

The State of Social Enterprise and the Law

2024–2025

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The Grunin Center

The Grunin Center for Law and Social Entrepreneurship was founded to create new ways for law to support positive change in the world. Our mission is to enhance the community of lawyers and legal institutions engaged in social entrepreneurship and impact investing and to accelerate their effective participation in these fields. To this end, the Grunin Center publishes *The State of Social Enterprise and the Law* annually.

We dedicate the 2025
Tepper Report to the life and
memory of Andrew Kassoy
(1969–2025), co-founder of B Lab.

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(As of the 2024-2025 academic year)

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Casey is originally from Connecticut and graduated from Cornell University in 2022 with a BS in industrial and labor relations and minors in business and law and society. As an undergraduate she researched emerging climate disclosure regulations as well as conservation and biodiversity finance. Prior to Law School, she spent two years working in Washington DC as a business analyst for a financial services company. She is interested in the intersection of business and sustainability, in particular how regulation can improve business efficiency and social outcomes. Casey will spend the summer of 2025 working as a judicial intern at the Delaware Supreme Court.

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Introduction

The US social enterprise legislative landscape in 2024 witnessed stagnation in the proposal and passage of social enterprise-related legislation, echoing the declining trend seen in 2023. The number of bills introduced in 2024 aimed at expanding available legal structures for social enterprises decreased compared to the previous year, falling from three in 2023 to just two in 2024.

The legislative activity seen in 2024 coincides with broader conversations around the purpose and end goals of social enterprise forms. Some hold the belief that traditional corporate structures and state law (primarily Delaware common law) can provide sufficient safeguards for businesses seeking to advance social and environmental goals beyond shareholder profits. Others remain skeptical, arguing that traditional corporate structures remain insufficient to protect non-shareholder constituents so that special legal forms are needed to house social entrepreneurial activities. Motivated by this debate, the 2024 report examines *McRitchie v. Zuckerberg*, a 2024 Delaware Chancery Court decision, and its implications on corporations' choice of legal entities and private ordering decisions.

To further inquire into how the choice of legal form advances or undermines a corporation's broader societal goals, we discuss a case study on OpenAI's formation and the fiduciary duty litigation brought by Elon Musk. The case study aims to investigate the underlying factors that motivated OpenAI's choice of legal entity and scrutinize the efficacy of that choice in achieving its goals.

Mapping State Legislation

Every year the Grunin Center for Law and Social Entrepreneurship at NYU School of Law tracks legislative developments in the social enterprise field throughout the 50 states and the District of Columbia for our Social Enterprise Law Tracker.¹

The Social Enterprise Law Tracker

This mapping of state legislation is based on findings drawn from the [Social Enterprise Law Tracker](https://socentlawtracker.org/). Designed as a comprehensive online resource for legal practitioners and researchers, the Social Enterprise Law Tracker compiles relevant legislative actions across the United States.

Using an interactive map, the Social Enterprise Law Tracker aims to make it easy for users to see at a glance which states allow for the various social enterprise legal forms, as well as how social enterprise legislation has spread across the country from 2009 to the present day. The Social Enterprise Law Tracker is the first such tool to provide a comprehensive mapping of social enterprise legislation in the United States.



The Social Enterprise Law Tracker was developed more than a decade ago, in 2013, by Shawn Pelsinger and Robert Esposito, both Jacobson Fellows in Law & Social Enterprise at NYU School of Law. The Social Enterprise Law Tracker is now managed and updated annually by the Grunin Center for Law and Social Entrepreneurship at NYU Law.²

Overview of Different Forms

The Social Enterprise Law Tracker maps the following social enterprise legal forms: the benefit corporation (including the public benefit corporation [PBC]), the social purpose corporation (SPC), the low-profit limited liability company (L3C), the benefit limited liability company (BLLC), and the statutory public benefit limited partnership (SPBLP).³ While often conflated, benefit corporations are a legal status conferred by state law, whereas B Corps are a certification issued by the nonprofit B Lab based on social and environmental performance standards.

As the above graphic shows, while several states have authorized more than one form designed to house social entrepreneurial activities, the state that provides for the broadest range of social enterprise forms is Delaware, which has authorized the BLLC, PBC, and SPBLP.⁴

The difference in legislative adoption by states across these various social enterprise forms may simply reflect corporate interest in particular forms over others. It is challenging, however, to make any assumptions about adoption rates by social enterprises of the forms. Given that

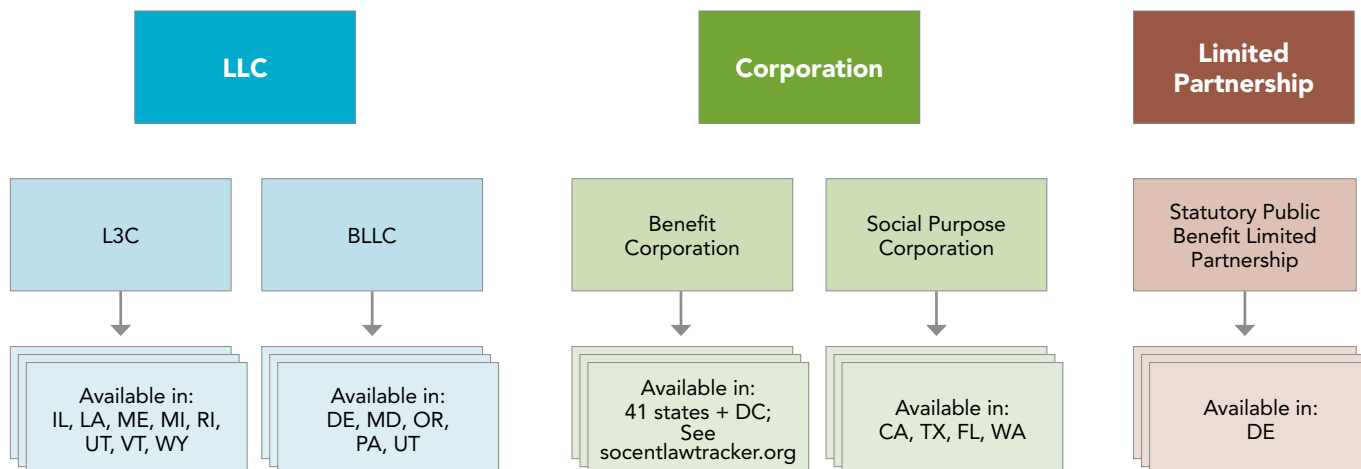
1. SOCIAL ENTERPRISE LAW TRACKER, <https://socentlawtracker.org/>.

2. GRUNIN CENTER FOR LAW AND SOCIAL ENTREPRENEURSHIP, <https://www.law.nyu.edu/centers/grunin-social-entrepreneurship>.

3. For a further description of these forms, see *The State of Social Enterprise and the Law*, GRUNIN CTR. FOR L. & SOC. ENTREPRENEURSHIP, 6 (2021), https://socentlawtracker.org/wpcontent/uploads/2022/04/2020-2021_Grunin_Tepper_Report.pdf.

4. Delaware first passed its benefit corporation legislation in 2013, BLLC (social enterprise LLC form) legislation in 2018, and SPBLP (social enterprise limited partnership form) legislation in 2019. In 2020, Delaware amended its PBC legislation to make it easier for publicly held companies to convert to the PBC form. See *Id.* at 14. As a result, Delaware companies are increasingly converting to PBCs both before and after going public. See 2021–2022 *Tepper Report*, *supra* note 2, at 8.

Social Enterprise Forms in the United States



the majority of social enterprises are privately held, there is a lack of reliable data on active US social enterprises and the legal forms they have chosen. As of the end of 2023, it was estimated that there were approximately 10 million social enterprises globally, comprising more than 3% of all businesses and generating around \$2 trillion in revenue each year.⁵ Of that amount, the United States had an estimated 1.3 million social enterprises, making it one of the largest ecosystems for social enterprises in the world.⁶ California and Delaware remain two leading states in defining and supporting social enterprises with dedicated legal frameworks.⁷

Social Enterprise Legislation in 2024

In 2024, legislative interest in increasing the available legal structures to house social enterprises persisted albeit at a reduced level than in 2023. Continuing a trend seen over the

past four years, no states successfully enacted legislation authorizing new social enterprise forms. The number of bills introduced in 2024 to expand available social enterprise legal structures declined from the previous year, dropping from three in 2023 to just two in 2024—Mississippi and Michigan. Mississippi again attempted to pass social enterprise legislation but failed for the eighth consecutive year.⁸ Similarly, Michigan has considered benefit corporation legislation four times since 2010. In February 2024, the legislation advanced to a third reading but, as of the end of 2024, had not progressed further.⁹

In contrast, Rhode Island introduced legislation in 2024 to repeal its existing L3C form, which passed the lower chamber but failed to advance, mirroring a similar failed effort in 2023.¹⁰ This legislation is part of an overall review of the legislation authorizing LLCs, of which the L3C is a narrower form.

5. World Economic Forum. *The State of Social Enterprise: A Review of Global Data 2013–2023*. Apr. 2024, <https://www.weforum.org/publications/the-state-of-social-enterprise-a-review-of-global-data-2013-2023/>.

6. *Id.*

7. Morrison & Foerster LLP. *Legal Reform as a Catalyst for Social Enterprise: An International Social Enterprise Law & Policy Report*. 2022, <https://www.mofo.com/resources/insights/220127-legal-reform-catalyst-report>.

8. See H.B. 437, 2024 Reg. Sess. (Miss. 2024).

9. See H.B. 5387, 102nd Leg., Reg. Sess. (Mich. 2024).

10. See S.B. 2782, 2024 Reg. Sess. (R.I. 2024).

State	Corporate Form	Bill Description	Result
Michigan	Benefit Corporation	Establishes benefit corporation form	Read for 2nd time and placed on 3rd reading status; no actions since taken
Mississippi	Benefit Corporation	Establishes benefit corporation form	Died in committee; MS has introduced and failed to pass benefit corp. legislation every year since 2017
Rhode Island	Benefit Corporation	Repeals the existing LLC Act and replaces it with a new code that does not include the L3C form	Held for further study (similar to 2023)

While some states have experimented with amendments to existing social enterprise statutes in prior years, 2024 saw no relevant revisions enacted to current laws.¹¹

This stagnation in social enterprise legislation coincides with broader shifts in how states are approaching environmental, social, and governance (ESG) issues, as a similar decline in the number of legislative movements is evident in state-level ESG policymaking. In 2024, the number of ESG-related bills introduced dropped sharply, with only half as many proposals and just a quarter as many enactments compared to the previous year.¹² Lawmakers introduced 61 anti-ESG bills and 15 pro-ESG bills; and seven and two, respectively, were signed into law in 2024.¹³

Of the two pro-ESG measures enacted, Maryland seeks to integrate ESG into public pension investments by appointing a Director of Diversity, Equity, and Inclusion and establishing a governance program to monitor and apply ESG factors.¹⁴ Meanwhile, Oregon mandates the divestment of public pension funds from thermal coal companies unless they are actively transitioning to clean energy.¹⁵

The anti-ESG legislation focuses on restricting public investments based on non-pecuniary factors. For example, Georgia, Louisiana, and South Carolina passed laws to require fiduciaries of public retirement systems or investment commissions to consider only pecuniary (financial) factors when making investment decisions.¹⁶ A second set of bills targeted ESG-driven corporate practices perceived as discriminatory toward certain industries like firearms and fossil fuels. For example, Georgia, Idaho, and Louisiana prohibited their state agencies from entering into public contracts with companies that discriminate against certain industries, characterizing these discriminatory behaviors as impermissible “boycotts.”¹⁷ If these anti-ESG legislative trends continue, social enterprises may face new challenges in maintaining their legal recognition and operational flexibility.

However, legal challenges in 2024 have complicated the enforcement of some of these anti-ESG laws. In Missouri, a federal court struck down anti-ESG regulations that would have required written consent concerning ESG-related investments.¹⁸ Similarly, in Oklahoma, a state court

11. For a further description of past legislative movements, see *The State of Social Enterprise and the Law*, GRUNIN CTR. FOR L. & SOC. ENTREPRENEURSHIP, (2023), https://socentlawtracker.org/wp-content/uploads/2024/09/2023_2024_Grunin_Tepper_Social-Enterprise-and-Law-Report.pdf.

12. Ropes & Gray. *The State of State ESG Activity as an Election Looms—a 2024 Mid-Year Review*. 2024, <https://www.ropesgray.com/en/insights/alerts/2024/06/the-state-of-state-esg-activity-as-an-election-looms-a-mid-year-review>.

13. *Id.*

14. See H.B. 1212, 2024 Reg. Sess. (Md. 2024).

15. See H.B. 4083, 2024 Reg. Sess. (Ore. 2024).

16. See H.B. 481, 2023-2024 Reg. Sess. (Ga. 2024), H.R. 267, 2024 Reg. Sess. (La. 2024), H.B. 3690, 2023-2024 Reg. Sess. (S.C. 2024).

17. In the context of these bills, “boycott” is often defined as companies refusing to do business with or discriminating against certain industries such as fossil fuels or firearms. However, under these laws it is unclear what specific business activities would amount to a boycott. See H.B. 1018, 2023-2024 Reg. Sess. (Ga. 2024), S.B. 1291, 2024 Reg. Sess. (Idaho 2024), S.B. 234, 2024 Reg. Sess. (La. 2024).

18. Phillips, Jason. “State Attempts to Limit ESG Investment Are Faring Poorly in the Courts.” *MultiState*, 22 Sept. 2024, <https://www.multistate.us/insider/2024/9/22/state-attempts-to-limit-esg-investment-are-faring-poorly-in-the-courts>.

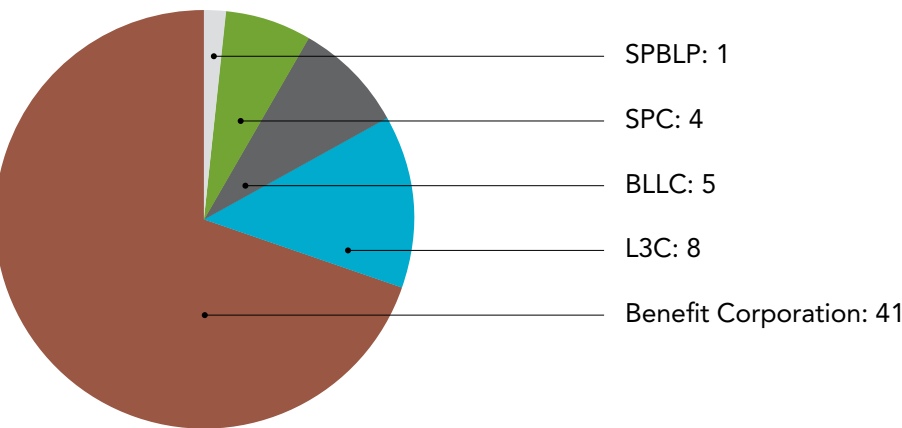
blocked a law creating a boycott of firms found to discriminate against energy businesses, ruling that it comprises a political agenda and therefore is unconstitutional.¹⁹

As courts continue to weigh in on the constitutionality of such laws, the future of ESG regulation at the state level remains uncertain.

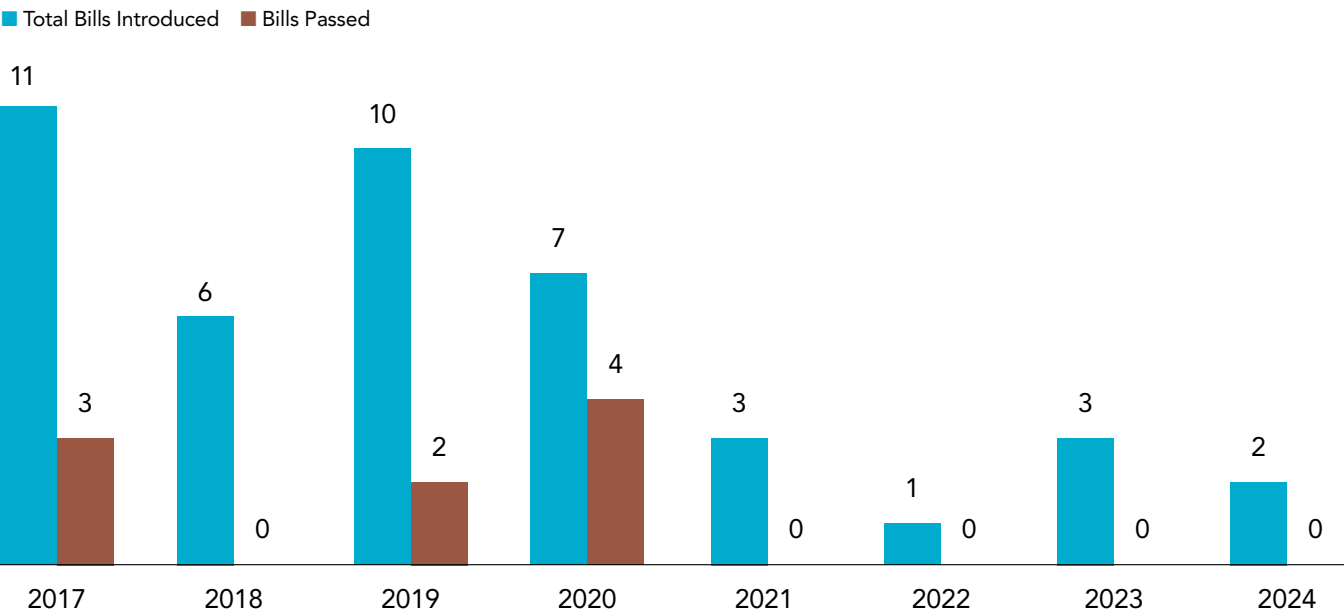
Current Social Enterprise Landscape

2024 Trends

US Social Enterprise Landscape, 2024



Benefit Corporation Bill Passage Rates



19. *Id.*

Reconstituting Constituency Statutes

The slowdown in new state legislation means that existing statutes and common law developments will inform choices between corporate forms and locations. One area of these familiar frontiers that merits discussion is state constituency statutes. Constituency statutes clarify the scope of fiduciary duties owed to a corporation. While there are several types of constituency statutes, the common denominator is a defined balance between fiduciary duties and non-pecuniary factors. Constituency statutes emerged in the 1980s following the Delaware Supreme Court's decision in *Revlon v. MacAndrews & Forbes*.²⁰ There, the Delaware Supreme Court articulated a shareholder-primacy approach towards directorial duties that focused only on profit maximization.

In response to the Revlon decision in Delaware, 32 other states enacted constituency statutes clarifying or outright rejecting Delaware's narrow interpretation of board decision-making.²¹ These range from modified shareholder-primacy statutes (*requiring* directors to consider what is in the best interest of the shareholders and *permitting* them to consider other factors) to strong-form level-playing-field statutes (giving boards *full discretion* in choosing which factors to prioritize²²). The practical effect of these statutes is to create a spectrum of directorial discretion and flexibility.

So, what does this mean for companies who, either through choosing a specialized form like the benefit corporation or through narrowing the general purpose clause typically contained in corporate charters (which is also referred to as "private ordering"), seek to embed social missions in their constituent documentation? The short answer is that it increases the complexity of the business landscape. The

larger significance is the uncertain role that Delaware's view of directorial duties will play in regards to corporate decision making and litigation.

A recent Delaware decision provides some clues. *McRitchie v. Zuckerberg*²³ was decided in 2024 by the Delaware Chancery Court, and first discussed in the 2022 issue of this report.²⁴ It reiterates firm-specific and narrow default fiduciary duties for businesses incorporated in Delaware.²⁵ Dicta offered in this opinion, however, validates what some critics had feared would be a corrosive effect of PBCs on the duties expected of companies opting for more conventional corporate forms, like the C-Corporation.²⁶ Namely, the Chancery Court imagined alternative ways—such as through choice of legal form or private ordering—that Meta might have chosen if it had wanted its directors to consider the interests of diversified shareholders' economic interests more broadly, not just with respect to their financial interests in the performance of Meta.

20. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

21. Principles of Corporate Governance: Analysis and Recommendations §2.01 Reporter's Notes 6 (Am. L. Inst. 2008).

22. *Id.*

23. *McRitchie v. Zuckerberg*, 315 A.3d 518 (Del. Ch. 2024).

24. PBC Pushback: Meta Litigation, *The State of Social Enterprise and the Law*, GRUNIN CTR. FOR L. & SOC. ENTREPRENEURSHIP, https://socentlawtracker.org/wp-content/uploads/2023/09/2022_2023_Grunin_Tepper_Report.pdf.

25. *Id.* at 11.

26. Brett McDonnell, "The Corrosion Critique of Benefit Corporations," 101 B.U. L. Rev. 1421 (2021).

Some Delaware corporations have already embraced private ordering over legal form choice.²⁷

As the political climate around social impact shifts, this holding may signal heightened judicial deference to decisions made by Delaware PBCs or by Delaware companies that through private ordering define an ESG-advancing or other socially oriented corporate purpose (as compared to Delaware companies opting for more traditional corporate forms). This deference could possibly offer these PBCs and mission-oriented companies a shield from litigation and anti-ESG shareholder activism. The Chancery Court appears to indirectly endorse this approach, suggesting that the outcome of a shareholder derivative suit would be different under the Board Power Exception²⁸ (§141(a)) or private ordering.²⁹

Alternatively, Delaware's approach may increase the attractiveness of incorporation in other states for publicly held companies that want to preserve protection for socially minded decisions but do not want to incorporate as a benefit corporation or narrow their corporate purpose through private ordering. Both Nevada and Texas are commonly touted alternatives³⁰ to Delaware with distinct features, in addition to having broader-reaching constituency statutes³¹. Given a spate of recent legislative activity, the Delaware legislature may also be interested in codifying its own constituency statute, if the legacy of *Revlon*³² becomes seen as a competitive disadvantage.

In short, constituency statutes and forthcoming common law developments will remain important for companies to consider amid increasing political and economic uncertainty.

27. Jibu Case Study, *The State of Social Enterprise and the Law*, GRUNIN CTR. FOR L. & SOC. ENTREPRENEURSHIP, https://socentlawtracker.org/wp-content/uploads/2023/09/2022_2023_Grunin_Tepper_Report.pdf.

28. "Structurally, the first sentence of Section 141(a) gives the board nearly plenary authority over the business and affairs of the corporation 'except as may be provided otherwise in this chapter or in its certificate of incorporation' (the 'Board Power Exception'). 215 The Board Power Exception authorizes modifications to the board-centric regime that appear in the DGCL ('in this chapter') or the charter ('in its certificate of incorporation')." *McRitchie v. Zuckerberg*, *supra* note 23 at 576.

29. *Supra* note 27.

30. Bainbridge, Stephen M. "DExit Drivers: Is Delaware's Dominance Threatened." *Law & Economics*, vol. 26, no. 4, July 2024. [escholarship.org](https://escholarship.org/uc/item/5jv5q8tf), <https://escholarship.org/uc/item/5jv5q8tf>.

31. While Nevada and Texas may not immediately come to mind for ESG-focused companies, their broad constituency statutes override the presumption that financial interests of the shareholders must always come first. These statutes allow ESG-minded companies to consider stakeholders related to their socially minded missions as additional constituents. See NV Rev Stat § 78.138 (2024); Tex. Bus. Orgs. Code Ann. § 21.401 (West).

32. *Revlon* requires enhanced scrutiny over director decisions when a company is subject to a sale or takeover. In those situations, directors are required to make reasonable efforts to obtain the highest value and their decisions are evaluated against the reasonableness standard instead of under the more deferential business judgment rule. See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, *supra* note 20.

OpenAI Case Study

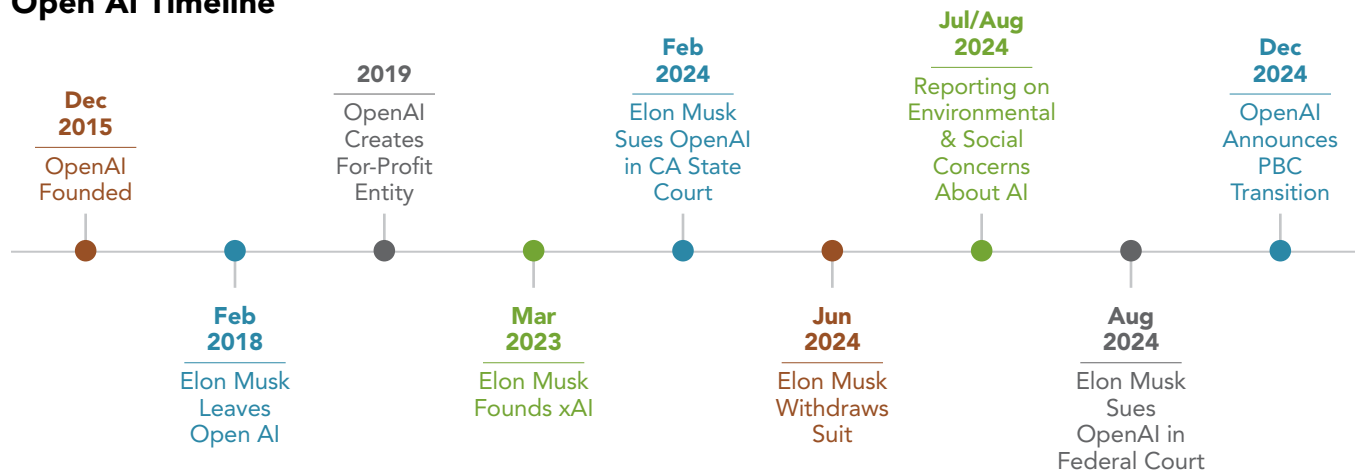
With more than 41 states having already enacted legislation establishing benefit corporation forms, we are now seeing a shift towards adoption of the form in new industries. One industry shifting towards use of the benefit corporation form is artificial intelligence (AI). Two major industry players—Anthropic³³ and xAI³⁴—adopted the benefit corporation form prior to 2024. In 2024, OpenAI announced that it would be transitioning from a nonprofit form to a benefit corporation form.³⁵

The following case study of OpenAI looks at the factors driving leaders in the AI industry to incorporate as benefit corporations. On a broader level, it also seeks to understand the implications of having company leaders in so-called “controversial”³⁶ industries adopt this legal form. Does their adoption of this form undermine or support the underlying goals of the benefit corporation as a legal form? OpenAI’s decision to transition to a Delaware PBC corporation provides an opportunity to explore these questions.

OpenAI Timeline: Founding and Early Governing Structures

In December 2015, OpenAI was founded as a nonprofit with Elon Musk and Sam Altman serving as the co-chairs.³⁷ At the time it was founded, OpenAI’s “aim [was] to build value for everyone rather than shareholders.”³⁸ In 2017, OpenAI began discussions around the need for a for-profit entity to “further the mission” of ensuring artificial intelligence benefits “all of humanity.”³⁹ Elon Musk and the rest of the board disagreed on how to structure a for-profit

Open AI Timeline



33. Anthropic is incorporated as a Delaware public benefit corporation and announced in September 2023 they would be adopting long-term benefit trust as a further experimental form of corporate governance. The Anthropic mission “is the responsible development and maintenance of advanced AI for the long-term benefit of humanity.” See Anthropic About Company Page, <https://www.anthropic.com/company> (last visited Mar. 20, 2025).

34. xAI incorporated as a Nevada public benefit corporation in December 2023. The xAI mission is “to advance our collective understanding of the universe.” See xAI About Page, <https://x.ai/about> (last visited Mar. 20, 2025).

35. *Why OpenAI’s structure must evolve to advance our mission*, OpenAI, <https://openai.com/index/why-our-structure-must-evolve-to-advance-our-mission/> (Dec. 27, 2024).

36. We choose to classify AI as a potential “controversial” industry as there are many ongoing disagreements and debates surrounding the underlying ethics and widespread use of artificial intelligence.

37. *Introducing OpenAI*, OpenAI.com, <https://openai.com/index/introducing-openai/> (Dec. 11, 2015).

38. *Id.*

39. *OpenAI and Elon Musk*, OpenAI.com, <https://openai.com/index/openai-elon-musk/> (Mar. 5, 2024).

entity, which ultimately led to Musk departing OpenAI in February 2018.⁴⁰ In March 2019, OpenAI announced it was forming OpenAI LP as a “capped-profit” company.⁴¹ OpenAI LP’s original corporate structure specified that it would be controlled by OpenAI Nonprofit’s board.⁴² Additionally, OpenAI claimed that the OpenAI LP’s primary fiduciary duty was to advance the aims of the OpenAI Charter.⁴³ That charter defines four principles—broadly distributed benefits, long-term safety, technical leadership, and cooperative orientation—geared towards fulfilling the mission:

“OpenAI’s mission is to ensure that artificial general intelligence (AGI)—by which we mean highly autonomous systems that outperform humans at most economically valuable work—benefits all of humanity. We will attempt to directly build safe and beneficial AGI, but will also consider our mission fulfilled if our work aids others to achieve this outcome.”⁴⁴

OpenAI Timeline: Disputes and Transformation

In March 2023, former OpenAI co-chair Elon Musk founded xAI as a competitor to OpenAI.⁴⁵ The following February, Musk filed a complaint against OpenAI in California state

court.⁴⁶ The foundation of the complaint is grounded in an alleged “breach” of OpenAI’s founding agreement that stipulated they would develop AI for the benefit of humanity rather than for company or personal profit.⁴⁷ The complaint contained five total claims, including both a Breach of Contract and a Breach of Fiduciary Duty claim.⁴⁸ In June 2024, Musk withdrew the suit just days before the Motion to Dismiss hearing.⁴⁹ Elon Musk’s initial suit was not the only controversy OpenAI faced in 2024. Throughout the summer of 2024, concerns about generative AI’s environmental⁵⁰ and social⁵¹ impacts dominated the news cycle. Additionally, the FTC indicated that it would be investigating OpenAI for potential antitrust violations.⁵² Then in August 2024, Musk filed a new complaint against OpenAI in Federal Court.⁵³ The new complaint featured 15 total claims including fraud, RICO violations, breach of contract, and unfair advertising claims.⁵⁴ It was based on a similar foundation as the state court complaint, that by performing for-profit activities OpenAI breached a founding agreement that Musk’s financial contributions to the company were predicated on.⁵⁵ Following a tumultuous year filled with allegations and litigation, in December 2024, OpenAI announced that it would be transforming its for-profit arm into a Delaware PBC.⁵⁶

40. *Id.*

41. OpenAI LP, OpenAI.com, <https://openai.com/index/openai-lp/> (Mar. 11, 2019).

42. *Id.*

43. *Id.*

44. OpenAI Charter, OpenAI.com, <https://openai.com/charter/> (last visited Mar. 20, 2025).

45. xAI Company Page, x.AI, <https://x.ai/company> (last visited Mar. 20, 2025).

46. See Complaint, Musk v. Altman, CGC-24-612746, (S.F. Super. Ct. filed Feb. 29, 2024).

47. *Id.*

48. *Id.*

49. Mike Scarcella, *Elon Musk Withdraws Lawsuit Against OpenAI*, Reuters, (June 12, 2024), <https://www.reuters.com/legal/elon-musk-withdraws-lawsuit-against-openai-2024-06-11/>.

50. Environmental concerns surrounding generative AI include massive energy and freshwater demands. See David Berreby, *As Use of A.I. Soars, So Does the Energy and Water It Requires*, Yale Environment 360, (Feb. 6, 2024), <https://e360.yale.edu/features/artificial-intelligence-climate-energy-emissions>.

51. Social concerns surrounding generative AI include unethical uses of the technology such as cheating within school. See Lauren Coffey, *Students and Professors Believe AI Will Aid Cheating*, Inside Higher Education, (July 29, 2024), <https://www.insidehighered.com/news/tech-innovation/artificial-intelligence/2024/07/29/students-and-professors-expect-more>.

52. David McCabe, *U.S. Clears Way for Antitrust Inquiries of Nvidia, Microsoft and OpenAI*, NY Times, (June 5, 2024), <https://www.nytimes.com/2024/06/05/technology/nvidia-microsoft-openai-antitrust-doj-ftc.html>.

53. See Complaint, Musk v. Altman, Case No. 3:24-cv-04722, (N.D. Cal. filed Aug. 8, 2024), https://regmedia.co.uk/2024/08/05/musk_v_openai.pdf.

54. *Id.*

55. *Id.*

56. *Supra* note 17.

Motivating Trends for Adopting a Public Benefit Corporation Form

There are three potential motivating trends for this move towards a PBC form by OpenAI (and AI companies in general). First, we think the strongest motivating trend is using the transformation to a PBC as an investment strategy. OpenAI has stated that it believes this transition to a PBC “will enable [it] to raise the necessary capital with conventional terms like others in this space.”⁵⁷ As OpenAI shares on its website: “We once again need to raise more capital than we’d imagined. Investors want to back us but, at this scale of capital, need conventional equity and less structural bespokeness.”⁵⁸ Moving to a Delaware PBC form will allow OpenAI to provide ordinary shares of stock to investors and the nonprofit arm of OpenAI.⁵⁹ A transition to a more traditional form, such as the C-Corporation, would also offer that option. However, by transitioning into a PBC, OpenAI is removing the cap on investor returns, yet still maintaining brakes on anticipated financial returns by requiring a balancing of shareholder interests, stakeholder interests, and the public benefit interests.⁶⁰

The second motivating factor we identified is response to litigation or protection from future litigation. As mentioned above, OpenAI has faced multiple lawsuits from Elon Musk, who notably has no equity in the company.⁶¹ The Delaware PBC statute requires plaintiffs in actions aimed at enforcing the balancing requirement to be stockholders that individually or collectively own at least two percent of the PBC’s shares.⁶² These requirements could help ensure that companies like OpenAI are protected from future litigation from non-stockholder parties, like Musk.

The third potential motivating factor we identified is maintaining or improving public opinion in light of disfavorable conditions. Choosing a PBC form over a traditional C-Corporation could signal to the public that OpenAI is still committed to public good despite their corporate transition from a nonprofit to for-profit structure. Additionally, in light of the negative press that OpenAI has been receiving, providing a path for stockholders to enforce OpenAI’s public benefit commitments could strengthen the public’s perceptions of a company’s commitment to the public good.⁶³ As we have not yet seen a derivative suit seeking to enforce a company’s public benefit obligations, it is unclear how effective Delaware’s PBC enforcement mechanisms will be in ensuring legal accountability.

OpenAI demonstrates an interesting view of the factors that a company takes into consideration when incorporating as a PBC. As legislation adoption slows, the use of the corporate forms by industries with controversial reputations, like AI, is generating interesting questions about the goals and success of PBC forms of governance. Additionally, it demonstrates the potential importance of enforcement mechanisms within these legal forms. The developments at OpenAI illustrate how, even amid a stagnant legislative environment, companies are actively adopting legal structures to align with emerging challenges and opportunities.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Elon Musk Wanted an OpenAI For-Profit*, OpenAI.com, <https://openai.com/index/elon-musk-wanted-an-openai-for-profit/> (Dec 13, 2024).

62. See 8 Delaware Code § 367 (2024).

63. Although empirical data has not been collected on the public’s perceptions of companies incorporated using a PBC legal form, multiple empirical studies have shown that consumers prefer brands with purposes that align with their personal values. See a 2018 survey of nearly 30,000 consumers finding that 63 percent prefer to buy goods and services from companies that stand for a shared purpose reflecting their personal values and beliefs. *Majority of Consumers Buying from Companies That Take a Stand on Issues They Care About and Ditching Those That Don’t*, Accenture Study Finds, Accenture, (December 5, 2018), <https://newsroom.accenture.com/news/2018/majority-of-consumers-buying-from-companies-that-take-a-stand-on-issues-they-care-about-and-ditching-those-that-dont-accenture-study-finds>.

Conclusion

The year 2024 reflected a continued stagnation of social enterprise legislative efforts, validating the conclusion laid out in the *2023 State of Social Enterprise and the Law* and highlighting the trend toward stagnation even as existing forms like benefit corporations are being adopted in new sectors like AI.

McRitchie v. Zuckerberg demonstrates how corporate entities leverage the benefit corporation form to not only protect non-shareholder constituents' societal interest, but also afford corporations with protection against non-shareholder constituents. Although the holding reinforces Delaware's long-held view of the fiduciary duties owed to shareholders, the dicta in that decision points to the possibility that Delaware corporations can expand fiduciary duties to include broader stakeholder interests through private ordering or by adopting alternative legal forms.

OpenAI's conversion into a Delaware PBC expounds in detail on three major benefits of becoming a PBC: access to traditional equity financing, shielding from non-shareholder litigation, and improving public perception. Together, *McRitchie v. Zuckerberg's* dicta and OpenAI's corporate legal form journey challenge the assumption that the new social enterprise forms are most appropriate for mission-first startups. These developments also raise unresolved questions about how enforcement mechanisms within PBC status will be tested going forward – questions we leave for future Tepper Fellows to explore.

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