

# TOWARD AN IMPROVED LEGAL FORM FOR SOCIAL ENTERPRISE

KEREN G. RAZ<sup>†</sup>

## ABSTRACT

Lawyers, policymakers, and social entrepreneurs are engaging in a vigorous debate regarding new legal forms for social enterprise. Some argue that commercial activity in the non-profit sector is not new and does not require a new legal form; others argue that new legal forms, including the Low-profit Limited Liability Company (L3C) and the Benefit Corporation, can meet the needs of social enterprise; and still others argue that new legal forms are needed. This debate has suffered, however, from a fractured understanding of foundational issues related to the meaning of “social enterprise” and the limitations of existing legal forms in facilitating it. This paper seeks to repair our fractured understanding of social enterprise by (1) clarifying what social enterprises are and how they differ from other organizations; (2) revealing what social enterprises require from a corporate form; (3) explaining how existing corporate structures, including the L3C and the Benefit Corporation, fall short in meeting those requirements; and (4) briefly considering the characteristics of a new legal form for social enterprise that will better facilitate the growth and success of these promising organizations.

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<sup>†</sup> Associate at Paul, Weiss, Rifkind, Wharton & Garrison. Previously the 2010-11 NYU Law and Social Enterprise Fellow and co-founder of NYU’s Law and Social Entrepreneurship Association. New York University School of Law J.D. 2010. I extend my gratitude to the following: Hannah Davis, Ben Cokelet, Andreas Zeller, and all other social entrepreneurs who provided enormous insights into the inner workings of their enterprises; Helen Scott and Gerald Rosenfeld of the NYU Jacobson Leadership Program in Law & Business; the NYU Catherine B. Reynolds Program for Social Entrepreneurship, and the editors at the *NYU Review of Law & Social Change*.

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## I.

### INTRODUCTION

In 2007, Hannah Davis, a high-school senior in the United States, co-founded the Ghana Literacy Project, an after-school literacy program for young women in a Ghanaian village.<sup>1</sup> The project had a fiscal sponsorship arrangement with a non-profit organization<sup>2</sup> and was, until recently, a classic example of a

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1. Interview with Hannah Davis, Founder, Ghana Literacy Project, in New York, N.Y. (Feb. 2, 2010).

2. *Id.* A fiscal sponsor is a § 501(c)(3) organization that contractually agrees to receive funds on behalf of a charitable program. Ellis Carter, *Fiscal Sponsorship vs. Fiscal Agency*, CHARITY L. BLOG (Sept. 17, 2010), <http://charitylawyerblog.com/2010/09/17/fiscal-sponsorship-vs-fiscal-agency/>.

charitable organization, raising money from donors to support after-school educational programming. Now, however, the Ghana Literacy Project has evolved into something new: a social enterprise.

A social enterprise is an organization or venture that advances a social mission through entrepreneurial, earned-income strategies.<sup>3</sup> In its transformation to a social enterprise, The Ghana Literacy Project expanded its mission from literacy to rural development and adopted two new revenue-generating programs, proposed by Ghanaian teachers, in order to wean the organization off of its reliance on Davis's fundraising.<sup>4</sup> The first program established an environmentally friendly pay-per-use public toilet.<sup>5</sup> The second program established the village's first Internet café, run by, and for, the participants in the after-school program.<sup>6</sup> These business ventures not only generate revenue for the literacy program but also serve as the core method by which the organization accomplishes its larger mission of rural development.<sup>7</sup> The Ghana Literacy Project changed its name to the Ghana Sustainable Aid Project to reflect its evolution from a traditional charitable program into a social enterprise.<sup>8</sup>

The Ghana Sustainable Aid Project is not alone. Other social enterprises include the Acumen Fund, an organization that provides support and capital to entrepreneurs in developing countries who are working to address problems in health, education, water, agriculture, housing, and energy;<sup>9</sup> Aurolab, which manufactures intraocular lenses for cataract patients and sells the lenses at prices affordable to the rural poor;<sup>10</sup> and Open Capital Advisors, which aims to aid economic development in Africa by helping socially-minded companies access capital.<sup>11</sup> Foundations are also getting involved in social enterprise. In 2009, the Bill and Melinda Gates Foundation established a \$400 million fund that will give loans to or make investments in non-profit entities or socially-minded for-profit businesses.<sup>12</sup> By law, profit cannot be the primary motivation

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3. The definitions of social enterprise and social entrepreneurship are controversial. The field lacks consensus, resulting in the plethora of existing definitions. My articulation of social enterprise reflects the definitions adopted by the Social Enterprise Alliance, the United Kingdom's Social Enterprise Coalition, and N.Y.U. School of Law. See *What is Social Enterprise*, SOCIAL ENTERPRISE ALLIANCE, <https://www.se-alliance.org/what-is-social-enterprise> (last visited March 10, 2012); *What is Social Enterprise*, SOCIAL ENTERPRISE COALITION, <http://www.socialenterprise.org.uk/about> (last visited May 27, 2012).

4. Interview with Hannah Davis, *supra* note 1.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *About Us*, ACUMEN FUND, <http://www.acumenfund.org/about-us.html> (last visited Jan. 29, 2012).

10. *About Us*, AUROLAB, <http://www.aurolab.com/aboutus.asp> (last visited Jan. 29, 2012).

11. *About Us*, OPEN CAPITAL ADVISORS, <http://opencapitaladvisors.com/about-us/> (last visited Jan. 29, 2012).

12. *Foundations Invest in For-Profits*, THE NON-PROFIT QUARTERLY (Sept. 20, 2009), available at <http://socialenterprise.emory.edu/content/foundations-invest-profits>. The fund is a

of these investments, but the Gates Foundation could earn a small return.<sup>13</sup>

These organizations demonstrate a trend in the use of business strategies to achieve a social mission.<sup>14</sup> This trend is a force to be reckoned with, and it is driving social entrepreneurs to call for a reexamination of the traditional non-profit and for-profit organizational forms.<sup>15</sup> Many lawyers, policymakers, and social entrepreneurs argue that traditional legal forms, such as the limited liability company and the § 501(c)(3), hinder the impact of social enterprises by closing grant-funding opportunities and barring revenue generation.<sup>16</sup> In response, the search is on for a new legal form that better facilitates social enterprise.<sup>17</sup> However, others argue that commercial activity in the non-profit sector is not new and does not warrant a new legal form.<sup>18</sup>

In this paper, I counter the latter set of critics and argue that organizations such as the Ghana Sustainable Aid Project constitute a new type of entity with needs left unmet by both traditional and emerging legal structures. In Part II, I explore this new type of entity, identify its four unique core characteristics, and distinguish it from traditional non-profit and for-profit entities. In Part III, I analyze three new legal forms—the Benefit Corporation, the Low-profit Limited Liability Corporation (L3C), and the Community Interest Corporation (CIC)—and conclude that they are important developments, but not the solution social entrepreneurs seek. Finally, in Part IV, I argue that, with the four core characteristics of social enterprises identified in this paper serving as a foundation for future discussion, an appropriate structure can be tailored to fit

program-related investment fund (PRI). Foundations can make PRIs in for-profit entities as long as the primary purpose of the investment is to accomplish one or more charitable purposes and no significant purpose of the investment is to produce income or capital appreciation. I.R.C. § 4944(c) (2006).

13. *Program-Related Investments*, BILL & MELINDA GATES FOUNDATION, <http://www.gatesfoundation.org/about/Pages/program-related-investments-faq.aspx> (last visited March 1, 2012) (“All of our PRIs will have as their primary purpose the achievement of specific charitable objectives that are aligned with the foundation’s mission, and no significant purpose of the investments will be to generate income or an appreciation of capital. In the case where an investment does earn a profit, the funds are returned to the foundation and utilized either for investment in additional PRIs or for traditional grant-making.”). See also 26 C.F.R. § 53.4944-3 (IRS regulations on program-related investments).

14. *The Emerging Fourth Sector*, FOURTH SECTOR NETWORK, <http://www.fourthsector.net/learn/fourth-sector> (last visited May 27, 2012).

15. Thomas J. Billitteri, *Mixing Mission and Business: Does Social Enterprise Need a New Legal Approach*, ASPEN INSTITUTE, 5–7 (2007), [http://www.aspeninstitute.org/sites/default/files/content/docs/pubs/New\\_Legal\\_Forms\\_Report\\_FINAL.pdf](http://www.aspeninstitute.org/sites/default/files/content/docs/pubs/New_Legal_Forms_Report_FINAL.pdf). See generally *The Social and Commercial Two-Step*, <http://www.socialedge.org/discussions/business-models/the-social-and-commercial-two-step> (last visited Jan. 20, 2010) [hereinafter *The Social and Commercial Two-Step*].

16. See *infra* Part II.C.

17. See Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337, 366–76 (2009).

18. See Billitteri, *supra* note 15, at 5 (citing views expressed by some participants at an Aspen Institute meeting that “current law already allows nonprofit groups to operate broadly at the intersection of philanthropy and business”).

the needs of modern-day social enterprises.

This paper does not identify a solution to this vexing structural problem. Rather, it seeks to repair our fractured understanding of social enterprise and the various corporate forms that, to date, have been designed to facilitate it. No legal form successfully can be molded to fit social enterprise unless we first understand what social enterprises are; what they require in a corporate form; and the specific ways in which existing structures fall short in satisfying these needs. Thus, the first step is to define “social enterprise,” and identify its unique characteristics and needs.

## II.

### FRAMEWORK: DEFINING SOCIAL ENTERPRISE AND IDENTIFYING ITS UNIQUE CHARACTERISTICS

#### *A. Defining Social Enterprise: Four Core Characteristics*

A social enterprise is an organization or venture that advances a social mission through entrepreneurial, earned-income strategies that generate revenues from the sale of products or from other activities. To be more specific, a social enterprise is an organization that possesses the following characteristics:

- (1) A governing social mission that guides organizational decisions and behavior;<sup>19</sup> and
- (2) A sophisticated business model (which is typically associated with traditional, purely for-profit companies) serves as the primary tool to achieve the mission.<sup>20</sup>

Two additional elements make social enterprises particularly novel from a legal and entrepreneurial view. These flow from the mix of social purpose and a sophisticated business model. Social enterprises:

- (3) Attract grant, debt, and equity financing;<sup>21</sup> and
- (4) Must balance the mission and profit motives of the various managers, investors, and stakeholders.<sup>22</sup>

These four characteristics constitute a more specific, nuanced definition of social enterprise. Consolidating them, we reach the following definition: a social enterprise, for the purpose of identifying an appropriate legal structure, is (1) an organization that serves first and foremost a social mission, (2) through the use

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19. This characteristic is the threshold characteristic. Where it is absent, the entity cannot claim to be a social enterprise. *See supra* note 3. *See also The Emerging Fourth Sector, supra* note 14.

20. The business model exists first and foremost to accomplish the social mission. Any profit to individuals is incidental. *See supra* note 3. *See also The Emerging Fourth Sector, supra* note 14.

21. *See What is Patient Capital*, ACUMEN FUND, (Feb. 22, 2010, 01:03 PM) <http://www.acumenfund.org/about-us/what-is-patient-capital.html>; *A Financing Gap*, ECHOING GREEN (Mar. 17, 2010), <http://www.echoinggreen.org/blog/a-financing-gap>.

22. *Id.*

of sophisticated business models typically associated with traditional corporate activity, (3) pursuing multiple financing options, and (4) facing novel governance challenges when balancing the interests of donors and investors.<sup>23</sup>

Within this definition, organizations can take a wide variety of forms and serve a broad array of missions. Among the social enterprises active today is Digital Divide Data, a data entry business incorporated as a § 501(c)(3) organization, which is staffed exclusively by people with disabilities and women who are victims of sex trafficking. It earns profits, which it uses to provide scholarships for its employees.<sup>24</sup> PODER is a revenue-generating enterprise, seeking § 501(c)(3) status, that contracts with non-profit clients for business intelligence, analysis, and strategic engagements in Latin America. It dedicates its profits towards programs that educate local communities about corruption and how to fight it.<sup>25</sup> Women's World Banking (WWB), which operates throughout the world, has operated for many years as a non-profit organization, providing support, advice, training and information to microfinance organizations targeting low-income women in developing countries.<sup>26</sup> This year, it launched an ambitious initiative to establish and operate its own microfinance institutions. It plans to generate revenue and attract private investment.<sup>27</sup>

### B. *Delving into the Definition: Exploring the First Two Characteristics of Social Enterprises*

Before exploring and assessing legal structures for social enterprise, we must understand its characteristics. To properly tailor a structure for social enterprise, we must have clarity as to what needs the form will serve. Thus, we need detailed and rigorous analysis regarding the characteristics and legal needs of social enterprises. Two key distinctions serve to distinguish social enterprises

23. Additionally, though not discussed in detail here—as they are explicit challenges rather than characteristics—social enterprises face unique branding and tax issues. See Billitteri, *supra* note 15, at 9–10; Andrew Wolk, *Advancing Social Entrepreneurship: Recommendations for Policy Makers and Government Agencies*, ASPEN INSTITUTE 13 (2008), [http://www.aspeninstitute.org/sites/default/files/content/docs/feature%20story%20archive%202008/nspp\\_AdvSocEntrp.pdf](http://www.aspeninstitute.org/sites/default/files/content/docs/feature%20story%20archive%202008/nspp_AdvSocEntrp.pdf).

24. *Working at DDD: Education and Employment*, DIGITAL DIVIDE DATA, <http://www.digitaldividedata.org/impact/employment/> (last visited March 2, 2012).

25. Interviews with Ben Cokelet in N.Y.C., N.Y. (September 2, 2009 and April 13, 2011). PODER stands for Project on Organizing, Development, Education, and Research. *Id.* PODER won the 2009 NYU Stern Business School Social Venture Competition. Ben Cokelet, New York University Reynolds Program in Social Entrepreneurship, [http://www.nyu.edu/reynolds/grad/alumni\\_html/08\\_html/cokelet.html](http://www.nyu.edu/reynolds/grad/alumni_html/08_html/cokelet.html) (last visited March 12, 2012).

26. WOMEN'S WORLD BANKING, <http://www.swwb.org/about/about-wwb> (last visited Jan. 29, 2012).

27. See *Building Women-Focused MFIs for the 21st Century, 2010: Women's World Banking Commitment*, CLINTON GLOBAL INITIATIVE, [http://www.clintonglobalinitiative.org/commitments/commitments\\_search.asp?id=693355](http://www.clintonglobalinitiative.org/commitments/commitments_search.asp?id=693355) (last visited Jan. 12, 2012).

from for-profit businesses and traditional charities.

### 1. *Social Enterprises Serve First and Foremost a Social Mission*

Like traditional non-profit organizations, social enterprises have a paramount social mission.<sup>28</sup> A social enterprise's primary mission is to "create social benefits for those whose lives it touches."<sup>29</sup> The social mission may vary widely: for example, an organization may work to eliminate poverty in a rural village, as with the Ghana Sustainable Aid Project, or it may fight corporate corruption. The relevant point is that the organization has an explicit goal to solve a social problem, and that goal guides the organization.<sup>30</sup> Thus, unlike traditional business models, any profit that flows to individuals is incidental to the social enterprise's primary purpose.<sup>31</sup>

This functional distinction separates social enterprises from for-profits with a subsidiary social mission. Some have suggested that social enterprise includes companies such as Ethos Water, a for-profit bottled water company that donates five cents per bottle of water sold to improve clean water access in developing countries.<sup>32</sup> However, given that the five-cent donation represents only a small fraction of Ethos' sale price—and given its recent sale to Starbucks, which yielded significant capital gains for Ethos's investors—I would argue that Ethos

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28. See *What is Social Enterprise?*, SOCIAL ENTERPRISE ALLIANCE, <https://www.se-alliance.org/what-is-social-enterprise> (last visited Dec. 4, 2010); *About Us*, SOCIAL ENTERPRISE UK, <http://www.socialenterprise.org.uk/about> (last visited Dec. 4, 2010).

29. See Muhammad Yunus, *CREATING A WORLD WITHOUT POVERTY: SOCIAL BUSINESS AND THE FUTURE OF CAPITALISM* 22 (2007). Yunus adds that social enterprises plow any profits back into the organization to improve or grow the business, which thereby increases the number of beneficiaries or the quality of the benefits. *Id.* at 23–25.

30. *Id.*

31. See, e.g., Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES, Sept. 13, 1970, at SM17 ([T]here 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 . . .). However, the notion that the only purpose of business is to increase its profits is also controversial. See, e.g., William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264–65 (1992). I believe that there is space in the law to argue that a business can pursue social purposes; however, this is not only unusual in practice but also cautioned against by lawyers who want to protect corporate clients from lawsuits. Currently, the generally accepted view is that businesses exist to earn a profit for shareholders and do not exist to pursue a social mission. *Is the Benefit Corporation Really Such a Big Deal*, Allen M. Bromberger, Law for Change, <http://www.lawforchange.org/NewsBot.asp?MODE=VIEW&ID=3631> (last visited March 5, 2012).

32. *Ethos Water Fund*, STARBUCKS COFFEE COMPANY, <http://www.starbucks.com/responsibility/community/ethos-water-fund> (last visited Jan. 12, 2012). See generally Jonathan Greenblatt of Ethos Water, SOCIAL ENTERPRISE ALLIANCE, <http://sea-alliance.blogspot.com/2007/04/jonathan-greenblatt-of-ethos-water.html> (last visited Jan. 12, 2012); Peter Thum: *Social Entrepreneurship in the 21<sup>st</sup> Century*, NYU CATHERINE B. REYNOLDS PROGRAM IN SOCIAL ENTREPRENEURSHIP SPEAKER SERIES, [http://www.nyu.edu/reynolds/speaker\\_series/past\\_ss/0809/thum.html](http://www.nyu.edu/reynolds/speaker_series/past_ss/0809/thum.html) (last visited Jan. 12, 2012).

Water does not exist first and foremost to solve a social problem.<sup>33</sup>

The primary mission distinction does not seek to establish a broad rule as to what constitutes a social good. The distinction lies not in the substantive social goal but in the extent to which the social mission impacts organizational decision-making. In other words, a social enterprise not only has a social mission; it also embeds that social mission into its incentive structure, its management system, its negotiations with partners, and its decision-making processes. A social enterprise does not just donate five cents per bottle sold. It also rigorously determines how to solve a specific social problem: access to clean water in developing countries. While Ethos Water's donations fund important progress toward this goal, this alone does not make the company a social enterprise.

2. *Social Enterprises Accomplish a Social Mission Through the Use of Sophisticated Revenue-Generating Business Models Typically Associated with Traditional Corporate Activity*

Aside from their social missions, social enterprises may resemble traditional businesses because they employ sophisticated business practices and business models to achieve their goals. For example, the Ghana Sustainable Aid Project has explored installing a system of revenue-generating environmentally-friendly public toilets in rural villages.<sup>34</sup> PODER, which contracts with non-profits to uncover corruption and abuses in Mexico, could be viewed as a traditional business that provides investigative and consulting services.<sup>35</sup> Examples of other traditional business ventures that are found in modern social enterprises include:

- An Internet café. In 2010, the Ghana Sustainable Aid Project launched a portable Internet café, which fits six computers in a suitcase, and can be set up in any location that can provide power. It is the only Internet café in the Ghanaian village in which the non-profit operates. Girls who participate in after-school empowerment and literacy programs are paid to run the café.<sup>36</sup>
- A business incubator. Organized as a Kenyan for-profit company, Open Capital Advisors provides incubation services to small and medium enterprises in East Africa.<sup>37</sup>

Critically, these business models may ultimately allow the organizations to

33. *A Better Way to Finance Social Enterprise*, Bruce Kogut, Columbia Business School: Public Offering, <https://www4.gsb.columbia.edu/publicoffering/post/5162/A+Better+Way+to+Finance+Social+Enterprise> (last visited March 7, 2012).

34. See *supra* Part I (discussing the Ghana Sustainable Aid Project).

35. See *supra* Part II.A (discussing PODER).

36. Interview with Hannah Davis, *supra* note 1. See also *Portable Internet Café*, Ghana Sustainable Aid Project, <http://ghanasustainableaid.org/GHANA/projects/cafe.html> (last visited March 2, 2012).

37. *Open Capital Advisors*, *supra* note 11.



generate a profit. A number of organizations return the profit to organizational programming, as Digital Divide Data does. Others may not.<sup>38</sup>

A distinction can also be drawn here between social enterprises and traditional non-profits. Traditional non-profits may engage in business-like functions targeted toward raising revenue. These efforts do not make that non-profit organization a social enterprise, however, because they do not directly further the non-profit's core charitable mission. While Save the Children distributes a holiday gift catalog, the catalog functions more as a revenue-generating arm than as a business that itself furthers the non-profit's core charitable mission: saving the lives of vulnerable and exploited children.<sup>39</sup> PODER's business of investigating corporate abuses for its paying clients is central to its model and its mission of holding corporations in Latin America accountable. Save the Children's holiday catalog is a valuable fundraising tool, but not an example of social enterprise: selling holiday gifts does not, in and of itself, further the organization's charitable mission.

The functional relationship between the business and the core mission distinguishes social enterprises from traditional charities. If the business exists solely to provide funding to the organization, then it is not a social enterprise. However, if the business is essential to solving the problem that the organization aims to tackle, then it could be considered a social enterprise. To put it another way, if the organization would be an entirely different entity without its business, as with PODER, then it could be considered a social enterprise.

### C. *Distinguishing Social Enterprise from Traditional Non-Profit Organizations and For-Profit Businesses*

Social enterprise marks an evolution of organizational behavior and purpose. Its innovative characteristics also make social enterprise a poor fit in traditional non-profit and for-profit corporate structures.

#### 1. *Shortcomings of Traditional For-Profit Forms*

Traditional for-profit legal forms, such as the C corporation and the limited

38. See, e.g., Nicole Perloth, *NonProfit CouchSurfing Raises Millions in Funding*, FORBES (Aug. 24, 2011, 9:51 PM), <http://www.forbes.com/sites/nicoleperloth/2011/08/24/non-profit-couchsurfing-raises-millions-in-funding/> (explaining that by accepting venture capital, CouchSurfing now has an additional obligation to repay its investors).

39. *Compare Soft and Huggable Plush Donkey*, SAVE THE CHILDREN, <http://gift.savethechildren.org/c.dvKSIBOSIIJcH/b.6885593/site/apps/ka/ec/product.asp?c=dvKSIBOSIIJcH&b=6885593&en=jkINJ1NOLJSL1MNKIITI1MOJkL3LioZLq11KbMQIkLYI6NRKsKbE&ProductID=951341> (last visited April 4, 2012), with *What We Do*, SAVE THE CHILDREN, [http://www.savethechildren.org/site/c.8rKLIXMGIpI4E/b.6146357/k.2755/What\\_We\\_Do.htm](http://www.savethechildren.org/site/c.8rKLIXMGIpI4E/b.6146357/k.2755/What_We_Do.htm) (last visited Oct. 15, 2011) (indicating the Save the Children donkey supports the organization by raising money but has nothing to do with the actual mission of the organization: "serving impoverished, marginalized and vulnerable children and families").

liability company (LLC),<sup>40</sup> fall short of satisfying the needs of a social enterprise by providing little guidance as to how to manage unique governance challenges<sup>41</sup> as well as by restricting access to donations and foundation dollars. Social enterprises incorporated as for-profits cannot receive tax-exempt donations.<sup>42</sup> Social enterprises that incorporate as for-profits struggle to counter the perception that they exist purely to make money.<sup>43</sup> Although permitted to do so, foundations rarely make grants to businesses.<sup>44</sup> Foundations must fulfill extensive “expenditure responsibility requirements” to ensure that a for-profit recipient uses the loans, grants, or equity investments exclusively for the investment purpose specified by the foundation.<sup>45</sup> Failure to ensure the charitable use of foundation dollars could jeopardize the foundation’s tax-exempt status.<sup>46</sup>

These limitations are already affecting the forms adopted by social enterprises. IDEO, a leading design and innovation consulting firm, has partnered with foundations extensively in the past, but recently spun off its social sector consulting services into a non-profit.<sup>47</sup> One of the main reasons IDEO chose to do so was that its for-profit form prevented it from accessing foundation dollars that would support its socially-oriented projects.<sup>48</sup> For the Ghana Sustainable Aid Project, the ability to receive donations could be critical for subsidizing its Internet café and public toilet prices for the poorest villagers.<sup>49</sup> Incorporating as a business could force it to forego that valuable capital.

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40. A C corporation is a corporate form common among major companies. It derives its name from the fact that it is taxed under Subchapter C, Section 1 of the Internal Revenue Code. I.R.C. § 11 (2010). A limited liability company is a corporate form that provides limited liability for directors, which is a key feature of the C corporation, but is typically taxed as a partnership. *See, e.g., Forming a Limited Liability Corporation in NY*, New York Department of State, Division of Corporations, State Records and UCC, <http://www.dos.state.ny.us/corps/llcguide.html> (last visited March 2, 2012).

41. Dana Brakman Reiser, *Blended Enterprise and the Dual Mission Dilemma*, 35 VT. L. REV. 105, 106-07 (2010). *See also* ROGER SPEAR, CHRIS CORNFORTH & MIKE AITKEN, *SOCIAL ENTERPRISE COALITION, FOR LOVE AND MONEY: GOVERNANCE AND SOCIAL ENTERPRISE* 9 (2007).

42. I.R.C. §170(a), (c) (2010) (limiting deductibility to gifts made to organizations in which net earnings do not inure to the benefit of private individuals. This limitation effectively precludes deductions for donations to for-profits given the role of shareholders.).

43. *See* Elizabeth Schmidt, *Vermont’s Social Hybrid Pioneers: Early Observations and Questions to Ponder*, 35 VT. L. REV. 163, 181 (2010) (citing Robert Hart’s statement about his difficulty in securing venture financing). It is commonly asserted that for-profits must maximize profit and cannot act in furtherance of a social mission.

44. *Id.* at 167 (listing the reasons for the lack of PRI funding by foundations).

45. *Terms of Program-Related Investments*, I.R.S., <http://www.irs.gov/charities/foundations/article/0,,id=137617,00.html> (last visited March 11, 2012).

46. *Program-Related Investments*, I.R.S., <http://www.irs.gov/charities/foundations/article/0,,id=137793,00.html> (last visited Jan. 12, 2012).

47. Aaron Hurst, *What IDEO Can Learn From Bridgespan*, HUFFINGTON POST (March 10, 2011), [http://www.huffingtonpost.com/aaron-hurst/what-ideoorg-can-learn-fr\\_b\\_833701.html](http://www.huffingtonpost.com/aaron-hurst/what-ideoorg-can-learn-fr_b_833701.html).

48. *Id.*

49. Interview with Hannah Davis, *supra* note 1.

## 2. Shortcomings of Traditional Non-Profit Forms

The non-profit form carefully protects the charitable character of an organization's assets and ensures they are used for the public interest.<sup>50</sup> However, this protection comes at a cost, as the non-profit form precludes social enterprises from obtaining funding from investors seeking equity stakes.<sup>51</sup> This protection also fails to address the unique governance challenges that exist when a non-profit aims to solve a social problem using business models. For example, how should a social enterprise choose whether to close a factory or run it at a loss? How should the competing interests of employees, the organization, and others be balanced? Although a non-profit may manage its interests through contract law, a properly developed legal form would provide consistency.

Non-profit organizations are governed by two distinct bodies of law: state law and federal tax law. I will focus on federal tax law, as the requirements it lays out significantly affect all non-profits based in the United States. Organizations that apply for tax-exempt status under § 501(c)(3) of the Internal Revenue Code, as PODER has done,<sup>52</sup> must satisfy two chief requirements to obtain and maintain their tax-exempt status. First, they must be organized and operated exclusively for one of the exempt purposes listed in § 501(c)(3).<sup>53</sup> To be organized exclusively for an exempt purpose, the organization's articles of incorporation must expressly limit its mission to an enumerated exempt purpose and must permanently dedicate its assets to an exempt purpose in case of dissolution.<sup>54</sup> An organization operates exclusively for an exempt purpose only if its activities exist primarily to accomplish its charitable mission. In other words, if an activity unrelated to the mission is found to constitute a substantial organizational activity, then the organization does not pass the "operational test."<sup>55</sup> Second, the organization's earnings cannot "inure" to the benefit of an individual. Although charitable organizations can pay their employees a salary, they cannot pay out dividends, or otherwise distribute their earnings to

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50. See, e.g., *Compliance Guide for 501(c)(3) Public Charities*, I.R.S., 2, <http://www.irs.gov/pub/irs-pdf/p4221pc.pdf> (last visited Jan. 12, 2012).

51. See Reiser, *supra* note 41, at 106 ("Charitable forms are inhospitable because although the law certainly permits charities to earn profits, it bars charities from distributing those profits. Entrepreneurs wishing to blend equity finance and social goals must look elsewhere.")

52. Interview with Ben Cokelet, *supra* note 25.

53. Treas. Reg. § 1.501(c)(3)-1 (2008). Exempt purposes listed in I.R.C. § 501(c)(3) include: charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, and preventing cruelty to animals. See also Treas. Reg. § 1.501(c)(3)-1(d) (2008). The regulations enumerate the following specific "charitable" purposes: relieving the poor and distressed or the underprivileged; advancement of religion; advancement of education or science; erecting or maintaining public buildings, monuments or works; lessening the burdens of government; lessening neighborhood tensions; eliminating prejudice and discrimination; defending human and civil rights secured by law; and combating community deterioration and juvenile delinquency. Treas. Reg. § 1.501(c)(3)-1(d)(2) (2008).

54. Treas. Reg. § 1.501(c)(3)-1(b)(1), (4) (2008).

55. Treas. Reg. § 1.501(c)(3)-1(c) (2008).

individuals as a corporation would make distributions to shareholders. Private individuals are not permitted to receive either a share of earnings during an organization's life or assets upon dissolution.<sup>56</sup>

The requirements that a non-profit dedicate all its assets upon dissolution to an exempt purpose and that those assets not inure to the benefit of individuals pose particular problems for social enterprises. Both requirements may be desirable for social investors concerned that business interests will trump the organization's social mission because they assure grants and donations will be locked into a charitable purpose and not siphoned off as profit. However, this limits a social enterprise's ability to restructure and attract investors who want to participate in the business gains upon dissolution.<sup>57</sup> Thus, the inurement prohibition and dissolution requirement fail to address the third and fourth characteristics of a social enterprise—the abilities to meet the needs of diverse investors and to meet unique governance challenges.

#### *D. Delving into the Definition: Exploring the Second Two Characteristics of Social Enterprise*

##### *1. Social Enterprises Can and Do Pursue Diverse Financing Opportunities*

Once a social enterprise establishes itself, if it is successful as a business, the revenue it generates will cover its costs. The challenge, therefore, lies in financing its startup and growth phases.<sup>58</sup> For this reason, literature on social enterprise stresses the importance of financial flexibility and improved access to capital.<sup>59</sup> Financial flexibility exists where a menu of funding opportunities are available to social enterprises. For example, donors and foundations could provide a blend of grants and investments.<sup>60</sup> Another opportunity might be “impact investing,” practiced by a growing group of investors who seek a social return first and foremost.<sup>61</sup> Other funding sources include traditional financing

56. I.R.C. § 501(c)(3) (2010); Treas. Reg. § 1.501(c)(3)-1(c)(2) (2008).

57. See Jim Fruchterman, *For Love or Lucre*, STAN. SOC. INNOV. REV., Spring 2011, at 46.

58. See *A Financing Gap*, ECHOING GREEN, *supra* note 21 (detailing the path to becoming an established enterprise and the difficulty of obtaining funding in the “startup” and “expansion” phases).

59. See YUNUS, *supra* note 29, at 170–71 (describing the importance of finding flexible means of financing a yogurt-selling social enterprise).

60. See, e.g., *Approach*, OMIDYAR NETWORK, <http://www.omidyar.com/approach> (last visited May 27, 2012) (describing Omidyar's dual strategy of investments in for-profit companies and grants to non-profit organizations).

61. Impact investing reflects an emerging concept in the world of finance where social and financial impacts are evaluated simultaneously. Investor Brian Dunn has developed a new matrix to describe how socially conscious investors might make decisions. Dunn's matrix extends modern portfolio theory's risk-return model to embrace a third dimension: social impact. Dunn argues that “[s]ince humans are not motivated by financial considerations alone, we find that the ‘new efficient frontier’ provides a useful mechanism for evaluating portfolios that are truly optimal for real-life investors.” Brian Dunn, *Modern Portfolio Theory – With a Twist*, Aquillian Investments,

alternatives, such as banks, early stage investors, venture capitalists, government, and community development financial institutions.

Traditional forms do not allow social enterprises to tap all of these potential pools of capital. Instead, these restrictive forms hamper the ability of social enterprises to obtain financing in the startup and growth stages and consequently limit their potential impact.

## 2. *Social Enterprises Face Unique Governance Challenges in Balancing the Interests of Donors With Investors With Diverse Motives*

Social enterprises face a number of distinct governance challenges that may be grouped into two broad categories: internal and external.

Internally, social enterprises must balance the potentially conflicting goals of mission and profit as they make everyday business decisions.<sup>62</sup> What prevents a social enterprise, privately owned in whole or in part, from becoming purely profit-motivated?<sup>63</sup> This point is salient where a social enterprise receives donations or tax benefits on the grounds that the organization operates for a charitable purpose, not to turn a profit. The internal challenge also confronts founders who want to ensure that their organizations' missions cannot be eliminated by new leadership or by pressure from investors seeking to make a business more profitable at the expense of the mission. Non-profit law addresses this governance challenge by barring private benefit altogether.<sup>64</sup> However, many now see this solution as wholly unsatisfactory.<sup>65</sup> Although traditional businesses also face governance challenges when balancing the interests of shareholders, stakeholders, and creditors, the law has developed rules and standards for managing such situations.<sup>66</sup> However, questions persist as to how these corporate rules and standards apply to social enterprises with a specific social mission.<sup>67</sup>

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Inc., available at

<http://americansforcommunitydevelopment.org/downloads/NewEfficientFrontier.pdf> (last visited March 2, 2012). This theory parallels Nobel Laureate and social business advocate Mohammad Yunus's assertion that humans are multi-dimensional beings who inherently seek more than just profit. YUNUS, *supra* note 29, at 86.

62. *The Social and Commercial Two-Step*, *supra* note 15.

63. See generally Suzie Sosa, *Mission and Money: A Dangerous Mix*, INC.COM (November 15, 2010), <http://www.inc.com/article/2010/11/social-entrepreneurs-hybrid-organizations.html>. See also Stephanie Strom, *Hybrid Model for Non-profits Hits Snags*, N.Y. TIMES (October 25, 2010), <http://www.nytimes.com/2010/10/26/business/26hybrid.html>. These articles correctly describe the challenges hybrid organizations face but improperly suggest hybrids cannot exist.

64. I.R.C. §501(c)(3) (2010); Treas. Reg. 1.501(c)(3)-1(c)(2) (2008).

65. See *supra* Part II.C.2.

66. See, e.g., REINIER KRAAKMAN, *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* (2009) at 2 (noting the role of the corporate form in facilitating cooperation among participants and thereby reducing transaction costs).

67. See, e.g., Allen Bromberger, "Social Enterprise: A Lawyer's Perspective," Perlman and Perlman LLP (2007), available at <http://www.alissamickels.com/BrombergerSE.pdf> (last visited April 13, 2012) at 5 (discussing the challenges of using the for-profit form for social enterprise);

The second governance challenge occurs when social enterprises seek to bring funders with different interests to the same table, including traditional profit-oriented investors, social investors, and donors.<sup>68</sup> While the first challenge is internal to the organization and relates to internal decision-making processes, the external challenge involves complex relationship management with individuals who fund the organization. Each source of financing has its own set of requirements. When tapping diverse pools of capital, social enterprises become obligated to multiple stakeholders, including those who may have conflicting interests. Additionally, founders of social enterprises have wanted to explore the possibility of equity distribution to attract investors and increase the organization's capital.<sup>69</sup> A financial structure that involves traditional investors seeking a market rate of return, impact investors, and donors creates a number of issues. How should the competing needs of market investors and social investors be balanced? How should social investors be assured that business revenue is retained for accomplishment of the social mission? And how can investors be assured that the mission will be maintained after a change in ownership?

The critical point to note here is that the uniqueness of the governance challenges lies in the blend of business and charity. These can be two competing interests, and they complicate the governance challenges that organizations struggle with on a daily basis. There is a corollary challenge of ensuring that money donors and investors provide for the purpose of accomplishing a charitable mission is in fact used for charitable purposes.<sup>70</sup>

Hannah Davis and the Ghana Sustainable Aid Project exemplify the unique governance challenges facing social enterprises.<sup>71</sup> For Davis, any business she establishes will exist solely for the purpose of rural development. She expects any revenue to be reinvested in projects that help the community develop.<sup>72</sup> Suppose Davis does not tap into external funding. She still faces significant governance challenges. For example, what will happen in the event that pressure builds—either internally (from the project's managers) or externally (from

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Robert A. Wexler and David A. Levitt, "Using New Hybrid Legal Forms: Three Case Studies, Four Important Questions, and a Bunch of Analysis," 69 *The Exempt Organization Tax Review* 63, 74 (January 2012) ("While directors in a traditional corporation clearly have some leeway under the business judgment rule, it is not clear how far they could go in pursuing activities that might be deemed to jeopardize profits.").

68. Timothy Ogden, "Social Entrepreneurship Success Raises Thorny Questions," *HARVARD BUSINESS REVIEW BLOG NETWORK* (August 30, 2010), [http://blogs.hbr.org/cs/2010/08/social\\_entrepreneurship\\_success\\_raises\\_thorny\\_questions.html](http://blogs.hbr.org/cs/2010/08/social_entrepreneurship_success_raises_thorny_questions.html) (last visited April 12, 2012) (addressing the challenges of a structure that takes donor and investor capital).

69. See BILLITTERI, *supra* note 15, at 15 (citing Robert D. Lang); Fruchterman, *supra* note 57, at 45.

70. See *infra* Part III.C (discussing the concept of the "asset lock" in greater detail). One possible solution to this challenge is the use of contracts and contract law. See Allen M. Bromberger, *A New Type of Hybrid*, *STAN. SOC. INNOVATION REV.* 50–51 (Spring 2011).

71. Interview with Hannah Davis, *supra* note 1.

72. *Id.*

fundings)—to generate greater profits at the expense of the quality of the programs? This is a distinctive governance challenge that a new legal form for social enterprise must address.

### III.

#### EMERGING LEGAL FORMS: A STEP IN THE RIGHT DIRECTION BUT NOT A MATCH FOR SOCIAL ENTERPRISE

The form of the social enterprise should be a tool that enhances, not constrains, its purpose and business model.<sup>73</sup> In pursuit of a better tool, social entrepreneurs are beginning to advocate for laws and policies that let social enterprises multiply and grow.<sup>74</sup> This section will show how three new legal forms—the Low-profit Limited Liability Company (L3C), the Benefit Corporation, and the Community Interest Company—have made significant strides for social enterprises upon which further progress can be built.

##### *A. Low-profit Limited Liability Company (L3C)*

The L3C is a variation of the limited liability company and is treated as such for tax purposes.<sup>75</sup> It is a for-profit organization and cannot receive tax-exempt status from the IRS.<sup>76</sup> The L3C was first proposed in order to help socially-minded businesses diversify their funding sources by accessing a type of foundation grant called program-related investments (“PRIs”).<sup>77</sup> PRIs are loans to or equity investments in either non-profits or for-profits for a charitable purpose, through which the lender or investor foundation can earn a return as long as the pursuit of the return is incidental to the charitable purpose.<sup>78</sup> The developers of the L3C created it by combining the key features of the LLC with the IRS’ PRI requirements.<sup>79</sup> It has been adopted in nine states.<sup>80</sup> Below I assess

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73. See Fruchterman, *supra* note 57, at 42.

74. BILLITTERI, *supra* note 15, at 5; Fruchterman, *supra* note 57, at 46; YUNUS, *supra* note 29, at 177–78.

75. *What is the L3C*, AMERICANS FOR COMMUNITY DEVELOPMENT, available at <http://www.americansforcommunitydevelopment.org/downloads/What%20is%20the%20L3C%20080711-1.pdf> (last visited March 11, 2012).

76. *Id.*

77. Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, AMERICANS FOR COMMUNITY DEVELOPMENT 40–41, available at <http://www.americansforcommunitydevelopment.org/downloads/thomaskellypaper.pdf> (last visited March 11, 2012).

78. *The Concept of the L3C*, AMERICANS FOR COMMUNITY DEVELOPMENT, <http://www.americansforcommunitydevelopment.org/concept.php> (last visited March 11, 2012).

79. *Id.* Robert Lang, CEO of Fabrique Cosmetiques and Americans for Community Development, worked closely with Marcus Owens, former head of the IRS Tax-Exempt Organizations Division, to craft a flexible limited liability company that would presumptively qualify for PRIs. The final product was the L3C. Kelley, *supra* note 77, at 41.

the extent to which the L3C meets the needs of social enterprise.

### 1. *The L3C Accommodates the Social Missions of Social Enterprises*

On its face, the L3C form accommodates the social mission characteristic of social enterprises. Like non-profits, an L3C must have a clearly articulated charitable purpose that it “significantly furthers.”<sup>81</sup> The charitable purpose must be one of the enumerated charitable purposes in the Internal Revenue Code.<sup>82</sup> Additionally, “the production of income or appreciation of property” must not be a “significant purpose” of the company.<sup>83</sup>

### 2. *Financing Characteristic: Met in Theory But Not in Practice*

The appeal of the L3C lies in the potential for socially-responsible for-profits to access more diverse financing. L3Cs could receive start-up capital from for-profit investors, as well as from the government and from foundations. Proponents of the L3C form have suggested that it will also enable the tranching of capital, which could attract more diverse investors.<sup>84</sup> As an example, the government could give a grant with no expectation of a financial return, a foundation could make an investment with a small financial return, and a market investor could provide debt or equity financing with an expectation of earning a market rate of return, commensurate with the market-rate risk.<sup>85</sup> Essentially, the foundation and government dollars would subsidize the higher cost of capital for a social enterprise to enable market investors to receive a standard market rate of return. Advocates argue that this would open up more capital for social enterprises as reluctant market investors would be enticed to invest.<sup>86</sup>

For example, if it were organized as an L3C, the Ghana Sustainable Aid Project could support its Internet café with a grant from a multinational organization, a PRI from a foundation, and a traditional profit-seeking investment. The grant and foundation investments would provide funding to the

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80. The states are: Illinois, Louisiana, Maine, Michigan, North Carolina, Rhode Island, Utah, Vermont, and Wyoming. It has also been adopted by the Crow Indian Nation of Montana and the Oglala Sioux Tribe. *Laws*, AMERICANS FOR COMMUNITY DEVELOPMENT, <http://www.americansforcommunitydevelopment.org/laws.php> (last visited March 11, 2012).

81. *See, e.g.*, VT. STAT. ANN. tit. 11, § 3001(27)(A).

82. *See, e.g.*, VT. STAT. ANN. tit. 11, § 3001(27)(A)(i).

83. *See, e.g.*, 26 U.S.C. § 4944(c) (2006); VT. STAT. ANN. tit. 11, § 3001(27)(B). As a variety of limited liability company, the L3C presumably satisfies the sophisticated business model characteristic because it will not be a non-profit able to fund its operations solely through grants. It faces the constraints of a typical business and must generate enough revenues to cover its costs and must also pay taxes. *See Kelley, supra* note 77; Schmidt, *supra* note 43.

84. Marc J. Lane, *The L3C: Social Enterprise's Powerful, New Capital Formation Tool* 18–20 (2009), [www.marcjlane.com/clientuploads/PDFs/L3C\\_01-27-09.pdf](http://www.marcjlane.com/clientuploads/PDFs/L3C_01-27-09.pdf). The term ‘tranching’ refers to the slicing up of capital based on risk levels. For example, an L3C’s debt could be sliced so that a market investor would assume less risk while a foundation would assume more risk.

85. *Id.* at 18–20.

86. *Id.*



Ghana Sustainable Aid Project without financial strings attached. Thus, a traditional investor may be more willing to inject capital because she can claim a piece of the profits that she would otherwise have to share with other investors.

However, the L3C model has yet to be endorsed by the IRS; consequently, foundations treat L3Cs as any other for-profit business.<sup>87</sup> Despite the L3C drafters' careful incorporation of PRI regulations, the IRS has refused to rule on whether L3Cs presumptively qualify for PRIs.<sup>88</sup> Thus, foundations must treat L3Cs the same as other for-profit companies. Though IRS approval is not required for a foundation to make a PRI, foundations have nevertheless been reluctant to make PRIs in L3Cs.<sup>89</sup> Foundations must still conduct a rigorous review of companies in which they might invest,<sup>90</sup> and they have no assurances that their donations will be used solely for charitable purposes.

The Knight Foundation provides an example of a foundation that has struggled to ensure the charitable use of its donor dollars. In 2007, Knight awarded a \$1.1 million grant to EveryBlock, an online news service company. The terms of the grant required that EveryBlock make its technology open-source by allowing anyone to use its code for free. Once the grant expired, the EveryBlock founders sold their company to MSNBC. According to the terms of the sale, future changes to EveryBlock's code would not be open source, and only technologies developed prior to the June 2009 sale would be accessible to the public. The Knight Foundation was not pleased that its grant ultimately did not secure open-source technology and instead had enabled the company to become desirable enough to be acquired. The Foundation stated that it would consider attaching a different accountability mechanism "in the future."<sup>91</sup>

### 3. Governance Characteristic: Unresolved Questions Remain

It is not clear that the L3C will help address the governance issues faced by social enterprises. The L3C is still so new, with the first statute going into effect in 2008, that critical questions have yet to be definitively answered. These unanswered questions include how much return investors can receive from an L3C, what level of return could put a foundation's tax-exempt status or the L3C's status at risk, and whether the L3C alters directors' fiduciary duties.

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87. See Robert Lang, *PRIs and Private Letter Rulings*, AMERICANS FOR COMMUNITY DEVELOPMENT <http://americansforcommunitydevelopment.org/supportingdownloads/PrivateLetterRulings.pdf> (last visited Jan. 30, 2010).

88. Mark Hrywna, *The L3C Status*, THE NONPROFIT TIMES (Sept. 1, 2009), <http://www.nptimes.com/09Sep/npt-090901-3.html> (citing Ron Schultz, senior technical advisor with the IRS's Tax Exempt and Government Entities Division).

89. Schmidt, *supra* note 43, at 167.

90. I.R.C. § 4944 (2010). See also *Grants by Private Foundations, Expenditure Responsibility*, I.R.S., <http://www.irs.gov/charities/foundations/article/0,,id=137613,00.html> (last visited March 11, 2012).

91. *Foundations Invest in For-Profits*, *supra* note 12, at 2.

Because of the lack of clarity inherent in the current form, the ABA Committee on Limited Liability Companies, Partnerships and Unincorporated Entities has urged states not to adopt L3C legislation.<sup>92</sup>

#### 4. *The Real Advantage: Potential Branding Benefits*

The L3C model could be advantageous to social enterprise if it creates a nationally recognized brand for socially-responsible businesses. The social entrepreneurship sector faces a dilemma in that few members of the public know what a social enterprise is.<sup>93</sup> The general public understands traditional charity, as well as for-profit business, but does not yet fully understand companies that balance both financial and social gain. If the L3C becomes an accepted model for hybrid organizations, then it could make it easier for social entrepreneurs to explain their organizations to the public. For example, if incorporated as an L3C, Davis's Ghana Sustainable Aid Project could be recognized nationally for what it is: a hybrid non-profit/for-profit organization. Regardless of whether the L3C form is the right one for social entrepreneurs, it could provide a form for the public to identify easily.

#### B. *Benefit Corporation*

Whereas the L3C is a derivation of the LLC, the Benefit Corporation is a variation of the C Corporation and is treated as such for tax purposes.<sup>94</sup> It is a for-profit organization and cannot receive tax-exempt status from the IRS.<sup>95</sup> First adopted in Maryland in April 2010,<sup>96</sup> Benefit Corporation legislation has since been passed in seven other states: California, Hawaii, Maryland, New Jersey, New York, Vermont, and Virginia.<sup>97</sup> My analysis will focus on the Maryland law, which was the first benefit corporation law passed.

Proponents claim that the Benefit Corporation form encourages corporations to pursue environmental and social benefits as well as profit. They argue that corporate law has historically required corporations to maximize shareholder value and does not permit consideration of other stakeholders, such as the

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92. *Resolution of the ABA Committee on Limited Liability Companies, Partnerships and Unincorporated Entities, Section of Business Law*, AMERICAN BAR ASSOCIATION (FEB. 7, 2010), [http://meetings.abanet.org/webupload/commupload/RP519000/relatedresources/ABA\\_LLC\\_Committee-L3C\\_Resolution\\_and\\_explanation-2-17-10.pdf](http://meetings.abanet.org/webupload/commupload/RP519000/relatedresources/ABA_LLC_Committee-L3C_Resolution_and_explanation-2-17-10.pdf) (last visited Jan. 14, 2012).

93. See Billitteri, *supra* note 15, at 9–10.

94. A C corporation is a business with a taxpaying identity independent of its owners, and it derives its name from the governing subchapter of the tax code: subchapter C. I.R.C. §§301-391.

95. See, e.g., Md. Code Ann., [Corps. & Ass'ns] § 5-6C-01. See also Corporations, I.R.S., <http://www.irs.gov/businesses/small/article/0,,id=98240,00.html> (last visited April 15, 2012).

96. *Maryland First State in the Union to Pass Benefit Corporation Legislation*, THE CORPORATE SOCIAL RESPONSIBILITY NEWSWIRE (April 14, 2010), [http://www.csrwire.com/press\\_releases/29332-Maryland-First-State-in-Union-to-Pass-Benefit-Corporation-Legislation](http://www.csrwire.com/press_releases/29332-Maryland-First-State-in-Union-to-Pass-Benefit-Corporation-Legislation).

97. State-by-state Legislative Status, BENEFIT CORP. INFORMATION CENTER, <http://www.benefitcorp.net/state-by-state-legislative-status> (last visited Mar. 29, 2012).

employees, affected communities, and the environment.<sup>98</sup> While many disagree with this understanding of corporate law,<sup>99</sup> it has resonated with legislators and Benefit Corporation advocates, and it serves as a major reason these forms have been enacted in six states.<sup>100</sup>

Under Maryland law, Benefit Corporations differ from C Corporations in that their purpose is to achieve a general public benefit, and directors are required to consider the impact of business decisions on the environment, customers, communities, and employees among others.<sup>101</sup> The law provides that the creation of general or specific public benefits is in the best interests of the corporation.<sup>102</sup> The law defines a general public benefit as “a material, positive impact on society and the environment, as measured by a third-party standard.”<sup>103</sup> The law states that the company must have a material, positive impact through a combination of any of the following activities:

[P]roviding individuals or communities with beneficial products or services; promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business; preserving the environment; improving human health; promoting the arts, sciences, or advancement of knowledge; increasing the flow of capital to organizations with a public benefit purpose; or the accomplishment of any other particular benefit for society or the environment.<sup>104</sup>

The new Benefit Corporation is often confused with the Certified B Corporation because they are similar in name and purpose. The non-profit organization B Lab, which also created the Certified B Corporation, worked with an attorney from the law firm Drinker Biddle to draft the Benefit Corporation

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98. See Md. Code Ann., [Corps. & Ass'ns] § 5-6C-07(a)(1).

99. See, e.g., *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (“Although such considerations [of non-stockholder corporate constituencies and 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.”); Stephen M. Bainbridge, *The Bishops and the Corporate Stakeholder Debate*, 4 VILL. J.L. & INV. MAN. 3, 25 (2002) (“Current law in fact allows boards of directors substantial discretion to consider the impact of their decisions on interests other than shareholder wealth maximization. This discretion, however, exists not as the outcome of conscious social policy but rather as an unintended consequence of the business judgment rule.”).

100. See, e.g., Tim Fernholz, *New California Law will Boost Social Entrepreneurship*, GOOD (Aug. 30, 2011), <http://www.good.is/post/new-california-law-will-boost-businesses-mixing-profit-with-social-good/>; *Maryland First State in the Union to Pass Benefit Corporation Legislation*, THE CORPORATE SOCIAL RESPONSIBILITY NEWSWIRE (April 14, 2010), [http://www.csrwire.com/press\\_releases/29332-Maryland-First-State-in-Union-to-Pass-Benefit-Corporation-Legislation](http://www.csrwire.com/press_releases/29332-Maryland-First-State-in-Union-to-Pass-Benefit-Corporation-Legislation) (quoting Maryland State Senator Jamie B. Raskin, sponsor of the Maryland legislation, “We are giving companies a way to do good and do well at the same time. The benefit corporations will tie public and private purposes together.”).

101. Md. Code Ann., [Corps. & Ass'ns] § 5-6C-07.

102. *Id.* at § 5-6C-06(c).

103. *Id.* at § 5-6C-01(c).

104. *Id.* at § 5-6C-01(d).

legislation.<sup>105</sup> B Lab's certification and the new legal form may have been created for the same purpose—to facilitate the growth of socially responsible businesses—but in the eyes of the law, they are two very different forms. A Certified B Corporation (hereinafter referred to as “B Corps” or a “B Corporation”) is a label given by B Lab to businesses that pass a socially responsible certification process.<sup>106</sup> B Corps is not a legal form and has no legal significance. The various states' laws require that Benefit Corporations assess their performance using a third party standard. While B Corps is a standard that companies may use to assess themselves, the laws do not require that that standard be used.<sup>107</sup>

To its credit, the passage of Benefit Corporation legislation in seven states has generated interest in socially responsible business.<sup>108</sup> However, when analyzed relative to the four characteristics of social enterprise, the Benefit Corporation falls short in some key respects. It has the potential to solve the branding challenges social enterprises face. It also provides a legislative stamp of approval to directors seeking to make business decisions that promote environmental or social purposes but fear lawsuits from shareholders who disagree with the socially-conscious decisions. However, the Benefit Corporation does not fully accommodate the characteristics of social enterprises laid out above, and therefore ultimately does not satisfy the needs of a social enterprise.

### 1. *Benefit Corporations Permit But Do Not Require a Social Mission*

Social enterprises, as defined in this article, advance a particular social mission. Benefit Corporations, however, are permitted but not required to have a specific social mission.<sup>109</sup> Unlike social enterprises with specific social goals, such as the Ghana Sustainable Aid Project, Benefit Corporations are only required to have a general public benefit purpose while also seeking a profit. In other words, they are only required to be socially responsible businesses, broadly defined.

Small Dog Electronics, a Vermont-based corporation, is an example of such

105. *Maryland Benefit Corporation*, NonProfitLaw Blog, <http://www.nonprofitlawblog.com/home/2010/05/marylands-benefit-corporation.html> (last visited March 11, 2012).

106. *What is a B Corp?* Certified B Corporation, <http://www.bcorporation.net/about> (last visited April 15, 2012).

107. Md. Code Ann., [Corps. & Ass'ns] § 5-6C-08(a)(2).

108. *See, e.g., Hannah Roeyer, Benefit Corporations Show California What Good Business Looks Like*, Rainforest Action Network, <http://understory.ran.org/2012/01/17/benefit-corporations-show-california-what-good-business-looks-like/> (last visited March 11, 2012).

109. I base this argument on the legislative language that distinguishes between the mandatory general public benefit and the optional specific social purpose. The language of the laws suggests that a general public benefit can remain ambiguous with no stated social mission—a broad commitment to doing good suffices. A statement of a specific social purpose is optional, per the legislative language. *See* Md. Code Ann., [Corps. & Ass'ns] § 5-6C-07.

a socially responsible business that might qualify as a Benefit Corporation but not as a social enterprise. Small Dog's founder told *Bloomberg Business Week* that he would consider incorporating as a Benefit Corporation if legislation pending in Vermont is passed. Small Dog, an Apple reseller that also operates electronic-waste recycling programs, pays 90 percent of its workers' health insurance premiums and matches its customers' donations to charities.<sup>110</sup> While commendable, these practices do not qualify Small Dog as a social enterprise. Small Dog's commitment to the environment, its employees, and charities exemplify a socially responsible business that recognizes its potential to have a positive impact on the world. I submit, however, that unlike the Ghana Sustainable Aid Project, whose stated purpose is to help end poverty in a Ghanaian village, Small Dog's stated purpose is to resell Apple products. One's business endeavors exist to support its social mission. The other's social endeavors exist to support and enhance its business purpose.

The Benefit Corporation allows for a specific social mission, but does not require it.<sup>111</sup> Significantly, this fails to distinguish between a business that chooses to be generally socially responsible and a business that binds itself to a specific social mission. Under the Benefit Corporation umbrella, they are one and the same, when in reality, they are quite distinct.

## 2. *The Financing Flexibility Characteristic: Benefit Corporations May Muddle the Issue*

As a derivation of the C corporation, the Benefit Corporation accommodates the second characteristic of a social enterprise—allowing for sophisticated business models that are typically associated with traditional for-profit enterprise. Moreover, on its face, the Benefit Corporation form satisfies the social enterprise's goal of attracting diverse sources of capital. A Benefit Corporation can issue equity and secure debt financing, pursuant to general corporate law. It can also receive PRIs, although a Benefit Corporation still faces the same challenges and requirements as an L3C seeking foundation dollars.<sup>112</sup> Investors and owners will be assured that the corporation is socially responsible because it is required by law to report on whether it is promoting a general public benefit and any specific benefit it has designated.<sup>113</sup> For those corporations that commit to a specific public benefit in their articles of incorporation, the reporting requirements would also assure investors and donors

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110. John Tozzi, *New Legal Protections for Social Entrepreneurs*, BLOOMBERG BUSINESS WEEK (April 22, 2010), [http://www.businessweek.com/smallbiz/content/apr2010/sb20100421\\_414362.htm](http://www.businessweek.com/smallbiz/content/apr2010/sb20100421_414362.htm).

111. MD. CODE ANN., CORPS. & ASS'NS § 5-6C-06(b)(1) (2011). ("The charter of a benefit corporation may identify as one of the purposes of the benefit corporation the creation of one or more specific public benefits.")

112. See *supra* Part III.A.2 (discussing financing challenges faced by L3Cs).

113. MD. CODE ANN., CORPS. & ASS'NS § 5-6C-08.

that the Benefit Corporations are pursuing it.<sup>114</sup>

However, the Benefit Corporation form satisfies the financing flexibility goal only on its face; significant unresolved governance issues compromise its effectiveness. It remains to be seen whether the governance ambiguities deter investors and donors from providing capital to Benefit Corporations.

### 3. *The Governance Characteristic: Minimal Mission Protection and Unresolved Conflicts*

As discussed in Part I, social enterprises face two primary governance challenges: internal and external. The internal challenge relates to how the organization adheres to its mission while conducting a sophisticated revenue-generating business. The external challenge relates to the difficulty of balancing the competing interests of the donors and investors who provide capital to the business.

The first issue is particularly relevant not only for major decisions involving conflicts between the mission and the money, such as a manager deciding, during an economic downturn, whether to cut health benefits or run an unprofitable business. The issue also affects seemingly minor business decisions. Taking the Ghana Sustainable Aid Project as an example, suppose Davis's Internet café generates significant profits. Should Davis use the money to expand into other villages, increase the salaries of her employees, or pay dividends to investors? The Benefit Corporation addresses this challenge by shielding directors from liability where they make business decisions based on social impact as well as profit maximization.<sup>115</sup> The law protects directors who make socially or environmentally beneficial decisions that have neutral or even negative effects on the bottom line. As touted by advocates of the form, the Benefit Corporation empowers directors to consider social goals, even where they may not be profitable.<sup>116</sup> The rationale for the liability shield is that, under the traditional corporate form, directors can potentially be sued by shareholders if they make decisions that do not maximize shareholder profit.<sup>117</sup>

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114. *Id.* at § 5-6C-08(a)(1)(ii).

115. MD. CODE ANN., CORPS. & ASS'NS § 5-6C-07.

116. *Certified B Corporation*, B LAB, <http://www.bcorporation.net/resources/bcorp/documents/Benefit%20Corporation%20-%20Legal%20FAQs.doc> (last visited Jan. 12, 2012).

117. *Legal FAQs*, Benefit Corp Information Center, <http://www.benefitcorp.net/for-attorneys/legal-faqs> (last visited March 11, 2012). However, a shareholder will not necessarily prevail. Courts have held in favor of directors where they find decisions were made in the long-term best interests of the corporation, even if they did not maximize shareholder return in the short-term. *See, e.g., Shlensky v. Wrigley*, 237 N.E.2d 776, 780 (Ill. App. 1968). In *Shlensky*, the court affirmed the dismissal of a complaint filed by a minority shareholder of the Chicago Cubs against the corporation that owned the team over the corporation's refusal to install lights at Wrigley Field. The court reasoned: "[I]t appears to us that the effect on the surrounding neighborhood might well be considered by a director who was considering the patrons who would or would not attend the games if the park were in a poor neighborhood. Furthermore, the long run interest of the corporation in its property value at Wrigley Field might demand all efforts to keep

While helpful in encouraging socially-conscious business decisions by protecting directors, the statute provides little protection for the mission itself. The broad, unchecked discretion vested in management can result in over-reaching and opportunism at the expense of social benefit.<sup>118</sup> The Benefit Corporation only provides two checks on management. First, it requires disclosure through a third-party assessment of a company's social and environmental performance as well as through the company's issuance of a public report on its progress in satisfying the general public benefit purpose.<sup>119</sup> Though certain requirements apply to the third-party standard a company must use to assess itself,<sup>120</sup> it is unclear how credible such an assessment would be as management itself conducts the assessment and produces the report. Second, while the statute grants directors immunity from liability for discharging their duties under the statute,<sup>121</sup> it does not on its face preclude the traditional right of shareholders to file lawsuits on behalf of the corporation for directors' "gross negligent misconduct."<sup>122</sup> It is unclear, however, whether a director's failure to pursue a general public benefit to a shareholder's liking will constitute gross negligent misconduct. Additionally, this analysis assumes that a shareholder will *want* to enforce the general public benefit. The Maryland legislation states that directors of Benefit Corporations have no duties towards the beneficiaries of the public benefit created,<sup>123</sup> notable in this instance because of the consequence that follows: the only people who can enforce the general public benefit are the directors and shareholders—not the beneficiaries.<sup>124</sup> Thus enforcement is left to shareholders, who may not care about the mission. If shareholders want managers to maximize profit over the public benefit, and management

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the neighborhood from deteriorating.”

118. Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 599–600 (2011).

119. MD. CODE ANN., CORPS. & ASS'NS § 5-6C-08.

120. The law requires that the assessment be designed by a third party independent of the benefit corporation and made publicly available the factors it considers when weighing the business, the relative weightings of those factors, and the identity of the people who develop and control changes to the standard. It does not require that the third party that designed the standard actually conduct the assessment. MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01(e) (2011).

121. *See* MD. CODE ANN., CORPS. & ASS'NS § 5-6C-02(a) (2011) (stating the applicability of the Maryland Corporations Code to benefit corporations); *Werbowsky v. Collomb* 362 Md. 581 (2001) (“The shareholder’s derivative action was developed in the mid-19th century as an extraordinary equitable device to enable shareholders to enforce a corporate right that the corporation failed to assert on its own behalf. That right could include the recovery of losses occasioned by self-dealing or fraudulent or grossly negligent misconduct on the part of the corporate directors or officers.”) Though the statute is not entirely clear on the applicability of corporate case law to benefit corporations here, I assume that it will be deemed applicable if the issue arises.

122. MD. CODE ANN., CORPS. & ASS'NS § 5-6C-07(c) (2011)

123. MD. CODE ANN., CORPS. & ASS'NS § 5-6C-07(b) (2011). *See also Understanding Legal*, B LAB, <http://www.bcorporation.net/become/legal> (stating that “non-shareholders are explicitly not empowered with a new right of action”).

124. MD. CODE ANN., CORPS. & ASS'NS § 5-6C-07(b) (2011).

acquiesces, it will be difficult still to prevent the corporation from doing so. Benefit Corporations, as a result, have limited bite in “solving social and environmental problems.” Furthermore, the legislation provides no guidance to courts on how to rule if directors, supported by some shareholders, make decisions that maximize profit, but are sued by other shareholders who argue that a public benefit has not been pursued. In this regard, the Benefit Corporation form does not address the question of how social enterprises can handle conflict between the pursuit of a profit and the pursuit of a mission.

Thus, from a legal and a managerial point of view, significant questions remain as to what exactly shareholders can enforce. Will managers have such broad discretion that they can justify any decision they make, regardless of whether it accomplishes a social mission?<sup>125</sup> Directors already have substantial authority to manage a firm based on what they believe to be the corporation’s best long-term interests.<sup>126</sup> Directors of a Benefit Corporation have “immunity from liability” in the “reasonable performance of duties in accordance” with the third-party standard,<sup>127</sup> yet the law provides no clarity as to what constitutes “unreasonable” performance. The extent to which an assessment using a third party standard is dispositive of whether an organization is accomplishing its general public benefit remains unclear. In addition, an annual public report and a third party review may not be enough to ensure that officers protect and accomplish the mission.<sup>128</sup> Compounding these weaknesses is the fact that Benefit Corporation laws are new. They have not been tested in courts, and the questions raised above remain unanswered.

With respect to the second governance issue, the Benefit Corporation should give pause to investors and donors. Given the vagueness of the statute’s liability immunity clause, uncertainty remains as to how a manager should balance any competing interests between social investors and for-profit investors.<sup>129</sup>

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125. Cf. Adam Winkler, *Corporate Law or the Law of Business? Stakeholders and Corporate Governance at the End of History*, 67 LAW & CONTEMP. PROBS. 109, 118 (2004) (describing potential problems with managerial entrenchment and their effect on corporate charity).

126. See *Paramount Comm’ns, Inc. v. Time, Inc.*, 571 A.2d 1140, 1150 (Del. 1990) (affirming that “directors, generally, are obliged to chart a course for a corporation which is in its best interests without regard to a fixed investment horizon.”).

127. Md. Code Ann., Corps. & Ass’ns § 5-6C-07(c) (2011).

128. See Reiser, *supra* note 118, at 617 (“The delegation to third-party standard-setters to vet this public benefit and the lack of a statutory floor for what counts as public benefit make low standards and greenwashing particular concerns for the benefit corporation.”).

129. Two other potential problems are also noteworthy. First, Maryland statute § 5-6C does not provide a framework to guide benefit corporations through fundamental changes such as mergers and control acquisitions. *Contra* S. 263, 2009 Leg., Reg. Sess. § 21.06 (Vt. 2010) (providing a framework to guide benefit corporations through merger and share exchanges). Second, the benefit corporation structure imposes a cost on organizations because of the statute’s requirement for a third-party assessment. B Lab, which first proposed the legislation to legislators in Maryland, charges licensing fees ranging from \$500 to \$25,000, depending on a corporation’s annual sales. *Make It Official*, B LAB, <http://www.bcorporation.net/become/official> (last visited May 3, 2010).



### C. Community Interest Companies

The United Kingdom established its own legal designation for social enterprise in 2005. The Community Interest Company (CIC) form “was specifically designed to provide a purpose-built legal framework and ‘brand’ identity for social enterprises that want to adopt the limited company form.”<sup>130</sup> Because U.K. and U.S. corporate law differ, the CIC is an intriguing development for U.S.-based international organizations, such as the Ghana Sustainable Aid Project, but too remote from U.S. law to be of significant use for purely domestic organizations.

Still, the CIC provides an innovative approach to the mission-protection issue. Companies that choose to register as CICs commit to an asset lock and a dividend cap.<sup>131</sup> An “asset lock” means that, upon liquidation and dissolution, the CIC can only transfer its assets to a CIC or charity, or otherwise towards the benefit of the community.<sup>132</sup> CICs are required to provide for an asset lock in their articles of association.<sup>133</sup> Additionally, the legislation imposes a dividend cap for CICs that limits the return investors and owners can receive, limiting the flexibility of CIC founders to pursue financing.<sup>134</sup> In response to pressure from investors and companies, regulators increased the cap in January 2010, allowing companies to pay higher dividend rates to investors.<sup>135</sup>

## IV.

### CONCLUSION: MAKING THE CASE

At this point, identifying a solution to this vexing structure issue would be premature. Our understanding of social enterprise thus far has been so vague and fractured that commentators and practitioners struggle to identify exactly why a new legal form is needed. Before a new legal form can be molded to fit social enterprise, a better understanding of the characteristics of social enterprise must

130. Sara Burgess, *Information Pack: Community Interest Companies*, REGULATOR OF COMMUNITY INTEREST COMPANIES, 38 (March 2010), <http://www.bis.gov.uk/assets/bispartners/cicregulator/docs/leaflets/10-1387-community-interest-companies-information-pack>.

131. *See id.* at 22, 26 (describing two requirements to register as a CIC).

132. *See id.* at 22–23 (explaining that a transfer of assets must meet one of a number of requirements or otherwise be made for the benefit of the community).

133. *Id.* at 23.

134. *Id.* at 26. The information pack also contains detailed restrictions on the capital structure of the CIC.

135. *See* David Ainsworth, *Payment Cap Lifted for Community Interest Companies*, THIRD SECTOR ONLINE (Jan. 6, 2010), <http://www.thirdsector.co.uk/News/DailyBulletin/975996/Payment-cap-lifted-community-interest-companies/407552A7FBE5AAD8AD19A1311447F699/?DCMP=EMC-DailyBulletin>. *See also* Paul Jump, *CIC Caps Unpopular, Consultation Reveals*, THIRD SECTOR ONLINE (Oct. 20, 2009), <http://www.thirdsector.co.uk/news/archive/946370/CIC-caps-unpopular-consultation-reveals/?DCMP=ILC-SEARCH> (reporting that the majority of social investors thought the CIC dividend caps for return to investors to be too low).

be established. In fact, the weaknesses of the emerging forms for social enterprise can be traced in part to the fact that they were designed without a solid grounding in the legal needs of social enterprise.<sup>136</sup> The L3C seeks to facilitate the flow of foundation and investor capital to social enterprises, but does so without addressing the need for mission protection, and with the IRS's reluctance to recognize the L3C. The Benefit Corporation was designed for the broader purpose of enabling corporations to make decisions for non-financial reasons. It was not designed to help social enterprises protect their missions or balance the needs of competing interests. The CIC imposes a dividend cap, which undermines a social enterprise's need for flexibility in designing its capital structure.

Despite these emerging forms' weaknesses, their strengths provide clues to what may work for a future form. For example, all of the emerging forms permit a business to strive toward a social mission while attracting both donors and investors. The L3C has the added advantage of serving as an increasingly recognizable "social business" brand. The Benefit Corporation shields directors from liability where they make decisions for social rather than purely financial reasons. The CIC protects the organization's social mission.

Over the next few years, proponents of the emerging forms will tinker with them, and new forms will appear. California recently approved the country's first flexible purpose corporation, a form inspired by early Benefit Corporation legislation vetoed by Governor Schwarzenegger.<sup>137</sup> The law, which went into effect on January 1, 2012, enables corporations to pursue specific charitable or public purposes and requires them to report on their progress in achieving the purpose.<sup>138</sup> The flexible purpose corporation is similar to the Benefit Corporation; it differs in that it does not require a general public benefit, only a specifically designated charitable or public purpose.

While legislators in California, advocates of the Benefit Corporation, and the drafters of the L3C push for their respective forms, social entrepreneurs would benefit from clarity as to what counts as a social enterprise. In this article, I have delineated boundaries around social enterprise and distinguished between what can and cannot be considered a social enterprise.<sup>139</sup> First, a social enterprise must have a social mission and functionally incorporate that social mission into its everyday business decisions and operations. Second, at the heart

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136. See, e.g., David S. Chernoff, *L3Cs: Less Than Meets the Eye*, TAXATION OF EXEMPTS, May–June 2000, at 3 (expressing cynicism about L3Cs by explaining myths surrounding this corporate form).

137. S.B. 201, 2010 Leg., Reg. Sess. (Ca. 2010), available at [http://info.sen.ca.gov/pub/11-12/bill/sen/sb\\_0201-0250/sb\\_201\\_bill\\_20111009\\_chaptered.pdf](http://info.sen.ca.gov/pub/11-12/bill/sen/sb_0201-0250/sb_201_bill_20111009_chaptered.pdf). See also Stephanie Strom, *A Quest for Hybrid Companies that Profit, but Can Tap Charity*, N.Y. TIMES, Oct. 12, 2011, available at [http://www.nytimes.com/2011/10/13/business/a-quest-for-hybrid-companies-part-money-maker-part-nonprofit.html?\\_r=4&pagewanted=2](http://www.nytimes.com/2011/10/13/business/a-quest-for-hybrid-companies-part-money-maker-part-nonprofit.html?_r=4&pagewanted=2).

138. S.B. 201, *supra* note 137.

139. See *supra* Part II.A.

of a social enterprise's operations lies a sophisticated revenue-generating business. Third, a social enterprise ought to have financing flexibility and recruit both donors and investors. Fourth, a social enterprise must protect its mission and balance the potentially competing interests of donors and investors. Current legal structures make it difficult to accomplish the latter two objectives.<sup>140</sup>

The crucial next step in concretizing the field is to incorporate these characteristics into the discourse of legal structure and social enterprise. The growth and maturity of social enterprise require a firmer stance on what counts as social enterprise and what does not, even if this excludes valuable organizations. As we consider appropriate legal structures, the threshold question is whether they accommodate and facilitate the following characteristics of social enterprise: a social mission, a sophisticated business, financing flexibility, and unique governance issues. These characteristics are the essential foundation of any effective legal structure, and the key to unlocking capital.

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140. See Bromberger, *supra* note 70, at 49, 53 (stating that rather than facilitating financing flexibility and interest balancing, the U.S. legal and regulatory structure is designed to keep business and charity separate).

