FACILITATING STAKEHOLDER-INTEREST MAXIMIZATION: ACCOMMODATING BENEFICIAL CORPORATIONS IN THE MODEL BUSINESS CORPORATION ACT

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I. INTRODUCTION

Milton Friedman noted in 1970, that "the social responsibility of business is to increase its profits."[1] This notion has continued to permeate the U.S. corporate system for nearly four decades,[2] and until recently it was primarily social investors who examined a corporation's social and environmental agenda when making investment decisions.[3] Now, however, more traditional investors, including those on Wall Street, are evaluating companies on a range of corporate social responsibility issues in addition to conventional financial analysis.[4]

The basic idea is that a "good record on corporate social responsibility and governance is good for business," which is in the long-term best

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1. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAGAZINE, Sep. 13, 1970, *available at* http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html (noting there is one, and only one, social responsibility of business: to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud). Well before the publication of Friedman's famous essay, the Michigan Supreme Court in *Dodge v. Ford Motor Co.* noted that "[a] business corporation is organized and carried on primarily for the profit of the stockholders." 170 N.W. 668, 684 (Mich. 1919).

2. Another notion that remains entrenched in U.S. corporate law is the idea of shareholder primacy, which is the idea that the interests of shareholders—wealth maximization—should always come first. *See* STEPHEN M. BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE 8–9, 53–57, 201–35 (2008) [hereinafter THE NEW CORPORATE GOVERNANCE] (explaining the theory of shareholder primacy and the more recent version of the model as viewed in today's scholarship, the weaknesses of the model, and how it compares to the theory of director primacy).

3. *See, e.g.*, Interfaith Center on Corporate Responsibility, http://www.iccr.org/ (last visited Feb. 22, 2010) (comprising of 275 faith-based institutional investors, including pension funds, foundations, religious communities, economic development funds, and colleges); Walden Asset Management, http://www.waldenassetmgmt.com/ (last visited Feb. 22, 2010) (investing clients assets with social and financial objectives in mind since 1975); Timothy Smith, *Institutional Investors Find Common Ground With Social Investors*, *in* SIXTH ANNUAL DIRECTORS' INSTITUTE ON CORPORATE GOVERNANCE at 257 (PLI Corporate Law and Practice, Course Handbook Series, 2008).

4. *See, e.g.*, Smith, *supra* note 3, at 257 (noting that in 2004 there were over 1100 resolutions on social, environmental, and corporate governance issues); Goldman Sachs, GLOBAL ENERGY: ENERGY ENVIRONMENTAL AND SOCIAL REPORT 1, Feb. 24, 2004 (stating that "[e]nvironmental and social issues count" and are a "key driver of future performance and valuation" in the oil and gas industry); Philipp Jung & Per-Erik Eriksson, *Microfinance Loan Obligations—Structured Finance for Microfinance Investments*, *in* INNOVATIONS IN SECURITISATION YEARBOOK 2006 179, 180 (Jan Job de Vries Robbé & Paul U. Ali eds., 2006) ("Emerging market funds, often theme oriented (sustainable development, environment, water, renewable energy, housing, small enterprise, etc.) are becoming every day more apparent. Whether socially responsible or not, today investors are looking into low volatility opportunities and/or segments of the market uncorrelated with mainstream global benchmarks.").

interests of shareholders.[5] Thus, there is a growing acceptance among investors that a for-profit corporation can both generate a financial return for shareholders, while also pursuing social, environmental, or community agendas.[6]

One notable problem is that there does not currently exist in U.S. corporate law a widely accepted corporate form to accommodate those social businesses that seek to adhere to a social, environmental, or community agenda while also providing a return to investors. However, one proposed model to embody this idea is the beneficial corporation (also known as a B Corporation),[7] which is a new corporate form that straddles the for-profit and nonprofit sectors.[8] A B Corporation, also known as a socially responsible corporation ("SRC") or a "for-benefit organization,"[9] uses the power of business to solve social and environmental problems.[10]

The basic idea behind the beneficial corporation is to formalize what social investors have been doing for a number of years by embedding social, environmental, or community goals into the corporation's governing documents, such that the board of directors and officers are charged with creating economic value for shareholders while also adhering to its stakeholder based agenda.[11]

Despite the lack of a widely accepted B Corporation form in the fifty states' corporate laws, over 160 corporations in thirty industries have already attempted to configure their articles of incorporation to become a B

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5. Smith, *supra* note 3, at 261. *See generally* SOPHIA A. MUIRHEAD, THE 2006 CORPORATE CONTRIBUTIONS REPORT 5 (2006) (noting that "[t]he total U.S. and international giving from 211 of the largest companies and corporate foundations amounted to $9.78 billion" in 2005); AMY KAO, CORPORATE CITIZENSHIP REPORTING: BEST PRACTICES 6 (2005) (noting that companies that practice corporate citizenship reporting usually have citizenship values reflected in its core values, make use of internal audits, utilize widely recognized standards into their reporting efforts, and make use of independent auditors).

6. *See generally* AMY DOMINI, SOCIALLY RESPONSIBLE INVESTING: MAKING A DIFFERENCE AND MAKING MONEY (2001) (describing the history of socially responsible investing and the basic approaches used by these investors).

7. *See* B Corp, http://www.bcorporation.net (last visited Feb. 22, 2010).

8. *See* Bart Houlahan, Remarks at AIGA Business and Design Conference 2008 (Oct. 25, 2008), *available at* http://www.aiga.org/resources/content/5/3/3/1/documents/aiga_gain08_houlahan.pdf).

9. Fourth Sector, For-Benefit Corporations, http://www.fourthsector.net/learn/for-benefit-corporations (last visited May 5, 2009) (describing nine core attributes of a For-Benefit Corporation).

10. *See* Houlahan, *supra* note 8.

11. *See id.*; *see also* Anne Field, *Do-Good Investing*, TR. & EST., Feb. 27, 2008, *available at* http://trustsandestates.com/wealth_watch/Wealth_Watch_News_02272008/ (describing a for-profit business that seeks social and environmental returns in addition to pursuing profit maximization as having a "triple bottom line").

Corporation.[12] Collectively, B Corporations are responsible for generating significant amounts of revenue.[13] Thus, there is a strong need for a new corporate form because for-profit corporate directors have a fiduciary responsibility to maximize shareholder wealth, which can be incompatible at times with the corporation's social agenda. This is especially true in situations where the board must make zero-sum decisions in which some stakeholders inevitably gain while others lose.[14]

It remains unclear at this time if simply having the articles of incorporation reflect the corporation's primary commitment to stakeholder based goals will suffice to withstand the judicial system's scrutiny of whether directors are complying with their fiduciary duties to shareholders. Other problems include how to prevent takeovers of B Corporations by investors who seek to do away with the corporation's original stakeholder-based agenda, how to discourage management from "play[ing] one stakeholder group against another [to] escape accountability,"[15] and what the standards of liability should be for directors of B Corporations given that they must focus primarily on stakeholder benefit maximization rather than shareholder wealth.

Previous scholars have already analyzed whether a new corporate form is necessary to support a stakeholder interest maximization model, and scholars have come down on both sides of the debate.[16] This Article

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12. *See* B Corp., *supra* note 7.

13. *See id.*

14. *See* ROGENE A. BUCHHOLZ, RETHINKING CAPITALISM: COMMUNITY AND RESPONSIBILITY IN BUSINESS 30 (2009). Stakeholders include "any individual or group who can affect or is affected by the actions, decisions, policies, or goals of the organization." *Id.* (noting that "typical stakeholders are considered to be consumers, suppliers, government, competitors, communities, employees, and, of course, stockholders"); *see also* Ulrich Steger, *Stakeholders and Corporate Sustainability*, INSIDE THE MIND OF THE STAKEHOLDER: THE HYPE BEHIND STAKEHOLDER PRESSURE 61, *passim* (2006) (denoting four distinct stakeholder clusters that include: 1) government, unions, and communities; 2) nongovernmental organizations (NGOs); 3) suppliers, customers, and financial institutions; and 4) media); THE NEW CORPORATE GOVERNANCE, *supra* note 2, at 9 n.15 (2008) (noting his "slight preference for the term 'nonshareholder constituencies,' which captures the idea of shareholders as having distinct interests from those of other stakeholders . . . ."); R. Edward Freeman & David L. Reed, *Stockholders and Stakeholders: A New Perspective on Corporate Governance*, 25 CAL. MGMT. REV. 88, 89 (1983) (describing stakeholders as "those groups without whose support the organization would cease to exist").

15. BUCHHOLZ, *supra* note 14, at 32.

16. *See generally* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005); Janet E. Kerr, *Sustainability Meets Profitability: The Convenient Truth of How the Business Judgment Rule Protects a Board's Decision to Engage in Social Entrepreneurship*, 29 CARDOZO L. REV. 623 (2007); Susan H. MacCormac, *The Emergence of New Corporate Forms: The Need for Alternative Corporate Designs Integrating Financial and Social Missions*, 2007 PAPER SERIES ON CORP. DESIGN 88; Alissa Mickels, *Beyond Corporate*

seeks to add to the literature by examining scenarios in which a separate B Corporation corporate form would provide a solution to the problems detailed above, and by proposing that the ABA enact a Beneficial Corporation provision in its Model Business Corporation Act to specifically address this issue.[17] The MBCA has been adopted either in whole, or in substantial part, by over thirty states.[18]

As such, amending the MBCA to reflect a new B Corporation form would promote wide acceptance in many states' corporate laws. States, such as Vermont, Minnesota, and California, have already passed or are working on drafting amendments to their corporate laws that would provide for this type of new corporate form to straddle the for-profit and nonprofit sectors.[19] The Article proceeds as follows:

Part II provides a background on how beneficial corporations are being structured currently, including different forms proposed by national and state governments to allow for-profit companies to pursue public, social, or environmental agendas.[20] Part III details scenarios in which beneficial corporation directors are likely to run into conflict between the corporate charter mandates, fiduciary duties to shareholders, and their own self-interest.[21] Part IV provides recommendations for provisions the ABA should enact in the Model Business Corporation Act ("MBCA") and discusses how these proposals potentially resolve the conflicts detailed in

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Social Responsibility: Reconciling the Ideals of a For-Benefit Corporation With Director Fiduciary Duties in the U.S. and Europe, 32 HASTINGS INT'L & COMP. L. REV. 271 *passim* (2009).

17. *See* discussion *infra* Parts II.A–C, III.

18. *See* AM. BAR ASSOC., MODEL BUS. CORP. ACT: OFFICIAL TEXT WITH OFFICIAL COMMENT AND STATUTORY CROSS-REFERENCE at ix & n.1 (2007).

19. *See, e.g.*, VT. STAT. ANN. tit. 11, § 3001(27) (2008) (detailing mandatory requirements for a "low-profit limited liability company"); S. File 1153, 85th Leg., Reg. Sess. (Minn. 2007), *available at* https://www.revisor.leg.state.mn.us/bin/showPDF.php (proposing new law for incorporation of socially responsible for-profit corporations); Assemb. B. 2944, 2008 Leg., 2007 – 08 Reg. Sess. (Cal. 2008), *available at* http://info.sen.ca.gov/pub/07-08/bill/asm/ab_2901-2950/ab_2944_bill_20080222_introduced.pdf (proposing amendment to Corporations Code allowing directors to consider impact on community, and environment when making business decisions).

20. *See* discussion *infra* Part II; *see also* Thomas H. Moody, *The Promise of the L3C*, TR. & EST. 16, 18 (Sept. 2008), *available at* http://www.drm.com/uploads/The_Promise_of_the_L3C.pdf (detailing Vermont's recent enactment of a low-profit limited liability company (L3C) structure); S.B. 773, 24th Leg., Reg. Sess. (Haw. 2008), *available at* http://www.capitol.hawaii.gov/session2008/bills/SB773_SD1_.pdf (proposing in 2007 the establishment of a private, for-profit, non-stock, membership corporation).

21. *See* discussion *infra* Parts III. A–D.

Part III.[22]

II. BENEFICIAL CORPORATIONS

The idea of using corporations for the public good is certainly not novel to the twenty-first century.[23] The first corporations in the United States were established specifically for the good of society as these entities helped to build infrastructure such as bridges and roads.[24] In 1932, E. Merrick Dodd, Jr. argued that the corporate person should be held to the same concept of citizenship as an individual, so that it is acceptable for corporate managers and directors to consider social obligations over economic self-interest.[25] The modern pursuit of corporate wealth and profit maximization has eclipsed this public role espoused by Dodd, however, and there currently exists no universally accepted corporate form that is a hybrid form of modern for-profit and nonprofit entities.[26]

This Part describes the general structure a B Corporation would embody if created, explains why current state corporate law is not sufficient to provide a sound legal structure to protect stakeholder interests, and provides examples of recent efforts to implement the B Corporation form into modern corporate law.[27]

A. GENERAL STRUCTURE

The typical for-profit public corporation—C or S Corporation—in the United States utilizes the following structure: shareholders meet annually to hear management's performance report, to elect a board of directors, and to vote on any other issues that require shareholder approval.[28] The board of directors serves as the intermediary between management and shareholders,

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22. *See* discussion *infra* Part IV.

23. *See* HARLAND PRECHEL, BIG BUSINESS AND THE STATE: HISTORICAL TRANSITIONS AND CORPORATE TRANSFORMATION, 1880S–1990S, 25–26 (2000).

24. *See id.* (noting that in the eighteenth century, corporations "were developed to carry out activities for the public," including education, religious, and military societies); *see also* Colin P. Marks, *Jimmy Cricket for the Corporation: Understanding the Corporate "Conscience"*, 42 VAL. U. L. REV. 1129, 1130–43 (2008) (describing the historical underpinnings of the modern corporation); Anne Moore Odell, *B Corporations: Verified Sustainability*, SOCIAL FUNDS, Mar. 13, 2008, http://www.socialfunds.com/news/article.cgi/2482.html.

25. *See* E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1161–62 (1932) (emphasis added).

26. *See* Mat Thomas, *Benevolent Business*, VEGNEWS, Nov. – Dec. 2008, at 28, *available at* http://www.bcorporation.net/resources/bcorp/documents/VegNews%20-%20Benevolent%20Business.pdf.

27. *See supra* Part II.

28. *See* MacCormac, *supra* note 16, at 90.

acts in the best interests of the shareholders, elects officers to run the corporation on a day-to-day basis, and meets with management to oversee activities in order to protect shareholder interests.[29]

Whether classified as a C Corporation, S Corporation, or LLC, these entities are all governed by the same pressure to maximize profits, often to the exclusion of or despite employee, environmental, and social concerns. Directors and officers pursue short-term profit maximization because companies, and, as a result, board and management performance, are valued on the basis of quarterly earnings reports.[30]

In contrast, a B Corporation would ideally be structured as a C Corporation from an ownership and tax perspective, but its charter and bylaws would explicitly command its directors and officers to consider specified outside stakeholders in addition to maximizing shareholder wealth.[31] Often described as a double[32] or triple bottom line, a B Corporation takes into account financial, social, and environmental factors.[33] By codifying these social or environmental goals into the corporate charter, the general idea is for the founders' original ideals to be maintained even if new management comes in or there is a takeover.[34] The hope is that this structure will attract shareholders who want to invest in a company that is "well-managed, [and] effectively advance[s] their social mission . . . ."[35]

B. WHY CURRENT CORPORATE LAW IS INSUFFICIENT TO GUARANTEE STAKEHOLDER-INTEREST MAXIMIZATION

Some may argue that current default corporate form rules allow for

29. *See* David A. Skeel, Jr., *Corporate Anatomy Lessons*, 113 YALE L.J. 1519, 1525–26 (2004).

30. *See* Steven Lydenberg, Long-Term Investing: *A Proposal for How to Define and Implement Long-Term Investing*, *in* PAPER SERIES ON CORP. DESIGN 1, 47 (2007), *available at* http://www.corporation2020.org/SummitPaperSeries.pdf (describing how corporate managers contribute to volatility in the financial markets).

31. *See* MacCormac, *supra* note 16, at 96.

32. *See* Moody, *supra* note 20, at 18 (noting that a double-bottom line entity offers "a social benefit as well as a financial return").

33. *See* JOHN ELKINGTON, CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS 311–13 (1998) (advocating that corporations be held accountable for a triple bottom line that includes economic prosperity, environmental quality, and social justice); *see also* John Elkington, *The Triple Bottom Line*, *in* THE ACCOUNTABLE CORPORATION 97–109 (Marc J. Epstein & Kirk O. Hanson eds., 2006); Lindsey Wolf, *Triple Bottom Line Business Networks*, ELEPHANT J., Nov. 25, 2008, *available at* http://www.elephantjournal.com/2008/11/triple-bottom-line-business-networks-svn-balle-b-corporation/.

34. *See* Thomas, *supra* note 26.

35. Moody, *supra* note 20, at 18.

parties to guarantee stakeholder-interest maximization simply by drafting the articles of incorporation.[36] Others may argue that the business judgment rule protects a board's decision to pursue social goals.[37] Einer Elhauge contends that stakeholders might simply "legally protect themselves by contract with the corporation."[38] However, this proposed solution is inadequate because modern corporate law presents certain ambiguities with the B Corporation structure.

For example, what duties do B Corporation directors have to stakeholders versus shareholders? Is the former a contractual duty, while the latter remains a fiduciary duty?[39] If the B Corporation's shareholders change their minds about the entity's social or environmental goals and vote to amend the articles of incorporation, should the board be able to prevent it? Does the business judgment rule protect B Corporation director decisions only with regard to those that affect shareholders or for those that also impact stakeholders?[40] If B Corporation directors do not, despite great effort, achieve the social or environmental goals mandated in the corporate charter, are they exposed to personal liability?[41] This Subpart examines specific aspects of modern corporate law that presents ambiguities for B Corporations as currently chartered.

1. Articles of Incorporation

The MBCA only requires that a corporation's articles of incorporation set forth four items: (1) a corporate name, (2) shares authorized to be issued, (3) the address of the initial registered office and the name of the entity's initial registered agent at that office, and (4) the incorporator's

36. *See* B Corp., *supra* note 7 (stating that by "embed[ing] your values into your corporate governing documents," B Corporations can "survive new investors, new management and even new ownership").

37. *See* MacCormac, *supra* note 16, at 88 ("[S]ocial and environmental values can be incorporated successfully into for-profit corporations without changing a firm's legal structure."); *see also* Kerr, *supra* note 16, at 633 ("[S]ocial entrepreneurship projects are investments that add both social and financial value to corporations' bottom line and are therefore within the scope of the business judgment rule, and furthermore, that the board of directors has a duty to be informed of the potential for social entrepreneurship in their company."); Elhauge, *supra* note 16, at 733 (arguing that contemporary corporate law gives managers the discretion to sacrifice profits in the public interest due to the business judgment rule).

38. Elhauge, *supra* note 16, at 737.

39. *See* Ann E. Conaway, *Lessons to Be Learned: How the Policy of Freedom to Contract in Delaware's Alternative Entity Law Might Inform Delaware's General Corporation Law*, 33 DEL. J. CORP. L. 789, 794 (2008).

40. *See id.* at 794–96.

41. *See id.* at 796.

name and address.[42] Optional provisions that can be set forth in the articles include the names of initial directors, the purpose for which the corporation is organized, the powers of the corporation, its directors, and shareholders, limiting or eliminating director liability to the corporation or its shareholders (with exceptions for violations of criminal law, intentional infliction of harm, or personal gain), and indemnification of a director to any person for action or failure of action taken.[43]

A social or environmental mission embodied in the articles of incorporation of a B Corporation can be easily amended or eliminated if the company is acquired by a majority of investors who do not have interests aligned with those of the entity's stakeholders.[44] Section 10.01(a) of the MBCA states:

> A corporation may amend its articles of incorporation at any time to add or change a provision that is required or permitted in the articles of incorporation as of the effective date of the amendment or to delete a provision that is not required to be contained in the articles of incorporation.[45]

Procedurally, section 10.03 of the MBCA states that a proposed amendment must be adopted by the board of directors, in the case of a corporation that has issued shares,[46] and then submitted to the shareholders for approval.[47] Thus, there exists the possibility for B Corporations to easily amend the original articles of incorporation to pursue goals not in the best interests of the original stakeholders should there be a need to attract outside investors and investment capital.

The subparts below set forth specific examples of when such amendments are likely to occur or when stakeholder-based interests are difficult to adhere to.[48]

a. Takeovers As a Threat to the Corporation's Original Purpose

Companies that pursue goals other than profit maximization often lose

42. *See* MODEL BUS. CORP. ACT § 2.02(a) (2007).

43. *See* MODEL BUS. CORP. ACT § 2.02(b) (2007).

44. *See* MODEL BUS. CORP. ACT § 10.01(a) (2007). The official comment for this section states that "[t]he sole test for the validity of an amendment is whether the provision could lawfully have been included in (or in the case of a deletion, omitted from) the articles of incorporation as of the effective date of the amendment." MODEL BUS. CORP. ACT § 10.01(a) cmt. (2007). *See generally* STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 42 (2002) [hereinafter CORPORATION LAW AND ECONOMICS].

45. MODEL BUS. CORP. ACT § 10.01(a) (2007).

46. *See* MODEL BUS. CORP. ACT § 10.03(a) (2007).

47. *See* MODEL BUS. CORP. ACT § 10.03(b) (2007).

48. *See infra* Part II.B.1.a–c.

out on opportunities for growth because attracting outside investment capital may mean "jeopardizing their ideals."[49] Ben Cohen, cofounder of Ben & Jerry's, tried to keep the company independent in 2000, but his efforts failed and it was acquired by Unilever for $326 million after a bidding war.[50] If outside investors and corporate raiders see an opportunity for growth—with growth being defined here as profit maximization—then there is little protection provided by current law to prevent a takeover that comes at the expense of stakeholder-oriented goals, even if such goals are imbedded in the articles of incorporation.

Recent examples of such takeovers include Colgate's 2006 acquisition of Tom's of Maine, Clorox's 2007 purchase of Burt's Bees, and Coca-Cola's 2008 purchase of a forty percent stake in organic Honest Tea.[51] Further, CEO performance is ultimately measured by profitability and not by adherence to stakeholder interests—especially given that it is difficult to measure how well off stakeholders may be either individually or when competing interests are at play.[52] If B Corporations continue to use the for-profit model of creation with a simple alteration of the articles of incorporation designed to promote a stakeholder based agenda, it will be difficult to encourage officers and directors to place stakeholder interests, which are difficult to measure, before that of profit maximization at all times.

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49. Ilana DeBare, *"B Corporation" Plan Helps Philanthropic Firms*, S.F. CHRONICLE, May 18, 2008, at C1, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/05/18/BULH10JFU3.DTL; *see also* Daily Good, http://www.dailygood.org/view.php?qid=3378 (May 21, 2008) (detailing the story of two entrepreneurs who started a company that grew to sales of more than $26 million with a mission to donate all profits to charity, but were unwilling to find outside investors for outside capital to help grow for fear of "undermining their philanthropic mission"). *But cf.* AMY DOMINI, SOCIALLY RESPONSIBLE INVESTING: MAKING A DIFFERENCE AND MAKING MONEY 181–82 (2001) (describing several for-profit companies that have successfully promoted stakeholder interests while achieving high profits for shareholders).

50. *See* BEN COHEN & MAL WARWICK, VALUES-DRIVEN BUSINESS: HOW TO CHANGE THE WORLD, MAKE MONEY, AND HAVE FUN 155 (2006); The Associated Press, *Ben & Jerry's Back to Roots, Seeking Social Change*, MSNBC, Jul. 11, 2006, *available at* http://www.msnbc.msn.com/id/13819483/. For six years after the acquisition, the two co-founders, Ben Cohen and Jerry Greenfield, publicly stated Unilever was not upholding the company's original three-part mission of quality products, profits, and social responsibility. *See id.* But, in 2006, Unilever appointed a new CEO for Ben & Jerry's that began to initiate proposals for social activism. *See id.* For example, one campaign involved selling "American Pie" flavored ice cream, which included information on the pint lids listing ways individuals can demand a change in the government's spending priority from nuclear bombs to programs for kids. *See id.*

51. *See* DeBare, *supra* note 49.

52. *See* MacCormac, *supra* note 16.

b. Corporate Adherence to Social Missions

Moreover, simply incorporating a social or environmental mission into the corporate charter does not insure it will be carried out or that it is possible to pursue these goals in the event of a crisis such as insolvency. Fannie Mae and Freddie Mac, both of which failed in 2008, provide a current example.[53] Both agencies were mandated with social missions by Congress when originally created.[54] The question now remains as to how "Fannie and Freddie will balance their social goals with the need to shore up their finances."[55]

Here, there are several competing interests at play: mortgage holders, taxpayers, employees, and even future applicants who fit the demographic Fannie Mae and Freddie Mac are supposed to cater to in their social charters. While there is no precise way to measure the correct outcome, it is clear that simply stating a social purpose in the articles of incorporation at establishment is insufficient by itself to protect stakeholder interests.

2. Corporate Bylaws

A corporation's bylaws, which tend to be longer and more detailed than the articles of incorporation, do not need to be filed with the state and are more easily amended than the articles of incorporation.[56] If the articles and the bylaws conflict, the articles of incorporation are controlling.[57] Unlike section 109(a) of the Delaware statutes, which states that only shareholders can amend bylaws unless the articles specify otherwise,[58] the MBCA allows directors to amend bylaws.[59] The two exceptions are when the articles "reserve that power exclusively to the shareholders" or when the shareholders amend, repeal, or adopt a bylaw that explicitly prevents

53. *See* Sean Stannard-Stockton, *The Failure of Social Enterprise*, PHILANTHROPY DAILY DIGEST, Sept. 10, 2008, http://tacticalphilanthropy.com/2008/09/the-failure-of-social-enterprise.

54. *See id.* (noting the social goals of Fannie Mae and Freddie Mac included "boosting homeownership and funding apartment construction for low- and moderate-income families").

55. *Id.*

56. *See* CORPORATION LAW AND ECONOMICS, *supra* note 44, at 43.

57. *See id.*

58. *See* DEL. CODE ANN. tit. 8, § 109(a) (2009). Section 109(a) states:

> After a corporation has received any payment for any of its stock, the power to adopt, amend or repeal bylaws shall be in the stockholders entitled to vote, or, in the case of a nonstock corporation, in its members entitled to vote; provided, however, any corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors or, in the case of a nonstock corporation, upon its governing body by whatever name designated.

Id.

59. *See* MODEL BUS. CORP. ACT § 10.20(b) (2007).

the directors from amending, repealing, or reinstating this new bylaw.[60] One notable problem is that bylaw amendments need not garner shareholder approval as do article of incorporation amendments under the MBCA.[61] Further, given that bylaws need not be of public record and directors can easily amend them, stakeholders may not always be aware as to when their interests are not being maximized.

3. Constituency Statutes

It could be argued that current law does not prevent directors from taking stakeholders into account.[62] These scholars argue that the idea of shareholder primacy is, in fact, primarily common law,[63] as most state statutes require directors to have a duty of loyalty to the corporation rather than shareholders.[64] Further, many states have what is known as a constituency statute.[65] A constituency statute authorizes, but does not require, the board to take into account the interests of stakeholders such as employees, suppliers, the community, the environment, and shareholders when determining a course of action or making a decision.[66] One problem with the effectiveness of these statutes is that the shareholder primacy

60. *See id.* § 10.20(b)(1)–(2).

61. *See* CORPORATION LAW AND ECONOMICS, *supra* note 44, at 48 ("There simply is no good reason to treat by laws differently than articles of incorporation.").

62. *See* Kerr, *supra* note 16, at 637–38 (2007) (noting that "[d]uring the 1980s, the large majority of state legislatures across the country passed corporate governance statutes which generally permit but do not require corporate officers and directors to consider the interests of non-shareholder constituents (stakeholders) when making business decisions."); *see also* Deanna Wylie Mayer, *How to B Good*, MILLER-MCCUNE, Oct. 20, 2008, *available at* http://www.miller-mccune.com/business_economics/how-to-b-good-762.

63. *See* Dodge v. Ford Motor Co., 170 N.W. 668, 681–84 (Mich. 1919).

64. *See* Kerr, *supra* note 16, at 636.

65. *See, e.g.*, ARIZ. REV. STAT. ANN. § 10-1202(A) (2009); CONN. GEN. STAT. § 33-756 (2010); FLA. STAT. § 607.0830(3) (2009); HAW. REV. STAT. § 414-221 (2009); IDAHO CODE ANN. § 30-1-602 (2010); 805 ILL. COMP. STAT. 5/8.85 (2004); IND. CODE § 23-1-35-1 (1999); IOWA CODE § 490.1108A (1999); KY. REV. STAT. ANN. § 271B.12-210(4) (2010); LA. REV. STAT. ANN. § 12:92(G) (2009); ME. REV. STAT. ANN. tit. 13-C, § 831 (2009); MASS. GEN. LAWS ch. 156B, § 65 (2005); MINN. STAT. § 302A.251 (2004); MISS. CODE ANN. § 79-4-8.30(d) (2009); MO. REV. STAT. § 351.347 (2001); NEB. REV. STAT. § 21- 2045(1) (2009); N.J. STAT. ANN. § 14A:6-1 (West 2003); N.M. STAT. § 53-11-35(D) (2001); N.Y. BUS. CORP. LAW § 717(b) (McKinney 2009); OHIO REV. CODE ANN. § 1701.59(E) (West 2010); OR. REV. STAT. § 60.357(5) (2007); 15 PA. CONS. STAT. §§ 1715-16 (2010); R.I. GEN. LAWS § 7-5.2- 8(a) (2009); S.D. CODIFIED LAWS § 47-33-4 (2007); TENN. CODE ANN. § 48-18-301 (2002); WIS. STAT. § 180.0827 (2002); WYO. STAT. ANN. § 17-16-830 (2007). *See generally* Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 46–47 (1992) (arguing that constituency statues will become increasingly important to contemporary corporate law).

66. *See, e.g.*, ARIZ. REV. STAT. ANN. § 10-1202(A) (2009).

model that pervades the modern corporate landscape is blocking change as corporate officers and directors seek to maximize profits first and consider stakeholder interests second.[67] As a general matter, social, environmental, and community interests are furthered by these corporations simply through job creation and philanthropy, rather than from the view of adhering to a stakeholder-based agenda that is potentially in lieu of greater profits.[68]

Another problem is that Delaware, where the majority of B Corporations could potentially reside, does not have a constituency statute.[69] Moreover, directors must first weigh financial concerns when assessing an acquisition or takeover prospect, and it is difficult to convince existing boards and management to change this attitude.[70]

For example, the Delaware Supreme Court in *Revlon* held that when the corporation's sale became "inevitable," the board's duty changed "from the preservation of [the corporation] as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit."[71] In this circumstance, the board did not need to consider stakeholders;[72] a result that does not provide the B Corporation form with legal grounding to guarantee that stakeholder interests will be maintained in certain circumstances.

Thus, providing a new legally recognized corporate form for B Corporations will allow directors posed with a takeover threat to weigh—equally, if not primarily—stakeholders' interests against the financial offer.[73] Specific language will need to be added to the MBCA, though, to prevent or to discourage directors and managers from acting in their own self-interest when the potential negative outcomes are not easily compared.

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67. *See* MARJORIE KELLY, THE DIVINE RIGHT OF CAPITAL—DETHRONING THE CORPORATE ARISTOCRACY (2001) (arguing that the system-wide mandate to maximize shareholder wealth is preventing individual companies who want to diverge from this model from being able to compete).

68. *See* Kerr, *supra* note 16, at 638.

69. *See* THE CONFERENCE BOARD, CORPORATE GOVERNANCE HANDBOOK 2007: LEGAL STANDARDS AND BOARD PRACTICES 11 n.14 (2007) (noting that "[a] vast majority of Fortune 500 companies are incorporated under Delaware law").

70. *See* Trish Karter, Dancing Deer Baking Co., Remarks at Winning Workplaces/Wall Street Journal Top Small Workplaces Conference (Oct. 15, 2008), *available at* http://www.bcorporation.net/index.cfm/nodeID/24083A50-5BF6-451A-BE21-335190BB9F2F/fuseaction/ content page) (noting that it is an "uphill battle" to get her company's board and investors to sign on to becoming a B Corporation).

71. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).

72. *Id.*

73. *See* MacCormac, *supra* note 16 ("Unfortunately, it is likely that because for-profit companies only have one stakeholder to whom management and the board owe a fiduciary duty—the stockholder—the existing for-profit corporate form may preclude more fundamental change.").

C. EXAMPLES OF SOCIALLY RESPONSIBLE CORPORATE FORMS

Lawrence E. Mitchell argues the best way for corporate social responsibility to be achieved is to view it as an issue of corporate governance.[74] Specifically, Mitchell views the board of directors as potentially being the "most effective pressure point" to make companies operate not just with an eye towards short-term profit maximization, but also to look at its long-term social responsibilities.[75] However, the current structure of the board, which is designed to protect directors from liability, benefits neither shareholders nor stakeholders.[76]

Instead, Mitchell believes the answer is to "insulate the board to some reasonable extent from market and institutional pressures."[77] Others argue that only the government has the "legitimacy to speak for society," change the way corporations are governed, and implement stakeholder principles.[78] This Part details some of the efforts made by governments to establish a corporate for-profit form that prioritizes stakeholder interests.[79]

1. United Kingdom: Community Interest Companies

The United Kingdom created a new legal form called Community Interest Companies ("CICs") for enterprises that seek to use profits and assets for public good without being classified as a nonprofit organization.[80] CICs are limited companies that are "created for the use of people who want to conduct a business or other activity for community benefit, and not purely for private advantage or to support political activities."[81] A regulator is appointed who has the task of continuous

74. *See* Lawrence E. Mitchell, THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW 279, 280 (Doreen McBarnet et al. eds., 2007) [hereinafter Mitchell, THE NEW CORPORATE ACCOUNTABILITY]; *see also* LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT (2001); Lawrence E. Mitchell, *Cooperation and Constraint in the Modern Corporation: An Inquiry Into the Causes of Corporate Immortality*, 73 TEX. L. REV. 477, 490–91 (1995); Lawrence E. Mitchell, *A Critical Look at Corporate Governance*, 45 VAND. L. REV. 1263, 1269–73 (1992).

75. Mitchell, THE NEW CORPORATE ACCOUNTABILITY, *supra* note 74, at 283.

76. *See id.*

77. *Id.*

78. BUCHHOLZ, *supra* note 14, at 35.

79. *See supra* Part II.

80. *See* Companies (Audit, Investigations & Cmty. Enter.) Act, 2004, c. 27, § 26; *see also* Community Interest Companies, http://www.cicregulator.gov.uk/aboutUs.shtml [hereinafter Cicregulator] (last visited Mar. 3, 2010) (providing information and resources for starting, converting, and ceasing a Community Interest Company, as well as regulatory requirements).

81. Cicregulator, *supra* note 80; *see also* Companies (Audit, Investigations and Cmty. Enter.) Act, 2004, c. 27, Explanatory Notes, 229, 232 (explaining the process for becoming a Community Interest Company, either as a new company or an existing company, and what intentions need to

monitoring and enforcement.[82] The structure of the CIC is such that it can be limited by shares and has an asset lock so that profits and assets cannot be distributed except as permitted by legislation.[83] Thus, profits and assets stay within the CIC or are transferred into another CIC or charity.[84] The U.K. is also developing a social stock exchange to improve access to capital for socially-minded corporations.[85]

2. Vermont: Low-profit Limited Liability Company ("L3C")

In the spirit of creating a new corporate form to straddle the for-profit and nonprofit sectors, Vermont's legislature passed legislation in April 2008 to create the L3C, a low-profit, Limited Liability Company.[86] The L3C designation signals to investors that the entity conducts activities to qualify as program-related investments ("PRIs").[87] According to I.R.S. regulations, a PRI can have no significant purpose to produce income or appreciate property,[88] but this provision can cause an inherent conflict for directors and officers of for-profit entities seeking to maximize shareholder value.

The L3C was created to resolve this dilemma—it must be organized with the *primary* objective to achieve a social or charitable purpose, but can distribute profits to equity owners.[89] Organizing the L3C is the same as a regular LLC under Vermont law, but the entity must use L3C in its name

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be stated on the documents, including a declaration that neither the company itself nor control of the company is by a political party).

82. *See* Companies (Audit, Investigations and Cmty. Enter.) Act, 2004, c. 27, § 27; *see also* Cicregulator, *supra* note 80 (stating the regulatory role and the Government expectation of a "light touch regulator" to encourage and assist in CICs).

83. *See* Companies (Audit, Investigations and Cmty. Enter.) Act, 2004, c. 27, Explanatory Notes, 192; *see also* Cicregulator, *supra* note 80 (explaining the asset lock concept as a governmental restraint to the distribution of funds).

84. *See* Companies (Audit, Investigations and Cmty. Enter.) Act, 2004, c. 27, Explanatory Notes, 192; *see also* Cicregulator, *supra* note 80 (elaborating on the concept of asset lock as a means to ensure assets and profits stay within the community).

85. *See* Marie Woolf, *Plan for Fair Trade Stock Exchange,* SUNDAY TIMES (London), Mar. 23, 2008, Home News at P. 2; *see also* Helen Warrell, *Social Stock Exchange to Begin in 2009,* THIRD SECTOR, Apr. 4, 2008, http://www.thirdsector.co.uk/News/DailyBulletin/800035/Social-stock-exchange-begin-2009/E802EC256D64A0A9280DCE2DC1DFEBC9/?DCMP=EMC-DailyBulletin (detailing the use of a $500,000 Rockefeller Foundation grant to research and to launch a social stock exchange for U.K. social enterprises).

86. *See* VT. STAT. ANN. tit. 11, § 3001 (27) (2008).

87. *See* 26 C.F.R. § 53.4944-3 (2001) (detailing the Internal Revenue Service exception for program-related investments); *see also* Moody, *supra* note 20, at 17.

88. *See* 26 C.F.R. § 53.4944-3(a)(1)(ii) (2001).

89. *See* VT. STAT. ANN. tit. 11, § 3001(27) (2008) (emphasis added); *see also* Moody, *supra* note 20, at 16 (explaining the basics of an L3C).

and include it in the articles of incorporation.[90] As of April 2009, there were 46 registered L3Cs.[91] There have also been attempts to pass similar legislation in Georgia, Michigan, Montana, and South Carolina.[92]

3. Minnesota: Socially Responsible Corporation

A bill entitled the Responsible Business Corporation Act was introduced to the Minnesota legislature in 2007 to establish an SRC, but it has yet to pass.[93] The proposed Act specifies that the SRC can carry out any business purpose so long as it also carries forth the social responsibilities it commits itself to in its articles of incorporation[94] and includes SRC in its name. The proposed bill specifies stakeholders in the following order: 1) shareholder, 2) employee, 3) customer, 4) supplier, and 5) creditor.[95]

The SRC's articles of incorporation can limit personal liability for directors except for breaches of the duty of loyalty and good faith or if the director derived improper personal benefit.[96] Twenty percent of the SRC board must consist of employees, and another twenty percent must represent the public interest.[97] Stakeholders must be allowed to provide advisory input to the board, publicly held corporations must publish an annual public interest report to summarize actions taken over the preceding year to benefit the public interest and stakeholders, and the corporation must provide special education to officers and directors regarding their special duties under the Act.[98]

The existence or at least discussion of these new corporate forms in the U.K. and around the U.S. provides a strong indication that both investors and corporate directors are seeking to find a new legal structure that allows them to promote a stakeholder based agenda before that of profit maximization. The next Part details scenarios that the MBCA will need to keep in mind in order to amend its provisions to accommodate the

90. *See* VT. STAT. ANN. tit. 11, § 3005(a)(2) (2008); *see also* Vermont Secretary of State: Corporations Division, Low-Profit Limited Liability Company, http://www.sec.state.vt.us/corps/dobiz/llc/llc_l3c.htm (last visited Apr. 9, 2009).

91. Vermont Secretary of State: Corporations Division http://www.sec.state.vt.us/seek/keysrch.htm (enter "L3C" in the business name search field) (last visited Feb. 18, 2010). It does not appear that any of these L3Cs are able to be public. *See id.*

92. *See* Moody, *supra* note 20, at 16.

93. *See* S. File 1153, 85th Leg., Reg. Sess. (Minn. 2007).

94. *See* Minn. S. File 1153, § 304A.04 (b).

95. *See id.* § 304A.02 (3).

96. *See id.* § 304A.05 (4).

97. *See id.* § 304A.06. The bill did not specify what constitutes the "public interest." *See id.*

98. *See id.* § 304A.09.

B Corporation form.[99]

III. POTENTIAL CONFLICTS

This Part details potential conflicts that a hybrid for-profit/nonprofit entity, such as a B Corporation, may encounter. These conflicts can arise either when the current legal structure does not support the B Corporation's social, environmental, or community based mission in certain circumstances, or when the entity's directors and officers can get away with acting in their own self-interest. These scenarios will help inform in Part IV what provisions are necessary in a potential B Corporation amendment to the ABA Model Business Corporation Act.

A. SHAREHOLDERS

Imagine a scenario in which a B Corporation is newly created under current corporate law in a state that has adopted the MBCA by simply reflecting its stakeholder promotion based purpose in its articles of incorporation. It has shareholders that consist of individuals who support the B Corporation's social agenda, private foundations seeking to maximize the value of their contribution in pursuit of the same social agenda, angle and venture capital investment,[100] and a pension fund. When the B Corporation is turning a healthy profit and operating efficiently while adhering to its social mission, the shareholders have no problem.

If, however, the venture capital investors and pension fund managers feel that the B Corporation could be operating more efficiently to maximize profits, there is little to stop them acting in their own self-interest by selling their shares to a corporate raider or to make decisions through representatives on the board that place profit maximization in front of the original social mission.

B. STAKEHOLDERS

In this scenario, the stakeholders of a B Corporation with an environmental mission to operate green at all times and a social mission to provide an employee-friendly work environment includes shareholders, employees, customers, suppliers, and creditors. The economy suddenly takes a nosedive and the company is forced into involuntary bankruptcy by

99. *See infra* Part III.

100. *See* Kerr, *supra* note 16, at 654 (noting that angel venture capital firms have increasingly started investing in social entrepreneurship as part of the "venture philanthropy" movement).

its creditors. It must either reorganize or face liquidation. A successful reorganization would entail laying off a significant number of employees and using cheaper, non-green operating principles, but the articles of incorporation prevent directors from taking those steps.

Section 8.30 of the MBCA, Standards of Conduct for Directors, specifies that directors must act "(1) in good faith, and (2) in a manner the director reasonably believes to be in the best interests of the corporation."[101] Thus, liquidation is the only avenue in this scenario, and the B Corporation, despite its positive impact on the environment and society, is forced to dissolve.

C. TAKEOVER THREATS BY OTHER B CORPORATIONS

Here, B Corporation I is newly created under current law by providing in its articles of incorporation a social mission to educate children in a specific impoverished community. It is faced with a takeover threat by B Corporation II, but not to alter the purpose-driven mandate in the articles that protects stakeholder interests such as those of its employees. Rather, B Corporation II seeks to change the beneficial purpose of the corporation to have an environmental mission within the same impoverished community—for example, using the corporation's real estate to build a recycling center.

In considering this bid, the B Corporation I directors would not be jeopardizing stakeholder interests and could still maximize profits if the takeover business plan is sound. In this case, there is no easy way to measure what the correct decision is given the original B Corporation's mission. Moreover, there is nothing to prevent, or to necessarily detect, directors and officers acting in their own self-interest over those of stakeholders and the original corporation.

D. STANDARDS OF LIABILITIES FOR DIRECTORS

Section 8.31 of the Model Business Corporation Act, Standards of Liability for Directors, establishes when a director can be held liable to the corporation or its shareholders.[102] The problem is that B Corporation shareholders, who may also be stakeholders, can often have conflicting interests from that of the corporation. Thus, suit can be brought against directors for not acting in good faith by either party when a decision is

101. MODEL BUS. CORP. ACT § 8.30(a) (2007).
102. *See id.* § 8.31.

made to the detriment of one side. Given the difficulties in measuring what the correct decision is if stakeholder interests are incompatible, directors have little guidance from current corporate law as to how to proceed and how best to avoid liability for making touch decisions.

IV. RECOMMENDED PROVISIONS FOR A B CORPORATION AMENDMENT TO THE MODEL BUSINESS CORPORATION ACT

Based on the discussion in Part III, it is obvious that a B Corporation amendment to the MBCA must be crafted to prevent or, at minimum, to discourage directors and officers from acting in their own self-interest when the potential negative outcomes are not easily compared. The following are large-scale issues that a new B Corporation should consider addressing: first, B Corporation directors should be protected from shareholder suits if they consider the interests of stakeholders and the public interest before that of profit generation.

Second, there should be hostile takeover protection to prevent investors who do not support the B Corporation's primary public, social, and/or environmental missions specified in the articles of incorporation. The MBCA provision could specify that there should be a stakeholder vote prior to any tender offer going forward.

With regard to the articles of incorporation, it should specify a hierarchy of the B Corporation's stakeholders and objectives to provide decision-making guidance for directors. In instances where the board of directors needs to place the interests of the second stakeholder group in front of the first group, there could be a vote placed before the group one stakeholders. The articles of incorporation should also mandate directors' responsibility to uphold the entity's core values so that nonmonetary factors guide the board's decision in considering a takeover bid.

Further, there should be mandatory stakeholder meetings in addition to annual shareholder meetings to evaluate the entity's performance on its public, social, and/or environmental objectives. The articles of incorporation should specify the entity's public, social, and/or environmental objectives as its primary objective (with its own hierarchy if more than one mission is specified) and profit maximization as subordinated to these goals. Stakeholders, with a majority vote, should be able to vote out directors who do not adhere properly to the stakeholder based agenda.

If a separate B Corporation form is not currently feasible to the MBCA,[103] the following are recommendations for specific minor amendments or additions to the Model Business Corporation Act that could facilitate a growing awareness and acceptance by investors of the B Corporation form in the short term: Amend section 3.01 Purposes[104] to carve out a provision specifically for B Corporations such that the primary purpose of this entity must be to further public, social, or environmental interests; amend section 4.01 Corporate Name[105] to include a provision detailing that a B Corporation name must contain words such as SRC (socially responsible corporation) or L3C (low-profit limited liability company) to imply clearly that the corporation is organized primarily for public, social, or environmental purposes; amend section 8.01 Requirements For and Functions of Board of Directors[106] to specify that B Corporation boards must oversee the B Corporations adherence to its public, social, and/or environmental missions; amend section 8.04 Election of Directors by Certain Classes of Shareholders[107] to require that a certain proportion of B Corporation directors be representative of the stakeholders specified in the articles of incorporation; amend section 8.42 Standards of Conduct for Officers[108] to state that B Corporation officers are required to put the best interests of stakeholders and the corporation's mission specified in the articles first, over that of shareholders and profit maximization; amend section 10.01 Authority to Amend[109] the articles of incorporation to state that B Corporations may not amend its articles to change the primary purpose for which the entity was created; and amend section 11.02 Merger[110] to carve out an exception for B Corporations such that these entities can only merge with other entities given the same status as a socially responsible corporation.

Essentially, the preceding suggestions offer a bifurcated solution to resolve some of the conflicts detailed in Part III.[111] A B Corporation provision to the Model Business Corporation Act should require first that

103. Both Minnesota and California have failed to pass socially responsible corporation statutes despite numerous discussions over the last few years. *See* Center for Corporate Policy, Second Annual D.C. Roundtable Meeting, Jun. 26, 2006, *available at* www.corporatepolicy.org/dcroundtable/2006DC.doc.

104. *See* MODEL BUS. CORP. ACT § 3.01 (2007).

105. *See id.* § 4.01.

106. *See id.* § 8.01.

107. *See id.* § 8.04.

108. *See id.* § 8.42.

109. *See id.* § 10.01.

110. *See* MODEL BUS. CORP. ACT § 11.02 (2007).

111. *See supra* Part III.

the entity be organized primarily for public, social, and/or environmental purposes. The articles of incorporation must detail the hierarchy of priorities both for its social mission and its stakeholders so that the directors and officers are not faced with a conflicting mandate and can manage the B Corporation to accomplish its social mission while fulfilling their fiduciary duties.

The secondary goal should then be to generate a return for investors, thus allowing the corporation to be financially self-sustaining. Therefore, when a conflict emerges or a takeover scenario occurs, the board is justified in its actions to deter takeover by adhering to the first mandate. By limiting director liability when stakeholder interests are prioritized in decision-making, the threat of shareholder lawsuits will be diminished while oversight efficiency is maintained.

V. CONCLUSION

Public faith in the current corporate form has declined as the recent financial crisis was sparked by mortgage brokers and investment bankers who prioritized short-term profit gain over the long-term interests of the company, shareholders, and the public.[112] Thus, there is momentum to find a way to balance for-profit considerations while considering stakeholder interests.

Coen Gilbert, co-founder of B Corp, an organization that certifies companies that claim to be socially responsible, believes that B Corporations represent "a new sector of the economy between the private sector and the nonprofit sector," that will eventually be "5, 7, [or even] 10 percent of GDP."[113] Gilbert also believes that one day there will be a social stock exchange, lower capital gains taxes for investing in B Corporations, and government procurement preferences.[114]

112. *See supra* pp. 137–39 (discussing traditional goals of profit maximization in business and the current trend toward enlarging corporate responsibility beyond procuring high profits); CHRISTINE ARENA, THE HIGH-PURPOSE COMPANY: THE TRULY RESPONSIBLE—AND HIGHLY PROFITABLE—FIRMS THAT ARE CHANGING BUSINESS NOW 42 (2007) (noting that a July 2005 Roper poll found that "72 percent of surveyed adults said they believed that corporate wrongdoing was rampant and that executives are bent on 'destroying the environment, cooking the books and lining their own pockets'").

113. Ilana DeBare, For Philanthropy, B is Letter Perfect, S.F. CHRONICLE, May 18, 2008, at C-1.

114. *See id.*

In order for this to occur, legal standards need to be created to prevent directors and officers from acting in their self-interest, to promote awareness of this new corporate form as an alternative to the purely for-profit or nonprofit models, and to establish a hierarchy of interests, such as stakeholder-maximization, to be pursued in addition to profit maximization.