Market*, *supra* note 1, at 588.

13. *Compare* MD. CODE ANN., CORPS. & ASS'NS §§ 5-6C-01 to 08 (LexisNexis through Oct. 1, 2016 and all chapters of the 2016 Regular Session of the Maryland General Assembly) *and* *Model Benefit Corp. Legislation*, BENEFIT CORP. (June 24, 2014), http://benefitcorp.net/sites/default/files/documents/Model_Benefit_Corp_Legislation.pdf *with* MD. CODE ANN., CORPS. & ASS'NS §§ 4A-1201 to 1208 (LexisNexis through Oct. 1, 2016 and all chapters of the 2016 Regular Session of the Maryland General Assembly) *and* OR. REV. STAT. ANN. §§ 60.750 – 770 (West through End of the 2016 Reg. Sess. and ballot measures approved at the 11/8/16 General Election, pending classification of undesignated material and text revision by the Oregon Reviser). Oregon “benefit company” law applies to both benefit corporations and benefit LLCs.

14. MD. CODE ANN., CORPS. & ASS'NS §§ 4A-1201 to 1205 (LexisNexis).

15. MD. CODE ANN., CORPS. & ASS'NS §§ 4A-1206 to 1208 (LexisNexis).

environment, as measured by a third-party standard, through activities that promote a combination of specific public benefits.”¹⁶ Benefit LLC managers must consider a large number of stakeholder interests beyond just the financial interests of the equity holders.¹⁷ Each benefit LLC must draft and make available an annual benefit report that includes, among other things, the ways the benefit LLC pursued or provided a general public benefit.¹⁸ The Maryland and Oregon benefit LLC statutes are largely the same, though the Oregon benefit LLC statute is included with the Oregon benefit corporation law to form a “benefit companies” statute.¹⁹ In contrast to Oregon, Maryland breaks the benefit LLC statute to a standalone subtitle.²⁰ There are a few substantive differences between the two state benefit LLC statutes, such as the voting approval threshold for entity conversion and the details of the benefit enforcement proceedings.²¹

16. MD. CODE ANN., CORPS. & ASS’NS §§ 4A-1201, 1206(a)(1) (LexisNexis). Oregon words its definition of “general public benefit” slightly differently, stating that it is “a material positive impact on society and the environment, taken as a whole, from the business and operations of a benefit company.” OR. REV. STAT. ANN. §§ 60.750(3), 60.758(1) (West).

17. MD. CODE ANN., CORPS. & ASS’NS § 4A-1207 (LexisNexis) (“A person managing the business and affairs of a benefit limited liability company: (1) Shall consider the effects of any action or decision not to act on: (i) The members of the benefit limited liability company; (ii) The employees and workforce of the benefit limited liability company and the subsidiaries and suppliers of the benefit limited liability company; (iii) The interests of customers as beneficiaries of the general or specific public benefit purposes of the benefit limited liability company; (iv) Community and societal considerations, including those of any community in which offices or facilities of the benefit limited liability company or the subsidiaries or suppliers of the benefit limited liability company are located; and (v) The local and global environment; and (2) May consider any other pertinent factors or the interests of any other group that the person determines are appropriate to consider.”). Instead of a list of stakeholders, Oregon benefit company law directs managers to follow Oregon’s LLC statute, seek the good of the entity, and pursue the general public benefit purpose (and any specific public benefit purpose) of the benefit LLC. OR. REV. STAT. ANN. § 60.764 (West).

18. MD. CODE ANN., CORPS. & ASS’NS § 4A-1208 (LexisNexis); OR. REV. STAT. ANN. § 60.768 (West). Maryland law says the report must describe the way the general public benefit purpose was “pursued,” while Oregon’s law is more onerous in stating that the report must detail the “extent to which the benefit company *provided* a general public benefit” (emphasis added).

19. MD. CODE ANN., CORPS. & ASS’NS §§ 4A-1201 to 1208 (LexisNexis through Oct. 1, 2016 and all chapters of the 2016 Regular Session of the Maryland General Assembly); OR. REV. STAT. ANN. §§ 60.750 to 770 (West through End of the 2016 Reg. Sess. and ballot measures approved at the 11/8/16 General Election, pending classification of undesignated material and text revision by the Oregon Reviser).

20. MD. CODE ANN., CORPS. & ASS’NS §§ 4A-1201 to 1208 (LexisNexis); OR. REV. STAT. ANN. §§ 60.750 to 770 (West).

21. MD. CODE ANN., CORPS. & ASS’NS §§ 4A-1201 to 1208 (LexisNexis); OR. REV. STAT. ANN. § 60.766 (West). Maryland’s benefit LLC law does not expressly note the voting percentage required to adopt or terminate benefit LLC status. Oregon expressly allows a direct or derivative lawsuit (as appropriate) against a benefit LLC for failure to provide a general or specific public benefit. Maryland does not expressly address benefit enforcement proceedings.

IV. A PLACE FOR BENEFIT LLCs?

A. *Analyzing the Arguments in Favor of the Benefit LLC Laws*

Why were the two benefit LLC statutes passed? It appears that many of the same reasons behind the passage of the benefit corporation legislation were at play in the passage of the benefit LLC legislation, including the support of certain business people and the positive press generated for politicians passing a bill that appeared to combat the shareholder-wealth-maximization norm in a time of significant anti-Wall Street sentiment.²² In the case of Maryland, former state senator Jamie Raskin confirmed that a small group of business people who favored the benefit LLC form were a major force behind the push for benefit LLC legislation, and there appeared to be virtually no objection to this entity form.²³ Also, while none of the social enterprise forms have come close to bringing the financial rewards to any state that the traditional corporate and LLC forms have, Maryland and Oregon may be engaged in “jurisdictional positioning,” securing an inside lane for their states in case jurisdictional competition involving social enterprises begins in earnest.²⁴ In fact, former Maryland state senator Jamie Raskin was quoted as saying, “Maryland may be at the forefront of the transformation of capitalism. We’re certainly becoming the Delaware of benefit corporations.”²⁵ And, even before passage of Oregon’s benefit company law, at least one legal scholar noted that Oregon had “already begun efforts to position itself as ‘the Delaware of green business.’”²⁶ Thus, the first argument in favor of the benefit LLC could be that there is little opposition to the form, some support from the business community, and some possibility of future financial rewards for the state.

The *legal* arguments for the *need* of a benefit LLC form, however, are weak. By design, LLCs are extremely flexible, contract based, and already perfectly able to mold to a social entrepreneur’s desires.²⁷ The

22. *The Social Enterprise Law Market*, *supra* note 1, at 572–81.

23. Telephone Interview with Jamie Raskin, *supra* note 4.

24. *The Social Enterprise Law Market*, *supra* note 1, at 563–72.

25. Gary Haber, *Md. ‘becoming the Delaware of benefit corporations’*, BALTIMORE BUS. J. (Oct. 5, 2010), <http://www.bizjournals.com/baltimore/stories/2010/10/04/daily18.html>.

26. Judd F. Sneirson, *Race to the Left: A Legislator’s Guide to Greening a Corporate Code*, 88 OR. L. REV. 491, 495–502 (2009) (mentioning the growth of green or sustainable businesses and noting socially focused amendments to Oregon’s corporate code).

27. Larry E. Ribstein, *A Critique of the Uniform Limited Liability Company Act*, 25 STETSON L. REV. 311, 331 (1995) (noting that LLCs were intended to be flexible, contract-based entities, and arguing for even more flexibility than provided by the ULLCA); Michelle M. Harner & Jamie Marincic, *The Naked Fiduciary*, 54 ARIZ. L. REV. 879, 897 (2012) (noting the flexibility and contractual nature of LLCs); Park McGinty, *The Limited Liability Company: Opportunity for Selective Securities Law*

availability of the traditional LLC form renders the addition of the benefit LLC largely superfluous.²⁸ Yet, the legal justification for the benefit corporation law was similarly weak in states like Oregon that already allowed social and environmental purposes for its traditional corporations; technically social entrepreneurs should have been able to achieve their legal goals with a traditional Oregon corporation.²⁹ Nevertheless, if a state chooses to pass benefit corporation law—when the same ends could be achieved under the state’s traditional corporation statute and social language in the firm’s articles of incorporation—it does make some sense to also give social entrepreneurs the choice of a benefit LLC with the accompanying simplicity and tax advantages of the form. This is especially true given that most social enterprises appear to be relatively small businesses, yet seem eager to signal to various stakeholders that the firm is socially focused. Thus, a second argument for the benefit LLC form could be that, even though the legal justification seems weak, approximately 30 states have passed benefit corporation legislation, and social entrepreneurs should not be forced into the corporate form if they want to signal their social purpose through choosing a “benefit” entity type.³⁰

Another argument that could be attempted in support of benefit LLC law is that this legislation provides an “off-the-rack” solution like the traditional LLC laws, cutting transaction costs for social entrepreneurs.³¹ In the traditional LLC laws, defaults are set at terms that legislatures think reasonable parties would agree on if they had the time and resources. The LLC laws are, however, mostly enabling; they allow sophisticated parties to contract out of these statutory defaults in their operating agreements.³² In the benefit LLC, on the other hand, much of

Deregulation, 64 U. CIN. L. REV. 369, 377 (1996) (noting that state legislatures designed LLCs to be flexible entities).

28. Ribstein, *supra* note 27, at 311; Harner & Marincic, *supra* note 27, at 897; McGinty, *supra* note 27, at 377.

29. *Choose Your Own Master*, *supra* note 4, at 25 n. 110.

30. Celia R. Taylor, *Carpe Crisis: Capitalizing on the Breakdown of Capitalism to Consider the Creation of Social Businesses*, 54 N.Y.L. SCH. L. REV. 743, 752 (2010) (“While the [LLC] model may be flexible enough to accommodate such ventures, there might be problems of signaling and identification of the goals and mission of any particular LLC, and confusion between traditional LLCs and socially intended LLCs.”).

31. Houman B. Shadab, *The Law and Economics of Hedge Funds: Financial Innovation and Investor Protection*, 6 BERKELEY BUS. L.J. 240, 249 (2009); LARRY E. RIBSTEIN, *THE RISE OF THE CORPORATION* 27 (2010).

32. Suren Gomtsian, *Contractual Mechanisms of Investor Protection in Non-Listed Limited Liability Companies*, 60 VILL. L. REV. 955, 995 (2015) (noting statutory defaults and the ability to opt-out in LLC law); accord Daniel M. Häusermann, *For A Few Dollars Less: Explaining State to State Variation in Limited Liability Company Popularity*, 20 U. MIAMI BUS. L. REV. 1, 44 (2011). In Delaware, even fiduciary duties can be amended or waived by contract, albeit without altering the implied contractual covenant of good faith and fair dealing. Mohsen Manesh, *Delaware and the Market*

the statutory language may not be waived or amended—such as the purpose to pursue a general public benefit, the consideration of major corporate stakeholders, the use of a third-party standard to evaluate social impact, and annual benefit reporting.³³ Bill Callison discussed this lack of flexibility in the benefit corporation context in detailing what he called the “illiberalism problem”;³⁴ the illiberalism issue stands out even more in the benefit LLC context given the intentional flexibility of the traditional LLC form.³⁵ Thus, the benefit LLC statutes do provide an “off-the-rack” solution, but unlike the traditional LLC statutes, the benefit LLC statutes only allow for limited tailoring.³⁶

for LLC Law: A Theory of Contractibility and Legal Indeterminacy, 52 B.C. L. REV. 189, 193 (2011) (noting the existence of the implied contractual covenant of good faith and fair dealing and stating that it is unwaivable under Delaware LLC law).

33. MD. CODE ANN., CORPS. & ASS'NS §§ 4A-1201 to 1208 (LexisNexis through Oct. 1, 2016 and all chapters of the 2016 Regular Session of the Maryland General Assembly); OR. REV. STAT. ANN. §§ 60.750 to 770 (West through End of the 2016 Reg. Sess. and ballot measures approved at the 11/8/16 General Election, pending classification of undesignated material and text revision by the Oregon Reviser).

34. 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, 98–104 (2012) (describing the illiberal problem with benefit corporations: “Rather than allowing shareholders the autonomy and freedom to pursue their own, self-defined ends and their own conception of the good, the Model forces all electing corporations to adhere to broad communitarian conceptions of ‘good’ assessed against an independent organization’s third-party standard which has been legislatively endorsed. Thus, the positive liberty of the election is stunted, and the negative liberty of avoiding external constraints is not obtained. In my opinion, there are insufficient reasons for applying external constraints, particularly since the state is not providing any particular benefit to corporations that elect benefit corporation status. If shareholders desire that the corporation they own benefit a particular low-income community or a particular river watershed, they may do so only by also adhering to a broader general public benefit purpose of having a ‘material positive impact on society and the environment, taken as a whole.’ Not only must low-income jobs be created or a sustainable watershed maintained, but beneficial employee health benefits, effects of corporate actions and inactions on the communities in which suppliers reside, and effects of actions and inactions on global warming (or perhaps even the benefits of global warming if all views are taken into account) must be considered.”).

35. *Id.*

36. The benefit LLC framework can be understood through the classic rules versus standards lens. In the rules versus standards decision, the benefit LLC has opted largely for standards. *See generally*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992). Rules are more costly and difficult for legislatures, but standards shift the costs to firms and their legal advisors. *Id.* at 562–63. In the enabling versus mandatory decision, the benefit LLC has opted largely for mandatory. Thus, the benefit LLC statute could be described as a set of mandatory standards, whereas many LLC statutes have default rules and are enabling in nature. Therefore these statutes may be especially bad for sophisticated parties who could choose better fitting terms through a well-written LLC operating agreement. Even for unsophisticated parties, the benefit LLC statutes’ vague standards are lacking in guidance and provide little assurance that any “benefit” is actually being achieved. Dana Brakman Reiser, *Theorizing Forms for Social Enterprise*, 62 EMORY L.J. 681, 683–84 (2013) (noting that purpose and profit will often be in tension for social entrepreneurs). While the mandatory language of the benefit LLC may lead to legal costs for firms and states, the requirements may stem from the fact that the state is giving the firms the “benefit” moniker and thus wants to have some assurance that the firms are benefiting the public. As mentioned above, however, the standards are extremely vague and will be costly to enforce; or they may be extremely under-enforced and result in the potential destruction

Where tailoring is allowed, such as certain choices related to benefit reporting, the statutes do not provide defaults, and this lack of defaults could drive up transaction costs.³⁷

B. Prevention of Widespread Acceptance of the Benefit LLC

Despite the arguments that could be made in favor of the benefit LLC, one main reason benefit LLC legislation has not passed in more states is that B Lab (and its allies) do not appear to be advocating for it, though that may change in the relatively near future.³⁸ The benefit corporation law is not organic in the way that the LLC legislation was; there are some businesses who are interested in the statute, but it appears that B Lab is the organization behind the effective coordination and lobbying for the benefit corporation legislation.³⁹ The other major social enterprise forms have not fared well without an organization like B Lab behind them. The L3C statutes have been at a standstill since 2012, due at least in part to academic criticism and failure to make amendments to address the perceived deficiencies, but also due to the efforts being led mainly by a single individual, Bob Lang.⁴⁰ The social purpose corporation (SPC) statute exists explicitly in only two states—California and Washington—but also appears to have influenced laws in Minnesota, Florida, and Texas.⁴¹ The SPC, however, has not come close to the speed and breadth of the spread of benefit corporations, and the SPC does not appear to have an organized proponent group pushing

of any brand benefit.

37. See generally, J. Haskell Murray, *An Early Report on Benefit Reports*, 118 W. VA. L. REV. 25, 43–46 (2015) [hereinafter *An Early Report on Benefit Reports*].

38. At the Berle Symposium at Seattle University School of Law on June 27, 2016, Bill Clark of Drinker Biddle & Reath LLP, the drafter of the Model Benefit Corporation Legislation and an attorney for B Lab, said that benefit LLC legislation was being proposed or considered in Pennsylvania and a small handful of other states.

39. *The Social Enterprise Law Market*, *supra* note 1, at 575–78.

40. See generally, Carter G. Bishop, *The Low Profit LLC (L3C): Program Related Investment by Proxy or Perversion?*, 63 ARK. L. REV. 243 (2010); J. William Callison & Allan W. Vestal, *The L3C Illusion: Why Low-Profit Limited Liability Companies Will Not Stimulate Socially Optimal Private Foundation Investment in Entrepreneurial Ventures*, 35 VT. L. REV. 273 (2010); David S. Chernoff, *L3Cs: Less than Meets the Eye*, TAX’N EXEMPTS, May/June 2010; Daniel S. Kleinberger, *A Myth Deconstructed: The “Emperor’s New Clothes” on the Low-Profit Limited Liability Company*, 35 DEL. J. CORP. L. 879 (2010).

41. Dana Brakman Reiser, *supra* note 36, at 739 n.43 (noting the California flexible purpose corporation law (the prior name of the California social purpose corporation law) and the Washington social purpose corporation law); Alicia E. Plerhoples, *Social Enterprise as Commitment: A Roadmap*, 48 WASH. U. J.L. & POL’Y 89, 137 n. 143 (2015) (noting the name change of the California statute); Cass Brewer, *Updated U.S. Map of Social Enterprise Statutes*, SOCENTLAW, <http://socentlaw.com/2015/02/updated-u-s-map-of-social-enterprise-statutes/> (last visited Feb. 17, 2016) (classifying California, Florida, and Washington as having social purpose corporation law and Texas as having a “quasi-social purpose corporation” law).

for passage. Until the benefit LLC legislation becomes a part of B Lab's (or another effective organization's) agenda, or until regulations lead to more tangible benefits for becoming a benefit LLC, it is unlikely that the form will spread to a large number of states.

Another reason that benefit LLC legislation has not gained widespread passage is that virtually all legal experts agree that LLC statutes are flexible enough to accommodate social entrepreneurs' legal needs.⁴² There is, however, ongoing debate regarding the state corporate statutes and whether they are flexible enough for social entrepreneurs.⁴³ As explained above, however, legal issues alone cannot be the only reason, as benefit corporation statutes are being passed in constituency statute states and in states whose corporate codes already explicitly allow for social and environmental purposes.⁴⁴

A final and related reason that benefit LLCs have not seen more widespread passage may be that legislatures are becoming less receptive to social enterprise forms in general. The L3C came under such sharp criticism that state legislatures may be a bit wary of passing a law until it has gained significant nationwide support as the benefit corporation law (but not the benefit LLC law) has done.⁴⁵ There also may simply be legislative fatigue regarding these new social enterprise forms, and state legislatures may believe that they have already benefited from any associated constituent goodwill when they passed the benefit corporation legislation.⁴⁶

42. Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 608 (2011) (“Typically, LLC law will be flexible enough to allow adoption of both profit and social purposes”); Joseph W. Yockey, *Does Social Enterprise Law Matter?*, 66 ALA. L. REV. 767, 780–81 (2015) (noting the use of LLCs for social enterprises and commenting on the form's flexibility); Cassidy V. (“Cass”) Brewer, *A Novel Approach to Using LLCs for Quasi-Charitable Endeavors (a/k/a “Social Enterprise”)*, 38 WM. MITCHELL L. REV. 678, 685 (2012) (commenting on the flexibility to the LLC and proposing use of LLCs for social enterprises).

43. See, e.g., Leo E. Strine, Jr., *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 151 (2012) (claiming “that as a matter of corporate law, the object of the corporation is to produce profits for the stockholders and that the social beliefs of the managers, no more than their own financial interests, cannot be their end in managing the corporation”).

44. OR. REV. STAT. ANN. § 60.047(2)(e) (West through End of the 2016 Reg. Sess. and ballot measures approved at the 11/8/16 General Election, pending classification of undesignated material and text revision by the Oregon Reviser) (stating that the articles of incorporation may include a “provision authorizing or directing the corporation to conduct the business of the corporation in a manner that is environmentally and socially responsible”).

45. Carter G. Bishop, *supra* note 40, at 243–46; Callison & Vestal, *supra* note 40, at 273, 274–75; Kleinberger, *supra* note 40, at 879.

46. *The Social Enterprise Law Market*, *supra* note 1, at 575–78.

V. SOCIAL ENTREPRENEURS' LEGAL OPTIONS

Social entrepreneurs do not have to choose a social enterprise legal form like a benefit LLC; they have a variety of entity choices in the United States. First, they must decide whether their organization should be a for-profit or non-profit form. Second, and assuming the organization is to be of the for-profit variety, the social entrepreneur faces a number of options, including C-Corporations, S-Corporations, benefit corporations, benefit LLCs, and LLCs.⁴⁷ The choice of entity can be a complex decision and will be fact based, without an easy, one-size-fits-all solution. For our purposes, social entrepreneurs have at least four important decisions to make: (1) taxation choice: choosing between a corporate form with double taxation or an entity allowing pass-through taxation;⁴⁸ (2) flexibility choice: choosing between entities that provide more or fewer enabling provisions; (3) state-of-formation choice; (4) signaling choice: choosing between a form that signals a commitment to “benefit” society and the environment, and a form that provides no such signal—or maybe even a signal that profit is paramount.⁴⁹ These four decisions may be at odds with each other. For most small businesses, the taxation choice, standing alone, is clear: choose pass-through taxation, often with an LLC or S-Corporation form.⁵⁰ The flexibility choice is also generally fairly clear: small businesses typically value flexibility,⁵¹ and the LLC is often thought to be the most flexible form.⁵² Standing alone, the state-of-formation

47. See generally, *The Social Enterprise Law Market*, *supra* note 1; Brewer, *supra* note 42, at 709–20 (describing how a for-profit LLC could be used for a social enterprise).

48. Robert R. Keatinge, Larry E. Ribstein, Susan Pace Hamill, Michael L. Gravelle, & Sharon Connaughton, *The Limited Liability Company: A Study of the Emerging Entity*, 47 BUS. LAW. 375, 380 (1992) (noting that pass-through entities “are not subject to federal income tax at the entity level”).

49. J. Haskell Murray, *Defending Patagonia: Mergers and Acquisitions with Benefit Corporations*, 9 HASTINGS BUS. L.J. 485, 500–03 (2013) [hereinafter *Defending Patagonia*]; Yockey, *supra* note 42, 800–02.

50. See, e.g., Howard M. Friedman, *The Silent LLC Revolution—The Social Cost of Academic Neglect*, 38 CREIGHTON L. REV. 35, 42 (2004) (noting the appeal of the LLC and pass-through taxation to small businesses); Rutheford B. Campbell, Jr., *The “New” Fiduciary Standards Under the Revised Uniform Limited Liability Company Act: More Bottom Bumping from NCCUSL*, 61 ME. L. REV. 27, 32 (2009) (discussing how limited liability and single taxation make the LLC popular among small business owners).

51. *Choosing a Business Structure*, IRS, <https://www.irs.gov/uac/choosing-a-business-structure> (noting the popularity and the flexibility of the LLC structure); Paul T. Geske, *Oppress Me No More: Amending the Illinois LLC Act to Provide Additional Remedies for Oppressed Minority Members*, 90 CHI.-KENT L. REV. 185, 196 (2015) (noting that flexible legal forms, such as the LLC, as popular with small businesses).

52. Wayne M. Gazur, *The Limited Liability Company Experiment: Unlimited Flexibility, Uncertain Role*, 58 LAW & CONTEMP. PROBS. 135, 138–39 (1995) (noting the flexibility of the LLC form); Sandra K. Miller, *A New Direction for LLC Research in A Contractarian Legal Environment*, 76 S. CAL. L. REV. 351, 353–54 (2003) (noting the high degree of flexibility afforded by many LLC

choice is also fairly clear for businesses and often ends up being the state of their headquarters or Delaware.⁵³ For a growing group of social entrepreneurs, however, the signaling choice is trumping the taxation, flexibility, and state-of-formation choices. A decent number of businesses appear to be choosing a corporate form rather than an LLC, when an LLC would seem to be the better choice, because only a benefit corporation (and not a benefit LLC) is available in the state they wish to use for incorporation.⁵⁴ While it appears that a benefit corporation could capture pass-through taxation through electing S-Corporation status, the S-Corporation is not as flexible as the LLC and the S-Corporation comes with a number of restrictions—such as a limit of 100 shareholders.⁵⁵ In addition, some businesses are forming out of state, which may add costs to the business, simply to chase the benefit entity form.⁵⁶

Benefit LLCs may be seeking to benefit from a halo effect from social enterprises in general and from certified B corporations.⁵⁷ The

statutes).

53. Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the “Race” Debate and Antitakeover Overreaching*, 150 U. PA. L. REV. 1795, 1825 (2002) (noting that in the public company context, the choice for state of incorporation usually boils down to Delaware or the state of the company’s headquarters); Minor Myers, *Fixing Multi-Forum Shareholder Litigation*, 2014 U. ILL. L. REV. 467, 481 (2014) (stating that non-Delaware incorporated firms tend to be incorporated in the state of the firm’s headquarters); Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV. 1747, 1760 (2004) (“The minority of companies that incorporate outside of Delaware usually choose the state in which they are headquartered. Looking only at companies that choose to incorporate outside of the state where they have their headquarters, Delaware has a greater than 85 percent share of the incorporation market.”).

54. Emeka Duruigbo, *Avoiding a Limited Future for the De Facto LLC and LLC by Estoppel*, 12 U. PA. J. BUS. L. 1013, 1020–21 (2010) (noting that, for reasons including the availability of pass through taxation, the LLC form has become an increasingly popular entity choice, especially for small businesses); Anthony Q. Fletcher, *Publish or Perish: The New York Limited Liability Company Law Publication Requirement: The Fundamental Flaw of an Otherwise Flawless Law*, 1 N.Y.U. J.L. & BUS. 139, 153 (2004) (“[T]he LLC combines the most appealing taxation and managerial features of the partnership with the traditional limited liability protections of the corporation, it is often characterized as a ‘hybrid’ between the partnership and the corporation. It is this hybrid composition which makes the LLC the preferred business vehicle among small business entrepreneurs.”).

55. From speaking with numerous social entrepreneurs, it does not appear that many have formed benefit S-corporations; perhaps the relative lack of sophisticated legal and tax advice available to these small businesses is an explanation.

56. *Find a Benefit Corp.*, BENEFIT CORP., <http://benefitcorp.net/businesses/find-a-benefit-corp?state=All> (last visited July 1, 2016) (showing that some benefit corporations have incorporated in states that are neither Delaware nor their state of headquarters, which suggests that the benefit corporation statute was driving that choice); Eric L. Talley, *Corporate Form and Social Entrepreneurship: A Status Report from California (and Beyond)* 8, (UC Berkeley Pub. L. Res. Paper No. 2144567, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2144567 (noting that only 5% of the California-incorporated benefit corporations in his sample were headquartered outside of the state).

57. Robert A. Katz & Antony Page, *Sustainable Business*, 62 EMORY L.J. 851, 865 (2013) (“A concern here is that a benefit corporation may in fact be no different than an ordinary corporation, but is attempting to benefit from the halo of social enterprise.”).

main benefit of the benefit LLC form is the signaling provided by choosing the form; much of the signaling benefit can be achieved through mere B certification from B Lab, while the legal issues can be dealt with in traditional LLC operating-agreement language.⁵⁸ B Lab-provided certification and the customized operating-agreement language is not terribly expensive for small simple companies, but it is also not free.⁵⁹ If a firm is so small that it cannot afford these relatively minor costs, then the benefit LLC may nevertheless be the wrong entity, given the additional costs associated with considering multiple stakeholders, using a third party standard to measure social impact, and engaging in annual benefit reporting.⁶⁰

Given the above, it is difficult to find a legal reason to encourage use of the benefit LLC form by a social entrepreneur, at least at this stage. The costs and uncertainty would be lower, in virtually all cases, by using a traditional LLC with desired social clauses in the operating agreement. Furthermore, the halo effect may be acquired by the traditional LLC obtaining certification from B Lab.⁶¹ Some social entrepreneurs, however, may appreciate the expressive value of having the benefit moniker in the firm's legal entity type and having certain social requirements enshrined in statute.

VI. CONCLUSION

Benefit LLCs are one of many social enterprise law forms enabled by new state statutes passed in the last decade. Benefit LLC statutes exist in only two states, yet on a per-state basis, benefit LLCs are leading all social enterprise forms in the United States. This Article suggests that the benefit LLC statutes have not been more widely adopted primarily because B Lab—the driving force behind the benefit corporation legislation—has not yet vigorously endorsed the benefit LLC form. In addition, the legal justification for the benefit LLC is even weaker than

58. *Defending Patagonia*, *supra* note 49, at 504–05; Yockey, *supra* note 42, at 800–02; Dana Brakman Reiser & Steven A. Dean, *Hunting Stag with Fly Paper: A Hybrid Financial Instrument for Social Enterprise*, 54 B.C. L. REV. 1495, 1517–32 (2013) (discussing a contract-based instrument for social enterprises).

59. The annual certification fees range from \$500 (for under \$1 million in revenue) to \$25,000 (for over \$100 million in revenue). *Annual Certification Fees*, B CORP., <http://www.bcorporation.net/annual-certification-fees> (last visited June 15, 2016).

60. *An Early Report on Benefit Reports*, *supra* note 37, at 43–46 (showing benefit corporation reporting compliance under 10%).

61. Certified B Corporation status is available from B Lab if an entity scores at least 80 points on the 200 point company questionnaire. The status is available to all entity types, even though “certified B corporation” status seems like an odd name for an LLC or other unincorporate form. *Choose Your Own Master*, *supra* note 4, at 21 n.88 (suggesting that “certified B company” would be a better name for the certification).

the legal justification for the benefit corporation, as LLCs are extremely flexible and already capable of meeting social entrepreneurs' basic needs. The signaling and expressive benefits of the form, which seems to be a primary draw in the benefit corporation experiment, may also be captured by the benefit LLC form. Additionally, the benefit LLC form has the added benefit of pass-through taxation and a simple legal framework that is friendlier to small businesses than corporate forms. There does not appear to be a compelling legal justification for the benefit LLC; the traditional LLC already has the flexibility for firms to engage in social enterprise activity. If, however, states have already decided to go down the "benefit" entity path by passing a benefit corporation statute, then those states should consider the benefit LLC form, if only to aid social purpose expression, and to provide a pass-through taxation option for social entrepreneurs set on using a "benefit" legal entity form.