MAKING MILLENNIAL MONEY MATTER: BENEFIT CORPORATIONS AND THEIR ROLE IN ESTATE PLANNING FOR SOCIAL ENTREPRENEURS

Comment

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I. FOR BENEFIT ENTITIES—AN INTRODUCTION

A. Introductory Hypotheticals

Sally loves chocolate.[1] She also has a passion for poverty alleviation. Several years ago Sally found a way to merge her passions by starting a business that produces gourmet chocolates using cacao beans grown by small-scale farmers in rural Ecuador. Since starting her business, profits have increased yearly. Additionally, and just as importantly to Sally, her decision to work directly with cocoa farmers has resulted in more than fifty families coming out of poverty. While her business has been turning consistent profits, Sally knows that she could increase her profits by using large farmers instead of rural family farmers. Nevertheless, she continues her current business model because of the social benefit it provides. Sally is getting older and by no means wishes to retire, but she wants to be sure that if something were to happen to her, her business would be able to continue its social mission.

For as long as he can remember, Jared has been concerned about his impact on the environment. After graduating from college, he founded a manufacturing company. Jared is keenly aware of the amount of waste at his plant and has set standards requiring that his plant recycle at least fifty percent of the manufacturing byproducts. Jared has also invested heavily in creating a Leadership in Energy & Environmental Design (LEED) certified building and requires that at least forty percent of the company's power use be provided by renewable energy.[2] Jared considers his environmental mission to be an essential part of the business' function and requires annual reports laying out the environmental impact of his company. A recent death in his family has made Jared more aware of his need to revise his estate plan. He wants to make sure that not only would the business be able to continue should he die, but that it continue its environmental mission.

Both Sally and Jared represent a growing number of mission-driven social entrepreneurs.[3] Their desire to protect the missions upon which their businesses are predicated represents a change in attitude toward business and

1. The author created this hypothetical.
2. *See LEED*, U.S. GREEN BLDG. COUNCIL, http://www.usgbc.org/leed [https://perma.cc/8J9C-TEHB] (last visited Feb. 5, 2016).
3. *See infra* Part I.B.

its role in society.[4] Many analysts expect that over the next 30 years, Baby Boomers will pass $30 trillion to Generation X and millennials.[5] This wealth transfer brings with it a shift in demographics unlike anything estate planners have seen before.[6] In order to best serve these clients, advisers need to understand what motivates them.[7]

B. *Why Estate Planners Should Pay Attention to Social Entrepreneurs*

According to a recent study published by Deloitte, millennials have much different expectations of business than did previous generations.[8] When asked to choose words and phrases that most closely resembled their ideals of what business should accomplish, millennial respondents chose "job creation," "profit generation," and "improving society."[9] Additionally, in perhaps the most telling metric, 75% of millennials believe "businesses are too fixated on their own agendas and not focused enough on helping to improve society."[10]

These sentiments show that the next generation of clients for estate planners are increasingly concerned about the role of business in society.[11] For small business owners, the largest part of their estate tends to be their business holdings.[12] If the millennial generation's trend toward businesses that do good for society continues, estate planners will see an increasing number of social entrepreneurs seeking estate plans.[13] These social entrepreneurs and small business owners, will be looking to their advisors to recommend ways to align their investments with their worldview.[14] Increasingly, estate planners will be called upon to design plans that pass on not only value to future generations, but preserve clients' values for generations to come.[15]

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4. *See Mind the Gaps: The 2015 Deloitte Millennial Survey*, DELOITTE, (2015) http://www2.deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/gx-wef-2015-millennial-survey-executivesummary.pdf [https://perma.cc/DV74-E5T8].

5. Liz Skinner, *The Great Wealth Transfer is Coming, Putting Advisers at Risk*, INVESTMENTNEWS (July 13, 2015), http://www.investmentnews.com/article/20150713/FEATURE/150719999/the-great-wealth-transfer-is-coming-putting-advisers-at-risk [https://perma.cc/P4E4-DDBC].

6. *Id.*

7. *Id.*

8. *See* DELOITTE, *supra* note 4, at 2.

9. *Id.* at 2.

10. *Id.*

11. *Id.*

12. Mark Papalia, *Small Business Insurance Checkup*, J. ACCOUNTANCY (Feb. 29, 2004), http://www.journalofaccountancy.com/issues/2004/mar/smallbusinessinsurancecheckup.html [https://perma.cc/KNH6-M4Q6].

13. *See* Deloitte, *supra* note 4, at 2.

14. *Id.*

15. *Id.*

This comment discusses how a social entrepreneur's social mission can be protected after the entrepreneur dies.[16] To realize a social entrepreneur's estate planning goals, estate planners need to understand what motivates these clients.[17] Estate planners also need a basic understanding of a new type of business entity made available in the last five years that allows an entrepreneur to legally protect his or her social mission.[18] To that end, this comment first defines who a social entrepreneur is and his or her special needs in estate planning.[19] It will consider why traditional business structures are insufficient to address the protection of an entrepreneur's social mission.[20] Then, this comment will introduce the benefit corporation and how this entity can be used to protect an entrepreneur's mission in an estate plan.[21] Next, it will consider three different states' requirements for benefit corporations and the advantages of each in estate planning.[22] Finally, this comment will suggest specific strategies estate planners can employ to ensure their social entrepreneur clients' missions continue after the entrepreneur dies.[23]

C. Social Entrepreneurs—Who Are They?

With the shift in attitude of millennials concerning business, more and more entrepreneurs are going to consider themselves to be social entrepreneurs.[24] To better serve millennial clients, estate planners need to understand the social entrepreneurial movement and specifically the challenges social entrepreneurs face when it comes time to draft their estate plan.[25] So what is a social entrepreneur?[26] A social entrepreneur is an individual who takes traditional entrepreneurial principles and uses them to address society's problems.[27] Nobel Laureate and economist, Muhammad Yunus, explained it in the following terms:

> The concept of social entrepreneurship is very important. It brings out the power of yearning in people to do something about problems that are not

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16. *See infra* Parts I–IV. While this comment focuses on social entrepreneurs, the same principles apply when protecting the social mission of a family business or a millennial entrepreneur. *See* DELOITTE *supra* note 4.

17. *See infra* Part I.B.

18. *See infra* Part II.

19. *See infra* Part I.C.

20. *See infra* Part I.C.

21. *See infra* Part II.

22. *See infra* Part III.

23. *See infra* Part IV.

24. *See infra* Part I.D.

25. *See infra* Part I.D.

26. *See What is a Social Entrepreneur?*, ASHOKA, https://www.ashoka.org/social_entrepreneur [https://perma.cc/JR84-5BCG] (last visited Feb. 5, 2015).

27. *See id.*

> currently being addressed with the efficiency and urgency they deserve. Because of the movement built around this concept today, we can see an enormous range of people around the world doing exciting things to help others.[28]

In other words, a social entrepreneur is someone who uses traditional business principles and practices to tackle society's most difficult challenges.[29]

In the past, any time an entrepreneur would pursue a social mission, it was generally to contribute to the business's bottom line or profit margin.[30] Businesses modifying their business practices to avoid harm to society and the environment is generally known as corporate social responsibility.[31] However, social corporate responsibility is often viewed as a marketing tool.[32] Social entrepreneurs, on the other hand, generally go beyond corporate social responsibility.[33] They tend to view their social or environmental mission as being just as important as—if not more important than—their profit motive.[34] Thus, social entrepreneurs are not only concerned with the impact their businesses may have on the environment and society; they generally build businesses to address a particular social or environmental problem.[35] Not only do they take the "do no harm" approach germane to corporate social responsibility, but they go into business with the intent to solve a societal problem while also making money, and even occasionally forgoing larger profits to further their mission.[36] This approach to business activities tends to lead to a different decision-making process than a traditional entrepreneur.[37] Thus, when creating an estate plan for a social entrepreneur, estate planners must understand the importance their clients place on their business's social mission and give the mission the requisite attention clients expect in constructing an estate plan.[38]

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28. MUHAMMAD YUNUS, CREATING A WORLD WITHOUT POVERTY: SOCIAL BUSINESS AND THE FUTURE OF CAPITALISM, 33 (2007).

29. *See* ASHOKA, *supra* note 26.

30. *See generally* David P. Baron, *Corporate Social Responsibility and Social Entrepreneurship*, 16 J. OF ECON. & MGMT. STRATEGY, July 26, 2007, at 683 (finding that "A social entrepreneur is willing to form a CSR firm at a financial loss because either doing so expands the opportunity sets of citizens in consumption-social giving space or there is an entrepreneurial warm glow from forming the firm. Firms can also undertake strategic CSR activities that increase profits, and a social entrepreneur carries strategic CSR beyond profit maximization and market value maximization.").

31. *Id.* at 684.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 685.

37. *See infra* Part I.C.

38. *See infra* Part I.C.

Significantly, not only are social entrepreneurs gaining momentum, they are also gaining legitimacy.[39] Since the early 2000s, when Mohammud Yunus was awarded the Nobel Peace Prize for his work with the poor, the idea of social entrepreneurship has reached the mainstream.[40] This movement is rapidly growing, sparking entire disciplines and university degree programs in places such as Oxford University, Stanford, and Harvard.[41] Furthermore, magazines such as *Fast Company*, *Bloomberg*, and *Forbes* all publish lists of noteworthy social entrepreneurs.[42] Social entrepreneurship, it seems, is not just a fad.[43] It is here to stay and estate planners need to pay attention.[44]

D. Social Entrepreneurs' Unique Estate Planning Needs

In many ways, social entrepreneurs are like traditional entrepreneurs who need to plan for the eventuality that one day they will not be here to run their business.[45] Just like for a traditional entrepreneur, when considering an estate plan for a social entrepreneur, practitioners need to concern themselves with succession planning for the business.[46] Social entrepreneurs and their estate planners need to consider the who, what, when, and how of passing on their businesses.[47] Just like any other entrepreneur, social entrepreneurs need to know how the ownership of their businesses will move forward and how their estates will be compensated for it at their passing.[48]

However, in this planning, social entrepreneurs face the particularly sticky question of how they can protect their social mission.[49] Whereas

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39. *See infra* notes 39–40 and accompanying text.

40. *See* MUHAMMAD YUNUS, BANKER TO THE POOR (1999). Yunus is the founder of Grameen Bank, a financial institution founded to help poor women in Bangladesh come out of poverty by providing them with small loans (known as micro-loans) to help them start businesses. *Id.* Grameen now has institutions and businesses throughout the world all with the express mission of helping the poor. *Id.*

41. *See Skoll Centre for Social Entrepreneurship*, OXFORD U., http://www.sbs.ox.ac.uk/node/12099/edit/faculty-research/skoll-centre-social-entrepreneurship [https://perma.cc/XPX8-K82Q] (last visited Feb 21, 2016); *Executive Program in Social Entrepreneurship*, STANFORD GRADUATE SCH. OF BUS., https://www.gsb.stanford.edu/programs/executive-program-social-entrepreneurship [https://perma.cc/4PV7-APR9] (last visited Feb 21, 2016); *Social Enterprise Initiative*, HARVARD BUS. SCH., http://www.hbs.edu/socialenterprise/ [https://perma.cc/UU3S-MGZV] (last visited Feb 21, 2016).

42. *See* Meg Miller, *The 2015 Innovation By Design Awards Winners: Social Good*, FAST CO. DESIGN (Sep. 14, 2015), http://www.fastcodesign.com/3049911/innovation-by-design/the-2015-innovation-by-design-awards-winners-social-good [https://perma.cc/DH5G-HZQX]; Stacy Perman et al., *America's Most Promising Social Entrepreneurs*, BLOOMBERG BUS., http://www.bloomberg.com/ss/09/04/0403_social_entrepreneurs/1.htm [https://perma.cc/FD2F-QZMH] (last visited Feb 21, 2016).

43. *Id.*

44. *Id.*

45. *See* Papalia, *supra* note 12.

46. *See id.*

47. *See id.*

48. *See id.*

49. *Benefit Corporations Are Necessary*, BENEFIT CORP. http://benefitcorp.net/attorneys/benefit-corporations-are-necessary [https://perma.cc/SJE8-8GPL] (last visited Feb. 5, 2016).

traditional entrepreneurs may be content to simply have their estates compensated for their holding in a traditional business, social entrepreneurs by their very nature want to be sure that their businesses are not simply sold to the highest bidder, but rather to the most capable steward of their vision.[50] Unfortunately, traditional practices and, in some states, the law is not on a social entrepreneur's side.[51]

American jurisprudence and legal tradition have required directors of for-profit companies to act solely to maximize shareholders' financial returns.[52] While true that directors are allowed to pursue any legal business activity, including any that may further a social or environmental cause, directors must justify all of their decisions in terms of maximizing shareholder value.[53] The Delaware Chancery Court recently reaffirmed the model of "shareholder primacy" by holding that board pursuit of any mission that "seeks not to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders" is a breach of directors' fiduciary duties.[54] The Chief Justice of Delaware's Supreme Court drove this point home when he wrote: "American corporate law makes corporate managers accountable to only one constituency—the stockholders."[55] Thus, mission-driven social entrepreneurs are constrained under the traditional corporate case law that has stuck with stubborn rigidity to profit maximization in the name of shareholder protection, leaving little room for for-profit entities whose mission is essential to the operation of the business.[56]

An estate planner may rightfully ask why the business judgment rule does not cover a social entrepreneur's desire to decide at the time of incorporation to limit the scope of a traditional corporation to incorporate with a stated mission or purpose.[57] After all, under the business judgment rule, a court generally gives the board great deference in their decision making to maximize shareholder value.[58] This deference, however, has its limits and none is given if the board of directors act to further any other interest, including a social or environmental interest, at the expense of shareholder value maximization.[59] Furthermore—and most applicable in the estate planning context—in a sale or change of control situation, directors are required to show that they acted reasonably in finding and accepting the bid

50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. Leo E. Strine Jr., *Making It Easier for Directors To Do The Right Thing*, HARV. BUS. L. REV. 235, 241 (2014).
56. BENEFIT CORP., *Benefit*, *supra* note 49.
57. *See In re* Walt Disney Co., 906 A.2d 27, 52 (Del. 2006).
58. *Id.*
59. Revlon, Inc. v. MacAndrews & Forbes Holding, Inc., 506 A.2d 173, 182 (Del. 1986).

from the highest bidder.[60] In a sale context (such as when a primary shareholder and founding social entrepreneur dies), consideration of a social mission simply has no place.[61] Corporate boards must sell to the highest bidder.[62] To do otherwise, is a breach of fiduciary duty.[63] As the Delaware Supreme Court put it in their fundamental *Revlon* ruling, "concern for non-stockholder interests is inappropriate" in a sale or change of control context.[64]

Some states have enacted constituency statutes that allow for consideration of non-shareholder constituencies.[65] These would appear to cover a social entrepreneur's desire to protect their mission by allowing a board to consider the environment or society in their decision making.[66] However, these statutes do not require the pursuit of these missions, they only allow for them.[67] Thus, in the estate planning context where social entrepreneurs wish to protect their vision, they are of little use.[68] There is no mechanism under traditional corporate law for enforcing the pursuit of a social mission.[69] Recognizing these gaps, state legislatures have enacted statutes that allow for the creation of for-benefit entities.[70]

E. Filling the Gap: For-Benefit Entities

In recent years, states across the nation have created alternative business structures to authorize individuals and organizations to pursue a social purpose, an environmental purpose, or both in addition to making a profit.[71] These structures allow the flexibility of running a for-profit business (free from the regulations of a traditional 501(c)(3) charity) while providing protections to managers who wish to also seek a social or environmental mission.[72] As one proponent explained,

> For-benefits are a new class of organization. Like nonprofits, they can pursue a wide range of social missions. Like for-profits, they can generate

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60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. BENEFIT CORP., *Benefit*, *supra* note 49.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. Jennifer Dasari et. al., *Recognizing Social Entrepreneurship: Minnesota Embraces the Public Benefit Corporation*, BENCH & B. OF MINN. (Sept. 12, 2014), http://mnbenchbar.com/2014/09/recognizing-social-entrepreneurship/ [https://perma.cc/RKC3-EHYL].
71. *See* Heerad Sabeti, *The For-Benefit Enterprise*, HARVARD BUS. REV. (Nov. 2011), https://hbr.org/2011/11/the-for-benefit-enterprise [https://perma.cc/F2C5-AJ6E].
72. *See id.*

> a broad range of products and services that improve quality of life for consumers, create jobs, and contribute to the economy.[73]

These entities provide a unique opportunity for social entrepreneurs, family businesses, and other mission-driven entrepreneurs to make sure that the values they hold dear pass on to future generations of managers.[74]

These structures allow for the preservation of not only the investments but the core values upon which these businesses were formed.[75] Due to the widespread adoption of for-benefit business entities over the past five years (thirty one states have adopted statutes enabling the incorporation of benefit corporations in the last five years), estate planning attorneys need to become conversant in this topic to better serve the growing number of clients who are concerned about leaving a legacy of more than just traditional assets.[76] The benefit corporation, while not the only type of for-benefit entity, is perhaps the most useful in estate planning.[77]

II. THE RISE OF BENEFIT CORPORATIONS

A. Benefit Corporations—Legally Protecting the Founder's Vision

Since 2010, thirty-one states have enacted legislation permitting the formation of benefit corporations.[78] For estate planning purposes, benefit corporation enabling statutes include four legal mechanisms that can protect a founder's social mission: namely, a stated corporate benefit purpose, scrutiny of director decisions based on that purpose, benefit reporting requirements, and allowing a benefit proceeding to enforce the pursuit of the benefit purpose.[79] These requirements provide the legal framework through which a social entrepreneur can protect her mission.[80] Without these requirements, a social benefit pursued by a social entrepreneur is merely

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73. *Id.*

74. *See Benefit Corporations Balance Company with Community*, 25 NO. 1 PA. EMP. L. LETTER 4 (Oct. 2014).

75. *See* Dasari et. al., *supra* note 70.

76. Lukas R. Gleissner, *South Carolina is a Benefit Corporation State What, You Didn't Know?*, 24 MAY S.C. LAW. 22, 24–25 (May 2013).

77. *See infra* Part II; William H. Clark, Jr. et al., *The Need and Rationale for the Benefit Corporation: Why it is the Legal Form that Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public*, BENEFIT CORP. Appendix C (Jan. 18, 2013), http://benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf [https://perma.cc/2Y6C-JPXW] (providing a more thorough treatment of various for-benefit entities).

78. *State-by-State Status of Legislation*, BENEFIT CORP., http://benefitcorp.net/policymakers/state-by-state-status [https://perma.cc/8B3U-2ED7] (last visited Feb. 4, 2016) (click on Maryland on the interactive map).

79. *See* Felicia R. Resor, *Benefit Corporation Legislation*, 12 WYO. L. REV. 91 (2012).

80. *See supra* Part I.

hubris to be disposed of when the time comes to sell the social entrepreneur's shares at death.[81]

B. Corporate Purpose Requirements

By their very nature, benefit corporations are different from traditional corporations.[82] As such, benefit corporations require an explicitly stated corporate purpose that defines the benefit the corporation brings to the environment or society.[83] Within the certificate of incorporation, most states require the corporation to declare it a benefit corporation and list its benefit purpose.[84] Like a traditional corporation's purpose, a benefit purpose can be general or specific.[85] For example, Maryland's statue states that a specific public benefit may include any of the following:

> (1) Providing 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) Preserving 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 public benefit purpose; or
> (7) The accomplishment of any other particular benefit for society or the environment.[86]

To protect a client's vision, an estate planner should work with the social entrepreneur to draft a suitable public benefit purpose within the certificate of incorporation.[87] The statement should be sufficiently broad so as not to constrain the entrepreneur in their pursuit of their mission, but sufficiently specific that it limits it to a specific type of public benefit.[88] This approach allows for the flexibility needed in running a small business while still allowing for enough specificity to provide a standard for measuring whether the business is working toward the social entrepreneur's mission.[89]

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81. *See supra* Part I.
82. *See supra* Part I.
83. *See* Resor, *supra* note 79.
84. *See* DEL. CODE ANN. tit. 8 § 362(a) (West 2016).
85. *See* MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01 (West 2016).
86. *Id.*
87. *See id.*
88. *See id.*
89. *See id.*

For example, in Sally's case, this would mean that she could state within her mission her goal to alleviate poverty while also making chocolate.[90] Sally's estate planner could recommend she incorporate as a benefit corporation and state within the certificate of incorporation that the corporation's specific benefit purpose is to "promote economic opportunity beyond the creation of jobs for communities tied to the production of cocoa."[91] Such a statement is sufficiently broad to allow for one of any number of approaches to poverty alleviation in areas tied to cocoa production, yet narrows the universe of public benefit to the promotion of economic opportunity within a loosely-defined geographic area (i.e. the areas where cocoa is grown).[92]

C. Scrutiny of Director Decisions Based Upon Corporate Purpose

Stating that a business has a specific benefit purpose is all well and good, but unless there is some kind of mechanism to enforce the benefit purpose, it is of little value.[93] Directors of benefit corporations are required to not only uphold the business's economic interest, but the business's social or environmental interest as well.[94] In the estate planning context this is significant because it ensures that even if the founding social entrepreneur is no longer part of the board of directors (through death or other circumstances), the mission for which the business was founded remains on the forefront of the minds of the board members.[95] Notably, these accountability statutes apply only to shareholders and not to a beneficiary of the public benefit.[96] So, in Sally's case, the board of directors of her business would be responsible to Sally and any other shareholders she may have in her benefit corporation.[97] The board would not owe any fiduciary duty to the cocoa farmers the business serves.[98] This type of protection is critical in a business context because without it, beneficiaries could have a cause of action against board members for breach of fiduciary duty.[99]

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90. *See supra* Part I.A. (Sally is the entrepreneur introduced in the introductory hypothetical); William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 818 (2012).

91. *See* MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01 (West 2016).

92. *See id.*

93. *See supra* Part I.D.

94. *See* DEL. CODE ANN. tit. 8 § 362(a) (West 2016).

95. *See, e.g.*, VT. STAT. ANN. tit. 11A § 21.09 (West 2016) (A director of a benefit corporation shall have a fiduciary duty only to those persons entitled to bring a benefit enforcement proceeding against the benefit corporation. "A director of a benefit corporation shall not have any fiduciary duty to a person who is a beneficiary of the general or specific public benefit purposes of the benefit corporation arising only from the person's status as a beneficiary.").

96. *Id.*

97. *See supra* Part I.A (Sally is the entrepreneur introduced in the introductory hypothetical).

98. *See* DEL. CODE ANN. tit. 8 § 362(a).

99. *Id.*

For as long as the business is in operation, the board must balance the financial interest with the social benefit stated in the certificate of incorporation.[100] Should they stray from that mission, they run the risk of losing their benefit status.[101] Thus, as part of the estate plan, an estate planner may recommend to a social entrepreneur that she consider including a provision in the certificate of incorporation that would require the dissolution of the corporation should it lose its benefit status.[102] Such a requirement would provide further incentive for a board of directors to keep the fundamental mission of the business in mind in making decisions.[103]

D. Reporting Requirements

To increase transparency and accountability to shareholders, directors and officers of benefit corporations are also required to generate regular public benefit reports detailing how the corporation fulfilled their mission.[104] This further helps to ensure that benefit corporations continue to promote the founder's vision—even after the founder has died.[105] For example, Delaware law requires any benefit corporation organized within its jurisdiction to provide (at minimum) a biennial benefit report that includes the following:

> (1) The objectives the board of directors has established to promote such public benefit or public benefits and interests;
> (2) The standards the board of directors has adopted to measure the corporation's progress in promoting such public benefit or public benefits and interests;
> (3) Objective factual information based on those standards regarding the corporation's success in meeting the objectives for promoting such public benefit or public benefits and interests; and
> (4) An assessment of the corporation's success in meeting the objectives and promoting such public benefit or public benefits and interests.[106]

Delaware's reporting requirements are similar to those in most other states.[107] There is a great deal of incentive for benefit corporations to ensure they are

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100. *See id*.
101. *See id.*
102. *See id.*
103. *See infra* Part II.E (Requiring the dissolution of the corporation should it lose its benefit status would give more teeth to the outcome of a benefit enforcement proceeding since the only equitable remedy available to a judge in a benefit enforcement proceeding is the revocation of the corporation's benefit status).
104. DEL. CODE ANN. tit. 8 § 366 (West 2016).
105. *See* Clark & Babson, *supra* note 90.
106. DEL. CODE ANN. tit. 8 § 366.
107. *See infra* Part III.B–C.

in compliance with these requirements.[108] If a corporation does not comply with these statutes, it loses its benefit status and the protection the status provides.[109]

These reporting requirements also protect a social entrepreneur's estate by ensuring the founder's vision continues to be pursued.[110] A social entrepreneur's personal representative or trustee can see whether the founder's vision remains intact from year to year through these reports.[111] However, social benefit can be difficult to measure.[112] Most states allow for the corporation's certificate of incorporation to require a third party standard to measure its public benefit.[113] An estate planner should encourage their social entrepreneur clients to include a third party measurement requirement in their business's certificate of incorporation.[114] Until recently, however, there have been few uniform benefit measurement options for social entrepreneurs to use.[115]

In 2008, the Rockefeller Foundation created the Global Impact Investing Network (GIIN) to work to create a set of standardized metrics for the comparison of benefit impact.[116] From this initiative, the Impact Reporting and Investing Standards (IRIS) were born.[117] IRIS is a catalog of performance metrics for measuring the qualitative outcomes of a social or environmental initiative.[118] It includes 488 different metrics to measure the impact of programs in sectors including agriculture, education, health, energy, environment, and water.[119] Each metric comes with a specific definition and instructions on how it's measured, thus ensuring continuity from report to report.[120]

An estate planner may recommend the certificate of incorporation require the use of IRIS metrics in the business and that a client implement IRIS metrics while the social entrepreneur is alive.[121] The earlier a social entrepreneur's business begins to measure and report a standardized set of metrics, the more likely the mission can be protected post mortem.[122] With

108. DEL. CODE ANN. tit. 8 § 366.
109. *Id.*
110. *See id.*
111. *See id.*
112. *See id.*
113. *See id.*
114. *See id.*
115. *History*, IRIS, https://iris.thegiin.org/about/history [https://perma.cc/V46J-WPB4] (last visited Feb. 5, 2016).
116. *Id.*
117. *Id.*
118. *Getting Started with IRIS*, IRIS, https://iris.thegiin.org/guide/getting-started-guide [https://perma.cc/53LQ-LCRU] (last visited Feb. 5, 2016).
119. *IRIS Metrics*, IRIS, https://iris.thegiin.org/metrics [https://perma.cc/R6ZG-LKHL] (last visited Feb. 5, 2016).
120. *Id.*
121. *See* DEL. CODE ANN. tit. 8 § 366 (West 2016).
122. *See id.*

a baseline standard measured during the entrepreneur's life, as the business continues after the entrepreneur's death, his or her personal representative or trustee is better equipped to raise concerns and initiate a benefit enforcement proceeding should future directors or officers stray from the benefit corporation's stated mission.[123] By comparing the metrics of each benefit report, a trustee or personal representative would have proof of mission adherence.[124]

E. Benefit Enforcement Proceedings

In addition to requiring board decisions to consider the company's benefit purpose, some states allow shareholders to bring suit or require a benefit enforcement proceeding if successor boards or officers stray from the benefit purpose.[125] In most states where such a proceeding is allowed, the holder of at least 2% of the total number of shares may allege that the corporation has derelict in its duty to pursue its benefit purpose.[126]

Estate planners, therefore, could encourage the social entrepreneur to place a portion of their equity in the corporation equal to at least 2% of the total number of authorized shares in a trust.[127] The trust would include language requiring the trustee to track the various IRIS metrics the corporation uses and set out parameters and requirements to initiate a benefit enforcement proceeding, should the metrics dip below a certain benchmark.[128] Coupled with a provision in the certificate of incorporation, requiring the dissolution of business should it lose its benefit status, the entrepreneur's business would be required to return to its mission or else dissolve.[129] Thus, the entrepreneur's vision is measurable and ensured to continue after he or she dies.[130]

III. BENEFIT CORPORATION STATUTES: A COMPARISON

Benefit corporations hold several benefits for a social entrepreneur in the estate planning process.[131] This section compares three states' specific implementation of the benefit corporation through their respective statutes.[132]

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123. *See id.*
124. *See id.*
125. UTAH CODE ANN. § 16-10b-305 (West 2015).
126. *See id.*
127. *See infra* Part III.A.4; *infra* Part III.C.2.
128. *See supra* Part II.E.
129. *See supra* Part II.D–E. If dissolution is chosen, the trust document could designate a favorite charity working in the same field as a contingent beneficiary to receive the proceeds of the business's dissolution. *See supra* Part II.D–E.
130. *See supra* Part I.
131. *See supra* Part II.B.
132. *See infra* Part III.A–C.

While this is not an exhaustive review of all states, these three are fairly representative of the various ways in which benefit corporations can be enacted.[133] This analysis will specifically focus on accountability mechanisms and how they affect a social entrepreneur's ability to protect their vision post mortem.[134] Of the three, Maryland offers the fewest protections for social entrepreneurs whereas Utah and Delaware offer the most.[135] Delaware law, however, tends to protect directors and officers more than other states.[136] Utah is probably the best choice for an estate planner to use as the location for incorporation if the social entrepreneur's home state does not allow for the creation of benefit corporations.[137]

A. Delaware

Because of Delaware's unique position in American corporate law, it is appropriate to begin the examination of particular state statutes here.[138] Delaware's benefit corporation statute contains four specific safeguards that could be helpful for social entrepreneurs to protect their mission through estate planning.[139] Specifically, Delaware's statute protects a social entrepreneur's mission through (1) specific public benefit requirements; (2) holding directors accountable to their benefit mission; (3) benefit reporting requirements for the corporation; and (4) the authorization of derivative suits by shareholders to enforce the pursuit of the stated mission.[140]

1. Public Benefit Requirements

Benefit corporations are called public benefit corporations in Delaware.[141] Under Delaware's public benefit requirements, a public benefit corporation is a for-profit corporate entity that is subject to all the other statutes governing all other for-profit corporations.[142] It requires that the corporation be created to produce a public benefit and "operate in a responsible and sustainable manner."[143] Delaware public benefit corporations must, therefore, balance "stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and

133. *See infra* Part III.A–C.
134. *See infra* Part III.A–C.
135. *See infra* Part III.A–C.
136. *See infra* Part III.A–C.
137. *See infra* Part III.A–C.
138. *See* ERIC CHIAPPENELLI, CASES AND MATERIALS ON BUSINESS ENTITIES 37 (3d ed. 2014).
139. DEL. CODE ANN. tit. 8 § 122 (West 2016).
140. *See infra* Parts III.A.1–4.
141. *See* DEL. CODE ANN. tit. 8 § 362 (West 2016).
142. *See id.*
143. *Id.*

the public benefit or public benefits identified in its certificate of incorporation."[144]

Other than the slight difference in the name of the entity type, Delaware's public benefit requirements are similar to most other states.[145]

2. Duties of Directors

Directors of Public Benefit Corporations in Delaware are charged with the responsibility to "manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation."[146] Thus, Delaware requires board members to constantly weigh the public benefit with the stockholder's financial interest.

Board members, however, receive greater protections under Delaware law than they otherwise would in other states. For example, Delaware's statute states that:

> (b) A director of a public benefit corporation shall not, . . . have any duty to any person on account of any interest of such person in the public benefit or public benefits identified in the certificate of incorporation or on account of any interest materially affected by the corporation's conduct and, with respect to a decision implicating the balance requirement in subsection (a) of this section, will be deemed to satisfy such director's fiduciary duties to stockholders and the corporation if such director's decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve.[147]

Thus, so long as a Delaware director acts in an informed and disinterested manner, courts will not interfere with the directors' decisions.[148]

The statute continues on to state that a public benefit corporation's certificate of incorporation "may include a provision that any disinterested failure to [balance the interests of the shareholders and the corporation's stated public benefit] shall not . . . constitute an act or omission not in good faith, or a breach of the duty of loyalty."[149] For the purposes of estate planning, however, it would probably be better to not include that type of

144. *Id.*
145. *See id.*
146. *Id.* § 365.
147. *Id.*
148. *See id.*
149. *Id.*

language because it exculpates directors from straying from the business's original mission.[150]

3. Reporting Requirements

Delaware's reporting requirements are similar to both Maryland's and Utah's.[151] One minor difference is that Delaware requires all shareholder notices to include a statement that the corporation is a public benefit corporation.[152] This, of course, has little effect on estate planning.[153] However, Delaware only requires bi-annual reporting of benefit activities, whereas Utah requires annual reporting of benefit activities.[154] This would tend to make incorporation in Delaware less desirable, however, the certificate of incorporation can also require annual reporting.[155] Delaware Public Benefit Corporations are required to report the following:

> (1) The objectives the board of directors has established to promote such public benefit or public benefits and interests;
> (2) The standards the board of directors has adopted to measure the corporation's progress in promoting such public benefit or public benefits and interests;
> (3) Objective factual information based on those standards regarding the corporation's success in meeting the objectives for promoting such public benefit or public benefits and interests; and
> (4) An assessment of the corporation's success in meeting the objectives and promoting such public benefit or public benefits and interests.[156]

With these regular reports, a social entrepreneur's personal representative or trustee can see whether or not the company continues to follow its initial stated social purpose.[157] However, the more often reports are given, the better.[158]

4. Derivative Suits

So what happens under Delaware law if after everything is put in place, reports come in that the corporation is no longer pursing its social mission?[159]

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150. *See supra* Part II.D.
151. *See infra* Parts III.B–C.
152. *See* DEL. CODE ANN. tit. 8 § 366.
153. *See id.*
154. *See id.*
155. *Id.*
156. *Id.*
157. *See id.*
158. *See id.*; *supra* Part II.D.
159. *See* DEL. CODE ANN. tit. 8 § 366 (West 2016).

Delaware does allow for shareholders to have a cause of action against the board for not fulfilling their duties:

> Stockholders of a public benefit corporation owning individually or collectively, as of the date of instituting such derivative suit, at least 2% of the corporation's outstanding shares or, in the case of a corporation with shares listed on a national securities exchange, the lesser of such percentage or shares of at least $2,000,000 in market value, may maintain a derivative lawsuit to enforce the requirements set forth in § 365(a) of this title.[160]

Thus, so long as the social entrepreneur's trust maintains at least 2% of outstanding shares, the trustee may sue to require the corporation to return to its social mission.[161]

B. Maryland

Maryland was the first state to adopt a benefit corporation statute in October 2010.[162] Similar to Delaware, Maryland has specific benefit purpose and reporting requirements.[163] However, Maryland's statute does not explicitly allow for any type of shareholder action requiring the board to fulfill its benefit purpose.[164]

1. Benefit Purpose Requirements

Unlike Utah and Delaware, Maryland requires a benefit corporation to have both a general and a specific public benefit.[165] A general public benefit is "a material, positive impact on society and the environment, as measured by a third-party standard, through activities that promote a combination of specific public benefits."[166] A specific public benefit includes:

> (1) Providing 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) Preserving the environment;
> (4) Improving human health;
> (5) Promoting the arts, sciences, or advancement of knowledge;

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160. *Id.*
161. *Id.*; *supra* Part II.E.
162. BENEFIT CORP., *State*, *supra* note 78 (click on Maryland on the interactive map).
163. *See infra* Parts III.B.1–2. *C.f. supra* Parts III.A.1–4.
164. *See infra* Parts III.B.1–2. *C.f. supra* Parts III.A.1–4.
165. MD. CODE ANN., CORPS. & ASS'NS § 5-6C-06 (West 2016).
166. *Id.* § 5-6C-01(c).

> (6) Increasing the flow of capital to entities with a public benefit purpose; or
> (7) The accomplishment of any other particular benefit for society or the environment.[167]

Thus, Maryland's benefit requirement statutes are more strenuous than that of Utah or Delaware.[168]

2. Reporting Requirements

Maryland's reporting requirements are similar to Utah and Delaware:

> (a) A benefit corporation shall deliver to each stockholder an annual benefit report including:
> (1) A description of:
> (i) The ways in which the benefit corporation pursued a general public benefit during the year and the extent to which the general public benefit was created;
> (ii) The ways in which the benefit corporation pursued any specific public benefit that its charter states is the purpose of the benefit corporation to create and the extent to which that specific public benefit was created; and
> (iii) Any circumstances that have hindered the creation by the benefit corporation of the public benefit; and
> (2) An assessment of the societal and environmental performance of the benefit corporation prepared in accordance with a third-party standard applied consistently with the prior year's benefit report or accompanied by an explanation of the reasons for any inconsistent application.[169]

Maryland also requires the annual benefit report to be posted on the corporation's website.[170] This is helpful for estate planners because it allows the social entrepreneur's heirs to have easier access to the reports.[171]

C. Utah

Of the three states discussed Utah probably has the most straightforward and useful (for estate planning) statutes for benefit corporations.[172] Utah has similar benefit purpose requirements and similar director duties as Delaware

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167. *Id.* § 5-6C-01.
168. *Id.* § 5-6C-08.
169. *Id.* § 5-6C-08(a).
170. *See id.*
171. *See id.*
172. *See supra* Part III.A–B.

and Maryland.[173] However, unlike Delaware, Utah's statute requires annual benefit activity reports, which allows for closer monitoring and reporting on the founding social entrepreneur's vision.[174]

1. Duties of Directors and Officers

Utah's code requires a benefit corporation's board to "consider the effects of an action or inaction upon: . . . the ability of the benefit corporation to accomplish its general public benefit purpose and a *specific public benefit purpose*."[175] Utah's Code requires all officers to also be held to this same standard in making decisions.[176]

When properly drafted, that specific public benefit purpose is an articulated version of the founder's vision.[177] Therefore, each decision requires the board of directors, or an officer, to consider the impact of that decision on the founder's vision.[178]

2. Benefit Enforcement Proceedings

Under the Utah Code, whenever the board or an officer strays from the stated mission, the following stakeholders may commence a benefit enforcement proceeding:

> (A) a person or group of persons that owns beneficially or of record at least 2% of the total number of shares of a class or series outstanding at the time of the act or omission complained of;
> (B) a director;
> (C) a person or group of persons that own beneficially or of record 5% or more of the outstanding equity interests in an entity of which the benefit corporation is a subsidiary at the time of the act or omission complained of; or
> (D) other persons as specified in the articles of incorporation or bylaws of the benefit corporation.[179]

A benefit proceeding is defined as a proceeding in a court of competent jurisdiction for: "(a) failure of a benefit corporation to pursue or create general public benefit or a specific public benefit purpose set forth in its

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173. *See supra* Part III.A–B.
174. UTAH CODE ANN. § 16-10b-301 (West 2015).
175. *Id.* § 16-10b-301(a) (emphasis added).
176. *Id.*
177. *See supra* Part II.C.
178. *See supra* Part II.C.
179. UTAH CODE ANN. § 16-10b-305(3)(a)(ii)(A–D) (West 2015).

articles of incorporation; or (b) a violation of an obligation, duty, or standard of conduct under this chapter."[180]

Therefore, if the business strays from the founder's vision, certain stakeholders have a cause of action against the corporation's officers.[181]

IV. PUTTING IT TO PRACTICE

A. Recommendations for Practitioners

In the next three decades, estate planners are going to play an essential role in one of the largest wealth transfers this country has ever experienced.[182] By some estimates, in the coming decades $30 trillion in wealth will be transferred from baby boomers to generation X and millennials.[183] Millennials represent a generation unlike anything estate planners have seen.[184] More than their parents and grandparents, millennials want to use their money to do good.[185] They see business as a vehicle to do good.[186] As such, social entrepreneurs will represent a growing number of the business community.[187] By extension, they will also represent a growing number of business clients.[188] An estate planning attorney needs to be prepared to give clients the tools they need to be able to protect the social mission of a business after they die.[189] With the advent of benefit corporations, estate planners have the ability to help the upcoming generation of do-gooders ensure their small businesses can continue to be a force for good for future generations.[190]

Social entrepreneurs, in their truest sense, however, are not the only type of client who may be interested in protecting a social or environmental mission through an estate plan.[191] For example, there may be a family-owned printing company whose founders are dedicated to helping promote literacy in their community.[192] This may be so important to the founders that they want to ensure the activity continues as part of the business when they pass it on to the next generation.[193] The same principles discussed would apply equally to the printing business as it would to a social entrepreneur.[194]

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180. *Id.* § 16-10b-103(4)(a–b).
181. *See supra* Part II.E.
182. *See* Skinner, *supra* note 5.
183. *See id.*
184. *See id.*
185. *See* DELOITTE, *supra* note 4.
186. *See id.*
187. *See id.*
188. *See id.*
189. *See id.*
190. *See supra* Part II.
191. *See supra* Part II.
192. *See Benefit Corporations Balance Company with Community*, *supra* note 74.
193. *See supra* Part I.D.
194. *See supra* Part I.D.

Essentially, any time a small business owner is engaged in some sort of cause or mission while pursuing a profit, they may be interested in taking advantage of the benefit corporation status in order to protect their cause.[195]

Additionally, it is important to remember that a benefit corporation is a for-profit enterprise.[196] It is not a non-profit.[197] Non-profits have their place, but these principles apply to businesses that are seeking social benefit and a profit at the same time.[198] The type of client who would be looking to use the benefit corporation status runs a for-profit business.[199] What makes them different is that they are seeking to do good in their communities and the world and that impact is as fundamental to their success as making a profit.[200]

1. Drafting the Estate Plan

With proper drafting of the benefit corporation's founding documents, estate planners can help their clients rest assured that their mission can continue on after they die.[201] The estate planner can recommend one of two avenues to protect the social entrepreneur's mission.[202] If the entrepreneur is the only shareholder of their business—without anyone to whom he or she would like to pass the business—within the bylaws of the corporation, an estate planner can recommend a provision requiring the business be sold to the best steward of the entrepreneur's mission upon the death of the entrepreneur.[203] This desire should also be reiterated in the entrepreneur's estate documents, instructing the personal representative or trustee to find the best buyer for continuing the business's mission and distribute the proceeds according to the entrepreneur's desires.[204] This would allow the entrepreneur's heirs to receive an inheritance while ensuring the business mission continues.[205]

On the other hand, if the entrepreneur has partners, his or her estate planner may recommend a different route.[206] In this case, an estate planner could recommend the entrepreneur place a number of her shares equal to 2% of the total number of authorized shares in a trust.[207] Doing so would preserve the entrepreneur's right to instruct the trustee to bring a benefit

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195. *See supra* Part I.D.
196. *See supra* Part II.A.
197. *See supra* Part II.A.
198. *See supra* Part II.A.
199. *See supra* Part II.A.
200. *See supra* Part II.A.
201. *See supra* Part II.A–E.
202. *See supra* Part I.D.
203. *See supra* Part I.D.
204. *See supra* Part I.D.
205. *See supra* Part I.D.
206. *See supra* Part II.E.
207. *See supra* Part I.D.

enforcement proceeding should the business stray from its social mission.[208] Because the ownership in this case is split between several partners, an estate planner could recommend the partners execute a cross-purchase agreement with the entrepreneur's remaining shares allowing his or her business partners to purchase those shares and continue the business.[209] Such a course of action would allow a social entrepreneur to use the proceeds to pass on value to his or her heirs while remaining confident that the core mission of the business remains intact for generations to come.[210]

B. Recommendations for Texan Estate Planners

Currently, benefit corporations cannot be organized in Texas.[211] However, should a Texan estate planner have a client who could benefit from using a benefit corporation, a Texas estate planner may recommend they incorporate in Utah.[212] Texas is missing out on an opportunity and can adopt legislation to allow for benefit corporations to be organized in the state of Texas.[213] Additionally, estate planning attorneys could contact their representative and encourage him or her to sponsor legislation that would enable the incorporation of benefit corporations.[214]

V. CONCLUSION

As baby boomers age and begin to retire, estate planners will need to turn their attention to Generation X and Millennials.[215] These new clients are going to want to know how they can do good with their money and pass on their values to their heirs.[216] Benefit corporations provide the perfect vehicle for these social entrepreneurs to make a lasting, measurable impact.[217] They will have dedicated their careers to making the world a better place.[218] Estate planners, then, have the opportunity to honor the mission of their social entrepreneur clients by utilizing the mechanisms within benefit corporation statutes to ensure the business's social impact continues.[219] More than any

208. *See supra* Part II.D–E.
209. *See* Mark P. Cussen, *How to Create a Business Succession Plan*, INVESTOPEDIA, http://www.investopedia.com/articles/pf/07/succession_planning.asp [https://perma.cc/9Q9S-RPMV] (last visited Feb. 5, 2016) (for an overview of how this would work).
210. *See id.*
211. *See supra* Part III.C.
212. *See supra* Part III.
213. *See supra* Part III.
214. *See* Clark et al., *supra* note 77.
215. *See* Skinner, *supra* note 5.
216. *See id.*
217. *See supra* Part II.
218. *See supra* Part II.
219. *See supra* Part II.

other generation, millennials want their money to matter.[220] For many of these clients, doing good is not just hubris, but a way of life.[221] What better way to honor that way of life than to ensure its impact is measured and continued after death?

220. *See supra* Part II.
221. *See supra* Part I.D.