MONEY ISN'T EVERYTHING: WHY PUBLIC BENEFIT CORPORATIONS SHOULD BE REQUIRED TO DISCLOSE NON-FINANCIAL INFORMATION

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ABSTRACT

Social impact investing is coming of age in the twenty-first century. Various forms of investment vehicles have been introduced since the turn of the century just as the millennial generation is entering the investment world. This article focuses on the benefit corporation which has become the most widespread form of social impact for-profit organization. For benefit corporations to be able to attract the capital necessary to fulfill their promise of social impact, investors will have to have confidence in both the financial and non-financial performance of the corporation. Thus, key to the benefit corporation's future success is the development of appropriate measures of accountability for the public benefit aspect of the organization's mission. This article proposes a disclosure regime, based on the current model for financial reporting and the new standards proposed by the Sustainability Accounting Standards Board, that will enable benefit corporations to be publicly traded by investors who have accurate and material information on both the corporation's financial performance and its performance with regard to its public benefit mission.

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I. INTRODUCTION

The intersection of investing and social impact dates back to Roman times. Under Roman law, the corporate form was licensed by the state in order to further public purposes.[1] Early corporate charters in America were granted for specific activities that were seen as advantageous to the public good, such as building a railroad, a canal, a

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[1] Larry D. Thompson, *The Responsible Corporation, Its Historical Roots and Continuing Promise*, 29 NOTRE DAME J. L. ETHICS & PUB. POL'Y 199, 206 (2015).

bridge,[2] or even a university.[3] Douglas Arner describes early American corporations as entities which spread benefits across society and transformed the corporate institution from a mechanism designed to protect privileges, as in Europe, to one of essentially democratic character designed to allow development of public enterprises that otherwise could not have taken place.[4] A corporate charter would not be granted if the public purpose of the applicant was not sufficient and the charter could be revoked if the public purpose was not fulfilled.[5] When states later enacted general incorporation statutes, corporate laws expanded the notion of corporate purpose to "any lawful activity" and the public obligation of corporations came to an end.[6] In the twentieth century, social responsibility developed as an investment approach.[7] Divestment movements were used to pressure corporations into supporting social movements. The most successful of these was the Sullivan Principles, used to pressure companies to cease doing business in apartheid South Africa.[8] Negative screening of certain "sin" activities such tobacco and firearms, became more widespread,[9] and comparisons of investment funds based on their holdings in fossil fuels for the purpose of encouraging divestment in those funds were adopted as tactics of the environmental movement.[10] Self-described socially responsible funds used screening criteria based on filters including gender equity,

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[2] *Id.* at 209.

[3] JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE COMPANY - A SHORT HISTORY OF A REVOLUTIONARY IDEA 43 (2003).

[4] Douglas Arner, *Development of the American Law of Corporations to 1832*, 55 SMU L. REV. 23, 46 (2002).

[5] *See* Thompson, *supra* note 1 at 210. For an expansive discussion on the development of corporations in America, *see* Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1620-23 (1988).

[6] Wayne D. Collins, *The Goals of Antitrust: Trusts and the Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279, 2312 (2013); *See*, *e.g.*, REV. MODEL BUS. CORP. ACT § 3.01 (2010) ("Purposes: Every corporation incorporated under this Act has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation.").

[7] Russell Sparkes & Christopher J. Cowton, *The Maturing of Socially Responsible Investment: A Review of the Developing Link with Corporate Social Responsibility*, 52 J. OF BUS. ETHICS 45 (2004) at 47.

[8] *See* Rev. Leon H. Sullivan, *Sullivan Principles for U.S. Corporations Operating in South Africa*, 24 INT'L LEGAL MATERIALS, 1496 (1985).

[9] *See*, *e.g.*, *Screening Your Portfolio*, SOCIAL FUNDS, http://www.socialfunds.com/page.cgi/article2.html (last visited Oct. 26, 2017).

[10] *See* 350.ORG, www.350.org (last visited Nov. 1, 2017). Fossil Free is a project of 350.org, which describes itself as follows: "350.org is building the global grassroots climate movement that can hold our leaders accountable to science and justice. 350's network extends to over 188 countries." MEDIA, http://350.org/about/media (last visited Nov. 1, 2017); *See also* ABOUT FOSSIL FREE DIVESTMENT, http://gofossilfree.org/about-fossil-free (last visited Nov. 1, 2017) (discussing the divestment campaign).

governance, and sustainable supply chain policies.[11] The underlying purpose, structure, and fiduciary obligations of corporations and their boards of directors, however, remained rooted in shareholder wealth maximization.[12] The corporate social responsibility movement, while having some success in reducing the negative social and environmental impacts of corporations, was not aimed at changing the corporate mission to achieve a particular social or environmental benefit. Progressive corporate law and feminist scholars argued for changes in corporate governance that recognize social and environmental purpose and responsibility, but had little institutional impact.[13] Organizations whose mission was to implement positive social change remained largely in the non-profit, charitable world, separate from organizations whose mission was generating profits, albeit with some attention to avoiding negative social impacts.

The 21st century has seen the blurring of this historic separation of missions with the advent of new instruments such as the social impact bonds (SIBs),[14] and new entities such as Low-profit Limited Liability Companies (L3Cs),[15] Flexible Purpose Corporations in California,[16]

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[11] *See, e.g.*, *The Calvert Principles for Responsible Investment*, CALVERT, (Jan. 16, 2017), http://www.calvert.com/approach/how-we-invest/the-calvert-principles. Calvert's principles of responsible investment include: "Reduce the negative impact of business operations on the environment [.] . . . Respect consumers by marketing products and services in a fair and ethical manner, maintaining integrity in customer relations and ensuring the security of sensitive consumer data [.] . . . Provide responsible stewardship of capital in the best interests of shareholders and debtholders.".

[12] *See* Henry T. C. Hu and Bernard Black, *Empty Voting and Hidden (Morphable) Ownership: Taxonomy, Implications, and Reforms*, 61 BUS. LAW. 1011, 1011 (2006).

[13] *See* Ronnie Cohen, *Feminist Thought and Corporate Law: It's Time to Find Our Way Up from the Bottom (Line)*, 2 AM. U. J. GENDER & L. 1 (1994); Theresa A. Gabaldon, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*, 45 VAND. L. REV. 1387, 1435 (1992); Janis Sarra, *The Gender Implications of Corporate Governance Change*, 1 SEATTLE J. SOC. JUST. 457 (2002); Kellye Y. Testy, *Capitalism and Freedom– For Whom? Feminist Legal Theory and Progressive Corporate Law,* 67 L. & CONTEMP. PROBS. 87 (2004); Cheryl L. Wade, Racial Discrimination and The Relationship Between The Directorial Duty of Care and Corporate Disclosure, 63 U. PITT. L. REV. 389 (2002).

[14] John Hartley, *Social Impact Bonds are Going Mainstream*, FORBES, (Sept. 15, 2014, 1:59 PM) http://www.forbes.com/sites/jonhartley/2014/09/15/social-impact-bonds-are-going-mainstream/#79947a8417d5 ("The bipartisan funding concept is a type of 'Pay For Success' model where private investors invest capital and manage public projects, usually aimed at improving social outcomes for at-risk individuals, with the goal of reducing government spending in the long-term.").

[15] *See New Types of For Profit Entities*, COMMUNITYENTERPRISELAW.ORG, http://communityenterpriselaw.org/new-types-of-for-profit-entities (last visited Oct. 25, 2017). L3Cs are similar to LLCs, except that their main purpose is charitable or educational as defined by the IRS.

[16] *See Id.*

Social Purpose Corporations in Washington[17] and Florida,[18] and Benefit Corporations which are now part of the corporate law regimes of thirty-three states and the District of Columbia,[19] including the influential Delaware.[20] These new approaches to corporate social responsibility have made their appearances, just as the millennial generation is coming of age in the investment world. Studies show, that as investors, millennials as a whole are two times more likely than other investors to invest in companies that are organized to provide a social or environmental benefit[21] and to base their investment decisions on their personal values.[22] Paul Hilton, a partner at Boston-based Trillium Asset Management, observed the increasing interest in social impact investing:

> [M]illennials are a major driver of this trend . . . . These are folks coming out of school having taken a combination of courses in women's studies and environmental studies and social entrepreneurship…and they come out saying, [w]hy can't I start a company that's going to make billions of dollars and also change the planet for the better, or invest in companies that fit that profile?[23]

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[17] *See Id.*

[18] *See* Alexandra Gabel, *Some "Benefits" Of Florida's Newer Forms Of For-Profit Corporations*, GRANT FRIDKIN PEARSON, P.A. (Jan. 11, 2017), http://www.gfpac.com/2017/01/11/some-benefits-of-floridas-newer-forms-of-for-profit-corporations.

[19] *See State by State Status of Legislation*, B LAB, http://benefitcorp.net/policymakers/state-by-state-status (last visited Oct. 28, 2017). These states are: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia.

[20] *See* DEL. CODE ANN. tit. 8, §§ 361–368 (2013).

[21] Paula DiPerna, *Wall Street Wakes Up: Sustainable Investment and Finances Going Mainstream*, 57 ENV'T SCI. AND POL'Y FOR SUSTAINABLE DEV. 42, 49 (2015), http://www.tandfonline.com/loi/venv20. (quoting *Sustainable Signals*, MORGAN STANLEY INST. FOR SUSTAINABLE INVESTING (2015), https://www.morganstanley.com/sustainableinvesting/pdf/Sustainable_Signals.pdf.).

[22] *The Deloitte Millennial Survey 2016*, DELOITTE, https://www2.deloitte.com/al/en/pages/about-deloitte/articles/2016-millennialsurvey.html (last visited Nov. 27, 2017).

[23] Sacha Pfeiffer*, A Guide on the Evolving Trend of Impact Investing*, BOSTON GLOBE, (Apr. 15, 2015), https://www.bostonglobe.com/business/2015/04/14/primer-impact-investing/G78rtdSsidgiTZBLwa5y0L/story.html (internal citations omitted); *See also* Kia Kokalitcheva, *Mark Zuckerberg Takes on Critics of his $45 Billion Giveaway*, FORBES, Dec. 4, 2015 http://fortune.com/2015/12/03/zuckerberg-foundation-llc (describing Mark Zuckerberg and Priscilla Chan's LLC as another example of impact investing that focuses on the social goal, but at the same time, does not eliminate the opportunity for profit, as do traditional foundations and charities) (quoting Zuckerberg's Facebook post: "The Chan Zuckerberg Initiative is structured as an LLC rather than a traditional foundation. This enables us to pursue

This article focuses on the benefit corporation,[24] which while new, has become the most widespread form of social impact for profit organization.[25] In a 2014 article in the *Stanford Innovation Review*, the authors observed that "[p]assage of L3C legislation seems to have stagnated, whereas benefit corporation legislation is quickly spreading across the country."[26] The prediction that "at current rates, the benefit corporation form will soon be available in nearly all, if not all, states"[27] has not yet come true. However, the number of benefit corporations has more than tripled from 998, in 2014,[28] to more than 3600, in 2016,[29] while the number of L3Cs has only increased by a third.[30] And one state, North Carolina, has repealed its L3C legislation.[31]

Robert Esposito observes that

> the financial industry possesses [a] myriad [of] tools for measuring a company's financial value, but has only begun to explore different methods for valuing a corporation's social and environmental impacts and benefits. Social enterprise's biggest challenge will be to fashion new and innovative metrics for measuring social and environmental benefits.[32]

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our mission by funding non-profit organizations, making private investments and participating in policy debates — in each case with the goal of generating a positive impact in areas of great need. Any net profits from investments will also be used to advance this mission.").

[24] *See* Janine Hiller, *The Benefit Corporation and Corporate Social Responsibility*, 118 J. BUS. ETHICS 287 (2012) (describing benefit corporations and their place in the social responsibility movement).

[25] Alexandra Leavy, *Necessity is the Mother of Invention: A Renewed Call to Engage the SEC on Social Disclosure*, 2014 COLUM. BUS. L. REV. 463, 483 (2014).

[26] Kate Cooney, et al., *Benefit Corporation and L3C Adoption: A Survey*, STANFORD SOC. INNOVATION REV. (Dec. 15, 2015), http://ssir.org/articles/entry/benefit_corporation_and_l3c_adoption_a_survey.

[27] *Id.*

[28] Cooney, et al., *supra* note 26, ("As of July 2014, we counted 998 benefit corporations in the United States from Secretaries of State (SOS) office lists.").

[29] Frederick H. Alexander, *The Capital Markets and Benefit Corporations*, BUS. L. TODAY (July 2016), http://www.americanbar.org/publications/blt/2016/07/05_alexander.html.

[30] *See Latest L3C Tally*, INTERSECTOR PARTNERS, http://www.intersectorl3c.com/l3c (last visited Nov. 1, 2017); *Cf.* Cooney, et al., *supra* note 26, (reporting 1,051 active L3Cs).

[31] S.B. 439, Gen. Assemb., Sess. Law 2013-157 (N.C. 2013).

[32] 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 L. BUS. L. REV. 639, 710 (2013).

If benefit corporations are going to be able to attract capital, investors are going to have to have confidence in both the financial and non-financial performance of the corporation. Thus, the key to the benefit corporation's future success is the development of appropriate measures of accountability for the public benefit aspect of the organization's mission. This article proposes a disclosure regime that will enable benefit corporations to be publicly traded by investors who have assurance that the corporation is advancing both its financial and its public benefit goals. Part II of this article examines the legal requirements imposed by the Model Legislation [33] and the Delaware Benefit Corporations Act,[34] and discusses the efficacy of these requirements in promoting both accountability to stakeholders and providing an incentive to advance the public benefit aspect of the corporation's dual mission. Part II also examines current federal disclosure requirements under the securities laws and how they might apply to a publicly traded benefit corporation. Part III considers how audit standards, currently applicable to financial reporting, might accommodate the dual mission of benefit corporations. Part IV offers some modest recommendations, in light of the predicted growth of the social investment trend, projecting millennials as the majority of the future investors, financial advisors, and fund managers.

II. LEGAL REQUIREMENTS OF MODEL LEGISLATION

A. Benefit Corporation Statutes

As of the writing of this article, thirty states and the District of Columbia have passed benefit corporation legislation, and seven states currently have bills in process.[35] Significantly, Delaware passed benefit corporation legislation in 2013. The importance of Delaware law in the corporate arena cannot be underestimated. According to Vice Chancellor Sam Glasscock of the Delaware Court of Chancery, "[m]ore than half the companies traded on the New York Stock Exchange and NASDAQ, as well as 60 percent of Fortune 500 companies, have chosen to officially set up shop in the 90-mile long state on the Delaware River . . . . Seventy-five percent of the U.S. initial public offerings involve Delaware

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[33] MODEL BENEFIT CORP. LEGIS. (2016).

[34] DEL. CODE ANN. tit. 8, §§361-68 (2017).

[35] *State by State Status of Legislation*, B LAB, http://benefitcorp.net/policymakers/state-by-state-status (last visited Oct. 31, 2017).

corporations."[36] As discussed below, a Delaware public benefit corporation will likely be the first benefit corporation to conduct an initial public offering.[37]

In general, benefit corporations are structured as regular corporations with additional requirements relating to the purpose of the corporation. First, the corporation's purpose must include a public benefit.[38] Both the Model Act and the Delaware statute require that a benefit corporation include, as part of its corporate purpose, a general public benefit.[39] The Model Act defines a general public benefit as "a material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation."[40] The Act identifies examples of specific public benefits to include: providing low-income or underserved individuals or communities with beneficial products or services; promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business; protecting or restoring the environment; improving human health, promoting the arts, sciences, or advancement of knowledge; increasing the flow of capital to entities with a purpose to benefit society or the environment; and conferring any other particular benefit on society or the environment.[41] The Delaware statute defines a public benefit as "a positive effect (or reduction of negative effects) on [one] or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature."[42]

Actions taken by directors that are in furtherance of the stated benefit or benefits are deemed to be in the best interest of the corporation,[43] thus expanding the notion of the directors' fiduciary duty

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[36] *History and Role of the Delaware Court of Chancery – An Inside Look at Business' Most Important Court*, MARKKULA CENTER FOR APPLIED ETHICS (Nov. 1, 2012), (citing the comments of Vice Chancellor Glasscock speaking at the Markkula Center for Applied Ethics Business and Organizational Ethics Partnership of Santa Clara University).

[37] *See infra*, note 56 (discussing Laureate Education, PBC).

[38] MODEL BENEFIT CORP. LEGIS. § 201 (2016).

[39] *Id.* ("Corporate purposes. (a) General public benefit purpose. – A benefit corporation shall have a purpose of creating general public benefit.").

[40] MODEL BENEFIT CORP. LEGIS. § 102 (2016).

[41] *Id.*

[42] DEL. CODE ANN. tit. 8, § 362 (2017).

[43] *See* MODEL BENEFIT CORP. LEGIS. § 201, CMT, (2016) ("Subsection (c) [of § 201] confirms that pursuing general and specific public benefit is in the best interests of the benefit corporation. Because the basic duty of a director is to act in a manner that the director reasonably believes to be in the best interests of the corporation, decisions by the board of

to act in the best interest of the corporation. No longer is the primary test this duty to maximize shareholder profits; decisions by directors that provide benefits to other stakeholders may be equally important factors.[44]

Second, the Model Act mandates that the Board of Directors of a publicly traded benefit corporation include an independent benefit director who is responsible for providing the annual benefit report to shareholders.[45] This report must contain the benefit director's opinion of whether the corporation acted in accordance with its general public benefit purpose and any specific public benefit purpose in all material respects during the period covered by the report. It must also include whether the directors and officers acted in accordance with their responsibilities to take into account the interests of multiple stakeholders relevant to the corporation's mission.[46] The Delaware statute, by contrast, does not require a benefit director; however, it does require the Board of Directors to provide a biennial report to shareholders on the corporation's performance with regard to its public benefit mission.[47] Finally, the Model Act requires, and the Delaware statute permits, a benefit corporation to measure its performance against a third party standard of its own choosing.[48]

B. Accountability for the Benefit Mission

Accountability for the public benefit aspect of the benefit corporation's mission is at the heart of the question of whether benefit corporations can fulfill their promise of social impact. The Model Act recognizes the importance to shareholders and other constituents of non-financial reporting:

> The annual benefit report is intended to permit an evaluation of that performance so that the shareholders can judge how the directors have discharged their responsibility to manage the corporation and thus whether the directors should be retained in office or the shareholders should take other action to change the way the corporation is managed. The

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directors that promote the creation of general or specific public benefit will satisfy the requirement to act in the best interests of the corporation. If an ordinary business corporation includes in its articles of incorporation a statement of a specific purpose, it is by definition in the best interests of the corporation for the directors to pursue that purpose.").

[44] MODEL BENEFIT CORP. LEGIS. § 301 (2016).

[45] MODEL BENEFIT CORP. LEGIS. § 302 (a) (2016).

[46] MODEL BENEFIT CORP. LEGIS. § 302 (c) (2016).

[47] DEL. CODE ANN. tit. 8, § 366 (b) (2017).

[48] *Id.*; MODEL BENEFIT CORP. LEGIS. § 401 (2016).

> annual benefit report is also intended to reduce "greenwashing" (the phenomenon of businesses seeking to portray themselves as being more environmentally and socially responsible than they actually are) by giving consumers and the general public a means of judging whether a business is living up to its claimed status as a benefit corporation.[49]

Nevertheless, state laws, based on the Model Act or the Delaware statute, do not require an independent audit of the financial or social mission and rely instead on the self-reporting regime of the corporation. Social responsibility reporting for regular corporations has also been criticized because it is self-reported, with one scholar noting that "[t]he unaudited, unenforceable and voluntary nature of CR reports and corporate codes of conduct render them ineffective approaches to enhancing a corporation's social and environmental commitments."[50] A number of scholars have identified this as a weakness of benefit corporations. Dana Reiser observes that "delegation to third-party standard setters to vet this public benefit and the lack of a statutory floor for what counts as public benefit make low standards and greenwashing particular concerns for benefit corporations."[51] Steven Munch agrees that "the statutes, as now drafted, do little to insure that a benefit corporation fulfills its social obligations and that its self-selection and identification as a dual mission enterprise is more than mere puffery."[52] He makes several recommendations for improving accountability through governance and regulatory changes at the state level. He proposes expanding access to legal remedies to stakeholders who are directly affected by decisions in pursuit of the corporation's stated public benefit, and internal policies that limit the corporation's financial goals,

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[49] MODEL BENEFIT CORP. LEGIS. §102, CMT. (2016).

[50] Esposito, *supra* note 24, at 662.

[51] Dana Reiser, *Benefit Corporations - A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 617 (2011); *See also* John Anner, *Jessica Alba and the Impact of Social Enterprise*, STANFORD SOC. INNOVATION REV. (Sept. 26, 2014), https://ssir.org/articles/entry/jessica_alba_and_the_impact_of_social_enterprise; *Social Impact Calculator*, LOW INCOME INVESTMENT FUND http://www.liifund.org/calculator/calculator (last visited Nov. 1, 2017) (noting "[T]he sector has a long way to go to document that it is in fact having an impact. And with 28 million small and medium enterprises in America, benefit corporations need to stand out from the crowd on the basis of their added social value. It would be really nice if in addition to the certification report, every benefit corporation could use a social impact calculator.").

[52] Steven Munch, *Improving the Benefit Corporation, How Traditional Governance Mechanisms Can Enhance the Innovative New Business Form*, 7 NW. J. L. & SOC. POL'Y 170, 189 (2012).

either by capping dividends, or by setting pre-requisites based on measurable achievements of the public benefit before dividends can be declared by the corporation. Munch further recommends expanding the number of required benefit directors on the Board of Directors, and giving them greater monitoring, reporting, and advising roles, requiring social audits[53] to review non-financial performance, and creating a state oversight board to review the "stringency and integrity" of the standards used in benefit reports.[54]

C. Federal Securities Laws

Securities laws, at both the state and federal levels, could provide a framework for accountability. Joseph Yockey notes "because it is costly for firms to opt-in to the mandatory disclosure requirements of the federal securities laws, doing so credibly signals to investors that a company is honest and transparent."[55] At the time of this writing, there is no publicly held benefit corporation,[56] although Laureate Education, which reincorporated itself as a public benefit corporation domiciled in Delaware, registered for its IPO in October, 2015.[57] For publicly traded

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[53] *See, e.g.*, *Social Audits – Socially Responsible Auditing Standards*, VASIN, HEYN & CO., http://vhcoaudit.com/social-audits/the-social-responsibility-audit/social-audits-socially-responsible-auditing-standards (last visited Oct. 25, 2017).

[54] Munch, *supra* note 52 at 191-95. *See also* Joseph Yockey, *Does Social Enterprise Law Matter*?, 66 ALA. L. REV. 767, 821 (2014).

[55] Yockey, *supra* note 54, at 820.

[56] *What Are B Corps?*, B LAB, https://www.bcorporation.net/what-are-b-corps (last visited Oct. 20, 2017) ("B Corps are for-profit companies certified by the nonprofit B Lab to meet rigorous standards of social and environmental performance, accountability, and transparency."). Unlike benefit corporations, there are now several publicly traded BLab certified corporations and the new CEO of Unilever has expressed interest in pursuing the BLab certification, but the legal status of these entities does not subject them to any additional requirements regarding accountability or transparency relevant to their B-certification status. Jo Confino, *Will Unilever become the world's largest publicly traded B corp?*, THE GUARDIAN (Jan. 23, 2015), www.theguardian.com/sustainable-business/2015/jan/23/benefit-corporations-bcorps-business-social-responsibility.

[57] *See* Robert W. Zentz, Esquire, *Form S-1 Registration Statement for Laureate Education, Inc.*, U.S. SEC. & EXCH. COMM'N (May 20, 2016), https://www.sec.gov/Archives/edgar/data/912766/000104746916013340/a2227130zs-1a.htm. The public benefit in Laureate's Certificate of Incorporation is "to produce a positive effect (or a reduction of negative effects) for society and persons by offering diverse education programs delivered online and on premises operated in the communities that we serve." In listing Risk Factors, the Laureate Prospectus states: "As a public benefit corporation, our focus on a specific public benefit purpose and producing a positive effect for society may cause our board of directors to make decisions that may not be in the best interests of our stockholders." In disclosing Risks associated with its Class A common stock, Laureate states: ***Our status as a public benefit corporation or a Certified B Corporation may not result in the benefits that we anticipate.***

benefit corporations, whose dual mission is legally recognized by state corporation statutes, an appropriate regulatory regime at the federal level for disclosure of material information related to the corporation's stated public benefit(s), in addition to its financial condition is warranted.[58]

We are a public benefit corporation under Delaware law. As a public benefit corporation we are required to balance the financial interests of our stockholders with the best interests of those stakeholders materially affected by our conduct, including particularly those impacted by the specific benefit purpose relating to education set forth in our certificate of incorporation. In addition, there is no assurance that the expected positive impact from being a public benefit corporation will be realized. Accordingly, being a public benefit corporation and complying with our related obligations could negatively impact our ability to provide the highest possible return to our stockholders.

As a public benefit corporation, we are required to publicly disclose a report at least biennially on our overall public benefit performance and on our assessment of our success in achieving our specific public benefit purpose. If we are not timely or are unable to provide this report, or if the report is not viewed favorably by parties doing business with us or regulators or others reviewing our credentials, our reputation and status as a public benefit corporation may be harmed.

As a public benefit corporation, our focus on a specific public benefit purpose and producing a positive effect for society may negatively influence our financial performance.

As a public benefit corporation, since we do not have a fiduciary duty solely to our stockholders, we may take actions that we believe will benefit our students and the surrounding communities, even if those actions do not maximize our short- or medium-term financial results. While we believe that this designation and obligation will benefit the Company given the importance to our long-term success of our commitment to education, it could cause our board of directors to make decisions and take actions not in keeping with the short-term or more narrow interests of our stockholders. Any longer-term benefits may not materialize within the timeframe we expect or at all and may have an immediate negative effect. For example:

- we may choose to revise our policies in ways that we believe will be beneficial to our students and their communities in the long term, even though the changes may be costly in the short- or medium-term;
- we may take actions, such as modernizing campuses to provide students with the latest technology, even though these actions may be more costly than other alternatives;
- we may be influenced to pursue programs and services to demonstrate our commitment to our students and communities even though there is no immediate return to our stockholders; or
- in responding to a possible proposal to acquire the Company, our board of directors may be influenced by the interests of our employees, students, teachers and others whose interests may be different from the interests of our stockholders.

[58] Allison Grey Anderson, *The Disclosure Process in Federal Securities Regulation: A Brief Review*, 25 Hastings L. J. 311, 314 (1974) ("the dual function of disclosure-promoting accurate investment analysis and protecting unsophisticated investors from unfair treatment-has always been implicitly recognized. On the one hand, disclosure makes available the information needed for accurate investment analysis, thus promoting efficient securities markets which in turn result in better allocation of the nation's capital resources. Conversely, as a protective device, disclosure prevents the kind of defrauding and exploitation of inexperienced investors which depends for its success on nondisclosure, or inadequate or misleading disclosure, by securities dealers or corporate insiders.").

Federal securities laws rely on disclosure as a central means of investor protection.[59] According to Monsma and Buckley,[60] to socially responsible investors and fund managers, "company performance in social and environmental objectives are as important as successful financial performance; the two are considered together in the 'total mix of information' to make investment decisions."[61] They predict that the SEC will become more involved in reporting of social and environmental firm performance. Particularly relevant to benefit corporations, they predict that the SEC's attention in this area is most likely to be focused on corporations that commit themselves to specific social and environmental goals.[62] Monsma and Olson, in arguing for greater environmental disclosures, observe that:

> While the duty to disclose material social and environmental information does not necessarily arise out of a line-item SEC disclosure requirement, it does arise out of the fact that investors can be expected to rely on the completeness and accuracy of information once a corporate commitment is made or once activities to manage social and environmental areas are undertaken by the companies.[63]

Unless exempt, securities may not be offered to the public without a detailed registration statement filed with the SEC[64] and no sales of registered securities can be made to the public without the distribution of the prospectus.[65] Once the securities have been issued, the Securities and Exchange Act of 1934 imposes ongoing reporting and disclosure

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[59] *The Laws That Govern The Securities Industry*, U.S. SEC. AND EXCH. COMM'N (Oct. 1, 2013), https://www.sec.gov/about/laws.shtml ("Often referred to as the "truth in securities" law, the Securities Act of 1933 has two basic objectives: require that investors receive financial and other significant information concerning securities being offered for public sale; and prohibit deceit, misrepresentations, and other fraud in the sale of securities.").

[60] David Monsma & John Buckley, *Non-Financial Corporate Performance: The Material Edges of Social and Environmental Disclosure*, 11 U. BALT. J. ENVTL. L. 151 (2004).

[61] *Id*. at 192.

[62] *Id.* at 202.

[63] David Monsma & Timothy Olson, *Muddling through Counterfactual Materiality and Divergent Disclosure: The Necessary Search for a Duty to Disclose Material Non-Financial Information*, 26 STAN. ENVTL. L.J. 137, 184 (2007).

[64] 1933 Securities Act of 1933, ch. 38, sec. 1, 48 Stat. 74, § 6, (codified as amended at 15 U.S.C.S. § 77g (2017)) (lists the information that is required to be in the registration statement).

[65] 1933 Securities Act of 1933, ch. 38, sec. 1, 48 Stat. 74, § 10, (codified as amended at 15 U.S.C.S. § 77j (2017)) (lists the information from the registration statement that must be included in the prospectus).

requirements, both to the SEC and to investors.[66] These consist of periodic reporting at annual and quarterly intervals, in connection with proxy statements for the annual meeting of shareholders, and as a result of a major corporate event such as a merger or sale of the business.[67] Regulation S-K lists the items that must be disclosed;[68] most of these are financial disclosures or issues closely tied to the financial condition of the corporation. However, as noted by Monsma and Olson, three sections of the S-K requirements are broader and might include information relevant to non-financial aspects of the corporation's operations.[69] While progress towards achieving a public benefit might be disclosed in these sections, without a more directed provision for public benefit analysis, the current disclosure regime is inadequate to inform the shareholders of a benefit corporation of this aspect of the corporation's mission.

A second source of disclosure requirements is found in Section 10-b of the 1934 Securities and Exchange Act, which requires disclosure of material information in order to prevent misrepresentation by the corporation.[70] In *TSC Industries v. Northway*,[71] the Supreme Court articulated the materiality standard that has been adopted by the SEC: a fact is material if there is a "substantial likelihood that disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made

[66] Securities Exchange Act of 1934, ch. 404, sec. 1, 48 Stat. 881, § 13 (codified as amended at15 U.S.C.S. § 78m (2017)).

[67] *Id.*; *See also Securities Exchange Act of 1934,* U.S. SEC. AND EXCH. COMM'N (Oct. 1, 2013), https://www.sec.gov/about/laws.shtml#secexact1934 (describing the 1934 Securities Exchange Act as follows: "With this Act, Congress created the Securities and Exchange Commission. The Act empowers the SEC with broad authority over all aspects of the securities industry. This includes the power to register, regulate, and oversee brokerage firms, transfer agents, and clearing agencies as well as the nation's securities self regulatory organizations (SROs)… The Act also identifies and prohibits certain types of conduct in the markets and provides the Commission with disciplinary powers over regulated entities and persons associated with them. The Act also empowers the SEC to require periodic reporting of information by companies with publicly traded securities.").

[68] Monsma & Olson, *supra* note 63 at 147.

[69] These are items 101 Description of the Company's Business, 103 Disclosure of Legal Proceedings, and 303 Management's Discussion and Analysis of Financial Conditions and Results (MD&A). *Id.* at 148.

[70] 17 C.F.R. § 240.10b-5 (1996). [hereinafter referred to as Section 10-b] (revealing that the SEC adopted rule 10-b of the Securities and Exchange Act to effectuate the criminal liability held under violation of 15 U.S.C.S. § 78j(b)). (quoting *United States v. O'Hagan*, "Liability under Rule 10b-5. . . does not extend beyond conduct encompassed by § 10(b)'s prohibition." 521 U.S. 642, 651 (1997)).

[71] *TSC Indus., Inc., et al. v. Northway*, 426 U.S. 438 (1976).

available."[72] Currently, materiality is generally measured by the effect of the information on the financial condition of the business.[73] For example, environmental information, such as carbon disclosure, is not required because it is material to the environment, and environmentally inclined shareholders are likely to find this information relevant to their investment decisions; rather, it must be disclosed if it poses a financial risk for the corporation. Similarly, other climate change risks, to the extent they have financial impact on the corporation, need to be disclosed.[74]

To illustrate the limitation of the current financially focused interpretation of materiality, consider the following hypothetical situation where the disclosure is not tied to a particular financial risk. If a corporation disclosed that it was "certified" as being socially responsible, would it be misleading if that certification could be obtained simply by paying a fee? And even if it were misleading, would it be considered material, such that a remedial disclosure would be required? Would it matter if the corporation making the misleading statement were a benefit corporation? This hypothetical raises two important issues: first, under the current financially focused regulatory scheme, information about a corporation's public benefit mission may not be considered material; second, if the information is material, its disclosure is only required to counter a misrepresentation. At present, there is no affirmative duty to disclose public benefit information despite the fact that the public benefit related activities are as material to a public benefit corporation's core mission as is financial information to all corporations.

Alexandra Leavy, in proposing that the SEC adopt a single standard or a set of industry standards, such as the Global Reporting Initiative,[75] notes that the SEC did not create the accounting regime that is now considered the standard for financial reporting and relies on the private, non-profit Federal Accounting Standards Board to establish and maintain accounting standards.[76] Similarly, the SEC might engage one or more organizations to create a standard or set of standards applicable

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[72] *Id.* at 449.

[73] Monsma & Olson, *supra* note 63.

[74] *See generally* Joseph J. Swartz, *Thinking Green or Scheming Green?: How and Why the FTC Green Guide Revisions Should Address Corporate Claims of Environmental Sustainability,* 18 PENN. ST. ENVTL. L. REV. 95, 120 (2009) (proposing that the SEC be given jurisdiction to enforce the Federal Trade Commission's Green Guides, as a means of determining when environmental or social disclosures are misleading).

[75] *See About GRI*, GLOB. REPORTING INITIATIVE, https://www.globalreporting.org/Information/about-gri/Pages/default.aspx (last visited Nov. 1, 2017).

[76] *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, 505 (2014).

to disclosing the benefit activities of benefit corporations.[77] Without such disclosure, Leavy argues, benefit directors have significant liability protection under benefit corporation laws. First, the states permit the directors to choose the standard by which performance will be measured, and second, to self-report the corporation's performance in accordance with the standard. Even where an independent benefit director is required to monitor these activities, the benefit director has no liability for the content of the report, even if it contains false, material information.[78]

D. SEC Release on Disclosure of Non-Financial Information

The Securities and Exchange Commission first considered requiring social and environmental disclosures in 1975 during a period of lengthy litigation with the National Resources Defense Council.[79] The Commission issued a Release that concluded that "although [the SEC is] generally not authorized to consider the promotion of social goals unrelated to the objectives of the federal securities laws, it is authorized and required by NEPA to consider promotion of environmental protection as a factor in exercising its rulemaking authority."[80] Now, over forty years later, in its April, 2016, Release entitled "Business and Financial Disclosure Required by Regulation S-K"[81] the Commission is acknowledging an increasing awareness and interest by investors and other groups in greater disclosure on matters of public policy and sustainability; it has requested comments on a number of disclosure issues, including Disclosure of Information Relating to Public Policy and Sustainability Matters.[82] Recognizing that there is a tradeoff between costs and benefits of disclosure requirements, and that the benefits of disclosing certain items may be greater for some registrants than others, the SEC "seek[s] to understand if disclosure requirements can be more appropriately tailored to registrants given the likely variation across

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[77] *Id.*; *See* notes 126-47 and surrounding text *infra* for a discussion of standards.

[78] *See Id.* at 487; Model Act § 302(e) and DEL. CODE ANN. tit. 8 § 362(b).

[79] *See Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031 (1979).

[80] Environmental and Social Disclosure, Release No. 33-5627, 40 FED. REG. 51656 (Nov. 6, 1975) (to be codified at 17 C.F.R. pt. 210, 211, 229, and 249), https://www.sec.gov/rules/concept/2016/33-10064.pdf (last visited Nov. 1, 2017).

[81] Business and Financial Disclosure Required by Regulation S-K, 81 FED. REG. 23916, (proposed Apr. 22, 2016) (to be codified at 17 C.F.R. pt. 210, 229, 230, 239, 240, 249), https://www.sec.gov/rules/concept/2016/33-10064.pdf (last visited Nov. 1, 2017). [hereinafter *Release*].

[82] *Id* at 204.

registrants in the benefits and the costs of disclosing certain types of information."[83]

After recounting several recent congressional mandated disclosures of the Dodd Frank Act[84] for disclosure about mine safety and health,[85] the use of conflict minerals,[86] and certain payments made by resource extraction issuers,[87] the Release notes the SEC's position regarding additional disclosures on political spending or related to an environmental or other matters of social concern should not be required of all registrants unless appropriate to further a specific congressional mandate[88] or unless, under the particular facts and circumstances, such matters are material.[89] In the Release, the SEC states that the test of materiality articulated by the Supreme Court in *TSC v. Northway* in 1976[90] would be "applied for any purpose under the Securities Act and the Exchange Act",[91] thus opening the door for the first time to a broad definition of materiality that could include the nonfinancial commitment to a public benefit by a benefit corporation.

The SEC notes in the Release that it is statutorily required to consider the costs and benefits in its rulemaking process. While recognizing that "requiring an appropriate level of disclosure is critical to a well-functioning capital market,"[92] (and that disclosure can reduce information asymmetry, and improve efficiency),[93] such disclosure may also increase the cost of capital, reduce investment, and result in some companies avoiding the disclosure requirements by seeking exemptions,

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[83] *Id*. at 15.

[84] See David M. Lynn, *The Dodd-Frank Act's Specialized Corporate Disclosure: Using the Securities Laws to Address Public Policy Issues*, 6 J. BUS. & TECH. 327, 330 (2011) (suggesting these congressional mandates are a departure from the SEC's rationale underlying required disclosures) ("The requirements for Specialized Corporate Disclosure are not based on the fundamental question of whether the information would be considered to be 'material' by investors in making voting or investment decisions. Rather, the requirements are based on a determination through the legislative process that the importance of the underlying public policy warrants the use of the public disclosure regime as a means for more broadly disseminating information that is of interest to certain members of the public, although not necessarily of interest to any investor.").

[85] Dodd-Frank Wall Street Reform and Consumer Protection Act ,12 U.S.C. § 5301, § 1504 (2015).

[86] *Id*. at § 1502.

[87] *Id*. at § 1504.

[88] For instance, as required by NEPA to consider promotion of environmental protection in rulemaking. *See Release*, *supra* note 81, at 205, n. 663.

[89] *Id.* at 205.

[90] *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 445 (1976).

[91] *Release*, *supra* note 81, at 37, n. 109.

[92] *Id.* at 53.

[93] *Id*. at 42.

going or remaining private.[94] Moreover, "high levels of immaterial disclosure can obscure important information."[95] The SEC observes that "[t]he appropriate choice of disclosure requirements therefore involves certain tradeoffs. These tradeoffs may depend on the nature of the audience for disclosure and the characteristics of registrants."[96] Mandatory disclosure of public benefit activities and their results by benefit corporations, but not all corporations, would likely result in the benefits outweighing the costs. Investors in benefit corporations have a heightened interest in the benefit activities of the business, and state law already requires the corporation to produce a benefit report. A regulation that makes that report more credible and meaningful would surely outweigh the additional cost of compliance and increase efficiency and confidence in the market.

The Commission recognizes that the process of identifying information that is "material" is an ongoing one.[97] One study, cited by the Commission, reported increased shareholder engagement on environmental and social issues[98] and a second study opined that this trend might indicate that investors were getting adequate financial information under the current disclosure requirements, but were seeking additional information on social and environmental issues.[99] Finally, the Release asks for comments on both the substance and form of sustainability disclosures, and whether they would best be part of an integrated reporting regime or separate from required financial reporting.[100]

E. Sustainability Reporting and Benefit Reporting

It is important to distinguish between sustainability reporting, using standards such as BLab[101] or GRI,[102] and reporting on a benefit

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[94] *Id.* at 53.

[95] *Id.* at 14.

[96] *Release*, *supra* note 81, at 14.

[97] *Id.* at 210.

[98] *Id*. at n. 691 (citing Bill Libit & Todd Freier, *The Corporate Social Responsibility Report and Effective Stakeholder Engagement*, HARVARD L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Dec. 28, 2013), https://corpgov.law.harvard.edu/2013/12/28/the-corporate-social-responsibility-report-and-effective-stakeholder-engagement.

[99] *Id.* at 211, n. 692 (citing Marc Goldstein, *Defining Engagement: An Update on the Evolving Relationship Between Shareholders, Directors and Executives*, INSTITUTIONAL SHAREHOLDER SERV. FOR THE INV. RESP. RES. CTR. INST. (Apr. 10, 2014), https://irrcinstitute.org/wp-content/uploads/2015/09/engagement-between-corporations-and-investors-at-all-time-high1.pdf).

[100] *Id*. at 214.

[101] Munch, *supra note 52.*

corporation's benefit mission. Even if the SEC mandates general sustainability disclosures, investors in a benefit corporation may still not have the information they need to evaluate the corporation's progress towards fulfilling its specific mission. For example, as noted previously, the mission of Laureate education is "to produce a positive effect (or a reduction of negative effects) for society and persons by offering diverse education programs delivered online and on premises operated in the communities that we serve."[103] Applying the Global Reporting Initiative, or BLab certification standards to Laureate might assess its corporate governance, environmental, labor, and other corporate practices, but would not necessarily communicate to investors whether Laureate's education programs are diverse, whether they are being effectively delivered, and whether the programs are producing a positive effect. Moreover, like the sustainability reports of regular corporations, there is no requirement that the benefit report be subject to an audit. As will be discussed in the next part, the reliability issues are similar for both types of reports of non-financial corporate information. As social responsibility reporting has a longer history than benefit reporting, more research has been done with respect to social responsibility reporting standards and it can inform the development of reporting standards for the benefit corporation.

III. AUDIT STANDARDS

A. Reliability of the Annual Report and Third-Party Standards

As previously discussed, the benefit corporation's dual mandate of maximizing shareholder wealth and providing a public benefit necessitates new reporting requirements. In addition to the financial statements, which address the achievement of the traditional mission of profit maximization, the benefit corporation generally also issues an annual report measuring its performance towards achieving the public benefit.[104] While the reporting requirements differ slightly from state to state, all states except for California and Delaware follow the Model Act and require an annual benefit report prepared against a third party standard and made available to the public either by publicly posting the

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[102] *Id.*

[103] Zentz, *supra* note 57.

[104] Steven H. Schulman, *Delaware Public Benefit Corporations: A Brief Introduction*, AG DEAL DIARY (Nov. 14, 2013) https://www.akingump.com/en/experience/practices/corporate/ag-deal-diary/delaware-public-benefit-corporations-a-brief-introduction.html.

report, or filing it with the appropriate state agency[105] Delaware requires for the benefit corporation to provide a statement to its stockholders discussing the progress it has made towards achieving its public benefit at least biennially.[106] A benefit corporation organized under Delaware law may also be required to have the report verified by an independent third party, if its stockholders request this third party verification.[107]

The Model Act requires that the benefit report include the objectives the directors established for the public benefit, which standards the directors use to measure progress towards achieving the objectives, and an evaluation on how the directors see the corporation's success towards achieving these objectives.[108] According to the Model Act, benefit corporations have to publish the annual or biennial report based on a third party standard, but the Model Act does not require a specific standard, only that it be comprehensive, independent, credible, and transparent.[109] Significant differences in interpretation of what constitutes independence and credibility exist among the states.[110] Hiller points out that using a third party standard is an important element in adding objectivity to the performance review.[111] However, she warns that investors and shareholders need to be leery of the content of the report, as its reliability will depend on the state.[112] All states following the Model Act require the directors use a third party standard when assessing the achievement of the objectives but allow the directors to determine which third party standards to apply.[113] The benefit corporation website provides a partial list of acceptable standards.[114] One of the more popular standards for sustainability reporting is the Global Reporting Initiative (GRI).[115] The GRI standards are meant to provide a foundation to businesses, governmental and other entities for

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[105] J. Haskell Murray, *Corporate Forms of Social Enterprise: Comparing the Statutes*, (Jan. 15, 2015), https://www.law.umich.edu/clinical/internationaltransactionclinic/Documents/May%2011%20Conference%20Docs/Corporate%20Forms%20of%20Social%20Enterprise.pdf.

[106] Schulman, *supra* note 104.

[107] DEL. CODE ANN. tit. 8, § 366 (b) (2017).

[108] Leavy, *supra* note 25 at 483-85.

[109] MODEL BENEFIT CORP. LEGIS. § 102 (2016).

[110] Hiller, *supra* note 24, at 292.

[111] *Id.*

[112] *Id.*

[113] MODEL BENEFIT CORP. LEGIS. § 401 (2016).

[114] *How Do I Pick a Third Party Standard?*, B LAB, http://benefitcorp.net/businesses/how-do-i-pick-third-party-standard (last visited Nov. 15, 2017).

[115] *GRI Standards*, GLOBAL REPORTING INITIATIVE, https://www.globalreporting.org/standards/Pages/default.aspx (last visited Nov. 15, 2017).

reporting sustainability issues. GRI, an independent organization, was founded in 1997 in Boston and reports that "[o]f the world's largest 250 corporations, 92% report on their sustainability and 74% of these use GRI's Standards to do so."[116] Other acceptable standards listed include ISO 26000, Green America Business Network and Ceres Roadmap to Sustainability.[117]

B. Auditor's Role in Providing Assurance

To address the reliability concerns raised by Hiller and others, this section analyzes the potential role of the external auditor towards the achievement of the benefit corporation's dual mission. Research on the role of auditors, with respect to regular corporations' sustainability reports provides valuable insight for the benefit corporation. Much of the literature refers to the auditor's assurance regarding sustainability reporting as a "sustainability audit." However, the work performed is technically an assurance engagement. According to the International Framework for Assurance Engagements, issued by the International Auditing and Assurance Standard Board, an assurance engagement has five elements: a three party relationship, subject matter to be reported upon, suitable criteria against which to assess performance, collection of evidence and the issuance of a written report.[118] For benefit reports, the definition of an assurance engagement contains three elements: (1) a set of criteria, (2) a collection of evidence, and (3) the written report, all of which are discussed in detail in this part.

Financial reporting, which is a robust and well-established system, provides a model for benefit reporting. Publicly traded corporations prepare annual financial statements in accordance with an applicable financial reporting framework, such as the U.S. Generally Accepted Accounting Principles (GAAP).[119] These standards are set by the

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[116] *GRI Sustainability Reporting Standards, A Record of Use and Endorsement*, GLOBAL REPORTING INITIATIVE, https://www.globalreporting.org/information/sustainability-reporting/Pages/gri-standards.aspx (last visited Nov. 15, 2017).

[117] *How Do I Pick a Third Party Standard?, supra* note 114.

[118] *International Framework for Assurance Engagements*, INT'L FED'N OF ACCOUNTANTS, http://www.ifac.org/system/files/downloads/b003-2010-iaasb-handbook-framework.pdf (last visited Nov. 1, 2017).

[119] CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Auditing Standards No. 1, § 150 (Am. Inst. of Certified Pub. Accountants, 1973). Generally Accepted Accounting Principles (GAAP) are the set of common standards used to prepare financial statements in the United States. *Id.* *See About GAAP*, FIN. ACCT. FOUND., http://www.accountingfoundation.org/cs/ContentServer?c=Page&pagename=Foundation%2FPage%2FFAFBridgePage&cid=1176164538898 (last visited Nov. 21, 2017).

Financial Accounting Standards Board (FASB).[120] Before issuing these annual financial statements to its stakeholders, the public corporation must engage external auditors to prepare an opinion on the reliability of those financial statements. The main objectives of the auditor are to "obtain reasonable assurance about whether the financial statements as a whole are free from material misstatements, whether due to fraud or error" and whether the financial statements are presented in all material aspects applicable financial reporting framework.[121] The opinion is issued after collecting sufficient and appropriate evidence. In conducting the audit, the auditor must follow Generally Accepted Auditing Standards (GAAS).[122] While the auditor is required to maintain objectivity, auditing standards recognize that an audit involves a certain degree of professional judgment regarding decisions about audit risk, type, timing and amount of audit procedures, evaluation of the evidence obtained and management's application of the financial reporting framework.[123] After Enron, Sarbanes Oxley and the establishment of the Public Company Accounting Oversight Board (PCAOB), public corporations or issuers faced further audit requirements. In addition to the evaluation of the financial statements, auditors for issuers must now conduct an integrated audit, which requires the auditors to issue audit reports on the financial statements and internal controls of the company.[124] The purpose of the audit of internal controls is to assess the effectiveness of internal controls in providing safeguards with respect to the reliability of financial reporting.[125] In doing so, these controls provide reasonable assurance that the financial statements are free of material misstatements. The integrated financial audit emphasizes the

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[120] *See What We Do: FASB*, FIN. ACCOUNTING FOUND., http://www.accountingfoundation.org/jsp/Foundation/Page/FAFSectionPage&cid=1351027541293 (last visited Oct. 31, 2017). The Financial Accounting Standards Board (FASB) is the private, non-profit organization that sets US GAAP. Formed in 1973, FASB's mission is to establish and improve accounting standards that add to the decision usefulness of the reported financial information. *Id.*

[121] *Overall Objectives of the Independent Auditor and the Conduct of an Audit in Accordance With Generally Accepted Auditing Standards*, AM. INST. OF CERTIFIED PUB. ACCOUNTANTS (2017), http://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AU-C-00200.pdf.

[122] *Id.* at AU-C § 200.A58.

[123] *Id.* at AU-C § 200.A27.

[124] *AS 2201: An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements,* PUB. CO. ACCT. OVERSIGHT BD., http://pcaobus.org/Standards/Auditing/Pages/AS2201.aspx#introduction (last visited Oct. 25, 2017).

[125] *Id.*

interdependency of reliable internal controls and reliable financial statements.

C. The Development of SASB Standards

For financial reports, corporations must follow an acceptable financial reporting framework and public corporations must follow U.S. GAAP as set by FASB, but benefit corporations do not have to follow a set standard when preparing the benefit report. During a financial statement audit the acceptable financial reporting framework or U.S. GAAP are the criteria against which the auditor assesses the corporation's performance, but a set of common criteria is missing for the provision of assurance on the benefit report. Absent a common set of criteria, the assurance given may be limited. This lack of use of common standards, as pointed out by Hiller[126] and Leavy,[127] and as previously noted, may not be in the best interest of the stakeholders.

The need for a common set of standards is also an issue when preparing and adding credibility to sustainability reports of regular corporations. In 2010, researchers at Harvard University recognized the lack of industry specific performance indicators and founded the Sustainability Accounting Standards Board (SASB) to develop a comprehensive sustainability-reporting standard for public companies.[128] While this research was not related to benefit corporations specifically, the adoption of a set of common standards for non-financial information reported by regular corporations can add to the discussion regarding benefit reporting, which has a narrower focus than sustainability reporting.[129] The Sustainability Accounting Standards Board (SASB), a 501(c) 3 non-profit organization, on April 6, 2016, issued sustainability-reporting standards for public corporations.[130]

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[126] Hiller, *supra* note 24 at 292.

[127] Leavy, *supra* note 25 at 486-88, 505-06.

[128] *Vision and Mission*, SUSTAINABILITY ACCOUNTING STANDARDS BD., http://www.sasb.org/sasb/vision-mission (last visited Oct. 25, 2017) [hereinafter SASB].

[129] *See e.g.*, *The Value of Sustainability Reporting*, EY LLP, http://www.ey.com/US/en/Services/Specialty-Services/Climate-Change-and-Sustainability-Services/Value-of-sustainability-reporting (last visited Oct. 25, 2017) (discussing how sustainability reporting is corporate reporting on economic, social and environmental performance). Corporations are increasingly adding these types of reports when they publish their annual financial statements.

[130] SUSTAINABILITY ACCOUNTING STANDARDS BD., http://www.sasb.org/ (last visited Oct. 25, 2017).

D. Why SASB Standards Are Preferred

While companies previously have used other standards, such as BLab or GRI, for sustainability reporting, SASB standards are designed to help public corporations to effectively disclose material sustainability information working within the framework of existing U.S. securities laws.[131] Unlike other standards, SASB standards are written specifically for SEC filings and follow the definition of "materiality" as used by the SEC in setting standards.[132] Furthermore, the SASB board of directors has included members with significant regulatory and securities laws expertise, including former SEC Chairs Mary Schapiro and Elisse Walter and former FASB Chair Robert Herz, and is currently chaired by former New York City Mayor Michael Bloomberg.[133]

Akin to FASB, SASB develops it sustainability standards around a Conceptual Framework. According to the Conceptual Framework, the purpose of sustainability accounting is to complement financial accounting and to provide a comprehensive picture of the organization's performance to the reasonable investor.[134] While the FASB Conceptual Framework does not constitute GAAP, it provides a system of objectives and fundamental concepts that lead to the development of consistent accounting standards. Similarly, SASB's Conceptual Framework guides SASB in the development of its standards. Auditors will find that the development of SASB standards is based on similar metrics to the development of the FASB standards. Both conceptual frameworks include the following principles on which the standards are based: "fair representation," "useful," "verifiable," "neutral," and "comparable."[135] As the financial reporting and sustainability standards would be based on similar conceptual frameworks with the same underlying principles, auditors are more likely to find standards based on SASB's conceptual framework easier to implement than standards based on different principles.

Sustainability is defined as encompassing environmental, social and governance (ESG) aspects and hence requires that standards are

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[131] *How Do I Pick a Third Party Standard?*, *supra* note 114; *See also*, *Conceptual Framework of the Sustainability Accounting Standards Board,* SUSTAINABILITY ACCOUNTING STANDARDS BD., (Feb. 2017), https://www.sasb.org/wp-content/uploads/2017/02/SASB-Conceptual-Framework.pdf at 7 [hereinafter SASB, *Conceptual Framework*].

[132] *See generally* Comment Letter from SASB to Brent Fields, Secretary, SEC (July 1, 2016) https://www.sec.gov/comments/s7-06-16/s70616-25.pdf.

[133] *Id.*

[134] SASB, *Conceptual Framework*, *supra* note 131, at 3.

[135] *Id.* at 12.

organized under five "dimensions": "Environment," "Social Capital," "Human Capital," "Business Model and Environment," and "Leadership and Governance."[136] The Conceptual Framework acknowledges that SASB standards should provide guidance on issues that are likely going to be material in a specific industry and follows the same definition of materiality as used by FASB, emphasizing, however, that materiality is an entity specific concept.[137] Because entities in a specific industry face similar ESG issues, SASB standards should be developed at the industry level. The Conceptual Framework also requires that standards need to provide information adding decision usefulness.[138] Sustainability reporting using SASB standards will thus enable

> [a]ll US publicly listed companies to engage in cost-effective sustainability disclosure; peer-to-peer company comparison by investors; focused efforts by companies to improve performance on material issues; a comprehensive view of material sustainability risks and opportunities for investors, and public access to sustainability data free of charge via the Form 10-K, 20-F, and the SEC EDGAR database.[139]

The Conceptual Framework clarifies that when setting standards that add to decision usefulness, SASB needs to conduct a cost-benefit analysis. Costs to consider include: costs to the company for collecting and auditing the information, costs of internal controls and costs of training.[140] Benefits to consider include: more condensed industry specific disclosures, resulting in more effective communication with stakeholders who will be able to compare companies on sustainability performance.[141] This cost-benefit analysis is important because standards that are too onerous are not likely to be adopted.[142]

For financial accounting purposes, information is material if the omission or misstatement of it would influence the opinion of the

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[136] *Id.* at 7-8.

[137] SASB, *Conceptual Framework*, *supra* note 131, at 9.

[138] *Id.* at 10.

[139] *Id.*

[140] *Id.* at 11.

[141] SASB, *Conceptual Framework*, *supra* note 131, at 11.

[142] *See Release*, *supra* note 81, at 52-53 (explaining that the SEC also notes the importance of this cost benefit analysis in the Release) ("When the Commission is engaged in rulemaking it is statutorily required to consider, in addition to the protection of investors, whether an action will promote efficiency, competition, and capital formation . . . Registrants may also choose to exit the Commission's reporting system, when eligible, or remain private if the disclosure requirements are sufficiently costly.").

reasonable user.[143] As mentioned above, SASB recognizes that for sustainability reporting materiality is an industry specific concept. While financial statement preparers, users and auditors can use a benchmark (such as a percentage of net income before tax) to determine materiality, determination of materiality for non-financial data is more challenging as the auditor may have to apply non-quantitative, as well as quantitative benchmarks. The SASB Conceptual Framework determines the materiality of issues based on evidence:[144] "evidence of interest"[145] to the potential investor and "evidence of financial impact,"[146] with adjustments to both from "forward looking adjustments."[147]

E. Using AT 101 to Audit Sustainability Reports and Benefit Reports

One of the additional requirements that SASB has set forth is the requirement that any metric adopted must be auditable; That is, it can be verified or attested to by the auditors.[148] In the Conceptual framework, SASB recommends that auditors of companies using the SASB standards apply Section 101 of the American Institute of Certified Public Accountants' (AICPA) Statements on Standards for Attestation Engagements (AT).[149]

While AT 101[150] was issued by the AICPA for non-issuers, the PCAOB has adopted AT Section 101 on an interim basis. AT 101

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[143] *Materiality in Planning and Performing an Audit*, AM. INST. OF CERTIFIED PUB. ACCOUNTANTS AU-C § 320.04, § 320.06 (2017), http://www.aicpa.org/research/standards/auditattest/downloadabledocuments/au-c-00320.pdf.

[144] SASB, *Conceptual Framework*, *supra note* 131, at 13.

[145] Evidence of interest includes: "Financial disclosure: Issues that may have a financial impact or may pose a risk to the industry in the short-, medium-, or long-term. Legal drivers: Issues that are being shaped by emerging or evolving government policy and regulation (e.g., carbon emissions regulation). Industry norms: Issues that companies in specific industries tend to report on and recognize as important drivers in their line of business. Stakeholder concerns: Issues that are of high importance to stakeholders, including communities, NGOs and the general public, or reflect social and consumer trends, and which rise to the level of interest to investors when they have economic implications. Innovation opportunity: Competitive advantage created from potential innovative solutions that benefit the environment, customers, and other stakeholders." *Id.* at 15.

[146] Once sustainability issues that would affect the reasonable investor have been identified, SASB assesses the actual or potential impact of sustainability issues on the financial performance. *Id.*

[147] Forward-looking adjustments are sustainability issues that are not yet material to the current investor but may become material because of future regulation or other mechanisms. *Id.* at 15.

[148] *Id.* at 20.

[149] SASB, *Conceptual Framework*, *supra* note 131, at 24.

[150] *Attest Engagements AT §101.38*, AM. INST. OF CERTIFIED PUB. ACCOUNTANTS (2015), http://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AT-

"applies to engagements . . . in which a certified public accountant in public practice (hereinafter referred to as a practitioner) is engaged to issue or does issue an examination, a review, or an agreed-upon procedures report on subject matter, or an assertion about the subject matter (here after referred to as the assertion), that is the responsibility of another party."[151] AT 101 is applicable to a variety of subject matter, including historical information about corporate behavior and provides that the practitioner reports on the written assertion made by the third party, which, in the case of the benefit corporation, is management. An important aspect of the assurance engagement, according to AT 101, is the availability of a set of criteria against which the practitioner can assess the accuracy of management's assertions.[152] The SASB standards for sustainability reporting will thus be the first step towards greater assurance provided by the auditor.

The SASB developed the provisional standards for 79 industries. These standards are intended for public companies filing sustainability reports, but the Conceptual Framework can also serve as a first step towards increased transparency and credibility for all companies including benefit corporations. As Dr. Bob Eccles, Chairman of ESG Quant, and fund manager at Arabesque Partners, points out in a Forbes article, efficient markets rely on standards.[153] Investors rely on accounting standards when they evaluate financial performance and can now rely on sustainability standards when they evaluate ESG performance. The role of the standards is the same; help investors make resource allocation decisions.[154] According to Mary Schapiro, Vice Chair of SASB and former Chairman of the SEC, "SASB standards—now available for 79 industries—can help create more efficient capital markets. Companies that understand material sustainability risks will manage them more effectively. And investors that understand material sustainability risks will better allocate their capital."[155] Similarly, investors in benefit corporations need to be able to rely on standards

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00101.pdf. AT 101 requires that the practitioner be independent of the company and that the practitioner collects sufficient evidence using a variety of procedures to reduce attestation risk to an acceptable level. The practitioner needs to issue a written report that identifies the subject matter and the responsible party, and criteria being used. The report also needs to include a statement that the practitioner followed AT 101 and an opinion.

[151] *Id.* § 101.01.

[152] *Id.* § 101.24.

[153] Bob Eccles, *What the World Needs Now: Sustainability Accounting Standards,* FORBES (May 3, 2016), https://www.forbes.com/sites/bobeccles/2016/05/03/what-the-world-needs-now-sustainability-accounting-standards/#71d8bb6e74d8.

[154] *Id.*

[155] *Id.*

when evaluating the company's non-financial benefit activities and results.

F. SASB Conceptual Framework Can Provide Foundation for Standards for Benefit Corporations

While the provisional SASB standards were developed for SEC registrants in preparing their sustainability reports, the SASB Conceptual Framework can provide the basis for standardizing the reporting requirements for disclosure requirements of benefit corporations, thereby improving the credibility of the annual benefit report. The standards developed using the Conceptual Framework should provide decision usefulness and the benefits from applying the standard should exceed the costs of implementation. For example, a standard might include the following: percentage of revenue derived from the stated benefit activities, percentage of stakeholders receiving a stated benefit, and percentage of expenses spent towards achieving the benefit. In addition, qualitative information such as geographic coverage, duration and continuity of benefit activities, the relationship between the effort expended by the corporation and the impact on the targeted stakeholders may need to be included. Once the benefit corporation issues its report according to the standard, the auditor will use the standard as the criteria necessary to conduct the examination of whether the reported information that is material to the achievement of the stated benefit is accurately disclosed. To do this, the auditor will supplement traditional audit procedures[156] by surveying stakeholders and engaging experts.

Having the foundation for a set of common standards for *reporting* provides the first step in reducing the expectation gap; using a set of common standards for *auditing* provides the second step in reducing the expectation gap. The expectation gap for financial statement audits, the gap between what investors expect from the audit and what auditors can expect to accomplish, was addressed in the Cohen commission's report, "The Commission on Auditors' Responsibilities: Report, Conclusions and Recommendations."[157] The report recommended additional accounting, disclosure and auditing standards. Similar to the expectation gap related to the financial statement audit, Wallage believes that "[t]he

[156] *Id.* Traditional audit procedures in include analytical procedures, inspection of documents and assets, confirmations, recalculations, observation, walkthroughs, and inquiry.

[157] *Report, Conclusions and Recommendations*, THE COMM'N ON AUDITORS' RESPONSIBILITIES, i, xii, (1978), http://documents.routledge-interactive.s3.amazonaws.com/9780415508117/articles/commission.pdf.

lack of established standards also constitutes a threat to the role of the auditor. Without authoritative guidance on the audit of sustainability reports . . . there may be an emergence of an expectations gap."[158] Stakeholders may expect that if an auditor assures a sustainability report, that he or she provides assurance on the overall ethical behavior of the organization, even when the auditor may not be able to provide such assurance on the entire report.[159]

Currently, auditors apply the standards and procedures of AT 101, as defined above, when conducting sustainability audits. Vasin, Heyn and Company, one of the many CPA firms providing social responsibility audits, emphasizes the principles of being competent and independent, using due care and appropriate planning for conducting a successful audit.[160] While Watson and Emery are skeptical of internal sustainability audits, or the company's report, they acknowledge that external auditors need to be hired to assess the company's sustainability report.[161] But Watson and Emery also believe that even the external auditors do not provide one-hundred percent assurance because of the sampling nature of the audit procedures performed.[162] Wallage proposes that the typical evidence gathering procedures (including inquiry, observation, inspection and others) used in a financial statement audit are insufficient for the audit of a sustainability report and need to be supplemented with evidence from other sources such as surveys from stakeholders.[163] Wallage states that while the reputation and experience of financial auditors are an advantage, "to verify sustainability reports, multidisciplinary cooperation seems to be indispensable."[164] Other critics, such as Mark Loewenstein, believe that, regardless of procedures, an audit is of questionable value because the auditor is hired and paid by the benefit corporation.[165] Likewise, Romero, Fernandez-Feijoo, and Riuz confirm in their study the importance of the assurance statement for sustainability reports to the stakeholders, but also confirm that the

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[158] Philip Wallage, *Assurance on Sustainability Reporting: An Auditor's View,* AUDITING: A. J. OF PRAC. AND THEORY, 53, 58 (2000).

[159] *Id.*

[160] VASIN, HEYN & CO., *supra* note 53.

[161] Michael Watson & Anthony R. Watson*, The Emerging UK Law on the Environment and the Environmental Auditing Response*, 18 MANAGERIAL AUDITING J., 666, 670 (2003).

[162] *Id.*

[163] Philip Wallage, *Assurance on Sustainability Reporting: An Auditor's View,* 19 AUDITING: A. J. OF PRAC. & THEORY, 61 (2000). Not that this is also an issue for financial audits, which has been addressed by the PCAOB.

[164] *Id.* at 64.

[165] Mark Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 THE BUS. LAW., 1019, 1020 (2013). Note that this is also a concern with financial audits.

perceived quality of these assurance statements[166] depends on the accountability of the assurer.[167]

G. Integrated Reporting

The addition of the audit procedures required to collect sufficient evidence for an examination of the benefit report leads to the final issue: should the report on nonfinancial information be integrated with the financial statements and hence require the auditor to provide assurance on both? PwC recently issued a brochure explaining its "Total Impact Measurement and Management Framework" towards integrated reporting, which as PwC explains is necessary for a company to evaluate its overall impact on society.[168] KPMG likewise states that the trend is towards "'integrated' reporting to provide a holistic and forward looking picture of the reporting organization [sic] to the multitude of stakeholders who are impacted by and who in turn impact the reporting organization [sic]."[169] The concept of integrating sustainability and financial reporting is similar to the integrated audit of public companies for which the auditor provides an opinion on the financial statements and internal control. The integrated audit thus recognizes the interdependency of effective internal controls and reliable financial statements. During the integrated audit the auditor issues two opinions, one on the financial statements and one on the effectiveness of internal control. The opinions can be combined in one report or two separate reports that cross-reference each other. Likewise, integrated reporting of financial

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[166] AT 101 applies to engagements during which the practitioner either performs a review or an examination. Examinations provide a higher level of assurance and an opinion is expressed. *See, e.g, 2014/2015 Sustainability Report,* COCA-COLA (2015), http://www.cocacolacompany.com/content/dam/journey/us/en/private/fileassets/pdf/2015/09/2014-2015-sustainability-report.pdf (reflecting a review engagement); *See also* VASIN, HEYN & CO., *supra* note 53 (showing an example of an examination engagement on its website); *Social Audits. Unqualified Letter*, VASIN, HEYN & CO., http://vhcoaudit.com/social-audits/the-social-responsibility-audit/social-audits-unqualified-letter/ (last visited Nov. 27, 2017). As an examination affords a higher level of assurance to stakeholders, it is closer in scope to a financial statement audit and includes the issuance of an opinion. Such an engagement should be preferred when issuing a report on sustainability.

[167] Silvia Romero, Belen Fernandez-Feijoo, & Silvia Ruiz, *Perceptions of Quality of Assurance Statements for Sustainability Reports,* 10 SOC. RESP. J., 489, 490-92 (2014).

[168] *Measuring and Managing Total Impact: A New Language for Business Decisions*, PWC 2, 11 (2013), http://www.pwc.com/gx/en/sustainability/publications/total-impact-measurement-management/assets/pwc-timm-report.pdf.

[169] *Integrated Reporting- Understanding the Requirements*, KPMG (2011), https://www.kpmg.com/ZA/en/IssuesAndInsights/ArticlesPublications/General-Industries-Publications/Documents/Integrated%20reporting%20-%20Understanding%20the%20requirements.pdf.

information and the achievement of the stated benefit can increase the efficiency and effectiveness of the auditor's work towards providing assurance on both.

For benefit corporations, where the two aspects of performance, financial and benefit, define the company's mission, integrated reporting is appropriate. As noted in the Laureate discussion of risks in the Prospectus, "[a]s a public benefit corporation, since we do not have a fiduciary duty solely to our stockholders, we may take actions that we believe will benefit our students and the surrounding communities, even if those actions do not maximize our short-or medium-term financial results."[170] Thus integrated reporting on how the two aspects of the mission directly affect each other is an important component of the information benefit corporation investors need.

The primary shortcoming of the current benefit corporation is its lack of using a common third-party standard. This deficiency will become more apparent as benefit corporations file IPOs and become publicly traded companies. While a benefit corporation may or may not choose to report on sustainability as defined by the SASB standards, at a minimum, a report on the stated benefit mission is material and necessary. Benefit corporations could achieve increased comparability with other entities and provide the auditor with the criteria necessary against which to assess performance by adopting the SASB Conceptual Framework to develop standards that specifically address the benefit mission. The second shortcoming of the current benefit corporation relates to the lack of required third party verification of the accuracy of the benefit report. Requiring an assurance engagement, preferably an examination conducted by a CPA, and integrating the resulting report into the annual report, will increase the credibility of the benefit report.

IV. CONCLUSION

As noted in the introduction, there is growing interest among millennials in new forms of socially conscious investing. According to a Morgan Stanley study in 2015, "millennial investors are nearly 2x more likely to invest in companies or funds that target specific social or environmental outcomes than the overall investor population."[171] The

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[170] Zentz, *supra* note 57.

[171] Paula DiPerna, *Wall Street Wakes Up: Sustainable Investment and Finance Going Mainstream*, 57 ENV'T: SCI. AND POL'Y FOR SUSTAINABLE DEV., 42, 49 (2015) (quoting *Sustainable Signals, Morgan Stanley Institute for Sustainable Investing*, (2015), http://morganstanley.com.

2016 Deloitte Millennial Survey found that personal values have the greatest influence on millennials' decision making.[172]

A 2015 Ernst & Young study of institutional investors' views regarding non-financial reporting by public companies found that 61.5% of respondents considered non-financial data relevant to all sectors and 59.1% consider corporate social responsibility (CSR) or sustainability reports essential or important when making investment decisions. Based on these, and many similar findings,[173] it is clear that investors in general are seeking more nonfinancial information about companies and are using this information to make investment decisions.

The millennial generation will be the recipients of the largest intergenerational wealth transfer in history.[174] A study of high-income millennials showed an even greater commitment to social impact investing. According to a 2014 study by U.S. Trust of high net worth millennials:

> [O]ne-half (50%) of high-net-worth investors, including 75% of Millennials, now consider the social and environmental impact of the companies they invest in to be an important part of investment decision-making. Two-thirds (67%) of Millennials view their investment decisions as a way to express their social, political or environmental values, and almost three quarters (73%) believe that it is possible to achieve market rate returns investing in companies based on their social or environmental impact. One-third of all high-net-worth investors and nearly two-thirds of Millennials currently own or are interested in social-impact investment strategies.[175]

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[172] *The 2016 Deloitte Millennial Survey*, DELOITTE (2016), http://www2.deloitte.com//content/dam/Deloitte/global/Documents/About-Deloitte/gx-millenial-survey-2016-exec-summary.pdf.

[173] *Survey Examines Growth of Impact Investing*, MACARTHUR FOUNDATION (May 4, 2015), https://www.macfound.org/press/publications/survey-examines-growth-impact-investing/; Sophia Grene, *Impact Investing Goes Mainstream*, FINANCIAL TIMES, (May 18, 2014), http://www.ft.com/cms/s/0/4773c440-d5f3-11e3-a239-00144feabdc0.html#axzz49PPJ3SAZ; *Report On US Sustainable, Responsible and Impact Investing Trends 201*, USSIF FOUNDATION (2014), http://www.ussif.org/files/publications/sif_trends_14.f.es.pdf.

[174] Vilas Dhar & Julia Fetherston, *Impact Investing Needs Millennials*, HARVARD BUS. REV., (Oct. 3, 2014), https://hbr.org/2014/10/impact-investing-needs-millennials/.

[175] *The 2014 U.S. Trust Insights on Wealth and Worth Survey, High Net Worth Millennials*, U.S. TRUST BANK OF AM. PRIVATE WEALTH MGMT. 1, 3 (July 2015), http://www.ustrust.com/publish/content/application/pdf/GWMOL/USTp_ARL8QSQ7_2015-09.pdf.

For benefit corporations, where non-financial benefits are part of the stated mission of the business, the importance of non-financial data is even more critical to the investors' "total mix of information" needed to decide whether to invest, and once invested, to make knowledgeable voting choices. Studies have also shown that millennials are not necessarily willing to rely on professional wealth managers and financial advisors, that they want to be actively involved in investment decision-making, and that they will create their own peer networks of investors. Benefit corporations are clearly aligned with these demographic and attitudinal changes.

Access to capital for businesses that articulate, implement and measure a public benefit, and a regulatory environment that requires reliable and robust disclosure of social as well as financial information, are necessary in order for these businesses to thrive. The first step towards robust and reliable disclosure is for the benefit corporation to implement criteria or a third-party standard that is based on materiality and decision usefulness. While none currently exists, the SASB Conceptual Framework provides the foundation for the development of such a standard. Once developed, the SEC could mandate disclosure of information material to the benefit objectives of the corporation that is consistent with the current financial reporting structure. Auditors will then be able to add these criteria to the financial reporting standards and deliver an integrated, reliable and comparable report on benefit corporations' dual objectives.

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