

# Washington’s Social Purpose Corporation: Creating Accountability for Corporations or Simply Providing a Halo to Undeserving Corporations?

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## I. INTRODUCTION

Imagine being the CEO and board chair director for a brand new company that you have created. You have decided that this company will be different than all the others out there because throughout the whole process you want to focus on the environment. Every decision you make will take into consideration how it will affect the environment and the world we live in. However, you have created a traditional for-profit corporation. You have shareholders to answer to and your number one obligation needs to be to maximize shareholder returns, not save the environment. What do you do?

In the United States, corporations and other types of business entities are constituted under state law.<sup>1</sup> Directors and officers of corporations are subject to standards of conduct imposed by state law.<sup>2</sup> Therefore, many corporations think carefully before deciding what type of business to incorporate as or where to incorporate.<sup>3</sup> Due to state law, where a corporation is incorporated dictates what the directors of the business can and cannot do.<sup>4</sup>

States should allow companies to be incorporated in a way that allows the directors of the company to consider their social and environmental goals first before their obligations to their shareholders. By allowing a corporation to incorporate in a way that lets shareholders know that the company will be considering social and environmental needs before shareholder dividend maximization, companies become socially conscious enterprises, and shareholders are aware of the goals of the company in which they are investing.

Many states have passed laws that enable directors to incorporate corporations in a way that allows them to consider social and environmental needs before the needs of their shareholders.<sup>5</sup> On April 13, 2013, Maryland became the first state to pass a statute that created a new corporate form to address the lack of environmental and socially conscious

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1. WILLIAM H. CLARK 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 (2011), [http://benefitcorp.net/storage/Benefit\\_Corp\\_vs\\_Traditional\\_Corporations.pdf](http://benefitcorp.net/storage/Benefit_Corp_vs_Traditional_Corporations.pdf) (last visited Aug. 12, 2014).

2. *Id.*

3. *Id.*

4. *Corporation FAQ*, COMPANIESINCORPORATED, <http://www.companiesinc.com/corporation/faq.asp#bylaws> (last visited Jan 13, 2015).

5. Doug Bend and Alexa King, *Why Consider A Benefit Corporation*, FORBES, <http://www.forbes.com/sites/theyec/2014/05/30/why-consider-a-benefit-corporation> (last visited March 20, 2015).

corporate structure.<sup>6</sup> This new entity is called a benefit corporation, which is a corporation that lets social entrepreneurs codify their missions in their corporate charters, thereby allowing social entrepreneurs to consider other factors besides maximum return on profits for their shareholders.<sup>7</sup> The Maryland statute enabled entrepreneurs to commit their for-profit ventures to a specific public good, and required them to report on their contributions to that goal.<sup>8</sup> Benefit corporations allow businesses to make their social mission their number one focus.

Official benefit corporate status allows entrepreneurs to foremost prioritize employees, communities, or the environment, not just shareholders.<sup>9</sup> Unlike traditional corporation structures, a benefit corporation prevents directors from facing lawsuits if they consider nonfinancial interests, even if the considerations damage the financial interest of the shareholders, such as the environment.<sup>10</sup>

As other states began to enact statutes modeled after Maryland's benefit corporation structure, Washington took to a slightly different path by enacting Washington's Social Purpose Corporation (SPC) bill.<sup>11</sup> The SPC allows a company to pursue social and environmental goals alongside their efforts to provide financial returns.<sup>12</sup> Washington's SPC bill imposes a less stringent set of verification and reporting requirements on SPCs than what is required from a typical benefit corporation.<sup>13</sup> Also, while benefit corporation entrepreneurs "must" consider their social purpose in decision-making, Washington's SPC entrepreneurs "may" consider their social purpose in decision-making.<sup>14</sup> Consequently, although directors of benefit corporations can be sued by shareholders for failing to pursue the corporation's social purpose, SPCs cannot be sued because SPC directors are allowed to consider their social purpose along with other factors, such as the shareholders, in decision-making.<sup>15</sup>

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6. John Tozzi, *Maryland Passes 'Benefit Corp.' Law for Social Entrepreneurs*, BLOOMBERG BUSINESSWEEK (Apr. 13, 2010), [http://www.businessweek.com/smallbiz/running\\_small\\_business/archives/2010/04/benefit\\_corp\\_bi.html](http://www.businessweek.com/smallbiz/running_small_business/archives/2010/04/benefit_corp_bi.html) (last visited Nov. 12, 2014).

7. *What are B Corps?*, BCORPORATION.NET (2015), <https://www.bcorporation.net/what-are-b-corps> (last visited Dec. 12, 2014).

8. *Id.*

9. Tozzi, *supra* note 6.

10. *Id.*

11. John Reed and Ame Wellman Lewis, *The Social Purpose Corporation*, STARTUP LAW BLOG, <http://www.startuplawblog.com/2012/05/08/social-purpose-corporation> (last visited 10/28/14).

12. Tozzi, *supra* note 6.

13. *Id.*

14. *Id.*

15. *Id.*

To add even more confusion to the mix, Vermont created a third hybrid corporate entity, known as the Low-Profit Limited Liability Company (L3C).<sup>16</sup> L3Cs give socially conscious corporate directors a third option when deciding how to incorporate their corporation.<sup>17</sup> L3Cs are considered a cross between a nonprofit organization and a for-profit corporation, and are given tax benefits similar to a nonprofit organization. This distinguishes an L3C from a benefit corporation and an SPC.<sup>18</sup>

As corporations become more socially aware of their responsibilities to the environment, it is important for states, constituents, and businesses to understand the different hybrid entities.<sup>19</sup> Only by understanding each hybrid entity can a corporation determine which type of entity best suits its goals and fully inform its constituents of what type of entity they are investing in.<sup>20</sup> Currently, there is much confusion over the differences between the different hybrid entities.<sup>21</sup> Therefore, it is important for states to be cognizant of what each respective hybrid corporate structure offers so that constituents and business can determine which structure best suits their goals. Although many Washington residents in the business world feel like the Washington's SPC is a step in the right direction for green businesses,<sup>22</sup> there are additional measures that must be taken to force these businesses to beneficially impact society and the environment when making management decisions. Washington's SPC Statute needs to be transformed to resemble a benefit corporation statute in order to hold businesses accountable for the decisions they make and ensure that they enact a real difference. Changing the SPC statute in three ways can accomplish this. First, change the statute so that SPCs *must* consider the social purpose in decision-making, instead of simply allowing them to consider the social purpose. Second, create an obligation for SPCs to report on its overall social and environmental performance using transparent third-party standards. Finally, provide a tax break to SPCs that have successfully pursued their social purpose.

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16. Gene Takagi, *L3C – Low-profit Limited Liability Company*, NONPROFIT LAW BLOG, <http://www.nonprofitlawblog.com/l3c> (last visited Nov. 13, 2014).

17. *Low-Profit LLC*, VERMONT SECRETARY OF STATE, <http://www.sec.state.vt.us/corps/dobiz/l3c/l3c.htm> (last visited April 4, 2011).

18. Takagi, *supra* note 16.

19. VERMONT SECRETARY OF STATE, *supra* note 17.

20. Takagi, *supra* note 16.

21. Renato Garcia, *Re-Engineering Georgia's Corporate DNA: A Benefit Analysis and Practicality Assessment for Benefit Corporation Legislation in Georgia*, 6 J. MARSHALL L.J. 627, 631 (2013).

22. Joe Wallin, *What's positive about Washington's new Social Purpose Corporations*, GEEK WIRE, <http://www.geekwire.com/2012/big-positives-washingtons-social-purpose-corporations> (last visited Dec. 15, 2014).

This article addresses the strengths and weaknesses of Washington's SPC statute as it asserts that Washington's SPC statute must be remodeled to more closely resemble Maryland's benefit corporation statute. Part II discusses the traditional corporate structure versus the three different hybrid entities that have been created thus far: benefit corporations, low-profit limited liability corporations, and flexible/social purpose corporations. Part III will look a little closer at Washington's SPC statute and the arguments for and against it. Lastly, Part IV will suggest changes that should be made to Washington's SPC statute in order to more adequately promote sustainable corporations. Specifically, Part IV provides a recommendation to modify Washington's SPC statute to model formal benefit corporation statutes, which have been enacted in twenty states thus far.

## II. BACKGROUND

In order to fully understand the different hybrid entities that exist for a socially conscious corporation, the role of a shareholder, board of directors, and officers within a corporation must be fully explained. Shareholders are known as the owners of the corporation.<sup>23</sup> Shareholders invest in the business and expect to be paid through the corporation's profits.<sup>24</sup> Next, the Board of Directors is a body of elected or appointed members who jointly oversee the activities of a company or organization.<sup>25</sup> The Board of Directors are responsible for large business decisions and oversee the officers of the corporation.<sup>26</sup> Lastly, the officers are elected by the directors to run the day-to-day activities within a corporation.<sup>27</sup> Officers make the daily decisions and oversee the employees of the corporation.<sup>28</sup> An example of an officer is a Chief Executive Officer, also known as the CEO, who manages the day-to-day decisions of the corporation and manages the employees.<sup>29</sup> Because shareholders, board of directors and officers are different people, each person may have very different goals and motivations concerning their vision for the corporation. These differing views can make choosing the correct state to incorporate

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23. *Shareholder*, INVESTOPEDIA, <http://www.investopedia.com/terms/s/shareholder.asp> (last visited Nov. 15, 2014).

24. *Id.*

25. *Board of Directors – B Of D*, INVESTOPEDIA, <http://www.investopedia.com/terms/b/boardofdirectors.asp> (last visited Mar. 26 2015).

26. *Id.*

27. *Corporate Officers*, COMPANIES INCORPORATED, <http://www.companiesinc.com/corporation/officers.asp> (last visited Oct. 16, 2014).

28. *Id.*

29. *Id.*

in and creating the best hybrid entity for the corporation difficult due to the sheer number of competing viewpoints.

Traditionally, corporations have had the choice between two types of business entities, nonprofit or for-profit organizations.<sup>30</sup> A nonprofit organization uses surplus revenues to achieve its social goals, rather than distributing excess revenue as profit or dividends to the shareholders or owners.<sup>31</sup> While nonprofit organizations are permitted to generate surplus revenues, the revenues must be retained by the organization for its self-preservation, expansion, or long-term plans, and are not distributed to shareholders of the nonprofit.<sup>32</sup> The point of a nonprofit organization is not to generate revenues, but instead to succeed at reaching the organization's overall social goal.<sup>33</sup> However, an organization's designation as a nonprofit does not mean that it does not intend to make a profit. Rather, the term "nonprofit" means that the organization does not have investors, and that the organization funds will not be used to benefit its owners."<sup>34</sup>

Conducting socially conscious activities, such as improving the environment, within a nonprofit legal entity presents many challenges. The nonprofit's organization for a narrowly defined "charitable purpose" is one of the largest challenges.<sup>35</sup> Due to the narrow definition of "charitable purpose," as defined by state and local governments, potential nonprofits are unable to work toward their environmental and social objective because it falls outside of the definition of "charitable purpose."<sup>36</sup> Because of this, broader environmental and social considerations cannot be effectively advanced through nonprofit organizations.<sup>37</sup>

On the other hand, state laws require the directors of for-profit organizations, who are elected by the shareholders, to manage or direct the management of the corporation's business affairs.<sup>38</sup> The directors may (and typically do) delegate some of their authority to the corporation's officers, insofar as the day-to-day activities of the corporation are

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30. Antony Page, *New Corporate Forms and Green Business*, 37 WM. & MARY ENVTL. L. & POL'Y REV. 347, 350 (2013).

31. *Business Types*, SBA, <http://www.sba.gov/content/nonprofit-organizations> (last visited Jan. 5, 2015).

32. Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L. J. 835, 838 (1980).

33. J. Steven Ott, *Understanding Nonprofit Organizations: Governance, Leadership, and Management*, BOULDER, COLORADO: WEST VIEW PRESS (2001).

34. Hansmann, *supra* note 32, at 838.

35. CLARK ET AL., *supra* note 1.

36. *Id.*

37. *Id.*

38. *Id.*

concerned.<sup>39</sup> In discharging their statutory obligations, directors owe certain duties—referred to as fiduciary duties—to the corporation itself and the corporation's shareholders.<sup>40</sup> One of these fiduciary duties is to maximize profits and earnings for the corporation's shareholders.<sup>41</sup> Every decision made by the directors must be for the sole purpose of maximizing profits, or they could be held liable for breaching their fiduciary duty.<sup>42</sup> In *eBay Domestic Holdings, Inc. v. Newmark*, which is discussed further below, Chancellor Chandler held that a public-service mission, which “seeks not to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders” is an invalid corporate purpose and inconsistent with directors' fiduciary duties.<sup>43</sup> In essence, the Chancellor firmly stated that the only purpose of a for-profit corporation should be to maximize shareholder investment and not to pursue any social purpose.

#### A. *The Traditional Corporate Structure*

A for-profit corporation is a business whose primary goal is making money (a profit), as opposed to focusing on a goal, such as helping the environment.<sup>44</sup> Thus, for-profit corporations are legally obligated to solely maximize shareholder profits. Most companies that the average consumer sees on a day-to-day basis are for-profit corporations.<sup>45</sup>

The purpose of a for-profit corporation's obligation to solely maximize shareholder profit stems back to 1919 in one of the most famous cases in business law, *Dodge v. Ford Motor Co.*<sup>46</sup> The plaintiff, Dodge, a shareholder of the corporation Ford Motor Co., brought an action against Ford in an attempt to force Ford to pay a more substantial dividend because Ford was sitting on a large amount of cash and had made questionable decisions regarding the business's excess profits.<sup>47</sup> The Michigan Supreme Court held that Ford Motor Company's nonpayment of special dividends

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39. *Id.*

40. Douglas Y. Park, *Fiduciary Duties of the board of Directors: The Basics*, DYP ADVISORS (August 22nd, 2011), <http://www.dypadvisors.com/2011/08/22/fiduciary-duties-of-board-of-directors-basics/>.

41. CLARK ET AL., *supra* note 1.

42. *Social Purpose Corporations: Just the FAQs*, HELSELL FETTERMAN, [http://www.hellsell.com/wp-content/uploads/FAQ\\_Social\\_Purpose.pdf](http://www.hellsell.com/wp-content/uploads/FAQ_Social_Purpose.pdf) (last visited Spring 2015).

43. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (2010).

44. *For-Profit Organization*, BUSINESSDICTIONARY.COM, <http://www.businessdictionary.com/definition/for-profit-organization.html> (last visited Jan 16, 2015).

45. *Id.*

46. CLARK ET AL., *supra* note 1.

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

while it was sitting on so much cash was impermissible.<sup>48</sup> Although Ford's motive for withholding cash from its shareholders was to put the money into further expanding the corporation, the Court held that the corporation's sole purpose was to make money for its shareholders.<sup>49</sup> Thus, the corporation could not arbitrarily withhold money that could and should go to their shareholders, even if the reasoning for withholding the money was to further the company's goals.<sup>50</sup> However, the Court did say that it would not interfere with the Corporation's business decisions.<sup>51</sup>

A recent example that reaffirmed the primacy of wealth maximization for shareholders was the case of *eBay v. Newmark*, regarding eBay as a minority shareholder of Craigslist.<sup>52</sup> Although Craigslist is a for-profit corporation, it operates its business largely as a community service, allowing users to post classified advertisements free of charge.<sup>53</sup> In contrast, eBay operates its business with the goal of maximizing revenues, profits, and market share.<sup>54</sup> Despite these differences, eBay made an investment in Craigslist and became a minority shareholder.<sup>55</sup> A dispute arose when it became apparent that eBay had invested in Craigslist with an eye toward forming an international partnership and making the company a subsidiary of eBay.<sup>56</sup> Upon learning this, Craigslist took defensive measures to make sure that control would not get into eBay's hands if something were to happen to Craigslist's founders.<sup>57</sup> The Court ruled, however, "having chosen a for-profit corporate form, the Craigslist directors are bound by the fiduciary duties and standards that accompany that form, including acting to promote the value of the corporation for the benefit of its stockholders."<sup>58</sup>

A final example reaffirming the primacy of wealth maximization for shareholders occurred in 2000.<sup>59</sup> The socially conscious ice cream maker Ben & Jerry's faced a problem when it wanted to sell the company.<sup>60</sup> The

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48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (2010).

53. *Id.* at 8.

54. *Id.* at 9.

55. *Id.* at 34.

56. *Id.* at 15.

57. *Id.* at 35.

58. *Id.* at 34.

59. Anthony Page & Robert A. Katz, *The Truth About Ben and Jerry's*, STANFORD SOCIAL INNOVATION REVIEW (Fall 2012), [http://www.ssireview.org/articles/entry/the\\_truth\\_about\\_ben\\_and\\_jerrys](http://www.ssireview.org/articles/entry/the_truth_about_ben_and_jerrys) (last visited Apr. 2, 2015).

60. *Id.*

directors of the company wanted to sell Ben & Jerry's to a group of investors led by founders Ben Cohen and Jerry Greenfield, but the French food giant Unilever was offering a better share price.<sup>61</sup> The difference in corporate governance between the two companies was not to be considered because the company was a for-profit company, and the only goal of the directors was to get the best price for its shareholders.<sup>62</sup> It did not matter that one had a more socially responsible management style.<sup>63</sup> The laws of corporate governance forced the board of directors to sell the company to the better-funded French, lest they be sued for failing to put shareholders' financial interests first.<sup>64</sup> This is exactly the kind of dilemma that the benefit corporation is seeking to eliminate.

The legal issue of fiduciary responsibility has long been seen as a barrier to companies wanting to take more proactive social and environmental measures.<sup>65</sup> However, for many companies, it has been seen as a fig leaf to avoid taking substantive measures to clean up pollution or end sourcing from sweatshops.<sup>66</sup>

In a for-profit corporation, "there is one and only one social responsibility of businesses; to use its resources and engage in activities designed to increase its profits, so long as it stays within the rules of the games, which is to say, engages in open and free competition without deception or fraud."<sup>67</sup> A corporate executive, also known as a board director, is an employee of the owners of the business (shareholders).<sup>68</sup> His responsibility is to conduct the business in accordance with the shareholders' desires, which generally will be to make as much money as possible.<sup>69</sup> The argument follows that if a corporation's only purpose is to maximize shareholder profits, then it is unable to pursue its social or

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61. Manish Bisaria et. Al, *Unilever's Acquisition of Ben & Jerry's: Background, Motive, and Impact*, U.N.C. KENAN-FLAGLER BUSINESS SCHOOL (2005), <https://extranet.kenan-flagler.unc.edu/kicse/ORIG%20Shared%20Documents/Unilever%27s%20Acquisition%20of%20Ben%20and%20Jerry%27s.pdf>.

62. *Id.*

63. *Id.*

64. Page & Katz, *supra* note 59.

65. Joel Makower, *California's Bold Move to Legitimize Sustainable Business*, GREENBIZ.COM (Feb. 14, 2011), <http://www.greenbiz.com/blog/2011/02/14/california%E2%80%99s-move-legalize-sustainable-business>.

66. *Id.*

67. See Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, available at <http://www.colorado.edu/studentgroups/libertarians/issue/s/friedman-soc-resp-business.html>.

68. Roger Donway, *Do Shareholders "Own" a Corporation?*, THE ATLAS SOCIETY'S BUSINESS RIGHTS CENTER, [http://www.atlassociety.org/brc/shareholders\\_owners\\_corporation](http://www.atlassociety.org/brc/shareholders_owners_corporation) (last visited Dec. 12, 2014).

69. *Id.*

environmental missions if it these missions conflict with profit maximization.<sup>70</sup> If corporations could only operate under a for-profit structure, the resulting business environment would be comprised of companies that completely disregard large-scale social issues in favor of private wealth maximization.

It is important to note, however, the level of scrutiny a court will give to the business decisions directors make for a company. When it comes to day-to-day decisions, directors can consider non-shareholder interests as long as they can show a rational connection to shareholder value.<sup>71</sup> This is because courts review director decisions, in the day-to-day context, under the deferential “business judgment rule.”<sup>72</sup> The business judgment rule is a rebuttable presumption by courts that “in making a business decision, the directors of a corporation act on an informed basis, in good faith, and in the honest belief that the action taken [is] in the best interest of the company.”<sup>73</sup> Courts reviewing decisions made in the day-to-day context will not question rational judgments about how promoting non-shareholder interests ultimately promotes shareholder value.<sup>74</sup> However, even though directors enjoy the most discretion in the day-to-day context, the decisions must show some connection to shareholder value.<sup>75</sup> This can cause a mission-driven company to face shareholder litigation, even under this lenient level of scrutiny.<sup>76</sup>

The debate over where a corporation’s priority lies is not new. “A continued and longstanding debate has been waged in corporate law scholarship among those who favor shareholder primacy, those who favor management discretion, and those who believe that corporations have a social responsibility to other constituencies, such as the corporation’s employees, and the wider public interest.”<sup>77</sup> Shareholder primacy prevails today as the dominant view.<sup>78</sup> However, the view of what a corporation should be and whom it should serve has started to change; in order to allow directors to consider things outside of shareholder primacy, hybrid entities were created.

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70. *Id.*

71. *See* Dodge v. Ford Motor Co., 170 N.W. 668, at 682 (Mich. 1919); *see also* CLARK ET AL., *supra* note 1.

72. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

73. *Id.*

74. *Id.*

75. *Id.*

76. CLARK ET AL., *supra* note 1.

77. Page, *supra* note 30.

78. *Id.*

### *B. Hybrid Entities*

Hybrid entities attempt to blend aspects of for-profit organizations with aspects of not-for-profit organizations.<sup>79</sup> They allow corporations to make a profit, while giving them the flexibility to consider the social and environmental ramifications of their decisions.<sup>80</sup> Corporations structured as hybrid entities no longer have to look only at maximizing shareholder profits; they may recognize social and environmental considerations, too.<sup>81</sup> In this article, three different hybrid entities will be discussed that have been legally recognized in various states: (1) benefit corporations, (2) low-profit limited liability companies, and (3) flexible/social purpose corporations.

#### **1. Benefit Corporations**

In 2010, Maryland became the first state in the nation to allow companies to register as benefit corporations.<sup>82</sup> Benefit corporations are a new class of corporation that is required to create a material, positive impact on society and the environment by meeting higher standards of accountability and transparency.<sup>83</sup> Although there are different ways to draft legislation to create a benefit corporation, there are three major provisions that are consistent from state to state in how a benefit corporation is created. These provisions include (1) making the benefit corporation form a purpose that has material, positive impact on society and the environment; (2) expanding fiduciary duties of directors in benefit corporations, which require consideration of non-financial interests; and (3) creating an obligation on benefit corporations to report on its overall social and environmental performance as assessed against a comprehensive, credible, independent, and transparent third-party standard.<sup>84</sup> Electing in or out of benefit corporation status is a voluntary act requiring a two-thirds vote of shareholders.<sup>85</sup> Likewise, in a merger or sale situation, a supermajority shareholder vote would be required if the

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79. Felicia R. Resor, Comment, *Benefit Corporation Legislation*, 12 WYO. L. REV. 91 (2012).

80. Evangeline Gomez, *The Rise of the Charitable For-Profit Entity*, FORBES (Jan. 13, 2012), <http://www.forbes.com/sites/evangelinagomez/2012/01/13/the-rise-of-the-charitable-for-profit-entity/>.

81. Resor, *supra* note 79.

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

83. Resor, *supra* note 79.

84. CLARK ET AL., *supra* note 1.

85. *Id.*

surviving entity would not be a benefit corporation.<sup>86</sup> Therefore, if a corporation decides to register as a benefit corporation, opting out of the entity that the investors initially invested in is difficult. Benefit corporations are required to have a purpose towards creating a “general public benefit” and are allowed to identify one or more “specific public benefit” purposes.<sup>87</sup> This differs from traditional corporations, which are allowed to form for any lawful purpose but have no explicit purpose requirement.<sup>88</sup> A purpose towards creating a general public benefit is defined as a “material, positive impact on society and the environment, taken as a whole, as assessed against a third-party standard, from the business and operations of a benefit corporation.”<sup>89</sup> Model legislation lists seven non-exhaustive possibilities for a purpose that lends itself to specific public benefits. Those seven possibilities are (1) providing low-income or underserved individuals or communities with beneficial products or services; (2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the ordinary course of business; (3) preserving the environment; (4) improving human health; (5) promoting the arts, sciences, or advancement of knowledge; (6) increasing the flow of capital to entities with a public benefit purpose; or (7) the accomplishment of any other particular benefit for society or the environment.<sup>90</sup>

The benefit corporation expands fiduciary duties of directors by requiring consideration of non-financial interests.<sup>91</sup> Directors of benefit corporations *must* consider the social purpose when making their management decisions.<sup>92</sup> This required consideration is a key feature of benefit corporations, as will be discussed below, distinguishing them from Washington’s SPCs, which merely *permit* consideration of the social purpose in management decisions.<sup>93</sup>

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86. *Id.*

87. Shelley Alcorn & Mark Alcorn, *Benefit Corporations: A New Formula for Social Change*, ASSOCIATIONS NOW (June 2012), <https://www.asaecenter.org/Resources/ANowDetail.cfm?ItemNumber=179687>.

88. CLARK ET AL., *supra* note 1.

89. *Id.*

90. Model Benefit Corp. Legislation §102 (2013).

91. *B Corporations, Benefit Corporations and Social Purpose Corporations: Launching a New Era of Impact-Driven Companies*, NETWORK FOR BUSINESS INNOVATION AND SUSTAINABILITY (2012), [http://nbis.org/wp-content/uploads/2012/10/ImpactDrivenCompanies\\_NBIS\\_Whitepaper\\_Oct2012.pdf](http://nbis.org/wp-content/uploads/2012/10/ImpactDrivenCompanies_NBIS_Whitepaper_Oct2012.pdf) [hereinafter NBIS White Paper].

92. *Id.*

93. *Id.*

Lastly, a benefit corporation is required to deliver an annual benefit report to its shareholders and post it online so it is available to the public.<sup>94</sup> The report must be filed with a department of the state and must include a narrative description of the ways in which the benefit corporation has pursued its general public benefit purpose and the ways it has pursued any of its specific benefit purposes.<sup>95</sup> Furthermore, they must name any circumstances that may have hindered creation of general or specific public benefit purposes. The corporation also needs to reveal the process and rationale for selecting or changing the third-party standard used to prepare the benefit report.<sup>96</sup> The report must also include “an assessment of the overall social and environmental performance of the benefit corporation against a third-party standard applied consistently with any application of that standard in prior benefit reports or accompanied by an explanation of the reasons for any inconsistent application.”<sup>97</sup>

Directors of benefit corporations are afforded certain protections with regard to the business decisions they make.<sup>98</sup> A shareholder is expressly given the right to bring a legal action on the basis that a director or officer failed to pursue or create the stated general or specific public benefit purposes, failed to *consider* the interests of the various stakeholders set forth in the statute, or failed to meet the transparency requirements in the statute.<sup>99</sup> However, the Model Legislation expressly states that the consideration of all stakeholders shall not constitute a violation of the general standards for directors.<sup>100</sup> Therefore, a director of a benefit corporation has the ability to make decisions that help pursue the stated general or specific public benefit purpose, even if that decision fails to maximize shareholder profits. Lastly, in an effort to restrict potential liability, the Model Legislation specifically excludes directors and officers from corporate liability for monetary damages and forces courts to give the exclusive remedy of awarding injunctive relief.<sup>101</sup> This requires the benefit corporation to simply live up to the commitments it voluntarily undertook.

Benefit corporations are a hybrid entity that best meets the needs of entrepreneurs, investors, consumers, and policy makers who are interested in using the power of business to solve social and environmental problems.

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94. Alcorn & Alcorn, *supra* note 87.

95. NBIS White Paper, *supra* note 91, at 18.

96. *Id.*

97. *Id.*

98. CLARK ET AL., *supra* note 1.

99. *Id.*

100. §102, *supra* note 90.

101. CLARK ET AL., *supra* note 1, at 19.

Unlike other corporate forms, benefit corporations offer clear market differentiation from other corporate structures and broad legal protection to directors and officers to make decisions based on the social purpose instead of shareholder profit maximization. They also expand shareholder rights by allowing shareholders to hold directors liable if they do not pursue the initially agreed upon social purpose.

## 2. Low-profit Limited Liability Corporations (L3C)

One type of corporation that recognizes its social mission over its profit objection is an L3C. An L3C's organizational form is similar to a regular for-profit Limited Liability Company (LLC).<sup>102</sup> However, unlike traditional for-profit corporations, an L3C expressly recognizes that its social mission takes priority over its profit objective.<sup>103</sup> L3Cs provide significant flexibility in structuring governance provisions, provide legal protection to owners and managers, and can attract private capital investment including equity capital.<sup>104</sup> Currently, eight U.S. states have passed L3C legislation.<sup>105</sup> L3Cs are variants of the traditional LLC form and are incorporated into the preexisting LLC statutory framework.<sup>106</sup> Thus, L3Cs are subject to the same general governance regulations provided by the traditional LLC statute of the state.<sup>107</sup>

In general, legislation authorizing the creation of an L3C has three requirements: (1) that the company significantly furthers charitable or educational purposes as defined by the IRS; (2) that no significant purpose of the company is the production of income or appreciation of property; and (3) that no purpose of the company is to accomplish political, legislative or lobbying activities.<sup>108</sup> One of the main designs of an L3C is to make it easier for socially oriented businesses to attract investments from foundations and private investors.<sup>109</sup>

The L3C was essentially designed to facilitate “program-related investments” (PRIs) by charitable foundations in a for-profit entity.<sup>110</sup> Program-related investments are investments made by foundations to

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102. *L3Cs—A Hybrid Low-Profit Business Entity*, NOLO, <http://www.nolo.com/legal-encyclopedia/l3cs-a-hybrid-low-profit-business-entity.html> (last visited Aug. 15, 2014).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Low-Profit Limited Liability Company*, DIGITAL MEDIA LAW PROJECT, <http://www.dmlp.org/legal-guide/low-profit-limited-liability-company> (last visited Oct. 12, 2014).

110. Gomez, *supra* note 80.

support charitable activities that involve the potential return of capital within an established time frame.<sup>111</sup> PRIs are one way that foundations can satisfy their obligation of distributing at least 5 percent of their assets every year to charitable purposes under the Tax Reform Act of 1969.<sup>112</sup> While foundations usually meet this requirement through grants, investments in L3Cs and charities that qualify as PRIs can also fulfill the requirement, while still allowing the foundations to receive a return.<sup>113</sup>

However, there are a number of issues associated with the use of an L3C to attract PRIs because The IRS has not approved L3Cs as an entity that can accept PRIs.<sup>114</sup> Therefore, there is a risk that the IRS may not recognize L3Cs as a way to obtain PRIs and could levy significant fines against a private foundation that has invested in an L3C to order to obtain PRIs.<sup>115</sup> The possible risk of not obtaining PRIs causes many private foundations to avoid investing in L3Cs unless the IRS provides an advanced private ruling that sanctions their investments.<sup>116</sup>

Furthermore, L3Cs can also have substantial difficulty attracting market-rate investments because of an L3C's statutory language, which limits income production.<sup>117</sup> Investors seeking market-rate returns do not typically invest in companies that might only incidentally provide them with such a return.<sup>118</sup> Additionally, as a matter of transparency and accountability, L3Cs do not have a third-party evaluator to determine whether or not they are pursuing their charitable purpose and/or achieving a measurable social impact.<sup>119</sup> Unlike nonprofits, which must comply with annual reporting requirements imposed by the IRS in exchange for their exempt status, and benefit corporations, which are required to do third-party assessments, L3Cs are free to self-regulate their charitable purpose and the extent to which they report publicly on their activities.<sup>120</sup> Due to self-regulation, it becomes unclear whether L3Cs effectually create a positive social impact, or simply state that they will do so in the hope of attracting more investors.

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111. DIGITAL MEDIA LAW PROJECT, *supra* note 109.

112. *Id.*

113. *Id.*

114. NOLO, *supra* note 102, at 21.

115. *Id.*

116. *Id.*

117. CLARK ET AL., *supra* note 1.

118. *Id.*

119. Jeff D. Woodward, Esq., *The Need and Rationale for the Benefit Corporation*, TAYLOR ENGLISH LLP (2013), <http://www.taylorenglish.com/content/uploads/2013/07/GA-Bene-fit-Corporations-and-other-Models-for-Sustainability-and-Social-Enterprise-highlighted-v1.pdf>.

120. *Id.*

### 3. The Flexible/Social Purpose Corporation

In addition to the benefit corporations and L3Cs, there are two other corporate forms that have been introduced for dual-mission businesses: (1) the Flexible Purpose Corporation in California (FPC); and (2) the Social Purpose Corporation in Washington (SPC). These corporate forms are similar to each other, yet differ from benefit corporations in their stated purpose, use of a third-party standard, and discretion to director's business judgment.<sup>121</sup>

The FPC legislation was primarily drafted to meet the needs of larger, often publicly traded companies interested in possessing a safe harbor to pursue at least one "special purpose" beyond maximization of shareholder value.<sup>122</sup> As a result, FPC legislation seems to protect the directors more than meet the needs of the consumers, investors, and entrepreneurs.<sup>123</sup>

In order to become an FPC, a company's articles of incorporation must specify at least one "special purpose" that the corporation will pursue, which can include, but is not limited to, charitable or public benefit activities.<sup>124</sup> The directors and officers of the FPC would effectively enjoy a safe harbor in pursuit of any such "special purpose."<sup>125</sup> However, one major problem with FPCs is that, while a "special purpose" can be broadly defined, it can also be limited in duration.<sup>126</sup> While tailoring a "special purpose" to have a narrow definition may meet the legal objective of the executives, directors, and investors of an FPC, it may be recognized by the state as a "new kind of company." This unintended halo effect in the eyes of consumers, investors, and entrepreneurs would come about even though the legal objective was modest and short-term socially or environmentally responsible activity.<sup>127</sup> One workaround for this problem is a company adopting a narrow "special purpose" that is already in place, such as buying enough carbon offsets to be "carbon neutral" in any given year or building a playground. A company will sometimes do this in order to obtain FPC status and be recognized as a company that is making a difference; however, in actuality, the company has not changed or altered its purpose at all.<sup>128</sup> This process results in corporations becoming an FPC simply for the status, whether through a general purpose or specific purpose, without creating much change within their corporate structure as

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121. Page, *supra* note 30, at 347.

122. Clark et al, *supra* note 1.

123. *Id.* at 5.

124. *Id.* at 6.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

promised. This loophole is evident through an FPC's limited transparency and accountability.

The FPC statute provides that an FPC board of directors must provide an annual report to shareholders and publish their report publicly on the Internet. The annual report must contain a section providing "management discussion and analysis concerning the FPC's stated purpose or purposes in its articles."<sup>129</sup> However, there are no specific guidelines regarding exactly what needs to be included in the report, which enables companies to neglect reporting the ways they may not have succeeded in achieving their stated purpose.<sup>130</sup>

Furthermore, unlike benefit corporation legislation, FPC legislation does not require the application of an independent third-party standard in making the report. The absence of a third-party standard allows each individual FPC to report on its "special purpose" activities and their impacts as it sees fit, which can substantially limit the accountability of these reports and the corporations.<sup>131</sup>

Lastly, the biggest difference of an FPC is that the corporation *may* consider their social purpose, but it doesn't *have* to consider this social purpose.<sup>132</sup> In contrast, benefit corporations can be sued for failing to pursue their social purpose, violating any duty or standard of conduct, or failing to post an annual report on the Internet.<sup>133</sup> Because FPCs cannot be sued for failing to pursue their social purpose, directors are given a wide range of discretion that further perpetuates the halo effect for a corporation that is not furthering their social purpose.<sup>134</sup> Although the structure of an FPC allows directors to have flexibility regarding decision-making and cost efficiency for the corporations, the lack of an independent third-party standard makes one wonder: what is the real objective behind forming as an FPC? Do the corporations actually want to create a change, or simply obtain the status as an FPC to further attract investors and customers?

### III. WASHINGTON STATE'S SOCIAL PURPOSE CORPORATION ANALYSIS

On June 7, 2012, Washington followed a growing list of states by adopting legislation that allows for-profit corporations to formally incorporate social and environmental goals into their mission statement

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129. *Id.*

130. *Id.* at 7.

131. *Id.* at 8.

132. NBIS White Paper, *supra* note 91, at 4.

133. *Id.*

134. *Id.*

and charter documents.<sup>135</sup> The corporate form was named a Social Purpose Corporation (SPC). The bill allows SPCs to promote positive short-term or long-term effects of the corporation's activities on employees, suppliers, customers, the public, or the environment.<sup>136</sup> Additionally, many qualities of the SPC statute resemble California's FPC statute.<sup>137</sup>

Under RCW 23B.25.020, an SPC is a for-profit corporation that is organized to promote short-term or long-term positive effects or to minimize adverse short-term or long-term effects of the corporation's activities concerning (1) the corporation's employees, suppliers, or customers; (2) the local, state, national, or world community; or (3) the environment.<sup>138</sup> In addition to these requirements, a SPC may have one or more specific social purposes.<sup>139</sup> Under RCW 23B.25.005, a corporation may elect to be governed as an SPC by one of the following means: (a) one or more persons may act as incorporator or incorporators of an SPC by delivering articles of incorporation that conform to the requirements of this chapter to the secretary of state for filing; or (b) any corporation that is not an SPC may elect to become an SPC by complying with RCW 23B.25.130, which requires recommendation by the board, consent by at least two-thirds of the shareholders entitled to vote, and an amendment and filing of the articles of incorporation.<sup>140</sup> Furthermore, an SPC may elect to cease to be governed as an SPC by board recommendation, consent by at least two-thirds of the shareholders entitled to vote, and amendment and filing of the articles of incorporation.<sup>141</sup> Moreover, a corporation may cease to be governed as an SPC if the directors and shareholders feel that the corporation could gain stronger investors as a regular for-profit corporation, since many investors are looking to invest in corporations where wealth maximization for its shareholders is its primary focus.<sup>142</sup>

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135. C. Kent Carlson et al., *Washington State Passes Legislation Authorizing Social Purpose Corporations: Bill to Permit Corporations to Seek Social, Environmental-Oriented Goals*, K&L GATES LLP (Apr. 16, 2012), [http://m.klgates.com/files/Publication/ab22741e-e266-495a-a89e-31fc2b781778/Presentation/PublicationAttachment/57cf9b22-d313-44d8-bfcb-9777cd5f5ef0/WA\\_State\\_Social\\_Purpose\\_Corporations.pdf](http://m.klgates.com/files/Publication/ab22741e-e266-495a-a89e-31fc2b781778/Presentation/PublicationAttachment/57cf9b22-d313-44d8-bfcb-9777cd5f5ef0/WA_State_Social_Purpose_Corporations.pdf) (last visited Feb. 10, 2015).

136. *Id.*

137. Page, *supra* note 30.

138. WASH. REV. CODE § 23B.25.020 (2012).

139. WASH. REV. CODE § 23B.25.030 (2012).

140. WASH. REV. CODE § 23B.25.005 (2012).

141. WASH. REV. CODE § 23B.25.140 (2012).

142. John Tozzi, *Washington State Tailors 'Social Purpose Corporation' to Sustainable Business*, BLOOMBERGBUSINESS (March 16, 2012), <http://www.bloomberg.com/bw/articles/2012-03-16/washington-state-tailors-social-purpose-corporation-to-sustainable-business> (last visited Jan 5, 2015).

Additionally, SPCs are required to notify prospective investors that the corporation's goals will not be limited to earning a profit.<sup>143</sup> SPCs must issue an annual report that is available to the public that provides details on the general or specific social purposes of the corporation's goals, including the corporation's efforts to promote its social purpose.<sup>144</sup> The report may, but it not require to, include the annual objectives that the corporation has set to achieve its purpose(s); the metrics used; how the corporation has achieved or fallen short of the state objectives; and how much money was spent in furtherance of the social purpose.<sup>145</sup> The report may be prepared in accordance with a third-party standard, but this is also not required.<sup>146</sup> Unfortunately, the reporting requirements contain loopholes similar to those of California's FPC.

One of SPC's defining characteristics is its flexibility.<sup>147</sup> Flexibility allows directors of SPCs to create a corporation with a social purpose that, depending on their actual goals for the company, they can or cannot follow.<sup>148</sup> Similar to for-profit corporations, directors of SPCs manage while the officers run the day-to-day operations. This structural hierarchy allows the directors to choose to include the social purpose in decision-making, but does not require them to incorporate the social purpose.<sup>149</sup> Moreover, there is no tax-favored status for SPCs, which means that corporations listed as an SPC don't receive any tax benefits like those given to nonprofit companies.<sup>150</sup> Consequently, the structure and flexibility of SPCs allows an entrepreneur to create a corporation that is functionally the same as a benefit corporation.<sup>151</sup> However, this same flexibility gives directors a wide range of discretion to ignore making the changes they may have promised.

#### *A. Arguments for the Social Purpose Corporation*

There are two main arguments in favor of social purpose corporations. First, that the SPC is a step in the right direction, promoting sustainable businesses. And second, that it promotes a sustainable business

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143. *Social Purpose Corporations*, SPCWA, <http://www.spcwa.com/what-are-spcs/> (last visited Jan 15, 2015).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. Wallin, *supra* note 22.

149. Peter J. Smith, *Washington's Social Purpose Corporation*, APEX LAW GROUP LLP 9 (Apr. 16, 2013), [http://www.spcwa.com/wp-content/uploads/2013/06/Washingtons\\_Social\\_Purpose\\_Corporation.pdf](http://www.spcwa.com/wp-content/uploads/2013/06/Washingtons_Social_Purpose_Corporation.pdf) (last visited Nov. 17, 2004).

150. SPCWA, *supra* note 142.

151. Smith, *supra* note 149, at 9.

while keeping the reporting requirements simple and giving the directors flexibility to make the best decisions for the corporation.

First, the biggest argument for the SPC is the fact that it promotes sustainable businesses and that it is a step in the right direction.<sup>152</sup> A corporation's fiduciary duty no longer lies solely with the shareholders in generating the most profit.<sup>153</sup> Directors are allowed to consider outside effects of their decisions, such as environmental effects, in determining what decisions to make, instead of worrying about whether they will be sued for their decisions because they did not generate shareholder profits.<sup>154</sup> The corporation receives statutory protection from shareholder lawsuits that generate from the directors pursuing their stated social purpose.<sup>155</sup> However, this argument for the SPC can also be made if benefit corporations were created and enacted like in other states.

The second argument for enacting an SPC over a benefit corporation is the simplicity and flexibility behind an SPC.<sup>156</sup> The simplicity and flexibility of the SPC statute makes the corporate form more accessible to business owners than the benefit corporation.<sup>157</sup> The SPC statute sets a low floor with respect to administrative burdens and standards, provides the necessary legal cover for social entrepreneurs, and was written to allow founders to raise the bar for their SPC to the standards of a benefit corporation if they so choose.<sup>158</sup> The SPC gives corporate directors the flexibility to run their business however they feel is best.

### *B. Arguments against the Social Purpose Corporation*

There are two main arguments against Washington's SPC statute: first, that the statute and corporate entity is unnecessary; and second, that the corporate entity is dangerous by giving the directors too much discretion.

The first argument against the SPC is that the statute and corporate entity is unnecessary.<sup>159</sup> Under a traditional corporate structure, directors

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152. Wallin, *supra* note 22.

153. *Id.*

154. *Id.*

155. Nic Wolfe, *Is a Social Purpose Corporation Right for Your Business?*, EVERYDAY LAW (Mar. 11, 2013), <http://blog.rocketlawyer.com/is-a-social-purpose-corporation-right-for-your-business-912818>.

156. Peter Smith, *The Health of Hybrid Entities: How many benefit corporations and social purpose corporations are out there? A comparison and data analysis on the SPC's relative success*, APEX LAW GROUP LLP (Aug. 9, 2013), <http://www.apexlg.com/?p=1054>.

157. *Id.*

158. *Id.*

159. See Aneel Karnani, *The Case Against Corporate Social Responsibility*, WALL ST. J., August 23, 2010, <http://online.wsj.com/news/articles/SB10001424052748703338004575230112664504890>.

and officers are protected by the business judgment rule that provides directors with wide latitude in how they go about attempting to achieve the primary task of maximizing shareholder wealth.<sup>160</sup> Under Washington law, a court will not substitute its judgment absent evidence of bad faith.<sup>161</sup> In Washington, plaintiffs may bring a general claim of breach of fiduciary duty against directors as long as they show that the directors' acts or omissions involved (1) intentional misconduct; (2) a knowing violation of law; (3) conduct violating RCW 23B.08.310 (which includes discharging duties in good faith under RCW 23B.08.300); or (4) any transaction from which the director will personally receive a benefit in money, property, or services to which the director is not legally entitled.<sup>162</sup> Therefore, if a director wanted to pursue a social purpose because they thought it would be ultimately beneficial to the corporation, a court will not step in and replace the directors' judgment with its own judgment. Thus, many people believe that there is no need for an SPC statute or an SPC corporate entity. However, some people believe that the purpose in creating the SPC statute is to allow corporations a shield for their directors in order to eliminate potential frivolous law suits before they can begin.

The second argument against the SPC is that it is potentially dangerous. Directors of SPCs lack the clear duties to their shareholders that for-profit directors have and, unlike for-profit corporations, do not have any implied duty of obedience. Because the SPC organization serves two masters—both the social purpose and wealth maximization—it appears less amenable to standard governance and oversight.<sup>163</sup> This can allow directors to have great power and discretion in making business decisions and makes it much more difficult for shareholders to hold them accountable for those decisions. Thus, this power potentially makes these corporations very dangerous.

#### IV. PROPOSALS FOR CHANGE TO THE SOCIAL PURPOSE CORPORATION STATUTE NEEDED TO HELP GREEN BUSINESSES

Although Washington has taken a step forward by allowing corporations to be socially conscious through the creation of the SPC statute, the statute should be revised in order to hold corporations accountable for the decisions they make. The statute that Washington

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160. Virginia Nicholson & Christopher H. Howard, *Conflict Resolution in Social Purpose Corporations*, SCHWABE, WILLIAMSON & WYATT (Dec. 10, 2012), <http://www.schwabe.com/show/article.aspx?Show=12707>.

161. *Id.*

162. *Id.*

163. *Id.*

currently has in place seems to make little difference and simply gives directors even more discretion in the decisions that they make. The statute has the ability to create a halo effect for corporations to say they are an SPC, but lets the directors consider anything they like when making a decision. If a director wanted to avoid considering their social purpose, nothing would stop them. This gives shareholders and common citizens a very skewed view of the corporation. On the one hand, they are told that this corporation finds a specific purpose very important, but on the other hand, if the directors never wanted to consider that specific purpose, they would not have to. This is illogical and Washington's statute needs to fix this problem.

There are three elements that must be added to the SPC statute to effectively create an improvement in corporate responsibility. These changes include (1) creating accountability, (2) creating an obligation to report on its overall social and environmental performance using transparent third-party standards, and (3) creating a tax benefit for these corporations.

#### A. *Creating Accountability*

The current statute that is in place in Washington does not provide any guidance on how directors should prioritize when making decisions. The statute simply says that a director *may* take into consideration their social purpose. This means that a director does not have to take into consideration their social purpose if he or she does not want to. They can take into consideration wealth maximization like a traditional corporate structure or their social purpose like a benefit corporation. However, if society wanted directors to be able to consider anything they wanted, then what would be the purpose of an SPC?

The reason hybrid entities were created was to hold corporations accountable to environmental or some other social purposes. Therefore, the social purpose should be the number-one motivator in a director's decision-making process. The new SPC law departs from traditional corporate law in that it mandates directors to take into account a disparate group of interests and constituencies, yet fails to prescribe a rule of decision. Directors are only told that they need not prioritize among those interests and constituencies. Without a prescribed rule of decision, there can be no accountability from the directors and no way for the shareholders to hold directors accountable.<sup>164</sup>

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164. Keith Paul Bishop, *How Should Benefit Corporation Directors Make Decisions?*, CALIFORNIA CORPORATE & SECURITIES LAW (Oct. 17, 2011), <http://calcorporatelaw>

One of the great qualities of benefit corporations, which have been enacted in numerous states, is that it requires benefit corporations to make their social purpose their top priority. As a benefit corporation, directors *must* consider the social purpose in decision-making. This creates clear guidelines for directors to understand how to make decisions in order to not be held liable, and it allows shareholders to be aware of what type of company they are investing in. It creates accountability all around.

*B. Obligation to Report On its Overall Social and Environmental Performance Using Transparent Third-Party Standards*

One of the biggest differences between an SPC and a benefit corporation is the reporting requirement. Under a benefit corporation, the corporation must do an annual benefit report using a third-party standard, while an SPC simply needs to do an annual benefit report with no externally verified reporting standard. They simply need to publish and file an annual report on how the organization is meeting its social purpose.<sup>165</sup>

Although requiring corporations to create annual benefit reports using a third-party standard could be burdensome and more difficult, it would create transparency between the corporation and its shareholders. There is huge distrust between the corporation and its consumers and investors; therefore, a third-party report would help bridge that gap.<sup>166</sup> If our legislation wants to continue to allow directors to make decisions however they wish, whether it is to maximize profits or consider their social purpose, it would at least be helpful for shareholders to know that they will get an honest annual report that expressly states what the corporation has accomplished. Civil society “plays a role in constraining corporate behavior that reduces social welfare, acting as a watchdogs and advocates.”<sup>167</sup> Therefore, making these corporations report annually using a third-party standard can allow society to act as the watchdog for the decisions that the directors make.<sup>168</sup>

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.com/2011/10/how-should-benefit-corporation-directors-make-decisions.

165. NBIS White Paper, *supra* note 91, at 4.

166. 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, 672 (2013).

167. Karnani, *supra* note 159.

168. *Id.*

### C. Creating a Tax Benefit For Social Purpose Corporations

Currently, SPCs are still subject to applicable sales and use taxes in the same manner as standard corporations.<sup>169</sup> In order to promote corporations to change into an SPC and to help green businesses, it would be helpful for the state to create some tax benefits for these corporations in order to promote the transition into a socially conscious entity. Although tax benefits should not be given to current SPCs under the current SPC legislation, if Washington transitions its statute into more of a benefit corporation statute, then those corporations should receive a tax benefit. If current SPCs were given tax benefits, then it would not be surprising if most companies transitioned into an SPC, not only for the halo effect, but also for the money they would save under the tax benefit. It is important to make sure that the corporations receiving the tax benefits are those that are actually creating a change and promoting their social purpose.

## V. CONCLUSION

Washington State has a robust economy supporting social entrepreneurship and has proven itself a fertile ground for social entrepreneurship growth.<sup>170</sup> Although Washington has taken a great leap by creating the SPC in order to allow their corporations to consider the social benefits from the business decisions they make, it is still not enough. As we have seen, traditional for-profit corporations technically have the ability to consider how their decisions will impact society and how their decisions will help reach their corporate goals as long as the directors have a way to show that these actions were taken for the best interest of the company. The directors are protected from lawsuits by the business judgment rule and, therefore, do not need to convert into an SPC corporation. It seems that the only thing the creation of an SPC corporation does is grant even more protection to directors for the decisions that they make. Although this is a good thing for those directors who really do want to make a difference to their society and environment by giving them more protection, the goal should be to create corporations *required* to make the difference that they have agreed to take on. It is important that the statute is not creating a halo effect for corporations that do not deserve the positive attention.

By creating a statute that is more in line with benefit corporation statutes, we are guaranteeing that these corporations will put social and environmental needs before profits. We are creating a corporation that the

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169. Wolfe, *supra* note 155.

170. Smith, *supra* note 149.

people can hold accountable for the goals they have set out and not allowing any corporation to simply take the title of a benefit corporation. A corporation must truly plan on making the difference that it claims. Accountability is huge and it is important to guarantee that these corporations are reaching for the goals they have claimed to set out.

