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Providing Clarity for Standard of Conduct for Directors within Benefit Corporations: Requiring Priority of a Specific Public Benefit

Roxanne Thorelli

Note

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Since its inception, Patagonia—one of the leading outdoor outfitters in the United States—has been committed to reducing its environmental impact.[1] By researching and developing environmentally friendly materials and methods, utilizing facility resources to the fullest, and directing a portion of its profits to social and environmental causes, Patagonia has been heavily focused on sustainability issues for more than three decades.[2] Indeed, even its mission statement reflects this strong commitment: "Build the best product, cause no unnecessary harm, [and] use business to inspire and implement solutions to the environmental crisis."[3]

Until 2012, Patagonia was a traditional for-profit corporation with a strong social mission. That year, however, a new legislative assembly bill was enacted to create the benefit corporation legal entity in California.[4] Recognizing that the benefit corporation entity provided the legal framework necessary for it

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1. *Company History*, PATAGONIA, http://www.patagonia.com/company-history.html (last visited Mar. 6, 2017).

2. Patagonia uses primarily recycled and reclaimed materials to create products, consumes solar power for energy, and improves existing buildings instead of constructing new facilities. *Resource Use*, PATAGONIA, http://www.patagonia.com/resource-use.html (last visited Mar. 6, 2017).

3. *Patagonia's Mission Statement*, PATAGONIA, http://www.patagonia.com/company-info.html (last visited Mar. 6, 2017).

4. Assemb. 361, 2011–12 Cal. Reg. Sess. (Cal. 2011).

to remain true to its social goals,[5] Patagonia quickly took advantage of this new option. Today, Patagonia is likely one of the most well-known benefit corporations in the United States.[6]

Benefit corporations similar to Patagonia are for-profit and have three distinguishing features. First, the required corporate purpose is to create a material positive impact on society and the environment.[7] Second, expanded director duties require consideration of other non-shareholder interests as well as the financial interest of shareholders when making corporate decisions.[8] Third, it is required to annually report the overall impact of the social and environmental performance using a credible, transparent, and independent third-party standard.[9] Thus, while a traditional for-profit corporation cannot fully pursue social purposes because of duties owed to shareholders, and while non-profit corporations cannot raise profits, benefit corporations can do both.[10] Benefit corporation directors must consider people, the planet, and profit—referred to as the "triple bottom line"[11]—as opposed to profit alone, for traditional for-profit corporations,[12] or just people and the planet, for non-profit corporations.[13]

5. *See B-Lab*, PATAGONIA, http://www.patagonia.com/b-lab.html (last visited Mar. 6, 2017) ("Benefit corporation legislation creates the legal framework to enable mission-driven companies like Patagonia to stay mission-driven through succession, capital raises, and even changes in ownership, by institutionalizing the values, culture, processes, and high standards put in place by founding entrepreneurs.").

6. J. Haskell Murray, *Defending Patagonia: Mergers and Acquisitions with Benefit Corporations*, 9 HASTINGS BUS. L.J. 485, 486–87 (2013).

7. BILL CLARK, DRINKER, BIDDLE, & REATH LLP, MODEL BENEFIT CORPORATION LEGISLATION § 102 (2016), http://benefitcorp.net/policymakers/how-pass-benefit-corporation-legislation [hereinafter MODEL ACT] (download model legislation).

8. *Id*. § 301(a).

9. *Id.* § 401.

10. For further discussion about the different director duties between traditional for-profit, non-profit, and benefit corporations, see *infra* Part I.B.

11. *See* Timothy F. Slaper & Tanya J. Hall, *The Triple Bottom Line: What Is It and How Does It Work?*, IND. BUS. REV. (Spring 2011), http://www.ibrc.indiana.edu/ibr/2011/spring/pdfs/spring2011.pdf (defining the "triple bottom line").

12. Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269, 288 (2013) (describing that traditional for-profit company benefits include making profits, although not exclusively).

13. Thomas Lee Hazen & Lisa Love Hazen, *Punctilios and Nonprofit Corporate Governance—A Comprehensive Look at Nonprofit Directors' Fiduciary*

Although Patagonia may be the biggest and most well-known company to shift to the benefit corporation model, it is certainly not the only one.[14] Other companies find this new model attractive in order to authenticate their status as a socially responsible entity that is accountable for its actions to provide a materially positive impact on society and the environment. Benefit corporations have advantages for all company shareholders and stakeholders, from reduced director liability to expanded stockholder rights to an advantage in attracting talent and increased access to private investment capital.[15]

However, while benefit corporations may be growing in popularity, they do not come without a set of risks and complications, specifically relating to the expanded director duties to consider the shareholder and non-shareholder interests when making corporate decisions.[16] As many scholars have rightly recognized, current benefit corporation legislation lacks guidance for director duties regarding how to make decisions based on the divided loyalties to shareholders and stakeholders.[17] For

Duties, 14 U. PA. J. BUS. L. 347, 350–51 (2012) (distinguishing non-profit corporations and the director duties owed to stakeholders).

14. There are over 3700 registered benefit corporations in the United States, with almost 500 in Delaware and 200 in California. N.Y.C. BAR ASS'N, NEW YORK BENEFIT CORPORATIONS AT FIVE YEARS OLD: A LOOK BACK AND A PEEK INTO THE FUTURE; B LAB DESCRIPTION OF BENEFIT CORPORATIONS, Westlaw 20160929P NYCBAR 19 (Sept. 19, 2016). Other known benefit corporations include: *B Corp*, PLUM ORGANICS, http://www.plumorganics.com/benefit-corp (last visited Mar. 6, 2017) (delivering nourishing, organic food to young children as part of the greater societal purpose led Plum Organics, a subsidiary of Campbell Soup Company, to reincorporate as a benefit corporation in 2013); *Kickstarter Is a Benefit Corporation*, KICKSTARTER, https://www.kickstarter.com/charter?ref=hello (last visited Mar. 6, 2017) (defining Kickstarter as focused on the mission to help bring creative projects to life instead of focusing on profits, so the company reincorporated as a benefit corporation in 2015); *Mission*, LAUREATE EDUC., INC., http://www.laureate.net/AboutLaureate/Mission (last visited Mar. 6, 2017) (stating that Laureate Education is the largest company to become a public benefit corporation with over one million students at over seventy institutions in twenty-five countries); *Our Business*, METHOD, http://methodhome.com/beyond-the-bottle/our-business (last visited Mar. 6, 2017) (describing how Method Products reincorporated as a benefit corporation in 2013 to formally focus on sustainability).

15. *Why Is Benefit Corp Right for Me?*, BENEFIT CORP., http://benefitcorp.net/businesses/why-become-benefit-corp (last visited Mar. 6, 2017).

16. *See* MODEL ACT, *supra* note 7, § 301(a).

17. Steven Munch, *Improving the Benefit Corporation: How Traditional Governance Mechanisms Can Enhance the Innovative New Business Form*, 7 NW. J.L. & SOC. POL'Y 170, 190 (2012) (explaining how directors need stricter duty guidelines to be able to frame and defend their decisions); *See e.g.*, J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Cor-*

example, neither benefit corporation statutes nor state case law address questions such as what weight directors should assign to shareholder and non-shareholder interests and which interests fall within the protected stakeholder categories that directors must consider.

Regrettably, existing legal scholarship has failed to address this problem in a systematic way. This lack of guidance for directors needs to be remedied, as benefit corporations are becoming more prevalent and directors need clarity for their responsibilities. Due to the requirement for pursuing a public benefit, directors of benefit corporations must understand their duties so they can fulfill their obligations to company stakeholders and promote the greater good.[18] Besides the directors themselves, determining the director standard of conduct concerns legal practitioners who protect director-clients and social activists who want benefit corporations to be accountable for fulfilling their social responsibilities.[19] With novel fiduciary duties for directors and no current case law for breach of benefit corporation fiduciary duty or benefit corporation governance, it is important to clarify director duty and provide guidance;[20] otherwise, the new corporate entity may ultimately prove unsuccessful.[21]

poration Law, 4 HARV. BUS. L. REV. 345, 354–55 (2014); Antony Page, *New Corporate Forms and Green Business*, 37 WM. & MARY ENVTL. L. & POL'Y REV. 347, 364 (2013).

18. *See* Alicia E. Plerhoples, *Delaware Public Benefit Corporations 90 Days out: Who's Opting in?*, 14 U. DAVIS BUS. L.J. 247, 275–76 (2014) (stating that research must continue to determine how director actions of balancing stakeholder interests will be interpreted). Also, because corporations "exist to create value," it is important that directors have a clear sense of how they are required to run a corporation and which values they are permitted to foster. Joseph R. Shealy, *The Corporate Identity Theory Dilemma: North Carolina and the Need for Constructionist Corporate Law Reform*, 94 N.C. L. REV. 686, 711 (2016).

19. Deborah J. Walker, Comment, *Please Welcome the Minnesota Public Benefit Corporation*, 11 U. ST. THOMAS L.J. 151, 177 (2013).

20. Christopher Lacovara, *Strange Creatures: A Hybrid Approach to Fiduciary Duty in Benefit Corporations*, 2011 COLUM. BUS. L. REV. 815, 879–80 (2011).

21. Studies show that when companies "participate in stakeholder-enhancing and socially responsible activities[, they] have to face negative economic consequences and often find themselves being pushed out of business." SHUANGGE WEN, SHAREHOLDER PRIMACY AND CORPORATE GOVERNANCE: LEGAL ASPECTS, PRACTICES AND FUTURE DIRECTIONS 88 n.45 (2013). *But cf. id.* at 176 (contending that benefit corporations will gain instrumental value through positive brand image and corporate reputation by creating socially responsible attributes).

This Note seeks to overcome the gap in the legal literature by providing a novel solution that will guide benefit corporation directors as they navigate this complicated terrain. Part I introduces the features of the benefit corporation as a new legal entity within social enterprises as well as its history. It also describes the provisions of director duty and liability within the Model Benefit Corporation Act (Model Act) in comparison to director duty and liability of for-profit and non-profit corporations. Part II explores and analyzes five important shortcomings of the current director duty provisions within several state benefit corporation statutes, ultimately arguing that the specific public benefit should be required and prioritized. Part III draws from the strengths of the Model Act and various state benefit corporation statutes to formulate statutory text that will provide increased guidance for directors in performing their duties. This Note proposes an ideal statute provision by requiring a specific public benefit, prioritizing the required specific public benefit purpose within director considerations, and including an opt-in for a general public benefit purpose to provide clarity regarding director duties in benefit corporations.

I. GENERAL STRUCTURE OF BENEFIT CORPORATIONS AND DIRECTOR DUTIES

Traditional for-profit corporations are intended to pursue the pecuniary interests of their shareholders.[22] These corporations may engage in socially beneficial activities, but the activities must be measured against an overall profit motive.[23] By contrast, non-profit corporations pursue socially beneficial ends generally without a view towards a profit motive for its members.[24] The important difference is that non-profit corporations do not have shareholders who receive distributions.[25] Between the pursuits of traditional for-profit and non-profit corporations is the benefit corporation.[26] Benefit corporations consider the

22. Regina Robson, *A New Look at Benefit Corporations: Game Theory and Game Changer*, 52 AM. BUS. L.J. 501, 513 (2015) (stating how traditional corporations are required to maximize shareholder wealth).

23. J. William Callison, *Benefit Corporations, Innovation, and Statutory Design*, 26 REGENT U. L. REV. 143, 144 (2014).

24. *Id.*

25. Thomas H. Boyd, Note, *A Call To Reform the Duties of Directors Under State Not-For-Profit Corporation Statutes*, 72 IOWA L. REV. 725, 729 (1987).

26. *See* Laura A. Farley, Note, *Knowledge Is Power: How Implementing Affirmative Disclosures Under the JOBS Act Could Promote and Protect Benefit Corporations and Their Investors*, 99 MINN. L. REV. 1507, 1508 (2015).

social good. They are also for-profit, having shareholders who obtain financial benefit from dividends.[27] However, the shareholders recognize that producing social good might reduce profitability.[28]

This Part will introduce the benefit corporation and director duties in general. Section A will discuss the features of the benefit corporation as a new legal entity within social enterprises, including the history of its creation through the B Lab Organization and constituency statutes, as well as its main three components: purpose, accountability, and transparency. Section B will describe director duties and liability within a traditional for-profit corporation, a non-profit corporation, and within benefit corporations under the Model Act.

A. WHAT IS A BENEFIT CORPORATION?

As a social enterprise, benefit corporations are a mix of for-profit and non-profit corporations. While for-profit corporations pursue options that maximize shareholder value,[29] and non-profit corporations pursue activities that benefit social purposes without distributions,[30] benefit corporations pursue social purposes and have shareholders who receive dividends, but realize that pursuing social missions may decrease profitability.[31]

1. History of the Benefit Corporation: Born of the Social Enterprise Movement and Constituency Statute

With the trend of supporting sustainable products and services, consumers want to make purchases from, and investors want to invest in, corporations that recognize their impact on the environment.[32] Research suggests that sixty-eight million

27. *See* Kevin V. Tu, *Socially Conscious Corporations and Shareholder Profit*, 84 GEO. WASH. L. REV. 121, 121 (2016).

28. Callison, *supra* note 23, at 145.

29. *Id.* at 143–44.

30. Tu, *supra* note 27, at 156–57.

31. Jacob B. Puhl, Note, *To B or Not to B: Why Ohio Should Enact Benefit Corporation Legislation To Protect Small Businesses in Ohio Who Wish To Make a Profit While Making a Difference*, 9 OHIO ST. ENTREPRENEURIAL BUS. L.J. 173, 187–88 (2014).

32. *Benefits of Becoming a Sustainable Business*, ECO-OFFICIENCY, http://www.eco-officiency.com/benefits_becoming_sustainable_business.html (last visited Mar. 6, 2017); *see* Walker, *supra* note 19, at 153; WILLIAM H. CLARK, JR. & LARRY VRANKA, THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION: WHY IT IS THE LEGAL FORM THAT BEST ADDRESSES THE NEEDS OF SOCIAL ENTREPRENEURS, INVESTORS, AND ULTIMATELY, THE PUBLIC 2–3 (2013),

consumers in the United States base their purchasing decisions on their sense of social and environmental values.[33] While for-profit corporations, non-profit corporations, and governmental organizations are the first three sectors of legal entities, social enterprises represent an emerging "fourth sector."[34] Although "social enterprise" has been defined in many ways, this Note will use a broader definition of "social enterprise" as an "entity that uses commercial activity to drive revenue with the common good as its primary purpose."[35]

As social enterprises do not fit perfectly within the current three sectors of legal entities, social entrepreneurs demand new corporate forms to accommodate their dual goals.[36] Benefit corporations help meet this need, as they neither adopt a "corporation-focused model that aligns corporate purpose, best interests, and fiduciary duties, nor do they adopt a fully rendered stakeholder model."[37] Instead, benefit corporations require consideration of stakeholders along with the enforcement rights given to directors and shareholders.[38] In general, benefit corporation statutes are the "most widely adopted social enterprise statute."[39]

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http://benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf [hereinafter WHITE PAPER] (stating that consumers prefer to purchase products and services from socially conscientious corporations).

33. *Benefits of Becoming a Sutainable Business*, *supra* note 32. The 2014 Neilsen Global Survey on Corporate Social Responsibility found that fifty-two percent of consumers check product packaging to ensure sustainable impact and fifty-five percent will pay extra for products and services from companies committed to social and environmental impact. NIELSEN, DOING WELL BY DOING GOOD 2 (2014), http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2014%20Reports/global-corporate-social-responsibility-report-june-2014.pdf.

34. Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337, 376–77 (2009). However, the social enterprise movement represents a return to early United States expectations of corporate activity before the nineteenth century. Johnson, *supra* note 12, at 277. Corporations were "public-serving" and incorporating was not for those companies having a private selfish purpose. *Id.* Also, there was no expectation that corporations achieve private financial gain as the main goal. *Id.*

35. Murray, *supra* note 17, at 347–48.

36. Lacovara, *supra* note 20, at 819.

37. Johnson, *supra* note 12, at 293.

38. *Id.*

39. Murray, *supra* note 17, at 348. While most statutes identify this new entity as a "benefit corporation" with either a general or specific public benefit, some states identify them as "public benefit corporations," "social purpose corporations," or "sustainable business corporations." *See* CAL. CORP. CODE § 2500 (2014); COLO. REV. STAT. §§ 7-101-501–509 (2013); DEL. CODE ANN. tit.

Another precursor to the benefit corporation is the permissive constituency provision in state corporate statutes,[40] which is the oldest and most common type of progressive corporate legislation.[41] Although these statutes differ slightly by state, they all permit directors to consider the impact a corporate action may have on non-shareholders.[42] Usually, these non-shareholder stakeholders consist of consumers, suppliers, employees, creditors, and the community.[43] If a corporate decision would harm these stakeholders, the directors may "trade-off a reduction in shareholder gains for enhanced stakeholder welfare."[44] Although benefit corporations can be viewed as an alternative to constituency statutes, many states are enacting benefit corporation legislation in addition to their pre-existing constituency statutes.[45] While permissive constituency statutes do not require directors to consider interests of constituencies other than shareholders, benefit corporations do require the consideration.[46]

Many states have relied on the Model Act to draft their benefit corporation legislation. The Model Act was drafted by B

8, §§ 361–368 (2013); HAW. REV. STAT. §§ 420D-1–13; WASH. REV. CODE §§ 23B.25.005–.150 (2012). California has legislation for social purpose corporations, as well as benefit corporations. *See* CAL. CORP. CODE § 14600–14631 (2011).

40. Sean W. Brownridge, *A Wolf in Sheep's Clothing: Unocal and the Defensive Mechanism Hidden in Corporate Benefit Purpose*, 60 VILL. L. REV. 903, 931 (2015).

41. Shealy, *supra* note 18, at 703. Many constituency provisions in state corporate statutes were enacted in response to takeover activity in the 1980s as a way to protect local businesses. Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 23–26 (1992). Starting in 1983 with Pennsylvania, forty-one states currently have some form of a constituency statute. *See* ANDREW KEAY, THE ENLIGHTENED SHAREHOLDER VALUE PRINCIPLE AND CORPORATE GOVERNANCE 187 (2013); Shealy, *supra* note 18, at 691. The statutes have been said to reflect arguments made by Harvard Law Professor E. Merrick Dodd in the 1930s. *Id.* He stated, "The public saw companies as economic institutions that have a social service role to play as well as making profits for shareholders." *Id.*

42. Anthony Bisconti, Note, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in Revlon Land?*, 42 LOY. L.A. L. REV. 765, 781–82 (2009).

43. Orts, *supra* note 41, at 16.

44. Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 994–95 (1992). *See generally* WHITE PAPER, *supra* note 32, at 8 (explaining how constituency statutes were developed as a defense mechanism to hostile takeovers).

45. Shealy, *supra* note 18, at 704–05.

46. MODEL ACT, *supra* note 7, § 301(a).

Lab, a non-profit organization with a mission to solve social and environmental issues using the power of business.[47] B Lab then lobbied states to pass benefit corporation statutes based on the Model Act.[48] Maryland became the first state in 2010 to pass benefit corporation legislation, which is very similar to the Model Act.[49] Since 2010, thirty states and the District of Columbia have passed similar benefit corporation legislation, and seven other states are in the process of passing legislation.[50] This legislation allows entrepreneurs to choose a business entity with an embedded social mission, and allows existing corporations to convert into it.[51]

2. Three Main Components of Benefit Corporations: Purpose, Accountability, and Transparency

Similar to traditional for-profit corporations, benefit corporations have three main components: purpose, accountability, and transparency.[52] Benefit corporations, however, have their own distinct version of each.

First, the corporate purpose of the benefit corporation must be to pursue a public benefit.[53] Benefit corporation directors must pursue the general public benefit and have the option to

47. *Our History*, B CORP., https://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps/our-history (last visited Mar. 6, 2017).

48. Brownridge, *supra* note 40, at 904.

49. Walker, *supra* note 19, at 156.

50. *State by State Status of Legislation*, BENEFIT CORP., http://benefitcorp.net/policymakers/state-by-state-status (last visited Mar. 6, 2017). Italy also adopted benefit corporation legislation, and similar national legislation is pending in Taiwan, Brazil, Chile, Argentina, and Columbia. John Montgomery, *Mastering the Benefit Corporation*, BUS. L. TODAY, July 2016, at 1, 1–2.

51. McKenzie Holden Granum, Note, *With the Emergence of Public Benefit Corporations, Directors of Traditional For-Profit Companies Should Tread Cautiously, but Welcome the Opportunity To Invest in Social Enterprise*, 38 SEATTLE U. L. REV. 765, 766 (2015). Thus far, only private companies have become benefit corporations; not one publicly traded company has become a benefit corporation. *Id.* at 767. However, Laureate Education, a private company that is a benefit corporation, has recently filed to become a publicly traded company. N.Y.C. BAR ASS'N, *supra* note 14.

52. *FAQ*, BENEFIT CORP., http://benefitcorp.net/faq (last visited Mar. 6, 2017).

53. James D. Cox & Thomas Lee Hazen, *The Evolution of Corporations in England and America: Benefit Corporations*, *in* TREATISE ON THE LAW OF CORPORATIONS § 2:14, at 16 (3d ed. Supp. 2015). This differs from traditional for-profit corporations, which are allowed to form for any lawful purpose, but do not have a required particular purpose. *See* MODEL BUS. CORP. ACT § 3.01 (AM. BAR ASS'N 2008).

also pursue one or more specific public benefits listed in the company's articles of incorporation.[54] In the Model Act, a "general public benefit" is 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."[55] A "specific public benefit" is anything that confers any particular benefit on society or the environment.[56] The Model Act includes seven examples of possibilities for a "specific public benefit": (1) providing low-income communities with beneficial products or services; (2) promoting economic opportunity for communities; (3) preserving the environment; (4) improving human health; (5) promoting the advancement of knowledge, arts, or sciences; (6) increasing the flow of capital to entities which benefit the environment or society; and (7) any other particular benefit on society or the environment.[57]

Whether a benefit corporation chooses to pursue a specific public benefit has an important effect on the scope of a benefit corporation's operation. While the general public benefit allows a company to create a materially positive impact on society and the environment as a whole, creating a specific public benefit purpose is an opportunity to concentrate on a corporation's unique mission and priorities. Benefit corporations pursuing only a general public benefit have a broader commitment than those that also select a specific public benefit. Choosing both a general public benefit and specific public benefit allows a benefit corporation to pursue its unique, individual objectives while also assuring its pursuit of broader societal goals.[58]

State statutes may provide guidance for creating appropriate specific public benefits, but corporations will likely draft specific language tailored for their own purposes. While the Model Act and state statutes do not outline a level of required specificity, a specific public benefit should be more specific than the "material positive impact on the society and the environment" of the general public benefit requirement.[59] While a spe-

54. MODEL ACT, *supra* note 7, § 301(a).

55. *Id.* § 102.

56. *Id.*

57. *Id.*

58. Thomas J. White III, Note, *Benefit Corporations: Increased Oversight Through Creation of the Benefit Corporation Commission*, 41 J. LEGIS. 329, 341 (2015).

59. *Delaware Public Benefit Corporations: Choosing a Specific Benefit*, B LAB, http://benefitcorp.net/sites/default/files/Delaware%20Public%20Benefit%

cific public benefit purpose should be more unique than the general public benefit purpose, benefit corporations should create a specific public benefit with a comprehensive purpose to allow for flexibility in the future.[60] For example, if a corporation's specific public benefit purpose is to promote innovation in education and improve access to quality schooling, the corporation should not name specific methods regarding how the corporation will achieve that purpose, because the corporation may evolve and the specific methods may change.[61]

Second, the accountability for the director's standard of conduct has expanded in comparison to traditional for-profit corporations. When making corporate decisions, directors "shall consider the effects of any action or inaction upon" the shareholders and stakeholder groups[62] as a whole.[63] There are six non-shareholder stakeholders that directors must consider: (1) company employees; (2) company customers; (3) the company's community; (4) local and global environment; (5) short-term and long-term interests of the company; and (6) the company's ability to accomplish the general and specific public benefit.[64] The Model Act, however, does not provide guidance for determining which groups may fit within these stakeholder categories or how to accomplish the benefits. Because benefit corporations must consider a general and an optional specific public benefit,[65] benefit corporations can pursue environmental

20Corporations_%20Choosing%20A%20Specific%20Benefit%20FINAL_6_3_0 .pdf.

60. *Id.*

61. *Id.* For instance, Patagonia's specific public benefits exemplify a workable balance between specificity and breadth. While Patagonia is a public benefit corporation, it has also chosen to adopt specific public benefits, six overall. These six specific public benefits are: (1) "1% for the [p]lanet" for yearly charitable contributions; (2) "[b]uild the best product and cause no unnecessary harm to the planet or its inhabitants"; (3) "[c]onduct [o]perations [c]ausing [n]o [u]nnecessary [h]arm"; (4) "[s]haring [b]est [p]ractices with [o]ther [c]ompanies"; (5) "[t]ransparency"; and (6) "[p]roviding a [s]upportive [w]ork [e]nvironment." PATAGONIA WORKS, ANNUAL BENEFIT CORPORATION REPORT 8–11 (2013), http://www.patagonia.com/on/demandware.static/Sites-patagonia-us-Site/Library-Sites-PatagoniaShared/en_US/PDFUS/bcorp_annual_report_2014.pdf (describing each of Patagonia's specific public benefit purposes).

62. MODEL ACT, *supra* note 7, § 301(a)(1).

63. *See id.* § 102 (stating that the required general public benefit purpose is a "material positive impact on society and the environment, taken as a whole," so directors must also consider the impact "as a whole").

64. *Id.*

65. *Id.* § 201.

goals even at the risk of reducing shareholder profitability.[66] At the same time, benefit corporation statutes generally allow shareholders, not other stakeholders, to commence and maintain an enforcement proceeding against benefit corporation directors.[67]

Third, the transparency of the benefit corporation requires disclosure of an annual report addressing the impact of the social and environmental performance with reference to a credible, independent, comprehensive, and transparent third-party standard.[68] While traditional for-profit corporations also file annual reports, the annual benefit corporation reports include a narrative description of "the ways in which the benefit corporation pursued general public benefit during the year and the extent to which general public benefit was created."[69] Overall, the corporate purpose, accountability, and transparency of a benefit corporation are distinct from those guiding a traditional for-profit corporation.

B. GENERAL DIRECTOR DUTIES WITHIN TRADITIONAL FOR-PROFIT CORPORATIONS, NON-PROFIT CORPORATIONS, AND BENEFIT CORPORATIONS

In order to understand the uniqueness of the standard of conduct for benefit corporation directors, it is important to distinguish director duties and liability from traditional for-profit corporations and non-profit corporations.

1. Director Duty Within Traditional For-Profit Corporations

Corporations are created under state law, and their directors are subject to standards of conduct created by state law. Directors oversee the activities of a corporation and act on behalf of the shareholders.[70] While managing and directing the

66. Callison, *supra* note 23, at 145.

67. *See* Jacob E. Hasler, Note, *Contracting for Good: How Benefit Corporations Empower Investors and Redefine Shareholder Value*, 100 VA. L. REV. 1279, 1315–16 (2014). These proceedings can normally be brought for failing to pursue or create the general public benefit or specific public benefit purpose set forth in the articles of incorporation, or violating any obligation, duty or standard of conduct within the statute. MODEL ACT, *supra* note 7, § 102. For further discussion regarding benefit corporation director duty and liability, see *infra* Part I.B.3.

68. MODEL ACT, *supra* note 7, § 401.

69. *Id.* § 401(a)(1)(i).

70. Shiva Mirzanian, Note, *Washington's Social Purpose Corporation: Creating Accountability for Corporations or Simply Providing a Halo to Unde-*

company, directors owe certain duties—fiduciary duties—to the corporation itself and to the corporation's shareholders.[71] State corporate law has long recognized three basic fiduciary duties for corporate directors: duty of loyalty, duty of care, and duty of good faith.[72] Under the duty of loyalty, directors are required to pursue the best interests of the corporation[73] and refrain from using their corporate positions for personal gain.[74] Under the duty of care, directors must exercise good business judgment and use ordinary prudence in the operation of the business.[75] The duty of good faith is sometimes referred to as a separate obligation but is also a part of the duties of care and loyalty to advance the best interests of the corporation.[76]

While the director duties of loyalty, care, and good faith are mandatory under statutory law, corporate directors also have duties that stem from case law interpreting the duties of the statutory law. In general, case law dictates that directors of traditional for-profit corporations must maximize shareholder profit when fulfilling the corporate duties of loyalty, care, and good faith.[77] Almost one hundred years ago, the Michigan Supreme Court clearly articulated this standard in *Dodge v. Ford Motor Co.*: "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 . . . ."[78] *Dodge* remains

serving Corporations?, 5 SEATTLE J. ENVTL. L. 255, 260 (2015).

71. Andrew S. Gold, *Dynamic Fiduciary Duties*, 34 CARDOZO L. REV. 491, 491 (2012).

72. *See* Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993) (stating that directors have a "triad" of duties to a corporation).

73. *See* MODEL BUS. CORP. ACT § 8.30(a) (AM. BAR ASS'N 2008).

74. AM. BAR. ASS'N, COMM'N ON CORP. LAWS, THE CORPORATE DIRECTOR'S GUIDEBOOK 1599–1600 (rev ed. 1978).

75. *See* MODEL BUS. CORP. ACT § 8.30(b) (AM. BAR ASS'N 2008); Robert J. Rhee, *The Tort Foundation of Duty of Care and Business Judgment*, 88 NOTRE DAME L. REV. 1139, 1140–41 (2013).

76. *See* MODEL BUS. CORP. ACT § 8.30(a) (AM. BAR ASS'N 2011); Leo E. Strine, Jr. et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 673–90 (2010) (discussing good faith under Delaware corporate law as well as "[t]he [r]ise and [d]emise of an [i]ndependent [d]uty of [g]ood [f]aith").

77. Granum, *supra* note 51, at 771. "Shareholder primacy" is a term used to describe the control shareholders have over the corporation and its directors. D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 277–78 (1998).

78. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919).

good law and the shareholder wealth maximization theory has been widely upheld[79] and accepted by courts.

However, a strict reading of shareholder wealth maximization may not represent the current state of modern corporate law.[80] The trend of corporate law is "moving away from historic shareholder-centric values towards a more stakeholder-centric approach."[81] No statute actually mandates shareholder wealth or profit maximization, only case law.[82]

2. Director Duty and Liability Within Non-Profit Corporations

Non-profit corporations are generally established for charitable or religious purposes.[83] Non-profit corporations have a default governing structure with a board of directors,[84] for which the directors also generally have the fiduciary duties of care, loyalty, and good faith.[85] The three duties are similar to that of

79. In *eBay Domestic Holdings, Inc. v. Newmark*, the Delaware Court of Chancery reaffirmed that corporate directors are obligated to maximize shareholder value pursuant to their fiduciary duties. 16 A.3d 1, 35 (Del. Ch. 2010). Former Chancellor Chandler stated that the directors are bound by the standard of conduct accompanying the for-profit entity, including "acting to promote the value of the corporation for the benefit of its stockholders." *Id.* at 34. Current Chancellor Strine states that "the corporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders." Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 155 (2012).

80. WHITE PAPER, *supra* note 32, at 8.

81. Rugger Burke & Samuel P. Bragg, *Sustainability in the Boardroom: Reconsidering Fiduciary Duty Under* Revlon *in the Wake of Public Benefit Corporation Legislation*, 8 VA. L. & BUS. REV. 59, 75 (2014).

82. Jessica Chu, Note, *Filling a Nonexistent Gap: Benefit Corporations and the Myth of Shareholder Wealth Maximization*, 22 S. CAL. INTERDISC. L.J. 155, 168 (2012); *see also* Mark A. Underberg, *Benefit Corporations vs. "Regular" Corporations: A Harmful Dichotomy*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (May 13, 2012), https://corpgov.law.harvard.edu/2012/05/13/benefit-corporations-vs-regular-corporations-a-harmful-dichotomy (contending that there is a mistaken rationale "that existing law prevents . . . directors from considering the impact of corporate decisions on other stakeholders[] [and] the environment"). *See generally* PRINCIPLES OF CORP. GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01 (AM. LAW INST. 1992) (noting that a business corporation maximizes corporate profit and shareholder gain, but that it must be constrained by social imperatives and might be qualified by social needs).

83. Hazen & Hazen, *supra* note 13, at 350–51.

84. MODEL NONPROFIT CORP. ACT § 8.01(a) (AM. BAR ASS'N 2008).

85. PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS § 300 (AM. LAW INST., Tentative Draft No. 1, 2007). For a discussion about the meaning of the three duties, see *supra* notes 72–76 and accompanying text.

a traditional for-profit corporation director, except the non-profit duty of loyalty requires pursuit of the corporation's charitable purpose as opposed to the pursuit of for-profit wealth maximization for shareholders.[86] Non-profit corporate directors also owe a duty of obedience which requires adherence to the purposes stated in the corporation's charter for the greater social good.[87] As non-profit corporations are tax-exempt entities,[88] they are prohibited from making any distribution of income and must re-invest any "profit" back into the corporation.[89] Also, they cannot obtain financing from investors.[90] Without shareholders, the non-profit corporation director owes the duties only to the entity itself.

If a director breaches a duty owed to the non-profit corporation, there are limited remedies available. The basic remedies include director removal or corporation dissolution by the attorney general, or a derivative suit brought by the members,[91] other directors, or the corporation itself.[92] Otherwise, members must either encourage the other directors of the corporation to sue for breach of duties on behalf of the corporation or bring the complaint to the attorney general's attention to bring an enforcement action,[93] because members do not individually have standing to sue.[94] Overall, there are limited remedies against

86. Summers v. Cherokee Children & Family Serv., Inc., 112 S.W.3d 486, 503–04 (Tenn. Ct. App. 2002).

87. James Edward Harris, *The Nonprofit Corporation Act of 1993: Considering the Election To Apply the New Law to Old Corporations*, 16 U. ARK. LITTLE ROCK L.J. 1, 16 (1994) (describing the board's obligation to remain faithful to the organization's mission and purpose).

88. 26 U.S.C. § 501(c) (2012) (listing the types of endeavors that can receive tax exemption for non-profit corporations).

89. MODEL NONPROFIT CORP. ACT § 2(c) (1964) (AM. BAR ASS'N, amended 2008).

90. Robson, *supra* note 22, at 520 (discussing that regulations restrict non-profit organizations from raising capital through investors).

91. MODEL NONPROFIT CORP. ACT § 6.30 (1986) (AM. BAR ASS'N, amended 2008) (stating that the members of non-profit corporations can bring a derivative suit on behalf of the corporation to enforce duties owed to the corporation).

92. Hazen & Hazen, *supra* note 13, at 405. A majority of states provide the attorney general with the authority to police non-profit corporations. *Id.* at 403.

93. Brenda Boykin, Note, *The Nonprofit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits*, 63 N.C. L. REV. 999, 999 (1985). Beyond derivative suits and actions brought by attorney generals, states have other various actions that can be brought. For example, donors can bring suit for mismanagement of charity funds in California. *See* Holt v. Coll. of Osteopathic Physicians & Surgeons, 394 P.2d 932, 937 (Cal. 1964).

94. *See, e.g.*, Boykin, *supra* note 93, at 1008 (stating that because North

non-profit directors who fail to achieve the corporate purpose or other wrongful corporate governance.

3. Director Duty and Liability Within Benefit Corporations Under the Model Act

As with traditional for-profit and non-profit corporations, benefit corporation directors have the fiduciary duties of loyalty, care, and good faith.[95] The duties of loyalty and good faith for benefit corporation directors are similar to those of a traditional for-profit corporation, focusing on conflict of interest issues.[96] However, the Model Act expands the duty of care from the traditional for-profit corporation and requires directors to consider short-term and long-term impacts of their corporate decisions on the six non-shareholder stakeholders as well as the corporation.[97] The expansion of fiduciary duties to consider other stakeholder interests by mandate is at the heart of what it means to be a benefit corporation and shields benefit corporation directors from the *Dodge* standard.[98] Social entrepreneurs consider benefit corporations attractive because of these duties requiring directors to consider the interests of the non-shareholder stakeholders.

Under the Model Act, benefit corporations must strive for a general public benefit purpose, meaning a "material positive impact on society and the environment, taken as a whole . . . ."[99] Therefore, directors must consider all the effects "as a whole" of the corporation on society and the environment when making corporate decisions. Directors "shall consider the effects of any action or inaction upon" the six stakeholder groups.[100] Under the Model Act, directors may also consider "other pertinent factors or the interests of any other group that they deem appro-

Carolina's Nonprofit Corporation Act does not provide for member derivative suits, members must rely on the Attorney General or the board for enforcement).

95. Page, *supra* note 17, at 362–64.

96. *Id.*

97. MODEL ACT, *supra* note 7, § 301(a)(1)(vi); *see, e.g.*, William H. Clark, Jr., *The New Pennsylvania Benefit Corporation Law*, 84 PA. B. ASS'N Q. 65, 67 (2013) (highlighting the inclusion of this consideration in Pennsylvania's benefit corporation law).

98. *See* Burke & Bragg, *supra* note 81, at 74–76. For a discussion of the *Dodge* shareholder profit maximization standard, see *supra* notes 77–79 and accompanying text.

99. MODEL ACT, *supra* note 7, § 102.

100. *Id.* § 301(a)(1).

priate," as well as the interests referred to in the state's constituency statute.[101] The Model Act, however, does not delineate how the director should "consider" the interests of stakeholder groups or otherwise prioritize them.[102]

While directors are required to consider the impact of corporate decisions on six non-shareholder stakeholders, directors do not owe a fiduciary duty to them, nor to beneficiaries of the general or specific public benefits.[103] Therefore, directors are protected against suits brought directly by non-shareholder stakeholders and beneficiaries of the corporate purpose. However, shareholders are permitted to bring suit on behalf of those third parties. Shareholders, directors, investors in the parent company of a benefit corporation subsidiary with five percent or more equity interest, or the corporation itself are the only parties permitted to bring an action against the benefit corporation or its directors.[104] The only action permitted is a benefit enforcement proceeding, which can be brought for the "violation of any obligation, duty, or standard of conduct," the "failure to pursue or create [the] public benefit[s] . . . set forth in its articles," or the failure to consider the interests of various stakeholders listed in the statute.[105] However, a benefit corporation can provide in its articles of incorporation or bylaws one or more identified stakeholders who may also bring a benefit enforcement proceeding.[106] The identified stakeholders can claim a breach of director duties for failing to pursue or create the general or specific public benefit, but cannot allege a breach of duty against the stakeholders themselves.[107] The limited standing to sue protects the benefit corporation from unknown liability that would be a disincentive to becoming a benefit corporation.[108]

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101. *Id.* § 301(a)(2).

102. *Id.* § 301(a)(3).

103. *Id.* § 301(d).

104. *See id.* §§ 301, 305(a)–(b); *see also, e.g.*, N.J. STAT. ANN. § 14A:18-10(b) (2016) (allowing investors owning ten percent or more of the parent company to bring suit); VT. STAT. ANN. tit. 11A, § 21.13(b) (2011) (allowing investors owning ten percent or more of the parent company to bring suit).

105. *See* MODEL ACT, *supra* note 7, §§ 102, 305(a); *see also, e.g.*, N.J. STAT. ANN. § 14A:18-10(a)–(b) (2016); VT. STAT. ANN. tit. 11A, § 21.13(a)–(b). A claim of action can also be brought for failure to post benefit reports on the Internet or to distribute paper copies. MODEL ACT, *supra* note 7, § 102.

106. MODEL ACT, *supra* note 7, § 305(b).

107. *Id.* § 301(d); WHITE PAPER, *supra* note 32, at app. A at 13.

108. WHITE PAPER, *supra* note 32, at 21.

Along with the limited claims of action permitted, the Model Act also insulates directors through exculpation of personal liability with respect to monetary damages.[109] The reasoning for further director insulation is to allow directors to focus on their responsibilities and to "eliminate director fear where there is no court precedent for which to quantify liability."[110] Thus, directors cannot be held personally liable for a failure to create, or even pursue, a general or specific public benefit.[111]

Overall, the benefit corporation acts as a middle ground between for-profit and non-profit corporations, pursuing the social good and providing distributions for its shareholders. Within the overall framework, benefit corporation directors must consider the impact of corporate actions on shareholders and numerous stakeholders. While the Model Act has been adopted by most states, many states have also created different benefit corporation legislation. Therefore, it is important to recognize the differences between some of the statutes and identify effective duty provisions in order to develop an ideal standard of conduct for directors.

II. COMPARISON OF DIRECTOR DUTIES WITHIN BENEFIT CORPORATION STATUTES

There is no case law interpreting the standard of conduct for directors of benefit corporations, as they are new legal entities.[112] Exacerbating the uncertainty of this limited guidance, state statutes have notable differences with regards to director standard of conduct. This Part explores the five identifiable issues with the lack of sufficient guidance for standard of conduct for directors of benefit corporations by comparing various state benefit corporation legislation that have problematic issues. Section A addresses the issue of requiring or allowing a general or specific public benefit. Section B discusses the issues of requiring directors to consider inactions as well as actions. Section C compares statutes that require directors to "consider" stakeholder interests with statutes that require directors to "balance" stakeholder interests. Section D debates whether directors should be required to consider the ability of the benefit corporation to "accomplish" or simply "pursue" the public bene-

109. MODEL ACT, *supra* note 7, § 301(c).
110. WHITE PAPER, *supra* note 32, at 20.
111. *See* MODEL ACT, *supra* note 7, §§ 301(c), 303(c).
112. Lacovara, *supra* note 20, at 826 n.32.

fit purposes. Last, Section E critiques the number and variety of stakeholder interests that directors must consider and suggests prioritizing those interests. As these are the five main concerns within the standards that lack clarity, it is necessary to identify the options that provide more guidance for directors.

A. GENERAL PUBLIC BENEFIT VS. SPECIFIC PUBLIC BENEFIT

The benefit corporation was created so directors would be required to consider the "triple bottom line" of people, the planet, and profit when making decisions.[113] To ensure the triple bottom line, the Model Act and many states' acts require benefit corporations to have a general public benefit purpose to make a material, positive impact on society and the environment as a whole.[114] However, "[t]he mandate that a benefit corporation pursue a 'general public benefit purpose' is too vague because it does not provide a practical way for directors to make decisions."[115]

The breadth of the general public benefit and the limited ability for stakeholders to bring an enforcement action provides benefit corporation directors too much decision-making freedom.[116] This freedom can allow director abuse and self-dealing or irresponsible directors, more so than with traditional for-profit corporations.[117] Focusing on the difficulty to consider all the stakeholders within the general public benefit, courts will likely give the benefit corporation directors more discretion than traditional for-profit corporation directors, thus exacerbating the above concerns.[118] Due to the lack of specificity for director guidance, benefit corporation directors may be able to justify abusive actions by pointing to a public benefit justification or

113. *See* Slaper & Hall, *supra* note 11.

114. MODEL ACT, *supra* note 7, § 201(a); J. Haskell Murray, *Corporate Forms of Social Enterprise: Comparing the State Statutes* 1–2, 5 (Jan. 15, 2015), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=1988556.

115. J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 30 (2012). Minnesota even requires directors of benefit corporations to consider "future generations" within its general public benefit. MINN. STAT. § 304A.021 subdiv. 3 (2016). This could become complicated and difficult to achieve.

116. *See* Walker, *supra* note 19, at 169.

117. *See* J. William Callison, *Putting New Sheets on a Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, the Dangers Created, and Suggestions for Change*, 2 AM. U. BUS. L. REV. 85, 108 (2012).

118. Walker, *supra* note 19, at 177 (describing how courts will likely be even more deferential to the decisions of benefit corporation directors).

a private shareholder benefit justification.[119] In this way, "multiple bottom lines" for benefit corporation directors will likely result in even more reduced director liability.[120] Therefore, the general public benefit may be too broad for a benefit corporation to accountably pursue.

While the general public benefit may be too expansive, a specific public benefit allows the benefit corporation a greater chance to pursue its more tailored purpose, because directors can more easily identify the objective.[121] A specific public benefit purpose can "also provide a more workable system of board accountability."[122] A benefit corporation may be more successful in fulfilling its social purpose with a required specific public benefit that provides a clear objective, while retaining an optional general public benefit to serve society more generally.

Some states moved in the direction of more directorial guidance by requiring benefit corporations to choose a specific public benefit purpose or purposes[123] without requiring a general public benefit at all.[124] Delaware and Colorado require the certification of incorporation to list "[one] or more specific public benefits" to be pursued within the corporation's purpose.[125] This requirement gives shareholders notice and control over the mission of the public benefit corporation.[126] The Colorado benefit corporation drafting group believed that the focus on the specific public benefit was "more likely to achieve the shareholders' goals" and would allow director flexibility.[127] Also, California and Washington's social purpose corporations and Minnesota's specific public benefit corporation do not require a

119. *See* Murray, *supra* note 115, at 37 n.168 ("[S]ubtle selfishness . . . will be easier for a manager to hide if the benefit corporation is not forced to make its priorities clear.").

120. *See* Walker, *supra* note 19, at 169.

121. Murray, *supra* note 115, at 32–33.

122. *Id.* at 33.

123. COLO. REV. STAT. § 7-101-503(1)(a) (2016); DEL. CODE ANN. tit. 8, §§ 362(a)(1), 365 (a) (2016).

124. *See e.g.*, COLO. REV. STAT. § 7-101-503 (2016); DEL. CODE ANN. tit. 8, § 362(a) (2016); *see also* Callison, *supra* note 23, at 155, 157 ("Delaware . . . eschews the 'general public benefit' requirement in favor of specific public benefits . . . .").

125. COLO. REV. STAT. § 7-101-503(1)(a) (2016); DEL. CODE ANN. tit. 8, § 362(a)(1) (2016).

126. Plerhoples, *supra* note 18, at 256.

127. Herrick K. Lidstone, Jr., *The Long and Winding Road to Public Benefit Corporations in Colorado*, 43 COLO. LAW. 39, 42 (2014).

general public benefit.[128] Research shows that in Minnesota, over two-thirds of the benefit corporations are specific public benefit corporations.[129] The corporate decision of many companies to include a specific public benefit appears practical,[130] as requiring a specific public benefit purpose focuses the goals of the benefit corporation and guides directors when discharging their duties.

Because the ambiguous nature of the general public benefit purpose can allow for director abuse, benefit corporations should require a specific public benefit.[131] However, those who create general public benefit corporations may be looking for the ability to consider many stakeholders. Also, research suggests that sixty-eight million United States consumers base their purchasing decisions on their sense of social and environmental values as a whole,[132] so consumers may want corporations to consider a variety of stakeholders. Therefore, a workable solution would be to allow benefit corporations an option of the general public benefit in order to focus on a specific public benefit and allow its directors more clarity and guidance.[133]

128. Murray, *supra* note 114, at 1–2.

129. In 2015, thirty-six of the fifty-five Minnesotan entities that converted or formed as benefit corporations were specific public benefit corporations. For data on Minnesota business filings, see *Search Business Filings*, OFF. MINN. SECRETARY ST., https://mblsportal.sos.state.mn.us/Business/Search. A spreadsheet compiling this data is on file with the author.

130. Statutes should yield to practicality, and legislation should follow practicality. *See* Ana M. Gonzalez, Note, *"Yes We Scan": Using SEC Disclosures To Compel and Standardize Tech Companies' Reports on Government Requests for User Data*, 83 GEO. WASH. L. REV. 1058, 1074, 1084 (2015).

131. *See supra* notes 114–20 and accompanying text.

132. *Benefits of Becoming a Sustainable Business*, ECO-OFFICIENCY, http://www.eco-officiency.com/benefits_becoming_sustainable_business.html (last visited Mar. 6, 2017).

133. Providing the general public benefit as an opt-in provision would make it more likely for the benefit corporation to follow the specific public benefit model, as the corporation would have to take affirmative action to opt in to the general public benefit. *See generally* Lauren E. Willis, *Why Not Privacy by Default?*, 29 BERKELEY TECH. L.J. 61 (2014) (discussing the behavioral consequences of the use of a default scheme). Omission bias creates the tendency to favor inaction over action, so the default of the specific public benefit may be more attractive. *See* Jonathan Baron & Ilana Ritov, *Reference Points and Omission Bias*, 59 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 475, 478 (1994).

B. CONSIDER EFFECTS OF ACTION VS. CONSIDER EFFECTS OF ACTION AND INACTION

The Model Act requires directors to consider "the effects of any action *or inaction*" on the six groups of stakeholders.[134] This provision is vague as to what "inaction" means, especially in relation to each company director individually. It would be impossible for directors to be held liable for failing to consider the impact of inactions that were not discussed. While the provision has not been interpreted, requiring consideration of unknown inactions "imposes an incalculable burden on directors that cannot be taken seriously."[135]

To illustrate the potential problems with requiring the consideration of "inactions" under the Model Act, consider the following example: a benefit corporation produces toxic substances that run off into a nearby river—an environmental impact that the directors must consider pursuant to the company's general public benefit. To stop the pollution, the directors consider building an infiltration system. The directors ultimately decide not to build the infiltration system due to its cost. Because of its vague use of the word "inaction," the Model Act could require the director to consider not only the impact of failing to build the infiltration system, but also potentially innumerable "inactions" that might not have been contemplated, including routing the runoff water to a well or building a berm to divert the water runoff. Thus, despite the directors never contemplating these ideas, they may still somehow be required to consider the impact of those "inactions."

By contrast, the Minnesota Public Benefit Corporation Act (Minnesota Act) requires directors to consider "the effects of any proposed, contemplated, or actual conduct."[136] This provision only requires the directors to consider the impact of decisions they actually discussed, but did not act upon. In the water runoff example, the Minnesota Act would require the director to consider the impact of failing to build the infiltration system. It would not require the directors to consider the "inaction" of ideas never discussed, like building a well or berm. While the two provisions may have the same intended meaning, the word-

134. MODEL ACT, *supra* note 7, § 301(a)(1) (emphasis added). Twenty-three state statutes follow the Model Act for this provision. Murray, *supra* note 114, at 1–2.

135. Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007, 1027 (2013).

136. MINN. STAT. § 304A.201 subdiv. 1 (2016).

ing within the Minnesota Act clarifies the meaning of a possible inaction as a proposed or contemplated action.

C. "BALANCE" STAKEHOLDER INTERESTS VS. "CONSIDER" STAKEHOLDER INTERESTS

While directors must "consider" the effects of action or inaction upon the six stakeholders under the Model Act,[137] directors under the Delaware Public Benefit Corporations Act (Delaware Act) must "balance" (1) the shareholder pecuniary interests; (2) "the best interests of those materially affected by the corporation's conduct"; and (3) the specific public benefit listed within the certificate.[138] While the courts have yet to clarify the meaning of "consider" and "balance" within the statutes, there has been considerable disagreement about the meaning of the two terms. The statutes with balancing standards do not require any specific decision as a result, nor give greater weight to one factor over other factors.[139] "'Balance' could mean giving exactly equal weight to each factor, but more likely means giving *some* weight to each factor."[140] Balancing the stakeholders may be impossible and frustrating for directors. Also, "balance" seems more active than "consider" because each interest must receive attention.[141] "Balance" fits the concept of the "triple bottom line" where each interest must be in balance with the others.[142]

On the other hand, "'[c]onsider' . . . only requires directors to think about each factor and could allow directors to completely disregard a factor after considering it."[143] When utilizing the term "consider," board decisions may be accompanied by an organized formality reciting to ensure the board "considered" the effect of each decision on the listed stakeholders, as opposed

137. MODEL ACT, *supra* note 7, § 301(a)(1).

138. DEL. CODE ANN. tit. 8, § 365(a) (2016). Colorado has also utilized the balancing requirement because it is more consistent with boards of directors' typical methods of operation. *See* COLO. REV. STAT. § 7-101-506(1); Lidstone, *supra* note 127, at 40.

139. Lidstone, *supra* note 127, at 44. However, shareholders could draft the benefit corporation articles of incorporation to be more specific or give more weight to certain factors.

140. Murray, *supra* note 17, at 355–56 n.64.

141. Walker, *supra* note 19, at 177–78. Balancing "is arguably more onerous than" considering. Murray, *supra* note 17, at 355.

142. Walker, *supra* note 19, at 178.

143. Murray, *supra* note 17, at 355–56 n.64.

to actually considering each stakeholder.[144] Even though "considering" stakeholders may allow directors to bypass interests completely,[145] "consider" provides more clarity for directors to discharge their duties. "Consider" offers more clarity because it provides a bright-line formality for directors to follow. Directors can "check the box" for each stakeholder as opposed to the nebulous "balancing" standard which may not truly create a balance. Benefit corporation directors should be required to "consider" the impact to stakeholders because "balance" engenders much confusion as to the weight each stakeholder should receive.

D. "ACCOMPLISH" THE PUBLIC BENEFIT PURPOSE VS. "PURSUE" THE PUBLIC BENEFIT PURPOSE

Under the Model Act, directors must consider the ability of the benefit corporation to "accomplish" its public benefit purpose.[146] However, directors are required to consider the ability of the benefit corporation to "pursue" its public benefit purpose under the Minnesota Act.[147] Although the courts have not yet interpreted any difference in the meaning between "accomplishing" or "pursuing" the public benefit purposes, "accomplish" seems to be a stronger verb on its face.[148] When "pursuing" a public benefit, directors may have the option to end the pursuit before the public benefit has been fully achieved, while "accomplishing" the public benefit may require the full achievement of the public benefit.

Although the stronger language of "accomplish" should encourage directors to heed the corporate purpose when making decisions, it imposes too high of a standard on directors. Shareholders can only bring an enforcement proceeding under the Model Act or Minnesota Act for failure of the directors to "pursue or create" the public benefits.[149] Although it is somewhat unclear what "pursue or create" means within the enforcement

144. Loewenstein, *supra* note 135, at 1026.

145. *Id.* at 1026–27.

146. *See* MODEL ACT, *supra* note 7, § 301(a)(1)(vii).

147. *See* MINN. STAT. § 304A.201, subdiv. 1(1)(i) (2016).

148. "Accomplish" is a stronger word, as it is a verb meaning "to succeed in reaching" and "to bring to completion." *Accomplish*, MERRIAM-WEBSTER (2016). The verb "pursue" is defined as "to find or employ measures to obtain" and "to engage in." *Pursue*, MERRIAM-WEBSTER (2016).

149. *See* MINN. STAT. § 304A.202, subdiv. 1(a) (2016); MODEL ACT, *supra* note 7, § 305(a)(1).

proceeding context, the standard of conduct for directors should be to "pursue or create" the public benefit purposes in order to be aligned with the claim that can be brought against the directors.

E. TOO MANY INTERESTS FOR DIRECTORS TO CONSIDER WITHOUT ANY HIERARCHY OR PRIORITY

Directors of benefit corporations must attract and serve shareholders while also having to serve the interest of multiple stakeholders, catering to various competing interests. Because there is no hierarchy nor prioritization of these interests in existing statutes, directors will likely disrupt the dual purpose of benefit corporations by only pursuing some interest and neglecting others.[150] Therefore, there needs to be a solution to balance the dual purposes. Difficult required consideration of the many stakeholders clamoring for director attention may be clarified by the potential for a priority of certain interests.

1. Difference in Number and Variety of Stakeholders

Within most benefit corporation statutes, there are six stakeholder groups to be considered when making corporate decisions. The numerous stakeholder interests are clamoring for attention. This may create a "fiduciary logjam" wherein directors are unable to choose on which factors to focus.[151] This makes the director decision-making process more difficult and problematic.[152] With the many factors that directors must consider under the Model Act, directors have an "impossible task," which may hinder their ability to make decisions and the quality of those decisions.[153] Psychological research shows that when faced with many alternatives, people either continuously

150. In the event that there is a conflict between a social benefit and shareholder interest, it is likely the directors will support the shareholder interest considering the current director standard of conduct is unclear and the shareholders vote for the directors. *See* Callison, *supra* note 117, at 109. Also, only the shareholders can bring a claim of action against the directors. MODEL ACT, *supra* note 7, § 305(b). Twenty-three state statutes follow the Model Act for this provision. Murray, *supra* note 114, at 1–2.

151. *See* Callison, *supra* note 23, at 153–54 (describing the social aspects of benefit corporation legislation as "illusory" when they conflict with private interests).

152. *See id.*; Loewenstein, *supra* note 135, at 1011.

153. Loewenstein, *supra* note 135, at 1036; *see also* WEN, *supra* note 21, at 86. ("[I]t is logically impossible to maximize in more than one dimension at the same time.").

choose the same one or two options,[154] or avoid and defer the decision because there are too many choices.[155] Therefore, benefit corporation directors are likely to focus on one or two stakeholders to the exclusion of others as a basis for decisions.[156] Alternatively, directors might defer decision-making and be forced to revisit the issue, thereby losing valuable opportunities.[157] Also, "considering" an excessive number of stakeholders may have negative effects, because directors may not be able to process and compare the choices available to them.[158] Overall, the large number of stakeholders that directors must consider when making corporate decisions may be overwhelming, which is likely to lead to poorer-quality decisions.

While the Model Act and most benefit corporation statutes list six or more stakeholder interests that directors must consider when making corporate decisions,[159] some statutes list fewer stakeholders.[160] For instance, both Hawaii and Minnesota require benefit corporation directors to focus on only two interests. In Hawaii, these two interests are: (1) the corporation's ability to accomplish its specific public benefit; and (2) an action's effects on the shareholders.[161] For Minnesota specific public benefit corporations, directors must consider: (1) the shareholders; and (2) the specific public benefit the corporation has listed in its articles of incorporation.[162] With this more tailored focus, directors can presumably manage these two require-

154. *See* John R. Hauser & Birger Wernerfelt, *An Evaluation Cost Model of Consideration Sets*, 16 J. CONSUMER RES. 393, 404–05 (1990).

155. Loewenstein, *supra* note 135, at 1030–31 (discussing the variety of techniques that directors may use to avoid making a final decision for what constituency is the most important to focus on, so the benefit corporation model may encourage the directors to shirk their duties).

156. *Id.* at 1033.

157. *Id.* at 1032.

158. *Id.* at 1033.

159. *See* MODEL ACT, *supra* note 7, § 301(a).

160. *See, e.g.*, VT. STAT. ANN. tit. 11A, § 21.09(a)(1) (2016); VA. CODE ANN. § 13.1-788(A)(1) (2016). Maryland omits the short and long-term interests of the benefit corporation and the ability of the benefit corporation to accomplish its general and specific public benefit purposes. MD. CODE ANN., CORPS. & ASS'NS §§ 5-6C-01 to 5-6C-08 (West 2016). This omission retracts a focus on the success of the benefit corporation's goals itself. Johnson, *supra* note 12, at 290.

161. *See* HAW. REV. STAT. § 420D-6(a)(1) (2016).

162. Minnesota does not require the general public benefit in the specific benefit corporation. MINN. STAT. § 304A.201, subdiv. 2 (2016); Brett H. McDonnell, *Committing to Doing Good and Doing Well: Fiduciary Duty in Benefit Corporations*, 20 FORDHAM J. CORP. & FIN. L. 19, 42 (2014).

ments more effectively than they could manage the six or more stakeholder interests directors are provided in most other statutes.[163]

To illustrate the tailored focus of a specific public benefit corporation, consider the following example: a company focusing on recycling and reusing products to decrease its environmental impact plans to purchase refurbished machinery for creating products. When contemplating this purchase, a specific public benefit corporation director would be required to consider only its specific objective of recycling and reusing products to decrease environmental impact and its effect on its shareholders. By contrast, the director of a general public benefit corporation would have to consider all six of its stakeholders, with little guidance as to the amount of attention each stakeholder deserves. This example demonstrates how directors of specific public benefit corporations are able to make more focused decisions, because they are not required to consider the impact of decisions on numerous extra stakeholders. Nonetheless, specific public benefit directors are still allowed to consider other interests, but are not required to for every decision.

2. Lack of Guidance for Priority of Stakeholder Interests Directors Must Consider

Within benefit corporation legislation, there is no hierarchy to or prioritization of the stakeholder interests that directors must consider.[164] The Model Act and most benefit corporation statutes allow directors to give only specific stakeholders a priority if the articles of incorporation have stated that there will be prioritization.[165] Some states have not included the possibility for stakeholder prioritization language at all.[166] Even the Model Act, which allows benefit corporations to select a specific public benefit, does not give priority to the specific public benefit over the obligation to fulfill a general public benefit.[167] This may imply a rotation of interests, which can keep shareholder wealth maximization from being the focus, but it is

163. Limiting the number of interests that directors must consider improves director focus to pursue company objectives and also keeps directors from being liable for failing to properly juggle six stakeholder interests.

164. Callison, *supra* note 23, at 149.

165. MODEL ACT, *supra* note 7, §§ 102, 201(a); *see, e.g.*, MASS. GEN. LAWS ch. 156E, § 10(b) (2016).

166. *See, e.g.*, MD. CODE ANN., CORPS. & ASS'NS § 5-6C-07 (West 2011).

167. MODEL ACT, *supra* note 7, § 201(b).

not clear.[168] However, it does not prevent one or two of the stakeholders from dominating the corporation's activities so long as each stakeholder is occasionally a main focus.[169] This could reduce the pursuit of the social purposes and disappoint the investor, consumer, or founder.[170]

Without any established priority or weight of factors for directors to consider, it is unlikely courts will be able to support director accountability.[171] No litigation has been reported thus far involving benefit corporations, likely due to the new nature of the entities, most of the entities being small, and most being closely held.[172] Therefore, it is unclear how courts may react. However, courts may invoke the canon of statutory interpretation and decide that a specific purpose controls over a general purpose requirement.[173] The top priority may be the specific benefit by default, so it would be helpful and practical to prioritize the specific public benefit. Requiring a priority of the specific public benefit may provide more guidance for effective director decision-making[174] and may allow shareholders and courts more accountability for directors.[175] Also, a required priority will help focus director decisions on the corporation's specific public benefit purpose. Last, a priority will provide further transparency to the board's decision making[176] and can provide weightings for the costs and benefits of any decision.[177]

In sum, there are five distinct ways that director duties under benefit corporation statutes can be clarified. These consist of requiring: (1) a specific public benefit with an option to adopt the general public benefit instead of requiring only the vague general public benefit; (2) consideration of proposed, con-

168. Walker, *supra* note 19, at 169.

169. *Id.*

170. *Id.*

171. Murray, *supra* note 17, at 365–66. However, it is possible that benefit corporation law may lead to norms that will deter directors from using social enterprises to further their own causes instead of the general interests of society. *Id.*

172. *Id.* at 366 n.117.

173. *Id.* at 357. It is likely that the specific interests and specific benefits take precedent over the general interests and general benefits. Callison, *supra* note 23, at 159; *see* Clifford F. MacEvoy Co. v. United States *ex rel.* Calvin Tomkins Co., 322 U.S. 102, 107 (1944) (stating that specific terms in a statute control over general terms).

174. Murray, *supra* note 17, at 356; *see also* Murray, *supra* note 6, at 507.

175. Murray, *supra* note 115, at 33.

176. Lidstone, *supra* note 127, at 40.

177. Murray, *supra* note 115, at 29.

templated, and actual actions instead of infinite unknown actions; (3) directors to "consider" the impact to stakeholders for a bright-line standard as opposed to "balance" stakeholders with unclear weight; (4) directors to "pursue or create" benefit purposes to align with enforcement proceeding requirements; and (5) a prioritized specific public benefit for a focused objective. These five clarifications will provide much-needed guidance for directors by decreasing the uncertainty surrounding their standard of conduct.

III. PROPOSED STATUTE TO INCREASE GUIDANCE AND CLARITY FOR STANDARD OF CONDUCT FOR DIRECTORS OF BENEFIT CORPORATIONS

States can improve benefit corporation legislation by including provisions that address the standard of conduct for directors.[178] This Part proposes specific statutory language that will clarify benefit corporation standard of conduct within Section A. Specifically, the statutory language clarifies the standard of conduct by imposing these three main components: (1) mandatory specific public benefit; (2) required priority of the specific public benefit; and (3) opt-in for the general public benefit. Section B explains the policy considerations underlying the statutory provisions. Last, Section C addresses counterarguments. By utilizing the proposed statute within this Note that addresses five main concerns with current legislation, states can provide clarity and guidance for standard of conduct for benefit corporation directors.

A. PROPOSED STATUTE FOR BENEFIT CORPORATION STANDARD OF CONDUCT

The model language below suggests the best standard of conduct for director duty to provide clarity and director guidance based on the five main issues with the current benefit corporation legislation. The main components of the proposed so-

178. The B Lab organization, which drafted the first model language for benefit corporation legislation, lobbies states to enact only its Model Act and does not encourage deviation from the Model Act provisions. Callison, *supra* note 23, at 164. More states should consider alternative approaches to the Model Act in order to allow legislation to advance and find the most viable and useful alternative. *Id.* Corporate law should help promote and enhance the creation of the corporate value found within the new benefit corporation instead of limiting its expansion. *See* First Union Corp. v. SunTrust Banks, Inc., No. 01-CVS-10075, 2001 WL 1885686, at *2 (Super. Ct. N.C. Aug. 10, 2001).

lution are: (1) mandatory specific public benefit; (2) required priority of the specific public benefit; and (3) optional general public benefit. The mandatory specific public benefit is accomplished through the language in subdivision 1(a)(1). The prioritization of the specific public benefit is accomplished through the language in subdivision 1(b). Finally, the provision allowing for the opt-in general public benefit is contained in the language of subdivision 2. Overall, the proposed statute provides clarity by utilizing the most effective parts of the Model Act, Minnesota Act, Delaware Act, and Colorado Public Benefit Corporation Act, as well as the priority and opt-in provisions distinct from current benefit corporation legislation.

Standard of conduct for directors.

Subdivision 1. Consideration of interests for specific public benefit corporation.[179] In discharging the duties of their respective positions and in considering the best interests of the benefit corporation, the board of directors, committees of the board, and individual directors of a specific public benefit corporation:[180]

(a) shall consider[181] the effects of any proposed, contemplated, or actual action[182] on:

(1) the ability of the benefit corporation to pursue or create[183] its specific public benefit purpose as listed in the articles of incorporation;[184] and

(2) the pecuniary interests of its shareholders;

179. For a full discussion of why the specific public benefit provides more clarity and guidance for directors than the general public benefit, see *supra* Part II.A.

180. *See* MODEL ACT, *supra* note 7, § 301(a).

181. *See id.* § 301(a)(1). For a discussion explaining why "consider" provides greater clarity and guidance for directors than "balance," see *supra* Part II.C.

182. *See* MINN. STAT. § 304A.201 (2016). For a discussion about why "action" provides greater clarity and guidance for directors than "action or inaction," see *supra* Part II.B. Also, the two stakeholders listed as required for consideration are similar to those required in the specific public benefit corporation in Minnesota: the specific public benefit and the shareholders. MINN. STAT. §§ 304A.001–304A.301 (2016).

183. *See* MINN. STAT. § 304A.201, subdiv. 1(1)(i) (2016). For a discussion about why "pursue or create" provides greater clarity and guidance for directors than "accomplish," see *supra* Part II.D.

184. *See* COLO. REV. STAT. § 7-101-503(1)(a) (2016); DEL. CODE ANN. tit 8 §§ 362(a)(1), 365(a) (2016). For a discussion about why a required specific public benefit provides greater clarity and guidance for directors, see *supra* Part II.A.

(b) shall give priority only to the benefit corporation's ability to pursue its specific public benefit purpose;[185] and

(c) may consider the effects of any proposed, contemplated, or actual action on:[186]

(1) the employees and work force of the benefit corporation, its subsidiaries, and its suppliers;

(2) the interests of customers as beneficiaries of the specific public benefit or general public benefit purposes of the benefit corporation;

(3) community and societal factors, including those of each community in which offices or facilities of the benefit corporation, its subsidiaries, or its suppliers are located;

(4) the local and global environment;

(5) the short-term and long-term interests of the benefit corporation, including benefits that may accrue to the benefit corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the benefit corporation;

(6) the interests referred to in [cite constituencies provisions of the business corporation law if it refers to constituencies not listed above]; and

(7) other pertinent factors or the interests of any other group that they deem appropriate which are listed in the articles of incorporation.

Subdivision 2. Consideration of interests for general public benefit corporation. A corporation may choose to include a provision in its articles of incorporation which specifies that it shall consider the effects of any proposed, contemplated, or actual action on the interests of the stakeholders listed in subdivision 1(c). A corporation that adopts the required consideration of the interests of the stakeholders listed in subdivision 1(c) shall be named a general public benefit corporation.

185. For a discussion about why requiring a priority of the specific public benefit provides greater clarity and guidance for directors, see *supra* Part II.E.2.

186. To see where the first five proposed statute permissive stakeholders are listed within the Model Act's seven mandatory stakeholders list, see MODEL ACT, *supra* note 7, § 301(a)(1)(ii)–(v). For further discussion why these stakeholders are permissive instead of mandatory, see *supra* Part II.E. To see where the last two proposed permissive stakeholders are listed within the Model Act's permissive stakeholders list, see MODEL ACT, *supra* note 7, § 301(a)(2)(i)–(ii).

B. CONSIDERATIONS UNDERLYING PROPOSED STATUTORY REFORM

1. Requirement of the Specific Public Benefit: Subdivision 1(a)(1)

First, the model language proposed here requires that the benefit corporation "shall consider . . . its specific public benefit purpose as listed in the articles" in subdivision 1(a)(1).[187] The required specific public benefit provides more guidance for directors by reinforcing the support and interest in placing an emphasis on one cause, as opposed to the broad concept of pursuing a general public benefit which allows directors too much decision-making freedom.[188] Allowing benefit corporations to pursue only a general public benefit as within the Model Act is too vague and does not provide a practical way for directors to make decisions.[189]

The specific public benefit's identifiable objective also allows better director accountability, as shareholders can point to a more concrete goal and determine whether the directors have worked towards the corporate goal.[190] With the limited standing to sue and limited claims of action, directors already have much flexibility that should not be expanded with the freedom of the general public benefit as well. Benefit corporations are favored by consumers and investors because of social consciousness,[191] so directors should be accountable for their actions to be socially conscious.

2. Priority of the Specific Public Benefit: Subdivision 1(b)

Requiring a specific public benefit is the first step towards a focused vision and identifiable objective, but it is not sufficient. Without a prioritization of interests, directors may not pursue the specific public benefit zealously. This can be especially problematic considering the likelihood the directors will seek to pursue shareholder interests at the neglect of stake-

187. This is similar to the Delaware Act, which requires every benefit corporation to create a specific public benefit. DEL. CODE ANN. tit 8, § 362(a) (2016).

188. Walker, *supra* note 19, at 169. For a full discussion of why the specific public benefit provides more clarity and guidance for directors than the general public benefit, see *supra* Part II.A.

189. Murray, *supra* note 115, at 30.

190. *See id.* at 33.

191. *See Benefits of Becoming a Sustainable Business*, *supra* note 132.

holder interests. Therefore, the proposed priority provision is included in subdivision 1(b) and states that the directors "shall give priority only to the benefit corporation's ability to pursue its specific public benefit purpose."

Prioritizing the specific public benefit is necessary to fully focus director attention towards the company objective.[192] With guidance for director focus, directors will be less likely to disproportionately attend to interests that detract from the specific public benefit. Therefore, the prioritization provision will help ensure that benefit corporations remain social enterprises focused on creating benefit for society.

When making corporate decisions, directors may consider the multiple stakeholders listed in the proposed statute (or must consider the multiple stakeholders if the company opted-in to the general public benefit), but would make the final decision based on the impact of the specific public benefit. For example, a benefit corporation that operates a fitness gym may have a specific public benefit to help Americans become healthy through physical activity and raise awareness about the importance of fitness. When determining a location to advertise for the company, the directors discuss placing new electronic advertisements in a neighborhood with a marsh that is not close to a public park nor other facilities where its residents can exercise. When contemplating the advertisement location, the directors may consider the disruption to the environment, the gym's customers, the community that might not appreciate a brightly lit advertisement near the marsh, the company employees, shareholders, the company's short-term and long-term interests, and the ability to pursue the benefit purposes. After considering the impacts on all of the stakeholders, the priority consideration would focus on pursuing the specific benefit purpose of raising awareness about physical fitness and helping Americans become physically fit. With the prioritization provision, the directors have clearer guidance about what to do—analyze each factor but keep the specific public benefit a priority.

192. Benefit corporations should rank or prioritize the specific benefit purpose because it is a value the benefit corporation intends to create. *See* First Union Corp. v. SunTrust Banks, Inc., No. 01-CVS-10075, 2001 WL 1885686, at *3 (Super. Ct. N.C. Aug. 10, 2001). Ranking or prioritizing the specific benefit helps to harmonize the corporate system to function smoothly. *See id.* For a discussion about why requiring a priority of the specific public benefit provides greater clarity and guidance for directors, see *supra* Part II.E.2.

The primary thrust of the proposed statute is to encourage directors to thoughtfully analyze each consideration and be able to explain why they came to a conclusion, but allow them to make the final decision based on pursuing the specific public benefit.

3. Opt-in to the General Public Benefit: Subdivision 2

Within subdivision 1(c), specific public benefit corporation directors "may consider" the multiple stakeholders when making corporate decisions; this creates a default of a permissive general public benefit. Within subdivision 2, general public benefit corporation directors "shall consider" the multiple stakeholders when making corporate decisions. While the default is a permissive general public benefit under subdivision 1, directors can opt-in to the required consideration of the multiple stakeholders when making company decisions under subdivision 2 by stating that requirement in the articles of incorporation. The opt-in for the required consideration of the multiple stakeholders forces the directors to affirmatively commit to that consideration. Creating the required consideration of the general public benefit as an opt-out may otherwise trap unwary benefit corporations because omission bias creates the tendency to favor inaction over action.[193]

The requirement under the Model Act for the general benefit corporation to consider the six mandatory stakeholders makes the decision-making process difficult and problematic.[194] Some benefit corporations might regard these requirements as so burdensome that fulfilling them hinders the company's pursuit of its unique, specific public benefit. Therefore, strictly requiring a general public benefit, as the Model Act and other state statutes do, does not represent the best policy.

The proposed language fixes the above policy shortcoming by allowing benefit corporations to make the general public benefit optional. The proposed language does so by allowing the benefit corporation to opt-in to the required general public benefit under subdivision 2. For example, a benefit corporation may have a specific benefit purpose of providing organic food to children around the country and raising awareness about healthy foods. The directors are creating an organic food deliv-

193. For a discussion of the necessity of an optional general public benefit, see *supra* notes 132–34 and accompanying text.

194. *See* Loewenstein, *supra* note 135, at 1011.

ery route. With a required general public benefit, the directors would need to make many vague, additional considerations (i.e. environmental impact from truck emissions, employee convenience of the routes and delivery time, etc.), which would complicate the effectuation of their specific public benefit—delivering food. The opt-in provision helps prevent this dilemma, by allowing the benefit corporation to simply focus on the unique, benevolent purpose of delivering organic food to kids.[195]

By making the requirement of the general public benefit optional, the proposed language could attract social entrepreneurs that would otherwise refrain from creating a benefit corporation because of the overwhelming requirements of the general public benefit. Because many benefit corporations already seek a general public benefit, however, the opt-in nature of the general public benefit in the proposed language creates a convenient option.

C. A SPECIFIC PUBLIC BENEFIT IS SUPERIOR

While the proposed statute effectively provides director clarity and guidance lacking in current benefit corporation legislation, there are a few counterarguments against the provision. This Section will address these counterarguments and highlight their merit, but will ultimately show that the required and prioritized specific public benefit with an opt-in provision for the general public benefit best carries out the purposes behind the benefit corporation.

1. Requiring a Specific Public Benefit

While the above proposed statute requires a prioritized specific public benefit and allows for an opt-in general public benefit, there are reasons why a general public benefit should be required instead. Provided with the Model Act, there is a rationale for the provisions in the Model Act called "the White Paper."[196] The White Paper lists two reasons why the benefit corporation statutes should require the general public benefit instead of the creation of one or more specific public benefits.[197] First, the purpose of the new corporate entity was to create "benefit for society and the environment generally as well as

195. Providing the default as a specific public benefit corporation allows more freedom to focus on one objective.
196. WHITE PAPER, *supra* note 32.
197. *Id.* at 21.

shareholders."[198] While a specific public benefit creates director clarity, corporations may not be interested in accomplishing the specific benefit for one part of society, but concurrently creating other problems for other parts of society like the environment or the community. The purpose behind the creation of the benefit corporation was to create an entity that provided broad societal good. The ideal way to allow for this protection is requiring a general public benefit purpose.

Second, the general public benefit avoids unintended consequences. The general public benefit purpose prevents abuse of corporations from "greenwashing," or the outward perception of social responsibility.[199] Without the general public benefit purpose, a corporation could choose a specific public benefit purpose and then "consider" and dismiss all other stakeholders when making decisions.[200] Therefore, benefit corporations may take advantage of the limited required considerations. This would undermine a main purpose of the benefit corporation legislation: to create benefit for society generally.[201]

However, the mandate that a benefit corporation pursue a "general public benefit purpose" is too vague, because it does not provide a practical way for directors to make decisions.[202] This vagueness can allow director abuse and self-dealing or irresponsible directors.[203] Furthermore, a general public benefit corporation might have the ability to "greenwash" more than a specific public benefit corporation, because it is less clear what stakeholder is the focus of the decisions. While the general public benefit may be too expansive, a benefit corporation can more

198. *Id.*

199. *Id.* at 2 (describing how marketers increasingly use certain terms like "green," "responsible," and "sustainable" to describe their companies or products without standards to support the claims, thus making the terms meaningless); *see also* Tina H. Ho, *Social Purpose Corporations: The Next Targets for Greenwashing Practices and Crowdfunding Scams*, 13 SEATTLE J. FOR SOC. JUST. 935, 939 (2015) (contending that companies should focus on sustainability as opposed to just portraying themselves as such in order to be successful); Lidstone, *supra* note 127, at 44 (discussing how critics believe that the unregulated nature may allow benefit corporations to greenwash for-profit activities under the benefit corporation label for marketing, with little desire to actually accomplish a public benefit).

200. WHITE PAPER, *supra* note 32, at 22.

201. *Id.* Also, requiring a specific public benefit may limit the variety of companies forming as benefit corporations who might not want a focused public benefit purpose. *See* Johnson, *supra* note 12, at 281.

202. Murray, *supra* note 115, at 30.

203. Callison, *supra* note 117, at 108.

easily pursue a specific public benefit because directors can more easily identify the objective.[204] A specific public benefit would also provide a more workable system of board accountability.[205]

Nonetheless, research suggests that sixty-eight million United States consumers base their purchasing decisions on their sense of social and environmental values as a whole,[206] so consumers may want corporations to consider a variety of stakeholders. For consumer, investor and entrepreneur demand, it is important to allow the benefit corporations to include the general public benefit with the consideration of a variety of stakeholders. Therefore, the proposed statute includes an opt-in of the general public benefit if corporations want the required consideration of multiple stakeholders.

2. Flexibility and Judicial Development

A required specific benefit and priority may create a loss of flexibility for the new entity form. Having too much detail creates rigid law and lacks flexibility to cope with and reflect continuing developments.[207] If the duty provision is too narrow, there is a danger that directors will "merely comply with the letter of the law as opposed to its spirit."[208] On the other hand, a general public benefit provision encourages flexibility and enables innovation by simply setting a "directional" performance requirement of a material positive impact on society and the environment, without creating unnecessarily prescriptive performance requirements like achieving zero waste or becoming carbon neutral.[209]

However, the general public benefit with general duty terms may allow for excessive judicial development.[210] As the general public benefit is vague and therefore unpredictable, it will force benefit corporations to rely on litigation to discern the duty's meaning. Such a situation would be harmful because lit-

204. Murray, *supra* note 115, at 32–33.

205. *Id.* at 33.

206. *Benefits of Becoming a Sustainable Business*, *supra* note 132.

207. LAW COMM'N & SCOTTISH LAW COMM'N, COMPANY DIRECTORS: REGULATING CONFLICTS OF INTERESTS AND FORMULATING A STATEMENT OF DUTIES 35 (1999).

208. *Id.* at 21.

209. *Id.*

210. *See id.* The general language would require interpretation by the courts. *Id.* at 35.

igation is burdensome and expensive. Corporations are inconvenienced by needing to wait until courts decide how to interpret the law before the directors understand their duties. The lack of clarity within the vague concept of the general public benefit could give serial and aggressive litigants the opportunity to bring frivolous lawsuits against the company.[211] This threat of vexatious litigation will dissuade social entrepreneurs from creating benefit corporations. Therefore, a required general public benefit is misguided.

3. Lack of Investors for Specific Public Benefit

Generally, there is uncertainty with whether benefit corporations will be able to attract the same types of capital as traditional for-profit corporations.[212] Critics are concerned that investors will continue to invest in traditional for-profit corporations because they are not willing to sacrifice a portion of their would-be profits for the greater social good, considering benefit corporations emphasize social responsibility rather than shareholder returns.[213]

However, benefit corporations are an attractive option for investors who are interested in turning a profit but are also committed to investing in a company that focuses on social responsibility and the environment.[214] The general idea is that these companies that "do good for society" will also tend to "do well in the market," thus benefitting the state as a whole.[215] Be-

211. *Id.*

212. *See* Doug Bend & Alex King, *Why Consider a Benefit Corporation?*, FORBES (May 30, 2014), http://www.forbes.com/sites/theyec/2014/05/30/why-consider-a-benefit-corporation/#24ed658b6ea3 (discussing that it is unclear how benefit corporations will impact raising capital and how angel investors and venture capitalists will react because benefit corporations are a new legal entity and are not yet proven to be effective).

213. *See* Justin Blount & Kwabena Offei-Danso, *The Benefit Corporation: A Questionable Solution to a Non-Existent Problem*, 44 ST. MARY'S L.J. 617, 657–58 (2013) ("[I]nvestors are fully entrenched in the business and cultural norm commonly taught in business schools—that the purpose of the corporation is to maximize shareholder wealth.").

214. Shealy, *supra* note 18, at 708. Bill Campbell, co-founder of Portland-based Equilibrium Capital, argues that benefit corporations will become more profitable over the long term as they pursue public benefit policies that, for example, attract better employees. Jeff Mapes, *Oregon Businesses Show Strong Support for New Law Allowing Benefit Corporations*, OREGONIAN (Jan. 2, 2014), http://www.oregonlive.com/mapes/index.ssf/2014/01/Oregon_businesses_show_strong.html.

215. Virginia Harper Ho, *"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 J. CORP. L. 59, 103

cause this corporate form explicitly includes philanthropy as a component of the board of directors' considerations, potential investors who seek only maximization of profits are less likely to invest in these types of ventures because their corporate goals diverge.[216]

Investors in benefit corporations and other social enterprises are part of the socially responsible investing (SRI) movement, which has grown over the past thirty years to represent almost ten percent of the United States' assets under management, or roughly $6.2 trillion dollars.[217] According to the United States Forum for Sustainable and Responsible Investment, in the year 2014, socially responsible investors invested $4.85 trillion dollars.[218] J.P. Morgan estimates the ten-year profit potential from these opportunities alone ranges between $183 billion and $667 billion dollars.[219] Although the benefit corporation is a new entity, the success of a reputable company similar to Patagonia, which has doubled in size and tripled its profits since 2008,[220] suggests that benefit corporations may be a good investment opportunity and will attract investors.[221]

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n.221 (2010) (explaining that empirical studies have revealed a positive correlation between corporate social performance and corporate financial performance). Stock in "responsible" companies is effectively a "composite financial product[]—a bundle that blends an investment vehicle together with a charitable giving vehicle." Joshua Graff Zivin & Arthur Small, *A Modigliani-Miller Theory of Altruistic Corporate Social Responsibility*, 5 TOPICS ECON. ANALYSIS & POL'Y, no.1, 2005, at 2. Shareholders buy into "responsible" corporations because they value both the economic return and the "charitable return" or "warm glow" they feel after contributing to the firm's non-profit initiative. *Id.*

216. *See* Kristin A. Neubauer, *Benefit Corporations: Providing a New Shield for Corporations with Ideals Beyond Profits*, 11 J. BUS. & TECH. L. 109, 126 (2016).

217. US SIF FOUND., REPORT ON US SUSTAINABLE, RESPONSIBLE AND IMPACT INVESTING TRENDS 12 (2014), http://www.ussif.org/Files/Publications/SIF_Trends_14.F.ES.pdf. SRI has evolved in both the public and private markets, becoming an institutionalized sector of the professional asset management market and giving rise to a distinct venture capital and private equity industry of funds and individual investors seeking values-aligned investment opportunities. *Id. But see* Blount & Offei-Danso, *supra* note 213, at 657 (stating that even those who advocate for "socially responsible investments" concede that many socially conscious investors still invest with the primary goal of making a return).

218. *See Sustainable and Impact Investing in the United States Overview*, US SIF, http://www.ussif.org/photogallery/infographics1.jpg (last visited Mar. 6, 2017).

219. Nick O'Donohoe et al., *Impact Investments: An Emerging Asset Class*, J.P. MORGAN (Nov. 29, 2010), https://thegiin.org/knowledge/publication/impact-investments-an-emerging-asset-class.

220. *See* Drake Baer, *How Patagonia's New CEO Is Increasing Profits*

There may still be a concern about whether investors will invest in the type of benefit corporation suggested in this Note: prioritizing the specific public benefit, with an optional general public benefit. However, it is likely investors will still invest as much in these benefit corporations as the specific benefit corporations already created. By providing notice of the prioritized specific public benefit to investors, benefit corporations are in a better position to attract the types of investors who share their interests in philanthropic endeavors.[222] With the many investments made in benefit corporations thus far,[223] it is likely investors will also invest in the benefit corporations formed under the proposed statute.

CONCLUSION

Fiduciary duties in benefit corporations ensure director accountability through two approaches. One is to deter and sanction directors who do not accomplish their purpose within the benefit corporation, and the second is to guide directors who work steadfastly towards accomplishing their purpose with the help of standards and guidance.[224] Directors can lead these corporations to successfully fulfill the social good and positively impact the society. However, given the lack of guidance or clarity of director duty within current statutes, directors may face moral challenges and difficult decisions when considering stakeholder interests. When lawsuits are brought against benefit corporations, courts will provide guidance for best practices for directors over time. Nonetheless, clarity of director duties is needed now to provide guidance when interests conflict. Benefit corporations propose to "do good while still doing well";[225] clear guidance for directors can help corporations accomplish these dual purposes.

Because the current benefit corporation statutes lack clear guidance for director duty, reform thus requires benefit corpo-

While Trying To Save the World, FAST COMP. (Feb. 28, 2014), http://www.fastcompany.com/3026713/lessons-learned/how-patagonias-new-ceo-is-increasing-profits-while-trying-to-save-the-world.

221. Shealy, *supra* note 18, at 715.

222. Neubauer, *supra* note 216, at 124.

223. Kyle Westaway, *Benefit Corporations: Can Investors Have Their Cake and Eat It Too?*, THE GUARDIAN (Aug. 14, 2013), http://www.theguardian.com/sustainable-business/benefit-corporations-sustainability-investors.

224. McDonnell, *supra* note 162, at 71.

225. *Id.* at 72.

rations to have a prioritized, specific public benefit with an optional general public benefit. The proposed statute requires a specific public benefit purpose that places an emphasis on one identified cause. This mandate gives directors the ability to focus on their single, unique benefit without having to struggle to consider a list of vague stakeholder interests. This focus will help eliminate the lack of clarity that currently impedes director decision-making in current benefit corporation legislation. The opt-in provision for the general public benefit allows social entrepreneurs to retain the "triple bottom line" as the main purpose behind their benefit corporation if they choose. In sum, the proposed statute provides directors with the confidence to make decisions while providing consumers and investors with the assurance that directors will be held accountable for corporate actions.