To "B" or not to "B": Duties of Directors and Rights of Stakeholders in Benefit Corporations

An emerging legal form for business entities is the Benefit Corporation, a variation on the traditional for-profit corporation that grants the board of directors broader discretion to consider nonshareholder constituents in corporate management decisions. Although this corporate form adequately responds to consumers' weariness of "big business" and attracts shareholders who value social responsibility more than short-term gains, it raises questions regarding benefit enforcement. Who may bring claims against a benefit corporation for failing to consider—or perhaps considering too often—the interests of external stakeholders? This Note analyzes the purpose and motivations behind benefit corporation legislation, evaluates recent proposals for the enforcement of fiduciary duties, and advocates for a solution as hybrid as the new corporate form itself. This Note argues that shareholders, as well as some external stakeholders, should be afforded more enforcement rights than the Model Legislation envisions.

INTRODUCTION

Kohlberg Kravis and Roberts (KKR) first rose to prominence after a particularly aggressive takeover of Nabisco in the 1980's.[1] But in 2015, these two private equity behemoths showed their softer sides when their profit-maximizing powerhouse Laureate Education reincorporated as a company committed to doing social good.[2] Laureate, which is the world's largest for-profit operator of higher education programs and enrolls more than one million students across the globe, made headlines when it announced its new charter as a "benefit corporation" under Delaware law—the very same day it became the first benefit corporation to register for an Initial Public Offering (IPO).[3] This offering presents several important questions about how benefit corporations should be conceptualized, managed, and evaluated. In early 2017, Laureate's shares became publicly traded, making it more likely that its directors will have disputes with its shareholders and other stakeholders.[4] Therefore, it is more imperative than ever to determine which duties are owed to which constituencies, which parties

1. Alex Barinka, *Laureate Education Plans IPO as a Public Benefit Company*, BLOOMBERG BUSINESS (Oct. 2, 2015, 4:37 PM), http://www.bloomberg.com/news/articles/2015-10-02/kkr-backed-laureate-education-files-for-initial-public-offering [https://perma.cc/N8NZ-52EF]; Brad Edmonson, *The First Benefit Corporation IPO is Coming, and That's a Big Deal*, TRIPLEPUNDIT (Feb. 4, 2016), http://www.triplepundit.com/2016/02/first-benefit-corporation-ipo-coming-thats-big-deal/ [https://perma.cc/Y4AB-LYMG].

2. Edmonson, *supra* note 1.

3. *Id.*

4. *See* Lauren Gensler, *The World's Biggest For-Profit College Company, Laureate Education, Raises $490 Million in Public Debut*, FORBES (Feb. 1, 2017, 11:29 a.m.) https://www.forbes.com/sites/laurengensler/2017/02/01/laureate-education-initial-public-offering/#280f18402b3d [https://perma.cc/EP75-Q8P2]. For the purpose of this note, "shareholders" are those residual claimants who hold an ownership interest in a corporation, typically through common or preferred stock. By contrast, all other "stakeholders" are those who have some interest in the corporation's actions or success, but do not have a direct ownership interest. Examples include creditors, employees, and customers.

have standing to sue the board in a benefit corporation, and which judicial standards apply when evaluating management decisions.

This is particularly relevant now that the benefit corporate form is emerging to serve a new societal role—one that provides a middle ground between profit-maximizing corporations and community-serving nonprofit entities in order to satisfy an increasingly socially-conscious consumer base. While benefit corporations were designed to protect directors who use corporate profits for social goals, or who otherwise consider nonshareholders when making day-to-day decisions,[5] they were not specifically intended to force private partnerships or entitle charities to more donations.

But first, what is a benefit corporation? It is a relatively new corporate form[6] enabled by state statutes.[7] These entities require the corporation's board of directors to consider all stakeholders when making corporate decisions, instead of imposing a duty to maximize shareholder profits.[8] Because directors in benefit corporations may also consider the corporation's stated social mission, directors are shielded from liability when they deviate from shareholder value maximization norms.[9] Currently, at least thirty states have enacted some type of benefit-corporation statute, and several others are actively attempting to pass new legislation.[10]

The benefit corporation is a helpful corporate form for companies seeking to attract customers through concerted marketing efforts to advertise a socially conscious business. A 2014 study by Nielson indicated that over half of global online consumers said they were willing to pay more for products and services provided by companies

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5. Gil Lan, *Benefit Corporations: A Persisting and Heightened Conflict for Directors*, 21 J.L. BUS. & ETHICS 113, 114 (2015).

6. Maryland became the first state to allow companies to incorporate as benefit corporations in 2010. John Tozzi, *Maryland Passes 'Benefit Corp.' Law for Social Entrepreneurs*, BLOOMBERG BUSINESS (Apr. 13, 2010), http://www.businessweek.com/smallbiz/running_small_business/archives/2010/04/benefit_corp_bi.html [https://perma.cc/2KX5-XX56].

7. Lan, *supra* note 5, at 113–14 (2015).

8. *Id.*

9. *Id.* at 114.

10. *State by State Status of Legislation*, BENEFITCORP.NET, http://benefitcorp.net/policymakers/state-by-state-status [https://perma.cc/YA5W-HT7L] (last visited Apr. 6, 2017). Such legislation has been passed in Vermont, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, New Jersey, Delaware, Maryland, West Virginia, Virginia, South Carolina, Florida, Tennessee, Louisiana, Arkansas, Indiana, Illinois, Minnesota, Nebraska, Colorado, Utah, Arizona, Nevada, California, Oregon, Idaho, Montana, and the District of Columbia. *Id.* The legislatures of Kentucky, Oklahoma, New Mexico, Hawaii, and North Dakota are still considering whether to pass benefit-corporation enabling statutes. *Id.*

that focus on progressive social goals.[11] That same study's March 2014 analysis showed an average annual sales increase of two percent for products that included sustainability claims on the packaging and a five percent increase for products that promoted sustainability through other marketing programs.[12] Thus, rebranding as a benefit corporation could help companies attract these types of consumers, who not only demand quality products, but also quality corporate attitudes.

As state legislatures continue to pass benefit-corporation legislation, directors and stakeholders should establish a set of expectations regarding duties and behavior for corporate management. Otherwise, they may encounter costly and unnecessary litigation. Several popular companies, including the successful crowdfunding website Kickstarter, have already elected benefit corporation status, and that number is only going to grow.[13] Many states with enabling statutes have modeled their benefit corporate legislation after the nonprofit B-Lab's Model Benefit Corporation Legislation ("Model Legislation"), which attempts to comprehensively address issues of duties and standing in benefit corporations. Although this legislation serves several useful purposes, it nonetheless presents several problems, including: lack of guidance, risk of conflicted interests, and difficulty for third-party beneficiaries to enforce social benefits.[14]

This Note proposes a hybrid solution based on principles of both the law of nonprofit entities and traditional corporate governance to balance the needs of directors, shareholders, and beneficiaries. Equity shareholders in benefit corporations should be afforded all of the same protections granted under traditional corporate law—except, of course, primacy of interest. Other stakeholders should be afforded modified versions of traditional corporate protections and be held to similar standards of conduct. First, directors should be afforded the discretion conferred by the Model Legislation to consider many stakeholder interests when making corporate decisions.[15] Second, imposing a modified duty of loyalty, and to a limited extent, a duty of care, serves

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11. *Global Consumers Are Willing to Put Their Money Where Their Heart Is When It Comes to Goods and Services from Companies Committed to Social Responsibility*, 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 [https://perma.cc/NVH2-PAYZ].

12. *Id.*

13. Mike Isaac & David Gelles, *Kickstarter Focuses Its Mission on Altruism over Profit*, N.Y. TIMES (Sept. 20, 2015), http://www.nytimes.com/2015/09/21/technology/kickstarters-altruistic-vision-profits-as-the-means-not-the-mission.html [https://perma.cc/HZG4-UQAE].

14. *See infra* Part I. B.

15. MODEL BENEFIT CORP. LEGIS. § 301(a) (B LAB, amended 2016), http://benefitcorp.net/sites/default/files/documents/Model_Benefit_Corp_Legislation.pdf [https://perma.cc/6VJT-CM7V].

shareholders and directors better than the duty of obedience that arises under the laws of non-profits to pursue charity purposes in a reasonably beneficial way. Third, a multi-step analysis is required to protect external stakeholders who would otherwise be barred from bringing fiduciary claims because they do not possess an ownership interest in the corporation. A single-stakeholder that has an articulable special interest in the corporation's general or specific public purpose, constitutes a particular group of people that is clearly distinguishable from the public at large, and is limited in number should have the right to sue to enforce fiduciary duties.[16]

This single external stakeholder can sue the board through its appointed director and should be promised indemnification in the event of an amendment to the stated social purpose. On one hand, traditional shareholders should be afforded dissenter's rights (modeled after the appraisal rights afforded under Delaware law to shareholders who are cashed out of traditional corporations during a merger) in response to a charter amendment but should otherwise retain their unaltered right to sue granted by the conventions of corporate law. On the other hand, constituencies who otherwise lack standing should be granted a limited right to sue by petitioning the state attorney general, who would only agree to pursue a claim of particularly egregious behavior. To deter nuisance suits, the board of directors should be afforded the protection of the business judgment rule, as modified in light of the stated corporate purpose. Finally, the burden of proof should be heightened from a mere preponderance standard to a clear and convincing standard for external stakeholder suits only.

The analysis proceeds in three main parts: Part I briefly details the emergence of benefit corporations and notes a few problems that are likely to arise as their popularity increases; Part II analyzes how existing corporate law devices and doctrines are incompatible when applied to the benefit corporation form and goes on to evaluate proposed responses to this concern; and Part III articulates a hybrid solution to appropriately balance directorial discretion, profit-seeking shareholder goals, and third-party interests.

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16. Christopher Lacovara, Note, *Strange Creatures: A Hybrid Approach to Fiduciary Duty in Benefit Corporations*, 2011 COLUM. BUS. L. REV. 815, 851–52 (2011); *see also* Alco Gravure, Inc. v. Knapp Found., 64 N.E.2d 752, 755 (N.Y. 1985) (holding that standing can be conferred where "a particular group of people has a special interest in funds held for a charitable purpose, as when they are entitled to a preference in the distribution of such funds and the class of potential beneficiaries is sharply defined and limited in number").

I. FROM ANNAPOLIS TO THE REST OF AMERICA: THE EMERGENCE OF BENEFIT CORPORATIONS

In 2010, Maryland became the first state to pass legislation enabling companies to incorporate as benefit corporations.[17] In the five years that followed, over thirty other states followed suit.[18] But just why is this corporate form so favorable? This Part discusses the reasons why benefit corporations are popular among consumers and identifies three major problems presented by the related enabling statutes.

A Kinder, Gentler Corporate Form

Some writers attribute the rise of benefit corporations to the American public's suspicion of traditional corporate management following the financial bailouts accompanying the 2008 financial crisis.[19] Americans felt frustrated, anxious, and wronged by big business and began to criticize wealth maximization as a corporate strategy.[20] People advocated for a new corporate structure whereby companies seriously considered the well-being of their employees and aimed for a broader public purpose.[21] However, even before 2008, the public increasingly called for more corporate social responsibility.

One company in particular took these criticisms to heart: the New England dairy chain Ben & Jerry's sought to become the "quintessential social enterprise" as a for-profit corporation seeking to advance social goals while still profiting financially.[22] It advanced its public mission by donating 7.5 percent of its profits to charity, offering its store as a site for voter registration, and purchasing raw materials from suppliers who deliberately employed people from disadvantaged backgrounds.[23] However, when the market value of the company's stock steadily plummeted between 1992 and 1999, management abandoned many of these social goals in favor of traditional wealth-maximizing techniques.[24] Ben & Jerry's ultimately sold itself to multinational conglomerate Unilever in the interest of continuing the brand, despite the owners' preferences to continue running an independent ice

17. Tozzi, *supra* note 6.

18. *State by State Status of Legislation*, *supra* note 10.

19. Jessica Chu, *Filling a Nonexistent Gap: Benefit Corporations and the Myth of Shareholder Wealth Maximization*, 22 S. CAL. INTERDISC. L.J. 155, 155 (2012).

20. *Id.* (calling this dual purpose in the corporation the "double-bottom-line").

21. *Id.* at 155–56.

22. *Id.* at 158–59.

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

24. *Id.* at 224.

creamery.[25] Following the acquisition, its founding partners revealed that their *Revlon* duties to maximize shareholder value during a sale process largely influenced their decision to accept Unilever's offer.[26]

Moreover, although Ben & Jerry's continued to support progressive social initiatives, in the years following the Unilever deal, the parent company hired a new CEO, stopped donating the 7.5 percent of profits to charity, and laid off one-fifth of Ben & Jerry's employees.[27] These measures were a wake-up call in the business community, because they illustrated how the norm of shareholder primacy could destroy even the most sincere commitment to social good.[28] Although these measures could have been viewed as a necessary evil to preserve corporate health, the founders likely would have supported alternate measures (like increased debt financing) that would have continued the corporate enterprise but may have lowered shareholder value.[29] Hoping to avoid a similar fate, companies like Dunkin Donuts "went private" to alleviate the pressure of wealth maximization.[30]

One reaction to these concerns was that the nonprofit B Lab drafted model legislation for state legislators to use as a template for enacting a benefit corporation statute in their home states.[31] B Lab's coordinated effort to push the law through legislatures across the country in less than a decade has in turn resulted in uniformity among states as to key provisions of the Model Legislation.[32] From a functional perspective, benefit corporations help companies attract and retain younger, educated employees.[33] Some modern workers seek socially

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25. *Id.* at 229.

26. Chu, *supra* note 19, at 159. When a corporation is in "*Revlon* mode," or puts itself up for sale, the directors have a duty to focus exclusively on maximizing shareholder value, rather than considering the interests of any other constituents. *See infra* Section II.A; *see also* Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173, 182 (Del. 1986).

27. Page & Katz, *supra* note 23, at 243, 245.

28. *Id.* at 243; Chu, *supra* note 19, at 160.

29. The separation of ownership and control inherent in public corporations sometimes provides perverse incentives for corporate managers. Because shareholders are residual claimants, yet nominate members of the board, managers have incentives to engage in conduct to maximize the value of equity at the expense of debtholders and employees. Managers can take NPV negative projects that transfer value from debtholders to shareholders, and may refuse to make NPV positive projects that only benefit bondholders or employees, but keep shareholder value constant.

30. Chu, *supra* note 19, at 160. "Going private" refers to the decision of a publicly held corporation to recapitalize its securities, thereby preventing shareholders from trading their stocks on the open market. Privately held companies have fewer disclosure requirements than companies listed on public stock exchanges, which are heavily regulated.

31. *The Model Legislation,* BENEFITCORP.NET, http://benefitcorp.net/attorneys/model-legislation [https://perma.cc/N4G7-DFVZ] (last visited Jan. 22, 2015).

32. *State by State Status of Legislation*, *supra* note 10.

33. James Surowiecki, *Companies with Benefits,* THE NEW YORKER (Aug. 4, 2014), http://www.newyorker.com/magazine/2014/08/04/companies-benefits [https://perma.cc/N4LN-LD27].

conscious employers and value a commitment to social purposes more than the prospect of marginally higher salaries.[34] While these workers previously self-selected into nonprofit positions, the emerging benefit corporation is a more attractive option, because it balances social responsibility with at least some of the profit-generating strategies of a traditional corporation.[35]

The crux of the Model Legislation is that it enables corporate directors to consider all sorts of corporate constituents when discharging their duties and "considering the best interests of the corporation."[36] Although for-profit corporate law also generally requires directors to act in "the best interest of the corporation" and does not strictly mandate maximizing shareholder value in all business decisions, corporate law *does* require value-maximization when *Revlon* duties are triggered, particularly in a merger or change-of-control transaction. By contrast, in discharging *all of their duties*, section 301 of the Model Legislation enables directors to consider effects on shareholders, employees, customers, beneficiaries of various public purposes, general community and society factors, the environment, and other pertinent factors—*without* giving priority to any particular factor unless otherwise stated in the corporate charter.[37]

B. More Discretion for Directors Raises More Questions Than Answers

Benefit corporation statutes are not without their flaws. The problems inherent in benefit corporations can be lumped into three umbrella categories: lack of guidance, risk of conflicted interests, and difficulty for third-party beneficiaries to enforce social benefits.

First, the directors have little guidance under the Model Legislation.[38] This problem arises from the vagueness found within many of the benefit corporation enabling statutes, namely, the provision mandating that directors "consider" socially-minded values in managerial decisions.[39] Perhaps because such consideration is often fact-intensive and context-specific, these statutes neither specify procedures for "considering" constituent interests nor describe how to

34. *Id.*

35. *Id.*

36. Model Legislation § 301(a) states that directors may consider effects on shareholders, employees, customers, beneficiaries of various public purposes, general community and society factors, the environment, and other pertinent factors—*without* giving priority to any particular factor unless otherwise stated in the corporate charter.

37. *Id.*

38. Lan, *supra* note 5, at 114 (discussing the "No Guidance Problem").

39. *Id.*

prioritize the interests of various stakeholders.[40] Thus, even ethically-minded directors are left with a great deal of discretion. Moreover, most state statutes only list broad considerations directors should take into account.[41] For example, section 301(a) of the Model Legislation, which defines standard conduct for directors, states that directors "shall consider the effects" of corporate decisions and omissions upon "the shareholders," "community and societal factors," "customers," "the local and global environment," and "the ability of the benefit corporation to accomplish its general public benefit purpose." These terms are subject to conflicting definitions in practice, and the hierarchy of constituents is equally ambiguous.

Second, the structure of benefit corporations increases the risk of conflicts of interest.[42] In traditional corporations, directors owe fiduciary duties to shareholders to act in the corporation's best interest when a transaction could confer a monetary benefit to the director.[43] Shareholders may bring a derivative action on behalf of the corporation to enforce a director's fiduciary duties in these interested transactions.[44] In the absence of self-interest, directors of traditional corporations are legally afforded wide latitude to make day-to-day decisions in running the company. However, most corporations espouse the norm of shareholder primacy—that because directors are fiduciaries not only to the company itself, but also to the shareholders, shareholder value should nonetheless be a primary consideration in day-to-day decisions of corporate governance. In fact, the court in *Unocal's* set the tone by holding that in most practical situations, the corporate interest is one with shareholder interest, effectively undermining the position of external stakeholders.[45]

By contrast, in benefit corporations, a director not only has fiduciary duties to the corporation and the shareholders, but he also owes duties to all of the constituents enumerated in section 301 of the model legislation. Thus, he is *always* conflicted between appeasing the shareholders who will ultimately re-elect him and actually considering the corporation's public benefit purpose in good faith.[46] This perpetual state of conflict, if present in a traditional corporation, would be resolved in favor of shareholder value maximization. Instead, in benefit corporations, the norm of shareholder primacy is heavily diluted (if not

40. *Id.*
41. *Id.* at 114 n.9; *see also* MODEL BENEFIT CORP. LEGIS. § 301(a).
42. Lan, *supra* note 5, at 115 (discussing the "Expanded Conflict of Interest Problem").
43. *Id.*
44. *Id.*
45. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985).
46. *Id.* at 115–16.

eradicated altogether) due to the identifiable fiduciary duties owed to creditors, employees, the environment, and the public at large.

A particularly illustrative example of this paradox, as applied to benefit corporations, arises during a financial recession when shareholders demand dividends.[47] It is easy to imagine a director who will vote in favor of distributing dividends when faced with the risk of losing his position even if he believes that the benefit corporation's long-term interests would be served by investing that cash in reducing the company's environmental footprint.[48] Although no court has face this issue, creating a remedy for this type of decision would be difficult, because it would be nearly impossible to prove that the director did not subjectively "consider" other constituents when deciding whether to issue dividends, especially given the highly deferential business judgment standard.

Third, benefit corporations are particularly ineffective at providing a remedy for third-party beneficiaries who demand more social responsibility from the board.[49] In traditional corporations, shareholders are primarily responsible for imposing fiduciary duties through derivative suits, because they are the party whose interests could be compromised by mismanagement.[50] By contrast, an aggrieved third-party that usually benefits from the benefit corporation's general public purpose is not given standing to sue the board of directors unless explicitly authorized in the corporation's articles or bylaws, which management has an incentive to avoid.[51] Therefore, the ordinary enforcement mechanisms afforded to shareholders via statutes are unhelpful to the other parties that benefit-corporation statutes require the directors to "consider."[52]

Although one scholar posits that alternative governance structures, including increased government monitoring, transparency, reporting, and disclosure could resolve these issues,[53] this Note instead advocates for increased standing and an expansion of the traditional right to sue as a way to regulate directorial behavior. This general requirement to confer standing on an external stakeholder should be included in enabling legislation, and the mechanics for designating an external stakeholder should either appear in the corporate by-laws or in a privately negotiated contract.

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47. *Id.* at 114.
48. *Id.* at 115.
49. *Id.* at 116 (discussing the "Unrepresented Public Interest Problem").
50. *Id.*
51. *Id.*; *see* MODEL BENEFIT CORP. LEGIS. § 305.
52. Lan, *supra* note 5, at 117.
53. *Id.*

II. THE GOOD, THE BAD, AND THE UNFEASIBLE: HOW EXISTING LAW AND PROPOSED THEORIES FAIL TO PROTECT STAKEHOLDERS IN BENEFIT CORPORATIONS

Traditional corporate law, which addresses a director's duty to a corporation and its shareholders, generally prioritizes shareholder profits over most other considerations. This rigidity is fundamentally incompatible with the amorphous and broad language mandated by section 301 of the Model Legislation.[54] This Part discusses existing judicial standards of review, analyzes other legislative attempts to permit directors to consider non-shareholder interests, and evaluates proposed solutions for balancing the multitude of interests at stake in a benefit corporation.

A. Healthy Skepticism: Why Other Constituency Statutes Can't Get the Job Done

The establishment of the benefit corporation as a business entity has not, by any means, been the first legislative attempt to shield directors from judicial review. In fact, many state legislatures have enacted what are colloquially referred to as "Other Constituency Statutes" to encourage traditional corporations to prioritize long-term interests alongside short-term shareholder payoffs.[55] These statutes function in conjunction with a state's existing body of corporate law to enable a board of directors to consider the interests of nonshareholders—such as employees, suppliers, customers, and the community—in the ordinary course of business.[56] Although Other Constituency Statutes vary by state as to which third-party constituents a director may consider,[57] section 301 of the Model Legislation seems to include most of the constituencies mentioned in the Other Constituency Statutes from many different states.[58]

The benefit corporation form, however, serves a distinct function from traditional corporations whose directors benefit from Other Constituency Statutes. In traditional corporations, directors routinely

54. *See supra* note 36.

55. A.A. Sommer, Jr., *Whom Should the Corporation Serve? The Berle-Dodd Debate Revisited Sixty Years Later,* 16 DEL. J. CORP. L. 33, 51 (1991).

56. *Id.*; *see* 15 PA. CONS. STAT. § 515.

57. Sommer, *supra* note 55, at 41–42. *Compare* 15 PA. CONS. STAT. § 515 (permitting directors to consider the interests of employees, suppliers, and customers), *with* OHIO REV. CODE ANN. § 1701.59(E)(4) (Anderson Supp. 1990) (permitting directors to consider both the long-term and short-term interest of shareholders, the degree of independence of the corporation, the economy of the state and nation, and miscellaneous societal considerations).

58. MODEL BENEFIT CORP. LEGIS. § 301.

act in the primary interest of shareholders, even when they are making general corporate decisions and are not legally obligated to do so. In extraordinary transactions like mergers, directors are *required* to act with shareholder interests in mind, but may consider other interests to a very limited extent. In the wake of *Revlon*, Other Constituency Statutes appeared to be a codification of existing law rather than a radically new concept.[59] In *Revlon*, Delaware courts held that directors may consider nonshareholder interests in change of control transactions as long as there is "some rationally related benefit accruing to the stockholders"[60] or "some reasonable relationship to general shareholder interests."[61] Against this backdrop, Other Constituency Statutes implicitly contemplate that the profit-seeking interests of shareholders ought to hold some priority in management decisions. This argument is bolstered by the fact that nearly all Other Constituency Statutes provide that directors "may, *in considering the best interests of the corporation,* consider the effects of any action" upon nonshareholder constituents.[62] Although the question of whether the corporation has its own interests distinct from those of its shareholders is the subject of ongoing debate in corporate law scholarship,[63] Other Constituency Statutes were enacted in response to the Delaware rulings that treated the two interests as equivalents.[64] Thus, in reality, Other Constituency Statutes still grant high priority to short-term shareholder interests when directing corporate decisions, even outside the merger context, if such considerations are (and should be) required in traditional corporations.

By contrast, benefit corporations grant discretion to directors to either accept or reject this doctrine of shareholder primacy on a decision-by-decision basis—that is, directors of benefit corporations may choose which constituents to prioritize in all transactions, whether under during general corporate governance or in the face of an extraordinary transaction like a merger. Unlike Other Constituency Statutes, which state that directors "may" consider other constituents,[65] the Model Legislation gives the affirmative directive that directors

59. Sommer, *supra* note 55, at 41.

60. Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173, 176 (Del. 1986).

61. Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1282 n.29 (Del. 1988).

62. Sommer, *supra* note 55, at 46; *see* 15 PA. CONS. STAT. § 515 (emphasis added).

63. Sommer, *supra* note 55, at 47–49 (quoting L. GOWER, GOWER'S PRINCIPLES OF MODERN COMPANY LAW 577 (4th ed. 1979) ("But what exactly is meant by saying that they [directors] must act in the interest of the *company?*")).

64. *Id.* at 48–49; *see* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (blurring the distinction between the duties directors owe to the corporation and to its shareholders).

65. Sommer, *supra* note 55, at 46; *see* 15 PA. CONS. STAT. § 515.

"shall" consider nonshareholder interests.[66] While the Other Constituency Statutes state that directors can only contemplate various interests "in considering the best interests of the corporation,"[67] the Model Legislation permits such contemplation "[i]n discharging the duties of their respective position *and in considering the best interests of the benefit corporation*."[68] To avoid surplusage,[69] the Model Legislation must be interpreted as articulating two distinct functions of directors: discharging positional duties and furthering the company's best interest. Thus, benefit corporations seek to distinguish the interests of the corporation from those of the shareholders. Moreover, the Model Legislation provides that directors "need not give priority to a particular interest," unless stated in the company's articles of incorporation.[70] These provisions, when taken together, make it unambiguous that directors of benefit corporations can prioritize employees, the environment, or any other interest above that of a profit-seeking shareholder in any managerial decision. Admittedly, the implications of this may be that benefit corporations will attract (potentially irrational) shareholders who hold motives other than short-term stock value.

This is not to say that a state that enacts an Other Constituency Statute containing identical language to section 301 of the Model Legislation would render the benefit-corporation form redundant. On one hand, Other Constituency Statutes are not only intended to give directors guidance in business decisions but also to inform reviewing courts.[71] Consider a pro-shareholder court construing an Other Constituency Statute that includes section 301's provision that "[i]n discharging the duties of their respective position and in considering the best interests of the benefit corporation," directors may consider nonshareholder constituents.[72] The court in its discretion could follow *Unocal's* example in holding that the corporate interest is one with shareholder interest in most practical situations, effectively

66. MODEL BENEFIT CORP. LEGIS. § 301.

67. Sommer, *supra* note 55, at 46; *see* 15 PA. CONS. STAT. § 515.

68. MODEL BENEFIT CORP. LEGIS. § 301.

69. A textual canon based on the principle that each word or phrase in itself has meaning and serves a purpose, and therefore, any interpretation of the statute rendering a word or phrase redundant or meaningless should be rejected. Katherine Clark & Matthew Connolly, *A Guide to Reading, Interpreting, and Applying Statutes*, THE WRITING CENTER AT GEORGETOWN UNIVERSITY LAW CENTER 6 (2006), https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf.

70. MODEL BENEFIT CORP. LEGIS. § 301(a)(3).

71. Sommer, *supra* note 55, at 54–55.

72. MODEL BENEFIT CORP. LEGIS. § 301.

undermining the position of external stakeholders.[73] A major feature of the benefit corporation is its express designation of a general public purpose, as mandated by section 201(a) of the Model Legislation.[74] This provision should prevent conflation of corporate and shareholder interests, because the corporate interest must be construed in light of its social purpose. A reviewing court would be constrained by the company's charter to evaluate a director's decisions in light of the desired public benefit purpose, thereby protecting a corporate interest that is distinct from the wealth-maximizing interest of individual shareholders.

Another way that benefit corporations serve distinct roles from Other Constituency Statutes is that they provide better opportunities for socially responsible businesses to market their services to consumers. Other Constituency Statutes would not afford the same advertising advantage. Particularly in the wake of the perceived Ben & Jerry's disaster,[75] consumers are likely to be skeptical of the traditional corporate form, even when it holds itself out as socially conscious. For example, Etsy (a traditional corporation that holds B-Corp certification) has come under fire for reorganizing its Irish subsidiary to conceal its tax-cutting strategies from the public.[76] If Etsy instead reincorporated as a statutory benefit corporation, it would face more stringent

73. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985).

74. MODEL BENEFIT CORP. LEGIS. § 201(a) ("A benefit corporation *shall* have a purpose of creating a general public benefit." (emphasis added)).

75. Page & Katz, *supra* note 23, at 243, 245. It is important to distinguish benefit corporations, which are the subject of this Note, from Certified B Corps, like Etsy. Unlike a benefit corporation, which is a specific type of corporation prescribed by statute, many different types of businesses can become certified as "B Corps" by the nonprofit B Lab. Barinka, *supra* note 1. To become a Certified B Corp, a business entity must meet legal and performance requirements determined by B Lab, which factors in a business's employee, community, and environmental impacts to determine whether the business is eligible for certification. *Benefit Corporations & Certified B Corps*, BENEFITCORP.NET, http://benefitcorp.net/businesses/benefit-corporations-and-certified-b-corps [https://perma.cc/JJ4E-C5XA] (last visited Jan. 22, 2015) (noting that Oregon and Maryland also offer benefit-LLC options for new businesses). The certified "B-Corp" label is essentially a certification mark used for marketing purposes, much like "fair trade" labels. Many trendy companies, such as Warby Parker and Etsy, experience such success because B-Corp certification signals to consumers that those companies are socially responsible and promote the public good. *How to Become a B Corp*, BENEFITCORP.NET, https://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp [https://perma.cc/M2CJ-A4UR] (last visited Jan. 22, 2015). However, just because a business has been certified by B Lab does *not* mean it has formally incorporated as a benefit corporation under state law. *About B Lab*, BENEFITCORP.NET, https://www.bcorporation.net/what-are-b-corps/about-b-lab [http://perma.cc/4FXM-M92V] (last visited Jan. 22, 2015); Jena McGregor, *What Etsy, Patagonia and Warby Parker Have in Common*, WASH. POST, (Apr. 20. 2015), https://www.washingtonpost.com/news/on-leadership/wp/2015/04/20/what-etsy-patagonia-and-warby-parker-have-in-common/ [http://perma.cc/PP44-LXEX] (stating that Etsy, Patagonia, and Warby Parker are all certified B-Corps).

76. Barinka, *supra* note 1.

disclosure requirements, thereby satisfying consumers who call for increased transparency.[77]

While I do acknowledge that businesses likely have incentives other than advertising motivations to adopt the benefit corporate form, those motivations are not the subject of this piece. There may be debates about whether shareholders should invest in benefit corporations at all, given the lack of shareholder wealth maximization. However, the aim of this note is to provide recommendations for an effective set of legal restrictions to regulate the benefit corporations that do emerge, whether rationally or not.

B. New Form, Same Old Standards of Review

When derivative litigation makes its way to a courtroom, judges apply different standards of review to different types of managerial decisions in order to ensure a corporate fiduciary is fulfilling his duties.[78] Absent bad faith or self-dealing, courts apply the business judgment rule to decisions made in the ordinary course of business to determine whether a director has violated his duties to the corporation.[79] This standard is highly deferential to managers, and a court will presume a director acted with a valid business purpose unless the plaintiff-shareholder shows otherwise.[80]

In the face of defensive measures designed to protect against change of control transactions, Delaware courts apply the heightened *Unocal* standard of review to determine whether the decision to use a defensive measure violated a manager's duty of loyalty.[81] Under this standard, directors will only receive the benefit of the business judgment rule if they can show they had "reasonable grounds for believing a danger to corporate policy and effectiveness existed" and that the defensive measure was "reasonable in relation to the threat posed."[82] The reasonableness inquiry takes the form of a balancing test in which the court will weigh the impact of the defensive measures on

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77. *Id.*

78. Alissa Mickels, Note, *Beyond Corporate Social Responsibility: Reconciling the Ideals of a For-Benefit Corporation with Director Fiduciary Duties in the U.S. and Europe*, 32 HASTINGS INT'L & COMP. L. REV. 271, 283 (2009).

79. *Id.* at 283; *see* Ryan v. Gifford 918 A.2d 341, 357 (Del. Ch. 2007) (citing Aronson v. Lewis, 472 A.2d 805, 812 (Del. 1984)).

80. Mickels, *supra* note 78, at 283; *see* Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971) (explaining that a court "under such circumstances will not substitute its own notions of what is or is not sound business judgment"); *see also* MODEL BUS. CORP. ACT §8.30(a) (2005).

81. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985); Golden Cycle, L.L.C. v. Allan, No. Civ.A. 16301, 1998 WL 892631 (Del. Ch. Dec. 10, 1998).

82. *Unocal*, 493 A.2d at 955.

nonshareholder constituencies, the effect on shareholder value, and the general effect on the corporation.[83]

For traditional corporations, a director has a duty to maximize shareholder value when *Revlon* duties are triggered, that is, "when a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear breakup of the company" or "where a target abandons its long-term strategy and seeks an alternative transaction involving the breakup of the company."[84] In these instances, directors should no longer take into account nonshareholder constituencies but instead focus exclusively on maximizing wealth for shareholders.[85]

On their face, the business judgment, *Unocal*, and *Revlon* standards are difficult to apply to benefit corporations. When a director considers the general public purpose of a corporation, he may be engaged in self-dealing as a member of the public who benefits from the stated purpose.[86] Therefore, heightened scrutiny instead of the default business judgment rule would often be applied when evaluating the management of benefit corporations. However, especially in benefit corporations, the policy grounds for granting corporate directors decision-making latitude are particularly compelling. The reasons for the business judgment rule are threefold. First, if management were liable for good-faith errors in judgment, competent people would be deterred from serving in these positions, because they would not want to bear the risk of failure.[87] Second, corporate managers often have more business expertise than judges and are better positioned to further the best interests of their companies.[88] Third, directors ought to be able to take reasonable risks in order to achieve monetary gains.[89]

Despite the inherent potential for conflicted directors in benefit corporations, denying them the protection of the business judgment rule could undermine a benefit corporation's purpose. Benefit corporations have no less a need for competent management than traditional corporations, especially since directors must appropriately consider all necessary nonshareholder constituents. Making it more difficult for directors to qualify for the business judgment rule may turn away risk-

83. *Id.*; *see also* Mickels, *supra* note 78, at 285.

84. Paramount Commc'ns, Inc. v. KDS Acquisitions Corp., 571 A.2d 1140, 1150 (1989) (citing Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261 (Del. 1988)); Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173, 182 (Del. 1986).

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

86. Lan, *supra* note 5, at 115 (discussing the "Expanded Conflict of Interest Problem").

87. Granada Invs., Inc. v. DWG Corp., 823 F. Supp. 448, 454–55 (N.D. Ohio 1993); *see also* Panter v. Marshall Field & Co., 646 F.2d 271, 297 (7th Cir. 1981) *cert. denied*, 454 U.S. 1092 (1981).

88. *Granada Investments*, 823 F. Supp. at 455; *see also Panter*, 646 F.2d at 297.

89. *Granada Investments*, 823 F. Supp. at 455; *see also Panter*, 646 F.2d at 297.

averse, yet skilled, managers. Additionally, courts would likely be reluctant to substitute their own judgment for those of the corporation's directors given the complicated nature of a benefit corporation's constituents.[90] However, it is unclear whether the threat of an increased standard of review would affect corporate decisions, because directors have such a low duty to merely "consider" constituents.[91] Plaintiffs would struggle to present any proof of a director's subjective thought processes to rebut a claim that he did, at a minimum, think about all stakeholders before making a decision.

C. What Do I Owe You?
Proposed Duties of Directors in Benefit Corporations

Although little case law has been developed on the subject, directors of a benefit corporation are simultaneously subject to existing duties imposed on boards of traditional corporations and additional duties imposed by the Model Legislation.[92] Specifically, a benefit corporation's director owes the traditional duties of loyalty and care, as well as a duty to consider the interests of constituents enumerated in section 301 of the Model Legislation.[93] Several scholars have hypothesized just how these duties would manifest themselves, but each proposal insufficiently balances the rights of shareholders and third-party beneficiaries.

1. Maintaining the Status Quo:
Enacting the Model Benefit Corporation Legislation

One solution would be to enact B Lab's Model Legislation in full and adhere to a strict textual interpretation of its provisions. Section 301(a)(1) of the Model Legislation details which constituencies the directors should consider in discharging their duties in the course of business, and section 301(a)(3) states that a director "need not give priority to a particular interest."[94] Moreover, the Model Legislation further states "[a] director does not have a duty to a person that is the beneficiary of the general public benefit purpose or a specific public benefit purpose of a benefit corporation."[95] So although directors have

90. Lan, *supra* note 5, at 116; MODEL BENEFIT CORP. LEGIS. §305.

91. *See* Lan, *supra* note 5, at 114.

92. Hani Kfouri, *Benefit Corporations: A Duty to Whom?* THE WAGNER REV. (April 16, 2014), http://www.thewagnerreview.org/2014/04/benefit-corporations-a-duty-to-whom/ [https://perma.cc/44X6-4DYC].

93. *Id.*; *see* MODEL BENEFIT CORP. LEGIS. § 301(a), (b).

94. MODEL BENEFIT CORP. LEGIS. § 301(a)(1)–(2).

95. *Id.* § 301(d).

an explicit mandate to consider these beneficiaries, they have no affirmative duty to act in their interest. And in fact, such third-party stakeholders are not granted standing to sue under the Model Legislation, nor in the charters of many existing benefit corporations.[96] Therefore, external stakeholders are equally unable to hold directors accountable in both traditional and benefit corporations.[97]

One formulation of the right to sue a benefit corporation's board of directors is to accept the Model Legislation's significant restrictions on standing.[98] There, the default rule is that no one may bring a claim against a corporation or its directors for violating duties imposed by the Model Legislation.[99] Furthermore, this provision absolves a company of monetary liability for failure to create a public benefit.[100] This does not, however, preclude a shareholder's typical right to bring claims against the board of directors to enforce fiduciary duties arising from sources other than the Model Legislation.[101]

Absent any additional designations in a public benefit corporation's charter or bylaws, a limited group may bring a benefit enforcement proceeding against the board: the benefit corporation itself (in a direct suit), a director, shareholders owning at least two percent of the benefit corporation's shares, and any shareholder owning five percent of shares in the benefit corporation's parent company.[102] When the interests of the shareholders, directors, and other parties are aligned, this solution is ideal, because it preserves the traditional management role of directors and accountability-enforcing role of shareholders. However, a major drawback of the benefit enforcement proceeding is that it cannot result in monetary damages.[103] Moreover, the Model Legislation's comments indicate that one ground for bringing a benefit enforcement proceeding would be to enforce a corporation's obligation under section 402 of the Model Legislation to post benefit reports on its website.[104] This suggests that a court would be comfortable enforcing *procedural* duties but may nonetheless defer to directors' decisions when fulfilling their obligations to consider various constituencies.

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96. *Id.* § 305.

97. Kfouri, *supra* note 92.

98. MODEL BENEFIT CORP. LEGIS. § 305 (restricting standing to four specified groups).

99. *Id.*§ 305(a).

100. *Id.* § 305(b).

101. *Id.* § 305 cmt.

102. *Id.* § 305(c).

103. J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporations*, 2 AM. U. BUS. L. R. 1, 35 (2012); *see* MODEL BENEFIT CORP. LEGIS. §§ 301, 305.

104. MODEL BENEFIT CORP. LEGIS. § 102 cmt.

By contrast, in the traditional course of business, and especially when the company is up for sale, the interests of shareholders and nonshareholder constituencies will diverge. Traditional *Revlon* duties to seek the highest value for investors in response to a bidding war do not apply in benefit corporations.[105] Even the most socially responsible stockholder is motivated by a desire to receive a return on investment, and if not to *maximize* wealth, to at a minimum avoid sustaining a loss. Thus, even ordinary economic conditions could cause tension between the interests of shareholders and the interests of other constituencies.[106]

2. Picking Favorites: Adopting a Single-Stakeholder Theory of Standing

One proposed solution to balance stakeholder interests is to require benefit corporations to specifically allow at least one nonshareholder beneficiary to bring fiduciary suits against the board of directors.[107] Although this measure could ensure that a benefit corporation's intentions to promote social good are genuine, rather than a mere marketing ploy, several drawbacks could make single-stakeholder standing practically unworkable.[108]

First, allowing too many stakeholders from a potentially immeasurable number of public beneficiaries to sue would be inefficient.[109] The threat of frequent litigation impedes the board's ability to both discharge its fiduciary duties and make timely decisions affecting the best interests of the company. Too many derivative suits would also unduly burden courts with potentially frivolous litigation.

Second, exactly how this standing would be conferred upon an external stakeholder, and how it could be forfeited, has not been discussed. The Model Legislation allows a benefit corporation to "add, amend, or delete the identification of a specific public benefit that it is

105. Daniel Fisher, *Delaware 'Public Benefit Corporation' Lets Directors Serve Three Masters Instead of One,* FORBES PERSONAL FINANCE (July 16, 2013, 2:06 PM), http://www.forbes.com/sites/danielfisher/2013/07/16/delaware-public-benefit-corporation-lets-directors-serve-three-masters-instead-of-one/#2715e4857a0bb9c02a5215ac [https://perma.cc/8LMF-PMZE].

106. Lan, *supra* note 5, at 115–16. Lan discusses the scenario of a stagnant economic recession where shareholders would prefer to receive dividends to increase their liquid assets, while social purposes such as investing in pollution-reduction measures may be better for the company as a whole. *Id.* Therefore, directors are faced with the choice between preserving their position in office by appeasing the shareholders who will ultimately vote to retain them or considering other constituents at the detriment of their own interests. *Id.*

107. Kfouri, *supra* note 92.

108. *Id.*

109. *Id.*

the purpose of the business to create."[110] It follows that amending a specific purpose could evince an intent to subordinate the interest of a particular social good under another.[111] Imagine a hypothetical where benefit corporation "B" has a specific social purpose related to researching cures for childhood illnesses. It begins by conferring the right to sue upon a third-party beneficiary, the Autism Foundation (AF), and devotes money to this cause. Over the years, the directors and shareholders of B learn more about a new illness affecting children called Chocotosis and would like to shift their donations to the Chocotosis Vaccine Group (CVG). In doing so, the shareholders vote to amend the social purpose, pursuant to section 201, to being specifically devoted to the funding of Chocotosis vaccines. However, AF vehemently opposes this new social purpose, because the AF's Chair strongly believes that vaccines are a leading cause of Autism. Thus, he believes that B's contributions to CVG will *cause* childhood illness, in violation of B's corporate charter. What can ACF do?

Under the single-stakeholder solution, ACF would have the right to bring a benefit enforcement proceeding but would not have a right to vote on corporate decisions.[112] Therefore, ACF's only option would be to sue the board of directors for amending the public purpose. However, ACF would likely lose, because the amendment was permissible under the Model Legislation, and the directors still have no obligation to prioritize the interests of any single constituent over any other.[113] ACF would be left with no recourse, because external stakeholders have no input on corporate management, and the actual shareholders voted in favor of the amendment. Unless it somehow lost its standing rights to enforce the fiduciary duties of B, ACF would be a perpetual thorn in B's side, threatening suit every time B makes a donation to CVG. Two ex ante solutions could have avoided this quandary: 1) the external shareholder with standing could have been granted the right to vote (treated as a class vote with veto power); or 2) a policy could have been put in place to revoke the external stakeholder's standing to sue upon any amendment to the benefit corporation's specific public purpose.

The class vote solution would block any effort to amend the purpose to begin with. Furthermore, because beneficiaries have not contributed capital to the company and thus bear less risk than a shareholder, it would be facially unfair to grant them equal voting

110. *See* MODEL BENEFIT CORP. LEGIS. § 201.

111. *See id.* § 201.

112. Kfouri, *supra* note 92.

113. MODEL BENEFIT CORP. LEGIS. §§ 201(d), 301(a).

rights. An entity that merely reaps the benefits of someone else's investment should not be permitted to block measures that are usually entrusted to shareholders.

Revoking the stakeholder's standing, although desirable for the board, would make the external stakeholder's enforcement power a mere façade. The stakeholder would have no reason to bring a fiduciary duty suit against a benefit corporation that continues to support the stakeholder's own social goal. For the right to sue to have any teeth, the stakeholder should be able to bring a suit both when the corporation fails to adequately consider its interests in the ordinary course of business and also when the corporation moves to undermine its interests entirely through a charter amendment.

One final issue with the proposed "single stakeholder standing" method would be deciding which "social good" is deserving of standing. The Model Legislation mandates that directors consider many different constituencies, including the environment, customers, and employees.[114] If some corporations grant standing to specific charities and others grant standing to environmental agencies for enforcement of fiduciary duties, each potential plaintiff has divergent interests. This inconsistency would cause difficulty for courts in proscribing predictable rules of benefit corporate governance, thereby making stakeholder suits risky and unpredictable.

It is important to note that the Model Legislation does permit a benefit corporation to confer standing upon nonshareholder constituencies in its bylaws or articles of incorporation. In such a case, the same problems described in this Section would arise, but the agents endowed with corporate management responsibilities would have assumed the risk of these problems through the appropriate channels. To impose these risks on an *unassuming* board would be unwise for a legislature, because the threat of increased liability might deter the formation of benefit corporations or the retention of competent management. Similarly, such a judicial over-step by courts would undermine the rationale for the business judgment rule—that the business affairs of a corporation are best managed by or under the direction of its board of directors.[115]

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114. *Id.* § 301(a).

115. DEL. CODE ANN. tit. 8, § 141(a); Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 359 (Del. 1993).

3. Idealism and Obedience: Analogizing to Nonprofit Entities

The solutions proposed thus far have one key similarity: they conceptualize the benefit corporation as a traditional corporation, but with modified charitable features. However, one writer instead frames the analysis as though a benefit corporation is really just a nonprofit entity that has been modified to include some profit-seeking features.[116]

Even nonprofit entities require their directors to fulfill traditional duties of care and loyalty to the company, but unlike in traditional corporations, nonprofit directors do not owe fiduciary duties to the individual members of the organization.[117] Moreover, in contrast with the Model Legislation, the stated social purpose in a nonprofit entity imposes a "duty of obedience" to the corporation's mission.[118] This duty has somewhat tautologically been interpreted to require that directors "serve the beneficiary in the way that reasonable people would see as genuinely beneficial."[119]

If the board of directors in a nonprofit entity fails to honor the social purpose, or otherwise fails to discharge the duty of obedience, only certain parties will have standing to sue the board.[120] A donor who has distributed funds to the entity will likely forfeit standing due to trust principles.[121] Once a donation is made, legal title of the funds transfers to the directors of the nonprofit entity as trustees, and the donor assumes the risk of mismanagement.[122] The equitable title vests in the intended beneficiaries of the funds, and thus the donors have lost standing to sue for a fiduciary breach, because their interest in the donation has terminated.[123] However, this principle does not eliminate a director's right to sue his own board for dereliction of its duties.[124]

For nonprofit entities, a state attorney general or public officer usually has standing to sue to enforce a charitable organization's

116. Christopher Lacovara, Note, *Strange Creatures: A Hybrid Approach to Fiduciary Duty in Benefit Corporations*, 2011 COLUM. BUS. L. REV. 815, 841–43 (2011).

117. *Id.* at 846–48.

118. *Id.* at 846; *see generally* MODEL BENEFIT CORP. LEGIS.

119. Lacovara, *supra* note 116, at 848; *see* Rob Atkinson, *Obedience as the Foundation of Fiduciary Duty*, 34 J. CORP. L. 43, 51 (2008) (quoting Restatement (Third) of Trusts § 2 cmt. b (2003)).

120. *See* Lacovara, *supra* note 116, at 850–51 (stating that a public officer, but not a donor, will have standing).

121. *Id.* at 849; Restatement (Third) of Trusts § 2 cmt. d (2003).

122. Lacovara, *supra* note 116; Restatement (Third) of Trusts § 2 cmt. d (2003).

123. Lacovara, *supra* note 116, 849–51 (citing Restatement (Third) of Trusts § 2 cmt. d (2003)).

124. Lacovara, *supra* note 116, at 850; *see* Holt v. Coll. of Osteopathic Physicians & Surgeons, 394 P.2d 932, 937 (Cal. 1964) (en banc) (discussing the trust principles enabling one trustee to sue another to prevent him from engaging in conduct that undermines the purpose of the trust).

purpose on behalf of potential beneficiaries.[125] Public officials must consent to sue and can decline to bring cases that they deem unmeritorious.[126] This minimizes the risk of nuisance suits by parties without tangible interests in an organization and reduces the court's transaction costs of determining the distinct justiciable interest of each plaintiff on a case-by-case basis.[127] Furthermore, although the general rule prohibits members of the public from suing the board of directors of a nonprofit entity, some states have a "special interest" exception.[128] This exception confers standing upon beneficiaries who have a special interest in the funds held for a charitable purpose, when the class of beneficiaries is well-defined and numerically limited.[129]

One solution to benefit enforcement challenges would be to adopt the nonprofit duty of obedience in benefit corporations.[130] Additionally, imposing stringent standing requirements furthers the intent to shield directors in benefit corporations from liability, minimizes the risk of nuisance litigation, and encourages competent managers to serve as directors.[131] Under this solution, shareholders would be able to bring derivative suits on behalf of the corporation for breaches of the duty of obedience.[132] However, this would still "leave nonshareholder constituencies at the mercy of shareholders," unless the corporate charter granted standing to external stakeholders.[133] Thus, permitting external constituencies to petition a public official would validate their enforcement rights and curtail frivolous suits, because a state attorney general would have to agree to take the case.[134]

To further reduce the risks of unmeritorious lawsuits against the board of directors, several solutions are available: affording directors the protection of the business judgment rule, requiring a

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125. Lacovara, *supra* note 116, at 850–51.

126. *Id.* at 851; *see* Hooker v. Edes Home, 579 A.2d 608, 612 (D.C. 1990) (discussing the "inherent impossibility of establishing a distinct justiciable interest on the part of a member of a large and constantly shifting benefitted class").

127. Lacovara, *supra* note 116, at 851; *see Hooker*, 579 A.2d at 612.

128. Lacovara, *supra* note 116, at 851–53.

129. *Id.* at 851–52; *see* Alco Gravure, Inc. v. Knapp Foundation, 64 N.E.2d 752, 755 (N.Y. 1985) (stating that standing can be conferred where "a particular group of people has a special interest in funds held for a charitable purpose, as when they are entitled to a preference in the distribution of such funds and the class of potential beneficiaries is sharply defined and limited in number").

130. Lacovara, *supra* note 116, at 863–69.

131. *Id.* at 863–69.

132. *Id.* at 868–69.

133. *Id.* at 870.

134. *See id.* at 871 ("[B]enefit constituencies could at least petition the state attorney general on the grounds that the corporation is not living up to its public commitment, arguing that B-corp benefit enforcement provisions could not have been intended to foreclose government enforcement actions.").

higher evidentiary standard to mitigate the vagueness of the public-benefit concept, and permitting indemnification of independent directors acting in good faith.[135]

Although these proposed measures would probably protect the board from nuisance suits, requiring a duty of obedience to the corporate purpose in the first place undermines the impetus behind the Model Legislation. While it is true that many Americans were outraged by the shareholder maximization norm following the corporate bail-outs during the 2008 financial crisis,[136] this should not be construed as a desire to eliminate profit-seeking strategies altogether. Consumers demanded a reformed version of the traditional corporation to reflect concerns for the well-being of employees, the environment, and a broader public purpose, not the creation of a new nonprofit entity that could raise funds more efficiently.[137] In fact, the option to operate as a nonprofit entity was available both before and after the 2008 financial crisis. Thus, to impose a duty of obedience to the social purpose would render the benefit corporation, which is intended to serve an entirely new societal role, redundant. Further, treating benefit corporations too much like nonprofit entities would discourage profit-conscious companies from incorporating as such.

The text of the Model Legislation states that the board of directors "shall *consider*" a variety of constituencies.[138] It goes on to state "[a] director does not have a duty to a person that is a beneficiary of the general public benefit purpose or a specific public benefit purpose of a benefit corporation arising from the status of the person as a beneficiary."[139] This language reflects an intention to give broad discretion to directors to take into account nonshareholder constituencies when making corporate management decisions, not to impose any affirmative duty to obey any particular purpose. This interpretation is bolstered by section 305, which provides that, except during a benefit enforcement proceeding,

> no person may bring an action or assert a claim against a benefit corporation or its directors or officers with respect to: failure to pursue or create general public benefit or a specific public benefit set forth in its articles of incorporation; or violation of an obligation, duty, or standard of conduct under this chapter.[140]

Nowhere in any other part of the Model Legislation is the duty of obedience explicitly conferred upon the board of directors. Because

135. *Id.* at 874–76.

136. *About B Lab*, *supra* note 75.

137. Chu, *supra* note 19, at 155–56.

138. MODEL BENEFIT CORP. LEGIS. § 301(a) (emphasis added).

139. *Id.* § 301(d).

140. *Id.* § 305(a)(1)–(2) (emphasis omitted).

many states have adopted the Model Legislation, perhaps we should uphold the intent of the drafters to omit such a duty.

Two textual arguments can be made in rebuttal. First, the Model Legislation precludes nonshareholder constituencies from alleging violations of duties "under this chapter."[141] Given the absence of the duty of obedience in the chapter, this is conceivably a duty (much like the duty of care and the duty of loyalty) that is not specifically precluded. However, it would be absurd if a duty not specifically listed, but that contravenes the purpose for introducing the benefit corporation as a business entity, could be enforced against an unsuspecting board of directors. While benefit corporations were designed to protect directors who use corporate profits for social goals, or who otherwise consider nonshareholders when making day-to-day decisions,[142] they were not specifically intended to force private partnerships or entitle charities to more donations.

Second, section 301(d) only states that a director does not have a duty to *a person* who is a beneficiary.[143] Arguably, this does not preclude a finding that the director would have a duty to the corporation itself to obey the stated social purpose.[144] However, this proposal focuses too much on one particular constituency (a particular beneficiary of a social purpose), and ignores the fact that benefit-corporation statutes are designed to serve many different constituents.[145] The Model Legislation mandates that directors "shall consider the effects" of their decisions on: shareholders, employees, subsidiaries, suppliers, customers, beneficiaries of the public benefit purposes, community factors, the local and global environment, and the short-term interests of the corporation, to name a few.[146] In considering this vast variety of interests, a director "need not give priority to a particular interest . . . over any other interest or factor[.]"[147]

If a duty of obedience was imposed with regard to the social purpose and standing was given to the beneficiaries thereof, it would elevate the status and priority of one group over others, such as employees or the environment. Just as shareholders in a benefit corporation are not able to sue a director for pursing social purposes that would not immediately maximize shareholder profits, neither should social beneficiaries be able to sue a director for decisions that

141. *Id.* § 305(a)(2).
142. Lan, *supra* note 5, at 114.
143. MODEL BENEFIT CORP. LEGIS. § 301(d).
144. Lacovara, *supra* note 116, at 856–58.
145. MODEL BENEFIT CORP. LEGIS. § 301(a).
146. *Id.* § 301(a).
147. *Id.* § 301(b).

maximize shareholder wealth but do not immediately further the social purpose. Additionally, to ensure some level of enforcement for donations, charitable entities could consider negotiating a contractual arrangement to have enforcement rights under the common law of contracts.

4. Sore Losers: Dissenter's Rights and Judicial Review

One potential solution to maintain a unified corporate devotion to the stated public benefit purpose would be to afford dissenter's rights, much like appraisal rights, to dissenting shareholders when there is a fundamental change to the company in which they have invested capital.[148] Specifically, this remedy aims to protect shareholders when directors change the stated public purpose of a benefit corporation or affirmatively articulate a stakeholder hierarchy. This is in part to offer a means of receiving monetary compensation, which cannot be provided during the benefit enforcement proceeding contemplated by the Model Legislation.[149] Under this solution, shareholders must provide timely notification to the board of their request for rights.[150] Dissenters would then be required to accept whatever value for the shares that a court would deem fair.[151] This appears to be an effective alternative to a purely injunctive benefit enforcement proceeding, given the practical drawback of such suits. On one hand, these injunctive enforcement proceedings will rarely be brought, because they provide little fiscal incentive for plaintiff's attorneys; on the other, if attorney's fees are increased in these actions, it might encourage more frequent suits.[152] However, there is a fine line between bringing meritorious suits to resolve corporate corruption and bringing frivolous suits that distract management from running the company.

One scholar suggests that the traditional duty of loyalty, when coupled with the promise of dissenter's rights, would be sufficient to hold directors accountable for not pursuing a broader social purpose.[153] Under the duty of loyalty, directors may not act in self-interest, and they are required to "in good faith advance the best interests of the

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148. Murray, *supra* note 103, at 36. For more background information on appraisal rights under Delaware law, and for an interesting discussion of how those rights provide arbitrage opportunities, see Stanley Onyeador, *The Chancery Bank of Delaware: Appraisal Arbitrageurs Expose Need to Further Reform Defective Appraisal Statute*, 7 VAND. L. REV. 339 (2017).

149. *Id.* at 35.

150. *Id.* at 37.

151. *Id.*

152. *Id.* at 39.

153. *Id.* at 37.

corporation."[154] Given that benefit corporations explicitly define an interest in pursuing a public purpose and considering nonshareholder constituencies, the duty of loyalty can easily be modified to include those measures.[155] Thus, there would be no reason to independently impose a more stringent duty of obedience as mandated by the laws of nonprofit governance.[156]

Just like when evaluating the decisions of directors in a traditional corporation, a reviewing court should afford directors of a benefit corporation the protection of the business judgment rule for the majority of corporate decisions.[157] However, to account for the nuanced responsibility of directors in a benefit corporation to consider nonshareholder constituencies, this rule should be modified into the "purpose judgment rule."[158] In reality, the two standards are likely functionally equivalent. A director, in his discretion, may prioritize short-term wealth maximization over promoting the public good in order to generate retained earnings sufficient for funding a large-scale social project during the next fiscal year. Thus, the director of a benefit corporation would only be found liable if he exercised bad faith, knowingly pursued an illegal action, or acted in pure self-interest.[159]

When the duty of loyalty is evaluated under the purpose judgment rule, directors should be afforded broad deference. Courts are already wary about substituting their own judgments for those of corporate directors in traditional for-profit corporations. Given the even more complicated web of interests that directors must consider in benefit corporations, judges would be even less willing to take on a managerial role during judicial review. The purposive judgment rule serves the functions of attracting and retaining skilled management and enabling directors to freely address the needs of varying constituencies without the threat of litigation.

However, this broad latitude may actually undermine the very stakeholder interests that directors are charged with protecting. Given the considerable barriers for nonshareholders to bring suit in the first place, having a court give such deference to directors' business decisions

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154. *Id.*; Stone v. Ritter, 911 A.2d 362, 369–70 (Del. 2006).

155. Murray, *supra* note 103, at 37–38.

156. *Id.*

157. *Id.* at 41; *see* In re Walt Disney Co. Derivative Litig., 906 A.2d 27, 52 (Del. 2006) (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) ("[Delaware] law presumes that 'in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company.'")).

158. Murray, *supra* note 103, at 41 (proposing that the business judgment rule for benefit corporations should function as an evaluation of how the directors decided to pursue the corporation's stated objectives most efficiently).

159. *Id.*

doesn't resolve the problem of unrepresented third-party constituents.[160] Moreover, unlike the proposal to impose a duty of obedience on directors,[161] which overestimates the similarities between a nonprofit entity and a benefit corporation, merely implementing the purposive judgment rule doesn't do enough to distinguish a benefit corporation from a traditional corporation.[162]

III. WALKING THE TIGHTROPE: STRIKING THE RIGHT BALANCE AMONG COMPETING FACTIONS IN A BENEFIT CORPORATION

Constituents who would profit from a successful benefit corporation often have divergent or even flatly contrasting interests. In order to best serve the goals of the benefit corporation form, while at the same time minimizing the effects of its weaknesses, benefit corporations should engage in a hybrid approach. This Part proposes a blended solution for determining duties, standing, and standards of review as they pertain to benefit corporations.

First, to address the problem of a lack of guidance for directors,[163] adherence to the Model Legislation is paramount. Its flexibility in enabling directors to consider various interests without being required to rank them is a feature, not a flaw, of section 301.[164] This intentional vagueness furthers the goals of attracting and retaining skilled management, and it also permits the board of directors to change the hierarchy of stakeholders in response to economic or political changes.

Next, to address the risk of conflicts of interest,[165] duties of loyalty and care but not obedience should be imposed upon the board of directors. First, the duty of loyalty requires directors to refrain from acting purely in self-interest and to have as their core motivation to "in good faith advance the best interests of the corporation."[166] Moreover, this duty should be construed broadly to acknowledge that the best interests of the corporation are necessarily tied to their stated benefit purpose.[167] Second, although a duty of care is customary in for-profit

160. Lan, *supra* note 5, at 116 (discussing how external stakeholders are not usually granted standing to sue the board of directors in a benefit corporation's charter or by-laws and therefore have little to no enforcement power).

161. Lacovara, *supra* note 116, at 856–58.

162. Murray, *supra* note 103, at 42 (noting that applying the traditional business judgment rule and the enhanced purposive judgment rule will likely yield the same result in most cases).

163. Lan, *supra* note 5, at 114.

164. MODEL BENEFIT CORP. LEGIS. § 301(a).

165. Lan, *supra* note 5, at 115.

166. Murray, *supra* note 103, at 37; *see* Stone v. Ritter, 911 A.2d 362, 369–70 (Del. 2006).

167. Murray, *supra* note 103, at 37.

corporations, it is unlikely to have any practical effects on benefit corporations.[168] Breaches of the duty of care, even in traditional corporate law, rarely yield liability due to Delaware's 102(b)(7) waiver and similar provisions located in the charters of other states.[169] Further, the Model Legislation specifically precludes an award of monetary damages for a director's failure to pursue a social purpose.[170] Thus, although directors should have a duty to make decisions in good faith and on a fully-informed basis, dereliction of this duty will not always provide recourse to affected stakeholders. Finally, a duty of obedience to the corporate purpose should not be adopted, as it would either be redundant or would implicitly impose a hierarchy of stakeholder constituents in favor of third-party beneficiaries in violation of section 301(a) of the Model Legislation.[171]

The issue of unrepresented third-party stakeholders requires the most complicated set of solutions.[172] Corporations and courts must strike a balance between protecting external beneficiaries and deterring nuisance suits. This Note advocates for a combination of single-stakeholder standing and a requirement that undesignated constituencies—parties who are neither shareholders nor the designated single stakeholder—petition a public official to bring fiduciary suits.

For this solution to be effective, a benefit corporation first must determine which external stakeholder ought to be granted standing to sue the board of directors for breach of their fiduciary duties. A corporation should choose a stakeholder that has an articulable special interest in the corporation's general or specific public purpose, constitutes a particular group of people that is clearly distinguishable from the public at large, and is limited in number.[173] Because this stakeholder receives standing based on its status as a beneficiary of the corporation's stated purpose, a process must exist to address amendments to the corporate mission. First, such changes ought to require a supermajority of shareholders to vote in favor of passage. Second, conferring standing to a single stakeholder should involve a bargained-for deal whereby standing is conferred unless and until an

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168. *Id.* at 38.

169. *Id.*

170. MODEL BENEFIT CORP. LEGIS. §§ 301, 305.

171. *Id.* § 301(a).

172. Lan, *supra* note 5, at 116 (discussing the "Unrepresented Public Interest Problem").

173. Lacovara, *supra* note 116, at 851–52; *see* Alco Gravure, Inc. v. Knapp Found., 64 N.E.2d 752, 755 (N.Y. 1985) (holding that standing can be conferred where "a particular group of people has a special interest in funds held for a charitable purpose, as when they are entitled to a preference in the distribution of such funds and the class of potential beneficiaries is sharply defined and limited in number").

amendment to the general or specific purpose passes. To ensure the rights of the stakeholder have teeth, the corporation should enter into an agreement to indemnify the stakeholder for a negotiated sum of monetary damages in the event of a purpose-driven charter amendment.[174] Third, the designated stakeholder should be treated as a non-voting class. The class may appoint at least one director to the corporation's board of directors, but will otherwise be unable to vote on matters traditionally reserved for a shareholder vote.

These measures ensure that the benefit corporation will fulfill its duty to consider the interests of at least the shareholders and the beneficiaries of its stated purposes, because there will be at least one director on the board to represent each interest. At a minimum, the director may raise the stakeholder's concerns during meetings so that the board can be more informed, even if the majority of the board does not always vote in the stakeholder's favor. The designated stakeholder will have a monetary remedy, rather than the purely injunctive one contemplated by the Model Legislation,[175] if the corporation amends its specific purpose. However, in order to minimize the likelihood of nuisance litigation, the designated stakeholder's right to sue shall not be unbridled. The director whom the stakeholders appoint shall be able to bring a benefit enforcement proceeding pursuant to section 305(c) of the Model Legislation.[176] The designated stakeholder may only sue its appointed director for dereliction of his duties, rather than the entire board.

Importantly, charter amendments affecting the corporate purpose affect not only designated stakeholders, but also traditional shareholders and undesignated constituencies. If a benefit corporation successfully amends its purpose, the director appointed by the acting single stakeholder should be removed immediately. The remaining directors should then vote to grant standing to a new class of beneficiaries based on their affiliation to the amended social purpose, and that class in turn could appoint a director to serve on the board. The corporation would proceed to indemnify the outgoing single stakeholder for the amount provided in their indemnification agreement. Shareholders of the corporation would be able to sue the board, based on traditional corporate law principles, for breach of the duty of loyalty if the amendment to the social purpose was not in the

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174. Although such a payout may strain a company experiencing financial distress, this remedy likely would not arise very often in practice. Purpose-driven charter amendments could threaten the marketing advantage of a socially responsible enterprise in the first place, so directors would rarely approve them.

175. MODEL BENEFIT CORP. LEGIS. § 305(c).

176. *Id.*

best interest of the corporation. However, shareholders who do not believe the amendment rises to the level of a fiduciary breach but nonetheless wish to forfeit their stake in the corporation, should be afforded dissenter's rights.[177] Dissenter's rights should be available for shareholders who notify the board of their intention to seek dissenter's rights prior to the record date and subsequently vote against the amendment. The shareholders should then be required to accept whatever judicial appraisal of the "fair value for the shares" that a court would deem reasonable.[178]

Other than single stakeholders, traditional shareholders—and, to a lesser extent, undesignated constituencies—should also be granted standing. Drawing on the body of traditional corporate law, shareholders should always have a right to sue the board of directors for breach of the fiduciary duties of loyalty and care. Additionally, shareholders should be permitted to seek injunctive relief in a benefit enforcement proceeding for a director's failure to pursue a public purpose, but they should not be able to recover monetary damages.[179] Next, although undesignated constituencies are granted little recourse under the Model Legislation, this Note proposes drawing on the body of nonprofit law to grant them limited benefit enforcement power.[180] To exercise this right, an undesignated constituent must petition a state attorney general to sue the board of directors, and the state attorney general must consent to bring suit.[181] This solution minimizes the risk of frivolous claims, because a state attorney general should only accept a petition that is premised upon a directors' utter failure to *consider* the stakeholder's interest. In keeping to the spirit of the Model Legislation, this high burden is required to prevent most undesignated constituency suits, except in particularly egregious circumstances.

In reviewing a director's decision, a court should apply a variation of the business judgment rule.[182] However, in order to account for the nuanced duty of directors in a benefit corporation to consider

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177. Murray, *supra* note 103, at 36.

178. *Id.* at 37.

179. MODEL BENEFIT CORP. LEGIS. §§ 301, 305.

180. *See* Lacovara, *supra* note 116, at 871 ("[B]enefit constituencies could at least petition the state attorney general on the grounds that the corporation is not living up to its public commitment, arguing that B-corp benefit enforcement provisions couldn't have been intended to foreclose government enforcement actions.").

181. *See id.*

182. Murray, *supra* note 103, at 41; *see* In re Walt Disney Co. Derivative Litig., 906 A.2d 27, 52 (Del. 2006) (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) ("[Delaware] law presumes that 'in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company.' ")).

nonshareholder constituencies, this rule should be modified into the proposed "purpose judgment rule," as an evaluation of how the directors decided to pursue the corporation's stated objectives.[183] Under this standard of review, a director of a benefit corporation would only be found liable if he exercised bad faith, knowingly pursued an illegal action, or acted in pure self-interest.[184] Moreover, a higher evidentiary standard should be required in external stakeholder suits in order to deter frivolous lawsuits, preserve a director's discretion to consider a variety of stakeholders, and retain competent management.[185] Instead of the traditional preponderance standard, clear and convincing evidence should be adopted.[186] Moreover, using Delaware's 12(b)(7) waiver as a model, benefit corporations should also be permitted to indemnify directors who are found liable, so long as they acted independently and in good faith.[187] These combined measures appropriately balance a shareholder's fiscal interests with the public purpose interests shared by external stakeholders and the public.

CONCLUSION

Determining who has standing to bring a fiduciary enforcement suit against the board of a benefit corporation and which standards should be applied by the reviewing court, is a complicated inquiry. The solution must preserve the benefits of the revised corporate form in light of the rationales for its establishment. Any solution should seek to shield directors from liability when they deviate from shareholder value-maximization norms;[188] encourage the directors to seriously consider the well-being of their employees, the environment, and a broader public purpose;[189] attract competent managers to serve as directors; [190] retain younger, educated employees who seek to work for socially responsible employers;[191] and, potentially, restore some faith to the consumers who grew frustrated with big business following the 2008 financial crisis.[192]

At the same time, benefit corporations raise many questions: how directors ought to address competing interests according to the

183. Murray, *supra* note 103, at 41.
184. *Id.*
185. Lacovara, *supra* note 116, at 874–76.
186. *Id.*
187. *Id.*
188. Lan, *supra* note 5, at 114.
189. Chu, *supra* note 19, at 155–56.
190. Surowiecki, *supra* note 33.
191. *Id.*
192. Chu, *supra* note 19, at 155.

Model Legislation;[193] how to encourage directors to consider shareholder payoffs and social purposes when there are positional pressures to appease one over the other;[194] when to confer standing in order to protect the interests of public beneficiaries;[195] which legal standard to apply to the judgments of directors in benefit corporations; which fiduciary duties to impose upon directors in benefit corporations;[196] and, more generally, how to conceptualize the structure of a benefit corporation as compared to either a traditional for-profit business or a nonprofit charity.

The hybrid solution presented in this Note adequately balances a director's need for discretion in corporate decision-making, a shareholder's desire to achieve profitable returns on investments, and the general public interest in having more socially responsible businesses. With this approach, Laureate Education's existing institutional shareholders, like private equity firm Kohlberg Kravis Roberts (KKR) and venture capital leader Point72, can both receive long-term profits and make valuable contributions to society at large.[197] And if Laureate's IPO is successful, it could very well pave the way for individuals and other institutional actors to feel safe investing capital in benefit corporations.

So, should companies follow Laureate and Kickstarter's lead and re-incorporate as statutory B-Corporations? And should investors pour capital into publicly traded B-Corporations? This quandary of whether to "B" or not to "B"—that is the question facing many institutional investors as the first IPO of a benefit corporation looms near on the horizon.

*By Tiffany M. Burba**

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193. Lan, *supra* note 5, at 114; MODEL BENEFIT CORP. LEGIS. § 301(a).

194. Lan, *supra* note 5, at 115; *see* MODEL BENEFIT CORP. LEGIS. § 301(b) (failing to proscribe rules regarding the hierarchy of interests to be considered).

195. Lan, *supra* note 5, at 116.

196. *See* Lacovara, *supra* note 116, at 846.

197. Edmonson, *supra* note 1.

* J.D./M.S. Finance candidate, 2017, Vanderbilt University Law School; B.A. University of Maryland, College Park. Many thanks to attorney Tracy Kane and Professor Randall Thomas for sparking my interest in this topic, and to all the editors and staff of *Vanderbilt Law Review* that made this publication possible. I would also like to thank my parents, Debra and Joseph Burba, for their constant support and encouragement.