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Benefit Corporation Legislation

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Comment

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I. Introduction

When the Maryland Governor signed into law the nation's first benefit corporation legislation, state Senator Jamie Raskin remarked, "This is a great moment in the evolution of commercial life in Maryland and America. We are giving companies a way to do good and do well at the same time. The benefit corporations will tie public and private purposes together." A benefit corporation is one of a handful of new business entities designed to accommodate businesses that aim to benefit society in more ways than traditional corporations can through contributions to shareholders, consumers, employees, and general economic

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growth.[1] In a growing number of states, lawmakers have passed legislation creating various new business entities to house social enterprise and organizations that blend for-profit and not-for-profit purposes.[2]

Benefit corporations are best understood within the broader context of corporate social responsibility (CSR) and its more recent offshoots, social enterprise and organizations with hybrid purposes.[3] Social enterprise is a general term for business organizations with social and environmental purposes.[4] Similarly, organizations with hybrid purposes mix attributes of the for-profit and not-for-profit sectors.[5] Opposed to traditional corporations, for-profit social enterprise measures its success in terms of financial performance and advancement of a social or environmental mission.[6] The creators of the new legal form, the benefit corporation, explain that hybrid organizations use "the power of business to solve social and environmental problems."[7] Social enterprise and businesses with hybrid purposes can have a primarily for-profit or a primarily not-for-profit purpose, yet with either combination the organizations will incorporate social and environmental responsibility into their policies and practices.[8]

The traditional binary organizational system of state corporate law and federal tax law is not suited to accommodate the growing number of organizations with hybrid for-profit and not-for-profit purposes.[9] Traditional organizational structures and organizational elections offered under state corporate law and federal tax law

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[1] Press Release, The Corporate Social Responsibility Newswire, Maryland First Sate in Union to Pass Benefit Corp. Legislation (Apr. 14, 2010) (on file with author). A successful traditional for-profit corporation can create significant social value because of consumers' ability to purchase its goods and services, the taxes it pays, and the jobs it creates for its employees and stakeholders. Robert A. Katz & Antony Page, *The Role of Social Enterprise*, 35 VT. L. REV. 59, 86 n.162 (2010).

[2] *See infra* notes 78–122 and accompanying text.

[3] Antony Page & Robert A. Katz, *Is Social Enterprise the New Corporate Social Responsibility?*, 34 SEATTLE U. L. REV. 1351, 1353 (2011). *See generally* Archie B. Carroll, *Corporate Social Responsibility*, 38 BUS. AND SOC'Y 268 (1999) (discussing the evolution of what is considered the modern era of corporate social responsibility starting in the 1950s).

[4] Katz & Page, *supra* note 1, at 86–93 (discussing definitions of social enterprise).

5 Linda O. Smiddy, *The Vermont L3C & Other Developments in Social Entrepreneurship*, 35 VT. L. REV. 3, 4 (2010).

[6] Katz & Page, *supra* note 1, at 86.

[7] CERTIFIED B CORPORATION, http://www.bcorporation.net/about (last visited Nov. 30, 2011).

[8] Katz & Page, *supra* note 1, at 86–93.

[9] *See generally* James R. Hines Jr., Jill R. Horwitz & Austin Nichols, *The Attack on Nonprofit Status: A Charitable Assessment*, 108 MICH. L. R. 1179, 1212 (2010) (discussing some of the tax consequences of hybrid for-profit and not-for-profit entities). Federal tax law is beyond the scope of this comment, but is referenced here and in the background section in order to establish some of the problems that the current organizational system creates for organizations with hybrid purposes. *See infra* notes 19–30 and accompanying text.

draw distinctions based on an organization's primary purpose as being for-profit or not-for-profit.[10] Additionally, traditional for-profit legal entities are not equipped with accountability and transparency standards, which are necessary to evaluate corporate social responsibility.[11] In the past ten years, state legislators across the country have responded to the shortcomings of the binary organizational system by creating new legal forms to better house businesses with hybrid purposes.[12]

This comment begins with a short background to introduce the primarily binary organizational system and its limitations on corporate social responsibility.[13] The background also introduces three hybrid legal forms now available in various states: the benefit corporation, the flexible purpose corporation, and the low-profit limited liability company (L3C).[14] Next, the analysis section demonstrates how benefit corporation legislation addresses three problems that organizations with hybrid purposes face as traditional for-profit corporate entities: (1) the shareholder wealth maximization norm; (2) the lack of accountability standards; and (3) the lack of transparency standards.[15] The analysis argues that because of a benefit corporation's features that address these problems, it is a better form for social enterprise than a traditional corporation.[16] The analysis then describes how benefit corporation legislation can create economic opportunity in Wyoming and is consistent with Wyoming public policy.[17] In conclusion, this comment argues the Wyoming legislature should adopt benefit corporation legislation to create more legal clarity, accountability, transparency, and economic opportunity.[18]

II. Background

A. *The Traditional Binary Organizational System*

State law and federal tax law principally require organizations to be either for-profit or not-for-profit entities.[19] Wyoming state law requires corporations to be for-profit.[20] Other state recognized entities, such as a limited liability company

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[10] *See infra* notes 19–30 and accompanying text.

[11] *See infra* notes 68–77 and accompanying text.

[12] *See infra* notes 78–122 and accompanying text.

[13] *See infra* notes 19–77 and accompanying text.

[14] *See infra* notes 78–122 and accompanying text.

[15] *See infra* notes 137–69 and accompanying text.

[16] *See infra* notes 137–69 and accompanying text.

[17] *See infra* notes 170–80 and accompanying text.

[18] *See infra* notes 137–80 and accompanying text.

[19] Michael D. Gottesman, Comment, *From Cobblestones to Pavement: The Legal Road Forward for the Creation of Hybrid Social Organizations*, 26 YALE L. & POL'Y REV. 345, 345 (2007) ("The U.S. legal system largely divides organizations into two categories: for-profit and nonprofit.").

[20] *See, e.g.*, WYO. STAT. ANN. § 17-16-140(a)(iv) (2011) (defining a corporation as for-profit).

(LLC), have more flexibility.[21] In Wyoming, an LLC must have a "lawful purpose," either for-profit or not-for-profit.[22] However, if an LLC seeks not-for-profit status under the United States Internal Revenue Code (IRC), the partners' profit-making capabilities are restricted.[23] The IRC designates public charities and private foundations as not-for-profit entities.[24] A public charity that elects to be a tax-exempt organization under the IRC must have a primary purpose in furtherance of a charitable program.[25] A private foundation that makes a similar election must have the primary purpose of making grants to other charitable organizations or to individuals outside the foundation.[26]

There are already some means by which organizations blur the boundaries of this binary system.[27] Traditional for-profit corporations, for example, will make charitable gifts to not-for-profit organizations.[28] Traditional for-profit corporations can also further their charitable goals by creating distinct legal entities that operate charitable divisions of their organization, which are usually titled corporate foundations.[29] Tax-exempt not-for-profit organizations can earn some profits, but they cannot distribute these profits to shareholders or partners in the same manner as for-profit corporations or LLCs.[30]

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[21] Ann K. Wooster, Annotation, *Construction and Application of Limited Liability Company Acts*, 47 A.L.R. 6th 1, §18 (2008) ("The LLC's operation is intended to be much more flexible that a corporation's . . . .").

[22] *See, e.g.*, WYO. STAT. ANN. § 17-29-104(b) ("A limited liability company may have any lawful purpose, regardless of whether for profit.").

[23] *See generally* Richard A. McCray & Ward L. Thomas, *Limited Liability Companies as Exempt Organizations—Update*, I.R.S. EXEMPT ORG. CONTINUING PROF'L EDUC. TECHNICAL INSTRUCTION PROGRAM (2001), http://www.irs.gov/pub/irs-tege/eotopicb01.pdf.

[24] I.R.C. § 501(c)(3) (2010) ("[N]o part of the net earnings of which inures to the benefit of any private shareholder or individual . . . .").

[25] *Id.*; *see generally Life Cycle of a Public Charity/Private Foundation*, I.R.S., http://www.irs.gov/charities/charitable/article/0,,id=136459,00.html (last updated July 1, 2011) (describing the requirements of being a recognized public charity or private foundation under the federal tax code).

[26] I.R.C. § 509 (2010) (defining a private foundation).

[27] Dana Brakman Reiser, *Governing and Financing Blended Enterprise*, 85 CHI.-KENT L. REV. 619, 619 (2010) ("This blurring of the boundary between for-profit and nonprofit has gone on for years and appears only to be gaining steam.").

[28] *See* I.R.C. § 170(a)(1) (2010) (allowing corporations a deduction for making charitable contributions).

[29] Jim Fruchterman, *For Love or Lucre*, STAN. SOC. INNOVATION REV., Spring 2011, at 42, 46–47 (discussing how some organizations take advantage of both for-profit and not-for profit governing structures and create two separate legal entities like Charles Schwab & Company and Schwab Charitable, its affiliated nonprofit), *available at* http://www.ssireview.org/images/articles/2011SP_Feature_Fruchterman.pdf.

[30] I.R.C. § 4958(c) (2010). Tax-exempt not-for-profit organizations can earn profits; however, if such an organization engages in an excess benefit transaction, an excise tax may be imposed on the person or organization party to the transaction. *Id.*

1. The Shareholder Wealth Maximization Norm

The shareholder wealth maximization norm, and the uncertainty that surrounds it, restricts directors, managers, and boards of traditional for-profit corporations from considering broader stakeholder interests. Corporations that wish to blur the boundaries of the binary organizational system in furtherance of social and environmental purposes encounter hurdles resulting from the wealth maximization norm.[31] The shareholder wealth maximization norm, derived from state corporate law and national corporate norms,[32] stands for the proposition that directors have a duty to maximize shareholder wealth.[33] According to this norm, directors can be held liable for not doing so.[34] If directors of traditional for-profit corporations begin to take actions more aligned with those of not-for-profit organizations, the directors might be held liable for violating their fiduciary duty to shareholders.[35] Jurists continue to debate the salience and applicability of the shareholder wealth maximization norm, but this only further contributes to the uncertainty for corporations that pursue social and environmental policies and practices in addition to profits.[36]

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[31] *See infra* notes 32–67 and accompanying text.

[32] Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm,* 21 J. CORP. L. 657, 717 (1996) ("[S]hareholder wealth maximization norm . . . has been fully internalized by American managers.").

[33] This comment will refer to this norm as the shareholder wealth maximization norm, whereas it can also be called the "shareholder primacy norm." *See, e.g.*, Robert Sprague & Aaron J. Lyttle, *Shareholder Primacy and the Business Judgment Rule: Arguments for Expanded Corporate Democracy*, 16 STAN. J.L. BUS. & FIN. 1, 4 (2010) (referring to the shareholder wealth maximization norm as the "shareholder primacy norm").

[34] *See infra* notes 37–42 and accompanying text.

[35] Judd F. Sneirson, *Green Is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. Rev. 989, 989 (2010) ("This perceived duty to maximize shareholder profits lies at the heart of the conventional law-and-economics-laced view of corporate governance, thus imposing a formidable obstacle to corporations wishing to become more sustainable.").

[36] *See, e.g.*, MICHAEL P. DOOLEY, FUNDAMENTALS OF CORPORATION LAW 97 (1995) (arguing scholars generally agree "that management's principle fiduciary duty is to maximize the return to the common shareholders"); Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV 1423, 1423 (1993) (arguing "the mainstream of corporate law remains committed to the principles espoused by the *Dodge* court"). *But see, e.g.*, Jonathan Macey, *A Close Read of an Excellent Commentary on Dodge v. Ford*, 3 VA. L. & BUS. REV. 177, 180 (2008) (arguing that "shareholder wealth maximization is widely accepted at the level of rhetoric but largely ignored as a mater of policy implementation"); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 278 (1998) (arguing "the shareholder primacy norm is nearly irrelevant to the ordinary business decisions of modern corporations"); Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. BUS. REV. 163 (2008) (discussing why *Dodge v. Ford* does not create an accurate representation of the purpose of a corporation).

The 1919 Michigan Supreme Court case, *Dodge v. Ford*, is considered the fountainhead of a director's fiduciary duty to maximize shareholder wealth.[37] In 1916, Henry Ford paid his employees higher than average wages and promised customers price discounts on the Model T.[38] Before founding Oldsmobile, brothers John and Horace Dodge were minority shareholders in the Ford Motor Company[39] and sued for the declaration of a special dividend.[40] They thought that the additional corporate profits Ford was distributing to corporate stakeholders, such as employees and consumers, belonged to the corporate shareholders.[41] The court ruled in favor of the Dodge brothers, holding that the purpose of a corporation is to make money for its shareholders, and found Ford's efforts to benefit stakeholders were at the shareholders' expense.[42]

Since *Dodge v. Ford*, courts have struggled to apply the shareholder wealth maximization norm.[43] Courts have difficulties evaluating whether directors were acting to maximize shareholder value after the fact.[44] Courts generally evaluate directors' actions in three different contexts: (1) day-to-day operations, (2) defending against hostile takeovers, and (3) change-of-control transactions.[45] In the first two contexts, courts apply the business judgment rule or the modified business judgment rule respectively.[46] Both of these standards carry the "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action

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[37] Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919); *see generally supra* note 36 (citing commentaries on *Dodge v. Ford* and the case's relationship to the shareholder wealth maximization principle).

[38] *Dodge*, 170 N.W. at 670–71 (discussing Ford Motor Company's financials including the policy of lowering selling prices).

[39] *Id.* at 669 ("The parties in the first instance associating, who signed the articles, included Henry Ford, whose subscription was for 255 shares, John F. Dodge, Horace E. Dodge, the plaintiffs, Horace H. Rackham and James Couzens, who each subscribed for 50 shares, and several other persons.").

[40] *Id.* at 673 ("Plaintiffs ask for an injunction to restrain the carrying out of the alleged declared policy of Mr. Ford and the company, for a decree requiring the distribution to stockholders of at least 75 percent of the accumulated cash surplus . . . .").

[41] *Id.* at 669.

[42] *Id.* at 685 ("The decree of the court below fixing and determining the specific amount to be distributed to stockholders is affirmed.").

[43] Macey, *supra* note 36, at 181 (comparing courts' lack of ability to enforce the shareholder wealth maximization norm to the highway patrols' lack of ability to enforce the speed on Connecticut's Merritt Parkway).

[44] *Id.* at 180–81.

[45] Steven J. Haymore, Note, *Public(ly Oriented) Companies: B Corporations and the Delaware Stakeholder Provision Dilemma*, 64 VAND. L. REV. 1311, 1326 (2011).

[46] *Id.*

taken was in the best interest of the company."[47] Courts generally do not apply the shareholder wealth maximization norm in these circumstances because courts grant broad discretion to the directors to make decisions they believe are in the best interest of the corporation.[48]

In contrast to the first two contexts, courts will apply the shareholder wealth maximization norm in change-of-control situations.[49] A change-of-control situation occurs when the sale of a corporation is inevitable.[50] In this situation, the director's primary duty becomes the "maximization of the company's value at a sale for the stockholders' benefit."[51] Directors are thus required to accept the highest reasonable offer in order to maximize shareholder wealth.[52] In these situations, directors cannot consider other stakeholders' interests: "[C]oncern for non-stockholder interests is inappropriate when an auction among active bidders is in progress."[53] The language here is clear that the directors are prevented from even considering the broader interests of the corporation and must solely focus on shareholders' interests and wealth maximization.[54]

Thirty states, including Wyoming, have adopted constituency statues to allow directors to consider a broader range of interests beyond shareholder wealth maximization in day-to-day decision-making, change of control situations, and hostile takeovers.[55] These statutes permit directors to consider the interests

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[47] Sprague & Lyttle, *supra* note 33, at 14 (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)).

[48] *Id.* at 17.

[49] *See infra* notes 81–122 and accompanying text.

[50] Haymore, *supra* note 45, at 1332.

[51] Rakhi I. Patel, *Facilitating Stakeholder-Interest Maximization: Accommodating Beneficial Corporations in The Model Business Corporation Act*, 23 ST. THOMAS L. REV. 135, 147 (2010) (quoting Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986)); Haymore, *supra* note 45, at 1332.

[52] Page & Katz, *supra* note 3, at 1370.

[53] Haymore, *supra* note 45, at 1333 (quoting *Revlon, Inc.* 506 A.2d at 182).

[54] *Id.*

[55] ARIZ. REV. STAT. ANN. § 10-2702 (2011); CONN. GEN. STAT. § 33-756 (2011); FLA. STAT. § 607.0830(3) (2011); GA. CODE ANN. § 14-2-202(b)(5) (2011); HAW. REV. STAT. § 414-221 (2011); IDAHO CODE ANN. § 30-1602 (2011); 805 ILL. COMP. STAT. 5/8.85 (2011); IND. CODE §23-1-35-1 (2011); IOWA CODE §491.101B (2011); KY. REV. STAT. ANN. § 271B.12-210(4) (West 2011); LA. REV. STAT. ANN. § 12:92(G)(2) (2011); ME. REV. STAT. tit. 13-C, § 831 (2011); MD. CODE. ANN., CORPS. & ASS'NS § 2-104(b)(9) (West 2011); MINN. STAT. § 302A.251(5) (2011); MISS. CODE ANN. § 79-4-8.30(d) (2011); MO. REV. STAT. § 351.347 (2011); N.J. STAT. ANN. §§ 14A:6-1(2), -14(4) (West 2011); N.M. STAT. ANN. § 53-11-35(D) (2011); N.Y. BUS. CORP. LAW § 717(b) (McKinney 2011); N.D. CENT. CODE § 10-19.1-50(6) (2011); OHIO REV. CODE ANN. § 1701.59(E) (West 2011); OR. REV. STAT. § 60.357(5) (2011); 15 PA. CONS. STAT. § 1715 (2011); R.I. GEN. LAWS § 7-5.2-8(a) (2011); S.D. CODIFIED LAWS § 47-33-4(1) (2011); TENN. CODE ANN.

of corporate employees, customers, suppliers, creditors, and communities.[56] Directors may also consider broader criteria such as the long-term interest of the corporation, the economic climate, and, in change-of-control or hostile takeover situations, whether stakeholders are best served by the continued independence of the corporation.[57]

While constituency statutes give directors broader discretion to consider interests beyond those of shareholders, they modify, but do not overcome the shareholder wealth maximization norm. [58] First, constituency statutes do not go beyond what a director can already do in making day-to-day decisions: consider what is in the "best interest" of the corporation.[59] Second, constituency statutes are often vague and do not contain guidance as to how non-shareholder interests may be considered.[60] Finally, even the most expansive constituency statutes only create the potential for directors to consider the effects of their decisions on non-shareholder interests, but never allow directors to consider stakeholders' interest above shareholders' financial returns.[61]

Organizations with hybrid purposes, therefore, lack guidance regarding the role shareholder wealth maximization plays in the business landscape. Risk-averse directors of traditional corporate entities, along with their cautious counsel, are often wary of considering stakeholders interests at the expense of financial returns.[62] Even though courts since *Dodge v. Ford* have struggled to apply the wealth maximization norm and constituency statues take a small step to overcome it, shareholder wealth maximization is the American corporate polestar.[63] Milton

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§§ 48-103-202, -204 (2011); VT. STAT. ANN. tit. 11A, § 8.30(a)(3) (2011); WIS. STAT. § 180.0827 (2011); WYO. STAT. ANN. § 17-16-830(g) (2011). Constituency statutes are also referred to as "non-shareholder constituency statutes" and "other-constituency statutes." 29 AM. JUR. 3D *Proof of Facts* § 133 (2011).

[56] 29 Am. Jur. 3d *Proof of Facts* § 133 (2011).

[57] *Id.*

[58] *See* John Tyler, *Negating the Legal Problem of Having "Two Masters": A Framework for L3C Fiduciary Duties and Accountability*, 35 VT. L. REV. 117, 135 (2010).

[59] 29 AM. JUR. 3D *Proof of Facts* § 133 (2011).

[60] *Id.*

[61] Tyler, *supra* note 58, at 135 (explaining constituency statues create "no legal duty, obligation, or responsibility that directors have to maximize or even ensure benefits to non-shareholders, and, to the extent directors decide in one instance to protect non-shareholder interests, they are legally free to change their mind with impunity" (citations omitted)).

[62] W. Derrick Britt, R. Todd Johnson & Susan H. MacCormac, *Frequently Asked Questions Proposed Amendments to the California Corporations Code for a New Corporate Form: The Flexible Purpose Corporation and Senate Bill 201*, THE CALIFORNIA WORKING GROUP FOR NEW CORPORATE FORMS, Feb. 23, 2011 [hereinafter WORKING GROUP] (on file with author).

[63] *See infra* notes 64–67 and accompanying text.

Friedman's familiar maxim, "[t]he social responsibility of business is to increase its profits," encapsulates the principle.[64] It is pervasive throughout court dicta,[65] business school curriculums,[66] and popular culture.[67]

2. *The Lack of Accountability and Transparency Standards*

Traditional for-profit entities lack structural mechanisms to assure shareholders and consumers that organizations are operating in a socially and environmentally responsible manner.[68] In the absence of required accountability and transparency standards, some traditional corporations will garner public support and earn profits by making unsubstantiated claims of corporate social and environmental responsibility.[69] A corporation's purported purpose beyond shareholder wealth maximization can be completely unsupported.[70] Additionally, there is no mechanism in traditional for-profit entities that anchors a social or environmental purpose.[71] A business' social purpose, therefore, can change or disappear with new management or board directives.[72]

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[64] Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, THE NEW YORK TIMES MAGAZINE, Sept. 13, 1970, at SM17.

[65] *See, e.g.*, eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 22 (Del. Ch. 2010). In *eBay Domestic Holdings*, prominent corporate law jurist Chancellor Chandler offers his opinion as to the purpose of a for-profit corporation:

> 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. The 'Inc.' after the company name has to mean at least that. Thus, I cannot accept as valid for the purposes of implementing . . . a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders . . . .

Id. at 23.

[66] Jill E. Fisch, *Measuring Efficiency in Corporate Law: the Role of Shareholder Primacy*, 31 J. CORP. L. 637, 654 (2006) (discussing that the shareholder wealth maximization norm was implicit in most business school courses).

[67] JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER 34–35, 36–39, 41–42, 45, 53, 54–55, 142 (Constable & Robinson Ltd. 2004).

[68] WORKING GROUP, *supra* note 62.

[69] Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TUL. L. REV. 984, 1000 (2011); *see, e.g.*, Steven D. Lydenberg, *Envisioning Socially Responsible Investing: A Model for 2006*, J. CORP. CITIZENSHIP, July 2002, at 57 ("Although an increasing number of corporations publish environmental and health and safety reports, many are simply token efforts—greenwashing . . . ." (citations omitted)).

[70] *See generally* Cherry, *supra* note 69 (discussing how BP has capitalized on green marketing campaigns, yet shown little change in policies and practices).

[71] WORKING GROUP, *supra* note 62.

[72] *Id.* ("[Traditional] corporate form presents risks for the entrepreneur seeking to maintain [a] mission . . . . This difficulty in 'anchoring the mission' represents a significant issue for entrepreneurs utilizing a blended value mode.").

Various not-for-profit organizations now offer private third-party certifications and standards to evaluate business' environmental and social policies and practices.[73] For example, many products in a local supermarket may be marked with Rainforest Alliance and Fair Trade seals of approval.[74] Some supermarket buildings are even United States Green Building Council LEED certified.[75] While third-party certification systems, such as Rainforest Alliance, Fair Trade, and LEEDs all fill important niches in evaluating a business' policies and practices, they are not comprehensive corporate social and environmental responsibility certifications. These certifications are voluntary and limited to specific aspects of corporate performance rather than assessing corporate practices as a whole.[76] Beyond these certifications, there are currently few standardized ways for organizations to signal that they are satisfying their social and environmental commitments.[77] Businesses with hybrid purposes want this ability so they can connect with socially conscious investors and consumers.

B. Hybrid Legal Entities

In response to the limitations of the current primarily binary organizational system, proponents of social enterprise have developed various innovative hybrid legal entities to better house organizations with hybrid purposes.[78] These new legal entities are considered hybrids because they attempt to blend aspects of for-profit

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[73] *See infra* notes 74–77 and accompanying text.

[74] *See, e.g.*, *Certification, Verification and Validation Services*, RAINFOREST ALLIANCE, http://www.rainforest-alliance.org/certification-verification (last visited Nov. 30, 2011) (offering certification for farms, forestry, ecotourism and forest-based carbon projects); *Certification & Your Business*, FAIR TRADE USA, http://www.transfairusa.org/certification (last visited Nov. 30, 2011) ("The Fair Trade Certified™ label ensures consumers that the farmers and workers behind the product got a better deal. . . . It reassures consumers that their purchases are socially and environmentally responsible.").

[75] *See, e.g.*, Allyson Wendt, *Grocery Store Earns LEED Gold*, GREEN SOURCE: THE MAGAZINE OF SUSTAINABLE DESIGN (Sept. 18, 2007), http://greensource.construction.com/news/070918PCCNaturalMarkets.asp.

[76] *See Certification, Verification and Validation Services*, *supra* note 74. For example, Rainforest Alliance Certification offers a diverse set of certifications including forest certification, logging and forest carbon verification and validation, and forest products chain-of-custody certification—all of which look to a specific component of forestry. *See id.*; *What LEED Is*, U.S. GREEN BUILDING COUNCIL, http://www.usgbc.org (last visited Nov. 30, 2011) (explaining that Leadership in Energy and Environmental Design (LEEDs) measures green building design, construction, operation and maintenance solutions).

[77] *See generally* Steve Lydenberg & Graham Sinclair, *Mainstream or Daydream? The Future for Responsible Investing*, J. CORP. CITIZENSHIP, Spring 2009, at 47 (discussing an increase in CSR reporting but also arguing a need for more steps to be taken).

[78] *See generally* Reiser, *supra* note 27 (describing on the complexities of social enterprises' dual mission and the extent to which the governance structures of several hybrid forms relieve this friction).

organizations and not-for-profit organizations.[79] States have passed legislation that allows organizations to incorporate as or elect to become benefit corporations, flexible purpose corporations, or low-profit limited liability companies (L3Cs).[80]

1. *Benefit Corporations*

Benefit corporations are one legal entity, established at the state level, for which social entrepreneurs advocate to facilitate social enterprise and business with hybrid purposes. Since 2010, Maryland, Vermont, Virginia, New Jersey, Hawaii, and California have passed legislation that creates benefit corporations.[81] Under these new laws, benefit corporations must change their standard internal governing documents to include a stated purpose that advances a "general public benefit."[82] The legislation for each state defines "general public benefit" as a "material, positive impact on society and the environment."[83] Although "material positive impact" is not defined, the legislation requires an independent third-party to evaluate the benefit corporation's fulfillment of its "general public benefit."[84] An additional mechanism used to evaluate the general public benefit is a benefit enforcement proceeding, which is a new right of action for shareholders and other groups with standing to challenge the directors' fulfillment of the general public benefit.[85]

A benefit corporation may elect to have additional "specific public benefits," which are also evaluated by an independent third-party.[86] Examples of "specific

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[79] *Id.* at 619 ("Each hybrid form draws on features found in existing organizational frameworks, adding on organizational innovations.").

[80] *See infra* notes 81–122 and accompanying text. An additional hybrid entity is the socially responsible corporation (SRC). Patel, *supra* note 51, at 150. Minnesota lawmakers have introduced SRC legislation, but as of this writing, no such legislation has passed. *Id.*

[81] *Benefit Corporation Legislation*, CERTIFIED B CORPORATION, http://www.bcorporation.net/publicpolicy (last visited Nov. 30, 2011) (demonstrating that as of this writing, benefit corporation has become law in six states).

[82] *See, e.g.*, MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01(C) (2011); N.J. STAT. ANN. § 14A:18-1 (WEST 2011); VT. STAT. ANN. tit. 11A, § 21.08(A) (2011); VA. CODE ANN. § 13.1-787(A) (2011).

[83] *See, e.g.*, MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01(C); N.J. STAT. ANN. § 14A:18-1; VT. STAT. ANN. tit. 11A, § 21.08(A); VA. CODE ANN. § 13.1-787(A).

[84] MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01(C); N.J. STAT. ANN. § 14A:1; VT. STAT. ANN. tit. 11A, § 21.08(A); VA. CODE ANN. § 13.1-787(A).

[85] *See, e.g.*, MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01(C); N.J. STAT. ANN. § 14A:18-1; VT. STAT. ANN. tit. 11A, § 21.08(A); VA. CODE ANN. § 13.1-787(A).

[86] *See, e.g.*, MD. CODE ANN., CORPS. & ASS'NS § 5-6C-03(D); N.J. STAT. ANN. § 14A:18-1; VT. STAT. ANN. tit. 11A, § 21.03(A)(6); VA. CODE ANN. § 13.1-782.

public benefits" are "promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business," "improving human health," or "preserving or improving the environment."[87]

One of the chief proponents of benefit corporation legislation is B Lab, a not-for-profit organization. A group of social entrepreneurs and business veterans founded B Lab to incubate and develop the new hybrid legal entity.[88] B Lab created its private B Corporation Certification System, which pioneered changing a corporation's internal documents in order to pursue a social benefit in addition to profits.[89] B Lab's private B Corporation Certification was an important precursor to state recognized benefit corporations, which implement similar changes with the support of state statutory law.[90] B Lab, in conjunction with corporate and securities lawyers, developed and wrote model benefit corporation legislation.[91] The state statutory requirements for becoming a benefit corporation closely mirror B Lab's private B Corporation Certification.[92] States have since used B Lab's model legislation in drafting their own benefit corporation legislation to create the new legal entity.[93]

B Lab assists, certifies, and audits corporations that wish to become and maintain status as both state recognized benefit corporations and private Certified B Corporations.[94] B Lab has certified 465 businesses, which have a combined total of $2.21 billion in revenue across sixty industries.[95] For example, B Lab certified the Colorado-based outdoors gear manufacturer, GoLite, in 2008, and Seventh Generation, the nation's most widely recognized brand of natural household products, in the prior year.[96]

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87 *See, e.g.*, MD. CODE ANN., CORPS. & ASS'NS § 5-6C-03(D); N.J. STAT. ANN. § 14A:18-1; VA. CODE ANN. § 13.1-782; VT. STAT. ANN. tit. 11A, § 21.03(A)(6).

88 *See generally* Jenna Lawrence, *Making the B List*, STAN. SOC. INNOVATION REV. (2009), http://www.ssireview.org/pdf/2009SU_What_Works_Lawrence.pdf (discussing the founding of B Lab).

89 *Id.*

90 CERTIFIED B CORPORATION, *supra* note 7.

91 *Id.*

92 *See generally Amendments to the Pennsylvania Consolidated Statues with Official Source Notes and Committee Comments*, PA. BAR ASS'N SEC. ON BUS. L., tit. 15 § 3331(e), http://www.bcorporation.net/resources/bcorp/documents/Draft_Pennsylvania-Legislation.pdf (last visited Nov. 30, 2011).

93 *Id.* William H. Clark, Jr. a partner in the Corporate & Securities Practice Group of Drinker Biddle and Reath LLP, helped draft the model legislation along with B Lab. *Id.*

94 *Id.*

95 *Id.*

96 *2011 B Corporation Annual Report*, B LAB, at 7 (2011), http://www.bcorporation.net/B-Media/2011-Annual-Report. In 2010, 3114 businesses were using the B Impact Rating System, 370 of which were Certified B Corporations. *Id.*

2. *Flexible Purpose Corporations*

A flexible purpose corporation is a second legal entity for which social entrepreneurs advocate at the state level to facilitate social enterprise and business with hybrid purposes. California passed the first flexible purpose corporation legislation in October 2011.[97] Broadly speaking, flexible purpose corporations are similar to benefit corporations. Both are designed to accommodate profitability along with social and environmental purposes.[98] Their similarities are not accidental because B Lab provided advice in drafting the flexible purpose corporation legislation as well.[99]

Flexible purpose corporations and benefit corporations, however, do have a few important distinctions. First, a flexible purpose corporation must have a "special purpose" as opposed to a benefit corporation's required "general public benefit."[100] The California legislation defines "special purpose" as charitable and public purpose activities that a not-for-profit organization is authorized to carry out.[101] Second, the flexible purpose legislation does not require a third-party to evaluate each "special purpose."[102] Third, flexible purpose corporation legislation does not create a new right of action for the enforcement of their stated "special purpose" and instead grants unfettered discretion to the director's business judgment in balancing the special purpose with maximizing shareholder value.[103]

3. *Low-Profit Limited Liability Companies*

A third legal entity for which social entrepreneurs advocate at the state level is a low-profit limited liability company (L3C).[104] Wyoming—along with eight other states, the Oglala Sioux Tribe, and the Crow Indian Nation of Montana—has passed L3C legislation.[105] These jurisdictions have amended their LLC statutes

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[97] Stephanie Strom, *A Quest for Hybrid Companies That Profit, but Can Tap Charity*, N.Y. TIMES, Oct. 13, 2011, at B1.

[98] WORKING GROUP, *supra* note 62.

[99] *Id.*

[100] *Id.*

[101] CAL. CORP. CODE § 2602 (West 2011). Benefit corporation legislation defines its "general public benefit" as a "material positive impact on society and the environment." *Id.*

[102] *Id.*

[103] WORKING GROUP, *supra* note 62.

[104] *See generally* Tyler, *supra* note 58 (describing the L3C form, explaining its relevant characteristic and correcting common misunderstandings about the L3C).

[105] 805 Ill. COMP. STAT. 180/1-26 (2011); LA. REV. STAT. ANN. § 12:1302 (2011); ME. REV. STAT. tit. 31, § 1611 (2011); MICH. COMP. LAWS SERV. § 450.4102 (2011); N.C. GEN. STAT. § 57C-2-01 (2011); UTAH CODE ANN. § 48-2c-412 (2011); VT. STAT. ANN. tit. 11,.§ 3001 (2011); WYO. STAT. ANN. § 17-29-102 (a)(ix) (2011); *see generally Laws*, AMS. FOR CMTY. DEV., http://www.

to permit the formation of L3Cs, which produce income, accumulate wealth for investors, and perform greater social purpose within a standardized form.[106] L3Cs are tailored for organizations with needs that differ from benefit corporations and flexible purpose corporations.[107] L3Cs are designed to accommodate for-profit entrepreneurs with *primarily* charitable purposes that want to attract program-related investments (PRIs) from foundations.[108]

PRIs are loans or investments made by non-profit, private foundations that qualify for two special conditions under federal tax law.[109] First, PRIs qualify as part of a foundation's required annual charitable distribution.[110] Second, PRIs are not jeopardizing investments, which means a foundation is not subject to excise taxes when making PRIs.[111] This is because a PRI's primary purpose must be to accomplish one or more of the foundation's tax-exempt purposes.[112] These two unique tax conditions make PRIs a good vehicle for the distribution of charitable capital.[113]

Under traditional LLC statutes, without an L3C election, an LLC can receive PRIs.[114] However, a foundation must perform extra due diligence on an organization-by-organization basis to make sure each LLC will comply with federal tax law's PRI requirements.[115] This additional work can deter foundations from investing in LLCs and prevent LLCs from accessing necessary charitable capital.[116] L3Cs, by contrast, are specifically formed with the United States

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americansforcommunitydevelopment.org/laws.php. (last visited Nov. 30, 2011) (demonstrating that L3C legislation has been enacted in nine states and is also a component of the jurisprudence of two Native American tribes).

[106] WORKING GROUP, *supra* note 62.

[107] *See infra* notes 78–121 and accompanying text.

[108] Smiddy, *supra* note 5, at 6 ("[L3C] . . . is a form of social enterprise combining profit-making objectives with serving social goals. The L3C form was originally created for the narrow purpose of facilitating foundations' willingness to make program-related investments in for-profit companies." (citations omitted)).

[109] Reiser, *supra* note 27, at 622 (discussing PRIs special treatment under federal tax law).

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] Luther M. Ragin, Jr., *Program-Related Investments in Practice*, 35 VT. L. REV. 53, 54–55 (2010) (discussing the Heron Foundation's experience with making PRIs).

[114] *Id.*

[115] *Id.*

[116] Arthur Wood, *New Legal Structures to Address the Social Capital Famine*, 35 VT. L. REV. 45, 50 (2010).

Treasury Department's PRI regulations in mind.[117] The L3C designation signals to foundations that the entity is PRI compatible, which increases the organization's ability to generate capital from foundations.[118]

Since the Wyoming state legislature passed L3C legislation in February 2009, twenty-six Wyoming organizations have elected to become L3Cs.[119] One example is the community development software company Univicty.[120] Univicity reincorporated from a registered not-for-profit organization to an L3C because the Internal Revenue Service disallowed it from developing for-profit software as a not-for-profit organization.[121] The L3C form enables Univicity and others to promote a social mission while raising limited capital though for-profit ventures and foundation PRIs.[122]

III. ANALYSIS

The traditional for-profit corporate form offers limited flexibly, accountability, and transparency; thus making it a less than ideal legal organizational form for social enterprise.[123] Benefit corporation legislation creates a hybrid alternative to better house social enterprise and business with hybrid purposes.[124] The first problem of the traditional corporate form that benefit corporation legislation addresses is the shareholder wealth maximization norm.[125] This comment argues benefit corporation legislation creates legal certainty amidst the shareholder wealth maximization norm debate by making innovative changes to the standard internal documents of a corporation and by supporting these changes with state statutory law.[126] These two measures avoid conflicts between social missions and shareholder wealth maximization.[127] The second problem with traditional corporate entities that benefit corporation legislation addresses is the lack of social and environmental accountability standards to distinguish those organizations that only make claims of social responsibility from those that take action to back up their claims.[128]

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117 *See* Tyler, *supra* note 58, at 121.

118 Elizabeth Schmidt, *Vermont's Social Hybrid Pioneers: Early Observations and Questions to Ponder*, 35 VT. L. REV. 163, 167 (2010).

119 WYO. STAT. ANN. § 17-29-102 (a)(ix) (2011); *see also Here's the Latest L3C Tally*, INTERSECTOR PARTNERS, L3C, http://www.intersectorl3c.com/l3c_tally.html (last visited Nov. 30, 2011).

120 *About Univicity*, UNIVICITY, http://www.univicity.com/about (last visited Nov. 30, 2011).

121 *Id.*

122 *See supra* notes 104–20 and accompanying text.

123 *See supra* notes 125–78 and accompanying text.

124 *See infra* notes 125–78 and accompanying text.

125 *See infra* notes 134–49 and accompanying text.

126 *See infra* notes 134–49 and accompanying text.

127 *See infra* note 149 and accompanying text.

128 *See infra* notes 151–63 and accompanying text.

This comment examines benefit corporation legislation's two mechanisms for creating accountability standards: (1) internal enforcement proceedings; and (2) mandatory independent third-party evaluations.[129] Benefit corporation legislation addresses a third problem with traditional entities—a lack of transparency.[130] The legislation creates mandatory reporting guidelines that provide transparency and further contribute to accountability within corporate responsibility.[131] Further, as a matter of policy, benefit corporation legislation is appropriate for Wyoming.[132] This comment argues the Wyoming legislature should adopt benefit corporation legislation to create more legal clarity, accountability, transparency, and economic opportunity in the field of social enterprise.[133]

A. Resolving the Shareholder Wealth Maximization Norm

Benefit corporation legislation circumvents the shareholder wealth maximization norm by requiring changes to a corporation's internal corporate law and to a state's statutory law.[134] These changes create more legal clarity for social enterprise and organizations with hybrid purposes.[135] The legislation takes steps to avoid conflicts between an organization's social mission and shareholder profits in an effort to prevent possible litigation between directors and shareholders.[136]

1. Benefit Corporation Legislation Requires Changes to Internal Corporate Law

Benefit corporation legislation addresses the shareholder wealth maximization norm by requiring organizations that seek to incorporate, or reincorporate, as a benefit corporation to make changes to their internal law—the requirements set forth in a corporation's articles of incorporation and bylaws.[137] First, a corporation's articles must include a benefit corporation election.[138] Second, the articles must

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[129] *See infra* notes 151–63 and accompanying text.

[130] *See infra* notes 164–69 and accompanying text.

[131] *See infra* notes 164–69 and accompanying text.

[132] *See infra* notes 170–80 and accompanying text.

[133] *See infra* notes 135–78 and accompanying text.

[134] *See infra* notes 135–78 and accompanying text.

[135] *See infra* notes 137–49 and accompanying text.

[136] *See infra* note 149 accompanying text.

[137] Stout, *supra* note 36, at 168 ("'Corporate law' can itself be broken down into three rough categories: (1) 'internal' corporate law (that is, the requirements set out in individual corporations' charters and bylaws); (2) state corporate codes; and (3) corporate case law.").

[138] *See, e.g.*, MD. CODE ANN., CORPS. & ASS'NS § 5-6C-03(A) (2011); N.J. STAT. ANN. § 14A:18-1 (West 2011); VT. STAT. ANN. tit. 11A, §§ 21.04, 21.03(a)(1) (2011); VA. CODE ANN. § 13.1-784 (2011).

state that the corporation has the purpose of creating general public benefit.[139] These two provisions within the corporation's internal documents explicitly state that the purpose of the corporation goes beyond generating shareholder profits.

The legislation also allows a benefit corporation to state a purpose that creates specific public benefits within its articles of incorporation.[140] In stating these, the corporation has the opportunity to add a more focused social or environmental mission to its internal documents. Examples of specific public benefits include: improving human health; promoting the arts, sciences, or the advancement of knowledge; and promoting economic opportunity beyond the creation of jobs in the normal course of business.[141] State benefit corporation legislation can include examples of "specific public benefits," while also providing flexibility for a corporation to compose its own social or environmental purposes.[142] Benefit corporation legislation requires benefit corporations to imbed their broader corporate purpose into their corporate DNA, thus, refuting the shareholder wealth maximization norm.

2. Benefit Corporation Legislation Requires Changes to State Statutory Law

Benefit corporation legislation also establishes an exception to the shareholder wealth maximization norm by creating statutory law that protects corporate directors from shareholder derivative suits when considering broader corporate stakeholders' interests, possibly at shareholders' financial expense. Under benefit corporation legislation, directors may consider the interests of shareholders, employees, suppliers, and customers when making decisions about the corporation.[143] Directors may also consider the interests of the community, the environment, short-term and long-term goals of the corporation, and the corporation's ability to accomplish any specific public benefits it has elected. Further, directors are not obligated to give priority to any of these interests, including shareholder wealth maximization.[144] Benefit corporation legislation changes state statutory law to ease the friction between shareholder wealth

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139 *See, e.g.*, MD. CODE ANN., CORPS. & ASS'NS § 5-6C-06(A); N.J. STAT. ANN. § 14A:5; VT. STAT. ANN. tit. 11A, §§ 21.08(a); VA. CODE ANN. § 13.1-786.

140 *See, e.g.*, MD. CODE ANN., CORPS. & ASS'NS § 5-6C-03(D); N.J. STAT. ANN. § 14A:18-1; VT. STAT. ANN. tit. 11A, § 21.03(A)(6); VA. CODE ANN. § 13.1-782.

141 *See, e.g.*, MD. CODE ANN., CORPS. & ASS'NS § 5-6C-03(D); N.J. STAT. ANN. § 14A:18-1; VT. STAT. ANN. tit. 11A, § 21.03(A)(6); VA. CODE ANN. § 13.1-782.

142 *See, e.g.*, MD. CODE ANN., CORPS. & ASS'NS § 5-6C-03(D); N.J. STAT. ANN. § 14A:18-1; VT. STAT. ANN. tit. 11A, § 21.03(A)(6); VA. CODE ANN. § 13.1-782.

143 *See, e.g.*, MD. CODE ANN., CORPS. & ASS'NS § 5-6C-07(A) ; N.J. STAT. ANN. § 14A:6; VT. STAT. ANN. tit. 11A, §§ 21.09, 21.03(a)(1); VA. CODE ANN. § 13.1-788.

144 *See, e.g.*, VT. STAT. ANN. tit. 11A, § 21.09(a)(3).

maximization and social and environmental purposes.[145] Thus, directors can have more freedom to pursue corporate social responsibility through social and environmental policies and practices.

Constituency statues allow directors of traditional corporations to consider some level of stakeholders' interests; however, they do not allow as much consideration as benefit corporation legislation. The most expansive constituency statutes only create the potential for directors to consider the effects of their decisions on non-shareholder interests, but never allow directors to consider stakeholders' interest above shareholders' financial interests.[146] Benefit corporation legislation provides broader discretion for directors to consider stakeholders' interest and the furtherance of the corporation's general public benefit and any identified specific public benefits.

Benefit corporation legislation also creates statutory law that protects shareholders. Benefit corporation legislation requires a two-thirds supermajority vote in order for a traditional corporation to convert into a benefit corporation.[147] This enables shareholders to help decide whether they want their current investment to be converted into an investment in a benefit corporation. There are additional provisions to protect shareholders once an organization is a benefit corporation. A supermajority vote is required for a benefit corporation to merge with any other organization, to remove its general public benefit provision, or to change any stated specific public benefits.[148] These measures anchor the benefit corporation's social mission. They ensure that directors or managers cannot change the direction of the corporation through a merger or change its purpose without shareholder approval. If a shareholder or consumer invests in a benefit corporation, these provisions can give them confidence that the corporation's general and specific public purposes will not change or disappear without their knowledge.

3. Benefit Corporation Legislation Helps Prevent Litigation for Social Enterprise

Benefit corporation legislation requires changes to a corporation's internal documents and a state's statutory law with the intent to prevent litigation involving directors and shareholders of corporations with a social or environmental

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[145] *See infra* notes 147–48 and accompanying text.

[146] *Id.*

[147] *See, e.g.*, VT. STAT. ANN. tit. 11A, §§ 21.05 ("Any corporation organized under this title may become a benefit corporation by amending its articles of incorporation . . . the amendment shall be approved by the higher of: (A) the vote required by the articles of incorporation; or (B) two-thirds of the votes entitled to be case by the outstanding shares of the corporation . . . .").

[148] *Id.*

purpose. Shareholders of benefit corporations essentially agree that profits and returns should not be the exclusive purpose of the corporation. This agreement is incorporated both into the new entities' operating provisions and into state statutory requirements.[149] Although no decisional law exists to date that supports or opposes benefit corporation legislation, the provisions in benefit corporation legislation establish legal clarity regarding a benefit corporation's hybrid purpose. This clarity is designed to ease the tension between the shareholder wealth maximization norm and corporations' social and environmental purposes to keep benefit corporations out of court.

B. *Benefit Corporation Legislation Establishes Accountability Standards for Corporate Social Responsibility*

Benefit corporation legislation establishes standards of social and environmental accountability through two mechanisms: an internal enforcement proceeding and an independent evaluator.[150] Benefit corporation legislation creates a new right of action through "benefit enforcement proceedings."[151] Shareholders, directors, parent companies, and any other persons or groups that may be specified in the articles of incorporation can bring an action against a director.[152] The causes of action available to these parties in the benefit enforcement proceedings include a failure to pursue the general public benefit or any specific public benefit set forth in its articles of incorporation.[153] The benefit enforcement proceedings provides a forum for parties with standing to challenge the benefit corporation's fulfillment of its stated general or specific public benefit to ensure accountability.

Benefit corporation legislation's second mechanism that establishes accountability is its requirement that an independent third-party verify the benefit corporation's efforts to fulfill its general public benefit and any specific public benefits.[154] The third-party standard must be a recognized standard or certification system for defining, reporting, and assessing corporate social and environmental performance.[155] One example of a qualified third-party standard is B Lab's

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[149] *See supra* notes 137–48 and accompanying text.

[150] *See infra* notes 151–63 and accompanying text.

[151] *See, e.g.*, N.J. STAT. ANN. § 14A:10 (West 2011).

[152] *Id.*

[153] *See, e.g.*, VT. STAT. ANN. tit. 11A, § 21.13(c)(1) ("'[B]enefit enforcement proceeding' means a claim or action against a director or officer for . . . failure to pursue the general public benefit purpose of the benefit corporation or any specific public benefit purpose set forth in its articles of incorporation . . . .").

[154] *See, e.g.*, MD. CODE ANN., CORPS. & ASS'NS § 5-6C-08(A)(2) (2011); N.J. STAT. ANN. § 14A:18-7 (West 2011); VT. STAT. ANN. tit. 11A, § 21.03; VA. CODE ANN. § 13.1-782 (2011).

[155] *See, e.g.*, MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01(E); N.J. STAT. ANN. § 14A:18-; VT. STAT. ANN. tit. 11A, § 21.03; VA. CODE ANN. § 13.1-782.

certification program, which evaluates organizations' social and environmental policies.[156] B Lab evaluates whether benefit corporations meet comprehensive and transparent social and environmental performance standards by using its B Impact Assessment.[157] The B Impact Assessment employs a survey that poses questions regarding a company's governance, environmental impact, community outreach, and employee treatment.[158] The content of the survey varies depending on the size and the type of company.[159] The corporate chief operating officer usually completes the survey with assistance from other departments of the company.[160] After the B Impact Assessment, B Lab generates a B Impact Report, which scores the organizations different policies and practices.[161] Another example of an acceptable independent third-party standard is the Global Reporting Initiative (GRI).[162] The GRI has established Sustainability Reporting Guidelines and has published assessment reports on a wide-variety of industries.[163]

C. Benefit Corporation Legislation Establishes Transparency Standards for Corporate Social Responsibility

Benefit corporation legislation establishes transparency by requiring a benefit corporation to disclose information about its social and environmental practices and policies to investors, consumers, and the general public.[164] The new

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[156] *2011 B Corporation Annual Report*, B LAB, at 34 (2011), http://www.bcorporation.net/resources/bcorp/documents/B%20Corp_2011-Annual-Report.pdf. Southern Energy Management is a sustainable energy company serving southeastern United States certified on Nov. 23, 2009; Benchmark Asset Managers is a group of investment advisors and portfolio managers certified on June 1, 2007; and GoLite is an outdoor-gear manufacturer certified on Dec. 18, 2008. *Id.*

[157] *Id.* Since the passage of state benefit corporation legislation, the B Impact Rating System now can be used for the public certification of a state recognized benefit corporation or the private certification of a Certified B Corporation. *Id.*

[158] Lawrence, *supra* note 88, at 65.

[159] *Id.*

[160] *Id.*

[161] Chris Fleisher, *To 'B' or Not to 'B'?*, VALLEY NEWS, Apr. 4, 2010, at C1; *see also The B Impact Assessment*, CERTIFIED B CORPORATION, http://www.bcorporation.net/become/BRS (last visited Nov. 30, 2011).

[162] *Who is Responsible for GRI?*, GLOBAL REPORTING INITIATIVE, http://www.globalreporting.org/AboutGRI/FAQs/FAQAboutGRI.htm (last visited Nov. 30, 2011). The Global Reporting Initiative is a non-profit based in Amsterdam that originated as part of the United Nations Environment Programme. *Id.*

[163] *Is the GRI Reporting Framework Relevant to my Organization or Sector?*, GLOBAL REPORTING INITIATIVE, http://www.globalreporting.org/AboutGRI/FAQs/FAQSustainabilityReporting.htm#AnchorFive (last visited Nov. 30, 2011). Automobile manufactures, pharmaceutical companies, consumer products industries, public authorities and not-for-profit organizations have all published reports with GRI. *Id.*

[164] *See, e.g.*, MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01(E)2 (2011); N.J. STAT. ANN. § 14A:18-11 (West 2011); VT. STAT. ANN. tit. 11A, § 21.14 (2011);VA. CODE ANN. § 13.1-790(C) (2011).

legislation requires a benefit corporation to publish an annual "benefit report," which addresses the ways the corporation pursued its general and specific public benefits during the year.[165] The benefit report is distributed to each shareholder and accessible to the public at the corporation's website.[166] Failure to comply with these reporting requirements can cause an organization to forfeit its status as a benefit corporation.[167] These reports offer information and insight into the corporation's social and environmental policies and practices. The transparency measures distinguish benefit corporations from traditional corporations, which will often guard their internal policies and practices or only publish them when they can present the corporation in a favorable light. Additionally, benefit reports further contribute to the accountability of benefit corporations.

In addition to these specific transparency requirements, the innovative legal structure of benefit corporations highlights their social commitment to potential investors and consumers. Benefit corporations must explicitly state their social goals in their articles of incorporation.[168] The innovative legal structure of benefit corporations and the corresponding mechanisms for establishing accountability significantly contribute to greater transparency, thus educating and attracting socially conscious investors and consumers. Accountability and transparency standards help distinguish organizations that take credible action from those that merely hide behind the claim of corporate social responsibility.[169]

D. Benefit Corporation Legislation Creates Economic Opportunity for Wyoming

Proponents of benefit corporation legislation in other states have emphasized its ability to offer states and their corporate constituents a competitive economic advantage.[170] Just as Univicity chose to incorporate in Wyoming because it had enacted L3C legislation, other businesses may choose Wyoming if it enacts benefit corporation legislation. By recognizing benefit corporations, Wyoming may create a more hospitable environment to new businesses interested in social enterprise and attract more entrepreneurs and jobs to the state.

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[165] *See, e.g.*, MD. CODE ANN., CORPS. & ASS'NS § 5-6C-08(A); N.J. STAT. ANN. § 14A:18-11; VT. STAT. ANN. tit. 11A § 21.14; VA. CODE ANN. § 13.1-791.

[166] *See, e.g.*, VA. CODE ANN. § 13.1-791(C).

[167] *See, e.g.*, *Amendments to the Pennsylvania Consolidated Statues with Official Source Notes and Committee Comments*, *supra* note 92, tit. 15 § 3331(e) (discussing the consequences for failing to file the Annual Benefit Report).

[168] Haymore, *supra* note 45, at 1343 (discussing how traditional institutional investors may shy away from alternative entities like benefit corporations, while social entrepreneurs may be more attracted to them).

[169] *See generally* Cherry & Sneirson, *supra* note 68.

[170] David Adelman, *Just What California Needs: A New Corporate Form*, LOS ANGELES LAW., Apr. 2011, at 68.

Benefit corporations' broader missions, beyond solely maximizing shareholder wealth, may produce more corporate profits in the short and long term.[171] For example, Norwood Marbles & Granite, a Maryland stone fabrication and installation company which has supplied stone for the Washington Monument and the White House, reincorporated as a benefit corporation in 2010.[172] When it sought third-party certification from B Lab, it initially failed the B Impact Assessment Survey.[173] Norwood then used what it learned from the survey to change certain aspects of its operations.[174] Norwood Marbles & Granite, which once only recycled a fraction of its millions of gallons of water used in its processing plants, now recycles ninety-eight percent.[175] It subsequently passed the B Impact Assessment and now saves $10,500 a month in utility expenses creating greater profits and water savings for the state.[176]

E. Benefit Corporation Legislation Aligns with Wyoming Public Policy

Social enterprise and the benefit corporation reflect libertarian values. While corporate social responsibility often appears to be progressive cause, social enterprise is a libertarian movement.[177] Benefit corporation legislation offers voluntary solutions to enhance corporate social responsibility because a corporation's founders, directors, and shareholders can define their own social or environmental purpose as opposed to abiding by one mandated by state or federal regulation.[178] An organization opts to become a benefit corporation only if this legal form meets its business needs. Further, an independent third-party evaluates a benefit corporation's fulfillment of its social or environmental purpose as opposed to being regulated and evaluated by the government. Corporations' legal status as benefit corporations and the transparency and accountability requirements it entails, offer consumers more information to choose what corporations to patronize.

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[171] *See generally* Joshua D. Margolis et al., *Does It Pay to be Good? A Meta-Analysis and Redirection of Research on the Relationship Between Corporate Social and Financial Performance*, at 21 (July 26, 2007) (unpublished manuscript) *(offering a meta-analysis of the empirical link between corporate social performance and corporate financial performance and its overall small positive effect)*, *available at* http://stakeholder.bu.edu/Docs/Walsh,%20Jim%20Does%20It%20Pay%20to%20Be%20Good.pdf .

[172] *About Norwood Granite & Marble*, CERTIFIED B CORPORATION, http://www.bcorporation.net/norwood (last visited Nov. 30, 2011).

[173] Issie Lapowsky, *B Corporations*, INC., May 2011, at 78.

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] Page & Katz, *supra* note 3, at 1380.

[178] *Id.* at 1384.

Wyoming has a history of implementing novel corporate structures. In 1977, Wyoming became the first state to pass limited liability company legislation.[179] Once again, Wyoming is at the forefront as one of only a handful of states to have passed L3C legislation.[180] The legislature's passage of benefit corporation legislation would continue Wyoming's tradition of corporate innovation and opportunity.

IV. Conclusion

Benefit corporation legislation offers significant innovation to a slowly changing American corporate landscape. Benefit corporation legislation does not mark the end of the corporate social responsibility debate. It would be expecting too much of the organizational form to believe benefit corporation legislation alone could create corporate social responsibility throughout the state and country. Benefit corporation legislation, however, does offer legal clarity, transparency, and accountability for businesses, consumers, and investors interested in corporate social responsibility.

The value of benefit corporation legislation lies in the innovative legal structure that creates legal clarity for businesses engaging in social enterprise.[181] Additionally, benefit corporation legislation's reliance on private third-party certification proves to investors and consumers that businesses are "making good" on their social and environmental purposes, and distinguishes benefit corporations from those that are simply making claims for public relations purposes.[182] These measures allow investors, directors, and consumers to be aware of and act on a corporation's hybrid purpose. Though many corporations do engage in a socially and environmentally responsible manner, without a legal form such as the benefit corporation, these "good actors" are hard to distinguish from others.[183] While courts have yet to examine benefit corporations' legal structure, the goal of this model legislation is to keep social enterprise out of the courts and on track with their hybrid missions.

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[179] Burke & Sessions, *The Wyoming Limited Liability Company: An Alternative to Sub S and Limited Partnerships?*, 54 J. Tax'n 232, 234 (1981).

[180] *See supra* notes 105–21 and accompanying text (discussing L3Cs in Wyoming).

[181] *See supra* notes 137–63 and accompanying text (laying out the structural changes to benefit corporation's internal documents and the statutory law that supports them).

[182] *See supra* notes 151–63 and accompanying text (discussing benefit corporation's mechanisms for accountability).