BENEFIT CORPORATIONS—A SUSTAINABLE FORM OF ORGANIZATION?

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INTRODUCTION

Founders of social enterprises believe profits and social good can be produced in tandem and wish to form organizations that will pursue these dual missions.[1] They will, however, encounter obstacles to articulating and enforcing such dual missions if they adopt either a traditional nonprofit or for-profit form of organization. Nonprofit forms bar profit distribution[2] and for-profit forms will create practical, if not legal, pressure to favor profit maximization over social good when the two come into conflict.[3] And these two imperatives will certainly, at times, conflict. If more profit could always be obtained by pursuing social good, traditional for-profits would produce the optimal level of social goods, charities would be swimming in resources, or both. Social entrepreneurs believe social good can be produced along with profits and desire hybrid forms of organization to smooth a single enterprise's path to realizing both goals.[4]

A mounting number of jurisdictions have attempted to meet this demand by enabling new hybrid organizational forms. These include the low-profit limited liability company ("L3C") available in nine U.S. states[5] and the community interest company ("CIC")

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1. *See* Robert Katz & Antony Page, *The Role of Social Enterprise*, 35 VT. L. REV. 59, 86–93 (2010); Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337, 338–342 (2009).

2. *See* Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980).

3. *See* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 736–38 (2005) (arguing the view that corporate managers must only pursue profit maximization is widely held, though not strongly supported).

4. *See* Kelley, *supra* note 1, at 339.

5. *See* 2011 R.I. Pub. Laws 67 (authorizing L3Cs in Rhode Island);

available in the United Kingdom.[6] In addition, "B Corp" is a private certification available to U.S. for-profits that demonstrate their commitment to a dual mission of making profits and promoting social good.[7] Qualifying entities can license the B Corp mark to market themselves to consumers, investors, and others. This Article examines another recent entrant into the hybrid form category: the benefit corporation. A handful of states have enacted statutes enabling "benefit corporations" in the past two years, and several more are considering similar legislation.[8] The benefit corporation form differs from the L3C, CIC, and B Corp in several respects, especially in its use of third-party standard-setting organizations to vet the social good bona fides of potential incorporators.[9] This Article evaluates whether the innovations in the benefit corporation form can meet the goals social entrepreneurs have for hybrid organizational forms, ultimately concluding it will fall short.

This Article proceeds in two parts. The first Part explores the new benefit corporation form. After briefly summarizing the key elements of the L3C, CIC, and B Corp for purposes of comparison, it describes the major components of the benefit corporation form. The second Part then undertakes an admittedly preliminary assessment of the benefit corporation. This Part offers four reasons why social entrepreneurs view hybrid organizational forms attractive: articulating and enforcing a dual mission, expanding funding streams, branding their enterprises, and achieving sustainability. The new benefit corporation form offers potential gains in formally articulating a dual mission, an advantage as compared with traditional nonprofit and for-profit forms. However, like the other

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Elizabeth Schmidt, *Vermont's Social Hybrid Pioneers: Early Observations and Questions to Ponder*, 35 VT. L. REV. 163, 170 (2010); Carter G. Bishop, *Fifty State Series: L3C and B Corporation Legislation Table* (Legal Studies Research Paper Series, Research Paper 10-11, May 26, 2011), *available at* http://ssrn.com/abstract=1561783; *see also* Legislative Watch, AMERICANS FOR COMMUNITY DEVELOPMENT http://www.americansforcommunitydevelopment.org/legislativewatch.php (last visited Aug. 28, 2011) (providing updated counts of states adopting and considering L3C legislation). Bills authorizing the L3C structure have also been introduced in a great many additional states. *See* Bishop, *supra* note 5; Schmidt, *supra* note 5, at 170; Legislative Watch, *supra* note 5.

6. *See* Companies (Audit, Investigations and Community Enterprise) Act 2004, c. 27, Part 2, *available at* http://www.legislation.gov.uk/ukpga/2004/27/pdfs/ukpga_20040027_en.pdf.

7. *See* B Lab, *About Certified B Corps*, CERTIFIED B CORP., http://www.bcorporation.net/about (last visited Aug. 28, 2011).

8. *See* Bishop, *supra* note 5; B Lab, *Benefit Corporation Legislation*, CERTIFIED B CORP., http://www.bcorporation.net/publicpolicy (last visited Aug. 28, 2011) (providing updated counts of states adopting and considering benefit corporation legislation).

9. *See, e.g.*, MD. CODE ANN. CORPS & ASS'NS § 5-6C-01(e) (LexisNexis 2011) (defining the role of third-party standard-setters); VT. STAT. ANN. tit. 11A, § 21.03(a)(8) (2011) (similar).

hybrid forms simultaneously under development, the benefit corporation lacks robust mechanisms to enforce dual mission, which will ultimately undermine its ability to expand funding streams and create a strong brand for social enterprise as sustainable organizations.

I. THE BENEFIT CORPORATION

Before delving into the details of the new benefit corporation form, it is useful to describe the dynamic scene onto which it enters. When social entrepreneurs' frustration with traditional nonprofit and for-profit forms became apparent, jurisdictions began to respond with new hybrid forms. An early mover here was the United Kingdom, which established the CIC in 2004.[10] The CIC is a company formed for community benefit purposes, which may offer investors limited dividends, but must lock its assets and earnings beyond these limited disbursements into the community benefit stream.[11]

Innovation began stateside with the L3C, first adopted by statute in Vermont in 2008.[12] Eight other states have since enacted similar legislation.[13] The L3C is a limited liability company formed to "significantly further the accomplishment of one or more charitable or educational purposes" and for whom neither income production nor property appreciation may be a significant purpose.[14] An L3C may have investor members who can receive unlimited disbursements during the L3C's existence or upon dissolution, and if the L3C ceases to pursue its educational and charitable purposes it

10. *See* Dana Brakman Reiser, *Governing and Financing Blended Enterprise*, 85 CHI.-KENT L. REV. 619, 630 & n.74 (2010). Other examples from abroad also exist, but will not be discussed here. *See, e.g.*, Matthew F. Doeringer, Note, *Fostering Social Enterprise: A Historical and International Analysis*, 20 DUKE J. COMP. & INT'L L. 291, 308–09 (2010) (describing, inter alia, Belgium's Société à Finalité Sociale).

11. *See* CIC Regulator, *CIC Guidance Chapter 1: Introduction*, OFFICE OF THE REGULATOR OF COMMUNITY INTEREST COMPANIES, 12–14, *available at* http://www.bis.gov.uk/assets/bispartners/cicregulator/docs/guidance/11-950-community-interest-companies-guidance-chapter-1-introduction.pdf.

12. *See* VT. STAT. ANN. tit. 11, § 3001(27) (2011).

13. *See* Schmidt, *supra* note 5, at 163, 170; Legislative Watch, *supra* note 5. Boosters of an L3C model for the United Kingdom have also proposed adoption of a similar form there, dubbed the social enterprise limited liability partnership ("SELLP"). *See* Claudia Cahalane, *What Is the Perfect Legal Structure for a Community Interest Company?*, THE GUARDIAN (Apr. 4, 2011), http://www.guardian.co.uk/social-enterprise-network/2011/apr/04/legal-structure-community-interest-company; Stephen Lloyd, *The Social Enterprise LLP – What Is It; And What Is It For?*, THE BARRISTER, http://www.barristermagazine.com/article-listing/current-issue/the-social-enterprise-llp-%E2%80%93-what-is-it;-and-what-is-it-for.html (last visited Aug. 28, 2011).

14. VT. STAT. ANN. tit. 11, § 3001(27) (2011).

transforms into an ordinary LLC.[15]

In addition, companies have been able to obtain private certification as a "B Corps" since 2006.[16] B Corps must provide in their formative documents that fiduciaries must consider the impact of their decisions on various nonshareholder constituencies, including the environment and the local, state, and national economy.[17] A private nonprofit organization, B Lab, vets aspiring B Corps to confirm that these governance structures have been established and conducts an extensive survey to determine how well an applicant uses "the power of business to solve social and environmental problems."[18] Those applicants meeting B Lab's standards may license the B Corp mark and are subject to audit by B Lab on an ongoing basis.[19] B Lab, of course, cannot confer a legal form on an organization. By varying governance structures and conveying information about conforming entities, however, B Corp status appeals to social enterprises in a manner similar to official hybrid forms.

In 2010, Maryland became the first state to establish a "benefit corporation" form of organization, the subject of this Article.[20] This new form blends both state enabling legislation and a third-party certification system. Vermont, New Jersey, Virginia, and Hawaii have since followed suit[21] and benefit corporation legislation has also been introduced in numerous other states.[22] Although

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15. *See* Brakman Reiser, *supra* note 10, at 650.

16. *See* B Lab, *About Certified B Corps*, *supra* note 7; *see also* David Adelman, *Understanding B Corporations*, GREENBERG & BASS LLP (Aug. 6, 2010), http://greenbass.com/news/understanding-b-corporations/ (describing the establishment and history of B Corps).

17. *See* B Lab, *Legal Framework*, CERTIFIED B CORP., http://www.bcorporation.net/become/legal (last visited Aug 28, 2011).

18. *See* B Lab, *Why B Corps Matter*, CERTIFIED B CORP., http://www.bcorporation.net/why (last visited Aug. 28, 2011).

19. *See* B Lab, *Who Certifies?* CERTIFIED B. CORP., http://www.bcorporation.net/index.cfm/fuseaction/content.page/nodeID/08c9dc4d-6064-48cb-af04-4fd9d4ced055/externalURL/ (click on "How do we Certify and Audit companies as B Corporations?") (last visited Aug. 28, 2011).

20. *See* MD. CODE ANN., CORPS. & ASS'NS §§ 5-6C-01 to -08 (LexisNexis 2011); *see also* John Tozzi, *Maryland Passes 'Benefit Corp.' Law for Social Entrepreneurs*, BLOOMBERG BUS. WK. (Apr. 13, 2010), http://www.businessweek.com/smallbiz/running_small_business/archives/2010/04/benefit_corp_bi.html; B Lab, *Maryland First State in Union to Pass Benefit Corporation Legislation*, CSRWIRE (Apr. 14, 2010), http://www.csrwire.com/press_releases/29332-Maryland-First-State-in-Union-to-Pass-Benefit-Corporation-Legislation.

21. *See* N.J. STAT. ANN. § 14A:18-1 to -11 (West 2011); VT. STAT. ANN. tit. 11A, § 21 (2011); VA. CODE ANN. § 13.1-782 to -791 (2011); S.B. 298, 2011 Leg. 26th Sess. (Haw. 2011). The Hawaii legislation dubs its form a "sustainable business corporation," but it is otherwise aligned with the other benefit corporation enactments. S.B. 298, 2011 Leg. 26th Sess. § 2 (Haw. 2011).

22. *See* B Lab, *Benefit Corporation Legislation*, *supra* note 8; BusinessWire, *Gov. Christie Signs Benefit Corporation Legislation* (Mar. 7, 2011),

Maryland was the first mover here and all enacted and pending statutes share many attributes, future references to the statutes will highlight important points of divergence.

A. Separate Statute

The benefit corporation concept has thus far been enacted only under special statutory authorization, separate and apart from the adopting jurisdiction's standard corporate legislation. States could have, alternatively, inserted provisions to allow the articulation or preference of social goals into their existing corporation laws as an opt-in provision.[23] Yet, all of the benefit corporation statutes envision a form of organization that is distinct from the standard corporate form.[24] Perhaps proceeding with a special statute eases legislative adoption, but the special statute approach also ties in with the statutes' recurring theme of avoiding infiltration of general corporation law by benefit corporation norms. Yet, this walling-off does not go both ways. When benefit corporation statutes are silent,

http://www.businesswire.com/news/home/20110307006758/en/Gov.-Christie-Signs-Benefit-Corporation-Legislation (discussing the passage of New Jersey's legislation and stating that New York, North Carolina, California, Pennsylvania, Colorado, and Hawaii are introducing and moving similar legislation).

Legislation to permit a different kind of incorporated hybrid, the "flexible purpose corporation," has been introduced in California. A flexible purpose corporation would pursue profit and at least one charitable purpose or a purpose to pursue the interests of employees, suppliers, customers, creditors, community, society or the environment. *See* S.B. 201, 2011 Gen. Assemb., Reg. Sess. (Cal. 2011) (proposing a change to CAL. CORP. CODE § 2302(b)(2) (2011)). These purposes would be disclosed to the secretary of state, but not vetted by a third party as benefit corporation statutes contemplate. *See id.* *See also* Jonathan Greenblatt, *Business Model Needed to Promote Social Enterprise*, S.F. CHRON., May 31, 2011, http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/05/30/ED0R1JMHF8.DTL; Keren Raz, *What is a Flexible Purpose Corporation?* (Sept. 8, 2010), http://charitylawyerblog.com/2010/09/08/what-is-a-flexible-purpose-corporation-by-keren-raz/ (describing the flexible purpose corporation and its differences from the benefit corporation).

23. *See* OR. REV. STAT. § 60.047 (2009) (permitting corporations to include in their articles "a provision authorizing or directing the corporation to conduct the business of the corporation in a manner that is environmentally and socially responsible"); *see also* Judd F. Sneirson, *Green Is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987, 1019–20 (2009) (describing the Oregon provision).

24. Some of the statutes make this point more vociferously than others. *Compare* MD. CODE ANN., CORPS. & ASS'NS § 5-6C-02(b)–(c) (LexisNexis 2011) ("This subtitle applies only to benefit corporations. . . . The existence of a provision of this subtitle does not of itself create an implication that a contrary or different rule of law is or would be applicable to a corporation that is not a benefit corporation. This subtitle does not affect a statute or rule of law as it applies to a corporation that is not a benefit corporation.") *and* VT. STAT. ANN. tit. 11A, § 21.02(b) (2011) (similar) *with* S.B. 2170, 214th Leg., 2nd Ann. Sess. (N.J. 2011) (describing the act as merely supplementing its general corporate law).

for-profit corporate statutory and decisional law will fill the gaps.[25]

Although it exists under a separate statutory framework, "benefit corporation" status is available both to newly forming corporations that may use the form from their inception and to existing for-profit corporations that adopt benefit corporation form by amending their charters.[26] The statutes use labeling and voting requirements to protect initial and existing shareholders from confusion. Upon adopting this status, charter documents, and in Maryland the stock certificates, must be clearly labeled or re-labeled to include the term "benefit corporation."[27] Those purchasing shares in the benefit corporation and inspecting its documents are thus placed on notice of the special nature of the corporation in question, if not specifically of the limits on what a benefit corporation may or may not do. Clearer labeling would be provided if the corporation's name were required to include the "benefit" term, as state law often demands inclusion of a designation of limited liability in other forms.[28] In May 2011, Maryland added the requirement of a benefit legend into corporate names;[29] it is thus far the only state to have done so.

For an existing business corporation to reinvent itself as a benefit corporation, the statutes demand significant support for the change among shareholders. Charter amendments require a vote of at least two-thirds of the outstanding shareholders, with the request for a vote providing notice of the change.[30] In Vermont, the notice of a shareholder meeting at which a change to benefit corporation status will be approved "shall include a statement from the board of directors of the reasons why the board is proposing the amendment and the anticipated effect on the shareholders of becoming a benefit corporation."[31] Requiring specific notice and a statement of reasons

25. *See, e.g.*, MD. CODE ANN., CORPS. & ASS'NS § 5-6C-02(a) (LexisNexis 2011); VT. STAT. ANN. tit. 11A, § 21.02(a), (d) (2011).

26. *See, e.g.*, MD. CODE ANN., CORPS. & ASS'NS § 5-6C-03 (LexisNexis 2011); VA. CODE ANN. § 13.1-784 to -785 (2011).

27. *See* MD. CODE ANN., CORPS. & ASS'NS § 5-6C-05 (LexisNexis 2011); VT. STAT. ANN. tit. 11A, §§ 21.03(a)(1), 21.04, 21.05 (2011).

28. *See, e.g.*, VT. STAT ANN. tit. 11, § 3005(a) (2011) (requiring limited liability companies to include those words or abbreviations like "LLC" in their names and requiring low-profit limited liability companies to include those words or the abbreviation "L3C").

29. *See* MD. CODE ANN., CORPS. & ASS'NS § 1-502(a)(2) (LexisNexis 2011). This change was approved on May 19, 2011, and was part of legislation enabling benefit limited liability company status, on terms analogous to the benefit corporation statute.

30. *See* MD. CODE ANN., CORPS. & ASS'NS §§ 5-6C-03, 5-6C-04 (LexisNexis 2011); N.J. STAT. ANN. § 14A:18-3 (West 2011); VT. STAT. ANN. tit. 11A, § 21.05(2) (2011) (allowing individual corporations to set a voting requirement above the two-thirds floor); VA. CODE ANN. § 13.1-785 (2011) (requiring such an amendment be approved by "all shareholders entitled to vote").

31. VT. STAT. ANN. tit. 11A, § 21.05(1) (2011). Virginia expressly requires

provides greater information to shareholders whose interest may be transformed by the change to benefit corporation status. Similar notice and supermajority voting requirements apply if a business corporation merges with a benefit corporation.[32] Notably, these requirements for opting into benefit corporation status apply to benefit corporations seeking to resume ordinary business corporation status as well.[33]

B. Public Benefit

The main thrust of benefit corporation statutes is to require these entities to pursue purposes beyond profit-making. A benefit corporation must be formed for a "general public benefit," meaning a "material, positive impact on society and the environment."[34] Other than in the New Jersey statute, general public benefit is defined by measurement against a "third-party standard,"[35] and all statutes permit incorporators to also pursue more "specific public benefits." They include:

> Providing [low income or underserved] individuals or communities with beneficial products or services;
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> Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;
>
> Preserving [or improving] the environment;
>
> Improving human health;
>
> Promoting the arts, sciences, or advancement of knowledge;
>
> Increasing the flow of capital to entities with a public benefit

that the amendment follow its typical corporate protocol for article amendments, which requires the board to notify shareholders of the amendment item on the meeting notice and to explain the board's position on it. *See* VA. CODE ANN. § 13.1-785 (West 2011).

32. *See, e.g.*, N.J. STAT. ANN. §§ 14A:18-3 to 18-4 (West 2011).

33. *See, e.g.*, VA. CODE ANN. § 13.1-786 (2011).

34. S.B. 298, 2011 Leg., 26th Sess. §§ 2, 5 (Haw. 2011); MD. CODE ANN., CORPS. & ASS'NS §§ 5-6C-01(c), 5-6C-06(A) (LexisNexis 2011); *see also* N.J. STAT. ANN. § 14A:18-1 (West 2011) (similar); VT. STAT. ANN. tit. 11A, § 21.03(a)(4) (2011) (using virtually identical language); VA. CODE ANN. § 13.1-782 (2011) (similar).

35. *See* MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01(c) (LexisNexis 2011); VA. CODE ANN. § 13.1-782 (West 2011); VT. STAT. ANN. tit. 11A, § 21.03(a)(4) (West 2011); S.B. 298, 2011 Leg., 26th Sess. § 2 (Haw. 2011).

purpose; or[and]

The accomplishment of any other particular [identifiable] benefit for society or the environment.[36]

The statutes provide little clarification of the hierarchy of purposes a benefit corporation will serve. Except in Virginia, the statutes do state that while a benefit corporation may adopt purposes to pursue specific public benefits, these specific public benefits do not limit its obligation to pursue a general public benefit.[37] However, general and specific public benefits may be articulated in addition to other purposes for which a corporation may be created, and these public benefits may, but need not, limit more traditional business purposes.[38] Finally, the statutes all declare that the general or specific public benefits that benefit corporations pursue "are in the best interests of the corporation," seemingly conclusively.[39] This provision alone might be used to trump potential shareholder claims that directors' decisions to pursue general or specific public benefits undermine the best interests of the corporation when they interfere with profit maximization or other business goals. The benefit corporation statutes, however, offer greater detail on how directors ought to make decisions and provide additional liability shields.

C. Directorial Obligations and Protections

Each statute explains the obligations of benefit corporation directors. They are required to consider the impact of their decisions on shareholders, employees of the corporation, subsidiaries and suppliers, "customers [to the extent they are] beneficiaries of the general or specific public benefit purposes of the benefit corporation," the community, society, and the local and global environment.[40] Some later-enacted statutes clarify that directors

36. MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01(d) (LexisNexis 2011) (bracketed language included in all but Maryland statute); N.J. STAT. ANN. § 14A:18-1 (West 2011); VT. STAT. ANN. tit. 11A, § 21.03(a)(6) (2011); VA. CODE ANN. § 13.1-782 (West 2011); *see also* S.B. 298, 2011 Leg., 26th Sess. § 5(b) (Haw. 2011) (providing a similar list and also including using patents for certain purposes).

37. *See* MD. CODE ANN., CORPS. & ASS'NS § 5-6C-06(b)(2) (LexisNexis 2011); N.J. STAT. ANN. § 14A:18-5(b) (West 2011); VT. STAT. ANN. tit. 11A, § 21.08(b) (2011).

38. *See* MD. CODE ANN., CORPS. & ASS'NS § 5-6C-06(a)(2) (LexisNexis 2011); N.J. STAT. ANN. § 14A:18-5(a)-(b) (West 2011); VT. STAT. ANN. tit. 11A, § 21.08(a) (2011).

39. MD. CODE ANN., CORPS. & ASS'NS § 5-6C-06(c) (LexisNexis 2011); N.J. STAT. ANN. § 14A:18-5(c) (West 2011); VT. STAT. ANN. tit. 11A, § 21.08(c) (2011); VA. CODE ANN. § 13.1-787(B) (2011).

40. MD. CODE ANN., CORPS. & ASS'NS § 5-6C-07(a)(1) (LexisNexis 2011); N.J. STAT. ANN. § 14A:18-6(a) (West 2011); VT. STAT. ANN. tit. 11A, § 21.09(a)(1)(C)

need not prioritize any particular person's or group's interests in their deliberations. Unless an individual benefit corporation elects to do so through a statement in its charter, directors may take action based on the effects of their decisions on any one of these groups or interests.[41]

The intent of this language appears to be broadening the range of appropriate considerations in directorial decision making, in order to give directors discretion to make decisions favoring social mission achievement over profit-maximization. The statutes' permission for a director to also "consider any other pertinent factors or the interests of any other group that the director determines are appropriate to consider"[42] goes even further down this road. Moreover, in case this wide range of potential justifications for directorial decisions does not sufficiently comfort benefit corporation directors, the statutes also specifically provide directors of benefit corporations with immunity from liability for performance of their duties within the broad discretion described above[43] and provide that no duty of such a director runs to the corporations' beneficiaries.[44]

This language is clearly modeled on language from constituency statutes, also known as anti-takeover legislation. Such statutes permit directors to consider nonshareholder constituencies in weighing takeover offers and other decisions[45] and have been criticized as simply giving directors cover to vote against control-shifting transactions and to take other actions in order to entrench themselves in their positions.[46] The broad discretion benefit

(2011) (bracketed text is in Vermont statute); VA. CODE ANN. § 13.1-788(A)(1) (2011).

41. *See* N.J. STAT. ANN. § 14A:18-6(b)–(c) (West 2011); VT. STAT. ANN. tit. 11A, § 21.09(a)(2)–(3) (2011); VA. CODE ANN. § 13.1-788(A)(3) (2011).

42. MD. CODE ANN., CORPS. & ASS'NS § 5-6C-07(a) (LexisNexis 2011); *see also* N.J. STAT. ANN. § 14A:18-6(b)(2) (West 2011); VT. STAT. ANN. tit. 11A, § 21.09(a)(2) (West 2011); VA. CODE ANN. § 13.1-788(A)(2)(b) (West 2011); S.B. 298, 2011 Leg., 26th Sess. § 6(a)(H) (Haw. 2011).

43. *See* MD. CODE ANN., CORPS. & ASS'NS § 5-6C-07(c) (LexisNexis 2011); N.J. STAT. ANN. § 14A:18-6(d) (West 2011); VT. STAT. ANN. tit. 11A, § 21.09(c)–(d) (2011); VA. CODE ANN. § 13.1-788(C) (2011); S.B. 298, 2011 Leg., 26th Sess. § 6(b) (Haw. 2011).

44. *See* MD. CODE ANN., CORPS. & ASS'NS § 5-6C-07(b) (LexisNexis 2011); N.J. STAT. ANN. § 14A:18-10 (West 2011) (clarifying the limited rights to sue); VT. STAT. ANN. tit. 11A, § 21.09(e) (2011); VA. CODE ANN. § 13.1-790 (2011) (similar to New Jersey statute). Some later-enacted statutes provide similarly broad discretion and immunity from liability for benefit corporation officers. *See* N.J. STAT. ANN. § 14A:18-8 (West 2011); VT. STAT. ANN. tit. 11A, § 21.11 (2011); VA. CODE ANN. § 13.1-789 (2011).

45. *See* Martin Lipton & Steven A. Rosenblum, *A New System of Corporate Governance: The Quinquennial Election of Directors*, 58 U. CHI. L. REV. 187, 214–15 (1991); Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85, 94–97 (1999).

46. *See, e.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC

corporation statutes accord to directors can likewise be faulted for giving directors unbridled discretion, with which they might pursue social good or might pursue foolish or self-serving practices.

Provisions in the later-enacted statutes suggest that their drafters may have had specific concerns about protecting benefit directors in the takeover context. These statutes require directors to consider "the short-term and long-term interests of the benefit corporation, including benefits that may accrue to the benefit corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the benefit corporation."[47] Thus, directors of benefit corporations appear protected from personal liability on claims that they have insufficiently produced public benefits or inadequately pursued profits for shareholders, whether in the context of ordinary business decisions or control transactions.

D. Third-Party Standard-Setters

The significant divergence between the corporate purposes and directorial obligations in business corporations and benefit corporations makes it vital that shareholders and others can differentiate the two. The crucible here is the issue of public benefit: only corporations pursuing a general (and perhaps also specific) public benefit can qualify as benefit corporations.[48] Those that do not pursue a public benefit are excluded from the category. Rather than entrusting a government agency to make these initial determinations, the benefit corporation statutes delegate this responsibility to third-party standard-setters. All of the statutes anticipate that such third parties will make available standards "for defining, reporting, and assessing" the social and environmental

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STRUCTURE OF CORPORATE LAW 38 (1991) ("[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."); Lucien Arye Bebchuck, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1493 (1992) (stating "the primary effect of these constituency statutes is simply to enhance managers' discretion in responding to hostile takeover bids"). *See generally* Rutherford B. Campbell, Jr., *Corporate Fiduciary Principles for the Post-Contractarian Era*, 23 FLA. ST. U. L. REV. 561, 621–23 (1996) (making this criticism and noting the literature); Brett H. McDonnell, *Corporate Constituency Statutes and Employee Governance*, 30 WM. MITCHELL L. REV. 1227, 1231–36 (2004) (reviewing the literature).

47. N.J. STAT. ANN. § 14A:18-6(a)(6) (West 2011); VA. CODE ANN. § 13.1-788(A)(1)(f) (2011); S.B. 298, 2011 Leg., 26th Sess. § 6(a)(E) (Haw. 2011); *see also* VT. STAT. ANN. tit. 11A, § 21.09(a)(1)(F) (2011) (containing very similar language); VT. STAT. ANN. tit. 11A, § 21.09(a)(4) (2011) (stating that no "different or higher standard of care" applies in contexts where control is an issue).

48. *See* MD. CODE ANN., CORPS. & ASS'NS § 5-6C-06 (LexisNexis 2011); N.J. STAT. ANN. § 14A:18-5; VA. CODE ANN. § 13.1-787 (2011); VT. STAT. ANN. tit. 11A, § 21.08 (2011); S.B. 298, 2011 Leg., 26th Sess. § 2 (Haw. 2011).

performance of aspiring benefit corporations.[49] The statutes decline to provide even minimum content for such standards. In addition, they do not dictate how the standards should be applied, how often, or by whom.

Instead, the statutes simply mandate that standard-setters be independent and transparent.[50] Sufficient independence is shown if the standard "is developed by a person [or entity] that is independent of the benefit corporation."[51] The Maryland statute offers no further definition of independence, but the later-enacted statutes define independence to exclude those with direct or indirect "material relationships" with the benefit corporation or its subsidiaries, including current or recent employment, familial relationships with executive officers, or direct or indirect ownership or management of five percent or more of the benefit corporation's equity.[52] For transparency to be sufficient, each statute requires the certifying party to make publicly available four types of information.[53] Standard-setters must publicize "the factors considered when measuring the performance of a business, the relative weightings of those factors, and the identity of the persons who developed and control changes to the standard, and the process by which those changes were made."[54]

B Lab has been deeply committed to and involved with the passage of benefit corporation statutes.[55] Its survey and audit

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49. *See* S.B. 298, 2011 Leg., 26th Sess. § 12 (Haw. 2011); MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01(e) (LexisNexis 2011); N.J. STAT. ANN. § 14A:18-1 (West 2011); VT. STAT. ANN. tit. 11A, § 21.03(8) (2011); VA. CODE ANN. § 13.1-782 (2011).

50. *See* MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01(e) (LexisNexis 2011); N.J. STAT. ANN. § 14A:18-1 (West 2011); VT. STAT. ANN. tit. 11A, § 21.03(a)(8) (2011); VA. CODE ANN. § 13.1-782 (2011); S.B. 298, 2011 Leg., 26th Sess. § 12 (Haw. 2011).

51. MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01(e)(1) (LexisNexis 2011) (bracketed language is only in Maryland statute); N.J. STAT. ANN. § 14A:18-1 (West 2011); VT. STAT. ANN. tit. 11A, § 21.03(a)(8) (2011); VA. CODE ANN. § 13.1-782 (2011); S.B. 298, 2011 Leg., 26th Sess. § 12(2) (Haw. 2011).

52. *See* N.J. STAT. ANN. § 14A:18-1 (West 2011); VT. STAT. ANN. tit. 11A, § 21.03(a)(5) (2011); VA. CODE ANN. § 13.1-782 (2011); S.B. 298, 2011 Leg., 26th Sess. § 12 (Haw. 2011).

53. *See* MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01(e) (LexisNexis 2011); N.J. STAT. ANN. § 14A:18-1 (West 2011); VT. STAT. ANN. tit. 11A, § 21.03(a)(8) (2011); VA. CODE ANN. § 13.1-782 (2011); S.B. 298, 2011 Leg., 26th Sess. § 12 (Haw. 2011).

54. *See* MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01(e)(1)–(2) (LexisNexis 2011); N.J. STAT. ANN. § 14A:18-1 (West 2011); VT. STAT. ANN. tit. 11A, § 21.03(a)(8)(B) (2011); VA. CODE ANN. § 13.1-782 (2011). The Hawaii legislation adds "an accounting of the sources of financial support for the organization that developed and controls revisions to the standard, with sufficient detail to disclose any relationships that could reasonably be considered to present a potential conflict of interest." S.B. 298, 2011 Leg., 26th Sess. § 12(3)(E) (Haw. 2011).

55. *See* B LAB, *2011 Annual Report: If Not Now, When, The Case for B Corp*,

processes are fully documented online[56] and thus appear to fit the transparency requirements, and B Lab will be independent of any unrelated potential incorporators.[57] B Lab evaluates potential B corporations using the B Impact Assessment, which looks at issues of corporate accountability, employee policy, products' benefit to consumers, the company's relationship with its community, and its impact on the environment.[58] The assessment contains a total of two-hundred points, and companies must score eighty points to be certified and granted access to the B Corp mark.[59] B Lab also audits twenty percent of those companies who qualify for B Corp certification every two years.[60]

Although the third-party standard-setter role seems tailor-made for B Lab, numerous existing standard-setters and entity-certification programs would also appear to qualify under the statutes.[61] Certifiers of fair labor practices consider social and, to some degree, environmental performance in their standards.[62] They are transparent and would likely be independent in most cases. Certifiers of high environmental performance, such as those authorized to assess compliance with the ISO 14001 Environmental Management System standard, could likewise qualify as third-party

CERTIFIED B CORP., http://www.bcorporation.net/resources/bcorp/documents/B%20Corp_2011-Annual-Report.pdf.

56. *See Who Certifies?*, *supra* note 19.

57. *Id.*

58. *See* B Lab, *B Impact Assessment 2010 Version 2.0*, http://www.bcorporation.net/resources/bcorp/documents/2010-B-Impact-Assessment%20(1).pdf. B Lab is currently beta testing an updated impact assessment. *See* B Lab, *Registration for Public Beta V3.0 Impact Assessment*, http://b-lab.force.com/GIIRS/BcorpRegistration (last visited Aug. 28, 2011).

59. *See B Impact Assessment 2010 Version 2.0*, *supra* note 58.

60. *See* B Lab, *Become a B Corporation*, CERTIFIED B CORP., http://www.bcorporation.net/become (last visited Aug. 28, 2011).

61. Indeed, the B Lab website itself offers a number of suggestions of other possible third-party standard-setters, including "Global Reporting Initiative ("GRI"), GreenSeal, Underwriters Laboratories ("UL"), ISO2600, [and] Green America," as well as a list of over one hundred raters on a referenced raters list. *See* B Lab, *Benefit Corporation – Legal FAQs*, CERTIFIED B CORP., http://www.bcorporation.net/resources/bcorp/documents/Benefit%20Corporation%20-%20Legal%20Provisions%20and%20FAQ.pdf. *But see* Doug Morris, *Benefit Corporation Laws Hold Social Ventures Accountable*, SUSTAINABLE BUS. OREGON (Mar. 1, 2011), http://www.sustainablebusinessoregon.com/columns/2011/03/benefit-corporation-laws-hold-social.html ("The B corporation standard is not mentioned specifically in the statute[s], but few, if any, other third party standards currently exist. Therefore a benefit corporation may also need to become a certified B corporation.").

62. *See* The SA8000 Standard, SOC. ACCOUNTABILITY INT'L, http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=937&parentID=479&nodeID=1 (last visited July 30, 2011); WRAP 12 Principles, WORLDWIDE RESPONSIBLE ACCREDITED PRODUCTION, http://www.wrapcompliance.org/en/wrap-12-principles-certification (last visited Aug. 28, 2011).

standard-setters with a few changes.[63] Even corporate governance advisory firms might be adjusted to fit the bill. As they are already beginning to offer advisory services to institutions and individuals seeking socially responsible investments,[64] retooling to certify benefit corporations could likely be done with ease.

Likewise, current product-focused standard-setters could also enter the market to qualify benefit corporations. Consider Cradle to Cradle ("C2C"), a certification offered by McDonough Braungart Design Chemistry LLC ("MBDC").[65] C2C is a multi-attribute product label that is licensed to those meeting MBDC's criteria for Material Health, Material Reutilization, Renewable Energy Use, Water Stewardship, and Social Responsibility.[66] C2C was not designed to vet aspiring benefit corporations. Rather, C2C is currently offered to products, such as the Method line of soap and cleaning products, rather than to entities.[67] However, MBDC publicizes its standards for environmental and social performance (required only for the tiers of certification beyond "basic"), and is transparent regarding how the standards are weighted[68] and the identity of those who develop and control changes to the standards.[69] Thus, it could offer certification to potential benefit corporations. It is not yet clear whether the benefit corporation certification market will attract rating agencies, governance advisory firms, or existing product or entity certifiers. In any case, meeting the statutes' limited transparency and independence requirements will not be a significant barrier.

E. Enforcement

Whether or not B Lab is joined by other standard-setters, it is

63. *See generally* ISO 14001:2004, Abstract, *Environmental management systems – Requirements with guidance for use*, INT'L ORG. FOR STANDARDIZATION (2004) (specifying "requirements for an environmental management system to enable an organization to develop and implement a policy and objectives which take into account legal requirements and other requirements to which the organization subscribes, and information about significant environmental aspects").

64. *See* Services for PRI Signatories, MSCI, http://www.msci.com/products/esg/unpri_signatories/ (last visited July 30, 2011).

65. *Certification Overview*, MBDC CRADLE TO CRADLE, http://mbdc.com/detail.aspx?linkid=2&sublink=8 (last visited July 12, 2011).

66. *Certification Criteria*, MBDC CRADLE TO CRADLE, http://mbdc.com/detail.aspx?linkid=2&sublink=9 (last visited Aug. 28, 2011).

67. *Certified Products*, MBDC CRADLE TO CRADLE, http://c2c.mbdc.com/c2c/list.php?order=type (last visited July 30, 2011).

68. *See Cradle to Cradle Certification Program, Version 2.1.1*, MBDC CRADLE TO CRADLE (Jan. 2010), http://www.mbdc.com/images/Outline_CertificationV2_1_1.pdf.

69. *See FAQ, Who Develops the Cradle to Cradle® Certification Criteria?*, MBDC CRADLE TO CRADLE, http://mbdc.com/detail.aspx?linkid=20&sublink=25 (last visited Aug. 28, 2011).

not the only body empowered to monitor and enforce the public benefit to which benefit corporations are devoted. The statutes also impose disclosure obligations upon benefit corporations, requiring them to provide annual benefit reports to their shareholders and to post them on their public websites.[70] The statutes describe the contents of this report differently. Again, the Maryland statute is briefer than the later enactments, but all require timely benefit reports including elements of description and assessment. All benefit corporations must describe how they have pursued their general and specific public benefit purposes and any circumstances that hindered their ability to do so.[71] Vermont's statute also demands that benefit corporations give a statement of actions they can take to improve performance in the future.[72] Vermont, New Jersey, and Hawaii also require the report to disclose the names and addresses of a "benefit director" and optional "benefit officer," director compensation, a statement by the benefit director, and the names of anyone owning five percent or more of the corporation's stock.[73] Assessment requires each benefit corporation to consider and report how well it performed in accordance with its third-party standard as compared with prior performance.[74]

In addition to demanding publication, the New Jersey statute requires the report to be filed with the state Department of the Treasury, on penalty of forfeiture of benefit corporation status.[75] Vermont's statute does not require filing, but demands that benefit corporations must submit the annual report for shareholder approval or rejection.[76] The statute does not explain the consequences if the report is rejected. Hawaii's statute disavows any government involvement explicitly, mandating that the report state that "the sustainable business corporation and its activities are subject to the oversight of the board of the sustainable business corporation and are not subject to the direct oversight, regulation, or endorsement of any governmental body."[77]

70. *See* MD. CODE ANN., CORPS. & ASS'NS. § 5-6C-08 (LexisNexis 2011); N.J. STAT. ANN. § 14A:18-11 (West 2011); VT. STAT. ANN. tit. 11A, § 21.14 (2011); VA. CODE ANN. § 13.1-791 (2011); S.B. 298, 2011 Leg., 26th Sess. § 11 (Haw. 2011).

71. *See* MD. CODE ANN., CORPS. & ASS'NS. § 5-6C-08 (LexisNexis 2011); N.J. STAT. ANN. § 14A:18-11 (West 2011); VT. STAT. ANN. tit. 11A, § 21.14(a) (2011); VA. CODE ANN. § 13.1-791 (2011); S.B. 298, 2011 Leg., 26th Sess. § 11(a)(1) (Haw. 2011).

72. *See* VT. STAT. ANN. tit. 11A, § 21.14(a)(1)(D) (2011).

73. N.J. STAT. ANN. § 14A:18-11(a) (West 2011); VT. STAT. ANN. tit. 11A, § 21.14(a) (2011); S.B. 298, 2011 Leg., 26th Sess. § 11(3)–(6) (Haw. 2011).

74. *See* MD. CODE ANN., CORPS. & ASS'NS. § 5-6C-08(A)(2) (LexisNexis 2011); N.J. STAT. ANN. § 14A:18-11(a)(2) (West 2011); VT. STAT. ANN. tit. 11A, § 21.14(a)(2) (2011); VA. CODE ANN. § 13.1-791(A)(2)(a) (2011); S.B. 298, 2011 Leg., 26th Sess. § 11(a)(2) (Haw. 2011).

75. N.J. STAT. ANN. § 14A:18-11(a)(6)(d) (West 2011).

76. VT. STAT. ANN. tit. 11A, § 21.14(c) (2011).

77. S.B. 298, 2011 Leg., 26th Sess. § 11(a)(8) (Haw. 2011).

The positions of benefit director and benefit officer merit additional explanation. Vermont, New Jersey, and Hawaii require benefit corporations to name a benefit director and permit them to appoint a benefit officer.[78] The benefit director must include in the annual report her own statement assessing whether the benefit corporation and its directors have acted in compliance with the benefit purposes of the corporation during the relevant period.[79] If a benefit director opines that the benefit corporation has failed to meet the requirements of the law, she must describe these failures.[80] In New Jersey and Vermont, benefit directors are immune from personal liability for their performance of these evaluative tasks, so long as they act in good faith and do not engage in intentional misconduct, knowing violations of law, or self-dealing.[81] Unlike the benefit director, a benefit officer is optional in every enacting jurisdiction. If a benefit corporation chooses to select one (who may be the same person as the benefit director), the benefit officer "shall perform the duties in the management of the benefit corporation relating to the purpose of the corporation to create public benefit."[82] Identifying at least one and perhaps two roles with clear responsibility for tracking and assessing public benefit provides additional monitoring and enforcement resources over mandated disclosure alone.

In addition, all benefit corporation statutes other than Maryland's, offer a special right of action often called a "benefit enforcement proceeding" to enforce the special duties of benefit corporation directors and officers and the public benefit purposes of the corporation.[83] The statutes limit potential plaintiffs in benefit enforcement proceedings to shareholders entitled to bring derivative actions and, in some cases other groups, if specified in a corporation's charter.[84] Thus, the additional proceeding does not expand standing to challenge conduct of benefit corporation

78. N.J. STAT. ANN. § 14A:18-7 (West 2011); VT. STAT. ANN. tit. 11A,§ 21.10 (2011); S.B. 298, 2011 Leg., 26th Sess. § 7(a) (Haw. 2011).

79. *See* N.J. STAT. ANN. § 14A:18-7(c) (West 2011); VT. STAT. ANN. tit. 11A, § 21.10(c)(3) (2011); S.B. 298, 2011 Leg., 26th Sess. § 7(c) (Haw. 2011).

80. *See* N.J. STAT. ANN. § 14A:18-7(c) (West 2011); VT. STAT. ANN. tit. 11A, § 21.10(c)(4) (2011).

81. *See* N.J. STAT. ANN. § 14A:18-7(e) (West 2011); VT. STAT. ANN. tit. 11A, § 21.10(f) (2011).

82. N.J. STAT. ANN. § 14A:18-9 (West 2011); VT. STAT. ANN. tit. 11A, § 21.12 (2011); S.B. 298, 2011 Leg., 26th Sess. § 9 (Haw. 2011).

83. *See* N.J. STAT. ANN. § 14A:18-10 (West 2011); VT. STAT. ANN. tit. 11A, § 21.13 (2011); VA. CODE ANN. § 13.1-790 (2011); S.B. 298, 2011 Leg., 26th Sess. § 10 (Haw. 2011).

84. *See* VT. STAT. ANN. tit. 11A, § 21.13(b) (2011) (empowering directors, individuals or groups owning ten percent or more of the equity of a parent of the benefit corporation); N.J. STAT. ANN. § 14A:18-10(b) (West 2011) (similar); VA. CODE ANN. § 13.1-790(B) (2011) (including no rights for owners of a parent company); S.B. 298, 2011 Leg., 26th Sess. § 10 (Haw. 2011).

fiduciaries, but does express support for an expanded range of inquiry in suits by traditional parties.

As yet, there is no case law addressing the obligations of benefit corporation fiduciaries, and the statutes do not speak to how courts should analyze such claims. One commentator argues that "the core duty of the benefit corporation can be defined as the duty to secure profits for the shareholders while considering the socially beneficial purposes of the corporation."[85] This seems a fair statement as far as it goes, but without greater legislative explanation or judicial interpretation, it remains difficult to provide guidance to fiduciaries in situations where profit and social benefit goals conflict.

F. Conclusion

The benefit corporation is thus significantly different from both traditional nonprofit and for-profit business forms and from other hybrid forms. By retaining traditional business purposes and adding the requirement of pursuing general public benefit, the benefit corporation allows entities to pursue a dual mission of both profit and social good. This duality of mission contrasts sharply with traditional nonprofit and for-profit forms, but is consistent with all other hybrid forms.

The benefit corporation, however, also differs in substantial ways from other hybrids currently available. Unlike the United Kingdom's CIC, the benefit corporation may offer investors unlimited midstream and residual returns and is subject to no government regulation of its purposes or activities. These attributes are shared by L3Cs, but the benefit corporation has more rigid governance structures than the almost fully flexible governance by contract in an L3C. The benefit corporation also requires greater disclosure than the L3C, and the Vermont, New Jersey, and Hawaii enactments require entities to vest particular individuals with responsibility for stewarding and reporting on the organization's public benefit achievements. These disclosure and fiduciary authorization mandates also represent a divergence from the B Corp structure, though B Corps and benefit corporations share the fundamental idea of third-party review of public benefit purposes. This idea of delegating to private parties the responsibility to certify the bona fides of hybrid entities is not found in either the CIC or L3C.

II. ASSESSING THE BENEFIT CORPORATION

The range and diversity of emerging hybrid organizational forms raises the question of which is best. It is likely impossible to answer this question for all social enterprises in all situations, but

85. MARC J. LANE, SOCIAL ENTERPRISE: EMPOWERING MISSION-DRIVEN ENTREPRENEURS 128 (2011).

this Part will undertake a preliminary assessment of how the benefit corporation serves the needs and goals of these entities and their founders. Fundamentally, founders and operators of social enterprises unsatisfied with traditional nonprofit or for-profit forms seek a type of organization that will legally establish their sense of a dual profit-making and social mission and enforce it over time. They would also like a hybrid form to expand the range of funding streams they can effectively access. Further, they seek to use the hybrid form as part of their effort to brand their social enterprises to enable them to market their products and services to consumers, business partners, and others as special and different from those offered by typical nonprofit charities and for-profit businesses. Many believe that achieving all or some combination of these three goals is the only way to make their endeavors sustainable. This Part evaluates whether and to what extent the benefit corporation form will accomplish these various and often overlapping goals. The exercise here is a limited case study of one form of organization. But, this effort will begin the important work of theorizing more generally the value hybrid forms offer to social enterprises.

A. Articulating and Enforcing a Dual Mission

Those forming a social enterprise have both profit or business goals and social goals and many want to pursue them both using the same entity.[86] A hybrid form is desirable if it will help them to articulate and enforce this dual mission of profit and social good.

1. The Limitations of Traditional Forms

One might think social entrepreneurs could use traditional nonprofit or for-profit forms to house their dual mission enterprises. After all, nonprofit forms do not bar profit-making. These forms do, however, dramatically cabin profit distribution under the nondistribution constraint.[87] This constraint is imposed by state law on all nonprofit forms of organization and will prevent a social enterprise formed as a nonprofit from distributing net profits to those with organizational control, including shareholders, other investors, directors, and officers.[88] In addition, if formed as a tax-exempt nonprofit, a social enterprise will be prohibited from distributing net profits by the inurement, private benefit, and excess

86. Social entrepreneurs view the lack of a legal form for their enterprises as a significant problem. *See* Katz & Page, *supra* note 1, at 85 ("A recent survey showed that 71% of social entrepreneurs believed that the choice of legal structure was the single greatest challenge for their ventures.").

87. *See* Hansmann, *supra* note 2, at 838.

88. *See id.* ("A nonprofit organization is, in essence, an organization that is barred from distributing its net earnings, if any, to individuals who exercise control over it, such as members, officers, directors, or trustees.").

benefit transaction rules under federal tax law.[89] Therefore, if a social entrepreneur wishes to distribute profits to investors, a nonprofit form is a nonstarter. Even in the unlikely scenario of a social entrepreneur interested in pursuing profits from his enterprise solely to reinvest them, various anticommerciality restrictions might prove challenging for obtaining tax-exemptions.[90] Thus, nonprofit form will be suboptimal for many dual mission organizations.

The problems with adopting a traditional for-profit form for social enterprise are more complex and arise from both legal and nonlegal sources. At inception, it appears permissible to include charitable or social goals as part of a corporation's purposes.[91] Yet, anecdotal reports suggest that in some states, inclusion of such goals as a major component of corporate purposes may stall or block acceptance of articles by the secretary of state. Typically, LLC law will be flexible enough to allow adoption of both profit and social purposes, though partnership statutes requiring a "business purpose" may create barriers to social enterprises in that form.[92]

Still, there are concerns that in a social enterprise formed as a traditional for-profit, fiduciaries will be hemmed in by their responsibilities to pursue profits for owners.[93] There is considerable

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89. *See* I.R.C. § 501(c)(3) (2010) (permitting exemption only to organizations that take "no part of the net earnings of which inures to the benefit of any private shareholder or individual"); I.R.C. §4958 (2010) (imposing penalty taxes on insiders engaging in "excess benefit transactions" with their exempt organizations); *see also* MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION 248–64 (2004) (describing these doctrines in detail).

90. *See generally* Evelyn Brody, *Business Activities of Nonprofit Organizations: Legal Boundary Problems*, *in* NONPROFITS & BUSINESS 83 (Joseph J. Cordes & C. Eugene Steuerle eds., 2009) (reviewing legal constraints placed on nonprofits' business activities); *see also* Dana Brakman Reiser, *Charity Law's Essentials*, 86 NOTRE DAME L. REV. 1, 18–25 (2011) (describing the anticommerciality bias of current tax exemption law).

91. *See* Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 169 (2008); *see also* PRINCIPLES OF CORPORATE GOVERNANCE § 2.01 Reporter's Note 6 (1994) ("[T]here is little doubt that [restrictions on the general profit-making objective] would normally be permissible if agreed to by all the shareholders. Such an agreement might be embodied in the certificate of incorporation, or not.").

92. *Compare* REV. UNIF. LTD. LIAB. ACT § 104(b) (clarifying that an LLC "may have any lawful purpose, regardless of whether for profit"), *with* REV. UNIF. PARTNERSHIP ACT § 202(a) (1997) (stating that any "association of two or more persons to carry on as co-owners a business for profit forms a partnership"). *See also* Robert R. Keatinge, *LLCs and Nonprofit Organizations—For-Profits, Nonprofits, and Hybrids*, 42 SUFFOLK U. L. REV. 553, 555, 583 (2009).

93. *See, e.g.*, KENT GREENFIELD, THE FAILURE OF CORPORATE LAW 41–42 (2006) (describing shareholder primacy as a "foundational principle" that "informs every aspect of corporate and securities law" in a work arguing corporate law should embrace a broader sense of proper corporate purposes);

debate about the degree to which for-profit fiduciaries may properly pursue other purposes without breaching their duties.[94] Moreover, with the many obstacles in the path of a successful shareholder suit to challenge fiduciary compliance,[95] lawsuits may not be the most salient risk for fiduciaries in a for-profit social enterprise. Even those who argue that for-profits possess substantial leeway to pursue social goals seem to be arguing about the edges of for-profit activity, not its core.[96] Whatever the correct answer is on the state of the law, fiduciaries rightly or wrongly are often wedded to the idea that in a for-profit entity their foremost goal should be maximizing the entity's value to its owners.[97]

Practical obstacles will also likely confound for-profit fiduciaries who seek to maintain a dual mission, especially if they desire to expand their social enterprises and require capitalization beyond the founders' own funds. To scale up a social enterprise, capital can be borrowed or ownership can be expanded, and usually some combination will be needed. To raise capital by expanding ownership without upsetting the stability of a dual mission, social enterprises will need to attract and retain owners equally committed to that dual mission. Dual-class stock structures, partnership agreements, shareholder agreements in closely held corporations, and operating agreements in LLCs can all be used to limit owners'

LANE, *supra* note 85, at 119. Comments in a recent Delaware Chancery Court case have reinforced these fears. *See* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 35 (Del. Ch. 2010) ("Directors of a for-profit Delaware corporation cannot deploy a rights plan to defend a business strategy that openly eschews stockholder wealth maximization—at least not consistently with the directors' fiduciary duties under Delaware law.").

94. *Compare, e.g.*, ROBERT CHARLES CLARK, CORPORATE LAW 17–18 (1986) (describing the obligations of corporate fiduciaries "to maximize the value of the company's shares"), *with e.g.*, Elhauge, *supra* note 3, at 735–39.

95. These include most importantly the demand requirement and business judgment rule protection. Where these protections are less certain or do not apply, as may be the case in suits alleging oppression by a controlling shareholder in close corporations, litigation may become a more realistic cause for concern.

96. *See* Elhauge, *supra* note 3, at 735–39, 842–48; Antony Page, *Has Corporate Law Failed? Addressing Proposals for Reform*, 107 MICH. L. REV. 979, 987–89 (2009); Sneirson, *supra* note 24, at 995–1007.

97. *See, e.g.*, Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2073 (2001) (noting that "[n]orms in American business circles, starting with business school education, emphasize the value, appropriateness, and indeed the justice of maximizing shareholder wealth"). *But see* Sneirson, supra note 24, at 1011–12 and sources cited (arguing the claims of shareholder primacy's hold on businesspersons is overstated); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 290–91 (1998) (similar). Particularly interesting and subtle arguments on this matter can be found in JAY W. LORSCH WITH ELIZABETH MACIVER, PAWNS OR POTENTATES 37–55 (1989). This empirical study found corporate directors' self-reporting of their obligations often included rhetoric about shareholder primacy, but then explained a more broadly-focused and textured reality.

ability to undo a dual mission. These structures can be implemented in an attempt to match dual mission minded investors with social enterprise investments.[98] Of course, one cannot be sure that a sufficient pool of investors with preferences aligning to the founders' will exist. Indeed, even investors initially committed to the dual mission might change their minds if the entity becomes sufficiently successful, and any of these private arrangements can be changed by the very people who would benefit financially from changing them.

If a for-profit social enterprise wants to draw market-rate investors, its dual mission will be squarely put at risk. Consensus favoring a dual mission can easily break down and market-rate investors may refuse to invest or quickly or detrimentally sell off their ownership stakes. Rather than fearing litigation, the founder of a for-profit social enterprise may instead worry about locking in a dual mission legacy,[99] about sufficient access to capital, or both. Dual mission is not easily embedded in traditional for-profit forms.

Ideally, a hybrid organization would offer a solution to this dual mission dilemma. To solve it, a hybrid form of organization should provide guidance on which goal, profit maximization or social good production, has priority and in what situations this priority must be given. This does not necessarily mean that either profit maximization or social good production must be prioritized every time the two come into conflict. In order to ease the tension inherent in a dual mission organization, some structure is needed for balancing these goals. This structure must work predictably and relatively transparently, and there must be some method for enforcing it.

2. The Benefit Corporation and Dual Mission Articulation

The benefit corporation statutes not only permit, but require, articulation of an expressly dual mission. These are corporations formed for profit and to pursue a "general public benefit."[100] This express dual mission mandate contrasts starkly with traditional nonprofit forms, which prohibit entities from acting to pursue profits for owners. It also represents a significant change from for-profit forms in which some pursuit of social good is certainly within legal bounds, but significant sacrificing of profits to further social goals engenders real risks.

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98. *See* Brakman Reiser, *supra* note 90, at 45–47 (describing how founders may entrench their dual missions in various for-profit forms of organization).

99. *Cf.* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 32 (Del. Ch. 2010) (controlling shareholders argued they needed to undertake defensive measures to protect their chosen corporate culture after their deaths).

100. *See* MD. CODE ANN., CORPS & ASS'NS §§ 5-6C-01(c), 5-6C-06(a) (LexisNexis 2011); N.J. STAT. ANN. § 14A:18-1 (West 2011); VT. STAT. ANN. tit. 11A, § 21.03(a)(4) (2011); VA. CODE ANN. § 13.1-782 (2011).

When one thinks more deeply about how a dual mission will be articulated in a benefit corporation, however, doubts emerge. The requirement of general public benefit is vague and undefined. The determination of whether a particular organization's goals pursue a general public benefit is left to an unregulated third-party standard-setter.[101] Moreover, the statutes provide no baseline or guidance for the standards these third parties should use to make this determination; they require only transparency and independence. If a standard-setter clearly and transparently sets low standards, it may qualify unrelated entities to form as benefit corporations just as would a standard-setter with higher standards, leaving the door open to greenwashing or even fraud. Perhaps transparency will enable consumers and investors to judge the mix of profit and social good individual benefit corporations serve based on which standard-setter is used. This, however, would require highly motivated consumers and investors to engage in significant research.[102] At the moment, benefit corporations require only formal articulation of a dual mission, and oversight over the genuineness of these statements is lacking.

3. The Benefit Corporation and Dual Mission Enforcement

Third-party standard-setters, fiduciaries, and shareholders all play enforcement roles in the benefit corporation. Except in New Jersey, third-party standard-setters serve as initial gatekeepers; in order to qualify for benefit corporation status, an entity must meet the requirements of an independent third-party standard.[103] As noted earlier, these standard-setters play this certification role bounded by neither standards nor oversight. Moreover, the role of the standard-setters themselves in ongoing enforcement is less clear. All of the statutes envision public benefit assessments in annual benefit reports will be made with reference to the third-party standard.[104] But, none of the statutes specify whether or how standard-setters should be involved in vetting public-benefit provision after incorporation. Standard-setters may choose to engage in auditing or other monitoring functions to boost enforcement or they may consider their role complete when initial

101. Although the New Jersey statute does not define general public benefit with reference to a third-party standard, it does not offer any other means for determining the bona fides of incorporators' public-benefit claims.

102. Even if this mechanism is workable, it undercuts the ability of benefit corporation status alone to operate as an effective brand, a point to which I will return in Part II.C.

103. *See* MD. CODE ANN., CORPS. & ASS'NS. § 5-6C-01(c) (LexisNexis 2011); VT. STAT. ANN. tit. 11A, § 21.03(4) (2011); VA. CODE ANN. § 13.1-782 (2011).

104. *See* MD. CODE ANN., CORPS. & ASS'NS. § 5-6C-08(a)(2) (LexisNexis 2011); N.J. STAT. ANN. §§ 14A:18-11(a)(2) (West 2011); VT. STAT. ANN. tit. 11A, § 21.14(a)(2) (2011); VA. CODE ANN. § 13.1-791(A)(2)(a) (2011); S.B. 298, 2011 Leg., 26th Sess. § 11(a)(2) (Haw. 2011).

certification is granted or denied.

Shareholders are also involved at the initial adoption of benefit corporation status and on any exit from that status. Shareholders must be granted express notice of the change and must vote by a supermajority to approve it.[105] These provisions may have been drafted to protect unsuspecting investors from being surprised by a benefit corporation's dual mission orientation. Yet, the notice and voting requirements apply in both directions. Thus, they also protect the benefit corporation and enforce its dual mission against termination without a strong consensus among shareholders.

Outside the context of transformation to fully for-profit status, though, the statutes offer little guidance to shareholders or fiduciaries on the thorny issue of how profit and social good should be balanced. They allow directors to forego profit maximization in favor of social good production or vice versa,[106] but they do not instruct directors on how to exercise this broad discretion. Directors are not told to err on the side of social good in every decision, to pursue more profit than social good across the enterprise, or the opposite of either instruction. Rather, directors are merely instructed to consider the impact of every decision on nonshareholder constituencies.[107] In addition, the statutes provide directors with a broad range of interests that they may act to benefit, and the role of benefit corporation director is constructed to be highly discretionary.[108] Thus, the statutes impose no clear framework for directorial decision making. Without one, it is difficult to identify a metric by which shareholders might enforce fiduciaries' compliance with dual mission.

Shareholders of all benefit corporations retain the informational, voting, and litigation rights of ordinary shareholders. Any of these rights could, theoretically, be used to enforce dual mission. Benefit corporation shareholders may demand to inspect corporate books and records beyond the benefit report to determine how a particular mission conflict was resolved. They may vote out directors who fail to sufficiently pursue their favored balance of profits and mission. They may even sue directors for a failure to

105. MD. CODE ANN., CORPS. & ASS'NS. § 5-6C-04(b) (LexisNexis 2011); N.J. STAT. ANN. § 14A:18-4(a) (West 2011); VT. STAT. ANN. tit. 11A, § 21.07(2)(B) (2011); VA. CODE ANN. § 13.1-786 (2011); S.B. 298, 2011 Leg., 26th Sess. § 3 (Haw. 2011).

106. *See* MD. CODE ANN., CORPS. & ASS'NS. § 5-6C-07 (LexisNexis 2011); N.J. STAT. ANN. § 14A:18-6(c) (West 2011); VT. STAT. ANN. tit. 11A, § 21.09(a)(3) (2011); VA. CODE ANN. § 13.1-788(A)(3) (2011).

107. *See* MD. CODE ANN., CORPS. & ASS'NS. § 5-6C-07 (LexisNexis 2011); N.J. STAT. ANN. § 14A:18-6 (West 2011); VT. STAT. ANN. tit. 11A, § 21.09 (2011); VA. CODE ANN. § 13.1-788(A) (2011).

108. *See* MD. CODE ANN., CORPS. & ASS'NS. §§ 5-6C-07(a)(1)-(2) (LexisNexis 2011); N.J. STAT. ANN. § 14A:18-6(a) (West 2011); VT. STAT. ANN. tit. 11A, § 21.09(a)(1)-(2) (2011); VA. CODE ANN. § 13.1-788(A) (2011).

meet their special fiduciary obligations under the statute, and the later-enacted statutes also provide for the benefit enforcement proceeding.[109]

Still, shareholders are unlikely to be assiduous and consistent enforcers. Their ability to obtain damages to redress faulty directorial decisions is significantly limited by ordinary fiduciary liability concepts like the business judgment rule and will be further frustrated by benefit directors' broad and unguided discretion and immunity. Moreover, benefit corporation shareholders have an additional reason not to engage in enforcement of dual mission—or at least a serious potential bias toward one-half of it. If a benefit corporation begins veering away from its dual mission to achieve greater profits, shareholders stand to gain financially from this decision. Thus, although many routes exist for shareholder enforcement, shareholders are uniquely hamstrung as enforcers in the benefit corporation context.

The statutes uniformly exclude other potential parties from engaging in enforcement through litigation. Beneficiaries and the public will not have standing to challenge actions by benefit corporation directors.[110] This position resonates with the traditionally extremely limited standing to challenge actions by nonprofit corporate directors.[111] This policy is justified as necessary in order to recruit directors, which are most often uncompensated, to serve on nonprofit boards.[112] However, the nonprofit context provides for government enforcement by state attorneys general and, for exempt nonprofits, the IRS. There is no regulatory role for any public official in the benefit corporation.[113]

Other hybrid forms of organization take very different stances on enforcement than the benefit corporation. The United Kingdom adopted public enforcement, launching a specialized CIC regulator in addition to allowing shareholder enforcement of dual mission.[114]

109. *See* N.J. STAT. ANN. § 14A:18-10 (West 2011); VT. STAT. ANN. tit. 11A, § 21.13 (2011); VA. CODE ANN. § 13.1-790 (2011).

110. This is only a default rule and can be changed by individual benefit corporations. *See* N.J. STAT. ANN. § 14A:18-10(b)(2)(d) (West 2011); VT. STAT. ANN. tit. 11A, § 21.13(b)(4) (2011); VA. CODE ANN. § 13.1-790(B)(2)(c) (2011).

111. *See* FREMONT-SMITH, *supra* note 89, at 324–42.

112. *See id.* at 324–25. This concern was raised in bar association comments to proposed New York benefit corporation legislation. *See* Letter from Committee on Corporation Law to Speaker Silver and Senator Squadron (Feb. 16, 2011) (on file with author) (noting concern regarding "attracting qualified individuals to serve" as benefit corporation directors even with limited standing).

113. The Hawaii statute makes this abundantly clear. S.B. 298, 2011 Leg., 26th Sess. § 11(a)(8) (Haw. 2011).

114. *See* Companies (Audit, Investigations and Community Enterprise) Act 2004, c. 27, Part 2, § 27, *available at* http://www.legislation.gov.uk/ukpga/2004/27/section/27; *About Us*, CIC REGULATOR, http://www.bis.gov.uk/cicregulator/about-us (last visited Aug. 28, 2011).

The regulator possesses broad authority to investigate, remove fiduciaries, and even terminate CICs found out of compliance.[115]

L3Cs rely solely on private enforcement, and the contours of this enforcement remain somewhat unclear. LLC members have internal means to challenge fiduciary actions and legal standing to enforce managers' fiduciary obligations.[116] The exact scope of these duties, and the means of their enforcement, is not addressed by the L3C statute and the nature of LLC fiduciary duties is both contested and jurisdictionally diverse.[117] Moreover, as a species of LLC, an L3C operating agreement may tailor fiduciary duties to a significant degree, generally including reducing those obligations when "not manifestly unreasonable."[118] Drawing on the language of the L3C statutes, John Tyler has suggested that the fiduciary duty of L3C managers should be understood to require prioritization of charitable and educational purposes over their profit-making ones.[119] Further, he has argued that enforcement mechanisms borrowed from for-profit forms should suffice to enforce these obligations.[120] Whether or not these views of L3C fiduciary obligation and enforcement become widely accepted, the statutes certainly offer no regulatory or other enforcement vehicles.

Like the benefit corporation, the B Corp retains the existing enforcement mechanisms of a for-profit corporation, including shareholder informational and voting rights as well as derivative suits. This private certification form, however, does not add benefit directors, benefit officers, or benefit enforcement proceedings found in some benefit corporation statutes. B Corp status also subjects adopters to potential audit by B Lab,[121] which B Lab and other standard-setters may require for benefit corporations, but the statutes do not require by their terms.

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115. *See* Companies (Audit, Investigations and Community Enterprise) Act 2004, c. 27, Part 2, §§ 42–51, *available at* http://www.legislation.gov.uk/ukpga/2004/27/contents.

116. *See, e.g.*, REV. UNIF. LTD. LIAB. CO. ACT §§ 901–903 (2006) (providing members with direct rights of action and only members with rights to sue derivatively, after demand or a showing of demand's futility).

117. *See* Sandra K. Miller, *What Fiduciary Duties Should Apply to the LLC Manager After More Than a Decade of Experimentation?*, 32 J. CORP. L. 565, 586 (2007).

118. *See, e.g.*, REV. UNIF. LTD. LIAB. CO. ACT § 110(d) (2006).

119. *See* John Tyler, *Negating the Legal Problem of Having "Two Masters": A Framework for L3C Fiduciary Duties and Accountability*, 35 VT. L. REV. 117, 141 (2010).

120. *See id.* at 154.

121. *See* B Lab, *How Are Companies Certified and Audited as B Corporations?*, CERTIFIED B CORP., http://www.bcorporation.net/index.cfm?fuseaction=modalContent.content&id=f7224b49-ed7f-4037-894c-31c6e3c32178 (last visited Aug. 28, 2011).

4. *The Benefit Corporation's Disclosure Model*

The benefit corporation form relies significantly on disclosure, both to amplify dual mission articulation and to lubricate enforcement. The benefit report[122] gives shareholders and the public an opportunity to view how the entity reacts to situations in which profit and social mission conflict. Of course, the benefit report need not address these questions specifically. It must only report on public benefits achieved and circumstances that have hindered public benefit production.[123] The Vermont, New Jersey, and Hawaii statutes demand that benefit corporations provide somewhat greater information in their benefit reports. They also compel them to charge a benefit director with a monitoring role, including preparing an opinion of the entity's public benefit performance.[124] The New Jersey and Vermont statutes also provide for potentially greater review of the annual report, demanding filing with a government agency and shareholder approval, respectively.[125] Whether these recipients of disclosure will actively enforce is not yet known. Empowering individuals required to engage activity in the process of creating and approving disclosures, however, may at least somewhat improve the likelihood that enforcement action will be taken based upon them.

In terms of disclosure, benefit corporations occupy a sort of middle ground between the situations of traditional nonprofit and for-profit entities. On the one hand, benefit corporations must issue self-styled disclosures about public benefit provision to shareholders and allow for public review, a different kind of transparency than would be required of a nonprofit. Nonprofits must provide standardized annual reports on their charitable activities to state attorneys general[126] and, if they are tax-exempt, they must submit annual informational tax returns to the IRS and make them public.[127] The level and contents of required disclosures for benefit corporations should provide greater transparency on how a dual mission is being managed than would be available from a standard for-profit corporation, partnership, or LLC. Corporations may have annual reporting obligations to shareholders and the secretary of

122. *See* MD. CODE ANN., CORPS. & ASS'NS § 5-6C-08(a) (LexisNexis 2011); N.J. STAT. ANN. § 14A:18-11(a) (West 2011); VT. STAT. ANN. tit. 11A, § 21.14(a) (2011); VA. CODE ANN. § 13.1-791(A) (2011).

123. *See* MD. CODE ANN., CORPS. & ASS'NS § 5-6C-08(a)(1) (LexisNexis 2011); N.J. STAT. ANN. § 14A:18-11(a)(1) (West 2011); VT. STAT. ANN. tit. 11A, § 21.14(a)(1) (2011); VA. CODE ANN. § 13.1-791(A)(1) (2011).

124. *See* N.J. STAT. ANN. §§ 14A:18-11, 14A:18-7(c) (West 2011); VT. STAT. ANN. tit. 11A, §§ 21.14(a), 21.10(c)(3) (2011).

125. *See* N.J. STAT. ANN. § 14A:18-11(6)(d) (West 2011); VT. STAT. ANN. tit. 11A, § 21.14(c) (2011).

126. *See* FREMONT-SMITH, *supra* note 89, at 315.

127. *See id.* at 409–11.

state,[128] and LLCs may be required to report annually to state authorities as well.[129] For-profits regulated by federal securities law may have additional reporting obligations.[130] None of these required reports, however, must contain information regarding the social goals and achievements of the disclosing organization. Benefit corporation disclosures are thus fairly robust and are certainly more closely tailored to address dual mission performance than either nonprofit or for-profit disclosures.

Benefit corporations also require more disclosure on the question of social and profit-making activity than any other hybrid forms currently available in the U.S.[131] L3C statutes require no disclosures beyond the annual reporting obligations derived from related LLC statutes, which include no requirement of reporting on the entity's furtherance of charitable and educational purposes.[132] Investor-members in an L3C could certainly demand such reporting, but it is not statutorily mandated. The B Corp certification requires B Lab to have access to certified entities for potential audits[133] but does not require any periodic disclosures to it, to investors, or to the public.

5. Conclusion

In sum, the benefit corporation form is effective in allowing social enterprises formally to articulate a dual mission. It clearly allows shareholders to take profits and requires a statement of purposes for the general public benefit. This is an improvement over traditional nonprofit and for-profit forms, but does not gain the

128. *See, e.g.*, MODEL BUS. CORP. ACT §§ 16.20, 16.21 (1984) (requiring corporations to provide shareholders and the secretary of state with annual reports); DEL. CODE ANN. tit. 8, § 502 (West 2011) (requiring Delaware corporations to file annual reports including very limited information with the secretary of state).

129. *See, e.g.*, REV. UNIF. LTD. LIAB. CO. ACT § 209 (2006).

130. *See, e.g.*, 17 C.F.R. § 240.13a-1 (2011) (requiring companies issuing registered securities to file annual reports with the SEC); § 240.14a-3 (requiring that annual reports accompany proxy solicitations relating to annual meetings).

131. The highly regulated CIC does require annual reporting on the achievement of its community benefit, which reports are provided to the Regulator, are made available to the public, and should be provided to shareholders. *See The Guidance: Statutory Obligations*, CIC REGULATOR 2–3 (May 14, 2005), *available at* http://www.bis.gov.uk/assets/bispartners/cicregulator/docs/guidance/11-957-community-interest-companies-guidance-chapter-8-statutory-obligations.

132. Illinois, unique among L3C-enacting jurisdictions, has directed that L3C managers are treated as charitable trustees and regulated by the state Attorney General. *See* 805 ILL. COMP. STAT. ANN. 180/1-26(d) (2011). Thus, Illinois L3Cs will have a reporting obligation that covers their public benefit activities. *See* 760 ILL. COMP. STAT. ANN. 55/7(a) (2011).

133. *See* B Lab, *Become a B Corporation*, *supra* note 60 (requiring no ongoing reporting from "B" licensees, but subjecting them to potential on-site auditing by B Lab).

benefit corporation a comparative advantage over other existing hybrids, which also clearly allow dual mission to be articulated formally. Indeed, the delegation to third-party standard-setters to vet this public benefit and the lack of a statutory floor for what counts as public benefit make low standards and greenwashing particular concerns for the benefit corporation.

In terms of enforcement, the benefit corporation usefully limits movement in and out of dual mission status by its shareholder vote requirements but gives little guidance on enforcing dual mission outside of the ultimate exit question. Third-party standard-setters could take a more active role here, but they need not do so under the statutes. Benefit corporation statutes expressly permit, but do not require, the pursuit of social goals over profit, and bend over backwards to protect fiduciaries from liability for their decisions. In this context, shareholder enforcement will be challenging and shareholders themselves may become biased toward profit goals or be bought out by others seeking financial over social gains. Some statutes may generate more robust enforcement by empowering benefit directors and creating specialized benefit enforcement proceedings. These innovations remain untested, but the benefit corporation's model of enhanced disclosure will at least provide a mechanism for shareholders and the public to track dual mission. In relative terms, this low level of enforcement is not damning, however, as other extant hybrid forms also provide limited enforcement regimes.

B. Expanding Funding Streams

The ability to effectively articulate and enforce a dual mission is the baseline requirement for a hybrid organization. It is also intimately related to the second reason social entrepreneurs are interested in hybrid forms—expanding their access to a range of funding streams. Founders or operators of social enterprises can opt to form their entities as traditional nonprofit corporations or as one of various for-profit organizational forms. Yet, any of these choices will limit the funding streams available to their enterprises.

Due to the nondistribution constraint, equity capital will not be available to social enterprises formed as nonprofits, but they can obtain capital through donations, income earned on investments, or sales of goods and services, and borrowing. To attract donations, a social enterprise will want to qualify as tax-exempt and eligible to receive tax-deductible contributions. Preserving this eligibility, though, may significantly curtail a social entrepreneur's activities. Tax law imposes limitations on commercial activity, affiliations with other for-profit entities, and even some compensation plans, as well as lobbying and campaign activity.[134] Earned income is, of course,

134. *See* Dana Brakman Reiser, *For-Profit Philanthropy*, 77 FORDHAM L.

another source of revenue. Although some of this income will qualify as tax-exempt,[135] for social enterprises just starting out, investment gains are unlikely to be large and revenue from sales of goods and services may be of a size uncertain even to fund current activities, let alone build capital. For startup social enterprises, investment gains are also unlikely to be large.

Finally, a social enterprise formed as a nonprofit might look to borrowing as a potential funding source. Nonprofit corporations may borrow from willing lenders, as could any other legally recognized organization.[136] Practical obstacles can figure prominently here, however, as banks and other lenders may be less willing to lend to nonprofits[137] or require more onerous terms from them due to an accurate or mistaken impression of the organization's financial risk or its lack of an equity cushion. If social enterprise founders or operators view donations, income earned on investments and sales of goods and services (whether subject to full or partial taxation or not), investment income, and borrowing as providing insufficient funding, then hybrid forms permitting equity financing become attractive.

Organizing as a traditional for-profit entity will give social entrepreneurs access to equity and debt, in addition to earned income (though it will be subject to taxation). A social enterprise organized as a for-profit may sell shares or memberships, privately or publicly, and may seek equity-investing partners or bank or other lenders. As in any small for-profit, it may be difficult for a social entrepreneur to convince arms-length investors to take equity positions, and it may be hard to obtain loans without offering personal guarantees or collateral. Using traditional business forms may avoid some concerns among investors or lenders about the incentives of the entity and its leaders to succeed financially and to repay its debts. Yet, for diligent investors or lenders who closely examine the business plan of a social entrepreneur, the mix of social and profit purposes may raise eyebrows and interest rates.

A social enterprise organized as a for-profit will also have

REV. 2437, 2454–55 (2009) (describing some of these limitations).

135. Tax-exempt organizations are exempt from tax on income from sales of goods and services only to the extent it is not deemed unrelated business income, defined as income from a trade or business that is "regularly carried on." I.R.C. § 512(a)(1) (2010). "[T]he conduct of which is not substantially related . . . to the exercise or performance" of exempt functions." § 513(a).

136. Only quite large and sophisticated nonprofit social enterprises will be able to access private debt markets through qualified tax-favored bond offerings. These bond offerings are regulated through I.R.C. sections 103, 141–150, and accompanying regulations. *See generally* IRS, *Tax-Exempt Bonds for 501(c)(3) Charitable Organizations: Compliance Guide* (2011), *available at* http://www.irs.gov/pub/irs-pdf/p4077.pdf.

137. *See* Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income*, 91 YALE L.J. 54, 72–73 (1981).

limited access to donated funds. Adopting a traditional business form bars tax-exemption and eligibility for deductible contributions, despite calls by some for a change in this position.[138] This is so regardless of whether an entity pursues social purposes or charitable activity. Of course, forming as a for-profit will not necessarily preclude all socially-motivated sources of revenue. Cause-related marketing[139] campaigns like the various "pink" product sales for breast cancer awareness[140] and the RED campaign to combat AIDS in Africa[141] have raised millions of dollars through sales by purely for-profit corporations. If a for-profit social enterprise can convince consumers or investors that it will use some of their dollars for good, they too may be able to attract the funds of those with mixed social and financial motivations. If hybrid forms can ease access to donations and other socially-motivated funding sources, social entrepreneurs will prefer them to traditional for-profit forms.

The benefit corporation statutes do not speak expressly to the question of financing, but adopters of this form would certainly be ineligible to receive deductible contributions. Rater, benefit corporations can pursue the funding sources available to traditional for-profits. In this pursuit, the dual mission embedded in the form may or may not prove advantageous. The benefit corporation form seems likely to draw potential investors and lenders' attention to the dual mission of the organization. On the one hand, this may make those motivated purely by profit even more hesitant to invest or lend to a benefit corporation than to a for-profit social enterprise. On the other hand, it may attract potential investors or lenders who are interested in combining their financial contributions with a purchase of social good. Socially-motivated investors may be more willing to risk lower financial returns from a firm credibly committed to simultaneously pursuing profit and social good. While they might distrust the bona fides of a pure for-profit social enterprise, a benefit corporation statutorily committed to pursue public benefit could be more attractive.

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138. *See, e.g.*, DAN PALLOTTA, UNCHARITABLE: HOW RESTRAINTS ON NONPROFITS UNDERMINE THEIR POTENTIAL 35–37 (2008); Anup Malani & Eric A. Posner, *The Case for For-Profit Charities*, 93 VA. L. REV. 2017, 2020–21 (2007).

139. *See* Terri Lynn Helge, *The Taxation of Cause-Related Marketing*, 85 CHI.-KENT L. REV. 883, 885–86 (2010) (explaining the cause-related marketing concept).

140. *See, e.g.*, *Save Lids to Save Lives*, YOPLAIT, http://www.yoplait.com/Slsl/default.aspx (last visited Aug. 28, 2011) (describing the yogurt producer's cause-related marketing campaign to benefit itself and Susan G. Komen For the Cure).

141. *See The (RED) Idea*, (RED), http://www.joinred.com/aboutred (last visited Aug. 28, 2011) (explaining the concept of selling products for which companies have promised to donate half of their profits to the Global Fund for HIV/AIDS).

In fact, both results might occur. Then, the question is whether the gain of attracting socially-motivated investors and lenders outweighs the cost of driving off purely-profit-motivated ones. This empirical question cannot yet be answered. Even assuming the gains would outweigh the costs, however, the potential gains are premised on the idea that the enforcement of dual mission is credible. The credibility of this claim comes back to enforcement and, as noted in Part II.A, enforcement in the benefit corporation remains uncertain.

The indeterminate ability of the benefit corporation form to expand funding streams is not unusual in the hybrid space. None of the other current hybrid forms can offer tax deductions to donors. The only one that claims the ability to attract tax-benefitted assets is the L3C, which is designed to attract foundation funding through program-related investments ("PRIs").[142] PRIs are investments by foundations in taxable entities motivated by the recipient's charitable program rather than the foundation's desire to earn income.[143] Qualifying PRIs avoid penalties on foundations for risky, jeopardizing investments and count toward the roughly five percent of assets foundations must distribute annually.[144] Foundations may believe a costly private letter ruling process is necessary to assure qualification as a PRI; if the L3C smoothed that path, it would perhaps become a preferred vehicle for foundation funding.[145] As of yet, the IRS has not offered any assurances that investments in L3Cs qualify as PRIs on the basis of L3C form alone, and it seems unlikely to do so in the near future.[146] Thus, no current hybrid form promises significant access to true donations, though they all share the benefit corporation's ability to perhaps attract socially motivated

142. *Frequently Asked Questions*, AMERICANS FOR COMMUNITY DEVELOPMENT, http://www.americansforcommunitydevelopment.org/faqs.php (click on Financing) (last visited Aug. 28, 2011) ("The L3C vehicle is designed to attract PRI investments.").

143. *See* I.R.C. § 4944(c) (2011).

144. *See id.*; *Qualifying Distributions – In General*, IRS.GOV, http://www.irs.gov/charities/foundations/article/0,,id=162934,00.html (last visited Aug. 28, 2011).

145. *See* Michael N. Fine & Kerrin B. Slattery, *Illinois Recognizes New Business Entity That Mixes For-Profit and Nonprofit Elements*, MCDERMOTT WILL & EMERY, Aug. 28, 2009, http://www.mwe.com/index.cfm/fuseaction/publications.nldetail/object_id/7e32373a-065a-4d91-a8c2-556532d769a9.cfm ("The only way to be certain of PRI treatment, currently, is for a private foundation to seek a private ruling from the IRS. However, the private letter ruling process consumes both time and money.").

146. *See* Mark Hrywna, *The L3C Status: Groups Explore Structure that Limits Liability for Program-Related Investing*, THE NON-PROFIT TIMES, Sept. 1, 2009, *available at* http://www.thefreelibrary.com/The+L3C+status%3A+groups+explore+structure+that+limits+liability+for.%20.%20.-a0208056187 (reporting comments made by the IRS' Ron Schultz, who "warned against jumping on the LC3 bandwagon too early because of unresolved tax questions").

dollars.

Likewise, none of the other hybrids appear much more likely to attract market-rate investors. CICs offer only capped dividends and lock remaining assets into the community benefit stream; thus, its investments are simply not on par with market-rate products. In fact, the capped dividend rates were viewed as unattractive enough to investors to necessitate a cap increase in 2010.[147] The L3C is amenable to tranched investment, which some believe will enable it to draw investors seeking market-rate returns.[148] As I have written elsewhere, without providing governance or other guarantees to market-rate investors, I am skeptical that they will view L3C investment as a substitute for market-rate products.[149] Further, if guarantees were made to satisfy market-rate investors that profit motive will control, it would undermine dual mission and the interest of foundations and other socially-motivated investors to contribute their funds.[150] Thus, to my mind, the L3C, like the CIC, the B Corp, and the benefit corporation, is likely to draw in new investment capital only from the socially-motivated category of investors. This may be a large market and a significant benefit of hybrid forms, but none so far makes a strong argument for reaching the clearly larger category of market-rate investors.

C. Branding

The third reason founders and operators of social enterprises may find a hybrid form attractive is to help them to create a distinctive brand.[151] The American Marketing Association defines a brand as "[a] name, term, design, symbol, or any other feature that identifies one seller's good or service as distinct from those of other sellers."[152] Social entrepreneurs wish to market their enterprises and their products to consumers, partners, and employees as meaningfully different from either traditional nonprofits or for-profits and view a hybrid form as one route to accomplish this goal.[153]

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147. *See Notices under the Companies (Audit, Investigations and Community Enterprise) Act 2004*, CIC REGULATOR, http://www.first-corporate.co.uk/CIC%20Dividend%20Cap.pdf.

148. *See* Robert Lang & Elizabeth Carrott Minnigh, *The L3C, History, Basic Construct, and Legal Framework*, 35 VT. L. REV. 15, 17 (2010).

149. *See* Brakman Reiser, *supra* note 10, at 647–48, 650–51.

150. *See id.* at 650–51.

151. Note that the branding issue shares much common ground with that of how social enterprises can appeal to investors, addressed *supra* Part II.B.

152. *Dictionary,* AMERICAN MARKETING ASS'N, http://www.marketingpower.com/_layouts/Dictionary.aspx?dLetter=B; *see also* Tim Calkins, *The Challenge of Branding, in* KELLOGG ON BRANDING 1, 8 (2005) ("Brands are sets of associations linked to a name or mark associated with a product or service.").

153. *See* Kelley, *supra* note 1, at 361–62; *see also* DAVID A. AAKER, BUILDING

Nonprofits, in essence, sell their halo. When they offer products to consumers, affiliations to partners, and jobs to employees, they are selling a sense of righteousness or trustworthiness, or both. For-profits sell efficiency. They offer products of the highest quality and lowest price, affiliations to draw in revenue, jobs that pay a market wage, and training in efficient business operations. Social entrepreneurs see themselves as offering something quite different. The profit motive makes them lean, efficient, innovative. But, their social mission keeps them virtuous and responsible. Thus, neither traditional nonprofit nor for-profit forms send the right message. Yet, it is difficult to convey what a social enterprise has to offer to consumers, partners, and employees quickly and credibly. Hybrid forms of organization are attractive to social entrepreneurs if they can provide a brand that will distinguish their products and enterprises.

Whether the benefit corporation form can effectively function as such a brand, however, depends on whether it is a credible proxy for truly dual mission entities. The benefit corporation form will work as a brand only if it conveys relevant information to consumers, partners, and employees, demonstrating the value they will obtain from a relationship with the entity the brand denotes.[154] These claims of value, and the benefit corporation's claims of differentiation from typical nonprofit and for-profit entities, also must be reliable.[155] Consumers, partners, and employees interested in purchasing from, partnering with, or being employed by a dual mission entity will look for or be swayed by brands that demonstrate an entity can be trusted to pursue both profit and social good. This tracks, of course, back into the problems of dual mission articulation and enforcement addressed above.[156]

The process of building the benefit corporation brand is at too early a stage to evaluate fully, though the uncertainties about enforcement of dual mission within the form create serious obstacles for its success. Of course, individual benefit corporations can

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STRONG BRANDS 135 (1996) (explaining how an organization's brand identity is important for "employees, retailers and others who must buy into [a company's] goals and values and implement [its] strategies").

154. *See* C. Whan Park, Deborah J. MacInnis & Joseph Priester, *Brand Attachment and a Strategic Broad Exemplar*, *in* HANDBOOK ON BRAND AND EXPERIENCE MANAGEMENT 3, 3 (Berndt H. Schmidt & David L. Rogers, eds. 2008) (explaining the consensus in the business academic community "that strong brand equity is contingent on a powerful relationship between the customer and the brand").

155. *See* Alice M. Tybout & Brian Sternthal, *Brand Positioning*, *in* KELLOGG ON BRANDING 11, 12–13 (2005) (explaining that a brand's positioning must include "reasons to believe" and arguing these reasons are "more important when the claims are relatively abstract," like those of a social enterprise will be).

156. *See supra* Part II.A.

certainly provide greater assurances of their dual mission bona fides, through shareholder agreements or other precommitment devices. By doing so, these individual benefit corporations may themselves become powerful brands. However, for the benefit corporation form of organization itself to function as a brand, it must convey this salient information on its own.

Finally, brands are weak unless and until they become familiar to their target audience.[157] Even if an organizational form could reliably convey commitment and follow-through on dual mission, it can function as a strong brand only when enough entities adopt it and the brand's meaning becomes known in the marketplace. Standard-setters clearly have a stake in disseminating information about the benefit corporation brand and encouraging social enterprises to adopt it. This need to generate adoptions seems, indeed, to explain B Lab's involvement in pursuing benefit corporation legislation in the various states. Thus far, there has been some publicity about benefit corporations, but few entities have adopted the form and little is known about how its future adopters will behave.

As is the case with expanding access to capital, other hybrid forms also face challenges similar to those of the benefit corporation in their drive to become effective brands. First, each form will need to prove an effective proxy for entities with clearly articulated and reliably enforced dual missions, issues addressed above.[158] Second, each form will need to be adopted widely enough to spread knowledge of the brand to potential customers, partners, and employees. This job is already underway for each developing hybrid form. B Lab, of course, has a strong interest in creating awareness of the B Corp form and is actively pursuing this goal.[159] Americans for Community Development is a "professional organization comprised of the individuals and organizations participating in the movement to create L3Cs,"[160] which has been heavily involved in spreading the word about the L3C to legislatures and the public.[161]

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157. *Cf.* AAKER, *supra* note 153, at 307 (explaining that for a consumer brand to be powerful, consumers must be aware of the brand and understand what it represents, and noting such brand knowledge is "not simply built by exposures; rather it is generated by a real customer intimacy with the brand").

158. *See id.*

159. *See* B LAB, 2011 *Annual Report*, *supra* note 55, at 16–17.

160. Karen Woods, *Welcome to the New Americans for Community Development*, AMERICANS FOR COMMUNITY DEVELOPMENT, http://www.americansforcommunitydevelopment.org/index.php (last visited Aug. 28, 2011).

161. *See Considering Legislation in Your State?*, AMERICANS FOR COMMUNITY DEVELOPMENT, http://www.americansforcommunitydevelopment.org/considering.php (last visited Aug. 30, 2011); *PR of L3Cs*, AMERICANS FOR COMMUNITY DEVELOPMENT, http://www.americansforcommunitydevelopment.org/prforl3cs.php (last visited Aug. 28, 2011).

In the United Kingdom, the CIC regulator has taken a role in informing the public about the CIC.[162] Each of these entities is pursuing a solid brand for its favored form; yet, the growing number and diversity of legal forms for social enterprise may lead to some confusion in the marketplace.

D. Sustainability

Finally, social entrepreneurs may also see a hybrid form as providing their enterprises with greater sustainability than traditional nonprofit or for-profit forms can offer.[163] Of course, sustainability can mean many different things. When thinking about sustainable development, the UN Brundtland commission defined it as "meeting the needs of the present without compromising the ability of future generations to meet their own needs."[164] When researching sustainable corporations, one quickly runs across ideas like the triple bottom line (economic, social, and environmental outcomes) or the 3-P model (People, Profit, Planet).[165] These ideas clearly resonate with the fundamental ideas of a social enterprise, melding pursuit of profits with social good, often including environmental goals. But, the benefit corporation form is not there yet. This new hybrid form must allow social enterprises to articulate and enforce dual missions, to obtain greater access to capital, and to brand themselves to consumers and partners as distinct and special entities offering distinct and special products, in order to truly embody the sustainable corporation.

CONCLUSION

The benefit corporation will not yet achieve all of the goals social enterprises desire from a hybrid form. Benefit corporation statutes have opened up a place for social enterprises to legally articulate their dual mission, and have guarded the ultimate exit from the hybrid form with significant shareholder voting requirements. Leaving all content to unregulated standard-setters and providing little guidance or enforcement apparatus for midstream decision making, however, does not do enough to ensure benefit corporations can enforce a dual mission over time. Thoughtful founders and leaders of social enterprises considering

162. *See About Us*, *supra* note 114.

163. Intriguingly, Hawaii calls its benefit corporation type entity a "sustainable business corporation." S.B. 298, 2011 Leg., 26th Sess. § 2 (Haw. 2011).

164. UNITED NATIONS, G.A. Res. 42/187, *Report of the World Commission on Environment and Development*, *available at* http://www.un.org/documents/ga/res/42/ares42-187.htm.

165. *See* JOHN ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS 20 (1998); PETER FISK, PEOPLE PLANET PROFIT: HOW TO EMBRACE SUSTAINABILITY FOR INNOVATION AND BUSINESS GROWTH 3 (2010).

the benefit corporation form will consider whether investors, consumers, partners, and employees will find this balance and brand appealing. Until a hybrid form is created that clearly and powerfully enforces dual mission, though, I believe access to expanded capital, effective branding, and sustainability will remain elusive.