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Beyond Puffery: Providing Shareholder Assurance of Societal Good Will in Crowdfunded Benefit Corporations

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NOTE

BEYOND PUFFERY: PROVIDING SHAREHOLDER ASSURANCE OF SOCIETAL GOOD WILL IN CROWDFUNDED BENEFIT CORPORATIONS

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INTRODUCTION

Going "green" has become a very big business. Companies are filling the store shelves with environmentally conscious, eco-friendly alternatives. The organic food market has shown the strongest "green" growth with revenue increasing 238% from 2002 to 2011 as compared with an overall food market revenue growth of only 33% during the same period.[1] Whole Foods, a leader in organic products, saw its stock price rise from $4.27 in late 2008 to $51.55 as of the first quarter of 2014.[2] This surging growth, coupled with consumers' admitted willingness to pay a premium for "green" products,[3] naturally explains why big corporate players are trying to establish market share in the "green" market. For example, Clorox recently funded and produced an entire web series seeking to plug and sell its line of "green" product cleaners.[4]

Conglomerates have expressed concern though because, despite consumers' claims that they are willing to pay more for "green" products, well intentions have not translated into sales.[5] A recent study, however, has shown that where a "high trust relationship" exists between the business and consumer, consumers' environmental concerns do translate into higher sales for "green" alternatives.[6] This fact might explain how, even with its large

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1. GREEN AM. ET AL., THE BIG GREEN OPPORTUNITY FOR SMALL BUSINESS IN THE U.S. 8 (2013), *available at* http://biggreenopportunity.org/wp-content/uploads/2013/05/Big-Green-Opportunity-Report-FINAL-WEB.pdf.

2. *Compare* Julie Jargon, *Whole Foods' Battle for the Organic Shopper: Upscale Grocer Aims to Shed Pricey Reputation with More Discounts and Lower-Priced Items*, WALL ST. J. (Aug. 21, 2013, 8:00 PM), http://online.wsj.com/articles/SB10001424127887323455104579015162135676136 (describing that, when going through a recessionary slump, the Whole Foods "stock traded for as low as $4.27 in late 2008"), *with* John Kell & Lauren Pollock, *U.S. Hot Stocks: Hot Stocks to Watch*, WALL. ST. J. (Feb. 13, 2014, 9:20 AM), http://online.wsj.com/article/BT-CO-20140213-708849.html (noting that in February 2014, Whole Foods reported its "[s]hares declined 7.1% to $51.55 premarket").

3. *See* GREEN AM. ET AL., *supra* note 1, at 20 ("Over the last decade, . . . numerous studies [have] indicated consumers' willingness to pay a premium for greener products and services . . . .").

4. Lauren Coleman-Lochner, *Clorox Spoofs "Real Housewives" as Green Sales Miss Mark: Retail*, BLOOMBERG (Sept. 5, 2013, 9:47 AM), http://www.bloomberg.com/news/2013-09-05/clorox-spoofs-real-housewives-as-green-sales-miss-mark-retail.html.

5. *See* GREEN AM. ET AL., *supra* note 1, at 20 (citing to a 2012 study finding that "some consumers may have even grown actively resistant to paying premium prices for green products and services").

6. *See id.* ("In both our survey data and our interviews, green business owners reported that, *where a high trust relationship* develops between a conscious consumer and an authentically green business, those consumers are willing to pay a premium for true green.").

advertising budget, Clorox ranks third in market share for "green" cleaning products,[7] behind Seventh Generation, a corporation based out of Vermont,[8] and Method, a corporation originally based out of San Francisco until acquired by a Belgian conglomerate.[9]

Although larger corporations may have found difficulties establishing a foothold in the "green" market, the Small Business Sustainability Report, which was based on the responses from 1305 small businesses, found that 75% of small businesses saw an increase in sales of "green" products during the Recession years of 2008–2011.[10] With such numbers, it is no surprise that 79% of the small businesses surveyed believed that being "green" gave their business a competitive advantage, and 75% of those businesses intended to expand their portfolios of "green" products and services.[11] As small businesses seem to grow more dominant in the "green" market and the traditional players attempt to establish a stronger market share, the potential threat (or windfall profit) of takeovers and acquisitions of these small businesses becomes very real.[12]

To provide a safeguard against those potential takeovers, several states have enacted new statutes allowing businesses to focus on social issues as much as, or more than, profit maximization.[13] While legal scholars have delved into whether these new legal entities would in fact allow directors to ignore shareholder profit maximization when acquisition is imminent,[14] this Note focuses on the opposite issue:

7. Coleman-Lochner, *supra* note 4.

8. *About Seventh Generation*, SEVENTH GENERATION, http://www.seventhgeneration.com/about (last visited Oct. 6, 2014).

9. Rod Kurtz, *A Soap Maker Sought Compatibility in a Merger Partner*, N.Y. TIMES (Jan. 16, 2013), http://www.nytimes.com/2013/01/17/business/smallbusiness/a-founder-of-the-soap-maker-method-discusses-its-sale.html. A small company being acquired by a large corporation brings to the light the shareholder protections needed for investors who actively gave money in hopes of making an environmental impact and not with a sole focus on the bottom line.

10. GREEN AM. ET AL., *supra* note 1, at 11–12.

11. *Id.* at 13–14.

12. *Cf.* Kurtz, *supra* note 9 (chronicling how small socially driven companies like Honest Tea, Kashi, Burt's Bees, and Mrs. Meyer's have been acquired by major conglomerates such as Coke, Kellogg, Clorox, and SC Johnson).

13. *See, e.g.*, J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 4–5 (2012) (discussing the various business entities, such as low-profit limited liability companies and benefit corporations, that have been created in various states to combat and attack the traditional shareholder wealth maximization principle in corporate governance).

14. *Compare* Justin Blount & Kwabena Offei-Danso, *The Benefit Corporation: A Questionable Solution to a Non-Existent Problem*, 44 ST. MARY'S L.J. 617, 669 (2013) (describing how benefit corporation statutes, while setting forth a general public benefit purpose, provide no "corresponding effective method" to allow stakeholders other than shareholders to enforce said benefit), *and* J. Haskell Murray, *Defending Patagonia: Mergers and Acquisitions with Benefit Corporations*, 9 HASTINGS BUS. L.J. 485, 511 (2013) [hereinafter Murray, *Defending Patagonia*] (noting how in *Revlon* mode, a

whether these new legal entities grant shareholders a right to ensure that the businesses' societal promise is properly considered when a tender offer is made. This Note is concerned with companies using a social enterprise entity—particularly the benefit corporation—merely as an advertising gimmick to lure in "green" investors and later selling out regardless of whether the buyout served the corporation's stated societal purposes.

Currently, there are no publicly traded benefit corporations, but that could soon change once the United States Securities and Exchange Commission ("SEC") finalizes its regulations on equity crowdfunding[15] and benefit corporations utilize those regulations. Investors who crowdfunded and bought shares online in a benefit corporation because of its societal mission could soon find themselves opposing a tender offer from an entity with a conflicting corporate ideology. Almost no legal scholarship has been written about any rights a shareholder in a benefit corporation has to ensure that the societal value of his or her investment is properly valued and considered by the entity's directors when deciding to approve a buyout offer. This Note therefore seeks to address the rights that shareholders in a benefit corporation can exercise to ensure that Boards of Directors consider and properly value the societal importance of a shareholder's investment when deciding whether or not to approve an acquisition.

A company filing as a benefit corporation must take steps to comply with the applicable statute—including designating itself as a "public benefit corporation" in its registered legal name—when accepting money from investors.[16] Some investors who provide capital to a benefit corporation will expect that the enterprise focus on its stated societal pursuits as much as, if not more than, profit maximization.[17] If a giant conglomerate that also sells cigarettes were

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court would most likely require a benefit corporation to still sell to the highest bidder), *with* Corporate Laws Comm., ABA Bus. Law Section, *Benefit Corporation White Paper*, 68 BUS. LAW. 1083, 1083–87, 1091 (2013) (arguing that benefit corporation statutes affirm what courts tend to hold in the absence of a statute requiring profit maximization), *and* Murray, *Defending Patagonia*, *supra* note 14, at 494 (stating that benefit corporation statutes could provide a valid defense under the *Unocal* standard).

15. *See infra* note 73 and accompanying text (discussing crowdfunding—the process through which companies and individuals raise money on the Internet).

16. *See, e.g.*, DEL. CODE ANN. tit. 8, § 362 (2013) (requiring that a benefit corporation be organized and filed for under this chapter, have a positive effect on an external entity, and use the words "public benefit corporation," "P.B.C." or "PBC" in its name).

17. *See* William H. Clark, Jr. et al., The Need and Rationale for the Benefit Corporation: Why It Is the Legal Form that Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public 16–17 (Jan. 18, 2013) (unpublished manuscript), *available at* http://www.benefitcorp.net/storage/

to seek to acquire the benefit corporation,[18] shareholders might find this objectionable and turn to the benefit corporation statute to determine what rights they have to preserve the societal value of their investment. Because no benefit corporations are currently publicly traded,[19] such an argument is not likely to arise in a court for the next few years. But, when the SEC finalizes its regulations concerning crowdfunding,[20] benefit corporations and other social enterprises will be able to access broad pools of capital from ordinary investors who may care more about their money going to the community than going towards a buyout profit.[21]

Part I of this Note uses the takeover of Ben & Jerry's in 2000 as a case example to demonstrate why alternative business entities that allow for considerations beyond profit maximization are necessary. Part II introduces the Model Benefit Corporation statute, explains its underlying policy principles, and then provides the current status of benefit corporation statutes as adopted at the state level. Part III describes the SEC's proposed Regulation Crowdfunding and explains how it could place the shares of a benefit corporation with retail investors who might value the benefit corporation's stated societal obligations more than profit. Part IV outlines the possible remedies for protecting shareholders who believe a takeover would violate the benefit corporation's stated purposes or obligations. Part IV also analyzes the possible outcomes that those remedies would have in court based upon existing corporate law and realistic scenarios of a court trying to determine the nonmonetary value of an investment. Part V offers a solution that would preserve shareholders' societal investment interest in benefit corporations during a takeover.

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documents/Benecit_Corporation_White_Paper_1_18_2013.pdf (noting how the Model Benefit Corporation Legislation ("Model Act"), which serves as the basis for most state benefit corporation statutes, requires a corporation to provide a "general public benefit" and focus on certain stakeholders before making a business decision in order to be a benefit corporation).

18. *Cf.* Mike Esterl, *Altria Expands in E-Cigarettes with Green Smoke*, WALL ST. J. (Feb. 3, 2014, 6:11 PM), http://online.wsj.com/news/articles/SB10001424052702304626804579360552508696542 (explaining Altria's, maker of Marlboro cigarettes, purchase of upstart e-cigarette maker Green Smoke Inc.). It should be noted that Green Smoke was not a benefit corporation nor are the health benefits of e-cigarettes currently known.

19. Jena McGregor, *Creating a Class of "Do Good" Companies*, WASH. POST (Sept. 20, 2013), http://www.washingtonpost.com/blogs/on-leadership/wp/2013/09/20/creating-a-class-of-do-good-companies.

20. *See* Crowdfunding, 78 Fed. Reg. 66,428, 66,428 (proposed Nov. 5, 2013) (to be codified at 17 C.F.R. pts. 200, 227, 232, 239, 240, and 249) (closing submission of comments on February 3, 2014).

21. *See* GREEN AM. ET AL., *supra* note 1, at 28 (stating that capital funding will increase after crowdfunding regulations are enacted).

Drawing from *Weinberger v. UOP, Inc*,[22] it recommends that courts or businesses require a majority of the disinterested shareholders to approve any takeover offer before the benefit corporation is sold. The Conclusion finishes by commenting that even though benefit corporation statutes currently provide no more societal investment assurance to investors than traditional corporation statutes, they are important because management potentially *could* use them to fend off an undesirable hostile takeover.

I. WHY ALTERNATIVE BUSINESS ENTITIES ARE NEEDED: BEN & JERRY'S AS A CASE EXAMPLE

Although thoroughly analyzed to the point of becoming corporate governance folklore,[23] the takeover of Ben & Jerry's Ice Cream in 2000 provides an apt example of what could occur when a giant corporation submits an offer that cannot be refused.

With more than 550 Ben & Jerry's locations across the globe,[24] the gourmet ice cream producer needs little introduction. Founded in 1978 by Ben Cohen and Jerry Greenfield, two former hippies who failed to get into Medical School and failed out of undergrad, respectively,[25] Ben & Jerry's is renowned for both its ice cream's delicious flavors and creative names, such as "Cherry Garcia."[26] Although originally serving out of a renovated gas station with humble dreams of earning $20,000 a year, Cohen and Greenfield achieved quick success and by 1981 were opening their first franchise.[27] As Ben & Jerry's success grew, Cohen and Greenfield

22. 457 A.2d 701 (Del. 1983) (en banc).

23. *See, e.g.*, Antony Page & Robert A. Katz, *The Truth About Ben and Jerry's*, STAN. SOC. INNOVATION REV., Fall 2012, at 39, 39 [hereinafter Page & Katz, *The Truth*], *available at* http://www.ssireview.org/pdf/Fall_2012_The_Truth_About_Ben_and_Jerrys.pdf ("The story of Ben & Jerry's is a legend . . . ."). *See generally* Antony Page & Robert A. Katz, *Freezing Out Ben & Jerry: Corporate Law and the Sale of a Social Enterprise Icon*, 35 VT. L. REV. 211 (2010) [hereinafter Page & Katz, *Freezing Out*] (discussing Ben & Jerry's history, its acquisition by Unilever, and identifying lessons that today's social entrepreneurs can learn from Ben & Jerry's experience); April Dembosky, *Protecting Companies that Mix Profitability, Values*, N.P.R. (Mar. 9, 2010, 12:00 AM), http://www.npr.org/templates/story/story.php?storyId=124468487 (explaining that corporate law required Ben & Jerry's Board of Directors to sell the company even though they did not want to sell it); Tina Rosenberg, *A Scorecard for Companies with a Conscience*, N.Y. TIMES (Apr. 11, 2011, 8:30 PM), http://opinionator.blogs.nytimes.com/2011/04/11/a-scorecard-for-companies-with-a-conscience (reporting on Ben & Jerry's founder's efforts to outbid Unilever during its hostile takeover and the recourse that new companies have as of 2000 by becoming a B Corp).

24. *Ben & Jerry's*, ENTREPRENEUR.COM, http://www.entrepreneur.com/franchises/benandjerrys/291399-0.html (last visited Oct. 6, 2014).

25. Page & Katz, *Freezing Out*, *supra* note 23, at 211, 215.

26. *Id.*

27. *Id.* at 216.

became disillusioned with running "a business that, like all others, exploits its workers and the community," and by 1982 had put Ben & Jerry's on the auction block.[28]

When a friend challenged Mr. Cohen to do it differently and change whatever he did not like about business culture,[29] Mr. Cohen decided to pull Ben & Jerry's off the auctioning block and turn it into "an experiment to see if it was possible to use the tools of business to repair society."[30] Ben & Jerry's distinguished itself from other large businesses by enacting several social policies that put people over profits. In addition to serving ice cream, Ben & Jerry's offered voter registration,[31] purchased its Brazil nuts from indigenous farmers in the Amazon,[32] used local Vermont milk,[33] bought brownies made in a bakery known for employing former prisoners,[34] paid livable wages to employees in addition to benefits,[35] and donated 7.5% of its annual profits to charity.[36] All the while, Ben & Jerry's saw its profits rise and market share expand, culminating in a 39% American market share for super-premium ice cream by 1997.[37]

By 1999, however, Ben & Jerry's stock price languished at $17 a share and was nearly 50% less than six years prior.[38] Many analysts cited slow sales growth and lack of market expansion as reasons why Ben & Jerry's stock continued to fall.[39] With consumers becoming more and more focused on their health, ice cream no longer seemed like a growth market.[40] Ben & Jerry's had received takeover offers as early as 1998,[41] but by 2000, with its stock stagnating, the vultures began to circle.[42]

To combat offers from Dreyer's Grand Ice Cream and others, Mr. Cohen formed a company called "Hot Fudge Partners" to take Ben & Jerry's private and allow the company to continue its social

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28. *Id.* at 217.
29. Page & Katz, *The Truth*, *supra* note 23, at 40.
30. *Id.*; *see also* Page & Katz, *Freezing Out*, *supra* note 23, at 217.
31. Rosenberg, *supra* note 23.
32. *Id.*
33. Page & Katz, *Freezing Out*, *supra* note 23, at 220.
34. Rosenberg, *supra* note 23.
35. *Id.*
36. *Id.*; Dembosky, *supra* note 23 (reporting that the donations went to "small community projects").
37. Page & Katz, *Freezing Out*, *supra* note 23, at 223.
38. *Id.* at 224.
39. *Id.* at 224–25.
40. *Id.* at 225.
41. *Id.*
42. *Id.* at 225–26 (noting that in 2000, Dreyer's, a competing ice cream manufacturer, offered a $38 per share all stock deal, which prompted Unilever to offer $43.60 per share).

endeavors.[43] The highest price Hot Fudge Partners could offer was $38 per share, which was still around double Ben & Jerry's current stock price.[44] Unilever, a multi-national conglomerate, submitted the bid price of $43.60 per share.[45] Because the takeover of Ben & Jerry's was imminent, the Board of Directors believed they were acting in what corporate law refers to as *Revlon* mode.[46] The name "*Revlon* mode" stems from the corporate law case *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*,[47] which held that a company's Board of Directors must seek to obtain the highest stock price for the company's shareholders when a takeover is inevitable.[48] Thus, Ben & Jerry's Board of Directors felt that the price discrepancy between Hot Fudge's offer and Unilever's offer was too large to ignore and had no other choice but to accept Unilever's offer.[49] Even though Mr. Cohen believed that the company could best accomplish its social priorities by remaining independent,[50] he felt that corporate law "required the board of directors of Ben & Jerry's to take [the] offer . . . despite the fact that they did not want to sell the company."[51] After twenty years of being independent and focusing on social issues, Ben & Jerry's became a wholly owned subsidiary of a multi-national conglomerate.[52]

Legal scholars frequently debate whether corporate law actually required Ben & Jerry's to sell to Unilever.[53] Regardless of any legal requirements to sell though, rejecting Unilever's offer would have likely resulted in several long and drawn out legal battles with both shareholders and Unilever costing millions in attorney's fees for Ben & Jerry's.[54] Although the acquisition worked out for Ben & Jerry's,[55]

43. *Id.*
44. *Id.*
45. *Id.* at 226.
46. Rosenberg, *supra* note 23.
47. 506 A.2d 173 (Del. 1986).
48. *See id.* at 182 ("Although such considerations [of non-stockholder interests] may be permissible, there are fundamental limitations upon that prerogative. A Board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders.").
49. Rosenberg, *supra* note 23.
50. *Id.*
51. Page & Katz, *Freezing Out*, *supra* note 23, at 229 (quoting Dembosky, *supra* note 23).
52. *Id.* at 226.
53. *See, e.g.*, *id.* at 213, 233–34 (outlining the argument that Ben & Jerry's could have used standard anti-takeover defenses to thwart a takeover without suffering director liability, such as triggering the shareholder-rights plan, also known as a "poison pill," that Ben & Jerry's had introduced in 1998, which diluted the acquirer's holdings thereby making any hostile takeover much more expensive).
54. *See, e.g.*, Page & Katz, *The Truth*, *supra* note 23, at 42 ("People close to the decision say [the directors] were motivated by fear of litigation, followed by a judgment that they would have to satisfy personally.").

the future of similar companies being sought for takeover is not always as clear.[56] To combat the possibility of forcing the Board of a social enterprise to decide between the company's social ideals and profit maximization in a takeover scenario, several new business entities have been established and championed.[57] The business entity that has gained the most traction and proved the most workable has been the benefit corporation.

II. ALLOWING FOR A DIFFERENT BOTTOM LINE: THE POLICIES AND PURPOSE OF BENEFIT CORPORATION STATUTES

In 2007, a small nonprofit entitled B Labs started certifying companies as "B Corps."[58] Similar to a trade name, any company applying for the label "B Corp" could obtain it so long as the company was considered socially aware according to B Labs' criteria.[59] Moving beyond this original intent, B Labs started to work on something greater that would not only distinguish socially aware companies but also give them a legal defense to preserve their societal purpose in case they ever found themselves in a position similar to Ben & Jerry's.[60] The result was the Model Benefit Corporation Legislation ("Model Act"),[61] which B Labs then began to heavily lobby states to adopt.[62]

The Model Act aims to offer corporations clear, legal protection to freely pursue societal objectives beyond wealth maximization[63] and alleviate directors' fears that a court might conclude, as Delaware has, that "[p]romoting, protecting, or pursuing non-stockholder

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55. *See* Page & Katz, *Freezing Out*, *supra* note 23, at 227–28 (describing the "unique and groundbreaking" provisions that Ben & Jerry's had worked into the merger agreement, such as requiring 7.5% of pretax profits be donated to charity, disallowing any layoffs, and conducting social audits of Unilever about its environmental impact); Rosenberg, *supra* note 23 (noting how Ben & Jerry's has "hewed pretty closely" to its pre-acquisition social policies while being a subsidiary of Unilever).

56. *Cf.* Rosenberg, *supra* note 23 (describing the acquisition of Silk Soymilk by Dean Foods, which is America's largest dairy company, and how "most of Silk's products are no longer organic").

57. *See supra* note 13 and accompanying text (describing the two primary alternative legal entities that have been developed: the low-profit limited liability company and the benefit corporation).

58. Murray, *Defending Patagonia*, *supra* note 14, at 488.

59. *See How to Become a B Corp*, CERTIFIED B CORP., http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp (last visited Oct. 6, 2014) (requiring prospective "B Corps" to complete B Labs' B Impact Assessment, which evaluates a company's social and environmental performance, and score at least 80 out of 200 points to obtain the "B Corp" certification).

60. Murray, *Defending Patagonia*, *supra* note 14, at 488–89.

61. *See* MODEL BENEFIT CORP. LEGISLATION (2014).

62. Murray, *Defending Patagonia*, *supra* note 14, at 488–89.

63. Clark et al., *supra* note 17, at 15.

considerations must lead at some point to value for stockholders."[64] To accomplish this goal, three objectives underlie the Model Act: 1) expanding fiduciary duties of directors to require consideration of non-financial interests, 2) allowing corporations to focus on making a materially positive impact on society and the environment, and 3) creating transparency and accountability for corporations by requiring them to report their social and environmental impact as assessed against a third-party standard.[65] The Model Act effectuates these objectives by 1) requiring corporations to state that they have a corporate purpose of "general public benefit" and may include one or more "specific public benefits," 2) requiring directors to consider factors other than the financial interests of shareholders when discharging their obligations as directors, and 3) requiring corporations to file annual compliance reports based upon third-party criteria.[66]

The Model Act has proven to be a vast success at the state level. Maryland adopted the very first benefit corporation statute in April 2010,[67] and Vermont passed the second shortly afterwards in May 2010.[68] Since then, twenty-six states and the District of Columbia have adopted benefit corporation statutes while thirteen additional states have introduced legislation.[69]

Although the exact statutory wording varies from state to state, the vast majority of benefit corporation statutes are based upon the language of the Model Act.[70] Currently, no publicly traded

64. Ebay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33 (Del. Ch. 2010).

65. MODEL BENEFIT CORP. LEGISLATION §§ 201, 301, 401; *see also* Clark et al., *supra* note 17, at 18–19 (defining a "third-party standard" as "a recognized standard for defining, reporting, and assessing overall corporate social and environmental performance" and then listing criteria that would meet that definition). Delaware does not require the third-party standard but does require the reporting. *Specifics on Delaware Benefit Corporation Legislation*, BENEFIT CORP. INFO. CENTER, http://benefitcorp.net/storage/documents/Delaware_Public_Benefit_Legislation_Specifics.pdf (last visited Oct. 6, 2014) [hereinafter *Specifics on Delaware*].

66. MODEL BENEFIT CORP. LEGISLATION §§ 201, 301, 401. *See* Blount & Offei-Danso, *supra* note 14, at 628–32 (describing the requirements that the Model Act imposes on corporations in order to claim benefit corporation status).

67. *See* 2010 Md. Laws 980–987 (approving S.B. 690, which was Maryland's benefit corporation bill, on April 13, 2010).

68. *See* 2010 Vt. Acts & Resolves 228 (approving S. 263, which was Vermont's benefit corporation bill, on May 19, 2010).

69. *See State by State Legislative Status*, BENEFIT CORP. INFO. CENTER, http://benefitcorp.net/state-by-state-legislative-status (last visited Oct. 6, 2014) (counting all the states that have passed, enacted, or proposed benefit corporation statutes).

70. Blount & Offei-Danso, *supra* note 14, at 621 n.16. Two notable exceptions of benefit corporation statutes that differ from the Model Act are those that were passed in Delaware and Colorado, but even they seek to establish the underlying principles of the Model Act. *See Specifics on Delaware*, *supra* note 65 (discussing that the main differences between the Delaware and Colorado statutes and the Model Act relate to reporting and transparency requirements, neither of which creates a different underlying principle of motivation for benefit corporations to follow).

companies exist as benefit corporations, but there are several large, privately held corporations that have filed as benefit corporations.[71]

III. MORE THAN A *VERONICA MARS* MOVIE: CAPITAL RAISING THROUGH EQUITY CROWDFUNDING

Crowdfunding has existed for several years, with the two most famous platforms, Kickstarter and Indiegogo, starting in 2009 and 2008, respectively.[72] These crowdfunding platforms allow people, or companies, to raise money from a large number of people through the vast connectivity of the Internet.[73] A person creates a profile on one of these platforms that describes what his or her finished product will be.[74] If an Internet user likes the finished product, the user will often pledge a certain amount of money so that the person can create the product.[75] If the person receives enough donations, the person keeps the money and hopefully uses it to create the product; typically, if the person does not raise enough money, then the money goes back to the donator.[76] The most successful and famous examples of using crowdfunding to raise capital are the *Veronica Mars* movie, which raised $5.7 million dollars via Kickstarter, the Neil Young-backed music player Pono, which raised $6.2 million via Kickstarter, and the smartwatch creator Pebble, which raised $10.3 million via Kickstarter.[77] In all of the above examples, users who pledged a specified amount of money were to be given the advertised product once it was finished being developed.[78]

Although there have been notable exceptions, the vast majority of fundraising campaigns have offered a future product in exchange for

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71. *See* Murray, *Defending Patagonia*, *supra* note 14, at 487 (citing the outdoor clothing company Patagonia, which has over $500 million in annual sales, as the "coolest company on the planet").

72. *About Us*, INDIEGOGO, http://www.indiegogo.com/about/our-story (last visited Oct 6, 2014); *What Is Kickstarter?*, KICKSTARTER, http://www.kickstarter.com/hello (last visited Oct. 6, 2014).

73. *See* Crowdfunding, 78 Fed. Reg. 66,428, 66,428 (proposed Nov. 5, 2013) (to be codified at 17 C.F.R. pts. 200, 227, 232, 239, 240, and 249) ("An entity or individual raising funds through crowdfunding typically seeks small individual contributions from a large number of people.").

74. *E.g.*, *Creator Questions: Getting Started*, KICKSTARTER, https://www.kickstarter.com/help/faq/creator+questions (last visited Oct. 6, 2014).

75. *E.g.*, *Kickstarter Basics: Kickstarter 101*, KICKSTARTER, https://www.kickstarter.com/help/faq/kickstarter+basics (last visited Oct. 6, 2014).

76. *Id.*

77. Stuart Dredge, *Kickstarter's Biggest Hits—Why Crowdfunding Now Sets the Trends*, GUARDIAN (Apr. 17, 2014, 8:18 AM), http://www.theguardian.com/technology/2014/apr/17/kickstarter-crowdfunding-technology-film-games.

78. *Id.* Although Pono has not been released yet, a unit of the final product will be given to those who pledged a certain amount.

a monetary donation.[79] This is partly because current crowdfunding regulations do not allow ordinary investors to invest in the traditional manner, such as buying a company's bonds or equity, without first registering such securities with the SEC, which is both burdensome and expensive.[80] Currently, if a retail investor[81] wants to engage in crowdfunding, then that investor is limited to giving money away, lending money, or exchanging money for a future product—with the latter being the most common.[82]

By allowing ordinary people to only buy products or lend money via crowdfunding campaigns, a large section of small businesses are unable to tap into retail investment pools and are functionally cut off from using the Internet to raise funds.[83] Furthermore, it disallows ordinary people who might love and see value in a company's product from investing in that company beyond a mere sales purchase.[84] In order to allow small businesses to utilize their equity, tap into the vast connectivity potential that the Internet offers, and allow common people to invest in companies they believe in, Congress passed an amendment, section 4(a)(6) to the Securities Act of 1933,[85] as part of the 2012 JOBS Act.[86] Section 4(a)(6) directed the SEC to issue rules regulating the use of crowdfunding when

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79. *See* Crowdfunding, 78 Fed. Reg. 66,428, 66,429 (proposed Nov. 5, 2013) (to be codified at 17 C.F.R. pts. 200, 227, 232, 239, 240, and 249) (citing artistic endeavors that have utilized crowdfunding as the primary example of crowdfunding); *see also supra* notes 77–78 and accompanying text (naming several famous examples of crowdfunding campaigns where people pledged money to receive a future product).

80. *See* Crowdfunding, 78 Fed. Reg. at 66,429 (describing how, previously, selling securities via a crowdfunding model would trigger the Securities Act of 1933 and create regulatory compliance costs so high that raising a small sum would essentially be infeasible).

81. A "retail investor" would be someone who is not qualified as an "accredited investor," which is defined at 17 C.F.R. § 230.501.

82. Crowdfunding, 78 Fed. Reg. at 66,429.

83. These businesses are functionally cut off from crowdfunding because, although they could always ask to *borrow* money via crowdfunding, most investors want something in return for their money other than a mere promise to pay back what was lent, especially if lending to a capitalist business.

84. *Cf.* Alex Hern, *Kickstarter: A Platform for Investment, Philanthropy or Shopping?*, GUARDIAN (June 21, 2014), http://www.theguardian.com/technology/2014/jun/23/kickstarter-crowdfunding-start-ups-pebble (explaining that had people been permitted to purchase equity via crowdfunding rather than being limited to purchasing a headset, their $300 investment would now be worth $20,000).

85. Pub. L. No. 73-22, 48 Stat. 74 (1933) (codified at 15 U.S.C. § 77a).

86. Jumpstart our Business Startups Act, Pub. L. No. 112-106, §§ 301–302, 126 Stat. 306, 315–21 (2012) (to be codified at 15 U.S.C. § 78a); *see also* Crowdfunding, 78 Fed. Reg. at 66,429–30.

selling securities and raising capital.[87] On November 5, 2013, the SEC issued its proposed rules for Regulation Crowdfunding.[88]

The proposed Regulation Crowdfunding provides the mechanics through which a company can use section 4(a)(6) to sell equity via crowdfunding without having to register the issuance.[89] The proposal essentially limits the amount of capital raising to $1 million per year, limits the amount individuals can invest, and requires initial issuances to be advertised and sold through registered crowdfunding websites or broker-dealers.[90] Although the SEC is hopeful that a secondary trading market will develop to allow investors to exit their positions, until that occurs investors are left with the traditional exit strategies for shareholders in private corporations—either being acquired or filing for an initial public offering.[91]

Benefit corporation statutes, equity crowdfunding, and shareholders' rights all foreseeably collide when a crowdfunded benefit corporation gets taken over by a corporation with certain principles that the crowdfunding investors ideologically oppose. A prime example is Oculus, which was acquired by Facebook after it used Kickstarter to crowdfund the development of its virtual reality headset.[92] After the deal was announced, several original Kickstarter donors sent messages to Oculus saying, "[t]his is a huge betrayal" or "I want my donation back."[93] Because the Kickstarter backers had only agreed to buy a product, they could do nothing but be angry.[94] If the backers had been equity shareholders though, they would have been able to vote against the merger under normal corporate law doctrine. If Oculus had been a benefit corporation that had sold its investors on the idea of an independent gaming platform devoted to community development and if Facebook intended merely to gut Oculus for its patent portfolio,[95] Oculus's shareholders could have tried to stop the sale.

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87. Jumpstart our Business Startups Act § 302(b); Crowdfunding, 78 Fed. Reg. at 66,430.
88. Crowdfunding, 78 Fed. Reg. at 66,428.
89. *See id.* at 66,429–31 (providing a brief summary of the regulations).
90. *See id.* at 66,430 (providing a summary of section 4(a)(6)).
91. *Id.* at 66,518 (discussing how investors typically get a capital gains return on their investments in venture capital-backed companies).
92. *See* Hern, *supra* note 84 (providing a comprehensive overview of the commercialization of Kickstarter and using the buyout of Oculus by Facebook as the story's prime example).
93. *Id.*
94. *Id.* (noting how Kickstarter only offers "pure commercial transaction[s]").
95. This is not Oculus's stated purpose nor does Oculus have an extensive patent portfolio. This is merely an example of something that could have happened.

IV. PREVENTING THE BOARD FROM SELLING THE CORPORATION DOWN THE RIVER: THE LACK OF SHAREHOLDERS' RIGHTS UNDER BENEFIT CORPORATION STATUTES

Shareholders who bought into a benefit corporation and believe that a merger will result in it straying from its stated purpose or violating its external fiduciary duties have three potential outlets for a remedy: super-majority voting requirements,[96] benefit enforcement proceedings,[97] or appraisal rights.[98]

A. *Super-Majority Voting Requirements*

The Model Act—and the vast majority of all benefit corporation statutes[99]—requires a two-thirds vote of all outstanding shareholders to approve a plan of merger, consolidation, conversion, or share exchange that would effectively terminate the company's status as a benefit corporation.[100] By requiring a higher amount of shareholder approval than that typically required for a merger or acquisition, the super-majority voting requirement provides strong assurance that any shareholder buyout conforms to the principles a benefit corporation's investors believe.[101]

Nonetheless, determined acquirers can easily persuade an additional 16.6% of outstanding shareholders to approve the merger, thus satisfying the super-majority requirement.[102] The two-thirds standard would be especially easy to meet if the benefit corporation's founders or Board members maintained a large share interest and were using the benefit corporation status more as a marketing gimmick than as a safe harbor against a takeover. In such takeover scenarios, super-majority voting would leave the socially minded minority shareholders unprotected.

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96. *See* MODEL BENEFIT CORP. LEGISLATION §§ 102, 105(b)(1) (2014) (stating that a "[m]inimum status vote," which is defined as two-thirds of voting shareholders, is required to dissolve an entity of benefit corporation status or to approve any transaction that would have such an effect).

97. *Id.* § 305(a).

98. *See* Clark et al., *supra* note 17, at 27 (stating that this Model Act does not override any underlying state appraisal rights that would normally exist for shareholders).

99. *Contra* N.Y. BUS. CORP. LAW §§ 1702(d), 1705 (McKinney 2014) (requiring three-fourths of all votes to terminate benefit corporation status).

100. *See* MODEL BENEFIT CORP. LEGISLATION §§ 102, 105(b) & cmt. ("[T]ermination may be accomplished either directly by an amendment of the articles or indirectly through a fundamental transaction.").

101. *See, e.g.*, DEL. CODE ANN. tit. 8, § 251 (2014) (requiring only a majority vote to approve a merger).

102. States such as Illinois, Louisiana, Maryland, Massachusetts, South Carolina, and Virginia require a two-thirds vote for normal mergers and takeovers that occur in those states. Murray, *Defending Patagonia*, *supra* note 14, at 508, 515–16 (noting that the two-thirds voting requirement is definitely achievable).

B. *Benefit Enforcement Proceedings*

Benefit enforcement proceedings allow shareholders or groups of shareholders who own 2% or more of outstanding stock to bring an enforcement action against the benefit corporation or its directors and officers for violating the company's stated purpose or failing to consider its societal obligations.[103] The shareholders cannot ask for monetary damages through benefit enforcement proceedings; they are limited to injunctive relief.[104] The section defining "benefit enforcement proceedings" in the Model Act is intended to allow a shareholder to prevent a transaction that violates the company's stated purposes or obligations.[105]

However, because the statute does not provide any guidance on how a director should weigh and value a company's stated purposes and obligations, shareholders may be left feeling unjustified when bringing suit.[106] Although no precedent currently exists, legal scholars commonly agree that the courts will apply the traditional business judgment rule in benefit enforcement proceedings when evaluating the Board of Directors' decision-making process.[107] Given

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103. MODEL BENEFIT CORP. LEGISLATION § 305(a)–(c). Parties with standing to bring an enforcement proceeding include the corporation, directors, a person or group of persons owning 5% of outstanding shares of the benefit corporation's parent company, and any persons expressly granted standing in the articles of incorporation. *Id.* § 305(c).

104. *Id.* § 305(b). Shareholders may, however, hold the corporation and directors liable for monetary damage for traditional breaches of fiduciary duties, such as violations of the duty of care or the duty of loyalty. *See id.* § 305 cmt. (limiting benefit enforcement proceedings to violations of societal values and not encroaching upon traditional actions for violations of standard fiduciary duties).

105. *See id.* § 102; Murray, *Defending Patagonia*, *supra* note 14, at 508 ("The benefit enforcement proceeding created by the benefit corporation statutes provides a way for a shareholder to potentially prevent a transaction that strays from the benefit corporation's mission.").

106. *See* Murray, *Defending Patagonia*, *supra* note 14, at 509 (suggesting that, without a governing hierarchy, a shareholder could potentially enjoin any transaction pursuant to any of the benefit corporation's purposes). *See generally* MODEL BENEFIT CORP. LEGISLATION § 305 (providing no guidance on which obligations and purposes should carry a stronger weight in a benefit enforcement proceeding).

107. *See* Blount & Offei-Danso, *supra* note 14, at 645–46 (stating that of the options available to a court, which are either micromanaging a business's decisions or applying the business judgment rule, a court is likely to apply the position that interferes with business acumen the least); *accord* MODEL BENEFIT CORP. LEGISLATION § 301 cmt. ("Subsection (e) confirms that the business judgment rule applies to actions by directors under this section."). *But see* Ian Kanig, Note, *Sustainable Capitalism Through the Benefit Corporation: Enforcing the Procedural Duty of Consideration to Protect Non-Shareholder Interests*, 64 HASTINGS L.J. 863, 899–900 (2013) (advocating for the use of the National Environmental Protection Act as a template for enforcing procedural considerations of exterior obligations before director decision-making in benefit corporations). *See generally* Edwin W. Hecker, Jr., *Fiduciary Duties in Business Entities Revisited*, 61 U. KAN. L. REV. 923, 935 (2013) (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000)) (noting that in Delaware the business judgment rule operates as "a

the broad range of obligations the Model Act requires directors to consider before making a decision,[108] shareholders will be hard pressed under the business judgment rule to prove that the directors failed in their decision making process without a statutory guide defining the weight of each of their obligations.[109] Directors could easily say that they considered all factors and that the financial benefit to the shareholders outweighed all other considerations. Because the business judgment rule will apply so long as decisions result from a valid decision making process and are rational, a court would most likely side with the directors and hold that their decisions were protected from being second-guessed.[110] Essentially, shareholders of a benefit corporation seeking to enjoin a merger or acquisition through a benefit enforcement proceeding would be on the same legal footing as a shareholder of a traditional corporation,[111] which is to say on no footing at all.

C. Appraisal Rights

Traditionally, appraisal rights have been granted by statute to shareholders in a merger or acquisition who believe the share price offered is inadequate.[112] Although the exact requirements differ

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presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company"; thus, courts are reluctant to second-guess the business decisions of directors and require shareholders to first prove a precondition was lacking when challenging the Board of Directors' prior decisions).

108. MODEL BENEFIT CORP. LEGISLATION § 301(a)(1)(i).

109. *See* Blount & Offei-Danso, *supra* note 14, at 646 (noting that the "broad considerations" directors are granted under the Model Act could potentially justify any corporate act other than "gross breaches" of fiduciary duties or illegal acts).

110. Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 955 (Del. 1985) ("If a defensive measure is to come within the ambit of the business judgment rule, it must be reasonable in relation to the threat posed."); *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996) (reporting that courts will apply the business judgment rule to protect directors, even if the judge believes that the decision was wrong, so long as the decision-making process utilized was rational or was applied in a good faith effort towards advancing the corporation's interests); *see also* Hecker, *supra* note 107, at 934–35 (discussing how directors must "act in the best interest of the corporation[] and its shareholders" and maximize the value of the corporation for the shareholders' benefit to have their decisions protected from second-guessing by the business judgment rule).

111. *See* Blount & Offei-Danso, *supra* note 14, at 648 (arguing shareholders of benefit corporations will have the same rights and remedies as shareholders of standard corporations if the business judgment rule is applied).

112. *E.g.*, DEL. CODE ANN. tit. 8, § 262 (2014) (granting appraisal rights to any class of stock of a corporation in a statutory merger, excluding the merger of a subsidiary corporation into its parent corporation); *accord* George S. Geis, *An Appraisal Puzzle*, 105 NW. U. L. REV. 1635, 1636 n.9 (2011) ("Every state grants appraisal rights for statutory merger transactions . . . .").

depending on a state's corporation statute,[113] typically shareholders must do the following before being granted an appraisal proceeding. First, shareholders must file a notice of intent to demand fair value prior to the merger or acquisition vote.[114] Second, shareholders must not vote in favor of the merger or acquisition.[115] Third, shareholders must demand fair value from the corporation for their shares after the merger or acquisition vote.[116] Depending on the state, they may also be required to deposit share certificates with the corporation at this stage, prior to the vote, or not at all.[117] Fourth, shareholders must attempt to negotiate with management a fair value for their shares.[118] Only if all of the above procedural hurdles have been followed will a court grant an appraisal proceeding to determine the fair monetary value that should have been offered.[119] Thus, shareholders believing that the directors of a benefit corporation did not fully weigh the loss of societal impact when accepting a merger offer are entitled to exercise their appraisal rights so long as they followed the required procedural rules.[120]

Putting aside the substantial costs of appraisal proceedings and the strict procedural requirements,[121] there seems to be an inherent conundrum of a shareholder asking for a financial evaluation of a

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113. *See* PRINCIPLES OF CORP. GOVERNANCE § 7.23 cmt. c (1994) (stating that "many" jurisdictions require shareholders to take numerous steps to meet the statutory procedural requirements). *Compare* DEL. CODE ANN. tit. 8, § 262 (2013) (lacking the requirement that shareholders make an additional demand after the merger or acquisition vote), *with* MODEL BUS. CORP. ACT § 13.26(a) (requiring demand be made again after the merger or acquisition vote).

114. *E.g.*, PRINCIPLES OF CORP. GOVERNANCE § 7.23 cmt. c; Barry M. Wertheimer, *The Shareholders' Appraisal Remedy and How Courts Determine Fair Value*, 47 DUKE L.J. 613, 624 (1998).

115. *E.g.*, PRINCIPLES OF CORP. GOVERNANCE § 7.23 cmt. c; Wertheimer, *supra* note 114, at 624.

116. *E.g.*, PRINCIPLES OF CORP. GOVERNANCE § 7.23 cmt. c; Wertheimer, *supra* note 114, at 624.

117. *See* PRINCIPLES OF CORP. GOVERNANCE § 7.23 rptr. n.2 (discussing the various statutes in various states and whether they call for certificates to be deposited, notarized, or neither).

118. *E.g.*, *id.* § 7.23 cmt. c; Wertheimer, *supra* note 114, at 624.

119. *E.g.*, DEL. CODE ANN. tit. 8, § 262(e) (2013); Wertheimer, *supra* note 114, at 624–25.

120. *See* Clark et al., *supra* note 17, at 27 (stating that any pre-existing state right is not encroached upon by the benefit corporation statute).

121. Joseph Glatt, *Is it Worth it? The Value of Delaware Appraisal Rights to the Activist Investor*, ACTIVIST INVESTING DEV., Summer 2007, at 1, 4, *available at* http://www.srz.com/files/News/ebd7562a-5d91-41ec-84c2-4b2b280f80dc/Presentation/NewsAttachment/fcf3914f-2885-4af4-b24a-23804876290f/filesfilesActivist_summer07_1_Is_it_worth_it.Glatt.pdf (stating that appraisal rights can cost approximately $1–2 million and last two to three years); *accord* Kirkland & Ellis, *Appraisal Rights—The Next Frontier in Deal Litigation?*, KIRKLAND M&A UPDATE, May 1, 2013, at 1, 1, *available at* http://www.kirkland.com/siteFiles/Publications/MAUpdate_050113.pdf (stating that appraisal proceedings often cost millions and take years).

corporation's nonmonetary value.[122] Appraisal proceedings do not seem to provide a solution for shareholders more interested in a corporation providing social value than shareholder wealth maximization because appraisal proceedings can only grant monetary remedies.[123] Furthermore, for benefit corporations selling equity on future secondary exchanges, courts will most likely look to the value of the stock trading on the crowdfunding exchange to determine the corporation's share value.[124] Due to the cost and length of appraisal proceedings, the limitation on available remedies, and the difficulty in determining the financial value of intangible good will, appraisal rights provide an inadequate solution for benefit corporation shareholders seeking societal justification.

V. A MAJORITY OF THE DISINTERESTED: A POTENTIAL REMEDY FOR ASSURING OUTSIDER SHAREHOLDERS THAT THEIR INVESTMENTS IN BENEFIT CORPORATIONS WILL NOT BE SOLD TO THE HIGHEST BIDDER WITHOUT THEIR INPUT

Not every giant conglomerate seeking to acquire a "green" business or social enterprise is an evil entity that will strip the social enterprise of all external values beyond making money.[125] As noted earlier, when Unilever acquired Ben & Jerry's, it was granted very unique concessions by Unilever that allowed Ben & Jerry's to continue its focus on both people and profits.[126] This Note is concerned with the situation where a company might have been using its "benefit corporation" status more as an advertising gimmick to lure in "green" investors via a crowdfunding portal and then sold out to the first available buyout offer regardless of whether that buyout served the corporation's beneficial purposes or external obligations. By finding a way for courts to uphold the underlying meaning of benefit

122. Dana Brakman Reiser, *The Next Big Thing: Flexible Purpose Corporations*, 2 AM. U. BUS. L. REV. 55, 66–67 (2012) (describing the difficulty a court would have in attempting to evaluate the price to attach to the societal value of stock).

123. *See id.* at 67 (noting the remedy of cash in an appraisal proceeding is very inept for a shareholder dissatisfied that the company elected to become for-profit and stop focusing on social welfare production).

124. *See id.* at 66 (stating that a liquid market allows shareholders to assess the value of their share price and protect their financial investments, thus providing a proper appraisal value for shareholders dissatisfied with a former social enterprise changing to for-profit status).

125. *See* Kurtz, *supra* note 9 (noting how the acquisition of a small, socially-focused company by a large corporation can give the small company access to economies of scale, efficient production infrastructure, and international markets, thus reducing costs and providing broader access).

126. *See* Page & Katz, *Freezing Out*, *supra* note 23, at 228 (discussing how provisions in the Ben & Jerry's acquisition allowed Ben & Jerry's to continue many of their societal endeavors).

corporation statutes, greater societal assurance will be provided to shareholders seeking to invest in companies concerned with more than just a bottom line. Looking to traditional corporate law, *Weinberger v. UOP, Inc.* provides a workable solution.

Weinberger involved the merger of two companies, Signal and UOP.[127] Signal was the controlling shareholder of UOP with a stock ownership of 50.5%.[128] UOP proposed to its minority shareholders a cash merger of $21 per share by Signal for UOP's remaining shares.[129] In order for the merger to be successful, a majority of the minority shareholders would have to approve the tender offer price.[130] This majority of the minority, coupled with Signal's 50.5% would comprise at least two-thirds of all outstanding shares, which would be more than enough to approve the merger.[131] Although the shareholder's vote was found to be uninformed due to the Board failing to disclose material information, the court cited approvingly to the majority of the minority technique for determining if a transaction price is fair.[132] If the vote had been fully informed, approval by the majority of the minority would have been sufficient in determining whether the offered price was fair.[133]

The majority of the minority approach utilized in *Weinberger* may also be used to protect societal investment interests promulgated by benefit corporations. Because directors, officers, or a controlling shareholder would stand to potentially gain a financial windfall during an acquisition, their duty of loyalty to the shareholders and the societal portion of the shareholders' investment appears compromised.[134] Requiring either a majority or two-thirds approval

127. Weinberger v. UOP, Inc., 457 A.2d 701, 707 (Del. 1983) (en banc).
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 703 ("[W]here corporate action has been approved by an informed vote of a majority of the minority shareholders, we conclude that the burden entirely shifts to the plaintiff to show that the transaction was unfair to the minority.").
133. *Id.*
134. *Cf. in re* ALH Holdings LLC, 675 F. Supp. 2d 462, 482 (D. Del. 2009) ("[T]he duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally." (alteration in original) (quoting Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993)). Although in an acquisition all shareholders of a benefit corporation would stand to make a monetary return on their investment, most likely only those shareholders with a large stake—primarily directors, officers, or a controlling shareholder—would stand to make a financial windfall. Thus, that financial windfall is a benefit not shared by all shareholders and comes at the potential expense and detriment to the benefit corporation's societal value that all the shareholders do take part of and partially own. Because directors, officers, or a controlling shareholder can appear to be

by shareholders that are not officers, directors, or a controlling shareholder before finalizing a merger would correct any appearance of prima facie violation of the duty of loyalty for violating the benefit corporation's societal purposes and goals.[135] Additionally, it would allow minority shareholders to potentially block transactions that contradict the company's social purpose. Whether to utilize the majority of the minority approach like that in *Weinberger*[136] or a heightened standard[137] is up to the courts, states, or the benefit corporations themselves to decide. Either way, taking the vote away from those who stand to make the most money at the potential loss of societal good will provides investors an assurance that an investment made for-profit but tempered with charitable intentions will not be sold out to the highest bidder. This technique would allow shareholders greater say in ensuring that the acquiring entity cares about continuing social priorities and that any takeover premium was weighed equally by any loss of social direction.[138] Although some shareholders might still be displeased, requiring a majority or two-thirds vote of outside investors before approving the takeover of a benefit corporation provides a valuable assurance that directors will not be able to overlook their exterior obligations when the benefit corporation is on the auction block.

CONCLUSION

Even if no changes are made to provide shareholders societal assurance in a takeover scenario, benefit corporation statutes are still valuable. While this Note focused on unscrupulous directors using benefit corporation status as an advertising gimmick, many companies do want legal assurance when promoting societal issues

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construing their financial windfall over general shareholder societal value in an acquisition of a benefit corporation, the duty of loyalty is potentially implicated. *See id.* ("Essentially any corporate decision which directly or indirectly confers a benefit upon a participating director can implicate the broadly construed duty of loyalty.").

135. *Cf. Weinberger*, 457 A.2d at 703 (noting that when the majority of the minority shareholders approve the merger with an informed vote, there is a strong presumption that what was offered was fair to all).

136. *See id.* (holding an offer price will be presumed fair if approved by a majority of informed minority shareholders).

137. *Cf.* Murray, *Defending Patagonia*, *supra* note 14, at 515–16 (collecting the then-current list of states' benefit corporation statutes and noting that only one state does not require two-thirds shareholder approval before changing from benefit corporation status to for-profit status).

138. *See supra* notes 99–124 and accompanying text (discussing the various options a shareholder would have to prevent an acquisition that is opposed to the benefit corporation's stated societal purposes and obligations and explaining how none of those options provide a workable solution).

that could conflict with profit maximization principles.[139] Although there is no case currently on the issue, there is a strong chance that benefit corporation statutes *could* be used by directors to fend off a corporate takeover by a business that ideologically conflicts with the benefit corporation's goals.[140] Because benefit corporation statutes do not provide *less* protection to shareholders than normal corporate statutes,[141] they are important because they *could* help directors preserve their company during a hostile takeover. But ordinary investors should know that, when investing, any "good will" promise is, currently, completely unprotected and mere puffery.

139. *E.g.*, Murray, *Defending Patagonia*, *supra* note 14, at 486 (quoting Yvon Chouinard, Founder of Patagonia) ("Benefit corporation legislation creates the legal framework to enable mission-driven companies like Patagonia to stay mission-driven through succession, capital raises, and even changes in ownership, by institutionalizing the values, culture, processes, and high standards put in place by founding entrepreneurs.").

140. *See supra* note 13 and accompanying text (describing the problems that various social enterprise legislation has been enacted to prevent, such as preventing a socially driven company from having to focus solely on shareholder profit maximization in a takeover situation).

141. *See supra* note 111 and accompanying text (noting how, currently, benefit corporation statutes provide shareholders the same amount of say that normal corporation statutes provide, which means shareholders have no say).