Assessing the Assessment: B Lab's Effort to Measure Companies' Benevolence

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ABSTRACT

For benefit corporations to persuade their various audiences that they are as beneficial for society as they claim, they need reliable assessments of their social performance. Even if assessments were not required by most states' benefit corporation statutes, it is difficult to imagine the benefit corporation form could gain credibility without them. Creating measurement tools for these assessments poses the twin challenges of balancing simplicity against validity and weighing vision against inclusiveness. This article examines how B Lab's popular assessment tool engages these challenges.

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INTRODUCTION

Benefit corporations advertise themselves as different from ordinary, for-profit companies. They are better, more responsible, and kinder, and should therefore be treated differently. Employees should be willing to work for them for less money and remain for longer periods because they treat their employees well and because working for them means trying to make the world a better place. Customers should seek out their products and services, even at a premium price, because customers should want to support the companies' efforts to improve society. Investors should finance them even if the expected financial returns are lower because the social returns more than make up the difference. Communities should welcome and support them because they will prove to be loyal and dependable local citizens.

To achieve all these benefits, though, these various audiences must buy the pitch; they must believe that benefit corporations will truly deliver their promises. Credibility is therefore the key challenge benefit corporations face.

The Benefit Corporation Model Legislation (the Model Act) includes a few mechanisms to help boost the credibility of the entity's social value.[1] Publicly traded corporations must have—and other corporations may have—a member of the board of directors designated as the "benefit director," who must report annually on the company's success in pursuing its social purpose.[2] Benefit corporations may also appoint a "benefit officer" to fulfill whatever duties the company's bylaws provide, including preparing the company's benefit report.[3] Shareholders who own at least 2% of a class of the company's outstanding shares have the power to bring a "benefit enforcement proceeding" against the corporation or its officers or directors for failing to provide a public benefit.[4] Benefit corporations

1. Most states that have passed legislation to enable benefit corporations have used some version of the Model Act, with Delaware and Washington being notable exceptions. Unlike the Model Act, Delaware's statute does not require benefit corporations to assess their social performance against a third-party standard.

2. *See* MODEL BENEFIT CORP. LEGIS. §302 (2016).

3. *Id.* §§ 304, 401.

4. *Id.* § 305(c)(2)(i).

must also release an annual report analyzing their social performance and make this report available on the company's website.[5] The heart of this report is an "assessment of the overall social and environmental performance of the benefit corporation against a third-party standard."[6]

These safeguards are, for the most part, toothless. Nothing assures that the benefit director or officer has either the inclination or the power to monitor the company, and neither position is mandated in closely held corporations. The benefit enforcement proceeding can produce at most injunctive relief, because the Model Act bars financial liability.[7] Plus, only the company itself, the directors, and certain large shareholders have standing to bring benefit enforcement proceedings.[8] In closely held companies, none of these participants are likely to have an incentive to enforce the company's social mission with a lawsuit, barring unusual circumstances.[9]

The benefit report is therefore the only statutory measure likely to have a real impact on a benefit corporation's credibility, and the utility of the report hinges on the quality of the third-party standard by which the company's social performance is measured. It also depends on the credibility of the information the companies provide.

The success of the benefit corporation experiment, then, rests on the ability of private entities to develop good standards to monitor companies' disclosure statements for accuracy.

The experiment must also avoid the pitfalls that have tripped up other third-party disclosure providers, such as credit ratings agencies.[10] Although the accuracy of these agencies' ratings is theoretically assured by the agencies' desire to preserve their valuable reputations (under "reputational capital theory"),[11] the legal requirements to obtain ratings

5. *Id.* §§ 401–402.

6. *Id.* § 401(a)(2).

7. *Id.* § 301(c) (directors are not personally liable for monetary damages for the company's failure to create a public benefit); *Id.* § 303(c) (officers are not personally liable for monetary damages for the company's failure to provide a public benefit); *Id.* § 305(b) (benefit corporations are not liable for monetary damages for failing to create a public benefit).

8. *Id.* § 305(c).

9. As of this writing, no publicly traded benefit corporations exist. Laureate Education, Inc., a benefit corporation, has announced its intention to complete a public offering, but has not yet done so. *See* Carrie Wells, *Laureate Education Files for IPO*, BALT. SUN (Oct. 2, 2015), http://www.baltimoresun.com/business/bs-bz-laureate-ipo-20151002-story.html [https://perma.cc/B26F-AMW8]. Etsy Inc. is a public company and a certified B Corp, but is not (at least not yet) a benefit corporation. *See* Jena McGregor, *What Etsy, Patagonia, and Warby Parker Have in Common*, WASH. POST (Apr. 20, 2015), https://www.washingtonpost.com/news/on-leadership/wp/2015/04/20/what-etsy-patagonia-and-warby-parker-have-in-common/ [https://perma.cc/Z9MF-MERN].

10. I am indebted to Frank Partnoy for this point.

11. *See, e.g.*, Nan S. Ellis et al., *Is Imposing Liability on Credit Rating Agencies A Good Idea?: Credit Rating Agency Reform in the Aftermath of the Global Financial Crisis*, 17 STAN. J.L. BUS. &

from the agencies for various purposes have added a value to the ratings aside from their accuracy. The market's disciplining impact on inaccurate ratings has been diluted by this alternative value source, reducing the agencies' incentive to invest in accuracy ("regulatory license theory").[12] The legal requirement for a third-party standard under the Model Act could suffer from similar weaknesses.

B Lab, the pioneering nonprofit that invented benefit corporations and drafted the Model Act, offers a comprehensive third-party standard. In addition, B Lab offers companies the ability to earn certification as a "B Corp" by scoring sufficiently high on its assessment and paying an annual fee.[13] Certified companies are potentially subject to periodic audits to ensure the information provided in the assessment is accurate.[14] As of this writing, B Lab has certified more than 1,700 companies as B Corps,[15] while there are approximately 3,000 benefit corporations in the country.[16] In addition, B Lab says that more than 30,000 companies have registered to take its assessment.[17] While not all certified companies are benefit corporations, these numbers indicate that B Lab's assessment tool is incredibly important and influential in the benefit corporation community.

This Article will therefore examine B Lab's assessment tool. First, in Part I, I will discuss what an ideal assessment tool would look like; that is,

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FIN. 175, 180 (2012); Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 604–05 (1984); Jonathan R. Macey, *Wall Street Versus Main Street: How Ignorance, Hyperbole, and Fear Lead to Regulation*, 65 U. CHI. L. REV. 1487, 1502–05 (1998).

12. *See, e.g.*, Frank Partnoy, *How and Why Credit Ratings Agencies Are Not Like Other Gatekeepers*, *in* YASUYUKI FUCHITA & ROBERT E. LITAN, FINANCIAL GATEKEEPERS: CAN THEY PROTECT INVESTORS? (2006); Frank Partnoy, *Overdependence on Credit Ratings Was a Primary Cause of the Crisis*, *in* LAWRENCE MITCHELL & ARTHUR WILMARTH, THE PANIC OF 2008: CAUSES, CONSEQUENCES, AND IMPLICATIONS FOR REFORM (2010); Frank Partnoy, *The Paradox of Credit Ratings*, *in* RICHARD M. LEVITCH, ET AL., THE ROLE OF CREDIT REPORTING SYSTEMS IN THE INTERNATIONAL ECONOMY (2002); Frank Partnoy, *Barbarians at the Gatekeepers?: A Proposal for a Modified Strict Liability Regime*, 79 WASH. U. L.Q. 491 (2001); Frank Partnoy, *The Siskel and Ebert of Financial Markets?: Two Thumbs Down for the Credit Ratings Agencies*, 77 WASH. U. L.Q. 619 (1999).

13. *See How to Become a B Corp.*, B LAB, https://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp [https://perma.cc/CK3J-T6J7]; *Performance Requirements*, B LAB, https://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/performance-requirements [https://perma.cc/FZ7Z-A98D] [hereinafter *Performance Requirements*]; *Pricing*, B LAB, https://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp/make-it-official [https://perma.cc/RT23-78Q9].

14. *See Performance Requirements*, *supra* note 13.

15. *See* B LAB, https://www.bcorporation.net/ [https://perma.cc/7JFV-67NT] (1,895 B Corps as of October 6, 2016).

16. *See* Nicole Fallon Taylor, *Becoming a Benefit Corporation: Is it Right for Your Business?*, BUS. NEWS DAILY (Jan. 22, 2016), http://www.businessnewsdaily.com/8734-benefit-corporation.html [https://perma.cc/GX7F-CCDP].

17. *See B Impact Assessment Overview*, B LAB (on file with the author) [hereinafter *Assessment Overview*].

I will provide an assessment tool for assessment tools. Then, in Part II, I will briefly describe B Lab's assessment process before analyzing how well it achieves the goals of an ideal assessment in Part III and then summing up in the conclusion.

I. THE IDEAL ASSESSMENT TOOL

Designing the ideal assessment tool requires some thinking about the needs of the different groups that will use it.[18] For some users, the purpose of the assessment tool is to provide "targeted transparency."[19] These users want disclosure of enough information to enable them to make educated choices, but not so much that they must choose between investing significant resources to digest the data and ignoring the data altogether. Consumers, for example, may be interested in purchasing products or services made by companies that mirror their social values. Such socially minded consumers need a quick and easy method of distinguishing pro-social companies from the purely profit focused. They will not invest the time needed to parse through a prolix securities-style disclosure statement.

For these users, the information provided must be easily and quickly digestible or it is useless, because the decisions at stake are insufficiently valuable to warrant bearing significant information costs. Users in this category likely include not only consumers but also employees and some communities: market participants who would like to encourage pro-social corporate behavior but only if the cost of doing so is fairly minimal.

Users with more at stake may want disclosures that are significantly more voluminous, or "robust transparency." Lenders, investors, and some communities may need more than a superficial sense that a company seeks something beyond profits. Because these groups' investments can be substantial, they are likely to require much more detailed information about the extent to which a company is aiding society in its operations. With so much more at stake, they also have the required incentive to invest the time and expertise to digest a more extensive disclosure device.

Perhaps the most critical members of the audience for an assessment tool are the pro-social companies themselves. The assessment methods for benefit corporations are by statute selected by the company being assessed.[20] In order to appeal to this group, an assessment tool must be cheap and easy to use. Few benefit corporations are likely to choose a tool

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18. I am indebted to Anne Tucker for pointing this out.

19. *See* Daniel E. Ho, *Fudging the Nudge: Information Disclosure and Restaurant Grading*, 122 YALE L.J. 574, 578 (2012) (describing targeted transparency).

20. *See* MODEL BENEFIT CORP. LEGIS. § 401 (2016).

that demands too much in terms of executive attention or financial resources, at least if less burdensome alternatives are available.

At the same time, an assessment tool that lacks credibility will provide little benefit. In order to obtain the tangible benefits that may be associated with benefit corporation status—such as inducing employees to work harder and consumers to pay more—a business must find a means of communicating a credible message of its pro-social nature. The assessment tool is instrumental in these efforts, since it purportedly measures the company's social virtue. If consumers, employees, or other target audiences disbelieve the measure, it will do the company little good. For benefit corporations, then, the assessment tool must be both cheap and credible; they desire both "credible transparency" and "efficient transparency."

The three major audiences for assessments tools have sometimes overlapping, sometimes conflicting goals. These can be usefully broken down into four categories: simplicity, validity, vision, and inclusiveness.[21]

The tool should be simple both to use and to understand, consistent with the goals of targeted and efficient transparency. Companies should not have to spend a great deal of time or money to apply the tool and obtain a measurement of their social contributions. They should be able to use metrics they are already gathering for other purposes to minimize expense. Consumers of the information—employees, customers, investors, communities—should be able to understand the results easily without the sort of detailed, difficult reading involved in parsing a prospectus, for example. A single letter grade (A through F), descriptor (gold, silver, bronze), or numeric score would be ideal if it could convey all the information desired.

The tool should produce valid results. A simple and cheap metric is useless if it does not measure what it aims to assess. Part of validity is accuracy; there must be some method of assuring that the results the company reports are both precise—the company did not err—and honest—the company did not lie. Both will generally require some objective, outside confirmation. In other words, the results must be credibly transparent.

To count as valid, a measure must also comport with the user's goals. For example, a chef who wants to ensure a turkey is cooked might measure the bird's surface temperature. That would not be a valid measure because the oven will heat the surface of the turkey before the interior, so the

21. There is no method of program evaluation that works for all types of programs. Instead, a program evaluation method must be tailored to the particular context. *See* Joan MacLeod Heminway, *Desire, Conservatism, Underfunding, Congressional Meddling, and Study Fatigue: Ingredients for Ongoing Reform at the Securities and Exchange Commission?*, 81 U. CIN. L. REV. 443, 451–52 (2012).

surface might be very hot but the interior might still be raw. A valid measure would take the turkey's interior temperature because that does correspond with what the chef wants to know—whether the meat is cooked. Therefore, measures are not universally valid or invalid in the sense I am using the terms; a measure's validity depends on its user's goal.

The assessment must reflect a coherent vision of how companies should be helping society. There is no single, correct view of what it means to be a socially responsible company, but an assessment tool should represent some particular conception. A measurement tool will unavoidably reflect some perspective on this question; by giving credit (or taking credit away) for certain actions or policies, the tool will necessarily push some vision. So it is critical that the vision be self-consciously constructed, consistent, and articulated clearly so that both companies and the consumers of the results know what a good score on the assessment means. This criterion is related to validity; vision sets the goals, and validity ensures that what is being measured meets them. Vision is also part of targeted transparency, because it helps make scores easy to understand.

Finally, a measurement tool should be inclusive. Even within the scope of a coherent vision for socially responsible entities, individual companies will choose to emphasize different aspects of that vision. Some might focus on environmental responsibility, others on helping the disadvantaged, and still others on making the workplace flexible and family-friendly. The measurement tool should be sufficiently flexible to reward companies for embracing some aspects of the vision, even if they do not successfully implement them all.

There is a fifth characteristic that is often cited as important for assessment tools: the independence of the drafting body.[22] For example, the American National Standards Institute's accreditation rules for standards creators mandate:

> The standards development process shall not be dominated by any single interest category, individual or organization. Dominance means a position or exercise of dominant authority, leadership, or influence by reason of superior leverage, strength, or representation to the exclusion of fair and equitable consideration of other viewpoints.[23]

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22. I am grateful to Dan Osusky for raising this point.

23. *ANSI Essential Requirements: Due Process Requirements for American National Standards* AM. NAT'L STANDARDS INST., § 1.2 (Jan. 2016), https://share.ansi.org/shared%20documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/2016_ANSI_Essential_Requirements.pdf [https://perma.cc/VM4H-S7YV].

The standards setter's independence and objectivity are important, but only indirectly. Ultimately what matters is whether the standards meet the four substantive goals. Independence tends to boost confidence that the standards setter will design the standards in good faith, but it is a means to an end, not the end itself.

B Lab has an incentive to set an easy standard. Companies pay for certification only if they qualify by earning at least 80 out of 200 possible points on the B Impact Assessment (BIA).[24] The more companies that qualify, the larger the group of companies that might pay B Lab for certification.

To avoid this conflict of interest, the BIA is not written by B Lab. Instead, the Standards Advisory Council (the Council) controls the BIA.[25] The Council consists of independent experts and representatives of different stakeholder groups.[26] Bart Houlahan, B Lab's co-founder, is a member of the Council's Developed Markets subgroup.[27] There are also two members of B Lab listed as members of the Health and Safety Working Group.[28] But the vast majority of Council members are employees of separate and independent organizations.[29] Both because the Council appears to be (mostly) independent of B Lab, and because the Council's independence is only indirectly important to the BIA's effectiveness, I will not further address this issue in this Article.

There are significant tensions among the four substantive goals of simplicity, validity, vision, and inclusivity. A simple measure of a behavior as complex as pro-social economic activity is unlikely to be valid. Conversely, a measure sufficiently sophisticated to capture that activity is unlikely to be simple. Similarly, an assessment tool that presents a strong vision will have difficulty including those who disagree with aspects of the vision, and an assessment tool that attempts to include everyone is unlikely to possess a coherent vision. No assessment tool can achieve perfection across all four goals. Instead, assessment designers must choose how heavily to weigh each of these values in trading one off against the others. The next Part will set out the major aspects of B Lab's assessment tool, and the following section will explore how well that tool makes these trade-off decisions.

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24. *See How to Become a B Corp.*, *supra* note 13.

25. *See Frequently Asked Questions*, B LAB, http://bimpactassessment.net/how-it-works/frequently-asked-questions/top-10#who-develops-the-standards [https://perma.cc/4NALUCYK].

26. *See Standards Advisory Council*, B CORPORATION, https://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps/standards-advisory-council [https://perma.cc/3Y75-NX6L].

27. *See id.*

28. *See id.*

29. *See id.* (listing Council members).

II. B LAB'S ASSESSMENT TOOL

B Lab's assessment tool, known as the "B Impact Assessment" or "BIA," (which recall is written by the Council, not B Lab directly) consists of an online questionnaire available on its website.[30] The assessment is customized based on the company's size (six categories), its industry sector (four categories), and the state of development of its geographic market (three categories).[31] As a result, there are in effect seventy-two different versions of the BIA.[32] Plus, there are addenda for a few industries whose impact the Council feels the BIA does not adequately measure on its own. These include micro-finance lenders, investors and investment advisors, and environmentally friendly building companies.[33]

Companies answer the questions online and receive an aggregate score on a 200-point scale.[34] Companies that score 80 points or above qualify for certification, but benefit corporations may use the assessment to fulfill their requirement of measuring their social performance against a third-party standard regardless of whether they are seeking certification status or qualify for certification.[35]

The BIA asks questions that cover four "impact areas." These include governance, workers, community, and the environment.[36] Each impact area (and each indicator within each impact area) is allocated points based on the Council's view of the relative importance of that area or indicator for companies in the relevant category (industry, size, etc.).[37]

B Lab says that the BIA's governance questions measure, "[t]he extent to which social and environmental considerations are engrained into the business, financial responsibility and oversight, transparency, and the prevention of negative outcomes."[38] Governance is important to a company's pro-social orientation, according to B Lab, because it demonstrates a company's ability and inclination to act benevolently.[39] Questions the BIA asks under this category include inquiries about the company's code of ethics; anti-corruption systems; financial controls; whistleblower policies; independence, composition, and activity of the board of directors; policies concerning growth; shareholder engagement;

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30. *See* B LAB, www.bimpactassessment.net [https://perma.cc/9YBD-RL7W].
31. *See Assessment Overview*, *supra* note 17.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. Interview with Dan Osusky, B Lab Standards Associate (May 23, 2016) (notes on file with the author) [hereinafter Osusky Interview].
38. *See Assessment Overview*, *supra* note 17.
39. *Id.*

CEO compensation; employee training and evaluation; feedback from stakeholders; and other comparable issues.[40]

The workers category is aimed at discovering the company's treatment of its employees along four dimensions: financial, social, physical, and professional.[41] The BIA asks about these categories because they are directly important, not because they may indirectly lead to achieving other important values, as was true of the governance questions. This category includes questions on topics such as: employee ownership; employee governance rights; employee compensation structure; percentage of employees who work full-time versus part-time; worker training programs; internal promotions; benefits provided, such as health care and retirement; maternity and paternity leave; vacation; severance benefits; safety standards; wellness programs; worker satisfaction; and related topics.[42]

Community questions attempt to discover the company's impact on the communities in which it functions. This includes not only the creation of jobs but also charitable donations and stimulus of other companies in the region.[43] This is also an area where the BIA is attempting to measure a company's beneficial impact directly, unlike the governance category. The community questions inquire as to the company's charitable donations; its involvement with the charities to which it donates beyond the donation itself; the impact of the company's product or service; transparency as to the company's supply chain; the company's use of small-scale suppliers; the company's vigilance as to working conditions at its suppliers' facilities; sourcing from under-served supplier groups, such as those in low-income areas; sourcing from local suppliers; sales to local consumers; employment of the chronically underemployed, such as those discriminated against because of race, gender, ethnicity, religion, disability, sexual orientation, drug or alcohol dependency, homelessness, or history of incarceration; use and treatment of micro-distributors; contribution to national and local economic development; partnerships with local organizations such as cooperative groups or chambers of commerce; advocacy for better social or environmental industry standards; paid leave for charitable work for employees; and other, similar topics.[44]

The environmental section of the BIA awards points for companies that reduce their environmental footprint all along the supply chain.[45] This

40. *See B Impact Assessment Spreadsheet V. 5* (Feb. 1, 2016) (on file with the author) [hereinafter *Assessment Spreadsheet*].

41. *See Assessment Overview*, *supra* note 17.

42. *See Assessment Spreadsheet*, *supra* note 40.

43. *See Assessment Overview*, *supra* note 17.

44. *See Assessment Spreadsheet*, *supra* note 40.

45. *See Assessment Overview*, *supra* note 17.

category also consists of ways the company is directly benefitting the world, in this case by reducing the harm done to the environment through the production process. This section inquires about the amount of carbon offset by the company's environmental practices; the extent to which solid waste from any manufacturing processes are recycled, reused, or composted; the percentage of energy used that comes from renewable sources; the percentage of manufacturing facilities that meet green building standards; whether the company annually measures and reports its energy and water usage, carbon emissions, and waste; whether the company has reviewed the life cycle impact of its products; efforts to reduce water usage in manufacturing; efforts to reduce use of toxic chemicals in manufacturing; the extent to which the distribution system involves clean emission vehicles; ways in which the product or service itself might benefit the environment, whether through education, measurement, or direct environmental impact as through conservation or production of clean energy; and other, similar questions.[46]

For companies that are seeking B Corp certification—but not for those benefit corporations who are merely using the BIA as a third-party standard to satisfy the statutory disclosure requirements—B Lab requires companies to submit supporting documentation for a random selection of questions.[47] This requirement applies not only to the initial application for certification but also to every application for recertification.[48] Companies that wish to maintain their B Corp certification must apply for recertification every other year.[49] In addition, B Lab sometimes performs a site review, which consists of facilities tours, employee interviews, and more in-depth documentation requests.[50] All publicly traded B Corps are required to undergo a site review during every application for certification or recertification, as are all companies that are wholly owned by a publicly traded corporation.[51] Otherwise, companies enter a lottery in which approximately ten percent of all B Corps applying for certification or recertification receive a site visit in any given year.[52]

To secure certification, a company must disclose its score in each of the four impact areas on a public webpage.[53] Publicly traded companies and companies that are wholly owned by them must disclose their answers

46. *See Assessment Spreadsheet*, *supra* note 40.
47. *See* Osusky Interview, *supra* note 37.
48. *See id.*
49. *See id.*
50. *See id.*
51. *See id.*
52. *See id.*
53. *See id.*

to every question (with some exceptions).[54] Other certified companies are rewarded with points for providing transparency such as this but are not required to provide this level of detail.[55]

III. B LAB'S SCORE

The BIA represents a sincere and sophisticated attempt to create a useful metric for profit-seeking companies. It scores well on each of the four criteria of simplicity, validity, vision, and inclusivity. Nevertheless, because these criteria are themselves in some tension, the BIA necessarily sacrifices some criteria for others at various points. I will analyze each of the criteria in turn, then conclude this section with some thoughts about whether this is a context that is better described by reputational capital theory or regulatory license theory.

A. Simplicity

The ideal tool to measure a company's contributions to the world would first and foremost be simple to use and understand. The various constituent groups who might be interested in a company's pro-social rating will find that rating more useful the cheaper and easier it is. If the rating system requires users to absorb dense documents akin to securities filings, its audience will be considerably more limited than if the information is communicated quickly and easily.

At first glance, the BIA seems to do a very good job of providing a metric that is simple for investors, consumers, and suppliers to use without careful parsing of complicated reports. The results are summarized in a single number, with higher scores indicating companies that provide greater social benefits than companies with lower scores. Although the maximum score is 200, companies scoring 80 points or higher may receive B Lab's certification.[56]

The BIA awards points for answers that indicate a company has pro-social policies or activities in one of its four impact areas. The test does not subtract points for antisocial policies or activities. This focus on the positive may present validity issues, as I will discuss below, but it does have the virtue of adding to the test's simplicity. Measuring the company's negative impact and designing a system that can somehow offset the negative against the positive would make the system more complex.

Although the use of a single, all-encompassing score makes the BIA seem admirably simple on its surface, the BIA is actually more

54. *See id.*
55. *See id.*
56. *See How to Become a B Corp.*, *supra* note 13.

complicated than it first appears, both for those who might rely on the score and for the rated companies. This becomes apparent when we drill down to how that core is calculated.

In the Council's efforts to tailor the BIA to companies of different sizes, from different industries, and from countries at different stages of economic development, much of the BIA's simplicity was unfortunately lost. As a result, it is not really possible to compare companies' contributions to society simply on the basis of their total BIA score. For example, a company that employs 10,000 people and earns a score of 100 on the BIA likely impacts the world much more substantially than a company that employs two people but has a BIA score of 140. For interested parties to use the BIA score effectively, they must look deeper. The score is a useful way to compare companies within the same category, but there are seventy-two categories. The score is only illuminating when we are, say, comparing two agricultural companies, each of which employs around a thousand people and both of which operate in developed countries. To compare one of these companies to a manufacturing company, or an agricultural company in a developing economy, it is not really possible to use only the final BIA score, even if the companies are of similar size.

The problem is not only that different companies with the same score may have vastly different impacts on the world but also that the scores themselves are compiled differently. The identical BIA question may be allocated different weightings based on the company's category. There may be good reasons for this difference, rooted in an effort to make the BIA evaluation more valid. But, this effort to improve the BIA's validity imposes a serious cost to the test's simplicity.

In order to compare a company to another that falls into a different one of the BIA's seventy-two categories, it is necessary to look at the answers to the assessment's individual questions. But few companies are required to grant access to this level of information. The Model Act does require benefit corporations to provide the public with an "assessment of the overall social and environmental performance of the benefit corporation against a third-party standard."[57] They must also disclose their rationale for selecting the standard they chose.[58] But, benefit corporations have enormous latitude in designing the precise content of their benefit reports, and this discretion extends to the detail they provide in assessing their performance against a third-party standard. In addition, not all companies certified by B Lab are benefit corporations. The benefit

57. *See* MODEL BENEFIT CORP. LEGIS. § 401(a)(2) (2016).
58. *See id*. § 401(a)(1)(iv).

corporation statute does not bind those that are ordinary corporations or limited liability companies.

B Lab itself also imposes disclosure requirements on certified companies. B Lab requires public companies and wholly owned subsidiaries of public companies to provide their scores on every question.[59] Those who interact with certified public companies and wholly owned subsidiaries, then, will have access to the detailed information required to make reasonable comparisons. Other companies, however, are only required to provide their total score and their subtotals for each impact area.[60] Even when this information is available, interpreting companies' answers and scores on the assessment is much more complicated and time consuming than looking at a single score.

So far, I have focused on the experience of stakeholders outside the company who wish to evaluate the business's pro-social status. For them, the BIA is a mixed bag; there is a simple, all-encompassing score available, but it does not really provide much information, especially if the goal is to compare companies of different sizes, in different industries, or which operate in different sorts of economies. For the companies themselves, the simplicity picture is considerably worse.

B Lab advertises that the assessment takes two to four hours to complete.[61] However, the amount of time it takes a company to complete the assessment depends on the type of information the company typically maintains in the ordinary course. For example, the BIA asks questions about the amount of carbon that was offset by the company's environmental practices over the course of the previous twelve months.[62] Some companies may track this information, but others may not. Even companies that do track their carbon impact may not do so in a way that easily lends itself to answering this question. A company may only track its carbon impact retrospectively at the end of its fiscal year, and may not be able to provide an accurate answer except at that time. Questions like these may, therefore, require some work to research the answers. Companies that have a lot of research to do may need more than the estimated time to complete the BIA. In addition, companies that participate in certain industries—microfinance, investing or investment advising, or green building—must complete specific industry addenda.[63]

Once the company has completed the assessment, B Lab randomly selects six to eight questions on which the company gave positive answers

59. *See* Osusky Interview, *supra* note 37.
60. *See* Osusky Interview, *supra* note 37.
61. *See Performance Requirements*, *supra* note 13.
62. *See Assessment Spreadsheet*, *supra* note 40.
63. *See Assessment Overview*, *supra* note 17.

(answers that garnered points) for documentary support.[64] The applicant must provide evidence that supports its answers to these questions.[65] For some questions, this may be a simple process. Documenting the health care plans provided to employees, for instance, should be quite straightforward. But documenting the amount of carbon reduced by a company's new, more efficient product may be more complex, involving laboratory studies of both the new product and the old, as well as studies that measure whether both products perform in real-world conditions as they did in the lab. Then there must be documentation of sales of the new product and survey data of customers to document any changes in usage when they replace the old product with the new. Some companies will have done this research already in the ordinary course, as part of their marketing or licensing process, but others may face this problem for the first time when performing the assessment. It is possible that B Lab would not require documentation as extensive as I am suggesting, but the gains made to the simplicity goal there would be offset by losses to validity.

After a company has completed the BIA and uploaded the supporting documentation, it must participate in an assessment review.[66] The review consists of a phone call with a B Lab staff member in which the staff member will go over questions that companies may have found difficult or unclear. B Lab says this phone call typically lasts sixty to ninety minutes.[67]

Companies that qualify for certification after completing the assessment review—that is, companies that score at least 80 points—must submit still more documentation. B Lab will select several (one to six) questions from the Business Impact Model portion of the BIA and ask for additional documentation to support the positive (point garnering) responses to those questions. B Lab may also ask for additional documents to clarify companies' answers.[68]

Companies must then complete an additional set of questions, the Disclosure Questionnaire. This begins as a one-page document consisting of a series of "yes-no" and "true-false" questions about fines, sanctions, litigation, and any "sensitive" practices.[69] Companies that have paid any fines, been subject to any sanctions, or otherwise engaged in activities,

64. *Id.* According to Dan Osusky, B Lab sometimes targets more questions than this, with the goal of evaluating 30%–50% of the questions that garnered a positive response.

65. *Id.*

66. *See Performance Requirements*, *supra* note 13.

67. *See id.*

68. *See id.*

69. *Disclosure Questionnaire*, B LAB, http://www.bcorporation.net/sites/default/files/documents/standards/B_Corp_DisclosureQuestionnaire-blank.pdf [https://perma.cc/J9HS-YD8E] [hereinafter *Disclosure Questionnaire*].

practices, or suffered events B Lab deems problematic, must disclose these issues on the company's public Impact Report, describe how the company has dealt with the issue, and demonstrate that management has taken steps to ensure that the issue will not occur again.[70] Companies engaged in production or trade in illegal products, hard alcohol, commercial logging, guns or other weapons, for example, fall into this must disclose and explain category.[71] Companies that have set up corporate structures to minimize tax liability must also disclose and explain this behavior (though apparently not if they minimized their taxes through other means). The same applies to companies that conduct animal testing, employ workers under the age of fifteen, require employees to work overtime, employ prisoners, forbid collective bargaining, or own facilities near sensitive ecosystems.[72] The answers to these questions will not affect a company's score, but B Lab reserves the right to refuse certification "if the company is ultimately deemed not to uphold the spirit of the community."[73]

B Lab staff conduct background checks on companies that score over 80 points on the BIA to supplement the Disclosure Questionnaire. The background check consists of a search of public records concerning the company, its brand, and its executives. The results of the background check may also result in a decision to deny certification.[74]

Even after a company has cleared all of these hurdles and obtained certification, B Lab may select the company for a more in-depth certification evaluation.[75] Ten percent of all certified B companies are chosen at random for this process each year, and certified companies that are either publicly traded or wholly owned by a publicly traded company are required to undergo certification evaluation once during every two-year certification period.[76] These evaluations involve more in-depth documentation of a company's responses on the BIA and may also include facilities tours and employee interviews.[77]

To sum up BIA's performance on the simplicity criterion, the single score summary—and the four impact area scores—provide a very simple method for users to determine a company's pro-social impact. This sort of one-dimensional metric works well in simpler contexts, such as city health inspectors' reports on restaurants' cleanliness. But users of the BIA data need much more nuanced information than restaurant customers do.

70. *See id.*
71. *See id.*
72. *See id.*
73. *Id.*
74. *See Performance Requirements*, *supra* note 13.
75. *See id.*
76. *See id.*
77. *See* Osusky Interview, *supra* note 37.

Investors, customers, communities, and employees will each care about different aspects of the BIA report, even within a given impact area. The summary score is simple, but it provides too little information to be terribly useful.[78]

Many of those interested in a company's pro-social performance will need the detailed information that comes only from answers to individual questions. For this audience, it is not clear that the point system adds much value. As I will discuss below, the point system requires the Council to establish a values system, and it is difficult to imagine any values system that could be universally accepted. The Council's system has the added flaw that it lacks transparency; the Council has not articulated the principles it uses to decide how to distribute point allocations among the different categories based on which of the seventy-two boxes a company occupies. This means that sophisticated users will still need to parse individual questions rather than defer to the BIA's scoring system. Only causal users—such as consumers who may slightly prefer to buy products made by pro-social companies—will find the summary scores useful. Users with more sophisticated needs, such as investors, communities, and even some customers, will need to look much more closely. B Lab does sell access to some detailed information through its analytics program, but this information is anonymized unless a company consents to revealing its particular answers.[79] For many certified companies, this more detailed information will not be available; so, for the more sophisticated users, the utility of the entire system is doubtful.

B. Validity

Simplicity is important because if the measure is too complex, it is possible that no one will use it. At least equally important is that the measure be valid—that it accurately measures the characteristics that users care about.

Validity is in tension with simplicity. To see why this is so, it may be helpful to compare assessments to theoretical models. The closer a model is to reality, the more complex it is and, therefore, the less useful. A simple model more often provides clear lessons but is easily

78. Note that a recent empirical study of restaurant health ratings brought the utility of even these measures into serious question. Daniel Ho examined more than 700,000 restaurant inspections across ten different cities. He concluded that there was little evidence that the scores were valid; that is, a high score on one inspection did not predict a similarly high score on a subsequent inspection, nor did the implementation of scoring regimes demonstrably improve public health. *See generally* Ho, *supra* note 19. Even in a simple context such as restaurant health ratings, there may be necessary trade-offs between simplicity and validity. I am indebted to Elizabeth Pollman for bringing this study to my attention.

79. *See B Analytics*, B LAB, http://b-analytics.net/ [https://perma.cc/33LK-PDSJ].

manipulated. A complicated model is more accurate but much harder to design and use and is less likely to provide clear policy recommendations.

An assessment is like a model. Assessments of pro-social behavior attempt to develop an algorithm for what actions and policies count as beneficial and then apply that algorithm to real companies. A simple assessment is easy to use and understand, such as an assessment evaluating companies based on whether they offer health insurance to their employees. The simplest version of that assessment would credential any company that offered its employees any health insurance plan. Although this assessment model is very simple, it is not very valid. If any health plan will suffice, then companies that offer complete coverage will be ranked the same as companies that pay for only catastrophic illnesses. Companies whose plan has no deductible will be placed on the same level as those whose plan requires families to pay the first several thousand dollars of expenses out of pocket. Additionally, companies that do not reimburse insureds for contraception or abortion services will appear identical to those that do.

On the other end of the spectrum, a valid and complex assessment risks rendering the assessment useless to all but the most sophisticated readers. For example, a health care assessment could provide the entire text of the health insurance policy. This assessment would be highly valid as an explanation of the health care the company provides but would be the opposite of simple.

Using just the summary score is the simplest use of the BIA and, therefore, the use that seems likely to be the most popular. This section will, for that reason, focus on the score's validity. Note, though, that at least some certified companies are required to provide much more detailed information about their BIA responses. For these companies, the validity concerns outlined below are more muted.

The summary score provides a single number, as though companies' positive impact on society could be ranked linearly, with companies that earned higher scores unambiguously better for society than those with lower scores. But this is a deeply problematic notion as applied to the BIA for at least five reasons: scale independence, lack of uniformity, failure to deduct for negative impact, interchangeability of categories, and inadequate verification. I will discuss each of these in turn.

1. Scale Independence

An accurate assessment of a company's positive social impact should take scale into account. A company that puts solar panels on a million homes has a much larger effect on the world than one that puts solar panels on a thousand homes. But that is not how the BIA works. The BIA score does not award more points for companies that are larger, holding all else equal. The questions and point allocations do change based on the size of the company, as measured by the number of employees, but the BIA does not reward companies for being larger and having a greater impact on society. As a result, a company that employs a thousand former convicts could have a lower score than a similar company that employs only ten. Thus, for an outside investor, consumer, or community trying to decide how to allocate their investment, consumption, or tax dollars, the score alone is potentially misleading and could produce a misallocation of resources.

One possible explanation for the Council's decision to structure the BIA as scale independent, in this sense, may be purely pragmatic. Questions aimed at larger companies may not be sensible when asked of smaller companies. For example, it seems ludicrous to ask a company without employees about its employee benefits. Another possible explanation is that the Council decided that it wanted the BIA to measure how virtuous a company is and not how much good it actually achieves. Perhaps the BIA is intended to measure social good achieved per person employed, rather than the absolute amount of good provided. There is some value to this sort of measure that the BIA provides; an assessment tool that tried to do otherwise might produce bizarre results. For example, if a company the size of Walmart reduced its greenhouse gas emissions by one percent, an assessment tool that measured total social good produced would report the company as a much more environmentally friendly company than a local installer of geothermal power, even if the company's business model and other practices were not at all pro-social. Still, the BIA ought to make some effort to capture the scale effect as well as a company's virtuous nature. One way to do this might be a separate measure for the total volume of benefits provided to society. Precise measurements in this area would likely be impossible, but a rough indicator might be the company's virtue index multiplied by some size factor. This sort of measure could be performed for each of the BIA's impact areas to provide a more comprehensive sense of what types of benefits a company is providing. This additional metric would add complexity relative to the attractive simplicity of a single, all-encompassing number; but if the single number's appearance of including every aspect of a company's pro-social behavior is illusory, as I argue in this section, it might be worthwhile to sacrifice some degree of simplicity to capture the impact of a company's scale.

One further note on scale—the number of employees may not be the most useful way for the BIA to measure a company's size. It is helpful for determining the impact of a company's employment policies, such as flexible work schedules, maternity or paternity leave, and generosity of benefits; however, it may not capture the company's impact in other areas. For example, a company may have relatively few employees yet have an enormous impact in lobbying for social change or developing a cleaner, cheaper, more sustainable energy source. Different measures of size, therefore, may be necessary depending on the type of benefit that is being measured.

2. Lack of Uniformity

Besides the issue of scale, there are a number of other ways in which the BIA fails to treat like companies alike. Companies from different industries are provided with different questions. Even when companies are asked the same question, the answers are sometimes scaled differently, so that the same answer garners a different number of points. For example, one question on the BIA asks, "Is there an annual conflict of interest questionnaire filled out by all board members and officers?"[80] Companies from developed economies with 50 to 999 employees can earn .2 points if they answer this question positively,[81] while companies of the same size and in the same industries but in emerging economies can earn .4 points (twice the score) from a positive answer.[82]

These discrepancies may result for a number of reasons. The impact area may have been assigned a different number of points based on the category involved.[83] Alternatively, even if the impact area as a whole has been assigned the same number of points, the impact area may contain a different number of questions based on the category so that the same number of points must be divided among a different number of questions.[84]

Because companies that fall into different categories are rated differently, the BIA is not terribly useful for making comparisons between companies. This is not only a problem for simplicity, as discussed above but also a challenge to the BIA's validity. A score of 80 points on the BIA—which qualifies a company for B Lab certification—means something different for companies in different categories. To be valid, the score should measure what users of the measure want it to measure. But if the score measures different things for different companies, the score can be valid only if these variations comport to broader principles that users embrace.

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80. *See Assessment Spreadsheet*, *supra* note 40.
81. *See id.*
82. *See id.*
83. *See* Osusky Interview, *supra* note 37.
84. *See id.*

The BIA may be varying its point structure according to underlying principles, but it is difficult to come to any firm conclusions based on the information B Lab and the Council have disclosed. Questions that are extremely important to determine some companies' environmental responsibility, for example, may be completely pointless to ask of others. The BIA quite rightly asks agricultural companies what percentage of the fertilizer they use is organic.[85] But it would add little value to ask that same question of a service or manufacturing company. Similarly, the monitoring of the output of hazardous and toxic wastewater may matter a great deal to a manufacturing company's profile but not to that of a retail sales operation.[86] As B Lab states in explaining this approach, "For each impact area and goal, weightings and indicators are adaptive to the material issues for that particular business based on their size, sector, and market."[87]

In this sense, it may not be feasible to have a metric that permits perfect comparisons across industries, sizes, or markets. Perhaps including questions that are tailored to the relevant segment is worth the sacrifice in comparability. Still, at a minimum, B Lab could apply some labeling to highlight this fact and make it clear that a score of 80 for a ten-person service provider in the United States means something different from an identical score earned by an agricultural cooperative in Brazil with five thousand employees. A simple three-letter code for each category indicating where the company falls could achieve this easily and cheaply. A code like this would remind users that the scores are not fit for intercompany comparisons except within categories and it would tell them where to look if they do want to make such comparisons. Even if a perfect comparison is not available, comparing two medium-sized agricultural companies may be better than comparing two companies with no overlapping categories.

Also, the Council should provide greater transparency about the underlying principles it applies in allocating points based on a company's category. Even if the Council does not wish to disclose the detailed breakdown (though this would be ideal), the more important disclosure is really the rules it is using. Disclosure of these rules would grant users a much clearer sense of the scores' meaning.

3. Failure to Deduct

A corporation's impact on society is the result not only of the positive impacts of its actions but also of any negative effects from its conduct. A company that trains unemployed workers in new skills to help them find

85. *See Assessment Spreadsheet*, *supra* note 40.
86. *See id.*
87. *Assessment Overview*, *supra* note 17.

jobs may also treat its own employees poorly. A valid assessment should, therefore, take into account both the positive and negative impacts of a company's behavior in order to arrive at an overall understanding of the company's influence for good or for ill.

The BIA scoring methodology, however, counts only the positive. As B Lab states, "All indicators represent the positive impact of a company, and are intended to exceed universal business norms. There are no negative points in the assessment."[88] A company could, therefore, score well on the BIA despite engaging in powerfully negative behaviors whose impact outweighed its positive actions.

The Council did include a safeguard to guard against credentialing some such companies. All companies applying for B Lab certification must complete a separate disclosure questionnaire aimed at uncovering applicants' negative conduct.[89] A company that employed forced labor or had been convicted of violating important domestic laws could be barred from certification despite scoring over 80 points on the BIA.[90]

Barring a company from certification is a binary solution and, therefore, is inadequate as a means of incorporating a company's negative actions into the assessment of its social impact. Companies whose negative activity does not rise to a level sufficient to warrant denial of certification escape without consequence for their bad behavior on the BIA. Also, because denial of certification may seem harsh in many cases, B Lab may prove reluctant to impose bans except in relatively extreme cases. B Lab also has the option of requiring disclosure of negative activity or of asking the applicant to remediate the issue, but enforcement of these lesser steps depends ultimately on the threat of denial of certification, which may not prove credible in many cases.

In addition, neither B Lab nor the Council has provided detailed information about what sorts of conduct may warrant a denial of certification. Without greater transparency, the threat of a ban will have little deterrent effect; when companies are unaware that a particular action could lead to losing the opportunity to become a certified B corporation, they will not take that possibility into account when deciding on their future conduct.

Deducting points for behavior that harms society is a complicated undertaking. To add this feature to the BIA, the Council would have to develop complex standards tied to companies' size, industry, and the development status of their home countries. Such standards would be difficult to design and complicated to explain, justify, and enforce, greatly

88. *Id.* (note omitted).
89. *See id.* at note 1.
90. *See* Osusky Interview, *supra* note 37.

undermining the simplicity goal. They also would risk offending companies that use the BIA or seek certification by penalizing behavior that some companies feel are acceptable or even beneficial. But these are the same barriers that the Council had to overcome to create the BIA's measurements of companies' positive behaviors. So, these obstacles are a poor explanation for refusing to take the same plunge in evaluating negative behavior as the Council did in evaluating positive behavior.

It seems critical to add this feature to the BIA if the scores are to meet the validity goal. Users of the BIA are almost certainly interested in companies' *net* impact on society—both the ways companies help and harm the world; leaving out the negative half of this equation seems an odd decision that greatly undermines the BIA's utility. Taking negative conduct into account would allow the BIA score to better reflect companies' social impact and avoid the problems inherent with the current binary system, in which the Council's only option is to deny certification for companies that exceed some (undisclosed) level of negative behavior.

4. Interchangeability of Categories

Investors, consumers, employees, and communities may care about different aspects of a company's pro-social profile. Some consumers may focus exclusively on the company's environmental policies, while some communities may be most interested in how a company treats its workers. Many might want to know about every aspect of a company's behavior.

Even this last, more all-embracing group may feel troubled at the prospect of equating one unit of environmental protection with one unit of corporate governance, social mission, or worker protection. How many tons of carbon can be released into the atmosphere in exchange for providing better health care benefits for workers? How many workers can be fired, paid substandard wages, or required to work under dangerous conditions in order to provide one underprivileged child with free computer programming lessons? How many independent directors on a company's board may be exchanged for helping one less homeless veteran?

All businesses must make difficult decisions about trade-offs. Even purely profit-driven enterprises must decide how much to invest in developing a new product versus spending those same dollars marketing the old one; they must balance hiring a first-rate and well-motivated workforce with reducing costs to improve profit margins. Companies that aim to achieve a social purpose while also earning a profit face an even more complex task; they must balance each of their social goals against each other and against the need to earn money. These decisions are an inevitable part of being a pro-social enterprise; they cannot be avoided.

Although there is no avoiding trade-offs like these, companies should engage in these decisions self-consciously. They should form principles which guide their behavior and which can be articulated to the various stakeholder groups. These groups in turn can hold the company accountable, even if only rhetorically, for implementing these principles in good faith. In most cases, there probably can be no mathematical formula for how to trade one social good for another. Probably only economists believe that all goods can be translated into dollar form, or perhaps "utiles,"[91] so that they can be exchanged based on some set ratio or more complex utility function (and perhaps not even very many economists believe this).[92] But to say these decisions cannot be reduced to precise formulae is not to say that there can be no principles at all. These decisions are important to companies' identity, mission, and culture and should be made thoughtfully with that fact in mind.

The BIA also makes these trade-offs between categories of pro-social behavior, but it does so implicitly, with no clear statement of how or why it has drawn the equivalencies that it has. A point earned under the governance impact area is worth precisely as much as one earned under the environmental impact area. By deciding how many points each positive answer to a question is worth, then, the Council is impliedly saying that policies that garner the same number of points have equivalent worth to the world. But neither B Lab nor the Council has articulated a set of principles to explain why they have drawn the equivalences that they have. For example, the following two questions are each worth 3.5 points on the BIA:

> Beyond those required by law, for what % of your projects do you implement policies for monitoring and improving indoor air quality during construction?[93]
>
> What % of the company is owned by:: [sic] Women and/or individuals from chronically-underemployed communities [sic][94]

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91. A "utile" is a nonmonetary unit of utility, invented by economists. *See* Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1, 23, n.142 (2000).

92. As Richard Schmalbeck explained:

> The very phrase "surplus of pleasure over pain" suggests, however, that utilitarians are concerned with a very broad range of human needs, including many for which there can be no organized market, and no exchanges that can be valued in dollars, pounds, francs, hours of labor, or other readily calculable measure. Economists sometimes refer to "utils," or "utiles," as units of utility, but usually as a didactic device, not out of any notion that utility can be precisely measured.

Richard Schmalbeck, *The Justice of Economics: An Analysis of Wealth Maximization As a Normative Goal*, 83 COLUM. L. REV. 488, 496–97 (1983) (internal notes omitted).

93. *See Assessment Spreadsheet*, *supra* note 40.

94. *See id*.

Policies to improve indoor air quality during construction are, therefore, equivalently good for society, as measured by the BIA, to having owners who are women and members of chronically underemployed communities.

It is not at all obvious why those two characteristics should be considered of equal worth. One could likely construct arguments favoring one or the other, perhaps even by a substantial margin. But neither the Council nor B Lab has provided any, even in general outline.

The same problem occurs within impact areas as between impact areas, though to a somewhat lesser degree. That is, it may be somewhat easier to understand why some characteristics are more important than others within a given impact area, since the questions within an impact area are aimed at a more or less uniform goal. Within the environmental impact area, for example, the BIA's questions attempt to ascertain the company's environmental responsibility. Still, even within an area, it would be helpful to understand how the Council has decided to allocate its points. For both between impact areas and within them, a statement of general principles would go some distance, even without a detailed, question-by-question explanation.

5. Inadequate Verification

Even an ideal assessment tool is worth little if companies are free to lie in responding to the questions. To ensure an assessment is valid, therefore, there must be some mechanism that confirms companies' responses are reasonably accurate. Otherwise, the information provided by the assessment will prove essentially meaningless, and the resulting certification will not be taken seriously.

Publicly traded companies solve this problem in reporting their financial information by paying for outside auditors. Large accounting firms examine companies' documents and validate the information disclosed in the companies' public filings. In addition, public companies face liability under the securities laws,[95] and their senior executives face potential criminal charges for purposefully distorting the information provided.[96]

Benefit corporations that are privately held have far fewer legal safeguards to ensure that they are providing the public benefits they claim. The Model Act requires benefit corporations to produce and disclose on their websites an annual benefit report that describes the general and specific public benefits they provide.[97] But there is no provision in the

95. *See* 17 C.F.R. § 240.10b-5 (Rule 10b-5).
96. *See* Sarbanes-Oxley Act of 2002 § 302, 15 U.S.C. § 7241 (2012).
97. *See* MODEL BENEFIT CORP. LEGIS. § 401 (2016).

Model Act imposing liability for providing false information in the benefit report. Stakeholders could conceivably sue under state fraud laws to remedy any false statements, but only if they could prove they were harmed by the fraud.[98] Perhaps an investor who was defrauded into making a substantial investment in the company by fraud in the benefit report might have a sufficient injury for a cost-effective fraud action, or perhaps such an action could be prosecuted on behalf of consumers as a class action, but the damages in both cases could be difficult to ascertain. Moreover, the Model Act does not require external audits to ensure that benefit reports are accurate.[99]

B Lab does have some measures to ensure the information companies provide on the BIA is accurate for companies seeking or maintaining B Corp certification. B Lab requires companies to submit documentation to support their responses to some randomly selected questions at both the initial certification and every recertification.[100] There is also the disclosure questionnaire and the background check, discussed above, and a public complaint process. In addition, B Lab performs a more in-depth review of ten percent of certified companies each year and of all publicly traded certified companies, as well as those companies that are wholly owned by publicly traded companies.[101]

These measures pale by comparison to the protections that exist for publicly traded companies in their financial disclosures and are likely to prove inadequate. Even those companies selected for certification evaluation will find the process sparse compared to a formal audit; B Lab estimates the process takes only six to ten hours.[102]

Perhaps, though, there is little point in adding more elaborate safeguards. Despite all the protections that guard against misstated financial reports by public companies, public companies are sometimes discovered to have misstated their financial performance.[103] Auditors

98. One of the elements of a fraud claim is that the plaintiff suffered damages as a result of the fraud. *See* Sec. & Exch. Comm'n v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 192 (1963) (intent and injury are essential elements of common law fraud).

99. *See* MODEL BENEFIT CORP. LEGIS. § 401(c) (2016) ("Neither the benefit report nor the assessment of the performance of the benefit corporation in the benefit report required by subsection (a)(2) needs to be audited or certified by a third party.").

100. *See Performance Requirements*, *supra* note 13.

101. *See id.* Selecting a significant percentage of companies to audit at random may prove a cost-effective method of ensuring that companies' disclosures are truthful. I am grateful to Eman Al-Hassan for this point.

102. *See id.*

103. *See, e.g.*, *Fly Leasing Addresses SEC Comments, Restates Financials*, PR NEWSWIRE (May 2, 2016), http://www.prnewswire.com/news-releases/fly-leasing-addresses-sec-comments-restates-financials-300261280.html [https://perma.cc/NJX6-G8G7] (NYSE-traded company restated financial statements for two years to resolve dispute over proper accounting with the SEC). *See generally*,

confirm the information disclosed to them comports with Generally Accepted Accounting Principles, but they cannot assure that the financial statements are entirely accurate and free of fraudulent misstatements. The Public Company Accounting Oversight Board's standards require only "reasonable assurance" of a financial statement's accuracy by outside auditors.[104] As § 1015.10 states:

> The exercise of due professional care allows the auditor to obtain *reasonable assurance* about whether the financial statements are free of material misstatement, whether caused by error or fraud, or whether any material weaknesses exist as of the date of management's assessment. Absolute assurance is not attainable because of the nature of audit evidence and the characteristics of fraud. Although not absolute assurance, reasonable assurance is a high level of assurance. Therefore, an audit conducted in accordance with the standards of the Public Company Accounting Oversight Board (United States) may not detect a material weakness in internal control over financial reporting or a material misstatement to the financial statements.[105]

The Model Act does require benefit corporations to publicize their benefit reports on their respective websites.[106] Such disclosure may allow verification by the crowd to the extent false information can be detected without inside access to corporate information. For now, perhaps this should suffice. Requiring additional measures would add to the expense and complication of becoming a certified B Corp and might discourage companies from doing so. Unless and until fraud becomes a significant problem, the cost of adding safeguards seems to outweigh the likely benefits.

C. Vision

An assessment of a company's pro-social impact needs to embody some underlying vision of what it means for a profit-seeking company to help society. In other words, there needs to be a coherent expression of what the assessment is trying to measure. One can imagine many different perspectives on what social missions are important, as well as different weightings even among those who agree on the fundamental goals. Some

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Michal Barzuza & David C. Smith, *What Happens in Nevada? Self-Selecting into Lax Law*, 27 REV. FIN. STUD. 3593 (2014) (comparing financial restatements of Nevada and Delaware firms).

104. *AS 1015.10: Due Professional Care in the Performance of Work*, PUB. CO. ACCT. OVERSIGHT BOARD, https://pcaobus.org/Standards/Auditing/Pages/AS1015.aspx [https://perma.cc/RQ94-U3T9].

105. *Id.* This version of the rule is effective as of December 31, 2016, but the prior (current as of this writing) version is materially similar.

106. *See* MODEL BENEFIT CORP. LEGIS. § 402 (2016).

might argue that environmental responsibility is most critical, while others might see worker empowerment, corporate governance, or another social mission as particularly vital. Because different stakeholders have different preferences, to be useful, an assessment must explain the individual vision underlying its evaluation metric so that users will know which assessment to choose.

B Lab provides statements of its goals, which can be interpreted as its—or the Council's—guiding vision for the BIA, in two places on its website. Under the heading, "Why B Corps Matter," B Lab's website states:

> Individually, B Corps meet the highest standards of verified social and environmental performance, public transparency, and legal accountability, and aspire to use the power of markets to solve social and environmental problems.
>
> Collectively, B Corps lead a growing global movement of *people using business as a force for good^{TM}*. Through the power of their collective voice, one day all companies will compete to be *best for the world^{TM}*, and society will enjoy a more shared and durable prosperity for all.[107]

The first paragraph indicates that certified B Corps are socially and environmentally responsible, transparent to the public about their conduct, and legally accountable. These are vision statements, but they suffer from some significant problems.

The first paragraph's overarching vision is a conglomerate of five visions: social performance, environmental performance, transparency/verification, legal accountability, and implementation of a social mission. These five visions are in some tension, yet this is not acknowledged. For example, older technology may require more workers to operate it (which is good for workers and fulfills the social performance goal), but new technology may be cleaner (which is better for the environment and fulfills the environmental performance goal). Legal accountability and transparency may together lead to liability, which will sap the company's ability to perform its social mission. The first paragraph does not indicate which of these principles should trump the others when they conflict.

Also, it is far from clear that the BIA comports with the paragraph's expressed vision. For example, it is unclear what the "highest standards" of social and environmental performance are. However, even if we assume that the BIA's questions reflect those standards, companies can achieve

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107. *Why B Corps Matter*, B LAB, https://www.bcorporation.net/what-are-b-corps/why-b-corps-matter [https://perma.cc/6Y79-M4MN].

certification while adopting only a portion of them—enough to earn 80 points on a 200-point scale.[108] Also, as explained above, the certification process's verification portion leaves much to be desired.[109] Public transparency also could be much stronger; certification requires only quite limited transparency for most companies, though greater transparency is rewarded with a higher BIA score.[110] Finally, neither the Model Act nor the rules governing B Corps impose any significant legal liability on a certified company, which would seem to be a requirement for "legal accountability."[111]

The second paragraph articulates laudable goals, but is so broad that it is hard to discern much substantive guidance. Business should be used as a force for good, where "good" seems to be defined as "a more shared and durable prosperity." This prosperity should be "for all," which seems a more ambitious version of the earlier statement that it be more widely shared. But how should businesses achieve this new, more widespread and more durable prosperity? And what is "prosperity"? Is it limited to greater access to material goods? That seems inconsistent with B Lab's environmental goals, which often require people to use less, not more, material and energy. Like the first paragraph, there is a sense of a vision here, but the way it is expressed makes it difficult to implement.

The other expression of a vision on B Lab's website is its "Declaration of Interdependence."[112] The Declaration begins by repeating the second paragraph's ambition that business be used as a force for good and that the benefits companies produce should be distributed to all stakeholders, not just the companies' owners.[113] It then goes on to list what B Corps believe:

> That we must be the change we seek in the world.
>
> That all business ought to be conducted as if people and place mattered.
>
> That, through their products, practices, and profits, businesses should aspire to do no harm and benefit all.

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108. *See How to Become a B Corp.*, *supra* note 13.

109. *See supra* notes 97–106 and accompanying text.

110. *See Assessment Spreadsheet*, *supra* note 40.

111. *See* Michael B. Dorff, *Why Public Benefit Corporations?*, 42 DEL. J. CORP. L., 21–28 (forthcoming 2017).

112. *Declaration of Interdependence*, B LAB, https://www.bcorporation.net/what-are-b-corps/the-b-corp-declaration [https://perma.cc/7ACD-ELKG].

113. *See id.*

> To do so requires that we act with the understanding that we are each dependent upon another and thus responsible for each other and future generations.[114]

Like the two paragraphs that explain why B Corps matter, the Declaration embraces heartwarming rhetoric but does not provide much practical guidance for those trying to implement a coherent vision. Exhorting companies to "be the change" is an inspirational instruction to take personal responsibility for implementing a vision, but it is not itself a vision; it provides no substantive directions as to what sort of change one should be.

The statement that companies should act as though "people and place mattered" is a bit cryptic. People are important, but which people and for what ends? The statement could refer to workers, customers, surrounding communities, or all fellow travelers on the planet. Each of these meanings would dictate very different strategies for acting as though people mattered.

Place is even more mysterious. This could be read as an admonishment to avoid outsourcing, though it is far from clear that is what was intended. If so, the admonishment needs greater explication. Banning outsourcing requires a company to prioritize the needs of the local community over those of people who live far away. If all humans have equal dignity and worth, then this exhortation seems of dubious moral value, especially if those to whom the work would be outsourced suffer from far greater poverty and/or live in countries with far less comprehensive safety nets than those whose jobs are being shipped overseas. Also, in some cases the local community will not be the best place to produce a product from an environmental perspective, perhaps because the local environment is more sensitive than elsewhere. If so, should environmental concerns trump concerns about place? Finally, a ban on outsourcing seems to contradict the goal of a more widely shared prosperity.

Aspiring to do no harm and benefit all laudably echoes Hippocrates' admonition to physicians to "do no harm."[115] Unfortunately, all economic activity necessarily does some harm. Manufacturing solar panels will reduce greenhouse gas emissions and combat global warming,

114. *Id.*

115. *See* HIPPOCRATES, ON EPIDEMICS 9 (The Perfect Library 2015) ("The physician must be able to tell the antecedents, know the present, and foretell the future—must mediate these things, and have two special objects in view with regard to disease, to do good or to do no harm."). Although a common misconception, this phrase is not part of the Hippocratic Oath. *See* Lisa L. Dahm, *Medical Futility and the Texas Medical Futility Statute: A Model to Follow or One to Avoid?*, 20 No. 6 HEALTH L. 25 at n.13 (2008).

commendable results that on balance should benefit the world. But the manufacturing process is not harm-free. Manufacturing goods requires the use of raw materials, which in turn often requires mining or other destructive methods to extract the raw materials from the planet's crust. Even if extraction could be achieved without environmental degradation, manufacturing generally involves the use of nonrenewable raw materials such as iron, gold, aluminum, rare earths, and petroleum. There are more and less destructive manufacturing processes, but it is impossible to do no harm at all while manufacturing goods. Similar arguments could be made for agricultural activities and even the service industry.

Benefitting all also sounds unobjectionable, but is equally impossible to implement. The category "all" presumably includes a company's competitors, workers, customers, and communities. Business in the U.S. economy involves competition; we have developed an extensive body of law to ensure that competition is the norm.[116] A company trying to develop a better or cheaper product does so in order to outsell the competition, taking away its competitors' customers for itself. The goal of benefitting all seems inherently incompatible with a capitalist economy.

Finally, the reminder that we are dependent on one another and that future generations depend on us is admirable and correct but not terribly helpful in making concrete decisions. The point of highlighting our mutual dependence seems very similar to the goal of companies benefitting all through their economic activities and shares the same practical problems. Intergenerational dependency fails to indicate what our obligations to future generations are. One perspective might be that our obligation to our grandchildren is to preserve as much of the planet's natural resources as possible. This would suggest that we limit economic activity so that we minimize our use of nonrenewable raw materials. Another perspective might suggest that we should maximize our grandchildren's standard of living. This goal would suggest the opposite approach, that we should increase industry and capital as much as possible so that our grandchildren can have lives that are more materially comfortable than our own. We should care about each other and about our descendants, but what actions does this admonition dictate? A coherent vision statement should guide us in making these decisions, not just provide an emotional framework.

There is a limit to how much guidance a vision statement can be expected to provide. The point of a vision statement is to indicate an overall sense of the assessment's goals and philosophy, not to dictate the outcome of every minute decision. Still, to be helpful, the vision statement

116. *See* State Oil Co. v. Kahn, 522 U.S. 3, 7 (1997) ("Under §1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1, '[e]very contract, combination . . ., or conspiracy, in restraint of trade' is illegal.").

must consist of more than just platitudes, and when aspects of the vision are in tension, it should provide some sense of how to resolve conflicts when they arise. Examples of forms this guidance could take include a hierarchy of principles, mandatory minimum requirements for each principle that cannot be subverted, or a Rawlsian maximin principle.[117] There is no doubt that many other possibilities exist, but a vision statement that endorses more than one value should provide some method of resolving conflicts.

D. Inclusivity

An assessment that is simple, valid, and embodies a clear vision would still be pointless if no one used it. To achieve broad utilization, the assessment's vision must be popular. Popularity could result from espousing narrow views that are widely held, or it could be achieved with a more ecumenical strategy of accepting a wide range of principles. Much depends on the size and viewpoints of the target audience.

The Model Act imposes the outer limits on how expansive an assessment's vision may be, but these outer limits are very broad. The Model Act defines both "general public benefit" and "specific public benefit."[118] Every benefit corporation under the Model Act must provide a general public benefit and has the option of providing a specific public benefit.[119]

The Model Act defines "general public benefit" as "[a] material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation."[120] Leaving aside the drafting oddity that included the requirement for a third-party standard in the definition, the definition imposes very few substantive requirements. Benefit corporations must produce a substantial and beneficial effect on "society." The Model Act does not specify what counts as a "positive impact," nor does it delineate the limits of whose interests count as part of "society," leaving these terms as blank slates to be filled in by benefit corporations and the creators of third-party assessments. The definition does require, however, that benefit corporations help the environment as well as society; companies that wish to focus only on helping people and not places must find some other form of business organization.

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117. *See* JOHN RAWLS, A THEORY OF JUSTICE 133 (rev. ed. 1999) ("The maximin rule tells us to rank alternatives by their worst possible outcomes: we are to adopt the alternative the worst outcome of which is superior to the worst outcomes of the others.").

118. *See* MODEL BENEFIT CORP. LEGIS. § 102 (2016).

119. *See id.* § 201.

120. *Id.* § 102.

Benefit corporations also have the option of adopting a "specific public benefit." The definition of "specific public benefit" is similarly broad:

> (1) providing low-income or underserved individuals or communities with beneficial products or services;
>
> (2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;
>
> (3) protecting or restoring the environment;
>
> (4) improving human health;
>
> (5) promoting the arts, sciences, or advancement of knowledge;
>
> (6) increasing the flow of capital to entities with a purpose to benefit society or the environment; and
>
> (7) conferring any other particular benefit on society or the environment.[121]

One oddly absent category is religion. Religion is included as a permissible public purpose for nonprofit organizations that wish to qualify for tax-deductible contributions under IRC § 501(c)(3), yet it was not included in the Model Act.[122] It is unclear why religion was not specifically listed here, but it would seem to fit under the very broad catchall provision in paragraph (7).

For both the general and specific public benefits, then, the Model Act is highly permissive. The third-party assessments have tremendous latitude to shape their visions of what should count as a benefit to society or the environment with very few concrete limitations. To see just how inclusive the statutory definition is, imagine a company that develops and manufactures new televisions with improved image quality, and that this company also donates a small percentage of its profits to an organization that works to clean pollution from the world's oceans. Such an organization is providing a public benefit and would qualify—assuming it met the Model Act's other requirements—to form as a benefit corporation. It provides a benefit to society—better televisions—and delivers a material benefit to the environment through its donations. It would also qualify as providing a specific benefit under paragraph five, because the company promotes the sciences and the advancement of knowledge through its research to create better televisions. A third-party assessment could be similarly inclusive if it so chose.

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121. *Id.*

122. *See* 26 U.S.C. § 501(c)(3) (listing "religious" purposes as acceptable).

Note also that the catchall provision could include sharply controversial missions. An organization that worked to ban all abortions would count as providing a benefit to society by some people's lights, as would an organization that attempted to provide free and legal abortions to all who needed one. Other than its emphasis on environmental benefits, the statute is apolitical.

In some ways, the BIA has taken advantage of the range of possibilities furnished by the Model Act. The BIA awards points in four impact areas: governance, workers, community, and the environment.[123] The BIA thus embraces a broad vision of what counts as a positive impact on society.

At the same time, the BIA imposes its vision on users of its assessment and does not provide much flexibility. Companies cannot become certified B Corps by excelling in only one of the four impact areas and abandoning the other three.[124] They must achieve at least some points in each of the four areas if they expect to have a realistic chance of earning 80 points and qualifying for certification.[125] In this way, although the BIA's vision is broad in that it encompasses a number of different types of positive impacts on society, it is also quite restrictive in that it requires companies that aspire to certification to pursue *all* of these areas. Companies do retain considerable flexibility, though, in deciding which areas to emphasize.

The other way the BIA is less inclusive than it might be is that it awards points based on some activities that not all would agree should count as a benefit to society. I should note that these are largely the exception; the vast majority of the BIA's judgments about what counts as beneficial to society or the environment are unlikely to prove controversial. But there are a few categories that seem potentially problematic. For example, the BIA awards points to companies that emphasize use of locally sourced parts.[126] Sourcing locally may provide environmental benefits by reducing the need for transportation, but it may also result in producing goods in environmentally sensitive locations. Also, because this question is asked of companies in emerging economies, it may help with local economic development. On the other hand, local sourcing may deprive workers in other countries from badly needed jobs and may result in higher costs if local production is inefficient. Plus, companies that pay more for local inputs than they would for imported substitutes will have fewer resources available to pursue their social

123. *See Assessment Overview*, *supra* note 17.
124. *See* Osusky Interview, *supra* note 37.
125. *See id.*
126. *See Assessment Spreadsheet*, *supra* note 40, question IBM11.3.

missions. Some companies might reasonably conclude that buying local is not, on balance, pro-social.

Another example is that the BIA rewards companies for granting board seats to certain stakeholder representatives, such as members of the local community, customers, environmental experts, and nonexecutive employees.[127] Sometimes having such representatives can provide valuable advice and perspective to a benefit corporation as it attempts to balance its various goals. Other times, though, it may lead to co-option of the company by one group at the expense of others or of the company's broader social purpose. A local community representative might advocate for an expansion of the local manufacturing plant to improve the local economy, as might a representative of the employees. The expansion might come at the expense of the local environment, though, and so contradict the company's environmental mission. Granting stakeholders a voice also risks creating dissension and paralysis as groups advocate for their particular interests. Some companies might reasonably prefer to avoid giving voting seats on the board to stakeholder representatives for these reasons.

That the BIA makes some controversial choices is largely inevitable. The vision goal and the inclusivity goal are necessarily in conflict. The stronger the vision, the more groups are likely to be excluded because they disagree with it. Conversely, having a "big tent" philosophy that includes all visions of what should count as a benefit to society, as the Model Act largely does, risks watering down the vision so much that the assessment ends up standing for nothing at all.

The balance struck by the BIA seems quite reasonable. The BIA rewards a wide array of possible social benefits, yet still provides some sense that it has an overarching vision of what benefit corporations should do. The fact that the BIA's position is reasonable, though, does not mean its choices will be appropriate for all benefit corporations. There remains a strong need for competing assessment tools that promote alternative visions to meet the needs of companies whose strategies do not fit well with the choices made by the BIA.

The disadvantage of having multiple third-party assessment tools is that it becomes harder to compare and evaluate companies when they are measured by different metrics. As I argued above, however, even among companies that use the BIA, intercompany comparisons are difficult and likely inappropriate for companies that do not happen to fall into the same subcategory out of the seventy-two different possibilities. Perhaps, then,

127. *See id.*, question GV2.3a.

having a variety of third-party assessments would not require much sacrifice in comparability.

Competing assessment tools might also face a "race to the bottom" problem.[128] The assessment's authors might water them down in order to induce benefit corporations to use them. The competition's result might then be, not a range of different but equally valid visions, but rather pressure to make the assessment as easy to pass as possible. When assessments are offered for free, as the BIA is, the incentive to attract users by weakening standards seems attenuated. Still, this is a danger worth monitoring if other entities develop competing assessments.

E. Reputational Capital v. Regulatory License

When sellers have information that buyers lack about the unusually high quality of their goods or services, it is to the sellers' advantage to convey that information to the buyers. Buyers who know that a seller's products are unusually good will often be willing to pay more for them. Sometimes, though, it is expensive or impossible for a seller to convey this information in a way that will be believed by buyers. In such cases, economic theory holds that sellers will invest in their reputations or post a bond for an amount that will be transferred to disappointed buyers if the product is of lower quality than advertised.[129]

When neither reputation investments nor bond posting are practical, there is a role for third-party intermediaries to play. A third party can certify the quality of a seller's products, putting the intermediary's own reputation at stake.[130] A classic example of such an intermediary is a credit rating agency, such as Standard & Poor's or Moody's.[131] The intermediary's quality certification is credible because the intermediary is risking its own reputation by engaging in the certification. If the certification turns out to be mistaken, the intermediary will suffer a loss of reputational capital, making it more difficult to sell its certification in the future. In order to protect its reputational capital, then, the intermediary will take care to certify products accurately.[132]

Frank Partnoy has argued convincingly that the reputational capital model may not apply when the law requires certification by an intermediary for some purpose. For example, the law requires a certain rating by a certified credit rating agency in order to permit certain types of

128. I am indebted to David Min for this point.
129. *See* Gilson & Kraakman, *supra* note 11, at 604.
130. *See id.* at 605.
131. *See id.*
132. *See id.* at 604–05.

investors to purchase a bond.[133] The credit rating agency, then, is not only providing an informational service, it is also serving as a regulatory barrier to entry. By providing issuers access to investors, the rating agencies sell a valuable service separate from the rating's informational value. Because this gatekeeping function, or "regulatory license," is so valuable, and because there are only three certified credit ratings agencies of any real market importance, the deterrent effect of harm to the rating agencies' reputational capital caused by providing unduly optimistic credit ratings is severely diluted. Rating agencies may profit from selling inflated ratings to issuers even if purchasers disbelieve the ratings—so that the ratings serve little informational value—because they are providing a regulatory license to sell bonds and this license to enter the market is highly valuable.[134]

There is some danger that Partnoy's regulatory license theory will also apply to third-party assessment tools used by benefit corporations.[135] The Model Act imposes a number of requirements for third-party assessments, including some that restrict what sort of entities can create them.[136] While it is unlikely that the BIA will be the only standard that will qualify, the number of choices may be limited. As a practical matter, because B Lab plays such a critical role in the benefit corporation movement, the BIA is likely to be the standard most companies use. Arguably, then, B Lab will not be deterred from weakening the standard by threats to its reputational capital, since it serves a regulatory license function by providing a standard to benefit corporations that they need to comply with the Model Act.

Although this is an important concern, I do not believe it will materialize in the benefit corporation context the way it has with credit rating agencies. Unlike with credit ratings, where statutes require that issuers earn a certain credit rating from an outside agency to become eligible to take various actions, the Model Act requires only that benefit corporations evaluate themselves against some third-party standard.[137] The Model Act does not demand that benefit corporations obtain some particular achievement level on these assessments.[138] Also, the third party's only involvement is in the creation of the assessment; companies

133. *See* Partnoy, *Siskel*, *supra* note 12, at 690–703 (describing numerous examples of regulations requiring a particular credit rating).

134. *See generally* Partnoy articles, *supra* note 12.

135. Again, I am indebted to Frank Partnoy for this point.

136. *See* MODEL BENEFIT CORP. LEGIS. § 102 (2016) (definition of "third-party standard").

137. *See id.* § 401(a).

138. *See id.*

perform the evaluations themselves.[139] B Lab and the Council therefore have essentially no power to permit or deny any statutory action a benefit corporation may desire to take and certainly have no authority to deny benefit corporation status to an entity that performs poorly on the BIA. Under these circumstances, it is difficult to see the BIA as analogous to credit-ratings agencies, who act as regulatory gatekeepers for a variety of important actions.[140]

B Lab does control companies' ability to declare themselves "Certified B Corps," but this is not a designation that has any legal significance. Instead, this designation is best seen as a marketing tool companies may use to signal their pro-social status to various constituencies such as customers, employees, and investors.

Still, to the extent the designation provides benefits that companies would otherwise be unable to obtain, "B Corp" status may be a closer analogy to the regulatory license scenario than the self-assessment the Model Act requires. As with a regulatory license, a third party exercises some control over a company's ability to participate in a market activity, and, in this case, the ability to claim pro-social status and its attendant benefits. Therefore, there may be some danger that, similar to how credit ratings became important to issuers as a means to access certain markets rather than as an accurate predictor of the odds a company would default on its debt,[141] B Lab's certification will become valuable to companies more for the attendant marketing benefits than as a meaningful statement about the companies' pro-social behavior.

The risk here also seems rather small. Unlike credit ratings, which have a legal effect separate from their information signal, B Lab's certification is *only* meaningful as a method of branding a company as pro-social. The standard economic analysis of reputational capital should therefore apply to B Corp certifications. If companies with the certification behave in ways that seem inconsistent with the values underpinning the certification—if they are caught polluting the environment, for example, or ignoring their stated social mission, or treating their workers poorly—that will erode the value of the certification. B Lab and the Council therefore have a strong incentive to maintain the integrity of the certification and protect their reputational capital.

One possible danger here stems from the "big tent" philosophy of the BIA. Because the BIA attempts to capture many different dimensions of pro-social behavior, it is not entirely clear what a failure of the standards

139. *See* MODEL BENEFIT CORP. LEGIS. § 102 (2016) (definition of "third-party standard" includes criteria for authors of the standard).

140. *See* Partnoy, *Siskel*, *supra* note 12, at 690–703.

141. *See generally* Partnoy articles, *supra* note 12.

would mean.[142] Credit ratings attempt to predict only one type of corporate behavior: the ability to make payments on the bond when due. Due to the probabilistic nature of these predictions, there is some ambiguity about what would constitute a failure. A high rating is not intended as a guaranty of payment, nor is a low rating a guaranty of default. Ratings are intended to measure probabilities, not certainties. But for the most part, a ratings agency that awarded a company's bonds a high score would likely be seen to have failed if the company subsequently defaulted. The ratings agency should have signaled that there was a high likelihood of default but failed to do so.

In contrast, it is far less clear precisely what B Corp certification signals. Companies can achieve certification by scoring 80 points out of a possible 200 on a self-assessment that measures a host of different behaviors. Those who rely on certification to measure a company's behavior could be focusing on anything from a single aspect of the BIA to a detailed understanding of the BIA as a measurement tool to a gestalt sense of corporate benevolence.

When a certified company later reveals that it has engaged in some behavior that might not live up to a user's perception of what is appropriate for a certified company, is that a failure of the certification process? Will it undermine B Lab's reputational capital, even if it involved conduct that was disclosed on the self-assessment? Conversely, the muddiness of the signal certification sends to the public may well shield B Lab's reputational capital even when troubling corporate behavior becomes public, perhaps undermining the incentive B Lab has to protect the integrity of the certification process.

It is too soon to judge what types of corporate behavior different segments of the public will perceive as a failure of the certification process. I suspect, though, that the greater danger is that B Lab's reputation will be too easily undermined by a certified company's poor behavior, rather than the reverse.

CONCLUSION

The BIA is a deeply considered and eminently reasonable third-party assessment tool for benefit corporations. Its flaws are, for the most part, the result of the inescapable tension between the goals of simplicity and validity and between those of vision and inclusivity. There are areas where it seems that the BIA can be improved along one dimension without undue sacrifice along another, however, and I have tried to indicate those areas to the extent possible.

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142. I am indebted to Colin Mayer and David Musto for this point.

Overall, I tried in this Article to point out the choices the BIA made with the hope that competing assessment tools will be developed that make other, equally reasonable, trade-offs among the four goals. I hope for alternatives, not because the BIA is flawed, but because different companies might prefer different sets of choices from among the menu of possible decisions, so there should be a variety of assessments available. I admire greatly the excellent and pioneering work done by B Lab and the Council, and I hope my small efforts in this Article will help them and other organizations that share their goals to improve on what is already a remarkable achievement.