# NOTE

# BENEFIT CORPORATIONS: A PROPOSAL FOR ASSESSING LIABILITY IN BENEFIT ENFORCEMENT PROCEEDINGS

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## INTRODUCTION

There has been a growing trend of more socially conscious consumption as a new generation of consumers and business leaders rises to the forefront. This trend has elicited a response from existing corporations and entrepreneurs starting new businesses such that socially-minded goals are taken into account in addition to profit-maximizing goals. Because the traditional corporation models restricted the ability of businesses to serve both socially-conscious and profit-maximizing goals simultaneously, new "fourth sector" corporations that combine aspects of the traditional for-profit, non-profit, and government sectors have been increasing in number. The most notable of these "fourth sector" corporations are benefit corporations, which are for-profit entities that claim to serve a general public benefit. Since the benefit corporation was first recognized in Maryland in 2010, it has garnered much criticism. Some argue that the new entity does not do enough to enhance the general public welfare, whereas others argue that the new corporate form is unnecessary to achieve beneficial goals. There appears to be a consensus, however, that crucial issues exist in the regulation of benefit corporations that the courts have not yet had the opportunity to address. One of these issues is the difficulty in assessing and enforcing the socially-conscious goals that benefit corporations claim to promote. This Note discusses the existing benefit corporation debate in four parts: Part I introduces the rise of the benefit corporation and its recent trends; Part II assesses the advan-

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tages of the benefit corporation; Part III considers its current limitations; and Part IV suggests a method of addressing the ambiguity in evaluating director liability in benefit enforcement proceedings.

## I
## THE BENEFIT CORPORATION

### A. Background

As a new generation infiltrates the workforce, the market economy is beginning to increasingly depend on variables other than the desire for financial gain. No longer are key market players such as consumers, investors, and employees making decisions without regard to the larger implications of their actions. A Nielsen survey published in 2015 indicates that 66 percent of global survey respondents are willing to pay more for products that are socially responsible. This figure has increased from 55 percent in 2014 and 50 percent in 2013.[1]

Similarly, the 2010 Cone Cause Evolution Study indicates that 80 percent of respondents would likely choose a brand that supports a cause over one that does not, given that both are similar in price and quality.[2] These figures show that consumers are increasingly considering a company's socially and environmentally conscious endeavors when making choices.[3] Social media likely plays a large role in shaping this trend, as consumers and employees are able to share information about a commodity's production processes and origins with ease. This undoubtedly has heightened the public's awareness of social missions that are pursuing goals such as environmental

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1 *Sustainable Selections: How Socially Responsible Companies Are Turning a Profit*, NIELSEN: NEWSWIRE (Oct. 12, 2015), http://www.nielsen.com/us/en/insights/news/2015/sustainable-selections-how-socially-responsible-companies-are-turning-a-profit.html [https://perma.cc/TX3P-CFV7]. Another study conducted by BBMG indicates that 73 percent of consumers care about the company who made the product, and not just the product itself. Jo Confino, *Consumers Believe Brands Can Have Positive Impact but Are Failing to Do So*, THE GUARDIAN (June 4, 2013, 1:04 PM), https://www.theguardian.com/sustainable-business/consumers-brands-positive-impact-failing [https://perma.cc/TY9Q-ZBNE].

2 CONE LLC, 2010 CONE CAUSE EVOLUTION STUDY 6, http://www.conecomm.com/research-blog/2010-cause-evolution-study [https://perma.cc/LJ86-EAYF].

3 *See Legal FAQS*, BENEFITCORP.NET, http://benefitcorp.net/sites/default/files/documents/Implications_of_Becoming_a_DE_Public_Benefit_Corporation_0.pdf [https://perma.cc/GW3N-SMQV] [hereinafter *Legal FAQS*] (noting that "[n]early 70 Million U.S. consumers state a preference for making purchasing decisions based upon their sense of a company's social and environmental responsibility").

sustainability, gender equality, and improved working conditions.[4]

Perhaps in response to this trend, the business world has begun to shift its strategies for business success in the long run.[5] Many companies are showing increases in cash and non-cash charitable investments and pro bono hours, which indicates a greater focus on social-oriented investment.[6] Companies are also beginning to recognize that public reputation makes a significant impact not only on consumer product choices but also on the acquisition of talent.[7] According to Benefitcorp.net, Millennials, who comprise 50 percent of the global workforce, prefer work with meaning.[8] A recent survey published by Deloitte also states that the overwhelming majority of Millennials believe that "the success of a business should be measured in terms of more than just its financial performance."[9]

Given this rising focus on corporate responsibility, businesses are recognizing the need for adjustment in order to attract and retain talent among Millennials.[10] Reflecting this growing trend and shift in Millennial mindset, a new corporate entity called the benefit corporation emerged in 2010.

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4 *See* COMM. ENCOURAGING CORP. PHILANTHROPY, GIVING IN NUMBERS 2 (2015), http://cecp.co/wp-content/uploads/2016/11/GIN2015_FINAL_web-1.pdf?redirect=NO [https://perma.cc/CN9Y-UFFE] ("[T]oday's instantaneous, transparent, and hyper-connected exchange of data has spawned a new reality. In a world where all stakeholders—customers, neighbors, regulators, and shareholders—can see inside the enterprise, leaders in the corporate sector have committed to an enlightened self-interest in societal investment.").

5 A market has emerged for providing consulting services to companies aiming for socially responsible branding and growth. *See, e.g.*, *Aspirational Consumers Are Rising. Are Brands Ready to Meet Them?*, GLOBESCAN (June 6, 2016), https://www.globescan.com/component/content/article/103-press-releases-2016/390-aspirational-consumers-are-rising-are-brands-ready-to-meet-them.html [https://perma.cc/396V-ZPLR] (stating that BBMG's purpose is to "creat[e] brands of enduring value . . . and re-engineer brand experiences to drive growth and positive social impact"). *See also* SUSTAINABLE BRANDS, http://www.sustainablebrands.com/ [https://perma.cc/Q8GD-X6XL] (focusing on enhancing sustainability to promote long-term growth).

6 COMM. ENCOURAGING CORP. PHILANTHROPY, *supra* note 4, at 5.

7 *See Legal FAQS*, *supra* note 3.

8 *Id.*

9 *Millennials Want Business to Shift Its Purpose: The Deloitte Millennial Survey 2016*, DELOITTE, 8 https://www2.deloitte.com/global/en/pages/about-deloitte/articles/gx-millennials-shifting-business-purpose.html [https://perma.cc/G8VE-3AZD].

10 *See id.* (reporting that "[b]usinesses must adjust how they nurture loyalty among Millennials or risk losing a large percentage of their workforces").

### B. The Hybrid Business Model

Millennial survey results such as Deloitte's make sense in light of the values that Millennials and hybrid business forms, or firms that merge aspects of for-profit and non-profit organizations, share.[11] For example, both appear to strive for authenticity in representing who they are.[12] To illustrate, Millennials have been fighting the need to follow previous generations' binary social constructs such as gender norms and instead have shown a proclivity towards more fluid boundaries.[13] Similarly, hybrid organizations have embraced the idea that social and economic goals can fall on a spectrum rather than being black and white.[14]

The idea of forming a hybrid between a non-profit and for-profit business organization garnered public attention with the founding of B Lab, a non-profit organization that started a movement to promote a "triple bottom line" approach for businesses constituting "profit, people and planet."[15] The movement paved the way for the concept of the benefit corporation to gain legal recognition.[16] The benefit corporation was first adopted as a new kind of corporate entity by Maryland in 2010.[17] This new model was created to merge the traditional for-profit business corporation model with a non-profit model by allowing social entrepreneurs to consider interests beyond those of maximizing shareholder wealth in order to promote a cause that provides a general benefit to the public.[18] Cur-

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11 Chris Miller, *Millennials and Hybrid Legal Structures Are Here to Stay*, STAN. SOC. INNOVATION REV. (July 1, 2016), https://ssir.org/articles/entry/millennials_and_hybrid_legal_structures_are_here_to_stay [https://perma.cc/8ARU-N83P].

12 *Id.*

13 *Id.*

14 *Id.*

15 Josh Patrick, *Assessing the Benefits of Becoming a Benefit Corporation*, N.Y. TIMES: YOU'RE THE BOSS (June 13, 2014, 1:00 PM), http://boss.blogs.nytimes.com/2014/06/13/assessing-the-benefits-of-a-benefit-corporation/ [https://perma.cc/L2FN-GGQG].

16 *Id.*

17 *Id.*

18 Noam Noked, *Benefit Corporations vs. "Regular" Corporations: A Harmful Dichotomy*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (May 13, 2012), https://corpgov.law.harvard.edu/2012/05/13/benefit-corporations-vs-regular-corporations-a-harmful-dichotomy/ [https://perma.cc/9UDQ-875N] (stating that advocates of the benefit corporation claim that it "fills a gap between traditional corporations and non-profits by giving social entrepreneurs flexibility to achieve the dual objectives of doing well and doing good").

rently, 33 states have passed benefit corporation legislation, and six states are working on passing legislation.[19]

In the early 20th century, courts imposed a responsibility on directors of corporations to consider shareholder wealth above stakeholder interests.[20] The theory behind imposing such a responsibility can be summed up by Milton Friedman's quote: "The social responsibility of business is to increase its profits."[21] This sentiment did not prevail in all circumstances, however. For example, courts have been reluctant to find directors liable for decisions pertaining to the day-to-day operation of the business.[22] Moreover, a number of states have passed non-shareholder constituency statutes.[23] Such statutes give directors of corporations the authority to consider interests beyond maximizing shareholder wealth.[24] Nonetheless, these statutes often fail to clarify to what extent directors are allowed to consider stakeholder interests at the expense of shareholder interests.[25]

Although many states have adopted constituency statutes that permit directors to consider the interests of groups beyond shareholders, the threat of litigation likely chills directors of traditional for-profit corporations from considering non-shareholder interests alongside financial concerns when making corporate decisions.[26] Shareholders, depending on the state, have the right to file direct or derivative actions on behalf of a corporation for a director's breach of fiduciary duty.[27] For example, in states such as New York, shareholders may file a derivative

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19 *State by State Status of Legislation*, BENEFITCORP.NET, [http://benefitcorp.net/policymakers/state-by-state-status [https://perma.cc/WRZ7-HQ6J] [hereinafter *State by State Status*].

20 *See* Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 976–77 (1992) (explaining how the *Dodge v. Ford Motor Co.* decision imposed on directors a duty to maximize shareholder wealth).

21 Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at 32.

22 Bainbridge, *supra* note 20, at 973–74.

23 *Id.*

24 *Id.*

25 *Id.*

26 *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 9–10 (2013), http://benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf [https://perma.cc/K8VM-NULW].

27 *See* Michael Smith & Bethany Rezek, *Director Fiduciary Duties: Owed to the Corporation or the Shareholders?*, KING & SPALDING (Jan. 22, 2014), https://www.kslaw.com/blog-posts/director-fiduciary-duties-owed-corporation-shareholders [https://perma.cc/G9T9-R2RT].

suit against corporate directors for a breach of fiduciary duty.[28] In other states, such as Delaware, shareholders may file a derivative suit or a direct suit, depending on whether the corporation or the shareholders suffered injury and whether the corporation or the shareholders would receive the benefit of any recovery.[29] The possible chilling effect is particularly problematic in Delaware, where over 50 percent of all publically traded companies are domiciled,[30] because Delaware lacks such a constituency statute.[31]

The effect of lacking a constituency statute can be seen in *eBay Domestic Holdings, Inc. v. Newmark*, where the Delaware Court of Chancery held that directors are obligated to maximize shareholder value.[32] *eBay* follows the landmark case, *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, where the Delaware Supreme Court held that when a sale of a company is inevitable, the directors of the corporation acquire "Revlon duties"[33] that require the corporation to be sold to the highest bidder.[34] Because many state courts look to Delaware case law when resolving corporate disputes (given that Delaware has the most developed case law in this area),[35] Delaware decisions such as *eBay* and *Revlon* have fostered an environment where directors of traditional for-profit corporations are likely to feel heavily pressured to prioritize the financial interests of shareholders above alternative interests, regardless of whether the corporation is domiciled in a state having a constituency statute.[36]

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28 *E.g.*, Bank of Am. Corp. v. Lemgruber, 385 F. Supp. 2d 200, 224 (S.D.N.Y. 2005).

29 Smith, *supra* note 27.

30 Div. of Corps., *About Agency*, STATE OF DELAWARE, http://corp.delaware.gov/aboutagency.shtml [https://perma.cc/NDB4-92FG].

31 CLARK & VRANKA, *supra* note 26, at 9–10.

32 eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34–35 n.105 (Del. Ch. 2010) ("Although such considerations [of non-stockholder corporate constituencies and interests] may be permissible, there are fundamental limitations upon that prerogative. A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders." (quoting Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 183 (Del. 1986)).

33 William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 837 (2012).

34 *Revlon*, 506 A.2d at 182.

35 Alicia E. Plerhoples, *Delaware Public Benefit Corporations 90 Days Out: Who's Opting In?*, 14 U.C. DAVIS BUS. L.J. 247, 248 n.3 (2013).

36 *But see* Bainbridge, *supra* note 20, at 996 (stating that it is likely that directors use non-shareholder constituency statutes to disguise actions made in their own self-interest).

The benefit corporation is an attempt to remedy this problem by requiring directors to consider interests beyond those that are purely financial in nature.[37] Thirty-three states have passed statutes recognizing the benefit corporation as a new business form.[38] Most of the statutes were modeled after the Model Benefit Corporation Legislation, which states that the purpose of a benefit corporation is to pursue a "general public benefit."[39] The model legislation defines a general public benefit as a "material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation."[40] Unlike constituency statutes, the model benefit legislation requires, rather than simply permits, directors to consider general public benefits when making decisions.[41] Moreover, the Model Benefit Corporation Legislation states that benefit corporations are permitted to identify specific benefit purposes and lists seven potential categories that these benefits may fall under:

> (1) [P]roviding low-income or underserved individuals or communities with beneficial products or services;
> (2) [P]romoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;
> (3) [P]rotecting or restoring the environment;
> (4) [I]mproving human health;
> (5) [P]romoting the arts, sciences, or advancement of knowledge;
> (6) [I]ncreasing the flow of capital to entities with a purpose to benefit society or the environment; [or]
> (7) [C]onferring any other particular benefit on society or the environment.[42]

Nevertheless, the degree to which a benefit corporation should heed these socially beneficial interests relative to the financial interests of its shareholders is a source of recent de-

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37 Julie Battilana et al., *In Search of the Hybrid Ideal*, STAN. SOC. INNOVATION REV., Summer 2012, at 51, 53 (stating that "[t]he Benefit Corporation is a corporate form . . . that requires organizations to consider a designated social purpose and corresponding social impact alongside financial analysis in making strategic and tactical business decisions").

38 *State by State Status*, *supra* note 19.

39 MODEL BENEFIT CORP. LEGISLATION § 201(a) (version of Apr. 4, 2016), http://benefitcorp.net/sites/default/files/Model%20Benefit%20Corp%20Legislation_4_16.pdf [http://perma.cc/5ZFM-KBM8] [hereinafter MBCL].

40 *Id.* § 102.

41 *Id.* § 301.

42 *Id.* § 102.

bate.[43] There is still a lack of clarity with regards to how to balance these competing interests because courts have yet to provide explicit guidance on this issue.[44]

Most states that recognize benefit corporations as a new corporate form have modeled their respective legislation after the Model Benefit Corporation Legislation or Delaware's legislation.[45] The Delaware benefit corporation statute uses slightly different language than the Model Benefit Corporation. In Delaware, the benefit corporation model requires directors to weigh the interests of stakeholders "materially affected by the corporation's conduct" in addition to the financial interests of shareholders.[46] Benefit corporations in Delaware are formally entitled "public benefit corporations" (PBCs) and are subject to the requirement to provide its shareholders with a public benefit report at least once every two years.[47] Under the Delaware statute, the statement must include: (1) the objectives the company's board of directors has established to promote the public benefit; (2) the standards the board of directors has adopted to measure the progress of the benefit; (3) objective factual information regarding the company's progress in reaching the stated objectives; and (4) an assessment of the corporation's success in meeting the stated objectives.[48] Additionally, a PBC is required to list in its certificate of incorporation at least one or more specific public benefits that the corporation seeks to promote.[49]

Although the Delaware statute lays the groundwork for the information that benefit corporations must provide to their shareholders, it does not indicate how these reports should be reviewed for accuracy. Rather, it states that a benefit corporation *may* use a third-party standard or certification to assess the corporation's claims if the corporation's certificate of incorporation or bylaws require it to do so.[50] In other words, Delaware does not require benefit corporations to have their claims

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43 This issue is discussed in more detail in Part II.

44 CLARK & VRANKA, *supra* note 26, at 10 ("[T]he lack of case law interpreting constituency statutes, coupled with the context in which many of these statutes were enacted, makes it difficult for directors to know exactly how, when and to what extent they can consider those interests.").

45 J. Haskell Murray, *An Early Report of Benefit Reports*, 118 W. VA. L. REV. 25, 41 (2015) ("[M]ost states have mostly gravitated toward either the Delaware framework or the Model Benefit Corporation framework.").

46 DEL. CODE ANN. tit. 8, § 362(a) (2017).

47 *Id.* § 366(b).

48 *Id.*

49 *Id.* § 362(a)(1).

50 *Id.* § 366(a)(c)(3).

measured against an objective third-party standard or to make their reports public.[51] This contrasts with the Model Benefit Legislation, which requires benefit corporations to generate a report annually, make the report public, and have the report assessed by a third party.[52] Moreover, while directors of Delaware PBCs are not subject to duties to any individual person, shareholders have the potential to bring derivative suits.[53] Additionally, benefit corporations currently do not enjoy any state or federal tax benefits.[54]

## II
## ADVANTAGES OF THE BENEFIT CORPORATION

### A. Raising Capital

Raising capital is one of the first and most important steps an entrepreneur must take before forming a successful business.[55] Compared to organizations that seek to support a social mission through a non-profit model, the benefit corporation is at a significant advantage in terms of raising capital.[56] For example, non-profits have difficulty obtaining loans from banks and private investors and thus must spend resources attempting to secure capital from private donors.[57] In contrast, the for-profit benefit corporation allows entrepreneurs to attract investors, albeit less easily than their more traditional for-profit counterparts.[58] Private investors and banks may charge higher interest rates to benefit corporations for fear that the social mission makes profitability less certain.[59]

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51 The supposed reasons for this lack of a third-party standard requirement are discussed and analyzed in Part II.

52 MBCL, *supra* note 39, § 102.

53 DEL. CODE ANN. tit. 8, § 327 (2017).

54 The city of Philadelphia, however, has granted tax breaks to B Corps. Evangeline Gomez, *The Rise of the Charitable For-Profit Entity*, FORBES (Jan. 13, 2012, 6:16 PM), http://www.forbes.com/sites/evangelinegomez/2012/01/13/the-rise-of-the-charitable-for-profit-entity [http://perma.cc/GER7-DTHE].

55 *See* Murray Newlands, *5 Steps Entrepreneurs Should Take Before Seeking Investment*, FORBES (June 18, 2015, 6:47 PM), http://www.forbes.com/sites/mnewlands/2015/06/18/5-steps-entrepreneurs-should-take-before-seeking-investment [http://perma.cc/8MD5-7AFE].

56 Steven Munch, *Improving the Benefit Corporation: How Traditional Governance Mechanisms Can Enhance the Innovative New Business Form*, 7 NW. J.L. & SOC. POL'Y 170, 173 (2012).

57 *Id.* at 174.

58 *Id.*

59 *Id.*

In addition, benefit corporations have the option of going public.[60] The first benefit corporation to go public was Laureate Education, Inc., which is the largest global network of online higher education and which registered for its IPO in late 2015.[61] According to the founder and CEO of Laureate, the company decided to register as a benefit corporation "so IPO investors will know that [Laureate] takes its social mission seriously."[62]

### B. Reputation

Another business advantage of the benefit corporation involves the corporation's reputation. Here, it is important to note the difference between benefit corporations and certified B Corporations (B Corps).[63] Whereas a B Corp refers to a company that has received a certification of meeting higher standards of accountability and transparency by a non-profit company called B Lab, a benefit corporation is a new type of legal entity.[64] B Lab does, however, require all certified B Corps incorporated in a state having a benefit corporation statute to elect to become a benefit corporation within four years of the first effective date of the legislation.[65]

Both benefit corporations and B Corps have the advantage of being able to promote themselves as social-mission-driven or socially responsible corporations, which undoubtedly adds positive value to a corporation's marketability—both for con-

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60 *FAQ*, BENEFITCORP.NET, [hereinafter *FAQ*] http://benefitcorp.net/faq [https://perma.cc/JCE4-Q7KA].

61 Brad Edmondson, *The First Benefit Corporation IPO is Coming, and That's a Big Deal*, TRIPLEPUNDIT (Feb. 4, 2016), http://www.triplepundit.com/2016/02/first-benefit-corporation-ipo-coming-thats-big-deal/ [https://perma.cc/PF2V-WJLS].

62 *Id.*

63 For a side-by-side comparison, see *Benefit Corporations & Certified B Corps*, BENEFITCORP.NET, http://benefitcorp.net/businesses/benefit-corporations-and-certified-b-corps [https://perma.cc/4G82-6ERA]; *see also* Katherine R. Lofft, Purvi B. Maniar & Tamar R. Rosenberg, *Are Hybrids Really More Efficient? A 'Drive-By' Analysis of Alternative Company Structures*, BUS. L. TODAY, Sept. 2012, at 1, http://www.ebglaw.com/content/uploads/2014/06/53119_Lofft-Maniar-Rosenberg-ABA-Business-Law-Today-Hybrid-Structures.pdf [https://perma.cc/KHW9-EB5P] (also discussing differences between the two corporate forms).

64 *How to Become a Benefit Corporation*, BENEFITCORP.NET, http://benefitcorp.net/businesses/how-become-benefit-corporation [https://perma.cc/87B4-PF56]; *About B Lab*, B LAB, https://www.bcorporation.net/what-are-b-corps/about-b-lab [https://perma.cc/87B4-PF56].

65 *Corporation Legal Roadmap*, B LAB, https://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/legal-roadmap/corporation-legal-roadmap [https://perma.cc/TFF8-6UKF].

sumers and potential employees.[66] While the public might associate for-profit corporations with the creation of negative externalities, benefit corporations have the advantage of drawing in consumers with the promise to create positive externalities.[67] The demand for corporate responsibility among consumers and employees will likely continue to grow, and the benefit corporation allows entrepreneurs to cater to this rising demand and to differentiate themselves from owners of more traditional for-profit corporations.[68]

### C. Aligning Interests

At the same time, the benefit corporation model and B Corps give a voice to the collective effort towards higher standards for corporate responsibility.[69] The more widespread recognition of these socially responsible organizations has been a catalyst for bringing like-minded business leaders together in recent years.[70] This phenomenon was one of the reasons behind crowdfunding platform Kickstarter's change from a for-profit structure to a benefit corporation.[71] As co-founder and CEO of Kickstarter Yancey Strickler states, the benefit corporation structure is "a powerful one for aligning people around a goal."[72] Additionally, readily available tools such as the B Lab Impact Assessment, which provides a free way to measure so-

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66 *See* Kent Greenfield, *A Skeptic's View of Benefit Corporations*, 1 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 17, 17 (2014) ("[T]here's a growing body of evidence . . . that the companies that are most successful at maximizing shareholder value over time are those that aim toward goals other than maximizing shareholder value. Employees and customers often know more about and have more of a long-term commitment to a company than shareholders do." (quoting Justin Fox & Jay W. Lorsch, *What Good Are Shareholders?*, 90 HARV. BUS. REV. 49, 57 (2012))).

67 *See* Battilana et al., *supra* note 37, at 3 (stating that hybrid corporate models seek to exploit these positive externalities).

68 *See* Doug Bend & Alex King, *Why Consider a Benefit Corporation?*, FORBES (May 30, 2014, 9:00 AM), https://www.forbes.com/sites/theyec/2014/05/30/why-consider-a-benefit-corporation [https://perma.cc/LA7A-LR2K] ("[T]he demand for corporate accountability is at an all-time high, with many consumers already aligning their purchases with their values. The benefit corporation status is a great way to differentiate your company from the competition and capitalize on these customers.").

69 Ryan Honeyman, *Has the B Corp Movement Made a Difference? A Look at the Progress of the B Corporation Movement to Date*, STAN. SOC. INNOVATION REV. (Oct. 13, 2014), https://ssir.org/articles/entry/has_the_b_corp_movement_made_a_difference [https://perma.cc/9X22-XMCF].

70 *Id.*

71 Catherine Clifford, *Kickstarter CEO: Why We're a Benefits Corporation, Not a Nonprofit*, ENTREPRENEUR (Sept. 22, 2015), https://www.entrepreneur.com/article/250935 [https://perma.cc/35EV-K5DQ].

72 *Id.*

cial and environmental impacts of a corporation, offer easy ways for business leaders to strive towards common goals.[73]

D. Liability

As previously mentioned, benefit corporations also enjoy the legal benefit of being explicitly permitted to consider stakeholder interests in addition to shareholder interests.[74] Directors of traditional for-profit corporations are held to a duty of care, which obligates the board of directors to choose operational measures that maximize shareholder wealth.[75] The Michigan Supreme Court discussed this rule in *Dodge v. Ford Motor Co.*[76] In that case, defendant Ford Motor Co., a car manufacturer, engaged in business practices that pursued miscellaneous goals at the expense of shareholder wealth.[77] Ford had gradually lowered the price of its cars from over $900 to $440 with the intention of spreading to the public the benefits of owning a motor vehicle.[78] In 1916, the company also decided to stop paying special dividends in order to fund a new manufacturing plant with a higher production capacity and to increase employee salaries.[79] Although adopted in pursuit of altruistic goals, Ford's business practices caused a decrease in short-term profits and dramatically impacted special dividends.[80] In response, shareholders brought an action against Ford to challenge its business decisions. Specifically, the plaintiff shareholders asked the court to require Ford Motor Co. to distribute accumulated cash surplus to shareholders and to enjoin the company from building a new manufacturing plant.[81] The Court explained the duty to shareholders that directors must meet:

> A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction

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73 *See* Honeyman, *supra* note 69.

74 *See, e.g.*, DEL. CODE ANN. tit. 8, § 362(a) (2017) (allowing the corporation to weigh the interests of those materially affected by the corporation's conduct).

75 Bainbridge, *supra* note 20, at 976.

76 170 N.W. 668, 684 (Mich. 1919).

77 *Id.* at 670–72

78 *Id.* at 670–73.

79 *Id.* at 670–71.

80 *Id.*

81 *Id.*

> of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.[82]

The court thus reaffirmed that the primary role as a director is to work towards the enhancement of shareholder profits. Despite this duty to shareholders, however, the court explained that directors should be given ample discretion to make day-to-day business decisions. The court stated:

> There is committed to the discretion of directors, a discretion to be exercised in good faith, the infinite details of business, including the wages which shall be paid to [employees], the number of hours they shall work, the conditions under which labor shall be carried on, and the price for which products shall be offered to the public.[83]

The idea that the board of directors should be entrusted with the authority to make business decisions based on its own best judgment is embodied in what is now referred to as the business judgment rule.[84] This rule is "a judicially created doctrine that protects directors from personal liability for decisions made in their capacity as a director, so long as certain disqualifying behaviors are not established."[85] Accordingly, the court in *Dodge* refused to interfere with the decisions that the directors of Ford Motor Company made in the conducting of its business—namely, reducing the price of its cars and choosing to expand its manufacturing base.[86]

In *Dodge* and subsequent cases, courts have shown that they are in practice likely to defer to the discretion of directors in deciding operational matters.[87] The business judgment rule thus shields directors from having their business decisions heavily scrutinized by judges who likely do not share the directors' expertise and experience in the business realm.[88] As a result, directors of traditional for-profit corporations are often able to make operational decisions encompassing the interests of stakeholders in addition to shareholders, irrespective of whether the company is incorporated in a state that has passed

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82 *Id.* at 684.

83 *Id.*

84 *See* Lori McMillan, *The Business Judgment Rule as an Immunity Doctrine*, 4 WM. & MARY BUS. L. REV. 521, 526–28 (2013) (discussing the business judgment rule and its history).

85 *Id.* at 524.

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

87 *See* Bainbridge, *supra* note 20, at 1022 ("Absent a disabling conflict, courts generally defer to board decisions.").

88 *Id.* at 977 (restating the "traditional" idea that "judges are not business experts").

a constituency statute.[89] Accordingly, the explicit permission to consider stakeholder interests that benefit corporation status gives directors does not provide groundbreaking legal protections when it comes to *operational*, or day-to-day decisions.[90] Electing to become a benefit corporation does, however, provide greater legal protection for directors' *structural* decision making.[91]

Structural decisions involve matters relating to the "changes in the ownership structure of the corporation."[92] An example of a structural decision is when a director is faced with defending a takeover attempt.[93] In such a case, courts generally give directors less deference than when operational matters are at hand.[94] A leading Delaware case, *Unocal Corp. v. Mesa Petroleum Co.*, set guidelines for implicating the business judgment rule in the case of a takeover attempt.[95] In *Unocal*, the court stated that the business judgment rule applies only when a legitimate threat is posed to the corporation and when the directors can show that their response was "reasonable in relation to the threat posed."[96] This case shows how the courts apply a stricter standard when reviewing director decisions that have an impact on the terms of ownership of a corporation. Thus, directors of for-profit corporations are barred from pursuing "purely philanthropic" ends when making structural decisions under the *Unocal* standard.[97]

In contrast to for-profit models, benefit corporation status offers protection to directors with regard to their structural decision making. For example, directors of benefit corporations will not be held liable for breaching *Revlon* duties, or their duty to sell to the highest bidder when sale of the company is inevitable.[98] An example of how this phenomenon comes into play can be seen in the acquisition case of Ben & Jerry's.[99]

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89 *Id.* at 998 (explaining how the board of directors will typically prevail regardless of whether the state has passed a non-shareholder constituency statute).

90 *Id.* at 975 (stating that "[s]tructural decisions relate to changes in the ownership structure of the corporation," whereas "[o]perational decisions encompass everything else—all of the decisions necessary to run the firm on a continuing basis").

91 *Id.*

92 *Id.*

93 Clark & Babson, *supra* note 33, at 836.

94 *Id.*

95 493 A.2d 946, 953–58 (Del. 1985).

96 *Id.* at 949, 955–56; *see also* Clark & Babson, *supra* note 33, at 836 (explaining the *Unocal* rule).

97 *See* Clark & Babson, *supra* note 33, at 836.

98 *Legal FAQS*, *supra* note 3.

99 Lofft, Maniar & Rosenberg, *supra* note 63, at 1.

Though not a benefit corporation, Ben & Jerry's had built a reputation in the market as a business dedicated to corporate responsibility through environmental and fair trade initiatives.[100] The company also committed to using dairy without growth hormones, created jobs in low-income areas, and donated a significant amount of their profits to charity.[101] Having developed an image of strong corporate responsibility and community involvement over the course of twenty years, the founders of Ben & Jerry's were reluctant to sell their company to the corporate giant, Unilever.[102] After Ben & Jerry's denied Unilever's offer, Unilever brought an action against the ice cream company.[103] Unilever prevailed on the grounds that Ben & Jerry's was under a duty to sell the corporation to the highest bidder given that a takeover was inevitable.[104] In such a case, having benefit corporation status would have allowed Ben & Jerry's to avoid having to sell to a company such as Unilever, which the Ben & Jerry's founders did not believe would maintain the socially responsible mission that the founders had built for two decades.[105] Thus, as a benefit corporation, Ben & Jerry's would be able to avoid the *Revlon* duty and would instead be under an obligation to consider the social implications of the sale in addition to the shareholder interests.[106]

### E. Psychological Benefits

Beyond business and legal advantages, the benefit corporation provides the psychological benefit of acting for the public interest. In their article, *A Modigliani-Miller Theory of Altruistic Corporate Social Responsibility*, Joshua Zivin and Arthur Small refer to this psychological benefit as "warm glow," or the utility[107] individuals receive from "the act of contributing to [the

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100 Paula Caligiuri, *When Unilever Bought Ben & Jerry's: A Story of CEO Adaptability*, FAST COMPANY (Aug. 14, 2012), https://www.fastcompany.com/3000398/when-unilever-bought-ben-jerrys-story-ceo-adaptability [https://perma.cc/6SCQ-AXFD].

101 *Id.*

102 *Id.*

103 Aiden Livingston, *To B or Not to B? Weighing the Benefits of Benefit Corporations*, MASHABLE (Mar. 2, 2012), http://mashable.com/2012/03/02/benefit-corporations [https://perma.cc/W29R-RCAA].

104 *Id.*

105 *Id.*

106 *Id.*

107 For a brief background on the economic theory of utility, see Brian Duignan & Henry West, *Utilitarianism*, *in* ENCYCLOPÆDIA BRITANNICA (2017), https://www.britannica.com/topic/utilitarianism-philosophy [https://perma.cc/4NMU-LKUE].

public's] betterment" and the "personal . . . feeling of having made a difference."[108] Alicia Plerhoples at Georgetown University Law Center also suggests that "warm glow" results from outside observers' perception of the charitable work that those within a benefit corporation perform.[109]

According to Zivin and Small, donors do not derive "warm glow" simply from the act of giving by itself but from giving in such a way that effectively results in a public benefit.[110] Thus, although the act of giving to charitable causes or investing in socially responsible organizations may give individuals utility, that utility is correlated to the impact that is being made on society.[111] Consequently, in the market for charitable giving, individuals will seek to use their resources where they will generate the most utility.[112] Whereas a monetary gift to a non-profit or charitable organization will generate a certain number of utils[113] for a donor, that same donor would theoretically derive greater utility from investing in an organization that achieves the same socially beneficial results as the non-profit organization while simultaneously generating profit for the investor.[114] In that sense, the benefit corporation can add to the overall utility that a society enjoys.

Additionally, incorporating as a benefit corporation forces business leaders to commit to the social mission they strive to achieve. Behavioral economists would call the benefit corporation status a "commitment device," or a tool that would keep directors accountable for continuing to live up to their socially-

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108 Joshua Graff Zivin & Arthur Small, *A Modigliani-Miller Theory of Altruistic Corporate Social Responsibility*, 5 TOPICS ECON. ANALYSIS & POL'Y 1, 3–4 n.3 (2005) (emphasis omitted).

109 Alicia E. Plerhoples, *Nonprofit Displacement and the Pursuit of Charity Through Public Benefit Corporations*, 21 LEWIS & CLARK L. REV. 525, 563–64 (2016).

110 *See* Zivin & Small, *supra* note 108, at 3–4 n.3.

111 *Id.*

112 *Id.* at 2 (explaining that "the market price of warm glow is not zero").

113 A "util" is a microeconomic term used to describe a standard unit of utility, or the happiness that an individual derives from consumption. For more information, see Marc Davis, *Microeconomics: Assumptions and Utility*, INVESTOPEDIA, http://www.investopedia.com/university/microeconomics/microeconomics2.asp [https://perma.cc/UD9Q-GQEW].

114 Here, the assumption is that: (1) the donor or investor is a rational market player who desires to maximize his or her utility, (2) the donor or investor views charitable organizations and businesses as perfect substitutes, and (3) the for-profit benefit corporation would be able to achieve equivalent results to the non-profit organization because of the facility with which a for-profit corporation would obtain financing and loans as compared to a traditional non-profit organization. *See* Zivin and Small, *supra* note 108, at 11.

minded undertakings even when profits are low.[115] While other for-profit businesses allow directors to hold out on charitable giving or sustainable initiatives when business is slow, directors of benefit corporations are under an explicit obligation to implement the company's social mission.[116] Because of this, benefit corporation status can serve as a tool for making sure that companies keep their promises to the public.

In sum, the benefit corporation provides a number of potential advantages, ranging from financial benefits to psychological benefits, that serve entrepreneurs, directors, investors, and society. These potential benefits are not without limitations, however, which I will examine in the following section.

## III
## LIMITATIONS

### A. "General Public Benefit"

The Model Benefit Corporation Legislation states that a benefit corporation must cater to a "general public benefit."[117] Although a number of specific benefits are listed in the legislation, the model legislation does not require the company to explicitly state the public benefit that the company will strive to create.[118] The vague language of "general public benefit" gives corporations significant leeway when electing to become a benefit corporation. For example, a "general public benefit" could range from something specific, such as committing to contribute 5% of profits to promote a particular arts education program,[119] to something broad, such as promising to promote a sense of wellbeing for employees in the workplace. Although

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115 James Surowiecki, *Companies with Benefits*, THE NEW YORKER (Aug. 4, 2014), http://www.newyorker.com/magazine/2014/08/04/companies-benefits [https://perma.cc/NPF2-U649].

116 *See id.* (explaining that shareholders of a benefit corporation can sue its directors for failure to carry out the company's social mission, "just as they can sue directors of traditional companies for violating their fiduciary duty").

117 *See* MBCL, *supra* note 39, § 102 (defining a "[g]eneral public benefit" as "[a] material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation").

118 *See generally id.*

119 The popular crowdfunding platform, Kickstarter, pledged to annually commit "5% of its after-tax profit towards arts and music education, and to organizations fighting to end systemic inequality," half of which would be "devoted to arts and music programs for children and young adults, with a primary focus on underserved communities in New York City . . . distributed to 501(c)(3) organizations, public schools, or via programs developed by Kickstarter itself." Rick Cohen, *Kickstarter Becomes a Public Benefit Corporation, So What?*, NONPROFIT QUARTERLY (Sept. 25, 2015), https://nonprofitquarterly.org/2015/09/25/kick

both commitments undoubtedly lead to positive externalities, there is a large difference in the scope and specificity of the social mission.

This large difference could be problematic for a number of reasons; the most obvious is the potential for companies to disguise their not-so-socially-conscious business practices as a benefit corporation. In the context of environmental impacts, this type of deceit is termed "greenwashing."[120] A typical example of greenwashing is when an energy company spends a lot of resources marketing its "green" practices, when in reality, those practices account for only a small fraction of its overall "not-so-green" business.[121] Analogously, there is a risk that corporations claiming a "general public benefit" would be able to take advantage of benefit corporation status while only tangentially pursuing socially beneficial missions or pursuing them in a way that results in negligible positive impacts. Accordingly, benefit corporations have received criticism from constituencies in states such as Michigan and North Carolina, where benefit corporation legislation failed to pass on the grounds that these corporations "create a false dichotomy between 'good' and 'bad' business."[122]

### B. Transparency

In the Model legislation, a "third-party standard" is defined as "a recognized standard for defining, reporting and assessing overall corporate social and environmental performance."[123] Currently, not all state benefit corporation statutes require re-

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starter-becomes-a-public-benefit-corporation-so-what/ [https://perma.cc/974M-TNRC].

120 "Greenwashing" describes the "deceptive use of green marketing which promotes a misleading perception that a company's policies, practices, products or services are environmentally friendly." Devika Kewalramani & Richard J. Sobelsohn, *"Greenwashing": Deceptive Business Claims of "Eco-Friendliness"*, FORBES (Mar. 20, 2012, 12:15 PM), http://www.forbes.com/sites/realspin/2012/03/20/greenwashing-deceptive-business-claims-of-eco-friendliness/ [https://perma.cc/W53Q-E5Z8]. *See also* Christopher Helman, *ExxonMobil: Green Company of the Year*, FORBES (Aug. 6, 2009, 12:00 PM), http://www.forbes.com/forbes/2009/0824/energy-oil-exxonmobil-green-company-of-year.html [https://perma.cc/J4G7-VGWT] (describing ExxonMobil's approach to going green); Colleen Haight, *The Problem with Fair Trade Coffee*, STAN. SOC. INNOVATION REV. (Summer 2011), https://ssir.org/articles/entry/the_problem_with_fair_trade_coffee [https://perma.cc/MY5G-BMET] (noting uneven economic advantages for fair trade coffee).

121 *About Greenwashing*, GREENWASHING INDEX, http://greenwashingindex.com/about-greenwashing/ [https://perma.cc/8AF3-V99L].

122 Plerhoples, *supra* note 35, at 249 (citation omitted).

123 MBCL, *supra* note 39, § 102.

view by a third party.[124] For instance, in Delaware, the biennial benefit report does not need to be assessed by a third party.[125] Although most states have based their benefit corporation legislation on the Model Benefit Corporation Legislation, the discrepancies amongst the states can be problematic, especially because most courts look to Delaware corporate law for guidance.[126]

There is speculation as to why the obligation for third-party review was not included in states such as Delaware. For example, some have argued that mandatory third-party review would be too financially burdensome on benefit corporations and that it would place benefit corporations at a financial disadvantage, particularly when their more traditional for-profit counterparts are not required to undergo regular review.[127] Additionally, there are already sufficient incentives for benefit corporations to report information accurately because benefit corporations are subject to lawsuits for fraud.[128] Law professors Omri Ben-Shahar and Carl Schneider also warn against mandated disclosure, arguing that the costs of such provisions typically far outweigh the benefits.[129]

Moreover, benefit corporations appear to largely evade the model legislation's requirement of publishing annual reports and making them available to the public.[130] In a study undertaken by Assistant Professor J. Haskell Murray at Belmont University, Massey College, results showed that only eight of the one hundred active benefit corporations in 2012 from California, Hawaii, New York, and Virginia had made a benefit corporation report available to the public.[131] These "abysmal" statistics (less than 10%), and the fact that some of the corporations even lacked a website, support the fear that benefit

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124 *See, e.g.*, DEL. CODE ANN. tit. 8, § 366(a)(c)(3) (2017).

125 *See id.*

126 *See* Matthew R. Loecker, *Social Entrepreneurship and Public Benefit Corporations*, MORSE BARNES-BROWN PENDLETON (Oct. 13, 2016), http://www.mbbp.com/news/social-entrepreneurship-and-public-benefit-corporation [https://perma.cc/3DP9-CAAW] (contrasting Delaware's public benefit corporation law with Massachusetts's law).

127 *See* Anna R. Kimbrell, Note, *Benefit Corporation Legislation: An Opportunity for Kansas to Welcome Social Enterprises*, 62 KAN. L. REV. 549, 571 (2013) (stating that the advantages of a benefit corporation's good reputation may be offset by the higher transaction costs of mandatory reporting standards).

128 *See id.* at 566 (stating that existing corporate law already provides protection for misrepresentation and fraud in the case of benefit corporations).

129 *See* OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 182–83 (2014).

130 Murray, *supra* note 45, at 34–35.

131 *Id.*

corporations will easily evade their socially responsible commitments.[132] The ambiguity in the statutory language regarding third-party review and the lack of enforcement of publishing requirements detracts from the stated goal of benefit corporations to encourage transparency.[133] Without universal mandatory third-party review, the public cannot be sure that benefit reports issued by companies are accurate and complete.[134]

### C. Efficiency

An additional concern involves the lack of incentives that benefit corporations currently have to pursue their stated social missions as efficiently as possible. Unlike philanthropic organizations, benefit corporations are not necessarily outcome-oriented; they are not under an obligation to "pursue evidence-based strategies" to "achieve clearly defined goals."[135] Moreover, benefit corporations, unlike non-profit organizations, are not given federal tax benefits.[136] These factors undoubtedly lower the economic incentive for benefit corporations to realize their stated goals as quickly and effectively as possible.

Additionally, there is doubt as to whether benefit corporations will pursue social missions more efficiently than non-profit organizations.[137] There is a concern that benefit corporations will crowd out the non-profit market and lead to an overall decrease in the amount of socially beneficial activity.[138] This effect could potentially result from a combination of financial and non-financial business advantages that benefit corporations enjoy that non-profits do not. As previously mentioned, benefit corporations are at a significant advantage when secur-

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132 *Id.* at 36.

133 *Legal FAQS*, *supra* note 3.

134 *See* Jeremy Nicholls, *People, Power and Accountability*, STAN. SOC. INNOVATION REV. (June 23, 2014), https://ssir.org/articles/entry/people_power_and_accountability [https://perma.cc/5PTW-WSZH].

135 Paul Brest, *A Decade of Outcome-Oriented Philanthropy*, STAN. SOC. INNOVATION REV., 42 (Spring 2012), https://ssir.org/articles/entry/a_decade_of_outcome_oriented_philanthropy [https://perma.cc/N9NV-5DZ2] (explaining how "outcome-oriented" is equivalent to "result-oriented" in philanthropy).

136 Gomez, *supra* note 54.

137 *See* Jill R. Horwitz & Rachel Culley, *Profits v. Purpose: Hybrid Companies and the Charitable Dollar* 21 (Univ. of Mich. Scholarship Repository, Law & Econ. Working Papers, Paper No. 48, 2014), http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1158&context=law_econ_current [https://perma.cc/6BB5-V8PN] (discussing the risks hybrid entities pose to nonprofit organizations).

138 *Id.*

ing capital to finance the organization.[139] Additionally, the IRS limits pay to employees of charitable organizations to "reasonable" compensation,[140] which may draw talent away from non-profit organizations and towards benefit corporations. With respect to non-financial advantages, benefit corporations have more freedom to pay to attract and retain talent, are not required to make executive compensation information available to the public, and are permitted to lobby and accept political campaign donations.[141]

D. Ambiguity

Arguably, the most problematic aspect of the benefit corporation is the ambiguity in how strictly the court should enforce a company's stated social mission.[142] The law is faced with the challenge of regulating benefit corporations in a way that strikes a delicate balance between protecting the shareholder's expectations with regards to social benefits and protecting the director's authority to make sound business judgments.[143] Some scholars argue that directors of benefit corporations should have less authority than directors of traditional for-profit corporations.[144] For example, Phil Peters, co-chair of the Corporation Committee of the California Bar, believes that benefit corporations give directors "unnecessarily broad discretion at the expense of shareholders."[145] Similarly, Frank Easterbrook and Daniel Fischel have stated that "a manager told to serve two masters (a little for the equity holders, a little for the community) has been freed of both and is answerable to neither."[146]

Currently, shareholders have the right to sue directors of benefit corporations for failing to uphold their socially beneficial commitments in an action called a benefit enforcement

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139 *See supra* subpart II.A.

140 Plerhoples, *supra* note 109, at 565.

141 Lofft, Maniar, & Rosenberg, *supra* note 63, at 5.

142 *See* Eric Camm, *Benefit Enforcement Proceedings for the Benefit Corporation–What Are They and How Will They Work?*, APEX L. GROUP (Apr. 2, 2012), http://apexlg.com/benefit-enforcement-proceedings-for-the-benefit-corporation-what-are-they-and-how-will-they-work/ [https://perma.cc/TJ4M-MZA3].

143 *See* Alicia E. Plerhoples, *Social Enterprise as Commitment: A Roadmap*, 48 WASH. U. J.L. & POL'Y 89, 95 (2015).

144 *See, e.g.*, Leslie Brokaw, *The "Benefit Corporation" Movement*, MIT SLOAN MGMT. REV. (Nov. 28, 2012), http://sloanreview.mit.edu/article/the-benefit-corporation-movement/ [https://perma.cc/DF69-9WD3] (discussing the view that benefit corporations grant managers too much authority).

145 *Id.*

146 FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 38 (1991).

proceeding.[147] The benefit corporation also provides that "in the absence of applicable case law, director decisions will be treated with similar deference to that afforded other business judgments under current law."[148] In Part IV, I propose an alternative to allowing a blanket business judgment rule to apply in such cases.

## IV
## PROPOSED SOLUTION

A benefit corporation has yet to be sued in a benefit enforcement proceeding for breaching a duty to fulfill a stated mission.[149] There is, however, a need for clarity regarding the extent to which directors of benefit corporations are legally allowed to prioritize stakeholder interests above maximizing share value.[150] As mentioned earlier, there is little "guidance as to how boards with dual responsibilities to shareholders and other constituencies should balance competing interests."[151]

There have been a number of proposed solutions to this issue, ranging from a call for "clear and enforceable" government regulations[152] to the creation of a regulatory board.[153] The question remains: when a Benefit Corporation is sued for failing to uphold a stated social mission, how should the court determine liability? In such a case, I propose that whether or not the court should impose liability should be a factor of:

$$\frac{\text{(Kind of Benefit)(Profit)(Time)}}{\text{(Time Lag of Benefit)}}$$

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147 *See* Surowiecki, *supra* note 115 (discussing shareholders' rights to sue a benefit corporation); Camm, *supra* note 142 (calling such a proceeding a "benefit enforcement proceeding").

148 FAQ, *supra* note 60.

149 Camm, *supra* note 142 (discussing possible outcomes of a benefit enforcement proceeding if one were to occur).

150 *See* CLARK & VRANKA, *supra* note 26, at 24.

151 Stephen I. Glover et al., *A Corporate Paradigm Shift: Public Benefit Corporations*, GIBSON DUNN (Aug. 9, 2016), http://www.gibsondunn.com/publications/documents/Corporate-Paradigm-Shift—Public-Benefit-Corporations.pdf [https://perma.cc/8MUQ-8H29].

152 This solution has been proposed by Professor Kent Greenfield at Boston College Law School. Brokaw, *supra* note 144 (quoting Ben Schreckinger, *Virtue Inc.*, BOS. GLOBE (Nov. 25, 2012), http://www.bostonglobe.com/ideas/2012/11/25/virtue-inc/sMNhJRcOIgZ0rqjpLTALrN/story.html [https://perma.cc/5ZD7-GW25]).

153 *See* Munch, *supra* note 56, at 191 (stating that directors "need either incentives or requirements to keep pressure on them and to help ensure that they do not fall back to using traditional, profit-focused frames in their decision making." This can be accomplished "by instituting new internal policies, procedures, and structures.").

> In the above model, the "Kind of Benefit" refers to the nature and scale of the social benefit that the organization claims to pursue. For example, missions geared towards improving human health, safety, and rights would be given a higher value than missions geared towards providing functional and affordable fashion accessories to the public. Next, "Profit" refers to the average net positive income that a benefit corporation has accumulated since the time of its incorporation as a benefit corporation. The larger the amount of profit, the higher the value given to this factor should be. Similarly, the "Time" factor refers to the amount of time that the organization has been incorporated as a benefit corporation. Accordingly, benefit corporations incorporated for a longer amount of time in years should be given a higher value of "Time." Finally, "Time Lag of Benefit" refers to length of time needed for the stated benefit to be realizable. If the benefit is of a nature that requires a significant passage of time (for example, improving air quality in a certain region), this factor would be given a high value.

In practice, the court would not assign specific numerical values to each of these factors. Rather, it would weigh the factors relative to each other. For example, consider Company A, a benefit corporation faced with a benefit enforcement proceeding for failing to pursue its stated social mission. Company A, who has claimed to pursue a kind of benefit that is largely pertinent to human health and safety, has realized significant profits over the last ten years,[154] and has been incorporated as a benefit corporation for a period of time far longer than the amount of time it would take to realize the stated benefit. Using the equation above, the weight of the numerator would far exceed that of the denominator. In such a case, the court should use a strict standard of review, where the burden of proof would fall on the directors of Company A, who are seeking to avoid liability, to show that their decision making was based on careful examination of the company's impact on its stated social mission (by use of rigorous third-party audits, for instance).

If, however, Company A in the above example had claimed a benefit that required a significant time lag before the benefit was realizable, all other factors remaining equal, the weight of the denominator would be more or less equivalent to that of the numerator in the above equation. In such a case, the court should use an intermediate standard of review, where the di-

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154 Note that at the time this note was written, no Benefit Corporation had existed for more than seven years. *See* Glover et al., *supra* note 151.

rectors of Corporation A would still have the burden of proof, but would only have to demonstrate that the board reasonably considered its stated social mission in the decision-making process.

In a final example, consider Company B, which claims a small-scale benefit, has not yet realized profit, has only been a benefit corporation for one year, and claims a benefit that requires a significant passage of time. In such a case, the denominator of the equation would outweigh the numerator. Thus, using this model, the court would use a low level of scrutiny or the business judgment rule. As such, the court would presume that the directors of Corporation B have taken the stated social mission into account before making their business decisions.

The proposed method of evaluating liability provides a number of benefits. First, the model differentiates between general public benefits that are very important (such as protecting human health, safety, and rights) from those that are less vital. The equation works in a way that holds companies claiming to undertake human health and safety missions to a higher standard of accountability than companies claiming to promote a smaller-scale benefit. A second benefit is that this model encourages companies to undergo thorough and regular audits without imposing an absolute requirement for audits, which can be financially burdensome for companies that are newly incorporated and have not yet been able to realize profits; the more rigorous and frequent the third-party audit, the more likely the court will find that the directors took the appropriate care to consider the stated social mission of the benefit corporation. Third, incorporating time as a factor encourages efficiency: the longer the organization has been a benefit corporation, the higher the expectation that it has furthered its stated social mission. Finally, the proposed model provides guidance on what shareholders and directors should expect when a benefit enforcement proceeding is brought in court, which could lead to less litigation and more out-of-court dispute resolution.

In spite of the proposed model's benefits, there are a number of potential limitations. First, there is the argument that shareholders are unlikely to bring suit because money damages are not awarded in benefit enforcement proceedings and thus shareholders have no economic incentive to sue.[155] I ar-

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155 *See* Kyle Westaway & Dirk Sampselle, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards, and Legislatures*, 62

gue that it is possible that a social mission will be important enough to shareholders that they will desire to bring suit on behalf of that mission.[156] As one author states, "[A]s long as benefit incorporation remains voluntary, benefit corporations will attract investors who believe in the concept of 'shareholder responsibility.'"[157]

Next, benefit corporations are still young (the first benefit corporation legislation was passed in 2010),[158] so at this point in time, applying this model will result in a situation where the business judgment rule will most likely apply. However, in time, benefit corporations will have existed long enough for the "Time" factor of the equation to no longer be dispositive.

Another argument is that because this model imposes greater accountability on benefit corporations attempting to pursue human health and safety-related missions, there could be a disincentive for corporations to pursue such goals. I argue that this will not be the case, as there will continue to be entrepreneurs primarily motivated by such important social missions. What is more, the imposition of greater accountability could function as an advantage because benefit corporations will be less likely to overstate their social missions. In other words, it would lower the risk of "greenwashing" among companies.

Although monetary awards are not available in benefit enforcement proceedings, a party bringing such an action will likely seek other remedies, such as restructuring of the corporation, replacement of directors running the Benefit Corporation, or an injunction.[159] While the proposed model is by no means exact, it will provide a simple guideline for courts when assessing whether or not to grant one of the aforementioned remedies. Accordingly, having such a guideline in place will

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EMORY L.J. 999, 1040–41 (2013) (stating that it is "not clear that there will be any *economic* incentive for the shareholders to bring suit to enforce the directors' duties . . . . most statutes declare that there will not be a monetary award available for directors' failure to create a public benefit" (footnote omitted)).

156 *See, e.g.*, Ian Kanig, Note, *Sustainable Capitalism Through the Benefit Corporation: Enforcing the Procedural Duty of Consideration to Protect Non-Shareholder Interests*, 64 HASTINGS L.J. 863, 902–03 (2013) (arguing for the likelihood that at least one shareholder would be willing to "engage in a benefit enforcement proceeding against the board of directors out of concern for both her long-term investment and the provision of positive externalities").

157 *Id.* (quoting Ian B. Lee, *Corporate Law, Profit Maximization, and the "Responsible" Shareholder*, 10 STAN. J.L. BUS. & FIN. 31 *passim* (2005)).

158 *State by State Status*, *supra* note 19.

159 *See* Camm, *supra* note 142.

mitigate the uncertainty of how courts will assess liability in benefit enforcement proceedings in the future.

## CONCLUSION

The widespread legal recognition of the benefit corporation is a positive step towards improving the social impacts that businesses have on their communities and increasing overall social utility. Rather than having a negative impact on non-profits, legal recognition of mission-driven corporations will enhance the larger social movement towards social conscientiousness. With the weight of corporate law promoting the proliferation of benefit corporations and other socially responsible business entities, society will benefit from the channeling of corporate resources and talent into efforts such as environmental conservation, community building, advocating for gender equality, enhancing worker's rights, and promoting economic opportunities for poorer communities. Current guidelines, however, lack the clarity needed to guide business leaders in their managerial capacities. In time and with the appropriate benefit enforcement proceeding guidelines in place, benefit corporations will be able to move forward with confidence in the pursuit of groundbreaking social change.

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