

Note

Knowledge Is Power: How Implementing Affirmative Disclosures Under the JOBS Act Could Promote and Protect Benefit Corporations and Their Investors

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“Build the best product, cause no unnecessary harm, use business to inspire and implement solutions to the environmental crisis.”¹ This is the mission statement of Patagonia, a California-based company that has gained international popularity and become one of the most successful outdoor clothing brands in the United States.² Nevertheless, the company’s socially-minded mission seems to be at odds with the traditional notion of a corporation: how can a company pursue mission-based goals and maximize profits? In the past, mission-based businesses faced the challenge of conforming to existing for-profit or non-profit business entities.³ Entity choice greatly impacts a business’s future and affects the management, operations, liabilities, and taxation of the entity.⁴ Because of these inadequate and polarized options, socially-minded businesses were tradi-

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1. *Our Reason for Being*, PATAGONIA, <http://www.patagonia.com/us/patagonia.go?assetid=2047> (last visited Mar. 9, 2015).

2. *Id.*

3. WILLIAM H. CLARK, JR., DRINKER BIDDLE & REATH LLP, ET AL., THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION: WHY IT IS THE LEGAL FORM THAT BEST ADDRESSES THE NEEDS OF SOCIAL ENTREPRENEURS, INVESTORS, AND, ULTIMATELY, THE PUBLIC 1–2 (2011), available at http://benefitcorp.net/storage/Benefit_Corp_vs_Other_Alternatives.pdf.

4. See generally Matteo Tonello, *The Business Case for Corporate Social Responsibility*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG., (June 26, 2011, 11:46 AM), <http://blogs.law.harvard.edu/corpgov/2011/06/26/the-business-case-for-corporate-social-responsibility>.

tionally limited—for-profit entities focused on maximization of shareholder profits, while non-profit entities prohibited an organization from providing a private benefit.⁵ Moreover, consumers and investors have demonstrated demand for socially-minded companies and have reflected changes in corporate expectations. This has shifted much of the business community toward social responsibility and sustainability.

Fortunately, companies like Patagonia have a new business entity option that accommodates both for-profit and non-profit goals: the benefit corporation.⁶ A benefit corporation is a business entity that allows companies to consider external, social benefits in addition to the traditional corporate obligation to maximize shareholder profits.⁷ These benefits can be very broad, and may include anything from concern for the environment to education reform.⁸ Benefit corporations focus on a broader range of stakeholders, and provide businesses with greater operational flexibility to pursue strategies that promote a social benefit instead of an exclusive focus on profit maximization.⁹ While benefit corporation entity structures are available to existing companies, legislation has primarily targeted small startup businesses.¹⁰ Numerous companies have utilized

5. See generally Josh Patrick, *Assessing the Benefits of Becoming a Benefit Corporation*, N.Y. TIMES (June 13, 2014, 1:00 PM), <http://boss.blogs.nytimes.com/2014/06/13/assessing-the-benefits-of-a-benefit-corporation/>; Stephanie Strom, *A Quest for Hybrid Companies That Profit, but Can Tap Charity*, N.Y. TIMES (Oct. 12, 2011), <http://www.nytimes.com/2011/10/13/business/a-quest-for-hybrid-companies-part-money-maker-part-nonprofit.html> (explaining the dynamic between non-profit, for-profit, and hybrid entities, such as Benefit Corporations).

6. Brian Cyr & Jessica Lubar, *For Good and For Profit: The Emergence of the Maryland Benefit Corporation*, ROSENBERG MARTIN GREENBERG LLP (June 2010), <http://www.rosenbergmartin.com/our-passion/documents/LubarArticleJune2010.pdf>.

7. *Id.*

8. Each state statute defines what may be considered a “benefit” for purposes of the benefit corporation. See *infra* I.B.1 for a discussion of general and public benefits. For an example of a benefit corporation, see METHOD, <http://methodhome.com/about-us> (last visited Mar. 9, 2015). Method Products is an established home cleaning products company that has institutionalized their commitment to environmental sustainability through incorporation as a benefit corporation.

9. *B Corps: Firms with Benefits*, THE ECONOMIST (Jan. 7, 2012), <http://www.economist.com/node/21542432>; see also Jack Rodolico, *Benefit Corporations Look Beyond The Profit Motive*, NPR (June 18, 2014), <http://www.npr.org/2014/06/18/316349988/benefit-corporations-look-beyond-the-profit-motive>.

10. Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 596 (2011).

this new entity structure to meet the demands of an increasingly socially-minded market.¹¹ Despite their popularity, however, it can be difficult for benefit corporations to obtain funding because the entity is often perceived as relatively risky as an untested business model with unknown returns.¹²

Despite the recent popularity of small and socially-conscious businesses, the competitive nature and high entry barriers of capital markets has led to difficulty acquiring sufficient funding for many small companies, including benefit corporations.¹³ Furthermore, due to the unique structure of the benefit corporation, such companies face additional challenges securing investors and maintaining funding.¹⁴

In 2012, in an attempt to address the funding issues all small businesses face, Congress passed the Jumpstart Our Business Startups Act (the JOBS Act, or the Act).¹⁵ The goal of the Act is to “increase American job creation and economic growth by improving access to the public capital markets for emerging growth companies.”¹⁶ The JOBS Act seeks to increase funding and growth through flexible rules and funding platforms for small businesses, which allows investor solicitation and “crowdfunding” for small businesses (collectively referred to as “JOBS Act funding platforms”).¹⁷ Essentially, the Act re-

11. Cara Griffith, *Benefit Corporations: The Corporate Entity Of The Future?*, FORBES (Oct. 30, 2014), <http://www.forbes.com/sites/taxanalysts/2014/10/30/benefit-corporations-the-corporate-entity-of-the-future>.

12. *Laws Provide Con Artists with Personal Economic Growth Plan*, N. AM. SEC. ADMIN. ASS'N (Aug. 21, 2012), <http://www.nasaa.org/14679/laws-provide-con-artists-with-personal-economic-growth-plan>.

13. David Skok, *Why Startups Fail*, FOR ENTREPRENEURS, <http://www.forentrepreneurs.com/business-models/why-startups-fail> (last visited Mar. 9, 2015).

14. See Briana Cummings, *Benefit Corporations: How To Enforce a Mandate To Promote the Public Interest*, 112 COLUM. L. REV. 578, 588 (2012) (“Double bottom line corporations [like Benefit Corporations] struggle to raise capital because they do not fit the settled categories and expectations of existing sources of capital.”); see also Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337, 352 (2009) (“In a recent study of the emerging fourth sector, social entrepreneurs reported that their most pressing challenge was gaining access to investment capital.”).

15. Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, 126 Stat. 306 (2012).

16. *Id.*

17. *Id.*

duces entry barriers that small businesses face as they try to obtain funding in capital markets.¹⁸

The JOBS Act is focused on promoting small businesses and, accordingly, will greatly impact benefit corporations, many of which are small businesses. Still, because the Act focuses on *all* small businesses, it does not adequately protect benefit corporation investors. Specifically, the Act lacks important affirmative disclosures to inform, and thus protect, benefit corporation investors. Potential investors could be at a serious risk if they unknowingly invest in a benefit corporation believing it to be a traditional corporation with a profit-only focus. The omission of such protection in the Act has the potential to create serious issues for those investing in benefit corporations and could ultimately hinder the future of benefit corporations.

This Note argues that affirmative disclosures would be advantageous to both benefit corporations and their investors under the JOBS Act's funding platforms, and would ultimately promote investor protection and the national progression of the benefit corporation. Part I of this Note outlines the emergence of the benefit corporation, the foundation of state benefit corporation legislation, and the JOBS Act. Part II analyzes a primary issue currently facing benefit corporations: the ability to attain sufficient funding. Part II then evaluates how the JOBS Act solves many funding issues for small businesses, but creates new, complex issues that undermine the protection of benefit corporation investors. Finally, Part III argues that the best way to resolve the issues created by the JOBS Act is to amend Securities and Exchange Commission (SEC) regulations under the JOBS Act and impose affirmative disclosure requirements for benefit corporations choosing to participate in JOBS Act funding options. Affirmative disclosures for benefit corporations would act as a preventative safeguard to ensure investor protection. Such regulatory measures would positively change the landscape of benefit corporations and are crucial to secure a successful future for benefit corporations as they utilize these new funding platforms and continue to grow in success and popularity.

18. *See id.* *See generally* Chris Brummer & Daniel Gorfine, *The JOBS Act Isn't All 'Crowdfunding'*, FORBES (Oct. 8, 2013, 8:00 AM), <http://www.forbes.com/sites/realspin/2013/10/08/the-jobs-act-isnt-all-crowdfunding> (explaining the fundamental aspects of the JOBS Act).

I. STATE AND FEDERAL REACTIONS TO THE SHIFT IN CORPORATE EXPECTATIONS: THE EMERGENCE AND FOUNDATIONS OF BENEFIT CORPORATIONS AND THE JOBS ACT LEGISLATION

Over the past decade, corporate expectations have shifted, driving the business community towards small business, social responsibility, and sustainability. One response to this shift has been the creation and popularity of the benefit corporation.¹⁹ Notwithstanding their popularity, benefit corporations have had difficulty obtaining financial success due to their new and untested structure. Moreover, benefit corporations face the same issues raising funds as a traditional small business, financial challenges which have intensified over recent years due to national economic instability.²⁰ To address the economic challenges of small businesses, Congress enacted the JOBS Act, thereby helping many benefit corporations. The Act creates new funding platforms for small businesses: equity crowdfunding and investor solicitation.²¹ This Section details both state benefit corporation legislation and the JOBS Act. Part A explains the foundations of benefit corporations as an entity. Part B expands on these foundations, and discusses the specifics of benefit corporation legislation and the differences between traditional and benefit corporations. Part C explains the current challenges facing benefit corporations. Finally, Part D discusses the JOBS Act and its potential to solve these issues.

A. THE EMERGENCE OF THE BENEFIT CORPORATION

Corporate structures that combined a for-profit structure with non-profit values began emerging in the early 2000s.²² These entities materialized to meet the needs of entrepreneurs interested in building a company focused on both profit- and mission-oriented goals.²³ Such entities continue to grow due to

19. See Reiser, *supra* note 10, at 606.

20. See Kelley, *supra* note 14, at 352.

21. See *id.*

22. See Carter G. Bishop, *The Low-Profit LLC (L3C): Program Related Investment by Proxy or Perversion?*, 63 ARK. L. REV. 243, 246–47 (2010) (detailing the first legally recognized hybrid entity, the Low-Profit Limited Liability Company, a legal entity that merges charitable or educational goals with the LLC structure).

23. See Reiser, *supra* note 10, at 606; Patrick, *supra* note 5.

increased demand from consumers and investors.²⁴ Though various types of hybrid entities exist,²⁵ the benefit corporation has proven the most effectual and successful because its foundations are based in corporate law, with which entrepreneurs and investors have a greater understanding and familiarity.²⁶

In 2010, Maryland became the first state to enact legislation adopting the benefit corporation.²⁷ Since Maryland's enactment, twenty-five additional states have adopted some type of benefit corporation legislation,²⁸ while others continue to introduce such legislation.²⁹ Delaware, the predominant state for corporate law, has also adopted benefit corporation legislation, solidifying the importance and potential of this emerging business entity.

B. DIFFERENCES BETWEEN TRADITIONAL CORPORATIONS AND BENEFIT CORPORATIONS

Generally, a benefit corporation is a business entity that allows companies to consider external social obligations in addition to the general corporate expectation of profit maximization and shareholder value.³⁰ While there are some differences among states' benefit corporation legislation, among the many states, benefit corporations are similarly defined and adhere to

24. Strom, *supra* note 5.

25. See, e.g., Bishop, *supra* note 22, at 246–47.

26. See Kelley, *supra* note 14, at 350–54; Reiser, *supra* note 10, at 594, 601–03. B Lab, a non-profit that promotes benefit corporations, headed this progress, implementing non-legal certifications and commercialization to initiate the early popularity of benefit corporations. *Powered by B Lab*, BENEFIT CORP INFO. CTR, <http://benefitcorp.net/about-b-lab> (last visited Mar. 9, 2015). B Lab has been pivotal in the creation and visibility of benefit corporations, especially in efforts creating the *Model Benefit Corporation Legislation*, which has served as the foundation for state efforts in benefit corporation legislation. See MODEL BENEFIT CORP. LEGISLATION §§ 102, 201(a) (2013), available at http://benefitcorp.net/storage/documents/Model_Benefit_Corporation_Legislation.pdf.

27. Cyr & Lubar, *supra* note 6.

28. Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Louisiana, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia, Washington, D.C., and West Virginia have all enacted legislation. See *State by State Legislative Status*, BENEFIT CORP, <http://www.benefitcorp.net/state-by-state-legislative-status> (last visited Mar. 9, 2015). Indiana, Kentucky, Montana, New Mexico, North Dakota, and Oklahoma have introduced legislation. See *id.*

29. See *id.*

30. *Id.*

the same fundamental requirements.³¹ There are three primary characteristics that differentiate benefit corporations from traditional corporations: corporate purpose; mandated director and officer accountability; and transparency requirements.

1. Corporate Purpose

A traditional corporation can have any legal purpose.³² Accompanying this flexible idea, however, is the general expectation that the goal of a corporation is to maximize profits and shareholder value.³³ Though the scope of this concept has been the topic of much debate and litigation,³⁴ it is generally understood that a corporation “is organized and carried on primarily for the profit of the stockholders.”³⁵

Benefit corporations deviate from this traditional purpose. While pursuing profits, benefit corporations also have the “purpose of creating general public benefit.”³⁶ This expands the traditional corporate goals to include the promotion of general or specific public benefits. A general public benefit is defined as a “material positive impact on society and the environment . . .

31. See generally JAMES D. COX & THOMAS LEE HAZEN, *The Evolution of Corporations in England and America*, 1 TREATISE ON THE LAW OF CORPORATIONS § 2:14 (3d ed. 2012 & Supp. 2014).

32. See, e.g., MINN. STAT. § 302A.101 (1981) (“A corporation may be incorporated under this chapter for any business purpose or purposes, unless some other statute of this state requires incorporation for any of those purposes under a different law. Unless otherwise provided in its articles, a corporation has general business purposes.”).

33. Judd F. Sneirson, *Green Is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987, 1001–03 (2009).

34. Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 735–38 (2005).

35. *Dodge v. Ford*, 170 N.W. 668, 684 (Mich. 1919); see also *Katz v. Oak Indus., Inc.*, 508 A.2d 873, 879 (Del. Ch. 1986); *Long v. Norwood Hills Corp.*, 380 S.W.2d 451, 475–479 (Mo. Ct. App. 1964); *Granada Inv., Inc. v. DWG Corp.*, 823 F. Supp. 448, 459 (N.D. Ohio 1993). Compare Sneirson, *supra* note 33, at 1001–06 (recognizing a duty to shareholders but arguing the business-judgment rule renders this duty meaningless), with Jonathan R. Macey, *A Close Read of an Excellent Commentary on Dodge v. Ford*, 3 VA. L. & BUS. REV. 177, 179 (2008) (arguing that duties to shareholders remain paramount, even in the face of deference to corporate managers), and STEPHEN M. BAINBRIDGE, *CORPORATION LAW AND ECONOMICS* §§ 1.4(B), 9.2, 9.3 (2002).

36. MODEL BENEFIT CORP. LEGISLATION § 201(a) (2013); see also CAL. CORP. CODE § 14601(a) (West 2014); HAW. REV. STAT. § 420D-2 (West 2014); MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01(c) (LexisNexis 2014); N.J. STAT. ANN. § 14A:18-1 (West 2014); N.Y. BUS. CORP. LAW § 1702 (McKinney 2003); VT. STAT. ANN. tit. 11A, § 21.03(a)(1) (2014); VA. CODE ANN. § 13.1-782 (2011).

from the business and operations of a benefit corporation.”³⁷ Some states allow benefit corporations to adopt specific public benefits in addition to general public benefits, including:

(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.³⁸

A general public benefit is required.³⁹ Specific public benefits, such as a societal or environmental benefit, are not mandatory.⁴⁰ The difference between the goals of a traditional corporation versus a benefit corporation is important because those goals drive the operation, strategic direction, and obligations of company management.⁴¹

2. Management Accountability

Typically, officers and directors must act in accordance with the purpose and goals of a corporation.⁴² As discussed, the general purpose of a traditional corporation is to maximize profits and shareholder value.⁴³ Consequently, directors must generally work to achieve those ends. In so doing, directors owe a fiduciary duty of loyalty and care to the corporation, and, thereby, to the shareholders.⁴⁴ The duty of loyalty requires di-

37. MODEL BENEFIT CORP. LEGISLATION § 102; *see also* CAL. CORP. CODE § 14601(c); HAW. REV. STAT. § 420D-2; MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01(c); N.J. STAT. ANN. § 14A:18-1; N.Y. BUS. CORP. LAW § 1702(b); VT. STAT. ANN. tit. 11A, § 21.03(a)(4); VA. CODE ANN. § 13.1-782.

38. MODEL BENEFIT CORP. LEGISLATION § 102; CAL. CORP. CODE § 14601(e); HAW. REV. STAT. § 420D-5(b); MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01(d); N.J. STAT. ANN. § 14A:18-1; N.Y. BUS. CORP. LAW § 1702(e); VT. STAT. ANN. tit. 11A, § 21.03(a)(6); VA. CODE ANN. § 13.1-782.

39. *See* MODEL BENEFIT CORP. LEGISLATION § 102.

40. *See id.*

41. *See generally* Rodolico, *supra* note 9.

42. *See* Leo E. Strine, Jr., *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 148–55 (2012). *But see* Lyman Johnson, *Emerging Issues In Social Enterprise: Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269, 273 (2012).

43. *See infra* Part I.B.1.

44. Andrew S. Gold, *The New Concept of Loyalty in Corporate Law*, 43 U.C. DAVIS L. REV. 457, 457–60 (2009) (“A director’s fiduciary duty of loyalty has long been a core feature of corporate jurisprudence.”).

rectors to pursue the best interests of the corporation and shareholders above their own interests.⁴⁵ The duty of care requires that directors exercise good “business judgment” and use ordinary care in operating the business.⁴⁶

Nevertheless, there is a division in traditional corporate statutes among states. Some states permit officers and directors of traditional corporations to consider other constituencies, stakeholders other than the company’s shareholders, in their business judgment. For example, Minnesota’s corporate statute provides that the Board of Directors “may . . . consider the interests of the corporation’s employees, customers, suppliers, and creditors, the economy of the state and nation, community and societal considerations, and the long-term as well as short-term interests of the corporation and its shareholders”⁴⁷ In contrast, other states, including Delaware, do not expressly permit corporations to consider such non-shareholder constituencies.⁴⁸ The difference between these so-called constituency statutes and non-constituency statutes presents an important difference in corporate common law among the states. The expectation of benefit corporations, however, is distinct from both constituency and non-constituency corporate statutes. While traditional corporate constituency statutes permit the consideration of other constituents aside from the corporation and its shareholders, benefit corporations *require* the consideration of a company’s purported benefits.⁴⁹ Accordingly, the management of benefit corporations has different fiduciary duties than the management of traditional corporations.

Benefit corporation legislation mandates heightened accountability requirements for management, which expands the fiduciary duties of officers and directors so that they are re-

45. *Id.*

46. *See, e.g.*, *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 525 (1984) (explaining that the business judgment rule is the standard, though declining to apply it in this case); *In re Farmland Indus., Inc.*, 294 B.R. 855, 881 (Bankr. W.D. Mo. 2003) (“Under the ‘business judgment’ rule, the management of a corporation’s affairs is placed in the hands of its board of directors and officers, and the Court should interfere with their decisions only if it is made clear that those decisions are, *inter alia*, clearly erroneous, made arbitrarily, are in breach of the officers’ and directors’ fiduciary duty to the corporation, [or] are made on the basis of inadequate information or study.”).

47. MINN. STAT. § 302A.251 subd. 5 (2014).

48. *See Johnson, supra* note 42, at 272.

49. *See* Leo E. Strine, Jr., *Making It Easier For Directors To “Do The Right Thing?”*, 4 HARV. BUS. L. REV. 235, 238 (2014). *See also Johnson, supra* note 42, at 289.

quired to consider the mission-based goals of the benefit corporation.⁵⁰ The directors and officers of benefit corporations still owe the duties of loyalty and care, but benefit corporation legislation modifies this notion to include a broader range of stakeholders and stronger levels of accountability from directors and officers.⁵¹ In addition to traditional fiduciary duties, benefit corporation legislation mandates that directors and officers act to support benefit corporations' purported benefits. Specifically, management must consider shareholders, employees, the "interests of customers as beneficiaries," "community and societal factors," the environment, and any other appropriate cause or group as designated by the articles or bylaws of a corporation.⁵² These considerations extend to directors and officers.⁵³ No single consideration must be prioritized against another unless the benefit corporation's articles of incorporation explicitly provide.⁵⁴ The different accountability requirements in benefit corporation legislation establish a fundamental difference from regular corporations, drawing a distinction from corporate common law, which mandates that directors "maximize the financial value of a corporation."⁵⁵ These requirements also establish that directors and officers of benefit corporations will be held accountable for their efforts in furtherance of a benefit corporation's mission-based purposes.⁵⁶

To substantiate these duties, many states have created a "benefit enforcement proceeding."⁵⁷ This proceeding creates a cause of action for specified shareholders, the corporation, or directors, if the benefit corporation fails to "pursue or create general public benefit or a specific public benefit purpose set forth in its articles," or "violat[es] any obligation, duty, or standard of conduct under" the statute.⁵⁸ The benefit enforce-

50. See, e.g., MODEL BENEFIT CORP. LEGISLATION § 102 (2013).

51. *Id.*; see also CAL. CORP. CODE § 14601(c) (West 2014); HAW. REV. STAT. § 420D-2 (West 2014); MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01(c) (LexisNexis 2014).

52. MODEL BENEFIT CORP. LEGISLATION § 301(a).

53. *Id.* § 303(a).

54. *Id.*

55. *Id.* § 301 cmt.; see also Reiser, *supra* note 10, at 595.

56. See Reiser, *supra* note 10, at 595.

57. MODEL BENEFIT CORP. LEGISLATION §§ 102, 301, 305 (citing *Dodge v. Ford*, 170 N.W. 668 (Mich. 1919); *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010)). A benefit proceeding does not necessarily preclude standard litigation, though. Because this is untested, it is yet to be seen how this type of proceeding will work.

58. *Id.*

ment proceeding further establishes that the directors and officers of a benefit corporation have a duty to act in accordance with the purported benefit, and will be held accountable for their pursuit of the benefits.⁵⁹

3. Operational Transparency

Unlike traditional corporations, benefit corporations must maintain a certain level of transparency in order to ensure that they are acting in accordance with purported general and specific public benefits.⁶⁰ Transparency requirements focus on the preparation of an annual benefit report, which must detail the “ways in which the benefit corporation pursued general public benefit during the year and the extent to which general public benefit was created.”⁶¹ The report is currently used for the benefit of existing shareholders. If one is adopted, the report is expanded to include the specific public benefit.⁶² The annual benefit report must also include any difficulties that have hindered the corporation’s ability to create these benefits.⁶³ Furthermore, the benefit corporation is tasked with assessing the “overall social and environmental performance of the benefit corporation against a third-party standard.”⁶⁴ Finally, the annual benefit report must be displayed on the company’s website, if they have one.⁶⁵ Such reporting requirements are not present in traditional corporate legislation and are a unique way to maintain and monitor the operation of a benefit corporation.

Though the benefit corporation is different from a traditional corporation, this new business model has proven successful as an independent entity.⁶⁶ Nevertheless, while benefit corporations have drawn substantial attention from entrepreneurs

59. See Cummings, *supra* note 14, at 593.

60. *Id.*

61. MODEL BENEFIT CORP. LEGISLATION § 401(a)(1)(i); CAL. CORP. CODE § 14630 (West 2014); HAW. REV. STAT. § 420D-11 (West 2014); MD. CODE ANN., CORPS. & ASS’NS § 5-6C-08 (LexisNexis 2014); N.J. STAT. ANN. § 14A:18-11 (West 2014); N.Y. BUS. CORP. LAW § 1708 (McKinney 2003); VT. STAT. ANN. tit. 11A, § 21.14 (2014); VA. CODE ANN. § 13.1-791 (2011).

62. See MODEL BENEFIT CORP. LEGISLATION § 401(a)(1).

63. *Id.* § 401(a)(1)(iii).

64. *Id.* § 401(a)(2). See Reiser, *supra* note 10, at 611 (“All of the statutes envision public benefit assessments in annual benefit reports . . . with reference to the third-party standard. But, none of the statutes specify whether or how standard-setters should be involved in vetting public-benefit provision after incorporation.”).

65. Reiser, *supra* note 10, at 604.

66. See Strom, *supra* note 5.

and investors, they face the same challenges as a traditional startup and a number of financial challenges unique to the benefit corporation entity.

C. FINANCIAL ISSUES FACING BENEFIT CORPORATIONS

To date, the primary issue facing benefit corporations has been raising enough money to fund operations.⁶⁷ Despite their popularity with business owners, benefit corporations have experienced difficulty gaining traction with investors.⁶⁸ Benefit corporations are often less attractive than other options because they lack the firm, traditional incentives to invest, such as an anticipated return on investment. The pecuniary return on investing in a benefit corporation is not yet clear. It can be difficult for benefit corporations to obtain funding because the entity, an untested business model, can be perceived as relatively risky.⁶⁹ While investors and entrepreneurs have shown interest in the benefit corporation, expectations regarding the return on investment in a benefit corporation are unknown.⁷⁰ Accordingly, investors are generally drawn towards a traditional corporate model, which offers a higher return on investment, or a non-profit model, which offers full dedication to public benefits and provides tax incentives for contributions.⁷¹

The general unfamiliarity with benefit corporations has exacerbated funding issues.⁷² There is not yet precedent with which to evaluate issues arising from benefit corporations; there has not been litigation regarding a benefit corporation's shareholder rights, nor has there been a benefit enforcement

67. See Cummings, *supra* note 14, at 588.

68. See Strine, *supra* note 49, at 251 ("But another crucial question for the benefit corporation to answer affirmatively is whether benefit corporations can generate results for equity investors that inspire confidence that companies doing it the right way will generate long-run returns consistent with prudent portfolio growth.").

69. See *id.*; see also Reiser, *supra* note 10, at 618–21 (explaining the difficulties that face small companies, especially benefit corporations, in obtaining funding).

70. See generally Reiser, *supra* note 10.

71. Emily Chan, *The Profitable Side of Nonprofits—Part II: Different Legal Structures*, NONPROFIT L. BLOG (May 13, 2011), <http://www.nonprofitlawblog.com/the-profitable-side-of-nonprofits-part-ii-different-legal-structures>.

72. See generally Reiser, *supra* note 10, at 618–21 (explaining the difficulties that face small companies, especially benefit corporations, in obtaining funding).

proceeding.⁷³ In effect, there is no clear foundation as to how a benefit corporation will operate and be held accountable if they do not achieve purported benefits or act in accordance with accountability requirements. The repercussions are unclear, and it is unknown what rights shareholders will have to enforce compliance with either the profit- or mission-based expectations.⁷⁴ Though a popular platform for entrepreneurs, the benefit corporation's newness can deter investors.

Moreover, because benefit corporations are often small or startup businesses, they face the same general difficulties obtaining and maintaining funding. Small businesses have difficulty obtaining funding due to the overly burdensome requirements to enter securities markets, which allow companies to gain capital.⁷⁵ Additionally, as small businesses, it is difficult to effectively advertise and access investors. Congress has recently addressed funding issues facing all small businesses, which will also improve the situation for many benefit corporations.

D. THE JOBS ACT PROVIDES A POWERFUL SOLUTION FOR FUNDING SMALL BUSINESSES

The JOBS Act was enacted on April 5, 2012.⁷⁶ The purpose of the act is to “increase American job creation and economic growth by improving access to the public capital markets for emerging growth companies.”⁷⁷ This is done primarily through two new funding platforms for small businesses: equity crowdfunding and investor solicitation. As Part 1 details, the Act “establishes the foundation for a regulatory structure for startups and small businesses to raise capital through securities offerings using the Internet through crowdfunding.”⁷⁸ Part

73. Strine, *supra* note 49, at 251; Doug Bend & Alex King, *Why Consider a Benefit Corporation?*, FORBES (May 30, 2014, 9:00 AM), <http://www.forbes.com/sites/theyec/2014/05/30/why-consider-a-benefit-corporation>.

74. Reiser, *supra* note 10, at 612 (“The statutes impose no clear framework for directorial decision making. Without one, it is difficult to identify a metric by which shareholders might enforce fiduciaries’ compliance with dual mission.”).

75. Joan MacLeod Heminway, *To Be or Not To Be (a Security): Funding for For-Profit Social Enterprises*, 25 REGENT U. L. REV. 299, 319 (2013) (“The costs associated with producing these filings are significant and may be slightly higher for social enterprise issuers . . .”).

76. Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, 126 Stat. 306, 307–08 (2012).

77. *Id.*

78. Crowdfunding, 78 Fed. Reg. 66,428, 66,429 (Nov. 5, 2013) (to be codified at 17 C.F.R. pts. 200, 227, 232, 239, 240, 249).

2 discusses the new allowance for investor solicitation under the Act.⁷⁹ These provisions were initiated to provide small businesses with an opportunity to reach investors and earn capital without entering the often costly and burdensome securities market.⁸⁰

1. The JOBS Act Establishes a Platform for Equity “Crowdfunding”

The JOBS Act improves funding for small businesses through the creation of a regulatory platform for equity crowdfunding. Put simply, crowdfunding raises money from a large amount of people investing small individual contributions.⁸¹ Currently, there are a number of websites that facilitate crowdfunding.⁸² Nevertheless, the current form of crowdfunding cannot offer investors any share in the financial returns of the company,⁸³ because selling shares or interest in the profit of a company equates to selling securities.⁸⁴ Selling securities or security-like products requires federal registration and is highly

79. *Fact Sheet: Eliminating the Prohibition on General Solicitation and General Advertising in Certain Offerings*, U.S. SEC. & EXCH. COMM’N (July 10, 2013), <http://www.sec.gov/news/press/2013/2013-124-item1.htm>.

80. Crowdfunding, 78 Fed. Reg. at 66,429. See Dave Michaels, *Crowdfunding for Internet Stock Sales Approved by SEC*, BLOOMBERG (Oct. 23, 2013, 11:01 PM), <http://www.bloomberg.com/news/articles/2013-10-23/sec-to-vote-on-crowdfunding-plan-as-white-advances-jobs-act-1->.

81. Crowdfunding, 78 Fed. Reg. at 66,429. See also Brummer & Gorfine, *supra* note 18 (defining crowdfunding as “the process by which capital is raised for a project, venture, or enterprise through the pooling of numerous and relatively small financial contributions or investments from the public, usually via the internet”).

82. Examples of current crowdfunding websites include <http://www.kickstarter.com>, <http://www.peerbackers.com>, and <http://www.indiegogo.com>. Although these websites offer funding options, they do not “offer securities, such as an ownership interest or share of profits in a business; rather, money was contributed in the form of donations, or in return for the product being made. The JOBS Act creates an exemption from the registration requirements of the Securities Act that provides for a form of securities crowdfunding.” *Small Business and the SEC*, U.S. SEC. & EXCH. COMM’N (October 10, 2013), <http://www.sec.gov/info/smallbus/qasbsec.htm#capital>.

83. Currently, small businesses can raise capital through “borrowing money from banks, other financial institutions or friends/family and by selling securities,” but if the company “offer[s] and sell[s] securities, even if to just one person, the offer and sale of the securities must either be registered with the SEC or conducted in accordance with one of the many registration exemptions . . . [this] would make your company a public company. Going public is a very significant step for any company.” *Id.*

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

regulated under the Securities Act of 1933.⁸⁵ Such regulation would trigger ongoing reporting to the SEC under the Securities Exchange Act of 1934.⁸⁶ These regulations and reporting requirements are costly and time-consuming, which prevents many small businesses from selling securities.⁸⁷

In response, the SEC has proposed rules under Title III of the JOBS Act (Title III) to facilitate crowdfunding as a legal platform to raise money without triggering the same SEC regulation, often referred to as the “equity model” of crowdfunding.⁸⁸ The purpose of Title III is to “help alleviate the funding gap and accompanying regulatory concerns faced by startups and small businesses in connection with raising capital.”⁸⁹ Title III makes equity crowdfunding accessible to both small companies and investors, as it allows qualifying companies to utilize crowdfunding to sell securities without the standard SEC regulations.

Specifically, Title III adds Securities Act section 4(a)(6), which creates an exemption from SEC registration under the Securities Act of 1933.⁹⁰ Under section 4(a)(6), if a company meets three main requirements, it may participate in equity crowdfunding.⁹¹ First, the company cannot raise over one million dollars over a twelve-month period.⁹² Second, individual investments within this time frame are limited.⁹³ Third, the investor transactions must be conducted through a registered intermediary, either a broker or a “funding portal,” a newly established entity under the SEC legislation.⁹⁴ A company may

85. *Id.*

86. *Id.*

87. *Small Business and the SEC*, *supra* note 82 (explaining the difficulties and burdens associated with registering a company with the Securities and Exchange Commission).

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

89. *Id.* at 66,430.

90. *Id.* at 66,431.

91. *See id.*

92. *Id.* at 66,431–32.

93. The investment cannot come from an investor in an amount greater than \$2,000 or 5% of the annual income or net worth if the investor has less than \$100,000 in annual income or net worth; alternatively, if the investor has an annual income or net worth of over \$100,000, the investor is limited to investing 10% of their annual income or net worth, but not to exceed \$100,000. *Id.* at 66,433–34.

94. A funding portal is defined by the SEC as an intermediary platform that does not, amongst other things, “(i) offer investment advice or recommendations; (ii) solicit purchases, sales, or offers to buy securities offered or displayed on its website or portal; . . . (iv) hold, manage, possess, or otherwise

only use one intermediary to conduct an offering or concurrent offerings.⁹⁵

In addition, Title III creates a number of regulatory requirements for companies that qualify and choose to partake in equity crowdfunding. Among other provisions, Title III adds section 4(a) to the Securities Act of 1933, which requires that “issuers and intermediaries that facilitate transactions between issuers and investors . . . provide certain information to investors and potential investors, take certain other actions and provide notices and other information to the [SEC].”⁹⁶ To protect investors, section 4(a)(6) requires issuer disclosures.⁹⁷ These disclosures are required at the time of offering, on an ongoing basis with the SEC, and must be displayed on the intermediary platform.⁹⁸ Registered intermediaries will also be required to provide communication channels to facilitate the sharing of information between the company and any potential investors.⁹⁹ Generally, “an issuer offering or selling securities in reliance on section 4(a)(6) must file specified disclosures, including financial disclosures, with the [SEC], provide these disclosures to investors and the relevant broker or funding portal and make these disclosures available to potential investors.”¹⁰⁰ These disclosures include basic information, such as the name, legal status, and website of the issuer; information regarding the directors, officers, and majority shareholders; basic business and financial information; and basic information regarding the offering.¹⁰¹ Furthermore, there are ongoing disclosure requirements, which require an annual filing “with the [SEC] and provid[ing] to investors reports of the results of operations and financial statements of the issuer.”¹⁰²

The new equity crowdfunding platform will undoubtedly help small businesses, including benefit corporations. Many ar-

handle investor funds or securities.” *Jumpstart Our Business Startups Act, Frequently Asked Questions About Crowdfunding Intermediaries*, U.S. SEC. & EXCH. COMM’N (May 7, 2012), <http://www.sec.gov/divisions/marketreg/tmjbsact-crowdfundingintermediariesfaq.htm> [hereinafter *Frequently Asked Questions*]; see also *Crowdfunding*, 78 Fed. Reg. at 66,435.

95. *Crowdfunding*, 78 Fed. Reg. at 66,435.

96. *Id.* at 66,430

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 66,437–38.

101. *Id.*

102. *Id.* at 66,450.

gue, however, that the disclosures are not enough, and that the Act lacks serious precautions to protect potential investors.¹⁰³

2. The JOBS Act Eliminates Prohibited Solicitation and Advertising of Private Security Offerings for Certain Small Businesses

In addition to allowing equity crowdfunding, the SEC has eliminated the prohibition on soliciting and advertising security offerings.¹⁰⁴ Traditionally, companies sell securities if they are registered with the SEC or if they fall within statutory exemptions from registration.¹⁰⁵ Most exemptions “prohibit companies from engaging in general solicitation or general advertising—that is, advertising in newspapers or on the Internet among other things—in connection with securities offerings.”¹⁰⁶ As such, if companies sell securities within these registration exemptions, the company is prohibited from advertising and soliciting potential investors. There are various exemptions from registration, but “Rule 506 of Regulation D is the most widely-used,” especially for small companies.¹⁰⁷ Rule 506 creates a “safe harbor” for companies seeking to solidify their offering as a private offering, and, therefore, protect themselves from the burdensome SEC public offering requirements.¹⁰⁸ Although Rule 506 traditionally required that these exempt companies refrain from advertising and soliciting their securities, Title II of the JOBS Act (Title II) provides for general solicitation. Title II eliminates the traditional prohibition of “general solicitation or general advertising in offering and selling securities pursuant to Rule 506, provided that all purchasers of the securities are accredited investors and the issuer takes reasonable steps to verify that such purchasers are accredited investors.”¹⁰⁹ The SEC specifies that accredited investors are “individuals who

103. See, e.g., Michael D. Guttentag, *Protection from What? Investor Protection and The JOBS Act*, 13 U.C. DAVIS BUS. L. J. 207 (2013) (explaining the lack of protection afforded to consumers under the JOBS Act).

104. *Fact Sheet*, *supra* note 79.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Rule 506 of Regulation D*, U.S. SEC. & EXCH. COMM’N (Jan. 1, 2013), <http://www.sec.gov/answers/rule506.htm>. Regulation D Rule 506 companies are required to fill out Form D, which is available at <http://www.sec.gov/about/forms/formd.pdf>.

109. Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, 78 Fed. Reg. 44,771, 44,771 (July 24, 2013) (to be codified at 17 C.F.R. pts. 230, 239, 242).

meet certain minimum income or net worth levels, or certain institutions such as trusts, corporations, or charitable organizations that meet certain minimum asset levels.”¹¹⁰ Title II is thereby limited in its availability to small businesses, but is nonetheless a powerful tool to gain more investors and funds.¹¹¹

The Act’s solicitation platform will open a new avenue for small and startup benefit corporations to advertise, and in turn gain more investors, but there are numerous issues that may arise. A primary concern is the minimal disclosure requirements.¹¹² The issuing company has minimal disclosure obligations triggered by Rule 506 at the time of offering; Rule 506 does not have ongoing disclosure requirements.¹¹³ Disclosure requirements are, in essence, replaced with investor accreditation requirements.¹¹⁴ However, this shift, from the corporation to the investor, may increase the likeliness of fraudulent practices and create information asymmetry among investors of benefit corporations; a scenario that has the potential to negatively impact the future of these new entities.¹¹⁵

II. THE INTERSECTION BETWEEN THE JOBS ACT AND BENEFIT CORPORATIONS

As previously discussed, the primary issue facing benefit corporations is the ability to raise and maintain enough funds to support their operations.¹¹⁶ However, with the enactment of Title II and III of the JOBS Act, raising funds is more attainable for all small businesses, including most benefit corporations. The JOBS Act aids in alleviating funding problems for benefit corporations, but it creates serious issues for the investors of benefit corporations: neither the SEC regulations nor state benefit corporation legislation includes affirmative disclosure requirements educating and informing potential investors. Part A discusses the ways in which the JOBS Act alleviates

110. *Fact Sheet*, *supra* note 79.

111. Chance Barnett, *The Crowdfunder’s Guide to General Solicitation and Title II Of The JOBS Act*, FORBES (Sept. 23, 2013, 10:40 AM), <http://www.forbes.com/sites/chancebarnett/2013/09/23/the-crowdfunders-guide-to-general-solicitation-title-ii-of-the-jobs-act/3>.

112. Brummer & Gorfine, *supra* note 18 (explaining the major change in the law and in what circumstances a company can now, under the JOBS Act, solicit or advertise their securities to investors).

113. *See* Guttentag, *supra* note 103, at 247–48.

114. *See id.* at 249.

115. *Id.*

116. *See supra* Part I.

funding issues for benefit corporations. Part B discusses the major issues the JOBS Act creates for potential investors, threatening the success of benefit corporations.

A. THE JOBS ACT SOLVES FUNDING ISSUES FOR BENEFIT CORPORATIONS

While it is impossible to resolve all financial issues facing benefit corporations, the JOBS Act largely alleviates many funding issues that benefit corporations currently face. Benefit corporations can now utilize the new equity crowdfunding model to raise funds or take advantage of the new solicitation laws to attract additional investors.¹¹⁷ These new funding platforms are ideal for benefit corporations for three primary reasons. First, benefit corporations are generally small, startup businesses, and the JOBS Act is intended to help such companies.¹¹⁸ Second, current, non-equity crowdfunding is targeted at small, often non-profit, companies with a mission or greater social purpose.¹¹⁹ While this generally does not need to be explicit in a company's mission to participate, this is what has driven, and will continue to drive, the popularity behind crowdfunding.¹²⁰ Due to their mission-based purposes, it is natural that benefit corporations will use these platforms.¹²¹ Benefit corporations inherently fall within this target mission-focused type of company.¹²² Third, benefit corporations will use solicitation because it is a simple, relatively easy way to gain investors. Benefit cor-

117. The JOBS Act does not include any provision excluding certain entity types.

118. Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, 126 Stat. 306, 307-08 (2012).

119. See, e.g., FIRSTGIVING, <http://www.firstgiving.com> (last visited Mar. 9, 2015) (exemplifying a non-profit oriented crowdfunding site); KICKSTARTER, <http://www.kickstarter.com> (last visited Mar. 9, 2015) (exemplifying a community and arts oriented crowdfunding site). See generally Taylor Corrado, *7 Top Crowdfunding Sites for Nonprofits and Higher-Ed Institutions*, HUBSPOT (Sept. 9, 2013, 6:00 PM), <http://blog.hubspot.com/marketing/crowdfunding-sites-for-nonprofits-higher-ed-li>.

120. See Victor Luckerson, *The Crowdfunding Economy Is About To Pop*, TIME (Sept. 24, 2013), <http://business.time.com/2013/09/24/the-crowdfunding-economy-is-about-to-pop>.

121. See Strom, *supra* note 5 ("Unlike a straight nonprofit group, these businesses can tap into conventional capital markets as well as philanthropy. And unlike a for-profit corporation, the structure allows investors to emphasize the social mission over making money, and to be supported by money from foundations.").

122. *Id.*

porations have the potential to be successful using solicitation because of their profit- and mission-based model, which has already proven attractive to investors and consumers in the increasingly socially-minded market.¹²³

Although there are some entry barriers to these platforms, they are minimal and are no different for benefit corporations than for any other business entity.¹²⁴ It follows, then, that benefit corporations will have the opportunity to sell shares in their company through equity crowdfunding without traditional SEC registration, thus increasing the company's ability to attain funding.¹²⁵ In addition to solicitation, a simple form of advertising to investors, the equity crowdfunding platform will greatly increase a company's exposure, as its information will be available on an intermediary's website, which potential investors will primarily utilize.¹²⁶ As a result, if benefit corporations meet the SEC requirements, they will be able to advertise shares and solicit investors. This will greatly increase a benefit corporation's exposure to potential investors.¹²⁷ Gaining traction with such investors will ultimately enable the corporation to acquire funds in support of the business.¹²⁸ While these platforms cannot fully eliminate funding issues facing small businesses, including those facing benefit corporations, they are an important and necessary step to level the playing field and access investors.

B. THE JOBS ACT GENERATES INVESTOR PROTECTION ISSUES FOR BENEFIT CORPORATIONS UTILIZING SOLICITATION AND CROWDFUNDING UNDER THE JOBS ACT

The funding platforms under the JOBS Act are advantageous for benefit corporations, yet the increased access to investors and the funding they provide creates serious problems in investor protection. Although affirmative disclosures are a primary way to protect investors,¹²⁹ neither the SEC nor states

123. *See id.*

124. The statute makes no reference to entity status. *See generally* Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, 126 Stat. 306, 307–08 (2012).

125. *Frequently Asked Questions*, *supra* note 94.

126. *See* Barnett, *supra* note 111.

127. *See* Michaels, *supra* note 80.

128. *Id.*

129. *See* Guttentag, *supra* note 103, at 249; *see also* Mary Jo White, Chair, Sec. Exch. Comm'n, National Association of Corporate Directors – Leadership Conference 2013: The Path Forward on Disclosure (Oct. 15, 2013) (“At the

have imposed adequate disclosure regulations upon benefit corporations. These regulations would be a crucial source of information regarding the nature of benefit corporations for potential investors, as they could explicitly provide pertinent investment information directly to the potential investor.¹³⁰ The potential damage caused by merely a single benefit corporation that defrauds its investors has the potential to negatively impact the reputation and future success of all benefit corporations.

The SEC's proposed legislation of equity crowdfunding includes limited disclosures regarding the business operations and financial condition of the company.¹³¹ These disclosures, however, do not necessitate disclosure detailing the type of business entity.¹³² The entity of a company affects the nature of an investment in that company.¹³³ While many benefit corporations may advertise their entity-status to their advantage,¹³⁴ there is no provision in either funding platform regulation that mandates the disclosure of the foundational differences between a benefit corporation and a traditional corporation.¹³⁵ Because there is no affirmative disclosure required, a benefit corporation would not be obligated to identify as such, leaving

SEC, one of the most meaningful powers that we have to wield on behalf of investors is our authority to require companies to tell investors about the things that matter to them.”).

130. See generally *Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings*, 78 Fed. Reg. 44,771 (July 24, 2013) (to be codified at 17 C.F.R. pts. 230, 239, 242) (explaining the disclosures required, which does not include any affirmative disclosures regarding business entity or operations); MODEL BENEFIT CORP. LEGISLATION § 401(a)(1) (2013).

131. Crowdfunding, 78 Fed. Reg. 66,428, 66430 (Nov. 5, 2013) (to be codified at 17 C.F.R. pts. 200, 227, 232, 239, 240, 249).

132. See *Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings*, 78 Fed. Reg. at 44,771.

133. See generally Anita K. Krug, *Escaping Entity-Centrism in Financial Services Regulation*, 113 COLUM. L. REV. 2039, 2042 (2013) (discussing the importance of the entity-status in financial regulation).

134. See Reiser, *supra* note 10, at 621–24; see also *Benefit Corporations: A New Formula for Social Change*, CTR. FOR ASS'N LEADERSHIP (June 2012), <http://www.asaecenter.org/Resources/ANowDetail.cfm?ItemNumber=179687> (“There is a strong case to be made for becoming a benefit corporation to gain a competitive advantage and attract investors, many of whom are specifically designing portfolios devoted to triple-bottom-line companies.”).

135. *Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings*, 78 Fed. Reg. 44,771.

potential investors unaware of the difference between a benefit and traditional corporation and, therefore, unprotected.

Like SEC regulation, state benefit corporation legislation does not include affirmative disclosures regarding the nature of the business entity.¹³⁶ Although state benefit corporation legislation includes efforts to promote transparency of operations, such efforts focus on minimal initial disclosures to potential investors and then after-the-fact annual disclosures regarding the company's efforts to attain their purported benefits.¹³⁷ These efforts revolve around the annual benefit report, which must be posted on the company website, and discloses completed efforts done to achieve the company's purported benefits.¹³⁸ While this regulation is an important step to keep existing shareholders informed about business operations and profits, it is ineffective to inform potential investors about the nature of the specific business and what a benefit corporation model entails.¹³⁹ State legislation does little in the way of informing investors about the fundamental nature of a benefit corporation before reaching shareholder status, ultimately leaving them unaware and unprotected.¹⁴⁰ Though some investors may seek to gain a better understanding of benefit corporations through independent research, many will remain unaware of the nature of their investment and uninformed as to how benefit corporations differ from traditional corporations.¹⁴¹

Affirmative disclosure regulations are one of the strongest tools available to protect both sophisticated and unsophisticat-

136. See generally MODEL BENEFIT CORP. LEGISLATION § 401(a)(1) (2013) (exemplifying the typical disclosures required of benefit corporations, which does not include explanation of the type of entity).

137. See *id.*; CAL. CORP. CODE § 14630 (West 2014); HAW. REV. STAT. § 420D-11 (2013); MD. CODE ANN., CORPS. & ASS'NS § 5-6C-08 (LexisNexis 2014); N.J. STAT. ANN. § 14A:18-11 (West 2013); N.Y. BUS. CORP. LAW § 1708 (McKinney 2003); VT. STAT. ANN. tit. 11A, § 21.14 (2014); VA. CODE ANN. § 13.1-788 (2011).

138. See MODEL BENEFIT CORP. LEGISLATION § 401(a)(1); CAL. CORP. CODE § 14630; HAW. REV. STAT. § 420D-11; MD. CODE ANN., CORPS. & ASS'NS § 5-6C-08; N.J. STAT. ANN. § 14A:18-11; N.Y. BUS. CORP. LAW § 1708; VT. STAT. ANN. tit. 11A, § 21.14; Va. Code Ann. § 13.1-788.

139. See, e.g., MODEL BENEFIT CORP. LEGISLATION § 401(a)(1) (exemplifying the traditional disclosures, which do not target investors).

140. See generally *id.* § 401(a)(1).

141. See Anne Field, *Benefit Corporations, L3Cs and All the Rest: Making Sense of Those Confusing Choices*, FORBES (May 25, 2012, 9:58 AM) <http://www.forbes.com/sites/annefield/2012/05/25/benefit-corporations-l3cs-and-all-the-rest-making-sense-of-those-confusing-choices/2>.

ed benefit corporation investors.¹⁴² The nature of an entity affects the nature of the underlying investment.¹⁴³ Since most investors will not understand the major differences in the operations, obligations, and largely untested shareholder rights of benefit corporations, information regarding the fundamental business nature of these corporations is important.¹⁴⁴ Without further affirmative disclosure regulations, investor protection is compromised in three ways. First, without mandatory disclosures regarding fundamental business information, many investors will be put at an informational disadvantage.¹⁴⁵ Second, without affirmative disclosures, there is a greater opportunity to employ fraud and deception in an attempt to attract investors.¹⁴⁶ Third, investors often need to be protected from “their own unwise investment decisions,” as investors may be attracted by the brand of an investment, such as a benefit corporation, without weighing the value it will bring them as a shareholder.¹⁴⁷

1. Without Adequate Affirmative Disclosure Requirements, Investors Will Be Ill-Informed About the Nature of Investments in a Benefit Corporation

Without affirmative disclosures, equity crowdfunding and solicitation will create a major informational gap between the individual investors, as well as between investors and benefit corporations. Thus, many investors will be left undereducated and ill-informed about the nature of benefit corporations when investing in such entities through these platforms. Such informational asymmetry can significantly harm investors and the market.¹⁴⁸

Under the current JOBS Act, benefit corporations have no responsibility to educate or inform investors regarding the nature of their business entity. The JOBS Act focuses primarily

142. See Guttentag, *supra* note 103, at 249.

143. See generally Krug, *supra* note 133, at 2042 (discussing the importance of the entity-status in financial regulation).

144. *Id.*; see Bend & King, *supra* note 73.

145. See Guttentag, *supra* note 103, at 249.

146. *Id.*

147. *Id.* at 252.

148. See *id.* at 249 n.226 (“The goal of protecting investors from information asymmetry is more of a means than an end. The concern for investors is not that they will have less information *per se*, but that various untoward results may follow when investors have less information.”).

on for-profit seeking investors.¹⁴⁹ This is advantageous for benefit corporations, but dangerous for investors. Benefit corporations often lose investors who seek either a maximized profit, therefore investing in a for-profit entity, or those who seek a non-profit venture to fulfill their mission-based interests.¹⁵⁰ The JOBS Act funding platforms are aimed at individuals seeking to invest in a profit-based entity.¹⁵¹ Therefore, the solicitation and equity crowdfunding platforms will attract individuals looking to gain equity in a company to earn a return on their investment. Benefit corporations, however, are not required to focus on maximizing profits and shareholder value, and investors may not understand this fundamental difference in their investment. For benefit corporations utilizing these funding platforms, the fundamental challenge of gaining investors who either want for-profit or non-profit investments will be eliminated. Rather than educating investors to solve the for-profit versus non-profit investment issue, the lack of disclosure creates a gap in information. In turn, the investor may be left unaware of the difference in their investment options, and may invest in a benefit corporation without realizing the true nature of such an investment.

Furthermore, the lack of investor education is compounded in light of the newness of benefit corporations. Benefit corporations only began emerging in 2010, and are recognized in fewer than half of the states.¹⁵² Without affirmative disclosures, there are few ways in which investors could learn about these new entities. Even sophisticated investors may not understand that the term triggers an entirely different entity than that of a traditional corporation, with different and largely untested obligations to shareholders.¹⁵³ This informational asymmetry can harm investors and markets due to unexpected and improper investor behavior.¹⁵⁴

149. Crowdfunding, 78 Fed. Reg. 66,428, 66,429 (Nov. 5, 2013) (to be codified at 17 C.F.R. pts. 200, 227, 232, 239, 240, 249) (“Title III was designed to help alleviate the funding gap and accompanying regulatory concerns faced by startups and small businesses in connection with raising capital in relatively low dollar amounts.”).

150. See *supra* Part I.C.

151. See *supra* Part I.D.

152. See *State by State Legislative Status*, *supra* note 28.

153. Bend & King, *supra* note 73; *Laws Provide Con Artists with Personal Economic Growth Plan*, *supra* note 12.

154. See Guttentag, *supra* note 103, at 249 n.226.

2. Lack of Information Without Affirmative Disclosures
Creates Perverse Incentives for Benefit Corporations To
Defraud and Take Advantage of Investors To Maximize Profit

The difference between traditional and benefit corporations has a major influence on how a company can gain investors. Traditionally, for-profit entities focus primarily on maximizing profit and thereby shareholder value.¹⁵⁵ Under the traditional corporate entity, directors can face shareholder litigation if the corporation fails to serve its shareholders and instead works solely towards achieving mission-based goals.¹⁵⁶ Therefore, shareholders implicitly incentivize traditional corporations to focus primarily on profits, which is advantageous for both the company and shareholders. As such, purchasing equity in traditional corporations is a relatively normalized practice. Even though, depending on the state, shareholder litigation can differ in scope, the benefit corporation is aimed at refocusing corporations on more than profits, expanding the focus to include mission-based goals.¹⁵⁷

Equity in benefit corporations is a very different investment than that of a traditional corporation. Benefit corporations have different operational obligations, which affect the value of their equity.¹⁵⁸ Further, benefit corporations have the ability to institutionalize the company's mission, which endures through director, officer, and ownership succession.¹⁵⁹ As discussed, benefit corporation legislation requires directors and officers to take actions that support that benefit corporation's purported public and specific benefits.¹⁶⁰ This obligation can be prioritized above profits, essentially allowing companies to secondarily consider profits and shareholder value.¹⁶¹ While this may attract some investors, a benefit corporation's commitment to a social mission should not attract investors unless the investor is fully aware of the unique nature of the business and investment and how that will affect the value of their investment.

155. MODEL BENEFIT CORP. LEGISLATION § 301 cmt. (2013).

156. *Id.*

157. *See* Cyr & Lubar, *supra* note 6.

158. *See* Reiser, *supra* note 10, at 621–24 (explaining the branding benefits of benefit corporations).

159. *See id.*

160. *Supra* Part I.B.2.

161. *Supra* Part I.B.2.

If investors are unaware of these fundamental differences between a regular corporation and a benefit corporation, the potential for fraud increases.¹⁶² Directors and officers of benefit corporations may be more likely to conceal the true nature of their business without mandatory affirmative disclosures.¹⁶³ The lack of disclosures may result in fraud or misinformation.¹⁶⁴ Moreover, benefit corporations that do not go so far as to commit fraud may still use the benefit corporation “brand” to purport their mission, while utilizing equity crowdfunding and solicitation merely to maximize profit.¹⁶⁵ Because the entity is relatively new, benefit corporations may easily push their mission to attract investors, but fail to mention how this may affect a potential investors status as a shareholder. This issue compounds the already existing potential for fraud under the JOBS Act, thereby misleading investors.¹⁶⁶ Such an increased likelihood of fraud and misinformation has the potential to damage the future of benefit corporations. There is concern that it would be burdensome on the company to make the disclosures on their own, and, further, that it could potentially steer investors in another direction if they had full information.¹⁶⁷ As the regulations stand, however, benefit corporations can conceal their nature as a benefit corporation when attracting investors, and instead appear as a “regular” corporation, leaving investors vulnerable.

3. If Investors Do Not Understand the Nature of the Benefit Corporation, Investors May Not Understand Their Rights and Value As Shareholders

The nature of a benefit corporation differs greatly from a regular corporation.¹⁶⁸ Therefore, shareholders have different

162. See Guttentag, *supra* note 103, at 248.

163. See *id.* (emphasizing the “fraud-deterring benefits of mandatory disclosure requirements generally,” noting that “disclosure requirements reduce fraud” and it is therefore “reasonable to mandate at least some basic disclosure requirements”).

164. *Id.*

165. Cummings, *supra* note 14, at 589–91.

166. Many argue that fraud may occur under the new crowdfunding platforms, due to both their newness and decidedly less stringent reporting requirements and regulation; the SEC urges that this will be mitigated by the intermediaries and investor participation. See Crowdfunding, 78 Fed. Reg. 66,428, 66,438 (Nov. 5, 2013) (to be codified at 17 C.F.R. pts. 200, 227, 232, 239, 240, 249).

167. *Id.*

168. See *supra* Part I.B.

rights and value. Without adequate affirmative disclosures, potential investors will likely be unaware of this difference.

Investors often become shareholders in a small company with the understanding that, if the company is successful, they will see a monetary return, be it through dividends or an increased return on their investment upon selling the shares.¹⁶⁹ However, neither of these benefits is guaranteed from a successful benefit corporation.¹⁷⁰ Benefit corporations balance their success differently, focusing on values that the company has institutionalized as equally or more important than profit and shareholder value maximization.¹⁷¹ While this is essentially the point of benefit corporations, investors should not participate in funding these ventures unless they are fully aware of the value of the equity in which they are investing. Unfortunately, the lack of disclosure regulations leave investors vulnerable to this misinformation.

Furthermore, shareholders tend to invest with the understanding that they can hold management accountable.¹⁷² Benefit corporations, however, are entirely untested in litigation.¹⁷³ Although some state legislation includes a shareholder right to action if the directors are not promoting the corporation's purported public or specific benefits, this is not a uniform provision found in all states.¹⁷⁴ Therefore, without full information, investors are subject to a new and untested realm of common law, and may be investing in a company without the ability to protect their rights to, and value in, the business.¹⁷⁵

With fully disclosed information regarding shareholder value and rights, these issues would be largely eliminated.

169. Capital One, *What Is a Stock and Why Buy Stocks?*, SHAREBUILDER KNOWLEDGE CTR. (2013) http://content.sharebuilder.com/mgdcon/knowledge-center/Trade/stocks/what_is_a_stock/what-is-a-stock.htm# (explaining that investors buy equity in companies in order to earn a profit, either from the payout of dividends to shareholders or in the trading of their stocks in a favorable market).

170. See *Benefit Corporations: A New Formula for Social Change*, *supra* note 134.

171. See MODEL BENEFIT CORP. LEGISLATION § 303(a) (2013); Steven J. Haymore, Note, *Public(ly Oriented) Companies: B Corporations and the Delaware Stakeholder Provision Dilemma*, 64 VAND. L. REV. 1311, 1338 (2011) (explaining the unique shareholder value of benefit corporations).

172. See Haymore, *supra* note 171, at 1338.

173. See Reiser, *supra* note 10, at 606.

174. See, e.g., 2013 DEL. LAWS CH. 122 (S.B. 47) (2013).

175. See *generally Benefit Corporations: A New Formula for Social Change*, *supra* note 134.

Again, the difference between a traditional corporation and a benefit corporation may be attractive to investors, but this difference should not include the capacity to attract investors unless they understand the true nature of a benefit corporation. If investors knew the true nature of a benefit corporation, they may better consider their investment, as the rights and benefits of being a shareholder in a benefit corporation are uncertain and untested.¹⁷⁶ Without affirmative disclosure requirements, potential investors may be misled, and focus solely on a company's social mission without realizing this social mission could compromise the investor's potential profit.

Furthermore, the affirmative disclosure requirements could be advantageous for benefit corporations.¹⁷⁷ Though an untested business entity, investors are still interested in benefit corporations. The return on investment is not clear, but many are drawn to the mix of profit- and non-profit based goals. Some argue that benefit corporations, in "doing things the right way," will be "profitable . . . in the long run, because regulatory shortcuts, product quality compromises, and the like tend to get discovered and result in corporate failures and underperformance."¹⁷⁸

III. THE SEC SHOULD ENACT LEGISLATION THAT REQUIRES STRONGER AFFIRMATIVE DISCLOSURE REQUIREMENTS FOR BENEFIT CORPORATIONS THAT CHOOSE TO UTILIZE THE JOBS ACT FUNDING PLATFORMS

Additional regulation is necessary to encourage benefit corporation disclosure in order to inform and protect investors. Such changes should be introduced promptly so as to *prevent* rather than *react* to damage to investors and the reputation of benefit corporations in the market. Part A of this section explains why effective regulation must come from the SEC, as the JOBS Act is on a national scale. Part B suggests initial and ongoing disclosure requirements for companies that take part in equity crowdfunding. Finally, Part C suggests that there should be similar disclosures included in any solicitation for in-

176. Haymore, *supra* note 171, at 1338 (explaining that there are vast differences in the goals of traditional investors and socially minded investors that seek to invest in socially conscious companies such as benefit corporations).

177. See Strine, *supra* note 49, at 251.

178. *Id.*

vestors. If affirmative disclosure requirements are not enacted in either equity crowdfunding or solicitation, the success and feasibility of benefit corporations could be in danger.

A. ENHANCED SEC DISCLOSURE REGULATIONS ARE MORE APPROPRIATE AND WOULD BE MORE EFFECTIVE THAN STATE REGULATION

SEC regulation would be the best way to create further affirmative disclosure requirements for benefit corporations utilizing the new advertising and equity crowdfunding platforms. There are three reasons that federal SEC efforts would be more effective than state efforts. First, such regulation would create a consistent disclosure requirement for all benefit corporations. Despite the fact that each state has different legislation, it is important to impose consistent disclosure requirements for all benefit corporations; this will protect investors equally throughout the United States. Second, SEC regulations would be more efficient than state legislation. A single legislative effort would be far more effective than attempting to amend existing state benefit corporation legislation and to force states to include such provisions in future legislation. Third, SEC regulation would be more consistent with the already existing disclosure regulations of the JOBS Act than with state disclosures, and therefore more effective. Although advertising and solicitation regulation includes minimal, informational disclosures,¹⁷⁹ further disclosure requirements would be consistent with general federal security regulation,¹⁸⁰ and would be cohesive with the equity crowdfunding regulation. SEC regulation is especially attainable for equity crowdfunding because the format of the SEC disclosures is flexible.¹⁸¹

Nevertheless, because each state has unique legislation, efforts at the state level could be effectively used to address the different variations of benefit corporations. Furthermore, federal efforts may be perceived as overzealous because benefit

179. See *Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings*, 78 Fed. Reg. 44,771 (July 24, 2013) (explaining the disclosures required, which does not include any affirmative disclosures regarding business entity or operations).

180. See Guttentag, *supra* note 103, at 249.

181. Crowdfunding, 78 Fed. Reg. 66,428, 66,438 (Nov. 5, 2013) (to be codified at 17 C.F.R. pts. 200, 227, 232, 239, 240, 249) (“[The SEC] recognize[s] that there are numerous ways to achieve [the goal of material disclosures] and, as such, [the SEC is] not proposing to mandate a specific disclosure format.”).

corporation legislation has not been enacted in every state.¹⁸² Ultimately, while such state-level regulation may be effective, it would be more advantageous if disclosure requirements were instituted by the SEC, thereby making them streamlined and cohesive across the states. A federal disclosure requirement is especially effective in light of the fact that the new JOBS funding platforms are nationally available and primarily regulated by the SEC.¹⁸³

B. PROPOSED LEGISLATION SHOULD REQUIRE DISCLOSURES BOTH AT THE TIME OF OFFERING AND ONGOING FOR BENEFIT CORPORATIONS UTILIZING EQUITY CROWDFUNDING

Benefit corporations participating in the equity crowdfunding platform established under the JOBS Act should have additional disclosure requirements. Such disclosures should be mandated at both the time of offering and on an ongoing basis.

1. Initial Disclosure Requirements

Equity crowdfunding legislation should be amended to mandate affirmative disclosures at the time of offering regarding the benefit corporation entity structure. Requiring time-of-offering disclosures is important in order to inform potential investors about the investment from the outset.

This recommendation can feasibly be incorporated into existing SEC proposed regulation. The SEC has included in their regulation that the “[SEC] may require additional disclosures for the protection of investors and in the public interest.”¹⁸⁴ The SEC is also considering including a disclosure requirement of “a discussion of the material factors that make an investment in the issuer speculative or risky.”¹⁸⁵ Considering these SEC proposals, it is reasonable that it is in the best interest of the public to mandate affirmative disclosures for benefit corporations—their status as such is material to the business, and could increase the perceived risk to investors and lower the overall returns on their investment.

182. See Strom, *supra* note 5.

183. Although companies need to adhere to both state and SEC regulations, the SEC’s regulations are generally stronger and more inclusive. *Frequently Asked Questions*, *supra* note 94.

184. Crowdfunding, 78 Fed. Reg. at 66,438.

185. *Id.* at 66,442.

The disclosures at the time of offering should include four elements. First, the disclosure should include a brief informational statement regarding the nature of a benefit corporation. This could be a boilerplate statement included to generally inform investors of the nature of a benefit corporation.¹⁸⁶ Such a statement may produce difficulties, however, because each state has instituted a unique benefit corporation, making it difficult to mandate each state to produce a boilerplate informational disclosure. To entice states to adopt their own boilerplate based on the state-specific legislation, it would be advantageous of the SEC to create an example boilerplate statement to serve as a model.

Second, the legislation should mandate that benefit corporations identify themselves as a benefit corporation, and disclose the benefits, either public or specific, that the company purports to support. This will inform customers of the mission-based side of the benefit corporation.

Third, the time of offering disclosure should include an explanation of that state's specific benefit corporation legislation, including the unique transparency, accountability, and shareholder action provisions that may or may not be required in the state. Because each state is different, it would be crucial to make the differences clear to investors to maximize investor education.

Fourth, the disclosure at the time of offering should include as an attachment the company's most recent benefit report. This will give investors an idea of the company's operational commitment to their purported benefit. An issue arises, however, when new benefit corporations, who have not yet made a benefit report, utilize equity crowdfunding. To address this problem, the affirmative disclosures should incorporate a provision requiring new benefit corporations to produce a benefit report including all applicable information available at the time of offering.

Benefit corporations and their proponents may oppose any additional disclosure requirements implemented by the SEC. The current disclosure requirements included in the JOBS Act have been decried as too burdensome on small companies.¹⁸⁷

186. This identification may need to include both a broad and specific description, including what a benefit corporation is, generally, and any differentiating factors of the state they are incorporated in.

187. See, e.g., Andrew A. Schwarz, *Keep It Light, Chairman White: SEC Rulemaking Under the CROWDFUND Act*, 66 VAND. L. REV. EN BANC 43, 46

There are also concerns that current disclosures are simply too costly and onerous for small businesses.¹⁸⁸ In light of these complaints, the SEC may be hesitant to impose further disclosures. However, the proposed disclosures for benefit corporations would be minimal. These disclosures would include either already existing information regarding the company, or would be standard informational statements regarding the nature of the entity. Though the disclosures would require additional work on the part of benefit corporations, they are worthwhile and important to the success of the business entity as a whole. They would notify potential investors of the nature of the investment, allowing investors to more clearly understand an investment before becoming a shareholder. In addition, they would force companies to be upfront about their status as a benefit corporation, limit the potential for fraud, and educate potential investors.

2. Ongoing Disclosure Requirements

The second element of regulation that should be imposed to protect investors is an ongoing disclosure requirement. Currently, ongoing disclosure requirements under the JOBS Act mandate “reports of the results of operations and financial statements of the issuer, as the [SEC] shall, by rule, determine appropriate, subject to such exceptions and termination dates as the [SEC] may establish, by rule.”¹⁸⁹ The SEC should, therefore, mandate that benefit corporations include their annual benefit reports with the otherwise required ongoing disclosures. This additional disclosure would have little to no impact on benefit corporations, as they are already required to provide benefit reports under state benefit corporation legislation.¹⁹⁰ In light of the relative ease of implementation, the SEC should also mandate that benefit corporations submit these reports prior to investment to enhance investor education and communication, and to establish further accountability in benefit corporations utilizing equity crowdfunding.

Again, many benefit corporations may argue that additional disclosures are unduly burdensome. Nevertheless, because

(2013) (attached to open letter for comment to SEC Chairman White, available at <http://www.sec.gov/comments/jobs-title-iii/jobstitleiii-240.pdf>).

188. *See id.*

189. Crowdfunding, 78 Fed. Reg. at 66450.

190. *See, e.g.*, MD. CODE ANN., CORPS. & ASS'NS § 5-6C-08 (LexisNexis 2014).

these reports are already required by state legislation, the SEC should also require these reports be made available directly to investors on an ongoing basis.

C. THE SEC SHOULD REQUIRE BENEFIT CORPORATIONS TO INCLUDE A DISCLOSURE REGARDING THEIR ENTITY STATUS IF THE BENEFIT CORPORATION UTILIZES THE NEWLY AVAILABLE ADVERTISING AND SOLICITING OPTIONS UNDER THE JOBS ACT

Since benefit corporations are eligible and can choose to advertise and solicit investors, the SEC should mandate that the benefit corporations disclose their status in the communication to potential investors. Currently, there are no affirmative disclosure requirements for any company utilizing the newly available platforms for advertising and solicitation.¹⁹¹ The SEC should set minimum disclosure requirements regarding the nature of the benefit corporation on these solicitations. Generally, these disclosures should include three fundamental elements. First, the legislation should require self-identification as a benefit corporation. Second, information regarding the nature of a benefit corporation should be included. Third, the solicitation communication should direct potential investors to the company website, where they can find the benefit report for more information regarding the nature of the business.

Although these proposed disclosures are not as comprehensive as those proposed for benefit corporations utilizing equity crowdfunding, the advertising and solicitation platform for benefit corporations poses fewer risks for investors. This is because solicitation occurs before the transaction between the investor and the benefit corporation occurs. Additionally, the mandated sophistication of the targeted investor under this funding platform adds a level of protection for the investor.¹⁹² Again, the SEC may be hesitant to require additional disclosures, but the fraud deterring values of such disclosures far outweigh the minimal effort necessary to inform potential investors about the fundamental difference between a benefit corporation and a traditional corporation.

191. See *Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings*, 78 Fed. Reg. 44,771, 44,771 (July 24, 2013) (to be codified at 17 C.F.R. pts. 230, 239, 242) (explaining the currently required disclosures, which do not include affirmative disclosures regarding business entity or operations).

192. See Guttentag, *supra* note 103, at 249.

Ultimately, these affirmative disclosure regulations would prove extremely beneficial to protect those seeking to invest in benefit corporations through JOBS Act funding platforms. Rather than react to issues of fraud and misinformation, these regulatory measures suggest a unique way to prevent them. Such measures are crucial to secure a successful future for benefit corporations and investors as they seek to utilize these new funding platforms.

CONCLUSION

Benefit corporations are a new type of business entity that continues to increase in both number and popularity for small businesses and entrepreneurs. This growth will be facilitated through the equity crowdfunding and solicitation platforms available to small and startup business under the JOBS Act. However, without affirmative disclosure requirements, those investors utilizing JOBS Act funding platforms could be at a serious risk if they unknowingly invest in a benefit corporation believing it to be a traditional corporation. Both state benefit corporation legislation and the SEC's regulation under the JOBS Act lack necessary investor protection measures. Thus, benefit corporations, which are largely untested and are already under critical scrutiny, could have their reputation and popularity seriously undermined if issues arise in their utilization of JOBS Act funding platforms. Without precautions to protect and educate investors, the success of benefit corporations could be considerably hindered. Although the current regulations lack necessary affirmative disclosures to protect uninformed investors who may be attracted to benefit corporations, with greater regulatory safeguards in place, the JOBS Act has the potential to facilitate the growth and success of benefit corporations. Such safeguards would be far more effective as a preventative rather than reactive measure. Implementing simple affirmative disclosure regulations would protect the future of benefit corporations and the investors seeking to make a return on their investment while promoting these mission-based companies.