RISING TO THEIR FULL POTENTIAL: HOW A UNIFORM DISCLOSURE REGIME WILL EMPOWER BENEFIT CORPORATIONS

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Today—perhaps more than at any other time in history—investors want to achieve two things: a positive financial return on their investment and the "warm glow" that comes from doing good. And the number of investors looking for that "warm glow" is increasing.

The benefit corporation—a hybrid business organization between a for-profit and a nonprofit corporation—is well-positioned to accept those investment dollars and use them to pursue good, whether by helping the homeless like ArtLifting, PBC, or helping the environment like Patagonia, Inc.

Unfortunately, benefit corporations are plagued by unworkable state-by-state disclosure rules. Benefit corporations are not required to inform investors what their financial return will be (or more precisely, provide the financial information necessary for an investor to perform such an analysis). More importantly for purposes of this Article, the existing state-by-state disclosure rules fail to provide adequate guidance for disclosing social performance (and thus, have the perverse impact of discouraging investment by socially conscious investors).

This lack of adequate guidance leads to confusing, non-uniform disclosure—assuming a benefit corporation bothers to prepare a benefit report at all—that does not empower investors or supporting stakeholders (like customers) to evaluate a benefit corporation's performance or compare performance across firms.

This Article proposes a uniform disclosure regime that will apply to all benefit corporations. The proposed regime standardizes disclosure, and thus empowers stakeholders (both investors and supporting stakeholders) to compare and contrast competing firms. Moreover, the proposed regime has an enforcement mechanism that would allow both investors and supporting stakeholders to ensure that benefit corporations are providing the required disclosure. Finally, the proposed regime is narrowly tailored to avoid overburdening the growth of benefit corporations, many of which have limited resources. In fact, this regime may save benefit corporations time and money because it replaces the current state-by-state patchwork of disclosure rules with a single, simple regime.

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Introduction

Thirty-three states and the District of Columbia allow for the formation of benefit corporations.[1] A benefit corporation is a hybrid business organization that borrows characteristics of both nonprofit corporations (the ability to pursue a public benefit purpose) and for-profit corporations (the ability to make a profit).[2] Professor Kevin V. Tu explains that a benefit corporation is available when the social entrepreneur's idea for improving society "is too much of a 'business' for the nonprofit form and too 'socially conscious' for the for-profit corporate model."[3]

By way of example, consider the question of how best to help the homeless. ArtLifting, a Public Benefit Corporation ("PBC") located in Boston, Massachusetts, was formed to help the homeless sell their artwork to individuals and businesses.[4] The business has grown from working with forty-eight artists in 2013 to one hundred and twenty in 2017.[5] Of the forty-eight original artists, five are no longer homeless.[6] The artists gain self-confidence that permeates every aspect of their life.[7]

One of the biggest questions facing benefit corporations—and the focus of this Article—is what they should disclose to investors and supporting stakeholders, like customers. Despite the fact that each state's benefit corporation legislation mandates disclosure in the form of a benefit report (a benefit report is the primary disclosure document prepared by benefit corporations), what a benefit corporation must disclose is far from a settled matter.

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[1] *State by State Status of Legislation*, Benefit Corporation, http://benefitcorp.net/policymakers/state-by-state-status.

[2] *See* Kevin V. Tu, *Socially Conscious Corporations and Shareholder Profit*, 84 Geo. Wash. L. Rev. 121, 157–58 (2016); *see also* Joseph W. Yockey, *Does Social Enterprise Law Matter?* 66 Ala. L. Rev. 767, 769 (2014) (explaining that a benefit corporation "seeks to do 'well' (financially) while doing 'good' (socially).").

[3] Tu, *supra* note 2, at 158. Traditionally, social entrepreneurs have acted through nonprofits, but now they can work through for-profits to bring business solutions to seemingly intractable social problems. *See* James A. Phillis, Jr., *Q&A: David Gergen*, Stan. Soc. Innovation Rev. (2008), https://ssir.org/pdf/2008FA_QA_gergen.pdf. David Gergen, advisor to Presidents Nixon, Ford, Reagan, and Clinton, did not hold back regarding the potential of social enterprise: "Social entrepreneurs, both nonprofit and *for-profit*, remind me of the Civil Rights movement because they share the same idealism. Although the two movements are very different and are going about things in very different ways, social entrepreneurs could have almost as big an impact on the country over time." *Id.* (emphasis added).

[4] *About Us*, ArtLifting, https://www.artlifting.com/pages/about-us. ArtLifting's corporate partners include Staples, Inc., which purchased seventeen pieces of art, now on display at its corporate offices in Framingham, Massachusetts. *Question of the Week: Artwork Procurement and Facility Management*, Facility Executive (Dec. 1, 2017), https://facilityexecutive.com/2017/12/artwork-procurement-facility-management/.

[5] *Question of the Week*, *supra* note 4. *See also* Megan Rose Dickey, *ArtLifting Raises $1.1 Million To Help the Homeless Sell Their Art*, TechCrunch (October 27, 2015), https://techcrunch.com/2015/10/27/artlifting-raises-1-1-million-to-help-the-homeless-and-other-disadvantaged-people-sell-their-art/.

[6] *See* Dickey, *supra* note 5.

[7] *See* ArtLifting, *supra* note 4.

The current state-by-state disclosure rules provide little guidance to benefit corporations preparing benefit reports.[8] As a result:

> (1) benefit reports fail to provide investors with the information necessary to determine what their social return will be and fail to speak to financial return at all;[9] and
>
> (2) benefit reports fail to provide supporting stakeholders (this Article uses "supporting stakeholders" to refer to customers and employees[10]) with the information necessary to determine if the benefit corporation is truly doing good (this Article refers to "doing good" and "pursuing a public benefit purpose"[11] interchangeably), or simply adopting the moniker of benefit corporation to engage in greenwashing.[12] "Greenwashing" is defined as businesses portraying themselves "as being more environmentally and socially responsible than they actually are."[13]

This Article proposes a solution to the problem described above: a uniform disclosure regime for benefit corporations.[14] The proposed regime—a federal regime overseen by the Securities and Exchange Commission ("SEC")—will require that all benefit corporations provide investors and supporting stakeholders with: (1) basic financial disclosures (balance sheet, income statement, etc.),[15] and (2) social disclosures. This Article proposes that the SEC seek the assistance of existing third-party organizations in formulating one uniform standard for social disclosure.[16]

Further, unlike the current state-by-state disclosure rules, the proposed uniform disclosure regime will have teeth. It will be enforceable by investors and supporting stakeholders by civil action.[17] It will also be enforceable by the SEC through cease and desist proceedings.[18]

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[8] *See infra* Part III.

[9] *See infra* Parts II.A & III.A.1.

[10] "Stakeholders" is a term used to refer to "all those who participate in the life of the business, including employees, creditors, suppliers, consumers, and the community, along with shareholders." Matthew Bodie, *The Next Iteration of Progressive Corporate Law*, 74 Wash & Lee L. Rev. 739 (2017). This Article focuses on customers and employees, because they are two groups that are most likely to be impacted by greenwashing. *See infra* Part II.B.

[11] The term "public benefit purpose" is drawn from the various benefit corporation statutes. *See, e.g.*, N.Y. Bus Corp. Law § 1707 (2018).

[12] *See infra* Part II.B.

[13] Ronnie Cohen & Gabriele Lingenfelter, *Money Isn't Everything: Why Public Benefit Corporations Should Be Required to Disclose Non-Financial Information*, 42 Del. J. Corp. L. 115, 124 (2017) (citing to Model Benefit Corp. Legis. §102, cmt. (2016)).

[14] *See infra* Part IV. This proposal is only a first step. The next logical step is the creation of an organized exchange for trading of shares in such entities. *See* Brett H. McDonnell, *Benefit Corporations and Public Markets: First Experiments and Next Steps,* 40 Seattle U. L. Rev. 717, 724–25 (2017) (discussing the possibility of an exchange that focused on social enterprise).

[15] *See infra* Part IV.B.

[16] *See infra* Part IV.C.

[17] *See infra* Part IV.D.

[18] *See id.*

Finally, because the proposed regime will apply to private companies—not just public companies like the Securities Laws[19]—it could burden small businesses.[20] However, as this Article discusses in detail below, benefit corporations are already subject to a state-by-state patchwork of disclosure requirements, which are expensive in time and money.[21] The proposed disclosure regime would simply replace that patchwork, hopefully in a cost-effective manner.[22]

The proposed regime will supplement—but not replace—the Securities Act of 1933 and the Exchange Act of 1934 (together "the Securities Laws").[23] That is to say, in the event that a benefit corporation goes public, it will continue to make its social disclosures as before, but financial disclosures will be replaced by Securities Laws requirements.[24]

This Article proceeds as follows: Part I provides a primer on benefit corporations; Part II explains why benefit corporation disclosure is important; Part III explains why the current patchwork of disclosure rules is unworkable; Part IV proposes a uniform disclosure regime for benefit corporations, presenting in broad strokes the necessary characteristics of a workable regime; and Part V discusses additional considerations and counterarguments.

I. Benefit Corporations Explained

A. Benefit Corporation Statutes

As of the date this Article was written, thirty-three states and the District of Columbia have adopted benefit corporation legislation, and another six are considering legislation.[25] This Article will use New York's benefit

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[19] Securities Act of 1933, Pub. L. No. 73–22, 48 Stat. 74 (codified as amended as 15 U.S.C. §§ 77a-aa (20120)); Securities Exchange Act of 1934, Pub. L. No 73–291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-qq (2012)).

[20] *See infra* Part V.D.

[21] When used in reference to the law, "patchwork" refers to assorted state statutes, that taken together, incongruously regulate a given area. *See, e.g.*, Eric Chaffee, *Securities Regulation in Virtual Space*, 74 Wash & Lee L. Rev. 1387 (2017) ("the patchwork of state blue sky laws needed to be replaced by a system of federal securities regulation to restore investor confidence and create strong and relatively stable securities markets."). This Article uses "patchwork" to refer to the various state statutes governing benefit corporation disclosure because of their incongruity. *See infra* Parts III.A & III.B (discussing differences in required content, audience, and enforcement). For a more complete comparative examination of benefit corporation disclosure requirements, *see* Maxime Verheyden, *Public Reporting by Benefit Corporations: Importance, Compliance, and Recommendations*, 14 Hastings Bus. L.J. 37, Appendix 1 (2018).

[22] *See infra* Part V.D.

[23] *See* Securities Act of 1933, Pub. L. No. 73–22, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–aa (2018)); *see also* Securities Exchange Act of 1934, Pub. L. No. 73–291, 48 Stat. 881 (codified as amended at 15 U.S.C. 78a–qq (2018)).

[24] *See infra* Part IV.B.

[25] *State by State Status of Legislation*, *supra* note 1.

corporation legislation as a representative example.[26] New York's benefit corporation legislation is added to—and is situated within—the state's pre-existing Business Corporation Law (the legislation became Article 17 of New York's Business Corporation Law).[27] That is to say, "[the] benefit legislation is situated within its existing state corporation code so that [the] state's existing corporation code applies to benefit corporations in every respect except those explicit provisions that are unique in the benefit legislation."[28]

Upon review of the legislation, it becomes clear that a benefit corporation is different from a traditional corporation. First, the certificate of incorporation must provide that the benefit corporation is being formed to pursue a general public benefit,[29] defined as "a material positive impact on society and the environment."[30] The certificate of incorporation may also list one or more specific public benefits.[31] Specific public benefits include providing low income individuals with beneficial products or services or promoting economic opportunity.[32] Under the legislation, "preserving the environment" is considered both a general and specific benefit.[33]

Second, and related to the foregoing, New York's benefit corporation statute redefines the fiduciary duty of care.[34] It provides—abandoning the traditional shareholder centric standard of care—that management shall consider whether a decision furthers the company's public benefit purpose, together with the interests of supporting stakeholders.[35] While this mandate seems onerous at first blush, it actually frees management from the duty to maximize the financial return to investors.[36] It releases the managers from

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[26] N.Y. Bus Corp. Law §§ 1701, 1709 (2018). While Delaware is certainly the leading state in the area of corporate law, Delaware's Benefit Corporation Law differs in some material ways from what was adopted by most states, including New York. For example, while Delaware requires that shareholders be provided with a benefit report, providing the report to the public is optional. Del. Code Ann. tit. 8, § 366(c)(2) (2018) Further, in Delaware a third-party standard need not be incorporated into the benefit report. Del. Code Ann. tit. 8, § 366(c)(3) (2018).

[27] N.Y. Bus Corp. Law §§ 1701 1709 (2018).

[28] Miriam F. Weismann, *The Missing Metrics of Sustainability: Just How Beneficial Are Benefit Corporations?*, 42 Del. J. Corp. L. 1, 16 (2017).

[29] N.Y. Bus Corp. Law § 1706(a) (2018).

[30] *See Id.* § 1702(b).

[31] *See Id.* § 1706(b).

[32] *See Id.* §§ 1702(e)(1), (2).

[33] *See Id.* §§ 1702(b), (e)(3).

[34] Yockey, *supra* note 2, at 769.

[35] *See* N.Y. Bus Corp. Law § 1707 (2018) (listing stakeholders directors shall consider, including employees, customers, and the community).

[36] I do not mean to imply that investing in benefit corporations necessarily involves lower returns. Some scholars have found that companies that incorporate environmental, social, or governance concerns (ESG) into their decision making out-perform those that do not. *See, e.g.*, Mozaffar Khan et al., *Corporate Sustainability: First Evidence on Materiality*, 91 Acct. Rev. 1697, 1698 (2016); Virginia Harper Ho, *Nonfinancial Risk Disclosure and the Costs of Private Ordering*, 55 Am. Bus. L.J. 407, 417 (2018) ("A vast body of empirical evidence from studies across the finance, accounting, and management literatures since the 1970s has now established that nonfinancial measures of corporate performance affect firm financial performance

Dodge v. Ford's mandate that "[a] business corporation is organized and carried on primarily for the profit of the stockholders."[37]

Third, benefit corporations require disclosure in the form of a benefit report.[38] Unfortunately, as Part III discusses, that benefit report is entirely unworkable. It is for that reason that this Article proposes a uniform disclosure regime for benefit corporations.

B. Examples of Benefit Corporations

A benefit corporation is considered a hybrid organization because it "explicitly accommodates both profit and public benefit."[39] While benefit corporations are for-profit, the management of a benefit corporation is free to pursue vigorously its stated public benefit purpose.[40] That is to say, management is not required to single-mindedly pursue maximization of shareholder profit; although, they certainly may pursue profit when doing so does not interfere with the interests of supporting stakeholders.[41] Freedom from the profit-maximization norm allows the benefit corporation to maximize positive externalities (e.g., feeding the hungry) or minimize negative externalities (e.g., reducing pollution).[42]

Benefit corporations are formed for a variety of public benefit purposes. Below is list of benefit corporations and the public benefit purposes they serve. While this list is meant to provide examples to assist the reader's understanding—and hopefully the reader will recognize some names on the list—it is by no means exhaustive.[43] Currently, there are thousands of active benefit corporations operating in the United States.[44]

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at an aggregate level. These studies, taken together, generally observe a positive relationship between financial performance and firm performance across a range of ESG indicators at the firm level, and to a lesser extent, at the portfolio level.").

[37] *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919).

[38] N.Y. Bus Corp. Law § 1708 (2018).

[39] Tu, *supra* note 2, at 158.

[40] Yockey, *supra* note 2, at 769.

[41] *See id.*

[42] *See* Robert A. Katz & Antony Page, *Corporate Creativity: The Vermont L3C & Other Developments in Social Entrepreneurship: The Role of Social Enterprise*, 35 Vt. L. Rev. 59, 86 (2010) ("A for-profit social enterprise seeks to [operate] in a manner that generates more public benefit or positive externalities than would a conventional for-profit firm.").

[43] This list was compiled from benefit corporations discussed in news articles, *see e.g.*, Dickey, *supra* note 5 (discussing ArtLifting), or discussed in other law review articles. *See e.g.*, J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 Harv. Bus. L. Rev. 345, 360 n. 86 (2014) (discussing King Arthur Flour). This method was used to compile the list because, to this author's knowledge, there is no comprehensive database of benefit corporations. Thus, the list is a non-random sample, and it is subject to various selection biases.

[44] This is a conservative guess. Some states maintain lists. Oregon alone lists 242 domestic benefit corporations. *See Oregon Benefit Companies*, Or. Sec'y of State, http://sos.oregon.gov/business/Pages/oregon-benefit-companies.aspx (last visited Jan 8, 2018). Four years ago, it was estimated that one thousand benefit corporations were operating in the United States. Kate Cooney et al., *Benefit Corporation and L3C Adoption: A Survey*, Stan. Soc. Innovation Rev. (Dec. 5, 2014), https://ssir.org/articles/entry/benefit_corporation_

CHART 1. Representative Benefit Corporations

Benefit Corporation	**State**	**Good or Service Provided**	**Public Benefit Purpose**	**Benefit Report Available; Third-Party Standard Used**[45]
ArtLifting, PBC	MA	Service: internet sales platform	Helps the homeless and the disabled sell their artwork	Not Available[46]
BESThq, LLC[47]	OR	Service: business support services	Aids business formation in historically underserved communities	Yes; Green America[48]
Café Yumm![49]	OR	Good: food items	Serves healthy food while caring for employees and the environment	Yes; Global Reporting Initiative (GRI)[50]
Canvas Host, LLC[51]	OR	Service: web hosting, web design	Provides web hosting services while consuming less energy	Yes; B Lab, Green America[52]
Can Can Wonderland, SBC	MN	Service: artist designed mini-golf and arcade	Furnishes economic engine for the arts	Yes; None[53]
Greyston Bakery, Inc.	NY	Good: baked goods	Employs hard to employ individuals	Yes; B Lab[54]

and_l3c_adoption_a_survey. In 2017, Nixon Peabody reported that there were 3,600 public benefit corporations in the United States. *See* Michael J. Fitzpatrick, *The Growth of Public Benefit Corporations Creates Both Opportunity and Challenges for Private Equity Firms*, NIXON PEABODY: PRIVATE EQUITY BLOG (May 3, 2017), http://web20.nixonpeabody.com/peblog/Lists/Posts/Post.aspx?ID=25.

[45] A "third-party standard" refers to a "standard for defining, reporting, and assessing overall corporate social and environmental performance." *How Do I Choose a Third Party Standard?*, BENEFIT CORP., http://benefitcorp.net/how-do-i-pick-third-party-standard.

[46] *See* ARTLIFTING, *supra* note 4.

[47] Oregon statutes provide for the formation of benefit companies, not benefit corporations. These LLCs are more akin to benefit corporations than limited profit limited liability companies (L3Cs), so they are included in Chart 1.

[48] *See* BESTHQ, LLC, 2017 CORPORATE SOCIAL RESPONSIBILITY AND BENEFIT REPORT 3 (2017), http://www.besthq.net/content-bhq/uploads/BESThq-2017-Benefit-Report.pdf.

[49] *See supra* note 47.

[50] *See* CAFÉ YUMM!, BENEFIT REPORT FOR THE 2014 BUSINESS YEAR 2 (2014), https://www.cafeyumm.com/assets/58191359fa4634b830000004.pdf (indicating they are working with GRI). A more recent version of the benefit report is also available, although it does not disclose third-party standards used. CAFÉ YUMM!, BENEFIT REPORT FOR THE 2016 BUSINESS YEAR (2016), https://www.cafeyumm.com/assets/59dbcb503cd74f3d1e000012.pdf.

[51] *See supra* note 47.

[52] *See Our History*, CANVAS HOST, LLC, https://www.canvashost.com/about/history.php.; *Canvas Host Becomes a Benefit Company*, CANVAS HOST, LLC (Jan. 6, 2014), https://www.canvashost.com/blog/company-new/canvas-host-becomes-a-benefit-company/.

[53] *See* CAN CAN WONDERLAND SBC, ANNUAL BENEFIT REPORT (2017), https://www.sos.state.mn.us/media/3216/can-can-wonderland-sbc.pdf. Minnesota does not require that specific public benefit corporations (as opposed to general public benefit corporations) use a third-party standard. MINN. STAT. § 304A.301(2) (2018).

[54] GREYSTON BAKERY, INC., ANNUAL REPORT 8 (2016), https://greyston.org/wp-content/uploads/2017/08/Annual-Report-2016.pdf.

Kickstarter, PBC	DE	Service: connects projects and funders	Connects low-visibility creators and merchandisers to public funding	Yes; None[55]
Kimpacto, Inc.	CA	Service: impact investing advisory firm	Helps social entrepreneurs find financing	Yes; B Lab[56]
King Arthur Flour Company, Inc.	VT	Good: baked goods	Uses baking to make a difference for customers, employee owners, communities, and planet	Yes; B Lab[57]
Laureate Education, Inc.	DE	Service: higher education	Provides higher education opportunities, predominantly in the developing world	Yes; B Lab[58]
Organik SEO	CA	Service: marketing	Provides online marketing services for social enterprise	No; B Lab[59]
Outlier Incorporated	NY	Good: clothing	Produces clothing while respecting environment, community, and workers	Yes; B Lab[60]
Patagonia, Inc.	CA	Good: clothing	Produces clothing without unnecessary harm (recyclable materials, monitor supply chain)	Yes; B Lab[61]
Seventh Generation, Inc.	VT	Good: cleaning products	Uses renewable, plant-based ingredients to manufacture cleaning supplies	Yes; GRI[62]

[55] KICKSTARTER PBC, BENEFIT STATEMENT (2016), https://www.kickstarter.com/year/2016/benefit-statement. Kickstarter is not required to incorporate a third-party standard into its benefit report because it is incorporated in Delaware. *See* DEL. CODE ANN. tit. 8, § 366(c)(3) (2018).

[56] KIMPACTO, INC., BENEFIT CORPORATION ANNUAL BENEFIT REPORT 3 (Mar. 31, 2017), http://www.kimpacto.com/uploads/1/9/5/1/19510313/kimpacto_-_annual_benefit_corp._report-march_2017_rev.pdf.

[57] KING ARTHUR FLOUR CO., INC., 2017 BENEFIT CORPORATION ANNUAL REPORT 3 (2017) [hereinafter KING ARTHUR 2016 REPORT], https://www.kingarthurflour.com/our-story/2017-bcorp-report.pdf.

[58] LAUREATE EDUC. INC., 2017 LAUREATE GLOBAL IMPACT REPORT 16 (2017), http://laureategir.net/2017/en.pdf.

[59] Organik SEO does not provide a benefit report directly, but instead provides a link to B Lab. *See Organik SEO's Annual Benefit Corporation Report*, ORGANIK SEO [hereinafter ORGANIK REPORT LINK], https://organikseo.com/about/b-corporation/.

[60] OUTLIER INCORPORATED, ANNUAL BENEFIT REPORT 7 (2012), https://outlier.nyc/BenefitReports/Outlier_2012%20Annual%20Benefit%20Report%20%20(final).pdf.

[61] PATAGONIA, INC., ANNUAL BENEFIT CORPORATION REPORT 10 (2016) [hereinafter PATAGONIA 2016 REPORT], https://www.patagonia.com/static/on/demandware.static/-/Library-Sites-PatagoniaShared/default/dw883f0dc2/PDF-US/2016-B-CorpReport-031417.pdf.

[62] SEVENTH GENERATION, INC., 2017 CORPORATE CONSCIOUSNESS REPORT 56 (2017) [hereinafter SEVENTH GENERATION 2017 REPORT], https://www.seventhgeneration.com/sites/default/files/2018-07/SVG_CC-Report_LOWRES-PREVIEW.pdf.

Software for Good, GBC	MN	Service: software development	Develops web and mobile applications for organizations working toward positive environmental and social change	Yes; B Lab[63]
The Soulfull Project PBC	NJ	Good: hot cereal	Provides one serving of hot cereal to local food bank for every serving of hot cereal purchased	Not Available[64]
Tony's Chocolonely, Inc.	OR	Good: chocolate	Prevents worker exploitation in the cocoa industry	Yes; GRI[65]
Urbane & Gallant, Inc.	CA	Good: clothing	Produces clothing while combatting human trafficking, including labor trafficking and sex trafficking	Yes; B Lab[66]
Yerdle Recommerce, Inc.	CA	Service: internet sales platform, logistical services	Provides logistics and technology that makes it easy for brands to buy back and resell their items, empowering the circular economy	Not Available[67]
Yikes, Inc.	PA	Service: web design	Provides web design services while using 100% renewable energy	Yes; B Lab[68]

C. How Benefit Corporations Differ from Nonprofits

Traditionally, a person who wanted to form a corporation had two choices: a for-profit or a nonprofit.[69] If the person wanted to "do good," her only real choice was the nonprofit because the shareholder-centric paradigm applicable to for-profit corporations leaves little room for pursuing a public

[63] Software for Good, GBC, 2017 Annual Benefit Report 7 (2017), https://www.sos.state.mn.us/media/3260/software-for-good.pdf.

[64] The Soulfull Project, PBC, https://thesoulfullproject.com.

[65] Toney's Chocolonely, Inc., Annual Fair Report 2016/2017 101 (2017), https://tonyschocolonely.com/storage/configurations/tonyschocolonelycom.app/files/jaarfairslag/2017-2017/tc_jaarfairslag_2016_en_totaal_01.pdf.

[66] Urbane & Gallant, Inc., Annual Benefit Report 2014 7 (2014), https://cdn.shopify.com/s/files/1/0366/9985/files/2014_annual_benefit_report-lowres.pdf.

[67] Yerdle Recommerce, Inc., https://www.yerdlerecommerce.com/index.html.

[68] Yikes, Inc., Annual Benefit Report 8 (Jan. 10, 2017), https://2fizr236wtbd3a0ep33qe8gb-wpengine.netdna-ssl.com/wp-content/uploads/2017/01/Annual-Benefit-Report_2016.pdf.

[69] *See, e.g.*, Michael A. Hacker, *"Profit, People, Planet" Perverted: Holding Benefit Corporations Accountable to Intended Beneficiaries*, 57 B.C. L. Rev. 1747, 1752 (2016) (discussing the "blunt dichotomy" between for-profit and nonprofit business organizations); Eric Chafee, *The Origins of Corporate Social Responsibility*, 85 U. Cin. L. Rev. 353, 361 (2017) (discussing the "divide" between for-profit and nonprofit business organizations).

benefit purpose.[70] However, there are several disadvantages to forming a nonprofit, summarized in the chart below.

CHART 2. Legal Entity Comparison Chart[71]

	Can it Raise Capital from Investors?	**Can it Engage in Commercial Activities?**	**Can it Pursue a Public Benefit Purpose?**	**Is it Tax-Exempt?**
Nonprofit Corporation	No	Restricted	Yes	Yes
Benefit Corporation	Yes	Yes	Yes	No
For-profit Corporation	Yes	Yes	No	No

1. Nonprofits Cannot Engage in Commercial Activities

Many social entrepreneurs—with good ideas for solving social problems—are prevented from forming nonprofits because, to again quote Professor Tu, their ideas are "too much of a 'business' for the nonprofit form."[72] That requires some unpacking.

First, a nonprofit must be formed for a charitable purpose as a matter of state law. Take again the example of New York. With limited exception,[73] New York's Not-For-Profit Law provides that the Certificate of Incorporation must state that the nonprofit is being formed as a "charitable corporation."[74] The statute then provides that a charitable corporation is one that is

[70] *See* Sergio Castello & Andrew Sharp, *Ignatian Business Values and Benefit Corporations: A Countercultural and Revolutionary Theory of the Firm*, 8 J. JESUIT BUS. EDUC. 85, 88 (2017) ("[t]raditional business values focus on increasing profits").

[71] Information for this chart is compiled from Parts I.C. & I.D. Because they have fallen into disuse, this Article does not discuss, or compare, the L3C. L3Cs were designed to attract program-related investment (PRI) from grant-making nonprofit foundations. *See* J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 544–45 (2016). Unfortunately, the IRS has not played along, refusing (so far) to hold that investments in L3Cs automatically qualify as PRIs (and if the IRS later determines that the investment does not qualify as a PRI, the nonprofit foundation has jeopardized its tax-exempt status). *See* Michael D. Gottesman, *From Cobblestones to Pavement: The Legal Road Forward for the Creation of Hybrid Social Organizations*, 26 YALE L. & POL'Y REV. 345, 349–50 (2007). North Carolina repealed its L3C statute just a few years after authorizing it. *See* Anne Field, *North Carolina Officially Abolishes the L3C,* FORBES (Jan. 11, 2014), http://www.forbes.com/sites/annefield/2014/01/11/north-carolina-officially-abolishes-the-l3c/. No new states have joined the ranks of those listed above. *See* Murray, *supra*, at 546.

[72] Tu, *supra* note 2, at 158.

[73] Technically, in New York, a nonprofit can be formed for other-than-charitable purposes, but those too are limited to purposes that are "non-pecuniary" in nature, such as a fraternal organization. N.Y. NOT-FOR-PROFIT CORP. LAW § 102(a)(9-a) (2018).

[74] N.Y. NOT-FOR-PROFIT CORP. LAW § 402(a)(2-a) (2018).

formed for "charitable purposes."[75] And with some degree of circularity, the statutorily provided list of charitable purposes includes "charity."[76]

Second, a nonprofit cannot receive tax exempt status pursuant to section 501(c)(3) of the Internal Revenue Code unless it is formed for a charitable purpose (and thus, here, federal law mirrors state law).[77] The Treasury Regulations implementing section 501(c)(3) define charitable purpose in accord with its generally accepted legal meaning, which includes "relief of the poor and distressed or of the underprivileged."[78]

There is a natural corollary to the second point above (although the first point is equally implicated[79]). Commercial activity—other than that which is purely incidental to the nonprofit's charitable purpose[80]—prevents a nonprofit from achieving section 501(c)(3) tax-exempt status.[81]

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[75] *Id.* § 102(a)(3-a).

[76] *Id.* § 102(a)(3-b).

[77] 26 U.S.C. § 501(c)(3) (2018) (limiting the exemption, in part, to nonprofits "organized and operated exclusively for religious, *charitable*, scientific, testing for public safety, literary, or educational purposes.") (emphasis added). Another problematic aspect of 501(c)(3) is that to retain its tax-exempt status, a nonprofit's activities must benefit the public generally, not a specific individual. Consider this example provided in the regulations:

> O's principal activity is exhibiting art created by a group of unknown but promising local artists . . . . All of the art exhibited is offered for sale at prices set by the artist. Each artist whose work is exhibited has a consignment arrangement with O. Under this arrangement, when art is sold, the museum retains 10 percent of the selling price to cover the costs of operating the museum and gives the artist 90 percent.
>
> The artists in this situation directly benefit from the exhibition and sale of their art. As a result, the principal activity of O serves the private interests of these artists. Because O gives 90 percent of the proceeds from its sole activity to the individual artists, . . . O's provision of these benefits to the artists is more than incidental to its [purported exempt purpose.]
>
> This arrangement causes O to be operated for the benefit of private interests in violation of the restriction on private benefit in paragraph (d)(1)(ii) of this section. Based on these facts and circumstances, O is not operated exclusively for exempt purposes and, therefore, is not described in section 501(c)(3).

26 C.F.R. § 1.501(c)(3)-1(d)(3) Example 2 (2018). The foregoing would likely prevent ArtLifting, discussed in the introduction, from qualifying under section 501(c)(3).

[78] *Id.* § 1.501(c)(3)-1(d)(2) (2018).

[79] *See* N.Y. Not-for-Profit Corp. Law § 204 (2018); *Santos v. Chappell*, 318 N.Y.S.2d 570 (N.Y. Sup. Ct. 1971) (discussing whether various profit-generating activities are consistent with nonprofit status).

[80] A nonprofit is allowed to make a purely incidental profit. New York Law provides:

> A corporation whose lawful activities involve among other things the charging of fees or prices for its services or products shall have the right to receive such income and, in so doing, may make an incidental profit. All such incidental profits shall be applied to the maintenance, expansion or operation of the lawful activities of the corporation, and in no case shall be divided or distributed in any manner whatsoever among the members, directors, or officers of the corporation.

N.Y. Not-for-Profit Corp. Law § 508 (2018).

[81] *See Airlie Found. v. IRS*, 283 F. Supp. 2d 58, 62 (D.D.C. 2003) (applying 26 U.S.C. § 501(c)(3) (2002)); *see* J. Haskell Murray & Edward I. Hwang, *Purpose with Profit: Governance, Enforcement, Capital-Raising and Capital-Locking in Low-Profit Limited Liability Companies*, 66 U. Miami L. Rev. 1, 10 (2011) ("Engaging a nonprofit in any margin-generating

And so, the question becomes: what is commercial activity? In short, an activity is commercial if it "has a direct counterpart in, or is conducted in the same manner as is the case in the realm of for-profit organizations."[82] This means that many of the benefit corporations listed in Chart 1 could not instead be formed as nonprofits (and without the ability to form a benefit corporation, likely could not operate at all).[83] Returning to one of the examples above, the founders of Greyston Bakery, Inc., could not have organized as a nonprofit.[84] It is engaged in the type of business—baking and selling brownies—that has a direct counterpart in the for-profit realm (such as Hostess Brands Inc., the makers of the Twinkie).[85]

2. Nonprofits Have Difficulty Raising Capital

Nonprofits cannot issue stock, which makes raising capital difficult.[86] As Professor Thomas Kelley explained, "[b]ecause nonprofits generally cannot issue stock . . . there is no straightforward way for a venture capitalist or other for-profit investor to take an equity stake in a nonprofit social venture."[87]

Even if a nonprofit could issue stock (or make a profit), a nonprofit is bound by the "non-distribution constraint."[88] As the term implies, a nonprofit cannot distribute income or profit to any stockholder.[89] Instead, all income and profits must be reinvested back into the corporation to further the nonprofit's lawful activities.[90]

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activities could subject a tax-exempt entity to the Internal Revenue Service's . . . commerciality doctrine, . . . which can be fatal to the organization's nonprofit and tax-exempt status.").

[82] Thomas Kelley, *Rediscovering Vulgar Charity: A Historical Analysis of America's Tangled Nonprofit Law*, 73 FORDHAM L. REV. 2437, 2476–77 (2005) (quoting Bruce R. Hopkins, THE LAW OF TAX-EXEMPT ORGANIZATIONS 629–30 (7th ed. 1998)).

[83] Alicia E. Plerhoples, *Delaware Public Benefit Corporations 90 Days Out: Who's Opting In?*, 14 U.C. DAVIS BUS. L.J. 247, 268 (2014) (calculating that 65% of benefit corporations would be prevented by their business activities from forming as nonprofits).

[84] For an excellent commentary on how inconsistently the commerciality test has been applied, see Kelley, *supra* note 82, at 2473.

[85] I.R.S. Priv. Ltr. Rul. 201310046 (Dec. 13, 2012) (operational test failed where organization is engaged in the sale of hot chocolate).

[86] *See* N.Y. NOT-FOR-PROFIT CORP. LAW § 501 (2018) (prohibiting the issuance of shares).

[87] Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337, 353–54 (2009). *See also* Murray & Hwang, *supra* note 81, at 10 (discussing how difficult it is for nonprofits to raise capital).

[88] *See* Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L. REV. 835, 838 (1980). *See also* Regina Robson, *A New Look at Benefit Corporations: Game Theory and Game Changer*, 52 AM. BUS. L.J. 501, 520 (2017) (discussing the impact of the non-distribution constraint on raising capital).

[89] *See* N.Y. NOT-FOR-PROFIT CORP. LAW § 515 (2018).

[90] *See id.* § 508; Roxanne Thorelli, *Providing Clarity for Standard of Conduct for Directors Within Benefit Corporations: Requiring Priority of a Specific Public Benefit*, 101 MINN. L. REV. 1749, 1763 (2017) ("As non-profit corporations are tax-exempt entities, they are prohibited from making any distribution of income and must re-invest any 'profit' back into the corporation.").

Finally, as to debt financing, because of the limitations on revenue generating activity, banks are not certain that nonprofits will have the revenue to pay back a loan, and are therefore "reluctant to make loans to nonprofits on competitive terms."[91]

As a result, nonprofits are dependent on donations.[92] The average head of a nonprofit spends a large portion of his time fundraising.[93] Beyond time, fundraising is also emotionally exhausting. Adam Braun is the founder of one of the most successful nonprofits in the world, Pencils of Promise, Inc.[94] He wrote that he hated asking people for donations: "I was scared. Scared to face rejection. Scared to hear no. Scared to be seen as someone who was asking for a handout."[95]

On the other hand, benefit corporations have an easier time (at least in terms of more options[96]) raising capital because they are asking for investments, not handouts. Investors in benefit corporations are issued stock, with all the accompanying benefits.[97]

D. How Benefit Corporations Differ from Traditional Corporations

Traditional corporations *can* engage in altruistic acts. Consider this example from Professor Joseph Yockey:

> To its credit, Starbucks uses a third-party . . . certification system to ensure that it purchases coffee beans through channels that promote social, environmental, and economic value for farmers and local communities. It employs thousands of people and maintains close watch over its suppliers. It will stop working with those who fail to live up to its standards for socially responsible practices. Overall, Starbucks arguably provides more "good" than many [benefit corporations] given its ability to leverage economies of scale. But the company's social focus still remains inciden-

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[91] *See* Kelley, *supra* note 87, at 354.

[92] *See* Murray & Hwang, *supra* note 81, at 10.

[93] *Frequently Asked Questions*, ArtLifting, https://www.artlifting.com/pages/frequently-asked-questions; *see* Brian Elliot, *Social/Tech Entrepreneurs' Identity Crisis*, Harv. Bus. Rev. (Oct. 19, 2010), https://hbr.org/2010/10/socialtech-entrepreneurs-ident ("[m]ost of my time is spent seeking funds").

[94] Pencils of Promise, https://pencilsofpromise.org/about/founders-story.

[95] Adam Braun, The Promise of a Pencil: How an Ordinary Person Can Create Extraordinary Change 219–20 (2014). Braun wrote that he overcame that fear when he realized he wasn't asking for him but for the children that he served. *See id.* at 223.

[96] "Easier" is a relative term. *See* Mark Horoszowski, *The Truth About Raising Money as a "Benefit Corporation*," MovingWorlds Blog (June 3, 2014), https://blog.movingworlds.org/the-truth-about-raising-money-as-a-benefit-corporation/ (stating that for-profit social enterprise finds it hard to raise capital).

[97] *See* Jason M. Wilson, *Litigation Finance in the Public Interest*, 64 Am. U.L. Rev. 385, 425 (2014); *FAQ*, Benefit Corp., http://benefitcorp.net/faq ("Benefit corporations have raised capital from many different types of investors in the private markets from traditional to impact focused funds. An increasing number of investors are also supporting their own portfolio company's adoption of benefit corporation status.").

> tal to its core revenue-generating activity of selling high-end coffee drinks and coffee-related products. Put another way, Starbucks "does not exist first and foremost to solve a social problem," nor does it have a "deep and particular commitment to philanthropic endeavor" that animates everything it does.[98]

But what if Starbucks wanted to redefine its purpose so that it did, to quote Professor Yockey, "exist first and foremost to solve a social problem"? That could pose problems.[99] Operating as a corporation can be risky for an entrepreneur who wants to pursue both making money and a public benefit purpose.[100] Is pursuing a public benefit purpose consistent with management's fiduciary duty of care?[101] The foregoing question is raised by the one-hundred-year-old case *Dodge v. Ford.*[102] In that case, Ford Motor Company—flush with surplus cash in the amount of $111.9 million[103] —was chastised by the court for not paying a dividend to its investors.[104]

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[98] Yockey, *supra* note 2, at 775.

[99] *See* Alina S. Ball, *Social Enterprise Governance*, 18 U. PA. J. BUS. L. 919, 946–47 (2016) ("fiduciary duties of traditional for-profit entities, particularly a for-profit corporation, force the directors and officers to prioritize owner maximization of profit, with no carve out to preserve the social mission of the entity").

[100] *See id.* at 947.

[101] *Compare* Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163 (2008) (corporations can pursue social missions), *with* Jonathan R. Macey, *A Close Read of an Excellent Commentary on Dodge v. Ford*, 3 VA. L. & BUS. REV. 177 (2008) (corporations must pursue shareholder wealth maximization).

[102] *See generally Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919); *see* Hacker, *supra* note 69, at 1752 ("For much of corporate law's history, a blunt dichotomy existed between for-profit and nonprofit entities. This was due in part to over-application of the Michigan Supreme Court's 1919 holding in *Dodge v. Ford Motor Co.*, where, in dictum, the court famously wrote that for-profit corporations are organized and operated exclusively for the benefit of their shareholders and directors must ensure that their actions put shareholder profit ahead of other competing interests. This is regarded as the shareholder primacy theory of corporate law and it has dominated discussions of corporate law for most of the past century.").

[103] Ford Motor Company's capital surplus was so large that the board of directors declared special dividends in each of 1911, 1912, 1913, 1914, and 1915. *Dodge v. Ford*, 170 N.W. at 670. Even so, by 1916 the surplus had ballooned to $111.9 million, as shown in the chart below:

Year Ending	Number of Cars Sold	Profits (in millions)	Regular Dividend (in millions)	Special Dividend (in millions)	Surplus Above Capital Stock (in millions)
Sept. 30, 1910	18,664	$4.5	$.4	—	—
Sept. 30, 1911	34,466	$6.2	$.4	$1	—
Sept. 30, 1912	68,544	$13.0	$.4	$4	$14.7
Sept. 30, 1913	168,304	$25.0	$.4	$10	$28.1
Sept. 30, 1914	248,307	$30.3	$.4	$11	$48.8
July 31, 1915 (10 months)	264,351	$24.6	$.4	$15	$59.1
July 31, 1916	472,350	$59.9	$.4	—	$111.9

Id.

[104] *See id.* at 684.

Rather than paying a dividend, Henry Ford wanted to use the surplus cash to help customers pay for a new automobile (those customers are characterized in this Article as supporting stakeholders), and thus share the company's profits with those supporting stakeholders.[105] That is to say, the goal was "to continue the corporation henceforth as a semi-eleemosynary [defined as benevolent or charitable] institution and not as a business institution."[106]

The foregoing statement—with an emphasis on the use of the word semi-eleemosynary—is the key to understanding the court's decision. The court was not concerned that some of the cash surplus was going to charity.[107] Instead, the court was concerned that Henry Ford (who owned fifty-eight percent of Ford Motor Company, and thus controlled the board of directors) was attempting to *change the very purpose of the corporation* from benefiting investors to benefiting the public.[108]

And so, when the Dodge brothers sued to compel the declaration of a dividend,[109] the court was inclined to do so, famously holding, "[a] business corporation is organized and carried on primarily for the profit of the stockholders."[110] The court went on to state that while a board of directors had broad discretion as to how it maximizes shareholder profit, that discretion "does not extend to a change in the end itself, to the reduction of profits or to the nondistribution of profits among stockholders in order to devote them to other purposes."[111]

Dodge v. Ford is not alone in its affirmation of the shareholder wealth maximization norm; consider *eBay Domestic Holdings, Inc. v. Newmark.*[112] In that case, the issue of "what is a proper corporate objective?" came up in

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[105] *See id.* at 683-684 (discussing that Henry Ford wanted to share the company's prosperity with the broader public, "by reducing the price of the output of the company.").

[106] *Id.*

[107] *See id.* at 684.

[108] *See id.*

[109] The Dodge brothers owned ten percent of Ford Motor Company. *See Dodge v. Ford*, 170 N.W. at 669.

[110] *Id.* at 684. Also driving the decision of the court appears to be the court's impression that Henry Ford had developed some level of animosity toward the shareholders of the corporation. The court observed: "[t]he record, and especially the testimony of Mr. Ford . . . creates the impression . . . that he thinks the Ford Motor Company has made too much money. . . [and that] a sharing of [that money] with the public, by reducing the price of the output of the company, ought to be undertaken." *Id.* at 683–84; *see* Macey, *supra* note 101, at 182–84 (suggesting that the decision was driven by Henry Ford's unbridled honesty as to his motivations).

[111] *Dodge v. Ford*, 170 N.W. at 684.

[112] *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010); *see Revlon Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 183 (Del. 1986) ("Although such considerations [of non-stockholder corporate constituencies and interests] may be permissible, there are fundamental limitations upon that prerogative. A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders."); *see also* Joseph Mead & Michael Pollack, *Courts, Constituencies, And The Enforcement Of Fiduciary Duties In The Nonprofit Sector*, 77 U. PITT. L. REV. 281, 308 (2016) (discussing the shareholder maximization norm).

the context of the legality of a stockholder rights plan.[113] The stockholder rights plan was put into place by the founders of craigslist to prevent a takeover by eBay (the founders of craigslist believed eBay was too focused on maximizing profit) to preserve craigslist's culture of *not* maximizing shareholder profit.[114] Beginning with a nod to *Dodge v. Ford*,[115] the court stated:

> [The founders of craigslist] personally believe craigslist should not be about the business of stockholder wealth maximization, now or in the future. As an abstract matter, there is nothing inappropriate about an organization seeking to aid local, national, and global communities . . . . The corporate form in which craigslist operates, however, is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment. Jim and Craig opted to form craigslist, Inc. as a *for-profit Delaware corporation* and voluntarily accepted millions of dollars from eBay as part of a transaction whereby eBay became a [minority] stockholder. Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include *acting to promote the value of the corporation for the benefit of its stockholders*.[116]

Thus, in a traditional corporation, pursuit of a public benefit purpose is inconsistent with management's fiduciary duty of care. A traditional corporation cannot change its primary purpose from increasing shareholder wealth to pursuing a public benefit purpose, i.e., doing good.[117]

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[113] Under *Unocal Corp. v. Mesa*, such a plan must serve a proper corporate objective. *See Newmark*, 16 A.3d at 28 (citing *Unocal Corp. v. Mesa*, 493 A.2d 946 (Del. 1985)).

[114] *See id.* at 8. The Court summarizes craigslist's anti-profit culture as follows:

> Though a for-profit concern, craigslist largely operates its business as a community service. Nearly all classified advertisements are placed on craigslist free of charge. Moreover, craigslist does not sell advertising space on its website to third parties. Nor does craigslist advertise or otherwise market its services, craigslist's revenue stream consists solely of fees for online job postings in certain cities and apartment listings in New York City.

Id. at 8.

[115] Technically, the court referenced Jonathan Macey's commentary on *Dodge v. Ford*. *See id.* at 34 (citing Macey, *supra* note 101, at 179).

[116] *Newmark*, 16 A.3d at 34 (emphasis added).

[117] There are many who would disagree with me. *See, e.g.*, J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 10 (2012) (arguing that *eBay v. Newmark* and *Dodge v. Ford* should be limited to their facts); Anthony Page & Robert Katz, *The Truth About Ben & Jerry's*, STAN. SOC. INNOVATION REV. (2012), https://ssir.org/articles/entry/the_truth_about_ben_and_jerrys ("[C]orporate law does not require publicly traded corporations to maximize shareholder wealth."). For an in-depth discussion of the debate, *see* Emily Winston, *Benefit Corporations and the Separation of Benefit and Control*, 39 CARDOZO L. REV. 1783, 1812–13 (2018). Winston implies that the fact there is no clear answer—*i.e.*, "uncertainty"— justifies benefit corporations, especially when one considers that said uncertainty impacts (or in some cases, paralyzes) corporate decision making. *See id. See* Jay Coen Gilbert, *The Real Truth About Ben*

That being said, the legacy of *Dodge v. Ford* is often discussed in overly one-dimensional terms: "[f]irms cannot have a conscience or compassionate commitment to anyone; they can only strive for profit and shareholder maximization."[118] This is too strict a reading of *Dodge v. Ford*. As mentioned above, *Dodge v. Ford* leaves room for a company to take into account how its actions—including socially responsible actions—increase long-term financial return to investors.[119] And thus, as a practical norm, companies often—without challenge—give to charity a portion of funds that could go to investors.[120]

But the founders of benefit corporations want to do more than give a portion of the profits to charity. They want to put pursuing a public benefit purpose first.[121] In so doing, they cross the line that *Dodge v. Ford* established: that the underlying purpose of a corporation cannot be changed from profit maximization to pursuit of a social goal.[122] Thus, to reduce the likelihood of a successful *Dodge v. Ford* type challenge, many states now allow for the formation of hybrid business organizations.[123] The most popular of these hybrid entities is the benefit corporation.[124] By altering the fiduciary duties owed by directors to investors, benefit corporation legislation provides a level of comfort for directors, and management in general, who wish to make decisions first based on social impact, and second based on profit-maximization.

II. Why Benefit Corporation Disclosure is Important

Before discussing why the current benefit corporation disclosure rules are unworkable, and why a uniform disclosure regime should replace it,[125] it is necessary to discuss why benefit corporation disclosure is important. First, disclosure is important for encouraging investment in benefit corporations—

& Jerry's and the Benefit Corporation, CSR Newswire (Oct. 1, 2012), http://www.csrwire.com/blog/posts/559-the-real-truth-about-ben-jerrys-and-the-benefit-corporation-part-1.

[118] Castello & Sharp, *supra* note 70, at 88 (citing William Quigley, *Catholic Social Thought and the Amorality of Large Corporations: Time to Abolish Corporate Personhood*, 5 Loy. J. Pub. Int. L. 109 (2004)).

[119] Joan MacLeod Heminway, *To Be or Not to Be (A Security): Funding For-Profit Social Enterprises*, 25 Regent U. L. Rev. 299, 300–02 (2013). This is confirmed in *Newmark*, where the court says there are many circumstances where it is perfectly acceptable for a corporation to "promot[e] non-stockholder interests—be it through making a charitable contribution, paying employees higher salaries and benefits . . . ." *Newmark*, 16 A.3d at 33.

[120] Heminway, *supra* note 119, at 302.

[121] *See supra* Part I.

[122] *Dodge v. Ford*, 170 N.W. at 684.

[123] *See State by State Status of Legislation*, *supra* note 1.

[124] *See supra* note 71 (discussing the fall of the limited profit limited liability company, L3C).

[125] *See infra* Parts III & IV.

people want to understand a company before they will invest in it. Second, disclosure alleviates fears of greenwashing.[126]

A. Disclosure Is a Necessary Prerequisite to Investment

Then-Professor Frank H. Easterbrook and Professor Daniel R. Fischel wrote regarding the public securities markets, "a world without adequate truthful information, is a world with too little investment."[127] This observation is confirmed through (1) empirical research and (2) observing history.

First, empirical research finds that information is a necessary prerequisite to investment.[128] For example, numerous empirical studies have found that liquidity—a measure of how many willing buyers there are for a security—increases as disclosure increases.[129] Of course, the quality of the disclosure plays a role here.[130]

Second, history teaches that a well-functioning disclosure system is a prerequisite to investment. The flow of capital into the United States capital markets increased once corporate disclosure became mandatory under the Securities Laws.[131] The Securities Laws are the most important disclosure

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[126] Phrased differently, a traditional corporation only needs to worry about disclosing information relevant to financial return, but a benefit corporation must disclose more. Investors in benefit corporations are interested in both financial return, *see* Brianna Cummings, *Benefit Corporations: How to Enforce a Mandate to Promote the Public Interest*, 112 COLUM. L. REV. 578, 588 (2012) (investors question whether they can expect market rate returns), and social return, *see* Cohen & Lingenfelter, *supra* note 13, at 121 ("[I]f benefit corporations are going to be able to attract capital, investors are going to have to have confidence in both the financial and non-financial performance of the corporation."). One social entrepreneur explained: "[y]ou're not just validating a business [model] and then raising money; You're validating a business model that helps make the world a better place." Horoszowski, *supra* note 96.

[127] Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and The Protection of Investors*, 70 VA. L. REV. 669, 673 (1984); *see also* H. COMM. ON INTERSTATE AND FOREIGN COMMERCE, 95TH CONG., 1ST SESS., REP. ON THE ADVISORY COMMITTEE ON CORPORATE DISCLOSURE TO THE SECURITIES AND EXCHANGE COMMISSION xvi (Comm. Print 1977) (stating that better disclosure encourages investment).

[128] As information increases, the cost of capital decreases. *See* Edwige Cheynel, *A Theory of Voluntary Disclosure and the Cost of Capital*, 18 REV. ACCT. STUD. 987, 987 (2013).

[129] *See* Merritt B. Fox, *Civil Liability and Mandatory Disclosure*, 109 COLUM. L. REV. 237, 265–66 (2009) (discussing empirical findings that disclosure increases liquidity); *see also* Brian J. Bushee & Christian Leuz, *Economic Consequences of SEC Disclosure Regulation: Evidence from the OTC Bulletin Board*, 39 J. ACCT. & ECON. 233, 236 (2005) (showing that increased disclosure increases liquidity); Michael Welker, *Disclosure Policy, Information Asymmetry, and Liquidity in Equity Markets*, 11 CONTEMP. ACCT. RES. 801, 801 (1995) ("a well-regarded disclosure policy reduces information asymmetry and hence increases liquidity in equity markets").

[130] *See* Arthur Levitt, Remarks on Corporate Finance in the Information Age at Securities Regulation Institute, San Diego, California (Jan. 23, 1997), https://www.sec.gov/news/speech/speecharchive/1997/spch135.txt.

[131] *See* BUREAU OF ECON. ANALYSIS, U.S. DEP'T COMMERCE, SURVEY OF CURRENT BUSINESS 49 (1938) [hereinafter 1938 Survey] (showing an increase in stock issuances between 1933 and 1937); *see also* Easterbrook & Fischel, *supra* note 127, at 692–93 (discussing the apparent increase in confidence after the Securities Act of 1933).

statutes in the United States, and a model for disclosure statutes worldwide.[132]

While the foregoing observations pertain to the public securities markets, there is no doubt that information is also important to those that invest in private placements, which are the primary method by which benefit corporations raise capital.[133]

Professor Ronnie Cohen & Gabriele Lingenfelter wrote that "[i]f benefit corporations are going to be able to attract capital, investors are going to have to have confidence in both the financial and non-financial performance of the corporation."[134]

Some benefit corporations have successfully navigated from the angel investing[135] round to the venture capital[136] round.[137] For example, Yerdle, a

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[132] Frederick Tung, *From Monopolists to Markets: A Political Economy of Issuer Choice in International Securities Regulation*, 2002 Wis. L. Rev. 1363, 1365–66 (2002) (discussing that many nations embraced the U.S. example); Stuart R. Cohn & Gregory C. Yadley, *Capital Offense: The SEC's Continuing Failure to Address Small Business Financing Concerns*, 4 N.Y.U. J. L. & Bus. 1, 77 (2007) ("foreign countries frequently look to U.S. business and securities laws as models for adoption").

[133] Private investors only commit their money after they sift through all the available information, and if there is no available information, they will not invest. Usha Rodregues, *Securities Law's Dirty Little Secret*, 81 Fordham L. Rev. 3389, 3401 (2013). Further, private investors require that the information be regularly updated. Douglas G. Smith, *The Venture Capital Company: A Contractarian Rebuttal to the Political Theory of American Corporate Finance*, 65 Tenn. L. Rev. 79, 117–19 (1997).

Private investors' focus on due diligence is understandable. If they invest, they will be committing large amounts of money for long periods of time. Rodregues, *supra*, at 3401; *see* C. Steven Bradford, *Crowdfunding and The Federal Securities Laws*, 2012 Colum. Bus. L. Rev. 1, 103 (2012) (stating that the average angel investment is between $100,000 and $2 million); *see also* National Venture Capital Association, Yearbook 2017, 5 (2017) (stating that the average VC investment is $9 million).

Private investors are in a position to demand disclosure from benefit corporations. However, it is better if the information is available ex ante. Private investors are able to invest less time in due diligence—i.e., spend less up-front money choosing an investment—when the information is already available (or at least a core portion of the information is already available). *See* Expert Report of Mark A. Sunshine at ¶ 72, National Credit Union v. RBS Securities, No. 11-cv-2340-JWL (D. Kan., Mar. 23, 2016) ("[T]he costs and effort . . . to purchase such [a] security are minimized because the information that the investor would have discovered in due diligence is already available."); Anita Indira Anand, *The Efficiency of Direct Public Offerings*, 7 J. Small & Emerging Bus. L. 433, 437–38 (2003) (stating that where information is not available, the cost of acquiring the information falls on the investor).

[134] Cohen & Lingenfelter, *supra* note 13, at 121.

[135] Angel investors are wealthy individuals who invest their own money directly (i.e., they do not rely on intermediaries), by purchasing stock or common stock. Abraham J.B. Cable, *Fending for Themselves: Why Securities Regulations Should Encourage Angel Groups*, 13 U. Pa. J. Bus. L. 107, 115 (2010). They must be wealthy because under the current regulatory framework startup offerings are often structured as private placements, and private placements may only be made to accredited investors (which is a regulatory synonym for wealthy). Seth C. Oranburg, *Bridgefunding: Crowdfunding and the Market for Entrepreneurial Finance*, 25 Cornell J. L. & Pub. Pol. 397, 407 (2015).

[136] Venture capital ("VC") firms form VC funds to invest other people's money. Cable, *supra* note 135, at 112. Those other people have plenty of money to invest because they are required by regulation to have investments in excess of $5 million. *See* Oranburg, *supra* note 135, at 409–10 (citing 15 U.S.C. § 80a-2(51)(A) (2012)). They are usually pension funds, endowments, or foundations. *See id.*

benefit corporation located in San Francisco, California, began with hundreds of thousands of dollars from angel investors and then raised $5 million from venture capital firms.[138] Both angels and venture capital firms are notoriously hungry for information.

Unfortunately, many other benefit corporations are having trouble raising capital.[139] It is because they do a poor job:

1. explaining to prospective investors what kind of financial return the investor can expect;[140]
2. explaining to prospective investors their public benefit purpose (the "what" of their social mission);[141] and
3. explaining to prospective investors how they will successfully pursue their public benefit purpose (the "how" of their social mission).[142]

Of course, the foregoing implies the reciprocal as well. If a benefit corporation can explain to investors through disclosure their expected financial return, social return, and how they will get there, investment will increase.

B. Disclosure Discourages Greenwashing

In addition to helping investors, disclosure helps supporting stakeholders know whether a benefit corporation is honestly pursuing its public benefit purpose, alleviating a concern that is sometimes discussed in terms of greenwashing.[143]

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[137] Benefit corporations rely on the same sources of investment as more traditional startups. *See* Yockey, *supra* note 2, at 816–17 (identifying the startup model—and corresponding reliance on angel investors and venture capital—as the most promising route for benefit corporations); Dana Brakman Reiser & Steven A. Dean, *Financing the Benefit Corporation*, 40 SEATTLE U. L. REV. 793, 795 (2017) (identifying benefit corporations as startups).

[138] J. Haskell Murray, *Social Enterprise and Investment Professionals: Sacrificing Financial Interests?*, 40 SEATTLE U. L. REV. 765, 776 (2017).

[139] *See* ALLIANZ ET AL., GROWING OPPORTUNITY: ENTREPRENEURIAL SOLUTIONS TO INSOLUBLE PROBLEMS 15–16 (2007) [hereinafter ALLIANZ REPORT] (social entrepreneurs report that raising capital is the number one challenge facing benefit corporations); *see also* Laura Farley, Note, *Knowledge is Power: How Implementing Affirmative Disclosures Under the JOBS Act Could Promote and Protect Benefit Corporations and Their Investors*, 99 MINN. L. REV. 1507, 1511 (2015) (discussing benefit corporations' difficulties raising capital); Cummings, *supra* note 126, at 588 (same).

[140] *See* ALLIANZ REPORT, *supra* note 139, at 18 (discussing lack of "clarity of message").

[141] *See id.*

[142] *See id.*

[143] *See* Dana Reiser, *Benefit Corporations – A Sustainable Form of Organization*?, 46 WAKE FOREST L. REV. 591, 617 (2011) (discussing the dangers of greenwashing); Brett H. McDonnel, *Committing to Doing Good and Doing Well: Fiduciary Duty in Benefit Corporations*, 20 FORDHAM J. CORP. & FIN. L. 19, 62 (2014) (same).

1. Customers

Increasingly, socially conscious customers are willing to pay more for a good when, in addition to the good, they are getting the "warm glow" that comes with helping others.[144] For instance, a "2015 study found that 66% of consumers surveyed were willing to pay more for products and services purchased from companies committed to positive social and environmental impact, up from 55% in 2014 and 50% in 2013."[145] However, some scholars are concerned about greenwashing, which involves a benefit corporation deceiving unwitting customers into parting with their money by fraudulently claiming that it pursues social or environmental ends.[146]

Some commentators are too quick to conclude a benefit corporation is greenwashing. For example, one commentator critiqued Patagonia for pursuing a "buy less" advertising campaign that "encouraged customers to buy used products or hold onto their current products for a longer period of time," while at the same time recording $500 million in sales.[147] That critique failed to take into account that the goal of the "buy less" advertising campaign is to encourage less consumption, not to lose money. For instance, assume the following premises: (1) pre-campaign Patagonia has ten thousand customers purchasing ten garments each; (2) post-campaign Patagonia has twenty thousand customers purchasing seven garments each; (3) the ten thousand new customers are taken from competitors that produce less durable, less environmentally friendly clothing. We can conclude that per capita purchasing would decrease, yet Patagonia would record more sales at the expense of its less environmentally friendly competitors. That is a win-win consistent with the model of "do 'well' (financially) while doing 'good' (socially)."[148] It is not a sin to make money.

However, even those who are most concerned that benefit corporations will engage in greenwashing concede that this fear can be greatly reduced by improved disclosure on the part of benefit corporations.[149] If Patagonia did a better job of disclosing how many garments it sold per customer (i.e., if it could show that the per capita sales are decreasing, while its total customer base is increasing), it would help resolve these fears.

On the other hand, if Patagonia is not as environmentally responsible as it claims, disclosure will shine light on that. Customers can "'vote with their

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[144] Yockey, *supra* note 2, at 789–90; Alicia E. Plerhoples, *Nonprofit Displacement and the Pursuit of Charity Through Public Benefit Corporations*, 21 Lewis & Clark L. Rev. 525, 569 (2017).

[145] Hacker, *supra* note 69, at 1754–55 (citing *Green Generation: Millennials Say Sustainability Is a Shopping Priority*, Nielson (Nov. 11, 2015), https://perma.cc/SDG9-TE98).

[146] *See, e.g.,* Plerhoples, *supra* note 143, at 558; Reiser, *supra* note 143, at 617; McDonnel, *supra* note 143, at 62.

[147] Hacker, *supra* note 69, at 1758–59.

[148] Yockey, *supra* note 2, at 769.

[149] *See* Plerhoples, *supra* note 144, at 560–61 (disclosure mitigates greenwashing fears); Yockey, *supra* note 2, at 821 (mandatory disclosure is necessary to quell greenwashing fears).

feet', or use social media and other internet-based applications to express their concerns about certain companies' public-benefit practices."[150]

While greenwashing is often thought of in terms of the environment, it need not be. Presumably, a benefit corporation is also representing to customers—simply by virtue of choosing to be a benefit corporation—that its suppliers (often in less developed countries) treat their employees well. Disclosure can help to confirm that goods are not being produced in sweatshops. If sweatshops are a virus,[151] disclosure is the disinfectant.[152]

2. Employees

As one commentator astutely points out, "[e]mployees . . . are more willing to work for [firms that hold themselves out as] socially and environmentally responsible companies."[153] They are willing to accept lower wages to do so. For example, many business school graduates accept lower compensation to go work for a non-profit that they believe in.[154]

Thus, employees, like customers, need disclosure to confirm that a company is pursuing the public benefit purpose it claims.[155] These employees, like customers, can "vote with their feet."[156]

III. The Current Disclosure Rules

While all states require benefit corporations to prepare a benefit report,[157] that is where the consistency ends. The lack of guidance in the various statutes means that benefit reports differ—both in terms of form and content—from state to state, and even within the same state.[158]

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[150] Verheyden, *supra* note 21, at 58.

[151] *See* Jay Mazur, *About Work: Families That Slave Together*, Newsday, Jan. 31, 1989, at 54 (describing sweatshops as a virus).

[152] *See* Louis D. Brandeis, *What Publicity Can Do*, *in* Other People's Money And How The Bankers Use It 92, 92 (1914) (describing disclosure as a disinfectant).

[153] Verheyden, *supra* note 21, at 43 (citing Plerhoples, *supra* note 144, at 549).

[154] *See* J. Haskell Murray, *supra* note 117, at 52.

[155] *See id.* at 43.

[156] Verheyden, *supra* note 21, at 58.

[157] *See* J. Haskell Murray, *An Early Report on Benefit Reports*, 118 W. VA. L. Rev. 25, 30–31 (2015); *see, e.g.*, N.Y. Bus. Corp. Law § 1708 (2018).

[158] Roy Shapira, *Corporate Philanthropy as Signaling and Co-Optation*, 80 Fordham L. Rev. 1889, 1898 (2012).

A. State-Mandated Disclosure

1. Financial Disclosure

Benefit corporation legislation does not require that a benefit report include financial information.[159] A shareholder must rely on existing corporate law (i.e., they are in the same position as an investor in a traditional corporation).[160] Theoretically, a shareholder in a benefit corporation, on written request, could obtain a copy of the corporation's balance sheet and profit and loss statement.[161] A non-shareholder has no right to financial records.[162]

It is odd that benefit corporation legislation does not make it easier for potential investors—i.e., those investors that would be amendable to investing in benefit corporations, but have not yet done so—to access financial information. Part of what makes benefit corporations unique—and part of what makes them attractive to potential investors—is that they claim to make a profit while pursuing a public benefit purpose.[163] Yet it is difficult for potential investors to determine if the benefit corporation is indeed making a profit.

Thus, while existing benefit corporation legislation could encourage investment by requiring disclosure (remember, as discussed in Part II.B., potential investors like transparency), the legislation fails to do so.

2. Social Disclosure

While benefit corporation legislation does not require that benefit reports contain financial disclosure, it does require that they contain social disclosure.[164] Again, take the example of New York. In New York, the annual benefit report must contain the following disclosures:

> (1) a narrative description of:
>
> (A) the process and rationale for selecting the third-party standard used to prepare the benefit report;
>
> (B) the ways in which the benefit corporation pursued general public benefit during the year and the extent to which general public benefit was created;

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[159] *See, e.g.*, N.Y. Bus. Corp. Law § 1708 (2018). The one exception is executive compensation. New York requires benefit corporations to include in the benefit report sent to shareholders "the compensation paid by the benefit corporation during the year to each director in that capacity." *Id.* However, this may be excluded from the public version of the report. *See id.*

[160] Weismann, *supra* note 28, at 22.

[161] N.Y. Bus. Corp. Law § 624(e) (2018).

[162] David Millon, *Radical Shareholder Primacy*, 10 U. St. Thomas L.J. 1013, 1024 (2013) ("[Shareholders] alone have a right of access, albeit limited, to corporate books and records . . . .").

[163] Yockey, *supra* note 2, at 769.

[164] N.Y. Bus. Corp. Law § 1708 (2018).

> (C) the ways in which the benefit corporation pursued any specific public benefit that the certificate of incorporation states it is the purpose of the benefit corporation to create and the extent to which that specific public benefit was created; and
>
> (D) any circumstances that have hindered the creation by the benefit corporation of general or specific public benefit;
>
> (2) an assessment of the performance of the benefit corporation, relative to its general public benefit purpose assessed against a third-party standard applied consistently with any application of that standard in prior benefit reports or accompanied by an explanation of the reasons for any inconsistent application and, if applicable, assessment of the performance of the benefit corporation, relative to its specific public benefit purpose or purposes . . . .[165]

What is striking about the foregoing is the lack of guidance it provides to benefit corporations. It simply states that the benefit report should include a narrative description of how the corporation pursued its benefit purpose and a measurement of its success against a third-party standard of the corporation's choice.

As a result of the lack of guidance, no two benefit reports are alike, in terms of *what* they measure and *how* they measure it.[166] This means that investors cannot conduct an apples-to-apples comparison of social impact across companies.

The lack of guidance also means that benefit corporations can fill their benefit report with puffery,[167] similar to how traditional corporations presented information before the Securities Laws.[168] One commentator provides the following example:

> King Arthur Flour is one of the leading benefit corporations, and its benefit report is one of the most professional and detailed [I have] seen, but even their 2013 benefit report reads much more like a promotional flier than a rigorous, transparent annual report. Some of the benefits to the community are extremely vague. For example, the report states that King Arthur Flour produces "some

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[165] *Id.*

[166] And amazingly, some companies do not even meet the non-specific requirements, which are fairly accommodating). By way of example, one benefit corporation simply provides a link to their B Lab report. *See* ORGANIK REPORT LINK, *supra* note 59. A B Lab report does not contain the narrative descriptions required by most benefit corporation statutes, including "the ways in which the benefit corporation pursued a general public benefit during the applicable year and the extent to which that general public benefit was created" and "any circumstances that have hindered the creation by the benefit corporation of a general or specific public benefit." CAL. CORP. CODE § 14630(a)(1) (2018).

[167] *See* J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345, 360 (2014) (noting that most read "more like a promotional flier than a rigorous, transparent annual report").

[168] *See infra* notes 276–80 and accompanying text.

> solid waste" and that they implemented a "zero-sort recycling system" in 2009, but does not say how much waste or how much recycling was done. Even the more specific claims, such as the statement that "the company donated $ 100,000.00 in dollars, goods, and time to various organizations," are difficult to evaluate without more data about King Arthur Flour's size, how the goods and time were valued, and to whom the gifts were made. The report does state that "[f]or the most part, we donate cash or products to nonprofit organizations within a 100-mile radius of Norwich, Vermont," but does not specify how much "for the most part is" or provide detailed information about those nonprofits.[169]

Moreover—in the worst-case scenario—the lack of guidance encourages fraud. Professor White argues that it "permit[s] . . . deceptive procedures (e.g., providing lengthy and confusing information) to conceal corporate shortcomings."[170]

3. Public Availability of Disclosure

The public availability of the benefit report also varies from state to state. At one extreme are states that publish the benefit report online for the company; this is convenient for both investors and supporting stakeholders, as it creates one "go to" location for reports, similar to EDGAR for SEC filings[171], or requires that the benefit report be published on the benefit corporation's website.[172]

At the other extreme are states that do not require the benefit report to be made available to the public at all, notably, Delaware[173], Kentucky[174], and Texas.[175] Delaware law, which is representative of these states, provides: "The certificate of incorporation or bylaws of a public benefit corporation may require that the corporation: . . . Make the statement described in subsection (b) of this section available to the public."[176] Of course, the use of the word "may" makes clear that they need not.

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[169] Murray, *supra* note 43, at 360 n. 86 (citing KING ARTHUR FLOUR, BENEFIT CORPORATION REPORT 2013, http://www.kingarthurflour.com/about/documents/KAF_Annual_Report_FY13_public.pdf.).

[170] Thomas J. White III, *Benefit Corporations: Increased Oversight Through Creation of the Benefit Corporation Commission*, 41 J. LEGIS. 329, 348 (2015).

[171] One state that does this is Minnesota. *See Public Benefit Corporations Annual Reports 2018*, OFFICE OF THE MINN. SEC. OF STATE STEVE SIMON, https://www.sos.state.mn.us/business-liens/business-liens-data/public-benefit-corporations-annual-reports-2018/.

[172] For a roundup of these states, see Verheyden, *supra* note 21, at Appendix 1.

[173] *See* DEL. CODE ANN. tit. 8, § 366. (2018).

[174] KY. REV. STAT. ANN § 271B.16-210(3)(a) (2018).

[175] TEX. BUS. ORG. CODE § 21.957(b)(2) (2017).

[176] DEL. CODE ANN. tit. 8, § 366. (2018).

4. State Enforcement of Disclosure

While benefit corporation statutes require social disclosure in the form of a benefit report, the enforcement mechanisms are weak.[177] In New York, only shareholders—not supporting stakeholders—can compel the production of a benefit report, and the only way a shareholder can do so is to bring a derivative suit.[178] In fact, New York's benefit corporation legislation incorporates, by reference, New York Business Corporation Law's traditional derivative suit provisions.[179] Other states also allow for benefit enforcement proceedings, which are procedurally similar and subject to similar constraints.[180] However, because the failure to disclose information would be characterized as a violation of the duty of care, any action would have to overcome the business judgment rule, which poses a high bar to success.[181]

Nor do most benefit corporation statutes provide for administrative enforcement of the disclosure rules. The three exceptions are Minnesota, New Hampshire, and New Jersey.[182] Minnesota's benefit corporation statute provides that "[i]f a public benefit corporation fails to file, before April 1 of any calendar year, the annual benefit report required by this section, the secretary of state shall revoke the corporation's status as a public benefit corporation."[183] New Hampshire's benefit corporation statute contains similar language, using "shall administratively dissolve".[184] New Jersey's benefit corporation statute provides that "[if] a benefit corporation has not delivered a benefit report to the department for a period of two years, the department may prepare and file a statement that the corporation has forfeited its

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[177] Yockey, *supra* note 2, at 796.

[178] Section 720 of New York Business Corporation Law states:

> (a) An action may be brought against one or more directors or officers of a corporation to procure a judgment for the following relief:
> (1) . . . to compel the defendant to account for his official conduct in the following cases:
> . . .
> (C) In the case of directors or officers of a benefit corporation organized under article seventeen of this chapter: (i) the failure to pursue the general public benefit purpose of a benefit corporation or any specific public benefit set forth in its certificate of incorporation; (ii) the failure by a benefit corporation to deliver or post an annual report as required by section seventeen hundred eight of article seventeen of this chapter or (iii) the neglect of, or failure to perform, or other violation of his or her duties or standard of conduct under article seventeen of this chapter.

N.Y. BUS CORP. LAW § 720(a)(1)(C) (2018). The action may be brought by the corporation itself, or derivatively by a shareholder. *See id.* at § 720(b).

[179] N.Y. Legis. Assemb. A-4692, Reg. Sess. 2011–12 (N.Y. 2011).

[180] *See, e.g.*, MASS. GEN. LAWS c. 156E, § 14(b)(2)(iii) (2018); *see also* Winston, *supra* note 117, at 1804–05 (discussing benefit enforcement proceedings and comparing them to traditional derivative suits).

[181] Yockey, *supra* note 2, at 796–97 (citing Larry E. Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431, 1470 (2006)).

[182] Verheyden, *supra* note 21, at app. 1.

[183] MINN. STAT. § 304A.301(5) (2018).

[184] N.H. REV. STAT. ANN. §§ 293-C:13(V) (2018).

status as a benefit corporation."[185] There do not appear to be public records indicating how many public benefit corporation statuses have been revoked, dissolved, or forfeited in any of these states.

As a result of the forgoing, with the exception of Minnesota, New Hampshire, and possibly New Jersey, benefit corporation compliance is, at best, spotty.[186] A 2011 study of benefit corporations found that only ten percent complied with reporting requirements.[187] A 2018 study confirmed that number.[188]

Contrasting this Articles' non-random sample,[189] eight out of twenty benefit corporations listed in Table 1 of this Article did not publish a benefit report in the last two years.[190]

B. The Involvement of Third Parties

Most benefit corporation statutes require companies to assess their performance against a recognized third-party standard.[191] This requirement is intended to compensate for the fact that the statutes themselves lack specificity as to disclosure.[192] Put differently, the specifics are outsourced.[193] Chart 3 offers a representative list of third-party organizations that provide standards and a brief description of each standard.

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[185] N.J. STAT. § 14A:18-11(d)(2) (2018); *see* Annie Kathryn Acello, Having Your Cake and Eating It, Too: Making the Benefit Corporation Work in Massachusetts, 47 SUFFOLK U. L. REV. 91, 105 (2014) ("New Jersey empowers its Department of Treasury to terminate a benefit corporation's status if it fails to file its benefit report for two years."); Annie Collart, *Benefit Corporations: A Corporate Structure to Align Corporate Personhood with Societal Responsibility*, 44 SETON HALL L. REV. 1160, 1179 (2014) (discussing forfeiture for failure to file benefit report in New Jersey).

[186] *See* Murray & Hwang, *supra* note 81, at 10; *see also* Verheyden, *supra* note 21, at 79.

[187] *See* Murray & Hwang, *supra* note 81, at 10.

[188] Verheyden, *supra* note 21, at 79 (finding 14% for Oregon, 11% for Colorado, and 8% for Delaware).

[189] For a discussion of how the benefit corporations were selected for inclusion in the list, see *supra* note 43. Because this is a non-random sample, there are likely various selection biases, including that the benefit corporations included in Table I are more "established" and therefore more likely to have prepared a benefit report. As such, that compliance is higher than that discovered in the J. Haskell Murray and Edward I. Hwang study and the Maxime Verheyden study should be expected.

[190] Two years is the longer period included in the various pieces of legislation. *Compare* DEL. CODE ANN. tit. 8, § 366 (2018) (requiring the benefit report be prepared biannually), *with* N.Y. BUS CORP. LAW § 1708 (2018) (requiring the benefit report be prepared annually).

[191] *See, e.g.*, N.Y. BUS. CORP. LAW § 1708 (2018).

[192] Justin Blount & Kwabena Offei-Danso, *The Benefit Corporation: A Questionable Solution to a Non-Existent Problem*, 44 ST. MARY'S L.J. 617, 650 (2013).

[193] *See id.*

CHART 3. Third-Party Standards[194]

Third Party	What is Measured	How is it Measured
B Lab	B Lab measures five areas: (1) environment, (2) workers, (3) customers, (4) community, and (5) governance.[195]	The measurement takes the form of a score out of 200.[196] It is not clear how the score is allocated among the five areas.[197]
Global Reporting Initiative (GRI)	A company can choose one of three standards: (1) environmental impact, (2) economic impact, or (3) social impact. By way of example, if a company chooses environmental impact, the scope of disclosure would include: materials consumption, energy consumption, water consumption, impact on protected habitats, greenhouse gas emissions, any non-compliance with environmental laws, and an assessment of suppliers' environmental impact.[198]	Measurements are in weight (i.e., tons of raw materials used), volume (i.e., water used), or joules (i.e., energy used), as applicable.[199]
Green America	What is measured depends on the industry. For example, textile manufacturers must disclose whether the manufacturing process is environmentally friendly (i.e., sustainable fibers, no GMO) as well as socially and economically just (i.e., sweatshop free).[200]	Narrative disclosures only.[201]
Sustainability Accounting Standards Board (SASB)	What is measured depends on industry. For example, Consumer Goods Standards require the disclosure of: management of chemicals and products, raw material sourcing and innovation, labor conditions in the supply chain, and environmental impact in the supply chain.[202]	Measurements are in weight (i.e., tons) or percentage (i.e., percentage of raw materials certified sustainable), as applicable.[203]

[194] *See How Do I Pick a Third Party Standard*, BENEFIT CORP., http://benefitcorp.net/businesses/how-do-i-pick-third-party-standard.

[195] *Certification*, CERTIFIED B CORP., https://bcorporation.net/certification.

[196] *See id.*

[197] *See generally* Michael B. Dorff, *Assessing the Assessment: B Lab's Effort to Measure Companies' Benevolence*, 40 SEATTLE U. L. REV. 515 (2017).

[198] *See* GLOB. REPORTING INITIATIVE, CONSOLIDATED SET OF GRI SUSTAINABILITY REPORTING STANDARDS 2018 § 101 (2016) [hereinafter GRI STANDARDS], https://www.globalreporting.org/standards/gri-standards-download-center/consolidated-set-of-gri-standards/.

[199] *See id.* at §§ 301–03.

[200] *See Apparel and Textiles Green Business Standards*, GREEN BUSINESS NETWORK, http://www.greenbusinessnetwork.org/project/standard-apparel-textiles/.

[201] *See id.*

[202] *See* SUSTAINABILITY ACCOUNTING STANDARDS BOARD, EXPOSURE DRAFT, CONSUMER GOODS STANDARDS 11, tbl.2 (2017) [hereinafter SASB CONSUMER GOODS STANDARDS], https://www.sasb.org/wp-content/uploads/2017/09/ConsumerGoods-ExposureDraft-Redline.pdf.

[203] *See id.*

Unfortunately, allowing benefit corporations to choose their third-party standard further undercuts standardization.[204] Between the third parties, there are differences regarding *what* impact is measured and *how* impact is measured. As to what impact is measured, consider two of the largest third-parties: B Lab and GRI. B Lab measures many areas, ranging from the benefit corporation's environmental impact to employee pay.[205] On the other hand, GRI focuses on the area most applicable to a specific benefit corporation's stated public benefit purpose (e.g., environmental impact only).[206]

Further, even when what is measured is the same, how it is measured will often differ due to a lack of standardized measurement or reliance on narrative disclosures.[207] Returning to the example of environmental performance, Patagonia reports an environmental score of 152 from B Lab.[208] Seventh Generation, another company that seeks to do good environmentally, follows GRI standards and reports that its greenhouse gas emissions decreased by 32% since 2012.[209] The lack of standardized reporting makes it impossible to tell which company is having a greater positive impact on the environment.[210]

Finally, some states do not require the use of a third-party standard at all.[211] For example, Delaware—consistent with its traditional approach of granting business organizations broad flexibility in their operation[212]—makes use of a third-party standard optional, leaving what is measured, and how it is measured, up to the caprice of the particular benefit corporation.[213]

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[204] Reiser, *supra* note 143, at 617.

[205] *B Corp Index*, BENEFIT CORP., https://www.bcorporation.net/sites/all/themes/adaptivetheme/bcorp/pdfs/bcorp_index.pdf.

[206] GRI STANDARDS, *supra* note 198, at 3–4. Additional "core" standards apply to all companies, and require disclosure of information regarding organization, strategy, ethics and integrity, governance, and stakeholder engagement. *See id.*

[207] *See, e.g.*, Cohen & Lingenfelter, *supra* note 13, at 142.

[208] PATAGONIA 2016 REPORT, *supra* note 61, at 10.

[209] SEVENTH GENERATION 2017 REPORT, *supra* note 62, at 17.

[210] Even if two companies use the same third party, it does not follow that the scores are comparable because the assessment is customizable based on company size, industry sector, and geographic market. Dorff, *supra* note 197, at 523.

[211] *See, e.g.*, DEL. CODE ANN. tit. 8, § 366(c)(3) (2018); KY. REV. STAT. ANN § 271B.16-210(3)(b) (2018); TEX. BUS. CORP. CODE § 21.957(b)(3) (2017). Minnesota does not require that specific public benefit corporations (as opposed to general public benefit corporations) use a third-party standard. MINN. STAT. § 304A.301(2) (2018).

[212] One prominent example of Delaware's flexibility is that it allows limited partnerships and limited liability companies to opt out of fiduciary duties. *See* Brent J. Horton, *Modifying Fiduciary Duties in Delaware: Observing Ten Years of Decisional Law*, 40 DEL. J. CORP. L. 921, 923 (2016).

[213] Delaware General Corporation Law provides:

> The certificate of incorporation or bylaws of a public benefit corporation may require that the corporation: . . . Use a third-party standard in connection with and/or attain a periodic third-party certification addressing the corporation's promotion of the public benefit or public benefits identified in the certificate of incorporation and/or the best interests of those materially affected by the corporation's conduct.

DEL. CODE ANN. tit. 8, § 366(c)(3) (2018).

One commentator wrote in 2013, when benefit corporations and their disclosure practices were still in their formative stage, "[i]f multiple companies begin performing third-party oversight services with varying degrees of standards and criteria, it will become difficult for investors and consumers to gauge the relative strength of the criteria and to compare different companies' standards."[214] Indeed, that is the case today.[215]

C. Federally Mandated Disclosure

The Securities Laws require that public companies provide large amounts of financial disclosure.[216] However, the Securities Laws' disclosure requirements do not apply to the vast majority of social enterprises because they raise funds through private placements.[217] That is to say, at present, federal law is a non-factor in benefit corporation disclosure.

The one exception is Laureate Education, Inc. (Nasdaq: LAUR), which went public on February 1, 2017.[218] However, the SEC requires no additional disclosures based on Laureate's benefit corporation status.[219] Laureate provides to the SEC (and the investing public) the same disclosures that any

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[214] Mitch Nass, *The Viability of Benefit Corporations: An Argument for Greater Transparency and Accountability*, 39 IOWA J. CORP. L. 875, 889 (2014).

[215] Twenty benefit reports were reviewed in preparation for this Article to determine the benefit corporation landscape and to confirm that benefit reports are not standardized. *See supra* Table 1. The extent to which benefit reports differed from company to company (in terms of format, measurements, etc.) is surprising.

[216] *See, e.g.*, 15 U.S.C. § 77 (2018) (listing the income statement and balance sheet as required disclosures); E. Norman Veasey, *Corporate Governance and Ethics in a Post Enron/WorldCom Environment*, 72 U. CIN. L. REV. 731, 733 (2003) (discussing the primacy of financial disclosure in securities filings).

[217] Ball, *supra* note 99, at 935–36 ("To the extent that most social enterprises are raising capital, it is likely through private placement transactions that are exempt from federal securities registration requirements. Social enterprises are likely to have a limited number of shareholders with whom management has close relationships and who believe in the mission of the enterprise."); *see generally* Dana Brakman Reiser, *There Ought to be a Law: The Disclosure Focus of Recent Legislative Proposals for Nonprofit Reform*, 80 CHI.-KENT L. REV. 559 (2005).

[218] *See* Laureate Education, Inc., Registration Statement (Form S-1), at 1 (Dec. 15, 2016) [hereinafter Laureate Registration Statement]. Etsy, Inc. is also publicly traded, but it is not a benefit corporation per se. It is a traditional corporation that pursues social goals and has B Lab certification. Etsy's registration statement provides, "We are a mindful, transparent and humane business. We believe that business interests and social and environmental responsibility are interwoven and aligned and that the power of business should be used to strengthen communities and empower people." Etsy, Inc., Registration Statement (Form S-1), at 2 (March 4, 2015) [Hereinafter Etsy Registration Statement]. However, Etsy's Certificate of Incorporation does not provide for a public benefit purpose; instead, it uses the generic phrasing "[t]he purpose of the Corporation is to engage in any lawful act or activity for which corporations may be organized under the Delaware General Corporation Law." *See* Etsy Inc. Eighth Amended and Restated Certificate of Incorporation, Art II (April 30, 2012).

[219] Instead, the investing public is left to rely on its benefit report. *See* LAUREATE EDUCATION INC., GLOBAL IMPACT REPORT 11 (2016), https://www.laureate.net/~/media/Files/LGG/Documents/Global%20Impact/Global%20Impact% 20Report%202016.ashx. The benefit report is subject to unhelpful state standards discussed in Part III.A & B.

other publicly traded company would provide.[220] As this Article discusses in greater detail in Part V.C below, the SEC has traditionally been reluctant to require social disclosure (sometimes referred to as environmental, social, and governance concerns, or "ESG").[221]

D. Some Conclusions Regarding the Existing State of Benefit Corporation Disclosure

Benefit corporations are being held back by a state-by-state patchwork of unworkable disclosure rules. State statutes do not require financial disclosures in benefit reports.[222] And while state statutes require social disclosure, specifics are not provided, nor is specificity achieved, by reference to third-party standards.[223] This prevents both investors and supporting stakeholders from making comparisons across companies.

It is fair to assume that a large amount of capital is staying on the sidelines due to potential investors not being able to assess where it will do the most good.[224] David Bornstein, a prolific author in the area of for-profit social enterprise, wrote that one of the biggest impediments to the success of social enterprise (of which benefit corporations are part) is uncertainty on the part of investors, arising from the lack of "simple and reliable mechanisms to compare performance."[225] He suggests that in order to encourage investment, "the challenge is to make information available in a simple format to facilitate thoughtful decision making."[226]

From the foregoing, we can extrapolate that the best way to encourage investment in benefit corporations is to improve information flow.[227] For reasons discussed below, the best way to improve information flow is via a nationwide (i.e., federal), uniform disclosure regime.[228]

Supporting stakeholders will also benefit from improved disclosure. Without complete and accurate disclosure, customers—and in some cases, employees—have difficulty detecting greenwashing.[229]

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[220] *See* Laureate Registration Statement, *supra* note 218, at 1.

[221] *See* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1206 (1999).

[222] *See supra* Part III.A.1.

[223] *See supra* Parts III.A.2 & III.B.

[224] *See supra* Part II.A.

[225] DAVID BORNSTEIN, HOW TO CHANGE THE WORLD: SOCIAL ENTREPRENEURS AND THE POWER OF NEW IDEAS 278 (2007).

[226] *Id.* at 281.

[227] *See supra* Part II.A.

[228] *See infra* Part IV.

[229] *See supra* Part II.B.

IV. Proposal: A Uniform Disclosure Regime for Benefit Corporations

Congress should pass a uniform disclosure regime for benefit corporations, just like Congress passed a uniform disclosure regime for publicly traded corporations in the form of the Securities Act of 1933. This Part describes what such a uniform disclosure regime should look like.

A. All Benefit Corporations Will File a Form BC-1

All benefit corporations should be required to annually file a Form BC-1 (where "BC" stands for benefit corporation) with the SEC. Part V.A explains why the SEC is in the best position to handle this burden.

It is the benefit corporation itself that will be registered. As such, this proposed system more closely tracks a company registration model.[230] In the event that the benefit corporation offers securities—stocks, bonds, etc.—it will bring the Form BC-1 up to date with a Form BC-1S (where the S stands for supplement) that will include information particular to that security.[231] The Form BC-1 would be divided into financial disclosures and social disclosures, as described below.

1. Financial Disclosures

Two financial disclosures that should be required are: (1) financial statements and (2) executive compensation.[232] Financial statements (i.e., balance sheet and income statement) allow for an accurate evaluation of whether a corporation is operated in a profitable manner.[233] As stated by Professor Paul Mahoney, "the purpose of accounting [is] to account—that is, to keep track of how an agent ha[s] used [capital]."[234] Financial statements help answer whether the benefit corporation has already made prudent

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[230] *See generally* Stephen J. Choi, *Company Registration: Toward a Status-Based Antifraud Regime*, 64 U. Chi. L. Rev. 567, 568 (1997) (discussing the company registration model); Milton H. Cohen, *"Truth in Securities" Revisited*, 79 Harv. L. Rev. 1340, 1341–42 (1966) (same).

[231] This is similar to the shelf registration process provided for by Rule 415 of the Securities Act of 1933. *See* Brent J. Horton, *Toward a More Perfect Substitute*, 93 B.U. L. Rev. 1905, 1927 (2013) (discussing the operation of Rule 415 in the mortgage-backed securities context).

[232] *See, e.g.*, Brent J. Horton, *In Defense of a Federally Mandated Disclosure System: Observing Pre-Securities Act Prospectuses*, 54 Am. Bus. L.J. 743, 769–71 (2017) (discussing key financial disclosures).

[233] *See id.* at 769–70.

[234] Paul G. Mahoney, Wasting A Crisis: Why Securities Regulation Fails 46–47 (2015).

use of its capital[235] and provide strong clues as to what the corporation is likely to do with future capital infusions.[236]

It is also important to disclose executive compensation.[237] Executives at benefit corporations should not be ashamed to make market-rate compensation if they are truly adding value to the company. It is when they are not adding value—both financial and social—that compensation becomes an issue. Where compensation is high, but value creation is low, it may signal "a culture of waste at a [benefit] corporation" or a circumstance where the corporation "exists solely to line the pockets of a few select executives."[238]

While benefit corporation legislation does generally require that information regarding executive compensation be included in the version of the benefit report that goes to investors, it is not required to be included in the version that goes to the broader public.[239] This is odd because supporting stakeholders (especially customers that bought a good with the expectation that some of the profits would be used to pursue a public benefit purpose) have just as much interest in making sure that the benefit corporation is not using its profits to unjustly enrich executives.

2. Social Disclosures

This Article does not attempt to definitively answer what social disclosures should be required in the Form BC-1. Instead, this Article draws from the way Congress developed the list of disclosures—albeit financial in nature—that are required by the Securities Act of 1933. Congress borrowed from the list of disclosures required by the New York Stock Exchange ("NYSE").[240] Joel Seligman wrote in *The Transformation of Wall Street* that the Securities Act of 1933, Schedule A, closely resembled the NYSE listing requirements.[241] Professor Mahoney wrote in *Wasting a Crisis* that "the SEC borrowed heavily from the NYSE's own disclosure rules to create a mandatory disclosure system."[242]

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[235] Horton, *supra* note 232, at 769–70.
[236] *See id.*
[237] *See id.* at 771.
[238] *See id.*
[239] N.Y. Bus Corp. Law § 1708(c) (2018).
[240] Joel Seligman, The Transformation of Wall Street 46 (2003).
[241] *See id.*
[242] Mahoney, *supra* note 234, at 80–81. That Congress would have borrowed from the NYSE makes sense. The NYSE's disclosure requirements were highly regarded at the time the Securities Laws were written:

> [Scholars] of corporate finance lauded the Exchange's listing requirements. Harvard's Professor William Z. Ripley, for example, declaimed unequivocally in his influential 1927 work, Main Street and Wall Street, "Beyond peradventure of doubt the New York Stock Exchange is today the leading influence in the promotion of adequate corporate disclosure." Similarly, Adolf Berle believed that "the most forward-looking steps in finance taken during the 1925–1929 boom were not taken by government, but by . . . the New York Stock Exchange."

Further, as the SEC began to require more sophisticated accounting standards, "[t]he SEC relie[d] on the private, non-profit Federal Accounting Standards Board ["FASB"] to establish and maintain accounting standards."[243] It is in fact the FASB that establishes and maintains the standards companies follow when preparing their financial disclosures to present day.[244]

Just like private organizations helped inform what financial disclosures are required in the traditional registration statement (Form S-1), private entities can help inform what social disclosures will be required in the Form BC-1. So the next logical question is who could the SEC partner with to develop a list of required disclosures for benefit corporations?

It seems that most benefit corporations depend on B Lab for third-party standards. Some even incorporate the B Lab report into their benefit report.[245] However, B Lab's standards are murky.[246] Companies get scores, but it is not clear how those scores are calculated.[247] The highest possible score a company can receive is two hundred, and a passing score is eighty.[248] A company also receives a score for environment, workers, customers, community, and governance.[249] Beyond this, however, there are many unknowns regarding B Lab scores. If a company gets a score of nineteen for environment, how was that calculated? Can we assume that the best possible score for environment is forty (two hundred divided by five categories)?[250] Some commentators have suggested that B Lab scores have no meaning: "While B Lab offers what it contends is an independent certification, in reality, companies are simply paying to license B Lab's mark of certification."[251] It is likely true that in its search for simplicity, B Lab lessens its standards' validity.[252] However, it is not true that B Lab standards have no meaning at all.[253]

SELIGMAN, *supra* note 240, at 46–47.

[243] Cohen & Lingenfelter, *supra* note 13, at 129.

[244] MAHONEY, *supra* note 234, at 81.

[245] *See, e.g.*, KING ARTHUR 2016 REPORT, *supra* note 57, at 2.

[246] *See* Weismann, *supra* note 28, at 25–26.

[247] *See* Dorff, *supra* note 197, at 527.

[248] *Certification Requirements*, CERTIFIED B CORP., https://bcorporation.net/certification/meet-the-requirements.

[249] *Certification*, supra note 195.

[250] *See* Dorff, *supra* note 197, at 526. It appears that this information is available to the benefit corporation itself. King Arthur Flour indicates that its B Lab assessment is governance 10%, workers 35%, community 22.5%, environment 22.5%, and customers 10%. *See* KING ARTHUR 2016 REPORT, *supra* note 57, at 2.

[251] David Groshoff, *Contrepreneurship? Examining Social Enterprise Legislation's Feel-Good Governance Giveaways*, 16 U. PA. J. BUS. L. 233, 269 (2013). *See also* Weismann, *supra* note 28, at 29 ("Arguably, B Lab's online certification process which requires little or no supporting documentation and does not inquire regarding asset allocation and/or commitment to the beneficial purpose, falls short of promoting investor transparency.").

[252] *See* Dorff, *supra* note 197, at 526–32 (discussing the tension between simplicity and validity).

[253] In fairness, B Lab is always trying to improve its measurements:

> Our assessment still has a long way to go, with granularity around its specificity per industry; we've added now a half dozen industry addenda and we'll continue to do

Some commentators favor SASB as a source of more meaningful standards.[254] SASB was founded by researchers concerned about the lack of standard measurements for social enterprises.[255] The goal of SASB is "to develop a comprehensive sustainability-reporting standard for public companies."[256] Cohen and Lingenfelter write:

> [T]he SASB Conceptual Framework can provide the basis for standardizing . . . the annual benefit report . . . . For example, a standard might include the following: percentage of revenue derived from the stated benefit activities, percentage of stakeholders receiving a stated benefit, and percentage of expenses spent towards achieving the benefit. In addition, qualitative information such as geographic coverage, duration and continuity of benefit activities, the relationship between the effort expended by the corporation and the impact on the targeted stakeholders may need to be included. Once the benefit corporation issues its report according to the standard, the auditor will use the standard as the criteria necessary to conduct the examination of whether the reported information that is material to the achievement of the stated benefit is accurately disclosed. To do this, the auditor will supplement traditional audit procedures by surveying stakeholders and engaging experts.[257]

That being said, this Article does not aim to suggest who the SEC should partner with to create a uniform system of social disclosure. Rather, the important point is that there are existing organizations—like B Lab or SASB—that have already begun to do a great deal of thinking about what the disclosure should look like. Thus, there is no need to start from scratch.

B. This Proposal is in Addition to the Existing Securities Laws

Under this Article's proposal, the requirement that a benefit corporation file a Form BC-1 is in addition to any requirements under the existing Secur-

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> that. Obviously, the emerging market piece was a brand new addition that we added what, four years ago now? Yeah, four years ago now. And so I'll begin by saying it's really hard. That being said, as I mentioned the other day, there is a body of work that we're building on. This is not the Dan and Bart Show talking about what we need to assess. There has been a long history of work around what it means to be a sustainable business contributing to society.

Larry Hamermesh et al., *A Conversation with B Lab*, 40 SEATTLE U. L. REV. 321, 337 (2017).

[254] *See, e.g.*, Weismann, *supra* note 28, at 28; Cohen & Lingenfelter, *supra* note 13, at 142.

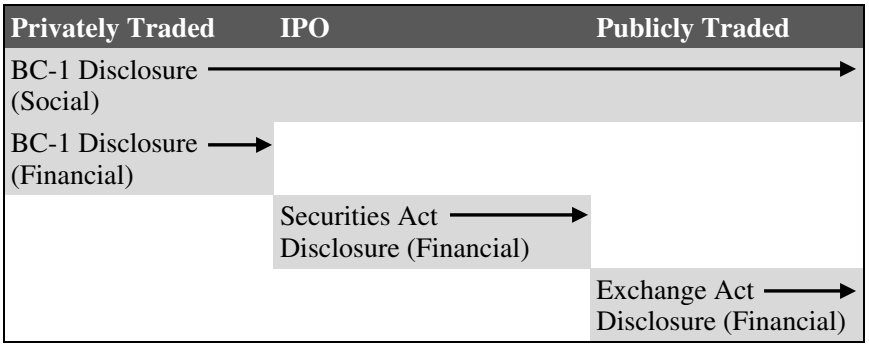
[255] *See* STEVE LYDENBERG ET AL., INITIATIVE FOR RESPONSIBLE INV., FROM TRANSPARENCY TO PERFORMANCE: INDUSTRY-BASED SUSTAINABILITY REPORTING ON KEY ISSUES VI (2010), http://www.sasb.org/wp-content/uploads/2012/03/IRI_Transparency-to-Performance.pdf.

[256] Cohen & Lingenfelter, *supra* note 13, at 137.

[257] *Id.* at 142.

ities Laws. The requirement to file the *social* portion of the Form BC-1 would begin with the benefit corporation's formation and would not end, even after it goes public. Similarly, the requirement to file the *financial* portion of the Form BC-1 would begin with the benefit corporation's formation, however, it would end upon the benefit corporation going public; the requirement would be superseded by the financially-oriented disclosures required by existing Securities Laws because to require both the financial portion of a Form BC-1 and a Form S-1 would be redundant. This is visualized in Chart 4 below.

CHART 4. Applicability of Proposed Form BC-1 Disclosure



C. Even Small Benefit Corporations Would Be Required to Disclose Information

As evident from the chart above, even benefit corporations that only engage in private placements must file a Form BC-1. This may seem demanding, but the typical justifications for exempting private placements from disclosure requirements do not apply with the same force to benefit corporations.

First, private placements were exempted from the Securities Laws disclosure requirements[258] because they were thought to be transactions "where the public benefits are too remote" to justify disclosure.[259] However, for benefit corporations, public benefits are not remote—they are the focus.[260] As such, the public has a right to inform itself regarding whether the benefit corporation is doing what it promised.[261]

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[258] 15 U.S.C. § 77d(a)(2) (2018).

[259] *See SEC v. Ralston Purina Co.*, 346 U.S. 119, 122–23 (1953) (quoting H.R. Rep. No. 73–85 at 5 (1933)).

[260] *See* Part I, *supra*.

[261] The legislative history makes clear the importance legislators placed on transparency to shareholders and supporting stakeholders, even if the end result was inadequate. NYS BILL AND VETO JACKETS, N.Y. STATE ARCHIVES, Ch. 599 at 9 (2011), http://digitalcollections.archives.nysed.gov/index.php/Detail/Object/Show/object_id/21316 ("[T]he bill . . .

Second, Congress exempted private placements because it did not want to impose disclosure costs on corporations at the formative stage.[262] However, as discussed in Part V.D below, the cost argument does not apply with the same force to benefit corporations, as they are already subject to the cost of state-based disclosure. This proposal simplifies the disclosure. If it preempts the current state requirements—which it would—the cost should be about the same, maybe even less.

Third—and perhaps the most obvious—exempting smaller companies would result in the exception swallowing the rule. If non-public companies are exempted, only one benefit corporation would have to follow the regime (i.e., Laureate).[263] As one commentator discussed, "most benefit corporations are small and are likely to remain small. Exempting all small benefit corporations from publishing benefit reports would make public reporting the exception instead of the rule."[264]

Finally, while a disclosure regime should avoid being overly complex, the proposed regime could scale the actual disclosure schedules based on the size of the benefit corporation or by requiring only biennial, as opposed to annual, disclosure. This would reduce costs to benefit corporations.

D. There Must be an Enforcement Mechanism, Albeit Tempered

As discussed in Part III.A, one of the reasons that state-by-state disclosure requirements have failed is the lack of a robust enforcement mechanism. Under the current patchwork rules, most states impose no penalty on a benefit corporation failing to provide a benefit report; the exceptions are Minnesota, New Hampshire, Rhode Island, and New Jersey.[265] Misstatements in a benefit report are penalized only when they rise to the level of fraud.[266]

It is clear that any uniform disclosure regime for benefit corporations must have an enforcement mechanism. The particulars of such a mechanism could fill an entire article. This Article seeks to only set forth a broad framework:

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[i]ncludes higher standards of transparency, requiring annual reporting to shareholders and the public about the corporation's social and environmental performance."). For a compilation of the legislative history of various benefit corporation statutes, *see* Plerhoples, *supra* note 144, at 532 n.34; *see also* Kyle Westaway & Dirk Sampselle, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards, and Legislatures*, 62 EMORY L.J. 999, 1010–14 (2013) (discussing the legislative history of various benefit corporation statutes).

[262] *See* Abraham J.B. Cable, *Fool's Gold? Equity Compensation & the Mature Startup*, 11 VA. L. & BUS. REV. 613, 626 (2017) (listing encouragement of capital formation as one of the primary goals of the private placement exemption); Abraham J.B. Cable, *Mad Money: Rethinking Private Placements*, 71 WASH. & LEE L. REV. 2253, 2275 n.92 (2014) (discussing how private placement exemption should be thought of in terms of helping startups).

[263] *See* discussion of Laureate Education, *supra* Part III.C.

[264] Verheyden, *supra* note 21, at 92.

[265] *Id.* at Appendix 1.

[266] Joan MacLeod Heminway, *Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations*, 40 SEATTLE U. L. REV. 611, 640–45 (2017).

1. Where the benefit corporation failed to file a Form BC-1,
   (a) *shareholders* should be able to compel its filing or sue for return of their investment in an action similar to that allowed by Section 12 of the Securities Act;[267]
   (b) *supporting stakeholders* should be able to compel its filing.
2. Where the benefit corporation included material misstatements in its Form BC-1,
   (a) *shareholders* in the benefit corporation should be able to sue for return of their investment in an action similar to that allowed by Section 11 of the Securities Act;[268]
   (2) *supporting stakeholders* should be able to sue for damages. In the case of a customer, the remedy could be a return of the customer's money.
3. Fraudulent statements by a benefit corporation should remain subject to actions by *shareholders* for securities fraud.[269]

However, limits should be placed on private suits in order to reduce the possibility of strike-suits. Specifically, all settlements should be required to receive court approval, and courts should have broad discretion to shift legal fees when the lawsuit was brought in bad faith.[270]

Further, like the enforcement of disclosure requirements under the Securities Laws, there should also be a public dimension to enforcement of the uniform disclosure regime in addition to the private enforcement mentioned above. The public dimension should be handled by the SEC, including through cease and desist proceedings.[271]

E. The Disclosures Should Be Publicly Available

All disclosures should be available on a federal government website, perhaps on EDGAR or a separate website.[272] This access is an important

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[267] 15 U.S.C. § 77l (2018).

[268] 15 U.S.C. § 77k (2018).

[269] This would be similar to a securities fraud case. *See* 15 U.S.C. § 78j (2018); 17 C.F.R. § 10b-5 (2018).

[270] Similar provisions are already contained in the Securities Act of 1933:

> In any suit under this or any other section of this title the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant such costs may be assessed in favor of such party litigant . . . if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him . . . .

15 U.S.C. § 77k(e) (2018).

[271] This would be similar to power granted to the SEC under the Securities Act. *See* 15 U.S.C. § 77h-1 (2018).

[272] *See EDGAR Company Filings*, SEC, https://www.sec.gov/edgar/searchedgar/companysearch.html.

mechanism for keeping both investors and supporting stakeholders informed.[273]

Further, by making information available to the broader public, even beyond supporting stakeholders, the system recognizes that the public also has an interest in benefit corporations. In short, the Form BC-1 would serve as an important document for prospective investors, supporting stakeholders, and the broader public.[274]

V. Additional Considerations and Counterarguments

A. Why Burden the SEC?

One possible criticism of this Article's proposal is best phrased as a question: why burden the SEC? A concern may be that the SEC will not have enough resources to both carry out its central mission and handle benefit corporation disclosure.[275] Nonetheless, thirty-three states and the District of Columbia have made a rightful determination that benefit corporation disclosure is important.[276] Thus, the SEC should be willing to allocate appropriate resources to make that happen.

Additionally, given its eighty-four years of experience enforcing corporate financial disclosure, the SEC is best situated to enforce social disclosure.[277] In contrast, states have repeatedly demonstrated an inability to manage disclosure, both for traditional corporations, which prompted the passage of the Securities Laws,[278] and for benefit corporations today.[279]

Indeed, the best argument in favor of burdening the SEC is historical: we find ourselves in a situation very similar to the situation faced by investors prior to the passage of the Securities Laws, when disclosure was gov-

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[273] *See supra* Part II.

[274] The broader public's interest in benefit corporations is reinforced by statute, which references "community and societal considerations." *See* N.Y. Bus Corp. Law § 1707(a)(1)(E) (2018).

[275] *See* Karen E. Woody, *Securities Laws as Foreign Policy*, 15 Nev. L.J. 297, 302 (2014).

[276] *See State by State Status of Legislation*, *supra* note 1.

[277] Whether the SEC is best situated to enforce social disclosure in the event that Congress passes legislation calling on it to do so is a different question from whether they can already do so under existing law. *See infra* Part V.C.

[278] *See* Amanda M. Rose, *State Enforcement of National Policy: A Contextual Approach (with Evidence from the Securities Realm)*, 97 Minn. L. Rev. 1343, 1376 (2013) ("Specifically, the New Deal Congress believed that state securities laws—known as 'Blue Sky Laws'—had been ineffective in deterring abuses that contributed to the Stock Market Crash of 1929 and the ensuing Great Depression."); Eric C. Chaffee, *Finishing the Race to the Bottom: An Argument for the Harmonization and Centralization of International Securities Law*, 40 Seton Hall L. Rev. 1581, 1611–12 (2010) ("[T]he patchwork of regulation created by the blue sky laws proved ineffective to prevent the stock market crash of 1929 and the Great Depression.").

[279] *See supra* Part III.

erned by a patchwork of state-based disclosure laws.[280] Disclosure then—like benefit corporation disclosure today—was a mess,[281] as it was ineffective at deterring abuses, and the substance of laws differed from state to state.[282]

It follows that a similar solution—a mandatory disclosure regime enforced by the SEC—would go a long way toward solving the ineffective state of benefit corporation disclosure today.

B. Social Disclosure Is Hard to Formulate and Interpret

Another possible criticism of this Article's proposal is that social impact can be extremely difficult to measure.[283] Some commentators have even suggested it may be impossible.[284] However, it does not follow that we should not try.

Again, consider history. When Congress passed the Securities Laws, with their emphasis on financial disclosures, financial accounting was still evolving.[285] It was not until 1933 that the American Institute of Accountants ("AIA") "adopted six broad principles that formed the basis for what later came to be known as generally accepted accounting principles, or

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[280] *See* John C. Coffee, *Market Failure and The Economic Case For a Mandatory Disclosure System*, 70 VA. L. REV. 717, 721 n.17 (1984) (discussing the Blue Sky Laws).

[281] *See* Horton, *supra* note 232, at 772–99.

[282] For example, some states required specific financial statements be disclosed. *See* VA. BLUE SKY LAW § 2 (1919), *reprinted in* JOHN M. ELLIOT, THE ANNOTATED BLUE SKY LAWS OF THE UNITED STATES 855 (1919) (requiring a balance sheet and income statement). Other states had less specific requirements. *See* FLA. BLUE SKY LAW § 2661b (1919), *reprinted in* ELLIOT, *supra*, at 137 (requiring an "itemized account of its actual financial standing", the meaning of which is open to interpretation). Blue Sky Laws also differed regarding who received the disclosure. Some states required that the information be disclosed directly to prospective investors—via a prospectus—while other states required that the disclosure only go to the commissioner of the state regulatory agency. *See* Benjamin Hamel, *An Examination of the Jumpstart Our Business Startups Act: How Jobs Act Exemptions May Help Startups and Hurt Investors*, 17 HOUS. BUS. & TAX L.J. 59, 69–70 (2016). Some states had no Blue Sky Law at all, like Indiana, Kentucky, and Maryland. ELLIOT, *supra*, at v–ix. For a discussion of the Blue Sky Laws generally, *see* Paul G. Mahoney, *Mandatory Disclosure as a Solution to Agency Problems*, 62 U. CHI. L. REV. 1047, 1075–76 (1995).

[283] *See* Yockey, *supra* note 2, at 796 ("[M]andatory disclosure does not eliminate the difficulty of interpreting social information in firms with complex missions.").

[284] *See* Allison M. Snyder, *Holding Multinational Corporations Accountable: Is Non-Financial Disclosure the Answer*?, 2007 COLUM. BUS. L. REV. 565, 586 (2007) ("The variety and nature of [corporate social responsibility] issues make measuring the impact of corporate behavior difficult, if not impossible."); Plerhoples, *supra* note 144, at 564 ("[The] question is costlier, more difficult, and sometimes impossible to ascertain.").

[285] In 1921, William Wallace Hewett complained about "the relatively unsatisfactory nature of accounting practice in its present [1921] stage of development." WILLIAM WALLACE HEWITT, THE DEFINITION OF INCOME AND ITS APPLICATION IN FEDERAL TAXATION 81 (1925); *see also* GARY JOHN PREVITS & BARBARA DUBIS MERINO, A HISTORY OF ACCOUNTANCY IN THE UNITED STATES 235 (2d ed. 1998) (labelling the period from 1919 to 1945 as when accountancy came of age).

"GAAP"—a term first used by the AIA in 1936."[286] It was not until 1938 that the SEC incorporated GAAP into its disclosure requirements.[287] And from then until the present—through the AIA and successor entities—those standards have been continually updated and improved upon.[288]

The partnership between the SEC and the AIA (later the FASB) should serve as a model for social disclosure. The SEC can work with one of the third parties mentioned in Part III.B to update and improve upon standards. As discussed already, those third parties have made progress developing standards. Certainly, there is much more work to be done, but there is a solid foundation.

The SEC can start slow and focus on those facts that are easier to quantify. As Professor Choudhury points out:

> There is . . . quantifiable information relating to social issues. For example, in terms of environmental issues, greenhouse gas emissions, carbon emissions, and energy consumption, are all quantifiable. Similarly, for employee issues, the average number of training hours per employee provided, the retention rate, the percentage of employee injuries or fatalities and the remuneration ratio of women to men for each employee are also quantifiable.[289]

Finally, disclosure may be easier to formulate if it is industry specific. Using apparel manufacturers as an example, some questions (that run the range from environmental to employee issues) could be:

> (1) What percentage of your products are manufactured using petroleum-based textiles?
>
> (2) How much water is used in the manufacturing (dying) process?
>
> (3) In what countries are your goods manufactured, and what are employees paid in each country (mean and median, USD)?

The answers to these and other questions can be compared across many different apparel manufacturers to help inform both investors and supporting stakeholders. More difficult disclosures can follow as the SEC gains experience requiring social disclosures.

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[286] Lance Phillips, *The Implications of IFRS on the Functioning of the Securities Antifraud Regime in the United States*, 108 MICH. L. REV. 603, 604–05 (2010).

[287] John W. Bagby et al., *How Green Was My Balance Sheet?: Corporate Liability and Environmental Disclosure*, 14 VA. ENVTL. L.J. 225, 305 n.475 (1995) (citing Administrative Policy on Financial Statements, SEC Accounting Series Release No. 4 (Apr. 25, 1938)).

[288] George J. Benston, *The Regulation of Accountants and Public Accounting Before and After Enron*, 52 EMORY L.J. 1325, 1334 (2003).

[289] Barnali Choudhury, *Social Disclosure*, 13 BERKELEY BUS. L.J. 183, 214–15 (2016).

C. Would it be Better to Rely on the Existing Securities Laws?

SASB argues that existing Securities Laws already require social and environmental disclosure.[290] SASB points to the fact that Regulation S-K already requires the Management Discussion and Analysis ("MD&A") section of a company's 10-K to describe "any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on *net sales or revenues or income* from continuing operations."[291]

The thrust of SASB's argument is as follows: by way of example, Coca-Cola cannot produce its beverages without clean water, i.e., lack of access to clean water would negatively impact its sales or revenue or income. Therefore, it should disclose the sustainability of its current access to clean water.[292]

However, it is not clear that the SEC interprets its own rules in the same way. Indeed, the evidence is to the contrary.[293] The SEC explored the possibility of requiring non-financial disclosures in 1975 and concluded that even if non-financial information (i.e., social or environmental information) was important to net sales, revenues, or income, it did not follow that the SEC should specifically mandate its disclosure.[294] Such disclosure would depend upon how many investors are actually interested in using the information.[295] The SEC concluded that investor interest in social disclosures was negligible.[296] In reaching that conclusion, the SEC cited the lack of investment in mutual funds that pursue social objectives.[297]

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[290] SASB provides standards for numerous industries. This Article draws information from its most recent exposure draft. *See* SASB CONSUMER GOODS STANDARDS, *supra* note 202.

[291] *Id.* at 5 (citing C.F.R. 229.303(Item 303)(a)(3)(ii)) (emphasis added).

[292] As SASB explains:

> Regulation S-K, which sets forth certain disclosure requirements associated with Form 10-K and other SEC filings, requires companies, among other things, to describe in the Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A) section of Form 10-K "any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations. If the registrant knows of events that will cause a material change in the relationship between costs and revenues (such as known future increases in costs of labor or materials or price increases or inventory adjustments), the change in the relationship shall be disclosed."
>
> Furthermore, Instructions to Item 303 state that the MD&A "shall focus specifically on material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition."

Id. (citing C.F.R. 229.303(Item 303)(a)(3)(ii)).

[293] Williams, *supra* note 221, at 1251.

[294] *See id.*

[295] *See id.*

[296] *See id.*

[297] *See id.*

Of course, legal commentators have vigorously contested the SEC's conclusion. In *The Securities and Exchange Commission and Corporate Social Transparency*, Cynthia A. Williams points out that the SEC's rejection of mandatory social disclosure in 1975 was based on conclusions of fact that no longer hold true.[298] She emphasizes the growing popularity in socially conscious investing between 1975 and 1999, citing, among other facts, that "[t]hese statistics have changed dramatically over the last two decades, and in particular in the last two years, suggesting that a significant, and growing, minority of investors would now find this information material. Today, there are 144 'socially and environmentally responsible' mutual funds, comprising $96 billion in assets in 1997 (up from $12 billion in 1995)."[299]

Since Professor Williams wrote the above commentary in 1997, there are even more investors that now find social and environmental information to be a significant factor in how they invest. When Professor Williams conducted her research in 1997, there were 144 "socially and environmentally responsible" mutual funds.[300] Today, there are 1,002.[301]

It should therefore not be surprising that the SEC has recently revisited its 1975 position, writing in a 2016 release titled Business and Financial Disclosure Required by Regulation S-K: "[w]e are interested in receiving feedback . . . on which, if any, sustainability . . . disclosures are important to an understanding of a registrant's business and financial condition and whether there are other considerations that make these disclosures important to investment and voting decisions."[302]

However, at the end of the day, the best solution should not depend on the SEC deciding to change existing rules and regulations, or how it interprets them, for the following reasons:

First, the SEC has stated that even if it finds that investors are interested in social and environmental information, it must balance that against the "challenges and costs associated with compiling and disclosing this information."[303]

Second—and most importantly—even if the SEC did decide to make a change, the change would only impact large, publicly traded corporations that are subject to the SEC's disclosure requirements, like Laureate.[304] Most benefit corporations would be left out. As such, the only disclosure regime that would be beneficial to investors and supporting stakeholders of both

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[298] *See id.* at 1267–68.

[299] *Id.* at 1267.

[300] *See id.*

[301] *See* U.S. SIF Found., Report on U.S. Sustainable, Responsible and Impact Investing Trends 13 (2016).

[302] SEC, Business and Financial Disclosure Required by Regulation S-K, SEC Concept Release, No. 33-10064, 205 (Apr. 13, 2016), https://www.sec.gov/rules/concept/2016/33-10064.pdf.

[303] *Id.*

[304] *See supra* Part III.C.

public and non-public benefit corporations is the one proposed by this Article.[305]

D. Compliance Costs

The benefit of any new regulatory regime must be assessed against its cost. Certainly, there are costs associated with any disclosure regime. Collecting, verifying, and reporting information is expensive, both in time and money.[306] For that reason, any mandatory disclosure regime should be narrowly tailored so that the financial stress on benefit corporations is as low as possible.

This Article's proposal may actually reduce costs. Benefit corporations are already paying to comply with the existing state-based disclosure requirements—i.e., spending time and money to prepare the required benefit report—which is expensive.[307] Further, preparing the benefit report involves working with a third-party standard.[308] To meet that requirement, benefit corporations often seek "certification" by a third party (not required, but it appears many benefit corporations do it), and then incorporate the certification report directly into their benefit report. B Lab will certify a company against its own standards for between $500 and $50,000, depending on the size of the company.[309] Thereafter, B Lab charges an annual certification fee of between $500 and $25,000.[310]

Further, the cost of this Article's proposal should decrease over time, once "there is a critical mass of disclosure . . . that satisfies regulators and is litigation-tested for accuracy and adequacy."[311] That is to say, as benefit corporations (and the lawyers and accountants that support them) gain experience—individually and collectively—less time and effort will be required to prepare benefit reports, and the cost of compliance will decrease accordingly.

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[305] *See supra* Part IV.

[306] Cohen & Lingenfelter, *supra* note 13, at 139.

[307] The expense is in money and time. There are numerous questionnaires, and answers must be supported with documentation. "'We have spent the last year carefully assessing our community impact and challenging ourselves to achieve organizational targets focused on creating economic opportunity for the City of Yonkers,' says Greyston Bakery CEO, Mike Brady." *Bakers on a Mission, New York's First Benefit Corporation Launches Benefit Report*, CSR WIRE (Mar. 20, 2013), http://www.csrwire.com/press_releases/35357-Bakers-On-A-Mission-New-York-s-First-Benefit-Corporation-Launches-Benefit-Report; *see also* Lori Valigra, *The Benefits of B-corp. Status*, MAINEBIZ (June 12, 2017), http://www.mainebiz.biz/article/20170612/CURRENTEDITION/306079992/the-benefits-of-b-corp-status

[308] N.Y. BUS CORP. LAW § 1708 (2018).

[309] *Certification*, *supra* note 195. Other certifiers are less costly up-front; for example, Food Alliance will certify a company for between $750 and $1,200, but also takes a licensing fee of .1-.4% of gross sales going forward. *Crop Producers*, FOOD ALLIANCE, http://fadocss-tyle.wpengine.com/crop-producers/#crop-faq-3.

[310] Groshoff, *supra* note 251, at 272.

[311] Heminway, *supra* note 118, at 319.

Nonprofits may also provide some ideas here. Nonprofits—which have very little free cash—are required to disclose information and are able to do so.[312] They often do so by relying on pro-bono representation from law firms. This model could also well-serve for-profit benefit corporations. Professor Alina Ball points out that "pro bono corporate representation is an underutilized resource that social enterprises could use to offset the financial burdens of benefit reporting. . . . Law firms should . . . be encouraged to provide access to pro bono services or deferred payment fee structures to for-profit social enterprises."[313]

Finally, when the Securities Laws implemented new disclosure requirements in the 1930's, companies argued they would be put out of business by the cost of compliance.[314] However, that did not happen. Thus, the cost of compliance will not drive benefit corporations out of business under the proposed regime.

Conclusion

Today, investors are looking for more than just a financial return. They also want the "warm glow" that comes from doing good.[315] Further, these socially-conscious investors are growing in number.[316] While baby boomers (born 1945–1964) show less interest in investing in for-profit social enterprises, Gen-X (born 1965–1984) and Millennials (born 1985–2004) show a higher propensity to invest for social impact.[317]

Benefit corporations can use those ready investment dollars to do good, whether helping the homeless like ArtLifting[318] or helping the environment like Patagonia.[319] However, in order to rise to their full potential, benefit corporations must:

> (1) convince investors that the benefit corporation is producing (or will produce) a financial return and that they are doing (or will do) good.[320]
>
> (2) convince supporting stakeholders that the benefit corporation is truly pursuing good,[321] as opposed to greenwashing.[322]

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[312] N.Y. Exec. Law § 172-b (2018); see Reiser, supra note 217, at 570 ("New York law already required nonprofits to produce various kinds of internal and external reports.").

[313] Ball, *supra* note 99, at 976.

[314] Seligman, *supra* note 240, at 76–78.

[315] *See* Yockey, *supra* note 2, at 789–90; *see* Plerhoples, *supra* note 144, at 569.

[316] *See* U.S. Trust, Bank of America Private Wealth Mgmt., 2017 U.S. Trust Insights on Wealth and Worth, Annual Survey of High-Net-Worth and Ultra-High-Net-Worth Americans 8–9 (2017), https://www.ustrust.com/publish/content/application/pdf/GWMOL/USTp_WW_FindingsOverview_Broch_Final.pdf.

[317] *Id.*

[318] ArtLifting, *supra* note 4.

[319] Patagonia 2016 Report, *supra* note 61, at 17.

[320] *See supra* Part II.A.

[321] *See supra* Part II.B.

Benefit corporations can accomplish the foregoing by disclosing relevant information.[323] However, the current state-by-state disclosure rules applicable to benefit corporations are chaotic, with different companies measuring different things and using different standards to do so.[324]

This Article proposes a uniform disclosure regime for benefit corporations, separate from the Securities Laws (which focus on financial disclosure), but still administered by the SEC.[325] The regime requires standardized financial, social, and environmental disclosures, and thus allows investors and supporting stakeholders to compare benefit corporation performance.[326]

Further, the regime would have an enforcement mechanism that would allow both investors and supporting stakeholders to ensure that benefit corporations are providing the required disclosure and that the disclosure is accurate.[327]

Finally, the proposed disclosure regime is narrowly tailored to avoid overburdening the growth of benefit corporations, many of which have limited resources.[328] In fact, this regime may save benefit corporations money and time because it replaces the current patchwork of disclosure requirements with a single, simple regime.[329]

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[322] *See, e.g.*, Plerhoples, *supra* note 144, at 558; Reiser, *supra* note 143, at 617; McDonnel, *supra* note 143, at 62.

[323] *See supra* Part II.

[324] *See supra* Part III.A & B. One commentator explained that the current disclosure rules are "characterized by a cacophony of indices, each measuring a different aspect, but also measuring similar aspects differently." Shapira, *supra* note 158, at 1898.

[325] *See supra* Part IV.

[326] *See supra* Part IV.A.

[327] *See supra* Part IV.D.

[328] *See supra* Part IV.A.

[329] *See supra* Part V.C.