

**Essential Tool, Harmless Distraction, or Unintended Consequence:
An Analysis of the Benefit Corporation and its Potential Impact on the Renewable Energy
Sector**

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I. Introduction

Public and private investments in renewable energy technologies have grown exponentially in recent years, increasing fivefold from 2004 to 2009.¹ While these investments are contributing to growth in renewable energy markets, the competitiveness of renewable energy technologies remains hindered by technological challenges and externalities associated with developing new energy sources.²

In the United States, efforts to encourage renewable energy production include public funding mechanisms designed to offset the risks associated with bringing renewable energy sources to market, such as tax credits, federal government procurement preferences, and renewable portfolio standards.³ Although these tools have increased use of renewable energy technologies, they are costly to the extent that they require taxpayer subsidies.⁴ Moreover, these subsidies only partially offset the financial risks for private energy companies involved in renewable energy technology development and delivery.⁵

A potential complement to existing efforts to promote renewable energy technologies is the advent of the benefit corporation, which expands corporate directors' fiduciary duties to include pursuit of social and environmental benefits in addition to shareholder profitability.⁶ In addition to expanding fiduciary duties beyond companies' financial interest, benefit corporations are also intended to enhance corporate accountability through neutral third party audits of

¹ Simon Muller et al., *Renewable Energy: Policy Considerations for Deploying Renewables*, INT'L ENERGY AGENCY 32 (2011), http://www.iea.org/publications/freepublications/publication/Renew_Policies.pdf.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ WILLIAM H. CLARK ET AL., THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION: WHY IT IS THE LEGAL FORM THAT BEST ADDRESSES THE NEEDS OF ENTREPRENEURS, INVESTORS, AND, ULTIMATELY, THE PUBLIC 1 (Jan. 18, 2013), *available at* http://www.benefitcorp.net/storage/documents/Benecit_Corporation_White_Paper_1_18_2013.pdf.

“social and environmental performance.”⁷ In other words, benefit corporations retain the tax and liability benefits of incorporation, but are enabled to conduct business in a way that goes beyond a traditional focus on profitability for shareholder benefit.⁸ As of this writing, 20 state legislatures have passed legislation authorizing benefit corporations, and legislation is pending in another 16 states.⁹

Although the benefit corporation could be a positive development for the renewable energy sector insofar as it (1) provides legal cover for directors of companies that want to consider factors beyond maximizing shareholder profit in their business decisions, and (2) heightens accountability for a business’s environmental and social performance through mandatory third party monitoring, it is unlikely that investors and entrepreneurs will opt for the benefit corporations as opposed to traditional structures such as the Limited Liability Corporation (LLC) or the Master Limited Partnership (MLP) unless the benefit corporation is proven to maximize shareholder profit in tandem with social and environmental benefits, rather than sacrificing one goal for the sake of the other.

Accordingly, this paper explores the potential advantages and drawbacks of benefit corporations to the renewable energy sector as compared to other business forms. It begins with a brief discussion of the central role renewable energy markets play in global efforts to forestall the effects of climate change, as well as examples of efforts to-date to incentivize renewable energy markets. Next, this paper introduces the history, purpose, and mechanics of the benefit corporation as a potential tool to assist renewable energy market development as compared to

⁷ *Id.*

⁸ *Id.*

⁹ See *Benefit Corp Information Center, State-by-State Status*, BENEFIT CORP., <http://www.benefitcorp.net/state-by-state-legislative-status> (last visited Feb. 12, 2014).

other business forms. Finally, this paper explores whether the benefit corporation is indeed a positive development for the renewable energy sector.

II. Background

As policymakers, industry, and environmental groups contemplate how to tackle challenges associated with global climate change, renewable energy has long been considered key to success.¹⁰ In addition to launching numerous public sector efforts to address the financial risks and uncertain returns in renewable energy markets, lawmakers have also explored the extent to which providing flexibility in business structures can ease the development of private renewable energy companies.

A. Renewable Energy Markets

Widespread deployment of renewable energy technologies is often seen as risky and unprofitable,¹¹ notwithstanding broad support for such technologies given their ability to reduce greenhouse gas emissions and alleviate projected climate change effects.¹² Investment is further hindered by regulatory, environmental, and technological uncertainty, all of which have a chilling effect on renewable energy markets.¹³

In an effort to tackle this multi-dimensional problem, the United States government has dedicated significant federal investment to promote renewable energy markets through tax and production incentives, loan guarantee programs, and grants. Federal tax incentives are among the most broad based approaches because they apply across the renewable energy sector.¹⁴ These incentives take the form of production tax credits, which offer a credit tied to the amount

¹⁰ INTERNATIONAL ENERGY AGENCY, *World Energy Outlook 23*, 2012.

¹¹ Muller, *supra*, at 32.

¹² INTERNATIONAL ENERGY AGENCY, *World Energy Outlook 23*, 2012.

¹³ *Id.*

¹⁴ ROBERTA F. MANN & MARGARET ROWE, *Taxation, in THE LAW OF CLEAN ENERGY: EFFICIENCY AND RENEWABLES* 146 (Michael Gerrard ed., 2012).

of electricity generated from a particular renewable power facility over a specified term, and investment tax credits, which are designed to tackle the cost associated with building a new renewable energy facility.¹⁵

While tax incentives are helpful for renewable energy businesses that are profitable enough to induce tax liability, they are not necessarily helpful for start-up renewable energy producers, which often operate at a loss during their first few years and therefore have no profit-based tax liability.¹⁶ Further, they are subject to periodic Congressional reauthorization, which in the current budget climate inserts a significant degree of uncertainty for renewable energy producers and investors alike.¹⁷ For example, the production tax credit has expired and been reauthorized five times since it was created in 1992, with the latest temporary extension going into effect in 2013.¹⁸ Given that renewable energy projects are subject to high upfront capital and medium term operating costs, it is likely that permanent authorization of the investment and production tax credits would make investment in renewable energy projects more attractive.

In addition to tax incentives, federal agencies also offer grants and loan guarantee programs to defray high upfront capital costs for renewable energy projects. As of 2010 the Treasury Department had distributed \$5.44 billion in grants to renewable energy project developers nationwide.¹⁹ As with federal tax incentives, however, grants and loan guarantee programs have recently been subject to intense public and Congressional scrutiny following the high profile Solyndra bankruptcy and the challenges associated with the federal appropriations

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Production Tax Credit for Renewable Energy*, UNION OF CONCERNED SCIENTISTS, http://www.ucsusa.org/clean_energy/smart-energy-solutions/increase-renewables/production-tax-credit-for.html (last updated Jan. 31, 2014).

¹⁹ Steven Ferrey, *The New Climate Metric: The Sustainable Corporation and Energy*, 46 WAKE FOREST L. REV. 383, 394 (2011) (explaining that of this \$5.44 billion, \$4.6 billion was spent on wind energy producers, “with another \$414 million each for solar and for geothermal, landfill gas, hydroelectric, biomass and fuel cell.”).

process.²⁰ In effect, these programs, while helpful, do not necessarily provide the market stability that renewable energy investors are looking for.

States have also played a significant role in facilitating renewable energy markets, perhaps most notably through the implementation of Renewables Portfolio Standards (RPS), which require that a certain percentage of energy consumed statewide be generated from renewable sources.²¹ As of 2010, “29 states and the District of Columbia had established binding RPS targets which, when fully implemented, will cover 56% of total U.S. retail electricity sales.”²² As compared to tax incentives and grant programs, the RPS more directly affects renewable energy markets, providing a reasonable degree of certainty regarding demand for electricity generated from renewable sources. Although a federal RPS (called a Clean Energy Standard) was proposed in 2011, Congress did not adopt it, and its near-term prospects for success appear dim.²³

Taken together, these federal and state policy approaches demonstrate that the public sector can play a significant role in paving the way for renewable energy technology development, particularly on the macroeconomic level. At the individual business level, however, investors and lawmakers alike have been searching for ways to provide renewable energy producers the flexibility they need to navigate the market and technological challenges associated with the renewable energy sector.

²⁰ Anne C. Mulhern, *Solyndra Bankruptcy Reveals Dark Clouds in Solar Power Industry*, N.Y. TIMES (Sept. 6, 2011), <http://www.nytimes.com/gwire/2011/09/06/06greenwire-solyndra-bankruptcy-reveals-dark-clouds-in-sol-45598.html>.

²¹ JOSHUA P. FERSHÉE, *Renewable Mandates and Goals*, in *THE LAW OF CLEAN ENERGY: EFFICIENCY AND RENEWABLES* 77 (Michael Gerrard ed., 2012).

²² WISER ET AL., *SUPPORTING SOLAR POWER IN RENEWABLES PORTFOLIO STANDARDS: EXPERIENCE FROM THE UNITED STATES* 3 (2010), available at <http://eetd.lbl.gov/sites/all/files/publications/report-lbnl-3984e.pdf> (noting that an additional seven states had implemented voluntary RPS standards).

²³ Economic Report of the President, *Transitioning to a Clean Energy Future* 135 (2011) available at http://www.whitehouse.gov/sites/default/files/microsites/2011_erp_full.pdf.

B. The Benefit Corporation

The advent of the benefit corporation was in response to a growing number of entrepreneurs and investors interested in creating socially and environmentally responsible for-profit businesses.²⁴ Though an array of for-profit and non-profit entities is available to such entrepreneurs, the benefit corporation was developed in an attempt to overcome deficiencies in existing structures.

1. History and Purpose of the Benefit Corporation

Historically, entities with missions beyond sheer profitability were structured as non-profits, but this structure has serious limitations.²⁵ For example, non-profits in their pure form do not allow investors to realize a return on their investment, posing a tremendous impediment to growth.²⁶ Further, non-profit entities must strictly adhere to their benefit-driven missions to retain 501(c)(3) tax status.²⁷ Conversely, although for-profit entities enjoy broader access to investor capital, the fiduciary duties associated with for-profit corporations may limit directors' ability to fully pursue a socially or beneficial mission, notwithstanding the generous deference given to for-profit directors by virtue of the business judgment rule.²⁸

²⁴ Ann E. Conaway, *The Global Use of the Delaware Limited Liability Company for Socially-Driven Purposes*, 38 WM. MITCHELL L. REV. 772, 775 (2012) (“In today’s global economy, more businesses are focusing on giving back to the world community . . . local and national governments have initiated measures to reduce dependence on fossil fuels and to switch to renewable energy sources.”).

²⁵ Conaway, *supra* note 24, at 777-79 (“In the past, for-benefit entities in the United States were generally organized as nonprofit corporations However, a true nonprofit entity does not allow an investor to receive any return on his or her investment. For example, all ‘profits’ are redistributed to the entity and not to its members or investors.”).

²⁶ *Id.*

²⁷ Christen Clarke, *California’s Flexible Purpose Corporation: A Step Forward, A Step Back, or No Step at All?*, 5 J. BUS. ENTREPRENEURSHIP & L. 301, 303 (2012) (“Nonprofits have a fiscal incentive to provide for social welfare through the benefit of tax exemption. In order to gain exemption from federal taxes, a nonprofit organization ‘must be organized and operated exclusively for exempt purposes set forth in [Internal Revenue Code] section 501(c)(3), and none of its earnings may inure to any private shareholder or individual.’”).

²⁸ *Id.* (“[F]or-profit entities generally have the potential to access unlimited capital. However, their role in achieving social goals is hindered, in essence, because of the fiduciary duty that corporate directors have toward their shareholders.”).

In response to these limitations, a number of hybrid entities were established prior to the benefit corporation in an attempt to cater to the specific needs of “social businesses.”²⁹ Two of the most widely used entities are Low-Profit Limited Liability Companies, and Certified B-Corporations.

a. Low-Profit Limited Liability Companies

The Low-Profit Limited Liability Company (L3C) was developed in 2005 in an attempt to further facilitate social businesses’ ability to attract investments from charitable organizations.³⁰ An offshoot of states’ LLC statutes, an L3C may be formed to “significantly further the accomplishment of one or more charitable or educational purposes,”³¹ and explicitly provides that the entity’s socially-beneficial mission takes priority over its for-profit objectives.³² Notwithstanding the flexibility and familiarity of the LLC and L3C, a significant challenge facing multi-mission businesses that elect this form is that, as both are governed by case law emphasizing the importance of directors’ fiduciary duties, they are not necessarily the safe-harbor that such entrepreneurs seek.³³ Further, businesses incorporated as LLCs or L3Cs may have trouble attracting investors insofar as (1) they might prefer investing in corporations rather than in LLCs, and (2) in the case of the L3C, the term “low profit” may not be particularly

²⁹ *Id.* (“Social businesses are defined as “a method of using the for-profit structure to satisfy social goals. Like other hybrid entities, a social business would be required to be ‘created and run for the express purpose of pursuing specific, articulated social goals, rather than maximizing profit.’ [Social businesses may be distinguished] from charities [because] social businesses must recover all costs.”). *See also* Conaway, *supra* note 24, at 777.

³⁰ Clark et al., *supra* note 6, at app. 2.

³¹ *Id.*

³² *Id.* (citing VT. STAT. ANN. tit. 11 § 3001(27)(B) (2011), 805 ILL. COMP. STAT. 180/1-5 (2011), and WYO. STAT. ANN. § 17-15-102(a)(ix)(B) (2011) (each of which requiring that “[n]o significant purpose of the company is the production of income or the appreciation of property”).

³³ *Id.* at 4.

appealing.³⁴ It is also worth noting that the L3C is further hindered by “the current refusal of the IRS to definitively recognize gifts by private foundations to L3Cs as a tax-free contribution.”³⁵

b. Certified B-Corporations

Another effort to accommodate socially beneficial entities is the Certified B-Corporation. Rather than enactment by statute, the B-Corporation is the product of a certification process overseen by a non-profit organization called B Lab.³⁶ Designed to provide a transparent set of criteria for investors interested in supporting companies with social and environmental performance objectives, certified B-Corporations are subject to third-party performance review by a non-profit organization called B Lab.³⁷ Although commentators have noted that this approach may be “overly paternalistic as well as structurally unsound,”³⁸ approximately 460 companies have registered to become certified B-Corporations since 2007, indicating a strong interest within the business community for structures that accommodate dual purpose entities.³⁹ However, as with the LLC and L3C, the B-Corporation structure arguably fails to provide the level of protection desired by dual-purpose entities for potential liability against failure to exercise their fiduciary duties in a traditional manner.⁴⁰

2. Mechanics

Given the high capital costs and market uncertainty surrounding renewable energy technologies, the benefit corporation is a potentially attractive alternative for entrepreneurs and investors seeking the flexibility to make long-term investment decisions that are not necessarily tied to short-term financial considerations. Because the benefit corporation is a distinct legal

³⁴ *Id.*

³⁵ Clarke, *supra* note 27, at 311.

³⁶ Conaway, *supra* note 24, at 801.

³⁷ Clark et al. *supra* note 6, at 5.

³⁸ Conaway, *supra* note 24, at 801.

³⁹ Clark et al., *supra* note 6, at 6.

⁴⁰ *Id.*

status, election into or out of a benefit corporation requires a two-third shareholder vote.⁴¹

Though state statutes authorizing the benefit corporation vary slightly from state to state, three provisions define the benefit corporation.⁴²

a. Dual Mission

First, a benefit corporation's articles of incorporation must include "a corporate purpose to create a material positive impact on society and the environment."⁴³ As such, the benefit corporation's purpose must create "general public benefit," and may identify "specific public benefit" purposes per the directors' discretion.⁴⁴ A general public benefit is defined as a "material, positive impact on society and the environment, taken as a whole, as assessed against a third-party standard, from the business and operations of a benefit corporation."⁴⁵

Accordingly, the Model Legislation includes a non-exclusive list of seven categories of possible public benefits:

- 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 ordinary 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.⁴⁶

Given the flexibility afforded to benefit corporations in defining their corporate purpose, some commentators have criticized the ambiguity inherent in the Model Legislation's definition

⁴¹ See MODEL BENEFIT CORP. LEGISLATION §§ 104, 105, available at <http://benefitcorp.net/attorneys/model-legislation>.

⁴² Clark et al., *supra* note 6, at 15

⁴³ *Id.* at Executive Summary.

⁴⁴ See MODEL BENEFIT CORP. LEGISLATION § 105, available at <http://benefitcorp.net/attorneys/model-legislation>.

⁴⁵ See *id.* at § 102(a).

⁴⁶ See *id.*

of general public benefit.⁴⁷ Notwithstanding the requirement that such benefit be measured against an independent third-party standard, the statutes do not provide any guidance as to what those standards should be, much less how, when, or by whom the standards should be applied.⁴⁸ Further, the statutes do not identify how directors are to prioritize components of their dual mission,⁴⁹ which could potentially leave them vulnerable to litigation for failure to meet their fiduciary obligations.

That said, the intent of the benefit corporation's dual mission is to enable directors of for-profit entities with socially and environmentally beneficial objectives to make decisions motivated by factors other than the corporate balance sheet.⁵⁰

b. Director Accountability

Second, to provide accountability for the benefit corporation's dual purpose, directors have "expanded fiduciary duties...which require consideration of non-financial interests" in the corporation's business dealings.⁵¹ Accordingly, benefit corporation directors:

[S]hall consider the effects of any action or inaction upon: (i) the shareholders of the benefit corporation, (ii) the employees and workforce of the benefit corporation, its subsidiaries and its suppliers, (iii) the interests of customers as beneficiaries of the general public benefit or specific public benefit purposes of the benefit corporation, (iv) community and societal factors, including those of each community in which offices or facilities of the benefit corporation, its subsidiaries and its suppliers are located, (v) the local and global environment, (vi) the short-term and long-term interests of the benefit corporation, including any benefits that may accrue to the benefit corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the benefit corporation and (vii) the ability of the benefit corporation to accomplish its general benefit purpose and any specific public

⁴⁷ Dana Brakman Reiser, *Benefit Corporations-A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 600-01 (2011).

⁴⁸ *Id.*

⁴⁹ *Id.* at 597-98.

⁵⁰ Clark et al., *supra* note 6, at 6.

⁵¹ *Id.* at 15.

benefit purpose.⁵²

In effect, benefit corporation directors are not only accountable to their shareholders, but to a broader group of stakeholders as well.

This stakeholder accountability, however, does not extend so far as to make benefit corporation directors subject to suit on behalf of this broader constituency; only investors and shareholders have a right of action against a benefit corporation for breach of directors' duties.⁵³ It is worth noting, however, that despite the protection afforded to benefit corporation directors through the entity's statutorily-specified dual mission and limited liability, there is not yet any case law interpreting the fiduciary duties owed by benefit corporation directors.⁵⁴

c. Third Party Monitoring

Finally, a benefit corporation must provide an annual report detailing its "overall social and environmental performance as assessed against a comprehensive, credible, independent and transparent third-party standard."⁵⁵ The report must be made publicly available on the benefit corporation's website and by filing a copy with the corporation's respective state department, and include information regarding:

[T]he ways in which the benefit corporation pursued a general public benefit and the extent to which it was created, the ways the benefit corporation pursued any specific benefit (if stated in the company's articles) and the extent to which it was created, any circumstances that may have hindered creation of general public benefit or specific public benefit and the process and rationale for selecting or changing the third-party standard used to prepare the benefit report.⁵⁶

⁵² See MODEL BENEFIT CORP. LEGISLATION § 301(a)(1), available at <http://benefitcorp.net/attorneys/model-legislation>.

⁵³ Clark et al., *supra* note 6, at 20 ("Benefit enforcement proceedings are a right of action only for shareholders, directors, investors in the parent company subsidiary with a 5% or more equity interest, and any other persons specified in the company's articles of incorporation.") (citing Model Legislation § 305(a)).

⁵⁴ Reiser, *supra* note 46, at 606.

⁵⁵ Clark et al., *supra* note 6, at 15.

⁵⁶ *Id.* at 18 (citing Model Legislation § 401(a)).

As the third-party monitoring requirement is an important distinguishing feature of the benefit corporation,⁵⁷ commentators have acknowledged some concern over not only the unregulated standards third-parties use in their monitoring efforts, but also the types of organizations that will be enlisted in this effort.⁵⁸

In sum, the benefit corporation is a new addition to a growing mix of alternative business forms for socially and environmentally oriented entrepreneurs. Proponents argue that it is particularly well-suited to dual-mission businesses as compared to either traditional or other hybrid entities. The following analysis considers whether this enthusiasm is warranted or misplaced.

III. Analysis: Benefit Corporations and the Renewable Energy Sector

A key question regarding the benefit corporation is whether it is indeed an attractive option for entrepreneurs and investors alike. While the benefit corporation does offer dual-mission businesses a significant degree of flexibility in carrying out their fiduciary duties, it is unclear whether this flexibility is in fact beneficial for the long-term prospects of not only the individual business, but also the broader industry in which it operates. Particularly in the context of the renewable energy sector, where the bottom-line economic benefits of renewable technologies versus traditional energy sources has proven challenging, it is possible that drawing focus away from profitability will in fact delay incorporation of renewable technologies into mainstream energy markets.

⁵⁷ *Id.*

⁵⁸ Reiser, *supra* note 46, at 597-98.

A. Advantages and Drawbacks of the Benefit Corporation as Compared to Other Entities

Notwithstanding the comparatively recent development of the benefit corporation, commentators have begun attempting to determine where the benefit corporation fits with respect to traditional business forms such as the C-corporation and the LLC. Within the context of renewable energy, the Master Limited Partnership (MLP) is also being touted as a desirable business form. Benefits and drawbacks of the benefit corporation as compared to these forms may generally be assessed in terms of relative tax implications, liability issues, and investor attractiveness.

1. Limited Liability Corporations

At first glance, the LLC is apparently well-suited to dual-mission entities, because it combines the protection of limited liability for directors and officers with pass-through tax treatment, as compared to traditional C-corporations which, like benefit corporations, are subject to double taxation.⁵⁹ Accordingly, one solution for socially and environmentally oriented businesses is to incorporate as an LLC and write a dual mission into the entity's articles of incorporation.⁶⁰ This approach offers legal liability protection to officers and directors, removes investment limitations imposed by non-profit structures, and allows for a flexible mission.⁶¹

However, proponents of the benefit corporation maintain that the LLC is ultimately an insufficient solution for hybrid entities for two reasons. First, although the LLC arguably offers legal cover for directors engaged in multi-purpose missions, there is minimal case law addressing director liability for pursuing goals other than shareholder profit.⁶² The benefit corporation

⁵⁹ Clarke, *supra* note 27, at 323.

⁶⁰ Conaway, *supra* note 24, at 816 (“Social entrepreneurship is the trend of the future. New “boutique” legislation is unpredictable and unreliable. For serious social stewards, the global entity of choice is the Delaware LLC.”).

⁶¹ Clark et al., *supra* note 6, at app. 1.

⁶² *Id.* at app. 3.

responds to this concern by explicitly requiring directors to consider social and environmental benefit in addition to their traditional fiduciary duty to maximize profitability.⁶³ Although there is a similar absence of case law interpreting directors' fiduciary duties with respect to the benefit corporation, the statutory cover provided by the benefit corporation may be more comforting to officers and directors of dual-mission entities than the ambiguous protection afforded by the LLC.

Second, the benefit corporation is arguably a more attractive investment vehicle than the LLC because it is more akin to a C-corporation than an LLC, which institutional investors tend to prefer.⁶⁴ However, this argument assumes that investors will not be deterred by the fact that the benefit corporation is a new, alternative entity. As “the vast majority of investors still prefer to maximize their financial return at the least risk,”⁶⁵ it remains to be seen whether the benefit corporation is indeed a more attractive choice for investment purposes. Even for charitable or “program related” investors, the benefit corporation is a better option than the LLC (or for that matter the L3C described above), because the third party monitoring requirement provides such investors with assurance and access to information that the benefit corporation is indeed pursuing their investment objectives, as opposed to LLCs with no such monitoring requirements.⁶⁶

2. Master Limited Partnerships

Recently, commentators and several Congressional members have promoted the idea of expanding the Master Limited Partnership (MLP) to encompass renewable energy companies.⁶⁷

An MLP is an entity that, like the LLC, includes the tax benefits of a limited partnership yet,

⁶³ *Id.* at 15.

⁶⁴ *Id.* at app. 3.

⁶⁵ Steven J. Haymore, *Public(Ly Oriented) Companies: B Corporations and the Delaware Stakeholder Provision Dilemma*, 64 VAND. L. REV. 1311, 1343-44 (2011).

⁶⁶ Clark et al., *supra* note 6, at 3.

⁶⁷ *Master Limited Partnership Parity Act: A bill to level the playing field by giving investors in renewable-energy projects access to a tax advantage now available only to investors in fossil fuel-based energy projects*, U.S. Sen. Chris Coons, <http://www.coons.senate.gov/issues/master-limited-partnerships-parity-act> (last visited Feb. 12, 2014).

unlike an LLC, converts its ownership interests to publicly traded securities.⁶⁸ This structure is designed to promote rapid growth through its ability to attract investor liquidity.⁶⁹

By statute, however, the MLP has historically only been available to investors in companies engaged in oil, natural gas, coal production, and pipeline construction.⁷⁰ In response, Senators Chris Coons of Delaware and Jerry Moran of Kansas proposed the Master Limited Partnerships Parity Act, first in 2012 and again in 2013, which would alter the U.S. tax code to allow renewable energy companies to become MLPs.⁷¹ Although the Act has not yet passed, it has enjoyed widespread support among environmental and industry groups alike.⁷² Proponents of this idea argue that such a move would reduce financing costs for renewable energy technologies, which would result in lower cost to the renewable energy consumer and, ultimately, reduce the need for other forms of public subsidies.⁷³ Further, supporters argue that opening the MLP structure to renewable energy companies would “democratize” the renewable energy sector, allowing ordinary investors to participate in the market.⁷⁴

As compared to the benefit corporation, the MLP may be a more attractive option for entrepreneurs and investors alike. First, because the MLP does not include the benefit corporation’s third party monitoring requirement, it may be more attractive to entrepreneurs who do not wish to pay for, or open their books to, such third party monitors. From the investor perspective, the MLP has a proven track record of success in the energy sector, which likely makes the MLP more attractive than the comparatively unknown and unpredictable benefit

⁶⁸ *Id.* .

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Master Limited Partnerships Parity Act, S. 795, 113th Cong. § 2 (2013) *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-113s795is/pdf/BILLS-113s795is.pdf>.

⁷² Coons, *supra* note 65, at 4.

⁷³ Felix Mormann & Dan Reicher, *How to Make Renewable Energy Competitive*, N.Y. TIMES (June 1, 2012), <http://www.nytimes.com/2012/06/02/opinion/how-to-make-renewable-energy-competitive.html>.

⁷⁴ *Id.*

corporation. Further, because the MLP is eligible for pass-through tax treatment, it may be a preferable alternative to the benefit corporation, which is taxed at the corporate and shareholder level.

On the other hand, the MLP's emphasis on investors' needs could potentially subsume the social and environmental performance goals that proponents of the benefit corporation emphasize. This may be a moot point to the extent that renewable energy and environmental performance are considered to exist hand-in-hand, but the benefit corporation's third party monitoring requirements would ensure periodic assessment of a given renewable energy technology's environmental benefits and costs, whether foreseen or not.

B. Unintended Consequences for the Renewable Energy Sector?

When viewed in comparison with other business entities, the benefit corporation does appear to fill a unique niche. By augmenting the limited liability associated with C-Corporations and LLCs, borrowing the third-party monitoring requirements of certified B-Corporations, and otherwise attempting to structure the entity as a C-corporation for investor purposes, the benefit corporation attempts to piece together the best components of other business entities. While the benefit corporation is likely a positive development insofar as it provides socially and environmentally driven, for-profit businesses another strategic option, it is unclear whether it is a good option for renewable energy companies in particular.

First, it is arguable that attention is better spent on adapting existing structures such as the MLP to provide a glide path for renewable energy companies, rather than starting from whole cloth to adopt and implement new business structures. Whereas granting renewable energy companies access to the MLP form is a matter of a single tweak to the federal tax code,⁷⁵ authorizing legislation for benefit corporations must be enacted on a state-by-state basis.

⁷⁵ Coons, *supra* note 65, at 3.

Further, the MLP is comparatively familiar to renewable energy companies, while the benefit corporation is an unknown. As such, the novelty of the benefit corporation may mean that renewable energy businesses would be compelled to spend as much or more time figuring out the intricacies of their newfound corporate structure rather than on bringing their technologies to market.

Also, because the economic viability of renewable energy technologies has long been a challenge,⁷⁶ adopting a corporate structure that diverts from goal of profitability may ultimately hinder development of truly economically sound renewable energy technologies. Although it is entirely possible that a benefit corporation could be as profitable as an MLP in the long run, the MLP already has track record of success in the energy sector.

IV. Conclusion

From a purely legal standpoint, the benefit corporation appears to be a positive development, as it addresses some of the key concerns of socially responsible businesses. In the context of renewable energy, however, the benefit corporation is unlikely the most ideal business form because (1) it detracts attention from making renewable energy technologies as economically sound as possible and (2) it fails to provide sufficient incentives for investors and entrepreneurs as compared to an LLC or an MLP.

⁷⁶ INTERNATIONAL ENERGY AGENCY, *World Energy Outlook 23*, 2012.