

# PROVING THAT THEY ARE DOING GOOD:

## WHAT ATTORNEYS AND OTHER ADVISERS NEED TO KNOW ABOUT PROGRAM ASSESSMENT

JENNIFER MILLER OERTEL,<sup>†</sup> PAUL P. FREDDOLINO<sup>‡</sup>, DONNA  
FREDDOLINO<sup>†‡</sup>

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† Partner, Jaffe Raitt Heuer & Weiss, P.C. B.A., 1993, Michigan State University; J.D., 1997, Northeastern University School of Law; Certification in Nonprofit Management, 2010, Georgetown University. Oertel is the coordinator of the firm's Tax-exempt Organizations Practice where she represents family foundations, public charities, and social enterprises. She also works in the areas of corporate law and finance, in which she has had over 16 years of experience in working with start-up, emerging growth, and publicly traded companies. Oertel earned her Bachelor's degree with highest honors from the Michigan State University Honors College and combines her social work background with business law experience in order to assist for-impact organizations and social enterprises to maximize social impact.

‡ Professor of Social Work, Michigan State University. B.A., 1967, The University of Notre Dame; M.A., 1970, Cornell University; Ph.D., 1977, University of Michigan. At MSU, he has taught courses in quantitative and qualitative research methods and evaluation practice. He has conducted externally funded evaluation research in community and mental health, substance abuse, child welfare, and older adult services. His most recent projects have assessed the effectiveness of a program serving children in foster care who have experienced trauma and several studies involving technology-based services for low-income older adults.

†‡ Consulting Manager, Plante Moran. B.A., 1980, Michigan State University; M.A., 1995, Michigan State University. Plante Moran is the eleventh largest certified public accounting and business advisory firm in the United States. Donna has worked and consulted with a number of not-for-profit and education providers throughout her career, helping to define organizational strategy, develop resources, and increase operational efficiencies. She recently served as board member for an organizational development nonprofit and delivers presentations nationally on the application of technology to help drive business process improvement.

## I. INTRODUCTION

Investigative Report of Greg Mortenson and Central Asia Institute by the Montana Attorney General, Steve Bullock, on April 5, 2012 announced a settlement agreement with Mortenson and the Central Asia Institute (CAI), concluding a year-long investigation into allegations of mismanagement of assets by Mortenson and the charity. Based on the results of the investigation, the Attorney General concluded that CAI's board of directors failed to fulfill some of their responsibilities as board members of a nonprofit charity. Further, Mortenson failed to fulfill some of his responsibilities as executive director and as an officer and director of the organization.

How do you know that a program designed and supported to achieve a particular social impact actually delivers results? How can you be assured that the charitable intention of a client supporting such programs is being served in an efficient manner? Do you rely on self-reported data, a third party resource, or your "gut"? What if your client's payment for services rendered hinges upon proving such impact, which must be objectively defined in a contract? With the increasing focus on accountability, including "pay for success" programs, having a clear understanding of alternative ways to document fulfillment of intended outcomes is essential.

Whether you advise individual donors, foundations, charities, social enterprises, government agencies, government contractors, or traditional businesses, and whether you are a transactional attorney or litigator, mediator, arbitrator, or judge, it is almost certain that you are or will be challenged with assessing the outcome or impact of social goals. Having an understanding of the context and alternative methods to assess program outcomes is an important and evolving set of knowledge for all professionals.

## II. THE PACE OF GROWTH AND NEED FOR ASSESSMENT

The United States is a nation of doers and givers. The level of giving, the number of tax-exempt charitable corporations, the alternative ways to deliver social impact results, and the corresponding need to effectively assess outcomes continues to increase. Charitable contributions are recovering from economic recession and on pace to surpass the prior high water mark of 2007. Gene Tempel, founding dean of the Lilly Family School of Philanthropy, noted that "if giving continues to grow

at the rate seen in 2012, it will take between 6 and 7 years for total giving to reach the pre-recession high of \$344.48 billion reached in 2007.”<sup>1</sup>

Historical evidence is found in the annual report of the Giving USA Foundation and the Indiana University Lilly Family School of Philanthropy.<sup>2</sup> First published in 1956, *Giving USA: The Annual Report on Philanthropy* is the longest running, most comprehensive report on philanthropy in the United States.<sup>3</sup> “The report shows that American individuals, corporations, and foundations gave \$316.23 billion in 2012, a 3.5% increase from 2011.”<sup>4</sup> Individuals are “the largest contributor[s] . . . g[iving] 72% of the overall \$316 billion, an increase of 3.9%.”<sup>5</sup> Adding “in bequests . . . and family foundations[,] . . . that number rises to 86%.”<sup>6</sup> As a result, with more individuals making giving decisions, they do so without a framework to assess the impact of the transfer of their assets. Moreover, although individual giving is on the rise, sequestration has gutted government funding for many social programs.

In relatively recent history, increased financial scrutiny in the for-profit world stemming from the financial recession and the well-publicized scandals such as Enron, Tyco, and WorldCom led to new regulations regarding financial disclosure and internal controls, such as the passage of the Sarbanes-Oxley Act of 2002.<sup>7</sup> Some of these practices have been adopted into the charitable world with the demand for increased internal financial controls and accountability. This translated into scrutiny of administrative costs and measurement of numeric output—number of meals served, number of children placed in foster care, and the like. In fact, in 2013, Oregon passed a state law that eliminated state and local tax subsidies to exempt organizations that spend less than 30% of donations directly on fulfillment of the particular organization’s mission.<sup>8</sup> For decades, states tried to pass similar statutes

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1. Roger Craver, *Giving USA 2013: Good News . . . and Bad*, AGITATOR (Jun. 19, 2013), <http://www.theagitator.net/research/giving-usa-2013-the-good-the-bad-the-ugly/>.

2. See *GUSA Annual Report*, GIVING INST., <http://givinginstitute.org/giving-usa/gusa-annual-report/> (last visited Mar. 15, 2014).

3. *Id.*

4. *Giving USA 2013 Released*, WINKLER GROUP (Jun. 19, 2013), <http://winklergroup.com/main/news-details/9#Uu-ByvbAn9U>.

5. Marc Pitman, *Charitable Giving Recovering Faster than Anticipated—Giving USA*, FUNDRAISING COACH (June 18, 2013), <http://fundraisingcoach.com/2013/06/18/giving-usa/>.

6. *Id.*

7. Sarbanes-Oxley Act of 2002, PUB. L. NO 107-204, 116 STAT. 745.

8. Tracy Loew, *Local Charities Spend Donations on Programs Despite Tax Filings*, STATESMAN J. (Jul. 3, 2013, 12:21 PM), <http://community.statesmanjournal.com/blogs/watch/2013/07/03/local-charities-spend-donations-on-programs-despite-tax-filings/>.

limiting the ability of charities to fundraise if they spent more than a certain percentage of income on administration. Those laws were struck down by the Supreme Court, ruling that government attempts to restrict a charity's ability to solicit contributions were deemed a violation of the First Amendment.<sup>9</sup>

Another movement claims that financial benchmarks alone should not be the focus but that organizations should be held accountable for the effectiveness of their programs toward achieving their intended charitable outcome goals (although sometimes referred to as "impact," in this Article, we will use "outcome goals" to refer more generally to the desired results as defined by the relevant stakeholders).<sup>10</sup> Take, for example, the program whose intended outcome goal was to get more inner-city youth enrolled in college. The program appeared to be very successful in that the numbers of such youth going to college increased dramatically. Administrative costs were low. However, years later it was discovered that very few of those youth served actually graduated from college. While outcome data proved that the program was successful in achieving its initially defined outcome goal, the long-term impact of that program was called into question. This example highlights the importance of identifying well-conceptualized outcome goals and securing agreement among stakeholders on what constitutes a success.

With everyone from individuals to governments and foundations calling for increased accountability, it is not surprising that donors are looking for objective means to assure that the funds they have given have achieved the intended outcomes. One of the most visible advocates of this type of information is Bill Gates, who has noted, "From the fight against polio to fixing education, what's missing is often good measurement and a commitment to follow the data. We can do better. We have the tools at hand."<sup>11</sup> In fact, a study by the Urban Institute found that nearly 200,000 contracts and grants were issued to some 33,000 service providers in 2009.<sup>12</sup> But many social programs and grants are not regularly evaluated for effectiveness, even if they track

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9. *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980).

10. One vexing problem in this subject area is the lack of agreement upon terminology.

11. Bill Gates, *Bill Gates: My Plan to Fix the World's Biggest Problems*, WALL ST. J. (Jan. 25, 2013, 8:12 PM), <http://online.wsj.com/news/articles/SB10001424127887323539804578261780648285770>.

12. ELIZABETH T. BORIS ET AL., HUMAN SERVICE NONPROFITS AND GOVERNMENT COLLABORATION: FINDINGS FROM THE 2010 NATIONAL SURVEY OF NONPROFIT GOVERNMENT CONTRACTING AND GRANTS 5 (2010), available at <http://www.urban.org/uploadedpdf/412228-nonprofit-government-contracting.pdf>.

information on program outputs.<sup>13</sup> Of forty-seven federal programs for workforce development, forty-one tracked some outcome measures, but only five programs had completed an impact study since 2004, according to a 2011 Government Accountability Office report.<sup>14</sup>

Few would dispute that it just makes sense to continue funding those programs that prove they are doing the most good, but as noted below, attention to outcome and impact data is increasingly mandated by legislation as well as new forms of legal entities and financing arrangements and among diverse sets of actors. This Article is intended to offer practical suggestions for attorneys and other advisers as to how they can establish cohesive and informed guidance for their clients when dealing with assessment of program outcomes. Program outcomes are the critical building blocks in assessing social impact. This Article will not cover complex and long-debated question of how to evaluate or assess overall social impact, as there are a myriad of such articles in existence for those desiring greater depth of that subject.

This Article will (1) define the challenge and briefly review some noteworthy resources available to help untangle some of the complexity; (2) highlight emerging legal and financial models that require impact or outcome assessment; and (3) provide an overview of basic outcome assessment strategies that attorneys and other advisers can use in their work with stakeholders increasingly concerned about responding to the emerging requirements.

### III. THE CHALLENGE AND SOME AVAILABLE RESOURCES

Despite important improvements toward essential financial reporting standardization, an equivalent discipline of evaluating impact has not materialized. The challenges involve both the technical aspects of measuring progress and impact, together with the values-based decisions about which measures are appropriate and how much progress on a measure can be considered a success. Without a shared framework for evaluation, most organizations tend to measure what they can, unable to build upon data reported by other entities and emerging practices for assessing impact. However, drawing upon research and evaluation methods, a standardized solution that can be applied across a broad range of mission-driven activities is within reach.

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13. *Id.*

14. U. S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-92, MULTIPLE EMPLOYMENT AND TRAINING PROGRAMS: PROVIDING INFORMATION ON COLOCATING SERVICES AND CONSOLIDATING ADMINISTRATIVE STRUCTURES COULD PROMOTE EFFICIENCIES (2011), available at <http://www.gao.gov/new.items/d1192.pdf>.

The absence of a standardized approach to assessing outcomes is not attributable to lack of interest or commitment to carrying out the work. Indeed, the importance of evaluation and assessment is regularly noted by several of the big names in the field. For example, the Bill and Melinda Gates Foundation clearly proclaimed that “[w]e hold ourselves accountable for what we do and how we do it by measuring inputs, activities, and outputs of our own work and the work of our grantees and partners.”<sup>15</sup> Similarly, the Ford Foundation describes its approach as follows: “Our assessment approach reflects this idea: with all of our grant-making strategies and throughout each stage of the process, we assess, learn and then make course corrections as needed.”<sup>16</sup> Another example is the Skillman Foundation, which has stated that evaluation is an important component of the learning and innovation process which should be guided by a set of principles or values about the role of evaluation, namely that it should be an ongoing, collective responsibility embedded in a foundation’s systems and structure that is flexible, dynamic, participatory, and collaborative while at the same time culturally and technically competent and operating within a culture that values transparency, critical inquiry, and learning.<sup>17</sup> Further, the website of the Max M. & Marjorie Fisher Foundation states that in order to be fully effective in philanthropy, “tools and insight provided by other philanthropic organizations” are needed in order to “expand, enhance and sustain [the] ability to advance the common good and make a strong impact.”<sup>18</sup>

The absence of a standardized approach is also not attributable to lack of viable models for outcome assessment. In fact, there are quite a number of models that have evolved in the past twenty years, with new organizations and commentators frequently suggesting alternative approaches. For most people new to outcome assessment, starting with an overview of the assessment process will make the more technical focus on specific measures and how to use them easier to follow.

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15. BILL & MELINDA GATES FOUND., <http://www.gatesfoundation.org/Who-We-Are> (last visited Feb. 3, 2014).

16. *Our Approach to Impact Assessment and Learning*, FORD FOUND., <http://www.fordfoundation.org/impact/approach> (last visited Feb. 3, 2014).

17. *Our Evaluation Philosophy and Approach*, SKILLMAN FOUND., <http://www.skillman.org/How-We-Work/Results-Evaluation/Our-Evaluation-Philosophy-and-approach> (last visited Mar. 15, 2014).

18. *Resources*, MAX M. & MARJORIE S. FISHER FOUND., <http://mmfisher.org/resources.html> (last visited Feb. 3, 2014).

## IV. THREE IMPORTANT RESOURCES

One of the forward thinking foundations in this arena—coincidentally Michigan-based—is the W. K. Kellogg Foundation. The foundation has been active for decades in utilizing assessment of outcomes and impacts with its grantees, and it has invested in the development of two popular and well-respected resources available for free download from its website, including a basic guide that provides an overview of the assessment process entitled the *W.K. Kellogg Foundation Evaluation*.<sup>19</sup> A second resource useful in developing the “theory” or “causal linkage” that explains why particular programs expect to have an impact is the *W.K. Kellogg Foundation Logic Model Development Guide*.<sup>20</sup>

When it is time to move beyond the basics of evaluation to actually defining outcomes and identifying measures that can be used to assess effectiveness, a very useful set of resources can be found in the work of the Center for What Works, which is now affiliated with the Rensselaerville Institute. The Center’s mission is “[t]o guide philanthropy, nonprofits, and communities to higher results, moving the needle on social issues.”<sup>21</sup> The Center’s website provides links to numerous resources, including valuable tools created through the Center’s collaboration with the Urban Institute. These tools make available user-friendly information about specific outcome measures that many programs will find helpful.

A third source of useful resources is Charity Navigator, the largest independent charity evaluator in the United States with a database of rating information on more than 7,000 organizations.<sup>22</sup> Charity Navigator has been working to expand its rating system (which originally only considered financial health) with the ultimate goal of including three dimensions of a charity’s operations that donors should consider before making a charitable contribution: (1) Financial Health, (2)

19. W.K. KELLOGG FOUND., W.K. KELLOGG FOUNDATION EVALUATION HANDBOOK (2004), available at <http://www.wkcf.org/knowledge-center/resources/2010/w-k-kellogg-foundation-evaluation-handbook.aspx>.

20. W.K. KELLOGG FOUND., W.K. KELLOGG FOUNDATION LOGIC MODEL DEVELOPMENT GUIDE (2004), available at <http://www.wkcf.org/knowledge-center/resources/2006/02/wk-kellogg-foundation-logic-model-development-guide.aspx>.

21. *Who We Are*, CENTER FOR WHAT WORKS RENSSELAERVILLE INSTITUTE, <http://whatworks.org/displaycommon.cfm?an=1&subarticlenbr=106> (last visited Mar. 15, 2014).

22. *Charity Navigator’s API*, CHARITY NAVIGATOR, <http://www.charitynavigator.org/index.cfm?bay=content.view&cpid=1397#.UtMU1STgI9e> (last visited Mar. 15 2014).

Accountability and Transparency, and (3) Results Reporting.<sup>23</sup>

In 2011, the organization expanded its rating analysis to include dimension 2.0, Accountability and Transparency.<sup>24</sup> In January 2013, Charity Navigator's newest rating dimension was launched—Results Reporting—which begins to address the final dimension of information it believes donors must consider to make a wise giving or social investment decision. By results, it is especially interested in the outcomes of the work of the charity and whether these results are providing a social value (such as offering meaningful change in communities and people's lives). As it notes, "Mission-related results are the very reason that charities exist."<sup>25</sup> A few charities have already begun testing this approach and reporting results, but in reality it will take several years for large-scale implementation. Additional information is available in the *Charity Navigator Results Reporting Concept Note*.<sup>26</sup>

Thus, the dilemma is not a shortage of resources and tools but rather the unfortunate fact that time and access to a curated summary of applicable information is a constraint. Reviewing and selecting from the range of possible alternative approaches is time-consuming and unlikely to be undertaken by those working with a single case, donor, or board. After a review of the current legal and financial environment, we will return to this issue with some suggestions for how attorneys and advisers might begin to approach the challenge of outcome assessment.

## V. THE CHANGING LEGAL AND FINANCIAL ENVIRONMENT

Not only has the importance of assessment of output or impact gained traction over the past several decades as a way to measure the stewardship of charitable and government funds, but the field of social enterprise has also spurred a growing number of new types of legal entities that require assessment of social gains. This is sometimes referred to as the "Fourth Sector" because it blurs the lines between

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23. *Where We Are Headed (2013 and Beyond)*, CHARITY NAVIGATOR, <http://www.charitynavigator.org/index.cfm?bay=content.view&cpid=1193#.UtMUpyTgI9c> (last visited Jan. 12, 2013).

24. Glen Rock, *Charity Navigator Launches New Rating System*, CHARITY NAVIGATOR (Sep. 20, 2011), [http://www.charitynavigator.org/index.cfm?bay=content.view&cpid=1288#.Uhldq3\\_3OEE](http://www.charitynavigator.org/index.cfm?bay=content.view&cpid=1288#.Uhldq3_3OEE).

25. *How Do We Plan to Evaluate Results Reporting*, CHARITY NAVIGATOR, <http://www.charitynavigator.org/index.cfm?bay=content.view&cpid=1507&print=1> (last visited Jan. 12, 2014).

26. CHARITY NAVIGATOR, RESULTS REPORTING CONCEPT NOTE: THE THIRD DIMENSION OF INTELLIGENT GIVING (2013) available at [http://www.charitynavigator.org/\\_asset\\_/etc/CN\\_Results\\_Reporting\\_Concept\\_Note.pdf](http://www.charitynavigator.org/_asset_/etc/CN_Results_Reporting_Concept_Note.pdf).



traditional purely for-profit business, government, and charity.<sup>27</sup>

The notion that investors can benefit from financing socially oriented businesses—a mix of philanthropy and finance known as “impact investing”—has evolved over centuries, when public and private sector groups began investing in emerging market enterprises to fight poverty. The Institute for Social Entrepreneurs published a chronology of several key events in the evolution of the social enterprise industry, beginning in the 1890s with Dale Carnegie’s model of making philanthropic grants to those causes he deemed to be more worthy and impactful, to the inception and proliferation of worker-owned cooperatives in the mid-century, to Ashoka’s inception in the 1980s and modern-day groups such as the Skoll Centre for Social Entrepreneurship and the Goldman Sachs Urban Investment Group.<sup>28</sup> “The field is expected to grow at least tenfold by 2020, drawing more than \$400 billion in investments to five sectors alone (housing, water, health, education, and financial services), with potential for at least \$183 billion in profits.”<sup>29</sup>

In the traditional model, businesses aimed to maximize hard-dollar return on investment for shareholders. Charities focused on securing grants from funding sources to either pay for their programming or to supplement program service revenues in order to survive. Today, many businesses are attempting to “do well while doing good,” while at the same time many charities are focusing on producing sustainable revenue streams that may be more commercial in nature. However, traditional business forms and their governing statutes are not well equipped to deal with these developments. As a general rule of corporate law, the directors of for-profit corporations owe fiduciary duties to both the company and its shareholders. Although these duties vary slightly amongst the various state laws, they all come down to one thing—maximization of profits. Directors and officers who do not follow that goal as their primary concern may be held personally liable to their shareholders.<sup>30</sup> However, most corporate actions are given the protection of the business judgment rule—the presumption that the director or officer has complied with his fiduciary duties unless there is evidence to

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27. *The Emerging Fourth Sector*, FOURTH SECTOR, <http://www.fourthsector.net/learn/fourth-sector> (last visited Mar. 13, 2014).

28. INST. FOR SOC. ENTREPRENEURS, *EVOLUTION OF THE SOCIAL ENTERPRISE INDUSTRY: A CHRONOLOGY OF KEY EVENTS* (2008), available at <https://www.se-alliance.org/upload/Membership%20Pages/evolution.pdf>.

29. Theresa Bradley, *Finally, Socially Responsible Investors Can Measure Their Impact*, CHRISTIAN SCI. MONITOR (Sept. 24, 2011), <http://www.csmonitor.com/Business/new-economy/2011/0924/Finally-socially-responsible-investors-can-measure-their-impact>.

30. See *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009).

the contrary. Socially minded directors and officers have used the business judgment rule to their—and society's—benefit by linking the social benefits to maximization of profits. For example, there are myriad financial models that show that environmentally safe production methods actually increase profitability.<sup>31</sup>

A question of fiduciary duties arises in the context of change-in-control transactions. In certain jurisdictions, such as Delaware, these transactions fall outside of the business judgment rule and trigger enhanced judicial scrutiny.<sup>32</sup> In response to unprecedented takeover activity in the early 1980s, many states enacted statutes (so-called “constituency statutes”) designed to permit corporations to protect themselves from hostile takeovers by permitting directors and officers to consider stakeholder interests in making such decisions as opposed to only considering dollar value to shareholders.<sup>33</sup> Certain courts have left open the question of whether these statutes may permit officers and directors to consider the long-term consequences on constituents other than shareholders in lieu of the short-term financial gains of shareholders, but given the dearth of judicial interpretation, caution is advised.<sup>34</sup>

New types of legal entities have been created as a way to address the question of fiduciary duties in contexts in which for-profit businesses desire to take into account motives other than maximizing shareholder monetary value. One such entity is the Benefit Corporation, which has been adopted in several states (most recently Delaware). Not to be confused with the “B Corp” certification described below (although the genesis of this new type of legal entity lies with B Labs), the board of directors and management of a Benefit Corporation are required to consider certain public benefits in corporate decision-making. Because profit motive is not their only concern, the fiduciary duties of officers and directors include the social motives of the corporation. Each year, the Benefit Corporation must make publicly available a report detailing its social and environmental (if applicable) performance.<sup>35</sup> In order to ensure independence, objectivity, and transparency in the reporting, the report must be prepared in accordance with a third-party standard (such

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31. Alissa Mickels, *Beyond Corporate Social Responsibility: Reconciling the Ideals of a For-Benefit Corporation with Director Fiduciary Duties in the U.S. and Europe*, 32 HASTINGS INT'L & COMP. L. REV. 271 (2009).

32. Eric Otis, *Beyond Shareholders: Interpreting Corporation Constituency Statutes*, 61 GEO. WASH. L. REV. 14 (1992).

33. See, e.g., *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1985); *Unocal Corp. v. Mesa Petrol. Co.*, 493 A.2d 946 (Del. 1985).

34. See, e.g., *Baron v. Strawbridge & Clothier*, 646 F. Supp. 690 (E.D. Pa. 1986).

35. Mickels, *supra* note 31, at 279-81.

as that developed by B Lab, described below).<sup>36</sup> Because significant variation exists among the various state statutes adopting the Benefit Corporation, and because the legislation often does not work well with the remainder of the corporation codes in such states, it remains to be seen how the case law applicable to Benefit Corporation controversies will play out.

Another relatively new type of corporate entity is the Flexible Purpose Corporation.<sup>37</sup> Effective in California in 2012, the Flexible Purpose Corporation permits management to pursue social interests in running the corporation.<sup>38</sup> A Flexible Purpose Corporation must declare at least one social or environmental “special purpose” in its charter.<sup>39</sup> The board of directors and management of a Flexible Purpose Corporation are given a new “safe harbor” (in addition to the business judgment rule) in that they are protected from shareholder liability when they weigh such special purpose(s) against shareholder value—both in the ordinary course of business and in change-of-control situations.<sup>40</sup> However, profit motives do not have to be secondary to any social purpose. Flexible Purpose Corporations are required to publish regular reports with objectives, goals, measurement, and reporting on the impact or “returns” of social/environmental actions. The fiduciary duties of directors and officers in Flexible Purpose Corporations include consideration of the special purpose(s) stated in the entity’s charter, and shareholders have traditional enforcement rights if directors fail to meet such duties.

The L3C, or low-profit limited liability company, is a statutory type of limited liability company whose primary purpose is charitable and which cannot have the generation of income or the appreciation of property as a significant purpose.<sup>41</sup> A L3C’s purposes track the charitable purposes of the Internal Revenue Code in that its primary purpose must be “religious, charitable, scientific, literary, educational, or for the prevention of cruelty to children or animals.”<sup>42</sup> L3Cs were designed to encourage private foundations to pursue their missions through “investments” in social enterprises while being assured that such investments would count toward the private foundations’ minimum

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36. Briana Cummings, *Benefit Corporations: How to Enforce a Mandate to Promote the Public Interest*, 112 COLUM. L. REV. 578, 595-602 (2012).

37. CAL. CORP. CODE §§ 2500-3503 (West 2012).

38. *Id.*

39. *Id.* § 2604.

40. *Id.* § 2700.

41. Christen Clarke, *California’s Flexible Purpose Corporation: A Step Forward, A Step Back, or No Step at All?*, 5 J. BUS. ENTREPRENEURSHIP & L. 301, 310-13 (2012).

42. I.R.C. § 170(c)(4) (West 2013).

distribution requirements and would not be taxable as an investment that jeopardizes the charitable purposes of the private foundation.<sup>43</sup> Unlike the other entities described, L3C statutes do not require that L3C entities publish public reports about their impact. However, assessment of outcome in achieving their primarily charitable mission is a logical result and arguably part of the proper due diligence that a private foundation would conduct with respect to the follow-up reporting of its investment in the L3C and certainly before it commits to any follow-on investment.

A new financial instrument utilizing impact assessment is the social impact bond (SIB).<sup>44</sup> SIBs, sometimes referred to as “pay for success programs,” have been described as an “innovative financial arrangement between one or more government agencies and an external organization (‘intermediary’) that can be either a nonprofit or a for-profit entity.”<sup>45</sup> In such an arrangement, the governmental entity outlines specific social outcomes to be achieved relative to a defined population over a set period of time. The government does not pay the intermediary unless such milestones are met, thus saving tax dollars unless a program actually produces the desired results. A third party is used to evaluate the achievement of the outcome using a method agreed upon by all involved parties at the inception of the social impact bond agreement. Because often millions of dollars will hinge upon whether or not social outcome goals have been met, it is imperative that all parties understand social outcome measurement.

In order to encourage social awareness and accountability, the B (“beneficial”) Corporation certification was developed by B Lab, a tax-exempt entity that certifies and audits entities that respect stakeholder and mission-driven concerns.<sup>46</sup> One factor in B Lab’s certification process is an entity’s commitment to full and accurate assessment and reporting of social, environmental, and financial performance.<sup>47</sup> Toward that end, in the Fall 2011, B Lab launched the “Global Impact Investing Rating System” (GIIRS, pronounced “gears”), a non-profit ratings

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43. See Clarke, *supra* note 41.

44. Peter G. Dagher, Jr., *Social Impact Bonds and the Private Benefit Doctrine: Will Participation Jeopardize A Nonprofit’s Tax-Exempt Status?*, 81 FORDHAM L. REV. 3479, 3481 (2013).

45. Kristina Costa et al., *Frequently Asked Questions: Social Impact Bonds*, CENTER FOR AM. PROGRESS (Dec. 5, 2012), <http://www.americanprogress.org/issues/economy/report/2012/12/05/46934/frequently-asked-questions-social-impact-bonds/>.

46. *The Non-Profit Behind B Corps*, CERTIFIED B CORP., <http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps> (last visited Jan. 12, 2014).

47. *Id.*

agency and analytics platform for impact investors.<sup>48</sup> GIIRS is similar to Morningstar and Capital IQ analytics except that it is designed for use in the for-impact investing world as opposed to the purely for-profit investing world in which investors are only concerned about the single bottom line of dollars earned. GIIRS is a tool designed for investors to aid in analyzing the social impact of their investments in a similar manner as they would analyze their financial risk and return. GIIRS is tailored to the impact-investing marketplace because it focuses on the impact performance of private companies, uses cross-industry and cross-geographic methods, and provides data that is independently verified. It is important to note, however, that B Corp certification does not alter the fiduciary duties of the officers and directors of the corporation.<sup>49</sup>

In addition to the new legal entities and financing instruments that require assessment of the achievement of social or environmental goals, data driven leadership practices focus on performance and collaboration between nonprofit (or government) and for-profit partners in solving community-based problems. Performance-based contracting programs often provide monetary bonuses for things such as completing contracted work early or under budget or for achieving specific performance (outcome) targets.<sup>50</sup> They may also carry penalties for negative results.<sup>51</sup>

Underscoring the fact that assessment will be part of the ongoing model is the *White House Fiscal Year 2014 Budget* released in April 2013 that highlighted Pay for Success programming, including SIBs.<sup>52</sup> As proposed, government agencies will pay for concrete and measurable social outcomes only after they are achieved. Thus, taxpayer dollars will flow to those social programs with proven results. This is not the first time the White House budget has proposed Pay for Success. These concepts were proposed in the 2012 and 2013 budgets, but they were neither included in the final budgets nor did the proposals garner significant public focus.<sup>53</sup>

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48. GIIRS, <http://www.giirs.org/> (last visited Jan. 12, 2014).

49. *Id.*

50. See OFFICE OF MGMT. & BUDGET, BEST PRACTICES FOR PERFORMANCE-BASED CONTRACTING (1998), available at [http://www.whitehouse.gov/omb/procurement\\_guide\\_pbsc](http://www.whitehouse.gov/omb/procurement_guide_pbsc) (document rescinded; for informational purposes only); see also *What Is Performance-Based Contracting?*, WORLD HEALTH ORG., [www.who.int/management/resources/finances/Section2-3.pdf](http://www.who.int/management/resources/finances/Section2-3.pdf) (last visited Mar. 15, 2014).

51. See OFFICE OF MGMT. & BUDGET, *supra* note 50; *What is Performance-Based Contracting?*, *supra* note 50.

52. OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2014 BUDGET OF THE U.S. GOVERNMENT 52-54 (2013), available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/budget.pdf>.

53. *Paying for Success*, OFFICE OF MANAGEMENT & BUDGET,

In the 2014 budget proposal, the Obama administration proposed support for Pay for Success programs in an amount of nearly \$500 million. The 2014 budget included a \$185 million request “in the areas of job training, education, criminal justice, housing, and disability services.”<sup>54</sup> It also included a \$300 million fund designed to provide incentives to state and local governments to develop SIBs and other Pay for Success programming, which would be administered by the Treasury Department.<sup>55</sup> This \$300 million Treasury fund, the White House budget explained, is partially modeled on the United Kingdom’s Social Outcomes Fund, whose £20 million fund “will be used to provide a ‘top-up’ contribution”—a portion of the outcome expenses beyond what any single budget is able or willing to contribute—to help finance payments for complex SIB agreements where benefits will cut across multiple budget lines.<sup>56</sup> The final 2014 budget included up to \$100 million in Pay for Success programming—the first time the concept survived a final budget.<sup>57</sup>

Although the funds that the 2014 final White House budget allocated for SIBs and Pay for Success were a mere drop in the bucket of the total \$3.7 trillion budget, Pay for Success programming has the ability to dramatically change the way in which funding is appropriated at all levels of government, not only by providing incentives to local government by partially financing outcome payments for SIBs directed by cities and states, but also through credit enhancements for certain investments in SIBs through the provision of partial guarantees. This will reduce the risk that the investor group will lose all of its investment in the SIB if the deal fails.

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<http://www.whitehouse.gov/omb/factsheet/paying-for-success> (last visited Mar. 15, 2014).

54. Hannah Traverse, *Summary: President's FY14 Budget*, CORPS NETWORK (Apr. 15, 2013, 1:50 PM), <http://corpsnetwork.org/summary-presidents-fy14-budget>.

55 *Id.*

56. Sonal Shah & Kristina Costa, *Social Impact Bonds: White House Budget Drives Pay for Success and Social Impact Bonds Forward*, CENTER FOR AM. PROGRESS (Apr. 23, 2014), <http://www.americanprogress.org/issues/economy/news/2013/04/23/61163/white-house-budget-drives-pay-for-success-and-social-impact-bonds-forward/>.

57. *Paying for Success*, *supra* note 53. Since drafting, the 2015 budget proposal was published. OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2015 BUDGET OF THE U.S. GOVERNMENT (2014), available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2015/assets/budget.pdf>

## VI. AN OUTCOME ASSESSMENT PRIMER

Credible work in measuring outcomes and impact is feasible for most philanthropic activities with a little planning and attention to detail. As an attorney or other adviser working with donors, foundations, and mission-driven organizations (tax-exempt entities and other emerging forms), awareness of these common steps in the outcome evaluation process will enhance the value of your services for your clients. As an initial step, an understanding of the following process will help guide you to the right questions to ask in order to be of assistance to your clients:

1. Within any specific program or focused area within a larger program, the work to be supported should generally have only a few outcomes identified. Targeting program efforts makes achieving success more likely, and it makes measuring success more feasible. One commonly used acronym speaks of SMART outcomes to capture the elements seen as essential in best practice. The identified outcomes must be the following:

a. Specific: For example, we are not going to cure poverty but rather increase the wages of graduates of our training program. This is very focused and specific. You have a sense of what the program expects to be accomplished.

b. Measurable: There are data that are reasonably available that permit measurement of the outcome. For example, by using pay stubs, someone could calculate the average hourly wage of clients who became employed after training.

c. Action (Change) Oriented: The outcome must reflect a change for the better in some aspect of the designated problem among the target population; there will be more of X or less of Y. Change implies that the measures for this outcome will be done twice so that the “change” can be measured. This generally will include some type of a measure of the situation before and after program services were applied.

d. Realistic: While it is tempting to describe the program’s intent to bring about considerable improvement in the targeted problem areas, the necessity of measuring outcomes should help to reign in aspirational overstatement of potential impact. But what is a realistic outcome? The answer to this can frequently be

found in the published literature or online with reference to the experience or success rates for other similar past programs, where possible. Most programs are—or should be—using approaches that they have some reason to believe build upon past practice, and the information describing the approach most likely reports how much change can be accomplished in a specified time period. This number or percent will be the best estimate of a realistic outcome.

e. *Timed*: Very simply, the outcome must specify the time period during which the program will operate and outcome measures will be collected. This is obviously related to the “realistic” component.

2. The link between the program or activities proposed by the organization and its success in achieving the proposed outcomes should be transparent with specific information about the resources it will take to support those activities. This is often referred to as the “causal linkage,” and these relationships must be clear for each of the proposed outcomes. In some cases, of course, the same resources and activities can be connected causally to more than one outcome. Simply stated, the following need to be described:

a. *Given a specific intended outcome, what are the activities that need to be implemented in order for the outcome to be achieved?* As an example, if the outcome is to increase awareness of the harmful effects of designer street drugs by eighth grade students in a community, all or most of these students must attend the events at which information about harmful effects will be presented. If the model being implemented also calls for peer mentors to aid the process, credible peer mentors must be recruited and trained, and they must spend some time (probably in structured activities) with the eighth grade students.

b. *Given the activities identified above, in addition to the obvious financial support, what are the resources that are needed to ensure that the activities occur, without which there can be no expectation of achieving the proposed outcome?* In this example, to get eighth graders to the events will require agreements with schools and possibly some well-known “motivators” to encourage attendance and attention—perhaps a sports figure or entertainment celebrity to headline the event. To



be able to recruit and train credible peer mentors, the program will need a mechanism to identify potential mentors, incentives to attract their participation, good training materials, and ongoing support to the mentors.

c. These details thus “flesh out” the causal linkage for this one outcome. The general idea is captured as: Resources → Activities → Outcomes.

A tremendous advantage of clearly identified causal linkages is that they point the way to the areas for evaluating the process of the work undertaken by the program, which will be especially important in making recommendations for the future regardless of the level of “success” identified by the outcome evaluation.

3. A credible evaluation will have at least two measures for each outcome. The rationale for at least two is simply to provide evidence from multiple perspectives and avoid the scenario where there is only one measure, and the results are not positive. Although this is frequently the point in the process where organizations and their stakeholders become concerned about where and how to select measures, there are in fact many sources and models (as described above). One convenient source described above is the lists of outcome measures reported by The Center for What Works.<sup>58</sup> The sample measures cover such areas as affordable housing and health risk reduction.

4. In reviewing the material provided by the organization or program, check to see if they describe plans for collecting data related to their outcomes and then reporting the data in a way that makes the results available to multiple stakeholders.

5. While there are very few situations in which there is an exact “head-to-head” competition for outcomes with exactly the same target population in the same environment, for a more complete understanding of the results, an effort should be made to compare outcomes with previous years, reports from organizations with similar objectives, and evaluation reports in the philanthropy and human services literature. This provides an opportunity to gain some perspective on how the program’s level of success compares with peer organizations and benchmarks.

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58. CENTER FOR WHAT WORKS, <http://portal.whatworks.org/programs.aspx> (last visited Jan. 12, 2014).

6. Finally, the program should have plans to review the data with stakeholders and service recipients, revise the program based on lessons learned from the results, and evolve based on new and emerging insights and knowledge. Many programs do not reach the hoped-for level of success on their first try. If the program has been collecting process data related to its resources and activities, it should be able to address some of the reasons for its level of success. These data can also guide the program in its review and point the way to changes for implementation in subsequent program development. This is consistent with the notion of developing a culture of continued improvement based on empirical assessments, an orientation that is pursued through foundations and adviser organizations.

## VII. CONCLUSION

We are living in an exciting and potentially turbulent time in which social outcomes and impact, and how they are measured, will create additional opportunities to spur social good while increasing sources of potential liability. Not only will contract outcomes and disputes hinge upon whether or not social impact or outcome milestones were achieved, they will also depend on the extent to which new corporate entities have expanded the scope of enforceable fiduciary duties of directors and officers of such entities. It is critical that practitioners familiarize themselves with these additional areas of exposure as well as the limitations of the various measurement tools being used today.

Setting a minimum floor—with measureable outcomes—establishes a clear standard of financial accountability for charitable organizations; it is *not* intended to measure overall effectiveness or determine high performing organizations. An organization's effectiveness can be a complex story that is better told through rigorous program evaluation. The private sector can show a direct correlation between efficiency and profits; the tax-exempt sector has no standard measuring tool. In fact, it would be misleading to use the percentage spent on administration or program services as the only metric in assessing organizational effectiveness.

Like it or not, outcome and impact assessment are here to stay and are only going to increase in use and prominence. Outcome measurement, along the lines described above, presents a necessary first step on the road to measuring impact. The legal and stakeholder demands for both accountability and proof of impact are pushing greater investment of time and talent into developing useful and accessible tools to support better outcome measurements and, ultimately, consensual measurements of social impact.

The coming years will no doubt see more productive debate toward the creation of a scalable, customizable model that can be adopted across the arenas of charitable activity. In the interim, awareness of these issues and of existing tools that help clarify the problems and offer initial solutions can be useful first steps.