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The Development of Social Enterprise and Rise of Benefit Corporations: A Global Solution?

Dina Dalessandro *

I. INTRODUCTION

This note seeks to analyze the benefits, as well as shortfalls of social enterprises, alongside the development of state legislation supporting them. Social enterprises at their core are business ventures intentionally designed to affect a societal good or benefit.¹ In doing so, social enterprises have transformed the landscape of the corporate law, as they arguably require an expansion of corporate governance. In fact, the benefit corporation model implicates a profound change from the traditional form. This is because in order to pursue a public good or benefit, these socially-driven companies may require directors and officers of the corporation to make business decisions which may diverge from the traditional goal of profit maximization.² The benefit corporation, in turn, seeks to better align decision-making and allow corporate officers and directors to pursue profit-maximization and public good. Moreover, numerous case studies of successful companies, such as Patagonia, show that the two need not be mutually exclusive.³

In an effort to support social enterprises many states have developed benefit corporation legislation. Today, thirty-four states have passed such statutes.⁴ As such, the social enterprise movement and benefit corporations, as their vehicle, can pose a valuable solution to many of the problems that traditional corporations have posed to society. Notably, the mounting criticism of corporate greed has provided support for the development of social enterprise. Through analysis of this new business model, it will become clear that benefit corporations can provide a potential solution to many important global problems, such as promoting sustainable

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1. Alina S. Ball, *Social Enterprise Governance*, 18 U. PA. J. BUS. L. 919, 921 (2016).

2. *Id.*

3. See generally Haskell J. Murray, *Defending Patagonia: Mergers & Acquisitions with Benefit Corporations*, 9 HASTINGS BUS L.J. 485 (2013).

4. *State By State Status of Legislation*, THE BENEFIT CORPORATION, <http://benefitcorp.net/policy-makers/state-by-state-status> [perma.cc/V8Y4-MM5Q].

development and environmental protection. The continued growth of the social enterprise movement can be supported by the creation of the benefit corporation statutes. However, to advance movement, as a whole, more support is needed from the bottom-up. Garnering greater demand from the market, will require the government and even Wall Street to accept this new corporate form and the social impact business model. In turn, social enterprises may seek to garner greater market support and investment, and perhaps even government funding in the form of tax breaks, to guarantee their growth and ultimately, their success. With this monetary and societal investment, then, the benefit corporation may become an effective solution to the problematic aspects that the traditional corporate model has posed.

II. SOCIAL ENTERPRISE DEFINED

The Social Enterprise Alliance, an organization which provides a platform for the social enterprise movement,⁵ defines social enterprises as “organizations that address a basic unmet need or solve a social or environmental problem through a market-drive approach.”⁶ Ultimately, social enterprises are “triple-bottom-line” organizations which seek to balance profit, social impact, and environmental sustainability.⁷ Notably, a social enterprise can be both a non-profit or a traditional corporation, but this paper will be focused solely on the corporate model. Social enterprises allow for a company to integrate a social impact or benefit into its business operations.⁸ In doing so, they have attempted to address a variety of social issues from poverty to maintaining environmental resources. Some well-known social enterprises include: Grameen Bank, which makes small loans for small business development; Warby Parker, which makes a contribution to non-profit Vision Spring for every pair sold; and Terra Cycle, which recycles packaging and consumer waste into new products, keeping it out of landfills.⁹ Indeed, the growth of social enterprise in the past ten years is a reflection on the need and demand for greater social responsibility and sustainability in business practices.

5. *About SEA*, SOCIAL ENTERPRISE ALLIANCE, <https://socialenterprise.us/about/what-we-do/> [perma.cc/7FSJ-HLLG].

6. *What is Social Enterprise?*, SOCIAL ENTERPRISE ALLIANCE, <https://socialenterprise.us/about/social-enterprise/> [perma.cc/MKP3-KDMF].

7. *Id.*

8. *Id.*

9. *See id.*

III. THE RISE OF SOCIAL ENTERPRISE

Alongside the development of social enterprise has been the public outcry against the traditional corporate model and the accumulation of wealth in only a small portion of the population. The frustration of the American public can be seen in the uprising of socially liberal platforms, as seen in Bernie Sanders' 2016 campaign for President. Sanders ran on the platform that millions of Americans are working longer hours for lower wages, while the wealthy top one percent and largest corporations are growing and getting richer.¹⁰ Part of this, Sanders claims, is the way corporations are designed and the way they function to help and benefit only the shareholders and the top executives.¹¹

Notably, the traditional corporate model is designed with the primary goal of shareholder wealth maximization. In more recent years, however, corporations have been criticized by both the public and their own shareholders for misusing corporate funds, high executive compensation, and unsustainable business practices. This criticism has fueled a global movement against social inequality and the destruction of our global environment and nature resources, and ultimately pushed for better corporate oversight.

Moreover, the 2008 economic crisis serves as evidence of the dangers of the comingling between Wall Street and large multinational corporations and the government. The 2008 crash is said to be the result of capitalistic corporate greed, the growth of privatization, and the lack of government regulation.¹² Ultimately, the 2008 economic crisis led to a global protest of the corporate form and the growing culture of corporate greed.¹³ A movement that quickly spread globally began in the United States and Canada in 2011, and was coined "Occupy Wall Street," transformed into a protest against the role of Wall Street in creating the economic collapse. The "Occupy" movement sought to fight back against the richest one

10. Bernie Sanders, *The Corporate Greed Must End*, HUFFINGTON POST BLOG (June 24, 2016), https://www.huffingtonpost.com/rep-bernie-sanders/corporate-greed-must-end_b_7653442.html [perma.cc/BY2E-LSSG].

11. *Id.*

12. Charles Ferguson, *The Inside Job*, (2010), <http://www.sonyclassics.com/insidejob/site/#/synopsis> [perma.cc/6QMT-XB4B].

13. Davis Randall, Davis & Mark Thomas, , *Across the World, the indigent rise up against corporate greed*, THE INDEPENDENT (Oct. 15, 2011), <http://www.independent.co.uk/news/world/politics/across-the-world-the-indignant-rise-up-against-corporate-greed-and-cuts-2371357.html> [perma.cc/WD3Q-Y3P6]; Edith Honan and Edward McAllister, *Thousands protest banks, corporate greed in US marches*, REUTERS (Oct. 14, 2011), <https://www.reuters.com/article/us-usa-wallstreet-protests/thousands-protest-banks-corporate-greed-in-u-s-marches-idUSTRE79A41E20111015> [perma.cc/92QA-XKFA].

percent of people, which are “writing the rules of unfair global economy.”¹⁴ The movement sustained itself as an effort to fight against the power of major banks and multinational corporations over the democratic process.¹⁵ Notably, it spread across Asia, Europe, and the Middle-east and led to protests in 1,500 cities across the world, fully exposing the lack of trust and confidence of the public in the democratic process and in capitalism on a global scale.¹⁶

The Edelman Trust Barometer, a yearly trust and credibility survey, which aims to measure the populations trust in business, government, NGOs and media on a global scale, reveals that “trust is in crisis around the world,” in its most recent study.¹⁷ The report indicates that a majority of respondents believe that the overall system is not working for them, stating that people’s societal and economic concerns, including globalization, the pace of innovation and eroding social values, turn into fears, spurring the rise of populist actions now playing out in several Western-style democracies.¹⁸ They claim that in order rebuild trust and faith in the system, institutions must step outside of their traditional roles and work toward a new, more integrated operating model that puts people at the center of everything they do.¹⁹ This where social enterprise comes into play.

Likewise, commentators have noted that social enterprises may provide a solution to many of the inequalities that capitalism has created. Notably, Majorie Kelly, author of the book *The Divine Right of Capital*,²⁰ argues many of the problems created by corporate America, such as wealth inequality and pollution can be traced to corporate law.²¹ Conventional corporate structures and the corporate model itself require operation solely in the interest of their owners, an idea known as “shareholder primacy”, the theory that shareholder interest should be assigned priority to all other corporate stakeholders. Social enterprises challenge the shareholder primacy norm by requiring corporate boards to think about another constituency: the public. The development of constituency statutes and

14. OCCUPY WALL STREET (Aug. 27, 2016), <http://occupywallst.org/about/> [perma.cc/3PE6-57RN].

15. *See id.*

16. OCCUPY WALL STREET, *supra* note 14.

17. EDELMAN TRUST, *Global Results*, (Jan. 17, 2017), <https://www.edelman.com/global-results/> [perma.cc/YJN6-FYAS].

18. *Id.*

19. *Id.*

20. *See generally* KELLY MAJORIE, *THE DIVINE RIGHT TO CAPITAL: DETHRONING THE CORPORATE ARISTOCRACY* (Berret-Koehler Publishers, 2001).

21. Mark Gunther, *Will Wall Street Embrace B Corps*, B THE CHANGE (Mar. 31, 2017), <https://bthechange.com/will-wall-street-embrace-b-corps-5df5c91c4f4a> [perma.cc/6VPD-A3LT].

public benefit corporation statutes has allowed corporations and directors to do more than just seek profits and thus has eliminated the profit maximization norm. Moreover, the statutes require a business to pursue profits in a sustainable way, for the environment and society at large. Therefore, this rise of social enterprises may provide a solution to the downfalls and problems created by the traditional corporate model.

IV. DEVELOPMENT OF STATE LEGISLATION

A. THE TRADITIONAL CORPORATE MODEL

Proponents of social enterprise and benefit corporation legislation have focused on landmark cases *Dodge v. Ford* and *eBay v. Newmark*,²² as evidence of why new corporate statutes should exist. The notion that corporations have a purpose beyond creating financial gain for its shareholders is remarkably novel. The Court in *Dodge v. Ford*,²³ articulated that “a business corporation is organized and carried on primarily for the profit of stockholders.”²⁴ For the past hundred years, courts diligently followed this proposition. The Michigan Supreme Court famously ordered Ford to make a cash distribution to its shareholders despite his claim that he wished to use the excess capital in the corporation to benefit society.²⁵ *Dodge* famously involved a minority shareholder suit by the Dodge brothers, who claimed Ford failed to maximize shareholder value.²⁶ The fact that Ford stated he wanted to maximize something other than profit maximization made it impossible for the court to afford him the traditional business judgment deference accorded to directors.²⁷

In the more recent *eBay Domestic Holdings, Inc. v. Newmark*,²⁸ the Delaware Court reaffirmed the primacy of wealth maximization.²⁹ The case involved a dispute between Craig Newmark and James Buckmaster, the majority shareholders and directors of Craigslist, and eBay.³⁰ Although technically a for-profit corporation, Craigslist sought to operate its business

22. Murray, *supra* note 3, at 510.

23. *Dodge v. Ford Motor Co.*, 170 N.W. at 668 (Mich. 1919).

24. *Dodge v. Ford Motor Co.*, 170 N.W. at 684; *see also* Elizabeth K. Babson & William H. Clark, *How Benefit Corporations are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 825 (2012).

25. Murray, *supra* note 3, at 493.

26. Michael Thomas, *Why Kickstarter Decided to Radically Change its Business Model*, FAST COMPANY (Apr. 12, 2017), <https://www.fastcompany.com/3068547/why-kickstarter-decided-to-radically-transform-its-business-model> [perma.cc/8B36-AUHV].

27. Leo E. Strine, *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 147–48 (2012).

28. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010).

29. Babson & Clark, *supra* note 24, at 827–28; *see also* Murray, *supra* note 3, at 491–93.

30. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010).

largely as a community service, allowing users to post classified advertisements free of charge, thus profit-maximizing was not the primary goal.³¹ The dispute arose when it became clear that eBay hoped to acquire Craigslist as a subsidiary. Newmark and Buckmaster opposed the monetization of the site, preferring to keep to its unique culture and community service roots, thus adopted a rights plan as a defensive measure.³² In response, eBay sued, alleging that Newmark and Buckmaster breached their duties as majority shareholders.³³ The Court evaluated whether Newmark and Buckmaster's claim that eBay's takeover would threaten the values, culture and business model of Craigslist was a viable reason to prevent the takeover.³⁴ Ultimately the Court found that Craigslist was not warranted to put a defensive mechanism in place to prevent the takeover and that doing so would violate the shareholder's wealth maximization, which is the primacy of a fiduciary's duties. Subsequently, *eBay* has been cited as reason why directors need a mechanism to support company goals which may fall outside the profit-maximization norm. As such, benefit corporation legislation was created largely in response to the *eBay* problem and with the justification that it can create protection for corporation's in the event of a takeover.

Unilever's takeover of Ben & Jerry's is yet another justification for why companies need benefit corporation statutes.³⁵ Ben & Jerry's Homemade, Inc. was a for-profit corporation that pursued a "double bottom line," seeking to advance progressive social goals, while at the same yielding financial returns for investors.³⁶ It advanced its social mission in many ways: committing 7.5% of its profits to a charitable foundation; conducting in-store voter registration; and buying ingredients from suppliers who employed disadvantaged populations.³⁷ However in 2000 Ben & Jerry's was acquired by Unilever, a large multi-national company which was only focused on profit maximization and abandoned the many social initiatives Ben & Jerry's had once pursued.³⁸ In this way, Ben & Jerry's is "a case study for the perils of maintaining a social mission in a publicly-traded corporate form."³⁹ In fact, the proponents of benefit corporation legislation firmly believe that social enterprises require the support of a statute in order to successfully pursue both its social motive or

31. Babson & Clark, *supra* note 24, at 827–28.

32. *Id.*

33. *Id.*

34. See *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1.

35. Murray, *supra* note 3, at 503-04.

36. Robert Katz & Antony Page, *Freezing Out Ben & Jerry: Corporate Law and the Sale of a Social Enterprise Icon*, 35 VT. L. REV. 211, 212 (2010).

37. *Id.* at 211.

38. *Id.* at 211–12.

39. *Id.* at 212.

public benefit and to produce a profit.

B. DEVELOPMENT OF CONSTITUENCY STATUTES

Constituency statutes allow directors to consider the constituencies of groups other than shareholders. Arguably, constituency statutes were developed as a defensive mechanism for companies that were subject to hostile takeovers and to provide protection to a target company's board, by giving them the discretion to reject a hostile takeover based on its consideration of constituencies other than shareholders.⁴⁰ Thus, the directors of these businesses are explicitly given the ability to consider people other than their shareholders. This allowed businesses pursuing a social mission the tools to do so, without being sued. While directors of mission-driven companies could now consider the interest of various constituencies, not all states adopted these statutes. Most notably, Delaware did not. The lack of case law and the fact that corporate law was still dominated by Delaware, led to little success in the interpretation and use of these statutes.⁴¹ Furthermore, the statutes are only permissive, and while they give directors the option to consider other constituencies, there is no requirement.⁴² While the constituency statutes provided for a shift in corporate law, allowing the consideration of issues outside of shareholder wealth maximization, they required no commitment on behalf of directors, nor did they require accountability.⁴³

C. B LAB AND THE B CORP

The new millennium fostered a great deal of entrepreneurialism for social purpose. In 2006, the nonprofit organization, "B Lab," established a way to change the business world.⁴⁴ B Lab sought to provide accountability and oversight for businesses that wished to pursue a public benefit.⁴⁵ A for-profit corporation could show its commitment to social motive by becoming a registered "B Corp," registering and submitting to monitoring by B Lab. B Lab monitors social enterprises by requiring them to maintain standards for social and environmental performance, accountability and transparency; if the standards are met, then B Lab will

40. Babson & Clark, *supra* note 24, at 829.

41. *Id.* at 831.

42. *Id.* at 832.

43. Benefit Corporation, *Benefit Corporations are Necessary*, <http://benefitcorp.net/attorneys/benefit-corporations-are-necessary> [perma.cc/BG5C-PR4M].

44. B Lab, *About B Lab*, <https://www.bcorporation.net/what-are-b-corps/about-b-lab> [perma.cc/P96E-Z6WW].

45. *Id.*

offer its certification status.⁴⁶

B Lab was founded by the former founders and executives of footwear brand, AND1, Bart Houlahan and Andrew Kassoy, after they watched their company deteriorate in the shadows of Nike.⁴⁷ While AND1 reached revenue of \$250 million in 2001, they were ultimately forced to sell the company in 2006.⁴⁸ Before the sale, they had given their employees generous parental leave benefits and equity in the company; donated five percent of their profits to charity, and they enforced strict rules on their overseas suppliers to ensure fair wages and safety.⁴⁹ As soon as they lost control of the company, all of that was stripped away. With the establishment of B Lab, their mission was to help usher in a new era of corporate governance where companies did right by shareholders and the world around them simultaneously.⁵⁰ As of this publication, there are 2,778 registered B Corps across 150 industries, which B Lab monitors, making this innovation a huge success for the founders.

However, many propositioned that these new companies designed and motivated by a social purpose could not be sustained on the traditional corporate statutes and then simply certified to be effective. Moreover, the traditional corporate model arguably did not have the necessary oversight and regulatory mechanism to allow social enterprises to be both successful and effective,⁵¹ even with help from B Lab.

As such, a community of academics, entrepreneurs, and lawyers, urged for more robust monitoring and governance in the creation and maintenance of social enterprises.

It is against the paradigm of shareholder primacy that benefit corporations have been drafted. These statutes address not only the need for a new corporate form, but also respond to the demand from the market place for a corporate form that meets the needs and expectation of increasingly socially and environmentally conscious consumers, investors, and entrepreneurs.⁵²

The push for a new and unique variation of the traditional corporation

46. Jonathon Storper, *What's the Difference Between a B Corp and a Benefit Corporation*, CONSCIOUS COMPANY MEDIA (Apr. 4, 2015), <https://consciouscompanymedia.com/sustainable-business/whats-the-difference-between-a-b-corp-and-a-benefit-corporation>. [perma.cc/L9NS-9U9P].

47. See Thomas, *supra* note 26.

48. *Id.*

49. *Id.*

50. *Id.*

51. See generally Ball, *supra* note 1.

52. Babson & Clark, *supra* note 24, at 838.

led to the development of the unique benefit corporation. The B Lab founders played a large role in developing legislation and lobbying states to pass new statutes. Jonathon Storper, a corporate attorney in the Bay Area's office of Hanson Bridgett, was one of the initial drafters of California's benefit corporation legislation.⁵³ Storper expressed the challenges he faced with getting the law passed in California, as the first effort was vetoed by then Governor Schwarzenegger.⁵⁴ Storper worked with two other California corporate attorneys and colleagues, John Montgomery and Donald Simon, as well as B Lab to lobby politicians and develop what they called a social purpose bill, which would in effect allow corporations to pursue a mission outside of the typical profit-maximization goals of traditional corporations.⁵⁵ Part of the battle, Storper explained, included getting around conservative business interests who feared that such legislation would impose social and environmental obligations on them.⁵⁶ Even more, Storper explained that people fear change and this new type of statute was daunting to both the business and legal world.⁵⁷ In fact, many lawyers, scholars and businesses were hesitant to take on this new corporate form.

Some of the initial criticism stemmed from the fact that the legislation created an entirely new type of corporation, while the traditional model had been widely accepted for the past hundred years. Well-respected Chief Justice Strine, of the Delaware Supreme Court, has suggested that the benefit corporation is really modest in the evolution of the corporate model.⁵⁸ Even going so far to state that "those who believe that corporate law must make stockholder welfare the sole end of corporate governance are simply wrong and have misread the precedent."⁵⁹

Indeed, since its formation, the benefit corporation has met a great deal criticism and reluctance. However, many initial fears and criticisms subsided by the overall successes that these statutes provided. In fact, supporters of the benefit corporation argue that it has been effective because it provides for reduced director liability, expanded stockholder rights, an advantage in attracting and retaining talent, increased access to certain private investment capital, increased attractiveness to retail investors, and mission protection, to name a few.⁶⁰

53. In-person interview with Jonathon Storper, Law Partner, Hanson Bridgett (Nov. 6, 2017).

54. *Id.*

55. Gunther, *supra* note 21.

56. *Id.*

57. *Id.*

58. Leo E. Strine, *Making it Easier for Directors To "Do the Right Thing"?*, 4 HARV. BUS. L. REV. 235, 242 (2014).

59. *Id.*

60. *FAQ*, BENEFIT CORPORATION, <http://benefitcorp.net/faq> [perma.cc/X2MU-ZWLH].

D. BENEFIT CORPORATION STATUTES

The introduction of the benefit corporation statute created a platform that allowed social entrepreneurs to create a business that pursued both profit and a social or environmental purpose. Most statutes actually require that the corporation must list a stated purpose in its charter and be designed to provide a “public benefit.”⁶¹ While the statutes do tend to differ from state to state, they have three common requirements: (1) a stated public purpose; (2) corporate governance scheme, (3) transparency and accountability enforcement.⁶²

Maryland was the first state to pass such a statute in 2010.⁶³ California pioneered its own legislation for the benefit corporation in 2011 and Delaware passed its own version in 2013.⁶⁴ As noted, thirty-four states passed benefit corporation statutes and six are “working on it.”⁶⁵ A few examples of well-known benefit corporations include Method, Kickstarter, Plum Organics, King Arthur Flour, Patagonia, Solberg Manufacturing, Laureate Education and Altschool.⁶⁶

As mentioned, the benefit corporation model explicitly creates an established general and specific public benefit.⁶⁷ In California, the general public purpose is defined as creating a material positive impact on society and the environment as a whole, but the statute does not require a benefit corporation to list a “specific purpose.”⁶⁸ In Delaware, the statute defines general public purpose as producing a positive effect or reducing a negative effect on one or more shareholders.⁶⁹ These requirements ensure that the corporation is not only focused toward a narrow cause or interest, but also on being a good corporate citizen.⁷⁰ Since a benefit corporation must have a specific purpose serving the public benefit, it requires some form of accountability mechanism. Accordingly, directors of benefit corporations will balance the impact of their decisions not only on its corporate shareholders but also on their stakeholders, which can even include the general public or the environment at large.⁷¹ As such, a common criticism

61. Jonathon Storper, *Being a Public Benefit Corporation in California, Delaware*, LAW 360 (Nov. 1, 2017), <https://www.law360.com/articles/980865> [<https://perma.cc/R59M-A5EV>].

62. See Jeremy Chen, *What is a California Benefit Corporation*, <http://jeremychenlaw.com/what-is-a-california-benefit-corporation/> [perma.cc/JW34-UW8B].

63. *FAQ*, *supra* note 60.

64. Storper, *supra* note 61.

65. *State By State*, *supra* note 4.

66. *FAQ*, *supra* note 60.

67. *Id.*

68. Storper, *supra* note 61.

69. *Id.*

70. Strine, *supra* note 58, at 244.

71. *FAQ*, *supra* note 60.

of the benefit corporation is that the decision-making places a large burden on directors.

In a traditional corporation directors must perform their duties in good faith and in the best interests of the corporation and its shareholders.⁷² This is typically referred to as the duty of loyalty. Directors of a benefit corporation not only have that continued obligation, but now they must also consider the stakeholder interests of employees and customers, as well as pursue the mission of the corporation faithfully.⁷³ To carry out the missions of the a social enterprise, a benefit corporation statute will feature built-in measures for accountability and transparency.⁷⁴ In most states, this requires a corporation to create and publish an annual benefit reports that assesses their overall social impact and performance against a third-party standard.⁷⁵ Notably, these reports do not need to be certified or audited by a third party, such as B Lab. However, the reporting mechanism is vital to the structure of benefit corporations because there is no requirement that they be independently monitored or certified by a third party, unless stated in their charter.⁷⁶ The requirement to measure the corporation's performance by determining an overall environmental or social impact in each year is certainly new for corporations.⁷⁷ Arguably, this oversight is necessary to ensure that directors are keep aligned with the designated mission of the corporation.⁷⁸

As noted, both the California and Delaware statutes require a corporation to produce an annual report to their shareholders. Though, the standards for the report do differ. In California, the report must detail how the board selected the third-party standard and how the corporation pursued its general and/or specific public benefit for the year, including what ways it failed.⁷⁹ Delaware corporations must provide shareholders with an overall statement of the objectives and standards adopted by the board and an assessment of its success during the year.⁸⁰ The California statute requires that the annual report is sent to its shareholders within 120 days following the end of the fiscal year and to post the report on its website.⁸¹ However, Delaware does not impose a requirement that the report must be

72. Chen, *supra* note 62.

73. *Id.*

74. *Id.*

75. Strine, *supra* note 58, at 244.

76. *Id.*

77. Storper, *supra* note 61.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

provided to the public or posted on the website.⁸² While both statutes create a mechanism for oversight, it is clear that California's guidelines are much tougher, while Delaware's are more elusive and are criticized as not imposing strict enough guidelines on these corporations.

V. AN EFFECTIVE SOLUTION TO TRADITIONAL CORPORATIONS?

Becoming a benefit corporation is fairly simple. If you are a new business, you can simply incorporate as a benefit corporation in any state where such legislation has been passed. The procedure for incorporation will be roughly the same as for a traditional corporation.⁸³ If you have an existing company, you can elect to become a benefit corporation by amending your governing documents, with a two-thirds super-majority of all shareholders.⁸⁴

A. GOVERNANCE PROBLEMS SOLVED?

In a benefit corporation, shareholders retain the same protections that they have in a traditional corporate model.⁸⁵ This includes electing the directors, voting on major corporate transactions, bringing lawsuits, and demanding to review the company's books and records.⁸⁶ Notably, shareholders of a benefit corporation retain the right to bring a derivative suit for breach of fiduciary duty.⁸⁷ In addition, shareholders of benefit corporations have a private right of action allowing them to enforce the mission of the corporation.⁸⁸ A public benefit enforcement proceeding can be brought by a shareholder, director, or group owning five percent or more in corporate equity, for a violation of director or officer duties or for failure to uphold the mission of the corporation.⁸⁹ However, damages are limited to injunctive relief, and monetary damages are not available.⁹⁰

82. *Id.*

83. Strine, *supra* note 58, at 243.

84. *Id.* at 247.

85. Murray, *supra* note 3 at 489; *see also* B Lab, *Benefit Corporations: Frequently Asked Questions for Investors*, http://benefitcorp.net/sites/default/files/FAQs%20Investors%206_9.pdf. [perma.cc/H89E-KSWQ].

86. *See* Murray, *supra* text accompanying note 3; *see also* B Lab, *Benefit Corporations: Frequently Asked Questions for Investors*, http://benefitcorp.net/sites/default/files/FAQs%20Investors%206_9.pdf. [perma.cc/LM83-Q2NQ].

87. Strine, *supra* note 58.

88. *Shareholder Duties and Protections*, BENEFIT CORP., <http://benefitcorp.net/investors/shareholder-duties-and-protections> [perma.cc/V7A8-S7DG].

89. *Id.*

90. *Id.* at "How Does Benefit Corporation Status Affect Liability??"

Additionally, a director's basic duties in a benefit corporation are the same as those for a general corporation; a director of a benefit corporation has the formal fiduciary duties of care and loyalty. To satisfy the duty of care, a director must become fully informed. In a benefit corporation this means "considering the impact of decisions on a broad array of the corporation's stakeholders, rather than just the interests of its shareholders."⁹¹ The duty of loyalty is same standard for both benefit and traditional corporations such that a director must not put his or her own interests before the interests of the corporation.⁹²

Critics argue that even though the director's duties do not change, they do expand—in that they require the director to pursue both profit and the corporation's mission. In this way, the discretion of the directors is rather broad because it does not give guidance on implementing the dual motives of these corporations.⁹³ More simply, the statutes do not explain how to properly balance profit maximization and social benefit, and moreover what to do when these two things conflict.

In contrast, some argue that the duties of a director are actually more constrained in a benefit corporation than they are in a traditional corporation due to the business judgment rule. In ordinary course, decisions made by a corporation's directors are protected by the business judgment rule, under which courts will not second-guess operating decisions made by directors.⁹⁴ Conceptually, this requires directors to be more careful when making business decisions because they are subject to the discretion of the statutes.⁹⁵ This legal protection provides directors with the flexibility to balance both financial and non-financial interests when making decisions. Since the directors are afforded a broad level of discretion, shareholders can keep this in check with their maintained powers to sue for breach of care or loyalty.⁹⁶

B. ABANDONING DUTIES?

Critically, the public benefit corporation does not vitiate any profit-maximization duty, nor does it relax the traditional protections that traditional corporate law provides to investors.⁹⁷ But, it does allow a shift

91. *Benefit Corporation Director Duties*, BENEFIT CORPORATION, <http://benefitcorp.net/businesses/benefit-corporation-director-duties> [perma.cc/V7A8-S7DG].

92. Strine, *supra* note 58, at 243.

93. See generally Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?* 46 FOREST L. REV. 591 (2011).

94. *Benefit Corporations are Necessary*, BENEFIT CORPORATION, <http://benefitcorp.net/attorneys/benefit-corporations-are-necessary> [perma.cc/V7A8-S7DG].

95. Strine, *supra* note 58, at 243.

96. Strine, *supra* note 58, at 243.

97. Strine, *supra* note 58, at 249.

of power within the stockholder base, allowing the right to sue when a director strays from profit maximization or from the corporation's mission. Of course, within the benefit corporation model, a director may consider the interests of more than just the shareholders, shifting away from the traditional profit-maximization norm established in *Revlon*. Under *Revlon*, the board must sell to the highest bidder, maximizing the potential profit to shareholders.⁹⁸ The Delaware Supreme Court famously held that "regardless of its mission, a corporation may not consider social and environmental factors in a change of control" and the "concern for non-stockholder interests is inappropriate" in the sale context.⁹⁹ However, with the establishment of benefit corporations, this duty arguably may not apply. This is due to the fact that under benefit corporation statutes directors have broader discretion to make decisions.¹⁰⁰ This, in turn, gives more power to directors who believe that a less profitable, but more socially responsible path should be taken, even in the context of a merger or acquisition.¹⁰¹ Although it is still unclear how courts will evaluate a director's decisions in the context of a sale or merger of the company, since the law is so new in this area and there are no case-studies as of yet.

C. PROTECTING THE MISSION

The shift in the shareholder paradigm in a benefit corporation has a substantial impact on the role of directors, as mentioned above. Arguably the strongest aspect of the benefit corporation statutes is that they drive the mission of the corporation by providing a more flexible platform designed for pursuing both profit-seeking and for creating a social benefit.¹⁰² In this way, the benefit corporation alleviates fears of *eBay*¹⁰³ repeating itself by explicitly stating that the purpose of the benefit corporation is not shareholder wealth maximization but a "general public benefit."¹⁰⁴ This is further enabled by the enhanced discretion of the board. Accordingly, the benefit corporation gives entrepreneurs and investors a more suitable option to achieve their objectives.¹⁰⁵

One of the strongest arguments in support of the benefit corporation is the maintenance of a mission.¹⁰⁶ This is what is commonly referred to as

98. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* 506 A.2d 173.

99. Reiser, *supra* note 93.

100. Strine, *supra* note 58, at 248.

101. Strine, *supra* note 58, at 245.

102. Strine, *supra* note 58, at 244–45.

103. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010).

104. Murray, *supra* note 3, at 493–94.

105. Strine, *supra* note 58.

106. Murray, *supra* note 3, at 507–08.

“mission stickiness,” a term that encompasses the idea that benefit corporations are designed to reduce the amount and/or probability of any mission-drift.¹⁰⁷ “This mission stickiness is currently created in two ways: the super majority vote and the benefit enforcement proceeding.”¹⁰⁸ As noted, most benefit corporation statutes require an affirmative vote of at least two-thirds of the shareholders to adopt or terminate benefit corporation status.¹⁰⁹ Moreover, a benefit enforcement proceeding can provide a way for shareholders to potentially prevent a transaction that strays from the benefit corporation’s mission.¹¹⁰ As such, the benefit corporation statutes can provide additional protection for risk-averse managers and serve as a valuable warning device to possible acquirers.¹¹¹ Arguably then, these statutes could serve to protect benefit corporations from potential bidders who would destroy the company’s mission, which was the pertinent issue in the aforementioned *Revlon*.

i. A Success Story: Patagonia

Since its inception in 1973, Patagonia has pursued its mission to build the best product, to cause no unnecessary harm, and to use business to inspire and implement solutions to the environmental crisis.¹¹² In these ways, Patagonia has established a mission-seeking approach to benefit both the society and environment, even before the benefit corporation existed.

Patagonia became one of the first benefit corporations in California in 2012 after the statute was enacted and is now a premiere example for the movement.¹¹³ Patagonia has numerous social and environmental initiatives, including providing health care to part-time workers, providing flexible working schedules, enforcing a code of conduct on all primary suppliers, using primarily environmentally preferred materials, and donating one percent of sales to environmental NGOs.¹¹⁴ Patagonia’s specific benefit purpose commitments include contributing one percent of annual net revenues to nonprofit charitable organizations that promote environmental conservation and sustainability, to build the best product and conduct operations causing no unnecessary harm, sharing best practices with other

107. *Id.*

108. Murray, *supra* note 3, at 507.

109. Murray, *supra* note 3, at 508.

110. *Id.*

111. Murray, *supra* note 3, at 488.

112. See *Annual Benefit Corporation Report*, PATAGONIA (Apr. 30, 2016), <https://www.patagonia.com/static/on/demandware.static/-/Library-Sites-PatagoniaShared/default/dw883f0dc2/PDF-US/2016-B-CorpReport-031417.pdf> [perma.cc/6T4D-Y67K].

113. Murray, *supra* note 3, at 486.

114. Murray, *supra* note 3, at 488.

companies, transparency, and providing a supportive work environment.¹¹⁵ Patagonia posts its performance report for each year on its website, available to the general public.¹¹⁶

Patagonia's founder Yvon Chouinard supported the benefit corporation movement since the beginning. While Patagonia continues to be a privately held corporation, Chouinard, recognizes that "benefit corporation legislation creates the legal framework to enable mission-driven companies like Patagonia to stay mission-driven through succession, capital raises and even change in ownership."¹¹⁷ Chouinard, now nearly eighty years old, relies on the benefit corporation model to keep his company intact for years to come.¹¹⁸ The benefit corporation movement provides a "clear and dependable path for business to be an agent of positive change", states Patagonia CEO Rose Marciano.¹¹⁹ In this way, the statutes create the legal framework to enable mission-driven companies like Patagonia to stay mission-driven through succession, capital raises, and even changes in ownership, by institutionalizing the values, culture, processes, and high standards put in place by founding entrepreneurs.¹²⁰

Notably, in 2015 Patagonia's sales reached a peak of \$750 million,¹²¹ showing that benefit corporations can be both sustainable and profitable. Accordingly, the benefit corporation allows "a company to act purposefully at all stages of decision-making, balancing transparency with the need to achieve financial gain, while also taking deliberate action to create additional benefits for multiple stakeholders" and eliminating the "false choice between making money and doing the right thing."¹²²

ii. Improvement in the Statute

While the benefit corporation statutes contain preemptory measures to

115. Murray, *supra* note 3, at 486.

116. Patagonia Works, *Annual Benefit Corporation Report*, https://www.patagonia.com/static/on/demandware.static/-/Library-Sites-PatagoniaShared/default/dw824fac0f/PDF-US/2017-BCORP-pages_022218.pdf [perma.cc/NVA8-X8AW].

117. Murray, *supra* note 3, at 485.

118. Daniela Siritori-Cortina, *From Climber to Billionaire: How Yvon Chouinard Built Patagonia into a Powerhouse His Own Way*, FORBES (Mar. 20, 2017), <https://www.forbes.com/sites/danielasiritori/2017/03/20/from-climber-to-billionaire-how-yvon-chouinard-built-patagonia-into-a-powerhouse-his-own-way/#11b6b66a275c> [perma.cc/CDT6-TC5D].

119. Rose Marcario, *Finding Moral Certainty for Businesses in an Uncertain World*, PATAGONIA (Apr. 18, 2017), <https://www.patagonia.com/blog/2017/04/finding-moral-certainty-for-businesses-in-an-uncertain-world/> [perma.cc/HH6P-XZ4T].

120. *Patagonia registers as first public benefit corporation*, CSR WIRE (Jan. 3, 2012), http://www.csrwire.com/press_releases/33565-Patagonia-Registers-as-First-California-Benefit-Corporation [perma.cc/3F2T-7YUU].

121. Siritori-Cortina, *supra* note 118.

122. Marcario, *supra* note 119.

prevent mission-shift, however many argue that more can be done, especially to protect a benefit corporation in the event it goes public. As mentioned above, Patagonia continues to be a privately held corporation, but academic Haskell Murray envisions a potential situation where Patagonia would go public and would require greater protection.¹²³

Murray argues that “mission stickiness could be improved by amending current benefit corporation statutes and giving the statutes some teeth by requiring a floor for corporate charitable giving and a partial asset lock.”¹²⁴ The first proposal involves imposing a mandatory floor for corporate charitable giving.¹²⁵ Notably, this is something that Patagonia already does, giving one percent of their annual revenues to a charitable organization of their choosing.

Murray’s other proposal is a partial asset lock for benefit corporations to prevent companies from raising capital for a benefit corporation by promoting themselves as a “good” company and then quickly selling to the highest bidder.¹²⁶ Arguably, the statutes could impose a lock on some percentage of the benefit corporations assets so that this percentage of the assets are guaranteed to be left behind, even if the corporation is bought and has its benefit corporation status terminated. In these ways, the corporate giving floor and the partial asset lock would ensure that the benefit corporation’s mission was not completely abandoned.¹²⁷ To date, neither of these suggestions have been enacted in already existing benefit corporation statutes, but they are potential food for thought, as the movement continues to transform.

Moreover, they may be important in the analysis of the future of the benefit corporation as companies begin to go public. Going public, refers to the process of selling shares that were formerly privately owned to investors for the first time. Although going public may be advantageous for many benefit corporations to attract more capital and investment, it may also create problems for maintaining the mission. For instance, “going public may create pressure to realize short-term profits to maintain the company’s stock price, causing the business to drift from its social mission.”¹²⁸ To date we have few examples of benefit corporations going public and thus little to test the potential mission drift issue.

123. See generally Murray, *supra* note 3.

124. Murray, *supra* note 3, at 507–08.

125. Murray, *supra* note 3, at 511.

126. *Id.*

127. Murray, *supra* note 3, at 513.

128. Brett McDonell, *Benefit Corporations and Public Markets*, THE CLS BLUE SKY BLOG (July 31, 2017), [http://clsbluesky.law.columbia.edu/2017/07/31/benefit-corporations-and-public-markets/\[per ma.cc/W87A-359Y\]](http://clsbluesky.law.columbia.edu/2017/07/31/benefit-corporations-and-public-markets/[per%20ma.cc/W87A-359Y]).

VI. THE FUTURE OF BENEFIT CORPORATIONS

As discussed above, incorporating as a benefit company is a tool to ensure the protection of the corporation's mission. Ultimately, becoming a benefit corporation can "protect [the] mission through capital raises and leadership changes, creates more flexibility when evaluating potential sale and liquidity options, and prepares businesses to lead a mission-driven life post-IPO."¹²⁹ It was vital for Delaware to adopt the benefit corporation statute because it is the "domicile for a majority of American public companies and the preferred domicile for companies seeking to go public."¹³⁰ "The best pathway forward for benefit corporations that wish to go public is arguably "through the use of the Delaware statute, because of Delaware's acceptance among institutional investors corporate managers, and the intermediaries who raise capital."¹³¹

Only one benefit corporation has gone public to date, so it is unclear what the fate for these corporations will be on as public companies and ultimately if they will be accepted by Wall Street. However, to be a viable replacement to the traditional corporate model, the benefit corporation statute may need to prove that it can be sustained on Wall Street.

Some commentators claim the reason why more companies have not gone public is due to investors' hesitancy, since the focus is not solely on shareholder wealth maximization.¹³² Thus, one of the major hurdles is raising capital and becoming more attractive to investors. One way to do this may be by increasing market awareness and demand for the benefit corporation.

A. GOING PUBLIC?

In 2017, Laureate Education became the first public benefit corporation to go public, notably it is also a certified B Corp.¹³³ Laureate is

129. *What is a Benefit Corporation?*, BENEFIT CORPORATION, <http://benefitcorp.net> [perma.cc/XV2H-FJAL].

130. Strine, *supra*, note 58, at 243.

131. *Id.*

132. Jing Cao and Max Chafkin, *The Barbarians are at Etsy's Hand-Hewn Responsibility Sourced Gates*, BLOOMBERG BUSINESSWEEK (May 18, 2017), <https://www.bloomberg.com/news/features/2017-05-18/the-barbarians-are-at-etsy-s-hand-hewn-responsibly-sourced-gates> [perma.cc/2J56-9NSQ].

133. Press Release, CSR Wire, *First Benefit Corporation Goes Public* (Feb. 13, 2017), http://www.csrwire.com/press_releases/39700-First-Benefit-Corporation-Goes-Public-Laureate-Education [perma.cc/T2SN-VQ5T]; Lauren Gensler, *The World's Biggest For-Profit College Company, Laureate Education, Raises \$490 Million In Public Debut*, FORBES (Feb. 1, 2017), <https://www.forbes.com/sites/laurengensler/2017/02/01/laureate-education-initial-public-offering/#531b90f22b3d> [perma.cc/Q3ZX-SZHE].

the world's largest for-profit operator of online and campus-based higher education. It owns, controls and manages eighty-eight institutions, serving one million students across 25 countries.¹³⁴ It grew fairly rapidly and in 2014 its revenues exceeded \$4.4 billion.¹³⁵ It's a 16-year-old company, but it announced its new charter as a Delaware Benefit Corporation in 2015.¹³⁶ Laureate and its shareholders, have "rejected the market paradigm of 'shareholder primacy' by going public as a new type of corporate entity specifically designed to treat customers, employees and communities as the shareholders' partners, rather than as interests to be managed for maximum financial gain."¹³⁷ Before going public, Laureate's initial investors included groups such as Kohlberg Kravis Roberts (KKR), one of the world's largest private equity firms, Point 72, another venture capital giant, and International Finance Corp., a private-sector arm of the World Bank.¹³⁸ Laureate CEO and founder, Doug Becker, made it clear that his company's only goal will not be making a profit, and that the company seeks to "balance the needs of stockholders with the needs of students, employees and communities in which we operate."¹³⁹ Laureate raised \$490 million from investors in its initial public offering ("IPO").¹⁴⁰ The Laureate IPO is considered to be a roadmap for individual and institutional investors who want to invest capital in businesses that generate strong returns and make valuable contributions to society at large.

Before Laureate Education, Etsy, a certified B Corp, went public in 2015, its IPO valuing the company at \$3.38 billion.¹⁴¹ Etsy's mission is "commitment to having a positive social, economic and environmental impact."¹⁴² While Etsy has maintained its B Corp status, which it retained in 2012, it has not yet incorporated as a benefit corporation. But, it may need to in order to maintain its B Corp status. B Lab requires companies incorporated in states with benefit corporation laws to comply with their home states' standards to maintain their B Corp status; a company has four

134. CSR, *supra* note 133.

135. *Id.*; Gensler, *supra* note 133.

136. Brad Edmonson, *The First Benefit Corporation IPO is Coming and That's a Big Deal*, TRIPLE PUNDIT (Feb. 4, 2016), <https://www.triplepundit.com/2016/02/first-benefit-corporation-ipo-coming-thats-big-deal/> [perma.cc/L6CP-LWPH].

137. *Id.* Press Release, CSR Wire, First Benefit Corporation Goes Public (Feb. 13, 2017), http://www.csrwire.com/press_releases/39700-First-Benefit-Corporation-Goes-Public-Laureate-Education [perma.cc/D62C-VV75].

138. Edmonson, *supra* note 136.

139. *Id.*; see also McDonell, *supra* note 128.

140. Gensler, *supra* note 133.

141. Jackie Marcus and Peri Shweiger, *Etsy and the B Corp IPO, Sustainability Meets Wall Street*, TRIPLE PUNDIT (Apr. 27, 2015), <https://www.triplepundit.com/2015/04/etsy-and-the-b-corp-ipo-sustainability-meets-wall-street/> [perma.cc/3UCU-83AX].

142. See *Mission and Values*, ETSY, <https://www.etsy.com/mission> [perma.cc/M5QZ-FTH6].

years from the date the legislation is passed to comply with state law or risk losing B Corp certification.¹⁴³ Etsy is incorporated in Delaware, where the benefit corporation statute passed in 2013, but with an amended statute released in 2015, B Lab is allowing Etsy until August of 2019 to re-incorporate, without losing its B Corp certification status.¹⁴⁴

Nevertheless, Etsy has shown that it is possible for a company that values commitments beyond shareholder maximization to be a publicly traded company.¹⁴⁵ Unfortunately, Etsy did not have a great first year after going public; the share price dropped from \$35.74 a share at its IPO to \$8.32 a share, nearly eighty percent,¹⁴⁶ but is trading at over \$60 a share as of 2019. However, failing to incorporate as a benefit corporation could put Etsy at risk for potential mission-drift and susceptible to being purchased by a hostile bidder. Furthermore, as a public company, Etsy faces greater scrutiny from investors on how much it prioritizes its “noble pursuits over its bottom line.”¹⁴⁷

It is too early to say what the future for Laureate Education or Etsy will be as public companies. While they have shown that it is possible to maintain a mission and a profit and to balance multiple constituencies including shareholders, their success cannot be applauded yet. Accordingly, lawyers, entrepreneurs and investors will be watching to see whether Wall Street will come to embrace other publicly traded companies with a social benefit mandate.¹⁴⁸

B. INCREASED INVESTMENT

One of the major gaps to fill is funding for these companies, and more specially impact investing, sometimes referred to Socially Responsible Investing (“SRI”). “Impact investments are those made to companies, organizations, and funds with the intention to generate social and

143. Brady Dale, *Social Good Organization Grants Etsy More Time to Change Its Corporate Status*, OBSERVER (Sept. 22, 2017), <http://observer.com/2017/09/etsy-b-corp-deadline/> [perma.cc/4RCB-RPL6].

144. *Id.*

145. Hiroko Tabuchi, *Etsy IPO Tests to Pledge to Balance Social Mission and Profit*, N.Y. TIMES (Apr. 16, 2015), <https://www.nytimes.com/2015/04/17/business/dealbook/etsy-ipo-tests-pledge-to-emphasize-social-mission-over-profit.html> [perma.cc/K5NT-KWY5]; Adele Peters, *Will Etsy Keep its Commitment to Social Good After Management Shakeup*, FAST COMPANY (May 4, 2017), <https://www.fastcompany.com/40418325/will-etsy-keep-its-commitment-to-social-good-after-its-management-shakeup> [perma.cc/MWF5-HHDL].

146. Oliver Staley, *Etsy had a rough first year as a public company, but it has a plan*, QUARTZ (Apr. 6, 2015), <https://qz.com/655415/etsy-had-a-rough-first-year-as-a-public-company-but-it-has-a-plan/> [perma.cc/8B5R-2SLW].

147. Tabuchi, *supra* note 145.

148. Gunther, *supra* note 21.

environmental impact alongside a financial return.”¹⁴⁹ Like the premise behind the social enterprise movement, it “challenges the long-held views that social and environmental issues should be addressed only by philanthropic donations, and that market investments should focus exclusively on achieving financial returns.”¹⁵⁰ A 2010 report by J.P. Morgan, titled “Impact Investments: An Emerging Asset Class”, states that impact investing has gained traction among a wide range of investors, including large-scale financial institutions, pension funds, family offices, private wealth managers, foundations, individuals, commercial banks, and development finance institutions.¹⁵¹ The report estimates the size of this market opportunity in impact investments to be between \$400 billion and \$1 trillion.¹⁵² This estimate includes investment opportunities in emerging markets across five sectors: housing, rural water delivery, maternal health, primary education, and services.¹⁵³ Likewise, the 2016 Report on US Sustainable, Responsible and Impact Investment Trends shows a thirty-three percent increase in the preceding two years, and a fourteen-fold increase since 1995.¹⁵⁴ In fact, from 2012 to 2014, the number of U.S. investment funds that incorporated environmental, governmental or social criteria increased by twenty-eight percent and their assets quadrupled to more than \$4.3 trillion.¹⁵⁵ The 2016 report also shows that SRI investing continues to expand—now accounting for more than one out of every five dollars under professional management.

Of course, one of the driving forces behind the SRI investment trend are millennials.¹⁵⁶ One study showed that two-thirds of those aged 22 to 34 are likely to invest in a company well-known for its social responsibility.¹⁵⁷ Indeed, studies suggest that as the millennial generation gets older, SRI

149. *What You Need To Know About Impact Investing*, Global Impact Investing Network, <https://thegiin.org/impact-investing/need-to-know/#s1> [perma.cc/QLY3-CCLJ].

150. *Id.*

151. *Impact Investing: An Emerging Asset Class*, JP MORGAN (Nov. 29, 2010), https://www.jpmorganchase.com/corporate/socialfinance/document/impact_investments_nov2010.pdf [perma.cc/LN9Z-KNJU].

152. *Id.*

153. Michael Iachini, *Socially Responsible Investing Comes of Age*, CHARLES SCHWAB (May 11, 2017), <https://www.schwab.com/resource-center/insights/content/socially-responsible-investing-comes-age> [perma.cc/Z3U3-H8UV].

154. *See Report on US Sustainable, Responsible, and Impact Investing Trends*, THE FORUM FOR SUSTAINABLE AND RESPONSIBLE INVESTMENT (2016), <https://www.ussif.org/trends> [perma.cc/5BKU-2YQB].

155. *Id.*

156. Ben Schiller, *As Wealthy Millennials Take Control of Family Fortune Impact Investing is Set for a Big Boost*, FAST COMPANY (Sept. 15, 2017), <https://www.fastcompany.com/40466206/as-wealthy-millennials-take-control-of-family-fortunes-impact-investing-is-set-for-a-big-boost> [perma.cc/C6SP-GWJ6].

157. Iachini, *supra* note 153.

investment will continue to grow as millennial investors are two times as likely as the overall investor population to invest in companies targeting social or environmental goals.¹⁵⁸ “Benefit corps create an attractive investment opportunity for the same conscious consumers that have fueled organics, fair trade, and “buy local” movements, while enjoying a form of inoculation from the short-termism that plagues public equity markets.”¹⁵⁹

This could be a good sign for the benefit corporation movement, which will likely be fueled by a younger generation of investors. Investing in a benefit corporation gives impact investors the assurance they need that they will be able to hold a company accountable to its mission in the future.¹⁶⁰

C. MARKET DEMAND

Another form of drive for the social enterprise movement is the increase in market demand for these types of companies. Notably, consumer consciousness is on the rise, wielding influence on business like never before.¹⁶¹ “In fact, ninety percent of global consumers are likely to switch to a brand associated with a good cause.”¹⁶² Increasing awareness on issues—such as equal pay, environmentally conscious manufacturing processes, prevention of counterfeit goods and/or human trafficking, responsible farming practices and overproduction of goods—has led to a rise in what is known as conscious consumption, a movement of people, who seek out ways to make positive decisions about what to buy and look for a solution to the negative impact consumerism is having on our world.¹⁶³ A survey done by YouGov and the Global Poverty Project, concluded that “three-quarters of consumers would pay an extra five percent for clothes manufactured under fair and safe working conditions”, while a Nielsen survey found that “a global majority would be willing to pay more for products or services provided by companies that are

158. *Millennials Drive Growth in Sustainable Investing*, MORGAN STANLEY (Aug. 9, 2017), <http://www.morganstanley.com/ideas/sustainable-socially-responsible-investing-millennials-drive-growth.html> [perma.cc/CF7K-LUDS].

159. *Id.*

160. *Why is the Benefit Corp Right for me?* Benefit Corporation, <http://benefitcorp.net/businesses/why-become-benefit-corp> [perma.cc/5ANU-JYG9].

161. *The Rise of the Corporate Consumer*, BUSINESS MATTERS (Sept. 6, 2016), <http://www.bmmagazine.co.uk/in-business/advice/rise-conscious-consumer/> [perma.cc/6GPB-ARBU].

162. *Americans Willing to Buy or Boycott Companies Based On Corporate Values, According to New Research by Cone Communications*, CONE COMMUNICATIONS (May 17, 2017), <http://www.cone.com/news-blog/2017/5/15/americans-willing-to-buy-or-boycott-companies-based-on-corporate-values-according-to-new-research-by-cone-communications> [perma.cc/Q29H-REYG].

163. Jessi Baker, *The Rise of the Conscious Consumer: Why Businesses Need to Open Up*, THE GUARDIAN (Apr. 2, 2015), <https://www.theguardian.com/women-in-leadership/2015/apr/02/the-rise-of-the-conscious-consumer-why-businesses-need-to-open-up> [perma.cc/GVU5-SJC4].

committed to positive social and environmental impact.”¹⁶⁴ In the latter group, millennials comprised fifty-one percent of sampling.¹⁶⁵ Indeed, millennials may be a huge driving force behind the social enterprise movement in the future. “If you look at the millennials’ point of view, they want to know the company behind a brand, its values, and what it does for society and the community.”¹⁶⁶

Accelerating consumer demand has resulted in the formation of a substantial marketplace for companies that are using the power of business to solve social problems.¹⁶⁷ It is likely that this increased consumer consciousness will be a substantial driving force behind the benefit corporation movement. Thus, businesses should seek to take advantage of this market of conscious consumers who no longer hold traditional utility preferences, as the public and millennials, in particular, continue to drive and demand social entrepreneurship.

D. HOW CAN WE DO MORE

As suggested above, market and investor support is necessary to continue the growth of the benefit corporation movement. At a macro level, local and federal government backing could provide the boost to social entrepreneurs, investors, and to consumers to grow the movement fully. That is to say that if we, as a society, value corporations that provide a social benefit or good in a sustainable way, it may be necessary to invest in infrastructure to support them.

i. Government Support

There are three methods in which the government may provide support to the benefit corporation movement. There is little research done on the potential success of these methods, therefore this note will only be able to hypothesize the realities of implementing them.

First, in order to attract more entrepreneurs to the benefit corporation, the government could provide tax breaks to these businesses. Providing financial support may help social enterprises that are struggling to make a profit succeed. However, academics have argued that extending non-profit

164. *Global Consumers are Willing to Put Their Money Where Their Heart Is*, NIELSON (June 17, 2014), <http://www.nielsen.com/us/en/press-room/2014/global-consumers-are-willing-to-put-their-money-where-their-heart-is.html> [perma.cc/NA7K-2TDY]; Shosanna Delventhal, *How Consumers Are Changing Business*, INVESTOPEDIA (Sept. 16, 2015), <https://www.investopedia.com/articles/investing/091615/how-conscious-consumers-are-changing-business.asp#ixzz4yvJZTBci> [perma.cc/7ZP4-W5PT].

165. *Global Consumers*, *supra* note 164.

166. *The Rise of the Conscious Consumer*, MEDIUM, <https://medium.com/future-of/the-rise-of-the-conscious-consumer-bcc5235cb80d> [perma.cc/AUG6-3UXJ].

167. See Babson & Clark, *supra* note 24, at 820.

type tax benefits to social enterprises could threaten the very benefits that their creators sought to create, as well as having a deleterious effect on the charitable sector itself.¹⁶⁸ A forgiving tax structure, they argue, may “place a substantial and likely unsustainable burden on the federal government to ensure that profitmaking does not trump providing public benefit, and threaten to undermine public support both for hybrid forms and for the existing tax preferences enjoyed by nonprofits.”¹⁶⁹

However, with additional reporting and transparency requirements, providing tax breaks for public benefit corporations could serve as a substantial catalyst for the creation of more socially-motivated entities. Nevertheless, to be effective the enforcement mechanisms will need to be more stringent, and greater transparency will be necessary.

Second, there could be reduced taxes on sustainably sourced and manufactured goods proposed both on a local or state level. This effort would attempt to influence market consumers to into buying these goods. A reduced sales tax on goods which are manufactured in a sustainable way or by a certified B Corp may help to supplement these enterprises and to ensure their financial growth. This can be seen as a direct opposite approach to what is called a “sin” tax,¹⁷⁰ in which the government taxes ‘bad behaviors’ to deter consumers from engaging in them. For instance, the government places higher taxes on goods and behaviors which they do not want to support and want to sway consumers away from buying, such as on cigarettes. Therefore, what is to say that the government should not be decreasing taxes on goods that provide a social benefit or are produced in a sustainable way. This is completely hypothetical, but in an ideal world could be used to increase the purchasing of goods from companies that are incorporated as public benefit corporations.

Finally, local level governments can provide greater support to benefit corporations. This is being done in some cities in the form of awarding city contracts to benefit corporations. For example, the cities of Philadelphia and San Francisco give preferential treatment to benefit corporations, in hiring these benefit corporations for various city project contracts.¹⁷¹

While arguably the first two proposals are somewhat lofty and could result in an uphill political battle, at the very least local governments could provide support for benefit corporations. Indeed, if sustainable and socially

168. See Joseph R. Ganahl and Lloyd Hitoshi Mayer, *Taxing Social Enterprise*, 66 STAN. L. REV. 387, 442 (2014).

169. *Id.* at 387.

170. See generally *Do Sin Taxes Really Change Consumer Behavior?* WHARTON BUS. SCHOOL, <http://knowledge.wharton.upenn.edu/article/do-sin-taxes-really-change-consumer-behavior/> [perma.cc/4JS2-UAK2].

171. Murray, *supra* note 3, at 511.

motivated manufacturing and goods are truly something valued by our society, then benefit corporations may be something worth investing in.

VII. CONCLUDING THOUGHTS

Lawyers, academics, entrepreneurs, CEOs, and the public at large have taken small steps to support the rise of social enterprises. Following global economic crisis and greater demands for corporate responsibility, the public support for companies that ‘do good’ is unprecedented. Today, corporations can be designed in a way to create profit while also maintaining a public benefit and doing so in a sustainable way. Through the establishment of the benefit corporation, it has now become a reality for corporations to be able to support constituencies other than their shareholders. Indeed, benefit corporations “have the potential to change the accountability structure within which managers operate by creating incremental reform that puts actual power behind the idea that corporations should do the right thing.”¹⁷²

When the benefit corporation statute was passed in California in 2012, Patagonia’s founder stated, “I hope five or ten years from now, we’ll look back on this day and say this was the start of a revolution, because the existing paradigm isn’t working anymore. This is the future.”¹⁷³ Now that it’s been nearly seven years, it is safe to say that this vision has advanced, with the spread of social enterprise and the creation of the benefit corporation statute in half of the fifty states. However, the movement has not yet garnered the support necessary to make a real impact on society. Indeed, only time will tell whether the benefit corporation will be strong enough to sustain itself and prove to be a replacement the traditional corporate model.

Nevertheless, the benefit corporation model shows true promise for the future of business leaders and investors, as it provides an alternative to the traditional corporate and business profit-seeking model. In an ideal world, through the influence of social enterprise and the market demand by conscious consumers, all corporations will be designed to fulfill a public good, to promote sustainability, and to create a fair and just economy. However, until that point, the benefit corporation can serve to support social enterprises and the growth of socially conscious business practices, which can provide for a more sustainable and efficient society.

172. Strine, *supra* note 58, at 235.

173. Gunther, *supra* note 21.