
COMMENT

**PLEASE WELCOME THE MINNESOTA PUBLIC
BENEFIT CORPORATION**

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I. INTRODUCTION

The public has become skeptical of corporations, especially since the recent succession of highly publicized financial crises and corporate scandals.¹ Corporations, now more than ever, are expected to behave as model citizens would—sharing the world’s resources, adding to society, protecting the environment, and recognizing and respecting stakeholders’ interests. These are tall orders and cannot be met by mere rhetoric. Consumers are wary of “green-washing,” the outward appearance of social responsibility, and it is no longer enough that corporations are charitable with their profits—corporate responsibility cannot simply be an add-on.²

Corporations have noticed. The upward trend in corporate social responsibility reporting by corporations illustrates this, as does their advertising, which often has more to do with a company’s ethical operations and production than its products.³ Directors in boardrooms now

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1. Jamie Raskin, *The Rise of Benefit Corporations*, NATION, June 27, 2011, <http://www.thenation.com/article/161261/rise-benefit-corporations#>. For a good summary of the factors affecting the public’s perception of corporations, see Kent Greenfield, *Corporate Citizenship: Goal or Fear?*, 10 U. ST. THOMAS L.J. 960, 961 (2014).

2. Bruce Rogers, *Too Many Feelings and Not Enough Facts*, FORBES, Oct. 7, 2013, <http://www.forbes.com/sites/brucerogers/2013/10/07/too-many-feelings-and-not-enough-facts-in-csr-strategy/>.

3. For example, Chevron’s recent two-page advertisement states: “Oil Companies Should Support the Communities They’re a Part of.” It includes a photograph of two African women, and makes no reference to the actual activities of the company. For a discussion about this advertisement, as well as a screen shot of the advertisement, see Ben Casselman, *Chevron Ad Campaign Answers Critics Head On*, THE WALL ST. J., Oct. 18, 2010, available at <http://online.wsj.com/news/articles/SB10001424052702304250404575558363902469440>.

accept that sustainability and corporate social responsibility increasingly drive innovation, increase customer confidence, enhance value,⁴ and reduce costs.⁵ More and more, corporate social responsibility is good for business.⁶

Amid this growing movement, practitioners, academics, students, and entrepreneurs have discussed without consensus whether corporations in their traditional form can address social and environmental concerns if the activities impact profit or growth. The central question is, in light of *Dodge v. Ford*, and more recently, *eBay v. Newmark*, how much can boards of corporations consider sustainability and the social good before they become liable for breaching their duty to maximize shareholder wealth?

As a response, twenty-one states and counting have created and enacted the benefit corporation in varying forms.⁷ These states include Maryland, where the first benefit corporation was introduced, and Delaware, one of the most recent to enact a statute of its own. This new corporate form is distinct in a few significant ways: the articles of incorporation have an express purpose or purposes to create some public benefit, in addition to their implicit purpose of creating profits for shareholders; directors must consider the public benefits before making a decision; and, public benefit corporations are required to report in some form to shareholders, or to shareholders and the public, on their progress in achieving these public benefits.

In March 2014, Minnesota joined this group, passing the Minnesota Public Benefit Corporation Act, which permits the incorporation of public benefit corporations in Minnesota from January 1, 2015. The enactment of the Minnesota Public Benefit Corporation Act provides the means for corporations and investors in Minnesota to participate in this emerging, interesting market without taking their business elsewhere.

The purpose of this article is to give practitioners an overview of the Minnesota public benefit corporation. Part II discusses the origins of the

4. A 2003-2004 survey conducted by the Center for Corporate Citizenship at Boston University found that eighty-two percent of executives believed that social and environmental concerns were important to the bottom line, fifty-nine percent that it was important to their reputations, and fifty-three percent that it was important to their customers. See Phillip Marvin & Bradley Googins, *The Best of the Good*, Harv. Bus. Rev., Dec. 2004, available at <http://hbr.org/2004/12/the-best-of-the-good/ar/1>.

5. For example, Coca-Cola saved tens of millions of dollars in the last decade by changing its packaging to “light weight” in an ostensible effort to reduce greenhouse emissions. David A. Lubin & Daniel C. Esty, *The Sustainability Imperative*, Harv. Bus. Rev., May 2010, at 1.

6. Walmart saved \$150 million in 2012 from solar and wind energy projects, fuel cell installations, and recycling. *Walmart to Save \$150m in Sustainability Initiatives in FY13*, ENVTL. LEADER, Oct. 12, 2012, available at <http://www.environmentalleader.com/2012/10/12/walmart-to-save-150m-with-sustainability-initiatives-in-fy13/>.

7. Benefit Corp. Info. Ctr., *State-by-State Legislative Status*, <http://benefitcorp.net/state-by-state-legislative-status> (last visited July 22, 2014).

benefit corporation, the specific expectations of corporations today, and how the benefit corporation was introduced nationwide and to Minnesota. Part III addresses whether and how Minnesota needs this new corporate form for its corporations to pursue sustainable business practices and to serve purposes other than the maximization of shareholder wealth. Part IV introduces § 304A, the Minnesota Public Benefit Corporation Act. Part V outlines the basic provisions and discusses the more unusual and significant features, all in an effort to help the practitioner incorporate and advise public benefit corporations in Minnesota. Finally, Part VI discusses some potential improvements and whether this corporate form will succeed, i.e., how the benefit corporation might be used and whether investors will invest.

II. THE BIRTH OF THE BENEFIT CORPORATION

This section begins with the social concerns that gave rise to the creation of the benefit corporation. It then outlines the components of the model benefit corporation, the first form of benefit corporation, and describes briefly Minnesota's history with the Minnesota Public Benefit Corporation Act.

A. *The Social Movement*

Corporate social responsibility, corporate citizenship, sustainability, social enterprise, and impact investing are all terms associated with the social revolution that is demanding corporations do business with an eye toward their social and environmental impact.⁸ Consumers are expressing preferences for services and goods from corporations that are conscientious about their societal and environmental impact. Knowing a company is mindful of its impact on society and the environment makes an American consumer fifty-eight percent more likely to purchase its products,⁹ and forty-nine percent of Americans have boycotted companies because of their adverse impact on society and the environment.¹⁰ While this expression of value-aligned purchasing may be more wishful than real,¹¹ there are some signals that consumers are increasingly interested in the process behind their products.¹² For example, sales of certified sustainable coffee

8. *The Initiative: Defining Social Responsibility*, CORPORATE SOCIAL RESPONSIBILITY INITIATIVE, http://www.hks.harvard.edu/m-rcbg/CSRI/init_define.html (last visited July 22, 2014).

9. *Benefits of Becoming a Sustainable Business*, ECO-EFFICIENCY, http://www.eco-efficiency.com/benefits_becoming_sustainable_business.html (last visited July 22, 2014).

10. Sheila M. J. Bonini et al., *The Trust Gap Between Consumers and Corporations*, MCKINSEY Q., no. 2, 2007, at 7, 10.

11. Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269, 294–95 (2012–13).

12. Sarah Stankorb, *Why Do-Good Businesses Are Blowing Up*, CNN.com (Nov. 12, 2013,

quadrupled between 2005 and 2010, to more than 390,000 tons from approximately 73,000 tons.¹³ It now makes up more than eight percent of the global export market.¹⁴ The immediate and startling growth of BlueAvocado, a business that makes reusable totes, when it was certified by B Lab¹⁵ as a sustainable company, signals that these kinds of companies are giving the public something they want.¹⁶ BlueAvocado's products are now sold in an additional 2,500 stores since certification, and the company is on track this year for its third year of doubling its revenue.¹⁷

Directors are increasingly aware that the approach of the companies they oversee to social concerns will affect their competition in the market.¹⁸ One indisputable indication of this trend is that currently ninety-five percent of Global Fortune 250 companies report, voluntarily, on their corporate social responsibility,¹⁹ up from eighty-three percent in 2008 and from sixty-three percent in 2006.²⁰ Commentators view this as a direct response to increasing investor interest in making investments based on non-financial factors. In 2010, twelve percent of managed assets were invested in stock that was screened on the basis of ethical concerns.²¹ As a result, major corporations are making major changes to their operations and production models. For example, in the last several years, Coca-Cola and its bottling partners created "light weight" packaging, resulting in savings of tens of millions of dollars and an enormous reduction in the company's gas

7:00 AM), <http://money.cnn.com/2013/11/12/smallbusiness/b-corp-blueavocado/index.html>.

13. *Market for Sustainable Products Expanding Rapidly*, SUSTAINABLE BUS., Nov. 22, 2010, <http://www.sustainablebusiness.com/index.cfm/go/news.display/id/21467> (providing a summary of the State of Sustainable Initiatives Review 2010).

14. *Id.*

15. The certification provided by B Lab and other companies is discussed in more depth in section II.B.

16. Stankorb, *supra* note 12. BlueAvocado's website provides interesting information on the origins and purposes of the company. <http://www.blueavocado.com>.

17. Stankorb, *supra* note 12.

18. *See, e.g.*, Lubin & Esty, *supra* note 5, at 1 ("Most executives know that how they respond to the challenge of sustainability will profoundly affect the competitiveness—perhaps even the survival—of their organizations."). *See also* THE CTR. FOR CORP. CITIZENSHIP, THE STATE OF CORPORATE CITIZENSHIP IN THE U.S., A VIEW FROM THE INSIDE 9 (2003-2004), *available at* http://bclcl.uschamber.com/sites/default/files/documents/files/State%20of%20Corporate%20Citizenship%202004_1.pdf (stating that eighty-two percent of executives surveyed believed that good corporate citizenship is important to the bottom line and needs to be a priority).

19. KPMG INTERNATIONAL CORPORATE RESPONSIBILITY REPORTING SURVEY 2011 2, *available at* <http://www.kpmg.com/GR/en/IssuesAndInsights/ArticlesPublications/Sustainability/Documents/s-s-KPMG-International-Survey-of-CR-Reporting-2011-Nov-2011-web.pdf>.

20. For an in-depth discussion of these statistics, see Adam Sulkowski & Steven White, *Financial Performance, Pollution Measures, and the Propensity to Use Corporate Responsibility Reporting: Implications for Business and Legal Scholarship*, 21 COLO. J. INT'L. ENVTL. L & POL'Y. 491 (2010).

21. *Id.* at 497-98.

emissions.²²

Two broad categories of concern have caused the public to look to corporations for solutions to social and environmental problems. First, corporations have enormous potential power for social change. Thus, the public needs corporations on its side or change simply will not happen.²³ In an increasingly corporate world,²⁴ global leaders, politicians, and citizens know corporations can have a larger impact than many of us can make individually in a lifetime.²⁵ Through operations, profits, decisions on where to manufacture and whom to employ, among other things, corporations can harness capital markets for social good. This is corporate social responsibility, and it encompasses both what corporations do with their profits and how corporations make them. It addresses how companies manage their impact on the economy, society, and the environment, as well as their relationships in all their key spheres of influence.²⁶

Second, we are operating at 147 percent of the world's capacity to replace its essential resources,²⁷ and the world cannot sustain every corporation if their sole goal is to increase profits.²⁸ Referencing a speech by environmentalist Paul Hawken, a sustainability blog stated: “‘We have an economy where we steal from the future, sell it in the present, and call it GDP.’”²⁹ As a kind of subset of corporate social responsibility, sustainability is specifically about the corporation's impact on the planet as it makes its profits. This sustainability primarily concerns the planet, but it

22. Lubin & Esty, *supra* note 5, at 6. Also, in 2009, Coca-Cola announced that its new vending machines and coolers would be HFC-free by 2015, which would reduce its greenhouse gas emissions by ninety-nine percent.

23. Tom Zeller, Jr., *Can Business Do the Job All by Itself?*, N.Y. TIMES, March 28, 2010, available at <http://www.nytimes.com/2010/03/29/business/energy-environment/29green.html?pagewanted=all> (discussing the need for partnerships between businesses and governments to address environmental concerns, Mr. Zeller stated that “the real solutions will come from business.”). See also Paul C. Light, *Driving Social Change: How to Solve the World's Toughest Problems*, STAN. SOC. INNOVATION REV., Spring 2011, available at http://www.ssireview.org/book_reviews/entry/driving_social_change_paul_c_light (stating that social problems are too big for one person to solve.).

24. Manta.com has more than thirty-two million companies listed. <http://www.manta.com/mb>.

25. See, e.g., HOLLORAN PHILANTHROPIES, http://www.halloranthropies.org/who_we_are#!staff (citing the power of business as the motivation for the organization).

26. CORP. SOC. RESPONSIBILITY INITIATIVE, *supra* note 8.

27. Rick Ridgeway, *The Elephant in the Room*, PATAGONIA (Fall 2013), <http://www.patagonia.com/us/patagonia.go?assetid=87970>.

28. For a thoughtful discussion on how corporations and individuals cannot continue to both seek their own gain and serve the common good, see Garrett Hardin, *Tragedy of the Commons*, SCIENCE, Dec. 13, 1968, available at <http://www.sciencemag.org/content/162/3859/1243.full>.

29. Kyra Choucroun, *It's Time to Grow Out of Endless Growth*, SUSTAINABILITY BLOG (JULY 7, 2011), <http://www.sustainability.com/blog> (citing Paul Hawken, *Commencement Address to The University of Portland Class of 2009*, (May 3, 2009), available at http://www.paulhawken.com/paulhawken_frameset.html).

also concerns the corporation; if the planet's resources cannot survive at this rate, then neither can corporations. "Economic success can no longer be secured without carefully managing and tracking the demand on and availability of natural capital."³⁰ We all depend, businesses and lives, on finding a way to make the planet, and its resources, last.

While many corporations are increasingly focused on their social and environmental impacts, some are seeking to employ an approach that integrates corporate responsibility with business strategy and are recognizing that this may, in fact, result in both more social good and more profit.³¹ The outcome is a "social enterprise," a corporation that has a specific hybrid, or dual, purpose of pursuing a social mission using business methods. Social change is not incidental to a social enterprise's purpose—it is one of the purposes of its existence.³² The benefit corporation, incorporated with a purpose of pursuing both profit and public benefits, can be considered a form of social enterprise.

B. The Benefit Corporation

In 2010, Maryland adopted the country's first benefit corporation statute.³³ On the day it became effective, eleven groups of individuals waited outside the doors of Maryland's State Department of Assessment and Taxation to register their entities as benefit corporations.³⁴ Since then, more than 250 benefit corporations have been incorporated around the country.³⁵

Behind the spread of benefit corporation legislation is B Lab, a nonprofit founded in 2006 to help entrepreneurs use business to solve social problems.³⁶ One of the main activities of B Lab is the drafting of the Model Benefit Corporation Legislation (the "Model Legislation").³⁷ Maryland's

30. NATIONAL FOOTPRINTS ACCOUNT, 2012 EDITION (Global Footprint Network, Oakland, C.A.), available at http://www.footprintnetwork.org/images/article_uploads/National_Footprint_Accounts_2012_Edition_Report.pdf.

31. See Coca-Cola, *supra* note 5, and Walmart, *supra* note 6 (providing good examples of this).

32. Antony Page & Robert A. Katz, *Is Social Enterprise the New Corporate Social Responsibility?*, 34 SEATTLE U. L. REV. 1351, 1361 (2011).

33. Anne Field, *First Ever Study of Maryland Corps Released*, FORBES, Jan. 25, 2013, available at <http://www.forbes.com/sites/annefield/2013/01/25/first-ever-study-of-maryland-benefit-corps-released/>.

34. *What Are B Corps*, B CORP., <http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps/our-history> (last visited July 22, 2014).

35. Peter Smith, *The Health of Hybrid Entities: How Many Benefit Corporations and Social Purpose Corporations Are Out There? A Comparison and Data Analysis on the SPC's Relative Success*, APEX LAW GROUP, LLP (Aug. 9, 2013), <http://www.apexlg.com/?p=1054>.

36. *The Non-Profit Behind B Corps*, B CORP., <http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps> (last visited July 22, 2014).

37. Another significant function of B Lab is the certification of businesses, at their request, as a "B Corp" if the corporation meets certain standards of social and environmental performance,

benefit corporation statute was based almost exclusively on the Model Legislation,³⁸ as are many of the statutes in more than twenty states.

Benefit corporations typically have four categories of unique aspects. First, benefit corporations have the purpose, in addition to growing shareholder investments, of creating general public benefit or both general and specific public benefits.³⁹ A general public benefit is defined as “a material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation.”⁴⁰ Second, the directors’ standard of conduct is markedly different. When discharging their duties to the corporation, directors must consider each decision’s potential impact on the ability of the benefit corporation to accomplish its general and specific public benefit purpose as well as the decision’s impact on various stakeholders, including shareholders, employees, and the communities in which the corporation operates.⁴¹ Third, accountability depends largely on the mandatory production and distribution of the annual benefit report. It must describe how the corporation pursued the general and specific public benefits with reference to a third-party standard.⁴² Fourth, the Model Legislation provides for a “benefit enforcement proceeding” whereby stakeholders, *if* specified in the articles, in addition to shareholders, may sue to force the corporation to post its report online or provide it to the person requesting it.⁴³

Benefit corporations accomplish three significant things. First, because many benefit corporations have general benefit purposes of positively impacting society and the environment, many benefit corporations have, if held to account properly, sustainable operations by reference to at least one third-party standard. They avoid draining the world’s resources in producing their profit. Second, as an “enabling statute,” the Model Legislation both requires and gives more discretion to directors to consider interests other than the maximization of wealth. Therefore, the power of a corporation can be leveraged for social or environmental change even at the expense of some profit without the traditional concern about director

accountability and transparency. Similar to fair trade certification, B Corp certification signifies to consumers that the business is sustainable.

38. Gene Takagi, *Maryland’s Benefit Corporation*, Non-Profit Law Blog (May 26, 2010), <http://www.nonprofitlawblog.com/home/2010/05/marylands-benefit-corporation.html> (last visited Nov. 20, 2013).

39. MODEL BENEFIT CORP. LEGISLATION § 201 (a).

40. *Id.* at § 102.

41. *Id.* at § 303.

42. *Id.* § 401. B Corp certification, for example, comports with the requirements of third-party independent evaluator under the Model Legislation and can be used as the third-party standard. While a benefit corporation can have B Lab conduct an evaluation, it need only use the factors of B Lab or another independent certifier to conduct its own evaluation.

43. MODEL BENEFIT CORP. LEGISLATION § 102, Comment on “Benefit Enforcement Proceeding.”

liability for breaching duties to shareholders. Third, incorporation and designation as a benefit corporation signals to the public that the corporation is pursuing public interests, or at least that it is accountable in some way for the pursuit of public interests. It provides a type of branding and avoids the “green-washing” of which consumers are so wary.

C. Minnesota’s History with Public Benefit Corporation Statutes

Long before Maryland passed the first public benefit corporation statute, a bipartisan group of politicians advocated for a form of the benefit corporation in Minnesota. A firm believer in the need for a corporate entity that ensures that social missions can be pursued alongside profits, Senator John Marty, in particular, has been working on and promoting versions of the Minnesota Responsible Business Corporation Act since 2008.⁴⁴ Last year, however, the bill didn’t get a hearing in the House, and the Minnesota State Bar Association was asked to take charge of writing a bill that the business and legal communities could accept. A drafting committee was convened, led by practitioner Kim Lowe,⁴⁵ and the current Minnesota Public Benefit Corporation Act is the result of almost one year of collaboration of legal practitioners, professors, social entrepreneurs, and students. The Minnesota Public Benefit Corporation Act was introduced to the Minnesota legislature in March 2014 and passed with bipartisan support.

III. WHY MINNESOTA WILL BENEFIT FROM THE BENEFIT CORPORATION

Many of Minnesota’s most prominent corporations use their profit, operations, and leverage to increase the standard of living across the globe. For example, Target, Wells Fargo, and Xcel Energy are among the members of Keystone, once known as the “Five Percent Club,” which is a group of companies committed to giving two to five percent of its pre-tax profits to charity.⁴⁶ Carlson Company uses its influence to take a hard line against sex trafficking by ensuring that its hotels do not facilitate the sexual exploitation of children.⁴⁷ With more than 1,300 hotels worldwide,⁴⁸

44. See also John Marty, *State Should Help Foster Socially Responsible Businesses*, MINNPOST (June 23, 2008), <http://www.minnpost.com/community-voices/2008/06/state-should-help-foster-socially-responsible-businesses>. To read the text of the Minnesota Responsible Business Corporation Act, please visit <https://www.revisor.mn.gov/bin/bldbill.php?bill=S1267.0.html&session=ls87>.

45. Kim Lowe is a partner of Fredrikson & Byron, P.A.

46. For a list of its 2013 members, see <http://www.minneapolischamber.org/mrcc-our-region/minnesota-keystone-members/>.

47. See Marilyn Carlson Nelson, *Marilyn Carlson Nelson’s Fight to End Sex Trafficking*, STAR TRIBUNE (Nov. 24, 2013), <http://www.startribune.com/opinion/commentaries/233086661.html>.

48. CARLSON, <http://www.carlson.com> (last visited July 21, 2014).

Carlson adds clout to individual, nonprofit, and government anti-sex trafficking efforts locally and internationally.⁴⁹ Medtronic is an example of the profit-making activity itself focusing on the welfare of humans. The battery-operated pacemaker, developed by Medtronic in 1957, has saved countless lives and is enhancing the quality of life for more than three million Americans today.⁵⁰

The question, however, is to what extent a corporation can pursue a social benefit, whether sustainability or other initiatives, when it cuts into profit. Could Target continue to make the decision to give away five percent if it didn't bolster the brand or enhance value? Could it choose to give away ten percent, a percentage that is much more likely to impact the bottom line? Could the directors of a corporation make a change in its production for the sake of the environment—like Coca-Cola's decision to use "light weight" packaging⁵¹—if it reduced its profit margin rather than increased it?

While some scholars and sophisticated practitioners argue that traditional corporations can facilitate both profit-making and social enterprise,⁵² the decisions in *Dodge v. Ford* and *eBay v. Newmark* created a popular perception among social entrepreneurs and the public that corporations cannot. At the very least, there is confusion, leaving social entrepreneurs uneasy about the feasibility of incorporating and operating a dual-purpose corporation without exposing directors and officers to liability.

In contrast, the benefit corporation is a legal structure that houses the pursuit of both profits and the common good. It also provides the corporation with a brand that signals this dual purpose to investors and consumers. The strongest arguments for the introduction of the benefit corporation to Minnesota, therefore, are pragmatic: it provides a practical solution for entrepreneurs who want to produce both profit and social good

49. For a description of Carlson Companies' critical role in promoting and implementing international efforts against human trafficking, see Kate Rice, *The War on Human Trafficking*, TRAVEL WEEKLY (May 7, 2014), <http://www.travelweekly.com/Travel-News/Travel-Agent-Issues/The-war-on-human-trafficking/>.

50. Mark A. Wood, M.D. & Kenneth A. Ellenbogen, M.D., *Cardiac Pacemakers from the Patient's Perspective*, 105 J. AM. HEART ASS'N. 2136, 2136 (2002), available at <http://circ.ahajournals.org/content/105/18/2136>; David Rhees & Kirk Jeffrey, *Earl Bakken's Little White Box: The Complex Meanings of the First Transistorized Pacemaker*, EARL BAKKEN, available at <http://www.earlbakken.com/content/involvement/whitebox.pdf>; Mary F. Mulcahy, *Know Your Heart and Your Pacemaker Now and Forever*, THE HUFFINGTON POST (Feb. 14, 2013, 11:22 AM), http://www.huffingtonpost.com/mary-f-mulcahy/pacemakers-end-of-life-care_b_2680794.html.

51. Lubin & Esty, *supra* note 5, at 48.

52. This includes Lowe, this legislation's drafter, and Vice Chancellor J. Travis Laster, who suggested that the Delaware Code, as it was before the adoption of the benefit corporation statute, could facilitate dual-purpose enterprises. See *infra* note 102. He didn't, however, answer the question of to what extent corporate social responsibility could impact profits.

but do not have the means to navigate nebulous corporate law.

A. The Confusion in Corporate Law About Traditional Corporations

Two cases form the core of the legal confusion. The first is, of course, *Dodge v. Ford Motor Co.*⁵³ In *Dodge*, Henry Ford, majority shareholder of Ford Motor Company, was sued by two minority shareholders, John and Horace Dodge, for not paying out dividends despite the corporation's enormous wealth. Ford's strategy appears, if taken at face value, very similar to one of the goals of social enterprise today: using a corporation to benefit its employees. In his words: "My ambition is to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this we are putting the greatest share of our profits back in the business."⁵⁴

In ordering the payment of a dividend, the Michigan Supreme Court's response included the following:

There should be no confusion . . . A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to . . . other purposes.⁵⁵

This articulation of the corporation's purpose does not pose an obstacle to for-profit corporations pursuing social purposes. The *Dodge* decision is not current or legally sound—it is almost one hundred years old and has rarely been cited for the proposition that the purpose of corporations is to pursue profit for shareholders.⁵⁶ Even at the time, it was judicial dicta, and did not have a strong legal basis.⁵⁷ Most significantly, commentators note that the case is appropriately understood as a minority oppression case.⁵⁸

Unfortunately, however, the Delaware Chancery recently issued a modern day remake of the old classic in *eBay Domestic Holdings, Inc. v. Newmark*.⁵⁹ Here, James Buckmaster and Craig Newmark, the majority owners of craigslist, an online advertisement service, were sued by competitor in the market and minority owner, eBay, for subordinating the financial interests of the stockholders to the interests of the community of craigslist users. eBay also challenged the institution of a shareholder rights

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

54. *Id.* at 683.

55. *Id.* at 684.

56. Lynn Stout, *Why We Should Stop Teaching Dodge v. Ford*, in *THE ICONIC CASES IN CORPORATE LAW 1*, 3–4 (Jonathan R. Macey ed., 2008).

57. *Id.*

58. *Id.* See also Celia Taylor, *Further Developments on the Benefit Corporation Front (Part 2)*, *THE RACE TO THE BOTTOM*, (Apr. 16, 2013, 06:01 AM), <http://www.theracetothetop.com/home/further-developments-on-the-benefit-corporation-front-part-2.html>.

59. 16 A.3d 1 (Del. Ch. 2010).

plan that would dilute eBay's ownership in craigslist if eBay increased its ownership at all.

The circumstances surrounding the case involved a potential takeover. As described by the Chancery, target-company craigslist "operates its business as a community service," and has a "community-service approach to doing business."⁶⁰ Most of the ads could be placed free of charge on the website. Nonetheless, "no competing site ha[d] been able to dislodge craigslist from its perch atop the pile of most-used online classifieds sites in the United States,"⁶¹ an apparent enigma to Chancellor Chandler (though, probably not to social entrepreneurs). craigslist's intention was to continue business in the same vein. On the other hand, eBay's intention, considered "inevitable," was to acquire craigslist.⁶² At that time, eBay had acquired PayPal, Skype, half.com and rent.com.⁶³ It had also just branched out into the international market, having used some of craigslist's nonpublic information to do so, without the knowledge of craigslist.⁶⁴ The shareholder rights plan was adopted to prevent this takeover, and the majority owners tried to justify it as a defense of the unique corporate culture of craigslist.

Applying the *Unocal* standard to this unusual case—the use of a shareholder rights plan by a closely-held private company in which the directors deploying the plan also owned more than seventy percent of the company⁶⁵—Chancellor Chandler ordered the rescission of two of the three components of the plan, stating:

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 the Rights Plan 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 . . .⁶⁶

Again, this decision is best explained as a minority oppression case—the Chancery was nullifying a shareholder rights plan that the majority shareholders had put in place specifically to limit the influence of its minority shareholder, a shareholder who had paid \$15 million to buy into the company. Also, neither here nor in *Dodge v. Ford Motor* did the court require the company to pursue profit or the maximization of shareholder

60. *Id.* at 8.

61. *Id.*

62. *Id.* at 15–16.

63. *Id.* at 9.

64. *Id.* at 17–18.

65. *eBay*, 16 A.3d at 6, 30–31.

66. *Id.* at 34.

wealth, or to change its corporate strategy. It only ordered rescission of the defense measures.⁶⁷ In craigslist's case, the court left in place the provision for a staggered board, which ultimately meant eBay could not exert influence through putting a second representative on the board.⁶⁸

However, these legal interpretations do not overcome the opinion's stark language. The judgment is laced with references to and rejections of craigslist's community-centered approach to business where that approach negatively impacts shareholders' returns. For example:

As an abstract matter, there is nothing inappropriate about an organization seeking to aid local, national, and global communities by providing a website for online classifieds that is largely devoid of monetized elements . . . The corporate form in which craigslist operates, however, is not an appropriate vehicle of purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment.⁶⁹

The court also stated: "[T]he relatively small amount of monetization that craigslist has pursued (for select job postings and apartment listings) does not approach what many craigslist competitors would consider an optimal or even minimally acceptable level."⁷⁰ These remarks leave a rather unshakeable impression that once incorporated, a corporation has a minimal level of profit that it must pursue to avoid liability.

Ultimately, the court categorically rejected craigslist's argument that preventing a threat to "corporate culture" was one corporate purpose protected by the *Unocal* standard and the business judgment rule. "Promoting, protecting, or pursuing non-stockholder considerations must lead at some point to value for stockholders."⁷¹ That statement by the Chancellor best summarizes the legacy of the case, at least for social enterprises. It communicates that it is not enough that the company's activities generally lead to value, any pursuit of non-stockholder interests must also lead to value for stockholders.

There is strong support for this perception. In a thoughtful article on capitalism in the United States and the role of government regulation, Chancellor Strine recently lamented the surprise of critics at the *eBay* decision and at any decision or individual that "starkly recognizes that as a matter of corporate law, the object of the corporation is to produce profits for the stockholders and that the social beliefs of the managers, no more than their own financial interests, cannot be their end in managing the

67. Johnson, *supra* note 11, at 285–86.

68. *eBay*, 16 A.3d at 7.

69. *Id.* at 34.

70. *Id.* at 8.

71. *Id.* at 33.

corporation.”⁷²

Between the language, the outcome, the commentary, and the need to explain these cases away, it is easy to see why these decisions are disconcerting for entrepreneurs interested in combining business and social goals.

B. Potential Solutions Other than a New Corporate Form

There are alternatives to a new corporate form but none are immediate or accessible enough to help the social entrepreneur.⁷³

A strong suggestion is to return to the traditional purpose of corporations as entities incorporated not for the shareholder but to promote some societal purpose.⁷⁴ Under this idea, to pursue a chosen social purpose, the corporation should include a clearly articulated mission or purpose in its articles regarding the social and environmental goals. In most states, a corporation can be incorporated for any business purpose, which does not exclude ones that are also social.⁷⁵ Because the role of directors is to act in the best interests of the corporation, if the decisions of the directors are rationally related to the furtherance of that purpose as stated in the articles, the directors should be shielded by the business judgment rule.⁷⁶ As noted, this is similar to where corporations began in the United States: entities incorporated for a public purpose.⁷⁷

There are two problems with this approach. First, as illustrated above, the current understanding of corporate purpose is leaning the other way. It would take something similar to the influx of the economic theorists to the Seventh Circuit to make a change this significant any time soon. Second, a corporation would need access to sophisticated legal counsel to write complex articles that ensure the social purpose can be legitimately pursued. This would result in complicated structures. Minnesota Public Radio, embodied in contracts and organizational documents drafted by sophisticated legal counsel, is a great example of this—it includes nonprofit

72. Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 151 (2012).

73. A discussion of the various social enterprise forms are outside the scope of this article, but is well worth reading about. Robert T. Esposito has written a comprehensive article comparing the benefit corporation to other social enterprise forms, and ultimately concludes that the benefit corporation is the best of them. See Robert T. Esposito, *The Social Enterprise Revolution in Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for the Benefit Corporation*, 4 WM. & MARY BUS. L. REV. 639 (2013).

74. For an overview of the development of corporate purpose, see Lyman Johnson, *Law and the History of Corporate Responsibility: Corporate Governance*, 10 U. ST. THOMAS L.J. — (2014)

75. MINN. STAT. § 302A.101 (2012) (“A corporation may be incorporated under this chapter for any business purpose or purposes . . .”).

76. Johnson, *supra* note 11, at 288–89.

77. Raskin, *supra* note 1.

and for-profit revenue streams,⁷⁸ is quite difficult to understand and has attracted some criticism.⁷⁹ A structure like this would require counsel that most social entrepreneurs cannot afford.

One argument is that Minnesota's "stakeholder statute" would make cases like *eBay v. Newmark* turn out differently. Since 1987, the Minnesota Business Corporation Act has included subdivision 5 of section 302A.251, which allows directors to consider the interests of constituencies other than the shareholders in the face of a potential takeover. This provision was enacted during a special session in response to the attempted takeover of Dayton Hudson Corporation (now Target).⁸⁰ In fact, it is an example of how treating stakeholders well can result in long-term benefit—employees and others in the community turned out in droves to support Dayton Hudson by encouraging the legislature to pass the statute.⁸¹ Yet, this provision has never been used to legally justify pursuing a social purpose over profit, and it is unclear what would happen if a Minnesota corporation tried to do so in a courtroom. As discussed below, the Minnesota Public Benefit Corporation Act harnesses section 302A.251 for this very purpose: to require directors to consider these other constituencies and to give them more discretion to do so.

Other alternatives, which can be classified as tactics more than real solutions, have been suggested for social entrepreneurs to avoid the predicaments of Craigslist and Ford Motor Company. For example, if Mr. Newman, Mr. Buckmaster, and Mr. Ford had articulated their desires to help the community a little less baldly and instead emphasized profit-making as the basis for Ford Motor Company's decisions, then the deferential business judgment rule would have protected them. The outcome might be corporate schizophrenia, because the corporation is marketing itself as altruistic to consumers and to shareholders as focused on financial growth, but it will ultimately protect directors' discretion. This still leaves social entrepreneurs, especially those with limited access to legal counsel, in a precarious position of not knowing exactly what should they say or do to ensure that they can pursue both profits and social ends without exposing themselves to liability. And, in some ways, this approach denies the interest of the owners and corporations—they are seeking to prove that business can be done a different way, not to surreptitiously achieve social good while ostentatiously making profit.

78. Around MPR, *Minnesota Public Radio: A History*, http://access.mnpublicradio.org/features/0004_mktplc/mpr_history.shtml (last visited Dec. 1, 2013).

79. James A. Phillips & Victoria Change, *The Price of Commercial Success*, STANFORD SOC. INNOVATION REV., Spr. 2005, at 65, 65, available at http://www.ssireview.org/articles/entry/the_price_of_commercial_success.

80. For an in-depth look at the story surrounding the enactment of the stakeholder provision, see KENNETH GOODPASTER & LAURA NASH, POLICIES AND PERSONS 178–205 (3d ed. 1998).

81. *Id.*

One obvious answer is: don't go public with shares, or, if the company is privately owned or closely held, be careful with whom you share the ownership. Facebook's strategy to keep ownership and control in the hands of the original owners may provide a model for social purpose businesses. It concentrated voting in the hands of the original owners, who can continue to pursue the original purposes of the entrepreneurs, not modern corporate law, without hindrance.⁸² These suggestions, however, are also unsatisfying for a social entrepreneur who is interested in growing his or her business and using the business to address social or environmental issues. The ability to access the market, have owners, and grow financial value support a for-profit form, even if growth looks different than that of a traditional for-profit company. Not every company has Facebook's leverage to bargain for loaded voting.

C. Benefit Corporation as a Pragmatic Solution

The arguments in favor of the Minnesota public benefit corporation are pragmatic. First, and most significantly, the Minnesota Public Benefit Corporation Act gives entrepreneurs a template to incorporate a for-profit entity that has social purpose without needing to draft complicated legal documents. Traditional corporate structures can be complex and a social entrepreneur would likely be unable to draft articles that could protect directors from liability in pursuit of profit and social goals. Sophisticated legal counsel is not easily affordable. A ready-made corporate form will reduce transaction costs for small businesses. It may also reduce the costs to the legal system as a template to avoid litigation caused by the countless creative structures that would be drafted instead.

Second, incorporation as a benefit corporation signifies to the public that the corporation is pursuing social purposes and is, at least theoretically, held accountable for achieving them. This helps consumers avoid confusing authentic socially responsible companies with companies that "green-wash." This gives a corporation a means to distinguish itself as one that takes social and environmental goals seriously.

The benefit corporation will give social entrepreneurs an alternative to nonprofits, something that many desire.⁸³ Without owners and without the ability for inurement of profits to investors, nonprofits lack the same incentives for investment, which can in turn limit growth and the ability to attract and retain talented management. The benefit corporation enables a

82. The resulting freedom from some of the market pressures arguably does result in long-term value for shareholders. Steven A. Davidoff, *Thorny Side Effects in Silicon Valley Tactic to Keep Control*, N.Y. TIMES, Sept. 4, 2013, at B8.

83. Rieva Lesonsky, *Why Starting a Non-Profit to Create Social Change is a Bad Idea*, READWRITE.COM (Aug. 24, 2012), <http://readwrite.com/2012/08/24/why-starting-a-non-profit-to-create-social-change-is-a-bad-idea#awesm=~ooSJgtGiFv2RjT>.

social entrepreneur to establish a company that pursues a social benefit while harnessing the power of the capital market, including the ability to attract investors, keep talent, and grow profit. This is an attractive option, and with more than twenty states incorporating benefit corporations, this keeps business in Minnesota. While public benefit corporations are not slated to be overwhelmingly popular, there are social entrepreneurs, impact investors, and consumers who are interested in running, investing in, and consuming products of benefit corporations. As a state that is notoriously “green” and socially minded, it would be a shame to see these companies incorporate elsewhere.

IV. MINNESOTA PUBLIC BENEFIT CORPORATION ACT

This section outlines and analyzes the Minnesota Public Benefit Corporation Act, as enacted in March 2014, in four major categories: incorporation and termination, purpose, directors’ standard of duties, and the annual report. As will be seen, there are some minor and major variances from the Model Legislation.

A. Incorporation and Termination

The section 304A is an “overlay” to section 302A, the Minnesota Business Corporation Act. As such, a new enterprise incorporating as a public benefit corporation will do so under Minnesota’s current section 302A, and is subject to its provisions, but where the provisions of section 304A conflict with section 302A, section 304A governs.⁸⁴

The requirements of incorporation, therefore, are the same as for any enterprise that incorporates under our incorporation statutes: the incorporator must be a natural person over eighteen years of age, the articles must state the name of the corporation, the aggregate number of shares to be issued, the address of the registered office, etc.⁸⁵ A public benefit corporation, however, must also state in its articles of incorporation that it is electing to pursue a general public benefit or a specific public benefit according to the following three options. The incorporating entity may state in its articles: (1) that it is electing to pursue a general public benefit; (2) that it is electing to pursue a general public benefit and a stated specific public benefit(s); or (3) that it is electing to pursue a stated specific public benefit(s).⁸⁶ The significance of these classifications will become clearer below.

An existing corporation may become a public benefit corporation by amending its articles of incorporation with approval by a minimum status

84. Minnesota Public Benefit Corporation Act, ch.304A, § 304A.011(2).

85. *Id.* at § 302A.101–55.

86. *Id.* at § 304A.101(2)(1), (2); *Id.* at § 304.101(1), (2), (4).

vote.⁸⁷ A “minimum status vote” is defined by § 304A as an affirmative vote by the holders of at least two-thirds of all of the issued and outstanding shares.⁸⁸ A dissenting shareholder has appraisal rights.⁸⁹ An existing corporation may also become a public benefit corporation through merger, exchange, transfer, or conversion, but only if the change causing the surviving corporation to be a public benefit corporation is approved by a minimum status vote.⁹⁰ Here, also, shareholders may exercise dissenter’s rights, giving the shareholder a procedural opportunity to have her shares purchased by the company at a price set by the court. This tracks the relief mechanisms provided in the Model Legislation.⁹¹

Under § 304A, a corporation may terminate its status as a public benefit corporation by approval of a minimum status vote to amend the articles to delete the general or specific purposes from its articles and remove the part of its name that designates it as a public benefit corporation. If, by merger, exchange, transfer or conversion, the effect is the termination of the public benefit corporation, then a minimum status vote is required.⁹² Again, shareholders who dissent are given appraisal rights.⁹³ This provision is common to most statutes—both the Model Legislation and Delaware’s Subchapter XV also require a two-thirds approval of the shareholders to terminate.⁹⁴

A public benefit corporation must, in compliance with § 302A.115 of the Minnesota Business Corporation Act, designate by its name that it is a public benefit corporation. Its name may include “general benefit corporation,” “specific benefit corporation,” “GBC,” or “SBC,” depending on which type of public benefit corporation it is.⁹⁵ This ensures notice to the public that they are investing or transacting with an incorporated public benefit entity. This requirement is a common provision in all public benefit corporation statutes.

These provisions should not cause a practitioner difficulty. They easily overlay the rest of Minnesota Business Corporation Act.

87. *Id.* at § 304A.102(1).

88. *Id.* at § 304A.021, subd. 5.

89. *Id.* at § 304A.102, subd. 3.

90. Minnesota Public Benefit Corporation Act, § 304A.102, subd. 2.

91. By contrast, Delaware’s Subchapter XV requires an approval of 90% of the holders of issued and outstanding shares to amend the articles of incorporation to become a benefit corporation or for a surviving corporation from a merger, conversion, exchange or transfer to be a public benefit corporation. *Supra* note 85, at § 363 (a).

92. *Supra* note 85, at § 304A.103, subd. 2.

93. *Id.* at § 304A.103, subd. 3.

94. MODEL BENEFIT CORP. LEGISLATION § 105(b)(1); DELAWARE CODE § 363 (c).

95. *Supra* note 85, § 304A.104, subd. 2.

B. Purpose: Two Forms and Two Purposes

As noted, § 304A provides for the establishment of a general benefit corporation and a specific benefit corporation. This is a major variation from the Model Legislation. Although both are geared toward impacting society and the environment in positive ways, they have different purposes.

1. Purpose of the General Benefit Corporation

The general benefit corporation most closely aligns with the Model Legislation. It is Minnesota's answer to an environment that is not renewing itself fast enough to keep up with humanity's commercial demands.

A general benefit corporation has the purpose of pursuing a general public benefit.⁹⁶ Defined in § 304A.021, general public benefit means "a net material positive impact from the business and operations of a general benefit corporation on society, the environment, and the well-being of present and future generations."⁹⁷ While diverging slightly from the Model Legislation's definition of general public benefit, general public benefit pursued by a general benefit corporation is similar to that of the Model Legislation, and neither the Model Legislation nor Minnesota's Act is very illuminating. The Model Legislation's Comment to this definition simply reiterates the phrase, noting that an evaluation of a benefit corporation's creation of a general public benefit involves the consideration of all the effects of the business on society and environment – i.e., no one factor is determinative. The significance of this purpose becomes clearer when read in tandem with § 304A.301, the specific requirements of the Annual Benefit Report.

2. Purpose of the Specific Benefit Corporation

The specific benefit corporation is an altogether different creature. It has the purpose of pursuing one or more specific public benefit purposes stated in its articles.⁹⁸ A specific public benefit means "one or more positive impacts (or reduction of a negative impact) on specified categories of natural persons, entities, communities or interests (other than shareholders in their capacity as shareholders) as enumerated in the articles"⁹⁹

The specific benefit corporation allows a public benefit corporation to seek any specific social benefit purpose. The drafting committee chose not to tie the definition of a specific public benefit to any list or set of goals. For example, the Model Legislation provides a list of potential pursuits, similar

96. *Id.* at § 304A.104, subd. 1.

97. A general benefit corporation may also pursue a specific public benefit stated in its articles of incorporation. *Id.* at § 304A.021, subd. 3.

98. *Id.* at § 304A.104, subd. 2.

99. *Id.* at § 304A.021 subd. 9.

to the tax definition of “charitable.” In the true spirit of Minnesota, the drafting committee felt it was not up to them to define a public benefit on behalf of others—the market could decide that by investment. Thus, a social entrepreneur is free to choose whatever social purpose (environmental, educational, medical, etc.) the corporation will pursue and state this in the corporation’s articles. The corporation may have more than one specific public benefit purpose.

Accordingly, the success of this corporate form will depend on investors who are interested in this particular benefit or cause and are willing to accept potentially reduced returns in its pursuit. Examples of specific public benefits can be found in other states that have enacted similar legislation. In Delaware, “furthering universal access to the internet” and “giving people access to, and the benefit of, health knowledge that is complete and unbiased as possible” have been stated as specific public benefits.¹⁰⁰

In Minnesota, as in other states, a general benefit corporation may also include in its articles a specific benefit purpose. A social entrepreneur has, then, three possible new corporate forms to choose from: the general benefit corporation, the specific benefit corporation, and the general benefit corporation that also has a specific benefit purpose.

The provision of three forms is a significant and controversial divergence from the Model Legislation, because the difference is that there is an option for a social enterprise to pursue profits and positive social impacts without regard for the corporation’s overall effect on the environment.—i.e., a benefit corporation in Minnesota need not be “sustainable.” This is somewhat contrary to the Model Legislation proponents because one of the primary concerns of the first benefit corporation’s drafters was sustainability. Most public benefit corporation statutes allow specific benefit purposes only in addition to a general benefit purpose. In other words, every benefit corporation is first and foremost a general benefit corporation. Colorado experienced resistance when drafting legislation that would have had a similar result.¹⁰¹

The specific benefit corporation, however, is a practical response to social entrepreneurs in Minnesota, allowing them to pursue social benefit and profit, but not requiring them to meet the higher standards of sustainability. This is analyzed further in the final sections.

100. Haskell Murray, *Delaware Public Benefit Corporations—Specific Public Benefit Purpose(s)*, SOCENTLAW, Nov. 1, 2013, available at <http://socentlaw.com/author/haskellmurray/>.

101. See generally Herrick K. Lidstone, et al., *The Long Winding Road to Public Benefit Corporations in Colorado*, June 15, 2013, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2266654.

C. Accountability: Directors' Standard of Conduct and Liability

Public benefit corporation accountability is particularly interesting: it is both more specific, because of the list of interests for directors to consider while making decisions, and less likely to result in liability, because there are multiple bottom lines. While this provides greater freedom for directors, it also may make the decision-making process more complicated. Exactly how, if ever, directors of general benefit corporations and specific benefit corporations will be liable is unclear.¹⁰²

1. Accountability in the General Benefit Corporation

In discharging her duties to a general benefit corporation, a director “shall consider the effects of any proposed, contemplated, or actual conduct” on the general benefit corporation’s ability to pursue general public benefit,¹⁰³ the pecuniary interests of the shareholders,¹⁰⁴ and the interests of the constituencies stated in § 302A.251, subdivision 5. The list of constituencies includes the employees, the communities in which the corporation operates, and the consumers. The directors may not give regular, presumptive, or permanent priority to either the pecuniary interests of the shareholders or any other interest or consideration unless the articles identify that interest or consideration as having priority.¹⁰⁵ A director who conforms to these standards may not be liable by reason of being or having been a director.¹⁰⁶

Only the shareholders have the right to assert a claim under §§ 304A or 302A against a public corporation, its directors or its officers on account of the general benefit corporation’s failure to pursue or create a general public benefit.¹⁰⁷ There is no monetary liability where there is such a failure.¹⁰⁸ This type of provision in the statute frequently raises questions about the statute’s teeth—for example, how effective it will be in achieving the public benefits where the constituencies other than the shareholders cannot sue. Monetary liability and a right of action for other stakeholders would ensure that directors are taking the public purposes seriously.

102. In response to a question at the Dorsey & Whitney Foundation Lecture, Vice-chancellor Laster predicted that the accountability of directors, having no polestar the equivalent of shareholder wealth for traditional corporations, would be problematic and a question that is likely to reach the courts first. From the Boardroom to the Courtroom: Litigation Tips for Directors and their Advisors, Oct. 8, 2013, William Mitchell College of Law. The program is on file with the University of St. Thomas Law Journal.

103. If the articles also state specific public benefit purposes, the directors also must consider the effects on the general benefit corporation’s ability to pursue that specific public benefit.

104. *Supra* note 85, at § 304A.201, subd. 1, 3.

105. *Id.* at § 304A.201, subd. 2.

106. *Id.* at § 304A.201, subd. 3.

107. *Id.* at § 304A.202, subd. 1(a).

108. *Id.* at § 304A.202, subd. 1(b).

The reason for not expanding monetary liability is two-fold. First, the Act purports to be a helpful template for social entrepreneurs and opening them up to unlimited liability would be counterproductive. Sincere about serving the underserved, a new business owner might be tempted to provide a right of action for every affected stakeholder, without understanding the legal implications. The various kinds of resulting liability are unforeseeable and potentially unlimited, which would not only cripple the company financially but discourage participation in its leadership: any director with corporate governance experience would refuse to take a position on a board in this kind of company. An alternative suggestion is that non-shareholder stakeholders should be given contractual rights, which can then be carefully considered, drafted with individual stakeholders or their representatives, and limited appropriately.

Minnesota will not have the benefit proceeding, unlike states that implemented the Model Legislation.¹⁰⁹ The courts, however, may give relief where a director or those in control of a public benefit corporation have breached their duties stated under § 304A “to a substantial extent and in a sustained manner” or have, “for an unreasonably long period of time failed to pursue or create” the general public benefit.¹¹⁰ Where there is such a breach, the court may terminate the status of a public benefit corporation, remove directors from the board, or appoint a receiver of the corporation.¹¹¹

What is required by “substantial extent” and “sustained manner” will have to be addressed and clarified by the courts. But, it does suggest more than isolated incidents of negligence or single-year failures to properly consider the public interests.

2. *Accountability in the Specific Benefit Corporation*

Similarly, the director of a specific benefit corporation shall consider the effects of any proposed, contemplated, or actual conduct on the pecuniary interest of its shareholders and the specific benefit corporation’s ability to pursue its specific public benefit purpose.¹¹²

Unlike the directors of a general benefit corporation, the directors of a specific benefit corporation *may* consider the interests of the constituencies listed in § 302A.251, but they are not required to. This allows the directors of specific benefit corporations to focus on their specific purpose, as well as growing shareholder investment. The directors may not give regular, presumptive, or permanent priority to the pecuniary interests of the shareholders or any other consideration unless identified by the articles as

109. *Supra* note 43.

110. *Supra* note 85, at § 304A.202, subd. 3.

111. *Id.* at § 304A.202, subd. 4.

112. *Id.* at § 304A.201, subd. 2 (1).

having priority.¹¹³

D. Transparency: The Annual Benefit Reports

Both general and specific benefit corporations are required to file an Annual Benefit Report with the secretary of state no later than ninety days after the conclusion of each calendar year, evaluating how the corporation has pursued the general public benefit in the previous twelve months. The report must state the name of the corporation, be signed by the chief executive officer not more than thirty days before the report is delivered to the secretary of state for filing, and must be current when signed.¹¹⁴

The Act's "teeth" are in the Annual Benefit Report. Theoretically, investors and consumers will read the report and take their money elsewhere if the corporation is not living up to its promises. While in the section on "Transparency," the report is the most meaningful method of accountability.

1. The General Benefit Corporation's Annual Benefit Report

The general benefit corporation has more requirements than a specific benefit corporation. First, the report must certify that its board of directors has chosen a third-party standard to evaluate its progress and has determined that the organization promulgating the standard is independent.¹¹⁵ The first time a third-party standard is used, the report must explain how and why the standard was chosen.¹¹⁶ In subsequent years, the report must state whether the standard is being applied in a consistent manner, and if not, explain why not.¹¹⁷ If the directors change third-party standards, the report must explain the choice.¹¹⁸

Then, the report must state how the corporation pursued general public benefit during the reporting period, the extent and way of creating the benefit, and any circumstances that hindered the corporation's efforts.¹¹⁹ The report must certify that the board of directors approved the report.¹²⁰

Given that the report is required to measure the achievement of general public benefit by reference to a third-party standard, in practice the definition of a general public benefit is whatever the third-party standard promulgators say it is. There are a number of such organizations: Global

113. *Id.* at § 304A.201, subd. 2 (2), (3).

114. *Id.* at § subd. 1.

115. *Supra* note 85, at § 304A.301, subd. 3(1)(i), (ii). "Independent," according to its definition in § 304A.021, means "having no material relationship with the public benefit corporation or a parent, a subsidiary, or other affiliate of a public benefit corporation." *Id.*

116. *Id.* at § 304A.301, subd. 3(3).

117. *Id.* at § 304A.301, subd. 3(4).

118. *Id.* at § 304A.301, subd. 3(5).

119. *Id.* at § 304A.301, subd. 3(2).

120. *Id.* at § 304A.301, subd. 3(1)(iii).

Reporting Initiative, B Lab Assessment, and UL Environment 880 and 881,¹²¹ among others.¹²² These entities issue evaluations prepared using questionnaires gauged to assess the impact of the corporation on various constituencies and its environmental impact, a kind of social and environmental audit.¹²³ The B Lab assessment, for example, looks at five areas of a corporation: leadership, employees, consumers, community, and environment.¹²⁴ It asks about the company's mission statement, earnings, audits, how employees are compensated, the ratio of the highest salary to the lowest, recycling and water conservation systems, etc. The general benefit corporation is not required to have this third-party make the evaluation,¹²⁵ but must evaluate its own performance by reference to the same benchmarks as its chosen third-party standard promulgator.

Two unique provisions in the Minnesota statute add a little bite to the accountability requirement. First, if the general benefit corporation fails to file its Annual Benefit Report within ninety days of the due date, the secretary of state will revoke the corporation's status as a general benefit corporation. Second, if a general benefit corporation intentionally fails to file the Annual Benefit Report and the status is revoked, a shareholder may obtain payment for the fair value of his shares.¹²⁶

The Annual Benefit Report of a general benefit corporation goes a long way toward keeping corporations accountable to their purpose by ensuring that the market will have access to the information. This transparency will give investors and consumers the opportunity to evaluate whether benefit corporations are fulfilling their promises, to compare them to other benefit corporations, and to make financial decisions accordingly. The hope is that market forces will further the benefit purposes as shareholders move their money elsewhere or have the corporation's status revoked and their shares bought out.¹²⁷ The success of this transparency-accountability depends on

121. UL 880 assesses manufacturers and UL 881, service providers. *ULE 880—Sustainability for Manufacturing Organizations*, <http://www.greenbiz.com/ratings/> (last visited Dec. 1, 2013).

122. For a longer list of third party standards, see *List of Standards*, BENEFIT CORP., <http://benefitcorp.net/third-party-standards/list-of-standards> (last visited Dec. 2, 2013).

123. Neetal Parekh & David Jaber, *Third Party Standards for Benefit Corporations*, TriplePundit, (Mar. 6, 2012), <http://www.triplepundit.com/2012/03/third-party-standards-benefit-corporations/>.

124. *The B Impact Rating System*, FOUNDATION CENTER, <http://trasi.foundationcenter.org/record.php?SN=29> (last visited Dec. 1, 2013).

125. *Supra* note 85, at § 304A.301, subd. 4. Requiring a third-party audit would be cost prohibitive for many small businesses. William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 822–23 (2012).

126. *Supra* note 85, at § 304A.301, subd. 6, 7.

127. Esposito, *supra* note 73, at 486. See also Clark & Babson, *supra* note 125, at 845. Whether investor choices has a determinative effect on the success of benefit corporations remains to be seen and there are cogent arguments, though more focused on consumer choices, that the market won't play as large a role as hoped for. See e.g., Johnson, *supra* note 11. Additionally,

shareholder interest in the creation of benefit purposes. Benefit corporations will likely attract sincerely interested shareholders because investments risk lower returns in exchange for the promotion of the benefit purposes.

Because the success of benefit corporations will be determined by market forces, (as with traditional corporations), the report is also an important opportunity for the corporation to distinguish itself. Corporations, whether they are social enterprises or regular for-profit businesses, are more likely to see a return on their investment into corporate social responsibility initiatives if they use more concrete measurements.¹²⁸ In addition to the third-party standard, therefore, benefit corporations should take care to report in less “fluffy” and more fact-based ways.

2. The Specific Benefit Corporation’s Annual Benefit Report

The requirements for the Annual Benefit Report of a specific benefit corporation are much less rigorous than that of a general benefit corporation. Because specific benefit corporations can have a wide range of purposes—any purpose of creating positive impacts, or reducing negative impacts, on any category of natural persons, entities, communities, or interests—there are no independent third-party requirements for the report. The report need only contain a narrative description of the way in which the corporation pursued and created the specific public benefit purpose stated in its articles, the extent to which it was created, and any circumstances that hindered efforts to pursue or create the benefit. It must include a certification that the report has been reviewed and approved by the board of directors.

V. MINNESOTA PBC STRENGTHS AND WEAKNESSES

The Minnesota public benefit corporation provides the social entrepreneur with the necessary template, makes progress in addressing real social and environmental concerns, and does not overly burden directors and their legal counsel. This section discusses several significant and unique aspects of the Minnesota general and specific benefit corporations.

A. The Specific Benefit Corporation and its Need for Shareholder Involvement

The specific benefit corporation’s reporting and accountability requirements are less rigorous than those of the general benefit corporation. As a result, the specific benefit corporation is likely to be more commonly

although not addressed in the statute, shareholders always have the option to file a criminal suit based on fraudulent disclosures in the report.

128. Rogers, *supra* note 2 (“Now that the CSR field has grown up from being a feel-good community to having major impact on business value, it’s time to move from feelings to facts.”).

used, and may be a good alternative to a 501(c)(3) organization. It is, however, more vulnerable to abuse, enjoying the benefit of increased director discretion but without having to live up to the higher standard of the general benefit corporation.

The specific benefit corporation will likely be more popular because social entrepreneurs, who are the most interested in these new forms, typically lack finances to ensure that their entity meets the more onerous requirements of a general benefit corporation and still make a profit. Incorporating as a specific benefit corporation will thus be a more attractive option.

In some ways, the specific benefit corporation is similar to a typical 501(c)(3). For example, the corporation can choose a broad or narrow public benefit purpose or purposes to which it will dedicate its resources. However, it is different for three reasons. First, a specific benefit purpose is not necessarily a charitable one. A specific benefit purpose might not qualify as a charitable purpose under our nonprofit statute.¹²⁹ Second, there are no tax benefits for a specific benefit corporation. “Donors” trade a tax credit for potential profit and become “investors.” The trade forces investors and donors to make a thoughtful choice about how to use their finances. Third, a specific benefit corporation is not subject to government supervision, unlike charitable organizations that are subject to rules of the IRS. This keeps the entities distinct. Investors of benefit corporations do not have the safeguards of government supervision, but they have the controls that come with ownership. While similar to a 501(c)(3), the entities are different enough to provide real options to those interested in financially contributing to social and environment activities.

The upshot is that shareholders need to be more actively involved in the decisions and profits of a specific benefit corporation beyond the specific purpose. Enforcement and accountability depend on active shareholder involvement in bringing claims, removing directors, terminating the entity, or moving money elsewhere. But, because there is a lower expectation of return, shareholders will buy in only if they care about the purposes of the corporation. As such, they will be more than financially invested. Ironically, however, if the corporation starts making market-rate returns, the shareholders may be distracted by the company’s financial growth and less eager to hold the directors and officers accountable for achieving the specific benefit purposes.

In addition, public access to the report will guarantee transparency. With all the focus on corporate social responsibility, it is hard to believe that the directors and officers will disregard the corporation’s specifically stated purpose for long without the public drawing attention to the false

129. Minn. Stat. § 309.50

branding.

There should not be a passive acceptance of low returns. While consistently lower returns may be a trade-off for social and environmental benefits, many social enterprises are even outperforming the market and shareholders should expect results from a public benefit corporation just as they do from any corporate entity. In order to truly serve its dual purposes, specific benefit corporations need shareholders to be invested just as they would be if they were traditional corporations—the power of the ownership component is a critical factor in making the public benefit corporation effective.

B. Sustainability is Optional

The general benefit form should satisfy proponents of the benefit corporation who are primarily interested in sustainability. It requires directors to consider how the actions of the corporation will impact society and the environment, allows directors to pursue more than shareholder profits, and requires the filing of a thorough Annual Benefit Report.

However, with the option to set up an entity with fewer reporting requirements, entrepreneurs may more readily choose specific benefit corporation. The result may be that the goal of sustainability will be optional for many of the benefit corporations in Minnesota.

There are two concerns with this diversion from the legislation in other states. First, public benefit corporations in Minnesota might not contribute much to furthering the goal of creating a more sustainable world. Minnesota could have followed the blueprint of other states, requiring that all benefit corporations have a general benefit purpose with the option to add specific benefit purposes. Developing sustainable corporations was, after all, one of the primary motivations of the creation of the benefit corporation. But, the reality is that in the end, while corporations can make the biggest difference to the environment, arm-twisting by government regulation is necessary if we hope to see all corporations held to a higher standard.¹³⁰ The benefit corporation, no matter what its particular requirements, will likely never achieve this as long as it is an opt-in structure. As such, it is better to provide a less demanding standard, which encourages entrepreneurship and responsibility for social and environmental impacts, than to provide only one form that is prohibitively onerous. It arguably might make a greater difference to the common good in the long run if corporations have the option to opt-in by degrees.

The bigger question is whether the specific benefit corporation will foster the same branding issues of green-washing that the benefit

130. As Chancellor noted, “To ensure that for-profit corporations do not generate excessive externalities, strong boundaries remain critical.” *Supra* note 73, at 171.

corporation label was designed to remedy. The concern is that because the general public benefit standard is absent, which operates as a check of sorts on benefit corporations elsewhere in the country,¹³¹ specific benefit corporations can in practice choose any social activity and brand themselves as a social enterprise. This is a legitimate concern and will require the market to use its purchasing power to support corporations that it believes are socially beneficial. But, general benefit corporations nationwide are not free from this concern either. There is no uniform standard to measure the social benefit of benefit corporations or any social enterprise. These corporations are a step in the right direction—requiring accountability, providing branding, and bringing attention to social and sustainability concerns—but they are not an end-all solution. It will come down to whether consumers are willing to take the time to inform themselves and to make choices that might be less convenient or more expensive in exchange for the good of society or the environment.

C. Directors of Public Benefit Corporations

Determining the standard of care to which the directors of a general benefit corporation or a specific benefit corporation will be held is a concern that may interest both the legal practitioner who would like to protect his director-client and the social activist who wants corporations to actually fulfill their social responsibilities. In § 304A, Minnesota’s Act strikes a fair balance between both camps.

Directors, of both general and specific benefit corporations, “shall consider” the effects of proposed, contemplated, or actual conduct on the corporation’s “ability to pursue” the general public benefit or specific public benefit, respectively, and a director is accountable for its “failure to pursue or create” these benefits.¹³²

The “failure to pursue or create” conveys that the corporation is concerned with creating the public benefit rather than merely attempting to do so. It is a significant requirement, asking directors to account for how their choices were intended to further the public benefit purposes. This could have been stated more strongly. The drafters could have, for example, required the directors to evaluate the public benefit corporation’s actual impact on the public benefit directly. Nonetheless, it is a significant step for the goals social enterprise movement.

What this actually means in practice will be understood once the first cases make it to the bench; however, these provisions in the statute will likely make courts even more deferential to the decisions of directors

131. Clark & Babson, *supra* note 125, at 841.

132. Sections 304A.201, subd. 1, subd. 2 and 304A.202, subd. 1.

because directors no longer have one “master.”¹³³ The deferential business judgment rule allows reasonably made decisions to stand, as long as they are connected to the stated purposes in the articles. With a greater number of purposes to consider, courts will likely give the boards of benefit corporations more latitude than traditional for-profit boards. This creates an entity that can pursue social benefits without the fear of liability if profits are lower; this is not only a major plus for social entrepreneurs, but also a comfort for legal practitioners concerned about their corporate clients. As long as the minutes reflect that the directors considered each of the interests and that no one interest had priority, the directors are unlikely to be liable. Benefit corporations would do well to have a checklist at board meetings and to work systematically through it.

No purpose of the public benefit corporation can be systematically ignored, which protects both the financial and the social interests. Directors will have to take care to not give “regular, presumptive, or permanent priority” to any one interest. This implies at least some sort of rotation of interests, which is a good safeguard against either the social purpose or the financial interest taking precedent. It doesn’t, however, prevent one or two of the purposes, where there is more than one, dominating the corporation’s activities so long as each occasionally is at the forefront. This could result in dilution of the social purposes, and disappointment to the investor, consumer, or founder. By way of contrast, the Delaware statute seems to guarantee more consideration of the public benefits because each interest must get attention. There, the directors must manage the affairs of a corporation in a manner that “balances the pecuniary interests of the stockholders, the best interest of those materially affected by the corporation’s conduct, and the specific public benefits identified in its certificate of incorporation.”¹³⁴ This fits the concept of a triple-bottom-line corporation where each interest must be in balance with the others. In Minnesota, the social entrepreneur choosing the specific benefit corporation entity, however, should take care to not have too many public benefit purposes in its articles in case one or two of them overshadow the others.

Less promising for both the social entrepreneur and the investor is that because directors cannot give regular, presumptive priority to any one purpose there is no equivalent of a single financial bottom-line to guide decisions. As such, it will be more difficult to hold the directors to the corporation’s goals, both financial and social, than it is in a traditional corporation. The results may be disappointing for the owners who hoped for social and environmental outcomes but cannot easily force them. It could

133. *Id.* Vice Chancellor Laster, during the lecture cited to in footnote 102, also stated that he foresaw that, without the “polestar” of the financial bottom-line to guide and measure director decisions, directors will inevitably be given more discretion.

134. DELAWARE CODE, TITLE 8, SUBCHAPTER XV § 365.

also be very frustrating for the directors of both general benefit corporations and specific benefit corporations as they must consider a host of purposes before making a decision. For the general benefit corporation, the entire list of stakeholders enumerated in § 302A.251, as well as “future generations,” must be considered. The directors of a specific benefit corporation will have to consider each public benefit included in its articles. Ultimately, the decision-making process could be complicated and frustrating.

In addition, directors will likely have to make difficult value judgments. The recent development of hydraulic fracturing, or “fracking,” provides a clear example. As a result of fracking, a process to extract oil and natural gas, the United States became the world’s leading producer of natural gas in 2011.¹³⁵ It is an economic boon for many small towns as it provides the money to continue to operate schools and maintain roads and other basic services.¹³⁶ However, fracking can contaminate natural water resources and omit carcinogenic dust. Some towns are recalling the officials who permitted the operations, while at the same time the fracking industry is becoming a multi-billion dollar industry. Environmental concerns directly clash with social ones, and there is no easy answer to which will have a better outcome for future generations.

The Minnesota Public Benefit Corporation Act, like all benefit corporation legislation, is an “enabling statute”¹³⁷ and it strikes a good balance between several interests. Directors are given freedom to pursue social and environmental goals, and directors are unlikely to be exposed to liability for failure to do so unless they flagrantly ignore such interests.

VI. WILL THE BENEFIT CORPORATION SUCCEED?

The Minnesota benefit corporation provides social entrepreneurs with a template they have been seeking, and this may result in it soon being a well-accepted, if on a small scale, part of our corporate world. In addition, investors seeking to both have social impact as well as financial return might find investing in a benefit corporation an attractive option, as one investment in a diversified portfolio.

A. Uses of the Benefit Corporation

The benefit corporation will be utilized most by small startups interested in the common good and in business ownership. The Act gives entrepreneurs the ability to found companies that pursue both social good

135. Jeff McMahon, *Gas Fracking Spurs Oil Rush*, FORBES, Oct. 23, 2012, available at <http://www.forbes.com/sites/jeffmcmahon/2012/10/23/gas-fracking-spurs-oil-rush/>.

136. *See id.*

137. Dennis J. Tobin, *The Evolution of the Corporation: The Public Benefit Corporation*, BLANEY MCMURTRY, Aug. 28, 2013, available at http://www.martindale.com/members/Article_Atachment.aspx?od=1087914&id=1956244&filename=asr-1956246.pdf.

and profit. It allows them to harness the power of capital markets, grow ownership, attract investors who wish to see an impact with their investment, and retain business talent. It provides greater freedom for directors and owners to pursue both social benefits and profits without fear of director and officer liability.

In addition, corporations might consider having a benefit corporation as a part of their corporate structure. Many corporations give a percentage of their profit to a nonprofit that furthers social or environmental goals, which are often goals that align with their own corporate purpose or slice of the market. Nonprofits provide tax benefits to corporations either in the form of tax exemption or tax credits. For example, UnitedHealth Group, Inc. recently gave \$50 million into a fund to construct housing for low-income families in exchange for federal tax credits for fifteen years.¹³⁸ Benefit corporations provide an alternative, trading this tax break for profit. Corporations might enjoy getting return on their investment and the opportunity to grow a socially-minded business that complements their company's goals.

B. Will Investors Invest?

There are many investors for social enterprises. Impact investing,¹³⁹ as it is called, is a growing phenomenon: whether as common stock, low-return preferred stock, or even fixed return, investments in a JP Morgan study showed that this market offers the potential over the next ten years for invested capital of between \$400 billion and \$1 trillion, and profits of \$183 billion to \$667 billion.¹⁴⁰

The JP Morgan study describes this as a “movement” of investors who are motivated by the idea that their investment can generate positive change. These investors reject the binary approach of investing either to maximize return or maximize social impact. The study predicts that this impact investing will soon overflow into the mainstream. It is a great option for those are committed to investing in social and environmental activities but who want to use their business acumen to this end and prefer greater financial accountability.

People want to feel good about their investments in the same way they feel good about giving to charity—people are “hardwired” that way.¹⁴¹ And

138. Jackie Crosby, *United Puts \$50M into Housing*, STAR TRIBUNE, (Nov. 14, 2013), <http://www.startribune.com/business/231933561.html>.

139. Impact investments are investments intended to make a positive impact beyond financial returns. *See id.*

140. *Impact Investments, An Emerging Asset Class*, Nov. 29, 2010, J.P. MORGAN GLOBAL RESEARCH, available at <http://www.rockefellerfoundation.org/uploads/files/2b053b2b-8feb-46ea-adbd-f89068d59785-impact.pdf>.

141. Elizabeth Svoboda, *Hard-Wired for Giving*, WALL ST. J. (Aug. 31, 2013, 11:17 PM), <http://online.wsj.com/news/articles/SB10001424127887324009304579041231971683854>

if impact investments become a common part of diversified portfolios, then benefit corporations will be appealing options. They are specifically incorporated to pursue social good, yield profit, and have some degree of accountability—the perfect feel-good investment.

VII. CONCLUSIONS

The benefit corporation is a welcome development for social entrepreneurs in Minnesota. It is a template for pursuing social and environmental goals using business practices, and protects social entrepreneurs from liability or complicated legal structures. The benefit corporation will not expose directors to unlimited liability, and short of blatant disregard of the benefit purposes, directors are unlikely to be liable for breaching their duties.

The introduction of the Minnesota public benefit corporation will prove advantageous for everyone. Minnesota will be able to capture an emerging market and retain businesses that may otherwise move elsewhere. Investors seeking to make an impact will be given more options to advance the common good in Minnesotan communities.

The benefit corporation isn't intended to be the end-all solution to social problems and sustainability. It remains to be seen just how much of an impact it will have on the market and on the common good. At the very least, the benefit corporation is a step toward accountability and a signal of impending change. It provides a means to hold a corporation's treatment of stakeholders to a higher standard. Further, the introduction of the benefit corporation in more than twenty states signals a change in the public's perception of corporations. Statistics indicate that consumers, investors, and corporations are all doing things a little differently by using the power of capital markets to advance the common good. The benefit corporation will provide another means in Minnesota to advance the common good while applying pressure on all corporations to do the same.

(analyzing scientific studies that indicate generosity triggers signals in our brain, the author notes that “[g]enerosity is inherently rewarding: the brain churns out a pleasurable response when we engage in it.”).