

Social Enterprise and Investment Professionals: Sacrificing Financial Interests?

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INTRODUCTION

Over the past decade, more than three dozen jurisdictions in the United States passed some form of social enterprise legislation.¹ Social enterprise statutes allow for the formation of for-profit entities that expressly require directors to consider the interests of corporate constituents beyond merely shareholders.² Proponents of these social enterprise statutes argue that such statutes are needed because traditional corporate law prevents sacrificing the financial interests of shareholders in the interest of a broader social good, or in the interest of other stakeholders. Recently, social enterprises have started exploring public markets and showing up on the radar of investment professionals, including those covered by the Employee Retirement Income Security Act (ERISA). ERISA has long required plan fiduciaries to “discharge [their] duties with respect to a plan *solely* in the interest of the participants and beneficiaries,” but various iterations of guidance from the Department of Labor (DOL) show differing amounts of favor or disfavor toward Economically Targeted Investments (ETIs)—investments made for financial returns *and* collateral social benefits to participants.³ This Article seeks to uncover and explain the relationship between social enterprises (most of which are likely to be classified as ETIs) and ERISA, while also discussing the current and future place of social investing in the broader financial world.

Part I of this Article provides a brief overview of impact investing and the array of newly created social enterprise legal forms. Part II takes stock of the current state of social enterprise investing. Part III examines ERISA and the DOL’s guidance on extra-financial considerations when making investment decisions. Part IV describes the difficult line proponents of social enterprise forms, such as benefit corporations, must walk. On one hand, social enterprise proponents argue for the statutory permission to intentionally sacrifice profits, and, on the other hand, they argue that social enterprises will provide a market rate of return. The last

1. See *Here’s the Latest L3C Tally*, INTERSECTOR PARTNERS, L3C, http://www.intersectorl3c.com/l3c_tally.html [<https://perma.cc/M52P-2XPQ>] [hereinafter *L3C Tally*] (showing nine states and two Native American tribes have passed L3C legislation since 2008); *State by State Status of Legislation*, BENEFITCORP.NET, <http://benefitcorp.net/policymakers/state-by-state-status> [<https://perma.cc/5BMF-REQ4>] (noting that thirty states and the District of Columbia have passed benefit corporation legislation since 2016).

2. See, e.g., Dana Brakman Reiser, *Theorizing Forms for Social Enterprise*, 62 EMORY L.J. 681, 706–07 (2013) (noting the mandate by social enterprise law, such as benefit corporation law, for directors to consider various stakeholders).

3. See *infra* Part III.

substantive section, Part V, unpacks financing options outside of the ERISA umbrella for social enterprises such as venture capital and crowdfunding while also considering the future of social enterprise investing under ERISA. A brief conclusion closes the Article.

I. IMPACT INVESTING AND SOCIAL ENTERPRISE LEGAL FORMS

Interest in social enterprises, organizations that use commercial means to reach social ends, is increasing among entrepreneurs, investors, governments, attorneys, and customers.⁴ This Part starts with a brief overview of the various social enterprise legal forms available in the United States and discusses some of the debates among experts related to these social enterprise forms.

A. Low-Profit Limited Liability Companies

In 2008, Vermont passed the first social enterprise law in the United States, allowing for the formation of low-profit limited liability companies (L3Cs).⁵ Including Vermont, a total of nine states have passed L3C laws (though, North Carolina repealed its L3C law effective January 1, 2014, bringing the total number of active L3C state statutes down to eight).⁶ The passage of L3C legislation has stalled in more recent years with Rhode

4. See, e.g., DAVID BORNSTEIN & SUSAN DAVIS, SOCIAL ENTREPRENEURSHIP: WHAT EVERYONE NEEDS TO KNOW 1–20 (2010) (describing the history and definitions of social entrepreneurship); MARC J. LANE, SOCIAL ENTERPRISE: EMPOWERING MISSION-DRIVEN ENTREPRENEURS 1–15 (2011) (noting the increase in social enterprises and providing a definition of social enterprise as a business that is mission-driven and seeks to better the lives of others); Tania Bucic, Jennifer Harris & Denni Arli, *Ethical Consumers Among the Millennials: A Cross-National Study*, 110 J. BUS. ETHICS 113, 113–14 (2012) (noting ethical purchasing habits and varying levels of engagement with cause-related marketing); Andrew White, *Lessons from Companies That Put Purpose Ahead of Short-Term Profits*, HARV. BUS. REV., June 9, 2016, https://hbr.org/2016/06/lessons-from-companies-that-put-purpose-ahead-of-short-term-profits?mod=djemCFO_h (describing companies that are seeking social purpose); J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 543–55 (2016) (describing the various social enterprise statutes enacted by state governments in the United States over the past decade); Sean Greene, *Preface to THE CASE FOUNDATION, A SHORT GUIDE TO IMPACT INVESTING* (2014), <http://casefoundation.org/wp-content/uploads/2014/11/ShortGuideToImpactInvesting-2014.pdf> [<https://perma.cc/C39V-7T4Z>] (noting the increasing interest in impact investing); Susan Mac Cormac, *Impact Investing*, MORRISON FOERSTER, <http://www.mofo.com/special-content/impactinvesting> [<https://perma.cc/2CLX-MTZX>] (listing various impact investing and social enterprise articles from the major law).

5. See J. William Callison & Allan W. Vestal, *The L3C Illusion: Why Low-Profit Limited Liability Companies Will Not Stimulate Socially Optimal Private Foundation Investment in Entrepreneurial Ventures*, 35 VT. L. REV. 273, 283 (2010).

6. See Eric H. Franklin, *A Rational Approach to Business Entity Choice*, 64 U. KAN. L. REV. 573, 591 (2016) (citing the eight states with L3C statutes in place, and noting that a ninth state, North Carolina, repealed its L3C statute).

Island passing the latest state L3C statute in 2012.⁷ The L3C form was conceived, in large part, to attract Program-Related Investments (PRIs) from foundations, and the statutory language mimics the IRS's requirements for making proper PRIs.⁸ The IRS, however, failed to create a clear L3C safe harbor for PRIs and, consequently, interest in the form has waned.⁹ Academic criticism of L3Cs started relatively soon after the first state legislation passed; the criticism focused mainly on the form being unnecessary and not providing significant advantages in attracting PRIs.¹⁰ Substantively, the L3C statutes remain probably the strictest social enterprise law on entity purpose, requiring that the L3C "significantly furthers the accomplishment of one or more charitable or educational purposes" and requiring that the L3C "would not have been formed but for the company's relationship to the accomplishment of charitable or educational purposes."¹¹ Furthermore, the L3C statutes require that "[n]o significant purpose of the company is the production of income or the appreciation of property," though the statutes explicitly state that making a profit is not "conclusive evidence of a significant purpose involving the production of income or the appreciation of property."¹² Despite such restrictive statutory language, approximately 1,300 L3Cs have been

7. See *L3C Tally*, *supra* note 1 (showing one L3C statute newly effective in 2008, four in 2009 (including the Oglala Sioux Tribe), three in 2010 (including North Carolina, which was later repealed), one in 2011, one in 2012, and one (the Navajo Tribe) in 2014).

8. See Robert Lang & Elizabeth Carrott Minnigh, *The L3C, History, Basic Construct, and Legal Framework*, 35 VT. L. REV. 15, 15–17 (2010).

9. See John A. Pearce II & Jamie Patrick Hopkins, *Regulation of L3Cs for Social Entrepreneurship: A Prerequisite to Increase Utilization*, 92 NEB. L. REV. 259, 261–62 (2013); Jamie Hopkins, *Low-Profit Limited Liability Companies: High-Risk Tax Fad or Legitimate Social Investment Planning Opportunity?*, 2014 CARDOZO L. REV. DE NOVO 35, 42–43 (2014), http://www.cardozolawreview.com/content/denovo/HOPKINS_2014_35.pdf [https://perma.cc/QWQ5-WMX9].

10. See generally Carter G. Bishop, *The Low Profit LLC (L3C): Program Related Investment by Proxy or Perversion?*, 63 ARK. L. REV. 243 (2010); Cassady V. ("Cass") Brewer, *Seven Ways to Strengthen and Improve the L3C*, 25 REGENT U. L. REV. 329 (2013); J. William Callison & Allan W. Vestal, *The L3C Illusion: Why Low-Profit Limited Liability Companies Will Not Stimulate Socially Optimal Private Foundation Investment in Entrepreneurial Ventures*, 35 VT. L. REV. 273, 274–75 (2010); Daniel S. Kleinberger, *A Myth Deconstructed: The "Emperor's New Clothes" on the Low-Profit Limited Liability Company*, 35 DEL. J. CORP. L. 879, 879 (2010); J. Haskell Murray & Edward I. Hwang, *Purpose with Profit: Governance, Enforcement, Capital-Raising and Capital-Locking in Low-Profit Limited Liability Companies*, 66 U. MIAMI L. REV. 1, 16–18 (2011); Cass Brewer, *Hybrid Business Entities in 2014*, SOCENTLAWBLOG (Jan. 6, 2014), <http://socentlaw.com/2014/01/hybrid-business-entities-in-2014/> [https://perma.cc/V4DR-H64M]; Anne Field, *North Carolina Officially Abolishes the L3C*, FORBES (Jan. 11, 2014), <http://www.forbes.com/sites/annefield/2014/01/11/north-carolina-officially-abolishes-the-l3c/>.

11. See, e.g., VT. STAT. ANN. tit. 11, §§ 4001(14), 4162 (2010); see also Cassady V. Brewer & Michael J. Rhim, *Using the 'L3C' for Program-Related Investments*, 21 TAX'N EXEMPTS 11, 11, 13 (2009) (stating that the Vermont L3C statute is similar to the L3C statutes in other states).

12. See sources cited *supra* note 11.

formed nationwide; however, the rate of formation appears to be slowing and research did not uncover any publicly traded L3Cs.¹³

B. Benefit Corporations, Public Benefit Corporations, and Benefit LLCs

In 2010, two years after the passage of the first L3C statute, Maryland passed the first benefit corporation statute.¹⁴ Including Maryland, thirty states and the District of Columbia have passed benefit corporation or public benefit corporation statutes.¹⁵ Most states passed benefit corporation statutes based on the Model Benefit Corporation Legislation (the Model).¹⁶ However, Delaware and Colorado's public benefit corporation (PBC) laws significantly depart from the Model in certain areas.¹⁷ Differences between the Model-based laws and the PBC laws are discussed in detail in another article by this author, but the primary differences are that, unlike the Model, PBC laws require a specific social purpose (instead of just a general one) and are more enabling in some areas than the Model, which tends to use more mandatory language.¹⁸ The Model requires benefit corporations to pursue a "general public benefit," defined 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," and requires that annual public reporting be measured against a third-party standard; however, Delaware's PBC law only requires reporting be done on a biennial basis, and both public reporting and the use of a third-party standard are optional.¹⁹ As another variation, Minnesota's statute allows the formation of general benefit corporations (similar to a Model-type benefit corporation) *and* specific benefit corporations (similar to the social purpose corporations described in Part

13. See Pearce & Hopkins, *supra* note 9, at 282 (2013) (noting that "L3Cs do not have the liquidity of publicly traded companies"); *L3C Tally*, *supra* note 1.

14. MD. CODE ANN., Corps. & Ass'ns § 5-6C-01 (West 2014) (effective Oct. 1, 2010).

15. *State by State Legislative Status*, BENEFIT CORP. INFO. CTR., <http://benefitcorp.net/policymakers/state-by-state-status> [<https://perma.cc/5BMF-REQ4>].

16. MODEL BENEFIT CORP. LEGIS. (2016) (The current version of the model legislation is dated April 4, 2016, but multiple versions of the model exist and some statutes were based on earlier versions that were slightly different than the current model legislation.).

17. See COLO. REV. STAT. ANN. §§ 7-101-501 to -509 (West 2006 & Supp. 2014); DEL. CODE ANN. tit. 8, §§ 361-368 (2011 & Supp. 2015).

18. See J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345, 347-70 (2014) (detailing the major differences between the Model Benefit Corporation and Delaware PBC. Note that the Delaware PBC statute has been amended since this 2014 article was written.). The Delaware PBC law is more flexible than the Colorado PBC law, given that the Colorado PBC law follows the model in its reporting requirements. Compare DEL. CODE ANN. tit. 8, §§ 361-368 (2011 & Supp. 2015), with COLO. REV. STAT. ANN. §§ 7-101-501 to -509 (West 2006 & Supp. 2014), and MODEL BENEFIT CORP. LEGIS. (2016).

19. MODEL BENEFIT CORP. LEGIS. §§ 102, 201(a), 401-02 (2016); see Murray, *supra* note 18.

I.C below).²⁰ Maryland and Oregon both have benefit corporation laws but deviate from the norm by having also passed laws allowing formation of benefit LLCs.²¹ The statutory language for benefit LLCs largely follows the benefit corporation language, but the statutory gaps are filled with the state LLC statute rather than the state corporate statute.²² As of late 2015, approximately 3,300 benefit entities have been formed and the benefit entity proponents appear to be the largest group of supporters for the social enterprise forms.²³

Proponents of the benefit corporation form authored a white paper (the *Proponent White Paper*) that argues that the entity type is a needed addition to the legal forms menu.²⁴ The *Proponent White Paper* claims not only that the market is demanding a social enterprise legal form like the benefit corporation but also that “existing legal frameworks do not accommodate for-profit mission-driven companies” like the benefit corporation.²⁵ In arguing that existing legal frameworks do not accommodate social enterprises, the *Proponent White Paper* focuses on *Dodge v. Ford*²⁶ and Delaware cases, like *Unocal* and *Revlon*, which took place in the company sale context.²⁷ The *Proponent White Paper* recognizes that “strict reading of *Dodge v. Ford* and other cases that specify shareholder wealth maximization as a fiduciary duty has been criticized by those who believe that these cases do not represent the current state of modern corporate law.”²⁸ The *Proponent White Paper* attempts to argue, however, that “*Dodge v. Ford* remains good law and many still

20. MINN. STAT. ANN. ch. 304A (West 2011 & Supp. 2015); see *infra* Part I.C.

21. MD. CODE ANN., Corps. & Ass'ns §§ 4a-1201 to -1208 (West 2014); OR. REV. STAT. §§ 60.750–60.770 (2014).

22. MD. CODE ANN., Corps. & Ass'ns §§ 4a-1201 to -1208 (West 2014); OR. REV. STAT. §§ 60.750–60.770 (2014). See generally J. Haskell Murray, *Beneficial Benefit LLCs?*, U. CIN. L. REV. (forthcoming 2017).

23. See J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 588 (2016).

24. See generally WILLIAM H. CLARK, JR. & LARRY VRANKA, BENEFIT CORP., WHITE PAPER: THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION: WHY IT IS THE LEGAL FORM THAT BEST ADDRESSES THE NEEDS OF SOCIAL ENTREPRENEURS, INVESTORS, AND, ULTIMATELY, THE PUBLIC, (2013), <http://benefitcorp.net/sites/default/files/documents/Benefit%20Corporation%20White%20Paper.pdf> [<https://perma.cc/JM6Y-S4MW>] [hereinafter PROPONENT WHITE PAPER].

25. PROPONENT WHITE PAPER, *supra* note 24, at 2–14.

26. *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919). In addition to *Dodge v. Ford*, the *Proponent White Paper* also cites *Katz v. Oak Industries, Inc.*, 508 A.2d 873, 879 (Del. Ch. 1986); *Long v. Norwood Hills Corp.*, 380 S.W.2d 451 (Mo. Ct. App. 1964); *Granada Investments, Inc. v. DWG Corp.*, 823 F. Supp. 448, 459 (N.D. Ohio 1993). But see Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 172–74 (2008) (arguing that *Dodge v. Ford* is bad law from both a normative and a positive position).

27. PROPONENT WHITE PAPER, *supra* note 24, at 7–14.

28. *Id.* at 7.

maintain that its ‘theory of shareholder wealth maximization has been widely accepted by courts over an extended period of time.’”²⁹

The *Proponent White Paper* argues for benefit corporation statutes in both constituency and nonconstituency statute states. Regarding constituency statute states, the *Proponent White Paper* claims that there is scant case law interpreting constituency statutes, that constituency statutes are vague and do not state how much weight to place on different stakeholders, and that other constituencies do not have standing to sue.³⁰ In nonconstituency statute states, like Delaware, the *Proponent White Paper* examines three contexts: (1) day-to-day decisions, (2) takeover defense decisions, and (3) change of control decisions.³¹ In the day-to-day context, the *Proponent White Paper* argues that even though these are the kind of decisions protected by the business judgment rule and of the kind that allow “directors [to] enjoy most discretion,” the law requires that these “decisions must show *some* connection to shareholder value.”³² The *Proponent White Paper* also notes that some mission-driven companies will make decisions that “might result in a diminishment of shareholder value, even over the long term,” and that those types of decisions knowingly embracing below-market terms may not be allowed under current law.³³ In the takeover defense and company sale situations, the *Proponent White Paper* notes the increased focus on shareholders’

29. *Id.* at 8 (quoting STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS § 9.2 at 413 (2002)).

30. *Id.* at 9–10. Interestingly, the benefit corporation statutes suffer from nearly all of those mentioned flaws: even less case law exists regarding benefit corporation statutes than constituency statutes; the benefit corporation statutes give little guidance to directors; the statutes do not specify the weight to be applied to different stakeholders; and while a third-party standard is required, the statutes provided little information about what the third-party standard should contain or how courts should use the standard in analyzing director conduct. The benefit corporation statutes do not expressly provide outside constituencies with standing to sue as a default. The *Proponent White Paper* notes “permissive constituency statutes only create the option (and not the requirement) for directors to consider interests of constituencies other than shareholders. . . . Mission-driven executives and investors are often in minority shareholder positions and would prefer that directors and officers be required to consider these expanded interests when making decisions.” *Id.* at 10. The *Proponent White Paper* does not discuss when or why minority shareholders should be prioritized over majority shareholders and does not discuss whether a traditional corporation in a constituency statute state could mandate nonshareholder constituency consideration in the firm’s articles of incorporation.

31. *Id.* at 11; see also J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 10–17 (2012) (discussing the different legal standards at play depending on the type of decision facing directors).

32. PROPONENT WHITE PAPER, *supra* note 24, at 12 (emphasis added); see also, Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 109–29 (2004) (providing justifications for a powerful, abstention-style business judgment rule).

33. PROPONENT WHITE PAPER, *supra* note 24, at 12. Specifically, the authors of the *Proponent White Paper* appear concerned that “a judge may not find it to be appropriate to consider and advance non-shareholder interests for their own sake (i.e., as part of the company’s mission) and not as a way of maximizing long-term shareholder financial value.” *Id.* at 14.

financial interests by the courts in *Unocal*³⁴ and *Revlon*³⁵ respectively.³⁶ The *Proponent White Paper* admits that these cases may be distinguished and navigated around, but it insists that the uncertainty in the law can lead to lawsuits if the firm focuses on the financial interests of shareholders.³⁷ The *Proponent White Paper* admits that some commentators have thoughtfully argued that one might be able to include a social purpose in a firm's certificate of incorporation to avoid the aforementioned issues, but claims that there is no clear statutory or case law on point, which supposedly makes firms nervous.³⁸

The rationales for benefit corporations summarized above and documented by the *Proponent White Paper* can or have been challenged, but they remain relevant for this Article and will be picked up again in the

34. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985). In *Unocal*, the business judgment rule is applied only if “the directors can first demonstrate that they were responding to a legitimate threat to corporate policy and effectiveness, and that their response was ‘reasonable in relation to the threat posed.’” PROONENT WHITE PAPER, *supra* note 24, at 12 (quoting *Unocal*, 493 A.2d at 949). The *Proponent White Paper* seemed especially concerned about the language in *eBay v. Newmark* which, in the *Unocal* context, stated: “Directors of a for-profit Delaware corporation cannot deploy a [policy] to defend a business strategy that openly eschews stockholder wealth maximization—at least not consistently with the directors’ fiduciary duties under Delaware law.” *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 35 (Del. Ch. 2010). The *Proponent White Paper* also appears concerned that “Delaware courts will seek to limit the ‘purely philanthropic ends’ of mission-driven companies, especially when their directors’ decisions are reviewed under *Unocal*’s scrutiny.” PROONENT WHITE PAPER, *supra* note 24, at 13. *But see* Stephen M. Bainbridge, *Unocal at 20: Director Primacy in Corporate Takeovers*, 31 DEL. J. CORP. L. 769, 772 (2006) (citing academics who have called *Unocal* a “toothless standard”).

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

36. PROONENT WHITE PAPER, *supra* note 24, at 12–13.

37. *Id.* at 13. *But see* Antony Page & Robert A. Katz, *Freezing Out Ben & Jerry: Corporate Law and the Sale of A Social Enterprise Icon*, 35 VT. L. REV. 211, 235–37 (2010) (explaining how “*Revlon* duties” can be avoided and how directors may be able to “just say no” to bids for the company); Lyman Johnson & Robert Ricca, *The Dwindling of Revlon*, 71 WASH. & LEE L. REV. 167, 224–25 (2013) (arguing that *Revlon* is diminishing in importance in Delaware law and arguing that courts should “reject *Revlon*’s faulty focus on short-term value maximization”).

38. PROONENT WHITE PAPER, *supra* note 24, at 13. *But see* DEL. CODE ANN. tit. 8, § 101 (West 2016) (“A corporation may be incorporated or organized . . . to conduct or promote any lawful business or purposes.”). In California, Professor Eric Talley and Jesse Finfrock argued that “the state does not permit flexibility in the statement of a corporate purpose within a corporate charter, constraining incorporators instead to utilize a stock set of phrases that do not clearly admit social entrepreneurship goals.” Jesse Finfrock & Eric Talley, *Social Entrepreneurship and Uncorporations*, 2014 U. ILL. L. REV. 1867, 1870 (2014). This limitation in California law, coupled with the absence of a constituency statute, “made it impossible for a for-profit California-incorporated firm to embrace social entrepreneurship goals in its core governing constitution.” *Id.* While Talley and Finfrock note the strong protection of the business judgment rule in California, like the *Proponent White Paper* authors, they argue that the protection is limited, stating that “[w]hile the rule grants fiduciaries discretion about *how* to serve their shareholder interests, it arguably does not give discretion about *whether* to do so. Consequently, for decisions that patently sacrifice shareholder welfare for the benefit of other considerations (including social purposes), even the BJR provides wavering protection.” *Id.* (emphasis in original). The California benefit corporation and social purpose corporation legislation was passed, at least in part, to address these issues. *Id.*

discussions about how investment professionals should treat benefit corporations below.³⁹

C. Social Purpose Corporations

In 2011, California passed a flexible purpose corporation statute, which was later renamed a social purpose corporation (SPC) statute.⁴⁰ Washington is the only other state with a similar SPC statute.⁴¹ The defining feature of the SPC statute is its flexibility in entity purpose.⁴² The Model Benefit Corporation Legislation requires a general public purpose but, in contrast, the SPC allows the required purpose to be significantly narrower.⁴³ Like benefit corporation statutes, SPC statutes require regular social reporting.⁴⁴ Accurate figures on the number of SPCs are not readily available, but only twenty-three flexible purpose corporations (later called SPCs) were formed in California in 2012, and it would be surprising if the number of SPCs in both California and Washington has exceeded 300 entities at the time of this publication.⁴⁵

II. THE STATE OF SOCIAL INVESTING

Social investing has various facets. This Part begins by briefly describing the related, but different, concepts of impact investing and investing that considers environmental, social, and governance factors (ESG factors). This Part then narrows its focus to consider the place of social enterprise legal forms, which currently only occupy a small portion of the overall social investing landscape.

39. See generally J. William Callison, *Putting New Sheets on a Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, the Dangers Created, and Suggestions for Change*, 2 AM. U. BUS. L. REV. 85 (2012); Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007 (2013); J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1 (2012); Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591 (2011).

40. CAL. CORP. CODE §§ 2500–2517, 2600–2605, 2700–2702, 2800, 2900, 3000–3002, 3100, 3200–3203, 3300–3306, 3400–3401, 3500–3503 (West 2014).

41. WASH. REV. CODE ANN. §§ 23B.25.005 to .150 (West 2013).

42. J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 552 (2016) (explaining that the SPCs “do not require a general public benefit purpose but do require adoption of one or more specific purposes”).

43. *Id.*

44. Alicia E. Plerhoples, *Social Enterprise as Commitment: A Roadmap*, 48 WASH. U. J.L. & POL’Y 89, 107–08 (2015) (discussing the SPC reporting requirements under Washington and California law).

45. Finfrock & Talley, *supra* note 38, at 1874–75 (noting that the benefit corporations and FPCs formed during 2012 make up “less than two-tenths of a percent of the new incorporations within California during [2012]”).

A. Impact Investing and ESG Factors

Impact investing has been defined a number of different ways, but the authors of perhaps the leading book on the topic state that “impact investors intend to create positive impact alongside various levels of financial return, both managing and measuring the blended value they create.”⁴⁶ Stated differently, the Global Impact Investment Network (GIIN), a leading nonprofit that supports development of the impact investment industry, opines that “[i]mpact investments are investments made into companies, organizations, and funds with the intention to generate social and environmental impact alongside a financial return. Impact investments can be made in both emerging and developed markets, and target a range of returns from below-market to market-rate, depending upon the circumstances.”⁴⁷ Like the definition of impact investing, estimates of market size vary, but one survey of 146 impact investors administered by J.P. Morgan found impact investments in the amount of \$10.6 billion in 2014, with the intention to increase them to \$12.2 billion in 2015, and a total of approximately \$60 billion of impact investments under management.⁴⁸

While impact investors generally understand social impact as critical to their investments, many more managers at least consider ESG factors.⁴⁹ More than 1,400 companies have signed the Principles for Responsible Investment, which includes a commitment to promoting disclosure on ESG factors and considering ESG factors when making investments.⁵⁰ Worldwide, approximately \$45 trillion in assets are reportedly being managed with a commitment to incorporate ESG factors into the investment decision-making process, though the estimated amount varies depending on the source and their estimation methods.⁵¹

46. ANTONY BUGG-LEVINE & JED EMERSON, *IMPACT INVESTING: TRANSFORMING HOW WE MAKE MONEY WHILE MAKING A DIFFERENCE* (2011).

47. *What is Impact Investing*, GLOBAL IMPACT INVESTING NETWORK (GIIN) (2016), <https://thegiin.org/impact-investing/need-to-know/#s1> [<https://perma.cc/9A5W-L6HT>].

48. Yasemin Saltuk & Ali El Idrissi, *Eyes on the Horizon, The Impact Investor Survey 5*, GLOBAL IMPACT INVESTING NETWORK (May 4, 2015), <https://thegiin.org/assets/documents/pub/2015.04%20Eyes%20on%20the%20Horizon.pdf> [<https://perma.cc/KJ3B-6QXN>].

49. Reiser, *supra* note 2, at 739 n.202 (2013) (discussing some of the definition of impact investing. Each definition either considers social impact to be an important factor or the most important factor in investment decisions). *But see* David A. Levitt, *Impact Investing through a Donor Advised Fund*, 25 TAX’N EXEMPTS 3, 4 (2014) (noting that “there is no legal definition of a mission-related or impact investment, and no legal requirements to qualify for this status”).

50. *About the PRI*, PRINCIPLES FOR RESPONSIBLE INVESTING, <https://www.unpri.org/about> [<https://perma.cc/JDA8-N7B4>]; Matthew J. Mallow & Jasmin Sethi, *Engagement: The Missing Middle Approach in the Bebchuk-Strine Debate*, 12 N.Y.U. J.L. & BUS. 385, 399–400 (2016).

51. Deborah Burand, *Resolving Impact Investment Disputes: When Doing Good Goes Bad*, 48 WASH. U. J.L. & POL’Y 55, 60 (2015) (citing SOCIAL IMPACT INVESTMENT TASKFORCE, *IMPACT INVESTMENT: THE INVISIBLE HEART OF MARKETS* 1 (2014)); *see also* US SIF: THE FORUM FOR

B. Publicly Traded Social Enterprises

Most businesses legally organized as social enterprises appear to be smaller private companies.⁵² In 2015, Laureate Education, Inc. filed an S-1 to set up the first benefit corporation initial public offering in the United States.⁵³ Laureate Education is also the largest benefit corporation, with more than \$4 billion in revenue from 88 institutions, 28 countries, and 1 million students.⁵⁴ Plum Organics, a Delaware PBC, is a wholly owned subsidiary of publicly traded Campbell Soup Company.⁵⁵ Further, French company Danone recently acquired WhiteWave Food for roughly \$10 billion and reportedly plans to use a Delaware PBC for WhiteWave's operations.⁵⁶

Other publicly traded benefit corporations are supposedly in the works. Further, publicly traded, certified B Corporation Etsy will have to become a benefit corporation, reincorporate in a constituency-statute state, or lose its certification unless the nonprofit organization in charge of certification, B Lab, changes its rules regarding certified B corporations.⁵⁷ The other social enterprise forms, such as social purpose corporations,

SUSTAINABLE AND RESPONSIBLE INVESTMENT, REPORT ON US SUSTAINABLE, RESPONSIBLE AND IMPACT INVESTING TRENDS 2014 12 (10th ed.), http://www.ussif.org/Files/Publications/SIF_Trends_14.F.ES.pdf [<https://perma.cc/A65N-GM38>] (showing \$6.2 billion in *U.S.-domiciled* assets in institutions “that apply various environmental, social and governance (ESG) criteria in their investment analysis and portfolio selection”).

52. *Find a Benefit Corp.*, BENEFITCORP.NET, <http://benefitcorp.net/> [<https://perma.cc/5EW8-36BH>] (providing a database of benefit corporations, most of which appear to be relatively young and relatively small companies, with some exceptions); *L3C Tally*, *supra* note 1 (providing a list of L3Cs, which appear to be mostly small companies).

53. Alicia Plerhoples, *First Benefit Corporation IPO*, SOCENTLAW (Oct. 5, 2015), <http://socentlaw.com/2015/10/first-benefit-corporation-ipo/> [<https://perma.cc/5HAG-2V97>]; *Registration Statement: Form S-1*, PRACTICAL LAW, <http://us.practicallaw.com/0-381-0950> [<https://perma.cc/JW3C-76NE>] (noting that “Form S-1 is the registration statement form most commonly used by domestic companies selling securities to the public for the first time”).

54. *FAQ: Investing*, BENEFITCORP.NET, <http://benefitcorp.net/faq> [<https://perma.cc/YA25-BAEQ>].

55. *Plum Organics*, B CORPORATION.NET, <http://www.bcorporation.net/community/plum-organics> [<https://perma.cc/27HU-NAC2>].

56. *Danone Swallows WhiteWave in \$10B Bid to Go Organic*, ORGANIC CONSUMERS ASS'N (July 7, 2016), <https://www.organicconsumers.org/news/danone-swallows-whitewave-10b-bid-go-organic> [<https://perma.cc/R9HV-HW9Z>]; E-mail from Rick Alexander, B Lab (July 11, 2016, 06:22 CST) (on file with author).

57. Haskell Murray, *Etsy's Dilemma*, BUS. LAW PROF BLOG (March 20, 2015), http://lawprofessors.typepad.com/business_law/2015/03/etsys-dilemma-.html [<https://perma.cc/GGB9-5JNT>]; Haskell Murray, *Certified B Corporations v. Benefit Corporations*, CONGLOMERATE (May 3, 2012), <http://www.theconglomerate.org/2012/05/certified-b-corporations-v-benefit-corporations.html> [<https://perma.cc/EPM6-K7J5>] (explaining the differences between B corporation certification (a private certification awarded by B Lab after a test and payment of a fee) and the legal status of a benefit corporation (one of the options for legal entity status provided by certain states and obtained through incorporating under one of the benefit corporation statutes)).

Benefit LLCs, and L3Cs, currently have no known publicly traded companies.

C. Private, Outside Funding of Social Enterprises

Data on businesses formed under social enterprise statutes that have received venture capital, private equity, or other private, outside funding is difficult to uncover. A few of the known companies are detailed here. Alliant International University, a California benefit corporation, is funded and controlled by Bertelsmann, a large, German mass-media company.⁵⁸ AltSchool, a Delaware public benefit corporation, raised \$100 million from Andreessen Horowitz, Founders Fund, Learn Capital, and First Round Capital in 2015.⁵⁹ Farmigo, a Delaware public benefit corporation, raised a total of \$26 million from investment firms Formation 8, Benchmark, and Sherbrooke Capital.⁶⁰ Yerdle, a California benefit corporation, raised \$5 million in Series-A financing from venture capital funds including, The Westly Group, Mindful Investors, and DBL Investors.⁶¹ Ello, a Delaware public benefit corporation, raised \$5.5 million from Freshtracks Capital, Bullet Time Ventures, and Foundry Group.⁶² Cotopaxi, a Delaware public benefit corporation, raised \$6.5 million in a Series-A raise led by the venture capital firm Greycroft Partners.⁶³ Year Up Professional Resources (YUPRO) is a Delaware public benefit corporation that received \$4.5 million investment from

58. Doug Lederman, *Blurring the Nonprofit/For-Profit Divide*, INSIDE HIGH. ED (Feb. 23, 2015), <https://www.insidehighered.com/news/2015/02/23/nonprofit-university-becomes-benefit-corporation-further-blurring-profit-divide> [<https://perma.cc/A7ZR-AYEH>]; Kristin DeCarr, *Bertelsmann Takes Controlling Stake in Alliant*, EDUC. NEWS (Feb. 27, 2015), <http://www.educationnews.org/higher-education/bertelsmann-takes-controlling-stake-in-alliant/> [<https://perma.cc/LP5F-D3GN>]; E-mail from Jonathan S. Storper, Hanson Bridgett LLP (June 9, 2016, 20:27 CST) (on file with author).

59. *Benefit Corporations Raising Capital*, BENEFITCORP.NET, <http://benefitcorp.net/benefit-corporations-raising-capital> [<https://perma.cc/3LG3-WHDN>].

60. Anthony Ha, *Farmigo Raises \$16M For A New Approach To The Farmers' Market*, TECH CRUNCH (Sept. 30, 2015), <http://techcrunch.com/2015/09/30/farmigo-series-b/> [<https://perma.cc/Z6NQ-VXN7>]; *RSF Capital Management Registers as One of Delaware's first Benefit Corporations!*, RSF SOC. FIN. (Aug. 1, 2013), <http://rsfsocialfinance.org/2013/08/01/rsf-de-benefit-corporation/> [<https://perma.cc/W5J5-ESWK>] (listing some of the first Delaware public benefit corporations, including Farmigo, and the major investors in those companies).

61. *Benefit Corporations Raising Capital*, *supra* note 59.

62. *Id.*; Haskell Murray, *Ello and Social Enterprise*, BUS. LAW PROF BLOG (Oct. 24, 2014), http://lawprofessors.typepad.com/business_law/2014/10/ello-and-social-enterprise.html [<https://perma.cc/ZXZ6-GVSF>].

63. *Benefit Corporations Raising Capital*, *supra* note 59; BENEFIT CORPORATION REPORT, COTOPAXI, <https://cdn.shopify.com/s/files/1/0281/7544/files/Cotopaxi-2015-Benefit-Corporation-Report.pdf?6577560737617330421> [<https://perma.cc/8CB4-BPM4>] (noting the company's legal status as a Delaware public benefit corporation, though they incorrectly use the term "benefit corporation," rather than "public benefit corporation").

Venture Philanthropy Partners, “a nonprofit philanthropic investment organization,” in 2009, before YUPRO converted to a PBC.⁶⁴ Method, a Delaware public benefit corporation, was supported in its transition to a Delaware public benefit corporation by Ecover, its acquirer, in 2013.⁶⁵ Beta Bionics, a Massachusetts benefit corporation, raised \$5 million dollars from Eli Lilly in 2016.⁶⁶ Maine’s Own Organic (MOO) Milk, a Vermont-organized L3C, raised more than \$3.9 million in 2013 (bringing the total amount raised close to \$6 million), before winding down operations in 2014.⁶⁷

There are quite a number of investment providers that are specifically interested in the social investing space, including Acumen Fund, Gray Ghost Ventures, Root Capital, RSF Social Finance, Slow Money, and Village Capital. However, these investment organizations do not appear to be exclusively focused on businesses that have utilized the social enterprise legal forms.⁶⁸ In addition, some of the investment organizations, like RSF Capital Management, PBC (a wholly owned subsidiary of RSF Social Finance) and Flexible Capital Fund, L3C, are organized as social enterprises themselves.⁶⁹

64. Press Release, Year Up, Year Up and VPP Enter \$4.5 Million Investment Partnership (Nov. 9, 2009), http://www.yearup.org/wp-content/uploads/2014/03/YearUpVPP_pr.pdf [<https://perma.cc/8UAS-8UEK>].

65. Ryan Honeyman, *Can B Corp Certification Help You Raise Capital?*, TRIPLE PUNDIT (Sept. 30, 2014), <http://www.triplepundit.com/2014/09/can-b-corp-certification-help-raise-capital/#> [<https://perma.cc/AC82-M38U>].

66. *Beta Bionics Raises \$5 Million*, TERRIER TECH (Apr. 5, 2016), <http://blogs.bu.edu/otd/2016/04/05/beta-bionics-raises-5/> [<https://perma.cc/269A-L37Z>].

67. Jessica Hall, *MOOMilk Attracts \$3.9 Million in New Investment*, PORTLAND PRESS HERALD (May 29, 2013), <http://www.pressherald.com/2013/05/29/moo-milk/>; J. Craig Anderson, *Maine’s MOO Milk to Shut Down*, PORTLAND PRESS HERALD (May 16, 2014), http://www.pressherald.com/2014/05/16/maine_s_own_organic_milk_known_as_moo_to_shut_down/ [<https://perma.cc/V6V3-26R6>] (noting the private funding raised and the large amount of investor money to be lost).

68. MARC J. LANE, SOCIAL ENTERPRISE: EMPOWERING MISSION-DRIVEN ENTREPRENEURS 188–201 (2011) (providing descriptions and listings of funding sources for social enterprises).

69. *RSF Capital Management, PBC*, BCORPORATION.NET, <https://www.bcorporation.net/community/rsf-capital-management> [<https://perma.cc/4LC5-G9RC>]; *Flexible Capital Fund Invests \$600,000 in Royalty Financing to Two Growing Vermont Companies*, VT. SUSTAINABLE JOBS FUND (Nov. 19, 2015), <http://www.vsjf.org/news/96/flexible-capital-fund-invests-600000-in-royalty-financing-to-two-growing-vermont-companies> [<https://perma.cc/63CV-YN2F>].

III. ERISA AND ECONOMICALLY TARGETED INVESTMENTS

A. ERISA Title I, Sections 403 and 404

Sections 403 and 404 of ERISA require plan fiduciaries to act for the exclusive benefit of the plan's participants and beneficiaries.⁷⁰ Specifically, Section 404 requires that a plan fiduciary “discharge his duties with respect to a plan *solely* in the interest of the participants and beneficiaries” and requires “care, skill, prudence, and diligence” and diversification.⁷¹ Under the text of Sections 403 and 404, it is not entirely clear whether ETI investments made for financial returns *and* collateral social benefits were appropriate for plan investments or would be subject to special scrutiny.⁷² The following sections in this Part analyze guidance from the DOL on this issue.

B. Interpretive Bulletin of 1994

In 1994, under the Clinton Administration,⁷³ the DOL issued Interpretive Bulletin 1994-1 (IB 94-1), which “corrected a misperception that investments in ETIs are incompatible with ERISA’s fiduciary obligations.”⁷⁴ IB 94-1 was commonly called the “all things being equal” test because plan fiduciaries were permitted to consider the social benefits

70. Peter E. Haller & Peter J. Allman, *DOL Clarifies Guidance on Economically Targeted Investments*, WILLKIE FARR & GALLAGHER (Oct. 28, 2015), http://www.willkie.com/~media/Files/Publications/2015/10/DOL_Clarifies_Guidance_on_Economically_Targeted_Investments.pdf [<https://perma.cc/SC67-YLCK>]. See generally Christopher Geczy, Jessica S. Jeffers, David K. Musto & Anne M. Tucker, *Institutional Investing When Shareholders Are Not Supreme*, 5 HARV. BUS. L. REV. 73 (2015).

71. ERISA § 404(a)(1) (codified at 29 U.S.C. § 1104(a)(1)) (emphasis added); see also Edward A. Zelinsky, *The Continuing Battle Over Economically Targeted Investments: An Analysis of DOL Interpretive Bulletin 2015-01*, CARDOZO L. REV. DE NOVO 3–4 (2016) (explaining the text of section 404).

72. Tom Perez, United States Secretary of Labor, Press Conference Announcing New ERISA Guidance on Economically Targeted Investments (Oct. 22, 2015), http://www.dol.gov/_sec/media/speeches/20151022_Perez.htm [<https://perma.cc/AKF2-DMZP>] (noting that ETI “is known by a number of terms—‘environmental, social and governance’, or ESG, investing; sustainable and responsible investing, impact investing.”).

73. The administrations under which the guidance was issued are important to note, because as Jayne Elizabeth Zanglein wrote roughly twenty years ago, “[t]he ongoing debate over economically targeted investments is primarily about power and politics and only secondarily about pensions.” Jayne Elizabeth Zanglein, *Protecting Retirees While Encouraging Economically Targeted Investments*, 5 KAN. J.L. & PUB. POL’Y 47, 47 (1996); see also Rado Bohinc & Stephen M. Bainbridge, *Corporate Governance in Post-Privatized Slovenia*, 49 AM. J. COMP. L. 49, 64 (2001) (noting the politicization of public pensions and social investing).

74. *New Guidance on Economically Targeted Investments in Retirement Plans from US Labor Department*, U.S. DEPT. OF LABOR, <http://www.dol.gov/opa/media/press/ebsa/ebsa20152045.htm> [<https://perma.cc/DJ2R-NQ9W>] [hereinafter *New Guidance on Economically Targeted Investments*]. See generally, Edward A. Zelinsky, *Economically Targeted Investments: A Critical Analysis*, 6 KAN. J.L. & PUB. POL’Y 39 (1997); Zanglein, *supra* note 73.

of an investment, if the financial returns were projected to be equal to or better than alternative investments.⁷⁵ Edward Zelinsky opined that “IB 94-1 encouraged employee benefit trusts to make social investments designated as ETIs” because it stated that ETIs may be properly selected for their collateral social benefits, without violating the applicable duty of loyalty, if those investments are prudent investments.⁷⁶

C. Interpretive Bulletin of 2008

Effective October 17, 2008, under the George W. Bush Administration, the DOL issued Interpretive Bulletin 2008-01 (IB 08-01), which stated that “ERISA’s plain text does not permit fiduciaries to make investment decisions on the basis of any factor other than the economic interest of the plan.”⁷⁷ IB 08-01 replaced IB 94-1 and made clear that “fiduciaries may never subordinate the economic interests of the plan to unrelated objectives.”⁷⁸ Later, however, IB 08-01 noted that in situations where multiple investments were *equal from an economic perspective*, fiduciaries were free to use other factors, such as ESG factors, as a tiebreaker.⁷⁹ IB 08-01 warned “that fiduciary consideration of noneconomic factors should be rare,” and that collateral considerations could only be considered “in very limited circumstances.”⁸⁰ Causing some concern, IB 08-01 cautioned that it would be difficult to rely on noneconomic factors and stay in compliance with the strict ERISA guidelines “absent a written record demonstrating that a contemporaneous economic analysis showed that the investment alternatives were of equal value.”⁸¹ As U.S. Secretary of Labor Tom Perez noted, “Even if the ‘all

75. Stewart J. Schwab & Randall S. Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 MICH. L. REV. 1018, 1079–80 (1998); Craig A. Bitman & Michael B. Richman, *DOL Issues New Guidance on Economically Targeted Investments*, MORGAN LEWIS (Nov. 5, 2015), <http://www.morganlewis.com/pubs/dol-issues-new-guidance-on-economically-targeted-investments> [<https://perma.cc/75ZQ-89J6>] (noting that IB 94-01 “set forth the ‘all things being equal’ test”); Perez, *supra* note 72 (stating that ETI “is known by a number of terms—‘environmental, social and governance’, or ESG, investing; sustainable and responsible investing, impact investing.”); Geczy, Jeffers, Musto & Tucker, *supra* note 70, at 86–87 (noting that IB 94-01 did not allow fiduciaries to take lower returns and/or greater risk to invest in ETIs).

76. See Zelinsky, *supra* note 71, at 6.

77. Interpretive Bulletin Relating to Investing in Economically Targeted Investments, 73 Fed. Reg. 61734, 61735 (Oct. 17, 2008) (to be codified at 29 C.F.R. pt. 2509) [hereinafter IB 08-01].

78. *Id.*; *New Guidance on Economically Targeted Investments*, *supra* note 74.

79. IB 08-01, *supra* note 77.

80. *Id.*; Perez, *supra* note 72; Bitman & Richman, *supra* note 75. See generally Edward A. Zelinsky, *Interpretive Bulletin 08-1 and Economically Targeted Investing: A Missed Opportunity*, 82 S. CAL. L. REV. POSTSCRIPT 11 (2009).

81. IB 08-01, *supra* note 77; Susan Mac Cormac et al., *Department of Labor Clarifies ERISA Fiduciary Requirements With Respect to Economically Targeted Investments and Environmental, Social, and Governance Goals*, MORRISON FOERSTER (Nov. 12, 2015), <http://www.mofo.com/~media/Files/ClientAlert/2015/11/151112DepartmentofLaborClarifiesERISA.pdf>

things being equal test' nominally hadn't changed [after the issuance of IB 08-01], in many quarters it was *understood* to have changed The 2008 guidance gave cooties to impact investing."⁸²

D. Interpretive Bulletin of 2015

On October 26, 2015, under the Obama Administration, the DOL issued Interpretive Bulletin 2015-01 (IB 15-01) to clarify what it considered confusion and misinterpretation of the DOL's intent in IB 08-01.⁸³ The DOL concluded that "IB 2008-01 has unduly discouraged fiduciaries from considering ETIs and ESG factors."⁸⁴ Specifically, the DOL was concerned that IB 08-01 discouraged plan fiduciaries from considering ETIs and ESG factors even if ETIs were equal or better economically and even when only using the permissible ESG factors to determine economic value of the investments.⁸⁵ In IB 15-01, the DOL sought to make clear that a plan fiduciary may, and should, consider ESG factors that "potentially influence risk and return."⁸⁶ Also, IB 15-01 made clear that "[f]iduciaries need not treat commercially reasonable investments as inherently suspect or in need of special scrutiny merely because they take into consideration environmental, social, or other factors."⁸⁷ Further, if an investment is justified on its economic merits, collateral goals are not needed as tiebreakers.⁸⁸ The DOL clarified that additional documentation was not presumptively necessary for ETIs or when considering ESG factors; rather, appropriate documentation depends on the facts and circumstances of each investment decision.⁸⁹ The DOL reaffirmed that plan fiduciaries must stay focused on the economic benefits of investments: "an investment will not be prudent if it would be expected to provide a plan with a lower rate of return than available alternative investments with commensurate degrees of risk or is riskier

[<https://perma.cc/Q4QW-A2C4>] (noting that some worried that IB 2008 required additional record-keeping, above and beyond those kept for normal investment decisions. In 2015, the DOL clarified that making ESG investments does not presumptively require additional documentation).

82. Perez, *supra* note 72.

83. Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments, 80 Fed. Reg. 65135-01 (Oct. 26, 2015) [hereinafter IB 15-01].

84. IB 15-01, *supra* note 83.

85. *Id.*; Haller & Allman, *supra* note 70 (noting, however, that ESG factors need to be considered for their economic impact).

86. IB 15-01, *supra* note 83; Perez, *supra* note 72 (commenting on IB 2015, Secretary Perez stated, "[j]ust because a project has social impact, that should not be a strike against it. Nor should it be a decisive argument for it").

87. IB 15-01, *supra* note 83.

88. *Id.*

89. *Id.*; Haller & Allman, *supra* note 70 (stating that the "new guidance also makes clear that fiduciaries are not required to maintain any special or additional documentation to demonstrate compliance with ERISA's fiduciary rules when considering ETIs or ESG factors").

than alternative available investments with commensurate rates of return.”⁹⁰ Finally, through IB 15-01, the DOL withdrew IB 08-01 and reinstated IB 94-1, hopefully removing the stigma from ETIs without elevating them above other investments.⁹¹

IV. WALKING THE LINE: PROFIT AND PURPOSE

ETIs have long been a source of debate among ERISA scholars. Some argue for disallowing any nonfinancial considerations while others argue for allowing nonfinancial considerations that do not negatively impact the economic returns.⁹² Firms that choose a social enterprise legal form, such as a benefit corporation, may place even more tension between profit and purpose than a typical ETI.⁹³ As explained below, ERISA trustees should be cautious with new social enterprise forms because the social enterprise statutes were passed, at least in part, to allow directors to sacrifice profits for purpose.⁹⁴ Benefit corporations, and other social enterprises, however, may choose not to sacrifice profits, but rather may use the publicity of their social entity status to attract customers and employees, leading to a stronger financial bottom line. Accordingly, investment professionals should closely monitor and evaluate the strategies of social enterprises and, in cases where ERISA applies, be sure to invest only in social enterprises that pursue a strategy aimed at achieving a full market return.

90. IB 15-01, *supra* note 83.

91. Haller & Allman, *supra* note 70; Perez, *supra* note 72 (making clear that IB 2015 “is not a thumb on the [social impact] side of the scale. What we’re doing today in no way compromises the financial health of retirement plans or their participants. . . . Indeed, today’s announcement reaffirms that ERISA fiduciaries may *not* accept lower returns or incur greater risks in the name of collateral benefits.”).

92. *See infra* Part IV.A.

93. Reiser, *supra* note 2, at 684 (“[E]ventually there will have to be decisions where profit and social good come into conflict and must be traded off.”); John Tyler, *Negating the Legal Problem of Having “Two Masters”: A Framework for L3C Fiduciary Duties and Accountability*, 35 VT. L. REV. 117, 117–18 (2010) (noting the seemingly irreconcilable conflict in the purpose of serving shareholder interests and the purpose of serving other stakeholder interests in social enterprises); *cf.* Barnali Choudhury, *Serving Two Masters: Incorporating Social Responsibility into the Corporate Paradigm*, 11 U. PA. J. BUS. L. 631, 646–47 (2009) (noting that “corporate managers should also be able to serve both the financial interests of shareholders and the interests of non-shareholder corporate constituents through use of the ambiguity of the corporate purpose. . . . [T]he lack of clarity in the corporate purpose suggests corporate law can neither commit itself to an exclusive profit maximization mandate nor to operating as a vehicle for the creation of societal wealth. The truth of the corporate purpose must, then, somehow lie between these two positions.” But admitting that it may be the case that “both masters cannot always be served at the same time.”).

94. *See supra* Part I.B.

A. Economically Targeted Investments and ERISA

The debate over ETIs and ERISA significantly predates discussion of social enterprises.⁹⁵ Edward Zelinsky has spoken out against ETIs as inappropriate under ERISA, and has opined that

[e]conomically targeted investing contravenes ERISA's duty of loyalty by permitting, indeed encouraging, plan trustees to invest plan assets to generate ancillary benefits for persons other than the participants whose labor is embodied in those assets. . . . Economically targeted investing is neither a coherent concept nor a concept compatible with ERISA's duty of loyalty.⁹⁶

On the other hand, Jane Elizabeth Zanglein has argued that “[t]he prudence rule sufficiently protects retirees from inappropriate, below-market investments” and, therefore, ETI investing should be allowed when the investment risk and returns are equivalent to other available options.⁹⁷ Zelinsky replies that ERISA’s Section 404 states that “a fiduciary shall discharge his duties with respect to a plan *solely* in the interest of the participants and beneficiaries,” and “solely means solely.”⁹⁸ Zelinsky is not convinced that trustees can put their personal social preferences aside; he writes that he would prefer trustees to “flip a coin” when choosing among economically identical investments because that would “not introduce into the decisionmaking process considerations which, unconsciously or deliberately, can skew that process.”⁹⁹ Scholars seem to agree, however, that under ERISA, financial returns cannot be intentionally sacrificed for collateral benefits to third parties and society at large.¹⁰⁰

B. Social Enterprise, Benefit Corporations, and ERISA

Due to benefit corporations being the most popular social enterprise entity type and the only type currently attracting publicly traded firms, this

95. See, e.g., Thomas A. Smith, *Institutions and Entrepreneurs in American Corporate Finance*, 85 CALIF. L. REV. 1, 31–32 (1997); Zanglein, *supra* note 73; Zelinsky, *supra* note 74.

96. Zelinsky, *supra* note 80, at 12.

97. Zanglein, *supra* note 73, at 55.

98. ERISA § 404(a)(1) (codified at 29 U.S.C. § 1104(a)(1)) (emphasis added); see Zelinsky, *supra* note 71, at 10–13 (writing that “[t]rustees must pursue beneficiaries’ interests ‘solely’ and ‘exclusively.’ Anything less opens the door of the fiduciary decisionmaking process to influences which are potentially detrimental to the beneficiaries’ welfare.”).

99. See Zelinsky, *supra* note 71, at 12.

100. As a normative matter, however, David Webber has argued that trustees should be allowed to consider the personal and professional interests of investors, not merely their financial interests. David H. Webber, *The Use and Abuse of Labor’s Capital*, 89 N.Y.U. L. REV. 2106, 2126–56 (2014).

section will focus on benefit corporations.¹⁰¹ A main justification for the benefit corporation statutory scheme is that it more clearly allows decisions that will benefit various stakeholders but will not benefit shareholders, even in the long run.¹⁰² If social entrepreneurs were only attempting to make decisions that would benefit nonshareholders in the short-run but redound to the benefit of shareholders in the long-run, the traditional corporate form would be sufficient given the protection of the business judgment rule.¹⁰³ Even in the takeover defense and company sale situations, firms could pursue social ends that arguably have a positive long-term result for shareholders by “just saying no,” retaining high voting shares, or simply incorporating in a constituency statute state.¹⁰⁴ Thus, the pitch that benefit corporation proponents have to make to states considering this entity legislation is that, in essence, benefit corporations are needed for the times when for-profit firms want to admit to pursuing social ends at the short *and* long-term expense of shareholders.¹⁰⁵

ERISA fiduciaries, on the other hand, can only make economically targeted investments when the expected financial return is equal to or greater than other available options.¹⁰⁶ This profit-focused expectation makes benefit corporations risky bets for ERISA fiduciaries. The empirical findings on returns for social investments are mixed, and we are too early in the benefit corporation history to have convincing data on the returns of these firms.¹⁰⁷ As shown, benefit corporations are only needed,

101. See *supra* Part I.

102. See *supra* Part I.B.

103. Alina Ball, *Social Enterprise Governance*, 18 U. PA. J. BUS. L. (forthcoming 2016).

104. See, e.g., Antony Page & Robert A. Katz, *Freezing Out Ben & Jerry: Corporate Law and the Sale of a Social Enterprise Icon*, 35 VT. L. REV. 211, 233–42 (2010) (discussing the many ways Ben & Jerry’s could have avoided “selling out” to Unilever, in, perhaps, the most discussed social business acquisition of the last twenty-five years).

105. Granted, there are other arguments that benefit corporation proponents could make, such as the benefit corporation statutes are useful because they require consideration of major stakeholders, drafting of regular social reports, and use of a third-party standard to measure social impact. All of these things, however, could be required by a traditional for-profit firm, as long as decisions were tied to shareholder interests in some way; the need for benefit corporations is most clear when firms wish to subordinate shareholder interests, both in the short- and long-term. Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 155 (2012) (“I do not mean to imply that the corporate law requires directors to maximize short-term profits for stockholders. Rather, I simply indicate that the corporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders. The directors, of course, retain substantial discretion, outside the context of a change of control, to decide how best to achieve that goal and the appropriate time frame for delivering those returns.”).

106. See *supra* Part III.

107. See Rado Bohinc & Stephen M. Bainbridge, *Corporate Governance in Post-Privatized Slovenia*, 49 AM. J. COMP. L. 49, 64 (2001) (“[S]ocial investing has substantial costs in the form of reduced returns to investors. In general, the greater the extent to which a public pension fund is subject to direct political control, the worse its investment returns.”); David Hess, *Public Pensions and the Promise of Shareholder Activism for the Next Frontier of Corporate Governance*:

as a matter of corporate law, to provide shelter for firms that wish to openly sacrifice profits in pursuit of social ends.¹⁰⁸ To be clear, profit-focused firms may choose the benefit corporation form solely for marketing and financial purposes, and that would not pose the same risk to ERISA fiduciaries. Moreover, considering nonshareholder constituents in decision-making does not doom benefit corporations to below-market returns, and an ERISA fiduciary may be able to claim that such a holistic approach to the corporation is financially beneficial in the long term. In the company sale area, the benefit corporation statute sets entities up to potentially capture significantly less capital because they must consider a wide range of stakeholders. Unlike most constituency statutes, which are permissive, benefit corporation statutes are mandatory, and benefit corporations risk lawsuits from activist shareholders if they do not properly consider (or balance) stakeholder interests.¹⁰⁹ Thus, directors, fearing lawsuits from activist shareholders, for not properly considering stakeholders, may take a lower bid for the company.¹¹⁰ Even if benefit corporation directors take the highest financial offer, they face a more significant litigation risk than traditional corporations from shareholders unhappy with the consideration and ultimate treatment of nonshareholder constituents.¹¹¹ In the sale context, benefit corporations could first switch to a traditional corporation with a two-thirds vote; this ability, however,

Sustainable Economic Development, 2 VA. L. & BUS. REV. 221, 260 (2007) (“Although some early studies showed that ETIs had a negative impact on pension performance, these studies used data from before the mid-1990s, when the Department of Labor issued a statement that ETIs were appropriate if the expected rate of return was comparable to that of alternative investments of a similar risk. More recent studies, including those using data after the Department of Labor’s announcement, have not found a negative relationship between the use of ETIs and fund performance.”); Terrance P. McGuire, *A Blueprint for Growth or A Recipe for Disaster? State Sponsored Venture Capital Funds for High Technology Ventures*, 7 HARV. J.L. & TECH. 419, 435 (1994) (“Efficient market theory suggests that if the market is functioning correctly, a program focused exclusively on ETIs may produce below-market rates of return. Put simply, states must place a priority on either maximizing profits, or maximizing job creation and community development.”); Geczy, Jeffers, Musto & Tucker, *supra* note 70, at 87–88; Smith, *supra* note 95, at 31–32 (noting “investment returns on public-sector pension plans in states with ETI requirements were one percent lower than in states without such requirements”).

108. See *supra* Part I.B.

109. Granted, “consider” is a low standard and there may not be many activist shareholders with sufficient interest and resources to bring such a lawsuit.

110. Strine, Jr., *supra* note 105, at 152–55 (noting that shareholders are the only ones with a vote and the only ones with the right to sue derivatively in corporate law, and thus corporate social responsibility is likely to have minimal impact on directorial action).

111. Cf. Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 605 (1992) (stating, in the constituency statute context that it “is the predictable reaction that this limited enforcement mechanism stimulates in corporate directors. If stockholders pose the sole internal threat to directors’ exercise of their otherwise untrammelled discretion, then the directors’ best means of protecting themselves from litigation is to act in, or at least to ascribe their actions to, the stockholders’ interests.”).

diminishes the argument benefit corporation proponents make about the social commitment being made by choosing the form.¹¹² While it does not appear that ERISA fiduciaries must avoid benefit corporations altogether, they may need to proceed with extreme caution given that a primary reason benefit corporations are needed is for firms wishing to pursue social ends, at the expense of financial returns.

V. CURRENT AND FUTURE PLACE FOR SOCIAL ENTERPRISE INVESTING

A. Venture Capital and Private Equity

There are certain investment professionals, such as venture capitalists and private equity specialists, who manage money exclusively or almost exclusively for high-net-worth individuals and sophisticated organizations.¹¹³ These venture capital and private equity professionals have traditionally been given far greater flexibility and have been burdened by significantly less regulation than professionals managing funds covered by ERISA. Venture capital funds tend to be organized as limited partnerships, and limited partnership law—especially in Delaware—gives great deference to the contracts entered into by the partners.¹¹⁴ Many, if not most, venture capitalists organize their funds under Delaware law, which allows waiver or modification of statutory fiduciary duties and provides the ability to craft their own terms.¹¹⁵ Venture capitalists tend to have relatively limited restraints from business law or from their contracts with investors, which tend to give venture capitalists a great deal of discretion.¹¹⁶ As a general matter of Delaware business law, general partners owe duties of loyalty and care to limited partners.¹¹⁷ In Delaware, those default duties can be eliminated by contract, though the contract will not eliminate the narrow, implied covenant of good faith and fair dealing.¹¹⁸ Venture capitalists, however,

112. Leo E. Strine, Jr., *Making It Easier for Directors to “Do the Right Thing”?*, 4 HARV. BUS. L. REV. 235, 247 (2014) (noting the difficulty in securing a two-thirds vote and opining that the requirement could be “outcome-determinative” in mergers and acquisitions situations involving benefit corporations).

113. PAUL GOMPERS & JOSH LERNER, *THE VENTURE CAPITAL CYCLE* 7 (1999).

114. David Rosenberg, *Venture Capital Limited Partnerships: A Study in Freedom of Contract*, 2002 COLUM. BUS. L. REV. 363, 375–82 (2002).

115. *Id.* at 370–71.

116. David Rosenberg, *The Two “Cycles” of Venture Capital*, 28 IOWA J. CORP. L. 419, 421, 428 (2003); see also Rosenberg, *Venture Capital Limited Partnerships*, *supra* note 114, at 367–68 (“[T]he managers of venture capital funds have virtually no general legal obligation to behave in the best interest of their investors.”). Rosenberg argues that reputational risks act as a safeguard for investors in the absence of significant legal protection. *Id.* at 366.

117. *Sonet v. Timber Co., L.P.*, 722 A.2d 319, 322 (Del. Ch. 1998).

118. *Auriga Capital Corp. v. Gatz Properties*, 40 A.3d 839, 851–53 (Del. Ch. 2012), *judgment entered sub nom.*, (Del. Ch. Feb. 23, 2012), *aff’d*, (Del. Nov. 07, 2012); see also Mohsen Manesh,

often modify and specify the duties owed through contract.¹¹⁹ Even if not bound by law, venture capitalists are often held in check by nonlegal means, such as concern for their reputation.¹²⁰

Contractarians, like Larry Ribstein, have argued for this flexibility in the alternative entity or “uncorporation” context, including the flexibility to modify or even eliminate fiduciary duties.¹²¹ There has been significant debate over whether general partners, as a default, should owe fiduciary duties to the limited partners, but most state laws seems to side with default duties currently.¹²² The freedom of contract, given unincorporate firms, such as limited partnerships and limited liability companies, has its detractors. For example, Sandra Miller has argued for “mandatory minimum standards to govern business relationships,” such as those in traditional corporations, and Reza Dibadj has argued that contracts alone are insufficient to protect investors in unincorporations.¹²³ Likewise, Bill

Contractual Freedom Under Delaware Alternative Entity Law: Evidence from Publicly Traded LPs and LLCs, 37 J. CORP. L. 555, 560–67 (2012) (describing Delaware law and the academic debate surrounding duties in LPs and LLCs).

119. See Rosenberg, *Two “Cycles” of Venture Capitalism*, *supra* note 116, at 431–32.

120. *Id.* at 421.

121. Larry E. Ribstein, *Fiduciary Duty Contracts in Unincorporated Entities*, 54 WASH. & LEE L. REV. 537, 541 (1997).

122. Mohsen Manesh, *Damning Dictum: The Default Duty Debate in Delaware*, 39 J. CORP. L. 35, 42–43 (2013), *citing* *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 170 (Del. 2002). Default fiduciary duties are also present in LLCs, though there was a protracted debate on this topic between former Chief Justice of the Delaware Supreme Court Myron Steele (arguing against default fiduciary duties in the LLC context) and current Chief Justice of the Delaware Supreme Court Leo Strine (arguing in favor of default fiduciary duties in the LLC context). Chief Justice Strine’s view was ultimately accepted. See Myron T. Steele, *Freedom of Contract and Default Contractual Duties in Delaware Limited Partnerships and Limited Liability Companies*, 46 AM. BUS. L.J. 221, 223 (2009); see also *Auriga Capital Corp. v. Gatz Properties*, 40 A.3d 839, 849–57 (Del. Ch. 2012) (where then Chancellor Strine wrote that “because the LLC Act provides for principles of equity to apply, because LLC managers are clearly fiduciaries, and because fiduciaries owe the fiduciary duties of loyalty and care, the LLC Act starts with the default that managers of LLCs owe enforceable fiduciary duties”); *Gatz Properties, LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1218–20 (Del. 2012) (stating that the Delaware Court of Chancery’s “pronouncements [regarding the existence of default fiduciary duties in the LLC context] must be regarded as dictum without any precedential value. . . . We remind Delaware judges that the obligation to write judicial opinions on the issues presented is not a license to use those opinions as a platform from which to propagate their individual world views on issues not presented.”); Ann E. Conaway & Peter I. Tsoulias, *Challenging Traditional Thought: No Default Fiduciary Duties in Delaware Limited Liability Companies After Auriga*, 13 J. BUS. & SEC. L. 1, 32–33 (2011) (agreeing with Chief Justice Steele and arguing against default fiduciary duties in the LLC context); Bruce E. Falby and John L. Reed, *Delaware Amends Its LLC Act: Managers and Controllors Owe Fiduciary Duties Unless LLC Agreement Provides Otherwise*, DLA PIPER PUBL’NS (Aug. 22, 2013), <https://www.dlapiper.com/en/us/insights/publications/2013/08/delaware-amends-its-llc-act-managers-and-contro/> [<https://perma.cc/X2PQ-P6TS>].

123. Reza Dibadj, *The Misguided Transformation of Loyalty into Contract*, 41 TULSA L. REV. 451, 475 (2006); Sandra K. Miller, *The Role of the Court in Balancing Contractual Freedom with the Need for Mandatory Constraints on Opportunistic and Abusive Conduct in the LLC*, 152 U. PA. L. REV. 1609, 1653–54 (2004).

Callison, Allan Vestal, and Daniel Kleinberger have argued for limits on the contractarian approach.¹²⁴

Venture capitalists and their investors tend to be financially sophisticated.¹²⁵ While investors in venture capital funds tend to be fairly passive, venture capitalists themselves are incredibly active and generally involved with the companies in which their venture capital funds invest.¹²⁶ Venture capitalists have a plethora of tools at their disposal to constrain agency costs, including: “(1) the use of staged investment; (2) the use of equity-based compensation; (3) the retention of control and monitoring rights; (4) the sale of convertible preferred stock; and (5) the ability to syndicate investments.”¹²⁷ While typical shareholders may have many of these rights in theory, venture capitalists have the ability, in practice, to use these tools more effectively.¹²⁸ Given the sophistication of these types of investors and the flexibility afforded by their contracts, venture capitalists and private equity professionals may be in a much better position to invest in social enterprises. As noted in an earlier section, it already seems like most of the funding flowing to benefit corporations and other social enterprises is coming from venture capitalists, some of whom are focused on social investing in general or have raised money for a specific fund focused on social investing.¹²⁹

124. J. William Callison & Allan W. Vestal, *Contractarianism and Its Discontents: Reflections on Unincorporated Business Organization Law Reform*, 42 SUFFOLK U. L. REV. 493, 504–06 (2009) (noting some of the risks associated with an “extreme contractarian approach,” such as the opportunity for managerial abuse and the limiting of judicial action); Daniel S. Kleinberger, *Two Decades of “Alternative Entities”: From Tax Rationalization Through Alphabet Soup to Contract as Deity*, 14 FORDHAM J. CORP. & FIN. L. 445, 465–71 (2009) (arguing that allowing elimination of fiduciaries’ duties in LLCs exposes the weaker party and departs from the history of business law).

125. C. Steven Bradford, *Crowdfunding and the Federal Securities Laws*, 2012 COLUM. BUS. L. REV. 1, 107–08 (2012) (noting the sophistication of venture capital firms and the terms they require and the risks they take); Elizabeth Cosenza, *Co-Invest at Your Own Risk: An Exploration of Potential Remedial Theories for Breaches of Rights of First Refusal in the Venture Capital Context*, 55 AM. U. L. REV. 87, 133 (2005); Deborah A. DeMott, *Agency and the Unincorporated Firm: Reflections on Design on the Same Plane of Interest*, 54 WASH. & LEE L. REV. 595, 606 (1997); Andrew A. Schwartz, *Corporate Legacy*, 5 HARV. BUS. L. REV. 237, 249 (2015) (noting the sophistication and experience of venture capitalists and private equity investors); Rosenberg, *Two “Cycles” of Venture Capitalism*, *supra* note 116, at 421 n.9 (2003) (assuming that most venture capital investors understand the riskiness of their investing). *But see* Joseph Bankman & Marcus Cole, *The Venture Capital Investment Bust: Did Agency Costs Play A Role? Was It Something Lawyers Helped Structure?*, 77 CHI.-KENT L. REV. 211, 215 (2001) (noting that some venture capitalists, especially those with limited experience, may attract less sophisticated investors).

126. Larry E. Ribstein, *Limited Partnerships Revisited*, 67 CIN. L. REV. 953, 958 (1999) (noting that investors in venture capital funds are generally passive and that the venture capitalists are given wide discretion); Rosenberg, *Venture Capital Limited Partnerships*, *supra* note 114, at 373–74 (noting the “singular influence [of venture capitalists] that is atypical of shareholders in a corporation”).

127. Robert P. Bartlett, III, *Venture Capital, Agency Costs, and the False Dichotomy of the Corporation*, 54 UCLA L. REV. 37, 52 (2006).

128. *See generally* Rosenberg, *Venture Capital Limited Partnerships*, *supra* note 114.

129. *See supra* Part II.C.

B. Further Department of Labor Clarification Needed?

At this stage, additional clarification is probably not needed to address social enterprise investing (specifically, benefit corporation investing) for ERISA fiduciaries. For starters, benefit corporations are just now starting to enter the public markets and are doing so in extremely small numbers, which might make specific guidance more confusing than useful. Also, benefit corporations are quite diverse and neither granting a blanket safe harbor nor a blanket prohibition would be the best path. The guidance in all three DOL bulletins discussed is clear that financial returns should not be sacrificed, though the bulletins differ in the amount of caution or encouragement they provide in regard to ETIs.¹³⁰ As such, ERISA fiduciaries are still directed to focus on the financial returns available from the investments, and are clearly permitted to consider ESG factors as those factors relate to potential financial returns.¹³¹ The guidance under IB 15-01, which purports to encourage ETIs (or at least not discourage them), should not be broadened, as doing so might unintentionally increase the likelihood of underinformed or personally interested investment decisions.¹³² Under IB 15-01, ERISA fiduciaries may be able to properly consider benefit corporations, but should be aware that some benefit corporations may be pursuing projects with below-market returns.¹³³ Given this fact, additional documentation supporting the reasoning of the ERISA fiduciary, while not expressly required by IB 15-01, may be wise.

C. Finding a Place for Social Enterprise Investing

Where does the current guidance leave benefit corporations and those wishing to do impact investing more generally? The uncertainty, even if slight, may lead ERISA fiduciaries to avoid benefit corporations even if they warm up to ETIs in general because benefit corporations have express permission to sacrifice shareholder interests, in the short and long term, for general public benefit. To be sure, the benefit corporation statutes based on the Model require “consideration” of shareholder interests, but the statutes do not require that anything be *done* to address that interest.¹³⁴ The Delaware version of the benefit corporation statute, under which Laureate Education, Inc. is incorporated, requires “balancing” of

130. See *supra* Part III.

131. *Id.*

132. See generally Zelinsky, *supra* note 71.

133. *Cf. id.*

134. MODEL BENEFIT CORP. LEGIS. § 301(a) (2016) (stating that directors “shall consider the effects of any action or inaction upon [a long list of corporate stakeholders]”) (emphasis added).

shareholder interests, which seems more significant and may give ERISA fiduciaries a bit more comfort.¹³⁵

One possible solution to the uncertainty is shifting the decision to the plan participants. Give the plan participants the ability to opt into benefit corporation investments in their plans. These participants, however, are generally rationally apathetic and sometimes ignorant, as well.¹³⁶ This apathy might lead them to ignore the opt-in entirely, but their ignorance may lead them to blindly check a box for benefit corporations merely because it sounds nice. Anne Tucker has described “citizen shareholders” as “the growing group of investors who enter the market through employer-sponsored defined contribution plans by investing in mutual funds, whose choices are structurally constrained, and who bear the risks of the market without the benefit of ownership rights extended to traditional shareholders.”¹³⁷ As recent scholarship has noted, even detailed disclosures and explanations about the investment options may not be able to solve the ignorance.¹³⁸

These impact investments, for now, may be better regulated to more sophisticated investors who can determine and contractually customize the appropriate balance of purpose and profit for their tastes. In the securities law arena, accredited investors are given less protection because they are thought to be able to defend themselves, either due to financial resources or financial sophistication.¹³⁹

135. DEL. CODE ANN. tit. 8, § 362(a) (2011 & Supp. 2015) (stating that a “public benefit corporation shall be managed in a manner that *balances* the stockholders’ pecuniary interests, the best interests of those materially affected by the corporation’s conduct, and the public benefit or public benefits identified in its certificate of incorporation”) (emphasis added); see also J. Haskell Murray, *Social Enterprise Innovation: Delaware’s Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345, 355 (2014) (discussing the debate over the word “consider” in the Model and “balance” in the Delaware public benefit corporation law, and opining that “balance” was more substantial and onerous).

136. Christopher Gulinello, *The Retail-Investor Vote: Mobilizing Rationally Apathetic Shareholders to Preserve or Challenge the Board’s Presumption of Authority*, 2010 UTAH L. REV. 547, 565, 578–83 (2010) (discussing the argument regarding ignorant shareholders and the tendency of retail shareholders to be apathetic); Anne M. Tucker, *Locked In: The Competitive Disadvantage of Citizen Shareholders*, 125 YALE L.J. FORUM 163, 163 (2015) (noting “[i]ndirect investors—especially mutual fund investors—are often low-dollar, low-incentive, rationally apathetic investors facing enormous information asymmetries and collective action problems”).

137. Anne Tucker, *The Citizen Shareholder: Modernizing the Agency Paradigm to Reflect How and Why A Majority of Americans Invest in the Market*, 35 SEATTLE U. L. REV. 1299, 1308 (2012).

138. See generally OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* (2014).

139. See Martin Goodlett, *Subjective Materiality and the Over-the-Counter Derivatives Markets*, 61 DEPAUL L. REV. 165, 190 (2011) (stating that “[a]ccredited investors operate in the financial markets with fewer restrictions than ordinary investors, but they also operate with diminished protections”); Jeffrey J. Hass, *Small Issue Public Offerings Conducted over the Internet: Are They “Suitable” for the Retail Investor?*, 72 S. CAL. L. REV. 67, 134 (1998). But see Howard M. Friedman, *On Being Rich, Accredited, and Undiversified*, 47 OKLA. L. REV. 291, 299–301 (1994) (noting that

We remain in the nascent stages of social enterprise, especially in the publicly traded arena. In the future, we will be able to better measure the financial returns of social enterprises and better assess the various risks. At this early stage, it is likely best to regulate the risks to those who can bear them best and keep the lion's share of social enterprise investing to those with sophisticated clients. However, social enterprise is also showing up in the crowdfunding arena, where investment professionals may not be consulted at all. Nevertheless, crowdfunding rules have placed some limits on the amounts that can be invested (and thus lost) by individuals investing in crowdfunding raises.¹⁴⁰

While it is possible that social enterprises, including benefit corporations, will produce market or above-market returns, there is a significant amount unknown about these companies as investment vehicles. In addition, the limited empirical research done on social enterprises shows that they are mostly very young companies; most social enterprises also appear to be small, though even less research has been done on the relative size of social enterprises.¹⁴¹ As social enterprises

some accredited but financially unsophisticated investors may face significant risks); Donald C. Langevoort, *Angels on the Internet: The Elusive Promise of "Technological Disintermediation" for Unregistered Offerings of Securities*, 2 J. SMALL & EMERGING BUS. L. 1, 22–23 (1998) (noting the thought that “people who have inherited wealth, or have substantial wealth due to real estate appreciation, or have high incomes from activities requiring no financial acumen will be less likely to exercise effective analytical judgment or bargaining power in direct offerings” and suggesting empirical work to uncover the actual results).

140. Andrew A. Schwartz, *The Digital Shareholder*, 100 MINN. L. REV. 609, 632 (2015) (stating that “because promising entrepreneurs can be expected to have alternative avenues for financing, some commentators predict that those with good prospects will prefer other financing sources (such as angel investors and VCs), leaving crowdfunding investors with the leftovers”); Ryan Caldbeck, *Crowdfunding Won't Solve the Venture Capital Series A Crunch*, FORBES (Jan. 23, 2013), <http://www.forbes.com/sites/ryancaldbeck/2013/01/23/crowdfunding-wont-solve-the-venture-capital-series-a-crunch/#7a61309b33c5> (opining that crowdfunding will appeal to entrepreneurs turned down by venture capitalists or shut out of venture capital financing). See generally Garry A. Gabison, *Equity Crowdfunding: All Regulated but Not Equal*, 13 DEPAUL BUS. & COM. L.J. 359, 389 (2015) (discussing the limits placed by the JOBS Act on the frequency and amount of investment in equity crowdfunding); Joan MacLeod Heminway, *To Be or Not to Be (A Security): Funding for-Profit Social Enterprises*, 25 REGENT U. L. REV. 299, 317 (2013) (noting social enterprise interest in the crowdfunding space); Dana Brakman Reiser & Steven A. Dean, *Se(c)(3): A Catalyst for Social Enterprise Crowdfunding*, 90 IND. L.J. 1091 (2015) (discussing a mechanism for crowdfunding social enterprises); Sysy Morales, *“Beta Bionics” Artificial Pancreas Company: First Startup to Raise \$1 Million in Public Stock Option*, DIABETES DAILY (Aug. 2, 2016), <https://www.diabetesdaily.com/blog/beta-bionics-is-the-first-startup-to-raise-1-million-in-public-stock-option-297881/> [<https://perma.cc/HY9G-3LNE>] (noting that benefit corporation Beta Bionics was the first company to raise \$1 million under new equity crowdfunding rules).

141. See Alicia E. Plerhoples, *Delaware Public Benefit Corporations 90 Days Out: Who's Opting In?*, 14 U.C. DAVIS BUS. L.J. 247, 259 (2014) (examining the early Delaware public benefit corporations and finding that 74.5% of the PBCs in her sample were companies incorporated that year, and thus the vast majority of early Delaware PBCs were not well-established companies converting to that form); Frederick H. Alexander et al., *M&A Under Delaware's Public Benefit Corporation Statute*:

mature and we gather better and more extensive data on these entities, it may be appropriate to revisit investing in benefit corporations and the accompanying warnings may not need to be as strong.

CONCLUSION

Companies organized under recently passed social enterprise statutes are starting to enter the public markets and become an option for investment professionals. Investment professionals covered by ERISA should approach social enterprises, such as benefit corporations, with caution because a main reason behind the passage of the social enterprise statutes was to allow firms to openly and purposefully sacrifice the firms' financial interests for the broader social good. While the Department of Labor's most recent guidance appears to encourage investments with collateral, social benefits, ERISA remains clear that the financial interests of plan participants and beneficiaries cannot be sacrificed. ERISA-covered investment professionals, however, need not completely abandon social enterprises, as there may be some firms that use their legal status and the benefiting of other stakeholders to financial advantage. As such, ERISA-covered investment professionals should carefully monitor the social enterprise space and thoughtfully analyze individual investments. Currently, venture capitalists and other investment professionals who are unburdened by ERISA, and who generally deal with more financially sophisticated clients, can use contracts to make investments that properly address the profit and purpose balance desired by their clients.¹⁴² If current trends continue, evaluating social enterprises will play an increasing role in the lives of investment professionals, requiring close evaluation of the growing empirical data, in pursuit of the best interests of their clients.

A Hypothetical Tour, 4 HARV. BUS. L. REV. 255, 279 (2014) (describing Delaware public benefit corporations, at the time of publication, as "closely held by a cohesive group of like-minded stockholders with similar preferences regarding the balance between pecuniary gain and the corporation's stated public purpose"); Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007, 1016 (2013) (noting that "most benefit corporations are likely to be closely held").

142. See Dana Brakman Reiser & Steven A. Dean, *Hunting Stag with FLY Paper: A Hybrid Financial Instrument for Social Enterprise*, 54 B.C. L. REV. 1495, 1496-99 (2013) (proposing use of contractual tools to set terms for investing for both financial and social gain).