Incorporating Social Enterprise Governance

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ABSTRACT

The social enterprise movement has ushered in a promising new wave of companies using market-based strategies to advance social and environmental change. The longevity and growth of social enterprises will be determined by their ability to balance the complex and often competing interests within these unique business entities. This Article argues that the benefit reporting requirements in hybrid-corporation statutes in the United States offer an innovative mechanism for encouraging and maintaining good social enterprise governance. Using the benefit reporting requirements within hybrid-corporation statutes as a model, this Article provides a normative framework and establishes the implementation principles for social enterprise governance across various legal entities. By counseling social enterprises on how to promote participatory democracy and increase the company's capacity to detect and address problems, corporate lawyers can serve a critical function in developing social enterprise governance.

INTRODUCTION

The social enterprise[2] ethos of conducting business fundamentally alters the ways in which a company should be governed because it compels directors and officers to make corporate decisions that account for the divergent interests of the company's stakeholders and

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(2) See infra Part I.A.

to consider the decisions' broader impact on society[3]. Social enterprises are business ventures that intentionally affect societal good. The sustainability of early-stage social enterprises is particularly vulnerable because they rarely operate at a high profit margin. Moreover, social enterprises must constantly manage the conflicting interests of profit returns and social impact[4], which is hard to do. Thus, social enterprises need good corporate governance practices and enforcement mechanisms if the sector will thrive[5]. Corporate governance describes the system of internal controls to regulate people, processes, and policies within an organization. Social enterprises in the U.S. are subject to state and, where applicable, federal laws regarding corporate governance. But there is an absence of regulatory oversight to enforce good governance models within the social enterprise sector because most social enterprises do not exceed the thresholds to initiate government monitoring[6]. As a result, many social enterprises are in a netherworld

(3) Haskell Murray, Choose Your Own Master: Social Enterprise, Certifications and Benefit Corporation Statutes, 2 Am. U. Bus. L. Rev. 1, 27-28 (2012) (discussing how directors are instructed to implement stakeholder governance, but are given no guidance about how accomplish that); Model Benefit Corp. Legis. § 101 cmt (B Lab Jan. 13, 2016), http://benefitcorp.net/sites/default/files/Model%20Benefit%20Corp%20Legislation_2016.pdf (identifying benefit corporations as "a business that operates with a corporate purpose broader than maximizing shareholder value and that consciously undertakes a responsibility to maximize the benefits of its operations for all stakeholders, not just shareholders"); Bridges Ventures LLP, To B or Not To B: An Investor's Guide to B Corps 12 (Sept. 2015), http://bridgesventures.com/wp-content/uploads/2015/11/To-B-or-Not-To-B-6-print.pdf.

(4) Barnali Choudhury, Serving Two Masters: Incorporating Social Responsibility into the Corporate Paradigm, 11 U. Pa. J. Bus. L. 631, 633 (2009); Dana Brakman Reiser, Theorizing Forms for Social Enterprise, 62 Emory L.J. 681, 684 (2014) ("[E]ventually there will have to be decisions where profit and social good come into conflict and must be traded off.").

(5) See Alicia E. Plerhoples, Social Enterprise as Commitment: A Roadmap, 48 Wash. U. J.L. & Pol'y 89, 91 (2015) (hereinafter Social Enterprise as Commitment) ("One answer lies in developing governance processes and policies that internalize, express, and self-regulate the social enterprise's commitment to its social mission.").

(6) Shruti Rana, Philanthropic Innovation and Creative Capitalism: A Historical and Comparative Perspective on Social Entrepreneurship and Corporate Social Responsibility, 64 Ala. L. Rev. 1121, 1146 (2013) (noting that social enterprises are "operating in a conceptual and regulatory no-man's-land . . . where their activities may be regulated only by the good intentions of their founders and managers . . . .").

of governance[7] that has not been previously analyzed in social enterprise legal scholarship.

The social enterprise sector is an increasingly growing segment of the U.S. economy[8]. Impact investing[9] in the social enterprise sector by institutional investment alone is estimated to be at $46 billion by conservative figures[10], which is a fraction of the estimated $6.20 trillion in U.S.-domiciled assets currently committed to socially responsible investing[11]. Thus, there are significant economic incentives to making sure the social enterprise sector is adequately supported[12].

(7) Cf. Joseph Stromberg, A sports governance expert explains why FIFA is so corrupt — and how to fix it, VOX: Culture (last updated June 2, 2015, 1:08 PM), http://www.vox.com/2015/5/27/8671925/how-to-fix-fifa (describing how a lack of regulations on international sports associations, such as FIFA and the Olympics, has placed the associations in a "netherworld of governance").

(8) See Brad Edmondson, The First Benefit Corporation IPO Is Coming, and that's a Big Deal, Triple Pundit (Feb. 4, 2016), http://www.triplepundit.com/2016/02/first-benefit-corporation-ipo-coming-thats-big-deal/# ("If the Laureate IPO is successful, it will provide a roadmap for institutional investors, family offices and individual investors who want to invest capital in businesses that generate a good return and make valuable contributions to society at large . . . . And it will provide a strong counterpoint to skeptics that believe that businesses cannot access institutional capital unless they focus exclusively on maximizing value for shareholders.").

(9) Impact investing refers to investors that are creating direct social impact through "targeted direct equity and debt investments in [social businesses] across developed and emerging markets." William H. Clark, Jr., et. al., White Paper 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 3–4 (Jan. 18, 2013) [hereinafter White Paper], http://benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf.

(10) JP Morgan & Global Impact Investing Network, Spotlight on the Market: The Impact Investor Survey 6 (2014), https://www.jpmorganchase.com/corporate/socialfinance/document/140502-Spotlight_on_the_market-FINAL.pdf

(11) US SIF: The Forum for Sustainable and Responsible Investment, Report on US Sustainable, Responsible and Impact Investing Trends 2014 (2015), http://www.ussif.org/Files/Publications/SIF_Trends_14.F.ES.pdf.

(12) See Steven A. Ramirez, The End of Corporate Governance Law: Optimizing Regulatory Structures for a Race to the Top, 24 Yale J. on Reg. 313, 354 (2007) ("Corporations are the pivotal store of risk capital in the United States, and the key holder of society's wealth. The manner in which corporations are governed will affect a wide range of national issues—from economic inequality to globalization."). Corporate law scholars have linked the emergence of the social enterprise sector to the 2008 =

More importantly, there are also societal reasons we want social enterprises individually and collectively to be sustainable institutions. Social enterprises can influence social change by improving the lives of those marginalized and excluded in various segments of our society. For every major media story of organizational corruption(13), there are many untold stories of small to mid-size businesses that fail in large part due to a lack of corporate governance mechanisms. Good corporate governance accomplishes more than mitigating fraud and scandals; it helps companies prevent corporate waste, effectively manage resources, adapt to changing realities, and are necessary for a company's sustainability, resilience, and scale(14).The long-term social impact goals of social enterprises require these companies endure and often necessitate growth to reach their target populations. Thus, social enterprises need to develop and promote effective corporate governance across the sector if the promise of the social enterprise movement(15) is to reach its full potential.

= financial crisis. See e.g., Robert T. Esposito, The Social Enterprise Revolution in Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for the Benefit Corporation, 4 Wm. & Mary Bus. L. Rev. 639, 642-44 (2013) (describing the resurgence of social enterprise as a result of the 2008 recession).

(13) See, e.g., Nine FIFA Officials and Five Corporate Executives Indicted for Racketeering Conspiracy and Corruption, U.S. Dep't of Justice — Office of Public Affairs (May 27, 2015), http://www.justice.gov/opa/pr/nine-fifa-officials-and-five-corporate-executives-indicted-racketeering-conspiracy-and (last updated June 9, 2015). Allegations of FIFA corruption have been an on-going issue for FIFA. See generally LastWeekTonight, Last Week Tonight with John Oliver: FIFA and the World Cup, YouTube (June 8, 2014), https://www.youtube.com/watch?v=DlJEt2KU33I (describing FIFA as a "comically grotesque organization," alleging corruption, and providing clips of other media outlets similarly criticizing FIFA).

(14) See Ozden Deniz, The Importance of Corporate Governance for a Well Functioning Financial System: Reforming Corporate Governance in Developing Countries, 14 Duq. Bus. L.J. 219, 222 (2012) (arguing that "corporate governance is also a public policy concern" as it enhances local capital markets by attracting investors).

(15) The term "social enterprise movement" is regularly used to describe the increase in visibility and quantity, in roughly a decade, of businesses that use market strategies to make social impact. See Alicia E. Plerhoples, Can an Old Dog Learn New Tricks? Applying Traditional Corporate Law Principles to New Social Enterprise Legislation, 13 Transactions: Tenn. J. Bus. L. 221, 222 (2012) [hereinafter Applying Traditional Corporate Law].

Corporate lawyers[16] not only help companies draft the charter documents that govern the business, they also help companies navigate a complicated network of organizational documents, state corporate law, private contracts, and federal and state regulations[17]. Each of these factors contributes to and influences the governance structure of the company. For this reason, corporate lawyers should have a significant role and lend their expertise to creating corporate governance models and enforcement mechanisms in the social enterprise sector[18]. This Article expands guidance to social enterprise practitioners and corporate lawyers by arguing that the entire sector, not merely hybrid entities, needs to develop effective governance models and provides a specific framework for a self-regulating mechanism the sector should adopt to support the development of social enterprise governance.

Part I provide an overview of the corporate governance vacuum in the social enterprise sector and identify why the current corporate governance paradigm does not provide adequate oversight for most social enterprises. It concludes by identifying that social enterprise governance is still underdeveloped, notwithstanding these new corporate forms. Thus, the Article argues that the social enterprise sector should adopt a new mechanism for enforcing and maintaining good corporate governance.

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(16) The terms corporate lawyer and transactional lawyer are used interchangeably in this Article to refer to the practice of law that integrates "the substantive business, financial, and lawyering skills needed to consummate business transactions." Susan R. Jones & Jacqueline Lainez, Enriching the Law School Curriculum: The Rise of Transactional Legal Clinics in U.S. Law Schools, 43 Wash. U. J.L. & Pol'y 85, 94 (2013). While transactional lawyering has been used in other lawyering scholarship to describe a broad range of skills that include almost any non-litigation-based practice, this Article narrows the use of the term to the representation of business entities where the legal team interprets, analyzes, and advises on private ordering, statutes, regulations, and case law to assist their clients in realizing their organizational goals and business objectives. In the relevant scholarship, these lawyers are also referred to as deal lawyers.

(17) See generally George W. Dent, Jr., Business Lawyers as Enterprise Architects, 64 Bus. Law. 279 (2009) (describing the various tasks and services provided by business lawyers).

(18) See Lynn A. Stout, Why We Should Stop Teaching Dodge v. Ford, 3 Va. L. & Bus. Rev. 163, 176 (2008) [hereinafter Stop Teaching Dodge] ("When it comes to corporations, lawyers are ship captains").

Part II explains how the benefit reporting requirements in hybrid-corporation statutes in the United States can promote the development of new corporate governance models unique to the social enterprise sector. This section concludes with specific recommendations for social enterprise practitioners and corporate lawyers to embed benefit reporting requirements into the DNA of the social enterprise regardless of the legal form or jurisdiction. If social enterprise practitioners and corporate lawyers collaboratively develop, document, and disseminate social enterprise governance models through benefit reports, then this collaboration will lead to a stronger, more resilient social enterprise sector that is better prepared to traverse the rough terrain towards sustained social change.

I. SOCIAL ENTERPRISES AND HYBRID ENTITIES

A. The Emergence of Social Enterprises

The term "social enterprise" does not have a precise definition and as such, while often used, it is also commonly misunderstood. The term is evolving as it continues to be refined and contoured by business and legal practitioners and scholars(19). As the term suggests, it describes those business enterprises that intentionally impact societal good(20).

(19) Justin Blount & Patricia Nunley, What is a "Social" Business and Why Does the Answer Matter?, 8 Brook. J. Corp. Fin. & Com. L. 278, 279 (2014) (arguing that the definitions for "social enterprise" remains "hopelessly fractured" and "often conflicting"); see also J. Haskell Murray, Social Enterprise Innovation: Delaware's Public Benefit Corporation Law, 4 Harv. Bus. L. Rev. 345, 347 (2014) (identifying that the term "social enterprise" is not well defined in the academic literature).

(20) Muhannad Yunus with Karl Weber, Building Social Business: The New Kind of Capitalism That Serves Humanity's Most Pressing Needs xvii (2010) (defining social business as dedicated entirely to achieving a social goal) (emphasis added). But see Brenda Massetti, The Duality of Social Enterprise: A Framework for Social Action, Rev. Bus., Winter 2012/2013, at 59 (defining social enterprises as "an organization where the majority of its social actions: (1) are congruent with the organization's mission and have some degree of social legitimacy; (2) are community internalizing regardless of whether they are required or chosen; (3) make clear social contributions while producing financial contributions (i.e. profits) that exceed their resource consumption" (emphasis added) (endnote omitted)). In a report to the Roberts Enterprise Development Fund (REDF), Mathematica Policy Research defines social enterprises as "mission-driven businesses focused on hiring and assisting people who face barriers to work." Dana Rotz et al., Economic self-sufficiency and life stability one year after starting a social enterprise job xv (2015), http://redf.org/wordpress/wp-content/uploads/2015/02/REDF-MJS-Final-Report.pdf.

Precise definitions matter because there is misuse[21] and confusion[22] about how business ventures are determined to be social enterprises[23].

The definitional variations are diverse enough to inspire a semester-long course I teach aimed at better understanding the meaning of the term social enterprise[24]. As Marc Lane points out, because the term "social good" is so broad, virtually "every business corporation and every charity could fairly be characterized as a social enterprise. After all, businesses employ people, fulfill the needs and wants of their customers, and pay taxes. Similarly, charities provide altruistic and humanitarian services that would otherwise be performed by government or not at all"[25].

Several accepted definitions of social enterprise narrow down the concept. The Social Enterprise Alliance[26], a leading organization in the sector, defines social enterprises as "businesses whose primary purpose is the common good. They use the methods and disciplines of business and the power of the marketplace to advance their social, en-

(21) See, e.g., Jim Schorr & Kevin Lynch, Preserving the Meaning of Social Enterprise, Stan. Soc. Innovation Rev. (Sept. 14, 2012), http://www.ssireview.org/blog/entry/preserving_the_meaning_of_social_enterprise (documenting how Salesforce.com "began using the term 'social enterprise' to describe 'how social and mobile cloud technologies are empowering companies to connect with customers, partners, and employees in entirely new ways'").

(22) See M. Tina Dacin et al., Social Entrepreneurship: A Critique and Future Directions 22 Org. Sci. 1203, (2011) ("[A]s a nascent field, social entrepreneurship scholars are in the midst of debates involving definitional and conceptual clarity . . . .").

(23) See Schorr & Lynch, supra note 20 ("For years, this new realm of hybrid ventures has struggled to define itself in a cohesive way, and the lack of a general consensus on terminology in this arena has been a constraint on the development of social capital markets, supportive policy environments, and other key pieces of the ecosystem needed to catalyze the growth of the field").

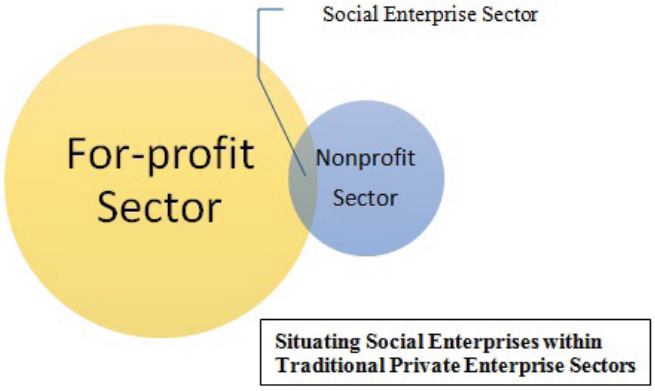
(24) Social Enterprise & Empowerment Clinic, The University of California Hastings College of the Law, http://www.uchastings.edu/academics/clinical-programs/clinics/socialenterpriseandeconomicempowerment/index.php (last visited May 9, 2016).

(25) Marc J. Lane, Social Enterprise: Empowering Mission Driven Entrepreneurs 6 (2011).

(26) Social Enterprise Alliance is a membership organization for social enterprises with local chapters across the United States. For more information, see the About Social Enterprise Alliance page, Social Enterprise Alliance, https://www.se-alliance.org/about#ourrole (last visited May 9, 2016).

vironmental and human justice agendas"[27]. Professor Filipe M. Santos defines social enterprises to be those businesses with a predominant strategic focus on value creation[28] over value capture[29], which explains why social enterprises are often in the business of providing services to socially neglected populations because that is where the potential for value creation is highest. Professor Dana Reiser concisely summarizes her general idea of a social enterprise as "an organization formed to achieve social goals using business methods"[30].

Another working definition of social enterprises is those for-profit businesses whose primary objective is to make social impact and nonprofits that incorporate market-based, commercial strategies to achieve their mission[31]. Social enterprises often operate at the intersection of profit-generating enterprises and social change organizations. Thus, for many social enterprises, the company could have easily chosen to be formed as a for-profit entity or a nonprofit corporation.



Situating Social Enterprises within Traditional Private Enterprise Sectors

(27) Larry D. Watson & Richard A. Hoefer, Developing Nonprofit and Human Service Leaders: Essential Knowledge and Skills 4 (2014) (reproducing the definition provided by Social Enterprise Alliance, which definition no longer appears on the Social Enterprise Alliance Website as of May 9, 2016).

(28) Filipe M. Santos, A Positive Theory of Social Entrepreneurship, 111 J.Bus. Ethics 335, 337 (2012) (defining value creation as the aggregate increase in utility of society's members after accounting for the opportunity cost of all the resources used in that activity).

(29) Id. at 339 (defining value capture as the portion of value created by the activity after accounting for the cost of resources that the focal actor mobilized); See alsoLane, supra note 24, at 4 (defining social enterprises "as one not motivated by profit, in that any profit motive takes a back seat to a mission centered on curing an acute social malady").

(30) Reiser, supra note 3, at 681.

(31) See Lane, supra note 24, at 7 (noting that social enterprises are "thinking about social impact every day and, in that quest, are going about the serious business of applying strategic planning and management tools to social causes").

The common theme in each of the aforementioned definitions is that a substantial variety of business models and legal entity forms are contained within the social enterprise sector, from traditional for-profits to nonprofits to hybrid entities. Although social enterprises have existed for more than a century(32), recent hybrid-entity legislation has catapulted the social enterprise movement in the United States to national attention and given new visibility to the growing sector(33). While the type of legal entity is an important part of understanding how social enterprise can form, on a day-to-day basis corporate governance is often more essential to determining the success of the social enterprise(34). As the following case studies exemplify, achieving a social mission requires thought and direction regarding the corporate governance structure of the social enterprise.

i. Case Study #1: Social Mission Achieved through Governance

Imagine a social enterprise that has the primary goal of using professional, long-term employment to empower its individual employees to disrupt cycles of poverty, substance abuse, and recidivism. This social enterprise is formed as a limited liability company (LLC) to allow the managers to raise capital from outside investors and the flexibility to operate the company in a manner that best supports the company

(32) See About Us, Goodwill Indus. Int'l, Inc., http://www.goodwill.org/about-us/ (quoting founder Rev. Edgar J. Helms as describing Goodwill, founded in 1902 and today a $4 billion nonprofit, as an "industrial program as well as a social service enterprise . . . a provider of employment, training and rehabilitation for people of limited employability, and a source of temporary assistance for individuals whose resources were depleted"); See also Antony Page & Robert A. Katz, Freezing Out Ben & Jerry: Corporate Law and the Sale of a Social Enterprise Icon, 35 Vt. L. Rev. 211, 211-17 (2010) (describing Ben & Jerry's Homemade, Inc. as an iconic social enterprises in the early 1980s with a double-bottom line business model, which they called "double-dip," was well known for its commitment to prioritizing progressive social goals over profits).

(33) See Heerad Sabeti with the Fourth Sector Network Concept Working Group, The Emerging Fourth Sector: Executive Summary 4 (2009), https://www.aspeninstitute.org/sites/default/files/content/docs/pubs/4th%20sector%20paper%20-%20exec%20summary%20FINAL.pdf ("The Fourth Sector is emerging organically, the collective result of thousands upon thousands of initiatives at the individual organizational level.").

(34) See Renatto Garcia, Comment, Re-Engineering Georgia's Corporate DNA: A Benefit Analysis and Practicality Assessment for Benefit Corporation Legislation in Georgia, 6 J. Marshall L.J. 627, 677 (2013) (identifying that the social enterprise "formula is far from perfect, giving rise to criticisms about conflicts of interest and the latent inefficiency of considering multiple stakeholder interests").

mission. At all times, the company is committed to maintaining employment of at least eighty percent of this work force with individuals who have a criminal record, have a history substance abuse, have recently returned from military service, or do not have a high school degree or equivalency certificate.

The core purpose of the company is not to simply employ but to restore dignity to its employees. The managers of the LLC, thus, want the employees to be involved in various operational decisions that will affect their work and the direction of the business. For example, employees are expected to provide insight on management structure, new software, expansion of product offerings, and employee scheduling. Employees are encouraged to provide feedback and share ideas about what the company should be doing better.

Thus, systematic employee participation in the operations of the company is a fundamental aspect of how the company seeks to achieve its social mission. Engaging employees in a transparent, democratic process is a significant means to how the company achieves its social mission of employee empowerment. Yet, at the entity formation stage, the company was provided no legal counsel on how to establish a system through which employees would participate in operational decisions.

As a result, the company engages in ad hoc employee voting and collects irregular feedback from the employees. The employees do not have consistent access to financial reports and company documents to inform their feedback. A key component of the company's social mission is to be accomplished through innovative, decision-making structures and processes, yet the company has no format through which to implement this social mission. Without an established governance system uniquely designed to engage the employees in decision-making, there is no mechanism for determining if the company is achieving its social mission. Moreover, even when employees have ad hoc opportunities to provide meaningful contributions, they lack the information necessary to keep the managers accountable to the social mission of the company[35]. Thus, this social enterprise that seeks to empower

(35) See Tom C.W. Lin, The Corporate Governance of Iconic Executives, 87 Notre Dame L. Rev. 351, 366 (2011) ("[F]ew outside parties are capable of meaningfully critiquing and checking executive decisions, given the economic and organizational advantages of corporate officers").

employees through democratic participation in decision-making has yet to disrupt the default "feedback loop that breeds . . . hubris at the senior executive levels"[36] and marginalizes employee perspectives.

ii. Case Study #2: Balancing Stakeholder Participation through Governance

Imagine another social enterprise with the mission to eliminate hunger in densely populated cities by connecting businesses with excess food to food banks, shelters, and other nonprofits who will distribute the food to individuals in need. Consistent with traditional corporate governance practices, the board is composed of executives and investor representatives. Thus, the company is in regular contact with and must be responsive to investors and its business customers, the primary sources of its revenue. However, the mission of the social enterprise is to eliminate hunger, not provide pick-up services for businesses with excess food. This traditional board composition "is procedurally designed to maximize shareholder wealth,"[37] not innovate to end food insecurity[38].

To maintain its ingenuity, the company will need to gather and incorporate feedback and ideas generated from the end-users of the platform — i.e., individuals suffering from food insecurity and, perhaps, the nonprofit food distributors[39]. How well this for-profit social enterprise

(36) Id. at 376.

(37) Kyle Westaway & Dirk Sampselle, The Benefit Corporations: An Economic Analysis and Recommendations, 62 Emory L.J. 999, 1004 (2013).

(38) See Daniel S. Shah, Lawyering for Empowerment: Community Development and Social Change, 6 Clinical L. Rev. 217, 247 (1999) ("[T]he optimistic idea that the rich can gain while helping the disadvantaged has meant in practice that the priorities of the empowered take over those of the disempowered even in the very programs which were meant to mitigate this general trend").

(39) Jeffrey Pfeffer &Gerald R. Salancik, The External Control of Organizations: A Resource Dependence Perspective 43-44 (1978) ("Organizations could not survive if they were not responsive to the demands from their environment. But, we have noted that demands often conflict and that response to the demands of one group constrains the organization in its future actions, including responding to the demands of others. This suggests that organizations cannot survive by responding completely to every environmental demand. The interesting issue then becomes the extent to which organizations can and should respond to various environmental demands, or the conditions under which one social unit is able to obtain compliance with its demands. By understanding the conditions of the social control of organizations, we believe it is possible to understand how organizations decide to comply with, or attempt to avoid, influence.").

gathers and incorporates information from its end-users will determine its success at developing new avenues to eliminate hunger. However, questions remain regarding obtaining the end-user feedback and how to incorporate it with investor interests, especially where the feedback and the investor interests conflict.

This social enterprise needs a mechanism for determining how it will collect various interests from its stakeholders and balance those interests where they do not align. A well thought-out corporate governance policy and information structure would likely make a significant difference for this social enterprise because the balancing of these stakeholder interests is vital to the long-term sustainability of this company.

B. Current Governance Vacuum within the Social Enterprise Sector

Most social enterprises are not hybrid-entities(40) but are formed as traditional for-profit companies or nonprofit corporations. The majority of for-profit social enterprises in the United States are closely-held companies and small nonprofits that might not rise to the level that would require scrutiny from federal regulatory agencies or state attorneys general. Thus, there is a vacuum of corporate governance enforcement in the social enterprise sector even though, for many of these companies, their governance is a means to achieving their social mission.

i. For-Profit Social Enterprises Not Subject to External Oversight

Pursuing profit-making and a social mission does not always lead to the same business decisions(41).

"Blended value, . . . [after all], could easily remain purely aspirational . . . [as] pursuing profit and social good will not always lead in the same direction. . . . Even if the stars align at the outset, eventually there will have to be decisions where profit and social good come into conflict and must be traded off"(42).

(40) See Plerhoples, supra note 4, at 90 ("[A] small cohort of hybrid entities have incorporated in numerous states.").

(41) Reiser, supra note 3, at 684.

(42) Id. at 684.

Therefore, for-profit social enterprises must be intentional about how they reach business decisions and transparent about documenting their decision-making processes. However, there are few oversight mechanisms that hold a for-profit social enterprise accountable for documenting these decisions and good corporate governance.

Local state laws establish the basic framework of distributing responsibilities within the company(43) but are not sufficient to ensure that the flow of power is properly maintained in the best interest of the company(44). Outside monitoring from government agents is often required to hold companies accountable to good governance practices. For example, the federal government monitors and enforces corporate governance practices through disclosure requirements that are in place to ensure that boards and managers are following the law. In the wake of global financial crises and high profile events such as the collapse of Enron(45), the federal government has been increasingly focused on minimizing risky financial transactions and improving the corporate governance of large corporations. Federal reforms such as the Public Company Accounting Reform and Investor Protection Act of 2002, commonly known as the Sarbanes-Oxley Act ("SOX")(46), and the

(43) See infra Part II.A.

(44) Jonathan R. Macey, Corporate Governance: Promises Kept, Promises Broken 71 (2008) ("[T]he institution of the board of directors, as we know it, is not a reliable corporate governance device. [Even if the] [b]oards of directors will not inevitably fail in the task of objectively monitoring management . . . [t]hey cannot . . . be expected to succeed reliably").

(45) Leading up to the demise of Enron, "[c]ompany executives created high expectations among investors regarding the company's growth potential and their unique skill-set to reach it, producing for a time an extraordinarily high stock market valuation. Meanwhile, the economic reality was turning out to be more sobering. Increasingly aggressive, apparently fraudulent, steps were taken to report financial results and conditions that would not deflate investors' expectations in a way that would put the managers' jobs, compensation and perquisites – not to mention social status and self-esteem – immediately at risk." Donald C. Langevoort, Managing the "Expectations Gap" in Investor Protection: The SEC and Post-Enron Reform Agenda, 48 Vill. L. Rev. 1139, 1139 (2003).

(46) Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745-810 (codified as amended in scattered sections of 15, 18, 28, and 29 U.S.C.).

Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank")[47] are aimed at improving the corporate governance of large corporations. These regulations, for good reason, do not apply to non-publically traded companies. As a result, the primary federal legislation aimed at improving corporate governance is not applicable to most for-profit social enterprises, which are relatively small businesses.

The federal government also enforces good corporate governance for companies that issue securities through disclosure requirements under the Securities and Exchange Commission ("SEC")[48]. U.S. public corporations are required to disclose a wide range of information in annual and quarterly reports, as well as in the proxy statements[49]. It is unlikely that private companies, not otherwise required to, would implement these specific reporting procedures because the corporate governance requirements "are a jumble of [various] statues, rules, forms and schedules"[50] that the average company would not be able to decipher without sophisticated corporate representation[51]. Moreover, the federal monitoring and enforcement system should not be expanded to all social enterprises given limited government resources and the potential financial burden federal reporting would place on the social enterprise sector.

(47) Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) [hereinafter Dodd-Frank Act] (codified as amended in scattered sections of 5, 7, 12, 15, 22, 26, 28, 31, and 42 U.S.C.).

(48) See Business Roundtable v. S.E.C., 647 F.3d 1144, and 1148-49 (D.C. Cir. 2011) (holding that Rule 14a-11 was "arbitrary and capricious" and reaffirming that SEC rulemaking requires strong empirical evidence to justify the costs and benefits of the rule).

(49) Securities and Exchange Act of 1934, Pub. L. 114-38 §§ 13(codified as amended at 15 U.S.C. § 77m (2012)); and17 C.F.R. §240.14a-3.

(50) Gregory S. Porter, What Did You Know and When Did You Know It?: Public Company Disclosure and the Mythical Duties To Correct and Update, 68 Fordham L. Rev. 2199, 2199 (2000).

(51) Regulatory compliance is also expensive. Public companies expend a significant amount of capital resources on complying with SOX, for example, and that cost of compliance continues to rise. A majority, fifty-eight percent, of large public companies surveyed estimated they spent more than $1 million on SOX compliance in 2014 alone. Protiviti, Inc., SOX Compliance – Changes Abound Amid Drive for Stability and Long-Term Value 6 (May 2015), http://www.protiviti.com/en-US/Documents/Surveys/2015-SOX-Compliance-Survey-Protiviti.pdf.

To the extent these for-profit social enterprises are raising capital, it is likely through private placement transactions that are exempt from federal securities registration requirements. Social enterprises are likely to have a limited number of shareholders with whom management has close relationships and who believe in the mission of the enterprise. These shareholders are therefore not likely to sue the company for failure to maintain good governance. Directors and executives of a social enterprise are also not likely to benefit from the minimal level of shareholder oversight unlike large for-profit companies(52).

In theory, shareholders monitor the decisions of corporate boards, often by reference to corporate earnings. Because social enterprises are not necessarily expected to increase their corporate earnings, the standard market indicators that something may not be working well within the governance structures are not likely to raise significant scrutiny into the corporate practices. For these reasons, there are limited internal and regulatory controls encouraging small, for-profit social enterprises to adopt good corporate governance practices.

ii. Nonprofit Social Enterprises Lack Internal Oversight

A significant number of social enterprises in the U.S. are formed as nonprofits. "Contrary to popular belief, private philanthropy is not the main source of nonprofit revenue; rather, over forty percent of nonprofit revenue is derived from fees for services performed"(53). The blurred lines of a nonprofit with a business enterprise means that nonprofit directors often have many of the same corporate responsibilities as for-profit directors but generally with less financial resources and often no compensation for their time and effort. Corporate gov-

(52) David Millon, Radical Shareholder Primacy, 10 U. St. Thomas L.J. 1013, 1019–23 (noting that shareholder primacy is a weak accountability mechanism for for-profit corporations). But see George W. Dent, Jr., Corporate Governance without Shareholders: A Cautionary Lesson from Non-Profit Organizations, 39 Del. J. Corp. L. 93, 114-16 (2014) (arguing that shareholder primacy is the foundational accountability mechanism for good corporate governance).

(53) Denise Ping Lee, Note, The Business Judgment Rule: Should it Protect Nonprofit Directors?, 103 Colum. L. Rev. 925, 929 (2003).

ernance in the U.S. nonprofit sector has been often criticized for its short comings(54).

Professor George Dent argues that nonprofit corporate governance is less effective than for-profit corporate governance in part because nonprofit directors do not know what directorship entails, and, as a result, the CEO, not directors, governs the nonprofit with little oversight(55). Nonprofit directors often have insufficient information to make informed decisions and provide executive oversight and evaluation. The existence of shareholders in a for-profit business is a means to the ends of information generation because for-profit corporations have to produce regular annual reports and provide disclosures to shareholders. Professor Dent argues that shareholder governance works particularly well because shareholders have a variety of enforcement tools at their disposal(56). Regardless of how unlikely

(54) See Faith Rivers James, Nonprofit Pluralism and the Public Trust: Constructing a Transparent, Accountable, and Culturally Competent Board Governance Paradigm, 9 Berkeley Bus. L.J. 94, 96 (2012) (noting that poor governance has contributed to the perception that the independent sector should improve the governance model); James, supra note 53, at 95 (noting that nonprofits still operate in an independent manner, "outside of heavy government control"); see also Thomas Lee Hazen & Lisa Love Hazen, Punctilios and Nonprofit Corporate Governance — A Comprehensive Look at Nonprofit Directors' Fiduciary Duties, 14 U. Pa. J. Bus. L. 347, 351 (2012) ("There is no single unified body of law that applies to charities and other nonprofits. Instead, the law in this area is fragmented . . . . Instead, the law regulating nonprofit and charitable governance remains an amalgam of trust law, corporate law, and tax law.").

(55) See George W. Dent, Jr., Corporate Governance Without Shareholders: A Cautionary Lesson From Non-Profit Organizations, 39 Del. J. Corp. L. 93, 99–100 (2014) (discussing why nonprofit boards frequently do not govern); see also Evelyn Brody, The Board of Nonprofit Organizations: Puzzling Through the Gaps Between Law and Practice, 76 Fordham L. Rev. 521, 534 (2007) ("In the case of nonprofits, some observers believe that the absence of shareholders emphasizes an inappropriate reversal of the power relationship between the board and the officers.").

(56) See Dent, supra note 54, at 108 (describing how shareholders use the threat of a policy resolution for shareholder vote to "generate [] publicity that criticizes management.").

shareholders are to use these enforcement tools[57], Professor Dent argues that the possibility of litigation serves as an effective accountability mechanism[58].

Many of the suggested measures for improving nonprofit boards also serve as critiques of for-profit boards. The common recommendations for nonprofit boards include the carefully planned division of authority[59], clear definition of organizational goals, and standards for review of executive performance[60]. Implementing these suggestions would depend on the volition of the directors, as there is no external force to compel their adoption[61]. Perhaps the most significant agency for influencing nonprofit corporate governance in the United States is the Internal Revenue Service (IRS), which determines at the federal level whether a nonprofit continues to qualify for tax-exempt status. Through the application for federal recognition of tax-exemption and the annual income tax reporting requirement, the IRS "attempts to reduce the potential for conflict of interest transactions by requiring disclosure of insider relationships, questioning relationships, and

(57) See Edward B. Rock & Michael L. Wachter, Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation, 149 U. Pa. L. Rev. 1619, 1644 (2001) (explaining that shareholder wealth maximization is a non-legally enforceable rule because of the judiciary's hesitation to question business judgments); see also Stephen M. Bainbridge, Director Primacy: The Means and Ends of Corporate Governance, 97 Nw. U. L. Rev., 547, 573 (2003) ("Shareholders exercise virtually no control over either day-to-day operations or long-term policy."); Lin, supra note 34, at 367 ("[M]any institutional shareholders lack proper economic incentives and organizing mechanisms to meaningfully engage in shareholder activism").

(58) See Dent, supra note 54, at 108-09 ("The outside directors may not feel much of a personal stake in these battles; they may be unwilling to wage a public campaign against the shareholders just to preserve the privileges of the managers").

(59) John Tropman & Thomas J. Harvey, Nonprofit Governance: The Why, What, and How of Nonprofit Boardship 7–9 (2009).

(60) Dennis D. Pointer & James E. Orlikoff, The High-Performance Board: Principles of Nonprofit Organization Governance 23–79 (2002).

(61) See Nicole Gilkeson, For-Profit Scandal in the Nonprofit World: Should States Force Sarbanes-Oxley Provisions Onto Nonprofit Corporations?, 95 Geo. L.J. 831, 852–53 (2007) (noting that under-enforcement of nonprofit regulation in California will likely continue due to the limited resources of the California Attorney General).

agreements that might result in excess benefit transactions, and explicitly suggesting that organizational bylaws include a comprehensive conflict of interest provision"[62]). While helpful, outside of these limited circumstances, nonprofit social enterprises are not counseled on how to balance and manage competing interests within a sustainable business. In short, there are few tools for monitoring and supporting nonprofits governance[63]. Thus, nonprofit social enterprises would greatly benefit from a mechanism by which to document and refine with oversight of the corporation.

C. The Rise of Hybrid-Entity Legislation

U.S. laws to support the growth of the social enterprise sector have focused almost exclusively on developing new legal entity forms. Starting in 2007[64], jurisdictions enacted legislation on new legal forms to enable founders of social enterprises to explicitly claim social mission and profit-making in a single entity[65]. To date these new legal entities include the low-profit limited liability company (or "L3C")[66], the benefit

62() James, supra note 53, at 100.

(63) Hazen & Hazen, supra note 53, at 361.

(64) For example, L3C became an official entity in Vermont on April 30, 2008. Vt. Stat. Ann. tit. 11, § 3001 (2008).

(65) See Reiser, supra note 3, at 685 ("One of the most basic things social entrepreneurs seek in a specialized legal form is safe space to declare that their entities are committed to a new and different goal — pursuing both profit and social good.").

(66) The L3C retain the flexibility and protections of the standard LLC while integrating the Internal Revenue Code definitions of "charitable" and "educational" purpose. Dana Thompson, L3Cs an Innovative Choice for Urban Entrepreneurs and Urban Revitalization, 2 Am. U. Bus. L. Rev. 115, 146 (2012). If the L3C ceases to comply with the Internal Revenue Code definitions, it automatically converts into a traditional LLC. Id. at 150; see also Reiser, supra note 3, at 690 ("The L3C adds charitable or education purpose requirements to an otherwise standard LLC framework.").

LLC[67], the benefit corporation (or "b-corp")[68], and the social purpose corporation[69]. These hybrid-entity statutes are the first new corporate forms with a national scope to be introduced into American corporate law since the limited liability partnership in 1991[70]. Generally, these hybrid entities have been met with excitement[71] and embraced by various segments within both the business and legal communities[72]. But

(67) The benefit LLC relies on the traditional LLC framework but requires the entity to pursue a general public benefit that is evaluated by a third-party standard. Md. Code Ann., Corps. & Ass›ns §§ 4A-1101 to -1108 (LexisNexis 2013), amended by 2013 Md. Laws. ch. 527 (S.B. 697) (codifying benefit LLCs); OR Rev. Stat. §§ 60.750-66.770 (2014). Oregon is one of a few states that provides for the benefit LLCs, the greater number of benefit LLCs over benefit corporations in Oregon suggest that the LLC format often works better for small businesses. See Active Benefit Companies, State of Oregon, https://data.oregon.gov/Business/Active-Benefit-Companies/baig-8b9x (last visited Apr. 15, 2016) (listing the active benefit corporations in the State of Oregon).

(68) By statute the b-corp must pursue an articulated general public benefit, defined as "a material positive impact on society and the environment, . . . assessed against a third-party standard . . . ." Model Benefit Corp. Leg. § 102 (B Lab Jan. 13, 2016). A b-corp is not synonymous with a company that has received certification from the organization B Lab, although both are called "benefit corporations." To be certified by B Lab as a benefit corporation an entity does not have to be incorporated or be a b-corp under state statute.

(69) See Alexandra Leavy, Necessity Is the Mother of Invention: A Renewed Call to Engage the Sec on Social Disclosure, 2014 Colum. Bus. L. Rev. 463, 482-83 (2014) (describing the requirements of the Social Purpose Corporation).

(70) See Alysa Christmas Rollock, Professional Responsibility and Organization of the Family Business: The Lawyer As Intermediary, 73 Ind. L.J. 567, 587 n.2 (1998) (noting that Texas was the first state to enact a statute allowing limited liability partnerships in 1991); Cf. Justin Blount & Patricia Nunley, Social Enterprise, Corporate Objectives, and the Corporate Governance Narrative, 52 Am. Bus. L.J. 201, 201 (2015) [hereinafter Corporate Objectives] ("[A] more recent corporate entity development is the rise of the 'social enterprise'").

(71) Kyle Westaway, Something Republicans and Democrats Can Agree On: Social Entrepreneurship, Stan. Soc. Innovation Rev. (Apr. 17, 2012), http://ssir.org/articles/entry/something_republicans_and_democrats_can_agree_on_social_entrepreneurship.

(72) Mike Isaac & David Gelles, 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; Heerad Sabeti, The For-Benefit Enterprise, Harv. Bus. Rev. (Nov. 2011), https://hbr.org/2011/11/the-for-benefit-enterprise. Embracement by these communities will help these hybrid entities succeed. Cf.Derrick Bell, Silent Covenants 64-69 (2004) (cautioning that interest-convergence, the apparent reconciliation of competing values, among the disenfranchised and empowered populations that lead to possibly effective remedies will not ultimately achieve promised structural change because these results will be abrogated at the point they threaten the empowered); Derrick Bell, Brown vs. Board of Education and the Interest Convergence Dilemma, 93 Harv. L. Rev. 518, 518 (1980) (describing how the divergence of interests makes integration less feasible).

scholars have also documented the potential dangers and unintended consequences of segregating social enterprises into separate legal entities, namely succumbing to the theory that traditional for-profit entities require directors to prioritize profit maximization in their corporate decision-making(73).

Although currently most social enterprises are not formed as a hybrid-entity(74), the hybrid entities still serve an important and growing segment of the social enterprise sector. Hybrid entities are visible representatives for the recent rise in social enterprises even if they are a relatively small percentage of social enterprises. Hybrid entities also help create the counter-norm for what it means to be a social enter-

(73) Blount & Nunley, supra note 18, at 312 ("The danger of creating new entity forms is that in the long term, limiting social enterprise to certain entity forms may result in marginalizing the value creation concepts of social enterprise to a subset of business entities, which has the potential to limit social enterprise's impact on society. The creation of new hybrid entities also tacitly gives credence to the widely held but inaccurate view that standard, for-profit corporations can legally justify misconduct or unethical decision-making as the relentless pursuit of profits required by corporate law."); Joseph W. Yockey, Does Social Enterprise Law Matter?, 66 Ala. L. Rev. 767, 800 (2015); see also Joan Heminway, Random Thoughts on the Beneficiaries of Corporate Board Decision Making, Business Law Prof Blog (June 10, 2015), http://lawprofessors.typepad.com/business_law/2015/06/random-thoughts-on-the-beneficiaries-of-corporate-board-decision-making.html#more. But see Model Benefit Corp. Leg. § 101(b) (B Lab Jan. 13, 2016) ("Application of business corporation law generally. — The existence of a provision of this [chapter] shall not of itself create an implication that a contrary or different rule of law is applicable to a business corporation that is not a benefit corporation. This [chapter] shall not affect a statute or rule of law that is applicable to a business corporation that is not a benefit corporation." (emphasis omitted)).

(74) Exact numbers and percentages are hard to pin down because of the limited empirical data on the social enterprise sector. See John Anner, Jessica Alba and the Impact of Social Enterprise, Stan. Soc. Innovation Rev. (Sept. 26, 2014), http://ssir.org/articles/entry/jessica_alba_and_the_impact_of_social_enterprise (noting the "decided lack" of empirical data on social enterprises). "There are 1008 companies that are certified B corporations." People Using Business as a Force for Good, B Lab, https://www.bcorporation.net/b-the-change (last visited May 9, 2016). There is also the Social Enterprise Database with approximately 1,800 social enterprises listed. Social Enterprise Database, Give to Get Jobs: for-profit jobs that give back, http://givetogetjobs.com/social-enterprise.php?keywords=&zip=&zip_radius=&x=69&y=22](last visited May 9, 2016).

prise in the public perception because they are off-the-shelf legal forms that contemplate profit returns and social mission.

Hybrid entities allow the emerging sector to better define which businesses fit the definition of a social enterprise. The legal structures of hybrid entities would not make sense for traditional for-profit businesses or charity-focused nonprofits that do not have a substantial revenue stream because hybrid entities do not come with any more favorable tax treatment(75). Thus, it is a fair assertion that, for all practical purposes, all hybrid entities are social enterprises, even though the community of social enterprises reaches beyond hybrid-entity forms. The argument for enacting hybrid-entity legislation is that traditional for-profit and nonprofit legal entities frustrate the potential of a social enterprise, forcing "a founder to choose between two equally inadequate categories"(76). Regardless of their legal necessity(77), one cannot deny the important normative discourse that hybrid-entity legislation has sparked about the role for-profit companies ought to play within society(78).

(75) See Lloyd Hitoshi Mayer & Joseph R. Ganahl, Taxing Social Enterprise, 66 Stan. L. Rev. 387, 421 (2014) ("[T]he creation of these new hybrids does not create any new tax categories or treatments. The different types of hybrid corporations . . . are treated the same as more typical state law corporations.").

(76) Reiser, supra note 3, at 683. See also White Paper, supra note 8, at 1 ("The sustainable business movement, impact investing and social enterprise sectors are developing rapidly but are constrained by an outdated legal framework that is not equipped to accommodate for-profit entities whose social benefit purpose is central to their existence.").

(77) See, Blount & Nunley supra note 69, at 223 (arguing that hybrid entities are "an overly complex solution to the relatively basic core difference between a social enterprise and a traditional for-profit business — a different corporate objective. By focusing on this basic distinction, a much simpler, but more effective, approach to reform can be devised that addresses the heart of the problem." (footnote omitted)).

(78) See TEDx, TEDxPhilly – Jay Coen Gilbert – On Better Businesses, YouTube (Dec. 1, 2010), https://www.youtube.com/watch?v=mGnz-w9p5FU, at 10:10("Right now our capitalist system is not serving society; it's serving shareholders. And we can't run around expecting different outcomes until we change the rules of the game.").

i. Fiduciary Duties Restrict Social Mission Considerations

The principal argument for hybrid-entity legislation is that fiduciary duties of traditional for-profit entities, particularly a for-profit corporation(79), force the directors and officers to prioritize owner maximization of profit, with no carve out to preserve the social mission of the entity(80).

Thus, it is often espoused that the fiduciary duty to maximize profits prevents or, at least, limits the ability of directors and officers to consider social goals at the risk of reducing profits(81). But as other scholars have noted, U.S. corporate law does not require that shareholder maximization be the sole objective of a for-profit entity(82). Courts

(79) See Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) ("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 . . . and does not extend to . . . other purposes."); Principles of Corp. Governance § 2.01 (1994) ("a corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain."). See also Thomas J. Billitteri, Mixing Mission and Business: Does Social Enterprise Need a New Legal Approach? 14 (2007), https://www.aspeninstitute.org/sites/default/files/content/docs/pubs/New_Legal_Forms_Report_FINAL.pdf ("[T]raditional corporations have a duty to maximize financial returns for shareholders, broadening that mandate to include a duty to a social mission could require revisions in state corporate law."). But see Stop Teaching Dodge, supra note 17, at 165-68 (explaining that the Michigan Supreme Court's "offhand remark" regarding the powers of directors is "judicial dicta, quite unnecessary to reach the Court's desired result" because the case deals "with controlling shareholders' duties not to oppress minority shareholders" not directors' fiduciary duties as it is often relied on).

(80) See Milton Friedman, The Social Responsibility of Business Is to Increase Its Profits, N.Y.Times Mag., Sept. 13, 1970, at 33, http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html ("In a free-enterprise, private-property system, a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society").

(81) See Blount & Nunley, supra note 18, at 304-06 (recognizing and rejecting the shareholder primacy argument for which many commentators argue).

(82) See, e.g., Virginia Harper Ho, "Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder Stakeholder Divide, 36 J. Corp. L. 59, 74 (2010) ("Indeed, neither case law nor corporate statutes impose on directors and officers an obligation to maximize shareholder wealth. Even in Delaware, whose=

routinely protect the decisions of directors under the judicial doctrine called the "business judgment rule"(83) as long as any rational business purpose could have possible future benefit to the shareholders(84). As Professor Lynn Stout argues, there is "judicial eagerness to protect directors" such that even when they fail to offer long-run shareholder benefits, the court will often make the connection for the directors(85). There are few legal scholars who would not agree that, apart from

=corporate code is less receptive to stakeholder interests than many other state corporate statutes, there is no requirement that management decision-making maximize shareholder wealth or even be justified solely in terms of shareholder interests."); John A. Pearce II, The Rights of Shareholders in Authorizing Corporate Philanthropy, 60 Vill. L. Rev. 251, 251 (2015) ("Despite any misimpressions to the contrary, corporate statutes do not dictate that directors have a singular duty to pursue profit-maximizing activities."); Stop Teaching Dodge, supra note 17, at 172 ("[T]he notion that corporate law as a positive matter 'requires' companies to maximize shareholder wealth turns out to be spurious."); Yockey, supra note 72, at 770 ("Proponents miss the mark when they argue that benefit corporation laws are necessary to enable firms to put social goals on par with profits. Indeed, corporate law already provides entrepreneurs with much of what the benefit corporation form claims to offer."); see generally, Lisa M. Fairfax, Doing Well While Doing Good: Reassessing the Scope of Directors' Fiduciary Obligations in For-Profit Corporations with Non-Shareholder Beneficiaries, 59 Wash. & Lee L. Rev. 409 (2002) (discussing directors' fiduciary duties in various contexts as the law exists and is changing).

(83) See Int›l Ins. Co. v. Johns, 874 F.2d 1447, 1458 (11th Cir. 1989) (describing the judicial deference given the board as the business judgment rule); Smith v. Van Gorkam, 488 A.2d 858, 872 (Del. 1985) (explaining that the "business judgment rule exists to protect and promote the full and free exercise of the managerial power granted to Delaware directors" and thus rest on the "fundamental principle . . . that the business and affairs of a Delaware corporation are managed by or under its board of directors"); Principles of Corp. Governance § 4.01 (1994) (outlining the duty of care required by directors and officers to a corporation, subject to the business judgment rule); Douglas M. Branson, The Rule That Isn›t A Rule - the Business Judgment Rule, 36 Val. U. L. Rev. 631, 632 (2002)(summarizing the development, role, and applicability of the business judgment rule for modern directors).

(84) Unitrin, Inc. v. Am. Gen. Corp, 651 A.2d 1361, 1373 (Del. 1995) ("[T]he business judgment rule shields directors from personal liability if, upon review, the court concludes the directors' decision can be attributed to any rational business purpose."); see also Lin, supra note 34 at 369 ("Courts historically have shown great procedural and substantive deference to the decisions and judgments of corporate executives").

(85) Stop Teaching Dodge, supra note 17 at 171.

limited defensive(86) and change of control decisions(87), "the business judgment rule will shelter corporate directors from liability for virtually all operational decisions"(88).

Although U.S. corporate law does not require directors and executives to prioritize shareholder maximization in all decisions(89), the widely-held, public perception is that profit objectives dominate traditional for-profit companies90. Those profit maximizing objectives, the

(86) Directors are provided significantly less deference when the courts review decisions undertaken defending takeover attempts. See Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954-55 (Del. 1985) (holding that directors have the benefit of the business judgment rule only if the directors can first demonstrate a legitimate threat to a corporate policy and that their response was reasonable given the threat posed); eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 35 (Del. Ch. 2010) ("Directors of a for-profit Delaware corporation cannot deploy a [corporate mission] to defend a business strategy that openly eschews stockholder wealth maximization – at least not consistently with the directors' fiduciary duties under Delaware law").

(87) See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (finding that when the company is broken up and shareholders are forced to sell their shares, the board has a duty to maximize shareholder wealth by getting the highest possible price for the shares). But see Lynn A. Stout, Bad and Not-So-Bad Arguments for Shareholder Primacy, 75 S.Cal. L. Rev. 1189, 1204 (2002) (providing examples of the Delaware Supreme Court systematically cutting back the situation where Revlon applies).

(88) Reiser, supra note 3, at 687.

(89) See Page & Katz, supra note 31, at 231-32 (discussing how profit maximization may be the norm, but that norm is likely unenforceable in courts that regularly grant boards of directors deference under the business judgment rule).

(90) See Lynn A. Stout, The Shareholder Value Myth, Harv. L. Sch. F. on Corp. Governance & Fin. Reg. (June 26, 2012), http://corpgov.law.harvard.edu/2012/06/26/the-shareholder-value-myth/ ("Shareholder-value thinking dominates the business world today. Professors, policymakers, and business leaders routinely chant the mantras that public companies 'belong' to their shareholders; that the proper goal of corporate governance is to maximize shareholder wealth; and that shareholder wealth is best measured by share price (meaning share price today, not share price next year or next decade)"). See also Corporate Objectives, supra note 69, at 233–34 ("Because of the contractual uniformity around the default corporate objective of shareholder wealth maximization, the public perception of the rigidity of the for-profit corporate does not match the reality of flexibility allowed by law. This perception had led to an inaccurate but honestly felt need from social entrepreneurs for new business entities."); Stop Teaching Dodge, supra note 17, at 164 (noting that the general public pays little attention to the scholarly debate regarding the legal purpose of the corporation).

perception contends, will inevitably compromise any social goals in the company's decision-making. Hybrid entities, thus, are a powerful step towards disrupting the profit maximization norm within for-profit companies(91). The hybrid-entity forms allow founders, directors, and officers to preempt the common conception that profit objectives will eventually govern business decision-making by explicitly designating the dual social mission commitment of the company(92). The hybrid-entity form also establishes a clear expectation for owners(93) about the direction of the company that should mitigate owner concerns down the line. Traditional for-profit legal entities may provide the executives and directors with the legal right to consider non-shareholder stakeholders and social mission, but the hybrid entities typically mandate a requirement for executives and directors to consider the mission(94). Thus, the argument goes, hybrid entities remove speculation and position the social mission in a prominent place within the company decision-making.

(91) See, e.g., Press Release, Ello, PBC, A Better Way (Oct. 20, 2014), https://ello.co/downloads/ello-pbc.pdf ("Ello exists for your benefit, not just to make money."); Jonathan Shieber, Ello Raises $5.5 Million, Legally Files as Public Benefit Corp. Meaning No Ads Ever, Techcrunch (Oct. 23, 2014), http://techcrunch.com/2014/10/23/ello-raises-5-5-million-legally-files-as-public-benefit-corp-meaning-no-ads-ever/ (discussing Ello's ability to raise significant venture capital funds despite rejecting traditional revenue streams based on ads and selling user data).

(92) Reiser, supra note 3, at 684 ("Rather than hiding these dual aspirations [of profit-making and social mission] behind a veneer of 'business as usual' or under the halo of selflessness, these founders want to claim their social enterprise's blended missions explicitly").

(93) See Celia R. Taylor, Berle and Social Businesses: A Consideration, 34 Seattle U. L. Rev. 1501, 1510 (2011) (explaining that charter documents are contracts "that provide the discipline and incentives that corporations expect from fiduciaries"); see also Principles of Corporate Governance: Analysis and Recommendations § 2.01 n.6 (Am. Law. Inst. 1994)("[T]here is little doubt that [social mission decisions] would normally be permissible if agreed to by all the shareholders. Such an agreement might be embodied in the certificate of incorporation, or not.").

(94) See, e.g., Model Benefit Corp. Legis. § 301(a) (B Lab Jan. 13, 2016) ("[D]irectors . . . shall consider the effects of any action or inaction upon . . . the ability of the benefit corporation to accomplish its general public benefit purpose and any specific public benefit purpose.").

ii. Nonprofit Structure Restricts Revenue Generation

On the other hand, the argument is that the nonprofit legal form(95) is also insufficient for social enterprises because it does not provide the same potential for growth and retaining talent as for-profit legal entities. While all directors and officers must maintain the social mission of the nonprofit(96), the inability(97) to raise capital through equity investment(98) frustrates the company's ability to scale and attract competitive talent. Retaining talent over the life of the nonprofit is also a serious barrier because a nonprofit business cannot provide equity incentives to its employees unlike lean, for-profit start-ups. The limit on commercial activity directly related to the tax-exempt purpose of most nonprofits imposes yet another obstacle to growth. The tax-exempt status of the nonprofit social enterprise means that executives cannot use all possible business strategies to support the business that would otherwise be available if the entity was for-profit(99). "The hope is that the hybrid nature of a social enterprise will allow firms to bypass the structural and financing obstacles that confront . . . nonprofits so they can address social issues in innovative ways"(100).

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(95) Although nonprofits can be formed as corporations, charitable trusts, or LLCs, this Article recognizes that most nonprofit entities are formed as corporations and, thus, this article will use nonprofit and nonprofit corporation interchangeably.

(96) See Harvey J. Goldschmid, The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems, and Proposed Reforms, 23 J. Corp. L. 631, 641 (1998) (noting that nonprofit directors should be "principally concerned with the effective performance of their nonprofit's mission").

(97) See Clara Miller, The Equity Capital Gap, Stan. Soc. Innovation Rev. 41, 42 (Summer 2008), http://www.socialimpactexchange.org/sites/www.socialimpactexchange.org/files/publications/equity_capital_gap.pdf (highlighting the difference between for-profit corporations' ability to solicit equity capital, and nonprofits restrictions in doing so because individuals are prohibited from owning and distributing profits in a nonprofit corporation).

(98) See Henry B. Hansmann, The Role of Nonprofit Enterprise, 89 Yale L.J. 835, 838 (1980) ("A nonprofit organization is, in essence, an organization that is barred from distributing its net earnings, if any, to individuals who exercise control over it, such as members, officers, directors, or trustees.").

(99) See Reiser, supra note 3, at 682, 685-89 (describing the assertion that "social enterprises can do more good for more people than traditional nonprofits because their financing and business methods make them more efficient, effective, and scalable").

(100) Yockey, supra note 72, at 773.

iii. The Current Impact of Hybrid Entities

While approximately three-quarters of U.S. jurisdictions now provide for some hybrid-entity form(101), a limited number of social enterprises have adopted these new legal entities(102). Different hybrid entities have different potential reasons why founders and managers may not be selecting them(103). Some content that hybrid entities potentially generate more ambiguities and uncertainty than solutions(104). There is also the issue that corporate lawyers, who social entrepreneurs consult with for entity formation counsel, are not generally comfortable advising their clients to experiment with these new entity forms(105).

(101) See Brewer, Minnigh & Wexler, Social Enterprise by Non-Profits and Hybrid Organizations, Portfolio #489, Social Enterprise Hybrids Across the U.S., Bloomberg BNA (2014), http://socentlaw.com/wp-content/uploads/2015/03/Social-Enterprise-Hybrids-Map-Mar-2015.pdf (providing a map showing various hybrid-entity forms as they do or do not exist in the United States).

(102) See Mayer & Ganahl, supra note 74, at 389 (estimating that over "1000 of these new entities now exist").

(103) See Thompson, supra note 65, at 145-50 (discussing the reluctance of foundations to make program-related investments (PRIs) to L3Cs because it may be unclear whether it constitutes a proper PRI or improper "jeopardizing investment" for tax purposes, and the "low-profit" designation of L3Cs deters other types of investment). Program-related investments are tax-exempt investments, often low-interest loans or investments with an anticipated low return on investments, which private foundations make in nonprofit and social enterprise programs that further the tax-exempt mission of the private foundation. See Mark J. Loewenstein, Benefit Corporations: A Challenge in Corporate Governance, 68 Bus. Law. 1007, 1027-34 (2013) (highlighting the numerous conflicts that arise when benefit corporation directors must make a decision, requiring directors to weigh many factors and consider multiple constituents, which leads to inferior decision-making practices); Murray, supra note 2, at 27 (criticizing the lack of guidance for directors in carrying out their fiduciary duties).

(104) See Applying Traditional Corporate Law, supra note 14, at 223 (describing the "two masters" issue for social enterprises as enterprises having a profit motive, but with social or environmental missions still at their core); Laura A. Constanzo et al., Dual-Mission Management in Social Entrepreneurship: Qualitative Evidence from Social Firms in the United Kingdom, 52 J.Small Bus. Mgmt. 655, 659–60 (2014) (discussing the divisive nature of some business corporation structures due to competing interests).

(105) See J. Haskell Murray, An Early Report on Benefit Reports, 118 W.Va. L. Rev. 25, 43 (2015) [hereinafter An Early Report on Benefit Reports] (noting the relative novelty of the benefit corporate form to some attorneys, and the misinformation among companies and legal sources when discussing benefit corporations); Stop Teaching Dodge, supra note 17, at 174 (noting that it takes "a certain degree of boldness to depart from [corporate law] tradition").

Another barrier to social enterprises incorporating as hybrid-corporations is the perceived hardship in the benefit reporting requirement(106). Hybrid-corporation statutes have, for the first time, included regular reporting requirements that are regulatory in nature, requiring social enterprises to measure impact and provide transparency about the company's social mission(107). Traditional U.S. corporate statutes do not require similar public transparency. Corporate lawyers and companies may be hesitant about the potential expense and effort of regularly producing these benefit reports. But as explored above, selecting a traditional for-profit or nonprofit entity can lead to deficiencies in corporate governance and, thus, jeopardizes the sustainability of the social enterprise. In fact, the legal entity selected for the social enterprise may not matter as long as the company has the appropriate corporate governance structure in place. That said, the benefit reporting required of hybrid-corporations may be an incredibly helpful tool in facilitating how the social enterprise sector can develop and in sharing corporate governance platforms for the profit and mission. The sector needs to understand the value of the benefit reporting requirements contained in the hybrid-corporation statutes.

II. TOWARDS SOCIAL ENTERPRISE GOVERNANCE

Common mechanisms for enforcing and promoting good corporate governance are not readily applicable to the social enterprise sector. Most social enterprises are either small for-profits not subject to federal regulation, or nonprofits with limited government oversight after entity formation. As a result, there is a lack of corporate governance models that accommodate the needs and complexity of the social enterprise ethos. A self-regulatory reporting tool would not only strengthen an individual social enterprise's governance practices, but the dissemination of these benefit reports would help establish governance norms tailored to the social enterprise sector. Benefit reporting requirements can provide a mechanism for social enterprises to increase their corpo-

(106) For examples of various benefit report requirements, see Model Benefit Corp. Legis. § 402(a)(1)-(2) (B Labs Jan. 13, 2016); Del. Code Ann. tit. 8, § 366(b) (2015); and Cal. Corp. Code § 3501 (2014).

(107) See Yockey, supra note 72, at 799 (discussing the unique public/private characteristics of benefit corporation enabling laws).

rate governance and expand their competitive advantage in the market place. An important role for corporate lawyers is to advise social enterprises on the positive effects that benefit reporting could have as a governance mechanism and to draft the reports with the company. Because social enterprises can exists in a variety of legal entities, there are a variety of corporate governance models that can be developed. Legal counseling needs to explain why benefit reporting, as a foundational aspect of any social enterprise regardless of the legal form, promotes sustainability. Corporate lawyers should refine their counsel on benefit reporting and social enterprise governance accordingly.

A. Benefit Reporting as Governance Mechanisms

The quasi-regulatory characteristics of the hybrid-corporation statutes make them unique among the corpus of U.S. corporate law(108). In developing hybrid-corporation statutes, the state's primary role has been to facilitate and promote collaboration among social enterprise practitioners to, among other things, develop governance norms. Not only could the benefit reporting requirements lead to helpful governance practices for hybrid corporations, but these statutory frameworks could also establish the de facto market forces that influence and maintain good corporate governance in the social enterprise sector.

i. Benefit Reporting Overview

State legislatures, at the behest of B-Lab pioneers(109), have innovated corporate statutory laws by creating hybrid-corporations such as the benefit corporation and the social purpose corporation. Additionally, they have also, for the first time, included regular reporting requirements that are regulatory in nature and resemble the federal securities reporting requirements(110). The reporting requirements apply to the hybrid-entity, regardless of the company's size or number of shareholders. These "benefit reports" requirements vary from state to state in aspects such as how often they need to be produced and distributed to the stakeholders, the necessary components of the reports, and the

(108) Id. at 799.

(109) White Paper, supra note 8, at 5.

(110) Yockey, supra note 72, at 799.

standards used to measure the reports. Despite these differences, the benefit reports share more in common than not as the primary objectives of all benefit reports is to measure impact and provide transparency about the company's social mission.

B. Improving Social Enterprise Governance through Reporting

Social enterprises need practitioner-informed models for good corporate governance that allow them to balance their social mission and commercial activities. Good governance systems engender accountability, communication, commitment, and justice(111). Currently, the U.S. social enterprise sector does not have external oversight or market focuses that adequately encourage the development and refinement of best practices for social enterprise governance.

Corporate lawyers can fill the gap between state facilitation of transform norms and practitioner expertise to develop governance models. Corporate lawyers understand the traditional corporate governance best practices and can play a vital role in implementing and designing new governance models unique to the social enterprise sector. Transactional lawyers have demonstrated that they "have the potential to add value in no small part by translating their clients' and the government's policy goals into the practical mechanisms of private ordering"112. Corporate lawyers also are the conduits through which information within a sector moves between firms to help share lessons learned through experimentation. For corporate lawyers to be effective, they should understand benefit reporting requirements as a mechanism for testing and memorializing new governance practices. Corporate lawyers would be instrumental in helping not only hybrid corporations in understanding benefit reports as a governance mechanism, but also in counseling all social enterprise entity forms on adopting benefit reporting as a self-regulatory mechanism.

Hybrid corporations constitute only a portion of the social enterprise sector. For reporting to be transformative to the sector, all social enter-

(111) See also Douglas Litowitz, The Corporation as God, 30 J. Corp. L. 501, 526 (2005) ("The profit motive has always favored secrecy, but justice requires transparency.").

(112) Nestor M. Davidson, Values and Value Creation in Public-Private Transactions, 95 Iowa L. Rev. 937, 943 (2009).

prises, regardless of entity form, should incorporate regular reporting as a fundamental component of the entity. If benefit reporting is encouraged and informed by social enterprise practitioners and corporate lawyers, then it also has the potential to become an industry standard that impact investors can rely on for helpful information about the potential success of the social enterprise. This would further entrench the practice into the sector. Once entrenched, benefit reporting will likely also be relied on by the sector and other stakeholders for informing governance practices in new and emerging social enterprises.

Although empirical data establishes a relationship between the lack of corporate governance and poor financial performance, good corporate governance is not a panacea for business success(113). Nonetheless, it stands to reason that the process of reflection through regular disclosures, with appropriate company action based on the information discovered through the reporting process, facilitates the long-term sustainability of the company(114).

i. Criticisms of Mandatory Reporting Less Applicable to Benefit Reports

While annual reporting is a standard practice for public companies, regulatory reporting has not achieved the full impact of its potential to

(113) Ben Emukufia Akpoyomare Oghojafor et al., Poor Corporate Governance and Its Consequences on the Nigerian Banking Sector, 5 Serb. J. Mgmt. 243, 247 (2010). Generally, the link between good corporate governance and economic returns is thinly supported by empirical evidence. See e.g., Duc Hong Vo & Tri Minh Nguyen, The Impact of Corporate Governance on Firm Performance: Empirical Study in Vietnam, 6 Int'l, J. Econ. & Fin. 1 (2014); Tek Lama, Empirical Evidence on the Link Between Compliance with Governance of Best Practice and Firms' Operating Results, 6 Austl. Acct. Bus. & Fin. J. 63 (2012). But see Mark Hirschey et al., Corporate Governance and Firm Performance 85 (1st ed. 2009) ("Despite repeated attempts by academics to show an irrefutable link between [corporate governance and shareholder returns], the results are largely inconclusive. Some empirical studies find important linkages between corporate governance and financial performance measure. Yet, other research . . . reports mixed and often weak results").

(114) See Erica Beecher-Monas, Corporate Governance in the Wake of Enron: An Examination of the Audit Committee Solution to Corporate Fraud, 55 Admin. L. Rev. 357, 380-87 (2003) (discussing how most directors unconsciously make self-interested decisions, tend to be over-confident, and operate on cognitive dissonance).

improve corporate governance(115). There are limitations on what regular reporting can be expected to achieve. The following sections outline two of the major criticisms of mandatory, regulatory reporting requirements. This Article argues, however, that much of this criticism is less applicable to a voluntary benefit reporting process for social enterprises.

1. Information overloads not applicable to most social enterprises

One criticism is that companies simply focus on fulfilling the duty of disclosing rather than reporting information of any real substance. In other words, although public companies may disclose the required information, too much is produced to be adequately scrutinized or questioned. Moreover, large companies with substantial amounts of information thus have the ability to bury potentially questionable facts or accounting practices in intentionally large disclosures that no stakeholders have the time or energy to careful sift through(116). The quantity and "complexity of many [mandatory] disclosures, the innumeracy and illiteracy of many readers, and the burden of accumulating amounts of disclosure . . . [all] limit the effectiveness of [reporting requirements]"(117).

(115) Omri Ben-Shahar & Carl E. Schneider, The Failure of Mandated Disclosure, 159 U.Pa. L. Rev. 647, 679 (2011) ("Mandated disclosure is not doomed to fail, but it rarely succeeds . . . . Rarely can each actor accomplish all that is needed, and therefore mandated disclosures rarely work as planned").

(116) See Celia R. Taylor, Drowning in Disclosure: The Overburdening of Securities & Exchange Commission, 8 Va. L. & Bus. Rev. 85, 87 (2014) (referring to the SEC as "a disclosure dumping ground"); see also Troy A. Paredes, Blinded by the Light: Information Overload and Its Consequences for Securities Regulation, 81 Wash. U. L. Q. 417, 433 (2003) (discussing how disclosures will not protect investors or result in better decisions if investors cannot process all of the information, which can be too long, complex or buried within large disclosures).

(117) An Early Report on Benefit Reports, supra note 104, at 37; see also Lin, supra note 34, at 367-68 (adding that "the economic incentives do not properly encourage most individual investors to educate themselves by reading securities disclosures . . . . Many institutional investors, for instance, are transient investors focused on quarterly or annual returns for their portfolio of numerous investments. Therefore it makes little sense for them to engage in prolonged shareholder activism and monitoring, where they bear much of the costs of the fight, and their competitors can free-ride the benefits of their efforts."); Arthur Levitt, Take on the Street: How to Flight for your Financial Future 44 (2003) (explaining his frustration reading mutual fund prospectuses and coming to the conclusion they were "written in impenetrable legalese, by and for securities lawyers").

The ability for a board, and to a greater extent the federal government, to substantively monitor risks and provide oversight through a reporting process necessarily diminishes when applied to multinational institutions(118). However, there are few social enterprises currently in existence that compare in size or magnitude to the multinational institutions that have failed despite being subject to extensive reporting requirements(119). The vast majority of social enterprises tend to be smaller companies that, even with growth potential, are likely to remain privately-held companies. Thus, the quantity and complexity of information to be disclosed and reported would often be more manageable for social enterprises.

2. Increased access to justice minimizes the financial costs

Another major criticism of reporting requirements is that the expense of regulatory reporting outweighs the objectives of mandated disclosures. There is no doubt that the cost of regulatory reporting is significant for public companies. Many of these costs are spent on corporate lawyers and accountants who are required to have specialized expertise on regulatory compliance across several different evolving areas of law.

Issues of extensive cost, however, are less applicable to benefit reporting because there are few regulations that control benefit reports of hybrid-corporations, and benefit reporting by other entity forms would be self-regulated by the individual companies. Moreover, pro bono corporate representation is an underutilized resource that social enterprises could use to offset the financial burdens of benefit reporting. Many U.S. law firms, for example, provide pro bono representation to nonprofit entities(120). Nonprofit social enterprises within the applicable

(118) Neil H. Aronson, Preventing Future Enrons: Implementing the Sarbanes-Oxley Act of 2002, 8 Stan. J.L. Bus. & Fin. 127, 131 (2002) (discussing the SEC's systemic failure to regulate Enron as evidence by its lack of review of financial statements from 1997 to 2002, when the company collapsed).

(119) An example of a multinational social enterprise is Mondragon Corporation, Spain's tenth largest business group with approximately 74,000 employees and cooperative owners. For more information see http://www.mondragon-corporation.com/eng/ (last visited May 19, 2016).

(120) Scott L. Cummings, The Politics of Pro Bono, 52 UCLA L. Rev. 1, 44 (2004) ("Referral organizations focused on linking transactional business lawyers with nonprofit and small for-profit organizational clients have gained increased attention within the pro bono system.").

pro bono client guidelines should access pro bono corporate counsel to help draft the benefit reports. Law firms should also be encouraged to provide access to pro bono services or deferred payment fee structures to for-profit social enterprises. Although operating through a for-profit model, for-profit social enterprises often have limited financial bandwidth. Their limited financial resources and focus on social mission make them analogous to nonprofit organizations and, thus, law firms should recognize them as eligible pro bono clients. As a result, the relative financial burden of benefit reporting to social enterprises could be significantly less than the cost of compliance for public companies with intricate reporting requirements under SOX, Dodd-Frank, or other reporting required by the SEC.

C. Impacts of Reporting on Social Enterprise Governance

Promoting good social enterprise governance does not require expansion of federal or state oversight to small social enterprises, which could impede growth in the sector with the increased cost of government regulation(121). The innovation of benefit reports in hybrid-corporate legislation has given the social enterprise sector a method for incorporating regular reporting into the fabric of the entity form to improve and track good governance practices. The sector should broadly embrace the practice of regular reporting and support the development of good corporate governance that would flow from its implementation.

The marketplace is the ultimate compliance officer. The positive response from impact investors and donors, and the sustainability of the participating social enterprises, will determine whether benefit reporting takes hold as a transform norm within the social enterprise sector. Corporate lawyers are often characterized as gatekeepers, but they are also norm facilitators(122). Thus, the intimate involvement of corporate lawyers

(121) See Martin Lipton & Jay W. Lorsch, A Modest Proposal for Improved Corporate Governance, 48 Bus. Law. 59, 59 (1992) ("The problem is not the system of laws, regulations, and judicial decisions which are the framework of corporate governance").

(122) See Martin C. McWilliams, Jr., Guardians Adrift: The Social Anthropology of the Corporate Gatekeeper Professions, 46 U.Louisville L. Rev. 225, 262-63 (2007) (explaining that the law provides insight into a culture's perceptions and norms); see also Susan Sturm, The Architecture of Inclusion: Advancing Workplace Equity in Higher Education, 29 Harv. J.L. & Gender 247, 333 (2006) (describing "lawyers working=

in the benefit reporting process is necessary to facilitate the positive outcomes, as outlined below, in the social enterprise sector(123).

i. Flexibility Engenders Organizational Buy-in

One of the criticisms of externally imposed reporting requirements is the difficulty of assessing whether the company is simply fulfilling an imposed requirement or if there is a genuine culture of corporate governance that permeates the company(124). While institutional investors generally express support for corporate governance reforms, empirical evidence has shown that investors believe that "the most important point to emphasize is the maintenance of self-regulation"(125). A voluntary benefit reporting system as suggested in this Article allows for social enterprise directors and executives to make determinations about the reporting process and define the contours of the report so that the product and process are helpful for the company. Executive and board participation in the design of the benefit reporting process could therefore engender the long-term engagement that is necessary to shift the culture towards prioritizing good corporate governance.

ii. Stakeholder Governance and Participatory Democracy

As mentioned above, stakeholder engagement is what contributes to the foundationally distinct nature of social enterprise governance.

=within organizations to use a capacity-building orientation simultaneously to advance core institutional values and to achieve compliance with the law."); Rutheford B. Campbell, Jr. & Eugene R. Gaetke, The Ethical Obligation of Transactional Lawyers to Act as Gatekeepers, 56 Rutgers L. Rev. 9, 68 (2003) (characterizing the Model Code of Professional Conduct as a "pronouncement of societal norms").

(123) See Lisa T. Alexander, Reflections on Success and Failure in New Governance and the Role of the Lawyer, 2010 Wis. L. Rev. 737, 741–2 (2010) (noting that while the role of lawyer remains underdeveloped in new governance scholarship, there is an emphasis on the need for collaborative lawyering).

(124) See Ruth V. Aguilera, Corporate Governance and Director Accountability: an Institutional Comparative Perspective, 16 Brit. J. Mgmt. S39, S43 (2005) ("One of the problems with codes of good governance is that it is hard to assess whether or not codes are simply a box-ticking corporate governance tool decoupled from a transformation in the firm's corporate governance culture").

(125) Jill Solomon & Aris Solomon, Corporate Governance and Accountability 137 (John Wiley & Sons, Ltd. 2004).

Stakeholders are "[a]ny identifiable group or individual who can affect the achievement of an organization's objectives, or who is affected by the achievement of an organization's objective"(126). The participation of stakeholders in social enterprise governance is significant to the sector's success because "stakeholders who feel included in the corporate decision-making process demonstrate a higher level of emotional investment and commitment to the firm's mission"(127). Participatory governance, which meaningfully engages stakeholders in resolving problems affecting them(128), is another component of social enterprise governance that makes it distinct from traditional models of corporate governance. Part of what makes stakeholder governance particularly difficult for social enterprises is that their key stakeholders are often members of marginalized populations. Recall the social enterprise case studies in Part I where stakeholders in social enterprise Number One included employees who were formerly incarcerated(129), and the stakeholders in social enterprise Number Two included individuals suffering from food insecurity(130). What makes social enterprises potentially revolutionary is the possibility that "marginalized stakeholders—those who traditionally have had little influence on matters of governance and who are subject to subordination under the systems under reform—can meaningfully participate in the process"(131). For these reasons, social enterprises need guidance and support to intentionally create governance models that can prioritize and manage relations with stakeholders, particularly the marginalized stakeholders they serve and seek to empower(132).

(126) R. Edward Freeman & David L. Reed, Stockholders and Stakeholders: A New Perspective on Corporate Governance, 25 Cal. Mgmt. Rev. 88, 91 (1983).

(127) Yockey, supra note 72, at 804.

(128) Jaime Alison Lee, "Can You Hear Me Now?": Making Participatory Governance Work for the Poor, 7 Harv. L. & Pol'y Rev. 405, 405 (2013)("In recent decades, courts, legislatures, administrative agencies, and other institutions all have used participatory-governance approaches to tackle complex problems of law and public policy.").

(129) See supra Part I.A.i.

(130) See supra Part I.A.ii.

(131) Lee, supra note 127, at 406.

(132) See Chris Mason et. al., From stakeholders to institutions: the changing face of social enterprise governance theory, 45 Mgmt. Decision 284, 288 (2007) ("[G]overnance structures should facilitate managing the claims of the stakeholders they serve.").

iii. Information Production

Directors often lack sufficient information to make informed decisions and provide effective executive oversight. Similarly, executives and managers benefit from having better access to information on the performance of the company. Many of the widely accepted measures for improving corporate governance in small companies, such as clearly defined division of authority, organizational goals, and standards for review of executive performance(133), require the company to have access to information on its performance and documentation of lessons learned through its operation.

Thus, the type and quality of information that social enterprises include in their benefit report can have a significant influence on improving the governance of the company. To date, benefit reports have often focused on documenting quantifiable data without including a more comprehensive analysis of the company's performance. Moving forward, corporate lawyers should advise their social enterprise clients on the value of preparing benefit reports that also capture qualitative information on how the company is incorporating those lessons learned on corporate governance into the structure of the business. The benefit reports could, for example, highlight changes from the previous year's benefit report whenever possible to save the company time in preparing the report and save the investors' and stakeholders' time in reviewing the report. This approach would not only give the reader a chance to compare different organizations in the field but also better evaluate the progress of the organization over time.

iv. Refine Board Composition

One of the attributes of regular reporting on corporate governance is that the process of gathering information and reviewing it with the board provides the directors an opportunity to self-reflect and to determine whether the board's current composition is appropriate for the needs of the company. Social enterprises that develop models for incorporating stakeholder participation become better at collecting information on the company, which will likely influence how directors make decisions about who serves on the board. The process of reporting

(133) See supra Part I.B.ii.

can also encourage boards to address whether additional expertise is needed in the boardroom to provide the company with better oversight. There is also a relationship between board composition and firm performance(134). Boards must therefore engage in strategic planning about their composition. In addition to reviewing the characteristics and contributions of individual directors, the board also has an opportunity to evaluate its effectiveness in providing the executives and managers with sufficient oversight and guidance(135). However, reflection and evaluation is not likely to occur in the social enterprise sector without the information produced and reviewed during a regular reporting process.

D. Implementing Benefit Reporting Across Entity Form

The social enterprise can randomly elect when to engage in a reporting process; but if it is not a fundamental aspect of the company identity, other activities will likely arise that are more urgent, but not more important, than regular reporting. Thus, corporate lawyers advising and counseling social enterprise clients on how to infuse benefit reporting and accountability into the fabric of the entity form is a necessary component of advancing social enterprise governance.

i. Organizational Documents

In drafting organizational documents for a social enterprise, corporate lawyers should advise their clients to consider integrating regular reporting that is analogous to the benefit reporting requirements for hybrid corporations. Reporting requirements can be included in the bylaws for a corporation or operating agreement for a LLC, or a com-

(134) See Deborah L. Rhode & Amanda K. Packel, Diversity on Corporate Boards: How Much Difference Does Difference Make?, 39 Del. J. Corp. L. 377, 395 (2014) (noting that female directors and directors of color have different life experiences that allows for them to bring "a wider range of options and solutions to corporate issues") (quoting Lisa M. Fairfax, Clogs in the Pipeline: The Mixed Data on Women Directors and Continued Barriers to Their Advancement, 65 Md. L. Rev. 579, 590 (2006)).

(135) See John L. Ward, Creating Effective Boards for Private Enterprise 3-4 (1991) (explaining that the board serves as a sparring partner for the company executives to test their strengths and weaknesses before products and ideas reach the marketplace).

pany policy. Corporate lawyers should also advise their social enterprise clients on the value of establishing a benefit officer136 position as an effective way of maintaining this self-regulatory process. Some audit committees, for example, have strengthened the evaluation and replacement of a corporation's independent auditor. In similar fashion, a benefit officer position designates an individual to ensure that the social enterprise engages in the reporting process in a thoughtful and consistent manner.

(136) Model Benefit Corp. Legis. § 304 (B Lab Jan. 13, 2016).

CONCLUSION

The social enterprise movement is still in its infancy and has yet to develop governance practices and models that account for the complexity of this sector. This dearth of governance models is problematic given how complicated the various interests are within each social enterprise. The hybrid-corporation statutes address this current vacuum in social enterprise governance by providing benefit reporting as a mechanism to document, disseminate, and refine good governance practices. The process of composing the benefit report provides a moment where corporate lawyers and social enterprise managers can critically analyze and engage in conversations regarding the company's governance model. All social enterprises, regardless of entity form, should take advantage of regular benefit reporting to hone the corporate narrative, develop a stakeholder governance model, and confirm that the governance structure is advancing the articulated social mission. Corporate lawyers can serve an important function in advancing social enterprise governance by advising their clients how to integrate into the foundation of the company a benefit reporting system.

The process of regular benefit reporting would facilitate the establishment of governance models unique to the social enterprise sector. The knowledge and participation of social enterprise practitioners is critical to the success of this new governance experiment to promote social enterprise governance. Thus, corporate lawyers will need to work collaboratively with social enterprise executives to design and implement benefit reporting processes. The contributions and expertise of corporate lawyers in developing good social enterprise governance can lead to more sustainable social enterprises, which would ultimately foster a more equitable and inclusive economy.

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