DEDICATION

This thesis is lovingly dedicated to my family, whose support, inspiration, encouragement and patience allowed me to spend many long nights and weekends absorbed in Law and Policy.

In particular, I dedicate this to the memory of my parents, June and Martin Mosenson, lifelong educators and learners who taught me the value of education; to my children, Marcus, Matthew, Johanna and Arianna, who are the lights of my life; and especially my wife, Kathleen, whose love and support guide my life and give it value. You are the reason I get up every morning.
ACKNOWLEDGEMENTS

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Finally, I wish to thank all of the people that I interviewed, consulted, obtained documents from, and who otherwise acted as a sounding board, all of whom contributed to making this work better. All of the errors and omissions contained herein are mine.
ABSTRACT

States have taken several approaches to facilitate private sector investment in not-for-profit corporations providing social services. These approaches include (a) fostering the creation of socially conscious, for-profit business entities that can fulfill a social purpose or invest resources in joint ventures with not-for-profit corporations; (b) promoting private capital financing vehicles, such as social impact bonds, which incorporate incentives for enhanced return based upon the funded social program’s attainment of specified measurable goals, and (c) promoting public-private partnerships and joint ventures between private sector entity partners and not-for-profit corporations to provide capital for investment in the not-for-profit corporation’s infrastructure and administration. New models of investment vehicles by for-profit financiers and social-purpose corporate entities are identified, meeting criteria for long-term sustainability of not-for-profit corporation. These criteria include a long-term investment horizon required to maintain the investors’ focus on infrastructure and administration; effective financial incentives for private investors; and consideration for the interests of all stakeholders, including program beneficiaries. To implement these new models, states such as New York State should adopt reforms that (a) encourage social purpose, for-profit corporations to enter into joint ventures with not-for-profit corporations, (b) support and expand financing vehicles such as social impact bonds for private sector investment in a not-for-profit corporation’s infrastructure, administration and programs as well as enhanced funding based on identified success criteria; and (c) eliminate barriers for private sector joint ventures and public-private partnerships with not-for-profit corporations.
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<tr>
<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>AC</td>
<td>Access Construction, a hypothetical construction form organized as a benefit corporation</td>
</tr>
<tr>
<td>ACO</td>
<td>Accountable Care Organization</td>
</tr>
<tr>
<td>AOC</td>
<td>State of California Administrative Office of the Courts</td>
</tr>
<tr>
<td>CMS</td>
<td>United States Centers for Medicare and Medicaid Services</td>
</tr>
<tr>
<td>CEO</td>
<td>Center for Employment Opportunities</td>
</tr>
<tr>
<td>DASNY</td>
<td>Dormitory Authority of the State of New York</td>
</tr>
<tr>
<td>DD</td>
<td>Developmental disabilities</td>
</tr>
<tr>
<td>DHHS</td>
<td>United States Department of Health and Human Services</td>
</tr>
<tr>
<td>DISCO</td>
<td>Developmental Disabilities Individual Support and Care Coordination Corporation</td>
</tr>
<tr>
<td>DOH</td>
<td>New York State Department of Health</td>
</tr>
<tr>
<td>DOL</td>
<td>United States Department of Labor</td>
</tr>
<tr>
<td>ER</td>
<td>Hospital emergency room</td>
</tr>
<tr>
<td>FQHC</td>
<td>Federally Qualified Health Center</td>
</tr>
<tr>
<td>FPC</td>
<td>Flexible purpose corporation</td>
</tr>
<tr>
<td>GIIRS</td>
<td>Global Impact Investing Rating System</td>
</tr>
<tr>
<td>HEAL</td>
<td>The Health Care Efficiency and Affordability Law for New Yorkers</td>
</tr>
<tr>
<td>HIPAA</td>
<td>The Health Insurance Portability and Accountability Act of 1996</td>
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<tr>
<td>HMO</td>
<td>Health Maintenance Organization</td>
</tr>
<tr>
<td>HUD</td>
<td>The United States Department of Housing and Urban Development</td>
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<tr>
<td>IRB</td>
<td>Northeastern University Institutional Review Board</td>
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<tr>
<td>IDA</td>
<td>Industrial Development Agency</td>
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<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<td>--------------</td>
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<tr>
<td>IRS</td>
<td>United States Internal Revenue Service</td>
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<tr>
<td>IT</td>
<td>Information Technology</td>
</tr>
<tr>
<td>L3C</td>
<td>Low profit limited liability corporation</td>
</tr>
<tr>
<td>LAO</td>
<td>State of California Legislative Analyst’s Office</td>
</tr>
<tr>
<td>LLC</td>
<td>Limited liability company</td>
</tr>
<tr>
<td>M. of A.</td>
<td>Member of the New York State Assembly</td>
</tr>
<tr>
<td>MH</td>
<td>Mental hygiene</td>
</tr>
<tr>
<td>MRDC</td>
<td>Manpower Demonstration Research Corporation</td>
</tr>
<tr>
<td>NFP</td>
<td>Not-for-profit</td>
</tr>
<tr>
<td>NYSUT</td>
<td>New York State United Teachers Association</td>
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<tr>
<td>OPWDD</td>
<td>New York State Office for People With Developmental Disabilities</td>
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<tr>
<td>P3</td>
<td>Public-Private Partnership</td>
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<tr>
<td>PFS</td>
<td>Pay For Success Bond</td>
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<tr>
<td>PRI</td>
<td>Program related investment</td>
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<tr>
<td>RFS</td>
<td>Request for Services</td>
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<tr>
<td>RU</td>
<td>Rise Up, a hypothetical OPWDD-licensed not-for-profit corporation</td>
</tr>
<tr>
<td>SIB</td>
<td>Social Impact Bond</td>
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<tr>
<td>UBIT</td>
<td>Unrelated business income tax</td>
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NEW MODELS OF PRIVATE SECTOR
FINANCING OF NOT-FOR-PROFIT CORPORATIONS

CHAPTER 1

INTRODUCTION

This thesis reviews several approaches that states have taken to foster private sector investment in not-for-profit\(^1\) corporations providing social services\(^2\). From this review, this thesis designs new models that combine selected aspects of the approaches for private sector investment that would tend to ensure long-term sustainability of the not-for-profit corporation\(^3\).

State governments throughout the United States have begun to foster ways in which not-for-profit corporations operating social service programs can access private sector financing for their operations. States are engaging in these explorations for several reasons, among them the decline in available government funding, the difficulties facing struggling not-for-profit corporations to access government-supported tax exempt financing if they seek to take risks that government oversight agencies do not support, the unavailability of government support for new startup or innovative projects not specifically authorized by funding regulations, and the desire of not-for-profits and private financiers to realize gain from investments in social programs.

Three primary approaches to encouraging private sector financing have been identified. First, states have enacted statutes to foster the creation of new socially conscious, for-profit business entities that can perform a public purpose or invest resources in not-for-profit corporations in addition to their profit maximization purposes. In a second approach, states have promoted private capital financing vehicles such as social impact bonds, which incorporate incentives for enhanced repayment to investors based upon the funded not-for-profit corporation meeting or exceeding specified measurable goals\(^4\). The third approach commonly taken by states is the promotion of partnerships between private sector entities and not-for-profit corporations,
where the private sector entity either provides capital to construct and manage capital projects, or to finance program expansion, on behalf of the not-for-profit corporation.

While these three approaches are intended to infuse private capital in otherwise publicly funded programs, none comprehensively provide the means by which long-term sustainability of the not-for-profit corporation can be assured. Long-term sustainability of a not-for-profit corporation is dependent on adequate funding for maintenance and expansion of infrastructure, administration, and operations, in addition to service delivery and program components (Pallotta, 2013; Pallotta, 2010). Moreover, private sector financiers seeking to invest in not-for-profit corporations seek returns on their investment commensurate with the risk that they are taking, and the current vehicles in large part do not take the concerns and interests of private investors into account. Finally, the private sector financiers need to provide to the government adequate assurances of their commitment in order to provide comfort to government sufficient to ensure long-term sustainability of the social program. The commitment can take the form of consideration given by for-profit financiers to the interests of all stakeholders, including program participants, fostering accountability (Liao, 2013).

Private sector funding is necessary for many not-for-profits because government funds are no longer available to fully support the organizational components required to maintain a healthy and thriving not-for-profit corporation. Likewise, foundation and corporate philanthropic efforts are not adequate to fill the funding gaps either. Government cutbacks in program funding, refusal or inability of government to fund innovation, limits on administrative expenditures, and inadequate infrastructure support all contribute to organizational stress. Further, this stress, referred to as the “starvation cycle,” is exacerbated by the demands of philanthropy and the continued need to seek out donors, service their needs, report on progress, and otherwise spend
valuable organizational time and talent towards maintenance and renewal of charitable funding (Gregory and Howard, 2009).

This thesis will evaluate state statutes implementing the primary model for social purpose, for-profit corporate entities, the benefit corporation, against success criteria indicating long-term commitment and accountability. In addition, this thesis will also review social impact bonds and public-private partnership transactions, through publicly available source materials.

From the examination of these approaches to private sector financing, this thesis makes a series of recommendations for state-level initiatives. These recommendations include statutory amendments to enhance the ability of social purpose, for-profit entities to invest in joint ventures and public-private partnerships with not-for-profit corporations to invest in infrastructure and program operations. Additionally, this thesis recommends legislation to expand social impact bond programs to better enable private sector investment in infrastructure, administration and programs, as well as enhanced funding based on identified success criteria. Finally, this thesis recommends that government study the adoption of new policies that value investment and expenditures in administration and infrastructure as a means by which a not-for-profit corporation can maximize its revenues to expand and maintain program operations, and how for-profit investors can contribute and participate in those efforts as joint venture or public-private partnership participants. These recommendations will serve to enhance governmental support for public-private partnerships by creating incentives and eliminating barriers for private sector partnership with not-for-profit corporations. Finally, this thesis will also make recommendations to address barriers to full implementation of these recommendations.

While the business entities, financing vehicles and joint venture arrangements exist in many states, this thesis focuses specifically on New York State, and on not-for-profit
corporations that provide long-term care residential services for individuals with developmental disabilities. In New York, these services are provided by not-for-profit corporations under contract with the New York State Office for People With Developmental Disabilities (OPWDD), who issues a license to the provider of services and regulates the provision of those services pursuant to federal and state standards. The not-for-profit corporations holding these licenses are generally paid through New York’s Medicaid program, administered by the New York State Department of Health. Although discussed in the context of OPWDD-licensed providers of residential services, the findings and recommendations in this thesis can easily be applied to other social service delivery networks in New York State, as well as government-funded social service programs in other states.
CHAPTER 2
LITERATURE REVIEW

The literature reviewed generally divided into four discrete types. The first type of literature described the limitations of government funding and private sector philanthropy, both causing financial pressure on not-for-profit corporations operating social service programs. Government funding cutbacks, lack of financing for innovation, startup projects, administration and infrastructure, or programs not within the four corners of what was expected by governmental oversight and rate setting program staff cause not-for-profit corporations to divert necessary resources away from non-program expenses in order to survive.

The second set of literature described social consciousness in for-profit corporations in general, positing new economic models for social purposes as global philanthropy moves away from the charitable giving model towards an investment model (Martin, 2011; Waddock and McIntosh, 2011). This literature also described ways in which for-profit corporations voluntarily engaged in social activities, and described efforts by third parties to evaluate a business’ social activities and award it a certification that can be marketed by the recipient. Consumers, investors, employees and vendors are drawn to socially conscious companies, and voluntary efforts to demonstrate social responsibility have reaped benefits for these companies.

The third and largest category of literature reviewed was descriptions of approaches states have taken to foster private sector investment in social service programs, through socially conscious for-profit entities such as benefit corporations, investment vehicles such as social impact bonds, and joint ventures involving public-private partnerships. Because each state has specific and unique laws, the literature usually focused on a particular state, and discussed varying approaches taken by the state to promote private investment. These articles were
descriptive in nature, setting forth the basic characteristic of each statute creating the corporations. Because there is little implementation of these new entities, the articles provided scant discussion of whether these approaches have been successful. (MacCormac and Haney, 2012).

Finally, all of the literature pointed towards criteria that would enable private investment opportunities and approaches to support long-term sustainability of the not-for-profit corporation. Three criteria were identified that could be used as measures when evaluating each approach. These criteria, as implemented in each approach, can also be used to develop new models for private sector investment that would enable the not-for-profit corporation to survive and thrive in these challenging economic times.

A. The Limitations of Government Support

Government funding limitations require new approaches to financing social services. Not-for-profit corporations operating social service programs and funded by government are facing cutbacks nationwide (Boris, deLeon, Roeger and Nikolova, 2010a; Boris, deLeon, Roeger and Milena, 2010b; Boris, de Leon, Roeger and Milena, 2010c). Not-for-profits funded by the government typically receive fee-for-service or cost-reimbursement funding, with constraints and limitations on payment for expenses unrelated to the actual, hands-on program (Boris, et al., 2010a). One particular concern has been limitations on payment or reimbursement of organizational administrative expenses, with little or no funding to support operations, overhead, capital investment, other back office support functions, and management and administrative expenses, all of which are necessary yet underfunded (Boris, et al., 2010a; Boris, et al., 2010b; Pallotta, 2012).
1. **New York Not-for-Profit Funding Issues.** Government regulations limiting funding for non-program related expenses further compound the difficulties facing not-for-profit corporations operating social service programs. For example, Executive Order #38, issued by New York Governor Andrew M. Cuomo on January 18, 2012, required thirteen New York State agencies that license and regulate social service programs receiving Medicaid and other state and federal funds to promulgate regulations limiting use of government-paid funds for administration, and regulating executive compensation. Under these regulations, in calendar year 2015, New York not-for-profit corporations operating state-funded social services are prohibited from spending more than 15% of their current year expense budget on administrative expenses. These expenses include office technology and information technology (“IT”) systems, rent, debt service and furnishings, facility infrastructure repair and real property maintenance, and management and administrative expenses, which includes overall program administration. The result is that these items, necessary for sustainability of any well-functioning corporation, are unfunded or underfunded by government and go unaddressed (Pallotta, 2012; Pallotta 2010; Boris, et al., 2010b). Corporations could be subject to funding reductions or cancellation of contracts if they exceed the allowable proportion of administrative expenses (New York Executive Order # 38, January 18, 2012).

Additionally, the rates paid by government for program expenses are subject to other limitations such as cost and utilization controls. Typical government payment methodologies for social service programs include insufficient cost-based, treatment-based or diagnostic code-based reimbursements, payment delays or waiting periods, extensive reporting requirements subject to audit years after submission, multi-year rate freezes, failure to include payment for additional services required by changes in the needs of the recipients, and / or requirements for a
private contribution match (Boris, et al., 2010a). In New York, OPWDD provider residential rates have been set by OPWDD based on program costs, reconciled in an annual fiscal report. Effective August, 2013, however, Medicaid program rate setting authority has been transferred to the Department of Health (DOH) as the sole New York State Medicaid agency. Consolidating all rate setting and fiscal oversight of New York’s $54 billion Medicaid program may result in generalized rate approaches that are insufficiently tailored to program needs of OPWDD provider corporations.

In New York, providers of services licensed by OPWDD are also facing reductions in program payments for services through DOH and OPWDD’s “rate rationalization” process, whereby provider reimbursement rates are proposed to be adjusted to regional averages, with minimal accounting for individual variation of both staffing costs and acuity of individuals receiving care. The vast majority of OPWDD providers receive the bulk of their funding from OPWDD for their services. The effect of rate rationalization is intended to be “net zero” to state expenditures. A “net zero” approach necessarily requires that, for every dollar added to the budget of one provider, one dollar must be taken from the other providers. The eventuality of severe cutbacks in the rates for some providers facing “rate rationalization” will result in closure of programs and potential not-for-profit corporation dissolution because of their dependency on OPWDD funding.

Further, New York State efforts to control costs include the implementation of a Medicaid managed care model through the state’s Medicaid reform proposals. The model includes new eligibility assessment instruments that may limit utilization of services, and therefore cost reimbursement. Many providers of services fear that the individuals currently served will be determined to be ineligible for services, or the current level of services provided,
because of new assessment tools that may not be sensitive to the unique needs of individuals with Autism Spectrum Disorders or other developmental disabilities. Moreover, the advent of a flat state budget for OPWDD local assistance, from which payments to the not-for-profit corporations are made, is in place for the upcoming fiscal year (New York State Office For People With Developmental Disabilities, 2013b; New York State Office For People With Developmental Disabilities, 2013d; New York State Division of the Budget, 2013b). As a result of these funding reductions, not-for-profit corporations operating social service programs in New York State have taken steps towards continued survival, including reduction in personal service costs through reduction in salaries and benefits, layoffs, or furloughs of staff. Corporations have also made programmatic cuts, including, reduction in program hours and the array of services or program locations. Finally, corporations have had to borrow additional funds from credit lines and other financial institutions to meet rising program costs. These responses are typical of organizational responses to budget constraints nationwide (Boris, et al., 2010a).

B. The Limitations of Corporate and Foundation Philanthropy

Not-for-profit corporations generally reliant on government funding also seek charitable funding from socially conscious companies and foundations. Private individuals, corporations and foundations have long supported social welfare programs not only through their own activities, but also through charitable donations or through privatization of public project development efforts. Institutions such as Carnegie Libraries were and still are a fixture of the American landscape. The United States government long ago developed the Marshall Plan, using private sector companies to rebuild a war-ravaged Europe. In addition, joint private sector–public sector partnerships continue to be encouraged by government, and sought-after by companies, in areas as diverse as war materials, transportation projects, human service programs
and international development efforts (Likosky, 2006). These programs encourage private businesses to assume the responsibility to perform essential government services, and in many areas, these businesses work alongside government-operated programs (Castellani, 2005). Current programs are often referred to as public-private partnerships, or, in industry shorthand, P3 projects.

While most not-for-profit corporations seek charitable donations or foundation support to supplement insufficient government funding, they frequently cannot rely on philanthropy to substantially replace government funding shortfalls. Typical charitable and foundation funding of not-for-profit corporations has been described as fostering a “starvation cycle” for not-for-profit corporations (Gregory and Howard, 2009). Corporate and foundation charitable giving most frequently focuses on program-specific and time-limited funding, rather than needed support of infrastructure and overhead expenses (Pallotta, 2010). Philanthropic donors often maintain unrealistic expectations of the cost of overhead and operations, and primarily fund identifiable discrete programs rather than administration, infrastructure and long-term operations. This emphasis on program-specific funding results in not-for-profit corporations underfunding infrastructure, spending excessive time courting donors, and in some cases, reporting misleading data about their operations and overhead, in order to maintain attractiveness to donors and maximize the appearance of efficiency overhead (Pallotta, 2012; Mosley, 2012).

Pallotta (2010; 2012) documents an attitude towards not-for-profit corporations by government regulators and charity evaluators, such as the Better Business Bureau, that gives the highest ratings to charities that spend the least on administration and infrastructure “overhead.” (Better Business Bureau, 2013; New York State Office of the Attorney General, 2013a). The attitude on behalf of those who rate charities is that all donated funds should go to “program”
spending, ignoring the requirements to invest in supportable back office structures in order for the programs to thrive and grow. Pallotta (2010) documents how charities divert resources away from fundraising, development and compensation for qualified executives, all in service to the attitude that less “overhead” is better, and in doing so, fail to capitalize on these investments to raise additional funds.

Pallotta (2012) documents the positive impact on not-for-profit revenue that results from (a) market rate compensation for not-for-profit executives, which serve to attract qualified people from the private sector; (b) adequate advertising and marketing spending, which, in the private sector, are key to business development and growth in market share; (c) risk taking in pursuit of new donors, which, in the private sector, is called venture capital and is a highly valued strategy to maximize return, (d) taking a long-term horizon, which is a typical and ultimately lucrative strategy in the private sector; and (e) retention of earnings, or, in not-for-profit accounting terms, fund balance, which is unspent revenue necessary for the not-for-profit corporation to sustain itself for the long-term. In every one of these areas, not-for-profits are discouraged from doing the very things that successful for-profit businesses take for granted as necessary and profitable. For-profit businesses that invest in these supports are highly valued and rewarded. Not-for-profit corporations that invest in these supports are determined to be inefficient and wasting donated and taxpayer funds. The result is even greater strain to survive, given a challenging economy.

Other structural obstacles and funding limitations of corporate and foundation philanthropy include high transaction costs, little standardization and fostering of programmatic efficiencies, and the reliance on the goodwill and present priorities of socially conscious corporate directors currently in power in funding corporations (Martin, 2011). Finally, like government underfunding, corporate philanthropic and foundation funding also results in neglect
of organizational infrastructure maintenance and improvement, all necessary for long-term sustainability (Pallotta, 2012; Lecy and Searing, 2012; Martin, 2011; Waddock and McIntosh, 2011; Pallotta, 2010; Gregory and Howard, 2009). Any successful model for long-term not-for-profit sustainability, that may eventually supplement or replace government funding, must address financing for infrastructure and operations of the not-for-profit entity.

Foundation philanthropy typically involves a not-for-profit foundation whose purpose is to fund programs operated by other not-for-profit corporations. Such foundation support is voluntary and subject to reapplication and renewal by grant recipients, causing the grant recipient both additional work and uncertainty (Murray, 2013; Pallotta, 2012; Murray, 2012). Accordingly, foundation philanthropy alone cannot be a reliable source of assured continued funding necessary to support long-term sustainability.

C. Private Sector Investment in Social Programs

In addition to corporate and foundation philanthropy, the last 50 years has also witnessed the rise of socially responsible investing, in which for-profit companies seek to use their money in part for the public good. Socially responsible investing has proven to be good business. Employees and consumers are attracted by companies promoting their socially responsible business practices (Gellman and Feintzeig, 2013). Green America, an organization promoting socially responsible investing, documented at a conference in the Spring of 2013 that, over the last decade, the assets of socially responsible investment portfolios grew 32 percent, from $2.3 trillion to $3.07 trillion, while assets in investments overall grew just 27 percent (Dunne, 2013). Social investing by individuals and businesses has also become prominent, with funds and investment services targeting resources towards companies identified as acting in whole or in
part for the public good and preventing harm, in addition to achieving profit maximization (Clark and Vranka, 2013).

Recognizing the desire to market social responsibility, the need to report to the public a level of commitment to social programs, and the effectiveness of private investment into public programs, voluntary efforts have arisen in which private corporations are rated on their commitment to the public interest (Clark and Vranka, 2013; Martin, 2011). One such voluntary effort was created and is maintained by B Lab, a not-for-profit corporation that has established voluntary standards for for-profit companies committed to addressing social needs. B Lab sponsors a certification program whereby private for-profit companies agree to be subject to a review of their social purpose activities by a third-party evaluator, based on recognized and accepted standards. If the private company is found to have met the standards, it is awarded a certification by B Lab\(^\text{13}\). The certification can be added to the company’s website and other promotional materials, and serves as a socially conscious “seal of approval.” The company can market its compliance with the B Lab standards as a means of demonstrating the value and effectiveness of its public social program investment. The B Lab compliance certification also identifies publicly traded companies who seek to be identified as socially conscious, so that these companies can seek inclusion in social investment policies adopted by large institutional investors seeking a socially conscious portfolio, including public employee pension funds, mutual funds and other investment vehicles. Additionally, the certification allows raters of investments to identify these companies as socially conscious and appropriate for inclusion in social investment policies (Clark and Vranka, 2013; Reiser, 2012a). Another not-for-profit corporation, Global Impact Investing Rating System, or “GIIRS” has been developed to rate B Lab certified corporations as to their level of social commitment, and to publish those ratings in a
manner similar to the ratings given by corporations such as Standard & Poor’s or Morningstar. This effort further solidifies and demonstrates the increasingly widespread commitment by private companies to utilize some of their profit for social good, as well as the desire for investors to ensure that their investments are socially conscious (B Lab, 2013; GIIRS, 2013).

Despite these promising developments towards voluntary standards for corporate philanthropy, they remain voluntary and companies are free to choose when and how to support not-for-profit corporations in their public welfare efforts (Murray, 2013; Murray, 2012). Moreover, companies that seek to engage in social enterprises still must comply with long-established legal requirements for for-profit businesses, including adherence to fiduciary duties towards shareholders that, absent a statute to the contrary, require their boards of directors to focus their efforts and decision making exclusively on activities that serve to maximize profit.

Although the B Lab certification requires that boards of directors of B Lab certified corporations consider the interests of non-shareholders when making decisions, and demonstrate a social purpose in addition to profit maximization, many states continue to impose a duty on boards governing for-profit corporations to consider only how a business decision impacts profitability (Clark and Vranka, 2013; Reiser 2012a). Moreover, even in the states that permit boards of directors of for-profit corporations to consider the interests of non-financial stakeholders when making corporate decisions, many boards are reluctant to do so for fear of liability in shareholders lawsuits based on violations of their fiduciary duties (Clark and Vranka, 2013).¹⁴

Table 1 presents a summary of the state approaches to foster private sector investment in not-for-profit corporations operating social service programs, including their characteristics and advantages. Although these approaches are not mutually exclusive, in practice there are different reasons and advantages underlying the use of each one.
<table>
<thead>
<tr>
<th>State Approaches to Foster Private Sector Investment in Not-for-Profit Corporations</th>
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<td><strong>Statutes Authorizing Social Purpose, For-Profit Benefit Corporations</strong></td>
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<tr>
<td><strong>Characteristics</strong></td>
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<tr>
<td>State statute that authorizes the creation of a private sector corporation that includes a social purpose in addition to profit maximization.</td>
</tr>
<tr>
<td><strong>Advantages</strong></td>
</tr>
<tr>
<td>• Private sector entity can engage in a joint venture with, or invest in, not-for-profit corporation.</td>
</tr>
<tr>
<td>• Publishes a self-evaluation of social purpose activities.</td>
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<tr>
<td>• Directors must consider the interests of non-financial stakeholders.</td>
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<tr>
<td>• For profit businesses can engage in social purpose activities alongside of normal business activities.</td>
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<tr>
<td><strong>Social Impact Bonds, also known as Pay for Performance Bonds, Pay for Success Bonds</strong></td>
</tr>
<tr>
<td><strong>Characteristics</strong></td>
</tr>
<tr>
<td>Investment agreements between for-profit investors, government social service funding agencies, fiscal intermediaries and not-for-profit corporations operating funded programs.</td>
</tr>
<tr>
<td><strong>Advantages</strong></td>
</tr>
<tr>
<td>• Investor in social program is repaid by government, with a premium for achieving goals.</td>
</tr>
<tr>
<td>• Investment vehicle for socially conscious institutional and individual investors.</td>
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<tr>
<td>• Government shifts risk to private investors.</td>
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<tr>
<td>• Independent evaluation of program, public report.</td>
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<tr>
<td>• Not-for-profit obtains needed funding and management consulting to ensure goals are met.</td>
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<tr>
<td>• Government shares savings with private investors.</td>
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<table>
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<tr>
<th><strong>Public-Private Partnerships, including Construction and Joint Ventures</strong></th>
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</thead>
<tbody>
<tr>
<td><strong>Characteristics (Build and Operate)</strong></td>
</tr>
<tr>
<td>Private sector developer builds and operates a building for government or not-for-profit.</td>
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<tr>
<td><strong>Advantages</strong></td>
</tr>
<tr>
<td>• Construction and operation of facilities can be bundled, one monthly payment.</td>
</tr>
<tr>
<td>• Avoids new debt, costly procedures, requirements and delays inherent in public construction projects.</td>
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<tr>
<td>• Not-for-profit can focus its effort and funding on programs.</td>
</tr>
<tr>
<td><strong>Characteristics (Joint Venture)</strong></td>
</tr>
<tr>
<td>Private sector entity enters into a joint venture agreement with a not-for-profit corporation.</td>
</tr>
<tr>
<td><strong>Advantages</strong></td>
</tr>
<tr>
<td>• Private sector investment in not-for-profit programs, infrastructure, administration, support functions.</td>
</tr>
<tr>
<td>• Private investor can receive return based on shared government savings.</td>
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<tr>
<td><strong>Characteristics (Special Purpose Entities)</strong></td>
</tr>
<tr>
<td>Special purpose entities, including Affordable Housing programs and Accountable Care Organizations</td>
</tr>
<tr>
<td><strong>Advantages</strong></td>
</tr>
<tr>
<td>• Fulfill designated purposes; for assignable tax credits; shared government savings.</td>
</tr>
</tbody>
</table>
D. Socially Conscious For-Profit Corporations: Benefit Corporations

Numerous states in the United States have enacted statutes that allow for the creation of new for-profit corporate entities that permit social purposes, including equity investment in social service programs, as part of their corporate missions. The most common corporate entity model created by states to promote private investment in social programs is the benefit corporation, adopted as of June 30, 2013 by 19 states plus the District of Columbia. The benefit corporation includes one or more general social purposes in its corporate mission, as well as specific purposes at its discretion. Because the corporate mission of a benefit corporation includes a social purpose as well as profit maximization, constituency language is included in the statutory enabling acts, specifically allowing boards of directors of benefit corporations to consider the interests of non-financial stakeholders without running afoul of shareholder interests. The benefit corporation incorporates socially conscious corporate action and social investing in a for-profit context.

Modeled after the voluntary standards developed by B Lab, benefit corporations are for-profit corporations created pursuant to state statutes that allow them to include a social purpose in addition to the usual mission of profit maximization. B Lab has supported these state efforts and has developed the Benefit Corporation Model Legislation (“Model Legislation”) to guide states in structuring their benefit corporations in an effective way (B Lab, 2013). Rather than simply recognizing voluntary certification by a nongovernmental not-for-profit corporation such as B Lab, various states have enacted laws enabling the creation of this new type of corporate entity, largely based on the Model Legislation developed by B Lab.

The Model Legislation crafted by B Lab includes the requirement that corporations choosing to form as, or convert to, a benefit corporation state a corporate purpose to include a
material positive impact on society and the environment (Model Legislation, Section 201). Variations among states relate to the degree of specificity required for that social purpose. Some states require that the purpose be specified, others that the purpose only include the general statement of social and environmental good. The Model Legislation also requires boards of directors, in making decisions for the best interests of the company, to consider the interests of non-financial stakeholders such as employees, beneficiaries of the general or specific public benefit, the community, and the local and global environment (Model Legislation, Section 301).

The Model Legislation includes one of the hallmarks of the voluntary B Lab certification—that of independent, third party evaluation of the social purpose activities of the corporation, based on an accepted standard independently developed, in a report made to the shareholders (Model Legislation, Section 401). Designing success criteria against which to measure the corporation’s activities is complex and requires thoughtful analysis. Benefit corporations must publish an annual “benefit report” to the corporation’s shareholders, outlining the social purpose activities and the results of the third party evaluation. Some states also require benefit corporations to post the report on their website, and / or file it with the state authority overseeing corporations. Depending upon the particular state legislation, the responsibility to prepare the report falls either on the entire board, or on a director identified as the “benefit director.” The evaluation is made in accordance with a third party standard of corporate social responsibility in the particular social area in which the corporation is operating (Model Legislation, Section 401). Shareholders of benefit corporations may bring an enforcement proceeding against the benefit corporation if it is not pursuing its intended social purposes (American Bar Association, 2013).

Finally, the Model Legislation both enunciates the accountability standards for directors of benefit corporations and insulates them from liability from suits by non-financial stakeholders
Directors are protected from suits by shareholders for violating their fiduciary duties to act solely in the shareholders’ best interest regarding profit maximization. The Model Legislation specifically states that consideration of the interests of non-financial stakeholders would not be a violation of a director’s fiduciary duties. Indeed, those directors are protected from financial liability based on those decisions. Under the Model Legislation, the directors are not subject to enforcement proceedings by non-financial stakeholders to change or enforce decisions made that might affect them. In this regard, all 20 jurisdictions that have enacted benefit corporation laws based on the Model Legislation have included these protections (Clark and Vranka, 2013).

Benefit corporations have both advantages and disadvantages that affect their ability to make long-term investments towards sustainability of the not-for-profit corporation and be accountable to stakeholders. Johnson (2013) notes that although benefit corporation boards of directors are required to take into account the desires of social program beneficiaries in decision-making, the Model Legislation and state enabling laws do not impose fiduciary duties on the corporate directors enforceable by those stakeholders (Johnson, 2013; Reiser, 2012a; Reiser, 2012b). The benefit corporation statutes permit or contemplate equity investments in the social service program, thereby ensuring a long-term investment horizon and commitment to infrastructure. However, because the requirement to consider the interests of non-financial stakeholders is permissive, rather than mandatory, these corporations lack the permanency of commitment necessary to ensure accountability to the social program operated by the not-for-profit corporation. Additionally, because there are no financial incentives to ensure continued participation, these corporations, however good their intentions, cannot be relied upon to
promote efficiency and innovation in infrastructure and administration (Mac Cormac and Haney, 2012)\textsuperscript{15,16}.

E. Creative Financing Approaches: Social Impact Bonds

Various governments are also exploring creative financing approaches such as social impact bonds (SIBs) as a means by which private capital can be accessed for public uses. Private sector investors themselves also seek investment opportunities in public programs in order to demonstrate a social welfare commitment, to comply with certain financial requirements requiring a minimum level of community reinvestment, and to explore new means by which their investments can be effectively used to garner additional profit. Finally, private investors have worked with government to create public-private partnership transactions, whereby a private investor assumes the obligation to construct, finance or operate a social or infrastructure program, thereby allowing government or the not-for-profit corporation to focus its efforts on operations, as well as avoiding costly and time-consuming government construction requirements.

In a typical SIB financing, a third party brokerage house or investment bank acts as a fiscal intermediary and assembles a group of private sector investors to loan money to a not-for-profit corporation operating a social service program. A contract is entered into among the not-for-profit corporation, the government agency funding the not-for-profit corporation, the fiscal intermediary and the private investors. Included in the terms of the agreement are provisions establishing expected success outcomes based on measurable goals for the program, a limited timeframe within which the not-for-profit corporation must achieve those goals, and the choice of an independent evaluator who will measure the degree of success of the social service program using the specified criteria. If the not-for-profit corporation meets the agreed-upon goals
within the specified time frame, the government funder will repay the private investors with a premium, often a portion of the money saved by the government through efficiencies realized by the program operation. If the program goals are not met, the group of private investors may receive a partial repayment, or, under certain circumstances specified in the agreement, no repayment or return on their investment (Nonprofit Finance Fund, 2012; McKinsey & Company, 2012; Disley, Rubin, Scraggs, Burrowes and Culley, 2011).

This model benefits the socially conscious private investors with the prospect of an enhanced repayment on a defined time horizon. It benefits the not-for-profit corporation by supplementing or replacing government funding that may be limited due to budget cutbacks or other reasons. It benefits the government funder by creating efficiencies that result in program saving, and transfers the risk of program operation from government agencies to the private investors. In addition, there is also the potential of bringing private sector expertise to create and maintain program efficiencies so that the program goals are met. SIBs and other financing vehicles are not limited to short or long-term investment horizons and so can remain flexible to meet program needs. Finally, the model benefits government, which achieves a more efficient and productive service delivery (Nonprofit Finance Fund, 2012; McKinsey & Company, 2012; Disley, et al., 2011).

F. Creative Financing Approaches: Public-Private Partnerships

Public-private partnerships (P3s) are collaborative efforts between a private sector entity and most often, a governmental entity. In one model, the private sector entity takes on the task of construction or renovation of a public works capital project. A typical P3 transaction of this type involves a private sector construction contractor and financier, building and managing a public works project on behalf of a government. This collaborative arrangement benefits
government in that it can avoid required procedures and delays inherent in a public sector construction project. Private financing also allows the governmental entity to avoid issuing new debt, lowering construction costs. The private sector entity handles the planning, procurement, financing, design and construction of the capital project, and once completed, can operate the building so that the public sector entity can concentrate its efforts and limited resources on program operation (Vanden Berk, 2010). The cost of construction and operation is folded into a single monthly rental payment made by the governmental entity to the private developer once the project is completed. Transactions such as these have been used primarily in transportation and public housing projects in the United States, but are starting to be used in other areas such as construction of program facilities. They have been used in other countries in areas such as housing, education, and corrections, all generally referred to as “social infrastructure” (Gilroy, 2013).

Public-private partnership transactions need not be limited to government projects, however. In circumstances where a not-for-profit corporation is funded by government for a capital project, that not-for-profit may benefit from engaging the services of a for-profit entity to provide the necessary expertise and construction services, turning the project over to the not-for-profit as a turnkey project upon completion, or continuing to manage the project once completed for a fee passed through to government. In these cases, the not-for-profit corporation can maintain its focus on program operation, and avoid unnecessary construction requirements imposed by debt holders or government construction processes, while ensuring that the construction project is completed in an efficient and timely manner by the for-profit contractor.

Public-private partnerships have also been long used in the United States in the construction of public housing, with private developers permitted under federal and state tax
laws to benefit from tax credits. The Low Income Housing Tax Credit Program managed by the U.S. Department of Housing and Urban Development, is based on sections of the Internal Revenue Code that act as an indirect federal subsidy used to finance the development of affordable rental housing (U.S. Department of Housing and Urban Development, 2013). Although structured in accordance with federal and state tax laws that address construction of affordable housing projects exclusively, these transactions can serve as a model upon which to base public partnership vehicles for other types of construction of facilities used for social services. Through tax incentives incorporated into public-private partnership collaborations, private investors can reap financial benefits while financing necessary infrastructure for a not-for-profit corporation and enhance the capacity of the not-for-profit corporation to fulfill their social missions, all the while reducing the cost of those programs to government.

G. Developing a Model for Sustainability: Criteria for Long-Term Sustainability.

This subsection discusses the long-term financing needs of not-for-profit corporations, and suggests three criteria by which a for-profit investment vehicle could lead to long-term sustainability of the not-for-profit corporation. The first of these three criteria includes an investment vehicle that encourages the private sector financier to take a long-term investment horizon, ensuring that the investor has enough “skin in the game” to keep focus on the sustainability of the not-for-profit corporation. Key to that sustainability is investment, both in terms of money and interest, on infrastructure and administration, as well as program operations (Pallotta, 2012; Pallotta, 2010). Not-for-profit providers of social services need to adequately fund underfinanced items such as aging buildings, IT systems, back office functions such as human resources departments, supplies and maintenance, advertising, and other support systems. A private sector investor who takes the long horizon will see the benefit in ensuring
sustainability of these administrative functions, and may even recognize that it is in the investor’s best interest to provide consulting services to enable the not-for-profit to succeed. Moreover, the timing of the investment is critical. The not-for-profit corporation may seek private sector funds to initiate a project with startup capital, or replace or supplement government funds for an underfinanced project. Finally, long-term sustainability may also be assured by encouraging the for-profit entity to create a joint venture or other partnership to allow it to take an equity interest in the not-for-profit corporation’s program or one of its components.

The second criterion to support sustainability and encourage private investment is to provide a vehicle for repayment incentive, based on measurable criteria (Nonprofit Finance Fund, 2012; McKinsey and Company, 2012). Investors seek a favorable return on their investment, as compared to market rates for competing investments, while government and the not-for-profit corporation seek efficiencies in program operations and cost savings. Typically, the attractiveness of the social impact bond vehicles is the marriage of these needs, with enhanced repayment based on measurable success, shifting the risk of program success to the private investor. In exchange for accepting that risk, the government ensures a premium paid to the investor upon success. Shifting the risk to the private sector financier also encourages the financier to provide management consulting services to the not-for-profit corporation to lessen the risk and raise the likelihood that success criteria will be met. In all of these instances, program outcomes to the beneficiaries are more likely to be met by an efficiently run not-for-profit program operator.

The third criteria identified for success is a measure of accountability by the financier towards the not-for-profit corporation and its program beneficiaries. Both the government and the not-for-profit corporation will seek assurances that the for-profit financier will not simply
change its mind and go elsewhere, leaving all of the stakeholders behind. Liao (2013) has suggested that the social purpose for-profit business entities adopt enforceable fiduciary duties for the entity’s governing body, requiring boards of directors to consider the interests of all stakeholders in making business decisions. Allowing program beneficiaries or the not-for-profit corporation to enforce a fiduciary duty on the board of the for-profit entity will serve to maintain the level of commitment to the funded corporation and its beneficiaries (Liao, 2013). While none of the states that have adopted laws enabling the creation of benefit corporations impose any duties on the boards of directors enforceable by non-financial stakeholders, thirty-three states have adopted constituency laws that enable the board of directors of a for-profit corporation to consider the interests of non-financial stakeholders. Both the Model Legislation and benefit corporation statutes adopted by states around the country also require boards to consider their interests.

This thesis will review of the benefit corporation laws of each of the 19 states and District of Columbia that have adopted them, applying factors to each to ascertain whether and how the states have addressed the three criteria identified. Additionally, this thesis reviews certain social impact bond and public-private partnership transactions, again assessing them against the criteria specified. From this review, this thesis will develop new models of private sector investment in not-for-profit corporations operating social service programs to ensure long-term sustainability.
CHAPTER 3

RESEARCH METHODOLOGY

The primary approach of this study was document review of state statutes authorizing the creation of social purpose, for-profit business entities, descriptions of social impact bond financing vehicles, and reports of public-private partnership implementation reports.

A. Data Collection

Data collection focused on a survey of state statutes creating for-profit entities to promote private investment in social programs, as well as reports of social impact bond and public-private partnership transactions. The design of new approaches that encompass the goals of long-term investment can be gleaned from successful implementation of each of these state approaches. Unfortunately, there is little implementation, and so the model must remain theoretical until tried.

Every state statute, as of June 30, 2013, that authorized the creation of benefit corporations in that particular state was reviewed under several criteria. The criteria, as described herein, sought to determine if the statutory framework was sufficient to support a model for a private sector investment approach that would promote long-term infrastructure investment and accountability. The statutes were also compared to the Model Legislation creating benefit corporations developed by B Lab and used as the model for state legislatures.

In addition, this study included interviews of individuals knowledgeable about the financing needs of not-for-profit corporations, who were interviewed for their perspective. These included:

A. Four executive directors or finance directors of not-for-profit corporations providing OPWDD licensed services;
B. Three individuals currently or formerly in New York State government and involved in the oversight and funding of not-for-profit corporations providing OPWDD-licensed services, and

C. One individual who has had a career in both the private sector and the not-for-profit sector, and who presently consults with not-for-profit corporations on matters relating to financing.

Interviews were conducted both in person and on the telephone, with confidentiality assured. Interviews were transcribed. Interview questions for the not-for-profit corporation executives focused on the individual interviewees’ personal familiarity with government funding requirements, challenges in maintaining adequate funding for administrative expenses, and experience with private sector financing of their operations. Interview questions for government officials inquired about their knowledge of private sector financing vehicles for not-for-profit corporations and considerations as to how they can be successfully implemented with the OPWDD-licensed providers. The interviews with the private sector individual focused on the needs and reactions to potential investment opportunities. Finally, each group commented on the three criteria posed by this thesis, with a focus on how one would measure and evaluate success in long-term investment for infrastructure and administration improvements.

B. Benefit Corporation Statutes

The bulk of the research involved review of the statutes of every state that authorized the creation of benefit corporations. For each state statute enabling the creation of benefit corporations, measures were developed that assessed the criteria by evaluating the three factors as discussed in the literature review section. Throughout, the project goal remained the integration of aspects of each approach to develop a model for long-term support, including
administrative expenses and infrastructure. Several factors were gleaned from the literature and are discussed below.

1. **Flexibility in mission.** Flexibility is measured by the level of detail as to the social purpose required to be included in the corporate charters, and the ability or inability of the corporation to invest funds with a long-term horizon and take a joint venture ownership interest in infrastructure of programs. The intent was to determine if the corporate entity could invest in other corporations, or simply provide a social benefit on its own. Greater flexibility in mission would tend to support the ability of the corporation to invest, or take a joint venture ownership interest, in not-for-profit corporations.

   The particular data collected from each statute included whether the statute required a specific recitation of corporate social purpose, or whether a general statement was sufficient. It is my belief that the more specificity that is required in the corporate powers, the more likely that the corporation will remain committed to that mission and the method by which it fulfills that mission. Data was also collected on whether there was a long or short term horizon prescribed in the statute for achievement of corporate purpose, and whether there was a prohibition on investment of corporate assets towards achievement of the social purpose.

2. **Commitment to mission.** Commitment is measured by the degree to which the corporation must adhere to the stated social purpose, and the method (in statute or allowed in the corporate charter) for changing that social purpose. These measures assessed how the corporation was required to make decisions related to the social purpose, who could make those decisions, and how easy it was for the corporation to change its social purposes once engaged.

   Data was collected from each statute as to how the corporation was authorized to change the corporate social purpose, terminate the benefit corporation status or terminate a particular
activity performed to achieve the social purpose. The statutes were also examined to determine if outside entities, such as government authorities, or individuals other than shareholders played a role in oversight of corporate changes.

3. **Accountability to mission.** Accountability is measured through establishment of fiduciary duties to stakeholders, or the requirement that the interests of program participants be considered in decision making, either required by statute or allowed in corporate charter. These measures took into account whether the corporation had to address the needs of non-financial stakeholders, which would tend to ensure a greater degree of long-term commitment to beneficiaries and government. This criterion also included whether the corporation was required to designate a particular “benefit director” with the responsibility to conduct an evaluation of the corporation’s social purpose activities, and whether or not the report was required to be made public and / or filed with a governmental oversight authority.

Data was collected on fiduciary duties to non-financial stakeholders, and whether those duties were enforceable. A companion inquiry in each state’s business corporation laws investigated whether there was a constituency statute effective that applied to the social purpose for-profit corporation. Data was also collected with relation to the procedures by which the annual benefit report was conducted and distributed.

C. **Social Impact Bonds**

Three social impact bond programs were assessed, including one in the United Kingdom financing a prison recidivism program, and two others proposed in New York, including one in New York City proposed for a prison recidivism program, and another in New York State for a job assistance program for former prisoners. Because financing tools such as social impact bonds are so new, there is little evaluation done on completed projects, and so these proposals were
evaluated based on criteria for how well the program, as proposed, would be capable of financing not-for-profit corporations providing OPWDD-licensed services. These measures relate to the structure of the transaction, the identity of the parties and the nature of efficiency measures to support enhanced repayment.

Criteria used to evaluate the social impact bond programs were similar to those used to evaluate benefit corporations, and included a long-term investment horizon, enhanced repayment for success, and accountability measures. The data collected and reviewed included whether or not the bond program included enhanced repayment to the private investors based on measurable results indicating success, and the process by which success was determined and measured. The reports of the bond programs were also reviewed to determine if data was available as to the source of enhanced repayment, and whether or not government savings could be identified and specified for repayment. In all three bond programs reviewed, the success criteria were quantitative in nature; and part of the discussions with the interviewees focused on how success could be both qualitatively and quantitatively measured for infrastructure and administration investment.

D. Public-Private Partnerships

Finally, public-private partnership transactions were reviewed to the extent that materials were available. Two different types of transactions were reviewed. The first type involved a private entity engaged in a construction project for a governmental agency. The second type involved a partnership between a private sector entity and a not-for-profit corporation to achieve a particular purpose. In the particular context of OPWDD-licensed programs, models for public-private alliances in developing managed care programs were explored through concept, with conclusions based on criteria as to potential for expansion to other areas of needed financing.
The criteria for reviewing public-private partnership vehicles included whether or not the model could be adapted to be used in the OPWDD licensed provider system, recognizing how OPWDD programs are funded and that not-for-profit corporations cannot be “owned” by a private entity because of both state and federal tax laws (New York State Office of the Attorney General, 2013; Weill Gotshal and Manges, 2012). The transactions were therefore reviewed as to their applicability in joint venture arrangements with the not-for-profit corporations.
CHAPTER 4

FINDINGS

The design of each investment approach contains certain elements previously discussed that could allow that approach to become an effective tool to foster private sector investment in social service programs, leading to long-term sustainability of the not-for-profit corporation. These criteria serve as a guide to creating new models. By reviewing both the positive aspects that encourage private investment, as well as the shortcomings that impede long-term investment, new models can be developed that allow for long-term investment in not-for-profit program operations and infrastructure that both supplement or replace government funding and ensure long-term sustainability.

A. Interviewee Comments on the Model Criteria

The interviewees were asked to comment on the suggested criteria identified through the literature, and all agreed that the criteria were appropriate for evaluation of the funding approaches. One additional criterion was suggested by a current / former government official, who said that any approach would have to save the state money in order to be of any value. Interviewee #5, a current / former New York State government official, plainly stated:

It has been my experience that the legislature and the executive really don’t have a lot of interest in paying for this area if they don’t have to. I have seen a shift repeatedly year after year to not use general tax dollars and substitute it with other money to pay for DD and MH areas. The politicians do not enthusiastically want to support this, but they do it because they are the benefactors of last resort. If they didn’t have to spend, they won’t want to do it.
He concluded his interview:

This is all outgo, there is nothing coming in. With a bridge or road, you can put a toll both in, in this field; it is all outgo, nothing coming back into the state. It can only reduce expenditures. With the mental hygiene field, there is nothing coming back to the state, so anything you can do to save the state money will be favored.

(Interviewee 5 at Appendix D, page D-14.

In a similar vein, the private sector interviewee suggested that the approach must provide a good rate of financial return for the private investor. Otherwise, the interviewees all supported measuring the approaches against the criteria as a means by which to evaluate their effectiveness and serve as a basis for new models.

1. **Demonstrable Long-term Commitment.** Interviewees and the literature both articulated the need for long-term financing and organizational commitment that can be relied upon that would allow for maintenance and planned growth in administration and infrastructure in addition to program operations. Pallotta (2012) discusses at length the necessity for strong and well-financed administration elements for a sustainable not-for-profit corporation. Additionally, the not-for-profit executives and governmental official interviewees agreed that it is critical to ensure long-term sustainability to preserve and improve infrastructure, including buildings, IT systems, and other capital assets, as well as administrative functions such as support, finance, human resources, security and facility maintenance. Interviewees agreed that a long-term investment into a not-for-profit corporation, through financing of assets or through a joint venture or public-private partnership, if permitted by governing laws, would lead an investor
towards support and interest in improving the effectiveness and efficiency of the not-for-profit corporation.

However, several issues, including control issues, have been identified and would need resolution before success can be achieved. One factor, therefore, to consider in designing a new model is the degree to which a private sector investor is capable of, and willing to, invest with a long-term horizon, and take steps in addition to funding to ensure sustainability. Those steps may include consulting on management and program efficiency. The availability of a commitment through an equity investment in a joint venture is a factor towards meeting these criteria. Any commitment by the private sector investor would be limited to the extent that it might threaten the tax exempt status of the not-for-profit corporation, and so transactions would have to be designed and implemented by thoughtful and knowledgeable professionals to ensure that the tax exemption of the not-for-profit corporation is sustained.

2. **Performance-based financial incentives.** The new models can also provide performance-based financial incentives to the investors that promote organizational efficiencies, providing enhanced quality improvement for more people at less cost per service. The design of benefit corporation, social impact bonds and public-private partnerships can all incorporate identification of success criteria, both qualitative and quantitative, that allow government savings to be shared by the private sector investor. The transfer of risk from the government to the private sector should come with an added reward for assumption of that risk. Moreover, taking on the risk of success will give an incentive to the private sector financier to provide necessary consulting services, including management, infrastructure and programmatic assistance, to the not-for-profit to assist in meeting success criteria.
Both government officials and not-for-profit corporation executives interviewed spoke of the difficulty in designing success criteria in social programs that do not have numerical or quantitative outcomes. Although they frequently track data, long-term care and health programs, often do not measure their success in quantifiable terms. Numbers of people serviced, numbers of adverse occurrences or hospitalizations avoided, numbers of repeat or recurring conditions avoided, measurements of the time required to take an action or make a decision, are all matters that can be observed, but may not adequately describe “success” of the social program. Similarly, the success criteria must capture financial impacts to the government, such as financial savings on the part of the government payer, to be considered as a source of financial incentive that can be shared by the government with the private investor. Finally, the private investor may have different criteria in defining what success is, and how to measure it. That investor may not have any background in the program delivery models of the not-for-profit corporation, and may need to learn the metrics used in the social service area before accepting success criteria upon which repayment is based.

All parties interviewed agreed that design of success criteria was critical in achieving a measure of success that can lead to a performance-based incentive payment. Moreover, all parties have to come to a common understanding of success, which might mean something different to the private sector entity than it does to the not-for-profit corporation service provider.

3. Accountability measures. Finally, the new models can provide effective accountability by the governing bodies of program operators to all of the program stakeholders, ensuring a corporation that is responsive and mission-driven. Benefit corporation statutes require the for-profit benefit corporation boards of directors to take into account the interests of non-financial stakeholders in making decisions, adopting the philosophy underlying the “constituency
statutes” passed in many states, including New York. To the extent that the boards of directors are required to take those individuals and entities into account, they are more likely able to demonstrate accountability to the social program funded, which could lead to an increased comfort level by government. Similarly, the not-for-profit corporation can be more readily relied upon to supplement government funding. While Liao (2013) suggested the imposition of fiduciary duties on boards of directors of for-profit investors as a means to ensure accountability, by and large the corporate world has not embraced these duties benefitting non-financial stakeholders. The not-for-profit executive interviewees’ primary concern appeared to be control of their programs, as well as the level of commitment by the private investor to their program, and so would seek accountability by contract, if not available by statute.

Table 2 summarizes the different variations that each state has made from the Model Benefit Corporation Legislation, and how they relate to the criteria for success that would led to long-term sustainability. Each state addresses the criteria of flexibility to mission, financial incentive for success and accountability to the public and to those served by the public purpose activities of the benefit corporation. The table includes a list of several states that have varied their statutes from the Model Legislation to either specify particular purposes, or add additional purposes, to those that can or must be adopted by benefit corporations. A more complete review of each state’s benefit corporation laws is contained in a chart detailing each state’s unique statutes and is attached as Appendix B to this thesis.
### Table 2: State Benefit Corporation Statutes: How Do They Address Criteria For Success?

<table>
<thead>
<tr>
<th>Flexible Purpose to permit long-term investment for sustainability</th>
<th>Incentive for investment, with shared savings based on measurable outcomes</th>
<th>Accountability to all stakeholders, both financial and non-financial</th>
</tr>
</thead>
</table>
| Model Legislation: Charter lists a “general public benefit”: “a material positive impact on society and the environment, taken as a whole, assessed against a third party standard, from the business and operations of the benefit corporation.” |  - No state provides details as to how benefit corporations will fulfill their general or specific public benefit purposes.  
  - No state provides statutory incentives or benefits for a corporation to become a benefit corporation.  
  - All states that follow the Model Legislation indicate as one of the specific public benefits: “Increasing the flow of capital to entities with a purpose to benefit society or the environment.”  
  - In every state, only corporations can become benefit corporations. They cannot be limited liability companies (LLCs), partnerships, not-for-profit corporations, sole proprietorships or other business entities.  |  - Model Legislation requires that boards of directors of benefit corporations consider the interests of:  
   - Employees.  
   - Customers.  
   - Community and society.  
   - Environment.  
   - Interests of the benefit corporation.  
   - Ability to accomplish the public purpose.  |
| Model Language permits listing of specific public benefits, including: “Increasing the flow of capital to entities with a purpose to benefit society or the environment.” |  |  |
|  - Most states follow the Model Legislation. No state requires listing of how the specific public benefit will be achieved.  
  - Notable changes to listing of specific purposes:  
    - Hawaii: Adds job creation and workers’ rights.  
    - Virginia: Adds services to families; historic and environmental preservation.  
    - South Carolina: Allows any business corporation to have a social purpose.  
    - Delaware: Provides a detailed list of specific public benefits  
  - No state prohibits investment as a means by which the social purpose is fulfilled.  
  - BUT: No state provides any particular tax or regulatory benefit to companies choosing to incorporate as, or convert to, benefit corporations. |  |  |
|  |  |  |  |
| Accountability to the Public |  |  |
|  - The Model Legislation requires preparation of an annual benefit report detailing the public purpose activities of the benefit corporation. Most states require publication of the annual benefit report.  
  - About half of the nineteen states that have authorized benefit corporations require appointment of a benefit director to prepare the benefit report.  |  |  |
|  |  |  |  |
|  |  |  |  |
B. Review of Benefit Corporation Statutes by State

The statutes of all nineteen states that have adopted benefit corporation legislation, as well as the relevant statutes of the District of Columbia, were reviewed and evaluated against the established criteria. In 2010, Maryland became the first state to adopt the benefit corporation concept as a separate state-created legal entity, following the Model Legislation. Numerous other states followed, and the benefit corporation model has now been adopted by nineteen states, plus the District of Columbia, with legislation pending as of this writing in an additional fourteen states\(^\text{22}\) (American Bar Association Corporate Laws Committee, 2013; Lowenstein, 2013; Reiser, 2012b; Reiser, 2012c; Clark and Babson, 2011). However, each is subject to unique state laws (Reiser, 2012b).

There are numerous variations in benefit corporation legislation unique to each state enabling law as enacted, but they generally follow the Model Legislation in implementation. A chart listing each state’s benefit corporation legislation and noting applicability of the criteria appears in Appendix B. In general, the states that have enacted legislation authorizing benefit corporations have modeled their statutes after the Model Legislation in several ways. For example, the statement of the specific public benefit is stated as “any general public benefit” which is further defined as “a material positive impact on society and the environment, taken as a whole, assessed against a third party standard, from the business and operations of the benefit corporation.” Few states require any specificity in the corporation’s charter as to the specific social purposes, and some have expanded the list of social purposes beyond those contained in the Model Legislation.

Accountability measures also follow the Model Legislation. The states have generally required a supermajority vote for the benefit corporation to terminate its status as a benefit
corporation, or substantially change its corporate purposes. None require approval by any governmental entity, although the nature of the corporation’s social purpose activities may require a certain degree of governmental approval of the program change. All states also require evaluation of the corporation’s social purpose activities by an outside third party, but differ in ways in which that evaluation is completed. Some states require appointment of an identified “benefit director”, and others do not; some states require that the evaluation be based on a certain set of standards, while others are unspecified (Brewer, 2013).

Statutes of the twenty states and district that have enacted benefit corporation legislation were reviewed to determine how those state legislatures addressed the criteria described in this thesis. Several did not follow the Model Legislation in important ways that impact how benefit corporations in those states address their responsibilities and fulfill their social purposes. A review of these statutes can influence how the models developed in this thesis can address those concerns.

For example, Arkansas and California expand the rights of shareholders to require the corporation to account for its social purpose activities, and allow for a shareholder to sue the board of directors for failure to prepare the annual benefit report, in addition to failure to pursue the public benefit. The importance of the annual benefit report is emphasized because it not only provides information to the public, but also assures the shareholders, in both publicly traded and private corporations, and other important stakeholders that the corporation is pursuing its intended social goals. Permitting the shareholders to enforce the obligation on the corporation emphasizes the importance of this document.

Numerous states vary from the Model Legislation with regard to the standard by which the third party evaluator must measure the corporation’s social purpose activities. The Model
Legislation requires that the standard be recognized as authoritative. California, Illinois, Maryland and Massachusetts permit the third party standard against which the corporation’s activities are to be measured in the annual benefit report to be developed by the independent third party, but not necessarily in accordance with a recognized publicly accepted standard. The independent entity can be identified by the corporation, and although not controlled by the corporation, can effectively create its own standard. This allows for a friendly but independent group to develop looser standards that ensure compliance by the benefit corporation, which can essentially gut the import of the report.

Several states expand the scope of public benefits contemplated by the state legislature in enacting the enabling legislation. Hawaii, for example, includes job creation and workers’ rights as acceptable public benefits. South Carolina and Virginia specifically include services to families, as well as restoration and preservation of the environment as benefits that can be pursued by benefit corporations in those states.

The Model Legislation, and many of the states, only requires the identification of a “benefit director” in publicly traded corporations. That individual has the responsibility of complying with the annual report and evaluation requirements. Hawaii, Illinois, Louisiana, and Massachusetts require all benefit corporations to have an identified benefit directors, and not just for publicly traded corporations. The existence of a designated individual, who is vested with the responsibility to evaluate the social purpose activities and to report them to the public, or at least to the shareholders, furthers accountability of the corporation.

One of the core sections of the Model Legislation is the requirement that benefit corporations state their social purposes in their corporate charters, either in general or specific terms. Louisiana, however, does not require a statement of general public benefit for the
corporation’s charter stating corporate purposes; rather, there is a specified list of public purposes included in the statutory language that governs each benefit corporation. Delaware has an extensive list of specific authorized public benefits in its legislation.

Finally, while virtually all states allow their for-profit business corporations to engage in any lawful purposes, the South Carolina legislation specifically authorizes other for-profit corporations to adopt social purposes without becoming benefit corporations, thereby freeing them from the requirements imposed on the benefit corporations and the profit maximization requirements imposed on most business corporations. Those business corporations, however, cannot rely on statutory language specifically authorizing their boards of directors to consider the interests of non-financial stakeholders, and so must rely on the more general constituency statute that exists in that state.

None of the statutes reviewed from the several states specifically addressed how the benefit corporations could achieve their social purposes. While many have engaged in philanthropic activities or smaller social programs on their own, there is no statute reviewed that prohibits the benefit corporation from engaging in a joint venture or public-private partnership with a not-for-profit corporation operating a social service program, and, in fact, such an investment could serve both social purposes as well as profit motives for the corporation.

Interviews with not-for-profit executives and present and former governmental officials revealed that none had ever considered whether the benefit corporation model could successfully be used in the OPWDD-licensed provider community (some were unaware of what benefit corporations could do). Those discussions focused instead on issues of control brought on by the nature of a private sector company having a joint venture interest in the not-for-profit corporation and its programs, and the reluctance of OPWDD to recognize for-profit providers of services in
their service delivery system. Some had not considered equity investment or joint ventures, and viewed private sector financing as simply a source of mortgage and secured transactions for equipment and other infrastructure. Some of the governmental officials demonstrated resistance to bringing a “profit motive” into the service system, identifying an inherent conflict of interest perceived between good health care and a profit motive. Another executive concluded the interview by saying that “This is the only way that the nonprofits can continue in the future. We no longer have partners in the government. People start fighting over the minimal dollars that are left,” the current / former government interviewees, as well as other executives, would agree with their colleague who concluded that “the OPWDD licensed service providers have never thought outside of the box, and up to now have lived comfortably within that box.”

C. Review of Social Impact Bonds

Social impact bonds (SIBs) are a new tool for bringing private sector financing to a not-for-profit social services program. The SIB structures the private investment in a pay for performance context, whereby the private investor receives an enhanced return based on the not-for-profit meeting measurable goals over a predetermined time period. An intermediary raises capital from investors, engages an independent evaluator to determine the criteria for success and method of measurement, and contracts with government and the not-for-profit corporation. If the goals of the program are met, the investors are paid back with an enhancement that represents a sharing of the savings from government (McKinsey and Company, 2012).

1. New York City SIB. In 2012, the nation’s first SIB program was announced in New York City. Under this program, entitled the Adolescent Behavioral Learning Experience, private investors, assembled by the investment firm of Goldman Sachs, agreed to fund a not-for-profit corporation to provide adolescent ex-offenders with personal responsibility education,
training and counseling, with the goal of reducing their level of re-incarceration. In this model, the New York City government will repay the investment only if agreed-upon targeted goals of reduction in recidivism are met, and therefore, the private investors’ return is dependent on program success.

Goldman Sachs, acting on behalf of private investors, will fund the program for four years, as a loan to MRDC, Inc., an intermediary not-for-profit research corporation. The MRDC corporation will then provide funds to the not-for-profit corporations engaged in the adolescent recidivism program. Bloomberg Philanthropies, a charitable foundation, will provide funds over time in the form of loan guarantees to MRDC to assist in the implementation of the program and allow it to pay Goldman Sachs back if the program is successful. An independent evaluator, the Vera Institute of Justice, will determine the program’s effectiveness over its four-year term. If the program meets its goal of a reduction in re-incarceration of 10%, Goldman Sachs will be paid back by MRDC, with funds provide by Bloomberg Philanthropies based upon the same success criteria. The payments will be made from funds saved by the government as a result of the reduction in recidivism. If success is not achieved, the private investors will not be paid back.

This program allows private sector investors to invest for a social purpose, with the promise of an enhanced return if the program is successful. Government benefits by shifting the risk of success or failure to the not-for-profit corporation and its financiers, who share in the savings if success criteria are met. Although based on a program delivery model with clearly enunciated success criteria, a bond such as this could be structured for infrastructure and administration financing of a not-for-profit licensed by OPWDD. Success criteria for OPWDD projects could be developed that measure both qualitative and quantitative factors, including
measures such as reduction in hospitalizations and infections, higher consumer satisfaction survey results and reduction in OPWDD survey findings, reduction in reportable adverse incidents, and other measures of quality in a long-term residential care context.

2. United Kingdom SIB. The New York City SIB program is modeled after the first such program, in the United Kingdom (U.K.). Social Finance, Ltd., an investment and social research firm in the U.K., created and implemented the world’s first SIB to fund a recidivism program at a regional British prison, the Peterborough Prison. The term of the bond is still active, and so final results are not yet available. However, preliminary evaluations demonstrate the efficacy of this approach to private investment in social programs and serve to inform the field so that it can be replicated. Disley, et al. (2011) of the RAND Corporation developed an evaluation methodology to be used as a template for evaluation of this transaction and can be used to review future SIB transactions. In their assessment, Disley, et al. identified several strengths of the SIB model used in the U.K. program. Among those strengths was the existence of negotiated outcome measures agreed to in advance by all parties involved in the transaction. Coupled with the outcome-based approach was a fixed time frame that allowed investors to gain repayment in a short horizon, and the incentive to the not-for-profit corporation to meet the goals by making efficiency improvements.

Disley, et al. (2011) also identified some drawbacks to the model that must be considered in future SIB transactions and other forms of private investment into social service programs. First, investment bankers, expert in project financing who acted as fiscal intermediaries, were unsophisticated in the program and policy areas involved. They were not experts in preventing prison recidivism. The result was delay and difficulty in creating the specific measurable outcomes upon which enhanced repayment was based. The authors recommended that the
intermediaries have complete working knowledge of program and policy areas at the outset, and that parties seeking to replicate this approach develop template standardized definitions, measures, outcomes, and contracts. Finally, although the repayment time horizon was short, the authors noted that some investors sought even shorter time frames to limit their financial exposure. To address these concerns, the authors recommended a variety of short and medium term investment opportunities.

Social Finance, Ltd. commissioned its own evaluation of the recidivism project financing (Helbitz, Powell, Bolton, Ashman and Henderson, 2011). Although describing success in achieving the agreed-upon outcomes, Helbitz, et al. admittedly did not establish a causal relationship between the decline in recidivism or management improvements in the Peterborough Prison and the private financing, drawing into question the entire program and its purported effectiveness. Future SIB transactions will need to be examined to determine if the model fosters productivity improvements that can be transferred and duplicated. (Nonprofit Finance Fund, 2012; Callanan and Mendonca, 2012; McKinsey and Co, 2012).

Social Finance, Ltd also sought to encourage interest in SIB programs in other areas such as health care. Corrigan (2011) advocated for SIB projects in the health care arena, especially in discrete health care projects with quantifiably measurable outcomes, such as diabetes and asthma prevention and treatment programs. Writing within the context of programs operated and funded by Britain’s National Health Service, Corrigan (2011) provided four prerequisites for a successful application of the SIB model to health care, including clearly defined and measurable outcomes, enhanced payments to investors if outcomes are met or exceeded, program structure that permitted the National Health Service to realize financially measurable outcome improvements, and a schedule of repayments based upon the degree of program improvement.
Literature describing and evaluating the British prison SIB provide guidance towards the design of new models for successful private investment. The self-evaluation of the British prison SIB by Social Finance, Ltd. critically examined the process by which the investment was negotiated and implemented, based on interviews with many of the individuals who played an active part (Helbitz, Powell, Bolton, Ashman and Henderson, 2011). After one year, Helbitz et al. (2011) commented on difficulties in design and structure, expectations and measures, all of which point to reforms that can enhance the likelihood of success of future SIBs. In the design of new models that encompass the best and most successful aspects of the SIB approach, the literature is beneficial (Helbitz, 2011).

3. New York State SIBs. New York State is also planning a series of SIB financings, entitled the Pay for Success Program. The New York State SIB will allocate $100 million over a five-year period for programs in health, education, juvenile justice and public safety, all to be funded by SIBs. In August, 2013, the Cuomo Administration issued revised requests for proposals for the first round of SIB transactions, allocating $30 million over a five year period for these initial projects. Successful applicants would submit fully realized proposals by September 30, 2013, including identification of private sector partners, fiscal intermediaries, not-for-profit corporations and evaluation protocols. New York State was expected to announce the first recipients of SIB funding in November, 2013 (New York State Division of the Budget, 2013a).

New York State was also the recipient of a $12 million federal grant from the U.S. Department of Labor to fund an SIB project to aid formerly incarcerated individuals to obtain employment. The $12 million grant to New York State was the largest award made by the federal government under a national competition for state-level SIB projects. In this project, New
York State is partnering with the Center for Employment Opportunities (CEO) to increase employment and reduce recidivism among New Yorkers recently released from prison. CEO is a not-for-profit corporation that operates innovative job creation and job placement programs. Individuals released from prison in New York City and Rochester will be served in this SIB project. The United States branch of Social Finance, Ltd. will be the fiscal intermediary, assembling a group of private investors for the program (New York State Office of the Governor, 2013).

In this model, the grant to New York State from the U.S. Department of Labor for the program will be evaluated based upon agreed upon outcomes that will be measured by an independent evaluator. Payment will be made only if minimum performance thresholds related to recidivism and employment are achieved. Above the minimum thresholds, payments will rise with better performance program (New York State Office of the Governor, 2013).

Interviews with present and former New York State officials knowledgeable about the existing and new New York State SIB programs relating to social services and employment and job creation were conducted, and documents related to New York SIBs were reviewed. The interviewees reported that the greatest challenge in designing the federally supported SIB program for employment services for ex-offenders was in defining success criteria and their parameters that would be required to support success. New York State also experienced reluctance on the part of the private investors to assume the risk that they might not be repaid should the program not meet benchmarks.

In discussing potential success criteria for OPWDD licensed programs and long-term supports, infrastructure and administration, they could not articulate measurable criteria without
first examining how the programs operated and were funded. Similarly, the not-for-profit executives interviewed could only define in broad terms how the success of a new infrastructure improvement could be measured to support payment enhancements for success.

As with the evaluation of the Peterborough Prison SIB performed by Disley, et al (2011), the private sector intermediaries and financiers, while expert in their field of finance, need to have the basic understanding of the programs financed and how they are evaluated before agreeing to success criteria upon which repayment is based. Differing priorities for the private sector financier and the not-for-profit corporation also need to be addressed in designing criteria for success. However, these drawbacks can be overcome by thoughtful analysis, and the benefits presented by SIB transactions, including independent review, financial incentives and a level of accountability inherent is transfer of risk to the private sector investors may serve as a model for new private sector financing initiatives.

D. Review of Public-Private Partnerships

This thesis reviewed two types of public-private partnership (P3) collaborative efforts. The first involved a private sector contractor building a courthouse for the judicial branch of a state government, resulting in a faster construction time without the delays inherent in government construction projects, and without the need for the state judicial branch to incur additional public debt. The second involved joint ventures between a private sector company and a coalition of not-for-profit corporations relating to establishment of a managed health care entity.

1. **Long Beach, California Courthouse.** One of the most prominent P3 transactions in recent years has been the construction of a new California state courthouse in Long Beach, California, providing 31 courtrooms for criminal, civil, traffic, and family court judicial
proceedings of the Superior Court of Los Angeles County. Court statistics demonstrated that over 100,000 people entered the courthouse in an average month. The 500,000 square foot facility on six acres was designed and constructed by a consortium of private sector entities. With no single and adequate source of public financing available to completely demolish the outdated existing courthouse and build a new one, the California Administrative Office of the Courts (AOC) entered into a “performance based infrastructure” project, whereby the entire $490 million project was assumed by the private sector consortium, which continues to operate and maintain the building after completion.

The members of the private sector construction and management consortium were able to leverage their ability to mitigate development risks, access advanced technologies and construction management expertise, as well as apply an “entrepreneurial spirit.” The AOC avoided the issuance of new debt in a tight credit environment, and the construction proceeded expeditiously, unhampered by the limitations of public works projects in California. Payments by the court system to the consortium are made after completion, encompassing the financing and construction costs, as well as ongoing operations. Payments are also conditioned on the successful compliance with construction and maintenance standards agreed to in advance by all parties (Judicial Council of California, 2011; Administrative Office of the Courts, 2009).

The Office of the California State Legislative Analyst (LAO), an entity independent of the executive and judicial branches of California’s government, evaluated the Long Beach Courthouse project and found both benefits and disadvantages to the P3 approach as applied to that project. The LAO spoke favorably of the transfer of risk from government to the private sector entity, as well as the potential for greater price and schedule certainty, and more innovative design and construction approaches. Additionally, because the state did not take on
additional debt to finance construction of the half-billion dollar project, public funds were freed for other purposes, and the private sector entities could access a wider variety of financing tools. The disadvantages included the potentiality of higher financing costs, as private sector entities generally paid higher interest rates than public entities. Additionally, private sector partners continue to add profit and overhead to all costs, including financing costs, and so the overall cost of the project had these additional profits and fees built in. The LAO also found that fewer firms would bid on the project if they were required to finance the project as well, and government flexibility would diminish.

The LAO recommended a series of best practices for evaluating whether or not a particular construction project should involve a P3 collaboration, which are applicable not only to government projects, but all public-private, or not-for-profit-private collaborative projects. These recommendations included:

A. Establishment of a set of template administrative protocols and standards to assist the state government agencies in determining which projects to proceed as P3 projects, under what conditions, and with what funding and oversight. In addition, the LAO recommended that the entire decision making process of deciding which approach to take be public and transparent, to both guide decision makers and inform potential private sector partners of expectations and standards.

B. Adoption of criteria for acceptable P3 project candidates, including assessment of their ability to complete the project according to specifications, complexity, their ability to accept risk transferred to them by government, and the adequacy of governmental revenue source to repay the financing and construction costs. The LAO also recommended that each project be subjected to a rigorous analysis as to
whether the P3 model had benefits that exceeded the risks and potential added costs in P3 projects, and whether or not the risks that were projected were less than a conventional government-built project for the same facility.

C. Conduct of a rigorous value for money analysis, identifying all costs over the life of the project, and then discounting those costs to net present value. Different potential private sector partners, and different alternatives to construction financing, could then be compared in an “apples to apples” analysis.

D. Adoption and implementation of a template project approval process, assessing the criteria established, ensuring that all stakeholders are in agreement in supporting the construction approach taken.

E. Establishment of public sector / not-for-profit expertise in P3 projects, to ensure consistency in communications, standards and to better protect public sector resources (Taylor, 2012).

2. **OPWDD provider initiatives.** Construction projects by private developers are not uncommon in the OPWDD system. Several turnkey construction projects have been completed by OPWDD-licensed providers, often financed originally by the private contractor, who is repaid at completion through the issuance of a tax exempt bond through a local Industrial Development Agency (IDA) or the Dormitory Authority of the State of New York (DASNY). Interviewees have spoken favorably of these transactions because, among other reasons, the private developer was able to shield the not-for-profit corporation from the day to day details of construction management. Not-for-profit corporations licensed by OPWDD to provide residential services have also engaged private developers to construct housing under tax credit transactions, discussed elsewhere in this thesis, although they have not been a priority for
OPWDD or seen as a significant way in which to expand housing opportunities for people with developmental disabilities\textsuperscript{26}. Private sector financed real estate mortgages and equipment leases and purchases are also common for OPWDD providers.

Private sector partners have also been found for side ventures by OPWDD licensed not-for-profit providers, primarily as vehicles for supported work opportunities for program participants. Two not-for-profit executive interviewees described this model, where the private sector entity partnered in a separate business with the not-for-profit corporation that in turn employed program service recipients. Government remains the source of funding for these ventures, coupled with private sector investment as seed money. Interviewees spoke favorably of accessing private capital for these ventures, contingent on continued OPWDD reimbursement. One not-for-profit interviewee while speaking favorably of arrangements such as these, nevertheless viewed them as charitable endeavors by the private sector entity in which the for-profit business never expected to make money but was engaged in the program for its social benefits. The interviewee continued:

If the investor is truly a social investor and use his money as a way to better society, the success criteria aren’t that important. They are doing it because they are socially conscious. The return on that is that the investor, the successful business that is able to provide a quality service and can break even for the investor. Their return on the investment is also doing a good job with the people with disabilities. (Interview #3, at Appendix D, page D-11).

The public-private approach is also being used by not-for-profit corporations to foster the creation and implementation of managed care entities to provide fiscal intermediary services through OPWDD’s proposed ‘People First” waiver of the state Medicaid program, at this writing.
still pending approval before the U.S. Centers for Medicare and Medicaid Services (CMS)\textsuperscript{27}. The People First Waiver contemplates the provision of specialized developmental disability services through a managed care delivery system. Legislation was passed that permits existing for-profit managed care corporations to partner with not-for-profit service providers to create fiscal intermediaries to coordinate care and payment systems to service providers. These new corporations, known as Developmental Disabilities Individual Support and Care Coordination Corporations ("DISCOs"), would take on the responsibility of enrollment, eligibility, care coordination, utilization management, quality assurance and payment to the service providers, and would in turn receive payments from the state for all of the service providers within their care network.

Because of the requirements of New York Insurance Law, none of the existing not-for-profit OPWDD licensed provider agencies have the resources to become, essentially, managed care insurance companies. Therefore, the legislation and OPWDD contemplate that for-profit managed care corporations would partner with the not-for-profit entity to provide DISCO services (New York State Office For People With Developmental Disabilities, 2013b).

Several collaborative efforts in this area are underway in New York, each presenting as private sector – not-for-profit sector collaborations to provide private sector money for the not-for-profit program operations. Several of the models establish joint ventures, whereby the for-profit insurance entity takes a minority ownership stake in the new DISCO entity. The for-profit company provides expertise in insurance, fiscal management and care standards common in the long-term care and health insurance industry, as well as funding for the venture and required reserves for claims. The not-for-profit provides expertise in the specialized population with developmental disabilities, and day to day operations of provider and beneficiary liaison. Both
the for-profit and not-for-profit entities share the same goals and have agreed to business terms deemed favorable to all of the parties to the collaborative effort. The business plan for one entity also provides for creation of an Independent Practice Association, a collaborative corporation that can serve as a group purchasing and management network, and can engage on its own as an intermediary between the not-for-profit providers and other existing insurance companies, including Medicaid managed care entities. However, as in any managed care program, there are limits that are both imposed by the nature of the managed care arrangement, in terms of capitation and utilization controls, as well as those self-imposed in order to manage the effort to maximize the services provided and profitability. Interviewees familiar with these corporations speak favorably of the relationship between the not-for-profit corporation and the for-profit managed care entity, and welcome the expertise and funding that only a for-profit entity can bring to the table.

Models of public-private partnerships also exist under the Accountable Care Organization (ACO) model developed by the U.S. Centers for Medicare and Medicaid Services (CMS) pursuant to the Patient Protection and Affordable Care Act. The ACOs are designed to improve health outcomes while reducing costs, and are collaborative efforts by medical practitioners, managed care corporations and provider entities such as OPWDD providers. Under a pilot project to be implemented in New York, a group of OPWDD providers will come together to form a Medicare Shared Savings Program ACO, in partnership with a private sector managed care company. This effort will manage the care of all of the individuals served by health services by the OPWDD provider corporations, who will continue to provide the care based on accepted standards of care for their patient populations. The private sector company will fund three essential infrastructure aspects of the program, including a comprehensive medical case
management system, a rigorous quality improvement program, and a health information exchange to support patient data sharing. The private sector company will also provide marketing systems, and will fund all of the applications to CMS for approval and implementation. The OPWDD providers will not be required to make any financial contribution, and the private sector entity will receive a portion of the savings expected from the coordinated care model. Structured as a Limited Liability Company, the private sector entity will own 51% of the new entity, with the not-for-profit corporations collectively holding a minority share. However, structural and other changes will require a supermajority vote of the LLC members, thereby protecting minority rights (Accountable Care Coalition of Greater New York, 2013).

Yet P3s pose a series of challenges for both the not-for-profit corporation and the private sector partner, including issues of establishment of trust, matching priorities and expectations in potentially different organizational cultures, communication and coordination, intellectual property and other rights of ownership, and most importantly, control and accountability. Not-for-profit executive interviewees most commonly expressed reluctance to yield control of any aspect of their program to an outside entity, because they felt that the private sector entity does not understand the nature of the OPWDD services or their organizational cultures. Some of the interviewees believed that the private sector entity would place the profit motive above the service component, and accountability to the program and service recipients would suffer as these constituencies would remain a secondary priority for the private sector entity. Finally, the not-for-profit executives expressed doubt that successful P3 capital transactions could be completed because it would require OPWDD or other governmental funders to pay more for facilities or services than would be required under more traditional financing vehicles. There is also question as to whether the success criteria valued by the not-for-profit corporations was
shared by the for-profit corporation, or whether the priorities of the private sector entity were essentially incompatible with those of the not-for-profit corporation.

Table 3 depicts this thesis’ research model, in which the criteria for success are applied to those aspects of each state approach that would tend to lead to successful private sector investment into not-for-profit corporations, enhancing the ability of those not-for-profits to be sustainable for the long-term. This thesis then makes recommendations for legislative action that support those criteria and financing approaches.
Table 3: Research Model

<table>
<thead>
<tr>
<th>Take the Best Aspects of State Approaches to Foster Private Investment</th>
</tr>
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<tr>
<td>Benefit Corporations</td>
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Apply Success Criteria to Ensure Long-term Sustainability and Accountability

- Flexibility to encourage long-term investment in administration and infrastructure.
- Enhanced repayment from shared savings based on agreed-upon measurable outcomes, measured by an independent evaluator.
- Accountability to all financial and non-financial stakeholders.

Recommendations for New Models of Private Sector Investment

- Focus benefit corporations on long-term investment in not-for-profit corporations through joint ventures and public-private partnerships to fulfill their social purposes.
- Provide incentives based on shared government savings for investment in not-for-profit corporation infrastructure, administration and programs.
- Ensure accountability to all stakeholders through government oversight, public benefit reports and supermajority votes for corporate changes affecting social proposes.
- Provide tax incentives, including tax exempt bond availability, for public-private partnerships and joint ventures.
- Establish the value of a not-for-profit corporation’s investment in infrastructure and administration.
- Propose legislation to implement recommendations.
CHAPTER 5
RECOMMENDATIONS AND CONCLUSIONS

A. New Models

This thesis recommends that new models be created to facilitate for-profit investment in not-for-profit corporations operating social service programs under license issued by a government agency. The new models for sustainable not-for-profit corporations with private sector investors would have several components derived from the existing models described in this thesis. These new models incorporate successful aspects of the social purpose, for-profit corporations such as benefit corporations, social impact bond, and public-private partnership approaches. This thesis also provides draft statutes to implement these recommendations. Section B below describes the draft statutes, and their texts and sponsor’s memoranda are contained in Appendix C to this thesis. In addition, these recommendations are illustrated in a hypothetical case study of a not-for-profit corporation that seeks to access private sector financing through direct investment and through a joint venture arrangement. The hypothetical appears as Appendix A to this thesis.

These models include several aspects. Set forth below is a brief discussion of each aspect. Each aspect will also be highlighted and discussed in the subsection of these recommendations proposing draft statutes.

1. Support for private sector investors. This thesis recommends that the model for a benefit corporation to fulfill its social purpose be focused on the ability of the private sector investor to make a long-term financial investment, including taking an equity interest in a government-funded social service program by becoming a joint venture partner or public-private partnership participant with a not-for-profit corporation. The benefit corporation model requires
that a social purpose to be contained within the corporation’s mission. The ability and desire of a private sector investor to take a long-term investment horizon lends credence to the commitment to the program. The new models should contain indicia of long-term commitment to the not-for-profit corporation and its mission. The models should be consistent with governmental requirements for program operators, as well as not threaten the tax exemption of the not-for-profit corporation engaged in any joint venture arrangement.

2. **Financial incentives for meeting or exceeding agreed-upon success criteria.**

A private sector investor will provide numerous opportunities for government payors to save money that would otherwise be spent on the provision of social services, especially if the private investment is accompanied by consulting services for efficiency, economy of scale or management improvements. To incentivize private investment, government, the not-for-profit corporation and the private investor can enter into an agreement whereby incentive bonuses are paid if success criteria are met, with the amount of payment representing a share of governmental savings occasioned by the private investment. Social impact bonds include these performance-based incentives, and they can be broadened to other approaches of for-profit investment to better encourage these investments. Financial incentives must also take into consideration the needs of the not-for-profit corporation, government payer, as well as the private sector financier, and must be carefully drawn to accommodate the interests of all parties.

3. **Accountability measures to ensure commitment of the for-profit investor.**

Accountability measures give the government payer and not-for-profit corporation comfort that the private sector investor maintains a level of commitment to the social program and that the investor will not easily eliminate support for the program. Accountability measures include fiduciary duties, public reporting of the social purpose and the corporation’s activities in
furtherance of that purpose, and measures of responsiveness to the interests of the program beneficiaries. Accountability can also be maintained by supermajority votes for corporate changes, and government oversight and review of efforts by the private sector investor or partner to terminate its investment or agreements with the not-for-profit corporations.

4. **Availability of tax exempt financing.** One aspect of private sector investment, especially in P3 transactions, is the cost of capital that must be dedicated by the private sector investor to the project or joint venture. One of the shortfalls of P3 ventures is that the favorable rates afforded to government through tax exempt financing are not available to private debtors. This thesis recommends that joint ventures and P3 transactions involving private debtors have the ability to access tax exempt bond financing, and that the private sector investor be able to benefit from those reduced debt costs in a manner similar to those public housing investors who benefit from assignment of tax credits.

5. **Amendment to charity evaluation metrics to place a high value on infrastructure and administrative investment.** There is an attitude perpetuated by government and charity regulators that penalizes not-for-profit corporations that spend what is perceived as “too much” on administrative expenses, including back office and fundraising, and compensation for executives charged with running the social service programs. Such an attitude lacks foresight and results in not-for-profit starvation. In order to encourage benefit corporations and other private sector entities to invest in infrastructure and administration, such investments should not be viewed as wrong or wasteful, but instead, should be evaluated as to their effectiveness in ensuring long-term sustainability. Not-for-profit corporations will be evaluated by potential private sector partners, whether benefit corporations, SIB investors, or joint venture partners, on their ability to ensure a firm foundation upon which programs and services rests. In
this regard, not-for-profit corporations are like any other business that requires a strong “back office” and infrastructure to thrive. One cannot lose sight of the profit motive inherent in all for-profit corporations, whether traditional business corporations or benefit corporations, and these entities seek to ensure that their business partners have the capital and resources necessary to enable them to meet their obligations in the joint venture or other arrangement. Government hostility and lack of support for infrastructure and administration investment will have a negative influence on private sector investors, and that hostile attitude by regulators and funders must change. A finding by the New York Legislature and a direction to the Secretary of State to develop measures to highly value these investments and expenses will break the barrier that inhibits investment in these vital functions of any business seeking long-term sustainability.

B. Proposed Statutes to Implement New Models.

Appendix C includes several proposed New York State laws, or amendments to existing New York laws, to effectuate or further development and implementation of the new models proposed in this thesis. Each proposed statute or amendment, in the form of a bill to be introduced in the New York Legislature, is accompanied by a draft Sponsor’s Memorandum to accompany the bill, explaining the purpose of the proposed law, as well as a summary and key provisions. These Sponsor’s Memoranda and accompanying material are in the form prescribed by the New York Legislature. Of course, adaption of these recommendations to other state will require rewording of the materials as appropriate to that state’s legislation and legislative practices.

Corporation Law, governing benefit corporations. These amendments clarify the ability of the benefit corporation to engage in collaborative ventures with not-for-profit corporations operating social service programs under license issued by a government agency, as well as the ability to invest in those corporations as a means to fulfill the social purposes of the corporation. They also provide greater accountability of the benefit corporation to the not-for-profit corporation, its service recipients and the government agency licensing the social service program.

The purposes of the benefit corporation are amended to clearly provide that a benefit corporation can fulfill its general or specific public purposes by investing in a not-for-profit corporation operating social services, or by entering into joint venture and public-private partnership arrangements with not-for-profit corporations. The investment can be through a social impact bond or made directly to the not-for-profit corporation. While such investments and joint ventures are not prohibited by the statute, the amendment makes clear that such activities are contemplated by the Legislature to be within the scope of acceptable undertakings to fulfill the corporate social purposes. New provisions also define the terms “joint venture,” “public-private partnership” and “social impact bond,” with relation to benefit corporations.

The proposed bill enhances accountability of the for-profit entity to the not-for-profit corporation and its program beneficiaries. The bill requires benefit corporations to specify specific social purposes as well as general purposes, in order to focus the activities of the corporation on its social goals. It also imposes oversight and review requirements for benefit corporations that choose to limit or terminate any relationship with a not-for-profit corporation, including a joint venture, public-private partnership, or SIB investment. The bill would require approval by a Justice of the Supreme Court, after notice to the Attorney General and any state agency licensing the not-for-profit corporation, a process that already exists in law when a not-
for-profit corporation seeks to amend or eliminate one of its corporate powers affecting social
service provision.

The Bill also requires boards of directors of benefit corporations to consider, when
making decisions on corporate activities, the interests of the not-for-profit corporation, joint
venture partners, and the beneficiaries of the not-for-profit corporation and any entity funded by
an SIB financing vehicle. These entities and individuals owed consideration are in addition to
already-existing requirements to consider the impact of decisions on other constituencies of the
corporation, including employees and customers of the corporation and the interests of
beneficiaries of the public purpose activities. These provisions clarify that consideration must be
afforded not only to individuals, but to business partners and funded entities as well. However, as
with other non-financial stakeholders, the bill makes clear that no duty that is enforceable in a
legal proceeding exists towards either the not-for-profit corporation or its beneficiary service
recipients, and neither may bring an action against the directors to enforce any duty, unless
otherwise stated in the corporation’s certificate of incorporation.

Finally, the bill provides for greater transparency and oversight in the annual benefit
report required to be compiled and published by the benefit corporation. The bill requires that the
annual benefit report contain not only information about how the corporation has fulfilled its
social purposes, but a description of any joint venture, public-private partnership or other
investment with a not-for-profit corporation. The benefit corporation must also provide a copy of
its annual benefit report to the not-for-profit corporation with which it has a relationship, as well
as any government agencies licensing that not-for-profit corporation to operate a social service
program.
2. A Bill to create a Task Force on Benefit Corporation Investment in Not-for-Profit Corporations. The second proposed statute that is included in Appendix C would establish a Task Force on Benefit Corporations Investment in Not-for-Profit Corporations operating social service programs under license from an agency of New York State. This proposed bill enunciates several legislative findings upon which the Task Force can base its investigation and recommendations. The proposed bill first establishes a legislative finding that not-for-profit corporations operating social service programs would benefit from investment of private sector funds to support infrastructure and administration improvements, as well as program operations. The Legislature further recognizes that benefit corporations can fulfill their general and specific public purposes by engaging in such investments, either directly or through joint ventures. Finally, the Legislature finds that social impact bonds can be utilized by benefit corporations in the exercise of their corporate social purpose, and recognizes that models need to be developed in order to effectuate the legislative findings.

The Task Force would be charged with reviewing all applicable laws, regulations, policies and standards to identify areas in which to investigate matters to effectuate the legislative findings. Included in this charge is a review of criteria and standards by which not-for-profit investments can be evaluated, and in particular, standards to evaluate investment in infrastructure and administration investments. This inter-agency Task Force would develop criteria upon which the benefit corporation’s annual benefit report prepared in accordance with the benefit corporation statute would be measured, with specific criteria for these collaborative efforts. Moreover, this task force would develop standards and criteria for measuring success outcomes upon which payment enhancements for social impact bonds would be based, as well as necessary contract terms for those transactions. The Task Force will also examine terms and
conditions that should be included in social impact bonds, including desired contractual terms, partnership agreement language, and criteria for enhanced repayment by government in the event of program success.

Once the comprehensive review of these materials is completed, the Task Force is charged with developing a comprehensive state plan to enhance benefit corporation investment into not-for-profit corporations, together with policies and procedures for state agencies to implement the findings, specific terms and conditions of SIB transactions, and methods of dispute resolution. The task force would develop standards and parameters for state agencies to include in regulations governing these collaborative arrangements with not-for-profit providers of services, including, for example, minority ownership of the joint venture by the for-profit partner, dispute resolution procedures, implementation of success measures and outcomes, and financing enhancements.

For example, OPWDD regulations that could arise out of the work of the Task Force could address the terms by which for-profit entities can finance, or, in certain circumstances, assume ownership and control of infrastructure and other capital and fixed assets, including real property, IT systems and other assets, as well as assume administrative control of non-program and support functions, without running afoul of laws governing not-for-profit entities. In doing so, the regulations could articulate how program fee for service rates paid by government could be adjusted to reflect the additional private sector resources provided by the benefit corporation, and the savings resulting from the not-for-profit corporation no longer having to service debt or provide for ongoing maintenance and control of these capital assets. Criteria would be developed that would measure efficiency and cost savings for the program by virtue of the investment in infrastructure and administration, and the rate paid to both the not-for-profit and the for-profit
corporations would be enhanced to reflect a sharing of that cost savings. Savings would be measured not only in additional services provided, but efficiency, effectiveness, sustainability, and management improvements that might not be readily perceived as cost savings, but would eventually provide sustainability and efficiency in the long-term.

In its deliberations and in making its findings, the Task Force is charged with considering the interests of all parties, including private sector investors and benefit corporations, the not-for-profit corporations, other joint venture partners, social service program beneficiaries and government agencies and funding sources. Finally, the proposed bill identifies the members of the Task Force, to be comprised of representatives from private sector and not-for-profit sector corporations and entities, as well as government agencies and officials with an interest in the work of the Task Force. The Task Force is charged with delivering its comprehensive report to the Legislature within 180 days after the effective date of the law once approved.

3. **A Bill authorizing the Dormitory Authority of the State of New York to issue tax exempt bonds on behalf of public-private partnerships.** This thesis also recommends that the legislature adopt a proposed bill authorizing the Dormitory Authority of the State of New York to issue tax exempt bonds on behalf of any not-for-profit corporation that is engaged in a joint venture or public-private partnership with a benefit corporation. The Dormitory Authority is New York’s largest statewide issuer of tax exempt debt, and does so on behalf of state and local government entities and not-for-profit corporations that have specific legislative approval. This bill would include in the list of approved not-for-profit corporations any such entity that is engaged in a joint venture, public-private partnership agreement or other collaborative effort with a benefit corporation. Access to low cost financing can aid both the not-for-profit and the private sector entity in accomplishing their public benefit missions. In addition to faster
construction schedules and avoidance of complex public works project requirements, the availability of lower cost debt will enhance the ability of these public-private partnerships to save public funds and allow the not-for-profit corporation to focus its activities on programs instead of capital projects. New York State cannot provide assignable tax incentives the way that the Internal Revenue Code provides for affordable housing projects, but permitting the state to issue tax exempt bonds for these projects is one way that the state can provide financial support to public-private partnerships with little additional cost.

4. A Bill establishing a legislative finding that not-for-profit corporation investment on infrastructure and administration is necessary and to be highly valued, and directing the Secretary of State to develop criteria for measuring the effectiveness of such spending. In order for for-profit entities to be willing to invest in not-for-profit corporations, either directly or through joint ventures and public-private partnerships, those not-for-profit corporations need to be credit-worthy and stable. Smart and aggressive investment in infrastructure and administration, including development, advertising, IT and repairs and maintenance, can yield enormous benefits in additional funds donated and programs expanded. However, government and private charity regulator and evaluators, including the Better Business Bureau and, in New York, the Attorney General Charities Bureau, Governor and administrative agencies overseeing social service programs, all discount and discourage spending on infrastructure and administration, to the point of penalizing not-for-profit corporations that seek to provide a stable foundation upon which to base their charitable activities. Bond rating agencies will also examine fund balances, reserves, and the quality of back office operations when determining credit-worthiness for investment by social impact bond and other investors, including those seeking tax exempt bonds.
With these principles in mind, this thesis recommends a bill in which the New York State Legislature finds that investment in infrastructure and administration is highly valuable and serves to enhance the ability of a not-for-profit corporation to sustain itself and its program operations in the long-term. The Bill recognizes that well-funded not-for-profit corporations, who invest appropriate amounts on non-program related expenses such as administration and infrastructure, are better able to attract and maintain private sector investments, and are better positioned for long-term sustainability and growth, and provide a more stable and more credit-worthy entity with which a private investor can fund with confidence. The Bill additionally finds that standards are required to value this type of investment and expense.

The proposed Bill contained in Appendix C also directs the New York Secretary of State, in consultation with the Attorney General, to develop standards and measures to highly value a not-for-profit corporation’s investment and expenditure of funds for infrastructure and administration, and how those expenditures serve to make the not-for-profit corporation more attractive to private investors. The Secretary of State is directed to make his report to the Governor and the Legislature within 180 days after the Bill becomes effective.

This proposed Bill, if enacted, would guide oversight and funding agencies in their rate setting for social service programs, including those in the Medicaid system. The Secretary of State’s report may lead to amendment of other statutes that govern payments to service providers in a variety of social service contexts.
C. Barriers To Implementation and Limitations of These New Models

Although there are both regulatory and attitudinal barriers to successful introduction and implementation of these new models, the regulatory barriers and limitations are far easier to overcome than the attitudinal barriers. Those attitudinal barriers include a public and government rejection of the idea that not-for-profit corporations can and should act like for-profit businesses who need to invest in administration, support, infrastructure and other back office functions necessary to ensure sustainability in the long-term. At the same time, an additional barrier, also attitudinal, exists in the private sector, which neither understands the potential advantages of benefit corporation status nor sees any real benefit to obtaining that status. Other than the pride and marketing potential from having your company voluntarily certified as “socially conscious” or “green” from B Lab, companies in New York have largely shunned the more formal recognition of social consciousness occasioned by filing to convert the company to the status of benefit corporation. Implementation of these recommendations will require a strategy that addresses both of these attitudinal barriers, as well as the regulatory barriers to for-profit investment, in the legislature, oversight agencies and in the public eye.

1. Regulatory Barriers and Limitations. The regulatory barriers consist largely in the absence of regulations directly applicable to this thesis’ recommendations. Because the recommendations proposed involve new entities, and new financing techniques, there is not a developed body of regulations, or common law, that provide any guidance. For these reasons, the greatest barrier will be the reluctance of any of the for-profit or not-for-profit entities, or state agencies and individuals charged with their oversight, to engage in any new initiatives until they are confident that they are protected by established standards and regulations. In addition, the sheer “newness” of the entities discussed in this thesis, the financial approaches, and the idea that
they could invest in and engage in joint ventures with highly regulated not-for-profit
corporations represents the greatest limitation to these recommendations.

For example, New York State OPWDD regulations, governing the operation and funding
of not-for-profit corporations providing services under a license issued by that agency, are silent
about whether for-profit companies may operate licensed programs. In practice, however,
knowledgeable interviewees confirmed that OPWDD will not license a for-profit voluntary
operator and has never done so in its 40 year history. With the introduction and potential
approval of the OPWDD People First Medicaid Waiver, joint ventures and other private sector –
not-for-profit sector collaborations will be established to implement a managed care model of
service delivery. Those joint ventures will by necessity be supported and capitalized by for-profit
entities, and so the door is open for further joint ventures. New York State OPWDD regulations
need to catch up with the new initiatives proposed by that very government agency.

There are tax and regulatory issues that prohibit a for-profit company from “owning” all
or part of a not-for-profit corporation, related to the prohibition on private inurement contained
in the sections of the Internal Revenue Code governing tax exempt entities. Revenues gained by
not-for-profit corporations that are tax exempt entities (which are virtually all of them) cannot
benefit a private individual or entity without an exchange of like value; to do otherwise would
run afoul of tax laws, and could both jeopardize the entity’s tax exempt status and cause both the
not-for-profit corporation and the private entity to incur excise taxes for engaging in prohibited
transactions (See Internal Revenue Code Section 4958).

Excessive private sector involvement in a not-for-profit corporation’s business can cause
regulatory concerns beyond tax issues. While private individuals and private sector entities can
invest in assets owned by a not-for-profit, and take a security interest in those assets to be
foreclosed upon in the event of default, those private individuals and entities cannot “own” not-for-profit assets, programs or corporations (without purchasing or foreclosing a lien against assets, in which case title to those assets transfers.). New York’s laws in this regard are typical of those found in many states. In New York, no one “owns” a not-for-profit corporation. In New York, like most states, the assets of the not-for-profit corporation are held in trust by the board of directors on behalf of the People of the State of New York, with oversight provided by the Attorney General through its Charities Bureau, and Secretary of State. Boards are required to manage those assets in a reasonably prudent manner. Although the standard for actions against a not-for-profit board of directors is one of “gross negligence”, the Attorney General has the authority to remove a member of a not-for-profit board, or the entire board, at his / her discretion. (New York State Office of the Attorney General, 2013b; Weill Gotshal and Manges, 2012; Kurtz, 1988). Not-for-profit executives interviewed confirmed that their boards of directors will not act absent conviction that their actions will not run afoul of the law.

Not-for-profit corporations can, however, engage in joint ventures with other entities, and wise boards of directors do not rule out such collaborative efforts if they bring needed capital or expertise to the corporation. Those joint ventures can be related, or even an integral part, of the not-for-profit corporation’s business, and can make money, although potentially subject to an Unrelated Business Income Tax (UBIT) issue. Finally, boards can and do frequently engage private sector lenders to finance capital acquisitions, including real estate, vehicles and equipment, providing security interests in the financed assets, and can continue to do so.

This thesis proposes models that encourage joint ventures between not-for-profit corporations and for-profit business entities, and creative collaborative financing vehicles such as social impact bonds. Social impact bonds are currently planned for several areas of social service
programs in New York, and regulatory barriers, if they exist, are slowly falling so that these financing approaches can be used. In the proposed model, however, the SIB is proposed to finance things such as long-term capital assets, including infrastructure. Current OPWDD and DOH rate setting structures, which reimburse OPWDD providers for capital assets as an add-on to a per-person, per-day rate, are not suited to recognize and implement an SIB investment in such capital assets; nor are those rate setting structures equipped to assess the value of the savings resulting from the investment, or the nature of a government-investor shared savings. The proposed Task Force can define parameters for transactions such as these, as well as standards for measuring success in long-term care and other social service contexts, but it will be the responsibility of the agency regulators and rate setters to determine how the Task Force findings translate to day to day operations. The Legislature will need to ensure that, in considering and acting upon the recommendations of the Task Force, it respects the separation of powers between the executive and legislative branches of New York State government, and prescribe the factors that go into how a rate should be calculated, but not what that rate should be or the weight that those factors should be afforded by rate setters. Although this thesis notes the separation of powers issues that could arise, a discussion of those issues is beyond the scope of this thesis.

Added to this discussion is the expected transformation of the OPWDD voluntary provider system envisioned in the People First Medicaid waiver, which will establish fiscal intermediaries through which payments for services will be made. Those Medicaid fiscal intermediaries (the DISCOs described herein) will also have quality of program and rate setting oversight over the provider agencies. Moreover, the potential for a capitated rate under a managed care system draws into question whether an enhanced payment for meeting criteria for
success can be incorporated into one capitated payment. With these changes seen on the horizon, coupled with the new InterRAI assessment tool that is expected to restrict eligibility to only those with the most severe impairments, it is no surprise that the not-for-profit executives interviewed were reluctant to enter into any new ventures, regardless of their merit on paper, until OPWDD issues regulations that comprehensively address what appears to be a fundamental transformation of the provider system.

New York State has also consistently limited private sector involvement in hospitals, which could limit the scope and applicability of the recommendations made in this thesis in the institutional health care context. While for-profit, privately owned hospitals have been part of the state’s health care system for many years, New York Public Health Law Section 2801-a(4)(e) requires that all owners of a corporation that operate a for-profit hospital be “natural persons.” The impact of this is that any corporation other than those with individual human “natural persons” as shareholders can invest in or own a hospital, eliminating the possibility of investor-owned entities, including joint ventures, from operating a hospital. In this regard, hospitals stand in the same place as the not-for-profit corporations operating OPWDD services, and subject to the same limitations. For-profit entities can invest in, and enter into joint ventures with, these health care corporations, but cannot participate as joint or full owners. Recent attempts to modify the Public Health Law to eliminate the “natural person rule” have failed (See, e.g., N.Y. Assembly Bill A6676-2013).

The absence of controlling law in New York also constitutes a significant regulatory barrier for benefit corporations that seek to invest funds in not-for-profit corporations as well. Although New York has enacted statutes that allow for the creation of these corporations, there is very little guidance as to what these corporations can do, how they can accomplish their social
goals, what is expected in the annual benefit reports, the standard of care that the benefit director must adhere to, and the scope and limits to the consideration that benefit corporation boards of directors must give to non-financial stakeholders. Because these corporations are so new in every state that has enacted statutes allowing for their creation, there is no body of common law, or model regulations, which can give guidance. As with the OPWDD not-for-profit licensees, many will choose to wait until there is such an established body of laws before stepping into a new area that may be fraught with unknown perils.

2. **Attitudinal Barriers.** Benefit corporations in New York have been slow in creation, due to a variety of factors including poor marketing of what they are and how they can accomplish social goals, and the lack of any incentives, both financial and practical, for companies formed as benefit corporations or converting to benefit corporations. Many New York companies have voluntarily applied to B Lab for certification as B Corps, and many have achieved that certification, but that certification has limited value other than bragging rights and other marketing purposes. Benefit corporations, however, are formally created and contain statutory requirements. New York, as with many other states, has simply failed to explain why any company would want to file as a benefit corporation instead of obtaining the voluntary B Corp certification. New York must be willing to create such financial and practical incentives so that benefit corporations can take an active role in revitalizing not-for-profit corporations dependent on government support. The draft statutes begin that evolution.

Benefit corporations adopt the principles of constituency statutes in allowing corporate money and effort to be used for social purposes. The lack of guidance, however, in the benefit corporation law as to the degree of consideration owed to non-financial stakeholders contributes to the limitations and attitudinal barriers on behalf of those boards of directors. They simply do
not know how much consideration to give these individuals and entities. This thesis recommends that the list of those owed consideration be extended to the joint venture partner and not-for-profit corporation in which an investment is made. Until there is legal clarity as to what that means, board of directors will be gun-shy in entering the field\textsuperscript{31}.

However, one advantage of the recommendations, if adopted, would be to bring the social purpose activities into the frame of central purposes of the business of the corporation, rather than “off balance sheet” activities. A benefit corporation that makes an investment in another entity, or enters into a joint venture agreement or P3 agreement, is engaged in business, not charity, and will treat its investment and business partners like other for-profit partners. Once the for-profit corporation partners with the not-for-profit entity in the operation of the social service program, the social program becomes part of the core business of the for-profit entity. In those cases, it would be the corporate shareholders themselves who would require the board of directors to take into account the social program in making decisions, because the operation of that program would affect their rate of return. Once the social purpose becomes part of the core business, shareholders take notice.

As is discussed throughout this thesis, the prevailing belief among regulators, fund managers, charity evaluators, and, by extension, the general public, is that that charities should not spend any amounts other than the minimal amount possible on administrative functions, executive compensation, infrastructure, advertising, marketing or other necessary, but non-program, functions. This attitude prevails notwithstanding clear evidence of the economy of scale and efficiency of return that can be achieved from targeted smart administrative investment, including compensation for valued employees. While the recommended regulations establish a legislative finding valuing such investment in a manner that for-profit entities
regularly adopt, that legislative statement is only the first step towards public acceptance of this new way to look at charities. While legislation can begin to address this, public attitudes can only change through a public relations effort to view charities differently. Such an effort is beyond the scope of this paper.

Finally, not-for-profit corporation executives are not used to power sharing and loss of control. Joint ventures, investment and other collaborations with more wealthy, diversified and sophisticated investors and partners will be threatening to these not-for-profit leaders. They will need to reassess their attitudes towards collaboration and control to realize that sustainability necessarily involves diversification and collaboration. In New York State, the transformation of the OPWDD system will drive that realization. Nationwide, and especially in health care, the economy will move not-for-profit leaders to realize that the benefits of collaboration, even if it means a limitation or loss of control, will ensure the survival of their corporations and the services that they provide.
CHAPTER 6

CONCLUSION

This thesis has presented several recommendations that can be implemented by New York State to encourage private sector investment into not-for-profit corporations operating social service programs. Among the recommendations are enhancements to the benefit corporation statute, authorization of tax exempt bonds and other initiatives for benefit corporations investing in not-for-profit corporations, and recognition by the state of the value of a not-for-profit corporation’s investment in administration. Attached to this thesis as Appendix A is a hypothetical case study of a not-for-profit corporation struggling to survive in the current economy, and how it can access private sector financing should these recommendations be adopted.

Private sector companies are largely seeking investment in not-for-profit corporations not as a result of any targeted and well-established government program that encourages such investment, but despite it. True, state governments across the country have enacted laws that create new and innovative social purpose business entities, riding the wave of socially responsible business efforts that have arisen from the community. Yet merely passing laws is not enough. Across the country, businesses are not changing to the benefit corporation model, and new benefit corporations are not being created, because there is simply no financial reason to do so. All it does is add another layer of oversight and reporting, all of which costs money and gives boards of directors agita over the potential risks. If a business corporation, partnership, LLC or sole proprietorship wants to take some of its money and dedicate it to a social purpose, it can just do so. It does not have to hire a benefit director and spend both staff time and corporate funds to
conduct a program evaluation and publish an annual benefit report. Even in states that do not have constituency laws that permit boards to take something or someone other than making money into account in decision making, social purposes can be seen as good for business and marketing the company’s wares.

The recommendations made by this thesis with regard to benefit corporations put some meat on the bone. Benefit corporations need real benefits. If they are going to enter the field to engage in social purposes, and especially social services, they need to understand that they are taking responsibility to continue that commitment; the beneficiaries and the corporations serving them are relying on their continued commitment. But benefit corporations need to be compensated for taking on that responsibility, they need to be supported in their efforts, and they need legal protections from liability that statutes can provide them. This thesis continues that dialogue.

Social impact bonds are new and exciting. For government leaders, they are positively edgy. For career administrators in government agencies, they are positively frightening, because they require an agency to determine if an ongoing social service provider is capable of success, and they must determine the metrics to measure that success. Social impact bonds did not originate from government. Rather, they originated from a private sector that sees the enormous amounts of money spent on government services, and how efficient program can achieve real savings, which can be shared. There is a lot of money to be made in social services, there is a lot of money being spent on social services. Banks know this, investment firms know this, and government only tacitly acknowledges this.

Social impact bonds to date have been used on programs that have clearly defined measurable results, such as the recidivism rate in a prison program, or the employment rate in a
jobs program. It will take smart and innovative thinking to develop metrics for social service programs whose success is not so clearly countable. Yet these measures can be made, and social impact bonds can be wildly successful in a host of special programs, both accomplishing government’s need to economize and increase efficiency, the investor’s need for a good return, and the not-for-profit corporation’s need for new sources of financing.

Underlying these recommendations is the change in attitude that views a not-for-profit corporation as a business entity, with the same needs and stresses that any business endures. Business entities require investment in the structures that support their core businesses, and the financing for these essential business functions to support long-term growth and sustainability. These recommendations address the not-for-profit corporation as an ongoing concern, and attempt to structure several types of financing approaches that not only pay for program services, but pay for the business structures behind those programs. But until the government charity regulators and evaluators such as the Attorneys General and the Better Business Bureaus recognize the needs of the businesses, recognize the corporation part of not-for-profit corporation, they will always be viewed simply as charities that depend on the good will and handouts of the community to survive.

The private sector financial consultant interviewee identified the paradigm shift occurring in these areas:

In a way, it’s like the nonprofit is looking more businesslike and certain parts of the business sector looking more like a nonprofit, sort of a convergence happening conceptually. . . .
At that point of convergence, the nonprofit and for profit looking in that space where you have this opportunity to invest in something that will pay principal and a modest return, that is the sweet spot for social impact investment. If you are a nonprofit just doing these services you’re not in that category, if you are a for profit with a social benefit, but it is too expensive and difficult to find a place in the market, you don’t fit into this space, as the band is quite narrow. (Interviewee #8, at Appendix D, page D-23).

Within that narrow band, both the for profit entities and the not-for-profit entities must evolve in order to survive. Not-for-profit corporations need to change with the times as well, and step up to the plate as independent businesses in their own right. The not-for-profit executives whose greatest fear is loss of control will have difficulty in an environment that requires collaboration, innovation and an entrepreneurial attitude towards social services. Although the application of these recommendations made in this thesis are to New York State long-term care providers, they are easily transferable to other states, and other social service arenas. Government, not-for-profit corporations, private sector investors, private sector businesses and socially responsible individuals can all come together to coalesce in a new economy that values social programs, and the businesses that operate them. Everybody wins.
NEW YORK STATE USES THE TERM “NOT-FOR-PROFIT CORPORATION” INSTEAD OF “NONPROFIT CORPORATION” AND SO THE FORMER TERM WILL BE USED THROUGHOUT THIS THESIS.

In contrast to business corporations, which are typically formed for pecuniary interests (see, e.g., New York Business Corporation Law), not-for-profit corporations are formed under different statutes and contain a social purpose (See, e.g., New York Not-for-Profit Corporation Law.) Not-for-profit corporations are also frequently, but are not required to be, tax exempt under federal and / or state laws (Healthcare Association of New York, 2004).

This thesis refers to investment in not-for-profit corporations operating social services. While there is no legal impediment to private sector financing or investment in not-for-profit corporations, they cannot take an equity, or ownership, interest. For example, in New York, the New York Not-for-Profit Corporation Law provides that the assets of a not-for-profit corporation are held in trust by the corporation’s board of directors on behalf of the People of the State of New York. Additionally, if the corporations are tax exempt (as many in New York are, including virtually all of those that provide social services under a state-issued license), no part of their assets or income can benefit a private individual or entity; there can be no “private inurement” of tax exempt property (New York State Office of the Attorney General, 2013b; Weill Gotshal and Manges, 2012).

Therefore, this thesis will refer to private investment or public-private partnership as joint ventures with the not-for-profit corporation, in which the private investor can take an equity interest. Any other limitations imposed by federal tax laws for these transactions are beyond the scope of this thesis.

Social impact bonds are also known as pay for performance bonds or pay for success bonds. In this thesis, they will collectively be identified as social impact bonds.

The cutoff date for the research underlying this thesis is June 30, 2013. In isolated circumstances, materials made publicly available after that date will also be included if there is a substantive reason related to the discussion to do so.

Unlike many states, New York provides comprehensive residential services for individuals with developmental disabilities in a dual system of both state-operated and not-for-profit corporation operated programs.

See, for example, OPWDD regulations limiting administrative expenses and executive compensation, Title 14, New York Code of Rules and Regulations, Sections 645 et. seq.

Even in circumstances where a not-for-profit corporation’s capital expenditures are included in the rate paid by OPWDD, the amount allowed for repairs and maintenance is minimal. The OPWDD “residential repair reserve” amount allocated to programs still receiving capital reimbursement is calculated as a fixed amount per resident of the community residence,
without regard to acuity level of the individuals in the house, age or size of the house, and characteristics of the residential (single family home, co-op apartment, etc.) Interviewees from the not-for-profit agencies all agreed that the “triple R” funding was insufficient to meet capital needs.

9 New York’s Medicaid spending of $54 billion, equating to approximately $1.04 billion per week, represents 37% of its annual budget for government operations. The OPWDD state-operated and voluntary provider licensed system, which provides services for many of New York’s most fragile and medically expensive residents, represents approximately 20% of that total spending, or $10.8 billion, per year (US House of Representatives, 2013).

10 Likosky (2010) proposes a National Infrastructure Bank, modeled after international development forums such as the World Bank, as a vehicle for private investment in the nation’s social service infrastructure.

11 Foundation and corporate funding can also come with conditions bordering on the unconscionable. A recent grant to the State of New Jersey for educational system improvements was conditioned upon the current Governor, Chris Christie, remaining in office (Braun, 2012). Additionally, among the conditions for Facebook founder Mark Zuckerberg’s $100 million grant to the Newark school system from his private foundation was the right to withhold funding if the district appointed a superintendent not to the liking of the foundation making the grant. Moreover, the foundation also reserved the right to withhold funding if the State of New Jersey replaced its Education Commissioner with an individual not supported by the foundation (Mooney, 2013).

12 Another common source of funding for not-for-profit corporations operating social service programs are church-affiliated umbrella corporations. Churches, synagogue groups and other religious denomination-related corporations routinely operate social service programs as independent not-for-profit corporations to both maximize government support and avoid unnecessary entanglement of secular and non-secular missions (Pallotta, 2012).

13 For purposes of clarity, this thesis will refer to the statutorily created entities as “benefit corporations” and those for-profit corporations voluntarily attaining B Lab certification as “B Lab certified corporations” or “B Corps.”

14 Boards of directors of for-profit business corporations have long had fiduciary duties towards shareholders, requiring them to conduct activities and make decisions based solely on considerations of maximizing shareholder gain. Those duties are enforceable by shareholders, who may bring derivative actions against the corporation to prevent the board from engaging in activities not directed towards profit maximization (Lowenstein, 2013; American Bar Association Committee on Corporate Law, 1990). In recent years, states have broadened the class of individuals and entities which can be taken into consideration by boards of directors when making business decisions. These laws allowing for consideration of other interests are known as “constituency statutes” and permit boards, in their discretion, to consider the interests of individuals and entities such as employees, customers and vendors, and the larger community
affected by corporate decisions (Clark and Vranka, 2013). These constituency statutes have been enacted in 33 states, including New York (See N.Y. Bus. Corp. Law Section 717b). These statutes are generally believed to have originated as a mechanism for boards of directors of publicly-traded business corporations to defend against hostile corporate takeovers, allowing the board to reject a lucrative offer on other considerations. Constituency statute provisions appear in the Model Benefit Corporation Legislation and virtually all benefit corporation statutes. In contrast, Delaware, home to many large corporations because of its laws favorable to the interests of publicly traded corporations, does not have a constituency statute. (Brewer, 2013.)

15 Three states have enacted a less-regulated version of the benefit corporation, known as a flexible purpose corporation (FPC). In these three states, California, Texas and Washington, FPC corporations formed under these statutes are not required to undergo a third party evaluation, specify in any level of detail their social purposes, or report their social activities to anyone other than shareholders. Because FPCs only exist in three states, and New York is not one of them, this thesis notes their existence but does not otherwise discuss them.

16 Another type of social purpose, for-profit entity has been created specifically to receive private foundation investments. The Low Profit, Limited Liability Corporation model (known as L3C Corporations) exists in several states and have been designed to receive program related investments (PRIs) by private foundations. PRIs are investments made in other corporations by the private foundation from of its own assets, and are subject to complex IRS regulations to ensure that their tax exempt status is preserved. L3C corporations are designed to have a structure and governance that meets those IRS criteria. Although a for-profit entity, these corporations have limited utility outside of the PRI context, and are charity-dependent on foundation grant funding (MacCormac and Haney, 2012). Although L3Cs can provide an IRS-recognized private foundation with an acceptable program related investment, they are limited by IRS regulations related to PRIs and so their utility to act as a vehicle for long-term equity investment in social programs by private investors is limited. They have been created in nine states, but not New York (Brewer, 2013). Because L3C Corporations exist in only a few states, and New York is not one of them, and because they are not able to invest in not-for-profit corporations, this thesis notes their existence but does not otherwise discuss them.

17 Housing tax credits are governed by federal and state laws particular to the construction of public housing. Each year, the IRS allocates tax credits to state housing finance agencies, who in turn award them to developers of affordable housing projects, often not-for-profit corporations. Those not-for-profit corporations that act as developers of affordable housing projects are allocated tax credits and can assign those tax credits to private investors to raise the necessary construction funds. The developers then benefit from lower debt service costs, reducing the overall cost of the project. The investors can use the tax credits for a period of up to 10 years to reduce their federal tax liability. The developer corporation benefits from lower construction costs, which can be passed on to beneficiaries in the form of lower rents. The private investors benefit from the tax credits, and the government benefits from a reduced cost and construction time for affordable housing projects.
Developers selling the tax credits often create joint ventures or partnerships with investors, who, according to federal laws, must participate as an owner of the property being developed. Frequently, these joint ventures take the form of limited partnerships with the developer – not-for-profit corporation and investors as partners. These transactions are usually structured in a manner that leaves the investor as a limited partner, with a controlling interest in the project as well as the beneficiary of the tax credits assigned to the project which are of little use to the tax exempt not-for-profit corporation partner. The not-for-profit corporation is usually a minority owner, but assigned to manage the day to day operation of the program when completed (US Department of Housing and Urban Development, 2013).

18 Not all commentators view the absence of fiduciary duties to program participants as a drawback. Corporations created in Delaware do so specifically to be free of regulation of their internal affairs, including several fiduciary duties. (Conaway 2012; Esposito, 2013).

19 As noted earlier, Flexible Purpose Corporations have only been authorized in three states (California, Texas and Washington), and so they are not part of the data reported in this thesis. In addition, statutes that created benefit corporation-like entities, but called them by a different name, were included in the data reported.

20 Edited transcripts of interviews appear in Appendix D herein.

21 Tax credit vehicles for affordable housing programs were also reviewed, but because they are limited to affordable housing under specific circumstances, data was not collected for them. The model, however, can serve to inform potential new models for private sector investment in which tax incentives are transferred in exchange for capital investment.

22 The 19 states that have adopted legislation authorizing the creation of benefit corporations are: Arizona, Arkansas, California, Colorado, Delaware, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Nevada, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, Vermont, and Virginia. In addition, benefit corporation legislation was also adopted in the District of Columbia. Legislation was pending as of June 30, 2013 in Connecticut, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Minnesota, Montana, New Hampshire, Ohio, Utah, West Virginia and Wisconsin. As of June 30, 2013, benefit corporation legislation had failed in the Alabama and New Mexico legislative bodies (B Lab, 2013).

23 MRDC is a New York not-for-profit poverty research agency. Created by the Ford Foundation and other organizations and governments in 1974, its original name was the “Manpower Demonstration Research Corporation”, but in 2003, it changed its legal name to the name it was commonly known as, MRDC. MRDC is active in both New York City and in Oakland, California, engaged in five policy areas: Family Well-Being and Children’s Development, K-12 Education, Young Adults and Postsecondary Education, Low-Wage Workers and Communities, and Health and Barriers to Employment (MRDC, 2013).

24 The City of Fresno, California recently announced the world’s first “health impact bond” program to fund a demonstration project in asthma management. One out of five children in Fresno experience asthma, which is the most common chronic disease among children in the
United States. Asthma is also a disease that, if treated correctly, can be managed. The health impact bond will pay for data collection and evaluation, with the goal of reducing the number of hospitalizations and emergency room visits due to asthma. The private investors will be paid back through the savings in health care expenses from reduced hospitalizations (Anderson, 2013). The US government is also exploring public-private partnerships in health care (Barnes, 2011).

The winners of the U.S. Labor Department’s national competition to provide state and local governments with technical assistance for social impact bonds were the Cities of Chicago and Denver, and the states of Colorado, Connecticut, Illinois, Michigan, New York, Ohio and South Carolina (Harvard Kennedy School Social Impact Bond Technical Assistance Lab, 2013).

One current/former government employee interviewee discussed at length the efforts that New York State’s housing agency, the Division of Housing and Community Renewal, went to bring OPWDD providers into tax credit transactions to provide housing for individuals with developmental, disabilities, with little success. See Interview #6, at Appendix D, Page D-15 herein.

New York’s People First Waiver application before CMS proposes a waiver of certain Medicaid regulations to allow New York to continue to bill the Medicaid system while implementing new programs not currently authorized under the federal regulations. Among the new methodologies under the waiver will be a managed care system in which service providers are paid through fiscal intermediaries, rather than directly by the state. In addition, the state will adopt a new assessment tool, the InterRAI, which will determine eligibility for services (New York State Office for People With Developmental Disabilities 2012). Each of these new initiatives cause concern with not-for-profit corporations providing OPWDD-licensed services for fear that eligibility requirements will be tightened and that capitated rates will cause them financial losses.

This section refers to not-for-profit corporations as “charities” because that is the term used when referring to these organizations in the context of seeking public donations and grants. For the purposes of this thesis, the term “charity” and “not-for-profit corporation” are used synonymously.

For example, the New York Attorney General publishes an annual report entitled “Pennies for Charity” which evaluates charities based upon their fundraising expenses (New York State Office of the Attorney General, 2013a). The national Better Business Bureau maintains a “Wise Giving Alliance” that similarly rates charities in accordance with metrics that include how much is spent on administration, with higher ratings resulting from lower levels of spending in infrastructure and administration (Better Business Bureau, 2013).

New York’s proposed 2013-2014 budget, prepared by Governor Cuomo’s Division of the Budget, does contain a pilot project that would permit two for-profit hospitals to open in New York, one in Brooklyn and the other elsewhere in the state. Enactment of this provision in the Governor’s budget would be a first step towards implementing the recommendations made in
this thesis in the hospital and institutional health care context (New York State Division of the Budget, 2013b).

According to B Lab, as of June 30, 2013, there have been 375 benefit corporations created in the United States, most of them converted from business corporations. B Lab reports that many of the firms were business corporations owned and managed by socially responsible individuals, leading to the voluntary B Corp certification, and chose to convert even though there was no demonstrable benefit to do so. In states that have enacted constituency statutes, business corporations may choose to consider the interests of non-financial stakeholders, while benefit corporations are required to do so. B Lab reports that some publicly traded companies chose benefit corporations status because it would make the company a more difficult takeover target, as the existing board could cite an adverse impact to the corporation’s social programs as a reason to deny the takeover offer, because boards are required to take the social purpose into account in all decision making (Watson, 2013).
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APPENDICES


Appendix B: Chart of Benefit Corporation Statutes.

Appendix C: Draft Statutes.
   1. A Bill containing amendments to the New York Benefit Corporation Law.
   2. A Bill to create a Task Force on Benefit Corporation Investment in Not-for-Profit Corporations.
   3. A Bill authorizing the Dormitory Authority of the State of New York to issue tax exempt bonds on behalf of public-private partnerships.
   4. A Bill establishing a Legislative Finding that not-for-profit corporation investment in infrastructure and administration is necessary and to be valued.

Appendix D: Edited Transcript of Interviews.

Appendix E IRB Materials and Approval.
Appendix A

The New Models Applied – A Hypothetical Not-for-Profit Corporation

One way to assess the impact of the recommendations made by this thesis is to examine how a hypothetical not-for-profit corporation could benefit should these recommendations be implemented. This hypothetical corporation, Rise Up (“RU”) is a New York not-for-profit corporation that provides long-term residential, health, clinical, and day services to adults with developmental disabilities, including cerebral palsy, intellectual disability, autism spectrum disorder, and other conditions. Located in Queens, New York, RU is known for taking some of the most medically challenging individuals out of Willowbrook State School, the notorious now-closed institution for people with developmental disabilities in Staten Island, New York. RU has been in business for approximately 40 years, with an annual budget approaching $50 million and a staff of almost 500.

The 200 residents of RU are aging; some are entering their 80s. With that aging, RU has begun to see the effects of Alzheimer’s disease as well as other co-morbid conditions with its population of residents, and has had to add additional behavioral specialists to its staff to attempt to manage those residents who have experienced new and challenging behaviors as a result of these conditions.

RU’s income is primarily derived from government benefits for its aging residents, primarily Medicare and Medicaid. OPWDD has entered into agreements with RU, as it has with all other voluntary residential providers in New York, to pay RU on a cost-based, fee for service on a per-person, per-day basis, funded by Medicaid. The small health clinic run by RU serves its own population, but very few others, providing primary care and an occasional specialty medical
service when a physician is available. The clinic is licensed by the Department of Health and is only open on a part-time basis. Residents obtain other specialties and off-hours primary care from larger clinics operated by other residential agencies nearby. Although RU must first bill Medicare for health services for its residents, it can then balance bill the New York Medicaid program for the remainder of what is owed, up to the service rate for clinic services set by the Department of Health. That clinic rate has not been revised in many years and RU, like many other New York agencies, is losing money with every service that it provides in the clinic. The management of RU has begun to consider simply closing the clinic and obtaining all health services elsewhere because of the financial drain that the clinic presents.

The OPWDD rates for residential services paid to RU have kept pace with rising costs over the years, but new programs and payment methodologies on the horizon are seen by management as threats to the agency’s existence. In 2013, rate setting, and other financial oversight of OPWDD not-for-profit provider agencies has been moved from OPWDD to the Department of Health, as the single state Medicaid agency. Governor Cuomo has required every state agency that pays Medicaid funds to limit growth in Medicaid, and both OPWDD, and now the Department of Health, have instituted a program originally termed “rate rationalization” to review and adjust residential payments. The rate rationalization program sets rates in part based on regional averages, with the number of direct care provider hours as the benchmark. Unfortunately for RU, there is no factor for acuity of care or required additional nursing, clinical or behavioral care necessary, and so the rate rationalization program, if instituted, will cause RU to lose approximately $2 million per year in revenue.

New York State has also filed an application for a Waiver of the Medicaid program with the US Centers for Medicare and Medicaid Services (CMS), which will radically transform the
OPWDD system. This “People First” Waiver will convert New York’s residential program for individuals with developmental disabilities into a managed care model, imposing utilization controls and potentially a capitated payment for services. Moreover, a fiscal intermediary corporation will be chosen to oversee the residential providers in each region of the state, and that intermediary will receive a fee for performing quality and utilization oversight, as well as be the conduit for payment. The fee received by the fiscal intermediary will be taken out of the residential rates for each provider, further reducing provider income. RU fears that, because it cares for extremely frail and medically and behaviorally challenged individuals, the capitated rates that it will receive will be insufficient to cover its costs.

RU’s infrastructure is aging. In the early 1980s, when RU agreed to take residents of Willowbrook into its program, the state funded construction of housing for the individuals. RU constructed a series of four to six bed homes, with mortgage financing tied to reimbursement on a monthly basis from the state. However, thirty years have passed, the homes are aging and require extensive capital improvements, but OPWDD’s reimbursement for the construction has ended with the payoff of the 30 year mortgages. When asked to continue the reimbursement to fund capital improvements, the State refused, noting that they have already paid for the homes. The minimal amount provided annually for repairs and maintenance does not approach the funds necessary to keep these homes in good repair and livable, especially with four to six medically challenged residents in each.

RU has an IT department that is small and unfunded. The other non-program staff, including human resources, development and fundraising, and administrative staff, is also small and unfunded. RU’s administrative expenses are within the state’s required cap, but only because upgrades to necessary back office functions are being deferred. As RU adds necessary staff and
functions, it requires additional funds to pay for these necessary functions, but no government funding is available, and the new state funding initiatives that are on the horizon appear to offer little hope. RU knows that few agencies in Queens have the expertise or the desire to take in individuals experiencing the level of disability currently served by RU, but RU also knows that it is in serious danger of insolvency without an infusion of cash.

1. **Benefit corporation / P3 Investment.** Access Construction (AC) is a family-owned builder and construction manager that specializes in accessible residential construction and renovation for senior citizens as well as people with challenging physical disabilities. Although formed as a business corporation in New York, it has seen its business falter because OPWDD is no longer funding renovation projects on older community residences. The owners of AC have decided to convert their construction company to a benefit corporation, both because they want to position their business a socially responsible, but also because they do feel that they want to make the world a better place for their clients, and so want a very public statement of their desire to do so. They had previously explored becoming B Lab certified, but found that the voluntary certification did not give them the acknowledgement that they wanted.

Once established as a benefit corporation, they approached RU to form a joint venture to renovate their aging residences, and also to construct a new building that would serve both as their administrative building and health clinic. RU was reluctant to invest any funds into a new health clinic, but also believed that the clinic could serve more people if it was in a new and attractive location, and housing the administration space in the clinic was preferred because it led to better both programmatic accountability and shared costs with the funded program.

RU believed that it not credit-worthy to obtain favorable terms for conventional construction financing of the clinic, but AC proposed that they build the facility through a joint
venture with RU. AC would design and construct the building, to RU’s specifications, and then, once the building is completed, AC would manage the building for thirty years. AC would be responsible for both capital and ordinary repairs and maintenance, taking that load off of RU’s shoulders. Moreover, RU would no longer need to hire construction managers and, when completed, building managers and maintenance contractors. Because of recent legislation, RU would be able to access tax exempt bond financing to fund the project at below-market rates, making the project and long-term maintenance affordable. RU’s contribution to the joint venture would be access to the tax exempt bond market and its expertise in managing the programs in the buildings. RU now believes that because it is located in a high need area, the new clinic will generate enough fee-for-service business with the population entitled to Medicare and Medicaid benefits to survive and pay for the debt service secured by the tax exempt bond, and thrive.

AC has also proposed that, within the same tax exempt financing, it can renovate the aging community residence housing stock of RU and assume maintenance and repair of those facilities as well. They are discussing transferring title to the buildings to the joint venture, with RU’s costs for the buildings built into new leases to the joint venture. Because the tax exempt financing is at a low interest rate, RU believes that OPWDD may act favorably to a rate change to cover the new rental cost, ensuring stability for the residents of the homes while preserving the aging housing for the next thirty years.

Because of the implementation of the OPWDD People First Medicaid Waiver, the method of payment and oversight of RU’s programs will change. It will no longer be an independent provider with a direct relationship to the State; rather, it will be paid through a fiscal intermediary who will provide capitated payments and manage quality assurance and other functions. RU is also exploring participating in a new joint venture being assembled in New
York City that will act as a fiscal intermediary for its OPWDD programs. This new initiative will be partnered with a commercial insurance company specializing in Medicaid managed care. The insurance company will provide the necessary processing of claims and billing, as well as the considerable financial reserve required of an insurance company in New York, while RU will provide expertise in managing care for its developmentally disabled population. While RU expects to pay a management fee to this new intermediary, it believes that the services that it will obtain, including management consulting and claims management, will more than pay for itself. Moreover, as a member of the joint venture, RU will have a seat at the management table of the joint venture and therefore maintain some level of control and input to the venture.

2. **Social impact bond.** RU has begun discussions with an investment bank to prepare a social impact bond to further fund an upgrade to its aging IT infrastructure, as well as its vehicle fleet, and the build-out of its administrative space in the clinic building, a large portion of which will not be funded by OPWDD or the Department of Health. Pursuant to recent legislation, OPWDD has developed metrics to value a provider’s investment in infrastructure, and has developed new enhanced rates that account for the efficiencies resulting from that investment and the improvements made as a result. Moreover, OPWDD has initiated a new program to sponsor social impact bonds to finance infrastructure improvements, and is offering to share with a private sector investor the savings expected to be found from the efficiencies. OPWDD has determined that the enhancements to information processing and management by RU will yield savings such as fewer hospitalizations and ambulance trips, better coordination of medication and durable medical equipment ordering and usage, and other innovations. Further, OPWDD will reward successful joint ventures under its new People First Waiver with rate
enhancements for a period of years in order to establish the joint ventures as viable entities, and RU will benefit from those rate enhancements.

The RU Social impact bond project is intended to be a collaborative effort by RU and some of the other OPWDD providers in Queens, all of whom have the same issues with financing of infrastructure. The not-for-profit providers will form a partnership that will enter into the joint venture arrangement that underlies the social impact bond. The investment bank will assemble investors willing to take the risk that the provider agencies will experience improvements in the areas targeted by OPWDD, and will fund the infrastructure improvements to the partnership, which will then allocate the funds among themselves. Using OPWDD’s new criteria for success, valuing infrastructure improvements and determining the value for each, RU, its partners, the investment bank and OPWDD will jointly agree on success criteria, and how to measure them. The investment bank will provide management consulting services to RU and its’ not-for-profit partners through its management consulting department to ensure that the providers succeed in their operations, and also ensuring that the providers will meet and exceed success measures. The bank has also agreed to provide RU with a construction consultant for the administration space build-out, who will work with AC and RU to maximize the funds available for the administrative space construction.

The final result will be sustainability for RU for many years. The ability of the benefit corporation to make a long-term investment in RU by not only building the new structure, but operating it for a thirty year lease, at favorable terms, commits the benefit corporation to RU’s long-term sustainability while also ensuring its own viability during that extended time period. The availability of both tax exempt financing and professional construction management services offered by the social impact bond investment bank will further effectuate the goals of both RU
and AC. The potential for shared savings from OPWDD payments back to the private investors will also upgrade RU’s entire infrastructure, which will result in better quality of care for the people served by the agency. These proposals will transform a struggling and potentially bankrupt provider of needed services to some of New York’s most fragile residents into a viable and strong entity for many years to come. Everybody wins.
## Appendix B: Chart of Benefit Corporation Statutes

<table>
<thead>
<tr>
<th>State</th>
<th>Reference</th>
<th>Specific Purpose Required/ May be specified</th>
<th>Investment Permitted/ Prohibited/ Silent</th>
<th>Limitations on termination of Benefit Corp status/ Relationship with other entities</th>
<th>Mandated Accountability -Must consider interests</th>
<th>Voluntary Accountability -May consider interests</th>
<th>Benefit Director Permitted/ Required</th>
<th>Public report</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Model Benefit Corporation Law</strong></td>
<td>Model Law</td>
<td>May identify one or more specific public benefits</td>
<td>“increasing flow of capital to entities with a purpose to benefit society or the environment” permitted</td>
<td>2/3 vote to terminate status</td>
<td>-Shareholders -Employees -Customers -Community / society -Environment -Interests of B Corp -Ability to accomplish public purpose</td>
<td>Other constituencies as determined by the Board</td>
<td>Required for publicly traded corporations; optional for others</td>
<td>Required for publicly traded corporations; optional for others</td>
</tr>
<tr>
<td>Arizona</td>
<td>AZ Rev Stat 10-122, eff 1/2015</td>
<td>May be specified</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Not required</td>
<td>Same as Model law</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Ark Code Title 4, Ch 36, eff 8/2013</td>
<td>May be specified</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Not required</td>
<td>Same as Model Law</td>
</tr>
<tr>
<td>State</td>
<td>Reference</td>
<td>Specific Purpose</td>
<td>Investment</td>
<td>Limitations on termination</td>
<td>Mandated Accountability</td>
<td>Voluntary Accountability</td>
<td>Benefit Director</td>
<td>Public report</td>
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<tr>
<td>California</td>
<td>Cal Code 14600, Eff. 2012</td>
<td>May be specific</td>
<td>Same as Model Law</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>May consider Interests of potential takeover partners</td>
<td>Not required</td>
<td>Same as Model law; no requirement of state filing</td>
</tr>
<tr>
<td>Colorado</td>
<td>Colo Stat Title 7, part 101, Eff 4/2014</td>
<td>May be specified</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Not required</td>
<td>No requirement to file with the state</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>Dc Code Title 29, Ch 13, Eff n.d.</td>
<td>May be specified</td>
<td>Same as Model Law</td>
<td>Same as Model law</td>
<td>Same as Model Law</td>
<td>Same as Model Law</td>
<td>Required</td>
<td>Must be filed with the DC Mayor’s office</td>
</tr>
<tr>
<td>Delaware</td>
<td>Del Code, Title 8, Eff 8/2013</td>
<td>“Public benefit” means a positive effect (or reduction of negative effects) on persons, entities, communities or interests</td>
<td>Same as Model law</td>
<td>The board of directors shall manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the</td>
<td>Not stated</td>
<td>Not required</td>
<td>No requirement to make public or file with the State</td>
<td></td>
</tr>
</tbody>
</table>
including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature

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
<table>
<thead>
<tr>
<th>State</th>
<th>Reference</th>
<th>Specific Purpose</th>
<th>Investment</th>
<th>Limitations on termination</th>
<th>Mandated Accountability</th>
<th>Voluntary Accountability</th>
<th>Benefit Director</th>
<th>Public report</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hawaii</td>
<td>Hawaii Stat Sections 420D-1- et seq, eff 7/2011</td>
<td>May be specified; Same as Model law</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Shareholders Public Purposes stated</td>
<td>-Employees -Customers -Community / society -Environment -Interests of B Corp -Ability to accomplish public purpose -other constituencies</td>
<td>Required</td>
<td>Exempts governmental oversight for private corporations’ must post report on website</td>
</tr>
<tr>
<td>Illinois</td>
<td>III Stat Ch. 40, Sec 1, eff 2013</td>
<td>May be specified; Same as Model law</td>
<td>Termination must be approved by government regulators and shareholders with 2/3 vote</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Same as Model Law</td>
<td>Required</td>
<td>State filing not required. No requirement that evaluation be based on recognized standard developed by independent third party</td>
</tr>
<tr>
<td>Louisiana</td>
<td>LA Stat Sec 1801 et seq, eff 8/2012</td>
<td>May be specified; Same as Model law</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Same as Model Law</td>
<td>Benefit Officer required</td>
<td>No requirement that evaluation be based on standard developed by independent third party</td>
</tr>
<tr>
<td>State</td>
<td>Reference</td>
<td>Specific Purpose</td>
<td>Investment</td>
<td>Limitations on termination</td>
<td>Mandated Accountability</td>
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<tr>
<td>Maryland</td>
<td>MD Code , Corps Sec 5-6C-01 et seq, Eff 10/2010</td>
<td>May be specified</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>-Shareholders</td>
<td>Other constituencies as determined by the Board</td>
<td>Not required</td>
<td>Not required to be filed with the State</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Mass Gen L Ch 156E</td>
<td>May be specified</td>
<td>Same as Model law, also includes “increasing the flow of capital and assets to entities with a general public purpose.”</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Required</td>
<td>-Standard for evaluation need not be “recognized.” -Must file the report with the State.</td>
</tr>
<tr>
<td>Nevada</td>
<td>Nev Rev Stat Title 7, Eff 1/2014</td>
<td>May be specified</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Not required</td>
<td>Not required to be filed with the state</td>
</tr>
<tr>
<td>State</td>
<td>Reference</td>
<td>Specific Purpose</td>
<td>Investment</td>
<td>Limitations on termination</td>
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<tr>
<td>New York</td>
<td>NY BCL Sec 1701 et seq, ef 2/2-12</td>
<td>May be specified</td>
<td>Same as Model law</td>
<td>2/3 vote to terminate status; ¾ vote to terminate public benefit</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Not required.</td>
<td>No state filing required. No website posting required.</td>
</tr>
<tr>
<td>Oregon</td>
<td>HB 2296, Eff 1/2014</td>
<td>Maybe specified</td>
<td>Same as model law</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Not required</td>
<td>Not required to be filed with the state</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>PA Stat Ch 15, sec 3301 et seq, eff 1/2013</td>
<td>Same as Model law</td>
<td>Same as Model law, additionally, support for initiatives to increase access to capital for emerging technologies</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td></td>
</tr>
<tr>
<td>Rhode Island</td>
<td>Gen laws Title 7, Eff 1/2014</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Required for publicly traded corporations, permitted for others</td>
<td>Filed with the State</td>
</tr>
<tr>
<td>State</td>
<td>Reference</td>
<td>Specific Purpose</td>
<td>Investment</td>
<td>Limitations on termination</td>
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<tr>
<td>South Carolina</td>
<td>SC Code Sec 33-38 et seq, eff 6/2012</td>
<td>Required</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Required</td>
<td>No requirement that evaluation be based on recognized standard developed by independent third party</td>
</tr>
<tr>
<td>Vermont</td>
<td>Vt Stat 11A, Sec 21.01 et seq, eff 7/2-11</td>
<td>Required</td>
<td>Same as Model law</td>
<td>2/3 vote to terminate status</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Required</td>
<td>Subject to approval by shareholders. No state filing requirement.</td>
</tr>
<tr>
<td>Virginia</td>
<td>Va Code Sec 13.1-782 et seq, eff 7/2011</td>
<td>May be specified</td>
<td>Same as Model law</td>
<td>2/3 vote to terminate status</td>
<td>Same as Model law</td>
<td>Same as Model law</td>
<td>Not required</td>
<td>No requirement to file with the state.</td>
</tr>
</tbody>
</table>
Appendix C

Draft Statutes

1. A Bill containing amendments to the New York Benefit Corporation Law.

2. A Bill to create a Task Force on Benefit Corporation Investment in Not-for-Profit Corporations.

3. A Bill authorizing the Dormitory Authority of the State of New York to issue tax exempt bonds on behalf of public private partnerships.

4. A Bill establishing a legislative finding that not-for-profit corporation investment in infrastructure and administration is necessary and to be highly valued.
1. A Bill Containing Amendments to the New York Benefit Corporation Law.

SPONSOR’S MEMORANDUM IN SUPPORT OF PROPOSED AMENDMENTS TO THE NEW YORK STATE BENEFIT CORPORATION LAW, ARTICLE 17 OF THE BUSINESS CORPORATION LAW.

A Bill authorizing benefit corporations to invest funds in not-for-profit corporations and to enter into joint venture arrangements and public-private partnerships with not-for-profit corporations.

BILL NUMBER: _____

TITLE OF BILL: AN ACT to amend the business corporation law in relation to authorizing benefit corporations to invest corporate assets in certain not-for-profit corporations, either directly or through financing vehicles such as social impact bonds; and in relation to authorizing benefit corporations to enter into joint ventures and public-private partnership arrangements with certain not-for-profit corporations.

PURPOSE OR GENERAL IDEA OF BILL: The purpose of the bill is to clarify the authorization of benefit corporations to fulfill their social purposes by investing in not-for-profit corporations operating social service programs under license issued by an agency of the state, through financing vehicles such as social impact bonds, or by entering into joint venture agreements and public-private partnership arrangements with these entities, including financing and investment in infrastructure and administration as well as program operations. The bill also provides protection for the not-for-profit corporation in the event that the benefit corporation
chooses to terminate the relationship, requiring approval by a Justice of the Supreme Court on notice to the Attorney General and program oversight agency before the relationship and funding can be terminated.

SUMMARY OF PROVISIONS:

This bill would specify that a benefit corporation could fulfill its general and specific public purposes by investing in, or becoming a business partner with, a not-for-profit corporation operating a social service program licensed by an agency of the state. The investment can be through a social impact bond or made directly to the not-for-profit corporation. This bill also protects not-for-profit corporation by specifying the procedure by which a benefit corporation can terminate its relationship with a not-for-profit corporation, including approval by a Justice of the Supreme Court on notice to the Attorney General and licensing agency. The bill also requires directors of benefit corporations to consider the interests of not-for-profit corporations and their constituencies in making corporate decisions. The bill requires that the benefit corporation provide a copy of its annual report to the Attorney General and state program oversight agency.

JUSTIFICATION:

Not-for-profit corporations require adequate funding to support infrastructure, administration and program operations. Benefit corporations are well suited to provide needed capital through investment in not-for-profit corporations, or through collective entities such as joint ventures and public-private partnerships. Social impact bonds are also innovative and effective ways in which benefit corporations can invest needed funds in not-for-profit corporations. This bill clarifies that investment in not-for-profit corporations, including joint
ventures and public-private partnerships, are within the definitions of general and specific public
benefits under Article 17 of the Business Corporation law. This bill also provides information
and protection for the not-for-profit corporations engaged in joint ventures with benefit
corporations in the event that the benefit corporations choose to terminate their relationships with
the not-for-profit corporations.

PRIOR LEGISLATIVE HISTORY: None
FISCAL IMPLICATIONS: Minimal
EFFECTIVE DATE: Immediately
AN ACT to amend the business corporation law in relation to authorizing benefit corporations to invest corporate assets in certain not-for-profit corporations; in relation to authorizing benefit corporations to enter into joint ventures and public-private partnerships with certain not-for-profit corporations.

EXPLANATION--Matter in CAPITALS is new; matter in brackets [ ] is old law to be omitted.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

(Note: Unaffected sections of statutes are included in this draft for clarity; they would not appear in the bill as introduced.)
§ 1701. Application and effect of article.

(a) This article shall be applicable to all benefit corporations.

(b) The existence of a provision of this article shall not of itself create any implication that a contrary or different rule of law is or would be applicable to a business corporation that is not a benefit corporation. This article shall not affect any statute or rule of law that is or would be applicable to a business corporation that is not a benefit corporation.

(c) Except as otherwise provided in this article, this chapter shall be applicable to all benefit corporations. The specific provisions of this article shall control over the general provisions of this chapter.

(d) A provision of the certificate of incorporation or bylaws of a benefit corporation may not relax, be inconsistent with or supersede any provision of this article.
Section 1: Section 1702 of the business corporation law is amended to read as follows:

§ 1702. Definitions.

As used in this article, unless the context otherwise requires, the term:

(a) "Benefit corporation" means a business corporation incorporated under this article and whose status as a benefit corporation has not been terminated as provided in this article.

(b) "General public benefit" means a material positive impact on society and the environment, INCLUDING INVESTMENT IN NOT-FOR-PROFIT CORPORATIONS OPERATING ONE OR MORE SOCIAL SERVICE PROGRAMS UNDER LICENSE FROM AN AGENCY OF THE STATE, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation.

(c) "Independent” means that a person has no material relationship with a benefit corporation or any of its subsidiaries. A material relationship between a person and a benefit corporation or any of its subsidiaries will be conclusively presumed to exist if:

(1) the person is, or has been within the last three years, an employee of the benefit corporation or any of its subsidiaries;

(2) an immediate family member of the person is, or has been within the last three years, an executive officer of the benefit corporation or any of its subsidiaries; or

(3) the person, or an entity of which the person is a director, officer or other manager or in which the person owns beneficially or of record five percent or more of the equity interests, owns beneficially or of record five percent or more of the shares of the benefit corporation. A percentage of ownership in an entity shall be calculated as if all outstanding rights to acquire equity interests in the entity had been exercised.
(d) "Minimum status vote" means that, in addition to any other approval or vote required by this chapter, the certificate of incorporation or a bylaw adopted by the shareholders:

1. The holders of shares of every class or series that are entitled to vote on the corporate action shall be entitled to vote as a class on the corporate action; and
2. The corporate action must be approved by vote of the shareholders of each class or series entitled to cast at least three-quarters of the votes that all shareholders of the class or series are entitled to cast thereon.

(e) "Specific public benefit," includes:

1. Providing low-income or underserved individuals or communities with beneficial products or services;
2. Promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;
3. 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, INCLUDING INVESTMENT IN NOT-FOR-PROFIT CORPORATIONS OPERATING ONE OR MORE SOCIAL SERVICE PROGRAMS UNDER LICENSE FROM AN AGENCY OF THE STATE; and
7. The accomplishment of any other particular benefit for society or the environment.

(f) "Subsidiary" means an entity in which a person owns beneficially or of record fifty percent or more of the equity interests. A percentage of ownership in an entity shall be calculated as if all outstanding rights to acquire equity interests in the entity had been exercised.
(g) "Third-party standard" means a recognized standard for defining, reporting and assessing general OR SPECIFIC public benefit that is:

(1) developed by a person OR ENTITY that is independent of the benefit corporation; and

(2) Transparent because the following information about the standard is publicly available AND REFERENCED IN THE REPORT MADE BY THE BENEFIT CORPORATION:

(A) the factors considered when measuring the performance of a business;

(B) the relative weightings of those factors; and

(C) the identity of the persons OR ENTITIES who developed, APPROVED and / OR control changes to the standard and the process by which those changes are made AND DETAIL OF CHANGES THAT WERE MADE.

(H) FOR PURPOSES OF THIS CHAPTER, “JOINT VENTURE” MEANS A BUSINESS UNDERTAKING, WHETHER BY CONTRACTUAL ARRANGEMENT, PARTNERSHIP OR OTHERWISE, BY THE BENEFIT CORPORATION AND A NOT-FOR-PROFIT CORPORATION OPERATING ONE OR MORE SOCIAL SERVICE PROGRAMS UNDER LICENSE BY AN AGENCY OF THE STATE.

(I) FOR PURPOSES OF THIS CHAPTER, PUBLIC-PRIVATE PARTNERSHIP MEANS A CONTRACTUAL OR BUSINESS AGREEMENT FORMED BETWEEN A NOT-FOR-PROFIT CORPORATION OPERATING ONE OR MORE SOCIAL SERVICE PROGRAMS UNDER LICENSE ISSUED BY AN AGENCY OF THE STATE, AND A BENEFIT CORPORATION FOR THE PURPOSES OF DESIGN, CONSTRUCTION, MANAGEMENT, OPERATION, MAINTENANCE AND ACCESS TO FINANCING OF A CAPITAL PROJECT FOR THE BENEFIT OF THE NOT-FOR-PROFIT CORPORATION, INCLUDING
INFRASTRUCTURE, ADMINISTRATION AND PROGRAM OPERATIONS OF THE NOT-FOR-PROFIT CORPORATION.

(J) FOR THE PURPOSES OF THIS CHAPTER, “SOCIAL IMPACT BOND” SHALL MEAN A FINANCIAL ARRANGEMENT BETWEEN ONE OR MORE BENEFIT CORPORATIONS AND A NOT-FOR-PROFIT CORPORATION BY WHICH THE BENEFIT CORPORATION MAKES A FINANCIAL INVESTMENT IN THE INFRASTRUCTURE, ADMINISTRATION OR PROGRAM OPERATIONS OF THE NOT-FOR-PROFIT CORPORATION, AND SUCH INVESTMENT IS REPAYED BASED ON AGREED-UPON CRITERIA FOR SUCCESS. THE REPAYMENT IS ENHANCED BY GOVERNMENT BASED UPON FINANCIAL SAVINGS RESULTING FROM THE SOCIAL IMPACT BOND INVESTMENT.

§ 1703. Formation of benefit corporations.
A benefit corporation shall be formed in accordance with this chapter except that its certificate of incorporation shall also state that it is a benefit corporation.

§ 1704. Election of an existing business corporation to become a benefit corporation.
(a) A business corporation may become a benefit corporation under this article by amending its certificate of incorporation so that it contains a statement that the corporation is a benefit corporation. The amendment shall not be effective unless it is adopted by at least the minimum status vote.
(b) Any corporation that is not a benefit corporation that is a party to a merger or consolidation in which the surviving or consolidated corporation will be a benefit corporation must approve the
plan of merger or consolidation by at least the minimum status vote in addition to any other vote
required by this chapter, the certificate of incorporation or the bylaws.

(c) Any corporation that is not a benefit corporation that is party to a merger or consolidation in
which shares of stock of such corporation will be converted into a right to receive shares of stock
of a benefit corporation must approve the plan of merger or consolidation by at least
the minimum status vote in addition to any other vote required by this chapter, the certificate of
incorporation or the bylaws.

Section 2: Section 1705 of the business corporation law is amended to read as follows:

§ 1705. Termination of benefit corporation status.

(a) A benefit corporation may terminate its status as such and cease to be subject to this article
by amending its certificate of incorporation to delete the statement that the corporation is a
benefit corporation. The amendment shall not be effective unless it is

(1) adopted by at least the minimum status vote, AND

(2) APPROVED BY A JUSTICE OF THE SUPREME COURT IF THE BENEFIT
CORPORATION IS A PARTICIPANT IN A JOINT VENTURE WITH A NOT-FOR-PROFIT
CORPORATION PROVIDING ONE OR MORE SOCIAL SERVICE PROGRAMS UNDER
LICENSE FROM ANY AGENCY OF THE STATE, OR IN A PUBLIC-PRIVATE
PARTNERSHIP WITH A NOT-FOR-PROFIT CORPORATION PROVIDING ONE OR
MORE SOCIAL SERVICE PROGRAMS UNDER LICENSE FROM ANY AGENCY OF THE
STATE, OR IS AN INVESTOR IN A SOCIAL IMPACT BOND BENEFITTING A NOT-FOR-
PROFIT CORPORATION PROVIDING ONE OR MORE SOCIAL SERVICE PROGRAMS
UNDER LICENSE FROM ANY AGENCY OF THE STATE. APPLICATION FOR
APPROVAL BY A JUSTICE OF THE SUPREME COURT SHALL BE ON NOTICE TO THE
ATTORNEY GENERAL AND TO ALL AGENCIES OF THE STATE LICENSING THE
PROGRAM UNDER WHICH THE JOINT VENTURE OPERATES, WHO SHALL DEVELOP
SUCH FORMS AND PROCEDURES AS ARE NECESSARY TO ENSURE THE
CONTINUED SUSTAINABILITY OF THE NOT-FOR-PROFIT CORPORATION AND THE
SOCIAL SERVICE PROGRAMS OPERATED BY THE NOT-FOR-PROFIT CORPORATION
AFTER TERMINATION OF THE BENEFIT CORPORATION STATUS.
(b) If a benefit corporation is a party to a merger or consolidation in which the surviving or new
corporation will not be a benefit corporation, the plan of merger or consolidation shall not be
effective unless it is adopted by at least the minimum status vote in addition to
any other vote OR APPROVAL required by this chapter, the certificate of incorporation or the
bylaws.
(c) Any benefit corporation that is party to a merger or consolidation in which shares of stock of
such benefit corporation will be converted into a right to receive shares of stock of a corporation
that is not a benefit corporation must approve the plan of merger or consolidation by at least the
minimum status vote in addition to any other vote OR APPROVAL required by this chapter, the
certificate of incorporation or the bylaws.
(d) A sale, lease, conveyance, exchange, transfer, or other disposition of all or substantially all
of the assets of a benefit corporation, unless the transaction is in the usual and regular course of
business of the benefit corporation, shall not be effective unless the transaction is approved by at
least the minimum status vote in addition to any other vote OR APPROVAL required by this
chapter, the certificate of incorporation or the bylaws.
Section 3: Section 1706 of the business corporation law is amended to read as follows:

§ 1706. Corporate purposes.

(a) Every benefit corporation shall have a purpose of creating general public benefit. This purpose is in addition to its purposes under section two hundred one of this chapter and any specific purpose set forth in its certificate of incorporation under paragraph (b) of this section. The purpose to create general public benefit shall be a limitation on the other purposes of the benefit corporation, and shall control over any inconsistent purpose of the benefit corporation.

(b) The certificate of incorporation of a benefit corporation SHALL [may] identify one or more specific public benefits that it is the purpose of the benefit corporation to create in addition to its purposes under section two hundred one of this chapter and paragraph (a) of this section. The identification of a specific public benefit under this paragraph does not limit the obligation of a benefit corporation to create general public benefit.

(c) The creation of general and specific public benefits as provided in paragraphs (a) and (b) of this section is in the best interests of the benefit corporation.

(d) A benefit corporation may amend its certificate of incorporation to add, amend or delete the identification of a specific public benefit that it is the purpose of the benefit corporation to create. EXCEPT AS OTHERWISE PROVIDED IN SECTION 1706 (E) OF THIS CHAPTER, the amendment shall not be effective unless it is adopted by at least the minimum status vote.

(E) IF THE BENEFIT CORPORATION IS A PARTICIPANT IN A JOINT VENTURE WITH A NOT-FOR-PROFIT CORPORATION OPERATING ONE OR MORE SOCIAL SERVICE PROGRAMS UNDER LICENSE BY AN AGENCY OF THE STATE, OR IN A PUBLIC-
PRIVATE PARTNERSHIP WITH A NOT-FOR-PROFIT CORPORATION PROVIDING ONE OR MORE SOCIAL SERVICE PROGRAMS UNDER LICENSE FROM ANY AGENCY OF THE STATE, OR IS AN INVESTOR IN A SOCIAL IMPACT BOND BENEFITTING A NOT-FOR-PROFIT CORPORATION PROVIDING ONE OR MORE SOCIAL SERVICE PROGRAMS UNDER LICENSE FROM ANY AGENCY OF THE STATE, THE BENEFIT CORPORATION MAY NOT ELIMINATE THAT SPECIFIC PURPOSE UNLESS IT IS APPROVED BY A JUSTICE OF THE SUPREME COURT. APPLICATION FOR APPROVAL BY A JUSTICE OF THE SUPREME COURT SHALL BE ON NOTICE TO THE ATTORNEY GENERAL AND TO ALL AGENCIES OF THE STATE LICENSING THE PROGRAMS OPERATED BY THE NOT-FOR-PROFIT, WHO SHALL DEVELOP SUCH FORMS AND PROCEDURES AS ARE NECESSARY TO ENSURE THE CONTINUED SUSTAINABILITY OF THE NOT-FOR-PROFIT CORPORATION AND THE SOCIAL SERVICE PROGRAMS OPERATED BY THE NOT-FOR-PROFIT CORPORATION AFTER AMENDMENT OF THE CERTIFICATE OF INCORPORATION.

Section 4: Section 1707 of the business corporation law is amended to read as follows:

§ 1707. Standard of conduct for directors and officers.

(a) In discharging the duties of their respective positions, the board of directors, committees of the board and individual directors and officers of a benefit corporation:

(1) shall consider the effects of any action upon:

(A) the ability for the benefit corporation to accomplish its general and any specific public benefit purpose;

(B) the shareholders of the benefit corporation;
(C) the employees and workforce of the benefit corporation and its subsidiaries and suppliers;

(D) the interests of customers as beneficiaries of the general or specific public benefit purposes of the benefit corporation, INCLUDING BENEFICIARIES OF THE SOCIAL SERVICE PROGRAMS OPERATED BY NOT-FOR-PROFIT CORPORATIONS WITH WHICH THE BENEFIT CORPORATION IS A JOINT VENTURE OR PUBLIC-PRIVATE PARTNERSHIP PARTICIPANT, OR IS A BENEFICIARY OF A SOCIAL IMPACT BOND INVESTMENT MADE BY THE BENEFIT CORPORATION;

(E) community and societal considerations, INCLUDING THOSE OF ANY NOT-FOR-PROFIT CORPORATIONS THAT ARE JOINT VENTURE OR PUBLIC-PRIVATE PARTNERSHIP PARTICIPANTS, OR WHO IS THE BENEFICIARY OF A SOCIAL IMPACT BOND INVESTMENT BY THE BENEFIT CORPORATION, or community in which offices or facilities of the benefit corporation or its subsidiaries or suppliers, OR not-for-profit corporation THAT ARE JOINT VENTURE OR PUBLIC-PRIVATE PARTNERSHIP PARTICIPANTS, OR WHO IS THE BENEFICIARY OF A SOCIAL IMPACT BOND INVESTMENT BY THE BENEFIT CORPORATION are located;

(F) the local and global environment; and

(G) the short-term and long-term interests of the benefit corporation, including 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;

(2) may consider:

(A) the resources, intent and conduct (past, stated and potential) of any person seeking to acquire control of the corporation; and
(B) any other pertinent factors or the interests of any other group that they deem appropriate; and

(3) shall not be required to give priority to the interests of any particular person or group referred to in subparagraphs one and two of this paragraph over the interests of any other person or group unless the benefit corporation has stated its intention to give priority to interests related to a specific public benefit purpose identified in its certificate of incorporation.

(b) The consideration of interests and factors in the manner required by paragraph (a) of this section:

(1) shall not constitute a violation of the provisions of sections seven hundred fifteen or seven hundred seventeen of this chapter; and

(2) is in addition to the ability of directors to consider interests and factors as provided in section seven hundred seventeen of this chapter.

(c) A director does not have a fiduciary duty to a person that is a beneficiary of the general or specific public benefit purposes of a benefit corporation arising from the status of the person as a beneficiary, unless otherwise stated in the certificate of incorporation or the bylaws of the benefit corporation.

(D) IN THE EXERCISE OF HIS OR HER FIDUCIARY DUTIES, A DIRECTOR MUST CONSIDER THE EFFECT OF HIS OR HER ACTIONS OR INACTIONS ON ANY NOT-FOR-PROFIT CORPORATION OPERATING ONE OR MORE SOCIAL SERVICE PROGRAMS UNDER LICENSE BY AN AGENCY OF THE STATE THAT IS A JOINT VENTURE OR PUBLIC-PRIVATE PARTNERSHIP PARTICIPANT, OR WHO IS THE BENEFICIARY OF A SOCIAL IMPACT BOND INVESTMENT BY THE BENEFIT CORPORATION. NOTHING IN THIS ARTICLE IMPOSES A RIGHT OF ANY NOT-FOR-
PROFIT CORPORATION THAT IS A JOINT VENTURE OR PUBLIC-PRIVATE PARTNERSHIP PARTICIPANT, OR BENEFICIARY OF A SOCIAL IMPACT BOND INVESTMENT BY THE BENEFIT CORPORATION, OR SOCIAL SERVICE BENEFICIARY OF THE PROGRAMS OPERATED BY THE NOT-FOR-PROFIT CORPORATION, WHETHER INDIVIDUAL OR ENTITY, TO ENFORCE A FIDUCIARY DUTY ON THE DIRECTORS OF THE BENEFIT CORPORATION UNLESS SUCH DUTY IS SET FORTH IN THE CERTIFICATE OF INCORPORATION OR BYLAWS OF THE BENEFIT CORPORATION, OR IN ANY DOCUMENTS SETTING FORTH THE TERMS OF THE JOINT VENTURE AGREEMENT.

Section 5: Section 1708 of the business corporation law is amended to read as follows:

§ 1708. Annual benefit report.

(a) A benefit corporation must deliver to each shareholder an annual benefit report including:

(1) a narrative description of:

(A) the process and rationale for selecting the third party standard used to prepare the benefit report;

(B) the ways in which the benefit corporation pursued general public benefit during the year and the extent to which general public benefit was created AND / OR SUSTAINED;

(C) the ways in which the benefit corporation pursued any specific public benefit that the certificate of incorporation states it is the purpose of the benefit corporation to create and the extent to which that specific public benefit was created AND / OR SUSTAINED; and
(D) any circumstances that have hindered the creation by the benefit corporation of general or specific public benefit; and

(E) A DESCRIPTION OF ANY JOINT VENTURE OR PUBLIC-PRIVATE PARTNERSHIP, AND SOCIAL IMPACT BOND INVESTMENT, ENTERED INTO BY THE BENEFIT CORPORATION AND THE SOCIAL SERVICE PROGRAMS OPERATED BY THE NOT-FOR-PROFIT CORPORATION JOINT VENTURE PARTNERS.

(2) an assessment of the performance of the benefit corporation, relative to its general public benefit purpose assessed against a third-party standard applied consistently with any application of that standard in prior benefit reports or accompanied by an explanation of the reasons for any inconsistent application and, if applicable, assessment of the performance of the benefit corporation, relative to its specific public benefit purpose or purposes;

(3) the compensation paid by the benefit corporation during the year to each director in that capacity; and

(4) the name of each person that owns beneficially or of record five percent or more of the outstanding shares of the benefit corporation.

(b) The benefit report must be sent annually to each shareholder within one hundred twenty days following the end of the fiscal year of the benefit corporation. Delivery of a benefit report to shareholders is in addition to any other requirement to deliver an annual report to shareholders.

(c) A benefit corporation must post its most recent benefit report on the public portion of its website, if any, except that the compensation paid to directors and any financial or proprietary information included in the benefit report may be omitted from the benefit report as posted. A BENEFIT CORPORATION MUST ALSO DELIVER A COPY OF ITS MOST RECENT BENEFIT REPORT TO ALL JOINT VENTURE AND PUBLIC-PRIVATE PARTNERSHIP
PARTICIPANTS, AND NOT-FOR-PROFIT CORPORATIONS THAT ARE BENEFICIARIES
OF SOCIAL IMPACT BOND INVESTMENTS MADE BY THE BENEFIT CORPORATION,
PARTNERS, EXCEPT THAT THE COMPENSATION PAID TO DIRECTORS AND ANY
FINANCIAL OR PROPRIETARY INFORMATION INCLUDED IN THE BENEFIT REPORT
MAY BE OMITTED FROM THE BENEFIT REPORT AS DELIVERED.

(d) Concurrently with the delivery of the benefit report to shareholders pursuant to paragraph (b)
of this section, the benefit corporation must deliver a copy of the benefit report to the department
for filing, AS WELL AS TO ANY AGENCY OF THE STATE THAT LICENSES PROGRAMS
OPERATED BY ANY JOINT VENTURE OR PUBLIC-PRIVATE PARTNERSHIP
PARTICIPANTS, OR BENEFICIARY OF A SOCIAL IMPACT BOND, except that the
compensation paid to directors and any
financial or proprietary information included in the benefit report may be omitted from the
benefit report as filed under this section.

(e) The annual benefit report shall be in addition to all other reporting requirements under this
chapter.

§ 1709. Conspicuous language on the face of certificates.
All certificates representing shares of a benefit corporation shall contain, in addition to any other
statements required by the business corporation law, the following conspicuous language on the
face of the certificate:
"This entity is a benefit corporation organized under article seventeen of the New York business
corporation law."
Section 6. This act shall take effect immediately.
2. A Bill to Create a Task Force on Benefit Corporation Investment in Not-for-Profit Corporations.

SPONSOR’S MEMORANDUM IN SUPPORT OF A BILL CREATING A TASK FORCE ON PRIVATE SECTOR INVESTMENT BY BENEFIT CORPORATIONS IN NOT-FOR-PROFIT CORPORATIONS OPERATING SOCIAL SERVICE PROGRAMS

A Bill creating a task force on private sector investment by benefit corporations in not-for-profit corporations operating social service programs.

BILL NUMBER: ______

TITLE OF BILL: AN ACT in relation to establishing a task force to study private sector benefit corporation equity investment in not-for-profit corporations operating social service programs, and requiring the task force to report its findings within 180 days.

PURPOSE OR GENERAL IDEA OF BILL: The purpose of the bill is to establish a task force on private sector benefit corporation investment in not-for-profit corporations operating social service programs under license issued by an agency of the state, including establishment of joint ventures, public-private partnerships, and through social impact bonds, with investment targeted to the not-for-profit corporation’s infrastructure and administration as well as program operations. The bill specifies the composition of the task force, and directs it to review applicable statutes, regulations, and standards so that it can establish appropriate policies and procedures to guide investments. The bill also charges the task force with developing criteria for evaluation of
benefit corporation public benefits and criteria for determining success to support enhanced repayment of social impact bonds.

SUMMARY OF PROVISIONS: The task force on private sector investment by benefit corporations in not-for-profit corporations operating social service programs is established. The task force composition is specified, and the task force is charged with investigating and reviewing applicable laws, regulations and standards to guide agencies in developing and implementing policies and procedures governing investment by benefit corporations into not-for-profit corporations operating social service programs under license issued by an agency of the state. The task force is also charged with developing criteria for evaluating the success of benefit corporations in meeting their public purposes, as well as criteria for success upon which enhanced repayment of social impact bonds can be based. The task force is directed to complete its work and issue a report within 180 days.

JUSTIFICATION: Benefit corporations established pursuant to Article 17 of the Business Corporation Law must specify both general and specific public benefits as corporate purposes, and may include in those purposes the corporation’s investment in not-for-profit corporations operating social service programs under license issued by an agency of the state. However, there are no standards governing how those investments can be made, including the structure of joint venture or public-private partnership arrangements, or investment vehicles such as social impact bonds. This bill establishes a task force to study laws, regulations and standards to enable it to develop and guide the implementation of policies and procedures for private sector benefit corporation investments in these not-for-profit corporations. The task force is to consider
the interests of all parties, including the not-for-profit corporation, the private investors and the government agencies overseeing the social service programs. The task force composition is specified, with a directive to make a final report within 180 days after the effective date of this article.

PRIOR LEGISLATIVE HISTORY: None

FISCAL IMPLICATIONS: Minimal

EFFECTIVE DATE: Immediately
AN ACT in relation to establishing a task force on private sector investment by benefit corporations in not-for-profit corporations operating social service programs, and requiring the task force to report its findings within 180 days.

EXPLANATION--Matter in CAPITALS is new; matter in brackets [ ] is old law to be omitted.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:
SECTION 1. LEGISLATIVE INTENT. THE LEGISLATURE FINDS THAT MANY NEW YORK BUSINESS CORPORATIONS HAVE TAKEN ADVANTAGE OF THE OPPORTUNITY TO BECOME BENEFIT CORPORATIONS TO PURSUE SOCIAL GOALS AS WELL AS PROFIT MAXIMIZATION. THE LEGISLATURE ALSO FINDS THAT NOT-FOR-PROFIT CORPORATIONS OPERATING SOCIAL SERVICE PROGRAMS UNDER LICENSE BY AN AGENCY OF THE STATE WOULD BENEFIT FROM INVESTMENT OF PRIVATE SECTOR FUNDS TO SUPPORT ONGOING INFRASTRUCTURE, ADMINISTRATION AND PROGRAM OPERATIONS. THE LEGISLATURE RECOGNIZES THAT BENEFIT CORPORATIONS CAN ACHIEVE THEIR GENERAL AND SPECIFIC PUBLIC BENEFITS THROUGH INVESTMENT IN NOT-FOR-PROFIT CORPORATIONS OPERATING SOCIAL SERVICE PROGRAMS, AND THAT THE STRUCTURE OF BUSINESS RELATIONSHIPS BETWEEN BENEFIT CORPORATIONS AND NOT-FOR-PROFIT CORPORATIONS MUST BE DEVELOPED AND STANDARDIZED IN ORDER TO ACHIEVE LONG-TERM SUSTAINABILITY OF THESE PRIVATE SECTOR – NOT-FOR-PROFIT RELATIONSHIPS. THE LEGISLATURE FURTHER RECOGNIZES THAT SOCIAL IMPACT BONDS CAN BE UTILIZED TO FINANCE NOT-FOR-PROFIT CORPORATIONS, AND THAT BENEFIT CORPORATIONS MAY FULFILL THEIR PUBLIC BENEFIT PURPOSES THROUGH INVESTMENT IN SOCIAL IMPACT BONDS. THE LEGISLATURE ALSO RECOGNIZES DEVELOPMENT OF MODELS FOR SUSTAINABLE PRIVATE SECTOR INVESTMENTS IS AN AREA THAT NEEDS STUDY AND REVIEW.
IN ORDER TO DETERMINE THE STRUCTURE, PARAMETERS, PROTECTIONS AND
NECESSARY REGULATION REQUIRED FOR IMPLEMENTATION OF THESE
BUSINESS ARRANGEMENTS.

SECTION 2. THE NEW YORK STATE TASK FORCE ON PRIVATE SECTOR
INVESTMENT BY BENEFIT CORPORATIONS IN NOT-FOR-PROFIT CORPORATIONS
OPERATING SOCIAL SERVICE PROGRAMS IS HEREBY ESTABLISHED. THE GOALS
OF THE TASK FORCE INCLUDE, BUT ARE NOT LIMITED TO:

(a) REVIEWING THE BUSINESS CORPORATION LAW, NOT-FOR-PROFIT
CORPORATION LAW, JUDICIARY LAW, ESTATES, POWERS AND TRUSTS LAW,
PARTNERSHIP LAW, SOCIAL SERVICES LAW, MENTAL HYGIENE LAW, PUBLIC
HEALTH LAW, STATE FINANCE LAW AND ANY OTHER STATUTES GOVERNING
BENEFIT CORPORATIONS AND NOT-FOR-PROFIT CORPORATIONS OPERATING
SOCIAL SERVICE PROGRAMS TO IDENTIFY AREAS REQUIRING AMENDMENT TO
EFFECTUATE THE LEGISLATIVE PURPOSES OF THIS ARTICLE, AND TO PRESCRIBE
AMENDMENTS TO EFFECTUATE THOSE PURPOSES.

(b) REVIEWING REGULATIONS ENACTED BY AGENCIES OF THE
STATE GOVERNING BENEFIT CORPORATIONS, NOT-FOR-PROFIT CORPORATIONS,
AND INDIVIDUALS AND ENTITIES OPERATING SOCIAL SERVICE PROGRAMS
UNDER LICENSE BY THOSE AGENCIES TO IDENTIFY AREAS REQUIRING
AMENDMENT TO EFFECTUATE THE LEGISLATIVE PURPOSES OF THIS ARTICLE,
AND TO PRESCRIBE AMENDMENTS TO EFFECTUATE THOSE PURPOSES.
(c) Reviewing laws, regulations and standards relating to social impact bonds and other investment vehicles by which private sector, for-profit entities invest funds into not-for-profit organizations to identify areas requiring amendment to effectuate the legislative purposes of this article, and to prescribe amendments to effectuate those purposes.

(d) Reviewing and designing standardized formats for joint ventures, public-private partnerships and other forms of entities and agreements between benefit corporations and not-for-profit corporations to fulfill the specific purposes of investment in not-for-profit corporations contained in the certificates of incorporation for certain benefit corporations.

(e) Identifying criteria and standards for assessment of the success of benefit corporations in investment in not-for-profit corporations by third party evaluators.

(f) Identifying and designing standards and criteria for social impact bonds by which benefit corporations may invest in not-for-profit corporations operating social service programs licensed by an agency of the state.

(g) Identifying criteria for measurement of success for investment by benefit corporations in infrastructure and administration of not-for-profit corporations, to be used for
BENEFIT CORPORATION EVALUATION AND ENHANCED PAYMENTS FOR PAY FOR PERFORMANCE BOND TRANSACTIONS.

(h) IDENTIFYING AND INVESTIGATING ANY OTHER ISSUES THAT IT IDENTIFIES RELATED TO INVESTMENT BY BENEFIT CORPORATIONS INTO NOT-FOR-PROFIT CORPORATIONS OPERATING SOCIAL SERVICE PROGRAMS UNDER LICENSE BY AN AGENCY OF THE STATE.

SECTION 3. THE TASK FORCE SHALL DEVELOPM A COMPREHENSIVE, STATEWIDE PLAN TO ENHANCE AND INCREASE BENEFIT CORPORATION INVESTMENT INTO NOT-FOR-PROFIT CORPORATIONS OPERATING SOCIAL SERVICE PROGRAMS LICENSED BY AN AGENCY OF THE STATE, TO INCLUDE:

A. POLICIES AND PROCEDURES TO BE ADOPTED BY APPROPRIATE STATE AGENCIES GOVERNING PRIVATE SECTOR INVESTMENT INTO NOT-FOR-PROFIT CORPORATIONS OPERATING PROGRAMS UNDER LICENSE ISSUED BY THOSE STATE AGENCIES.

B. THE NATURE, CONTENT AND CONTRACTUAL TERMS OF JOINT VENTURE AND PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS BETWEEN BENEFIT CORPORATIONS AND NOT-FOR-PROFIT CORPORATIONS, INCLUDING CRITERIA FOR PARTICIPATION BY NOT-FOR-PROFIT CORPORATIONS AND BENEFIT CORPORATIONS.

C. SPECIFIED CONTRACTUAL TERMS TO BE INCLUDED IN SOCIAL IMPACT BOND TRANSACTIONS, INCLUDING RESPONSIBILITIES OF ALL PARTIES, OUTCOMES, MEASUREMENT METHODOLOGIES, CRITERIA FOR SUCCESS AND
PAYMENT SCHEDULES, CIRCUMSTANCES UNDER WHICH THE AGREEMENTS CAN BE TERMINATED AND THE RESULTS OF TERMINATION, AND METHODS OF DISPUTE RESOLUTION.

D. IN MAKING ITS FINDINGS AND RECOMMENDATIONS, THE TASK FORCE SHALL CONSIDER THE INTERESTS OF ALL PARTIES TO THE INVESTMENTS, JOINT VENTURES AND PUBLIC-PRIVATE PARTNERSHIPS, INCLUDING THE PRIVATE INVESTORS, NOT-FOR-PROFIT CORPORATIONS, GOVERNMENT AGENCIES AND SERVICE RECIPIENTS.

SECTION 4. THE TASK FORCE SHALL ISSUE ITS FINDINGS, IN THE FORM OF A REPORT, NO LATER THAN 180 DAYS AFTER THE EFFECTIVE DATE OF THIS ARTICLE.


SECTION 6. THE SECRETARY OF STATE SHALL SERVE AS CHAIRPERSON OF THE TASK FORCE.

SECTION 7. THE TASK FORCE MAY CONSULT WITH ANY CORPORATION, EDUCATIONAL INSTITUTION, GOVERNMENTAL AGENCY, PERSON, AND MAY EMPLOY CONSULTANTS, INCLUDING INDEPENDENT FINANCIAL SERVICE AND RESEARCH CORPORATIONS.

SECTION 8. THE MEMBERS OF THE TASK FORCE SHALL SERVE WITHOUT COMPENSATION, EXCEPT THAT AT-LARGE MEMBERS SHALL BE ALLOWED THEIR NECESSARY AND ACTUAL EXPENSES INCURRED IN THE PERFORMANCE OF THEIR DUTIES UNDER THIS ACT.

SECTION 9. THE SECRETARY OF STATE SHALL PROVIDE THE TASK FORCE WITH SUCH FACILITIES, ASSISTANCE, AND DATA AS WILL ENABLE THE TASK
FORCE TO CARRY OUT ITS POWERS AND DUTIES. ADDITIONALLY, ALL OTHER DEPARTMENTS OR AGENCIES OF THE STATE OR SUBDIVISIONS THEREOF SHALL, AT THE REQUEST OF THE CHAIRPERSON, PROVIDE THE TASK FORCE WITH SUCH FACILITIES, ASSISTANCE, AND DATA AS WILL ENABLE THE TASK FORCE TO CARRY OUT ITS POWERS AND DUTIES.

SECTION 10. This act shall take effect immediately.

A SPONSOR’S MEMORANDUM IN SUPPORT OF A BILL TO AUTHORIZE THE DORMITORY AUTHORITY OF THE STATE OF NEW YORK TO ISSUE TAX EXEMPT BONDS ON BEHALF OF NOT-FOR-PROFIT CORPORATIONS THAT OPERATE SOCIAL SERVICE PROGRAMS WHO ARE ENGAGED IN JOINT VENTURES, PARTNERSHIPS OR OTHER BUSINESS ENTITIES WITH BENEFIT CORPORATIONS

A Bill to amend the Public Authorities Law to authorize the Dormitory Authority of the State of New York to issue tax exempt bonds on behalf of not-for-profit corporations that operate social service programs who are engaged in joint ventures, partnerships or other business entities with benefit corporations

BILL NUMBER: ______

TITLE OF BILL: AN ACT in relation to amending the public authorities law to authorize the Dormitory Authority of the State of New York to issue tax exempt bonds on behalf of not-for-profit corporations that operate social service programs who are engaged in joint ventures, partnerships or other business entities with benefit corporations.
PURPOSE OR GENERAL IDEA OF BILL: The purpose of the bill is to authorize the Dormitory Authority of the State of New York to issue tax exempt bonds on behalf of not-for-profit corporations that operate social service programs who are engaged in joint ventures, partnerships or other business entities with benefit corporations. Benefit corporations may fulfill their general and specific public purposes by investing in not-for-profit corporations. In order to support and encourage these investments, the legislature finds that it is in the best interests of the public to allow not-for-profit corporations engaged in joint ventures or public-private partnerships (as defined in Article 17 of the Business Corporations Law) to benefit from tax-exempt bonds issued by the Dormitory Authority of the State of New York, to allow below-market rate loans to assist in the financing of these collaborative public-private ventures.

SUMMARY OF PROVISIONS: The Public Authorities Law is amended to authorize the Dormitory Authority of the State of New York to issue tax exempt bonds on behalf of not-for-profit corporations that operate social service programs who are engaged in joint ventures, partnerships or other business entities with benefit corporations, as defined in Article 17 of the Business Corporations Law

JUSTIFICATION: Benefit corporations established pursuant to Article 17 of the Business Corporation Law must specify both general and specific public benefits as corporate purposes, and may include in those purposes the corporation’s investment in not-for-profit corporations operating social service programs under license issued by an agency of the state. It is in the best interests of the state that benefit corporations fulfill their public purposes through investment in not-for-profit corporations, and the state seeks to encourage such investments. In
order to encourage and support private sector investment in not-for-profit corporations, this bill authorizes the Dormitory Authority to issue tax exempt bonds to not-for-profit corporations that are engaged in collaborative financing vehicles with benefit corporations.

PRIOR LEGISLATIVE HISTORY: None

FISCAL IMPLICATIONS: Minimal

EFFECTIVE DATE: Immediately
AN ACT to amend the public authorities law to authorize the dormitory authority of the state of new york to issue tax exempt bonds on behalf of not-for-profit corporations that operate social service programs who are engaged in joint ventures, partnerships or other business entities with benefit corporations, as defined in Article 17 of the business corporations law.
THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

SECTION 1. LEGISLATIVE INTENT. THE LEGISLATURE FINDS THAT MANY NEW YORK CORPORATIONS HAVE TAKEN ADVANTAGE OF THE OPPORTUNITY TO BECOME BENEFIT CORPORATIONS TO PURSUE SOCIAL GOALS AS WELL AS PROFIT MAXIMIZATION. THE LEGISLATURE ALSO FINDS THAT NOT-FOR-PROFIT CORPORATIONS OPERATING SOCIAL SERVICE PROGRAMS UNDER LICENSE BY AN AGENCY OF THE STATE WOULD BENEFIT FROM INVESTMENT OF PRIVATE SECTOR FUNDS TO SUPPORT ONGOING INFRASTRUCTURE, ADMINISTRATION AND PROGRAM OPERATIONS, AND THOSE SUCH INVESTMENTS MAY SUPPLEMENT GOVERNMENT FINANCING OF THOSE PROGRAMS. THE LEGISLATURE ALSO RECOGNIZES THAT FINANCING OF INFRASTRUCTURE AND ADMINISTRATIVE FUNCTIONS OF NOT-FOR-PROFIT CORPORATIONS MAY BENEFIT FROM ACCESS TO TAX EXEMPT BONDS ISSUED BY THE DORMITORY AUTHORITY OF THE STATE OF NEW YORK, AND THAT PRESENTLY, SUCH ENTITIES ARE NOT AUTHORIZED TO ACCESS TAX EXEMPT FINANCING FROM THE DORMITORY AUTHORITY. THE LEGISLATURE ALSO FINDS THAT IT WOULD BE IN THE PUBLIC INTEREST FOR JOINT VENTURES, PUBLIC-PRIVATE PARTNERSHIPS AND OTHER BUSINESS ENTITIES BETWEEN BENEFIT CORPORATIONS AND NOT-FOR-PROFIT CORPORATIONS TO ACCESS TAX EXEMPT FINANCING TO ACHIEVE THE SPECIFIC PUBLIC BENEFITS STATED IN THE CERTIFICATES OF INCORPORATION OF THE BENEFIT CORPORATIONS.
Section 2. : Article 1680 of the public authorities law is amended to read as follows:

§ 1680. Dormitories at certain educational institutions other than state operated institutions and statutory or contract colleges under the jurisdiction of the state university of New York.

1. For all purposes of this section sixteen hundred eighty, the term "educational institution" shall mean any of the following:

ANY NOT-FOR-PROFIT CORPORATION THAT OPERATES A SOCIAL SERVICE PROGRAM UNDER LICENSE FROM AN AGENCY OF THE STATE, AND HAS ENTERED INTO A JOINT VENTURE, PUBLIC-PRIVATE PARTNERSHIP OR OTHER ENTITY WITH A BENEFIT CORPORATION, AS DEFINED IN ARTICLE 17 OF THE BUSINESS CORPORATION LAW, WITH A SPECIFIC PUBLIC BENEFIT PROVIDED IN ITS CERTIFICATE OF INCORPORATION THAT INCLUDES INVESTMENT IN NOT-FOR-PROFIT CORPORATIONS OPERATING SOCIAL SERVICE PROGRAMS UNDER LICENSE FROM AN AGENCY OF THE STATE, TO PROVIDE CAPITAL FOR INVESTMENT IN INFRASTRUCTURE, ADMINISTRATION AND PROGRAM OPERATIONS OF THE NOT-FOR-PROFIT CORPORATION.

Section 3. This act shall take effect immediately.
4. A Bill Establishing as Legislative Finding that Not-for-Profit Corporations Investment in Infrastructure and Administration is necessary and to be highly valued.

SPONSOR’S MEMORANDUM IN SUPPORT OF A BILL TO DIRECT THE SECRETARY OF STATE, IN CONSULTATION WITH THE ATTORNEY GENERAL, TO DEVELOP STANDARDS AND MEASURES TO VALUE A NOT-FOR-PROFIT CORPORATION’S INVESTMENT AND EXPENDITURES OF FUNDS FOR INFRASTRUCTURE, ADMINISTRATION AND DEVELOPMENT COSTS AND TO EVALUATE A NOT-FOR-PROFIT CORPORATION’S INVESTMENT AND EXPENDITURES IN THESE AREAS IN ACCORDANCE WITH LEGISLATIVE FINDINGS DETERMINING THAT SUCH EXPENDITURES ARE HIGHLY VALUED AND NECESSARY FOR LONG-TERM SUSTAINABILITY OF THE NOT-FOR-PROFIT CORPORATION.

A bill to direct the Secretary of State, in consultation with the Attorney General, to develop standards and measures to value a not-for-profit corporation’s investment and expenditures of funds for infrastructure, administration and development costs and to evaluate a not-for-profit corporation’s investment and expenditures in these areas in accordance with legislative findings determining that such expenditures are highly valued and necessary for long-term sustainability of the not-for-profit corporation

BILL NUMBER: ______
TITLE OF BILL: AN ACT in relation to setting forth the legislative finding that the investment and expenditure of funds by a not-for-profit corporation for infrastructure, administration and overhead are necessary and appropriate in order for the not-for-profit corporation to be sustainable and grow in the long-term, and directing the Secretary of State, in consultation with and the Attorney General, to develop standards and measures to highly value a not-for-profit corporation’s investment and expenditures of funds for infrastructure, administration and development costs and to evaluate a not-for-profit corporation’s expenditures in these areas in accordance with legislative findings.

PURPOSE OR GENERAL IDEA OF BILL: The purpose of the bill is to set forth the legislative finding that the investment and expenditure of funds by a not-for-profit corporation for infrastructure, administration and overhead are necessary and appropriate in order for the not-for-profit corporation to be sustainable and grow in the long-term, and to direct the Secretary of State, in consultation with and the Attorney General, to develop standards and measures to highly value a not-for-profit corporation’s investment and expenditures of funds for infrastructure, administration and development costs and to evaluate a not-for-profit corporation’s expenditures in these areas in accordance with legislative findings.

SUMMARY OF PROVISIONS: The Secretary of State is directed to develop standards and measures to value a not-for-profit corporation’s investment and expenditures of funds for infrastructure, administration and development costs and to evaluate a not-for-profit corporation’s investment and expenditures in these areas in accordance with legislative findings.
that such expenditures are necessary and appropriate for long-term sustainability and growth of the not-for-profit corporation.

JUSTIFICATION: Not-for-profit corporations must spend appropriate amounts on non-program specific expenses, such as back office systems, real property maintenance and preservation, debt service, and other capital and fixed assets, as well as administrative expenses such as development costs, advertising and compensation for key executives. A not-for-profit corporation ignores these vital expenses at its peril. Not-for-profit corporations that rely on government funding to operate their programs frequently lack available funds to support non-program related expenses. Both private and governmental charity regulators regularly criticize a not-for-profit corporation because it spends what is considered an excessive amount on non-program expenses, notwithstanding the necessity of such expenditures and frequent success in development because of these expenses. This bill makes it clear that the Legislature finds that expenses for non-program related items are necessary and appropriate for the long-term sustainability and growth of the not-for-profit corporation, and directs the Secretary of State to develop procedures and measures to highly value such expenditures so that charitable donors and for-profit investors can more properly evaluate the viability of the not-for-profit corporation.

PRIOR LEGISLATIVE HISTORY: None

FISCAL IMPLICATIONS: Minimal

EFFECTIVE DATE: Immediately
AN ACT in relation to setting forth the legislative finding that the investment and expenditure of funds by a not-for-profit corporation for infrastructure, administration and overhead are necessary and appropriate in order for the not-for-profit corporation to be sustainable and grow in the long-term, and directing the Secretary of State, in consultation with and the Attorney General, to develop standards and measures to highly value a not-for-profit corporation’s investment and expenditures of funds for infrastructure, administration and
development costs and to evaluate a not-for-profit corporation’s expenditures in these areas in accordance with legislative findings.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

SECTION 1. LEGISLATIVE INTENT. THE LEGISLATURE FINDS THAT NOT-FOR-PROFIT CORPORATIONS REGULARLY INVEST IN AND EXPEND FUNDS FOR NON-PROGRAM RELATED ITEMS, AND THAT THESE INVESTMENTS AND EXPENDITURES ARE NECESSARY AND APPROPRIATE FOR THE LONG-TERM SUSTAINABILITY AND GROWTH OF THE NOT-FOR-PROFIT CORPORATION. THESE INCLUDE BACK OFFICE SYSTEMS, REAL PROPERTY MAINTENANCE AND PRESERVATION, DEBT SERVICE, AND OTHER CAPITAL AND FIXED ASSETS, AS WELL AS ADMINISTRATIVE EXPENSES SUCH AS DEVELOPMENT COSTS, ADVERTISING AND COMPENSATION FOR KEY EXECUTIVES, ALL OF WHICH A NOT-FOR-PROFIT CORPORATION IGNORES AT ITS PERIL. THE LEGISLATURE ALSO FINDS THAT NOT-FOR-PROFIT CORPORATIONS THAT RELY ON GOVERNMENT FUNDING TO OPERATE THEIR PROGRAMS FREQUENTLY LACK AVAILABLE FUNDS TO SUPPORT NON-PROGRAM RELATED EXPENSES, AND THAT BOTH PRIVATE AND GOVERNMENTAL CHARITY REGULATORS REGULARLY CRITICIZE NOT-FOR-PROFIT CORPORATIONS THAT SPEND WHAT IS CONSIDERED AN EXCESSIVE AMOUNT ON NON-PROGRAM EXPENSES, NOTWITHSTANDING THE NECESSITY OF SUCH EXPENDITURES AND FREQUENT SUCCESS IN DEVELOPMENT BECAUSE OF THESE EXPENSES. THE LEGISLATURE ALSO FINDS THAT PRIVATE
SECTOR INVESTMENT IN NOT-FOR-PROFIT CORPORATIONS IS TO BE ENCOURAGED AND SUPPORTED, AND THAT NOT-FOR-PROFIT CORPORATIONS MUST REMAIN SUSTAINABLE AND ABLE TO GROW IN ORDER TO ATTRACT AND MAINTAIN SUCH PRIVATE SECTOR INVESTMENT. IN ORDER TO SUPPORT PRIVATE SECTOR INVESTMENT AND MAINTAIN ACCEPTABLY HIGH CREDIT RATINGS NECESSARY TO ATTRACT PRIVATE SECTOR LENDERS, THE LEGISLATURE FINDS THAT NOT-FOR-PROFIT CORPORATIONS MUST SPEND SUFFICIENT AMOUNTS OF FUNDS TO ENSURE LONG-TERM SUSTAINABILITY OF THEIR CORPORATIONS, AND THAT, BY DOING SO, THE NOT-FOR-PROFIT CORPORATIONS SAVE THE STATE MONEY BY MAINTAINING CREDIT WORTHINESS ACCEPTABLE TO PRIVATE SECTOR INVESTORS. FINALLY, THE LEGISLATURE FINDS THAT NOT-FOR-PROFIT CORPORATIONS MUST BE EVALUATED NOT ON HOW LITTLE THEY SPEND ON NON-PROGRAM EXPENSES, BUT HOW EFFECTIVE SUCH EXPENDITURES ARE TO ENSURE LONG-TERM SUSTAINABILITY AND GROWTH OF THE NOT-FOR-PROFIT CORPORATION.

SECTION 2. THE SECRETARY OF STATE IS DIRECTED, IN CONSULTATION WITH AND THE ATTORNEY GENERAL, TO DEVELOP STANDARDS AND MEASURES TO VALUE A NOT-FOR-PROFIT CORPORATION’S EXPENDITURES OF FUNDS FOR INFRASTRUCTURE, ADMINISTRATION AND DEVELOPMENT COSTS AND TO EVALUATE A NOT-FOR-PROFIT CORPORATION’S EXPENDITURES IN THESE AREAS IN ACCORDANCE WITH LEGISLATIVE FINDINGS. IN DOING SO, THE SECRETARY OF STATE IS DIRECTED TO CONSIDER THE EFFECTIVENESS OF A NOT-FOR-PROFIT CORPORATION’S NON-PROGRAM EXPENSES, AND HOW THOSE EXPENDITURES
WILL SERVE TO ENHANCE THE CREDIT RATING OF THE NOT-FOR-PROFIT CORPORATION SO THAT IT CAN ATTRACT AND MAINTAIN PRIVATE SECTOR INVESTMENT IN THE NOT-FOR-PROFIT CORPORATION AND ITS PROGRAMS, IN ORDER TO SUPPLEMENT SCARCE GOVERNMENT FUNDING OF INFRASTRUCTURE AND ADMINISTRATION EXPENSES. THE SECRETARY OF STATE IS DIRECTED REPORT ITS FINDINGS TO THE LEGISLATURE AND THE GOVERNOR WITHIN 180 DAYS OF THE EFFECTIVE DATE OF THIS ARTICLE.

SECTION 3. This act shall take effect immediately.
Appendix D

Edited Transcripts of Interviews

Interview 1: Not-for-Profit Executive.

I’ve always been a believer that the not for profit has to do more as the government backs off more and more does not want to accept the liability for the population we serve, within the last 3 years we have become large if not larger than the comparable mental health agencies here.

We have become very well known in 3 or 4 years we have become the go to provider in MH services. We do not serve this population in the traditional way, we serve them through local funding because we didn’t buy into the philosophy of continuing day treatment, but now the philosophy has caught up with ours, well after we got into the game.

We have also been known as an agency that specialized in dually diagnosed individuals, we are tremendously diverse. I have always believed that there will always be programs that need to be deficit funded but the new position is that we should not be able to maintain a surplus. And now with managed care coming in, there is no real surplus anyway.

We just signed a LLC joint venture agreement to become an ACO with a national provider just to get our foot in the theater for the Medicare shared savings program. We are also doing an FQHC, looking for the federal wraparound, then behavioral health services, people with specific characteristics, and now the ACO which is the Medicare shared savings program, could potentially benefit the company for shared savings. The p3 is being underwritten by a large health care company in the United States, and it brings with it a tremendous amount of technological expertise and knowledge and training. They also are very good at managing costs because they are looking for profit.

The ACO is only for Medicare but reality is that everything going into managed care, we are also affiliating with a managed care company so it will follow in that manner. In managed care it will be a for profit business, because we are in both MH and DD and behavioral health, we are in DISCOs for DD and health homes for MH. They are both just conduits for managed care to flow through. So we looking to joining a DISCO and health home, so that we are positioning ourselves in terms of providing integrated reasonable cost health care to the highest consumers through that model, we have quite an expansive business platform at this point. We are doing a lot of networking

But getting back to your original questions, private enterprise is also something that has so many different facets. We do have a cleaning business and it is $4 M a year, it is a commercial cleaning business but we hire state contracts for a lot of them, pay prevailing wages and we get a lot of government buildings, and a lot of business from that, expanding into private corporations and other NFPs for cleaning. Right now it is a $4 M operation, and it throws off about half a million in admin offset each year. What it does that is the real value is that the job coaches and job training has historically been funded by state funds which have been drying up and we have
always lost money in those services, so the process for the cleaning company which ranges from $3-500, 000 surplus per year, it that it really just offsets the deficit that we have incurred because we are not getting reimbursed properly for the job coaches.

We are covering our costs so we are making a little money which is fine and it is covering some admin. That is kind of a public private arrangement.

We also have a vehicle cleaning business which is something outside of state contracts although they are starting to get into it. It is a kind of a unique business, and good for the type of people that we are serving in our MH programs, and also for the people in the OPWDD programs. We market it as a fleet thing. We do it for businesses right now, and we just started it this year. We have a couple of the real estate companies here, and we are doing the bus shelters in the county, count buses, as well as traveling to other agencies and some companies in the region.

That is a startup, we have lost $30 -40,000 this year, but it is a startup so we don’t expect to make a profit in a new company right away because we are establishing businesses with people who have limitations, getting to the right model, the right way to make money will take 3-4 times longer than usual.

We have the largest employment of people in programs to place people in the region; we place 40 people a year with supports, so there are some people that we have never been able to place with a competitive employer because of someone’s behavioral problems. The private employer will not put up with someone who had a breakdown, so we are able in our own business. If they have a meltdown or breakdown, or a DD consumer gets sick and is out for a few weeks, we are able to accommodate, take him back. In the competitive market, people who are fragile won’t be taken back by the private business. We have had a lot of people having difficulty finding stability in their lives, they benefit from businesses that we operate ourselves because of our ability to be flexible.

The other thing that we have taking about relating to private business was that just this morning, we met with a franchise store person. There is a very aggressive market around this area, and they are trying to find a market niche with selling the franchise to agencies who serve people with disabilities.

Another local agency has one. I have formed a collaborative of agencies with the same mission and values of us; with similar cultures to work together to see what we can do in terms of minimizing overlap. We are meeting ever 2 weeks for over a year and a half, it takes a long time to build up trust, and the franchise store approached the agencies that are the biggest and then they approached us to listen to their presentation to open a store. This is another example and people coming in and wanting us to compete against each other for a product that we can all benefit from. If we decide to spend the $250, 000 for the franchise, training and all that, if we are willing to make that individually, why not make it as a joint investment, so that all of our people are benefitting, rather than if the company came in a pitted us against one another.
Those types of things that we are doing, I have looked at and I always look for situations that are mutually beneficial to the corporation as well as to the person who is volunteering or contributing by giving. The bottom line is that it is very clear that you can’t do it without supplemental money and it can’t come from peoples’ pockets anymore.

Nobody wants to fund, a roof on the building, none of the governments are going to pay for it. Another potential incentive at least in capital are some of the federal initiatives coming out of the ACA that are paying for some of those things, and the other thing if that managed care companies that are for profit and the ACOs that are for profit are the mother ships, the primary insurers, national underwriter that have money and are driving the programs. To them, it is small change to invest in infrastructure, but again, we need infrastructure in order to play their game. The issue is that this cannot be speed dating, you really have to know who you are getting into bed with; some of these people are sharks. They just identified a new market, they aren’t there for any kind of charitable purpose, and we are just a new market

You can start with IT, looking for government money. The medical records system has some grants out there now, meaningful use money, HEAL stuff, it is something, but it doesn’t cover the cloud, the servers, wiring, it doesn’t cover firewalls, safety stuff, so it really is limited. I had an IT study done of the whole place, to find out what I needed to upgrade to where we are going. They did an excellent job, but just to bring you up to where you should be, with a system now held by band aids and scotch tape that is yellowing, just to begin you go to where you should be is $800,000. Just to get a solid base. And there is HIPAA, security, encryption, it is a lot.

Where I’m going is to explore unique ideas with capital campaigns. The FQHC has a lease agreement where we will be separate corporation, the FQHC gets the rate and then pays us as the provider rent, and so that will cover capital costs and administrative costs. I’m looking to that money to take a loan and pay off my capital investment in infrastructure and renovations and redoing buildings, some building and expansion.

What OPWDD has done now is just ridiculous. They don’t really do property approvals, more maintenance grants, they give you a dollar amount person in a month, not enough. I get $600 a month for 8 people, that pays for nothing, and the buildings are aging, after you pay the mortgage off, then you pay to rebuild the building.

Private ownership is difficult, we are a not-for-profit, ownership won’t work, we could somehow link their technology to more of the marketing in terms of improving outcome measurement and proceeding with developing a state of the art IT system. I want to become the Mayo clinic of the region. I am looking for some big underwriters, some philanthropic people but that won’t happen tomorrow. As long as I am not selling my soul, I don’t have a problem with entering into situations, and if we have to alter our corporate structure to be able to accommodate investments by people who believe in what we do and it is an investment rather than a donation, I am not opposed, we really need to think of other ways to support people.

I think if you look at the health homes collaborative, they have joined together to buy IT services from a separate corporation, a for profit IT system company, affiliated with the parent
that already has a huge network and can use a common tech platform that the health homes will
flow through that, kind of an interesting way that they are doing that. I like the model where they
are collaborating and buying services, not everyone needs a separate in-house IT system.

I agree that the big issue is how to identify success in hospitalization, clinic visits. You
could do a longitudinal study with general health profiles, where they are going, where they are
projected to go, services provided to them and how that impacted on the model, but I don’t see
how to do it in long-term care because you are providing a home, it is hard to measure.

This model sounds like the ACO system, with a shared savings model that they have in
Medicare. I can send you an article from the Wall Street Journal that describes a pilot program,
some of the providers got money back and some didn’t. The incentive was based on profit
sharing against a benchmark.

It is difficult to measure success in our business. Success is being all related to
economics, for good or bad, is it is what our society is about. These aren’t really quality
measures, they recognize quality as to how it impacts spending, but the quality of some of the
things that we do and the improvement that we make in people’s lives are immeasurable. You
cannot put a number on it, cannot even aggregate it, you can do client satisfaction, but that
doesn’t really change the impact on somebody’s life in the long-term. One of our MH folks did
an interview with a donor that I am soliciting, he spoke about his life, he had a family, he got
married, worked as an electrician, couple of kids, had a psychiatric breakdown, eventually his
wife left him, he lost custody of his kids, lost his home, lost his job, and wound up in county
mental health services for 15 years. He got medication from the county, and then went to day
treatment once in a while. He was with us for a year and a half, He is now stable, has a part time
job, has an apartment, got his kids on weekends, he is working very hard to keep the normalcy
in his life, although he know he can’t go back, no longer has the tolerance for the stress, but he is
in a job that doesn’t have that stress and can support himself so he can live without being
isolated. That success won’t show up on a balance sheet, it is more qualitative. This happens all
the time. When my clinic director comes with a balance sheet in the red, he tells me one of these
stories, even if we didn’t get paid for him.

We should document these qualitative measures; start a file of these stories. A story is
extremely powerful, more so than we increased our budget by 5%, that kind of story can be more
powerful to a donor.

More businesses are becoming socially conscious. It fits into their business model, giving
back to their community and how do they do that. What I would think of is how it benefits them
as part of a diverse community, using a social enterprise to help the community by doing
business in the community. What we have gotten from our clean by steam company who do
peoples cars, every Monday at a different company, are phone calls as to how impressed they
were to meet the people, and that they couldn’t believe what hard workers they were, a new
appreciation of people with a disability. i find the reverse, they thank you for giving them the
experience for getting a superior product at a competitive price, but also feeling good about
learning about someone else and their talents. Any opportunity that I have when i talk to
companies about donating time or services, I play up that this is a community that should help one another, and that we need to be partners in helping our community.

This is the only way that the nonprofits can continue in the future. We no longer have partners in the government. People start fighting over the minimal dollars that are left.
Interview 2: Not-for-Profit Executive.

We have limited amounts of private sector money coming in. We have grants related to EMR startup. It was foundation money to fund a position for the development and implementation of electronic medical records.

We have not really given much thought to private sector money for any program or infrastructure; that wasn’t one of the considerations when we were looking at private foundations and anybody who would be supportive of the task at hand.

Government is loath to fund back office, admin. The state has no money. I think you have to start to research all of your options, so you would look at individual institutional financing, make the payments, pay the interest, the other thing that we toyed around with was the transfer of the asset to a private corporation for the purposes of development, you would become a tenant and the real estate would be the responsibility of the for profit corporation.

It would be arm’s length transaction. They would buy it and lease it back. It would be in the form of investment rehab and then you become a tenant. surrender your ownership with an arrangement that fixes your expenses and cost over a period of time.

No more prior property approvals from OWDD; that is a good area to look at, because what is the true useful life, properties 15-20 years maximum funding, supposedly there is no reserve fund established to address it. Unlike HUD projects, where you have a pot of money for major capital improvements.

Then you are into a whole different business that maybe outside of your scope, now you are into opening up attacks and possible issues with UBIT and things like that. you may not be equipped to handle, or have the money for that if you have a revenue stream coming in, but you may not have that in managed care.

The whole issue with the property is what is preventing them from strong-arming us, back then it made sense when money was plentiful, now the one piece that makes us more unique as it relates to control.

Other states, these homes are owned by the state and they are paid for. New York is unique in that the provider owns the real estate. We have always had the question that lingers, we talk about who owns it, the mortgage is paid for, we are down to zero dollars, the concept would be if you wanted to relocate to a smaller facility and excess money left over, whose money is it? If you have expenses, the state says we paid for it already, no reimbursement.

Right now, there is that government money, dollars that the state would allocate to nonprofits to enhance or develop things like IT and back office operations, especially in consolidations, multiple agencies that can collectively benefit, and there is money to get that show on the road. OPWDD provides $5 million to incentivize providers to consolidate and to
avoid duplicate back office service and admin costs; it is used to encourage consolidation of smaller corporations.

Our aging facility, has real estate value, development around it, location good, needs an overhaul. If the corporation comes in acquire ownership? Different options, first, partnership, but the real estate, contract with you to run the program. Or they could just go ahead and get a license in their name and partner with us. They could be paid back by a rate that includes real property. Or like a reverse mortgage philosophy. They acquire the building, value of $10 M, needs 3M in renovations, but no money available. The company buys the parcel and becomes the landlord, covers maintenance and repairs, for that we pay a fee for administering that, cash buyout, up-front money that we then have. That could work.

For a joint venture, if they have skin in the game, more likely to not pull out when paid back, more likely to get the building up to speed.

Question now is we have an idea for a business venture, for arguments sake the changes we make is that it is a nonprofit business partner. We have ideas and partners, but no capital, don’t want to share a large portion of profit, so there are options, we can use our money to fund it and pay ourselves back, or do a combination of things with a private company. We can pay back at a rate of X, just as a loan, or you come in and your risk is whatever you put up for capital and your portion of the proceeds continue to be paid to you. It’s similar to what you’re saying, a relationship from a cash infusion standpoint, but a partnership that could allow proceeds to be distributed.

One option is that you don’t surrender ownership of property. The first option is you put up your own money; second one is that you get someone to fund a percentage of it, and for that you have an arrangement that they get their money back at a guaranteed interest rate over a series of payments, or they become a partial owner of the operations.

They could buy a partial interest in the building and program. They could even take a piece and rebuild it; they could take exclusive control of a piece. or we could have a shared arrangement.

When you analyze where our strengths are, you have control over people. We have the beds, if we pool together, we would have 2500 beds, an asset that can support a partnership with a company.

If they own it, more likely to invest for efficiency. In consolidation, if they have expertise in it, and eliminate you dependence on doing it solely by yourself, it could work.

Even when you say you buy a portion of the asset, it is a limited value to somebody, how do you sell it to someone else? What if it is the third floor of a building? It has to be more than a portion of something, you have to make it attractive, and the company would have to have a direct control on the profits that would be coming in.
We tried bond financing for the purchase of an admin building. Not an SIB, no benchmarking of success or enhanced repayment, but would be tax exempt funding, very successful.

For SIB, how does the investor directly benefit? Does the investor control the efforts of the nonprofit? How do they ensure control so that they get paid back? Makes sense that there are benchmarks; they fix the liability of the government if there are some additional ramifications for success of something like that. If you assume that you can identify measurable performances, you can measure it. Recidivism is pretty measurable. It is much harder in our business, but doable. If you are in a residential program, and you have people who are ill a lot, and you can minimize the amount of hospitalizations, programs in place that preempt people’s illnesses, whether it is diet, exercise, medical care, stuff like that, you can measure performance like that. It is harder to measure.

It is easier, you can measure better information, more coordinated, faster, interrelated, better access to information. You can make an assumption that nothing jumps out as far as efficiency as to how to measure. It can be response time, up time, availability of information, down time between query and response that can be measured. There is a correlation between efficiency and productivity.

P3 model could also work. The question is you assume that there is some flowing of dollars to cover property costs, but what would have to happen for that to work, once you cap property costs, which is what is happening at OPWDD now, limiting property costs to lease increases, they want us to lease now, not buy new property. In that instance, you have the reverse of a triple net lease. What would have to make sense is that the fee is large enough to the investor for them to recover their outlay and pay them a sizable amount of profit It might be a larger payment than just in a real estate investment, and the state may not be willing to just pay hat. Could you then say that my expenses go down equal to or greater than the amount of the cost? That would be the selling piece. It might work for government because it is so expensive to build but maybe not work for the nonprofits, but there are those outside developers that will do this kind of thing. It might be worthwhile to investigate.

When a nonprofit like ours engages in a for profit business as a program, it really isn’t generating the kind of revenue you need to survive. A lot of other programs are supporting it, through job coaches paid for by the government, administrative costs absorbed by other programs, etc.

The problem is that when you really go to be competitive and give people a reason to use you and not someone else, it is despite your reduced productivity and added expense because of the individuals employed there. It is a social commitment by the private business. Business wise, it doesn’t really work. The other thing would be a mix between competent and needy workers for staffing, then more on the productivity side, overshadowing the interest of trying to employ people with disabilities. Ok for government contracts, but you have to see if it is really a program within our mission.
In New York, you cannot have a for profit business holding an OPWDD license, which is good for us, but the whole private sector wants to own something. These relationships with DISCOs, with for profit insurance partners, is a blend of nonprofit and for profit ventures. They are doing that to acquire the infrastructure and technology knowhow to be able to move forward. The state wanted to keep the for profits out, but instead the nonprofits are bringing in for-profits as partners. Those for profits will take administrative fees out of the system.
Interview 3: Not-for-Profit Executive

We have been doing some work in this area. There really isn’t money available in the program. It would be great if there was someone willing to loan you the money or invest in the company. We have been talking to people who are philanthropists and social enterprises. We really have been looking at some ways, some dollars that might be available to help us with our new scanning and shredding business moving further.

The scanning business will be a nonprofit, looking for someone to lend money or invest in it. The first group that we worked with in terms of helping us to get the business going, as still part of the agency, because the people with disabilities working in it and the way we are able to support it is through a supported employment opportunity, with the majority of the people are funded through supported employment. We kept it as part of the agency right now so we can use agency resources to support it.

We started to work it with the retired executives group. They helped us to write a business plan and do a number of different steps to get the business run more like a business. We did a launch; we had a day set up with public relations and sales people. We talked about how the program would work and who will work in it. If we just employed enough people and got enough contracts, we could do it. The problem is that you cannot, you need to marketing people, and you need the upfront money. We have contracts now with a couple of local businesses and others; we have portable equipment, so we can scan their material as they want it more on site. If we were to get a large contract, we wouldn’t be able to handle it right now, we don’t have vehicles to pick up stuff, we don’t have employees, we are using residential staff, and some of the administrators go out, so as long as they are small, we can do it, but we cannot do it for a large contract. We can market it as a social enterprise, why go to us instead of others, we have people with disabilities. Without dollars, it will stay small.

No government money is available for this, except if you are a provider of “ability 1” program, which is for contractors with employees who are 50% or more disabled, you get a government contract. We would like to get a big government contract, but we don’t have enough money to start up to buy equipment.

Private financing? There is a local group. They assist agencies and give money who are about 6-8 months away from merging, to give them the last push to get a merger done, although for social enterprises exclusively to nonprofits. The companies pay them back, it is a loan. They realize that they may not get paid back under certain circumstances. They invest in businesses that they feel there is a chance of repayment. To access this, we need a really strong business plan.

There are benchmarks along the way; they give it to nonprofits to invest so that as the business grows, they can pay it back. Sometimes, if the nonprofit can expand, it pays back.

Ownership interest would work if it was a minority interest, we would need to stay in control. We would have to fund it out of operating dollars if there was no investor. We look at what really large companies pay for scanning. What is the likelihood that you could charge the
same or a penny less? We would be able to turn around and still have a profit enough so that someone would be willing to invest. I’m not sure at what that point is - how do you tell an investor you can pay him back? When you are nonprofit that is trying to do something as less reliant on government funds, and more looking at expansion of new businesses, how long will it take you to generate enough money to do this?

If they are going to close sheltered workshops, what will people do, some of the people in workshops don’t have the capacity to do this work. There is a range of ability, how do we accommodate these people and still make money out of it. A private investor wants to be paid back; how do you keep them interested in the long-term, when the loan is paid off, how do you insure that they will stay with you.

One of the groups that is interested is a local bank. I went to a conference on social enterprise that they sponsored. They are interested social enterprises, these are loans, not gifts. Some of the people who invest in this group are local, some of them are investors who may or may not care about being paid back, more like social philanthropy. Finding those right people is trickier.

You would have to design this program to attract these investors, how money will be used, under what conditions they will be paid back. Advantages to partial ownership, they have skin in the game, not just a lender; it doesn’t have the same level of control, the investor wants some control, but we maintain majority control, with the risk is that the investor leaves.

Similar to agencies that have come together to be DISCOs, because if the requirements are that there is risk and reserves, money to do IT stuff, everyone is looking for insurance company partner. There are many insurance partners who are really interested in becoming the partner, but they want to control because they put the money up. They cannot be controlling if they are for profit, the entity has to be a nonprofit. They just don’t want to loan money, the arrangements that people are trying to come up with are very complicated.

Right now, the long-term care part of it through OPWDD, has to be not for profit, but it doesn’t mean that it won’t be in the future. Also, there are some insurance companies that already put their name in as a placeholder. They put in a letter of intent to do it, even though they know they can’t do it now. Or they create a nonprofit arm.

I know very little about benefit corporations, there hasn’t been much about them. As for investment by them, you cannot buy a nonprofit, but benefit corporation maybe open up their own service as a for profit business. They will have to be able to do something different, especially if there is a savings. If you are investing, there has to be different funding sources besides government.

If the investor is truly a social investor and use his money as a way to better society, the success criteria aren’t that important. They are doing it because they are socially conscious. The return on that is that the investor, the successful business that is able to provide a quality service and can break even for the investor. Their return on the investment is also doing a good job with the people with disabilities.
Nobody ever wants to pay for administration, maybe include it in fundraising. I don't now, if you show them that fundraising is what keeps you alive, there may be some ways to look at it that way. IT can only be funded through a HEAL grant, back to government money again. Maybe foundations would be more likely to do a one-time IT grant with no return back to them. If you could attract benchmarks for IT, be able to show what the social good of that this is going to do, if it makes you more efficient, what does that mean. You could take each piece of it, what is the real good that comes out of it that comes to the people you are supporting, that supporting this through some product will make you more efficient or make services work better for them.

There are probably lots of things like that that could be there, but the investor would have to love your program. The investor would have to feel that he would be willing to invest in it because he wants to be associated with that program, valuing being associated with it.

That value would be important, because it doesn’t really bring you anything else. The agency would have to come up with the unique thing that would attract someone who would be wanting to associate with.

Boards of directors feel an obligation to the people that we serve. The person who decides to invest in one of our agencies already has the one characteristic that you need, some sense of moral obligation to do something good with their money, versus people who just want to get rid of a bunch of money. They are prone to do it anyway, but you have to do something to keep them involved, something they can see, look at, participate in, brings them back to you all the time, otherwise it is a one-time thing.
Interview 4: Not-for-Profit Executive

There is no private sector involvement in what we get; local volunteers are interested in doing something with our assets, as we have too much property. P3 financing is an option, where they take the risk and you set up payment structure through the rates. We have a lot of real estate, and are trying to get a way to finance it. Some program funds being reduced, rented space is not needed, more of our space is owned space instead of rented. This is great timing to look at private takeover of real estate.

There is no money to fix buildings, clients have issues and homes need renovation. We are looking to downsize residential homes. They want us to sell but how do you sell a large residential facility? We want to go into rental situations, maintenance wrapped in.

Any new idea is worth a serious discussion, everybody is in retrenchment, no expansion, but maybe put new money into fixing up what we have, or partner with a for profit business and they can be owner of an asset. They are looking for different models. Our HMO that we are looking at, they are for profit in one aspect, nonprofit in another, all in all they are looking at minority shareholder ownership. We are in final negotiations with them to create a joint venture. The not for profit needs to be the lead according to OPWDD. They can control us better.

Rates are declining, rate rationalization, contract with reduced rate, admin charge, they are a for profit with minority interest. We have the DD expertise, they have the money for reserves.

The insurance company will fund the entire operation, contract with each agency, with the floor rate is the rate they are getting now, less admin charge. The DISCO has quality assurance responsibilities. Our formula is less risk, we think we can gain agencies because of our size.

In terms of taking over smaller agencies, you need capital infusion, most agencies are overbuilt, but if they cannot operate, you have to get out of some of their real estate. Private money may have an opportunity there. Many agencies cannot see beyond next month, going paycheck to paycheck, using credit lines for payroll or wait until the next fundraising event.

Talent pool is weak now, DISCOs will eliminate some agencies, maybe some of these private agencies, but need state to accept ownership interest by private investor for these models to be successful.

Not familiar with SIBS, we have a health home grant with MH, they serve seriously mentally ill clients, metrics include can we reduce hospitalization or ER visits by these people, and it is really based on a bonus system. After a certain period, if you save on those high end costs, you get extra money from the state.

Private business is not really accountable to you. Commitment to stay into it was a big part of the negotiation with the insurance company in the DISCO, what was the term of the
agreement, etc. What is the term of the relationship, There was no discussion of commitment to the people, that is what the nonprofit is for, to preserve that.

Maybe now that rate setting is going to DOH, they already have for profit businesses in there. so not so much of a new model for them.
Interview 5: Current / Former Government Official

The legislature might be inclined to relax some of the rules to finance DD activities. It has been my experience that the legislature and the executive really don’t have a lot of interest in paying for this area if they don’t have to. I have seen a shift repeatedly year after year to not use general tax dollars and substitute it with other money to pay for DD and MH areas. The politicians do not enthusiastically want to support this, but they do it because they are the benefactors of last resort. If they didn’t have to spend, they won’t want to do it.

I am not familiar with pay for success bonds. I am familiar with shared savings for government and nonprofits. The government is limiting how much to spend for taxpayer dollars, they don’t care how you spend private dollars.

Benefit corporations haven’t really taken off. We need an incentive to come in with a return over time. On the state government side, if you can figure out a way to reduce state costs and have nonprofits become more self-sufficient, you have an enthusiastic audience, as long as you don’t interfere with the unions and jeopardize their jobs. You would have bilateral support. For decades, they have made every effort to substitute general revenues, with other special sources of revenue, Medicaid, federal, making the nonprofits come up with their own funds.

There have been movements to let for profits come in, but pushback from labor, fearing that the private sector can jeopardize the state operated positions. If it was just an investment with a return over a period of time, like municipal bonds investments, no issue. If we can provide the same type of return, you might get people to be attracted to that. Investment into the existing program, as a substitute for government money with private money, with an incentive would work.

Medicaid managed care is trying to get these folks into programs. But these folks need individual services, not everybody needs everything. Services have to be tailored to the individual, so this population really isn’t compatible with managed care. From the state perspective, however, it works because it offloads these services to a revenue stream other than the general fund.

DISCOS will push out some smaller operations, we will see consolidations, more larger providers, there is an efficiency but there is a balance between efficiency versus community based services. For profits bring their own money to the table. I have been approached by different groups out of state who want to come into New York. We have to get away from the idea that it is privatization, this is investment. There needs to be a loosening of the rules to provide the incentive for these business to come in. If you can save the state money, they will not object, if you can keep labor happy, you have the best of both worlds. This is all outgo, there is nothing coming in. With a bridge or road, you can put a toll both in, in this field; it is all outgo, nothing coming back into the state. It can only reduce expenditures. With the Mental hygiene field, there is nothing coming back to the state, so anything you can do to save the state money will be favored.
Interview 6: Current / Former Government Official

In the Mental Hygiene system, there really is no set prohibition for a for profit to get involved, but it has been an unwritten rule to not allow for profits into the DD world. But they already do long-term care services and medical services in other systems. OPWDD had frowned upon it but there is nothing really that truly prohibits it. Other states have for profit entities providing DD services. I don’t know how many states only have nonprofits, but I know that many of the states allow for profits to provide DD services to people.

I don’t know exactly how it works in other sectors, but on the Health Department side, there are certain restrictions around for profits relative to return on investment, things of that nature. It is similar to what happens in the managed care world where there are profit margins allowed and such. New York has been kind of unique in keeping out of the DD world for profit entities to provide services directly. Obviously, that will change in the future through managed care but that time will be down the road. Nothing really that prohibits that legally now.

The notion of the partnerships is a good one, looking for investors in our system, we haven’t explored it as a system, we have relied very heavily on Medicaid to fund our world, in part Medicare for health benefits for our folks, including pharmaceuticals. Most of our services are not covered by private insurance. The autism bill may change some of that, but by and large, OPWDD services not covered by third party insurances.

Some clinical services are funded by insurance, but not residential. The notion of diversification is good. Part of our problem is that we don’t have other funders to support our system. I think that from a housing perspective, we have done some limited housing development with developers, for profit, tax credit deals, incentive programs with greater priority on the population that the state has made a priority.

There has been a lot of partnering there particularly outside of the DD system, some providers have been good at that, but it is hard to find partners and build relationship with developers. It has been difficult to get people to want to do it, and takes a certain level of experience and sophistication that many of the OPWDD providers lack. We are starting to do more of that in our system, the other systems have done better at this, Mental Health in particular. They have a lot more experience; the OPWDD system has been more traditional in our approach to housing, basically building and buying homes, while other systems have been really working with developers.

One model is where a developer builds and owns the property, and leases it to the program. Another model has the state Division of Housing and Community Renewal making a capital investment housing and community renewal. They have funds that they make available to go into a project, they also have been stretching their dollars by inviting other agencies to bring money to the table to invest in various projects. There were opportunities for OPWDD to take advantage of, where OPWDD would also make a capital investment into a project, into the overall cost of development, and then in addition, the state would pay the monthly rent or subsidize the rental for the population. It is a partnership between the developer, government and
in some cases the actual provider, who can also contribute in some way to the capital infrastructure being developed.

The benefit to the state system is you are developing more low income housing for people is non segregated housing, the units are integrated, some for target population, others for public, and the state agency can set a limit for how many units are set aside. Say, 20% of the units set aside for people with disabilities. The thought would be that the state has some capital investment, not paying for the entire project, but gaining access to apartments, and expanding the capacity of the system as they turn over, for more integrated housing. OPWDD has been behind the curve on this over the years, being much more traditional in its approach.

The other benefit to developer deals is that we don’t take the property off the tax rolls, the developers get tax credits on their income tax, but the properties are still taxable for property taxes for the local municipalities. It also becomes an economic driver for the community. It creates an integrated environment, treats people with disabilities like anybody else, gives them access to the housing, so we are really not asking for the public to do any more.

Those kinds of things are important as we move forward, the more agencies can avoid directly being in the housing business or infrastructure business, the better off they can be. Shifting the cost to the developer, who can use the tax credits, and who also takes care of maintenance rolled up into the rent, allows the provider to focus effort and resources into program.

Not aware of SIBS, but measurement of success is difficult in a long-term care, service provision sector. It is hard to develop success criteria, translate administrative improvement to success. Another area that we know of where there is a lot of money being invested and partnering is on the whole building of electronic record infrastructure. From an IT perspective, there is a lot of money to be invested there and grants available. Unfortunately the way it works is that each agency has their own IT system. I don’t know why that has to be, there are a number of companies out there, but nobody has been willing to merge their systems, and so everybody is still making this expenditure. The state hasn’t gone down that path, but to me, there should be some better opportunity to deal with IT. It is a major expenditure undertaking for agencies to deal with alone. You could develop a model with a for profit entity working with a collaborative of nonprofits to develop a joint IT system, that they could all use effectively. That is one of the major shortcomings in the system right now, everybody is left to their own to figure this out, find your own money to do this, and it is a very very expensive undertaking.

Although I am not familiar with benefit corporations, there is room in the OPWDD system for them to get involved. There are for profits that will come in and manage an entity through a management agreement, and there are a number of states have them. This comes up a lot when agencies are in trouble, folks will hire a national company to come in and clean it up. They can take it over, or a temporary basis, or dismantle it. New York has not ventured down that path, but is something to look at. The state probably couldn’t block a management company, the license holder is still the nonprofit, but there would have to be the funding to support it. Some agencies do this now, putting some of their back office stuff to companies. It is common in the for profit world, a number of the for profit entities don’t have their own HR departments, etc.
That is more and more of the trend, to purchase those kinds of things. Our field is in need of going in that direction to be more efficient. Providers have never thought outside of the box, and up to now have lived comfortably within that box.

The question for any for profit business is whether or not they can make money doing this. You have to work out the economics, what will it take to get someone to invest in social services. It is harder also when you are talking about administration, not program. I don't know how they view the return, what the criteria are, what would they expect to see for a return from a nonprofit, as they choose where to invest their money. It is a great idea to pursue, as things are not sustainable the way they are, we have to come up with new ways of financing.

There are more opportunities in the real estate, it is tangible, people know it, which is a different thing. People can understand it, put their arms around it. It is harder when you are dealing with a service delivery system, more challenging to get that kind of buy in. Clearly with real estate, there are a lot of people out there interested in real estate. As long as it is profitable for them, they have a guaranteed and consistent tenant base, maybe that’s not a bad thing.

Clearly, real estate is the easiest thing to look at here, we have talked before about how do we get our arms around the infrastructure we have, how do we better leverage that infrastructure to be able to advance the system as a whole. I don’t think that it is complicated, but people understand it, and we have a lot of properties around the state, aging, no money for rehab, a lot of it already paid off, there are opportunities to look at the infrastructure to see what else we can do differently. We have to examine how we can turn it into an asset to help the system going forward. With all of what we have in that realm, it is ripe for significant brainstorming to leverage this for the system going forward.

With the DISCOs, for the insurance companies it is just an expansion of their existing business portfolio. They have to take a look at how much greater risk are they taking on, or not, all tied into the amount of risk that people think they can take.

There have been conversations about these issues over the years in OPWDD, but it has never been a focus within the OPWDD system. The expectation on the part of CMS going forward is that the state is broadening its housing opportunities for people with disabilities; there is mention of it in the transformation plans about this, expanding the portfolio for housing opportunities, but no real detail or discussions about anything like private investment.
Interview 7: Current / Former Government Official

There are a lot of different angles to jump in, maybe the best is the SIB angle, that is the area that New York is heavily involved in right now. New York calls the Pay For Success (PFS) With the RFP, the state is pursuing that avenue aggressively. The state is in the training wheel phase right now, in a year it expects to have a much broader program.

The state really has a wealth of learning in the last year. The state applied for the US DOL grant solicitation under their employment training administration. The Obama Administration made the national program available in the competition for $20 M, and the DOL provided that the maximum grant award to any one recipient would be $12 M. The competition was available to states or local governments, they decided to assign a maximum per grant award of $12 M.

The application ran into some issues related to the state’s procurement requirements. New York submitted an application to target a program that would provide employment services and training to individuals who had just been released from state prison, similar to the Peterborough prison transaction. In that case, that might have been services provided prior to discharge, New York’s is after discharge, but very much in the same vein. The application required a complete submission, including signed participation commitment documents from the intermediary corporation, from the service provider and from the investor that would provide the upfront resources.

Getting from nothing to those signed commitment letters in that six month prison was a daunting task for New York. The Office of the State Comptroller is responsible for approving any state contract so the state had to comply with competitive procurement, and ended up with a competitive solicitation, an RFP, and secured an intermediary to put the project together. In the textbook model of PFS, the intermediary is this incredibly critical piece of the puzzle. They are the corporation that has the responsibility of finding providers that can provide the high level services, responsible for raising the capital and maintaining investor relations, and also having to deal with the state being the entity that holds the contract for all of the responsibilities.

There are really only two intermediaries currently in New York. One is called Third Sector and the other is Social Finance USA. Their UK branch did the Peterborough project. These are the only two corporations that I am aware of that are trying to create this business in this niche, and so that is one of the challenges in putting together a PFS bond.

Once chosen, the intermediary is the key actor. The state had to complete a really complicated and rapid negotiation with all of the parties, the bank that was advancing the money, the intermediary corporation. In a PFS, the question is whether the investors will be socially conscious or private foundations, with a charitable focus, but it is pretty open and can be any of them. Some advocates of PFS would say that the holy grail is unlocking true private sector capital, investment capital, as opposed to socially conscious or foundation money. Some pension funds, etc., need investment grade funds, the long-term goal is to make these like muni bonds or T bills.
While the applications are being put together, the State also had to develop all of the operational specifications, including plans for how individuals will be referred to the employment service provider, arranging protocols to make sure that the control group is random, developing all the protocols for how the program will be managed, etc. It was all time consuming.

Determining success is not easy. It is a mixed bag. In the case of the US DOL grant, the state already had the provider; there was an existing program that the state had previously funded with state money, the Department of Correctional Services held the contract for that program, and had monitored, and had data on the number of individuals that went through the employment training program that ended up recidivating back to prison. It was very much a quantitative measure. In this case, the state already had the benchmark so the negotiation to set the standards for payment were there. The state had to ensure that the new standard for the PFS bond was higher than the existing program already had.

It was very important to the state that it would improve performance over the baseline, that created the dynamic tension that can crop up throughout the negotiation. In the US DOL application, the standards set are substantially higher than the benchmark. One of the major points of departure from the benchmark was that, in the benchmark, there was a self-election factor of individuals who had been released from prison, a creaming effect, people that were motivated found their way to this program to get the services, and they achieved a certain level of recidivism reduction. There was no control group and so in addition to raising the standards, the DOL application required a control group with random selection criteria.

When these deals are negotiated, there are a million factors to consider as to how to measure success, when to pay the investor and how much. This transaction was structured with limited payments for limited success, with payments gradually increased was success increased. The original deal called for zero payment unless the provider had accomplished a higher performance than even the benchmark program, and then there was a lot of risk at the limited to modest success, a lot of risk to the intermediary and to the bank.

The intermediary occupies an interesting space; they want to run the program successfully, so they can build their corporation so they can do more deals. Because they are a nonprofit, they are not in it for net income; they are in it for sustaining their corporation and building it to extend to other deals.

No information about whether the bank would provide consulting to the provider, the state did not get involved in that. It is up to the intermediary to manage them. That is textbook, the reality is that the state provided the corporation doing the program, because the state has the knowledge of the providers and what services are available, the intermediary did not have that capacity, and in terms of the intermediary works with the investor to take steps to improve the performance so that payment is made, that is a good question. In the textbook model, it is the intermediary that puts the deal together from both sides, obtaining the private sector funds and the program provider.
All parties have to be secure in the terms, once the deal is set, if a party backs out, the entire PFS program could fail unless the intermediary finds another private sector investor. This market is new, and there are not a lot of banks and other investors out there, so if the private funder backs out, the intermediary may have difficulty finding an alternative. If this was a more mature market with a stable of potential investors, they would be able to substitute an investor but if there is no alternative, they have a problem.

My review of the state’s application to the US DOL is to illustrate the complexity of these transactions, especially as this is all so brand new, private capital markets are not used to dealing with these kinds of programs, not used to evaluation measures, not used to the uncertainty or time horizons involved. For example, in the state’s application for the federally sponsored PFS bond through the DOL, there will be two years’ worth of services and one year of evaluation before testing is done and payments made. Put yourself in the bank’s shoes, three years until you even know if you will be paid back.

The evaluation is done by an independent corporation, with a separate engagement between the state and the corporation, based on competitive bidding through an RFP.

From a general standpoint, the lessons learned are that this is a tremendous amount of work for what is a $12M program that could be financed directly without the PFS bond, there is a lot of administrative baggage that goes into this, with thousands of hours negotiating the performance terms, the contractual provisions, the operational protocols, etc.

Some of the work can be establishing the infrastructure so that it is easier going forward, certainly to scale up the program post release in the correctional system a lot of this would be replicable, but transferring this to other fields, such as DD, each one of them is so unique that the text book looks great, private financing, intermediary, providers, but the reality is a long way from that right now. Really not clean measurable outcomes. It is relatively easy to measure the cost of incarceration, job program, local government cost of police, etc., but harder to quantify reduction in crime.

The new RFP projects announced by the state in August arose from the Governor’s budget allocating $30M in state financed PFS bonds. The RFP is to secure proposals from outside parties for that $30 M envisioned that there would be up to three projects over a multi-year period.

In the new RFP, it places a lot of burden placed on the respondent, they will need to identify the cost of the program, the program undertaken, the costs and benefits that would occur in the program, they also have to identify the financing, intermediary, ability to raise funds, the intermediary corporation, so this will be a very challenging RFP for a provider. It is really intended not for individual program, it is intended for a collection, group, complex corporations like intermediaries that have the ability to be multi-faceted and put together the transaction. developing a structure through these projects.

Realistically, what the state is looking for, trying to get proposals that people can match a successful program with an intermediary corporation that has the ability to raise the capital, and
the applications that demonstrate all of those points will end up scoring well will include evaluation. Once chosen, all of the terms of the deals will need to be negotiated, and there is of course the possibility that they will never come to fruition because the terms cannot be agreed to.
Interview 8: Private Sector Financial Consultant

My background is in banking, working in social responsibility areas, managed portion of our annual foundation giving, as well as making loans and investments including social impact investments to NYC and internationally, then ran a nonprofit, now I consult with nonprofits.

The key thing with SIBS is the ability to repay, the single most important driver. If they can repay with a significant return, that is even better, with minimal risk, that is amazing.

SIB can be risky if you cannot meet benchmarks. Any transaction has different risks, in the case of SIBS, the agreed upon benchmarks are the way that you can tell you are reducing the costs of service delivery in reducing the cost of service delivery, you begin to generate the return to repay the investors.

Unless benchmarks are met, there could be no return or partial return. In a way, the risk isn’t really shifted, the government isn’t really assuming risk as it goes in, it is just doing what it does, but the investors are taking a risk, by trying to say that in our model we can deliver these services more efficiently and therefore less expensively. Try to get controls into the nonprofit to ensure that benchmarks are met. It is in their interest to do so. The investors, in broad terms, in this case probably means some combination of people from the philanthropic sector and traditional investors that are willing to accept a lower return in exchange for a social good or social benefit.

The benchmarks usually measurable, clear and quantitative, and program related. How can you measure a more qualitative effect, it doesn’t really lend itself to an SIB. There is a good report put together by McKinsey on SIBs, it does a terrific job on explaining how they are put together, who the various players are, where do risks enter these transactions.

There is a continuum of investment vehicles. They run from gifts and philanthropy grants with no expectation of return or repayment, to soft investments, program related investments, that allow an investor to get their principal back but either no interest or very little interest, to commercial grade investments where an investor would expect to receive both a return of principal and a market based return.

Given that range, every financial product that has been developed, bonds, equities, loans, short term and long-term, working capital lines of credit, even credit enhancements like guarantees, all of those have at some point or another been structured as social impact investments. By social impact investment, I mean those that broadly fall into a category where someone is willing to sacrifice return or security in exchange for obtaining a higher social benefit.

Banks operate under regulation by governmental authority, under the authority of the federal government they take deposits. Federal insurance regulates them under the Community Reinvestment Act, basically says that if you are going to take deposits from the community you
also have to provide credit and investment to that community. If you take deposits from New York, you must invest in New York, some affirmatively investment in low and moderate income communities. There are technical definition for these terms, has to do with the percentage of income.

There is no obligation for banks to provide loans at a discount, there is no regulatory requirement that they do so, they simply have to provide a certain volume of credit and make it available. Typically although not officially, it has been on a proportion to their total assets.

If you are making mortgages, credit cards, car loans, products available at low and moderate communities, you can count these towards your CR obligations.

I am familiar with benefit corporations conceptually, but haven’t dealt with them, they are brand new, and there only very few of them in New York. The point of these types of entities are not that they make you a better investment for someone seeking to place social impact capital, these are structured that way to protect you from shareholders claims, that you would sacrifice some return to achieve a social benefit. There is no duty towards nonfinancial stakeholders. It would be too much of a stretch for a business to impose that kind of duty on their board.

All that is to say that there is a place for that, one of the places that I spend a lot of time looking is that you have certain types of businesses aiming at bottom of the pyramid business concept, addressing a broad need where the margins might be small but the volume is high, they have some strategy to address a social need, they attempt to focus on low and moderate income people. You also have nonprofits, very complex nonprofits, which typically combine both for profit and nonprofit affiliates under a single nonprofit parent.

In a way, it’s like the nonprofit is looking more businesslike and certain parts of the business sector looking more like a nonprofit, sort of a convergence happening conceptually. The grandfather is microfinance, this is where these concepts started, to achieve social good using conventional strategies, by offering credit being the primary way to do that. It is amazing how many problems can be solved by that level of intervention. Then things get more complicated. At that point of convergence, the nonprofit and for profit looking in that space where you have this opportunity to invest in something that will pay principal and a modest return, that is the sweet spot for social impact investment. If you are a nonprofit just doing these services you’re not in that category, if you are a for profit with a social benefit, but it is too expensive and difficult to find a place in the market, you don’t fit into this space, as the band is quite narrow.

You need a way of defining success. Once you get away from the standard definition, that you provide a profit, that is what the market is based on, the way the market defines a success is that you earn a profit, it is a simple measure, universally understood, the problem is once you try to look beyond that to achieving social benefit, it becomes very complicated very quickly. There are so many variables; it is difficult to obtain measures that really reflect the value of the intervention.
For that type of infrastructure improvement, it is quite a common need, there are starting to be conversations around what is called change capital. It is philanthropy, but designed to provide that investment whether in efficiency or infrastructure, staffing, that enables the nonprofit to then begin an operation or strengthen an operation that is revenue generating or produces substantial efficiencies.

The place where some of the best thinking is being done is the Heron Foundation, their current leader is Claire Miller. She has been beginning to do some writing and thinking about this. She is the former director of the Nonprofit Finance Fund. Their current leader Anthony Bugg-Levine. He is very involved in nonprofits and SIBs, and is tracking this change capital conversation very closely.

There is a lot of talk about SIBS and a lot if skepticism right now, very complicated to put together, very untested. New York State just released a 30M RFP for a PFS model. There is one pending with the US DOL. If you think about the concept behind them it makes a lot of sense, as long as you can find the places to get the savings, then you can show a way to monetize the savings. There are a lot of things complicating them, including getting the right investors, people who have an appetite for them and the factors that go into them. You also need to have how you are going to extract money from the government. It’s not like the savings just show up in a single agency's budget line, not using four staff members, etc. Frequently, it is a part of this job, that job, spread across many different agencies, are you really reducing the workload, or is there an actual job being shifted to another place, more efficiently. It is quite complicated to figure out from a state perspective, what is the savings and where are they?

How can you quantify the amount of money that you saved because you are not spending it on trying to service that population? If caseloads are reduced, say by 100%, but it doesn’t mean that all of a sudden, you can pay them 10% less, where do you find the savings? It’s just not that simple to translate that efficiency to true cost savings.

New York State, in their RFP, wants a complete project, intermediary, investor, project in one application. It is directed towards coalitions, intermediaries, and it looks to be very difficult. The big rub is that people can form coalitions and work in partnerships, they do that all the time, but basically, we are looking here to large nonprofits, who combine both the nonprofit and for profit worlds, with for profit sector leadership at the highest levels of management. These are entities that operate under a parent umbrella that is not-for-profit and use structured finance as a regular part of their financing and approach to development. They are really sophisticated, but there are many of them in New York. Some of the biggest challenges in the areas in which New York is seeking to fund are getting the true metrics. There has been some research on asthma reduction, some research on aging out of foster care, there has been some research on the health benefits in managing stuff, but how do you translate that into a proposal to the state about how it is going to save money. Even if ER visits, hospitalizations are down, you have to link fewer visits, fewer whatever, to staffing costs, infrastructure costs, you have to have an idea of what it would cost to treat X, then once you reduce, what it will cost to treat Y. Both of these are details are there but most people still don’t know what these things are. Even experts in those areas can’t calculate it.
One of the corporations that I am working with is in the process of development of a managed care entity, built by a coalition of half dozen nonprofit peers, looking at a publicly traded partner willing to invest lots of money into the development of the entity. It is a market rate realm they are expecting to put in equity and they expect to get a market return.

Could it happen on a smaller scale? You really need large scale to attract a meaningful investment by an entity. An individual nonprofit running a workforce development program, for example, I’m not sure how you can put real equity into that corporation in a way that you can benefit from it. It’s not necessarily a direct connection between the investment and the savings the investment generates for the nonprofit provider of services, but the savings may be in the public sector, or by society, or by individual participants relating to their compensation.

If investors could invest in nonprofits, they would be doing it already. It exists in the hospital world, most major hospitals have for profit and nonprofit affiliates, they are good at raising money and they do that through wealthy patrons or affiliated with universities and they build endowments. They do all these things that help them tap philanthropic capital; they need that investment alongside of commercial investment in order to survive.

The Heron Foundation’s focus on change capital is interesting and they still have it on their home page, a whole letter that Claire Miller wrote when she took over the corporation, talking about their portfolio, both grant making and investing to social impact capital. Change capital is one part of that. It recognizes the structure behind the service delivery, part of a continuum of capital, includes grants, other supports, to build infrastructure, working capital lines of credit and other support to support growth of infrastructure, to smooth that operation, ultimately commercial grade financing to scale.

Dan Pallotta’s central tenet that basically, you have to allow there to be incentives for nonprofits to really achieve results to scale, and those incentives should be aligned with their accomplishments. It seems distasteful because they are in the nonprofit sector, but culturally it is challenging to overcome. Anything that touches the public sector is subject to a very high level of scrutiny. Even without it, his corporations were fundraising and very effective in raising a lot of money high overhead costs, high compensation for senior staff, people found that distasteful, yes you raised a lot of money but it is just going to making you rich, building it on the premise that people are directly impacting human suffering, there is a very challenging tension and one that no one has figured out how to overcome smoothly yet.
Appendix E
IRB Materials and Approval

Northwestern

NOTIFICATION OF IRB ACTION

Date: June 20, 2013  IRB #: CPS13-06-08
Principal Investigator(s): Nancy S. Lee
                        Steven H. Mosenson
Department: Doctor of Law and Policy
            College of Professional Studies
Address: 20 Belvidere
        Northeastern University
Title of Project: New Models of Private Sector Financing of Nonprofit
                Organizations
Participating Sites: N/A
DIIHS Review Category: Expedited #6, #7
Informed Consents: Two (2) signed consent forms
Monitoring Interval: 12 months

APPROVAL EXPIRATION DATE: JUNE 19, 2014

Investigator's Responsibilities:
1. The informed consent form bearing the IRB approval stamp must be used when
   recruiting participants into the study.
2. The investigator must notify IRB immediately of unexpected adverse reactions, or new
   information that may alter our perception of the benefit-risk ratio.
3. Study procedures and files are subject to audit any time.
4. Any modifications of the protocol or the informed consent as the study progresses must
   be reviewed and approved by this committee prior to being instituted.
5. Continuing Review Approval for the proposal should be requested at least one month
   prior to the expiration date above.
6. This approval applies to the protection of human subjects only. It does not apply to any
   other university approvals that may be necessary.

C. Randall Colvin, Ph.D., Chair
Northeastern University Institutional Review Board

Nan C. Regina, Director
Human Subject Research Protection

Northeastern University FWA #4630
Script: Hello, [name] this is Steve Mosenson. I am working on my Doctoral Thesis at Northeastern University, and I would like to take a few minutes of your time to talk about private sector financing of not-for-profits in the developmental disabilities field. Would you be willing to be interviewed? I expect that it will take no longer than 30 minutes. I expect that our discussion will focus on long term financing needs for your organization, the limits of government funding, potential sources of private financing, and your experiences in securing private financing for infrastructure and administration.

I will keep your identity confidential, and will audio record the interview with your approval. All documentation of the interview, including copies of the audio file, will be kept in a password-protected file on my personal computer, which itself requires a password for access. None of the recording files will be disclosed to anyone other than those individuals in my Doctoral Program who may need to review it in the course of evaluating my thesis. If my thesis is published, I will not use your name or other identifying information, including the name of your organization/company. I will also have a written consent for you to sign. You may decline to participate and I will end this call, and you can withdraw your consent at any time before or during the interview. Can we set up an appointment to speak? Thank you.

Script: Hello, my name is Steve Mosenson, and I was referred to you by Michael Likosky. He is a member of my Doctoral Thesis committee at Northeastern University's Law and Policy Program. Mike thought that you would be a good person to be interviewed about private sector financing of not-for-profit organizations dependent on government funding. In particular, I am looking at financing tools such as Social Impact Bonds, and social purpose corporations such as B Corporations.

Would you be willing to be interviewed? I expect that it will take no longer than 30 minutes. I expect that our discussion will focus on these financing tools and corporate entities and how they can be used to fund long term infrastructure and operational needs of these nonprofit organizations.

I will keep your identity confidential, and will audio record the interview with your approval. All documentation of the interview, including copies of the audio file, will be kept in a password-protected file on my personal computer, which itself requires a password for access. None of the recording files will be disclosed to anyone other than those individuals in my Doctoral Program who may need to review it in the course of evaluating my thesis. If my thesis is published, I will not use your name or other identifying information, including the name of your organization/company. I will also have a written consent for you to sign. You may decline to sign and I will end this call, and you can withdraw your consent at any time before or during the interview. Can we set up an appointment to speak? Thank you.

APPROVED
Group 1. Informed Consent

Northeastern University, College of Professional Studies, Doctorate in Law and Policy

Name of Investigator(s): Principal Investigator: Nancy S. Lee, Ph.D. PMP. Student Researcher: Steven H. Mosenson

Title of Project: New Models of Private Sector Financing of Nonprofit Organizations

Informed Consent to Participate in a Research Study
We are inviting you to take part in a research study. This form will tell you about the study, but the researcher will explain it to you first. You may ask this person any questions that you have. When you are ready to make a decision, you may tell the researcher if you want to participate or not. You do not have to participate if you do not want to. If you decide to participate, the researcher will ask you to sign this statement and will give you a copy to keep.

Why am I being asked to take part in this research study?
You are an Executive Director, Chief Financial Officer or Budget Director of a New York not-for-profit corporation that operates programs for individuals with developmental disabilities.

Why is this research study being done?
This project will examine several models of for-profit investment in nonprofit social service programs. From this review, the project will design new models of investment vehicles and social-purpose corporate entities that can be used to supplement or replace government funding for infrastructure and operations.

What will I be asked to do?
If you decide to take part in this study, the researcher will interview you about how your programs are funded, government cutbacks in administrative support, and how private sector funding could enhance your ability to fund and operate your program. You will also be asked about your views on the implementation of the financing, what would be done differently if done again, and suggestions for future improvement of the particular financing means utilized.

Where will this take place and how much of my time will it take?
You will be personally interviewed in your office for approximately 30 minutes.

Will there be any risk or discomfort to me?
There will be no risk or discomfort to you. The interview will be recorded. Your identity will be kept confidential. Handwritten notes will be transcribed electronically and then shredded. All audio files and interview transcriptions will be kept in a password protected file on the student researcher’s computer and destroyed after one year.

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Northeastern University - Human Subject Research Protection
Rev. 10/30/2013
Will I benefit by being in this research?
You will not personally benefit from this research. Your organization may indirectly benefit from the new models of private sector financing that may be developed as a result of this research.

Who will see the information about me?
Your part in this study will be confidential. Only the researchers on this study will see the information about you. No reports or publications will use information that can identify you in any way or any individual as being of this project. All notes and materials will be secured in a locked file drawer in the office of the student researcher. The only people who will have access to the material, including the tapes of interviews and notes, will be faculty at Northeastern University, as well as members of my Thesis Committee, who may seek access to evaluate the student researcher's project. In rare instances, authorized people may request to see research information about you and other people in this study. This is done only to be sure that the research is done properly. We would only permit people who are authorized by the Northeastern University Institutional Review to review this material.

If I do not want to take part in the study, what choices do I have?
You may decline to participate at any time, including prior to, during or after the interview.

What will happen if I suffer any harm from this research?
No harm or potential for harm is expected from this research.

Can I stop my participation in this study?
Your participation in this research is completely voluntary. You do not have to participate if you do not want to and you can refuse to answer any question. Even if you begin the interview, you may end it at any time.

Who can I contact if I have questions or problems?
If you have any questions about this study, please feel free to contact Steven H. Mosenson at 845-707-1523, the person mainly responsible for the research. You can also contact Nancy Lee, the Principal Investigator, at 617-373-7868.

Who can I contact about my rights as a participant?
If you have any questions about your rights in this research, you may contact Nan C. Regina, Director, Human Subject Research Protection, 960 Renaissance Park, Northeastern University, Boston, MA 02115. Tel: 617.373.4588, Email: n.regina@neu.edu. You may call anonymously if you wish.
Group 2. Informed Consent

Northwestern University, College of Professional Studies, Doctorate in Law and Policy

Name of Investigator(s): Principal Investigator: Nancy S. Lee, Ph.D. PMP. Student Researcher: Steven H. Mosenson

Title of Project: New Models of Private Sector Financing of Nonprofit Organizations

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Why am I being asked to take part in this research study?
You are an individual instrumental in implementing private investment programs such as Social Impact Bonds, or executive of a social purpose corporation.

Why is this research study being done?
This project will examine several models of for-profit investment in nonprofit social service programs. From this review, the project will design new models of investment vehicles and social-purpose corporate entities that can be used to supplement or replace government funding for infrastructure and operations.

What will I be asked to do?
If you decide to take part in this study, the researcher will interview you about how the transaction or social purpose corporation in which you participated was structured, and how success was measured. You will also be asked about your views on the implementation of the financing, what would be done differently if done again, and suggestions for future improvement of the particular financing means utilized.

Where will this take place and how much of my time will it take?
You will be personally interviewed in your office or another public location of your choosing for approximately 30 minutes. You may also choose to be interviewed by telephone or via Skype.

Will there be any risk or discomfort to me?
There will be no risk or discomfort to you. The interview will be recorded. Your identity will be kept confidential. Handwritten notes will be transcribed electronically and then shredded. All audio files and interview transcriptions will be kept in a password protected file on the student researcher’s computer and destroyed after one year.

APPROVED

[Signature]

[Date]

Northwestern University - Human Subject Research Protection

Ref: 13002.13
Will I benefit by being in this research?
You will not personally benefit from this research. Your organization may indirectly benefit from the new models of private sector financing that may be developed as a result of this research.

Who will see the information about me?
Your part in this study will be confidential. Only the researchers on this study will see the information about you. No reports or publications will use information that can identify you in any way or any individual as being of this project. The only people who will have access to the notes and materials, including the audio files, will be faculty at Northeastern University, as well as members of my Thesis Committee, who may seek access to evaluate the student researcher's project. In rare instances, authorized people may request to see research information about you and other people in this study. This is done only to be sure that the research is done properly. We would only permit people who are authorized by the Northeastern University Institutional Review to review this material.

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Will I be paid for my participation?
No
Will it cost me anything to participate?
No
Is there anything else I need to know?
No

I agree to take part in this research.

Signature of person agreeing to take part ___________________________ Date ____________

Printed name of person above ________________________________________________

Signature of person who explained the study to the ___________________________ Date ____________
participant above and obtained consent

Printed name of person above ________________________________________________