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The Global Use of the Delaware Limited Liability Company for Socially-Driven Purposes

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**THE GLOBAL USE OF THE DELAWARE LIMITED
LIABILITY COMPANY FOR SOCIALLY-DRIVEN
PURPOSES**

Ann E. Conaway[†]

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I. INTRODUCTION

In today's global economy, more businesses are focusing on giving back to the world community¹; minimizing carbon footprints²; maximizing renewable energy³; engaging in beneficial

1. The Bill and Melinda Gates Foundation is one such organization. See THE BILL & MELINDA GATES FOUND., <http://www.gatesfoundation.org/Pages/home.aspx> (last visited Oct. 6, 2011).

The Grand Challenges in Global Health initiative is focused on engaging creative minds to work on scientific and technological breakthroughs for the world's most pressing health problems. Grand Challenges Explorations is a grant program within the initiative that fosters innovative, early-stage research to expand the pipeline of ideas that can lead to those much needed global health and development solutions.

Grand Challenges in Global Health, THE BILL & MELINDA GATES FOUND., <http://www.gatesfoundation.org/global-health/Pages/grand-challenges-explorations.aspx> (last visited Oct. 6, 2011). One of the new Grand Challenges in Global Health initiatives that won additional funding is in Tanzania. *IFAKARA Health Institute*, THE BILL & MELINDA GATES FOUND., <http://www.gatesfoundation.org/Grants-2009/Pages/IFAKARA-Health-Institute-OPP53214.aspx> (last visited Oct. 6, 2011). This project is testing "placement of outdoor decoy sites that attract and trap breeding, resting and feeding mosquitoes for their ability to reduce malaria transmission in rural communities." Ling Wong, *Can Bacteria Protect Against HIV? Grand Challenges Explorations Grants Help Ask the Question*, IMPATIENT OPTIMISTS (July 13, 2011), <http://www.impatientoptimists.org/Posts/2011/07/Can-Bacteria-Protect-Against-HIV-Grand-Challenges-Explorations-Grants-Help-Ask-the-Question>. This statement by Bill Gates best reflects the vision of the Gates Foundation: "I believe that risk-taking is essential if we are to achieve truly transformative health technologies." Bill Gates, *Discovery Science—Taking the Challenge*, THE GATESNOTES (Oct. 26, 2010), <http://www.thegatesnotes.com/Topics/Health/Discovery-Science-Taking-the-Challenge>.

2. See *Green Directory*, CLIMATE ACTION PROGRAMME, http://www.climateactionprogramme.org/green_directory/ (last visited Oct. 6, 2011), for descriptions of programs being instituted around the world to reduce carbon footprints through renewable energy sources.

3. In the United Kingdom, Scotland presently leads with offshore wind, onshore wind, wave, and tidal energy as part of their package of renewable energy sources. *Marine*, SCOTTISH RENEWABLES, <http://www.scottishrenewables.com/technologies/marine/> (last visited Oct. 6, 2011); *Offshore Wind*, SCOTTISH RENEWABLES, <http://www.scottishrenewables.com/technologies/offshore-wind/> (last visited Oct. 5, 2011); *Onshore Wind*, SCOTTISH RENEWABLES, <http://www.scottishrenewables.com/technologies/onshore-wind/> (last visited Oct. 6, 2011). Because the territorial waters off England, Wales, Scotland, and

social purposes,⁴ such as aiding homeless veterans, those who are mentally disabled or ill, are former convicts, or are elderly and in

Ireland belong to the British Crown, all offshore wind, wave, and tidal renewable technologies must be developed in tandem with the “Crown Estate,” which is a statutory corporation in England. *Offshore Wind Energy*, THE CROWN ESTATE, http://www.thecrownestate.co.uk/offshore_wind_energy (last visited Oct. 6, 2011); *Wave and Tidal*, THE CROWN ESTATE, <http://www.thecrownestate.co.uk/energy/wave-and-tidal> (last visited Oct. 6, 2011). Scotland likely will be seeking a vote for independence within the next two years because of the Crown Estate in order to be able to retain the revenues generated by Scottish renewable technologies. Simon Johnson, *David Cameron and Alex Salmond at Loggerheads Over Scottish Independence Vote*, THE TELEGRAPH (May 9, 2011, 7:00 AM BST), <http://www.telegraph.co.uk/news/uknews/scotland/scottish-politics/8501020/David-Cameron-and-Alex-Salmond-at-loggerheads-over-Scottish-independence-vote.html>. A possible alternative to a vote for independence might be the devolvement of the Crown Estate to each of the revenue-generating countries. *Salmond Calls to Devolution of the Crown Estate*, FISHNEWSEU.COM (June 22, 2011, 10:42 AM), <http://www.fishnewseu.com/latest-news/scottish/6045-salmondalls-for-devolution-of-the-crown-estate.html>. Northern Ireland is also being developed as a productive source of wind and wave energy. Jessica Shankleman, *Crown Estate to Kick Off Northern Irish Offshore Renewables Leasing Round*, BUS. GREEN (Mar. 8, 2011), <http://www.businessgreen.com/bg/news/2032033/crown-estate-kick-northern-irish-offshore-renewables-leasing-round>.

4. Social Enterprise Alliance (SEA), www.se-alliance.org, is a membership organization comprised of approximately 700 members in the United States and Canada that brings together nonprofits, venture capitalists, corporations, and service providers for the purpose of “actively building the field of social enterprise through networking opportunities, educational forums, strategic partnerships, and impact legislation.” *About Us*, SOC. ENTER. ALLIANCE, <https://www.se-alliance.org/about> (last visited Oct. 6, 2011). SEA has defined a “social enterprise” as “an organization or venture that achieves its primary social or environmental mission using business methods.” *What is Social Enterprise?*, SOC. ENTER. ALLIANCE, <https://www.se-alliance.org/what-is-social-enterprise> (last visited Oct. 6, 2011).

A “social enterprise” differs from a “socially responsible” organization in two ways:

Social enterprises *directly* address social needs through their products and services or through the numbers of disadvantaged people they employ. This distinguishes them from “socially responsible businesses,” which create positive social change *indirectly* through the practice of corporate social responsibility (*e.g.*, creating and implementing a philanthropic foundation; paying equitable wages to their employees; using environmentally friendly raw materials; providing volunteers to help with community projects).

Social enterprises use *earned* revenue strategies to pursue a double or triple bottom line, either alone (as a social sector business, in either the private or the nonprofit sector) or as a *significant* part of a nonprofit’s mixed revenue stream that also includes charitable contributions and public sector subsidies. This distinguishes them from traditional nonprofits, which rely primarily on philanthropic and government support.

Id.

need of palliative care; granting financial aid to patients for cancer treatments⁵; providing low-income, low-energy housing;⁶ giving aid to victims of tsunamis and nuclear disasters;⁷ and donating to areas hit by freak storms and other weather conditions,⁸ or to communities decimated by civil war and newly overthrown rulers.⁹ In each of these cases, businesses and individuals are themselves donating or investing in organizations that are reaching out to “give back” to a targeted group of people or to a cause or to otherwise engage in a socially-driven or beneficial purpose.

In the United States and the United Kingdom, local and national governments have initiated measures to reduce dependence on fossil fuels and to switch to renewable energy sources.¹⁰ In the United States, solar energy is well developed.¹¹

5. See *Resources for Financial Assistance for Patients and Their Families*, NAT'L CANCER INST., https://cissecure.nci.nih.gov/factsheet/FactSheetSearch8_3.aspx (last visited Oct. 6, 2011), for a site with a U.S. database of government and nonprofit organizations that provide aid for cancer patients who either have no health insurance or who need financial help notwithstanding the presence of health insurance.

6. The Office of Community Service offers low-energy, low-income housing as well as many other specialized programs directed toward the healthy maintenance of the family. See *Low Income Home Energy Assistance Program (LIHEAP)*, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUM. SERVS., <http://www.acf.hhs.gov/programs/ocs/liheap/> (last visited Oct. 6, 2011).

7. University students at Brandeis worked with the Red Cross to raise funds to send aid to victims of Japan's tsunami and resulting nuclear disaster. Susan Chaityn Lebovits, *Japan Relief Fundraising Aiding Victims of Disaster*, BRANDEISNOW (Apr. 4, 2011), <http://www.brandeis.edu/now/2011/april/japan.html>.

8. In response to the Joplin, Missouri disaster, an individual businessman began selling t-shirts with a picture of Uncle Sam stating: “America Lends a Hand.” Proceeds from the sales were sent to the Joplin area, as well as North Dakota. *Westporter's T-Shirt Sales to Aid Midwest Disaster Victims*, WESTPORT NEWS (July 21, 2011, 4:21 PM), <http://www.westport-news.com/news/article/Westporter-s-T-shirt-sales-to-aid-Midwest-1527924.php>.

9. For example, in Yemen, the Office of U.S. Foreign Disaster Assistance continued to provide food and medical aid to the people of Yemen during its civil war. *Yemen-Complex Emergency*, U.S. AGENCY FOR INT'L DEV. (Mar. 17, 2011), http://www.usaid.gov/our_work/humanitarian_assistance/disaster_assistance/countries/yemen/template/fs_sr/fy2011/yemen_ce_fs02_03-17-2011.pdf.

10. In the United States, twenty-nine states have initiated measures to reduce reliance on fossil fuels in favor of renewable energy sources. See *State-Federal RPS Collaborative*, CLEAN ENERGY STATES ALLIANCE, <http://www.cleanenergystates.org/projects/state-federal-rps-collaborative/> (last visited Oct. 6, 2011). Depending upon the geographic region, each state's reason for implementing “green” initiatives may differ. For example, coastal states are concerned with global warming and rising tides. Western states are more concerned with long droughts. Midwestern states fear impact on agriculture, whereas other states consider “green” directives to be job enhancers.

Wind energy is a growing renewable resource in the United States with onshore and offshore sites in place in the West and other offshore sites being built along the East Coast.¹² Wave energy is less

In the United Kingdom, England has already, through the Crown Estate, implemented offshore wind turbines. See *Offshore Wind Energy*, THE CROWN ESTATE, http://www.thecrownestate.co.uk/offshore_wind_energy (last visited Oct. 6, 2011). The Crown Estate also operates wind, wave, and tidal turbines in Scottish and Northern Irish territorial waters through bidding developers. See *id.* All revenues from offshore facilities in Scottish and Northern Irish territorial waters pass to the Crown Estate in the United Kingdom. *Scottish Government Criticizes Crown Estate's Plans for Coastal Communities Fund*, OFFSHOREWIND.BIZ (July 25, 2011), <http://www.offshorewind.biz/2011/07/25/scottish-government-criticizes-crown-estates-plans-for-coastal-communities-fund/>.

11. For example, the DuPont Company is now actively involved in the solar energy field with the purchase of Innovalight. *DuPont Snaps up Innovalight in Solar Push*, BUS. GREEN (July 26, 2011), <http://www.businessgreen.com/bg/news/2096739/dupont-snaps-innovalight-solar-push>. United States solar energy is generally positioned in California, Arizona, Colorado, and Florida, as well as other states. LARRY SHERWOOD, U.S. SOLAR MARKET TRENDS 8–11 (2011), available at <http://irecusa.org/wp-content/uploads/2011/06/IREC-Solar-Market-Trends-Report-June-2011-web.pdf>. In general, solar energy can be set up anywhere; however, the issue is one of “tying in” to an existing grid, which is a costly endeavor in many circumstances. See *Grid Integration for Systems Integration*, U.S. DEP’T OF ENERGY (July 30, 2010), http://www1.eere.energy.gov/solar/grid_integration.html.

12. See *Industry Statistics*, AM. WIND ENERGY ASS’N, http://www.awea.org/learnabout/industry_stats/index.cfm (last visited Oct. 6, 2011). Today, the United States generates 42,432 megawatts (MW) of cumulative installed capacity of wind power, making it the second largest generator of wind energy—second only to China. See *id.* Texas leads the country in the generation of wind energy, largely through the Roscoe Wind Farm as well as many other wind farms located throughout the state. See, e.g., Eileen O’Grady, *E.ON Completes World’s Largest Wind Farm in Texas*, REUTERS (Oct. 1, 2009, 6:00 AM), <http://www.reuters.com/article/2009/10/01/wind-texas-idUSN3023624320091001> (naming Texas as the leading state for wind capacity and discussing the completion of Roscoe Wind Farm). The U.S. Department of Energy issued its *20% Wind Energy By 2030*, predicting that twenty percent of U.S. electricity will be produced by wind, with four percent of that being generated by offshore wind. U.S. DEP’T OF ENERGY, *20% WIND ENERGY BY 2030*, at 10 (2008), available at <http://www.nrel.gov/docs/fy08osti/41869.pdf>.

In Delaware, Bluewater Wind LLC contracted to set up the first wind turbines off Fenwick Island where winds are steady and the coastal shelf is relatively shallow, making maintenance easier and less costly. Mark Svenvold, *Wind-Power Politics*, N.Y. TIMES (Sept. 12, 2008), <http://www.nytimes.com/2008/09/14/magazine/14wind-t.html?pagewanted=all>. However, in 2008 when the economy turned, the loans that guaranteed the wind project were withdrawn. *Id.* Presently, Senators Tom Carper of Delaware and Olympia Snowe of Maine have offered legislation that would offer tax incentives for investors in projects like Bluewater Wind. Press Release, Sen. Tom Carper, Sens. Carper, Snowe Introduce Bill to Encourage Offshore Wind Energy Production (July 21, 2011), available at <http://carper.senate.gov/public/index.cfm/pressreleases?ID=fdef0fd4-8302-488e->

developed in the United States but does exist, particularly along the Oregon coast.¹³ Underwater turbines are currently being tested in the Mississippi and East Rivers in the United States.¹⁴

Scotland and Northern Ireland are far ahead of the United States in the renewable energies of wind and wave technologies.¹⁵ However, one difficulty that Scotland and Ireland face in benefitting directly from their renewable energy efforts is that the Crown Estate claims all revenues from offshore wind and wave facilities in Scotland and Northern Ireland.¹⁶

Yet, what each of these renewable energy undertakings has in common is a “beneficial” purpose. In the past, for-benefit entities in the United States were generally organized as nonprofit corporations.¹⁷ The same choice is available in the United Kingdom, but the entity’s purpose is traditionally limited to charities.¹⁸ However, a true nonprofit entity does not allow an

aae6-4caf97975ba1.

13. Tracy Loew, *Oregon is First U.S. Site for a Wave-Power Farm*, USA TODAY (Feb. 17, 2010), http://www.usatoday.com/money/industries/energy/environment/2010-02-16-wave-energy_N.htm. Wave energy in the United States has generally been met with skepticism due to the erratic nature of waves and concern for the aquatic environment. *See id.* One wave site was established off the coast of Oregon over two years ago but it sank. *Id.* Now another is in place but the costs are five to six times that of wind energy. *Id.*

14. Peter Fairley, *Tidal Turbines Help Light Up Manhattan*, TECH. REV. (Apr. 23, 2007), <http://www.technologyreview.com/energy/18567/?mod=related>; Phil McKenna, *Turbines Could Tap the Mississippi’s Power*, TECH. REV. (Nov. 5, 2010), <http://www.technologyreview.com/energy/26679/>.

15. *See* sources cited *supra* note 3.

16. *See Offshore Wind Energy*, THE CROWN ESTATE, http://www.thecrownestate.co.uk/offshore_wind_energy (last visited Oct. 6, 2011). One proposal by the United Kingdom is that fifty percent of Scottish revenues from offshore technologies would be returned to the Crown Estate. *Scottish Government Criticizes Crown Estate’s Plans for Coastal Communities Fund*, OFFSHOREWIND.BIZ (July 25, 2011), <http://www.offshorewind.biz/2011/07/25/scottish-government-criticizes-crown-estates-plans-for-coastal-communities-fund/>. Scottish Ministers, however, seek full devolution of Scottish territorial waters. *Id.* For a dialogue between Professor Conaway and Scottish practitioners, see LINKEDIN correspondence from Professor Conaway to Scottish Renewable Energy (on file with author), *available at* http://www.linkedin.com/groupAnswers?viewQuestionAndAnswers=&discussionID=61630111&gid=1795794&trk=eml-anet_dig-b_pd-pmr-cn.

17. A nonprofit corporation is organized as a corporation, but its “members” do not receive distributions as stockholders as in for-profit corporations. *Cf.* I.R.C. § 501(c)(3) (2006) (explaining that no part of a nonprofit’s net earnings benefit private shareholders). For U.S. tax regulations and exemptions governing organizations see *id.* §§ 501–515.

18. Under English Companies Law, a not-for-profit entity could be organized as a company limited by guarantee if it states a beneficial purpose under the Statute of Elizabeth and prohibits any distributions to shareholders/members.

investor to receive any return on his or her investment. For example, all “profits” are redistributed to the entity and not to its members or investors.¹⁹

In the present economy, entrepreneurs increasingly wish to invest capital in socially responsible businesses and to receive an internal return—a true admixture of profit and “social benefit.” In addition, these “social entrepreneurs” increasingly seek capital from private investors or foundations with “program related investments,” or “PRIs,” that include low-interest loans or loan guarantees to nonprofit charities or organizations engaged in socially beneficial efforts.²⁰ Examples of hybrid organizations blending profit with “benefit” in the United States include the B, or Benefit, Corporation²¹ and the L3C.²² Each of these hybrid entities

Companies Act, 1985, c. 6, § 1 (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/1985/6/contents>. A corporation is formed when two or more persons subscribe their names to a memorandum of association that is then registered at Companies House. *See* Companies Act, 2006, c. 46, § 7 (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/2006/46/contents>. Under the Twelfth EC Companies Law Directive, a single person may subscribe to the memorandum of association if the company is to be a single member private limited company. As of 2008, a charitable organization in England may also be organized as an unincorporated association, a trust, or a corporation by Royal Charter. Charities Act, 2006, c. 50, §§ 31–34 (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/2006/50/contents>. A “charitable purpose” is defined fifteen ways under the Charities Act of 2006. *Id.* § 2.

19. *See* I.R.C. § 501(c)(3).

20. Julia Vail, *Program-related Investments Provide Needed Relief*, PHILANTHROPY J. (Mar. 16, 2009), <http://www.philanthropyjournal.org/resources/special-reports/finance-accounting/program-related-investments-provide-needed-relief>. PRIs were primarily jump-started by the Tax Reform Act of 1969 and the Ford Foundation. *Id.* The Foundation Center reports that in 2009 \$50,000 was granted to the Sierra Club in California to study methods of saving energy by studying building codes. *Global Philanthropy*, FOUND. CTR., <http://foundationcenter.org/gpf/climatechange/> (last visited Oct. 5, 2011). The PRI grant for the Sierra Club came from the George Gund Foundation. *Id.* The only other “renewable energy” grants reported by the Foundation Center were for \$600,000 in 2007 by the W.K. Kellogg Foundation to ZERO Regional Environment Organisation for solar and wind powered water systems in Zimbabwe and \$100,000 in 2010 from the Ford Foundation to FIS Social Company, SA to develop an innovative business model for distributing sustainable solar panels to poor rural families in Peru and Argentina. *Id.* Other general grants were made to study climate changes, but no others were made on the specific issue of renewable energy sources or technology in the United States. *Id.*

21. *See* Ann E. Conaway, *Lessons to be Learned: How the Policy of Freedom of Contract in Delaware’s Alternative Entity Law Might Inform Delaware’s General Corporation Law*, 33 DEL. J. CORP. L. 789 (2008) [hereinafter *Lessons to be Learned*] (discussing in depth the advent of the B Corporation in the context of “freedom to contract” in favor of “other constituencies” in a corporation’s life).

carries significant pre-packaged disadvantages.²³

In the United Kingdom, the limited company may provide for-benefit and for-profit services since the company exists for whatever “purposes” are set forth in the articles of association. The fiduciary duties of the directors are thereafter linked to the “purposes” of the company even if those purposes seem to be in conflict with one another. The limited company is currently regulated by the Companies Act of 1985 (1989), the Insolvency Act of 1986, the Company Directors Disqualification Act of 1986, the Business Names Act of 1985, the Financial Services Act of 1986, and the Income and Corporations Taxes Act of 1988.²⁴ In the United Kingdom, however, the organization that is being used by an

22. The L3C is a low-profit limited liability company that has a primary social purpose and a secondary profit purpose. *Id.* at 792 n.10. The first state to enact the L3C was Vermont. VT. STAT. ANN. tit. 11, § 3001(27) (2010). Other states with L3C legislation include Illinois, Louisiana, Maine, Michigan, North Carolina, Utah, Wyoming, The Crow Indian Nation of Montana, and The Oglala Sioux Tribe. See ILL. COMP. STAT. ANN. 180/1–26 (West Supp. 2010); H.R. 1421, 2010 Leg., Reg. Sess., 2010 La. Acts 417; ME. REV. STAT. tit. 31, §§ 1599, 1611 (2010); MICH. COMP. LAWS SERV. § 450.4102(m) (LexisNexis Supp. 2010); Act of Aug. 3, 2010, S. 308, 2009 Sess. (N.C. 2009), <http://www.ncga.state.nc.us/Sessions/2009/Bills/Senate/PDF/S308v5.pdf>; UTAH CODE ANN. § 48–2c–412 (LexisNexis Supp. 2010), *repealed by* Unincorporated Business Entity Uniform Acts of 2011, S.B. 131, 2011 Leg., Gen. Sess. (Utah 2011); WYO. STAT. ANN. § 17–15–102(a) (ix) (2009) (*repealed* 2010); *L3C Information*, RURAL DYNAMICS INC.COM (Jan. 14, 2009, 11:54 AM), <http://www.ruraldynamics.org/l3c-information> (discussing Crow Indian Nation’s passing of L3C legislation); *Low-profit Limited Liability Companies (L3Cs)*, LAWFORCHANGE, <http://www.lawforchange.org/lfc/NewsBot.asp?MODE=VIEW&ID=3869&SnID=2> (last visited Sept. 26, 2011) (discussing the Oglala Sioux Tribe’s adoption of L3C legislation). By enacting legislation at the state level, jurisdictions with the L3C create a hybrid organization that allows entrepreneurs to invest in a hybrid entity that can receive “program related investment” income from investment firms without adhering to rigid nonprofit tax regulation. See *Lessons to be Learned*, *supra* note 21, at 792 n.10, 801 n.36.

23. See J. William Callison & Allan W. Vestal, *The L3C Illusion: Why Low-Profit Limited Liability Companies Will Not Stimulate Socially Optimal Private Foundation Investment in Entrepreneurial Ventures*, 35 VT. L. REV. 273, 274 (2010) (“[W]ithout changes to federal PRI [‘program-related investment’ provisions for private foundations] rules, the L3C construct has little or no value. Indeed, the existence of the state law form, without matching federal income tax substance, is dangerous since the ill-advised may assume value and use the form.”).

24. See Companies Act, 1989, c. 40, §§ 72–76, 78–79 (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/1989/40/contents> (detailing the regulation in which limited companies are subject to the Financial Services Act in sections 72–76, Insolvency Act section 78, and Company Directors Qualification Act section 79); Incomes and Corporations Tax Act, 1988, c. 1, § 6. (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/1988/1/contents/enacted>; Business Names Act, 1985, c. 7, § 1 (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/1985/7/contents>.

increasing number of developers in the renewable energy sector is the limited liability partnership, or “LLP.” Yet, the United Kingdom LLP functions in many ways like the limited company, including mandatory compliance with inflexible filing rules, internal managerial regulations, public listing of members’ or owners’ names, required presence of auditors and auditing procedures, compliance with insolvency regulations, and application of the Company Directors Disqualifications Act 1986.²⁵

In the United States, the preeminent solution is the flexible, contractually based Delaware limited liability company, or “LLC.” The thesis of this article is that, presently, the Delaware LLC provides global investors maximum internal efficiency, as well as asset protection at a decreased agency cost, for businesses operating solely within or outside the United States for socially-driven enterprises. The Delaware LLC offers contractual freedom to investors, managers, owners, funds, and foundations to structure a for-benefit, for-profit socially responsible business plan with limited liability for owners and investors, including maximum tax efficiencies within the United States or the United Kingdom due to its completely mobile, contractual character.

II. INTRODUCTION TO GLOBAL CHOICE OF ENTITY FOR SOCIALLY-DRIVEN BUSINESSES

Today, a host of entities masquerade as for-benefit organizations. The best known of these entities is the nonprofit corporation. Yet, because the nonprofit corporation is driven by a mandatory corporate infrastructure—non-distribution of profits to equity holders and compliance with Internal Revenue Code regulations—the nonprofit corporation is inflexible in today’s demanding marketplace for investors who want a return on their investment.

Another new “benefit” corporation being touted by B Lab is the “Benefit Corporation,” otherwise known as the B Corporation.²⁶

25. Limited Liability Partnerships Act, 2000, c. 12 (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/2000/12/contents>; Limited Liability Partnerships Regulations, 2001, S.I. 2001/1090, art. 3 (U.K.), *available at* <http://www.legislation.gov.uk/uksi/2001/1090/contents/made> (adopting the full text of the Companies Act 1985 and the Company Directors Disqualification Act 1986, virtually unmodified).

26. *About Certified B Corps*, B LABS, <http://www.bcorporation.net/about> (last visited Oct. 6, 2011).

Unlike the nonprofit corporation, the B Corporation is a for-benefit/for-profit corporation that permits its owners to invest in a socially-driven-purpose organization and to benefit financially at the same time.²⁷ A B Corporation must, however, amend its certificate of incorporation to become a valid B Corporation.²⁸ The B Corporation must also be “certified” by meeting specific B Lab standards in order to carry the moniker of B Corporation.²⁹ Inherent contractual and fiduciary conflicts arise under the governance paradigm of the B Corporation without statutory clarification since the B Corporation permits profit maximization to shareholders *in para passu* with the maximization of environmental, consumer, and community benefits.³⁰ Proponents of the B Corporation rely on “constituency” statutes as a fundamental basis for the conflicted dual-purpose B entity.³¹

27. See Celia R. Taylor, *Berle and Social Businesses: A Consideration*, 34 SEATTLE U. L. REV. 1501, 1513 (2011) (“B Corporations agree to engage in ‘triple bottom line’ accounting, focusing on social, environmental, and economic returns.”).

28. See *id.* (“To gain the ‘B Corporation’ designation (granted by B Lab), a corporation must . . . amend its articles of incorporation to state explicitly that managers must consider the interests of employees, the community, and the environment.”).

29. See *Lessons to be Learned*, *supra* note 21, at 793 n.12.

30. See Taylor, *supra* note 27, at 1516 (“B Corporation directors may decide not to take a particular action that would be profit-maximizing because they conclude that it would harm the environment (thereby doing no harm), but they still must be concerned that their actions ultimately redound to the benefit of their shareholders.”).

31. Several jurisdictions have constituency statutes. See, e.g., ARIZ. REV. STAT. ANN. § 10-1202(A) (2010); CONN. GEN. STAT. § 33-756(d) (2010); FLA. STAT. § 607.0830(3) (2011); HAW. REV. STAT. § 414-221(b) (2011); IDAHO CODE ANN. § 30-1-602 (2010); 805 ILL. COMP. STAT. 5/8.85 (2011); IND. CODE § 23-1-35-1(d) (2010); IOWA CODE § 490.1108A (2011); KY. REV. STAT. ANN. § 271B.12-210(4) (West 2010); LA. REV. STAT. ANN. § 12:92(G) (2010); ME. REV. STAT. tit. 13-C, § 831(6) (2011); MASS. GEN. LAWS. ch. 156B, § 65 (2010); MINN. STAT. § 302A.251 (2010); MISS. CODE ANN. § 79-4-8.30(d) (2010); MO. REV. STAT. § 351.347 (2010); NEB. REV. STAT. § 21-2045(1) (2010); N.J. STAT. ANN. § 14A:6-1(2) (West 2011); N.M. STAT. ANN. § 53-11-35D (2011); N.Y. BUS. CORP. LAW § 717(b) (Consol. 2010); OHIO REV. CODE ANN. § 1701.59(E) (West 2010); OR. REV. STAT. § 60.357(5) (2010); 15 PA. CONS. STAT. §§ 1715(a), 1716(a) (2010); R.I. GEN. LAWS § 7-5.2-8(a) (2010); S.D. CODIFIED LAWS § 47-33-4(1) (2011); TENN. CODE ANN. § 48-18-301 (2011); WIS. STAT. § 180.0827 (2011); WYO. STAT. ANN. § 17-16-830(g) (2011).

Generally, the constituency statutes exist as amendments to statutory statements as to directorial duties of care. See *Lessons to be Learned*, *supra* note 21, at 794 n.16. In a typical case, constituency acts provide that in satisfying managerial duties of care, directors may consider the interests of “stakeholders” such as employees, suppliers, customers, creditors, and the community at large. *Id.* Because these acts were born out of the hostile takeover era of the 1980s and 1990s, many of the acts were originally triggered upon a change in control.

Additionally, a highly criticized for-benefit/for-profit entity is the L3C. The L3C is technically a hybrid entity that is organized as a low-profit entity but with a social purpose.³² The L3C, from a tax perspective, will generally permit income and expenses to “flow through” to members.³³ However, tax-exempt members must consider the impact of any unrelated business income.³⁴ The L3C is organized as any other LLC and thus may be: (1) member-managed; (2) manager-managed; or (3) managed by a board of managers.³⁵ The rights and duties of the members and managers will be set forth in the L3C Certificate of Formation and Operating Agreement.³⁶ The capital structure of the L3C is typically designed to permit tax-exempt, program-related investments by private foundations as well as for-profit sources.³⁷ Distributions to members are made in accordance with the terms of the Operating Agreement of the L3C.³⁸ The confusion arising from the L3C is that the exact same capital, managerial, and profit/benefit

Today, however, most of the constituency acts do not operate solely within the context of hostile acquisitions (only Connecticut, Iowa, Louisiana, Missouri, Oregon, Rhode Island, and Tennessee limit their constituency acts to corporate acquisitions), and only Connecticut *requires* consideration of constituent interests—all other “stakeholder” acts are permissive only. *Id.*

Given the history underlying these acts, and the permissive nature of their reach, it is difficult to imagine how a B Corporation could legally “expand” the scope of directorial duties owed to stockholders and the common law on this issue based upon these acts. *Id.* The legal argument seems tenuous at best.

32. *See Lessons to be Learned, supra* note 21, at 792 n.10.

33. *See infra* Part III.D.

34. The IRS has not ruled that an investment in an L3C will necessarily qualify as a program-related investment (PRI). The IRS has issued private letter rulings permitting PRIs that were set up as LLC investments. *See* I.R.S. Priv. Ltr. Rul. 2006-03-031 (Oct. 25, 2005) (finding that a private foundation that invested in a private for-profit pharmaceutical company organized to help solve global health issues was a tax-exempt investment under Internal Revenue Code section 4942(g) (2007)); *see also* I.R.S. Priv. Ltr. Rul. 2006-10-020 (Dec. 13, 2005) (finding that a private foundation’s contributions to an LLC formed to invest in low-income communities qualified as a PRI under Internal Revenue Code section 4944(c) (2006)). In each of these cases, LLCs were the entities of choice, not L3Cs.

35. *See infra* Part III.D.

36. Callison & Vestal, *supra* note 23, at 287–88 (explaining that an L3C Operating Agreement can establish fiduciary duties).

37. *See id.* at 273 (“The result was intended to . . . allow[] private foundation money to flow more efficiently and in greater quantity into profit-making ventures.”).

38. *Id.* at 287 (“[T]he operating agreement can . . . establish fiduciary rules governing members and managers.”).

purposes can be achieved by an LLC without an L3C designation.³⁹ Yet, the proponents of L3C legislation argue that the primary focus of “benefit,” rather than profit, warrants the necessity of new legislation.⁴⁰ This justification by L3C proponents is nonsensical considering the flexibility of today’s Delaware LLC, along with its Court of Chancery and the Delaware Supreme Court’s unprecedented learning curve in regards to their knowledge and appreciation of the standard and sophisticated contractual LLC.

The English LLP, though currently available in England and Scotland, is not a legislative choice for Irish investors. In addition, the English LLP requires for its existence at least two owners.⁴¹ The Scottish LLP also mandates two owners and thus immediately extinguishes any use of the Scottish LLP as a special purpose entity.⁴² The English LLP also shares many required inflexible corporate characteristics, including publication of members’ names despite lack of personal liability, mandatory auditor presence and auditor filings, and compliance with the Insolvency Act of 1986 and the Company Directors Disqualification Act of 1986, even where directors are not present in the entity.⁴³

Finally, the United Kingdom limited company is available for a renewable energy technology company that combines beneficial and economic purposes. To achieve this cooperative financial effort, the memorandum of association (or the articles of association under the reforms of the Companies Act 2006) of the limited company will set forth in great detail the purposes and

39. See Dana Brakman Reiser, *Blended Enterprise and the Dual Mission Dilemma*, 35 VT. L. REV. 105, 109 (2010) (“The L3C adopts the LLC governance framework with virtually no changes.”).

40. See Callison & Vestal, *supra* note 23, at 273 (discussing the process through which proponents of L3C legislation advocated for the legislation).

41. Limited Liability Partnerships Act, 2000, c. 12, § 2(1)(a) (U.K.), available at <http://www.legislation.gov.uk/ukpga/2000/12/contents>.

42. See *id.* § 2(2)(c); see also Limited Liability Partnerships (Scotland) Regulations, 2001, S.I. 2001/128, § 3(b), available at http://www.legislation.gov.uk/ssi/2001/128/pdfs/ssi_20010128_en.pdf (incorporating the Limited Liability Partnerships Act, 2000, into the Scottish LLP regulations).

43. See Limited Liability Partnerships Act, 2000, c. 12, § 2(2)(e)–(f) (U.K.), available at <http://www.legislation.gov.uk/ukpga/2000/12/contents> (stating that all members, both designated and non-designated, must include their names on the incorporation document); Limited Liability Partnerships Regulations, 2001, S.I. 1090, § 3 (U.K.), available at <http://www.legislation.gov.uk/uksi/2001/1090/contents/made> (incorporating the Accounts and Audit provision of Part VII of the Companies Act, 1985, into the English LLP regulations); *id.* at § 4(2) (incorporating the Company Director Disqualification Act 1986 and the Insolvency Act 1986 into the English LLP regulations).

objectives of the limited company, including the procedures that management is to follow in carrying out company objectives.⁴⁴ Thereafter, the fiduciary duties owed by managers will track the detailed statement of purposes and objectives published in the memorandum of association or articles of association as registered in the Companies House.⁴⁵ It is left to the managers of the limited company to sort and implement the fiduciary duties to the company according to their best efforts and without engaging in competition with the company.⁴⁶

The most flexible contractual entity presently available in the global marketplace is the Delaware limited liability company. The Delaware LLC begins with the significant advantage of operating under a state policy of “freedom of contract” and “[maximum] enforceability of limited liability company agreements.”⁴⁷ Freedom of contract grants investors in a Delaware LLC the ability to structure operating agreements according to the sophistication of the parties and the nature of the business. In this sense, a Delaware LLC would permit the creation of a for-benefit, for-profit entity without any special designation and could also eliminate duties or liabilities for breach of duties between contradictory financial interests.

III. CHOICE OF ENTITY IN THE UNITED STATES AND UNITED KINGDOM FOR SOCIALLY-DRIVEN BUSINESSES

A. *The United Kingdom Limited Liability Partnership*

1. *General Background*

The LLP in England, Wales, and Scotland received Royal Assent for “incorporation” by any two or more persons who wish to

44. See *infra* Part III.B.

45. See Companies Act, 2006, c. 46, § 171 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2006/46/contents> (“A director of a company must—(a) act only in accordance with the company’s constitution, and (b) only exercise powers for the purposes for which they were conferred.”). See generally Gordon L. Clark & Eric R. W. Knight, *Implications of the UK Companies Act 2006 for Institutional Investors and the Market for Corporate Social Responsibility*, 11 U. PA. J. BUS. L. 259 (2009).

46. Companies Act, 2006, c. 46, § 172 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2006/46/contents>.

47. DEL. CODE ANN. tit. 6, § 18-1101(b) (2010).

go into business together on July 20, 2000.⁴⁸ The effective date for the United Kingdom LLP Act was April 6, 2001.⁴⁹

The United Kingdom LLP combines the organizational flexibility and pass-through default tax status of a partnership, but unlike its American counterpart, imposes “corporate” filing requirements, mandatory auditing procedures, statutory insolvency mandates, and adherence to the Company Directors Disqualifications Act. The “owners” in a United Kingdom LLP are “members” rather than “partners.”⁵⁰ In England and Wales, partners in a partnership have joint liability for partnership obligations and debts, as do partners in a United States partnership governed by the Uniform Partnership Act of 1914.⁵¹ Those same partners have joint and several liability for losses or damages resulting from conduct occurring in the ordinary course of the partnership business or with the consent of the partners inasmuch as the partnership is not an entity.⁵² Scotland, however, adopted independent partnership legislation in 2001—following the Revised Uniform Partnership Act of 1994—that imposes joint and several liability on all partners for contract and tort liabilities of the partnership.⁵³

Because of the growth of professional partnerships in the United Kingdom and the potential for a “doomsday” claim—a

48. Limited Liability Partnerships Act, 2000, c. 12, Introduction (U.K.), available at <http://www.legislation.gov.uk/ukpga/2000/12/contents>.

49. The Act came into legal effect on April 6, 2001 by virtue of the Limited Liability Partnerships Act 2000 (Commencement) Order 2000. Limited Liability Partnerships Act, 2000, c. 12 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2000/12/contents>.

50. In the use of the term “members” for the “owners” of the U.K. LLP, England, Scotland, and Wales have created an entity that more resembles the original U.S. two-member LLC for professionals—with the exception of the U.K. “transparency” requirements for public posting of members’ names, mandatory auditing procedures, and other corporate regulations.

51. See Partnership Act, 1890, 53 & 54 Vict., c. 39, § 9 (1890) (U.K.), available at <http://www.legislation.gov.uk/ukpga/Vict/53-54/39/contents>; UNIF. P’SHIP ACT (1914) § 15, 1 U.L.A. 117 (2001).

52. See Partnership Act, 1890, 53 & 54 Vict., c. 39, § 9 (1890) (U.K.), available at <http://www.legislation.gov.uk/ukpga/Vict/53-54/39/contents>; UNIF. P’SHIP ACT (1914) § 15, 1 U.L.A. 117 (2001). A partnership is formed by the mere association of two or more persons to participate in the control of a business for profit. See, e.g., REVISED UNIF. P’SHIP ACT (1997) § 202, 1 U.L.A. 92 (2001) (“[T]he association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.”).

53. See The Limited Liability Partnerships (Scotland) Regulations, 2001, S.I. 2001/128, available at http://www.legislation.gov.uk/ssi/2001/128/pdfs/ssi_20010128_en.pdf.

claim against the personal assets of a partner for actions of an unknown partner who may be located in another part of the country or even outside the country and where the claim exceeds the assets of the partnership or the firm's insurance coverage—England, Wales, and Scotland adopted the LLP primarily for professionals since these persons cannot escape their general duty of care to their clients for ordinary negligence.⁵⁴ With these parameters in mind, the United Kingdom LLP allows members to enjoy protection from personal liability for contractual obligations of the partnership as well as torts committed by a wrongdoing partner acting in the ordinary course of the partnership.⁵⁵ In this sense, the United Kingdom LLP is a legal entity separate from its members and is deemed to be a “body corporate.”⁵⁶

2. Formation

To “incorporate” an LLP in the United Kingdom, a name must be checked against the index of names maintained by the Registrar of Companies according to the Companies Act of 1985.⁵⁷ A founder has no procedure to “register” a name in advance of formation of the LLP, but does have the obligation to examine the records at Companies House, to ensure that the LLP does not have a name that is “the same as” or “too like” an existing name shown

54. “The only option for many professions, in the past, was to operate as partnerships. . . . The fact that professional bodies were required to operate as partnerships meant that they were subject to the particular rules relating to the liability of partners.” Limited Liability Partnerships Act, 2000, c. 12, n.7 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2000/12/notes/division/3>.

55. *Id.* § 1(5) (“[E]xcept as far as otherwise provided by this Act or any other enactment, the law relating to partnerships does not apply to a limited liability partnership.”).

56. “A limited liability partnership *is a body corporate (with legal personality separate from that of its members) which is formed by being incorporated under this Act . . .*” *Id.* § 1(2) (emphasis added).

57. If an LLP carries on business under a name that is not its registered name, it must comply with the provisions of the Business Names Act 1985. Section 4(1)(b) of the Business Names Act states that the corporate name of an LLP and the name of each member must be shown on all premises where the business is conducted under the business name so that clients, customers, and suppliers may have access to this information. Business Names Act, 1985, c. 7, § 4(1)(b) (U.K.), available at <http://www.legislation.gov.uk/ukpga/1985/7/contents>. This information must also be given in writing to any person who requests it. *Id.* § 4(4). If the LLP fails to comply with these provisions of the Business Names Act, the members may be subject to criminal penalties and the LLP may be unable to enforce contracts made under the business name. *Id.* §§ 5(1), 7(4)–(5).

on the records.⁵⁸

Once a name is cleared, the LLP may register with the Registrar of Companies.⁵⁹ By this act of registration, the United Kingdom LLP becomes a separate legal entity from its members.⁶⁰ The Limited Liability Partnerships Act (“LLPA”) requires at least two members for incorporation, and the names of these members must be listed on the registration.⁶¹ For creation, the LLP must also disclose the intended place of the registered office of the LLP.⁶² The registered office states the country within Great Britain where the registered office is located, and the registered office must be situated within the country of registration.⁶³ A member or agent/solicitor acting on the member’s behalf must sign the LLP’s incorporation document.⁶⁴ If all requirements are met, the Registrar of Companies will issue a certificate of incorporation indicating the LLP’s date of incorporation, its registered number, and its legal existence as an LLP.⁶⁵ The LLP may commence business upon its incorporation.⁶⁶

3. *The Partnership Agreement—Tailoring the Investment*

As with general partnership law, an LLP is not required to adopt a written agreement regulating the internal relationship of its members.⁶⁷ If the members do not submit their verbal

58. Companies Act, 1985, c. 6, § 28(2) (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/1985/6/contents>.

59. Limited Liability Partnerships Act, 2000, c. 12, § 3(1) (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/2000/12/contents>.

60. *Id.* § 1(2).

61. *Id.* § 2(1)(a). The disclosure of the names of members also requires the indication of which members are designated members or non-designated members. *Id.* § 2(2)(f). In general, designated members are obligated to appoint an auditor, sign LLP documents, deliver accounts to the Registrar of Companies, send notices of amendments to the certificate of incorporation to the Registrar of Companies, prepare, sign, and file the LLP’s annual return, and to wind up and dissolve the LLP if such is required. *Id.* §§ 8–9.

62. *See id.* § 2(2)(c).

63. *See id.* Thus, an LLP registered in England or Wales may not have its registered office in Scotland and vice versa. DOUGLAS ARMOUR, TOLLEY’S LIMITED LIABILITY PARTNERSHIPS: THE NEW LEGISLATION § 2.8, at 8 (2001).

64. *See* Limited Liability Partnerships Act, 2000, c. 12, § 2(1)(b) (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/2000/12/contents>; ARMOUR, *supra* note 63, § 2.5, at 5.

65. *See* Limited Liability Partnerships Act, 2000, c. 12, § 3 (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/2000/12/contents>.

66. *See id.* § 3(4); ARMOUR, *supra* note 63, § 2.4., at 4–5.

67. ARMOUR, *supra* note 63, § 2.5, at 5.

understandings as to profits and losses as well as management in writing, the LLP Regulations of 2000 set out default rules that modify those of the Partnership Act of 1890.⁶⁸ Thus, in the absence of a written agreement, the default LLP provisions provide that:

- (1) All members share equally in profits and losses;
- (2) The LLP must indemnify members for expenses incurred in relation to the LLP;
- (3) All members must participate in management;
- (4) Members are not entitled to remuneration for management duties carried out for the LLP;
- (5) All existing members agree to admit new members or to the assignment of an interest in the LLP by a member;
- (6) A member cannot be expelled without the express agreement of all members;
- (7) Business decisions will be made by majority unless the decision is concerning a change in the nature of the business, which requires consent of all members;
- (8) All members have access to books and records of the LLP; and
- (9) Members cannot compete against the LLP without consent of other members.⁶⁹

Neither the Scottish nor English Limited Liability Partnerships Acts statutorily permit the elimination of the fiduciary duties of care or loyalty by professionals.⁷⁰ These Acts also do not contain any stated public policy of “freedom of contract.”⁷¹ In addition, the LLPA of 2000 adopted in England, Wales, and Scotland contains no provision authorizing the elimination of the common law fiduciary duties of care and non-competition owed by professionals or others to clients or by professionals to each other.⁷² It would appear, therefore, that the United Kingdom LLP is not as flexible

68. *Id.*

69. *Id.* A “typical” United Kingdom LLP agreement will cover the following categories: nature of the LLP’s business; LLP’s name, property, and place of business; banking; members’ shares and contributions; profits and losses; draws; members’ duties; holiday entitlements; management; limits on members’ authority; admission of new members; indemnity; cars; insurance; retirement; expulsion; termination/winding up; covenants; notices; and arbitration. *Id.* § 2.5, app. 1.

70. Limited Liability Partnerships Regulations, 2001, S.I. 2001/1090, § 7 (U.K.), *reprinted in* ARMOUR, *supra* note 63, app. 2, at 123–24.

71. *See* Limited Liability Partnerships Act, 2000, c. 12 (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/2000/12/contents>.

72. *Id.*

as the Delaware LLC on the issue of contractual modification or elimination of duties imposed by statute or common law among sophisticated parties in arm's length transactions. However, in practice in the United Kingdom, the "limitation" or "expansion" of fiduciary duties does not occur by statutory fiat.⁷³ Rather, practitioners use the memorandum of association or articles of association and its detailed description of the entity's purposes and objectives to "tailor" fiduciary duties. Thus, by limiting a purpose or objectives clause to primary social purpose and reducing wealth maximization to a secondary objective, fiduciary duties are limited as well.

In addition, the United Kingdom LLP apparently is broad enough to allow the creation of a for-profit, for-benefit entity. In other words, a United Kingdom LLP may be incorporated for any "purpose" or "objective" that the members/investors desire.⁷⁴ Thereafter, the members, or the managing member, must implement the express purpose set out in the memorandum of association and articles of association for the benefit of the corporate entity. The complexity of the management of this United Kingdom entity is its overlay of fiduciary duties commonly owed to equity holders operating in direct conflict with the express nonprofit, socially-driven, beneficial purposes of the LLP. In short, in the absence of the contractual ability to modify, tailor, or eliminate conflicting profit-maximizing fiduciary duties, founders (visionaries) and investors (capital founders) in the United Kingdom LLP will always be at odds with each other at the outset. Capital investors and foundations generally seek some form of internal rate of return, whereas founding members may sacrifice profit in order to achieve the social goal (e.g., providing renewable energy sources to local neighborhoods). The United Kingdom

73. See Judith Freedman, *Limited Liability Partnerships in the United Kingdom—Do They Have a Role for Small Firms?*, 26 J. CORP. L. 897, 902 (2001) (explaining that the Limited Liability Partnerships Regulations set out default provisions for the LLP but do not impose a duty of good faith and can be altered by the LLP agreement). See generally Limited Liability Partnerships Act, 2000, c. 12 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2000/12/contents> (containing no language concerning expanding or limiting fiduciary duties).

74. Limited Liability Partnerships Act, 2000, c. 12, § 2 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2000/12/contents> (explaining that any two or more persons associated for the carrying on of a lawful business with a view to profit may form an LLP if they subscribe their names to an incorporation document, which must be delivered to the registrar as statutorily specified). The registrar will issue the certificate of incorporation if all is in order. *Id.* § 3.

LLP attempts to address the socially-driven business equitably by allowing contractual tailoring in the purpose clause, but thereafter does not permit the contractual elimination or modification of the duties owed to the conflicting financial interests in the benefit/profit entity. In this sense, the United Kingdom LLP of England, Scotland, and Wales goes far in inducing socially-driven businesses but does not go far enough in protecting outside investors.

B. The United Kingdom “Private Company”

1. General Introduction—The Memorandum of Association

The United Kingdom Companies Act of 1985 provides in pertinent part that:

- (1) Any two or more persons associated for a lawful purpose may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability.
- (2) A company so formed may be either—
 - (a) a company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them (“a company limited by shares”);
 - (b) a company having the liability of its members limited by the memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up (“a company limited by guarantee”); or
 - (c) a company not having any limit on the liability of its members (“an unlimited company”).⁷⁵

75. Companies Act, 1985, c. 6, §§ 1, 2(a)–(c) (U.K.), available at <http://www.legislation.gov.uk/ukpga/1985/6/contents>. Since July 15, 1993, pursuant to the European Community’s Twelfth Council Company Law Directive on single-member private limited liability companies, a private limited company may be formed with one person. See Companies (Single Member Private Limited Companies) Regulations, 1992, S.I. 1992/1699, art. 2 (U.K.), available at <http://www.legislation.gov.uk/uksi/1992/1699/contents/made>. For more information about the European Community’s Law Directive see Council Directive 89/667, 1989 O.J. (L 395) 40, available at <http://eur-lex.europa.eu/LexUriServ>

Under the Companies Act, the memorandum of association is often a lengthy public document setting forth in great detail its purposes, object, and authority, including whether it is limited or unlimited, or public or private.⁷⁶ By striking contrast, the United States certificate of incorporation normally presents a paucity of information regarding the filing corporation.⁷⁷ The United Kingdom memorandum of association may comprise as few as fifty or as many as a hundred pages or more of public documentation for the company's formation.⁷⁸ This memorandum of association is the company's "constitution," which records the purposes for which the entity is being incorporated and sets forth the distribution of power within the company and its internal procedural mechanisms.⁷⁹

Under the 1989 reform of the Companies Act, a United Kingdom company could not make the argument that a contract with a third party was *ultra vires* on the grounds that it was beyond the purposes or object stated in its memorandum of association.⁸⁰

/LexUriServ.do?uri=CONSLEG:1989L0667:20070101:EN:PDF.

76. See Companies Act, 1985, c. 6, §§ 1–3 (U.K.), available at <http://www.legislation.gov.uk/ukpga/1985/6/contents>.

77. See, e.g., CORPORATE DOCUMENTS & PROCESS COMM. & CORPORATE LAW COMM., A.B.A., PUB. CO. ORGANIZATIONAL DOCUMENTS: MODEL FORMS AND COMMENTARY 57–74 (2009) (illustrating the scarcity of information required about a filing corporation in a certificate of incorporation by showing an example of a certificate of incorporation for Delaware).

78. See Companies (Tables A to F) Regulations, 1985, S.I. 2007/2826 (U.K.) (amended 2007), available at <http://www.legislation.gov.uk/uksi/2007/2826/contents/made> (outlining the requirements and form of memoranda of association under United Kingdom Companies Act).

79. In like manner, in Delaware it is widely understood that a certificate of incorporation is a "contract" between the corporation, state, and its stockholders, as well as between the corporation and its stockholders "*inter sese*." See *Morris v. Am. Pub. Utils. Co.*, 122 A. 696, 700 (Del. Ch. 1923). In addition, the Delaware Code provides:

In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters:

(1) Any provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders, or the . . . members . . . of a nonstock corporation; if such provisions are not contrary to the laws of this State. Any provision which is required or permitted by any section of this chapter to be stated in the bylaws may instead be stated in the certificate of incorporation.

DEL. CODE ANN. tit. 8, § 102(b)(1) (2010).

80. Companies Act, 1985, c. 6, § 35 (U.K.), as superseded by Companies Act,

Thus, it is the duty of the directors of a United Kingdom company to know and act within the limitations of the memorandum of association.⁸¹

In 2006, the Companies Act was modernized and the memorandum of association re-defined.⁸² Under section 8 of the Companies Act 2006, the memorandum of association is defined as: “a memorandum stating that the subscribers—(a) wish to form a company under this Act, and (b) agree to become members of the company and, in the case of a company that is to have a share capital, to take at least one share each.”⁸³ The policy of the new definition is to shift the emphasis from the memorandum of association of a limited company being the document that details the purposes and objects of the company to the articles of association.⁸⁴ In this manner, the formative document remains the combination of the memorandum of association and the articles of association, but only the articles of association become the “constitution” of the company under the reformed Act.

2. *The Articles of Association—Tailoring the Investment*

Whereas the memorandum of association before set forth a company’s purposes, objects, authority, internal structure, and nature, the articles of association provided for the internal management of the company, including any limitations on the

1989, c. 40, § 108(1) (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/1985/6/contents> (“The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company’s memorandum.”).

81. Companies Act, 1989, c. 40, § 108(3) (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/1985/6/contents> (“It remains the duty of the directors to observe any limitations on their powers flowing from the company’s memorandum; and action by the directors which but for subsection (1) would be beyond the company’s capacity may only be ratified by the company by special resolution. A resolution ratifying such action shall not affect any liability incurred by the directors or any other person; relief from any such liability must be agreed to separately by special resolution.”).

82. Companies Act, 2006, c. 46, Introduction (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/2006/46/contents> (“An Act to reform company law and restate the greater part of the enactments relating to companies . . .”).

83. *Id.* § 8.

84. *See id.* § 8, nn. 32–34 (noting that, in the future, “key information regarding the internal allocation of powers between the directors and members of a company will be set out in one place: the articles of association”).

powers of directors as agents for the company.⁸⁵ A company could register its articles of association at Companies House.⁸⁶ If a company was limited by shares, it could choose to not register its articles of association, in which case “Table A” of the Companies Act applied to the company to the extent provisions in the table were not excluded by the company.⁸⁷

With the 2006 reforms, the articles of association now must be filed with the memorandum of association.⁸⁸ The articles must set forth the internal regulation of the company.⁸⁹ The articles may also set out “provisions for entrenchment” that require modification or amendment procedures or conditions that are more restrictive than those necessary for a special resolution. The articles may not, however, limit or eliminate managerial liability for negligence or breach of duty since such provisions would be deemed void under section 232 of the Companies Act 2006.⁹⁰

Under the prior law, the legal effect of the memorandum and the articles of association, when registered, was that the company and its members were bound “to the same extent as if they respectively had been signed and sealed by each member.”⁹¹ The memorandum and articles, like the United States certificate of incorporation, constituted a contract between the members and the company and between the members *inter se*.⁹² Under this

85. *See id.* § 2.

86. *See id.* § 7. *See generally* GBFI Company Formation, COS. HOUSE, (Nov. 2007), http://www.companieshouse.gov.uk/about/pdf/ca_gbf1.pdf (summarizing the procedural requirements for forming a company under the Companies Act 2006).

87. Companies Act, 1985, c. 6, § 8(2), Table A (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/1985/6/contents>.

88. Companies Act, 2006, c. 46, § 8 (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/2006/46/contents>; *id.* § 9 (stating that when registering, the application must be delivered to the registrar together with a memorandum of association and, among other things, a copy of any proposed articles of association); *id.* § 18.

89. *Id.*

90. *Id.* § 232.

91. Companies Act, 1985, chapter 6, section 14(1) (U.K.) provides:

Subject to the provisions of this Act, the memorandum and articles, when registered, bind the company and its members to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles.

92. *See* *Hickman v. Kent or Romney Marsh Sheepbreeders Ass'n*, [1915] 1 Ch. 881, [903] (Eng.) (stating that general articles dealing with the rights of members should be “treated as a statutory agreement between them and the company as well as between themselves *inter se*”); *supra* note 79 and accompanying text (discussing a certificate of incorporation acting as a contract).

contractual theory, a member could enforce a “personal” right such as a right to a dividend or a voting right. An “outside” right—such as the right of a member to be a director or a solicitor for the company—was only enforceable by the company and not by the member personally.⁹³ In sum, the contractual rights of members provided by the memorandum or articles were enforceable by members personally only if those claims involve rights or obligations of members qua members. The articles could be modified or amended by the members “bona fide” if it was in the interest of the company. Both amendment and modification required a majority vote or unanimous consent.⁹⁴ Because the articles constitute a contractual right, the members could vote in their self-interest in determining the company’s “best interest.”

The contractual effect of section 14 of the Companies Act and its ensuing case law has been the target of great academic debate in the United Kingdom.⁹⁵ Despite great consideration for reform by the United Kingdom Law Commission to move section 20 from a contractual basis to a statutory one, the Law Commission instead suggested a careful definition of “personal” rights under a memorandum and articles.⁹⁶

Under the reform of 2006, the articles of association and any resolutions or agreements create the constitution of the company.⁹⁷ New companies formed in England, Wales, Northern Ireland, and Scotland are subject to the reform version of the Companies Act

93. See *Hickman*, 1 Ch. at 896–97.

94. Companies Act, 1985, c. 6, § 9 (U.K.), available at <http://www.legislation.gov.uk/ukpga/1985/6/contents>; see also *Allen v. Gold Reefs of W. Afr. Ltd.*, [1900] 1 A.C. 656, [671] (Eng.) (stating that articles can be altered and will be binding if they are “bona fide for the benefit of the company”).

95. For an overview of the debate, see K.W. Wedderburn, *Shareholders’ Rights and the Rule in Foss v. Harbottle*, 15 CAMBRIDGE L.J. 194 (1957) (advocating personal contractual rights for everything except provisions identified as procedural only). See also G.D. Goldberg, *The Enforcement of Outsider Rights under Section 20 (1) of the Companies Act of 1948*, 35 MOD. L. REV. 362 (1972) (advocating that a member has the contractual right to have any of the affairs of the company conducted as set forth in the memorandum and articles); Graham. N. Prentice, *The Enforcement of Outsider Rights*, 1 CO. LAWYER 179, 184 (1980) (stating that personal rights should only have contractual power if the provision is “definitive” to the power of the company).

96. ANNOTATED COMPANIES LEGISLATION 314 (John Birds et al. eds., 2010) (defining personal rights as “rights which are enforceable under the statutory contract”).

97. Companies Act, 2006, c. 46, § 17 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2006/46/contents>.

2006.⁹⁸

3. *The Limited Company—Reflections for Social Responsibility*

The United Kingdom limited company clearly has the contractual flexibility in its memorandum of association and articles of association to adopt a for-benefit, for-profit purpose for an existing or new socially-driven business. It is apparent, though, that the limited company suffers the “transparency” burden of over-disclosure. Under the United Kingdom disclosure guidelines, not only will unnecessary information be disclosed in the memorandum of association, but the company will also be taxed with mandatory fiduciary duties, auditor controls, and adherence to insolvency and director disqualification statutes.⁹⁹

As for fiduciary duties, the United Kingdom limited company differs from the traditional United States corporation. In the United States, directors are statutory managers of the corporation and owe fiduciary duties of care and loyalty to shareholders and the corporate enterprise.¹⁰⁰ In the United Kingdom, directors act as agents of the corporation and their duties of care and loyalty run to the company rather than to the company’s members.¹⁰¹ In this manner, a United Kingdom limited company has more flexibility to create a “hybrid” nature with directors’ duties following the purpose and objective of the company. Yet, the oddity of U.K. law is that this paradigm necessarily sets constituencies with adverse financial interests at odds with each other. Directors of socially responsible, for-profit United Kingdom limited companies are

98. *Id.* §§ 1–6.

99. *Id.* §§ 82–85.

100. The board of directors in a U.S. corporation is vested with original statutory authority to manage the business and affairs of the corporation. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(a) (2010). In a jurisdiction such as Delaware, the directors must manage the corporation in accordance with the common law fiduciary duties of care and loyalty. *Stone ex rel. Am. S. Bancorp. v. Ritter*, 911 A.2d 362, 369–70 (Del. 2006) (holding that the obligation to act in “good faith” is not an independent fiduciary duty but is a “subsidiary element” of the duty of loyalty). Therefore, a contractual modification of a certificate of incorporation to add “stakeholders” beyond shareholders would reasonably create contractual (potentially third-party beneficiary) rights but would not necessarily create fiduciary duties or standing to the specified stakeholders, including members of the community or the environment at large. An independent statute would require this type of judicial recognition but, even then, such an act would not strip the judiciary of their “equitable” powers to “do justice.”

101. Companies Act, 2006, c. 46, §§ 171–177 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2006/46/contents>.

tasked with sorting and implementing the purposes, however mismatched financially, set forth in the company's memorandum of association or articles of association.¹⁰²

C. *The B or Beneficial Corporation*

1. *General Introduction*

The B, or Beneficial, Corporation¹⁰³ is the brainchild of B Lab, a nonprofit corporation established in 2006 and based in Berwyn, Pennsylvania.¹⁰⁴ In a nutshell, the concept of B Lab is that a company should be able to “do good” and “give back” to the community, customers, suppliers, and the environment without concern about shareholder suits for failure to maximize shareholder value at all costs.¹⁰⁵ Although B Lab is itself organized as a nonprofit corporation, the concept B Lab espouses is a new type of corporation that would require: (1) an amendment to a company's articles of incorporation stating that it is a beneficial corporation whose purpose is to maximize the interests of the company's “stakeholders,”¹⁰⁶ including its employees, customers,

102. *Id.* § 171(a).

103. Currently there are 454 B Corporations in fifty-four different industries, with \$2.18 billion in revenue and \$1 million in annual savings. *About Certified B Corps*, B LAB, <http://www.bcorporation.net/> (last visited Oct. 6, 2011).

104. See *Lessons to be Learned*, *supra* note 21, at 793 n.12.

105. A business's focus on all constituencies of a company as well as on accomplishing a socially responsible purpose is often referred to as the “triple bottom line.” See Carolina Miranda, *Human Capital: The “People” Part of the Triple Bottom Line*, CULTIVATING CAPITAL (July 8, 2011), <http://www.cultivatingcapital.com/category/triple-bottom-line>.

106. The theory of “stakeholder” interests in a corporation is not new to corporate law. For example, in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), the Delaware Supreme Court noted that, in the context of a hostile tender offer, a board of directors might be warranted in considering the interests of note holders in addition to those of stockholders. *Id.* at 182 (citing *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985)). Although this language in *Revlon* was dicta by the court and was never repeated in another Delaware Supreme Court case, an investor could file a certificate of incorporation today in Delaware that adopted a “beneficial” purpose and the Secretary of State's Office would accept that filing. However, because Delaware never adopted a “constituency” statute, the legal question presented by such a filing is: What duties would Delaware directors owe to the employees, creditors, community, and environment? Under Delaware's common law, it would seem that the certificate could not create fiduciary duties to anyone but shareholders. The open question is whether the purpose clause is broad enough to create third-party beneficiary rights in the “constituencies” thus named. Another issue is the application of the business judgment rule to the decisions by Delaware directors where the certificate

suppliers, the community in which it operates, and the environment;¹⁰⁷ and (2) a certification by B Lab that the company is a B Corporation.¹⁰⁸

2. Formation and Management

The B Corporation, as a new type of entity, requires a separate corporate statute for its formation.¹⁰⁹ One recently enacted statute is that found in Vermont.¹¹⁰ Under the Vermont Benefit Corporation Act, a benefit corporation is formed when its articles of incorporation are either filed or amended to include the statement: “This corporation is a benefit corporation.”¹¹¹ In addition, a benefit corporation must exist for a “general public benefit” as defined by having “a material positive impact on society and the environment, as measured by a third-party standard, through activities that promote some combination of specific public benefits.”¹¹² A specific public benefit is defined under the Vermont Benefit Corporation Act.¹¹³ Any amendment of the

has broadened the scope of “stakeholders.” See *Lessons to Be Learned*, *supra* note 21, at 794–95 & nn.16–17.

107. See *Understand Legal*, B CORPORATION, <http://www.bcorporation.net/become/legal> (last visited Oct. 11, 2011).

108. Only B Lab can “certify” that a company is a legitimate B Corporation, providing quite a boon for B Lab. *Become a B Corporation*, B CORPORATION, <http://www.bcorporation.net/become> (last visited Oct. 11, 2011). For this service B Lab receives one-tenth of one percent of the corporation’s annual revenue. See Hannah Clark Steiman, *A New Kind of Company: A “B” Corporation*, INC.COM (July 1, 2007), <http://www.inc.com/magazine/20070701/priority-a-new-kind-of-company.html>. If a company is not seeking certification, access to the metrics of compliance is free. *The B Impact Rating System*, B CORPORATION, <http://www.bcorporation.net/become/BRS> (last visited Oct. 6, 2011). B Lab generally rates a new company on five factors—community, consumers, employees, environment, and leadership. See *Lessons to be Learned*, *supra* note 21, at 793 n.12.

109. Four states presently have B Corporation statutes: Maryland, New Jersey, Vermont, and Virginia. See MD. CODE ANN., CORPS. & ASS’NS §§ 5-6C-01 to -08 (West 2011); N.J. STAT. ANN. § 14A:18-1 to -11 (West 2011); VT. STAT. ANN. tit. 11A, §§ 21.01 to .14 (2011); VA. CODE ANN. §§ 13.1-782 to -791 (2011). Other states have introduced legislation regarding B Corporations. See, e.g., S.B. 1462, 26th Leg., Reg. Sess. (Haw. 2011).

110. VT. STAT. ANN. tit. 11A, § 21.01 to .14 (2011).

111. *Id.* § 21.03(a)(1) (defining a benefit corporation).

112. *Id.* § 21.03(a)(4).

113. See *id.* § 21.03(a)(6)(A)–(G) (“[A specific public benefit includes:] (A) providing low income or underserved individuals or communities with beneficial products or services; (B) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business; (C) preserving or improving the environment; (D) improving human health; (E)

articles of incorporation to add, amend, or delete a specific public benefit requires a two-thirds vote of the outstanding shares of the benefit corporation.¹¹⁴

Once the benefit corporation is formed, its management is similar to that of the traditional board of directors, with one exception: the addition of a “benefit director.”¹¹⁵ The primary purpose of the benefit director is to file the annual “benefit report” that states whether or not the directors of the benefit corporation have complied with their general and specific public benefit purposes.¹¹⁶

Non-benefit directors must act in the best interests of the benefit corporation, including:

(A) the shareholders of the benefit corporation; (B) the employees and workforce of the benefit corporation and its subsidiaries and suppliers; (C) the interests of customers to the extent they are beneficiaries of the general or specific public benefit purposes of the benefit corporation; (D) community and societal considerations, including those of any community in which offices or facilities of the benefit corporation or its subsidiaries or suppliers are located; (E) the local and global environment; and (F) the long-term and short-term interests of the benefit corporation, including the possibility that those interests may be best served by the continued independence of the benefit corporation.¹¹⁷

The board of directors of the benefit corporation is not required to give priority to any specific constituency of the corporation.¹¹⁸ The directors of a benefit corporation are not held to a “different or higher standard of care when an action or inaction might affect control of the benefit corporation.”¹¹⁹ Directors do not owe fiduciary duties to all designated beneficiaries

promoting the arts or sciences or the advancement of knowledge; (F) increasing the flow of capital to entities with a public benefit purpose; and (G) the accomplishment of any other identifiable benefit for society or the environment.”).

114. *Id.* § 21.08(e).

115. *Id.* § 21.10.

116. *Id.* § 21.10(c)(3)(A).

117. *Id.* § 21.09(a)(1)(A)–(F).

118. *Id.* § 21.09(a)(3) (providing that the board of directors is not required to give preference to any particular person or group unless the articles of incorporation have designated a priority among the stakeholders).

119. *Id.* § 21.09(a)(4).

under the corporation's articles of incorporation merely because the person is a beneficiary of a general or specific beneficial purpose.¹²⁰ Instead, directors only owe fiduciary duties to those who may bring a benefit enforcement proceeding against the benefit corporation.¹²¹ An enforcement proceeding may be brought by: (1) a shareholder who otherwise had that right; (2) a director; (3) a person or group of persons owning ten percent or more in an entity of which the beneficial corporation is a subsidiary; or (4) those persons named in the articles of incorporation.¹²²

3. Certification

The Vermont Act, unlike the B Lab paradigm, does not require a "certification" for the formation of a benefit corporation.¹²³ Rather, in assessing the compliance of the corporation with its beneficial purposes, the benefit director, in the annual benefit report, must apply a "third-party standard" of performance.¹²⁴ The "third-party standard" is defined in the Vermont Act as: "[A] recognized standard for defining, reporting, and assessing corporate social and environmental performance that . . . (A) is developed by a person that is independent of the benefit corporation; and (B) is transparent because the . . . information about the standard is publicly available."¹²⁵

The B Lab system requires a corporation to score "40 out of 100 on a survey B Lab developed after consulting with more than 150 entrepreneurs, investors, and academics."¹²⁶ Some of the criteria that gain points for potential B Corporation candidates include "democratic decision making, having good benefits, donating profits to charity, and being energy efficient."¹²⁷ However, the B Lab certification monopoly has not gained uniform acceptance among founders of socially-driven businesses.¹²⁸

For example, in the organic farming industry, some have

120. *Id.* § 21.09(e).

121. *Id.*; *see also id.* § 21.13(a).

122. *Id.* § 21.13(b)(1)–(4).

123. *See supra* text accompanying notes 111–14; *see also* VT. STAT. ANN. tit. 11A, § 21.05.

124. VT. STAT. ANN. tit. 11A, § 21.14(d)(2).

125. *Id.* § 21.03(a)(8).

126. *See* Steiman, *supra* note 108.

127. *Id.*

128. *Id.*

alleged that the “organic certification system” is “somewhat suspect” and “has actually weakened their movement by enabling the creation of organic factory farms.”¹²⁹ Some of the questions on B Lab’s survey have dubious relevance or social value.¹³⁰ All socially-driven businesses are not created equally, nor are their purposes equally “certifiable.” As in the Vermont Act, a third-party annual review of compliance with “benefit” objectives is a logically better indicia of how well a socially responsible business is performing on an annual basis than a single source “certification” made in a “one-size-fits-all” package.

4. *The Truth About Benefit Corporations*

Just as the “agile virtual corporation” set “best practices” standards fifteen years ago,¹³¹ the benefit corporation may well be in search of standards today. Yet, it is nonsensical to assume that only B Lab can provide “certification” for all beneficial, socially responsible businesses.¹³² First, B Lab assumes that the corporate form is the subliminal choice of entity for socially-driven organizations.¹³³ Yet, with the corporate form comes a statutory board of directors, officers, other mandatory compliance requirements, and over one hundred years of ingrained common law application of traditional fiduciary concepts, including the bedrock governance principle that directors must maximize shareholder wealth in the best interest of the corporate enterprise. With such a well-established, traditionally-based statutory infrastructure, one must immediately wonder why B Lab chose this bastion of corporateness as its target for implementing “stakeholder” interests. In Delaware alone, B Lab need only have looked to the most popular Delaware entity being formed today—that of the limited liability company (LLC)—and virtually all of its

129. *Id.*

130. *Id.* One example of such a question: “Are corporate events or team-building exercises held at least twice annually?” *Id.*

131. Ann E. Conaway Stilson, *The Agile Virtual Corporation*, 22 DEL. J. CORP. L. 497, 499 n.11 (1997) (describing the purpose and scope of re-engineering businesses in an evolving global economy).

132. Another nonprofit organization, the Natural Capital Institute, is developing a standard for “responsible business” that will be launched soon. Steiman, *supra* note 108.

133. *B Corporation Declaration of Interdependence*, CERTIFIED B CORPORATION (2008), http://www.bcorporation.net/resources/bcorp/documents/Bcorp_SM_Declaration.pdf.

impediments would disappear. So why a B Corporation?

First, B Lab itself is organized as a nonprofit corporation in Pennsylvania.¹³⁴ However, in order to “sell” “doing good” and “giving back” to private investors in a down economy, B Lab needs a vehicle that can blend nonprofit and profit characteristics. The form in which B Lab is organized cannot work because as a nonprofit all monies are distributed to the company and not its members.¹³⁵ Pennsylvania does not presently have a benefit corporation statute so a “new” form of entity would have to be created if the corporate form were to be retained.¹³⁶ In this story, it appears that the marketing of a B Corporation got ahead of the legal practicalities (or more logically stated, the legal morass of the B Corporation). In hindsight, the founders of B Lab would have been well-advised to abandon the B Corporation moniker and instead seek out the best choice of entity for their platform.

In short, the B Corporation of B Lab origination is overly paternalistic as well as structurally unsound. The entity envisioned by B Lab is inflexible with its corporate infrastructure, overly broad with its “constituency” purpose clause, and legally uncertain with its attempt by contract law to usurp over one hundred years of corporate fiduciary duty law. Certainly, the social and environmental development sought by B Lab is laudable. However, the same result is more readily attained and legally defensible by the contractually created LLC. By trying to fit “benefit” into more than one hundred years of corporate common law, B Lab is hammering the proverbial square peg into a round hole—an endeavor that causes much frenzy, but guarantees no return on the investment.

As for statutory attempts such as that in Vermont, the “benefit” entity remains inflexible with its corporate structure and its added feature of a “benefit” director.¹³⁷ Notwithstanding the Vermont Act’s attempt to define the benefit corporation directors’ duties

134. Jay Coen Gilbert, *Remarks on White/Leach Benefit Corporation Bill Upon Introduction to the Pennsylvania State Senate* (Feb. 7, 2011), available at http://www.bcorporation.net/resources/bcorp/documents/B%20Lab%20remarks_PA_020711.pdf.

135. Ferdinand S. Tinio, Annotation, *Distribution of Funds by Nonprofit Corporation Absent Dissolution*, 51 A.L.R.3d 1318 (1973).

136. The Pennsylvania Legislature is currently contemplating legislation to recognize B Corporations as a legal entity. S.B. 433, 195th Gen. Assemb., Reg. Sess. (Pa. 2011).

137. VT. STAT. ANN. tit. 11, § 21.12 (2011).

with respect to whom may bring a claim, it seems inequitable that corporate law would create a “stakeholder” entity that permits no protection for those very “stakeholders.”¹³⁸ In addition, if a benefit corporation is statutorily established for a primarily social purpose, then in “equity” or “fairness” it seems that a court would hold directors liable for failure to exercise care and loyalty in seeking to achieve that primary goal rather than shareholder wealth maximization. If the goal is to relieve directors of liability in benefit corporations, then states adopting benefit legislation must be willing to provide for statutory elimination of directorial duties to non-traditional “stakeholder” interests. Due to the paucity of statutory authority to eliminate fiduciary duties, courts will certainly rely upon their equitable powers to “do equity” and “impose fairness” in appropriate cases. For these reasons alone, the B Corporation is a legal nightmare.

D. The “L3C” or Low-Profit Limited Liability Company

1. General Background

The “L3C,” or “low-profit limited liability company,” came onto the new entity scene in 2008.¹³⁹ The L3C is another hybrid social entrepreneur organization that attempts to blend “program related investments,” or PRIs, with some small degree of income production for private foundations.¹⁴⁰ In the field of renewable energy technologies, startup companies need significant funding sources. One obvious beginning path is founder capital. Once this base is tapped, venture capital or foundations become important

138. The constituency acts were not enacted with benefit corporations in mind, but rather to fend off hostile takeovers—a distinctly different concern than that being pursued by B Lab. See ARIZ. REV. STAT. ANN. § 10-1202(A) (2010); CONN. GEN. STAT. § 33-756 (2010); FLA. STAT. § 607.0830(3) (2010); HAW. REV. STAT. § 414-221 (2010); IDAHO CODE ANN. § 30-1-602 (2010); 805 ILL. COMP. STAT. 5/8.85 (2010); IND. CODE § 23-1-35-1 (2010); IOWA CODE § 490.1108A (2010); KY. REV. STAT. ANN. § 271B.12-210(4) (West 2010); LA. REV. STAT. ANN. § 12.92(G) (1994); ME. REV. STAT. ANN. tit. 13-C, § 831 (2010); MASS. GEN. LAWS ch. 156B, § 65 (2010); MINN. STAT. § 302A.251 (2010); MISS. CODE ANN. § 79-4-8.30(d) (2010); MO. REV. STAT. § 351.347 (2010); NEB. REV. STAT. § 21-2045(1) (2010); N.J. REV. STAT. § 14A:6-1 (West 2010); N.M. STAT. ANN. § 53-11-35(D) (2001); N.Y. BUS. CORP. LAW § 717(b) (Consol. 2010); OHIO REV. CODE ANN. § 1701.59(E) (West 2010); OR. REV. STAT. § 60.357(5) (2010); 15 PA. CONS. STAT. § 1715-16 (2010); R.I. GEN. LAWS § 7-5.2-8(a) (2010); S.D. CODIFIED LAWS § 47-33-4 (2010); TENN. CODE ANN. § 48-18-301 (2010); WIS. STAT. § 180.0827 (2010); WYO. STAT. ANN. § 17-16-830 (2010).

139. Callison & Vestal, *supra* note 23, at 273.

140. *Id.* at 282–83.

resources. Foundations often have excess funds that will be subject to an excise tax if not invested.¹⁴¹ These funds may be invested and receive beneficial tax treatment if they qualify as a PRI.¹⁴² A PRI must meet three requirements under the Internal Revenue Code: (1) “The primary purpose of the investment is to accomplish one or more of” the specified requirements (religious, scientific, educational, literary, or charitable); (2) “No significant purpose of the investment is the production of income or the appreciation of property”; and (3) “No purpose of the investment” is to influence legislation or to participate in political campaigns.¹⁴³

In the renewable energy sector, a foundation could qualify for a PRI under the Treasury definition so long as the primary purpose of the investment was to further the scientific objective of advancing research, development, and implementation of solar and wind energy in a particular sector, and this was a primary goal of the foundation’s investment objective.¹⁴⁴ If the company also had private investors with the objective of receiving a return on their investment, the motive of the private investors should not affect the PRI so long as the PRI was below-market.¹⁴⁵

2. *The Vermont Act*

Vermont was the first jurisdiction to adopt an L3C statute.¹⁴⁶ According to the Vermont Act, an L3C is described to mirror the federal definition of a program-related investment.¹⁴⁷ Therefore, a Vermont L3C must: (1) significantly further the accomplishment of a charitable or educational purpose within the meaning of the Internal Revenue Code and would not be formed but for the objective of accomplishing such purpose; (2) no significant purpose of the L3C is the production of income or the

141. *Id.* at 276–79 (setting forth the various excise taxes on foundations regarding charitable gifts).

142. *Id.*

143. Treas. Reg. § 53.4944-3(a)(1)(2011).

144. *See id.*

145. *Id.* § 53.4944-3(b) ex. 5.

146. VT. STAT. ANN. tit. 11, § 3001(27) (2010). Other jurisdictions with L3C legislation include: Illinois, Louisiana, Maine, Michigan, North Carolina, Utah, and Wyoming. *See* 805 ILL. COMP. STAT. 180/1-26 (2010); LA. REV. STAT. ANN. § 12:1302(C) (2010); ME. REV. STAT. tit. 31 § 1611 (2011); MICH. COMP. LAWS § 450.4102(m) (2010); N.C. GEN. STAT. § 57C-2-01(d) (2011); UTAH CODE ANN. § 48-2c-412 (2011); WYO. STAT. ANN. § 17-15-102(a)(ix) (2010).

147. *Compare* VT. STAT. ANN. tit. 11, § 3001(27)(A), *with* Treas. Reg. § 53.4944-3(2)(i).

appreciation of property; and (3) no purpose of the company is to accomplish a political or legislative purpose or goal as defined in the Internal Revenue Code.¹⁴⁸ Next, the certificate of formation must indicate that the company is an L3C and the name must bear the designation, “L3C.”¹⁴⁹ Finally, if the L3C ceases to satisfy the requirements for an L3C, the company defaults to an LLC and must amend its certificate to indicate this change in status.¹⁵⁰

3. *The Truth About L3C Legislation*

The obvious difficulty with the Vermont Act is that it does not even require a “purposes” clause in the articles of organization.¹⁵¹ Thus, unlike the B Corporation, there is no clear mechanism in the statute whereby investors or outsiders can gauge whether the L3C is in compliance with its stated literary, educational, scientific, charitable, or religious objectives.¹⁵² Also, the Vermont Act places no mandate on the members of the L3C to file a “compliance with benefits objectives” through a third-party annual review.¹⁵³ The Vermont L3C simply comes into existence by stating that it is such in the articles of organization and thereafter utilizes the required L3C designation.¹⁵⁴ For private investors, the L3C appellation is no guarantee that the LLC will operate any differently than a standard limited liability company.¹⁵⁵ For foundations seeking PRIs, federal law mandates supervision of and compliance with investment standards.¹⁵⁶ State acts such as that in Vermont do not further the cause for private foundation funding.¹⁵⁷

The L3C proponents have been successful in lobbying for legislation without fully balancing all options available for private foundation funding or the confusion, ambiguity, and possible misrepresentation caused by state legislation in this area without parallel federal tax legislation. Certainly, private letter rulings

148. VT. STAT. ANN. tit. 11, § 3001(27)(A)–(C).

149. *Id.* §§ 3026(a)(6), 3005(a)(2).

150. *Id.* § 2001(27)(D).

151. *See supra* Part III.B.1.

152. *See supra* Part III.C.2.

153. *See supra* Part III.C.3.

154. *See* VT. STAT. ANN. tit. 11, § 3001(27)(A)–(D).

155. *See supra* Part III.B.1.

156. *See* Treas. Reg. § 53.4944-3 (2011).

157. *See* Callison & Vestal, *supra* note 23, at 282–86 (“[B]y focusing on the LLC’s profit motivation, the Vermont statute arguably eviscerates L3Cs as a method for attracting capital and encouraging beneficial economic growth.”).

make clear that these L3C acts are unnecessary.¹⁵⁸ In a 2006 private letter ruling involving an LLC, where a foundation made an investment in businesses in low-income communities owned or controlled by members of minority or other disadvantaged groups who were unable to secure reasonable traditional financing for the purpose of community benefits, the question was raised whether the foundation investment constituted a PRI.¹⁵⁹ In a favorable ruling, the Internal Revenue Service examined the foundation's mission, objectives, and goals, which included aiding groups to achieve economic and educational independence and giving back to low-income communities, and concluded that the investment mirrored the foundation's charitable and educational purposes.¹⁶⁰ In this case, the fund would only invest if the business had been denied traditional financing and sixty-seven percent of the owners or controllers of the business were in fact members of disadvantaged groups.¹⁶¹ Thus, an L3C was not necessary to the success of using an LLC for PRI investments.¹⁶² What is necessary is that the investment matches the mission and objectives of the foundation and the operating agreement reflects that mission.

4. *The Problem with Statutory Fiduciary Duties*

The Vermont Act tracks many of the uniform unincorporated acts by setting forth mandatory fiduciary duties of care and loyalty.¹⁶³ The duty of care, which is not actually a "fiduciary duty," requires that a member or manager not act in a grossly negligent or reckless manner or with intent to do harm or commit fraud.¹⁶⁴ This so-called fiduciary duty of care is actually a mere standard of accountability and has now been labeled as such by the National Conference of Commissioners on Uniform State Laws in its newly-revised Harmonized Uniform Business Organization Code.¹⁶⁵ The

158. See *supra* note 40 and accompanying text.

159. I.R.S. Priv. Ltr. Rul. 2006-10-020, at 1-3, 18 (Mar. 10, 2006).

160. *Id.* at 3, 24-35.

161. *Id.* at 8.

162. *Id.* at 4, 35 (concluding that the foundation's contributions to a fund organized as an LLC "qualify as a program-related investment").

163. VT. STAT. ANN. tit. 11, § 3059(a)-(c) (2011).

164. See HARMONIZED UNIF. BUS. ORG. CODE § 409(c) (2011) ("The duty of care of a member of a member-managed limited liability company in the conduct or winding up of the company's activities and affairs is to refrain from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.").

165. See *id.*

duty of loyalty, on the other hand, requires that members or managers not take LLC property without the consent of other members, not act in a manner adverse to the LLC, and not take an opportunity or compete with the LLC in certain circumstances.¹⁶⁶

As with the B Corporation, these traditional fiduciary duties “work” where the only “stakeholders” are members, managers, or others set out in the LLC operating agreement.¹⁶⁷ On the other hand, the fiduciary duties of “care and loyalty” were inserted into the LLC acts based upon a presumption that the common law of partnerships and limited partnerships was somehow applicable to the new, hybrid LLC. That presumption fails if the purpose of an L3C is to expand the “stakeholders” of the business beyond that intended by the original LLC acts. Arguably, the better approach is that in Delaware and jurisdictions that follow a statutory policy of “freedom of *contract*,” rather than implication of fiduciary duties, since under the Delaware approach, parties are free to draft any duties desired in order to tailor them to the nature of the enterprise as well as the investors and the investments. At present, the Vermont Act serves only to set non-traditional “stakeholders” with opposite financial interests at odds with one another. The Act grants no flexibility for sophisticated investors to remove counter-productive duties where necessary.

E. The Delaware Limited Liability Company (LLC)

1. General Background and History

Delaware adopted the Delaware Limited Liability Company Act (“DLLCA”) in 1992¹⁶⁸ as the last of its unincorporated entity statutes.¹⁶⁹ When the DLLCA was enacted, the statute contained the language that permitted each Delaware unincorporated entity to:

- (1) expand or restrict duties (including fiduciary duties) owed by a person or partner to each other or to the entity,

166. See VT. STAT. tit. 11, § 3059(b)(1)–(3).

167. See, e.g., *id.* § 3060 (noting permitted actions by “members”).

168. DEL. CODE ANN. tit. 6, §§ 18-101 to -1109 (2010) (Delaware Limited Liability Company Act).

169. See, for example, Delaware’s other unincorporated acts, *id.* §§ 15-101 to -1210 (2010) (Delaware Revised Uniform Partnership Act enacted in 1999); *id.* §§ 17-101 to -1111 (2010) (Delaware Revised Uniform Limited Partnership Act enacted in 1973); DEL. CODE ANN. tit. 12, §§ 3801–3826 (2010) (Delaware Statutory Trust Act enacted in 1988).

- provided that the private organic agreement did not “eliminate the implied contractual covenant of good faith and fair dealing”¹⁷⁰;
- (2) limit or eliminate the liability of a partner or other person to each other or to the entity for breach of contract or breach of fiduciary duty, provided that no exculpation could be granted in a private organic document for any act or omission that constituted “a bad faith violation of the implied contractual covenant of good faith and fair dealing”¹⁷¹; and
- (3) exculpate a partner or other person that is a party to the entity’s private organic document or is otherwise bound by that agreement for breach of fiduciary duty, where such person relies in good faith upon the terms of the private organic document.¹⁷²

In 2004, the Delaware General Assembly amended the language “expand or restrict” when used to delineate the contractual parameter of “duties,” to clearly include the term “eliminate.”¹⁷³ Although some found the 2004 amendments surprising, in retrospect the amendments simply mirrored Delaware’s stated public policy in its unincorporated entity law that “[i]t is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.”¹⁷⁴

The obvious benefit of the Delaware LLC is that the entity

170. See DEL. CODE ANN. tit. 6, § 18-1101(c); see also *id.* § 15-103(f) (2010) (permitting a partnership agreement to limit or eliminate “any and all liabilities for breach of contract and breach of duties”); *id.* § 17-1101(d) (permitting a partner’s duties to be expanded, restricted, or eliminated by a limited partnership agreement); DEL. CODE ANN. tit. 12, § 3806(c) (permitting a trustee’s duties to be expanded, restricted, or eliminated by the governing instrument).

171. DEL. CODE ANN. tit. 6, § 18-1101(e); see also *id.* § 15-103(f) (providing that a partnership agreement may not limit or eliminate liability for a bad faith act or omission); *id.* § 17-1101(f) (providing that a limited partnership agreement may not limit or eliminate liability for a bad faith act or omission); DEL. CODE ANN. tit. 12, § 3806(e) (providing that a governing instrument may not limit or eliminate liability for a bad faith act or omission).

172. DEL. CODE ANN. tit. 6, § 15-103(f) (permitting the elimination of fiduciary duties in general partnerships); *id.* § 17-1101(d) (permitting the elimination of fiduciary duties in limited partnerships); *id.* § 18-1101(c) (permitting the elimination of fiduciary duties in LLCs); DEL. CODE ANN. tit. 12, § 3806(c) (permitting the elimination of fiduciary duties in statutory trusts).

173. DEL. CODE ANN. tit. 6, §§ 18-1101(c), 17-1101(d), 15-103(f); DEL. CODE ANN. tit. 12, § 3806(c).

174. DEL. CODE ANN. tit. 6, § 18-1101(b).

generally avoids entity level taxation.¹⁷⁵ Next, Delaware LLCs enjoy significant contractual flexibility that permits sponsors to create a private or public entity and to install any managerial infrastructure that reflects the dynamics of the nature and purposes of the LLC.¹⁷⁶ This internal malleability also extends to founders and investors to craft noneconomic equity interests¹⁷⁷ or to eliminate voting rights of some members if desired.¹⁷⁸ In addition, a public LLC is subject to different rules and regulations than corporations under the stock exchanges as well as the federal securities laws—rules that significantly affect the internal governance of the entity and the rights of owners/investors.¹⁷⁹ The 2004 amendments to Delaware’s unincorporated entity acts authorized sponsors and investors to contractually limit or eliminate *duties and liabilities* of owners or managers to each other, the entity, or another person that is a party to the entity’s private agreement. Additionally, Delaware’s

175. See *Lessons to be Learned*, *supra* note 21, at 790. Unincorporated entities are today classified for tax purposes under the “check-the-box” tax regulations. Treas. Reg. § 301.7701-2 to -3 (2010). Under the “check-the-box” regulations an “eligible entity” is a business organization for federal tax purposes that is not treated as a trust and is not mandated to be treated as a corporation for taxation treatment. *Id.* § 301.7701-2. If the organization has a sole owner, it may be classified as a disregarded entity; if it has two or more owners, it may elect partnership tax treatment; or, as a corporation regardless of the number of owners. *Id.* § 301.7701-2 to -3. The “check-the-box” “election” is made by the taxpayer on Form 8832. *Id.* § 301.7701-3(c)(1)(i).

176. DEL. CODE ANN. tit. 6, § 18-1101(b) (“[The] policy of this chapter is to give maximum effect to the principle of freedom of contract.”).

177. *Id.* § 18-301(d) (describing the requirements for admission of members in a Delaware LLC).

178. *Id.* § 18-302(a) (describing classes and voting rights in a Delaware LLC).

179. In 2007, The Blackstone Group, L.P. went public as a Delaware limited partnership. In a statement equally applicable to public LLCs, The Blackstone Group, L.P. noted:

We are a limited partnership and will qualify for exceptions from certain corporate governance and other requirements of the rules of the New York Stock Exchange. Pursuant to these exceptions, limited partnerships may elect not to comply with certain corporate governance requirements of the New York Stock Exchange, including the requirements (1) that a majority of the board of directors of our general partner consist of independent directors, [and] (2) that we have a nominating/corporate governance committee that is composed entirely of independent directors In addition, we will not be required to hold annual meetings of our common unitholders. Following this offering, we intend to avail ourselves of these exceptions. Accordingly, you will not have the same protections afforded to equityholders of entities that are subject to all of the corporate governance requirements of the New York Stock Exchange.

THE BLACKSTONE GROUP, L.P., PROSPECTUS (FORM 424(B)(4)) 55 (2007).

Court of Chancery and Delaware Supreme Court now have more combined case law experience in matters of LLC contract interpretation than any other jurisdiction.¹⁸⁰

2. *Forming and Tailoring the Business*

In order to form a Delaware LLC, one or more authorized persons must execute a certificate of formation.¹⁸¹ The certificate of formation must be filed with the Secretary of State and must contain the name of the limited liability company, including the designation LLC or L.L.C., the address of the registered office, and the name and address of the registered agent for service of process.¹⁸² The certificate of formation may also contain any other information the parties desire.¹⁸³ The actual formation of a Delaware LLC is somewhat confusing. Section 18-201(b) provides:

A limited liability company is formed at the time of the filing of the initial certificate of formation in the office of the Secretary of State or at any later date or time specified in the certificate of formation if, in either case, there has been substantial compliance with the requirements of this section. A limited liability company formed under this chapter shall be a separate legal entity, the existence of which as a separate legal entity shall continue until cancellation of the limited liability company's certificate of formation.¹⁸⁴

However, Delaware requires the existence of an LLC operating agreement to form a Delaware LLC.¹⁸⁵ Pursuant to section 18-201(d), an LLC agreement “shall be entered into or otherwise existing either before, after or at the time of the filing of a certificate of formation.”¹⁸⁶ The LLC agreement may be oral, implied, or written,¹⁸⁷ but is not subject to the statute of frauds.¹⁸⁸

180. See generally DEL. CODE ANN. tit. 6, § 18-1101(c) (permitting the elimination of fiduciary duties in LLCs); *Delaware LLC Operating Agreement*, MYLLCAGREEMENT.COM, <http://www.mylcagreement.com/state-llc-agreement/delaware-llc-operating-agreement.html> (last visited Oct. 11, 2011) (stating that one of the many reasons Delaware is often the choice state to form an LLC is Delaware has a considerable amount of LLC case law).

181. DEL. CODE ANN. tit. 6, § 18-201(a).

182. *Id.* § 18-201(a)(1)–(2).

183. *Id.* § 18-201(3).

184. *Id.* § 18-201(b).

185. *Id.* § 18-201(d).

186. *Id.*

187. *Id.* § 18-101(7) (“[L]imited liability company agreement’ means any

The LLC agreement, whether existing before, at the same time as or after the time of filing, may be made effective as of the date of the formation of the LLC or such other time as is specified in the LLC agreement.¹⁸⁹ It is imperative, therefore, that practitioners beware of the Delaware statute and make sure that both a certificate of formation and an LLC agreement exist before allowing clients to transact business in the LLC name.

In addition to the standard LLC, Delaware offers a “series” limited liability company.¹⁹⁰ To create a Delaware “series” LLC, the certificate of formation must contain a notice of the limitation of liability of the series.¹⁹¹ A “series” is, in essence, an allocation by the LLC operating agreement of the company’s property, assets or obligations, and the profits or losses attendant to the property, assets, or obligations so allocated.¹⁹² Members, managers, or LLC interests may be designated to the series.¹⁹³ Separate records must be maintained for each series so that assets may be identified to a single series as well as losses or profits generated by that series.¹⁹⁴ If the certificate of formation sets forth the mandated notice of series and its limitations of liabilities and separate books and accounts are maintained for each series, then the debts, obligations, and profits of each series remain solely with that series and cannot cross into the assets of another series.¹⁹⁵ Each series may have a different “business purpose or investment objective.”¹⁹⁶ A properly formed series may “carry on any lawful business, purpose or activity, whether or not for profit.”¹⁹⁷ In addition, each series may sue or be sued in its own name, and has the power and capacity to contract, hold title to property (real, personal, or intangible), and grant liens

agreement (whether referred to as a limited liability company agreement, operating agreement or otherwise), written, oral or implied, of the member or members as to the affairs of a limited liability company and the conduct of its business.”).

188. *Id.* (“A limited liability company agreement is not subject to any statute of frauds (including § 2714 of this title).”).

189. *Id.* § 18-201(d).

190. *Id.* § 18-215(a) (“A limited liability company agreement may establish or provide for the establishment of [one] or more designated series of members, managers, limited liability company interests or assets.”).

191. *Id.* § 18-215(b).

192. *Id.* § 18-215(a).

193. *Id.*

194. *Id.* § 18-215(b).

195. *Id.*

196. *Id.* § 18-215(a).

197. *Id.* § 18-215(c).

and security interests.¹⁹⁸

3. *Management of the Delaware LLC*

A Delaware limited liability company does not need to designate whether it is member-managed or manager-managed.¹⁹⁹ Under Delaware law, both members and managers retain agency authority to bind the LLC whether or not the company is member- or manager-managed.²⁰⁰ The operating agreement of the parties dictates their rights, including, but not limited to, voting rights, profit interests, loss sharing, notices and consents for meeting purposes, access to information and confidentiality provisions, and exit rights on dissociation, dissolution, termination, or expulsion.²⁰¹ In other words, the parties to the company agreement are free to contract for whatever provisions each desires. There is no requirement that the parties bargain for “fair” or “equal” terms since business issues might dictate that one investor may wish solely to “do good” whereas another may wish to generate an internal rate of return on her investment. Each party bargains for its own interests. The Delaware LLC imposes no statutory or judicial burden of equality of investment or motive by the contracting parties.²⁰² The policy of “freedom of contract” clearly upholds this interpretation by the Delaware courts.²⁰³

Further, Delaware courts apply a “plain meaning” interpretation to partnership and LLC operating agreements.²⁰⁴

198. *Id.*

199. *Id.* § 18-402.

200. *Id.*

201. See Peter J. Walsh, Jr. & Dominick T. Gattuso, *Delaware LLCs: The Wave of the Future and Advising Your Clients About What to Expect*, 19 BUS. L. TODAY 11, 11 (2009) (“As business law practitioners know, limited liability companies are creatures of contract. Delaware’s statutory scheme affords members virtually unlimited discretion to define the terms of their relationship in the operating agreement.”).

202. See Mohsen Manesh, *Delaware and the Market For LLC Law: A Theory of Contractability and Legal Indeterminacy*, 52 B.C. L. REV. 189, 193 (2011) (noting the perception that “heightened contractability and reduced indeterminacy” makes Delaware appear more attractive to incorporating business but also noting that these features may actually harm Delaware).

203. See Ann E. Conaway, *The Multi-Facets of Good Faith in Delaware: A Mistake in the Duty of Good Faith and Fair Dealing; A Different Partnership Duty of Care; Agency Good Faith and Damages; Good Faith and Trust Law*, 10 DEL. L. REV. 89, 102–04 (2008).

204. *QVT Fund LP v. Eurohypo Capital Funding LLC*, C.A. No. 5881-VCP, 2011 WL 2672092, at *10 (Del. Ch. July 8, 2011).

Under a plain meaning approach, the Delaware judiciary will not admit extrinsic evidence into an unambiguous contract for the purpose of rendering it ambiguous.²⁰⁵ The plain meaning interpretative guide provides sponsors and investors with the needed certainty that negotiated agreements will be upheld despite changing market conditions.²⁰⁶ Other jurisdictions, applying a “realism” test, permit parol evidence in order to discern intent with the result that “realism” courts render the parties’ hard-won contractual terms moot.²⁰⁷ In many cases, these courts, espousing “realism,” in fact utilize vague tort-based fiduciary duties to fill gaps that the parties intended to be left blank or filled by commercially reasonable standards.²⁰⁸ Thus, courts that “reform” contracts in the name of fiduciary duties are bullwhipping investors with *their own contract*. Delaware courts, on the other hand, are loath to bind parties to terms to which neither party agreed—true *freedom from contract*.²⁰⁹

4. *The Delaware LLC—The Ultimate in Entity Efficiency and Investor Flexibility*

Because of its statutory policy of freedom of contract and other unique features, the Delaware LLC is unlike almost all United States limited liability companies.²¹⁰ The ability to craft a hybrid

205. *Athenian Venture Partners I, L.P. v. GMG Capital Invs., LLC*, C.A. No. 08C-04-084 DCS, 2011 WL 883013, at *6 (Del. Super. Ct. Jan. 10, 2011).

206. *See Related Westpac LLC v. JER Snowmass LLC*, C.A. No. 5001-VCS, 2010 WL 2929708, at *1 (Del. Ch. July 23, 2010).

207. *See Stephenson v. Oneok Res. Co.*, 99 P.3d 717, 722–23 (Okla. Civ. App. 2004) (noting that when an ambiguity is present in a joint operating agreement, the jury is entitled to consider extrinsic evidence to resolve the ambiguity); *Smith v. Osguthorpe*, 58 P.3d 854, 863 (Utah Ct. App. 2002) (holding that the trial court was required to consider parol evidence in determining whether a partnership dissolution agreement was fully integrated or not).

208. *See, e.g., Bishop of Victoria Corp. Sole v. Corp. Bus. Park*, 158 P.3d 1183, 1190 (Wash. Ct. App. 2007).

209. *See, e.g., QVT Fund LP*, 2011 WL 2672092, at *10; *Related Westpac LLC*, 2010 WL 2929708, at *1; *Athenian Venture Partners*, 2011 WL 883013, at *6.

210. *See generally*, Ann E. Conaway, *Why No Respect? The Contractual Duties of Good Faith and Fair Dealing in Delaware*, SOC. SCI. RES. NETWORK (June 17, 2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=994624## (explaining the statutory policy of “freedom of contract” in Delaware unincorporated entity law and the confusion of some courts in applying these contractarian principles of traditional fiduciary duties). Georgia, Kansas, Oklahoma, Pennsylvania, Utah, and Virginia also have “freedom to contract” provisions. *See* GA. CODE ANN. §§ 14-11-1107(b), 14-2-920 (2010); KAN. STAT. ANN. § 17-76,134(b) (2010); OKLA. STAT. ANN. tit. 18, § 2058(D) (2010); 15 PA. CONS. STAT. ANN. §§ 8916(b), 8520(d) (2010);

business with a blend of investors with differing financial objectives is precisely what is necessary for socially-driven, economically responsible organizations. The Delaware LLC does not require a special statute or amendment to an existing statute to accomplish a socially beneficial goal. Also, unlike the B Corporation, the Delaware LLC has no mandate that the certificate of formation publicly announce its purpose or objectives since neither members nor managers have personal liability for the debts or obligations of the LLC.²¹¹

The Delaware LLC has the further advantage of its “series” provisions.²¹² If, for example, a renewable energy technology business wished to explore solar as well as onshore and offshore wind possibilities, each different technology and asset base could be allocated to a separate series in order to insulate similar sectors or technologies of the business, whether or not they outperform another in any given year. Likewise, if one technology suffered a loss due to design failures, the other branches of the business would be sheltered from loss by the internal liability shield of the series if notice and separate records were properly maintained.

As noted in the section on the L3C, the standard LLC can accomplish everything that the L3C can but without the limitations and contradictory applications of fiduciary duties to financially adverse investors.²¹³ Delaware has solved the duties issue by granting a full complement of investor authority to eliminate or limit the application of duties or liability for breach of duties, especially where those duties are raised in a nontraditional, “stakeholder” setting.²¹⁴ In essence, Delaware LLC law permits the sponsors/founders themselves to determine how best to regulate compliance with the “purpose” and “objective” of the social or environmental goal of the company as weighted against the interests of certain capital investors who seek a simple return on their investment. The LLC operating agreement may set forth: standards of compliance; priorities of distributions; asset management for third-party beneficiaries; remedies for unhappy

UTAH CODE ANN. § 48-2c-1901 (2010); VA. CODE ANN. § 13.1-1282(B) (West 2010); Conaway, *supra* at 3.

211. See DEL. CODE ANN. tit. 6, § 18-1101(d) (2010); Conaway, *supra* note 210, at 7.

212. See DEL. CODE ANN. tit. 6, § 18-215.

213. See *supra* Part III.D.1, 3.

214. See DEL. CODE ANN. tit. 8, § 102(b)(6)–(7); Conaway, *supra* note 210, at 3 n.4.

parties, including third-party beneficiaries; exit rights for disgruntled capital investors; capital call rights; weighted voting among classes of stakeholders; or the need, or lack thereof, for a “compliance officer” to draft a status report to be circulated to stakeholders annually.²¹⁵

VI. CONCLUSION

Social entrepreneurship is an increasing beacon in today’s marketplace. New and existing businesses are seeking to “do good,” “give back,” prioritize the human capital of their ventures, and generate wealth for investors all at the same time. Seeking this “triple bottom line” is not only good marketing but also good business and social stewardship. What is confusing this sector of the U.S. economy is the growth of “niche” entities—the B Corporation and the L3C—that serve no economic or financial purpose but instead confuse an otherwise overburdened entity-laden choice of entity feast.

For example, the B Corporation requires yet another statute to overlay “stakeholder” interests onto over one hundred years of the fiduciary-driven corporate paradigm. Yet, “stakeholder constituency” statutes already exist for other purposes in many jurisdictions. The B Corporation does not create clarity in the arena of social enterprises—just the opposite. The B Corporation sets up the ultimate dichotomy of traditional fiduciary duties owed to stockholders under the common law of corporate entities versus a new law that inserts “stakeholders” and third-party beneficiaries into the corporate common law paradigm. This confusion is the proverbial tip of the iceberg. Any court interpreting a dispute arising from a B Corporation must consider the appropriate application of the business judgment rule, equity, and entire fairness. The B Corporation essentially sells investors a lawsuit.

Likewise, the L3C is confusing and unnecessary. The L3C requires amendments to LLC legislation and accomplishes nothing that a standard limited liability company could not achieve. The L3C indeed does greater harm by adding language that seemingly tracks federal tax definitions of PRIs, yet the state and federal

215. See DEL. CODE ANN. tit. 6, § 18-101(7) (2010). For general information regarding operating agreements, see 51 AM. JUR. 2D *Limited Liability Companies* § 4 (2011); LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES § 4:16 (2011). For an example of an operating agreement form, see 12 AM. JUR. 2D *Legal Forms* § 167A:8 (2011).

definitions are not in sync. Also, compliance with the state definition does not guarantee a foundation that its investment will receive favorable tax treatment since the PRI must also satisfy the foundation's own internal purposes and objectives. To the unwary and uninitiated, the L3C is misleading and thus harmful to the market.

In the United Kingdom, the limited company may be organized for a social and profitable purpose so long as this is reflected in the articles of association under the Companies Act 2006. The current disadvantage of the limited company is that it must adhere to "transparency" requirements, including: public filing of internal articles of association, mandatory auditor procedures and filings, compliance of insolvency and disqualification of directors' provisions, and other market-related provisions. In addition, the limited company cannot eliminate liability for a breach of fiduciary duty or the duty itself. The only "limitation" on a director's duty is in the nature of the purpose and objective of the business. Thus, if the corporate enterprise is defined as being primarily for benefit and secondarily for profit, directors are tasked with sorting their duties accordingly. In many cases, these duties will be owed to investors with opposite financial interests in the venture.

Also in the United Kingdom is the limited liability partnership—a body corporate. The disadvantages to the LLP are that it requires at least two persons for formation and it retains the corporate mandates for transparency and thus public filings for its internal operating documents. Also, the LLP is subject to virtually all the filing provisions that apply to a limited company under the Companies Act 1985. In terms of fiduciary duties, like the limited company, the LLP cannot eliminate fiduciary duties or liability for breaches of fiduciary duties. However, the articles of association for the LLP may "limit" the members' duties by limiting the purpose of the LLP primarily to a beneficial cause with profit generation being only a secondary motive. The members' duties then mirror the purpose/objective of the corporate body. However, like the limited company, members are put to the task of satisfying investors with diverse financial expectations.

Clearly, the most investor and market friendly of all entities available today for social stewardship and profit return is the Delaware limited liability company. The Delaware LLC comes packaged with a state policy of "freedom of contract" that

encourages investors, foundations, and sponsors to craft their own deal—whatever that deal may be. The Delaware Limited Liability Company Act does not impose any statutory fiduciary duties on members or managers, but the parties are free to include any duties should they desire. If the parties do not wish to insert fiduciary duties, they are free to craft any internal structure they wish—whether it is for benefit, for profit, or both. The LLC may be formed as a “series” LLC and the operating agreement may allocate property or assets among series and designate members or managers to each series as well as profits and losses to those series. Each series may have a different business purpose or objective and may contract, hold title, and sue or be sued in the series’ name. The series may be formed with a single member and may “elect” its tax status under the “check-the-box” tax regulations. Finally, the Delaware Supreme Court and the Delaware Court of Chancery together have interpreted more LLC agreements than any other jurisdiction. This judicial predictability in Delaware lowers agency costs significantly for a Delaware LLC—more than the formation of an LLC in any other U.S. jurisdiction.

Social entrepreneurship is the trend of the future. New “boutique” legislation is unpredictable and unreliable. For serious social stewards, the global entity of choice is the Delaware LLC.