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## Ready to Re-Launch: Fixing the Pitch for the Social Enterprise

Shelley A.D. Sandoval

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# Ready to Re-Launch: Fixing the Pitch for the Social Enterprise

SHELLEY A. D. SANDOVAL\*

*Corporate misfeasance places headlines of economic fraud and shareholder suits above the fold in today’s changing marketplace. Corporate response directly appealing to the socially charged agenda of the incoming Millennial generation continues to fall short of marketplace expectations among buyers focused on genuine action and real-time transparency. Individual states have passed legislation to support development of social value on the corporate agenda using tax credits, most have been met with variable results. The international playing field enjoys aggressively growing support in recognition of social value creation and capture. The United States drags its heels bound by the stiff structures of corporate law, taxation, and questions left unexamined due to a muddled landscape of various social issues, terms and agendas.*

*This Comment uses Illinois’s Benefit Corporation Act and its efficacy to date as a “stuck in the middle” scapegoat against the backdrop of America’s evolving marketplace. Factors mitigating an evolving ecosystem reallocate the weight given to traditional supply and demand factors. Rising in power among management teams and representing growing market value, millennial buyers choose to place emphasis on new factors placing social and monetary objectives on opposite sides of the scales that balance America’s corporate industry.*

*Culminating in a comprehensive sweep of novel and timeless issues facing social value enterprises, such as enforcement and measurement, this Comment enlivens discussion of collaboration, conscience, and evolution of law as diversity in thinking, individual value and social factors are in vogue among legislating states, enforcing courts and agency authorities.*

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## I. INTRODUCTION – ADDRESSING U.S. ECONOMIC EXPEDIENCY IN THE MIDST OF PALPABLE INTERNATIONAL COMPETITION

*Capitis aestimatio* or “valuing of a head,” dramatizes the monetary value of an individual within their community as an economic term of human capital.<sup>1</sup> Although the noble roots of an individual’s values remain unchanged, economic forces in today’s society are pushing America’s legal framework to maximize the social value of human capital captured within the social enterprise. Flexible purpose corporations, low profit limited liability corporations (L3C), and benefit corporations (B Corp) are all legally recognized United States corporate forms falling under the “social enterprise” umbrella, heretofore targeting a niche green activist consumer segment. “The explanation behind the LLC’s birth boils down to innovative professionals creating solutions when the current legal system fails to meet client needs.”<sup>2</sup> The social enterprise, broadly defined as seeking to maximize both profit and social value, is far from novel.<sup>3</sup> Momentum within an expanding consumer

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1. Historic Latin term used when assessing a fine paid for someone’s murder. *Capitis aestimatio*, BLACK’S LAW DICTIONARY (10th ed. 2014).

2. Susan Pace Hamill, *The Origins Behind the Limited Liability Company*, 59 OHIO ST. L.J. 1459, 1463 (1998).

3. Kyle Westaway, *Profit + Purpose*, STAN. UNIV. LECTURE SERIES (Apr. 9, 2012) (downloaded using iTunesU). Many socially conscious private corporate forms exist, but none explicitly differentiate objectively good companies from companies that operate with a visage of goodwill within an objective framework of checks and balances set forth in the structure of

base that values long-term reward over short-term success demands attention from corporate officers and legislators, mirroring that of the evolving global panacea focused on capturing social value while maximizing profit.<sup>4</sup>

Although for-profit companies have a unilateral fiduciary duty legally binding management to maximize shareholder value,<sup>5</sup> case law “and the decisions offer little in the way of predictability or rational explanation of why enumerated factors should be decisive.”<sup>6</sup> Technically, a corporation pursuing objectives that do not maximize shareholder value operates with increased liability of a shareholder derivative suit;<sup>7</sup> realistically courts assess offering management broad freedoms only requiring a *rational relation* between an officer’s decision and its purpose to maximize shareholder value.<sup>8</sup> Frequent headlines reporting corporate fallout due to mismanaged decisions demonstrate the reality of confusion created by the broad freedom afforded to corporate officers who are required only to *rationaly relate* the purpose of their decision-making. There are several examples, such as the large-scale Volkswagen car recall following the discovery of false emissions tests.<sup>9</sup> Or Vantiv Inc., a service fee processing corporation for online sport betting, commonly known as DraftKings, which fell under investigation for illegal

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the B Corp. For example, the Flexible Purpose Corporate form allows for value creation defined within a special purpose, however success is measured subjectively; L3Cs allow investment of private equity and debt towards program related investments (PRI) but are only available for corporations in a low profit threshold. *See generally* KYLE WESTAWAY, *PROFIT & PURPOSE: HOW SOCIAL INNOVATION IS TRANSFORMING BUSINESS FOR GOOD* (2014) [hereinafter *Profit & Purpose*].

4. *E.g.*, Heerad Sabeti, *The For-Benefit Enterprise*, HARV. BUS. REV. (Nov. 2011), <https://hbr.org/2011/11/the-for-benefit-enterprise> (noting the current corporate system’s effect on the social entrepreneur is “shoehorning their vision into one structure or the other and accepting burdensome trade-offs in the process”).

5. 805 ILL. COMP. STAT. ANN. 5/2.10(b)(3) (Lexis through P.A. 99-928, except for portions of P.A. 99-906, and 99-912, 2016 Reg. Sess.) (directors have a “duty of loyalty to the corporation or its shareholders” only).

6. BARRY R. FURROW ET. AL., *HEALTH LAW* § 5-4, at 182 (2d ed. 2000) (addressing the state of U.S. corporate law in holding shareholders and/or directors liable for actions).

7. Bernard S. Sharfman, *Shareholder Wealth Maximization and Its Implementation Under Corporate Law*, 66 FLA. L. REV. 389, 401 (2014).

8. *Compare* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986), *with In re* Goldman Sachs Grp., Inc. S’holder Litig., No. 5215-VCG, 2011 WL 4826104, at \*23 (Del. Ch. Oct. 12, 2011) (dismissing a complaint alleging directors violated their fiduciary duties by always encouraging excessive risk-taking). *See also* Gordon v. Bindra, No. 2:14-cv-01058-ODW (ASx), 2014 WL 2533798, at \*11-12 (C.D. Cal. 2014) (officers who also serve as directors do not lack independence as a matter of law).

9. *E.g.*, Mike Spector, *VW Dealers Suffer as Diesel-Car Sales Stall*, WALL ST. JOURNAL (last updated Dec. 18, 2015, 6:19 PM), <http://www.wsj.com/articles/vw-dealers-suffer-as-diesel-car-sales-stall-1450473802> (Volkswagen’s management decisions to manipulate emissions tests for 500,000 vehicles in violation of U.S. emissions standards resulted in multi-billion-euro costs to remedy the issue and repair the damage to its reputation, regulatory penalties, and litigation).

gambling allegations, and where corporate counsel reported being unsure of the management's duties and rights.<sup>10</sup>

Litigation surrounding social enterprises is no exception to the vividly muddled scene of today's corporate jurisprudence. The social enterprise represents an opportunity to evolve stale corporate jurisprudence while continuing maximization of shareholder value propelled by a market that understands the value of human capital as extending beyond short-term rewards to capturing long-term creation of social value in its corporate objectives.<sup>11</sup> The social enterprise corporation answers today's marketplace demand, but within the existing corporate structures will likely fail. Burt's Bees, Etsy, IBM, Method, and Nike are all household names using their trade to serve a purpose;<sup>12</sup> all of which are not legally registered social enterprises, but proudly operate using strategic auspices of social value creation.<sup>13</sup> Branding is necessary to enable profitability within corporate social value concepts.<sup>14</sup> Without a legal regulatory structure or branding recognition, social enterprises will remain stuck in the muddy wake of too-big-to-fail corporations independently operating within their own concepts of social purpose. Internationally, supply and demand for social value is not only being articulated among the G8; various forms of social enterprise corporations are currently adopted in fifty countries.<sup>15</sup> The U.S. legal bodies and consumer markets must respond to our strained corporate system to stop leaving modern-day

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10. EXHIBIT B, LETTER FROM VANTIV, N.Y. CTY, INDEX No. 654456/2015 (Nov. 12 2015), <https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=FloOpRB/89r9gq4pdJSXoA==&system=prod>.

11. See generally STEPHEN DAVIS, JON LUKOMNIK & DAVID PITT-WATSON, *THE NEW CAPITALISTS: HOW CITIZEN INVESTORS ARE RESHAPING THE CORPORATE AGENDA* (2006).

12. Burt's Bees develops a line of natural body care products; Etsy connects local handmade goods to consumers; IBM launched a commercial research lab in Africa to create commercially viable products to address Africa's ongoing challenges; Method produces natural cleaning products; Nike focuses on people, planet, and impact in their design process. See generally PROFIT & PURPOSE, *supra* note 3, at xxiv (2014).

13. Burt's Bees boasts triple bottom line purpose (people, profit, planet) objectives through its "The Greater Good" branding. IBM identifies their responsibility and role in applying technology to societal problems, empowering employees, and corporate citizenship; Nike focuses on sustainable innovation providing comprehensive progress reports and partnerships for the Global Reporting Initiative and the United Nations Global Compact. BURT'S BEES, *It's Not Just a Business Model it's Our Life's Work*, <https://www.burtsbees.com/content/our-purpose/our-purpose-1asset.html> (last visited Oct. 18, 2016); IBM, *Corporate Responsibility at IBM*, <http://www.ibm.com/ibm/responsibility/?lnk=fab> (last visited Jan. 25, 2016); NIKE INC., *Corporate Responsibility Reporting*, <http://about.nike.com/pages/resources-faq> (last visited Nov. 4, 2016).

14. McKenzie Holden Granum, *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 UNIV. L. REV. 765, 781 (2015).

15. B LAB, <https://www.bcorporation.net/> (last visited Feb. 1, 2016).

human capital, proven to maximize *both* fiscal and social value, sitting on the table.

## II. TODAY’S SOCIAL ENTERPRISE TREND – THE BENEFIT CORPORATION

*It is in vain to say that enlightened statesmen will be able to adjust these clashing interests and render them all subservient to the public good. Enlightened statesmen will not always be at the helm.*<sup>16</sup>

-James Madison, Federalist No.10, November 23, 1787

The *Burwell v. Hobby Lobby*<sup>17</sup> decision was the first time corporate purpose was directly addressed by the Supreme Court.<sup>18</sup> Judicially endorsing the corporation as a function of shareholder wealth maximization as opposed to corporate personhood,<sup>19</sup> *Hobby Lobby* recognized that “it is not at all uncommon” for a corporation “to further humanitarian and other altruistic objectives.”<sup>20</sup> Evidenced by the *Hobby Lobby* Supreme Court grant of certiorari, the U.S. economic climate is ripe for the unfolding pedagogy surrounding the concept of the social enterprise.

Traditional notions of the corporation are shifting as focus on value attributed to stakeholders (versus shareholders) continues to be exalted in popular and scholarly discourse.<sup>21</sup> Shareholder primacy<sup>22</sup> is now a shadow cast behind the emergence of stakeholder theory, focusing on the interests of

16. THE FEDERALIST NO. 10 (James Madison).

17. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2766-76 (2014).

18. *See generally* Lyman Johnson & David Millon, *Corporate Law After Hobby Lobby*, 70 BUS. L. 1 (2015).

19. Stefan J. Padfield, *Corporate Social Responsibility & Concession Theory*, 6 WM. & MARY BUS. L. REV. 1, 25 (2015).

[S]hareholders of a closely held corporation can alter the default rules of corporate law, including the issue of corporate purpose. . . . [T]he doctrine of waste should allow any shareholder who disagreed to challenge corporate conduct that was pursued for purely religious or social responsibility purposes without any claimed shareholder wealth benefit . . . .

*Id.* (explaining the result of an action by a shareholder for non-wealth maximization purposes effectively enables a shareholder to claim a right by using the corporation to achieve a desired social purpose).

20. *Burwell*, 134 S. Ct. at 2771.

21. Sharfman, *supra* note 7, 394.

22. Shareholder primacy embodies the theory that corporations shall make shareholder interests primarily important before other stakeholders. Lynn A. Stout, *The Corporation as a Time Machine: Intergenerational Equity, Intergenerational Efficiency, and the Corporate Form*, 38 SEATTLE U. L. REV. 685, 693-694, 693 n. 22 (2015).

stakeholder groups such as employees, customers, creditors, and society in its corporate management and legal philosophy.<sup>23</sup>

The existing narrative of U.S. corporate law places Delaware at the forefront of best practices and California the frontrunner for ingenuity. Illinois's reputation for industrial strength within a temperamental economy, adoption of B Corp legislation in 2013 received with hostile community-wide acceptance, makes Illinois an ideal incubator to realistically assess a social enterprise's market-making potential.<sup>24</sup>

### A. LEGISLATING THE BENEFIT CORPORATION

The Benefit Corporation Act<sup>25</sup> (The BCA) made Illinois one of thirty-one states to legalize a private corporation's interest in using the business to maximize *both* profit and social value.<sup>26</sup> The BCA's language is derived from the legal authority for corporate formation, Business Corporation Act of 1983.<sup>27</sup> The BCA mirrors model legislation adopted by most states proffered by B Lab, a nonprofit organization leading lobbying and grassroots activism.<sup>28</sup> The BCA distinguishes the B Corp as a specialized corporate form by incorporation of terms to establish no duty exists to make the interests of any shareholder or stakeholder priority over the interests of another.<sup>29</sup>

Under current law,<sup>30</sup> corporations must maximize profits for the shareholders and cannot weigh other concerns. "The proposed bill expands corporate purpose for these corporations to allow owners to consider society and environment, in addition to profit."<sup>31</sup> Senator Frerichs continued to express

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23. *Id.*

24. 805 ILL. COMP. STAT. ANN. 40/1 (Lexis through P.A. 99-928, except for portions of P.A. 99-906, and 99-912, 2016 Reg. Sess.) (HB1261 makes a technical change to *The Benefit Corporation Act*).

25. *Id.*

26. *State by State Status of Legislation*, B LAB, <http://benefitcorp.net/policymakers/state-by-state-status> (last visited Jan. 2, 2016).

27. 805 ILL. COMP. STAT. ANN. 5/1.01 (Lexis through P.A. 99-928, except for portions of P.A. 99-906, and 99-912, 2016 Reg. Sess.).

28. *Model Benefit Corporation Legislation with Explanatory Comments*, B LAB (Jan. 13, 2016), [http://benefitcorp.net/sites/default/files/Model%20Benefit%20Corp%20Legislation\\_2016.pdf](http://benefitcorp.net/sites/default/files/Model%20Benefit%20Corp%20Legislation_2016.pdf) [hereinafter *Model Benefit Corporation*].

29. LEGISLATIVE REFERENCE BUREAU, LEGISLATIVE SYNOPSIS AND DIGEST OF THE 97th ILL. GEN. ASSEMB., S. 97-2897 at 1507 (2013), <ftp://12.43.67.2/Digest/97thFinalDigest.pdf>.

30. The Business Corporation Act of 1983 designates all businesses recognized in Illinois as purposed "for the . . . buying, selling, or otherwise dealing in notes . . ." 805 ILL. COMP. STAT. ANN. 5/3.05 (Lexis through P.A. 99-935, except for portions of P.A. 99-912 & 99-933 of the 2016 Reg. Leg. Sess.).

31. Senate Transcript of Record, 97th Ill. Gen. Assemb., SB2897, at 116-17 (March 28, 2012), <http://www.ilga.gov/senate/transcripts/strans97/09700098.pdf> (statement by Senator Frerichs) (introducing the BCA, clarifying the enhanced transparency and accountability,

concern about shareholder lawsuits resulting from a corporate officer's decision to pursue a project for their local community as opening itself up to the potential liability of shareholder derivative suits.<sup>32</sup>

Building on Senator Frerichs's remarks, the parlance and perspectives captured in the Illinois House and Senate debates articulate the legislative purpose of the BCA to create a legal duty for officers to weigh equally corporate decisions to maximize both shareholder and social value creation.<sup>33</sup> Shareholder derivative suits are often cited as a reason why social enterprises should be better legislated; in practice these allegations function as a red herring.<sup>34</sup> Case law demonstrates causation in connection with the breach of fiduciary duty as equally difficult to allege and reason on both sides of the bench, even in the most clear cut cases.<sup>35</sup> Often employing the business judgment rule,<sup>36</sup> absent evidence of bad faith, fraud, illegality or gross overreaching, courts are not at liberty to interfere with the managerial decision-making of corporate officers.<sup>37</sup>

Notable in recently evolving dicta is an expanding scope of corporate rights while providing a paucity of opinion responding to these evolving corporate constitutional issues.<sup>38</sup> The BCA requires B Corp directors and officers *only to consider* the impact of the company's actions on both private and public stakeholders.<sup>39</sup> Because of its recent adoption, case law to carve out rights and duties of those executing the business of a B Corp does not exist. Distinctions between objective and subjective elements related to the defining difference of all forms of social enterprise (added purpose) leave all parties questioning the practical legal effect.

potential to attract business with social responsibility interests, voluntary incorporation and no changes to Illinois corporate taxation).

32. *Id.*

33. Senate Transcript of Record, 97<sup>th</sup> Ill. Gen. Assemb., SB2897 (Mar. 28, 2012), <http://www.ilga.gov/senate/transcripts/strans97/09700098.pdf>; House Transcript of Record, 97<sup>th</sup> Ill. Gen. Assemb., SB2897, at 17-18 (May 10, 2012), <http://www.ilga.gov/house/transcripts/htrans97/09700134.pdf> (statements by Senator Feighholtz, and Senator Reboletti).

34. *Id.*

35. *See Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 477-79 (1977) (fairness is not a factor courts assess, because this would open the 'floodgates of litigation'); *see generally* *Gustafson v. Alloyd Co. Inc.*, 513 U.S. 561 (1995) (example of a court not fully understanding the corporate securities law in relation to use of a statutory prospectus).

36. Granum, *supra* note 14, at 772.

37. An example of extreme overreaching occurs when a director did not exercise due care in being sufficiently informed of material facts necessary to carry out duties when making an independent business decision. Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1713-31 (2015); *see supra* note 8.

38. *See supra* notes 8, 37.

39. 805 ILL. COMP. STAT. ANN. 40/4.01 (Lexis through P.A. 99-928, except for portions of P.A. 99-906, and 99-912, 2016 Reg. Sess.); 805 ILL. COMP. STAT. ANN. 40/4.10 (Lexis through P.A. 99-928, except for portions of P.A. 99-906, and 99-912, 2016 Reg. Sess.).

For example, a comparison can be drawn by equating the TOMS® corporate social value objective, “for every pair I sell, I’m going to give a pair of new shoes to a child in need,”<sup>40</sup> to the *Virginia Bankshares v. Sandberg* opinions conveyed within a corporate prospectus stating investors will receive “high value for their [minority shareholder] shares.”<sup>41</sup> Both statements can be evaluated using an evidentiary standard (shoes sold match those donated; stock benefits to minority holders comparable to those of majority holders) to objectively measure the validity of the underlying opinion.<sup>42</sup>

The subjective nature of social value creation raises an issue of credibility and legal standing. When can a shareholder bring a claim against TOMS® for not creating enough social value in the selection of qualified ‘in need’ children? In *Virginia Bankshares*, the court found a corporation’s opinion of what constitutes “high and fair” value of their stock only rises to the legally actionable material misstatement of fact, if objective evidence proves the underlying opinion supporting the statement is false.<sup>43</sup> One would be hard pressed to find the suitable evidence that the courts require such as internal board documents, meeting minutes or emails.<sup>44</sup>

“I think we should hold back,” Leader Durkin shared to the Illinois Senate during floor debates, questioning the impact of B Corp objective and subjective elements as applied to shareholders, officers and the general public.<sup>45</sup> Directly responding to information presented that related to the third party review standard for B Corp social value creation, Leader Durkin embodies traditional corporate ideology in stating:

For an investor, this is a terrible idea, . . . the structure creates a lack of accountability he adds. So, if the management of a benefit corporation makes a bad decision, there’s very little you can do about it as a shareholder. Now, you look at the Bill, it states that exoneration for personal liability an officer is

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40. TOMS® corporate mission states: “[i]t’s about a promise—a better tomorrow.” BLAKE MYCOSKIE, *START SOMETHING THAT MATTERS* 6 (2011).

41. *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1090 (1991) (shareholder stocks can be assessed using recognized methods of valuation: the bank’s assets, actual and potential levels of operation).

42. *Id.*

43. *Id.*

44. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 326-28 (2007) (holding evidence that is incorporated by reference and taken collectively must plead facts rendering an inference of scienter must be at least as likely as any plausible opposing inference to protect against frivolous unsound claims).

45. House Transcript of Record, 97<sup>th</sup> Ill. Gen. Assemb., SB2897, at 25 (May 10, 2012), <http://www.ilga.gov/house/transcripts/htrans97/09700134.pdf>.

not personally liable for monetary damages for action taken as an officer if the officer performed the duties of the position in compliance with this Section or failure of the benefit corporation to pursue or create general public benefit or specific public benefit. For the past 150 years jurisprudence in this country has allowed for the theory called where you can hold officers and directors personally liable by piercing the corporate veil which is when they have acted outside the scope of their corporation and against the best interest of the investors. We're going to reverse that in Illinois with this Bill.<sup>46</sup>

The questions and concerns raised in Leader Durkin's remarks emphasize the common misunderstanding of the liabilities and duties imposed under The BCA as different from those under the traditional Business Corporation Act of 1983.<sup>47</sup> The only distinction between a B Corp and any other corporate form is the added ability to maximize social value using the corporation's resources, which is proven to be legally insignificant because it is not recognized as a valid claim for standing on a state or federal basis.<sup>48</sup>

Leader Durkin mentions a conversation with the Illinois State Bar Association and their comment regarding its Corporate Law Department's attorneys who "don't understand the nature of it and why we need it" which unfortunately does paint a realistic picture of the B Corp's position in local communities.<sup>49</sup> Organizations like Impact Engine, a Chicago-based accelerator program for social enterprises, communicated in Leader Durkin's remarks. Quoting Tasha Seitz, Impact Engine Chief Investment Officer, explaining why they encourage their member companies to incorporate as C corporations instead of B Corps, because "that's what investors are comfortable with. It's hard for startups to pry checks from investors' hands in the

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46. *Id.* at 24.

47. Compare 805 ILL. COMP. STAT. ANN. 40/1.05 (Lexis through P.A. 99-932, except for portions of P.A. 99-912, 2016 Reg. Sess.), with 805 ILL. COMP. STAT. ANN. 5/3.05 (Lexis through P.A. 99-932, except for portions of P.A. 99-912, 2016 Reg. Sess.).

48. Compare 805 ILL. COMP. STAT. ANN. 40/1.05 (LexisNexis 2013), with 805 ILL. COMP. STAT. ANN. 5/3.05 (Lexis through P.A. 99-932, except for portions of P.A. 99-912, 2016 Reg. Sess.).

49. House Transcript of Record, 97<sup>th</sup> Ill. Gen. Assemb., SB2897, at 25 (May 10, 2012), <http://www.ilga.gov/house/transcripts/htrans97/09700134.pdf> (remarks of Leader Durkin).

first place, and the unfamiliar designation “is just one more thing you have to explain.”<sup>50</sup>

## B. STUCK IN THE MIDDLE - ILLINOIS BENEFIT CORPORATIONS

As defined in The BCA, social value creation of general and specific purpose is difficult to define regardless of methodology or opinion.<sup>51</sup> Patagonia, for example, has made significant investments toward research and development of sustainable clothing materials.<sup>52</sup> Determining whether Patagonia’s officers properly allocated resources to meet their duty to the community who reaps the benefits of their sustainable clothing material research, versus allocated resources towards advertising spend or operational decisions to meet their duty to maximize shareholder value, clearly demonstrates there are no bright lines to draw.<sup>53</sup>

For an Illinois company to become a B Corp it must satisfy the three main pillars serving as the locus of the social enterprise’s corporate distinction: purpose, accountability, transparency.<sup>54</sup> The BCA attempts to further define ‘corporate purpose’ as either general or specific types of social value

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50. Steve Hendershot, *Is Being a ‘Good’ Business Good for Business?*, CRAINS CHI. BUS. (Oct. 25, 2014), <http://www.chicagobusiness.com/article/20141025/ISSUE02/310259996/is-being-a-good-business-good-for-business> (quoting Nancy Goldstein, founder of Compass X, an Illinois registered B Corp: “People follow the money. . .[t]he way the B Corp community will thrive is if we’re all wildly successful.”).

51. *Pfeiffer v. Begley*, 2015 IL App (2d) 140271, 27 N.E.3d 670, 676 (Ill. App. Ct. 2015). The elasticity of the legal definition of corporate purpose as delineated in *Pfeiffer v. Begley* is:

While the benefit achieved may have an indirect economic effect on the corporation, in the sense that the interests of the plaintiff class reflect a value not theretofore apparent, the benefit need not be measurable in economic terms. Changes in corporate policy or, as here, a heightened level of corporate disclosure, if attributable to the filing of a meritorious suit, may justify an award of counsel fees.

*Id.* (citing *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1164–65 (Del. 1989). See generally Olinga Ta’eed et. al., *Social Value in Public Procurement: 2014 Pathfinder Project for Public, Private, Third and Community Sectors*, CTR. FOR CITIZENSHIP ENTER. & GOVERNANCE (Oct. 1, 2014), [http://www.local.gov.uk/documents/6281932/6282225/SUMMARY+Social+Value+in+Public+Procurement+\(2+Oct+2014\).pdf/26f936ef-995a-40bc-9831-0de897c5e569](http://www.local.gov.uk/documents/6281932/6282225/SUMMARY+Social+Value+in+Public+Procurement+(2+Oct+2014).pdf/26f936ef-995a-40bc-9831-0de897c5e569).

52. J. Haskell Murray, *Defending Patagonia: Mergers and Acquisitions with Benefit Corporations*, 9 HASTINGS BUS. L.J. 485, 487-88 (2013).

53. *Id.*

54. *Model Benefit Corporation*, *supra* note 28.

creation.<sup>55</sup> The BCA attempts to define *general public benefit*, as a “material positive impact on society and the environment, taken as a whole . . . from the business and operations of a benefit corporation,”<sup>56</sup> and distinguishes *specific public benefit* as:

- (1) providing low-income or underserved individuals or communities with beneficial products or services;
- (2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the ordinary course of business;
- (3) preserving the environment;
- (4) improving human health;
- (5) promoting the arts, sciences or advancement of knowledge;
- (6) increasing the flow of capital to entities with a public benefit purpose; or
- (7) the accomplishment of any other particular benefit for society or the environment.<sup>57</sup>

Until the general and specific public benefit captured in the BCA can be legally defined using legally recognized measureable terms, all parties to whom B Corps exist to serve are defenseless against non-meritorious claims of advancing social value.<sup>58</sup> Corporations, like Patagonia, that have the ability to operate within social value concepts report strong internal ethical values, placing at the top of *Fortune*'s best places to work list and increased sales.<sup>59</sup> Warby Parker attributes \$100 million in venture capital gains as a result of its social value creation approach.<sup>60</sup> The potential is obvious yet

55. OFFICE OF THE SEC'Y OF STATE, A GUIDE FOR ORGANIZING DOMESTIC CORPORATIONS 3-4 (2016), [www.cyberdriveillinois.com/publications/pdf\\_publications/c179.pdf](http://www.cyberdriveillinois.com/publications/pdf_publications/c179.pdf).

56. 805 ILL. COMP. STAT. ANN. 40/1.10 (1)-(7) (Lexis through P.A. 99-932, except for portions of P.A. 99-912, 2016 Reg. Sess.).

57. *Id.*

58. *Id.*

59. Kevin Ercoline, *Beyond Puffery: Providing Shareholder Assurance of Societal Good Will in Crowdfunded Benefit Corporations*, 64 AM. UNIV. L. REV. 169, 170-72 (2014); see generally PROFIT & PURPOSE, *supra* note 3.

60. Ercoline, *supra* note 59; PROFIT & PURPOSE, *supra* note 3.

translating these material benefits to gain the investor buy-in necessary to be successful will remain a primary culprit of B Corp success.<sup>61</sup>

The Benefit Report is the vehicle for B Corp communication and transparency. It is by law made publicly available on the B Corp's website and distributed to shareholders annually.<sup>62</sup> The reporting requires comprehensive details of the company's progress towards meeting its indicated general and specific public benefit objectives.<sup>63</sup> While other states with similar B Corp statutes require the Benefit Report to be filed with the state,<sup>64</sup> Illinois removed this requirement in a subsequent amendment to The BCA.<sup>65</sup> Not requiring B Corps to submit Benefit Reports to the state for public record exemplifies Illinois's negligible commitment to the quality and accuracy of the information contained in these reports.<sup>66</sup> In Illinois, the only way a B Corp's annual reports are communicated to the public is by voluntary display on the company's own public website.<sup>67</sup> In practice, this leaves community members and potential investors relying solely on reporting and assessment produced by the company. Further, the third-party carrying out the company's assessment for this report is entirely within the control of the company.<sup>68</sup>

The third-party standard set forth in The BCA is perhaps the most easily identifiable area ripe for immediate redrafting. The legislative intent of outside evaluation is independent evaluation in reviewing a company's practices as they impact their stated general and specific purposes.<sup>69</sup> The required degree of separation between the B Corp and the third-party evaluator is a simplistic misnomer in today's available analytical assessment tools for social value.<sup>70</sup> In Illinois, B Corps may enlist *any qualifying entity* as long as there

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61. Ercoline, *supra* note 59, 172-74.

62. 805 ILL. COMP. STAT. ANN. 40/5.01(8)(c) (Lexis through P.A. 99-932, except for portions of P.A. 99-912, 2016 Reg. Sess.).

63. *Id.*

64. *Model Benefit Corporation*, *supra* note 28.

65. LEGISLATIVE REFERENCE BUREAU, *supra* note 29.

66. *Id.*

67. For example, Mightybytes, a full-service creative firm for conscious companies displays its report along with supplementary information. See MIGHTYBYTES, MIGHTYBYTES 2013 BENEFIT REPORT (Jan. 28, 2014), [http://www.mightybytes.com/wp-content/uploads/2014/02/2013benefitreport\\_finallegal.pdf](http://www.mightybytes.com/wp-content/uploads/2014/02/2013benefitreport_finallegal.pdf). *Contra* CMTY. FIRST MED. CTR., <http://www.cfmedicalcenter.com/> (last visited Oct. 18, 2016) (Community First Medical Center, a healthcare facility does not display information remotely relating to its B Corp status).

68. 805 ILL. COMP. STAT. ANN. 40/1.10(1)-(5) (Lexis through P.A. 99-932, except for portions of P.A. 99-912, 2016 Reg. Sess.) ("Third-party standard" definition).

69. *Id.*

70. Other measurement designs implemented by social purpose organizations, include: Balanced Scorecards, a strategic planning and management system focused on key financial and non-financial indicators: people and knowledge, internal, customer, and financial; Social Return on Investment (SROI) is grounded in a set of principles that are applied within a framework including values of people to give a voice to resource-allocation decisions; Environmental, Social and Governance (ESG) is often applied for large corporations, mergers,

is no financial relationship and they have access to necessary and appropriate expertise.<sup>71</sup> To maintain B Corp status, the evaluation and subsequent reports must be executed on a yearly basis.<sup>72</sup> While this alone adds another task to a busy officer's duties, the costs incurred to a B Corp for this evaluation process typically ranges from \$500 to \$50,000.<sup>73</sup>

While corporate jurisprudence leaves a trail of questionable standards and enforcement, B Corps are not absolved from all legal enforcement of their managerial decisions under The BCA.<sup>74</sup> Benefit Enforcement Proceedings allow shareholders to bring an action for non-compliance with managerial requirements deemed necessary to pursue or create the identified general and specific purpose.<sup>75</sup> Unlike traditional shareholder actions, only injunctive relief may be ordered and monetary damages are not available.<sup>76</sup> No litigation directly involving B Corp governance has been brought before Illinois courts, again rendering the effectiveness of this enforcement provision under The BCA a mere afterthought for B Corps, investors, and the communities they serve.<sup>77</sup>

Lacking effective legal mechanisms to communicate and enforce the B Corps' purpose, traditional corporate narratives and practices will continue to dilute the distinguishing purpose of the B Corp. Issues with capital formation, implementation of social value objectives, and long-term viability for the B Corp as a form of social enterprise is questionable.<sup>78</sup>

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and portfolio managers looking to garner information on long-term performance advantages, risk profiles, and qualifications of a company's management and other characteristics; Social Accountability 8000 (SA8000) is a compliance standard that is the world's first auditable social certification for qualifying decent workplaces across all industrial sectors based on conventions of the ILO, UN, and national law. PROFIT & PURPOSE, *supra* note 3, at 168-70.

71. 805 ILL. COMP. STAT. ANN. 40/1.10(2), (4) (Lexis through P.A. 99-932, except for portions of P.A. 99-912, 2016 Reg. Sess.).

72. *Id.*

73. A company with annual sales between \$0 - \$149,999 charged an annual fee of \$500, while a company with annual sales upwards from \$2 million - \$4,999,999 charged an annual fee of \$1,500, and a company with annual sales of \$1 billion+ charged an annual fee of \$50,000+. *Make It Official*, B LAB, <https://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/make-it-official-2> (last visited Oct. 18, 2016).

74. 805 ILL. COMP. STAT. ANN. 40/4.20 (Lexis through P.A. 99-932, except for portions of P.A. 99-912, 2016 Reg. Sess.) ("Right of action; benefit enforcement proceeding").

75. *Id.*

76. *Id.*

77. Blair & Pollman, *supra* note 37, 1738-42 (2015).

78. Dana B. Reiser, *Benefit Corporations – A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 592-96 (2011).

### III. THE SOCIAL ENTERPRISE IS RIPE FOR ACTIVATION

“Ultimately, managers need to think about their company’s social performance not just because their license to operate might in some way be restricted if they fail to respond to social pressures . . . New capitalists want companies to *treat customers, suppliers, workers, and communities fairly*.”<sup>79</sup> Outdated formalistic paradigms identify the social enterprise supply fulfilled by non-profits, charities, or foundations and consumer demand by activists, eco-impact investors, or philanthropic donors.<sup>80</sup> Coined “the new corporate agenda” the marketplace for corporations pursuing social enterprise endeavors presents opportunity for outweighing outdated rigid principles limiting the available market potential.<sup>81</sup>

Social enterprise focused corporations are emerging as a domestic and international hot topic in response to shifts within the global corporate ecosystem.<sup>82</sup> Regardless of the type of social enterprise a company chooses to incorporate as, any company pursuing social value creation today faces similar issues of funding, implementation, enforcement, and measurement to sidestep short-term solutions and focus on long-term viability to pursue and sustain capital growth.<sup>83</sup>

#### A. DOMESTIC ACTIVATION

The concept of the social purpose corporate form has enjoyed wide bipartisan support.<sup>84</sup> For example, Pennsylvania’s Secretary of Commonwealth, Republican Secretary Carole Aichele stated

There are entrepreneurs who want to create, investors who want to finance, and consumers who want to do business with companies which have publicly made a commitment to better their communities and

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79. DAVIS ET AL., *supra* note 11, at 213.

80. *See generally* JEANNE C. MEISTER & KARIE WILLYERD, *THE 2020 WORKPLACE: HOW INNOVATIVE COMPANIES ATTRACT, DEVELOP, AND KEEP TOMORROW’S EMPLOYEES TODAY* (2010).

81. DAVIS ET AL., *supra* note 11, at 213.

82. MATTHEW J. KIERNAN, *INVESTING IN A SUSTAINABLE WORLD: WHY GREEN IS THE NEW COLOR OF MONEY ON WALL STREET 98* (2009).

83. *Id.* at 84-96.

84. As stated by Democratic Governor Jack Markell from Delaware: “Public benefit corporations will harness the power of private enterprise to create public benefit . . . such companies ‘consider profit to be the means—not the exclusive end goal—of their business.’” Mike Issac & David Gellas, *Kickstarter Focuses Its Mission on Altruism Over Profit*, N.Y. TIMES (Sept. 20, 2015), [http://www.nytimes.com/2015/09/21/technology/kickstarters-altruistic-vision-profits-as-the-means-not-the-mission.html?\\_r=0](http://www.nytimes.com/2015/09/21/technology/kickstarters-altruistic-vision-profits-as-the-means-not-the-mission.html?_r=0).

their environment as a part of their business model, . . . By giving them the option to do so in Pennsylvania, Gov. Corbett has said our state is open for business to, and actively working to attract, these companies and the jobs they bring with them.<sup>85</sup>

America's roots in capitalism ensure the future of the social enterprise's purpose will survive when they yield monetary value as recognized by each player within the ecosystem.<sup>86</sup>

Deloitte's 2015 survey of CEO's found their top five priorities to be: customers, growth, performance, innovation, and cost seen consistently across industries.<sup>87</sup> Drivers behind a community's choice to consume goods and services have notably shifted to focus on the customer journey that reinforces long-term engagement redefining the timeless loyalty loop<sup>88</sup> while balancing frugal spending habits.<sup>89</sup> Consumer behaviors demand both cost-effectiveness of big-corporate economic power and increased social value creation. Without a structured system to meet both demands, the opportunity for a social enterprise to capture these consumers is slim.

Separation of powers issues aside, federal law plays a primary role in mitigating the authority and powers derived from corporate law.<sup>90</sup> The *Hobby Lobby* decision classified a corporation as equivalent to the persons using its authority in the eyes of the law because those individuals are using the corporation to achieve their desired ends.<sup>91</sup> Evidenced in the Illinois Business Corporation Act of 1983, a business's articles of incorporation must set forth "the purpose or purposes for which the corporation is organized, which may

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85. PA. DEP'T OF STATE, *Pennsylvania Registers First "Benefit Corporations," Implements New Law to Attract Socially, Environmentally-Conscious Business*, PR NEWSWIRE (Jan. 22, 2013, 4:11 PM), <http://www.prnewswire.com/news-releases/pennsylvania-registers-first-benefit-corporations-implements-new-law-to-attract-socially-environmentally-conscious-businesses-187936431.html> (Tom Corbett, Republican Party Governor of Pennsylvania until January 20, 2015) (reporting from Pennsylvania Department of State on the importance of supporting B Corp development through effective legislation).

86. KIERNAN, *supra* note 82, at 98.

87. Khalid Kark, Mark White, Bill Bridges & Anjali Shaikh, *Navigating Legacy: Charting the Course to Business Value*, DELOITTE UNIV. PRESS (Nov. 10, 2016), <http://dupress.com/articles/global-cio-survey/?id=us:2el:3dc:dup1264:eng:cons:ciosurvey:dcpromo>.

88. David C. Edelman & Marc Singer, *Competing on Customer Journeys*, HARV. BUS. REV. (Nov. 2015), <https://hbr.org/2015/11/competing-on-customer-journeys>.

89. Anne Martinez, Rukhshana Motiwala & Ali Sher, *America the Frugal: US Consumer Sentiment Survey*, MCKINSEY & CO. (Dec. 2014), [http://www.mckinsey.com/insights/consumer\\_and\\_retail/america\\_the\\_frugal\\_us\\_consumer\\_sentiment\\_survey](http://www.mckinsey.com/insights/consumer_and_retail/america_the_frugal_us_consumer_sentiment_survey).

90. Verity Winship, *Teaching Federal Corporate Law*, 8 J. BUS. & TECH. L. 217, 218-19 (2013).

91. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

be stated to be, or to include, the transaction of any or all lawful businesses . . . .”<sup>92</sup> From terminology “lawful business,” which is often embodied as for any “lawful purpose,” stems the debate surrounding the legal basis for a corporation’s legal liability to take managerial liberties.<sup>93</sup> The debate cyclically turns on how much autonomous decision-making authority is vested in a corporation’s officers.<sup>94</sup> The four dissenting opinions in the *Hobby Lobby* decision demonstrates this reluctance to draw a bright line.<sup>95</sup>

State and federal case law provides even less guidance than the ominous *Hobby Lobby* Supreme Court opinion, unsurprisingly, current events follow suit demonstrating the imminent economic injury resulting from the difficulty among courts to establish a legal framework.<sup>96</sup>

June 2015, a commercial aircraft transporting 141 passengers was emergency landed on its departing runway.<sup>97</sup> After detecting smoke, the pilot radioed air traffic control seeking permission to evacuate, an unidentified voice responded urging the pilot to “hold off on evacuating the plane . . . .”<sup>98</sup> After two calls to air traffic were not returned, the pilot exercised his best judgment to evacuate the passengers.<sup>99</sup> Several weeks later, the pilot received notice of his termination.<sup>100</sup> Allegiant Air’s motion to remove the case to federal court was denied, the case is currently pending in Nevada’s Eighth Judicial District Court.<sup>101</sup>

According to Federal Aviation Administration regulations, the pilot has the responsibility for emergency decision-making.<sup>102</sup> The pilot emphasized “[he] felt the best decision was to get [passengers] to safety and get them away from an airplane that was smoking.”<sup>103</sup> Alleging the airline valued financial profit over the safety of the passengers, the pilot’s suit contends no

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92. 805 ILL. COMP. STAT. ANN. 5/2.10(a)(2) (Lexis through P.A. 99-932, except for portions of P.A. 99-912, 2016 Reg. Sess.).

93. *Id.*; *Burwell*, 134 S. Ct. at 2771.

94. 805 ILL. COMP. STAT. ANN. 5/2.10(a)(2) (Lexis through P.A. 99-932, except for portions of P.A. 99-912, 2016 Reg. Sess.); *Burwell*, 134 S. Ct. at 2771.

95. Lyman Johnson & David Millon, *Corporate Law After Hobby Lobby*, 70 BUS. L. 1, 14, 23-26 (2015).

96. *See supra* notes 8, 35, 41, 51.

97. David Kerley & Erin Dooley, *Ex-Pilot Sues Allegiant for 'Malicious' Firing After Emergency Evacuation*, ABC NEWS (Nov. 13, 2015, 8:12 AM), <http://abcnews.go.com/US/pilot-sues-allegiant-malicious-firing-emergency-evacuation/story?id=35165366>.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Kinzer v Allegiant Air, LLC*, No. A-15-727524-C, 2016 WL 3176570 (D. Nev. June 1, 2016) (order denying motion to dismiss and motion to extend time as moot).

102. 14 C.F.R. § 91.3(b) (2015) (stipulating authority to “deviate from any rule of this part to the extent required to meet that emergency”).

103. Kerley & Dooley, *supra* note 97.

pilot should be forced to consider employment termination, media exposure, or bottom line spending when it comes to decision-making in the interest of safety.<sup>104</sup> The airline has not made comments or filed an answer to the pilot's suit.<sup>105</sup> The pilot seeks damages for wrongful termination, defamation, and infliction of emotional distress.<sup>106</sup>

The airline's response to the plane evacuation during and after the controversial event saw the diffusion of seemingly financially based business decisions which were not impacted by the weight of any potential legal ramifications. Without material evidence like internal corporate documents,<sup>107</sup> one can only ponder how much weight a costly plane evacuation or employment of a pilot who is not willing to take on a smoking plane is given when a corporation's priority is the maximization of shareholder value. While America is caught up in prudential limitations, the international arena is not only addressing the issue head on, it is trailblazing and setting an example for productive social value creation.<sup>108</sup>

## B. INTERNATIONAL ACTIVATION

"Just about every company on earth stands to be impacted by the Sustainable Investment Revolution."<sup>109</sup> International response to understanding and capitalizing on social value is exceedingly more proactive than domestic legislative and judicial consideration. Most international legislation, having been enacted in the last five years, exemplifies the evolving rhetoric surrounding the growing movement to activate underutilized resources to deliver both social and economic benefits.<sup>110</sup> The following three remedies for maximizing social value are offered to provide perspective on the state of U.S. legislative efforts to date.

The European Parliament amended its Accounting Directive in 2015 requiring all European Union (EU) Member States to modify their respective financial reporting requirements to include publication of information by public interest entities that impact the communities they serve.<sup>111</sup> Changes include mandates for public-interest entities to disclose in their management reports relevant and useful information on their policies, including risks, and

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104. Kerley & Dooley, *supra* note 97.

105. Kerley & Dooley, *supra* note 97.

106. *Kinzer*, 2016 WL 3176570, at \*1 (D. Nev. June 1, 2016).

107. *See supra* text accompanying note 43.

108. KIERNAN, *supra* note 82, at 98.

109. KIERNAN, *supra* note 82, at 99.

110. Ta'eed et. al., *supra* note 51.

111. *European Commission Consults on Non-Binding Guidelines on Disclosure of Non-Financial Information By Certain Large Companies*, EUROPEAN COMM. PRESS RELEASE DATABASE (Jan. 15, 2016), <http://europa.eu/rapid/midday-express-15-01-2016.htm?locale=en#5>.

outcomes relating to: environmental matters, social and employee aspects, respect for human rights, anticorruption and bribery, and diversity.<sup>112</sup> The directive mandates that each Member State must codify these changes in their national legislation by December 2016.<sup>113</sup>

Among an impressive array of forward-thinking legislation, the United Kingdom's Social Value Act of 2012, requires local government agents to assess the social value opportunity in its contract selection process.<sup>114</sup> Awarded contracts must consider: "(a) how what is proposed to be procured might improve the economic, social, and environmental well-being of the relevant area, and (b) how, in conducting the process of procurement, it might act with a view to securing that improvement."<sup>115</sup> Requiring consideration in section (a) of the contract's effect on a respective area's economic, social, and environmental well-being before the procurement process begins, goes beyond mere 'consideration' by engaging section (b) in a system to capture ROI metrics throughout the life of the contract.<sup>116</sup> The Centre for Citizenship Enterprise and Governance has proposed a public portal to capture intangible values based on the 'well-being' of a respective community to a contract at no cost to public organizations.<sup>117</sup>

India has enacted one of the most prescriptive solutions for social value creation under its Companies Act of 2013.<sup>118</sup> The Act requires large corporations to donate at minimum 2% of their annual gross profits towards activities focused on social responsibility.<sup>119</sup> Corporations must publicly report these expenditures detailing the beneficiaries.<sup>120</sup> Failure to meet the 2% donation minimum results in personal liability at the corporate director level by imposition of fines or imprisonment.<sup>121</sup> Enforcing legislation with tangible mechanisms, like monetary fines or imprisonment, aligns the social value consideration with other common managerial duties warranting attention from officers expected to execute the intended results.

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112. *Id.*

113. *Id.*

114. Examples of forward-thinking legislation from the U.K. include: Localism Act (2011), Sustainable Communities Act (2007), Local Government Act 'Best Value' (1999), and Directive 92/50 EEC Horizontal Policies for Procurement (1992).

115. THE STATIONARY OFFICE LTD. (U.K.), PUBLIC SERVICES (SOCIAL VALUE) ACT 2012, c. 3, §1(3) (Eng.), [http://www.legislation.gov.uk/ukpga/2012/3/pdfs/ukpga\\_20120003\\_en.pdf](http://www.legislation.gov.uk/ukpga/2012/3/pdfs/ukpga_20120003_en.pdf).

116. *Id.*

117. Ta'eed et. al., *supra* note 51, at 5.

118. *Investment Climate Statement*, U.S. DEP'T OF STATE 23 (June 2014), <http://www.state.gov/documents/organization/228508.pdf>.

119. *Id.*

120. *Id.*

121. *Id.*

Aligning social value with other corporate considerations is propelling countries like India from the ‘developed market’ to the ‘emerging market’ category.<sup>122</sup> Emerging markets are currently identified among the BRIC countries (Brazil, Russia, India, and China) and the Next Eleven (Bangladesh, Egypt, Indonesia, Iran, Mexico, Nigeria, Pakistan, Philippines, South Korea, Turkey, and Vietnam).<sup>123</sup> These countries represent four billion individuals earning less than \$1,500 annually, who can be better engaged through productive legislation like the European Parliament’s procurement procedures, the United Kingdom’s contract selection process, and India’s donation enforcement.<sup>124</sup>

The expediency demonstrated within these three legislative changes stands in stark contrast to the current state of U.S. judiciaries and legislatures, the latter of which still needs to establish a foundation for the issue, before it can generate momentum to provide effective legislation to find the right solution. Global markets are fostering the normative shift towards incorporating social value creation and evaluation in strategies to develop “increasingly dynamic and attractive markets” the U.S. needs to extend its efforts to follow suit.<sup>125</sup>

#### IV. SOCIAL ENTERPRISE OUTLOOK

Separation of powers ideology does not preclude Madison’s Federalist No. 10 notion that an enlightened statesmen will not inherently hold his/her interests as subservient to the public good.<sup>126</sup> Madison’s contention is alive and aptly connected by a common denominator, the “public good” which translates today to communities supporting the social enterprise vehicle to pursue self-serving profit *and* greater-good social value creation goals.<sup>127</sup> The popular limited liability company was based on novel German legislation during the 1980-90s in response to “innovative professionals creating solutions when the current legal system fails to meet client needs.”<sup>128</sup> Flowing from these profound moments in our country’s history, the factors explored in this Comment—state and federal legislative complexities, community branding misconceptions, and international headway in social value procurement—place the U.S. in a historically prime position to take on the social enterprise innovation professionals widely endorse. Bridging the gap towards

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122. KIERNAN, *supra* note 82, at 103-04.

123. KIERNAN, *supra* note 82, at 104.

124. *See supra* notes 114, 115, 118.

125. KIERNAN, *supra* note 82, at 104.

126. THE FEDERALIST No. 10 (James Madison).

127. *Id.*

128. Hamill, *supra* note 2.

the next step to continue the momentum of the social enterprise solution requires analysis of the funding, implementation, enforcement, and measurement mechanisms to achieve long-term innovation.

## A. ISSUE: FUNDING

Success in the U.S. free market capitalist ecosystem is driven by supply and demand.<sup>129</sup> Focusing on private and public sector corporate structures fueled by the forces of supply and demand, leads to simple solutions to mobilize a nascent investor market.<sup>130</sup> Companies with a proclivity to operate under social enterprise values are varied in legal corporate classification and operational practices, however, forces mediating the barriers to market acceptance by investors likewise apply.<sup>131</sup>

### 1. *Private Sector Solutions*

Identifying investor types lends to general classifications: activist, money hungry, or trying to make a quick buck.<sup>132</sup> For the token ‘good will’ activist investor type, common areas of focus are: partnership, philanthropy, and socially responsible practices, are commonly an afterthought investment option within a well-rounded portfolio.<sup>133</sup> Common knowledge dictates the ROI expectations for this “good will” investment set are virtually unprotected. It must evolve to be recognized as an essential cornerstone of a diversified investment portfolio to overcome this branding misconception currently placing it among the first to liquidate.<sup>134</sup> Many solutions to reconfigure branding problems utilize do-gooder rhetoric to raise concepts surrounding impact investing, crowd sourcing, social entrepreneurship and the like.<sup>135</sup>

Despite being a niche category, social enterprises source an avid consumer movement at the helm of socially responsible practices.<sup>136</sup> Taking to the numbers, during the 2008-11 recession, 75% of small businesses saw an

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129. See *Capitalism*, BLACK’S LAW DICTIONARY (10th ed. 2014).

130. KEVIN LAWTON & DAN MAROM, *THE CROWD-FUNDING REVOLUTION* 21, 33 (2013) (Figure 2.1 demonstrating an exponentially increasing rate of change, and Figure 2.2 the funding pyramid).

131. Reiser, *supra* note 78, at 624.

132. Granum, *supra* note 14, at 779.

133. LAWTON & MAROM, *supra* note 130, at 72-75.

134. David A. Levitt & Steven R. Chiodini, *Taking Care of Business: Use of a For-Profit Subsidiary by a Nonprofit Organization*, 2014 *BUS. L. TODAY* (June 2014), [https://www.americanbar.org/publications/blt/2014/06/03\\_levitt.html](https://www.americanbar.org/publications/blt/2014/06/03_levitt.html); LAWTON & MAROM, *supra* note 130, at 72-75.

135. LAWTON & MAROM, *supra* note 130, at 72-75.

136. Reiser, *supra* note 78, at 622.

increase in green product sales;<sup>137</sup> \$3 billion was raised by crowdfunding in 2013, doubling from the \$1.5 billion raised in 2011;<sup>138</sup> Harvard's Michael Jensen focused on a handful of private companies to estimate some \$500 billion lost due to poor management from 1977-88.<sup>139</sup> Consumer demand and corporate supply potential evidently exists among the branding confusion in the marketplace.<sup>140</sup>

The most notable frontrunner among the investment options available to social enterprise interested consumers was recently adopted under the federal JOBS Act crowdfunding exemption.<sup>141</sup> Crowdfunding finds momentum within an investor set identifying with social value creation and having little expectation of return on overall investment.<sup>142</sup> Success among websites facilitating crowdfunding such as Kickstarter, Razoo, and StartSomeGood,<sup>143</sup> demonstrate the emerging panacea of consumer driven marketplace ideology.<sup>144</sup> While investor sentiments towards the crowdfunding mechanism are varied, considered alongside numbers reporting growth in the 'activist' consumer segment, a strong argument is made for the emergence of a new investor type placing importance on both profit and social value purpose in investment selection.

## 2. *Public Sector Solutions*

Traditional government supported remedies *can* support social enterprise growth, among many examples include Philadelphia and San Francisco. In 2012 Philadelphia became the first city in the nation to provide a tax incentive to certified B Corps under the PA Tax Credit Act.<sup>145</sup> The incentive

137. Reiser, *supra* note 78, at 622.

138. Eamonn Kelly, *Introduction: Business Ecosystems Come of Age*, DELOITTE UNIV. PRESS (Apr. 15, 2015) <http://dupress.com/articles/business-ecosystems-come-of-age-business-trends/>.

139. DAVIS ET AL., *supra* note 11, at 11.

140. Reiser, *supra* note 78, at 624.

141. Press Release, U.S. Sec. & Exch. Comm'n, SEC Adopts Rules to Permit Crowdfunding (Nov. 3, 2015), <http://www.sec.gov/news/pressrelease/2015-249.html>.

142. Christine Hurt, *Pricing Disintermediation: Crowdfunding and Online Auction IPOs*, 2015 U. ILL. L. REV. 217, 222-24 (2015).

143. KICKSTARTER, [www.kickstarter.com](http://www.kickstarter.com) (last visited Jan 12, 2015); RAZOO, [www.razoo.com](http://www.razoo.com) (last visited Jan. 12, 2015); START SOME GOOD, <http://startsomegood.com> (last visited Jan. 12, 2015).

144. See generally LAWTON & MAROM, *supra* note 130.

145. Kyle Westaway, *Profit + Purpose*, STAN. UNIV. LECTURE SERIES (Apr. 9, 2012) (downloaded using iTunesU); see also *City of Philadelphia Sustainable Business Tax Credit* §505 107-9 (last updated Jan. 11, 2017) <https://beta.phila.gov/services/payments-assistance-taxes/tax-credits/sustainable-business-tax-credit/>.

qualifies sustainable enterprises to receive up to \$4,000 in tax credits.<sup>146</sup> San Francisco passed an ordinance, the “Benefit Corporation Discount” granting B Corps a bidding preference on city contracts.<sup>147</sup> The ordinance provides a 4% advantage when determining the highest ranked or apparent lowest bid during each stage of the proposal selection process.<sup>148</sup> While tax incentives and contract preference provisions are tools that may enhance the short-term viability for a social enterprise, local governments can offer far greater long-term support by embracing non-traditional mechanisms.<sup>149</sup>

The Gateway EB-5 Investor Visa is adopted under the United States Citizenship and Immigration Service’s program.<sup>150</sup> The program grants a total of 10,000 permanent resident visas throughout the country, per year, facilitating investments between communities with an immediate need for capital formation and international investors seeking permanent U.S. residency.<sup>151</sup> A qualifying investment generates over ten jobs and recognizes value to the recipient community between \$500,000 to \$1 million.<sup>152</sup> Besides being a directly measureable value add, this program exemplifies a non-traditional government resource that can be better utilized by incremental changes to focus on developing social enterprises to support long-term growth for both the company and the recipient communities. Connecting the concept of innovative social value creation with existing resources sits at the crux of underutilized market-making potential in the U.S.<sup>153</sup>

## B. ISSUE: IMPLEMENTATION

Traditional government supported remedies *can* support social enterprise growth. All necessary players—corporations, consumers, and state and federal government—must be agile in responding to mounting tensions

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146. *City of Philadelphia Sustainable Business Tax Credit* §505 107-9 (last updated Jan. 11, 2017) <https://beta.phila.gov/services/payments-assistance-taxes/tax-credits/sustainable-business-tax-credit/>.

147. S. F. ADMIN. CODE 3 (Apr. 11, 2012), <http://www.sfbos.org/Modules/ShowDocument.aspx?documentid=41408>.

148. *Id.* at 6.

149. Dana Brakman Reiser, *Theorizing Forms for Social Enterprise*, 62 EMORY L.J. 681, 692 (2012-13).

150. *About GCGRC*, GREEN CARD GATEWAY REG’L CTR, <http://www.gcgrc.com/about/> (last visited Feb. 10, 2017).

151. *The EB-5 Visa: Immigration*, GREEN CARD GATEWAY REG’L CTR, <http://www.gcgrc.com/immigration/> (last visited Feb. 10, 2017).

152. *Id.*

153. DAVIS ET AL, *supra* note 11.

within the ecosystem to build and maintain credibility throughout the establishment of the social enterprise.<sup>154</sup> Case studies detailing efforts by Starbucks and Accenture towards social value creation provide an argument for implementing governmental resources to strengthen existing collaborations, one obvious method of better facilitating non-profit collaborations.

### 1. *Case Studies: Starbucks & Accenture*

Large-scale corporations frequently implement programs targeting social value objectives while leaving the potential to maximize their ROI on the table.<sup>155</sup> The first example found in the Starbucks collaboration with Arizona State University (ASU) to create a College Achievement Plan (CAP).<sup>156</sup> The CAP offers all Starbucks employees full benefits including tuition coverage for a bachelor's degree.<sup>157</sup> The collaboration utilizes ASU's education platform to provide a dedicated team of advisors, 24/7 tutoring, a choice of over 50 degrees, and flexibility for the future with no requirement to continue employment with Starbucks upon graduation.<sup>158</sup>

The relationships created by the CAP are synonymous with the maximization of each stakeholder's return on investment: Starbucks employees can earn a degree with no tuition price tag attached and receive enhanced resources for success, the Starbucks company earns a loyal workforce to power its consistent and customer centric service model, and ASU receives a tuition revenue opportunity. These collaborations are all without question mutually beneficial transactions that work to elevate each parties' potential for success above what it would be without the CAP.

Accenture's Development Partnership (ADP) program, allows employees to donate their personal consulting service time to form unique partnerships within emerging economies.<sup>159</sup> ADP's goal is to allow high performing employees the opportunity to build and expand global mobility and leadership skills, while affording ADP clients the best talent available.<sup>160</sup> Sander

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154. 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, 177 (2012) (explaining flexibility in the corporate form).

155. *Id.*

156. *Starbucks College Achievement Plan*, STARBUCKS, <http://www.starbucks.com/careers/college-plan> (last visited Jan. 12, 2016) (the program facilitates employee growth as a person, as a partner within their individual career, and the community).

157. *Id.*

158. *Id.*

159. *Development Partnerships Impact Report*, ACCENTURE, (June 2012), [https://www.accenture.com/ph-en/~/\\_/media/Accenture/Conversion-Assets/DotCom/Documents/Global/PDF/Industries\\_10/Accenture-Development-Partnerships-Impact-Report.pdf](https://www.accenture.com/ph-en/~/_/media/Accenture/Conversion-Assets/DotCom/Documents/Global/PDF/Industries_10/Accenture-Development-Partnerships-Impact-Report.pdf).

160. *Id.*

van't Noordende, Accenture Group Chief Executive of Accenture Management Consulting, explains the collaborative nature of a 2013 partnership with Vodafone and Oxfam "to develop a mobile technology strategy to enable improved productivity and economic value for small-holder farmers in 26 markets across Africa, Asia and Latin America."<sup>161</sup> The mutually beneficial nature of this collaboration is undeniable, for Accenture: the employee personal satisfaction, enhanced framework for unique solution development, identification of future business; and for Accenture's clients: access to the top talent and network of corporate resources, expanding their global network.<sup>162</sup>

The Starbucks and Accenture programs exemplify how a for-profit company can foster innovation, impact, and leadership within a local community or global reach while productively serving their respective interest. Clearly, these collaborations cannot exist absent each party to the transaction's performance. While within the broad scope of corporate powers, CAP and ADP can thrive, the framework to move these collaborations beyond the scope of the enlightened statesmen within board room may require the government to incentivize each party, taking control of the helm as history proved with the creation of the LLC, to provide the legitimacy of rule of law while simultaneously advancing corporate benefits, like tax changes, while creating public good.<sup>163</sup>

## 2. NON-PROFIT COLLABORATION

Resources to structure the non-profit and for-profit arenas are by no means a recent innovation.<sup>164</sup> Mechanisms to encourage both parties to engage in partnerships exist within the federal tax structure under the Internal Revenue Service (IRS).<sup>165</sup> Underutilization of these mechanisms due to simple issues relating to taxation and processing result in unproductive spending

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161. *Id.*

162. *Id.*

163. See THE FEDERALIST No. 10 (James Madison) ("It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm.").

164. Susanah Camic Tahk, *Crossing the Tax Codes For-Profit/Nonprofit Border*, 118 PENN. ST. L. REV. 489 (2014).

165. Unrelated Business Income Tax (UBIT) applies to income derived from a regularly carried on trade or business that is unrelated to the performance of the organization's tax-exempt functions as filed with the federal government in their mission statement. There is no bright-line for how much unrelated business activity is too much for a nonprofit to conduct before incurring tax ramifications as demonstrated by federal tax law's unclear application to circumstances warranting an unrelated activity to a non-profit's tax-exempt purpose. Levitt & Chiodini, *supra* note 133(publication of the American Bar Association); INTERNAL REVENUE

and difficulty in establishing long-term strategy. Identified below are three easily remedied tax difficulties that make the IRS's resources highly unlikely sources of support for socially productive mutually beneficial programs like the CAP and ADP.<sup>166</sup> Entities that typically collaborate with private corporations qualify for tax exemptions as either a non-profit or association, meaning they encompass a gathering of people for a common purpose.<sup>167</sup> Focusing on the structure behind tax incentives for private corporate partnerships with qualified non-profits reveals a clear trend of substantial impediments to continued long-term viability in these partnerships.

First, financial planning issues associated with tax deductions and credits. Both private and non-profit entities use deductions and credits in a similar manner to adjust their annual gross income (AGI) as necessary for ongoing financial strategy.<sup>168</sup> Deductions are taken at the beginning of the calculation process, one subtracts each deduction producing the total taxable income figure, to which the applicable tax rate is applied.<sup>169</sup> Should a deduction be later denied by the IRS, these figures will adjust accordingly.<sup>170</sup> Tax credits are taken at the end of the process, one subtracts the credit from the final amount of tax due.<sup>171</sup>

If a deduction or credit is later denied by the IRS, the effects on a company's financial reporting and strategy are significant as they can place a company's total taxable income within an entirely new tax rate or increase the total amount of tax due.<sup>172</sup> Looking through a corporate strategy lens, if Starbucks was interested in implementing their CAP program nationally, only assessing financial drivers, to offset the increased implementation costs

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SERV., U.S. Department of the Treasury, IRS Publication 598, *Tax on Unrelated Business Income of Exempt Organizations*, Cat. No. 46598X (Rev. Jan. 2015) <https://www.irs.gov/pub/irs-pdf/p598.pdf>. Project Related Investments (PRI) allow an exception to the traditional requirement that non-profit foundations must release a minimum of 5% percent of its value yearly (initially imposed to discourage non-profits not actively using funds), allowing the 5% percent to be invested in a private corporation if it ultimately serves a charitable purpose. PROFITS & PURPOSE, *supra* note 3; *see also Program-Related Investments*, INTERNAL REVENUE SERV. (last updated Oct. 14, 2016), <https://www.irs.gov/Charities-&-Non-Profits/Private-Foundations/Program-Related-Investments>.

166. Tahk, *supra* note 164, at 489.

167. Qualified tax exempt entities are "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . for the prevention of cruelty to children or animals . . ." 26 U.S.C. § 501(c)(3) (201).

168. *Compliance Guide for Tax-Exempt Organizations (Other than 501(c)(3) Public Charities and Private Foundations)*, INTERNAL REVENUE SERV., 13-15 (2014), <https://www.irs.gov/pub/irs-pdf/p4221nc.pdf>.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

they might claim a deduction or tax credits for any tuition monies they provided for their employees. Should the deduction or credit later be denied, the reassessment of the taxable income or tax due figures would make a financial advisor largely adverse to the idea of implementing this program due to the uncertainty represented by the risk in the government's role. Because of the varied endemic accounting and reporting projection issues, corporate tax advisors often look outside of the government's system creating unnecessarily complex vehicles to "allow these ventures to carry out their activities while complying with the law."<sup>173</sup>

Second, uncertainty surrounding direct expenses necessitating government assistance to enable social value based collaborations.<sup>174</sup> Federal tax law does not clarify how corporations should treat social purpose direct expenses commonly related to incentive programs or charitable contributions.<sup>175</sup> Consider an officer at Accenture assessing next year's agenda for presentation to the board of directors. When deciding whether to present plans to expand a social value based project within the existing ADP program or another purely profit generating program, the officer will initially employ the same evaluation methodology. However, for the social value ADP program, to justify the intangible 'income' goodwill, that cannot be set off by direct profit yield (e.g. employee personal gratification or future business potential in developing markets), the officer will need to include the tax benefit to even give the program a chance against the alternative purely profit based program. To generate reliable figures, given the necessary tax benefit, the officer may also need to consider hiring tax counsel to research or provide a reasonable estimate of the amount and any uncertainty that the IRS could reject the tax benefit. Even if the officer diligently pursued the ADP program and cogently communicated to the board of directors its financial factors, the likelihood that a program having a financial factor outside of the company's control will be chosen over another project with market growth uncertainty that can be altered at any time within the company's control is comparably grim.<sup>176</sup> As a result, social value based projects will almost always see the reduction in the available corporate resources allocation.<sup>177</sup> If the financial factors present in these decisions had a strong foundation of legal clarity, the officer's task towards social value creation would be less onerous.

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173. Tahk, *supra* note 164, at 514 ("However, designers of these vehicles have had to contend with operating outside of the tax law's existing frameworks. Their vehicles all have been forced to use an apparatus that was not intended to accommodate the new inter-field developments and that has not been retooled to do so.")

174. Jesse Finrock & Eric Talley, *Social Entrepreneurship and Uncorporations*, U. ILL. L. REV. 1867, 1876 (2014).

175. *Id.*

176. Tahk, *supra* note 164, at 515.

177. Tahk, *supra* note 164, at 516.

Third, IRS resources are ultimately not intended for social value collaborations.<sup>178</sup> An obvious solution to the officer's problem in forecasting potential IRS financial incentives is to obtain an advanced approval from the government to provide assurances where the IRS involvement is a prohibiting factor. Licensed non-profits can file for pre-approval of large contributions, or simply use historically approved similar transactions to justify a financial factor when working to achieve potential collaboration.<sup>179</sup> Common issues with IRS processing time can delay or completely eliminate potential collaborations.<sup>180</sup> While transactions naturally encompass an element of liability, the IRS's process for qualifying non-profits as tax-exempt entities does *not* factor in collaborations between non-profit and for-profit entities and *was not* intended to accommodate these collaborations.<sup>181</sup>

Developments in federal taxation law will embolden corporate officers interested in taking advantage of financially solvent social value transactions. To foster growth in social value transactions between non-profit and for-profit entities our government must provide and maintain credible resources to ensure long-term growth and viability.

### C. ISSUE: LONG-TERM VIABILITY

Financial value is easily captured using quantitatively established reporting tools like the stock exchange or interest rates. Capturing *social value* combines quantitative and qualitative measurements, empirical by nature with a limited set of unauthenticated reporting tools to be drawn upon.<sup>182</sup> Clearly there is need for developing a definition so social value currency may be uniformly adopted and understood to advance today's corporate ecosystem.

#### 1. ENFORCEMENT

Enforcement ensuring accountability validates the social value currency as a resource within the market. Currency forms left unregulated historically

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178. Reiser, *supra* note 78, at 622-24.

179. Tahk, *supra* note 164, at 521-32.

180. Tahk, *supra* note 164, at 514-16.

181. Tahk, *supra* note 164, at 514-16.

182. See KIERNAN, *supra* note 82.

do not survive, for example, the rise and fall of the trendy bitcoin digital currency.<sup>183</sup> While any form of capital success needs validation by an uninterested third party entity, regulation that is recognized and respected by market drivers will traditionally succeed.<sup>184</sup>

The Securities and Exchange Commission (SEC) serves to “protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.”<sup>185</sup> While the SEC’s intricate regulatory structure provides backbone to the corporate ecosystem, it leaves ethical matters such as disclosures required for “Amendments to the Registrant’s Code of Ethics, or the Waiver of a Provision of the Code of Ethics”<sup>186</sup> to vague language, simply because ethics do not legislate. While notions of ethical standards are a positive consideration, “vague ideas of profitability or social good are not sufficient for leading for-purpose organizations.”<sup>187</sup>

Regulatory mechanisms offered by the SEC within the last 15 years have performed a defensive rather offensive role in responding to changing economic indicators.<sup>188</sup> The Sarbanes-Oxley Act of 2002 enhances corporate responsibility; the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 further reshapes the regulatory system focusing on disclosure and transparency; the JOBS Act of 2012 provides a positive outlook for the future of social value regulation via crowdfunding.<sup>189</sup> The trickle-down effect of defensive reactionary regulation leads to difficulty in implementation and compliance for these programs; for example, following the bitcoin’s quick rise to popularity within the U.S. markets, state banking regulators scrambled to piece together solutions for effective regulation.<sup>190</sup>

Until the reporting requirements and enforcement offered by government agencies catch up to the chameleon-like qualities of the new capitalist ecosystem, we will continue to see growing pains in regulatory action backtracking to keep up with investor-led value creation.<sup>191</sup>

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183. See generally Conrad Bahlke et al., *Recent Developments in the Regulatory Treatment of Bitcoin*, 28 INTELL. PROP. & TECH. L.J. (2016), <http://www.stroock.com/siteFiles/Publications/IPTechJnlBitcoin.pdf>.

184. *Id.*

185. *What We Do*, U.S. SEC. & EXCH. COMM’N (June 10, 2013), <http://www.sec.gov/about/whatwedo.shtml>.

186. *Amendments to the Registrant’s Code of Ethics, or Waiver of a Provision of the Code of Ethics*, U.S. SEC. & EXCH. COMM’N, Form 8-K Item 5.05 (expires Mar. 31, 2018), <https://www.sec.gov/about/forms/form8-k.pdf>.

187. PROFIT & PURPOSE, *supra* note 3, at 168.

188. *What We Do*, *supra* note 185.

189. *What We Do*, *supra* note 185.

190. Bahlke et al., *supra* note 182 (in response to extensive bitcoin activity, U.S. state banking regulators have indicated that financial regulatory requirements involving third parties should extend to bitcoin and other virtual currency activity).

191. DAVIS ET AL., *supra* note 11, at 213.

## 2. MEASUREMENT

Measuring social value as a quantitative calculation matches the vague quality of ethical valuations.<sup>192</sup> Courts typically addressed social value as an indirect economic benefit conferred.<sup>193</sup> The *Pfeiffer* court used the corporate benefit doctrine to apply a damage calculation for withdrawal of stock offering.<sup>194</sup> The court assessed a substantive corporate benefit based on factors such as employee morale, attraction, and retention as non-measurable economic terms.<sup>195</sup> The court's opinion drew upon "conscience and reason, as opposed to capriciousness or arbitrariness" in ensuring "an orderly and logical deductive process."<sup>196</sup>

Real-Time Information (RTI) capabilities must be achieved to legitimize the transparency, demonstrate successes and failure to all players, and provide a quantifiable unit for the enforcement structure.<sup>197</sup> A multitude of reporting structures are currently utilized,<sup>198</sup> among the swelling tide of reporting practices, each faces problems cited by all parties to the transaction as too expensive, overly complex, resource intensive, subjective, easily-challenged, difficult to articulate and niche.

On paper, a corporation's project assessment strategy flows naturally within a quarterly segmented financial calendar allowing officers to understand and communicate a social impact story internally and externally, strategically make decisions, and reap financial benefits.<sup>199</sup> In practice, social

192. DAVIS ET AL., *supra* note 11, at 213.

193. *Pfeiffer v. Begley*, 2015 IL App (2d) 140271, ¶13, 27 N.E.3d 670, 675-76 (Ill. App. Ct. 2015).

194. *Id.*

195. *See Id.* (citing *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1165 (Del.1989)) ("While the benefit achieved may have an indirect economic effect on the corporation, in the sense that the interests of the plaintiff class reflect a value not theretofore apparent, the benefit need not be measurable in economic terms. Changes in corporate policy or, as here, a heightened level of corporate disclosure, if attributable to the filing of a meritorious suit, may justify an award of counsel fees.").

196. *Id.* at ¶20.

197. PROFIT & PURPOSE, *supra* note 3, at 169.

198. Sample of measurement techniques include: Classic *Balanced Scorecards*: measures four quadrants financial and non-financial indicators (people and knowledge, internal, customer, financial); *Social Return on Investment* (SROI): incorporates people as a value within the resource-allocation decision-making structure; *Environmental, Social and Governance* (ESG) known for larger corporate long-term investment analysis technique incorporating quality of corporate management, culture, risk profile among many characteristic based factors; *Social Accountability 8000* (SA8000), used in the industrial platform, an auditable certification standard creates a common language measuring social compliance, often cited for protecting basic human workers' rights. PROFIT & PURPOSE, *supra* note 3, at 169.

199. PROFIT & PURPOSE, *supra* note 3, at 171.

impact mission measurement, setting up standards and processes, and sustaining the necessary measurement and reporting through the fulfillment stage finds social value based projects met with severe opposition on the corporate calendar.<sup>200</sup> Setting management operations, partnerships, supply chain structure, and company financials aside, the same pragmatic mindset currently at work within for-profit corporations who consistently overcome funding, implementation, enforcement and measurement issues, are certainly able to achieve social value creation, capture and maximization to achieve purpose within its capitalist structure.

## V. CONCLUSION

The B Corp social enterprise model may be the current trend, merely a means to an end. What remains consistent to the end of social value creation is the social enterprise's role in making generations of profit and social value an increasingly worthy purpose reflected within U.S. consumerism. Struggling within the tensions of government regulation and natural market forces—the end for social value's relevance emerging as a form of capital can be found in better funding mechanisms, implementation structure, enforcement and measurement issues that today strains the success of the social enterprise.

As the model social enterprise form, this Comment used the Illinois B Corp to demonstrate the basic principle and structure of the dual-mission, for-profit entity. Limited by branding, financing, transparency, and lax third party enforcement mechanisms, the future is not green for the Illinois B Corp. The nationally developing pedagogy of the duties and liabilities of the corporation and its actors must pace with the international community to understand how to remain competitive and support social value creation within our agencies, legislature, and judiciary.

Promotion and growth of the social enterprise as a vehicle for social value means each player within a collaborative nexus readjust individual interests to work in productive tension. Corporate social responsibility is about protecting the company and acting in the best interests of the company. The evolving concept of social value dating back to the literal price paid for a person's head<sup>201</sup> is grounded in protection of individual(s) as the community's assets and subsequent actions in the best interests of the entire community. Although the narratives and concepts explored in this Comment should be challenged by the possibilities formal fallacy lends for its law in

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200. PROFIT & PURPOSE, *supra* note 3, at 171.

201. *Capitis aestimatio*, *supra* note 1.

action approach,<sup>202</sup> it is without question the infallible supply and demand forces that drive our capitalist economy boil down to the simple *modus ponens* that will always result in command of necessary actions by a community when the true social value of an individual as a community asset is at stake.

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202. See Richard A. Booth, *Form and Function in Business Organizations*, 58 BUS. L. 1433, 1433 (2003) (“The question that naturally arises is why not get rid of this ever expanding alphabet soup of corporations, partnerships, limited partnerships, LLCs, LLPs, and LLLPs, and replace it with a unified system? In other words, is it not time for entity rationalization?”).